



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

Case Reference : LON/00AU/LBC/2015/0015

Property : Flat A, 30 Jackson Road, London
N7 6EJ

Applicant : Peter George Brand

Representatives :

Respondent : David Evan Williams

Representative :

Type of Application : Determination of alleged breaches
of covenant

Tribunal Members : Miss A Seifert FCIArb

Date and venue : 15th April 2015 at 10 Alfred Place,
London WC1E 7LR

Date of Decision : 23rd June 2015

DECISION

Summary of the tribunal's decision

- (1) The respondent is in breach of the covenants contained in clause 2.12.2 and 2.12.3 of the lease dated 18th November 2011 ("the lease").
- (2) No order for costs is made under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Reasons for the tribunal's decision:

The application

1. The flat which is the subject of this application is Flat A ("the Flat") 30 Jackson Road, London N7 6EJ ("the Building"). The Building contains three flats. The Flat is a two bedroom flat on the ground floor. Flat B is on the first floor, and flat C is on the second and third floors of the Building.
2. By a lease dated 18th November 2011 ("the lease") made between the applicant, Mr Brand, and the respondent, Mr Williams, the term of the existing lease of the Flat was extended until 25th March 2164.
3. Mr Brand applied to the tribunal in an application dated 18th February 2015 ("the application"), under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), for an order that a breach of covenant or a condition in the Lease had occurred. Mr Brand is the freehold owner of the Building and provided an Official Copy of the Register of Title.
4. Directions were issued by the tribunal on 20th February 2015.

The hearing

5. A hearing was held on 15th April 2015. Mr Brand attended the hearing. He confirmed the contents of his statement in support of the application dated 13th March 2015 gave additional oral evidence and made submissions.
6. Mr Williams did not attend the hearing and was not represented.
7. The tribunal did not consider that an inspection of the Flat or Building was required to determine the issues.

The issues

8. The relevant issues for determination were:

- (1) Whether the lease included the covenants relied on by the applicant.
- (2) Whether there has been an underletting of the Flat as alleged.
- (3) Whether the respondent has failed to comply with the provisions of clause 2.12.2 and 2.12.3 of the lease.

The evidence

9. Mr Brand seeks a determination that Mr Williams is in breach of clauses 2.12.2 and 2.12.3 of the lease concerning subletting, in particular, the obligations to give notice, pay a registration fee and arrange for the underlessee to enter into a deed of covenant with the landlord to observe the terms of the lease.

In paragraph 5 of the application (Details of Covenant or Condition in lease alleged to have been breached), it was stated that:

‘By clause 2.12.2 of the lease dated 18th November 2011, the respondent covenanted within 1 month after every underlease of the demised premises to give notice thereof in writing with particulars thereof to the applicant’s solicitors and to pay the applicant’s solicitors such registration fee being not less than £50 as shall be reasonable or customary at the time thereof in respect of every such notice together with Value Added Tax.

By clause 2.12.3 of the lease the respondent further covenanted prior to completing any such underlease to execute and deliver to the applicant’s solicitors a Deed of Covenant made directly between the underlessee and the applicant whereby that party covenants to comply with the terms of the lease insofar as the respondent fails to do so.’

10. A copy of the lease was provided to the tribunal. Clauses 2.12.1, 2.12.2 and clause 2.12.3 were as follows.

2.12.1

Not to assign transfer underlet or part with possession of part only of the Demised Premises

2.12.2

Within one month after every assignment assent transfer mortgage charge or underlease of the demised premises to give notice thereof in writing with particulars thereof to the Lessor’s solicitors and in the case of a devolution of the interest of the Lessee not perfected by an assent within one month after the grant thereof give notice in writing

to the Lessor's solicitors of any Probate or Letters of Administration under which such devolution arises and to pay to the Lessor's solicitors such registration fee being not less than Fifty pounds (£50) as shall be reasonable or customary at the time thereof in respect of every such notice together with Value Added Tax or any equivalent tax replacing the same

2.12.3

Prior to completing any such dispositions as are referred to in Clause 2.12.2 hereof to arrange for the transferee, assignee or sublessee to execute and deliver to the Lessor's Solicitor a Deed of Covenant made directly between that party and the Lessor whereby that party covenants to comply with the terms of the Lease insofar as the Lessee fails to do so and in the case of a transfer or assignment covenants to observe and perform all the covenants and conditions on the part of the Lessee herein contained

It was noted that the lease does not prohibit underletting of the whole of the Flat (clause 2.12.1).

