



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

Case Reference : **BIR/00CN/LBC/2022/0002**

Property : **14 Chipstead Road, Birmingham, B23
5HA**

Applicant : **Mr N Plotnek**

Representative : **Stevensons Solicitors**

Respondents : **Mr M Shabir & Mr W Akhtar**

Type of Application : **Application under section 168(4) of the
Commonhold & Leasehold Reform Act
2002, for an order that a breach of
covenant has occurred.**

Tribunal Members : **Judge M K Gandham
Mr J Arain**

**Date and venue of
Hearing** : **20 October 2022
Centre City Tower, 5 – 7 Hill Street,
Birmingham B5 4UU**

Date of Decision : **6 January 2023**

DECISION

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1. The Tribunal determines that a breach of the following covenants in the Lease to the Property have occurred:
 - Clause 3(b) – for failure to observe and perform the restrictions and stipulations of paragraph 2 of Schedule 1 to the Lease; and
 - Clause 3(g) – for failure to serve notice of the mortgage on the landlord within one month.

REASONS FOR DECISION

Introduction

2. Mr Nicholas Richard Plotnek ('the Applicant') is the freeholder of the leasehold property known as 14 Chipstead Road, Erdington, Birmingham, B23 5HA ('the Property'). Mr Mohammad Shabir and Mr Wahid Akhtar ('the Respondents') are the current leaseholders, by way of a lease dated 23 November 2007 made between (1) the Applicant and (2) Royston Hillbert Skerritt ('the Lease').
3. The Applicant made an application to the Tribunal, received on 17 May 2022, under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ('the Act') seeking an order that a breach of covenant or condition had occurred in respect of the Lease. Attached to the application was an expert report from Crossland Property Consultants Limited ('Crossland') dated 28 February 2022. The Applicant also made an application under Rule 19 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, for permission to adduce expert evidence.
4. Section 168(1) of the Act, as amended by paragraph 141 of Schedule 1 to the Transfer of Tribunal Functions Order 2013, provides that a landlord under a 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 a lease unless subsection (2) is satisfied.
5. Subsection (2) may be satisfied in one of three ways – if the tenant admits the breach; if a court or arbitral tribunal has finally determined that the breach has occurred; or (of particular relevance in the present case) if the appropriate tribunal, on an application by the landlord under subsection (4), has finally determined that the breach has occurred. It is important to appreciate that an application by the landlord under section 168(4) of the Act may lead to the service of a section 146 notice under the Law of Property Act 1925 and a subsequent application to the Court for an order for forfeiture of the lease.
6. Following receipt of the applications, the Tribunal issued a Directions Order on 8 June 2022, setting out the timeline for receipt of the parties' statements of case and allowing the Respondents to make any objections to the production of expert evidence by 30 June 2022.

7. No objections were received by the deadline set and the Applicant submitted a Statement of Case on 22 June 2022, enclosing an updated report from Crossland dated 31 May 2022 ('the Expert Report'), for use in connection with the proceedings. The Respondents did not provide a formal Statement of Case, as required by the Directions Order, but on 22 July 2022 the Tribunal received an email from Mr Shabir, who explained that he had been abroad and had only received the tribunal's correspondence on his return. The email set out the Respondents' circumstances, so the Tribunal determined that it would stand as the Respondents' Statement of Case.
8. On 14 August 2022, the Tribunal wrote to both parties confirming that the matter would be determined on 20 September 2022. The hearing was postponed at the request of the Respondents and a new hearing was arranged for 20 October 2022.

The Lease

9. The Tribunal was provided with a copy of the Lease which, in clause 3, provides as follows:
 - “3. THE TENANT hereby covenants with the Landlord that the Tenant will at all times:-
 - …
 - (b) observe and perform the restrictions and stipulations set out in the Schedule hereto
 - …
 - (g) within one month after any assignment or transfer of the Property or after the devolution on death or otherwise or mortgage reconveyance or vacating receipt affecting the Property serve on the Landlord notice evidencing the same and pay a fee of 0.20% of the consideration for registration thereof or in respect of a remortgage 0.20% of the mortgage advance (or if there is no consideration or mortgage advance a fee of £75)”
10. The paragraphs in the Schedule to the Lease which were relevant to the application provide as follows:
 - “1. Not to erect or place on the Property or any part thereof any additional building or erection except in accordance with plans and specifications previously approved in writing by the Landlord whose fees in relation thereto shall be paid by the applicant PROVIDED nevertheless that nothing in this Clause shall prevent the erection of a substantially constructed garden hut or greenhouse of a size not exceeding 2.5 metres x 1.6 metres x 2.2 metres high abutting the rear boundary in a position where so far as possible it cannot be seen from the public road
 2. Not to make any alterations or additions to the outside of or which may affect the stability of the dwellinghouse erected on the Property or any part thereof or the offices or outbuildings thereon or any other building for the time being thereon except in accordance with plans and specifications previously approved in writing by the Landlord whose fees in relation thereto shall be paid by the applicant

