FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LBC/2020/0003**
HMCTS code (paper, video, audio)	**:**	**V:CVPREMOTE**
Property	**:**	**Flat 19 Cumberland Court London W1H 7DP**
Applicant	**:**	**Cumberland Court Investments Ltd**
Representative	**:**	**Mr. Freilich**
Respondent	**:**	**Mr. Eric Young**
Representative	**:**	**Mr. Wright of Counsel**
Type of application	**:**	**Determination of Breach of Lease (s.168 Commonhold and Leasehold Reform Act 2002)**
Tribunal members	**:**	**Tribunal Judge Mullin** **Mr. Ridgeway**
Venue	**:**	**CVP Hearing**
Date of decision	**:**	**11th September 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V:CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to by the Applicant are in a bundle of 169 pages, the documents that we were referred to by the Respondent are in a bundle of 28 pages, the contents of which we have recorded. The order made is described at the end of these reasons.

Decisions of the tribunal

(1) The Tribunal Determines that the Respondent has not breached his lease as alleged in the Application.

The application

1. The Applicant seeks a determination that a breach of covenant or condition in the lease has occurred pursuant to s.168 of the Commonhold and Leasehold Reform Act 2002.

The hearing

2. The hearing took place via the Cloud Video Platform on 24th August 2020. The Applicant was represented by Mr. Freilich at the hearing and the Respondent appeared was represented by Mr. Wright of Counsel. The Tribunal is grateful to the Parties for the helpful and Courteous way they conducted the hearing.

The background

3. By a lease dated 25 October 1977, the premises known as Flat 19, Cumberland Court Greater Cumberland Place, London W1H 7DP (the Property) was demised to Mr Young for a term of 99 years less 10 days from 25 March 1977.

4. Mr Young thereafter resided at the Property but subsequently moved to the USA where he currently resides.

5. On 5 February 2015, Mr Young entered into an assured shorthold tenancy demising the Property to Ms Eman Mahmoud Mohamed for a term of 2 years.

6. It is common ground that he did so without his (then) Landlord's consent and that this amounts to a breach of the terms of the lease.

7. The lease contains (*inter alia)* the following terms:

> *3. THE TENANT COVENANTS with the Landlords:-*
>
> *3.09.1 Not to assign charge or part with or share possession of any part of the Premises*

3.09.2 Not to underlet part of the Premises

3.11 At all times during the Term to comply with the Regulations in the Fourth Schedule

THE FOURTH SCHEDULE

REGULATIONS AS TO USER

1. To use and occupy the Premises as a private residence of the Tenant and Tenant's own family

8. On 2 May 2017, Cumberland Court Investments Limited acquired the head lease for Cumberland Court (including Flat 19) (the *Head Lease*). By clause 1.01 of the Lease, Cumberland Court Investments Limited became Mr Young's landlord – being the person entitled to the reversion immediately expectant upon the determination of the Term.

9. The Landlord appointed Moreland Estate Management (*Moreland*) to act as its agent in relation to Cumberland Court and Flat 19.

10. By a letter dated 13 May 2019, Moreland wrote to Mr Young in relation to disturbance said to be caused by the occupants of Flat 19. In this letter, Moreland wrote:

> *I am now in a position where I am asking you to allow me to act on your behalf and instruct solicitors to serve the proceedings to remove the tenant otherwise I am going to have to issue unnecessary proceedings against you as the leaseholder, which is a draconian step that could at its worst mean the loss of your investments if the Courts rule there is a breach and my client seeks to forfeit your lease and take possession of your properties.*
>
> *The costs for us to instruct a solicitor on your behalf is £1,200 + VAT per property and I would ask that you instruct us by close of business on Friday 31st May 2019 - an e-mail instruction will suffice. If instructed, I will need you to provide us with some documentation such as:-*
>
> *• The Tenancy Agreement*
>
> *• Confirmation for the deposit held and the scheme in which is it held*
>
> *• Confirmation of the date you provided the tenant with the How To Rent Guide*
>
> *Once in receipt of the above documentation (which is a legal requirement to provide your tenant), I will be in a position to pursue this matter on your behalf with the courts and the solicitors appointed.*
>
> *I trust you will agree with me that this would be the most effective way forward (the removal of the tenant) and we can then hopefully*

