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

Case Reference : **LON/00BG/LBC/2016/0102**

Property : **Flat 51, Naxos Building, 4
Hutchings Street, London E14 8JR**

Applicant : **Millennium Seacon Properties
Limited**

Representative : **Mr J Sandham of Counsel
instructed by Scott Cohen Solicitors**

Respondent : **John Terrance McLean**

Representative : **Mr R Mullis of Counsel instructed
by Alexander JLO Solicitors**

Type of Application : **Determination of an alleged breach
of covenant**

Tribunal Members : **Judge N Hawkes
Ms S Coughlin MCIEH**

**Date and venue of
Hearing** : **1st February 2017 at 10 Alfred Place,
London WC1E 7LR**

Date of Decision : **16th February 2017**

DECISION

Decisions of the Tribunal

- (1) The Tribunal finds that, in breach of Paragraph 21 of the First Schedule to the Lease, the respondent failed to provide the applicant with access to Flat 51, Naxos Building, 4 Hutchings Street, London E14 8JR in response to correspondence from the applicant dated 31st March 2016, 10th May 2016, 4th July 2016 and 29th July 2016.
- (2) The Tribunal is not satisfied, on the balance of probabilities, that the respondent is in breach of Paragraph 7 of the First Schedule to the Lease or that he is in breach of Clause 14.3 of the Lease.

The application

1. The applicant is the registered freehold proprietor of the Naxos Building, 4 Hutchings Street, London, E14 8JR (“the Building”).
2. The respondent is the registered proprietor of the leasehold interest in Flat 51, Naxos Building (“the property”) pursuant to a lease dated 4 November 2003 for a term of 999 years, commencing on 1 January 2002 (“the Lease”).
3. By an application dated 14th November 2016, the applicant seeks a determination pursuant to subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) that the respondent is in breach of the following covenants of the Lease:
 - (i) Paragraph 7 of the First Schedule “No part of the Premises shall be used or be permitted to be used for any purpose save that of a single private dwelling.”
 - (ii) Clause 14.3 “Not to assign underlet or part with the possession of part only of the Premises.”
 - (iii) Paragraph 21 of the First Schedule “To permit the Lessor and the Manager or their respective servants or agents with or without workmen and others during the said term at all reasonable times on giving not less than forty-eight hours’ notice to the Lessee (except in case of emergency) to enter the Premises for” specified purposes including for the purposes of viewing “the condition or user thereof”.

The hearing

4. The applicant was represented Mr Sandham of Counsel at the hearing and the respondent was represented by Mr Mullis of Counsel.
5. The Tribunal heard oral evidence from Mr Richard Simmons of Avon Estates (London) Limited, the applicant's agent, and from Mr Peter Borsitzky, the manager of the Building.
6. The respondent required permission to rely upon a witness statement and statement of case which were both served out of time. The Tribunal was informed that the delay was caused by the respondent's absence from the country at the material time.
7. It was ultimately agreed that the respondent's statement of case and witness statement would be admitted on the basis that Mr Sandham would have the opportunity to ask supplemental questions of the applicant's witnesses in order to deal with any issues of which the applicant did not have prior notice.
8. It was also agreed that Mr Mullis would have the opportunity to address the Tribunal if he considered that the respondent would be prejudiced by the introduction of any of the fresh evidence adduced by the applicant. However, this did not prove to be necessary.
9. The respondent did not give oral evidence and he did not attend the hearing. The Tribunal was informed that the respondent felt unable to attend the hearing as a result of stress.
10. The Tribunal has read the respondent's witness statement and has taken it into account as admissible hearsay evidence. The applicant also relied upon admissible hearsay evidence regarding the manner in which the property is said to have been occupied.
11. In weighing up the evidence, the Tribunal has, of course, taken into account the fact that such evidence has not been tested in cross-examination.

The alleged breach of the user covenant

12. By Paragraph 7 of the First Schedule to the Lease, the lessor covenants that "No part of the Premises shall be used or be permitted to be used for any purpose save that of a single private dwelling."

