



Residential  
Property  
TRIBUNAL SERVICE

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
LEASEHOLD VALUATION TRIBUNAL for the  
LONDON RENT ASSESSMENT PANEL  
COMMONHOLD AND LEASEHOLD REFORM ACT 2002**

**LON/00BK/LBC/2010/0050**

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**Premises:** Flat 42, Maitland Court  
Lancaster Terrace  
London W21 3PE

**Applicant:** Maitland Court Ltd

**Represented by:** Mr S Datta, counsel

**Respondent:** Mr R Schindler

**Represented by:** Mr J Swirsky, counsel

**Tribunal:** Mr NK Nicol  
Mrs J Hawkins

**Date of Hearing:** 12/10/10

**Date of Decision:** 22/10/10

## REASONS FOR DETERMINATION

1. The Applicant is a company formed for the purpose of buying the freehold of Maitland Court, Lancaster Terrace, London W2 3PE. The enfranchisement was completed in 2008. The Respondent had been the lessee of flat 42 since 1983 and took part in the enfranchisement. As a consequence of the enfranchisement, the Applicant offered each lessee a new 999 year lease. The Respondent took such a new lease in 2008.
2. In March 2009 the Respondent transferred his interest to his wife, Mrs Marion Schindler. She was not formally added as a party to these proceedings but the Respondent's legal representatives represented her as well and indicated that she fully intended to be bound by any findings made by the Tribunal. The Applicant had no objection to proceeding in this way.
3. The Applicant has applied for a determination by the Tribunal under s.168(4) of the Commonhold and Leasehold Reform Act 2002 as to whether breaches of the Respondent's lease have occurred. The relevant provisions of the 2008 lease are as follows:-

3. The Lessee HEREBY COVENANTS with the Lessor as follows:

(7) ...

(c) Not at any time to sublet the Demised Premises without the Lessor's written consent (not to be unreasonably withheld or delayed) provided that the Lessor may withhold its consent where the Lessee is in material breach of any of his obligations in this Lease

(d) To impose in any deed or other agreement for the subletting of the Demised Premises covenants or obligations prohibiting any subletting of the whole or any part of the Demised Premises by the subtenant and requiring the subtenant to observe and perform the regulations specified in the Fourth Schedule ...

(8) Within 14 days next after any transfer assignment subletting or parting with possession ... or devolution of the Demised Premises to give notice in writing of such transfer assignment subletting parting with possession or devolution and of the name and address and description of the assignee sublessee or person upon whom the relevant term or any part thereof may have devolved (as the case may be) and to deliver to the Lessor or its managing agent within such time as aforesaid a solicitor's verified copy of every instrument of

transfer assignment subletting or devolution ... or other instrument effecting or evidencing the same and to pay to the Lessor or its managing agents a reasonable fee plus Value Added Tax for the registration of every such notice

4. (4) Observe and perform the regulations in the Fourth Schedule hereto PROVIDED that the Lessors reserves the right to add to buy notice modify or waive such regulations in its reasonable discretion

#### THE FOURTH SCHEDULE

##### Regulations

1. Not at any time to use or occupy or permit the Demised Premises to be used or occupied except as a single private dwelling only and in a manner appropriate to a block of high-class residential flats

4. The alleged breaches of covenant were as follows:-

- (a) The Respondent had let the premises to flat sharers, that is groups of three or four individuals unrelated by blood or marriage, since he became the lessee. In June 2008, he entered into an assured shorthold tenancy with four individuals. In June 2009, he entered into a further assured shorthold tenancy with another four individuals, save that one person was common to the two groups. The Applicant is anxious to establish that such lettings would constitute a breach of paragraph 1 of the Fourth Schedule. To the Applicant, this was by far the most important of the allegations they wished to pursue.
- (b) The Applicant claimed that the Respondent had failed to obtain consent for the June 2009 tenancy in accordance with clause 3(7)(c).
- (c) The Applicant alleged that the Respondent had failed to include in any tenancy agreement an absolute prohibition on subletting in accordance with clause 3(7)(d). Until the hearing of this application the Applicant had not seen a full copy of the tenancy agreement granted in June 2009 due to the accidental omission of one page. Upon seeing that page at the hearing, the Applicant realised, as they had expected, that the missing terms of the tenancy agreement were standard terms that they had seen in another copy of an agreement proposed by the Respondent. They included at clause 4.1 a prohibition on subletting or assignment without the Respondents consent, not to be unreasonably withheld. The Applicant maintains that clause 4.1 did not constitute compliance with clause 3(7)(d).

