

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL &  
LEASEHOLD VALUATION TRIBUNAL**

In the matter of an Application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (Breach of Covenant/Forfeiture Application)

Case No. CHI/45UE/LBC/2005/0004

Property: 9 Bowman Court, London Road, Crawley, West Sussex, RH10 8XG

**Between:**

David Glass

("the Applicant")

and

Clare Maree Siney

("the Respondent")

**DECISION  
OF THE LEASEHOLD VALUATION TRIBUNAL**

**1. The Application**

The application is made under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for a determination that a breach of covenant in the Lease has occurred. Section 168 of the 2002 Act was inserted to prevent a Landlord under a long Lease from serving a Notice under Section 146 of the Law of Property Act 1925 until a breach of covenant by a Tenant has been finally determined or admitted. This Section of the 2002 Act was brought into force with effect from 28<sup>th</sup> February 2005 by the Commonhold and Leasehold Reform Act 2002 (Commencement No. 5 and Savings and Transitional Provisions) Order 2004.

**2. Preliminaries**

Directions were made by the Tribunal on 7th July 2005 proposing that the matter be dealt with on the fast track and without an oral Hearing. The parties were requested to submit written representations and unless either party objected, the matter would be dealt with as a paper determination without an oral Hearing. The Applicant requested that the matter be dealt with as a paper determination and the Respondent did not object. Accordingly the matter was determined by a single Lawyer/Chairman on written representations without an oral hearing.

**3. The alleged breach of covenant**

The Applicant alleged that the Respondent was in breach of covenant 3 (8) (a) of the Lease. That Clause read as follows:

3. *The Tenant hereby covenants with the Landlord as follows:*  
*(8) (a) Not to underlet share or part with the possession of the whole or any part of the flat nor to assign part only of the flat nor allow the tenant's car space to be used otherwise than by the occupier of the flat and his lawful visitors."*

There appeared to be no dispute that the Respondent had purported to transfer the whole of the flat to a third party, which the Applicant alleged was a clear breach of this covenant.

4. **The Applicant's representations**

The Applicant submitted a written statement setting out the grounds in support of his Application including a number of copy documents. In particular he produced copies of correspondence with seven Firms of Solicitors acting in the sales of Flats numbers 1,3,5,6,11,14, & 15 Bowmans Court where Deeds of Variation of the Leases had been entered into varying the wording of covenant 3 (8) (a) of the Leases. In his written statement the Applicant confirmed that a total of twelve Tenants of Flats in Bowmans Court had entered into similar Deeds of Variation. In all those cases the Tenants had accepted that the original wording of that Clause had prevented assignments and that the covenants required amendment to enable sales of those Flats to proceed.

5. The Applicant also produced a copy letter from the Weymouth District Land Registry dated 8<sup>th</sup> March 1995 which took the view that Clause 3 (8)(a) of the Leases contained a prohibition on dealing with the leasehold properties and that an entry had been made on all the leasehold titles warning of such prohibition. Land Registry office copy entries of the title to 9 Bowmans Court were produced showing an entry on that title dated 24<sup>th</sup> February 2004 which read *"The covenants implied under Part 1 of the Law of Property (Miscellaneous Provisions) Act 1994 in the disposition to the proprietor are modified."*

6. The Applicant also included in his submissions a copy Law Report of a Court of Appeal Case dated 14<sup>th</sup> December 1995 in the case of *Wapshott & Anor v. Davies Donovan & Co, and Kidd & Anor v. Dale & Newberry* (1995 EGCS 199) That case involved negligence by two firms of Solicitors arising out of a similar breach of covenant where there were qualified and unqualified covenants amounting to prohibitions against transfers or sub-letting. That case was an appeal against the amount of damages, rather than the issue of whether or not a covenant had been breached. The matter of whether or not there had been a breach of covenant, was not at issue in that case.