The submissions

13. It is the applicant's case is as follows.

14. The applicant states that the property appears to have been let to Alessia Montagna and Jonatan Silvosa (“the tenants”) pursuant to a twelve month assured shorthold tenancy which commenced on 16th March 2016.
15. In October 2016, the respondent instructed his agents to serve a notice seeking possession on the tenants on the grounds that they had breached the tenancy agreement.
16. An email dated 31st October 2016 to the respondent from his agents, Field & May, confirms that this was done but there is little evidence in support. The applicant states that, in any event, this is not answer to whether a breach “has occurred” for the purposes of section 168(4) of the 2002 Act.
17. The applicant submits that the evidence supports the conclusion that the “use” of the property has been that of at least two dwellings and not a “single private dwelling”.
18. The evidence relied upon by the applicant includes the following:
 - (i) Mr Borsitzky states at paragraph 6 of his witness statement dated 20th December 2016, “I believe that there are two people separately renting rooms of Flat 51. I have spoken to one of the tenants, Ms Eleni Charalampous, who confirmed that she moved into the Flat in October 2015 and confirmed that the rooms were individually let. At the time of our conversation, she indicated that the agents – Field & May, were in the process of marketing the other room in the Flat as it was empty. At the time, Ms Charalampous confirmed that she had had a 12 month contract and I can confirm that she is still living within the Flat.”
 - (ii) Mr Borsitzky states at paragraph 7 of his witness statement dated 20th December 2016 “... I am aware of a second tenant who has now taken up rental of a room in the premises, Ms Daisy Ho. I spoke to Ms Ho in early November and she confirmed she was renting a room. I asked her to fill in a resident’s form which she has completed.”
 - (iii) Mr Borsitzky exhibits a copy of the resident’s form to his witness statement. The resident’s form provides “Daisy Ho”, “room rental”, “Agency Name Field & May”, “Tenancy Start Date “Mid-October 2016 Finish date 1 year contract”.

- (iv) In oral evidence, Mr Borsitzky stated of Ms Charalampous “Ms Charalampous as far as I know as per today she moved out. I parked my car and she requested me to allow the removal van to park and she said ‘everyone is moving out today. All tenants are moving out today’. I took a photograph. She mentioned to me they received certain letters from the court in mid-November 2016 and she said they also contacted their own lawyers requesting legal advice and they were advised to move out asap so they took the case up with Field & May and requested compensation due to the inconvenience. They were asked to move out by 31st December 2016 and they refused and needed an extension up until today and, in compensation, Field & May has paid for all their removal costs. About 12 noon today the conversation happened.”
- (v) In respect of Daisy Ho, Mr Borsitzky stated that he was present when Ms Ho filled in the residence form and that Ms Charalampous told him that Ms Ho moved out at the end of 2016.

19. In C. & G. Homes v Secretary of State for Health [1991] 2 WLR 715, the Court of Appeal considered the use by the Secretary of State of a house for housing former inpatients with mental disorders as part of a programme of care in the community.
20. In that case, it was held that the houses in question were not being used as private dwelling-houses. In reaching that decision, the court considered various factors including the number of occupants; the degree of permanency of their occupancy; the relationship between them; whether payment was made or not and, if so, whether it was only a contribution to expenses or something more; whether the owner or lessee resided there and, if not, whether people were there to supervise and support those who did.
21. The applicant states that it is not the case that the whole of the property was being used as a single private dwelling because tenancies were granted of individual rooms which started at different times.
22. The applicant argues that it is irrelevant that the tenants may have sub-let because the voice of the covenant is passive not active and the sub-tenants appear to have been in occupation before the assured shorthold tenancy began. Neither party could explain this apparent inconsistency.