work with you to find a new tenant that will be more suitable for the estate as I really do not wish to pursue you as the leaseholder, but if we cannot move this matter forward, then my client will have no option but to pursue you in relation to breach of contract (i.e. the lease).

11. As Mr Young explains at paragraph 7 of his statement in this Application, in reliance upon this letter, Mr Young paid to Moreland the sum of £3,000 by cheque on 3 June 2019 to act on his behalf (£1,200 + VAT for both flats referred to in the letter).

The Issues

12. The Respondent accepts that in letting the Property Mr. Mohammed he breached the terms of the lease identified above. The Issue for the Tribunal is whether the Applicant has waived the breach or is otherwise estopped from relying on it.

13. The Respondent argues that the Applicant has waived the breach (and/or is estopped from relying on it for three reasons:

    (i) the terms of Moreland's letter dated 13 May 2019;

    (ii) demanding and receiving rent, service charges and other charges due under the Lease from Mr Young during the course of 2019; and/or

    (iii) acquiescence in breaches of this covenant in the leases relating to other flats within Cumberland Court.

14. The Applicant argues that they are not so estopped and that they have not waived the breach. They point to the fact that they were not the Landlords at the time of the underletting, that the breach is a continuing one, that the letter of 13th May 2019 was not written on the instructions of the Landlord and they also drew our attention to the Supreme Court Case of *Duval v Randolph Crescent Ltd* UKSC 2018/0211.

Reasons for the tribunal's decision

15. The Respondent expanded upon their arguments in Mr. Wright's very helpful skeleton argument. In it he submitted that the Tribunal had jurisdiction to consider the issues of waiver and estoppel following *Swanston Grange (Luton) Management Ltd v Langley-Essen* [2008] L & TR 20. Mr. Freilich submitted the issue for the Tribunal was purely whether or not there had been a breach of the lease, and at least impliedly, that the Tribunal should not therefore consider issues of waiver or estoppel. He did not provide any arguments for why *Swanston Grange* should not be followed.

16. The Tribunal considers that it does have jurisdiction to consider whether or not the alleged breach has been waiver or whether the Applicant is estopped from relying on it. Indeed, it is bound to do so following the decision in *Swanston Grange.*

17. Mr. Wright also referred the Tribunal to the case of *Downie v Turner* [1951] 2 KB 112. In that case a landlord applied for forfeiture of a lease on the ground of breach of covenants (a) by sub-letting, and (b) by using the premises for a purpose other than that of a private dwelling-house in that by virtue of the sub-letting the house was used as two dwelling-house. Waiver of the first breach was admitted.

18. The headnote of the case report states the ratio of the case as follows:

"both the breach of covenant against sub-letting and the alleged use of the house otherwise than as a private dwelling-house arose from the sub-tenancy; and it was impossible in law to distinguish them for this purpose and say that the one was done once and for all and the other was a continuing breach"

19. This case remains good law, is binding on this Tribunal and Mr. Freilich raised no specific arguments to the contrary. The facts of this case are self-evidently very close to those *Downie*. The Tribunal considers that following *Downie* it is bound to hold that the breach in this case is a once and for all breach as opposed to a continuing one. The breach alleged in this application is indistinguishable from the initial sub-let, the breach of the regulation as to user is no more than a different aspect of the sub-letting. We agree therefore that if there was a waiver of the breach of the sub-letting, that would also necessarily waive the breach of the regulations as to user.

