



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

Case Reference : CHI/21UD/LBC/2017/0040

Property : Flat 2 Quebec Mansions, 102 Filsham Road, St Leonards on Sea, East Sussex TN38 0P

Applicant : Quebec Mansions Limited

Representative : Heringtons Solicitors

Respondent : Robert Carl Anthony Warner

Representative : Holden & Co Solicitors

Type of Application : Determination of alleged breach of covenant: section 168 Commonhold and Leasehold reform Act 2002

Tribunal Member : Judge E Morrison

Date of decision : 12 October 2017

DECISION

The Application

1. By an application dated 20 July 2017 the Applicant lessor applied for a determination that the Respondent lessee has breached a covenant in his lease by permitting a dog to be kept in his flat.

Summary of Decision

2. The Respondent has breached the covenant in clause 1(c) of the Supplemental Deed dated 17 May 1996 that “he will not permit a dog to be kept in the demised premises”.

The Lease

3. The lease of Flat 2 is dated 25 March 1958 and was granted for a term of 999 years from 24 June 1950, subject to certain covenants and conditions. By clause 1(c) of a Supplemental Deed dated 17 May 1996 the lease was varied so as, amongst other things, to include a covenant by the lessee that “he will not permit a dog to be kept in the demised premises”.

Procedural Background

4. On 9 August 2017 the Tribunal issued Directions. They provided for the application to be determined on written submissions and without a hearing unless a party objected within 28 days. There being no such objection, this determination has been made solely on the written evidence and submissions of the parties. There has been no inspection of the property by the Tribunal.
5. The Applicant provided several witness statements in support of its application. The Respondent was directed to provide his statement of case and any supporting documents by 6 September 2017. In fact nothing was provided until written submissions were served by the Respondent’s solicitors on 27 September 2017, just a few days prior to the scheduled determination date of 2 October 2017. The Applicant objected to the Tribunal considering these, but the Tribunal, exercising its case management powers and considering the overriding objective, decided to do so, while giving the Applicant an opportunity to respond. The Applicant’s submissions in response are dated 5 October 2017.

The Law and Jurisdiction

6. Sections 168(1) and (2) of the Commonhold and Leasehold Reform Act 2002 provide that a landlord under a long lease of a dwelling may not serve a notice under section 146 of the Law of Property Act 1925 in

respect of a breach of covenant unless either the tenant has admitted the breach, or a court or tribunal has finally determined that a breach has occurred.

7. Section 168(4) permits a landlord to apply to a tribunal for such a determination.

The Applicant's case

8. The Applicant has provided the following witness statements in support of its application:

- George Bryan – lessee of Flat 1 and managing director of the Applicant
- George Bryan – supplementary statement
- David Hartnoll – lessee of Flat 3
- Richard Nicholas Bryant – lessee of Flat 8
- Sallyann Sayers – employee of Arko Property Management (“Arko”), the Applicant’s managing agents.

9. The relevant evidence as set out in these witness statements and the other documents in the Bundle (all of which were supplied by the Applicant) may be summarised as follows:

- The Respondent lessee of Flat 2 has sub-let the flat to Mr Andrew Batsford who lives there with his family.
- In March or April 2017 (the date is not specified) it became known that there was a dog in Flat 2.
- On 19 April 2017 Arko wrote to the Respondent, who lives in Norfolk, and to Mr Batsford, pointing out that keeping a dog on the premises was “strictly prohibited”. The letter to the Respondent stated that if Mr Batsford “fails to conform to the terms of the lease, it will be the Freeholder’s intention to issue proceedings”.
- Mr Batsford responded promptly to Arko, admitting that he was temporarily looking after a “very small dog” due to the illness of a family member who was travelling almost daily to London and Maidstone for cancer treatment. He offered to “keep the dog out of sight never outside the property” and asked for clemency. (It is unclear whether there was a response to this request – no response is in the Bundle).
- On 13 June 2017 Heringtons, solicitors instructed by the Applicant, wrote to the Respondent requiring him to “make arrangements with your tenant for the dog to be permanently removed from the Flat by close of business on the 27th June 2017 but please note that if this is not done within the period indicated we will have to advise our clients to

issue appropriate Proceedings in the First Tier Property Tribunal or Court for an order about removal...”

