

555



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/00AS/LBC/2013/0101**

**Property** : **9B Marlborough Parade, Uxbridge  
Road, Uxbridge UB10 0LR**

**Applicant** : **Mrs Joan Elizabeth Jackson**

**Representative** : **Hockfield & Co Solicitors**

**Respondents** : **Mr Param Gill and Mrs Rubina Gill**

**Representative** : **None**

**Type of Application** : **Section 168(4) Commonhold and  
Leasehold Reform Act 2002 – to  
determine whether a breach of  
covenant or a condition in the lease  
has occurred**

**Tribunal Member** : **Judge John Hewitt**

**Date and venue of  
Determination** : **Tuesday 18 February 2014  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **Friday 21 February 2014**

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**DECISION**

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## **Decisions of the Tribunal**

1. The Tribunal determines that:
  - 1.1 a breach of the covenant set out in clause 3(24) and Regulation 1 set out in the Fifth Schedule to the lease has occurred – see paragraph 36 below;
  - 1.2 a breach of the covenant set out in clause 3(24) and Regulation 5 set out in the Fifth Schedule to the lease has occurred – see paragraph 49 below;
  - 1.3 on the evidence before me the Applicant has not made out a case that a breach of clauses 3(12),(13) and (14) has occurred; and
  - 1.4 on the evidence before me the Applicant has not made out a case that a breach of clause 3(24) and Regulation 2 set out in the Fifth Schedule to the lease has occurred.
  
2. The reasons for these decisions are set out below.

**NB** Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to me for use at the determination.

## **Procedural background**

3. On 18 December 2013 the Tribunal received an application from the Applicant pursuant to section 168(4) Commonhold and Leasehold Reform Act 2002 [1]. The Applicant sought a determination that a breach of a covenant in the lease had occurred.
  
4. Directions were given on 20 December 2013 [15]. The Directions gave notice to the parties that the Tribunal proposed to make a determination on the papers without an oral hearing. The parties were informed that a determination would be made during week commencing 17 February 2014 and that if an oral hearing was requested it would take place at 10:00 12 March 2014. The Tribunal has not received a request for an oral hearing.
  
5. Direction 3 provided that the Respondents were to provide the Applicant and the Tribunal with a statement of case on or before 17 January 2014. The Tribunal has not received a statement of case from the Respondents.
  
6. The Applicant's solicitors have provided the Tribunal with a trial bundle pursuant to direction 7.

## **Material provisions of the lease**

7. Material provisions of the lease are as follows:
  - 7.1 The lease is dated 22 April 1983 [25]. It was made between Glofield Properties Limited as the Lessor and Garry Michael Evans as the Lessee.
  
  - 7.2 The lease granted a term of 99 from 29 September 1982 at a ground rent commencing at £50.00 per year and on other terms and conditions therein set out.

7.3 Definitions set out in clause 1 provide:

*“(B) THE expression ‘the Lessee’ shall mean the original Lessee and the successors in title of the original lessee including the survivor and survivors of two or more joint lessees and shall also include an Underlessee”*

*“(H) THE expression ‘the Demised Premises’ shall mean those parts of the Lessor’s Property which are described in the First Schedule hereto and are hereby demised”*

The First Schedule [44] provides that *“The Demised Premises are THE FLAT known as Flat No. 9B on the Second Floor of the Building and shown edged red on plan ‘A’ annexed hereto and so that the Demised Premises shall (for the purposes of obligation as well as grant) include:*

*(i) – (vi) ...”*

7.4 Covenants on the part of the Lessee are set out in clause 3. Included are:

*“3(12) (i) NOT to assign transfer underlet or part with possession of part only of the Demised Premises (as distinct from the whole) or in any way whatsoever*

*(ii) NOT to assign underlet or part with possession of the whole save in compliance with the provisions of sub-clause (13) and (14) of this Clause*