3. Not to use the Property or any part thereof for the purpose of any trade manufacture or business of any description or for the sale of beer wine or spirits or as a club or for the teaching of music or for the keeping of pigs poultry or pigeons or for any other purpose except as the site of a single private dwellinghouse for the residence of one family at a time PROVIDED that nothing in this Schedule shall prevent the use of the Property for the practice or profession of a qualified physician surgeon dentist or solicitor or the placing of a name plate of reasonable size at the door or gate of any house”

The Inspection

11. The Tribunal inspected the Property on the morning of 20 October 2022. The Applicant was in attendance, together with his representative, Mr Glenn Stevenson from Stevensons Solicitors. Mr Shabir attended on behalf of the Respondents.
12. The Property is located on the corner of Chipstead Road with Gretton Road in Erdington, Birmingham. It comprises a two storey, semi-detached house, constructed approx. 1950, in brick and tile, with a small frontage and even smaller, triangular, rear garden. To the rear of the house there is a recently constructed single storey extension which extends across the whole of the rear elevation.
13. The front door of the house opens onto a hallway which leads to two rooms and the kitchen on the ground floor. Underneath the staircase, the Respondents had installed a shower room with a toilet and sink. On the first floor, the landing led to three further rooms and a second shower room with a toilet and sink. The kitchen and the rear room on the ground floor extended into the new extension.
14. The house was double glazed and had the benefit of central heating. It was fitted with a fire alarm system, with interconnected smoke detectors to each of the rooms, and emergency lighting and smoke detectors in the hallway and first floor landing. None of the rooms were numbered, nor did they have any thumb turn locks or door closers.

The Hearing

15. Following the inspection, a public hearing was held in the tribunal’s hearing rooms at Centre City Tower in Birmingham, which was attended by the Applicant and Mr Stevenson, as well as both of the Respondents. In addition, Mr Gurdip Chamba (a Chartered Building Surveyor and the author of the Expert Report) also attended to give expert evidence on behalf of the Applicant.

Applicant’s Submissions

16. Mr Stevenson, on behalf of the Applicant, confirmed that the application was made to the tribunal as the Applicant considered that there had several breaches of the covenants in the Lease, in particular with regard to the provisions of clause 3(g) of the Lease and the restrictions and stipulations set out in paragraphs 1, 2 and 3 of the Schedule to the Lease.

