FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AX/LBC/2020/0034**
HMCTS code (paper, video, audio)	**:**	**V - Video**
Property	**:**	**5 St Stephens Cottages, 70 Vincent Road, Kingston Upon Thames, Surrey, KT1 3HJ**
Applicant	**:**	**Paragon Asra Housing Ltd.**
Representative	**:**	**Mr. T. Gallivan of counsel, instructed by Devonshires Solicitors**
Respondent	**:**	**Mr. Charles Christian Bedford**
Representative	**:**	**Ms. A. Gourlay of counsel**
Type of Application	**:**	**For the determination of an alleged breach of covenant**
Tribunal Members	**:**	**Tribunal Judge Stuart Walker (Chairman)** **Tribunal Member Susan Coughlin MCIEH**
Date and venue of Hearing	**:**	**20 November 2020 – video hearing**
Date of Decision	**:**	**23 December 2020**

DECISION

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. A face-to-face

hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Tribunal's determination is set out below.

The parties said that they were satisfied that the hearing had been conducted fairly but they also agreed that conducting a hearing by video was not as good as at a face-to-face hearing.

(1) The Respondent's application to strike out this application under rule 9(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is refused.

(2) The time for seeking leave to appeal against the Tribunal's decision to refuse that application is extended so that any application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends these written reasons to the parties.

(3) The Respondent has, at some time after the end of 2011, and certainly no later than September 2018, and on a number of occasions between, sublet the property without permission and in breach of clause 3(15) of the lease.

(4) Any application for an order under either section 20C of the Landlord and Tenant Act 1985 or paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 and any written submissions in respect of the making of any such order are to be received by the Tribunal no later than 14 days after receipt of this decision.

Reasons

The Application

1. The Applicant initially sought determinations pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that two breaches of covenant had occurred.

2. The application was made on 28 July 2020. Two beaches of the lease were identified. The first alleged breach was that the Respondent had sublet the property without permission and the second was that the Respondent was not using the property in accordance with the user clauses in the lease. However, the second of these claimed breaches was not pursued at the hearing and the Tribunal made no findings in relation to it.

3. Directions were originally issued by the Tribunal on 28 August 2020 (pages 72 to 77). These were amended on 7 October 2020 to extend the time for compliance. In compliance with the directions an agreed electronic bundle of 313 pages was prepared. This was taken into

account by the Tribunal. As is often the case, the numbering of the electronic bundle and that of the hard copy do not align. References to page numbers in what follows are to the hard copy of this bundle unless otherwise stated. In addition to the legal submissions in the agreed bundle the Respondent provided a skeleton argument dated 18 November 2020 and a bundle of authorities comprising a total of 128 pages. A revised version of this skeleton argument dated 19 November 2020 was also before the Tribunal. The Applicant also produced a bundle of authorities comprising 42 pages and a short skeleton argument in response.

4. The relevant legal provisions are set out in the Appendix to this decision. The Tribunal bore in mind throughout its deliberations that the burden was on the Applicant to show that the breach of covenant had occurred on the balance of probabilities.

The Hearing

5. The Applicant was represented by Mr. Gallivan of counsel. The Respondent appeared from his home in New York and was represented by Ms. Gourlay of counsel.

6. Neither party requested an inspection, and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

7. The Tribunal heard oral evidence from Miss T. Steele, a manager employed by the Applicant who was employed by their predecessors in title since 2001. Her witness statement is at page 119. It also heard oral evidence from the Respondent, whose statement is at page 182. Both were asked questions in cross-examination and the Tribunal took account of their evidence.

The Background

8. The property which is the subject of this application is a 2-bedroom terraced house. The Applicant is a housing association. The Respondent holds the property on a shared ownership lease. There was no dispute that the Respondent was not living at the property and it was accepted that the property was being let by him to others. The issues in the case centred on the interpretation of the lease and the question of whether or not the Respondent had been given permission to sublet.

The Lease

9. By a lease dated 15 July 1983 made between Richmond Upon Thames Leasehold Housing Association Ltd. and Dorothy Kathleen Bainbridge (pages 84 to 113) the property was demised for a term of 99 years from 15 July 1983. The Applicant acquired the freehold interest on 2 June 2017 (page 115) and the Respondent became the registered proprietor of the lease on 26 November 2009 (page 118).