*(iii) ...*

*3(13) NOT at any time during the term hereby granted to underlet or permit the Demised Premises to be except upon terms that the under-tenant shall be liable to pay throughout the term of such underlease not less than the aggregate of the rent hereby reserved and the Maintenance Contribution*

*3(14)(i) TO cause to be inserted in every underlease whether mediate or immediate except in the case of a sub-letting at a rack rent without payment of a premium for a period not exceeding seven years*

*(a) a covenant by the underlessee with the Lessor and the Lessee to observe and perform all the covenants and conditions in this Lease contained (except) the covenants for payment of rent or maintenance contribution) with a condition permitting re-entry in case of any breach of any of the said covenants or conditions (except as aforesaid)*

*(b) a covenant by the underlessee with the Lessee to produce within one calendar month next after the making thereof (without demand by any person) for*

registration every assignment of the underleased premises or any sub-demise of the same  
(ii) ...

3(24) *THAT the Lessee will at all times during the said term observe the regulations contained in the Fifth Schedule hereto or any regulations added to or substituted therefor under Clause 10*

*The Fifth Schedule*

1. *to use and occupy the Demised Premises as a private dwellinghouse for the sole occupation of the Lessee and his family and servants and for no other purpose*
2. *without prejudice to the generality of Regulation 1 not to use the Demised Premises or any part thereof for the purposes of any business as defined by Section 23(2) of the Landlord and Tenant Act 1954*
3. ...
4. ...
5. *not to do or permit to be done whether by himself his family servants agents or visitors any act to the nuisance damage or annoyance of the Lessor or the tenants of the Lessor or the occupiers of any part of the Building .... or which may prejudicially affect or depreciate the amenities of the Lessor's Property or any illegal or immoral act*
6. *to 20. ..."*

**The breaches alleged**

8. The application form states that the grounds of the application are that:
  - 8.1 The Respondent has sublet the flat to Smart Renting Limited without the Landlord's consent;
  - 8.2 The flat is no longer in the occupation of the Respondent and their family;
  - 8.3 Smart Renting Limited is using the flat for the purposes of a business by subletting the flat on a room by room basis;
  - 8.4 The occupants have caused disturbance to the owner of the flat below, whose kitchen has been flooded on two occasions.
9. The application form also makes reference to a letter dated 13 September 2013 [11] sent by the Applicant's solicitors to the Respondents which (in substance) repeats the assertions set out above but also complained that the property has been converted from a one-bedroom to a two-bedroom flat without consent and appropriate planning and building control approvals; and that the conversion does not comply with building regulations as the partition wall intersects a UPVC window.
10. That letter sought to put the Respondent on notice that breaches were alleged and sought confirmation of *'the steps that you propose to take to immediately remedy the position (if it be capable of remedy)*. The

letter stated that in the absence of such confirmation action will be taken which will result in the forfeiture of the lease.

11. The Applicant's solicitors assert that they did not receive a reply to that letter.

### **The Applicant's evidence**

12. The evidence relied upon by the Applicant is set out in a witness statement of Mr Christopher Jackson dated 22 January 2014 [59]. The witness statement is endorsed with a statement of truth. Mr Jackson states that he is a chartered surveyor.