17. Mr Stevenson stated that the Applicant had become aware that works had been carried out to the Property, without consent, and had instructed Crossland to carry out an inspection of the Property. The Applicant confirmed that, prior to the inspection, notice was given to the Respondents in accordance with clause 3(f) of the Lease. [Following the hearing the Applicant, at the Tribunal's request, provided copies of the notices sent to the Respondents].
18. Mr Stevenson stated that the inspection, which took place on 15 February 2022 by the Applicant and Mr Chamba, revealed extensive works had been carried out at the Property, including the construction of a single story extension and internal alterations to the house. He stated that these had all been completed without the prior consent of the Applicant, contrary to paragraphs 1 and 2 of the Schedule to the Lease. In addition, Mr Stevenson submitted that the inspection revealed that the Property was being used for multiple occupancy, therefore, was not being used for a single family, in breach of paragraph 3 of the Schedule to the Lease.
19. Following the inspection, Mr Stevenson stated that he wrote to the Respondents on the Applicant's behalf at the correspondence address detailed in the leasehold office copy entries, notifying them of the results of the inspection and requesting that the breaches be remedied. As no response was received to his letter by the deadline given in it, an application was made to the tribunal under section 168(4) of the Act.
20. Mr Stevenson stated that, whilst updating information in readiness for the tribunal proceedings, the Applicant also became aware of a charge to Godiva Mortgages on the leasehold title, which had not been present on the Office Copies he had obtained in November 2021. Mr Stevenson confirmed that the Applicant had not been provided with any notice of the mortgage, which was also a breach of the covenant contained within clause 3(g) of the Lease.
21. With regard to the information detailed in the Respondents' Statement of Case, Mr Stevenson submitted that the condition of the Property upon the Respondents' purchase was not relevant to the proceedings.
22. The Applicant confirmed to the Tribunal that he had never given any consent for the works to the Property and that he had never received any notice of the mortgage. He also confirmed that he had no knowledge of a Mr Yasir, referred to by the Respondents in their Statement of Case.
23. The Applicant further stated that, although the Respondents had a receipted invoice for the ground rent for the period 1 May 2022 to 30 April 2023, this rent had been accepted from the Respondents in error by a member of his staff. He stated that the invoice, which was dated 3 May 2022, had not been sent out to the Respondents but had been placed on the file; that on 16 June 2022, whilst he was away from his office, a man had attended the office and had insisted on paying the outstanding rent for the Property and that a member of his staff had felt pressurised into supplying the firm's bank details and providing a receipt once the money had been transferred. The Applicant confirmed that the money had been returned to the Respondents the next day by Stevensons Solicitors.

24. Mr Chamba confirmed that he attended the Property on 15 February 2022 with the Applicant to carry out an inspection of the Property. He stated that the layout of the Property on the day of the inspection was as per the drawing marked 'current layout' in Appendix D to the Expert Report and the photographs set out in Appendix E were taken on that day.
25. Mr Chamba stated that he had managed to obtain details of the layout of the Property in November 2019 from Zoopla (included at Appendix C to the Expert Report) and that the inspection revealed that a number of works been carried out to the Property since that date.
26. Mr Chamba confirmed that these works were detailed within the Expert Report and included the single story rear extension, to create a kitchen/lounge and new bedroom on the ground floor, and new shower rooms to both the ground and first floor. In addition, Mr Chamba stated that, other than the kitchen/lounge and shower rooms, all of the rooms in the Property were numbered from 1 to 5, rooms 1 and 2 being on the ground floor with rooms 3 to 5 on the first floor.
27. Mr Chamba stated that he could not gain access to rooms 3 and 4 but that rooms 1, 2 and 5 were clearly being used as bedrooms and that they appeared to have interconnected smoke detectors. He also stated that the doors to each of the bedrooms he inspected were fire rated doors with self-closers and that they had key locks and thumb turn locks on the inside, as usual for properties used for multiple occupancy. In addition, he stated that there was a noticeboard in the entrance hallway, which was also typical of properties used as HMOs. He confirmed that, on the day of the inspection, he had only encountered the occupants of rooms 1 and 2.
28. Mr Stevenson submitted that it was evident that at the time of the February inspection, the Property was not being used as a private dwelling house for one family. He submitted that, although substantial alterations had been made since that inspection – such as the removal of the numbering to the doors, the self-closers, the locks and the noticeboard in the hallway – it was clear that a breach of paragraph 3 of the Schedule to the Lease had occurred and that it was not necessary for the Tribunal to be satisfied that any breach was continuing.
29. In addition, Mr Stevenson stated that, though the Respondents asserted that they were unaware that the Property was being used in this way, this was not relevant as the Respondents were responsible for the use of the Property under the terms of the Lease and, therefore, were ultimately liable for any breach of the same.
30. According, Mr Stevenson submitted that the Respondents were in breach of clauses 3(g) and the restrictions and stipulations set out in paragraphs 1, 2 and 3 of the Schedule to the Lease. Mr Stevenson also submitted that it was quite clear on the evidence that there had been no waiver of the breaches by the Applicant's acceptance of the rent as, as soon as the Applicant had realised the error made by his staff member, a cheque for the that amount had been sent to the Respondents the very next day.