10. By clause 3(15) of the lease the Respondent covenanted (insofar as is relevant) as follows;

> "*(a) Not to assign underlet mortgage charge or part with possession of part only of the Premises and not to underlet or part with possession of the whole of the Premises otherwise than in accordance with the provisions of sub-clause (b) and (c) hereof*
>
> *(b) subject as provided in sub-clause (c) hereof not to assign mortgage or charge the whole of the Premises without the landlord's previous written consent not to be unreasonably withheld and subject as provided in sub-clause (16) hereof PROVIDED ALWAYS the Leaseholder may only assign this Lease at a price no greater than .....*
>
> *(c) (i) The Leaseholder shall not assign the Premises (save in the case of one or more joint tenants to the remainder) except to a person .... nominated by the landlord .....* (pages 90-91)

Application to Strike Out the Application

11. On 24 September 2020 the Respondent made an application to strike out the Applicant's application pursuant to rule 9(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. This rule allows the Tribunal to strike out the whole or part of proceedings if it considers that the proceedings or the manner in which they are being conducted are frivolous, vexatious or are otherwise an abuse of the process of the Tribunal. The application is at pages 10 to 16

12. The ground put forward was that the proceedings were an abuse of process because the Applicant had waived their right to forfeit the lease and so the application served no purpose (see para 14 of the Respondent's skeleton argument ("RS")). In their application the Respondent anticipated a response from the Applicant based on the decision of the Upper Tribunal in the case of Triplerose Ltd. -v- Patel [2018] UKUT 0374 (LC) to the effect that waiver cannot be a defence to a section 168 application (see para 17 RS). This was common ground.

13. Rather ingeniously, the Respondent instead sought to argue that waiver on the part of the Applicant meant that their application had no utility and therefore was an abuse of process. Ms. Gourlay argued that, even if the Tribunal were to find that there were a breach of covenant, the Applicant could not take the question of subletting any further (para 19 RS). Developing this argument, she contended that there was no value to a landlord in an "unactionable determination of breach of covenant" (para 26 RS), that the Applicant had made it clear that they intended to forfeit the lease, and that section 168 was enacted specifically with a view to slowing down the forfeiture process.

14. Further, Ms. Gourlay argued that there was nothing preventing the Tribunal from determining whether or not there had been a waiver in this case where it was relevant to do so, and she relied on the decision

in the case of Stemp -v- Ladbroke Garden Management Ltd. [2018] UKUT 375 which, she argued, showed that the Tribunal had jurisdiction to do so (para 18 RS).

15. In their reply, the Applicant argued that reliance on Stemp was misconceived (para 10 at page 68). That case, they argued, was exceptional as there it had been necessary for the Tribunal to consider whether the right to forfeit had been waived in order to determine the question which was before it.. They also relied on the decision in Swanston Grange (Luton) Management Ltd -v- Langley Essen [2008] L&TR 20 which makes a distinction between waiver of the right to forfeit and waiver of the covenant itself.

16. In the course of oral argument Ms. Gourlay accepted that forfeiture was not the only remedy available to the Applicant if there were found to be a breach of covenant. However, she argued that there was nothing to show that the Applicant was seeking a remedy other than forfeiture and that section 168 was expressly concerned with forfeiture and not other remedies. In response Mr. Gallivan argued that the question of remedy was one for the Applicant and that it was proper for them to exercise their rights to seek a determination from the Tribunal as a prelude to seeking forfeiture or any other remedy available to them. He argued that the question of whether there is an abuse of process or not must be based solely on a consideration of the matters which the Tribunal has jurisdiction to decide.

The Tribunal's Decision

17. The Tribunal refused the Respondent's application for the following reasons. Firstly, it did not consider that, even if the Respondent could show that the County Court would inevitably refuse to order forfeiture on the grounds of waiver, that it was a futile exercise on the part of the Applicant to seek a determination as to whether there had been a breach of covenant or not. The Tribunal accepted that there were other potential remedies available to the Applicant if a breach were established and therefore rejected the Respondent's argument that their application was futile. Whilst it accepted that section 168 provided for procedural hurdles in the way of those seeking forfeiture but not other remedies, there was nothing, in its view, in that section which limited the use that could be made of a determination under section 168(4). If an applicant pursuing other remedies seeks a determination in the Tribunal rather than going directly to the County Court that is a matter for them. There may be good reasons for doing so. In the view of the Tribunal, seeking such a determination, even if forfeiture is impossible, does not of itself amount to an abuse of process.