### **The underletting**

13. In paragraph 3 it is asserted that there has been a breach of clauses 3(12) and (14) as regards an underletting.
14. In paragraph 4 it is asserted that there has been a breach of Schedule 5 as regards the use and occupation of the flat as a private dwellinghouse for the sole occupation of the lessee and his family and servants and for no other purpose.
15. In paragraph 5 it is asserted that the Respondents have sublet the flat to Smart Renting Limited in breach of covenant. That, in turn, Smart Renting has sublet the flat on a room by room basis and is using the flat as a business. In support of that assertion Mr Jackson exhibits an 'Assured Shorthold Tenancy Agreement (the tenancy agreement) and a series of four House/Flat Sharing Licence Agreements (the licences).
16. The tenancy agreement is dated 19 November 2009 [64]. It was made between Mr Param Gill as landlord and Smart Renting Limited as tenant. The subject of the tenancy agreement is said to be 9b Marlborough Parade, Uxbridge Road, Hayes, Middlesex UB10 0LR. The term granted was twelve months commencing on 19 November 2009 at a rent of £780 per calendar month payable in arrears by equal monthly instalments on the 19<sup>th</sup> day of every month. The copy agreement provided is not signed by either party.
17. The tenancy agreement contains contradictions. For example at clause 3(8) there is a provision that the tenant is not to assign or sublet or part with possession of the property or let any other person live there. At clause 10 there is a provision that the property can be sublet. Clause 3(9) imposes an obligation on the tenant to use the property as a single dwellinghouse and not to use it or any part of it for any other purpose nor allow anyone else to do so. Clause 3(10) imposes an obligation on the tenant not to receive paying guests and or carry on or permit to be carried on any business, trade or profession on or from the property. Clause 3(11) imposes an obligation on the tenant not to do or permit or suffer to be done in or on the property any act or thing which may be a nuisance damage or annoyance to the landlord or to the occupiers of the neighbouring premises.

18. At [69] there is a licence granted by Smart Renting Limited to a J Paramsathynathan in respect of Room 3 for a term of six months beginning on 22 November 2012 at a rent of £85 per week.
19. At [72] there is a licence granted by Smart Renting Limited to a Aminata Badibonga Mukundi in respect of Room 2 for a term of six months beginning on 22 November 2012 at a rent of £85 per week.
20. At [75] there is a licence granted by Smart Renting Limited to a Shawn Venton in respect of Room 1 for a term of six months beginning on 22 November 2012 at a rent of £85 per week.
21. At [78] there is a licence granted by Smart Renting Limited to a Warren Philogene in respect of Room 1 for a term of six months beginning on 29 September 2013 at a rent of £100 per week.

### **Findings**

22. The witness, Mr Jackson, is a professional person and his witness statement is endorsed with a statement of truth. His evidence has not been challenged or contradicted by the Respondents. I am therefore prepared to accept his evidence and to accept that the copy documents provided by him are genuine copies.
23. As to the tenancy agreement, it is on what appears to be a pre-printed form. It is stated to be an Assured Shorthold Tenancy Agreement within the meaning of the Housing Act 1988 as amended by the Housing Act 1996. Plainly it cannot be an assured shorthold tenancy within the meaning of that legislation because an assured shorthold tenancy is a species of an assured tenancy. By virtue of section 1 Housing Act 1988 a tenancy of a dwelling house let as a separate dwelling is, for the purposes of that Act an assured tenancy, if and so long as the tenant is an individual and is occupied by the tenant as his only or principal home.
24. The tenancy was granted to Smart Renting Limited, the tenant is thus not an individual and a company cannot occupy a dwellinghouse as its home.
25. Whilst the tenancy does not create an assured shorthold tenancy, it nevertheless is sufficient to create a valid common law tenancy.
26. I find that the tenancy agreement granted a subletting of the whole of flat 9b Marlborough Parade for a term of twelve months from 19 November 2009 and that upon expiry of the fixed term Smart Renting Limited remained in occupation as tenant and has been holding over on the same terms as those set out in the tenancy agreement. I am reinforced in this finding by the fact that in 2012 Smart Renting Limited granted licences for rooms 1, 2 and 3 each for the same period, namely six months from 22 November 2012. Thus I infer that it was

then still in control of the premises and the whole of the premises, as opposed to part only of the premises.

27. A sample draft letter dated 4 February 2013 [68] evidently prepared by Smart Renting Limited and intended for the occupiers of flat 9b in relation to 'noise nuisance complaints' suggests to me that as at that date Smart Renting Limited was still in occupation of the premises and seeking to control its tenants/licensees.
28. I infer from the licence granted by Smart Renting Limited to Warren Philogene for a term of six months from 20 September 2013 that Smart Renting Limited was in still in occupation of and controlling the premises as at that date.
29. Accordingly, and on this evidence, I find that the Respondents granted a subletting or underletting of the whole of the demised premises for the period from 19 November 2009 to 20 September 2013 at the least. The subletting may have continued beyond 20 September 2013, the letter from Mr Craig dated and signed by Mr Craig on 5 January 2014 [80] states that noise and other disturbance has continued up until that date but that is not evidence upon which I can rely with any confidence of the subletting continuing up and until that date, even though I suspect that might have been the case.

