FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference :	CHI/00HY/LBC/2019/0036
Property :	1 Old School House, High Street, Amesbury, Salisbury, Wiltshire SP4 7FG
Applicant :	Sovereign Housing Association Limited (the Landlord)
Representative:	Capsticks Solicitors LLP
Respondent:	Mrs Suzanne Rebecca Megan Outen (the Tenant)
Representatives:	---
Types of Application:	Section 168(4) Commonhold and Leasehold Reform Act 2002 – alleged breaches of covenant
Tribunal Member:	Judge P J Barber

Date of Decision: 19 December 2019

DECISION

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Decision

(1) The Tribunal determines in accordance with the provisions of Section 168(4) of the Commonhold and Leasehold Reform Act 2002, that a breach of covenant has occurred, being a breach by the Respondent tenant of the obligations imposed pursuant to Clause 3.18.2 of the Lease dated 21st January 2011.

Reasons

INTRODUCTION

1. The application received by the Tribunal was dated 28th August 2019 and was for determination of an alleged breach of covenant in regard to the sub-letting of the Property. Directions were issued on 25th September 2019 providing for the matter to be determined by way of a paper determination, rather than by an oral hearing, unless a party objected within 28 days; no such objections have been made and accordingly, the matter is being determined on the papers.
2. The Applicant has provided a bundle of documents to the Tribunal which variously include copies of the application, details of a tenancy fraud investigation, the Lease, the parties' statements of case and certain correspondence. By an application dated 13th November 2019, the Respondent sought leave to include as part of the bundle, a copy of a letter dated 9th May 2019, including various other appendices, written by Capsticks LLP to Freeths LLP, being solicitors then instructed by the Respondent. Leave was granted for the letter to be so included.
3. 1 (formerly Plot 1) Old School House, High Street, Amesbury, Wiltshire SP4 7FG ("the Property") is a residential unit arranged over several floors and demised pursuant to a Lease dated 21st January 2011 made between Western Challenge Housing Association Limited (1) and Suzanne Rebecca Megan Southey (2) ("the Lease") for a term of 99 years from 21st January 2011.
4. In broad terms, the complaint made by the Applicant as landlord, is that the Respondent tenant has sub-let the Property in breach of Clauses 3.18.1 to 3.18.3 of the Lease.
5. No inspection was carried out in respect of the Property.

THE LAW

8. Section 168 of the Commonhold and Leasehold Reform Act 2002 (as amended by *Regulation 141 of the Tribunals and Inquiries, England and Wales Order No. 1036 of 2013) provides that :*

"168 – No Forfeiture Notice before determination of breach

(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 (c.20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied

(2) This subsection is satisfied if -

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach; or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection 2(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made

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

(5) But a landlord may not make an application under subsection (4) in respect of a matter which-

(a) has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post dispute arbitration agreement

(6) For the purposes of subsection (4), "appropriate tribunal" means-

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal"

WRITTEN REPRESENTATIONS

10. The directions provided that the application and accompanying documents should stand as the Applicant's case. The Respondent provided a statement by way of a letter in response dated 10th October 2019 and being at Pages 208-211 of the bundle, and referring to attached Annexes A-F. The Respondent's statement comprised a letter written by the Respondent's husband on her behalf and in which it was broadly submitted as follows. The Respondent referred to various purported errors in the application, including discrepancies over the correct valuation of the Property, and also the nature of the Property being described by the Applicant as shared ownership social housing, averring that the Respondent had not entered into the shared ownership lease to attain significant profits through subletting, rather that it was only subsequently due to changes in circumstances, that she had sought permission to sub-let. The Respondent submitted that the Property is a three bedroomed terraced house, rather than a three bedroomed flat; she also took issue with the Applicant's claim that it had instructed a tenancy fraud investigator to investigate suspicions regarding the Respondent's claims that the Property was not sub-let; the Respondent said she had never claimed that the Property was not sub-let and had made every effort "to comply". The Respondent also challenged the amounts of monthly rent which she was alleged to have charged and which she