18. Secondly, and in any event, the Tribunal did not accept that it had jurisdiction to make a determination about whether or not there had been a waiver of forfeiture in this case. It considered the decision in Stemp, noting that in that case the parties had conceded that the Tribunal was wrong to deny itself jurisdiction to consider forfeiture

(para H5) and the question of jurisdiction was not argued before the Upper Tribunal. Also, Triplerose was not referred to in Stemp and, indeed the latter case was only decided less than a month after the decision in the former was issued. In Stemp the dispute between the parties was whether or not costs could be recovered form the tenants as an administrative charge by virtue of a clause in the lease which allowed for the recovery of costs incurred under or in contemplation of forfeiture proceedings. It was not a case about whether or not there had been a breach of covenant by the tenants. The tenants argued that the costs sought could not be recovered under the terms of the lease because the landlord had waived forfeiture. It follows that in that case the question of whether or not there had been a waiver was central to the very issue of dispute between the parties. That was not the situation before this Tribunal.

19. The point made by the Respondent in answer to this distinction was that it was indeed necessary for the Tribunal to make a determination as to whether there had been a forfeiture or not because otherwise it could not determine whether the proceedings were an abuse of process. The Tribunal rejected that argument. This application was concerned with an alleged breach of covenant, as to which the question of forfeiture was admittedly irrelevant – after all there can be no waiver without a breach. In the view of the Tribunal what the Respondent was seeking to do, albeit with some dexterity, was to use an abuse of process argument to extend the Tribunal's jurisdiction to matters which Triplerose made clear were not within its remit. If the Respondent's argument were correct, any Respondent to a section 168 application could make the same argument, namely that the landlord had waived forfeiture and so the application was an abuse of process. This would effectively create a jurisdiction which Triplerose had decided the Tribunal did not have.

20. The Tribunal was satisfied that there was a difference between a situation like that in Stemp where it had no choice but to consider whether there had been a waiver, and this case – like most others – where the issue was simply whether or not there had been a breach. The making of an abuse of process application did not, of itself, change the extent of the Tribunal's jurisdiction.

21. The Tribunal having announced its decision to refuse the strike-out application ex tempore, Ms Gourlay sought an order from the Tribunal to extend the time in which to seek leave to appeal that decision until 28 days after promulgation of the Tribunal's decision in the substantive proceedings. This was not opposed by Mr. Gallivan and was granted by the Tribunal.

The Issues

22. Having dealt with the strike-out application, the Tribunal turned to the issues raised by the substantive application. There were three main areas of contention. The first was whether or not what the Respondent had allegedly done could, in any event, amount to a breach of covenant.

This was an argument based on the construction of the terms of the lease. The remaining issues were whether or not the covenant had been waived by the Applicant by virtue of having granted the Respondent permission to do what he had done and, finally, whether or not the Applicant had waived the covenant by failing to take action against the Respondent. The Tribunal considered these issues in turn as follows.

Construction of the Lease

23. The Applicant's case as elucidated by Mr. Gallivan at the hearing and as set out in the Applicant's reply (para 1 at page 66) was that clause 3(15) of the lease, which is set out above, created an absolute prohibition on subletting or parting with possession of the whole of the property.

24. The Respondent's argument, as pursued by Ms. Gourlay was, on the contrary, that the Respondent did not need the Applicant's consent to sublet. She argued that the natural meaning of the words in the relevant clause were such that subletting does not require consent. She argued that the lease contemplated under-letting of the whole as clause 3(15)(a) used the word "under-let". Clause 3(15)(a) requires compliance with sub-clauses (b) and (c) but, she argued, as neither of these referred to subletting, there were no conditions to be satisfied before the tenant was entitled to sublet (paras 40 to 43 RS). In support of this argument she relied on other terms of the lease which showed that the property could be sublet by virtue of their references either to persons deriving title under the leaseholder or "other tenants or occupiers of the premises" (paras 44 to 47 RS). In oral argument Ms. Gourlay argued that sub-clauses (b) and (c) were simply not engaged and, that being the case, there were no limits on subletting.

25. The Applicant's response to this argument was that it sought to place an "Alice in Wonderland" construction on the lease. It was accepted that the lease may contemplate subletting by the tenant, but this was not the same as permitting subletting. Any subletting would be, it was argued, a breach of clause 3(15) but would nevertheless be effective and, in any event, it was open to the landlord to consent to subletting (as was the case here at least initially) (paras 2 to 4 at page 67).