- The application to the tribunal was posted on 27 July 2017. (Directions were prepared by the tribunal on 9 August 2017, and the application was then sent by the tribunal to the Respondent.)
 - On 18 August 2017 the Respondent attempted to speak to Mr Bryan, who referred the matter to Heringtons. On 21 August 2017 the Respondent, following a telephone conversation, wrote to Heringtons stating that he first became aware of the issue with the dog in July, and he then spoke to Lynx (his managing agents in respect of the tenancy granted to Mr Batsford) “immediately instructing that either the dog or the tenant to leave. As Lynx have not contacted me I wrongly assumed this issue had been rectified... The tenant was given until today 21/09/17 to remove the dog...”. The Respondent confirmed that he had received the tribunal application “last week” but also provided Heringtons with his new address. At the same time the Respondent sent Heringtons a copy of the letter sent by Lynx to Mr Batsford and his partner on 21 July 2017. This stated “... If you wish to remain at the property you will have to re home the dog. If you are not willing to do this I am afraid that you will have to vacate...”.
 - On 22 August 2017 the Respondent emailed Heringtons stating that “the dog was rehomed yesterday and now left the property”.
 - On 29 August 2017 Holden & Co, solicitors instructed by the Respondent, wrote to Heringtons stating they were instructed to commence accelerated possession proceedings against the sub-tenants (Mr Batsford and his partner), explaining that it takes approximately 100 days to get possession following a section 21 notice, and inviting the Applicant to agree to a 3 month stay “to enable the Possession Order to be obtained against the tenant of Flat 2 which will resolve the grounds of complaint”. Holden & Co also invited the Tribunal to order a stay. The Tribunal then invited Heringtons to comment on this request.
 - On 30 August 2017 Holden & Co provided a copy of the section 21 notice sent to the sub-tenants.
 - On 8 September 2017 Heringtons informed the Tribunal that the Applicant did not agree to a stay. On 12 September Heringtons wrote to Holden & Co in like terms. On 13 September a further letter from Heringtons said that a dog was heard barking in Flat 2 on 11 September 2017. On the same date the Tribunal refused a stay.
10. It is the Applicant’s position that the lease, as varied, imposes an “absolute prohibition” from keeping a dog, which prohibition has been breached. It is submitted that the Respondent did not make arrangements to remove the dog following Arko’s letter of 19 April 2017 and took no notice of Heringtons’ letter of 13 June 2017. The

Respondent, by his email of 22 August 2017 has admitted that there was a dog in the flat.

The Respondent's submissions

11. The Respondent has not provided any factual evidence to challenge the Applicant's witness statements. Nor is it denied that the Respondent's sub-tenants have kept a dog in Flat 2. However it is submitted on his behalf that this does not constitute a breach of the Respondent's own covenant. It is argued that the Respondent was entitled to sub-let, and that once sub-let it was the sub-tenant(s) who became responsible for day-to-day activities. The Respondent could only control those activities through enforcement of the covenants in the sub-tenancy. Clause 14 of the assured shorthold tenancy granted in this case included a covenant "Not to keep any animals in the Building without the express of the Landlord". (the omission of the word "consent" after the word "express" being an obvious typing error.)
12. The Respondent argues that not only has he not "permitted" a dog to be kept, but he has expressly forbidden it through clause 14 of the tenancy agreement. It is submitted that the Respondent was unaware of the dog until July, that he then took the obvious course of instructing his managing agents to write to the sub-tenants seeking removal of the dog, and then embarked on the most effective way to obtain possession through service of a section 21 notice.

The Applicant's response

13. The Applicant disputes the assertion that the Respondent ceased to be liable for any breach of covenant once he had parted with possession by granting a sub-tenancy. The lease pre-dates the Landlord and Tenant (Covenants) Act 1995, so that although the Supplemental Deed was executed after the Act came into force, the pre-Act law applies. Under that law, as between landlord and tenant, the burden of a covenant which touches and concerns the land, and is not purely personal or collateral, runs with the reversion and with the term at law. A tenant will be guilty of a breach of covenant if he either gives leave to the sub-tenant to commit it, or abstains from taking reasonable steps to prevent the breach where it is within his power to prevent it.
14. Thus in law the Respondent remained liable on the covenant despite the sub-letting. By failing to reply or take action in response to Arko's letter of 19 April 2017 or Heringtons' letter of 13 June 2017 the Respondent is in breach of covenant.

Discussion and Determination

15. The Respondent's submissions do not go quite so far as to explicitly contend that, as a result of his parting with possession by sub-letting, he cannot be liable for any breach of the covenant in question. However, if that is the implication of the submission, as the Applicant believes it to be, it is simply wrong in law. Notwithstanding the subletting, the lease remains vested in the Respondent, subject to the covenants and conditions in the Lease and the Supplemental Deed. A sub-letting is not an assignment of the Respondent's interest; it is simply a parting with the right to immediate possession in favour of the sub-tenant. It does not affect the rights and obligations between the Applicant as lessor and the Respondent as lessee. Therefore, the Respondent cannot escape liability for a breach of covenant by sub-letting. That is the position regardless of whether the Landlord and Tenant (Covenants) Act 1995 applies.
16. The only issue is whether or not there has been a breach of the covenant in the Supplemental Deed that the lessee "will not permit a dog to be kept in the demised premises".
17. The Applicant has described this covenant as imposing as an "absolute prohibition" against keeping a dog. While this might be an accurate statement if the covenant simply provided that a dog *shall* not be kept (an absolute covenant), the use of the word "permit" in the covenant means that the Tribunal must consider not only whether a dog was kept at the flat (which is not in dispute), but also whether the Respondent *permitted* that situation.
18. In *Woodfall: Landlord and Tenant* at 11.199, the position is explained:

"Permit" or "suffer"

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 person. Accordingly, the use covenant in a lease is often widened to prohibit the permitting or suffering of the prohibited activity. A covenant not to permit the carrying on of a prohibited activity will generally be broken if the prohibited activity is carried on by the covenantor himself. In a covenant not to permit certain use of the premises, "the word "permit" means one of two things, either to give leave 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... a tenant permits or suffers a breach of covenant if he abstains from taking legal proceedings against his under-tenant, when there could be no good defence to any such proceedings; it depends in the circumstances 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 sub-tenant.

