



**HM Courts  
& Tribunals  
Service**



**Residential  
Property  
TRIBUNAL SERVICE**

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN  
APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND  
LEASEHOLD REFORM ACT 2002**

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**Reference number:** LON/00BE/LBC/2011/0046

**Property:** Flat 2, Warwick Gardens House,  
93-97 Azenby Road, London SE15 5AJ

**Applicant:** Warwick Gardens House Right to Manage  
Company Limited

**Respondent:** Louise Emma Fernback

**Represented by:** Future Foundations Limited

**Appearances:** For the Applicant:  
Mr C Maclean – a director of the RTM Company

For the Respondent:  
Ms M Whelan and Mr M Hershall, both of Future  
Foundations Limited

**Tribunal:** Mr A J Andrew  
Mr S A Manson  
Mr L G Packer

**Hearing:** 25 July 2011

**Date of Decision:** 24 August 2011

## DECISION

1. The Respondent is in breach of the covenant contained in clause 3(9) of her lease.
2. The Respondent is not in breach of the covenant contained in clause 4(5) of her lease or of regulations numbered 3, 6, 10, 15 and 16 in the fifth schedule to her lease.

## THE APPLICATION

3. The RTM Company applied under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination that Ms Fernback was in breach of the following covenants or conditions contained in her lease:-
  - 1) Clause 3(9) by which the lessee covenants: *"Within fourteen days next after any subletting charging by way of legal mortgage parting with possession or devolution of the Demised Premises to give written notice thereof to the Lessor's Solicitors and to produce to them a certified copy of every instrument affecting or evidencing the same and to pay to the Lessor's Solicitors a fee of Ten Pounds (exclusive of Value Added Tax or any other tax payable thereon) or such other reasonable sum as the Lessor's solicitors shall reasonably determine for the registration of such notice"*.
  - 2) Clause 4(5) by which the lessee covenants to: *"Observe and perform the regulations set forth in the Fifth Schedule hereto"*.
  - 3) By Regulation 3 the lessee covenants: *"Not to do or permit to be done in or upon the Demised Premises any illegal or immoral act or any act or thing which may be or become a nuisance or annoyance or cause damage to the Lessor or the other Flat Owners or to any adjoining or neighbouring property"*.
  - 4) By Regulation 6 the lessee covenants: *"Not to shake any mats brooms or other articles out of the windows of the Demised Premises"*.
  - 5) By Regulation 10 the lessee covenants: *"Not at any time to interfere with the external decoration or painting of the Demised Premises or of the Building"*.
  - 6) By Regulation 15 the lessee covenants: *"Not to play any musical instrument gramophone tape recorder radio or television between the hours of 12:00pm and 7.00am so as to be audible outside the Demised Premises"*.
  - 7) By Regulation 16 the lessee covenants: *"At all times to behave and ensure that his friends servants or visitors behave as he would wish"*

*others to behave and exercise consideration and common sense for the benefit of the Lessor and the other Flat Owners”.*

## **THE STATUTORY FRAMEWORK**

4. Section 168 of the Commonhold and Leasehold Reform Act 2002 states:

- 1) *A landlord under a long lease of a dwelling may not serve a notice under s.146 (1) of the Law of Property Act 1925 (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless sub-section (2) is satisfied.*
- 2) *This sub-section is satisfied if –*
  - (a) *it has been finally determined on an application under sub-section (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 sub-section (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 sub-section (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.*