- (d) The Applicant claimed that the Respondent further breached clause 3(7)(d) by not including in the tenancy an obligation to observe the regulations contained in the Fourth Schedule. The Respondent claimed that clause 4.7, contained on the previously missing page, constituted compliance by requiring the tenant to “observe the restrictions in the Headlease applicable to the Property”, with a copy of the Headlease said to be attached. The Applicant maintained that clause 4.7 did not constitute such compliance.

### **Clause 3.8**

5. The above allegations were the only ones contained in the original application. However, the Applicant's legal representatives carried out a land search after the issue of the application and found out about the transfer in March 2009. It appeared to them that clause 3.8 had been breached. The Respondent objected to this issue being raised at the hearing on the basis that it was not in the original application and no formal application had been made to add to it.
6. The Tribunal heard submissions from both parties but decided to permit this issue to be raised. Under paragraph 7 of Schedule 2 of Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 the particulars of this alleged breach should have been in the statement accompanying the original application but Tribunal decided that it was appropriate in accordance with reg.3(8) of the same Regulations to dispense with this requirement. The particulars of the alleged breach and relevant documents had been specified in good time prior to the hearing and were clearly sufficient to enable the issue to be determined. The Respondent claimed that they would suffer prejudice because they had not prepared for this issue, being under the impression that the Applicant was going to drop it or had waived it. In fact, there was no evidence that the Applicant was going to do either.
7. The fact is that the Respondent was in clear breach of clause 3.8. Through some form of oversight, the relevant notification had not been provided. It turned out at the hearing that the Respondent has now provided it to the satisfaction of the Applicant's legal representatives and a copy of the Notice of Assignment of Lease was faxed to the Tribunal during the lunch break. However, this was way outside

the 14 day time limit specified in clause 3.8. In the circumstances, it is difficult to see what use the Applicant may make of this finding of breach but the Tribunal's role under s.168(4) is simply to determine whether a breach has occurred.

**“single private dwelling”**

8. Following the enfranchisement, the Applicant attempted to make it clear to the lessees, through their agent, Mr Terry Benson of Fortune Management, that they intended to enforce the covenant requiring their consent to any subletting, now contained in clause 3(7)(c). It would appear that the Respondent was fully aware of this because they sought and obtained consent for their June 2008 letting, albeit that this was shortly before the grant of the new lease.
9. The Respondent and his wife had left the actual letting of their flat to their agent, Mr Fraser of Kensington Flats, who they have known for over 30 years. The June 2008 letting was made in accordance with his normal practice whereby he advertised the availability of the letting and was approached by a group of four apparent friends. He interviewed them, showed them the flat, took up their references and let the flat to them under a fixed term assured shorthold tenancy to which all four were parties. In particular, he did not bring the individuals together but rather they approached him as a pre-existing group of friends.
10. In June 2009 Mr Fraser granted a new tenancy in exactly the same form. He regarded this as a renewal of the existing tenancy although, in fact, only one of the four individuals remained the same. Again, the three new tenants had been found by their predecessor tenants and were not brought in by Mr Fraser.
11. Mr Fraser did not think that the June 2009 required separate notification to the Applicant's agent on the basis that it was a renewal. However, by letter dated 19<sup>th</sup> August 2009 the Applicant's solicitors, Wagner & Co, stated to the Respondent,

Our clients have become increasingly concerned at the number of potentially unauthorised sublettings at Maitland Court. Our client is entitled, primarily for reasons of security, to know who was living at Maitland Court.

We remind you that under the terms of your list, you have covenanted:-

- (i) Not at any time to sublet your flat for a term of less than six months.
- (ii) Not at any time to sublet your flat without the consent of the freeholder (such consent not to be unreasonably withheld).

- (iii) Within 14 days of any subletting, to give notice in writing to the freeholder or the managing agents and to provide a copy of the tenancy agreement and pay a reasonable fee.

With this in mind, you are required to provide copies of any existing tenancy agreement that you have entered into in relation to your flat. This agreement should be provided to us by no later than 7 days from the date of this letter.