11. The tribunal was satisfied that the lease contained the covenants relied upon by the applicant (clauses 2.12.2 and 2.12.3).
12. The breaches of the above clauses alleged by the applicant can be summarised as follows.
13. It was stated in the application form (paragraph 5) that 'On a date unknown to the applicant but believed to be in or about November 2014 the respondent underlet the demised premises yet failed or neglected and at the date of issue of this application still fails or neglects to comply with clauses 2.12.2 and 2.12.3 of the lease.'
14. In his statement in support of the application, Mr Brand stated:

'In about November 2014 the respondent began refurbishing the Flat. He subsequently moved out and two ladies and a gentleman moved in and remain there. An estate agent's 'let' board was erected outside the property and was removed on or about 9th March 2015. Letters addressed to the occupiers of the flat are delivered to the address.

Despite my writing to the respondent on 8th and 25th November 2014.....and emailing him on 23rd December 2014.....asking him to comply with the registration requirements under the lease neither I nor have the solicitors acting for me on the grant of the lease or their successors received the Deed of Covenant or registration fee nor has any explanation been given or received as to why it is not forthcoming.....'

15. Copies of the letters dated 8th November 2014 and 25th November 2014 and the email dated 23rd December 2014 were provided in the applicant's bundle for the hearing.
16. At the end of the letter dated 8th November Mr Brand requested Mr Williams to deal with the registration requirement under the lease. The letter dated 25th November 2015 concluded 'Lastly, could you please attend to the registration requirements under the lease as requested by me in my last letter to you of 8th November 2014.' The email dated 23rd December 2014 from Mr Brand to Mr Williams stated. 'Could you please deal with the registration requirements under the lease as requested by me in my letters of 8th and 25th November 2014. Could you please acknowledge receipt of this email whether or not you intend taking any action on it.'
17. In letter to the tribunal dated 27th February 2015 Mr Brand stated, 'The name of Jurate Siojeviene appears on some envelopes seen and addressed to the occupier of the leasehold property.'
18. In his oral evidence at the hearing, Mr Brand said that he had not received Particulars of the underletting, the Registration fee or the Deed of Covenant as required by the lease. He repeated the information contained in his statement in support of the application, that having refurbished the Flat in or about November 2014, Mr Williams moved out, and two ladies and a gentleman moved in. He had realised this sometime in 2014. He referred to the estate agent's board. He said that he had not contacted the estate agent to obtain further information. Mr Brand said he did not know the terms on which the Flat had been sublet. Mr Brand said he lives in flat B, the first floor flat immediately above the Flat. He said that underlessees were still in occupation.
19. As previously stated Mr Williams did not attend the hearing and was not represented. In an email to the tribunal dated 10th April 2015. Mr Williams stated:

'Further to my phone call: I understand that it would be impossible to contest the applicant's objections and therefore I do not intend to do so. I have instructed my solicitor to assist me so that the issue can be resolved before the day of the tribunal.'

Findings and conclusions

20. Having considered the evidence as a whole, I am satisfied that it has been shown that the Flat has been underlet in or about November 2014.
21. The tribunal finds that there has been breach of clauses 2.12.2 and 2.12.3 of the lease dated 18th November 2011. Mr Williams has not complied with clause 2.12.2 in that he has not within one month of the

underletting, given notice in writing with particulars of the underletting to the landlord or his solicitors and has not paid the registration fee. Mr Williams has not complied with clause 2.12.3 in that he has failed, prior to completing the underlease, executed and delivered to the landlord's solicitors as required by that clause.

The tribunal's Decision

22. Having reached the above conclusions the tribunal finds that there has been a breach of clauses 2.12.2 and 2.12.3 of the lease.