## BACKGROUND

5. At the start of the hearing Ms Whelan said that Ms Fernback did not dispute the facts contained in a number of witness statements prepared on behalf of the RTM Company and included in the hearing bundle. Consequently the facts were not in dispute and are briefly summarised in the following paragraphs.
6. Ms Fernback's lease of flat 2 was granted on 30 December 1982 for a term of 125 years from 25 March of that year. Ms Fernback has held that lease for some 25 years. The RTM Company exercised the no fault right to manage under the Act in 2005 and consequently it has since that time managed Warwick Gardens House, a block of private residential flats with some commercial units on the ground floor. Acorn Estate Management manages Warwick Gardens House on behalf of the RTM Company. The freehold reversion is owned by Abbott Management Limited but it played no part in these proceedings.
7. Ms Fernback lives in Dubai. For some 10 years she sublet the flat, using letting agents. She never gave notice of those sub-lettings to the freeholder, the RTM Company or the managing agents. During those years the flat was occupied by successive sub-tenants and there is nothing to suggest that their behaviour caused a nuisance or annoyance to any of the other occupiers of Warwick Gardens House.
8. In October 2010 Ms Fernback entered into an agreement with Future Foundations Limited. Regrettably a copy of the agreement has never been produced and was not included in the hearing bundle. Initially there was some confusion as to the status of the agreement. In the tribunal's directions of 27 May 2011 Future Foundations Limited are described as Ms Fernback's letting agents. However, at the hearing, Ms Whelan said that Ms Fernback granted a tenancy to Future Foundations Limited for a term of 12 months with a 6 months break clause and we accept that evidence, which was not challenged by Mr Maclean.
9. Future Foundations Limited contracts with a number of local authorities, including the London Borough of Southwark, to provide accommodation and support for young people aged 16 to 18 who have been in care. Thus it provides accommodation and support to potentially vulnerable young people.
10. Although we did not have a copy of the tenancy agreement it is apparent that it permitted Future Foundations Limited to use Ms Fernback's flat to provide accommodation for those care leavers who must have occupied as licensees of Future Foundations Limited. It is equally apparent that Future Foundations Limited was not required to obtain Ms Fernback's consent to any particular placement, so that she would not know who was occupying the flat at any given time and she would have no direct control over the occupier.

11. Having taken this tenancy Future Foundations Limited in November 2010, installed an 18 year old care leaver called Chloe in the flat. Under its contract with the London Borough of Southwark Future Foundations Limited was obliged to provide accommodation and 3 hours supervision a week for Chloe.
12. After taking up residence in the flat Chloe's behaviour deteriorated and matters came to a head during the first two weeks in December 2010.
13. Other young people moved into the flat with Chloe. There were late night parties: items, including used sanitary towels, were left in the common parts of Warwick Gardens House and thrown out of the windows of the flat, people were threatened with knives, bicycle tyres were slashed, money was stolen, the police were called and there were a number of arrests. When other occupiers of Warwick Gardens House challenged this behaviour they were subjected to threatening and abusive language. The behaviour of these young people was so bad that at least one family in Warwick Gardens House felt constrained to leave their flat some two weeks before Christmas and move to temporary accommodation. One of the witnesses describes the behaviour of Chloe and her friends as "feral" and having read the witness statements in the hearing bundle we endorse that description.
14. Other occupiers in Warwick Gardens House complained about this behaviour to Mr Maclean as a director of the RTM Company and also to the managing agents. However because Ms Fernback had failed to give notice of the letting they were initially unable to establish who if anyone, was responsible for Chloe. Finally on 13 December 2010 they were put in touch with Future Foundations Limited by the London Borough of Southwark, and that was also the first day on which they were able to contact Ms Fernback, by e-mail. Thus it is reasonable to conclude that neither Ms Fernback nor Future Foundations Limited were aware of the behaviour of Chloe and her friends until 13 December 2010.
15. To their credit Future Foundations Limited acted promptly and they removed Chloe from the flat on 13 December 2010. They offered Chloe further support, though not any further accommodation. She declined the offer. The Company attempted to secure the flat from re-entry. Unfortunately that was not an end of the matter. For some days after the 13 December 2010 friends of Chloe returned to Warwick House Gardens on a number of occasions and caused considerable damage to the common parts and again threatened other occupiers. The communal entrance door was forced open, the common parts were sprayed with graffiti, occupiers were verbally abused and threatened with knives.
16. Notwithstanding Chloe's behaviour Ms Fernback did not exercise the break clause contained in Future Foundations Limited's tenancy and it has subsequently placed another care leaver in the flat: fortunately his behaviour does not appear to have given rise to any complaint.

