



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

Case Reference : **CAM/00MG/LBC/2016/0019**

Property : **18, North Fourteenth Street, Milton Keynes,
Buckinghamshire MK9 3NP**

Applicant : **Eaton Mews (Freehold) Ltd**
Representatives : **J Garrard & Allen Solicitors
Mr Faisal Sadiq, Counsel**

Respondent : **Afrah Holding Corporation**
Representatives : **Macintyre Law, Solicitors
Miss Zoe Gibbon, Counsel**

Date of Application : **14th December 2016**

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

**Application for Costs under Rule 13 of the
Tribunals Procedure (First Tier Tribunal)
Property Chamber) Rules 2013**

Date of Hearing : **12th April 2017**

Tribunal : **Judge John R Morris
Mrs M Wilcox BSc MRICS
Mr C Gowman BSc**

Date of Decision : **4th May 2017**

DECISION

Decision

1. The Respondent having admitted to subletting the Property without the consent of the Landlord, the Tribunal determines that the Respondent is in breach of Paragraph 10(c) of the Third Schedule to the Lease under which the Respondent covenants not to sublet the Property without the consent of the Landlord.
2. The Tribunal Orders that costs of £2,000.00 be paid to the Applicant by the Respondent within 48 days of the receipt of this Decision by the parties.

Reasons

Introduction

3. The Application made on the 14th December 2016 is for a determination that the Respondent is in breach of a covenant or condition in a lease between the parties (Section 168 (4) Commonhold and Leasehold Reform Act 2002).
4. The Respondent is the Tenant of the Property by virtue of a lease dated 28th March 1991 for a term of 125 years commencing on 25th March 1989. A copy of the Lease was provided together with Official Copies of the Freehold Title Number BM210096 at the Land Registry for the Building naming the Applicant as the proprietor and the Leasehold Title Number BM159946 for the Property naming the Respondent as the proprietor.
5. The covenants in which the Respondent is said to be in breach is Paragraph 10(c) of the Third Schedule to the Lease under which a Tenant, the Respondent, covenants not to sublet the Property without the consent.
6. On 26 May 2016, the Respondent granted Mr Ali Al-meri and Mrs Hala Mohammed Habash Alameri an Assured Shorthold Tenancy of the Property, which was to commence from that date of a term of 6 months. A copy of the Tenancy was provided.
7. The Respondent granted the Tenancy without obtaining the consent of the Applicant as required under the Lease.
8. A Directions Order was issued on 10th January 2017.

The Law

9. Section 168 of the Commonhold and Leasehold Reform Act 2002 states:
 - (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 (c20) (restriction of forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless (2) is satisfied.*

- (2) *This subsection is satisfied if it has been finally determined on an application under subsection (4) that the breach has occurred or the tenant has admitted the breach*
10. Rule 13 of the Tribunals Procedure (First Tier Tribunal) Property Chamber) Rules 2013
The Tribunal may make an order in respect of costs only-
(b) *if a person has acted unreasonably in bringing, defending or conducting proceedings*

Inspection

11. The Tribunal inspected the Property in the presence of Messrs P Gladwin and RM Lament, Directors of the Applicant and Mr Faisal Sadiq, Counsel for the Applicant and Ms Rachel Macintyre, Solicitor for the Respondent and Miss Zoe Gibbon Counsel of the Respondent. The Respondent's Tenants were also in attendance.
12. The Tribunal found the Property to be a one-bedroom purpose built flat in modern block of 9 similar flats comprising a hallway, bedroom, bathroom and living room off which was a kitchen and balcony.