said were £700 to £950, not £700 to £7950. The Respondent also referred to alleged false statements made by the Applicant regarding the number of her children, being 2 rather than 3, and disputed that she had failed to provide information requested, including permission from her mortgage company. The Respondent further disputed that she had been instructed to restrict any rent being charged by her, to the amount she was paying to the Applicant, pursuant to the shared ownership provisions of the Lease. The Respondent further said that the Applicant had not as it stated, sent correspondence to her, requiring her to stop sub-letting, and she disputed its existence. The Respondent also referred to correspondence sent to Capsticks LLP by her former solicitors Freeths LLP, to which she said no formal reply had been received, alleging less than professional behaviour on the part of the Applicant, and noting that neither party had been completely blameless and that Sovereign had always been aware of the subletting. The Respondent also referred to the Applicant's approach to the Respondent's mortgage lender, Santander who she said had confirmed that she had made all her mortgage and rent payments and would not support Sovereign's claims for payment to them by the Respondent of £29,945.60 being the amount which the Applicant had purportedly claimed from the Respondent in regard to "profits gained" from the subletting arrangement. The statement also provided "*Suzanne acknowledges that she has made errors in relation to the subletting of 1 Old School House, but denies any intentional breach of her lease. In both instances of subletting 1 Old School House she made every effort to comply with the instructions given to her and that Sovereign Housing are also not without fault".*

12. In their reply dated 23rd October 2019, the Applicant referred to the Respondent's admission of subletting, and referred to the Respondent's defence as apparently being that such subletting took place with the Applicant`s knowledge, which the Applicant disputed. The Applicant referred to the letter (Page 14 of the bundle) containing permission to sub-let issued by Spectrum Housing, the Applicant's predecessor to the Respondent, dated 28th August 2012 ("the 2012 Consent"), and pointed out that the Applicant's title had only been registered in January 2017. In any event the Applicant submitted that the letter cannot be construed as giving ongoing permission to sub-let, given that it was expressly limited to two years. In addition the Applicant stated that the Respondent's husband had in his letter dated 19th September 2019 (Pages 246-248 of the bundle), admitted that the Respondent "*did not comply with all of the necessary conditions…*", and that one of the conditions was that the "*subletting will be reviewed on an annual basis*", not meaning it suggested, that the onus was on the Applicant to revoke the permission to sub-let after expiry of two years. The Applicant further suggested that the wording of the letter was such that permission would lapse unless and until a fresh decision was made to extend it, and also that it was not incumbent upon the Applicant to contact the Respondent to review the position. The Applicant also referred to other conditions in the 2012 Consent, submitting that the Respondent had not provided a forwarding address, making it difficult in any event for the Applicant to seek out the Respondent. The Applicant further stated that the Respondent's claim that the 2012 Consent continued until actively revoked, was inconsistent with her email dated 21st May 2018 (Page 83 of the bundle), in which she had said "*Back in 2012 I was granted permission…..Unfortunately the time has come again where we are being posted and will need to move … I would need written permission from yourselves to go ahead with any reputable letting agent as the property would need to be fully managed by them.*" The Applicant

suggested this gave the impression that the Respondent was still then living at the Property, when it said, she was actually living at Bulford Barracks, Salisbury. The Applicant submitted that the 2012 Consent did not give indefinite permission to sub-let, so as to give rise to some form of waiver of variation of the Lease. In regard generally to the Respondent's statement dated 10th October 2019, the Applicant submitted that none of the alleged errors would be material to whether a not a breach had occurred.

CONSIDERATION

14. The Tribunal, have taken into account all the case papers in the bundle.

15. In regard to the alleged breaches, the relevant clauses in the Lease are as follows:-

3.18 Alienation

3.18.1 Not to assign, underlet, charge, mortgage, or part with possession of part only of the Premises.

3.18.2 Not to underlet or part with possession of the whole of the Premises before Final Staircasing has been accomplished.