## REASONS FOR OUR DECISION

17. Ms Whelan, on behalf of Ms Fernback, did not challenge the RTM Company's right to make an application under 168(4) of the Act and it was unnecessary for us to consider the issue.
18. In so far as Ms Fernback's failure to give notice of the letting to Future Foundations Limited was concerned, Ms Whelan made two points. Firstly she said that clause 3(9) required Ms Fernback to give notice to "*the Lessor's Solicitors*" and she did not have details of those solicitors. Secondly she said that the freeholder, the RTM Company and the managing agents were all aware that Ms Fernback had let her flat for the previous 10 years without giving notice, and that consequently they had effectively waived the right to receive notice of any subletting.
19. We do not accept either of these arguments. The lease, for good reasons, requires Ms Fernback to give notice of any subletting. As this case demonstrates it is essential that a lessor knows who is occupying the flat and on what terms. Where, as in this case, the lease requires the lessee to give notice to the lessor's solicitors we do not accept that the lessee can simply sit on her hands and say that she does not know who those solicitors are. Faced with such an obligation Ms Fernback should have made reasonable enquiries to ascertain the identity of the lessor's solicitors so that notice could be given in conformity with the covenant.
20. Turning to Ms Whelan's second argument Ms Fernback let the flat on terms that allowed Future Foundations Limited to place vulnerable young people in the flat with an unspecified degree of supervision and without any reference to her. In short she surrendered control of the flat to Future Foundations Limited. The letting to Future Foundations Limited was of a wholly different character to the previous sublettings to specified subtenants who had a direct contractual relationship with Ms Fernback. We agree with Mr Maclean that any failure to enforce the notice provisions on previous sublettings cannot be regarded as a waiver of the obligations to give notice of the subletting to Future Foundations Limited.
21. Although Ms Fernback did eventually give notice of the subletting on 27 April 2011 she had steadfastly declined to provide a copy of the tenancy agreement and has not paid the registration fee. Consequently she remains in breach of clause 3(9) of her lease.
22. Turning to other asserted breaches we specifically drew the parties attention to paragraph 11.199 of current edition of Woodfall on Landlord and Tenant which commences with these words:-

*"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"*

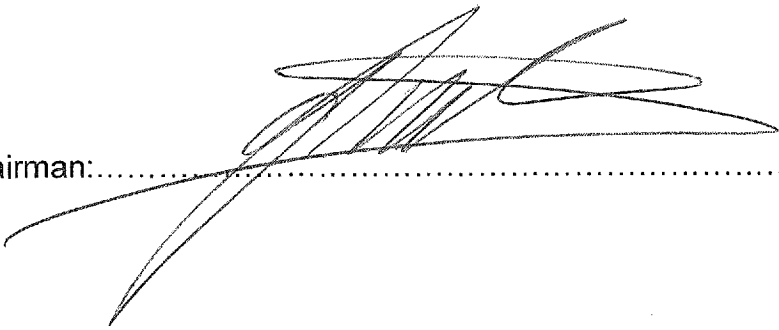
and continues

*"In a covenant not to permit certain use of the premises, the word "permit" means one or 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".*

In the context of that passage we invited the parties to submit written representations as to whether the behaviour of Chloe and her friends could be said to amount to a breach of the user regulations by Ms Fernback and we received written representations from both parties.

23. The thrust of Mr Maclean's submission was that Future Foundations Limited, as the agent of Ms Fernback, abstained from taking reasonable steps to prevent the breaches complained of: in particular it failed to discharge various statutory duties and responsibilities as a provider of social work services on behalf of London Borough of Southwark and but for that failure the breaches would not have occurred.
24. The argument could only assist the RTM Company in respect of regulation 3 because it is the only regulation that prohibits the permitting, rather than the doing, of a prohibited activity. That apart, Mr Maclean's argument is misconceived: the relationship between Ms Fernback and Future Foundations Limited is that of landlord and tenant and not principal and agent.
25. We have considerable sympathy for the other occupiers of Warwick Gardens House, but having regard to paragraph 11.199 in Woodfall and in particular the current state of the authorities referred to in that paragraph, we do not consider that Ms Fernback is liable for the actions of Chloe and her friends. If the RTM Company were to succeed it would have to demonstrate that Ms Fernback had either acquiesced in the prohibited behaviour or had failed to take appropriate action to prevent that behaviour upon becoming aware of it. It is apparent that there was no such acquiescence or failure by Ms Fernback. She first became aware of the prohibited behaviour on 13 December 2010 and on that day Future Foundations Limited removed Chloe from the flat and made reasonable efforts to secure the flat from re-entry. To the extent that misbehaviour continued beyond that date it cannot be said that Ms Fernback either acquiesced in it or failed to take appropriate action to prevent it. Future Foundations Limited's relationship with Chloe came to an end when she declined any further help from them after she was removed from the flat, and they cannot be held responsible for her friends' conduct after that point.
26. That said Ms Fernback has been alerted to the inherent risk of allowing Future Foundations Limited to place vulnerable young people with an unspecified degree of supervision in a residential block of flats with a communal entrance. The current sub tenancy expires in two months. If it is renewed and if there were any repetition of the type of behaviour described above another tribunal at a future date may well conclude that,

by renewing the subtenancy, Ms Fernback has acquiesced in that behaviour.

Chairman:..........(A J Andrew)