FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HB/LBC/2019/0032,0033,0034, &0035 CHI/00HB/LAC/2019/0013,0014,0015 & 0016
Property	**:**	20,37,44 and 45 Balmoral House, Canons Way, Bristol BS1 5LN
Applicant	**:**	(1) HB GR 2010B (2) RMB 102 Limited
Representative	**:**	SLC Solicitors
Respondent	**:**	Nadiya Jassim Al-Jibouri
Representative	**:**	Mostafa Jassim Al-Jibouri
Type of Application	**:**	Determination of an alleged breach of covenant and an application under paragraph 5 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002
Tribunal Member	**:**	Mr D Banfield FRICS
Date of Decision	**:**	17 February 2020

DECISION

Decisions of the Tribunal

The Respondent is in breach of clauses 25.2, 26 and 27 of Part One of the Eighth Schedule to the Leases.

The application to make a determination under paragraph 5 of schedule 11 of the Commonhold and Leasehold Reform Act 2002 is refused.

The Application

1. On 15 August 2019 the Tribunal received applications from the landlord in respect of alleged breaches of covenant relating to 4 flats the lessee of which was the Respondent. Applications were also received under Sch.11 to the Commonhold and Leasehold Reform Act 2002 as to liability to pay an administration charge.

2. On 22 August 2019 Judge Agnew made directions setting out a timetable for the exchange of documents leading to the preparation of a hearing bundle at which point the Tribunal would decide whether an oral hearing was required or if the matter could be determined on the papers.

3. The Applicant complied by serving their statement of case but it transpired that it was not received due to the Respondent being abroad. Judge Whitney therefore made further directions varying the dates for compliance with Judge Agnew's directions and requiring the parties to indicate to the Tribunal whether they are content for the matter to be determined on the papers in accordance with rule 31 of the Tribunal Procedure Rules 2013.

4. Following applications by the Applicant seeking to bar the Respondent from the proceedings due to a failure to serve a statement of case and to change the Applicant to RMB102 Limited Judge Whitney made further directions on 23 December 2019. These directions declined to bar the Respondent and joined the new registered freeholder RMB 102 Limited as a party.

5. There has been no indication from the parties that an oral hearing is required and the application is therefore determined on the papers already received and contained in a bundle which as amended consists of pages 1 to 439 references to which are shown as [*]

The Leases

6. The four leases appear to be in common form the clauses relevant to this application being as follows;

   THE EIGHTH SCHEDULE

   PART ONE

   4. To pay all costs charges and expenses (including legal costs and fees payable to a Surveyor) incurred by the Lessor in or in contemplation of any proceedings or service of any notice under Sections 146 and 147 of the Law of Property Act 1925 .....

   14. To make good any damage to any part of the development by any act of omission or negligence of any occupant of or person using the Demised Premises.....

   25. Not at any time during the Term;

25.2 underlet the Demised Premises without the prior written consent of the Lessor or its agents (such consent not to be unreasonably withheld or delayed) .....AND ALSO to pay or cause to be paid to the Lessor or its agents such reasonable fee at the same time as the granting of every such consent

26.On the occasion of every assignment or transfer of the Demised Premises for the unexpired portion of the Term and in every under-lease which may be granted to insert a covenant by the assignee transferee or underlessee ..directly with the Lessor to observe and perform the covenants conditions and obligations on the part of the Lessee appearing in this lease other than payment of the reserved rents in the case of an under letting or under-lease which for the avoidance of all doubt shall remain to be performed by the Lessee

27. To give written notice within 28 days to the Lessor or its agents of any assignment transfer mortgage charge grant of probate.... or other matter disposing of or affecting the Demised Premises .....AND ALSO to pay or cause to be paid at the same time to the Lessor or its agents such reasonable fee appropriate at the time of registration.....

PART TWO

1.Not to use or suffer to be used the Demised Premises for any purpose whatsoever other than as a private residence for occupation by a single household .....

3. Not to obstruct or permit to be obstructed at any time any entrance stairways lifts corridors or any openings of whatsoever nature on the Development

4.Not to use or permit or suffer the Demised Premises to be used for any illegal immoral or improper purpose and not to do permit or suffer on the Demised Premises any act or thing (.....) which shall or may be or become a nuisance danger annoyance or inconvenience to the Lessor or to the owner or occupier of any of the Properties or other owners or occupiers of any neighbouring property .....