23. Further, the applicant invites the Tribunal to find that this was not a subletting of individual rooms by the assured shorthold tenants because of the references to Field & May who were the respondent's agents. The applicant states that agents would not need to be involved if the tenants were unlawfully subletting.
24. The applicant invites the Tribunal to find that the alleged breach of covenant occurred from mid-October 2016 (the date on the residence form of Ms Ho's arrival) until the end of December when Ms Ho left on the basis that Ms Ho and Ms Charalambous were both in occupation of the property during this period.
25. The respondent's case is as follows.
26. The respondent states 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 person (Woodfall para 11.199).
27. In this case, the use of the alternatives "shall be used or permitted to be used" must mean that the lessee is only in breach of covenant if he himself uses the premises for a purpose other than that of a single private dwelling or if he permits the premises to be used for another purpose.
28. The words "no part of the Premises shall be used" cannot, in their context, be understood as imposing a strict liability on the lessee in respect of use by others not permitted by him, since otherwise the words "or permitted to be used" would be unnecessary. "One leans towards treating words as adding something, rather than as mere surplusage" (SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd [1954] 1 WLR 492).
29. Further, given that the lease permits the lessee to sublet the premises as a whole, it would be unusually harsh if the lessee were then liable for a user contravention by a lawful subtenant which the lessee had not permitted. The above construction of the provision avoids that result, and is therefore to be preferred to one which imposes a strict liability, rendering the words "or permitted to be used" redundant.
30. If and to the extent that the provision is ambiguous, the ambiguity should be resolved against the landlord (see Woodfall para 11.012). 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" - Berton v Alliance Economic Investment Co [1922] 1 KB 742 at 759.

31. The evidence, such as it is, is based on hearsay. There is no direct evidence that the respondent has used the premises other than as a single private dwelling, or that he has permitted it to be so used. On the contrary, the evidence supports the proposition that he has (through his agents) only let the premises as a whole, first to a Mr McLay and then to Mr Montagna and Mr Silvosa jointly.
32. The respondent exhibits to his witness statement dated 25th January 2017 a statement from Field & May showing that from 17th March 2016 to 17th February 2017 the respondent received a single monthly rent payment.
33. The respondent states that, whether or not the power to grant sub-tenancies on behalf of the respondent was within the scope of Field & May's apparent authority, the question for the Tribunal is from which principal Field & May's authority emanated. Field & May could well have been acting as agents on behalf of the tenants if they sublet individual rooms at the property. The respondent submits that it is going a step too far to find, on the balance of probabilities, that Field & May were acting on behalf of the tenants in granting sub-tenancies. Further, the respondent argues that if Field & May were acting as agents to the respondent in granting sub-tenancies, they were "on a frolic of their own".

The Tribunal's determination

34. The Tribunal prefers the respondent's interpretation of Paragraph 7 of the First Schedule to the Lease.
35. However, the nature of the evidence in this case is such that there is a considerable degree of uncertainty regarding the manner in which the premises were being occupied during the relevant period. Whilst the facts contended for by the applicant are certainly possible, the Tribunal is not satisfied that the factual basis for the applicant's case on either interpretation of the covenant is made out on the balance of probabilities.
36. Mr Simmons' evidence is double hearsay; he gives evidence of what the alleged subtenants told Mr Borsitzky regarding their occupation of the premises. He stated in cross-examination that he has no record of the conversations with Mr Borsitzky and that he cannot recall the dates of the conversations. Whilst he did his best to assist the Tribunal, given the limited nature of his involvement, the Tribunal does not consider that it can place any significant weight on Mr Simmons' evidence.
37. Mr Borsitzky also did not keep any records of conversations which is understandable as he described a busy concierge office with people coming in and out to collect keys and packages. However, whilst he also

did his best to assist the Tribunal, this means that he is reliant upon his recollection of conversations which is likely to have diminished in accuracy with the passage of time.

38. Further, Mr Borsitzky's evidence regarding the alleged subletting of the property is hearsay; he did not visit the premises and he has no direct knowledge of who was in occupation or on what basis.
39. If the premises were being sublet on a room by room basis by Field & May, it is certainly possible that Field & May were acting as agents for the respondent within the scope of their apparent authority (but without the respondent's actual knowledge).
40. However, the Tribunal considers that it is also possible that, if the tenants wished to leave early, they would have contacted Field & May, who were their point of contact, to ask if they could do this and that Field & May may have offered to find the subtenants on the tenants' behalf.
41. In any event, the Tribunal is troubled by the fact that Ms Charalampous informed Mr Borsitzky that she had moved into the premises in October 2015, renting an individual room, when this is before the assured shorthold tenancy to Alessia Montagna and Jonatan Silvosa appears to have been granted. Mr Borsitzky appeared uncertain when the conversation occurred but he did not express any uncertainty regarding the date which he was given.
42. Neither party asserted that it was likely on the balance of probabilities that the assured shorthold tenancy agreement was a sham. Accordingly, this may well be an example of visitors to the concierge providing Mr Borsitzky with inaccurate information and, as noted above, neither Ms Charalampous nor Ms Ho were available to be cross-examined.
43. Mr Borsitzky's account of the conversation which he had with Ms Charalampous at around noon on the day of the hearing is likely to have been very accurate, notwithstanding the lack of any records, because the conversation was so recent.
44. If, as the applicant contends, Ms Charalampous and Ms Ho were both in occupation until Ms Ho moved out at the end of December leaving Ms Charalampous in occupation, it is surprising that Ms Charalampous informed Mr Borsitsky that "all tenants are moving out today" rather than simply stating that she herself was moving out. It appeared to the Tribunal that Ms Charalampous's account was more consistent with her talking about "the tenants" as someone who might have been assisting the tenants but who was not herself in occupation than with her being the remaining tenant.