The Respondents' Submissions

31. On behalf the Respondents, Mr Shabir stated that they had purchased the Property at auction in 2020, mistakenly thinking it was freehold and without viewing the same. He stated that the Property was in a very poor state of repair and required substantial works to make it fit for habitation.
32. Mr Shabir confirmed that the Respondents had spent almost £48,000 to put the Property into a condition suitable for letting, which included complete rewiring, new plumbing, a new kitchen, new shower rooms to both floors and the removal of the existing rear extension – which was leaking and dangerous – with a new extension of approximately the same size. He confirmed that Buildings Regulations Consent had been obtained for the works and a copy of the Final Certificate, dated 28 April 2021, had been provided to the Tribunal.
33. Mr Shabir stated that the Applicant must have been aware that substantial works were required to the Property and that these works were being carried out, as a representative of the Applicant, Mr Yasir, had attended the Property whilst the works were being undertaken. He also stated that Mr Yasir had informed the Respondents that the Applicant would be willing to sell the freehold to them for the sum of £63,500. Mr Shabir stated that, although the Respondents did wish to purchase the freehold, they considered that this sum was too high based on the money that they had already spent putting the Property into good repair. He confirmed that the ground rent had been paid to date and had provided a receipted invoice with his email to the Tribunal for the period 1 May 2022 to 30 April 2023.
34. Mr Shabir stated that, once works had been completed, the Property was let as a whole to a single occupant, Mr Ali. He stated that the Respondents had been completely unaware that the Property may have been used for multiple occupancy but that as soon as they were informed that this might be the case, they immediately served notice to quit on Mr Ali. [At the Tribunal's request, a copy of the tenancy agreement and notice served on Mr Ali were provided to the Tribunal following the hearing].
35. Mr Shabir stated that the Respondents had not been made aware of the Applicant's February inspection, that he had not received the letter from Stevensons Solicitors following the inspection and that Mr Akhtar was unable to read English. In relation to the findings of that inspection, Mr Shabir stated that, although the Respondents had installed the interconnected fire alarm system (on the advice of their electrician to future proof the Property) and the fire doors; they had not numbered the rooms, installed the self-closers or put any locks on the doors. They stated that they did not carry out an internal inspection following the letting of the Property to Mr Ali and that he must have carried out these additional works himself.
36. The Respondents confirmed that, upon their purchase of the Property, the layout was as per the diagram in the Expert Report at Appendix D labelled "*previous layout 2019*", other than they stated that there had also been a plastic and wood structure adjacent to the lean-to at the rear of the bathroom. They agreed that the

new brick built extension was not a like-for-like replacement of the structures which had previously existed, which were much less sturdy structures.

37. The Respondents confirmed that they had never asked for the Applicant's consent to carry out any of the works and that it had only been Mr Yasir who had attended the Property whilst the works were being completed. The Respondents also confirmed that they had not read the provisions in the Lease, so had not realised that they needed to forward notice of the mortgage to the Applicant.

The Tribunal's Deliberations and Determination

38. The Tribunal considered all of the evidence, both written and oral, which is briefly summarised above.
39. The Tribunal considered each alleged breach in turn:
40. *Regarding clause 3(g)*, the Tribunal was provided with updated office copy entries of the leasehold title, registered under Title Number WM923458. The Tribunal is satisfied that the Respondents obtained a mortgage from Godiva Mortgages on 12 October 2021 and failed, within one month of taking out that mortgage, to serve notice on the Applicant evidencing the same. Although the Tribunal accepts that this was a genuine error on the part of the Respondents this is not a defence and a breach of covenant did occur.
41. *Regarding clause 3(b)*, the Tribunal, firstly, considered whether the works to the Property constituted a failure to observe the restrictions and stipulations in either paragraph 1 or paragraph 2 of the Schedule to the Lease.
42. The Tribunal noted that the Respondents had confirmed that they had not obtained any approval in writing from the Applicant prior to the works being carried. As such, the Tribunal considered the wording of each clause to see whether permission would have been required for the works.
43. *In relation to paragraph 1*, the Tribunal noted that this referred to "any additional building or erection" on the Property and gave, as an example, a garden hut or greenhouse, which, if under a certain size and placed at the rear boundary, would not have required consent. The Tribunal found that the wording in the paragraph suggested that the restriction related to additional structures on the plot, rather than the alteration of the existing house. As the Respondents had not constructed any additional structures on the plot, the Tribunal found that the works had not been a breach of this paragraph.
44. *In relation to paragraph 2*, the Tribunal found that the recently built rear extension was an alteration and addition to the outside of the Property and that the works could, if they had not been completed correctly, have affected the stability of the house. As such, the Tribunal found that the failure of the Respondents to obtain the previous approval in writing of the Applicant for the rear extension was a failure to comply with the stipulations set out in paragraph 2, thus a breach of clause 3(b) of the Lease had occurred.