7.No piano record player radio loud-speaker or other electric electronic mechanical musical or other instrument of any kind shall be played or used .....in the Demised Premises so as to in the opinion of the Lessor cause unreasonable annoyance to any occupiers.....

The Evidence

The Applicant

Breach of Covenant

7. In the application the alleged breach refers to Clause 1 of Part 2 of the Eighth schedule only [45]. In the statement of case the alleged breach is widened to include Clause 25.2, 26 and 27 of Part One of the Eighth

Schedule and clauses 3,4 and 7 of Part 2 of the Eighth Schedule. [248-250]

8. The breaches are identified as;
    a. Letting on short term lets contrary to the 8th schedule part 1 clause 1. In support the case of Nemcova v Fairfield Ltd UKUT 303 (LC) is cited.
    b. Letting without prior written consent contrary to the 8th schedule part 1 clause 25.2. No consent has been given
    c. Contrary to the 8th schedule part 1 clause 26 no covenant has been obtained
    d. Contrary to the 8th schedule part 1 clause 27 no written notice of any assignment etc has been given.
    e. Complaints of noise contrary to clauses 4 and 7 of Part 2 of the 8th schedule.
9. In support of these contentions the Applicant exhibits;
    a. email correspondence from Kim Haynes of Hillcrest Estates to Mr Al-Jibouri in May 2019 regarding a door broken by an Air BnB tenant in flat 45 and the advertising of 4 flats on the "yourapartment" website which appeared to be owned by the Respondent. Photographs were referred to in support of the link between the advert and the subject flats. [295-309]
    b. Complaints in August 2019 about noise emanating from Flat 45. [310-311]
    c. An email from Kim Haynes in August 2019 regarding AirBnB lettings at Flats 44 and 20[313] and further complaints about the behaviour of occupiers of Flats 45 and 37 [314]
    d. A schedule of complaints received between 7 February and 19 October 2019 [324-329]
    e. Screen shots taken in August 2019 from the websites of booking.com, expedia.co.uk and uk.hotels.com with various photographs and client references. [331-350]

Administration Charge

10. The Applicant intends to raise the costs of this action and the cost of damage to communal door the by way of administration charges and seeks a determination under Paragraph 5 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002. In support reference is made to clause 4.1 of the leases and clauses 4 and 14 of Part One of the Eighth Schedule.
11. Exhibited is an email dated May 13 2019 referring to an "attached Invoice for an out of hours callout regarding an out of hours incident at Balmoral House". [298] Neither the invoice or the amount claimed are provided. On being questioned by the Respondent Hillcrest's account manager responded, "Apparently the communal door glass was smashed by the

Tenant renting Flat 45" The Applicant's schedule of S.146 costs amounting to £6,087.50 is at [359]

The Respondent

12. In a statement of case dated 6 December 2019 [425-429] Counsel for the Respondent makes submissions regarding the identity of the Applicant and the lack of a statement of truth both of which have been superseded by Judge Whitney's directions of 23 December 2019.
13. The properties were purchased in 2006 for investment and the developers Crest Nicholson were aware they were to be sub-let. Their managing agent gave rolling consent and the Applicants should have been aware of the situation when they purchased in 2011.
14. The Respondent admits subletting the properties under tenancy agreements and at all times considered that consent had been obtained.
15. Automatic annual charges for sub-letting fees were invoiced between 2013 and 2017 until in March 2018 the Respondent challenged the amount and no further demands were received.
16. The Respondent denies letting through AirBnB and if sub tenants have let the properties on short term lets it was not with his permission or knowledge.
17. The Applicant's agents have continued to make unqualified demands for ground rent and service charges which the Respondent has paid thereby waiving any right to forfeiture.
18. The allegations of noise and damage are hearsay and unsubstantiated
19. If the statement of costs is an application under Rule 13 it should be struck out as the Respondent has not behaved unreasonably in defending the application.
20. If the costs are in respect of an application under paragraph 5a to schedule 11 of the CLARA 2002 liability is denied, they have not been correctly demanded, accompanied by a summary of rights, were not reasonably incurred being precipitous and at a time when any rights or contemplation of forfeiture if any had been waived. The amount claimed is also unreasonable.
21. In Mr Al-Jibouri's Witness Statement dated 6 December 2019 he confirms the matters set out by counsel and referred to above. He adds that service charges and ground rent has been paid up to 31 May 2020 and that the monies have not been returned. No resident has contacted him regarding damage, noise or sub-letting and any suggestion is hearsay.
22. Attached to his statement are tenancy agreements;
    a. Flat 37, 12 months from 4 March 2018 [400]
    b. Flat 45, 12 months from 12 March 2018 [411]
    c. Flat 20, 12 months from 1 March 2018 [421]
23. Also attached are service charge invoices from Harbourside and ground rent demands from E&J Estates.