3.18.3 Not without the prior written consent of the Landlord (such consent not to be unreasonably withheld) to assign the whole of the Premises before Final Staircasing has been accomplished.

Clause 3.18.1 is an absolute prohibition against underletting part only of the Property; Clause 3.18.2 is an absolute prohibition against underletting the whole of the Property, before Final Staircasing has been accomplished. The Lease was evidently granted on shared ownership terms, such that the Respondent acquired an initial percentage of 40% on payment of a premium of £60,000 subject additionally, to payment of rent of £4,500 per annum in respect of the 60% interest retained by the Landlord. No evidence has been provided to the effect that Final Staircasing has occurred such that the Respondent would have acquired the remaining 60% interest from the Landlord. Accordingly, it follows that Clause 3.18.2 presently prohibits any underletting, absolutely; the clause is not subject to any qualification providing for any consent to sub-let. Nevertheless, it is apparent that the Applicant's predecessor social landlord Spectrum Housing Group, had given the 2012 Consent. The 2012 Consent is as follows:

"Thank you for your email of 6 August requesting to sub-let your above shared ownership property.

I have now taken instructions with regard to this and it has been agreed that you may sub-let the property for two years with the following conditions:

1. *You let me have a note of your forwarding address so that we will be able to contact you if required.*
2. *The sub-letting will be reviewed on an annual basis.*
3. *The property is let through reputable agents and a copy of the tenancy agreement supplied to me.*
4. *Details of the agents must be supplied with contact details, again to allow*

contact if required by us.

If you have any queries please contact me. If not I await hearing from you if and when the property is to be let."

It is clear that the above letter firstly, gave consent to sub-let, but limited only for two years, and secondly that it did not purport to vary or amend the relevant covenants in the Lease. The Tribunal considers that the Respondent was aware of the time limitation of this consent, as a result of her request by email in 2018 for a further consent to sub-let.

16. The Tribunal notes and accepts that the Respondent sought further consent from Sovereign Housing to sub-let in 2018, as a result of which the Applicant wrote to her on 20th June 2018 (Page 85 of the bundle) referring to the request and the prohibition contained in Clause 3.18.2 of the Lease, but nevertheless saying that if certain conditions were met, then consent might be given. The conditions refer broadly to a requirement for evidence from the military as to posting and as to mortgagee consent to sub-letting. Whilst there are some indications in the bundle of attempts by the Respondent to provide such evidence, there is no clear evidence that such process was fully complied with, or that Sovereign Housing ever issued any consent or approval. Accordingly, the Tribunal considers that the Respondent was aware of the requirement for consent to further sub-letting and that despite such process for obtaining consent not being completed, she nevertheless granted an assured shorthold tenancy of the Property, commencing on 3rd September 2018 (Pages 149-167 of the bundle). The Respondent was evidently the original lessee to the Lease and would presumably have received legal advice as to its terms when she completed and entered into it, or at least would have had the opportunity to be so advised.
17. In regard to the errors in the application referred to in the Respondent's statement, the Tribunal does not consider that these have any material effect upon the central issue, being as to whether or not a breach of covenant has occurred. Whilst it is clear that consent to subletting had been issued in 2012 by the Applicant's predecessor, such consent was limited to two years, and it is apparent from the Respondent's email of 21st May 2018 at Page 83 of the bundle, that the Respondent accepted at that time, that a separate consent would be necessary for further subletting. The Applicant had set out its detailed requirements for granting any such further consent, in its letter to the Respondent of 20th June 2018 at page 85 of the bundle. Whilst it is accepted that the Respondent appears to have made some attempts to meet the required conditions for obtaining such consent in 2018, there is no evidence that such consent was ever actually issued, and the Respondent nevertheless proceeded to grant an assured shorthold tenancy, commencing in September 2018, as at pages 149-167 of the bundle.
18. The Tribunal accordingly determines that a breach of Clause 3.18.2 of the Lease has occurred.
19. We made our decisions accordingly.

Judge P J Barber

A member of the Tribunal
appointed by the Lord Chancellor

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.