20. The Tribunal accepts the Respondent's argument that as a result of the letter of the 13th May 2019 the Applicant waived the breach of the regulations as to use. That letter makes clear that the Applicant was really concerned about the behaviour of the specific sub-tenant rather than subletting the property *per se*. This is most clear in the final paragraph where it is suggested that the managing agents would assist in finding a new tenant to replace Mr. Mohammed. It was an unequivocal representation that the Landlord was unconcerned by the subletting of the property and indeed would be supportive of such subletting in the future.

21. The Applicant argues that this letter was not written on the specific instructions of the Landlord and thus does not constitute waiver. However, Mr. Freilich accepted that whilst he was not specifically instructed to write the letter, he did have authority to do so given that Moreland had been properly appointed by Landlord as managing agents for the Property. If he had authority to write the letter, then it should be treated as if it came from the Landlord themselves regardless of whether or not they specifically instructed for it to be sent.

22. We agree with the Respondent that on an objective reading, this letter contains a clear and unambiguous promise or representation that if Mr Young instructs Moreland to remove the sub-tenant, the Landlord would not take action against him directly. It is common ground that Mr. Young made the relevant payment and so instructed Moreland (although the payment was subsequently returned in circumstances which are unclear but which we do not need to determine). The breach alleged in this application was therefore waived.

23. In any event, even if the Tribunal is wrong on that point. The Tribunal also considers that the acceptance of rent by the Landlord until (as was accepted by the Applicant) December 2019 also operates as a waiver of the relevant breach. The Applicant argued against this conclusion by relying on its assertion that the breach is a continuing one. As set out above, we are bound by *Downie* to conclude that the breach is not continuous. The Landlord demanded and accepted service charges and rent after it had knowledge of the breach, it has therefore waived the breach by doing so.

24. Similarly, if wrong on the two points above, the Tribunal finds that the Landlord's acquiescence combined with the letter of 13th May 2019, and the acquiescence of their predecessors in title, creates an estoppel which prevents them from seeking to rely on the breach of lease. The evidence before the Tribunal (in Mr. Young's Statement) is that there has been a longstanding acquiescence to other flats in the building be sublet and that some are currently on the market to be let out. This is entirely unsurprising given the nature and location of the Property.

25. Mr. Freilich sought to argue that the Landlord takes a consistent approach to subletting and does not tolerate it and takes action where necessary. He also indicated that there is more than one form of lease containing different provisions.

26. Mr. Wright in reply pointed out that this was entirely unevidenced, in sharp contrast to the tone and content of the letter of 13th May 2019, that looking at the Landlord's headlease at clause 3.09.8 the underleases should be in the same form and that looking at the Land Registry information relating to the Landlord's title, the vast majority of the underleases began on the same date as Mr. Young's, suggesting that they would be in the same form.

27. The Tribunal prefers the Respondent's case on this point. Other than the oral evidence given to the Tribunal, there is no other evidence (documentary or otherwise) which gainsays what Mr. Young sets out in his statement: that there has been a substantial period of acquiescence in relation to the subletting of the Property and other flats in the building. The letter of the 13th May 2019 also supports this conclusion entirely in that it clearly envisages the continued subletting of the Property as the preferred scenario. The Tribunal finds that the various Landlords have, for many years, taken no exception to the subletting of flats in the building despite being aware of the same and thus they are estopped from relying on the breach alleged in this application. It would be unconscionable and unfair if they were permitted to do so.

28. Finally, the Applicant's reliance on *Duval* does not assist them with any of the above points. That case relates to consequences for Landlords of not enforcing covenants when being required to do so. That does not appear to the Tribunal to be a relevant consideration here. Whilst the Landlord on this Application is trying, in effect, to enforce a covenant; the issue for the Tribunal is whether or not the breach has been waived or there is an estoppel which prevents them from doing so. That is what is considered and determined in this decision and *Duval* does not assist the Applicant in that regard.

Name: Tribunal Judge Mullin
Mr. Ridgeway MRICS

Date:11th September 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).