7. **The Respondent's Representations**

Ashfords, Solicitors for the Respondent, had submitted a number of written representations on behalf of their Client in the form of a Response to Application dated 13<sup>th</sup> July 2005. They maintained that Clause 3 (8)(a) of the Lease was only a prohibition on assignment of part. They attempted to infer that the Landlord had intended to only prohibit an assignment of part. They referred to the subsequent sub-clause (b) of Clause 3 (8) which required notice of every assignment charge assent transfer or underlease of the flat to be given to the Landlord. They maintained that such a clause clearly envisaged assignment.

8. They also maintained that the Applicant was estopped by his conduct from relying upon that clause in the Lease. During the pre-contract conveyancing process there had been correspondence with the Applicant's Managing Agents in which they were made aware of the proposed transfer of this flat. They alleged that the Applicant and his Agents had permitted the sale to proceed and lead the Respondent to believe that the Applicant had no objection to the proposed sale.
9. They also produced a copy narrative extract from Woodfall relating to a Tenant's rights to assign or underlet. This reviewed the common law right of a Tenant to sub-let *unless restrained by his lease... from doing so.* The narrative went on to review the historical Case Law regarding restrictions on assignment and sub-letting. The Respondent's Solicitors relied upon this in support of their view that the Tenant has a right to sub-let or assign unless restrained by the Lease.
10. **Consideration**  
Following a thorough review of the written representations by both sides, the Tribunal considered the matter carefully. First of all it considered the wording of the covenant 3 (8)(a) of the Lease. The wording seemed very clear and was an absolute covenant against assignment. Whilst this was unusual, it was entirely a matter for the parties themselves to decide what covenants were contained in a Lease to which they were to be a party. In the absence of any contrary evidence, it is assumed that a Lease of a Flat granted at a premium representing full market value at arms length between two unconnected parties who are separately represented, shall be a valid and binding Lease.
11. In interpreting Leases the Tribunal looks at the actual words used, rather than trying to guess what the parties had in their minds when they agreed the wording of the Lease. In that respect and in the absence of any evidence showing that a simple clerical error or mistake had been made, the Tribunal rejects the Respondent's argument that the Landlord had intended only to prohibit an assignment of part.
12. In respect of the Respondent's suggestion that the Applicant was estopped by his conduct from relying upon that Clause due to the pre-contract correspondence with his Managing Agent, the Tribunal took the view that such correspondence did not prejudice the Applicant in asserting a breach of covenant. The Respondent had been advised by Solicitors and it was reasonable to suppose that those Solicitors had read the Lease and correctly interpreted the Clauses which restricted assignment. It was not a matter for the Applicant to suggest that the proposed assignment was prohibited when the wording of the Clause preventing assignment was so clear.
13. The narrative extract from Woodfall was considered and this clearly included the words "unless restrained by his lease from doing so (assigning)" This Lease contained a clear covenant prohibiting assignment and all the various Case Law was relevant only when Leases fail to include any specific restrictions on assignment. In this case there was a clear prohibition on assignment and accordingly the narrative did not assist the Respondent.

14. The Tribunal was assisted by the evidence produced by the Applicant that twelve Tenants of other Flats in the same Building who held Leases which were subject to the same covenant, and their Solicitors, had all accepted that there was a clear prohibition against assignment. Also the letter from the Land Registry confirming the prohibition and the registered Notice on the title was ample evidence that there had been a breach of covenant.

15. **DECISION**

For the reasons given above the Tribunal HEREBY DETERMINES in accordance with its powers under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant has occurred in that the Respondent has purported to transfer the Leasehold title to 9 Bowman Court in breach of Covenant 3 (8) (a) of the Lease dated 27<sup>th</sup> April 1988 made between Bucklesway Homes Limited (1) Michael Brenton and Lesley-Anne Tennick (2) and Fletchers Court Management Company Limited (3)

Dated this 11th day of August 2005

  
*J.B. Tarling*

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John B. Tarling (Lawyer/Chairman)

A member of the Panel appointed by the Lord Chancellor