26. In his oral submissions Mr. Gallivan argued that the Tribunal should construe clause 3(15) as a whole and that it was straight forward and easy to interpret. It was clear, he argued, that the Respondent was not permitted to part with possession of the whole of the premises otherwise than in certain circumstances and that, if those circumstances were not present then parting with possession was prohibited.

<u>The Tribunal's Decision</u>

27. The Tribunal concluded that subletting of the property was prohibited by the terms of the lease. It considered the natural meaning of the words of the clause as follows. It begins very simply with an absolute prohibition on parting with possession of part only of the property;

"*Not to assign underlet mortgage or part with possession of part only of the Premises*"

It then continues by stating;

"*and not to underlet or part with possession of the whole of the Premises otherwise than in accordance with the provisions of sub-clause (b) and (c) hereof*"

28. There was no dispute that the effect of sub-clauses (b) and (c) was to require written consent to assign, mortgage or charge the property and that they imposed restrictions on the price paid for any assignment and the people to whom an assignment may be made. The Tribunal accepted that these sub-clauses did not provide for any subletting. A tenant wishing to sublet, rather than assign or mortgage, the whole of the property could not fall within them.

29. The question, therefore, was what was the effect of this. The Tribunal concluded that this meant that subletting was prohibited. This was because the clause is in the form "not to … other than". In other words it firstly prohibits an activity – ie underletting or parting with possession – and then creates an exception to that prohibition. If that exception cannot be met, then the prohibition applies. The fact that the exceptions do not include any possibility for underletting does not change the meaning of the clause nor does it strain its language. The situation would, perhaps, be different if sub-clauses (b) and (c) did not allow for any parting of possession at all, as the references to those sub-clauses would make little sense. However, the clause as drafted is not inconsistent with those sub-clauses. The effect is that the tenant may not underlet at all and may only part with possession if sub-clauses (b) and (c) are met. In the view of the Tribunal the language of the lease is clear and it is not necessary to seek clarification from the other terms of it. In any event, the Tribunal was satisfied that there was no inconsistency between its interpretation of clause 3(15) and the other terms relied on by the Respondent. It accepted that the lease could quite properly contemplate subletting in breach of covenant and include terms to regulate the situation if such an event should occur.

30. The Tribunal therefore concluded that the lease created an absolute prohibition on subletting.

Did the Landlord Consent to Sub-Letting

31. The Applicant's case was as follows. The Respondent was aware that he required permission to sublet the property. In October 2010 the Respondent approached Miss Steele about the possibility of subletting it for a period of 12 months so that he could travel to the United States in order to try to gain a place on the United States national rugby squad and hopefully compete in the 2011 Rugby World Cup. This was evidenced by an e-mail to her from him dated 4 October 2010 (page 139).

32. In response to this request Miss Steele informed the Respondent that she required a written request for permission to sub-let for a period of 1

year only. He was required to produce evidence in relation to his playing rugby in the US and was informed that he was not permitted to sublet for a profit and he was required to provide a contact address (page 138).

33. A written request to sublet was made by the Respondent on 18 October 2010 (page 141). The request was granted. Miss Steele's oral evidence was that she wrote a letter to the Respondent which gave the Applicant's permission to sublet for a year. That letter was no longer in the Applicant's files, and she accepted that as a result of a move to electronic filing and mergers of her employer with other organisations, the records held were not complete. Her recollection was that the letter she wrote to the Respondent granted permission to sublet from the beginning of November 2010 until the end of October 2011. She also accepted that it was unlikely that that letter set out in terms that any subletting should not be for a profit.

34. The Applicant's case was that there was never any further request from the Respondent to sublet and that, therefore, permission to do so expired at the end of October 2011. In addition, they argued that permission to sublet would never be given for an indefinite period and nor would it be given only orally. Miss Steele's evidence was that from then on she was unaware that the Respondent was subletting. She stated that in 2017 the Respondent fell into arrears and that letters written to him at the property in late 2017 and in 2018 were not answered. Her evidence was that the Applicant was not aware that the property was still being sublet until 9 August 2018 when a call was received from the Leeds Building Society who have a charge on the property who had sent investigators to the property and found a subtenant living there.