Hearing

13. Prior to the hearing the Tribunal had received a Bundle, which contained:
- Application Form
 - Direction Order
 - Copy of the Lease
 - Land Registry Official Copies of the Freehold Title Number BM210096 and the Leasehold Title Number BM159946
 - Witness Statements by Messrs P Gladwin and RM Lament, Directors of the Applicant
 - A copy of the Assured Shorthold tenancyt Agreement dated 26 May 2016 granted by the Respondent to Mr Ali Al-meri and Mrs Hala Mohammed Habash Alameri
 - Correspondence between the parties
 - Statement of Costa incurred by the Applicant
14. Counsel for the Respondent opened by stating that the Respondent admitted that it was in breach of the Lease and consented to an Order by the Tribunal confirming the breach.
15. Counsel for the Applicant requested an Order for costs under Rule 13 of the Tribunals Procedure (First Tier Tribunal) Property Chamber) Rules 2013 on the basis that the Respondent had acted unreasonably.
16. Counsel for the Applicant stated that the Respondent had acted unreasonably throughout.
17. Firstly, he referred to the to the witness statement of Mr Gladwin with reference to previous lets. The third let that was noted by Mr Gladwin

recorded at paragraph 19 had been approved in accordance with the Lease following correspondence with the Applicant's Agents, Squares, showing that the Agent knew what was required.

18. Secondly, he referred to correspondence from Mr Richard Satyanadhan of the Applicant's Solicitors as follows:
 - An email dated 26th October 2016 to the Respondents' Agent and the Respondent stating what was required;
 - An email dated 25th January 2017 in response to the Respondent's Agent's phone call following the Application to the Tribunal in which the Agent asked what the Application was about;
 - An email dated 27th January 2017 to the Respondents' Agent and the Respondent attaching Mr Gladwin's and Mr Lament's witness statements;
 - An email dated 14th February 2017 in response to the Respondent's email of 1st February 2017 asking what was required which sets out the situation in some detail and advising the Respondent to obtain legal advice;
 - An email dated 24th February 2017 to the Respondent in which invites the Respondent to consent to a Declaration that the Respondent is in breach in order to save costs and again advising the Respondent to obtain legal advice;
 - An email dated 27th March 2017 to the Respondent referring it to the hearing Bundle and date of the hearing.
19. Counsel for the Applicant submitted, that following the above, for the Respondent to instruct his legal team to appear at the hearing and admit the breach amounted to unreasonable behaviour.
20. Counsel for the Respondent stated that Mr Alfarhan, the Director of her client, initially did not appreciate the seriousness of the situation and when he did, he did not understand what to do in response believing that the Agent, Squares, was competently dealing with the matter. By way of evidence for this she referred to Mr Alfarhan's emails of:
 - 1st February 2017 at 11.04 to Mr Richard Satyanadhan of the Applicant's Solicitors in which stated "*...honestly I don't understand what is the story and why this e mail is sent to us because we are out of the country...and squares is dealing with our property...Could you let me know what you need from us...*" and again on
 - 1st February 2017 at 11.31 "*...just let me know what is the issue and how to solve it...we are unable to communicate effectively since we are living overseas...*"
 - 19th February to Mr Satyanadhan in which he explains how Afrah Holding, a family firm of 4, owns the Property and that Squares Agency was employed to manage it. In the email he shows he misunderstands the email dated 26th October 2016 of Mr Satyanadhan. In Mr Satyanadhan's email he refers to a company of 59 members meaning the Applicant whereas Mr Alfarhan thinks he is referring to the Respondent company.
 - 22nd February 2017 in which he repeats the contents of his email of the 19th February 2017 and adds that "*to solve this matter we are willing to*

change the Agency that will take care of our property to one of your choice... in order to solve this discrepancy between us and close the case.”