Rule 13 costs

23. At the hearing Mr Brand applied for 'Costs'. He submitted that his claim was for £86. This was not for legal costs, but was for his 'out of pocket' expenses. He said that this was made up of the following:

- (a) photocopying (no receipt)
- (b) land registry £6
- (c) word processing £24 (receipt provided)
- (d) binding £25 (receipt provided)
- (e) post (no receipt)

24. Mr Brand submitted that Mr Williams had 'thrown in the towel' at the very last moment and that he had been put to expenses of making the application which could have been avoided if Mr Williams had dealt with the issues earlier.

25. Under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules")

13(1). The Tribunal may make an order in respect of costs only –

(a) under section 29(4) of the 2007 act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

(ii) a residential property case; or

(iii) a leasehold case.

26. Mr Brand's application for the above costs, which the tribunal has treated as an application under Rule 13(b), was made orally at the hearing. He contended in effect that the respondent, Mr Williams, had acted unreasonably in defending or conducting the proceedings.
27. The tribunal considered whether the conduct complained of could be regarded as unreasonable under of Rule 13(b). For this purpose the behaviour complained of must be out of the ordinary. In *Ridehalgh v Horsefield* [1994] 3 AllER 848, when considering the word 'unreasonable', Sir Thomas Bingham MR said:

'Unreasonable' also 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.

The above case concerned a wasted costs order but the principles also apply to an application for costs on the ground that a person has acted unreasonably within the meaning of rule 13(b). Each case must be considered on its merits.

28. The tribunal notes the following:
- Mr Brand's letters dated 8th November and 23rd November 2014 mainly refer to matters other than the alleged breaches.
 - Few details of the alleged underletting were included in the application form dated 18th February 2015.
 - Directions were made by the tribunal on 20th February 2015.
 - On 27th February 2015 the applicant wrote to the tribunal stating the name which was on some envelopes addressed to the occupier of the Flat.
 - The applicant's statement in support was dated 13th March 2015.
 - In the directions steps were to be taken by the respondent by 20th and 27th March 2015.
 - Mr Williams emailed the tribunal on 10th April 2015 indicating in effect that he was not opposing the application.
29. The tribunal notes the relatively short period between the issue of the application, the compliance by the applicant with his part of the directions timetable, and the email from Mr Williams indicating that he was not opposing.

30. Whilst the tribunal deprecates Mr William's non-compliance with its directions, this was for a relatively short period before he made his position clear. The tribunal considers that in all the circumstances this non-compliance does not justify an award of Rule 13(b) costs.
31. Having considered the matter as a whole, the tribunal finds that it has not been shown that Mr Williams has acted unreasonably in defending or conducting the proceedings.
32. Even it had been shown that Mr Williams had acted unreasonably within the meaning of Rule 13(b), it would still have been necessary for the applicant to show that the costs had been incurred and were linked to Mr William's behaviour in defending or conducting the proceedings.
33. Receipts were produced for part of the £86 only. Mr Brand stated in his oral evidence that the balance had been incurred. Even if incurred, the costs have not been shown to be linked to Mr Williams' behaviour in the proceedings. The directions required Mr Brand, to produce certain documents and provide certain information in order to prove his case. The burden of proof is on the applicant to produce evidence to support his case. For example the information and documentation referred to in paragraph 1 of the tribunal's directions in this case, directed the applicant to provide:
 - Up-to date official copies of the entries on the registers of the applicant's title and the respondent's leasehold title;
 - The name(s) and address(es) of any mortgagee(s) of the leasehold title; and, if known
 - The name(s) of the sub-tenants or occupiers of the leasehold property.
34. The sums claimed were incurred to support the application and comply with the steps required to be taken by Mr Brand to comply with the directions. It has not been shown that the alleged costs were linked to Mr Williams's behaviour within Rule 13(b).
35. The tribunal concludes that no order for Rule 13(b) costs is appropriate in this case

Name: A Seifert

Date: 23rd June 2015

Judge of the First-tier Tribunal

Appendix

Leasehold and Commonhold Reform Act 2002

Section 168 No forfeiture notice before determination of breach

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of covenant or condition in the lease has occurred.