35. The Respondent's case was that he had ongoing consent to sublet the property. In his witness statement (page 182) he stated that the Respondent was aware that he was not living in the property as a result of phone calls made in September 2011, January 2012 and October 2012 to Miss Steele, and also as a result of a call to another employee in July 2014 (para 8 at page 183). He stated that in September 2011 he contacted Miss Steele by e-mail to advise her of a further opportunity to stay overseas, to which he received no reply (page 254). His case is that in February 2012 he contacted Ms. Steele by telephone to inform her that he and his wife were to adopt two nephews in South Africa and later in that year he informed the Applicant that the adoption process required him to live in South Africa indefinitely. He argued that Miss Steele granted him permission to continue to sublet in a telephone call and that she did this because there was a subletting arrangement already in place and because he had no option to return to the UK for an unknown length of time (para 14 at page 184).

36. In her submissions on behalf of the Respondent Ms. Gourlay relied on the submissions made in her skeleton argument. She made much of the poor record-keeping of the Applicant and also argued that it was

possible that Ms. Steele had simply forgotten that she had granted consent, especially as her oral evidence showed that she had some personal difficulties at about that time. She invited the Tribunal to prefer the Respondent's evidence where it diverged from that relied on by the Applicant.

The Tribunal's Decision

37. There was no doubt that the Respondent had sublet the property after the initial period of 1 year's consent came to an end. The Respondent certainly did not argue to the contrary. His oral evidence was that his original tenant left and that the property had been continuously sublet since the end of 2011. Included in the bundle is an assured shorthold agreement letting the property for a term of 1 year from 1 September 2018 (pages 18 to 30).

38. The Tribunal was satisfied on the balance of probabilities that the Applicant did not give permission to sublet the property for any period beyond that originally granted. This was for the following reasons.

39. Firstly, the Tribunal bore in mind that the Respondent's case was that the only dealings between himself and the Applicant which led to a grant of further permission were on the telephone. His oral evidence was that he relied entirely on two phone calls which happened in 2012. It was not his case that he had made a written request which had been lost, and there was no evidence that he had provided any documentary evidence to support his application for an extension. Nor was it his case that he was ever notified in writing that he had been given consent. This is in marked contrast to the process he went through initially, where he was required to make a written request with documentary support and where he received written confirmation that consent had been granted (albeit that letter is now lost).

40. Whilst the Tribunal accepted that the Applicant's record keeping was not what it could have been, and whilst it accepted that Miss Steele may very well have had a telephone conversation with the Respondent which was not recorded and which she no longer recalls, that must be considered in the context of the Applicant's internal processes as a whole. If it were the case that the Applicant's procedures allowed Miss Steele to give oral consent to sublet without requiring any written documentation, then the situation would be very different. But that is not the case.

41. The Tribunal accepted Miss Steele's oral evidence that she had no authority to consent to any subletting. This is consistent with the correspondence between her and the Respondent in connection with the 2010 permission where she made reference to her putting his case forward and he himself, when referring to a previous conversation with Miss Steele, mentioned presenting his case to the board (pages 139 and 140). It also accepted her evidence in her witness statement that in her entire career she has never granted permission to sublet over the telephone (para 16b at page 124) together with her oral evidence that if

she had received an oral request to sublet then she would have asked for the request to have been put in writing. This is again consistent with what happened when permission was given in 2010. In addition, it accepted her oral evidence that any subletting would always be for a specified period of time and that such a specified period would not be extended in any circumstances.

42. The Tribunal considered that there is a significant difference between, on the one hand, possibly forgetting the fact that you had received a telephone call from someone and, on the other, forgetting that you had done something which you knew you had no permission to do, which you had never done before, and which was done in a way which was contrary to the authorised process.

43. The Tribunal also bore in mind that when permission was granted in 2010 Miss Steele informed the Respondent that the term of the permission granted would be a maximum of 1 year which would not be extended or re-granted because of the nature of the property (page 140).

44. In addition, the Tribunal considered exactly what permission the Respondent said he had been given. His oral evidence about this was confused. Initially he said that he had not made a request for indefinite permission. And again later he said that it wasn't indefinite permission. However, he also said that he had told Miss Steele that he would be in South Africa for an unknown period of time and that he asked for the subletting to continue, that he anticipated that the permission would come to an end when his adoption of his nephews was complete, and that he did not know how long that would take. In his witness statement he said that he told Miss Steele that he would be required to live in South Africa for an indefinite period (para 13 at page 184). When asked when the permission would come to an end, his response was that it would do so once his nephews were adopted. However, his oral evidence was also that the adoption took 4 years and that he had been living with his family in the United States since 2016. On this version of events any oral permission would in any event have come to an end by 2016, yet there was a subletting after that.