45. As to whether the Respondents had also failed to comply with the restrictions and stipulations set out in *paragraph 3* of the Schedule to the Lease, the Tribunal found that, based on the findings in the Expert Report, the Property was more likely than not being used for multiple occupancy at the time of the February inspection. The photographs in the Expert Report showed that three of the rooms were being used as bedrooms, there were numbers on the bedroom doors, Fire Exit signs on the upstairs landing and a tenant's notice board in the hallway.
46. The Tribunal also accepted, as per the decision of the Upper Tribunal in *Kyriacou v Linden* [2021] UKUT 0288 (LC), Mr Stevenson's submission that, even if the breach had been remedied by the time of the hearing, this was not relevant for the purpose of determining whether a breach of the Lease had occurred under section 168(4) of the Act.
47. As to Mr Stevenson's submission that, as the leaseholders of the Property, the Respondents were ultimately responsible for the use of the same, the Tribunal does not agree. In making its decision on this point, the Tribunal considered the decision of the Upper Tribunal in *Marchitelli v 15 Westgate Terrace Limited* [2020] UKUT 192 (LC) ('*Marchetelli*'). In *Marchetelli*, the FTT made a finding that the appellant's flat was being used for an illegal purpose, contrary to the provisions of the lease, however the FTT failed to consider whether the appellant, or her agent, permitted or suffered this to occur (as were required for her to have been in breach).
48. In this matter, clause 3 of the Lease states that the tenant covenants with the landlord that the tenant will at all times observe and perform the restrictions and stipulations set out in the Schedule. Paragraph 3 of the Schedule confirms that (subject to some exceptions not relevant in this case) the Property cannot be used for anything other than the residence of one family at a time. Taken together, clause 3(b) and paragraph 3, provide that *the tenant* covenants that *the tenant* will not use the Property for any purpose other than for the residence of one family at a time.
49. In this matter, the Respondents stated that they were unaware that the Property was being used for anything other than as a private residence for one family as the Property had been let to a sole tenant. They further stated that, as soon as they had been informed of the potential multiple occupancy, they had served notice to quit on him. The Respondents provided a copy of the tenancy agreement to the Tribunal which confirmed that the Property had been let on an assured shorthold tenancy to Mr Ghaffar Ali for a term of six months at a rent of £850 per calendar month. Clause 2.19 of the tenancy agreement also confirmed that Mr Ali was not to sublet or take in lodgers or paying guests without the landlord's prior consent.
50. Although the Tribunal accepts that valid notice was given to the Respondents of the February inspection and that the notices were correctly served (having been sent to the Respondents' registered addresses as detailed on the office copies), as the Respondents had not attended that inspection there is little to suggest that they knew that the Property was being occupied by someone other than Mr Ali.

51. In addition, the Tribunal does not find it unreasonable for the Respondents to have installed fire doors and a fire alarm system to the Property whilst carrying out extensive renovations, in case they wished to consider alternative lettings in the future. There was no corroborating evidence to indicate that the Respondents had numbered the rooms nor that they had installed the self-closers or door locks (all of which had been removed by the time of the hearing). The Final Certificate for building regulations consent simply related to the construction of the extension and there was no evidence that the Respondents had applied for a HMO licence.
52. As such, although the Tribunal accepted that the Property had been used for multiple occupancy at the time of the February inspection, the Tribunal was not satisfied that the Respondents had been aware of this and, also, that they had only used the Property as a private dwellinghouse for the residence of one family. Consequently, the Tribunal found that the Respondents had not breached the restrictions and stipulations set out in paragraph 3 of the Schedule.
53. Accordingly, the Tribunal determines that the Respondents have breached clause 3(b) of the Lease, by failing to comply with the restrictions and stipulations set out in paragraph 2 of the Schedule to the Lease, and that they have also breached the covenant set out in clause 3(g) of the Lease.
54. Although the Respondents implied that a waiver of the breaches may have occurred by the Applicant being aware of the construction works and having accepted the ground rent following their completion, these would be matters for the County Court to decide upon if required in any defence to a forfeiture claim.

Appeal

55. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M K GANDHAM

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Judge M K Gandham