45. The uncertainties and inconsistencies in the evidence are such that the Tribunal is not satisfied on the balance of probabilities that the property was being let on a room by room basis during the relevant period.
46. Accordingly, the Tribunal is not satisfied on the balance of probabilities that the respondent is in breach of Paragraph 7 of the First Schedule to the Lease.

The alleged letting of individual rooms

47. Clause 14.3 of the Lease, the lessor covenants “Not to assign underlet or part with the possession of part only of the Premises.”

The Tribunal’s determination

48. For the reasons set out above, the Tribunal is not satisfied on the balance of probabilities that the alleged underletting and/or parting with possession of part only of the property occurred.
49. Accordingly, the Tribunal is not satisfied on the balance of probabilities that the respondent is in breach of Clause 14.3 of the Lease.

The alleged breach of the covenant to allow access

50. By Paragraph 21 of the First Schedule to the Lease, the lessor covenants “To permit the Lessor and the Manager or their respective servants or agents with or without workmen and others during the said term at all reasonable times on giving not less than forty-eight hours’ notice to the Lessee (except in case of emergency) to enter the Premises for...” specified purposes including for the purposes of viewing “the condition or user thereof”.

The submissions

51. It is the applicant’s case that:
 - (i) By letter dated 31st March 2016, the applicant requested access to the premises between 1 pm and 3 pm on 14th April 2016 to carry out an inspection because reports had been received that “internal works” had been carried out to the property and that the property had been “sub-let to multiple parties”. This letter was sent to the respondent both at the property and at another of his addresses. The applicant received no reply to this letter.

- (ii) A further letter was sent to the respondent on 13th April 2016. The applicant received a response to this letter from the respondent's agents, Field & May, stating that "our tenants" are busy and suggesting 28th April 2016 as an alternative date for the inspection.
 - (iii) By email dated 13th April 2016, the applicant requested access to the property on 10th May 2016 as an alternative to 28th April 2016. No response to this correspondence was received.
 - (iv) By email dated 4th July 2016, the applicant requested access to the property on 19th 21st or 27th July 2016. No response was received.
 - (v) By email dated 29th July 2016, the applicant requested access to the property on 2nd or 3rd August 2016. Again, no response was received.
52. The correspondence upon which the applicant relies is exhibited to the witness statement of Mr Simmons. The respondent states that, while the default may lie with the respondent's agent, that is not an answer to the allegation of breach of covenant.
53. It is the respondent's case that it cannot be said that access was refused when the offer to provide access on 28th April 2016 was made. Further, by the email of 13th April 2016, the respondent was informed that there would be a charge of £375 plus VAT for inspecting each flat and there is no basis under the lease for imposing such a charge.

The Tribunal's determination

54. The Tribunal accepts the respondent's case that the respondent was not in breach of covenant in April 2016 when the offer to provide access on 28th April 2016 was made.
55. However, the Tribunal finds that the respondent was in breach of covenant in failing to provide access to the property in response to the correspondence dated 31st March 2016, 10th May 2016, 4th July 2016 and 29th July 2016. The Tribunal notes that the respondent's agents could have provided access whilst disputing that any charge for an inspection was payable.
56. Whilst the respondent's agents may have been responsible for the failure to provide access (the Tribunal has been informed and has no reason to doubt that that the applicant himself was away at sea), the

agents were clearly acting on the respondent's behalf in relation to the provision of access.

Name: Judge N Hawkes

Date: 16th February 2016

ANNEX - RIGHTS 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.