24. The demand dated 8 June 2018 from E&J Estates includes "Sublet-Renewal Fees for January 2015,2016,2017.

Discussion and Determination

25. The only questions for the Tribunal are whether any of the matters complained of by the Applicant constitute a breach of covenant and whether and if so how much of an administration fee may be charged.

26. Evidence has been produced of 12-month tenancies on 3 of the flats but these all expire in March 2019 and no evidence has been produces as to the current position.

27. The disturbance complained of starts in February 2019 a month before the 12-month tenancies expire.

28. The Respondent accepts that long term lettings were entered into and that consent was not sought as he believed he had an ongoing annual licence to sublet dating back some time. His evidence also indicates that the last licence payment was demanded on 5 January 2017.Although only three tenancy agreements have been produced there seems to be no doubt that all four flats were so let.

29. The situation in March 2018 therefore seems to be that tenancies were entered into without obtaining the prior written consent of the Lessor contrary to clause 25.2 of Part One of the Eighth Schedule.

30. Likewise, the tenancy agreement did not contain the covenant referred to in clause 26 and notice was not given as required by clause 27.

31. We have then considered whether the lack of enforcement of the strict requirements of the lease but decided that whilst this may be grounds for mitigation in any forfeiture proceedings it does alter the obligations set out in the lease.

32. Turning then to the requirement to use the premises as a private residence we have no difficulty in accepting the guidance given in the Nemcova case cited that if the flats have been let short term through AirBnB or similar agencies a breach would occur.

33. To enable the Tribunal to make such a determination the Applicant must provide evidence that satisfies the Tribunal that the advertisements and various complaints made actually refer to the subject properties. Understandably no addresses are given on the website advertisements and whilst photographs of some of the rooms are provided nothing has been done to link them to the Respondent's flats and as such provide little assistance.

34. Whilst compelling evidence may have been available only emails from Kim Haynes referring to various issues have been produced which are largely reporting what she has been told by others. No witness statements have been produced from any of the complainants or from Kim Haynes and as such we cannot be satisfied that the matters complained of are in respect of the subject flats. Therefore, with the exception of the breach referred to in the next paragraph we are unable to find that any of the alleged breaches have occurred.

35. As referred to in paragraph 28 above the Respondent has admitted entering into tenancies without complying with the requirements of the leases and whilst it may be that she considered that "rolling consent" had been given this does not preclude the Tribunal from finding that she is in breach of clauses 25.2, 26 and 27 of Part One of the Eighth Schedule to the Leases.

Costs

36. It seems clear that the application for costs is under Schedule 11 rather than Rule 13 the latter being only applicable where the conduct of a party has been unreasonable in connection with the proceedings before the Tribunal. There has been no suggestion that this is the case here.

37. Under paragraph 5 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 the Tribunal may determine whether an administration charge is payable and if so the amount.

38. Although the application referred only to a claim in respect of costs under clause 4 of Part One of the Eighth Schedule the Statement of Case widens this to include Clause 4.1 of the lease in respect of the damaged door.

39. Dealing first with the claim under clause 4.1 it is noted that the invoice referred to on page 298 of the bundle has not been included leaving the Tribunal unaware of the amount of the claim. Secondly, as referred to in paragraph 34 above the Tribunal is not satisfied on the evidence provide to it that the damage was caused by a tenant of Flat 45 as alleged.

40. With regard to the claim for costs in respect of an application for forfeiture under clause 14 of Part One of the Eighth Schedule the Respondent avers that the Applicant has forfeited its right to seek forfeiture due to continuing to demand payment of service charges and ground rent.

41. The Tribunal accepts that costs of an application before the Tribunal may be recoverable as "in contemplation of proceedings". However, for a claim for s.146 costs to be successful the Tribunal must be satisfied that it was the intention of the Applicant at the time the costs were incurred to seek forfeiture of the lease. By continuing to demand ground rent and service charges the Tribunal cannot be so satisfied and **the application to make a determination under paragraph 5 of schedule 11 of the Commonhold and Leasehold Reform Act 2002 is therefore refused.**

D Banfield FRICS

17 February 2020

RIGHTS OF APPEAL

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

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

S.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-dispute 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 a leasehold valuation tribunal for a determination that a breach of a covenant or 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.