In the event that we do not hear from you within the time specified in the preceding paragraph, consideration will have to be given by our clients as to whether or not it is appropriate to issue a formal notice pursuant to s146 of the Law of Property Act 1925 with a view to commencing proceedings to forfeit your lease.

12. By letter dated 20<sup>th</sup> August 2009 Mr Fraser stated that he did not know that the landlord's agent had to be informed of renewals, only of new lettings. He attached a copy of the June 2009 tenancy (with the aforementioned page missing) and apologised for not providing notification of it. He promised to diarise future notification. By letter dated 10<sup>th</sup> September 2009 he informed Mr Benson that one of the tenants had been replaced.
13. By e-mail sent on 23<sup>rd</sup> November 2009 Mr Benson complained to Mr Fraser that he still did not have a copy of the current tenancy agreement. This would mean that the Applicant's solicitor did not let the Applicant's agent know about the information they had received. Further, the Applicant's solicitor did not follow up on the threat to issue a s146 notice. Indeed, no further action was taken in respect of the tenancy by the time it expired by effluxion of time one year after its commencement.
14. For the next tenancy, due to be granted in or about June 2010, Mr Fraser did ask in advance for consent. He and Mr Benson discussed some of the terms by e-mail but, in an e-mail dated 17<sup>th</sup> June 2010, Mr Benson told Mr Fraser,

Having consulted with [the Applicant's] solicitor I reply as follows:-

[The Applicant] are not prepared to grant consents to the proposed AST for the following reasons:-

1. The proposed tenancy agreement does not comply with the provisions of clause 3(7)(d) of the lease.
2. Clause 1 of the Fourth Schedule to the lease requires the Demised Premises to be used as a single private dwelling.

In regard to 2 we wish to know the relationship between the proposed tenants?

15. Although the Applicant had attempted to publicise the enforcement of the covenant against subletting without consent, they appear to have made no attempt to publicise any criteria for that consent. The Applicant's concern is that they would prefer to have family units occupying any premises sublet by lessees rather than flat sharers. They object to having young people who might have parties or amongst whom there is a higher turnover of occupants. Mr Benson claims to have had greater problems with flat sharers than family units, although he gave no evidence of this.
16. The problem for the Applicant is that it does not seem realistically possible for them to derive from their concern any meaningful criteria with any precision. There was a suggestion that they would prefer all the tenants to be related to each other. Both the Tribunal and counsel for the Respondent, Mr Swirsky, were able to present to Mr Benson a number of occupancy arrangements amongst people who were unrelated which apparently he would have no problem with, e.g. a household made up of unrelated elderly spinsters. It appeared to the Tribunal that the Applicant's antipathy to flat sharers was neither rational nor thought out which, if true, would explain why they had not set out their reasons. In any event, the Applicant did not do so in any document and Mr Benson was not able to articulate any rationalisation in his evidence.
17. The Applicant's argument was that the letting granted by the Respondent in June 2009 was a breach of clause 1 of the Fourth Schedule in that it did not comply with the requirement for the letting to be of a "single private dwelling". Mr Datta, on the half of the Applicant, pointed to the fact that three of the occupants changed when the tenancy was renewed in June 2009 and the fourth occupant changed within the following three months. He suggested that this demonstrated that the occupation was transitory and inconsistent with the concept of a "single private dwelling".
18. The first problem with Mr Datta's argument is that it contradicts one of the authorities he quoted himself. In apparently the only case which considered the same phrase in another lease, *Roberts v Howlett* [2002] 1 P&CR 19, HHJ Langan QC, sitting as a deputy High Court judge in the Chancery Division, held that occupation for a year could not, in modern living conditions, be regarded as transitory. On the facts of this case, three tenants occupied the property for one

year, another for 15 months and the other 4 tenants have been in occupation since at least July or September 2009 and continue to be there.