45. In summary, the Tribunal considered the Respondent's account was inherently incredible. For his account to be accurate Miss Steele, who has considerable experience of managing shared ownership properties, must have decided to do something which she knew she had no authority to do. She must also have failed to seek written confirmation to substantiate the Respondent's request, despite this clearly being part of the Applicant's process. In this respect the Tribunal bore in mind that whilst the Respondent's case was that Miss Steele was content for things to remain as they were as there was already a subletting in place, the reason for his request was completely different from that given previously. It was not the case that he was simply asking for an extension on the same grounds as before. Miss Steele must, if the Respondent is correct, also have failed to confirm the Applicant's

decision in writing, must have ignored her previous statement that there would be no extension or regrant and must, despite the clear insistence previously that the maximum period during which permission would be granted was 1 year, have decided to grant permission for an indefinite period as, at that time, the Respondent did not know how long the adoption would take.

46. This last point alone is sufficient to render the Respondent's account incredible. Bearing in mind the Applicant's clear reluctance to sublet social housing it is inconceivable that they would have granted permission to sublet for an indefinite period. At the very least, one would have expected them to have set some clear mechanism for determining when the period would come to an end, which they did not.

47. The Tribunal was satisfied, therefore, that at some time after the end of 2011, and certainly no later than September 2018, and on a number of occasions, the Respondent has sublet the property without permission.

Waiver of the Covenant

48. The Respondent's case in respect of waiver of the covenant was that the Applicant had not been concerned to ensure that the Respondent had stopped subletting when his permission to do so had come to an end, and, on their own case, would have remained unaware of the sub-letting had not the mortgagee contacted them. The passage of time was such, it was argued, that the Applicant had abandoned the covenant. Their failure to take steps amounted to a representation that the terms of the lease would not be relied upon. Reliance was placed on para 11.044.3 of Woodfall, Landlord & Tenant (paras 78 to 81 of RS). Ms. Gourlay in her oral submissions argued that there had been a failure to take any steps between December 2011 and 9 August 2018. She also pointed out that this was not a lease of a large area nor was it a high value lease.

49. Mr. Gallivan's response to this argument is at paragraph 9 of the Applicant's reply (page 68). He argued that, at worst, the Applicant had failed to pursue enquiries as to what was going on at the property more aggressively. This was insufficient, he argued, to amount to a representation that the covenant was no longer enforceable.

<u>The Tribunal's Decision</u>

50. The Tribunal accepted that the Applicant had been far from punctilious in ensuring that the requirements contained in the lease were being complied with. This was despite them having lost contact with the Respondent and their having suspicions about what may have been going on. However, it bore in mind the test, which is set out in Woodfall and the cases cited there. The question of waiver of covenant is not a question of whether breaches have been overlooked but whether those omissions can be said to amount to a representation that the covenant is no longer enforceable. In this case it is not said that there has been a positive act by the Applicant which could give rise to

such a representation. It is not even said that there has been a failure to act in respect of breaches of which they were aware. It is not said that they consciously overlooked breaches. What is said is that they did not do enough to discover whether there was a breach or not and that this was over a period of less than 7 years.

51. The Tribunal was not satisfied that this was sufficient to give rise to a representation that the covenant against subletting was not enforceable. It was not satisfied that the Applicant had pursued a course of conduct which was inconsistent with the continuance of the covenant. In addition, it noted the decision in A-G of Hong Kong -v- Fairfax Ltd. [1997] 1 WLR 149 relied on by Ms. Gourlay and, in particular, the judgment of Lord Browne-Wilkinson who, at page 152 C observed that proof of knowledge of a breach of covenant was essential before there could be any question of abandonment. Here the Tribunal was not satisfied that the Respondent had established such knowledge on the part of the Applicant.

52. It follows, therefore, that the Tribunal was satisfied that the Respondent has breached the requirements of clause 3(15) of his lease in the manner explained above.

Applications under s.20C of the Landlord and Tenant Act 1985 and Para 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002

53. At the close of her submissions Ms. Gourlay sought to make applications under both section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of the Commonhold and Leasehold Reform Act 2002. However, Mr. Gallivan submitted that the preferable course would be for any such application to await the Tribunal's determination. The Tribunal agreed and directed that any written submissions in this regard should be made to the Tribunal within 14 days of their receipt of this determination.

Name: Tribunal Judge S. J. Walker **Date:** 23 December 2020

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

- The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

- If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

- The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 168

(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) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(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) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(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.