21. Counsel went on to say that Mr Alfarhan appointed his solicitor on the 23rd March 2017 and subsequently visited the UK with the express intention of giving instructions in person with a view to sorting the matter out. Unfortunately, he could not be contacted to confirm that he consented to the declaration that the Respondent was in breach in time for the hearing to be vacated.
22. Counsel for the Applicant submitted that Mr Alfarhan was not a lawyer and when he appreciated the seriousness and understood the situation he took appropriate action and so did not act unreasonably.
23. The Tribunal then stated that if it were to find that the Respondent it would need to consider whether an order for costs should be made or not and if so what that order should be. It was of the opinion that in this case if an order was to be made it should relate to the amount of costs incurred and so requested the parties to address this point. The Tribunal stated that it would not undertake a forensic examination as might be done in respect of a determination of reasonableness under section 27A of the Landlord and Tenant Act 1985 but would take a more general view. Considering what costs were proportionate to the matter and what proportion of those costs were attributable to the unreasonable behaviour if found.
24. Counsel for the Applicant referred the Tribunal to the Schedule of Costs provided. The Schedule gave the hourly rate as £225.00 per hour and was in three parts. Part 1 listed the attendance in relation to correspondence and telephone calls which came to £2,385.00 ex VAT, Part 2 the timed attendances which came to £1,282.50 ex VAT and Part 3 the disbursements (Tribunal's Fees and Counsel's Fees) which came to 5,224.50, totalling £8,892.00 ex VAT. He submitted that all were reasonable.
25. The Tribunal noted that Part 1 costs included incoming correspondence amounting to £967.50, which it said it would not normally allow when in taxing costs.
26. Counsel for the Respondent said that of the 29 outgoing letters to the Applicant 5 were little more than a single line and did not warrant a charge of £22.50 each, a total of £112.50 (0.5 units). Counsel was also critical of two charges of £67.50 for instructing Counsel twice. Counsel for the Applicant stated that he had been instructed to draft the Application as well as attend the hearing. Counsel for the Respondent therefore questioned the Solicitor's charge of £157.00 (0.7 units) for finalising the Application. She was also critical of the attendances for giving dates of unavailability to the Tribunal (0.2 units), Service and filing of statements (0.2 units) and Completion of Tribunal Forms (0.1 unit). Such work should be carried out by secretarial staff and included in the hourly rate. She also submitted that a more junior member of staff should have carried out pagination and finalisation of the Bundle and the charge of £270.00 (1.2 units) was too much.

27. She submitted that the case did not warrant such a senior Solicitor at a cost of £225.00 per hour or barrister at a cost of £3,000 for the hearing.
28. Counsel for the Respondent stated with regard to the attendances that all the matters had to be accounted for irrespective of who did them. If more junior staff undertook them then they would take longer and cost the same. With regard to his own fee he said that that because nothing had been heard from the Respondent he had to be ready to deal with any submission which may be made and so was appropriate to the circumstances.

Decision

Breach of Covenant

29. The Respondent having admitted to subletting the Property without the consent of the Landlord as stated by the Respondent, the Tribunal determines that the Respondent is in breach of Paragraph 10(c) of the Third Schedule to the Lease under which the Respondent covenants not to sublet the Property without the consent.

Application under Paragraph 13 of the 2013 Rules

30. In relation to the Application under paragraph 13 the Tribunal applied the three-stage test in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander; Ms Shelley Sinclair v 231 Sussex Gardens Right to Manage Limited; Mr Raymond Henry Stone v 54 Hogarth Road, London SW5 Management Limited* [2016] UKUT 290 (LC), LRX/90/2015, LRX/99/2015, LRX/88/2015 considering:
 - (i) Whether the Applicant had acted unreasonably, applying an objective standard;
 - (ii) If unreasonable conduct is found, whether an order for costs should be made or not;
 - (iii) If so, what should the terms of the order be?
31. The Tribunal also took into account the meaning of “unreasonable” in *Ridehalgh v Horsefield* [1994] Ch. 205 which dealt with a wasted costs order, the principles of which we consider apply in this case:

“Unreasonable” means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner’s judgement, but it is not unreasonable.