19. In any event, this one thin piece of evidence does not even begin to demonstrate that any letting by the Respondent has not been of a "single private dwelling". The Tribunal was referred to a number of cases, in all of which the court examined carefully all the circumstances of the case including extensive details of the living arrangements of the tenants concerned. The burden of proof was on the Applicant. Such a burden may not be discharged unless one has at least some evidence. The Applicant had none and therefore never had any realistic prospect of discharging the burden.
20. Further and in any event, there can be no doubt whatsoever that the requirement that lettings be as a "single private dwelling" does not and cannot, of itself, prevent lettings to flat sharers. The Respondent was keen that the Tribunal should identify clear and simple criteria by which a letting could be judged. However, the authorities make it clear that each case depends on its facts. For the Tribunal's part, it is extremely difficult to see how there would be a breach of paragraph 1 of the Fourth Schedule unless the letting in question were made to 3 or 4 separate households who lived clearly defined separate lives and that this separation were supported by some physical division of the flat, even if only to the extent of having separate locks on all the bedroom doors.
21. The Applicant expressed concern about flat sharers being brought together by the letting agent and having no knowledge of each other before that time. According to Mr Fraser's evidence, that was not the situation here. In any event, such a circumstance could not be anything more than a relatively minor part of the factual matrix. It does not follow from such circumstances that the flat sharers in question would inevitably fail to occupy the flat as a single private dwelling.
22. For these reasons, the Tribunal is satisfied that no breach of paragraph 1 of the Fourth Schedule has occurred.

#### **Subletting without consent**

23. Mr Fraser's view that the letting of June 2009 was a simple renewal rather than a new letting does not stand up. There was only one tenant out of four in common



with the previous letting. It was a new letting which required the Applicant's consent. In any event, there is no exception for renewals. It is difficult to see how a renewal could be objected to unless some other relevant circumstances have changed but, nevertheless, consent is still required.

24. Clause 3(7)(c) does not give the Applicant carte blanche to refuse consent for any reason. It must not be unreasonably withheld or delayed. In relation to the June 2009 letting Mr Fraser was clearly seeking consent in his letter of 20<sup>th</sup> August 2009, even if he did not put it in exact terms. The Applicant did not do anything about this for the remaining year of the tenancy. That is clearly unreasonable delay.
25. Mr Datta argued that the consent must be sought and obtained before the letting is granted. Clause 3(7)(c) does not state that expressly but he argued that it was necessarily implied. However, as he himself pointed out, contractual terms must be interpreted against the known admissible background. Modern lettings of assured shorthold tenancies do not normally allow much, if any, time between the conclusion of the agreement and the commencement of the tenancy itself. Mr Datta is effectively arguing that the only way of complying with clause 3(7)(c) is for consent to be sought and obtained within that narrow window. While that will be possible sometimes, as happened with the proposed renewal of the existing tenancy in June 2010, it is not realistically possible to do that many, if not most, times, particularly if the letting is a new one, rather than a renewal. Therefore, the Tribunal does not interpret clause 3(7)(c) as requiring consent to be obtained before the letting commences.
26. For these reasons, the Tribunal is not satisfied that a breach of clause 3(7)(c) has occurred.

### **Subletting by tenant**

27. The Applicant, correctly in the Tribunal's opinion, submitted that clause 3(7)(d) required any letting by the Respondent to contain an absolute prohibition against subletting. Clause 4.1 of the Respondent's standard terms of tenancy is not an absolute prohibition against subletting since it contains a qualification of consent not to be unreasonably withheld. Mr Swirsky argued that clause 4.1 achieves the

same effect because the Respondent would never give his consent to a subletting in order to comply with the terms of his own lease. The Tribunal rejects this circular reasoning. In this instance, the requirements of clause 3(7)(d) are clear and clause 4.1 does not comply with them. Therefore, the Tribunal is satisfied that a breach of clause 3(7)(d) has occurred. Again, it is difficult to see how the Applicant could make any use of this since Mr Swirsky is right that the Respondent retained the ability to prevent any subletting. However, as already mentioned above, that is not a question for the Tribunal.

**Observing regulations**

28. In contrast, the Tribunal is not satisfied that clause 4.7 of the Respondent's standard terms of tenancy constitutes a breach of clause 3(7)(d) of the lease. Clause 4.7 provides for the tenant to see all the obligations in the Fourth Schedule and requires the tenant to comply with them. That clearly satisfies the requirements of clause 3(7)(d).

**Conclusion**

29. In summary, the Tribunal has concluded that breaches have occurred of clauses 3(7)(d) and 3(8) of the lease.

Chairman.....

Date 22<sup>nd</sup> October 2010

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### **Conclusion**

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Chairman *N.K. Nicol* .....

Date 22<sup>nd</sup> October 2010