19. Thus, had the Respondent himself kept a dog at the flat, this would be a breach of the covenant. However, where the Respondent's sub-tenant has kept the dog, it is necessary to ask whether the Respondent permitted this.
20. The assured shorthold tenancy agreement prohibited the keeping of any animals without the Respondent's consent. The tenancy agreement therefore did not itself permit the sub-tenants to keep a dog. The Tribunal then has to consider whether the Respondent, once he became aware that a dog was being kept in Flat 2, took reasonable steps to prevent the situation continuing.
21. There is a dispute as to when precisely the Respondent became aware of the dog. The Applicant's case is that Arko's letter of 19 April 2017 put him on notice. The Respondent's case appears to be that he did not find out until an unspecified date in July, although he does not deny receiving either Arko's letter of 19 April or Heringtons' letter of 13 June 2017. While there is some indication that the Respondent had at some point in time moved to a new address, and while both letters were sent to the previous address (this being the only address then known to the Applicant), there is no evidence that he was not receiving post sent to him at his previous address. To the contrary, the tribunal application was posted to him at that address on or shortly after 9 August 2017. In his letter of Heringtons of 21 August 2017 the Respondent referred to having become aware of the tribunal proceedings "last week". The Tribunal therefore finds, on a balance of probabilities, that letters sent to the Respondent at his previous address would have reached him within a few days of posting and that he first became aware of the dog in Flat 2 on or around 22 April 2017.
22. There is no evidence that the Respondent took any action in response to Arko's letter of 19 April 2017. However, the letter did not set out any particular steps that it required the Respondent himself to take. To the contrary it explained that Arko itself would raise the matter directly with the sub-tenants, and indeed Arko wrote to Mr Batsford on the same day. Given the tenor of the letter, the Tribunal cannot find that the Respondent "permitted" the breach at that stage simply by virtue of his failure to take action. A reasonable person reading Arko's letter might have concluded that Arko was going to take the obvious first step of requesting that the dog be removed, and that there was no need for the Respondent to do likewise.
23. However, Heringtons' letter of 13 June 2017 made it clear that the Respondent himself was required to take action. It demanded that the Respondent "make arrangements with your tenant for the dog to be permanently removed from the Flat by close of business on 27th June 2017". Quite how the Respondent was supposed to achieve this without the sub-tenants' cooperation was not specified. Clearly he could not have obtained a possession order that quickly. To commence injunction proceedings, and obtain an injunction would have been a very tall order, not to mention disproportionately costly. The Tribunal cannot

conclude that the Respondent could have reasonably been expected immediately to commence proceedings against his sub-tenants at that point in time. However he could have reasonably been expected to write immediately to the sub-tenants, or to instruct others to do so on his behalf, requiring the removal of the dog within a reasonable period, and setting out what legal steps would be taken to achieve removal in default of compliance.

24. There is no evidence that the Respondent took any action until 21 July 2017, when his own managing agents Lynx wrote to the sub-tenants. Even allowing for a possible few days' delay in the letter of 13 June 2017 coming to the Respondent's attention, there is still a period of about four weeks during which the Respondent did nothing. In the view of the Tribunal that abstention amounts to a permitting of the breach.
25. As from 21 July 2017 the Respondent appears to have taken reasonable steps to prevent the breach by (i) causing Lynx to send the letter to the sub-tenants and (ii) after allowing a reasonable period for remedy, issuing a section 21 notice to the sub-tenants as the first step towards obtaining possession. However this cannot negate the legal effect of his inactivity during the previous month, and for this reason the Tribunal concludes that the Respondent has breached the covenant that "he will not permit a dog to be kept in the demised premises" as set out in clause 1(c) of the Supplemental Deed dated 17 May 1996.

Concluding remarks

26. In Mr Bryan's witness statements he seeks an order for costs. However no details of costs have been provided and in a letter sent by Heringtons to the Tribunal dated 19 September 2017 they say that they will defer a formal application until the current determination had been made. The parties are reminded that the tribunal is usually a "no costs" jurisdiction. The only circumstances in which the tribunal can make a costs order are set out in Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. In *Willow Court Management Ltd v Alexander* [2016] UKUT 0290 (LC) the Upper Tribunal gave guidance as to how Rule 13 should be applied.
27. Although there has been a breach of covenant, it is not a serious breach. There is no evidence that the dog was ever going to be in Flat 2 other than for a temporary period. In his swift response to Arko's initial letter the sub-tenant Mr Batsford proposed a compromise, the reply to which has not been put in evidence by the Applicant. Mr Bryan's first witness statement also accepts that Mr Batsford subsequently tried on two occasions to discuss the situation with him, but Mr Bryan was not prepared to do so. In the Tribunal's view it is most unfortunate that further efforts were not made to resolve this

dispute without the need for a formal application and its attendant expenditure of time and money.

Dated: 12 October 2017

Judge E Morrison

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.