32. In considering whether there had been unreasonable conduct the Tribunal first considered whether the Respondent had acted unreasonably.
33. From Mr Gladwin's witness statement the Tribunal found that the proceedings were commenced on 14th December 2016 because the Respondent had sublet the Property on 26th May 2016 without obtaining the Applicant's consent.
34. A Directions Order was issued on 10th January 2017 in which there was an Important Notice stating:
The Respondent should be aware that a finding by the Tribunal that there has been a breach of covenant could lead to the Lease being forfeited i.e. you could lose your property.
And
Failure to comply with the Directions could result in serious detriment to the defaulting party e.g. the Tribunal may refuse to hear all or a part of that party's case and orders may be made for them to reimburse costs or fees thrown away as a result.
35. The Tribunal was of the opinion that these Directions could not have left the Respondent or its Agent in any doubt as to the effect and importance of these proceedings.
36. On 27th January 2017 in compliance with the Directions Order the Applicant's Solicitor emailed to the Respondent and its Agent the Witness Statement of Mr Gladwin and Mr Lament.
37. The Tribunal was of the view that these Statements set out the issue clearly.
38. On 1st February 2017, Mr Alfarhan, a Director of the Respondent emailed the Applicant stating he was in Kuwait, asking for clarification and how he could settle the matter and that his Agent dealt with letting of the Property. On 14th February 2017, the Applicant's Solicitor emailed a full reply to the Respondent and its Agent and recommended that legal advice was obtained.
39. Up to this point The Tribunal was of the opinion that the Respondent's conduct was not unreasonable.
40. On 17th February 2017, the Respondent's Agent in an email in reply showed he knew that the issue was a lack of consent to sublet The Agent admitted the breach and apologised for it. The Agent also recognised the need to obtain legal advice.
41. On 19th February 2017, Mr Alfarhan replied for the Respondent by an email in which he appeared not to understand the issue and stated that the Agent was responsible. On 21st February 2017, the Agent asked for a consent form and on 22nd February 2017 Mr Alfarhan repeated his e mail of the 19th February adding that he would change his Agent. This exchange is concluded by an email on the 24th February 2017 from the Applicant's Solicitor setting out the terms on which the matter can be settled.

42. The Directions, the Witness Statements and the correspondence from the Applicant's Solicitor of the 14th February 2017 could have left the Respondent and its Agent in doubt as to the seriousness of the proceedings, the matter in issue, what action was required to resolve it and the need in the circumstances for promptly obtaining legal advice in the UK, particularly as the Respondent's Director was living in Kuwait.
43. The Tribunal found from their emails of 17th, 19th, 21st and 22nd February 2017, that the Respondent and its Agent were aware of the seriousness of the matter and the nature of the issue and that they required legal advice because they did not have the knowledge or expertise to deal with the matter.
44. In the light of the documentation the Respondent had received by 14th February 2017, Mr Alfarhan's emails of 19th and 22nd February 2017 appear to be a prevarication. If he genuinely did not understand the situation then he needed to take action, either to appoint an Agent that was able to deal with the matter or obtain legal advice. The Tribunal was informed that he appointed his solicitor on 24th March 2017 but it appears that instructions to enable the solicitor to give advice, were not given until he subsequently came to the UK. Following that advice, when his solicitor sought to obtain confirmation that the Respondent would admit the breach to enable the bundle preparation to be halted and the hearing vacated, he was not available.
45. The failure to comply with Directions, the emails of the 19th and 22nd February 2017, the lateness in taking appropriate action, culminating in a hearing and its related costs were, in the opinion of the Tribunal, did not amount to a genuine attempt to seek a resolution and the Tribunal finds that the Respondent acted unreasonably in defending and conducting the proceedings.
46. The Tribunal having found that the Respondent had acted unreasonably considered whether an order should be made. The Tribunal could find no mitigation to show that it should not. The Respondent's Director is a business man who has studied in the UK where the Respondent Company has two properties and employs an Agent to manage at least one of them. The Tribunal felt he must have been aware that one of the effects of his actions was to cause the Applicant to incur costs. In addition, in the absence of the order, the Respondent's unreasonable behaviour would mean that all the costs would fall upon the Leaseholders as Leaseholders, through the service charge. Alternatively, if the service charge provisions of the Lease do not allow this, all the costs will be paid by the Leaseholders as shareholders of the Applicant, of which the Respondent is not one. The Tribunal therefore determined that an order for costs should be made.
47. The Tribunal examined the Schedule of Costs, taking into account the submissions of the Parties' respective Counsel. For the purposes of this order the Tribunal assessed that the proportionate amount of costs incurred for obtaining the determination that there had been a breach of the Lease was in the region of £6,000. The Respondent's prevarication and procrastination had led to about a third of these costs being unnecessarily incurred i.e. £2,000.00.

48. Therefore, the Tribunal Orders that costs of £2,000.00 be paid to the Applicant by the Respondent within 48 days of the receipt of this Decision by the parties.

Judge JR Morris

Annex – Right of Appeal

1. 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.
2. 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.
3. 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.
4. 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.