#### **Breach or not**

30. I have found there was a subletting of the whole of the demised premises. Clause 3(12)(i) of the lease is concerned with a subletting of part only of the demised premises and thus is of no application.
31. Clause 3(12)(ii) is concerned with the whole of the demised premises and brings into play clauses 3(13) and (14).
32. Clause 3 (13) is a prohibition on an underletting save on terms that the undertenant shall be liable to pay throughout the term not less than the aggregate of the rent reserved in the lease and the Maintenance Contribution mentioned in the lease. The ground rent payable mentioned in the lease is £50 per year until 29 September 2014, but no evidence has been put before me as to the amount of the Maintenance Contribution payable and thus I am unable to make a determination that there has been a breach of clause 3(13) of the lease.
33. Clause 3(14) provides that in every underlease certain matters must be complied with, save in the case of a subletting at a rack rent without a premium for a period not exceeding seven years.
34. I have found that the subject subletting was for a fixed term of twelve months, albeit the subtenant is holding over on expiry. The tenancy agreement does not provide for the payment of a premium. There is no evidence before me that the rent payable of £780 per month is not a rack rent. Thus on the evidence before me the Applicant has not shown that a breach of clause 3(14) is engaged and that a breach has occurred.

The Applicant has asserted that the Respondents have sublet the flat without consent but I cannot see any requirement in the lease obliging the Respondents to obtain such consent.

### **The Regulations**

35. The Applicant asserts that there has been breach of Regulations 1, 2 and 5. The evidence relied upon is that of Mr Jackson set out in paragraphs 6 and 7 of his witness statement. For the reasons set out above I accept his evidence.

#### **Regulation 1 - private dwellinghouse – sole occupation**

36. I have found that there has been a subletting of the whole. That subletting was/is to a commercial company which has sublet rooms. It follows that for the period 19 November 2009 to 20 September 2013 the demised premises have not been used as a private dwellinghouse for the sole occupation of the Respondent and their family and servants. I thus find that for that period the Respondents were in breach of Regulation 1.

#### **Regulation 2 – not to use the premises for business**

37. There is no evidence before me that the Respondents have used the demised premises for the purpose of any business carried on by them. I find that they have sublet the demised premises to Smart Renting Limited which has used the premises for the purpose of its business of letting properties.
38. Paragraph 11.199 *Woodfall: Landlord and Tenant* makes plain that a covenant not to do something will not generally be broken if the prohibited thing is not done by the covenantor but by a third party. For this reason sometimes covenants prohibiting an activity are extended to 'not to do or cause to be done, suffered or permitted to be done...' or some variation of those words. I shall consider the effect of these words shortly in relation to Regulation 5.
39. I find that properly construed Regulation 2 is limited to use by the lessee as opposed to use by any subtenant or undertenant or other third party. The clause is narrowly drawn and does not extend to an obligation 'not to use or permit or suffer to be used...'
40. The business use referred to in Regulation 2 is that within the definition of section 23(2) Landlord and Tenant Act 1954. That section gives a wide definition to the expression 'business'. In so far as may be relevant I find that use of the demised premises by Smart Renting Limited in letting out rooms on licences/tenancies was a business use within the definition of section 23(2) of that Act.

#### **Regulation 5 – nuisance, damage and annoyance**

41. The evidence relied upon is that of Mr Jackson in paragraph 7 of his witness statement. For the reasons given before I accept that evidence. Mr Jackson's evidence is supported by a draft sample letter dated 4 February 2013 [68] from which it seems Smart Renting was prepared



to write to its tenants in relation to 'a series of complaints of noise nuisance which originates from 9b Marlborough Parade'. I infer that letter was written at the behest of the Respondents following complaints to them made by or on behalf of the Applicant.

