S35

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LBC/2013/0059**
Property	:	Flat 464, Park West, Edgware Road, London W2 2QT
Applicant	:	Daejan Properties Limited (landlords)
Representative	:	RadcliffesLeBrasseur (solicitors)
Respondent	:	Mr C. Risberg and Mrs E. Risberg (joint leaseholders)
Representative	:	None
Type of Application	:	For a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ('the Act') that the leaseholders have breached covenants in their lease
Tribunal Members	:	Professor James Driscoll, solicitor and Tribunal Judge and Mr Trevor Sennett MA FCIEH
Date and venue of Hearing	:	A Determination was made on consideration of the papers filed on 30 September 2013 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	30 September 2013

DECISION

Decisions of the tribunal

(1) The tribunal determines that the landlord has not proved that the leaseholders are in breach of the covenants in their lease.

The application

1. In this matter the applicant is the landlord of premises at Park West, Edgware Road, London W2 2QT which is a substantial block of flats in central London. The respondents are the joint leaseholders of Flat 464 in the premises holding it under a long lease.

2. The landlords have taken these proceedings to seek a determination that the leaseholders are in breach of covenants in their lease. Their application is dated 7 August 2013 and it gave as the leaseholder's address the address of the subject property. Steps have also been taken to apprise the leaseholder's mortgagees of the application.

3. The tribunal has not received any communication from the leaseholders (nor from their mortgagees).

4. Directions were given by the tribunal on 8 August 2013. This included a direction that the tribunal concluded that the application should be considered on the basis of the papers only and without a hearing. This was the course suggested by the landlord's solicitors in their letter to the tribunal dated 7 August enclosing the completed application.

5. Although the tribunal gave the leaseholders the option of seeking a hearing, we have heard nothing from them in response to the application, to the directions and to the other communications we sent to them at the subject premises (which is the only address that we have for them).

6. The directions also directed the leaseholders to prepare a bundle of documents for the hearing. This they have failed to do.

7. The relevant legal provision is set out in the Appendix to this decision.

The determination and the reasons for it

8. We considered the application on 30 September 2013 and the only documents we had before us were the completed application, a copy of the lease, a witness statement with various exhibits and the correspondence between the landlord's solicitors and ourselves.

9. A statement in support of the application was made by Ms Vicky Hawkins and it is dated 31 July 2013. Ms Hawkins is employed as a credit control manager by the Freshwater Group of Companies of which the landlord is part. She exhibits to her statement various Land Registry entries which shows the freehold and leasehold ownership and when a particular flat is subject to a mortgage. (There are other exhibits which we deal with below).

10. On behalf of the landlords she contends in her statement that the leaseholders are in breach first of clause 2(15)(v) and second clause 2(20) of the lease. Essentially the landlords claim that the leaseholders have (a) created subtenancies without notifying the landlord (and paying them a fee) and (b) have failed to use the Flat for their occupation and that in breach of the lease they have, or are using the Flat for a business.

11. In support of these claims, Ms Hawkins exhibits several pictures taken on CCTV, advertisements showing the Flat being available for short-term occupation or rentals, and a copy of exchange of emails between the landlord's solicitors and solicitors who were then acting for the leaseholders and copies of letters sent to the leaseholders by the landlord's solicitors all in 2011.

12. Clause 2(15)(v) of the lease reads as follows: 'Upon every assignment transfer underlease mortgage charge or other document affecting this Lease to give to the Lessor within one month thereafter notice in writing thereof and also if required by the Lessor to produce each such document or a certified copy thereof to the Lessor's Solicitors and pay a fee of Eight pounds for the registration of each such notice or document'.

13. Clause 2(2) reads as follows: 'To use and occupy the Flat solely and exclusively as a self-contained residential Flat in one occupation and not to permit the Flat or any part thereof to be used or occupied otherwise than for the said purpose nor (without Prejudice to the generality of the foregoing) for the purpose of any trade or business".

14. We turn to the evidence filed by the landlords which consists of Ms Hawkin's statement with its exhibits. As to current breaches, Ms Hawkins includes some 31 separate pictures taken by CCTV. Some of these have been annotated with comments such as 'a group of women leaving', '2 woman arriving', 'couple leaving' , 'family arriving' , 'family leaving'. Most of the pictures have not been annotated.

15. It appears from the marking in the top right corner of the pictures that they were taken at various times from 14 to 16 June 2013, and from 18 to 30 June 2013. The pictures show individuals and couples carrying luggage into what appears to be a common landing in a building. However, there is nothing to show that this is the landlord's building or that it is a common part of the subject premises. Nor does it show the subject flat. In other words, it is impossible to make out which building is the subject of the pictures or which floor (let alone which flat) they relate to.

16. In paragraph 4 of her statement Ms Hawkins states 'I can confirm that none of those persons pictured are the Respondents'. It is not clear from her statement whether she has ever met the leaseholders.

17. The pictures also show what appears is a porter's or concierge desk. Such an employee could presumably be an important source of information on who is using the subject Flat but no such statement was obtained.

18. Also exhibited to Ms Hawkin's statement are copies of advertisements for short-term London flats, which seemed to the tribunal to be clearly aimed at the tourist market. There are three such copies.

19. The first, which refers to a booking period of 7 nights and it gives the address of the property as 'Marble Arch'. There is nothing to link it with the subject Flat, let alone the leaseholders.

20. The second one also refers to the property as 'Marble Arch', shows a map location in Park West, but again does not link it with the subject property or the leaseholders.

21. Third, is an advertisement referring the leaseholders themselves who state that they have set up a business of letting holiday flats. The only date mentioned is 2009. There is no link with the subject flat.

22. Ms Hawkins also exhibits in her statement (exhibit 3) copies of emails between the landlord's solicitors and a firm called Zadies, solicitors, who were then acting for the leaseholders, all dated 2011, which show that at that stage the leaseholders admitting to breaching their lease and that the leaseholders were prepared to give an undertaking to save the landlords the trouble and expense of applying to this tribunal for an order under the Act. Also attached are copies of letters sent to the leaseholder's solicitors and to their mortgagees about the breach of covenant.

23. It does not appear that any sort of formal undertaking was ever forthcoming and in her statement Ms Hawkins simply states that the landlords 'did not pursue the matter further' (paragraph 3).

24. This brings us to our conclusions. Despite their being some circumstantial evidence we conclude that the landlord has failed to prove that the subject flat is being used for the business of short-term lettings. The landlord's allegations are simply not borne out by the evidence. The photographic evidence is not linked to the subject Flat; nor is the marketing evidence linked to the Flat, or the leaseholders except for the 2011 document which itself is a general advertisement which does not refer to the Flat. Nor do we consider that the references to events in 2011 assists the landlords. It is clear that the landlords decided not to take that breach further and the admission made on behalf of the leaseholders cannot found a determination under the Act (see: section 168(2)(b)).

25. If such a finding of fact was proved, we would have had little hesitation in finding that the leaseholders are in breach of covenant 2(2) of their lease. We would have had more difficulty in finding a breach of covenant 2(15)(v) as it is difficult to see how short-term lets to tourists could amount to creating a sub-tenancy.

The tribunal's decision summarised

26. As was explained in the Directions, the burden of proof that there has been a breach of the lease lies with the landlord. We have concluded that the landlord has failed to prove that the leaseholders are in breach of their lease.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002, section 168 (No forfeiture notice before determination of breach)

(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 a leasehold valuation 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.