42. The evidence is further supported by a letter from Mr Gary Craig, the lessee of flat 9a Marlborough Parade, which is beneath flat 9b. That letter is dated 5 January 2014 and a copy is at [80]. Mr Craig gives a quite graphic account of life and the noise, nuisance, damage and annoyance emanating from flat 9b. The letter is written to the Applicant and I infer that she is similarly annoyed and disturbed by what has gone on. I have no reason to believe that Mr Craig's account is untruthful or exaggerated. It has not been contradicted or challenged by the Respondents. I thus accept his evidence.
41. Regulation 5 imposes an obligation on the lessee 'not to do or permit to be done whether by himself his family servants agents or visitors any act ...'.
42. From paragraph 11.199 of *Woodfall* I note that its editors conclude that the word 'permit' means one of two things, either to give leave (or permission) for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it. The paragraph goes on to cite a number of examples from decided cases where the nature and extent of steps reasonably required to be taken were considered. There is a line and it is a question of fact in each case whether the line has been crossed or not.
43. It has been held that a tenant permits or suffers a breach of covenant if he abstains from taking legal proceedings against his undertenant, when there could be no good defence to such proceedings. It depends on the facts of each case whether a covenantor may reasonably be expected to take legal proceedings in order to stop a breach of covenant on the part of his subtenant. See *Atkin v Rose* [1923] 1 Ch 522.
44. Further it was held in *Borthwick-Norton v Romney Warwick Estates* [1950] 1 All E R 362, on appeal [1950] 1 All E R 798 that where a lease contained a covenant that the tenant would not do or suffer to be done any act on the demised premises that might be an annoyance, etc., to the landlord and where one of the subtenants had been convicted of using her flat as a brothel, the tenant had broken the covenant, as they had deliberately closed their eyes to what was going on, without taking steps to verify or dispel the allegations made to them.
45. For completeness I should add that the editors of *Woodfall* draw attention to a debate as to whether the word 'suffer' is wider than the word 'permit' but that the extent of the difference is unclear.
46. In the present case I find that the Respondents took the positive step of subletting the property, a one-bedroom flat to a rental company and by

clause 10 of the tenancy agreement permitted the rental company to sublet. The property was subsequently adapted to create three rooms which the rental company has in turn sublet to individual occupiers.

47. There is clear evidence that the use of the one-bedroom flat by three individual adults has caused nuisance, damage and annoyance to the Applicant landlord and to the tenant of flat 9a. The evidence of Mr Craig, which I accept, is that such excessive noise nuisance and inconsiderate use of flat 9b by the occupiers of that flat has been going on since 2008. In addition water damage has occurred on eight occasions over that period, the last occasion being some six months ago from due mainly to an inadequately maintained and faulty washing machine in flat 9b.
48. I am satisfied on the evidence before me that complaints have been made to both the Respondents and to Smart Renting Limited about the use and occupation of the premises, this is confirmed by the sample letter at dated by 4 February 2013 sent by Smart Renting to its tenants [68].
49. Although the evidence submitted by the Applicant could have been more comprehensive I am satisfied that this is one of those cases where the Respondents have been aware for some time of the noise, nuisance, damage and disturbance and annoyance has been caused by the subtenants of their tenant, Smart Renting Limited, that the Respondents had the ability to take steps including proceedings against Smart Renting Limited under the terms of the tenancy agreement, that such proceedings would have had a reasonable prospect of success and that the Respondents have stood by, closed their eyes and have failed to take effective action. Thus I find that over the period 4 February 2013 to 5 January 2014, at the least, the Respondents have been in breach of clause 3(24) and Regulation 5 set out in the Fifth Schedule to the lease.

Judge John Hewitt  
21 February 2014