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HM Courts & Tribunals Service

Residential Property Tribunal
Case No. CAM/22UJ/LBC/2013/0001

Property	:	**Flat 2 Faircotes, Station Road, Old Harlow, Essex CM17 0AP**
Applicant	:	**Faircotes Ltd (rep. Mr Muldoon, Solicitor)**
Respondent	:	**Mr Ronald Edward Peck**
Date of Hearing	:	**1 May 2013**
Type of Application:		**For a determination that the Respondent tenant is in breach of a covenant or condition in the lease Commonhold & Leasehold Reform Act 2002 s.168(4)**
Members of Tribunal:		**Mr G M Jones - Chairman Mr Neil Martindale FRICS Mrs Lorraine Hart**

ORDER

UPON hearing the Applicant by its solicitor and the Respondent not appearing

IT IS HEREBY DECLARED that: -

1. The Respondent as tenant of Flat 2 Faircotes, Station Road, Old Harlow, Essex CM17 0AP was guilty of a breach of the covenants contained in clauses 4(13) and 4(14) of the lease dated 4 June 1980 in that he sublet the flat to one Mick Venables between November 2012 and March 2013 during which period the flat was occupied as a residence by persons not being the tenant or members of the tenant's family.

2. The Tribunal is not satisfied that the tenant was in breach of any of the covenants contained in clauses 4(5), 4(9) or 4(10) of the said lease by causing water to escape from Flat 2 into the offices below on 14 or 23 January or 21 February 2013 by allowing the pipe-work in the flat to fall into disrepair or by failing to repair the same nor is the tenant liable to indemnify the landlord in respect of any such alleged breaches as alleged or at all.

3. There shall be no order as to costs.

G M Jones
Chairman
28 June 2013

REASONS

0. BACKGROUND

The Property

0.1 The subject property is a sizeable three room self-contained flat on the first floor of a substantial house, probably Edwardian, which is currently used as ground floor offices with two flats on the first floor and two more flats (smaller because they are partly in the roof space) on the second floor. The flats are entered via a separate entrance at the side of the building with entry phone system. The building generally is in fair condition, though the external timberwork (including large wooden-framed windows and decorative timbers, is badly in need of decoration.

The Parties and the Lease

0.2 The landlord is a company owned by the solicitors firm that practises from the ground floor. The tenant, who is retired and apparently has respiratory problems, has moved to the warmer climate of Cyprus for the sake of his health. His interests in this Application are represented by his daughter, Mrs Nicola Bide, who lives at Finchingfield in Essex (who, however, did not attend the hearing).

0.3 The lease dated 4 June 1980 is for a term of 99 years from 29 September 1979 at a ground rent (currently £60.00 p.a.) and provides for the landlord to collect a service charge in relation to of the cost of insuring the building and of maintaining the structure, exterior and common parts. The tenant is responsible for maintaining the interior of the flat, the windows and doors thereof and all sanitary, water, gas and electric pipes, wires and fittings in and serving exclusively the flat. The lease provides for notices to be served on the tenant by the landlord at the flat.

0.4 Supplementary to the repairing obligations, the tenant covenants as follows: -

0.4.1 Within 3 months after service of notice of any disrepair for which he is liable (or immediately in case of need) to make good any disrepair, in default of which the landlord may execute the necessary works and recover the costs thereof from the tenant as rent in arrear.

0.4.2 To make good and indemnify the landlord against all damage caused to the building (otherwise than by insured risks) by any act or omission of the tenant or of any other person for the time being in the building with the consent (express or implied) of the tenant.

0.5 In addition, the tenant covenants: -

0.5.1 Not to use the flat other than as a private residential flat in the occupation of the tenant and the tenant's family only.

0.5.2 (a) Not to assign charge underlet or part with or share possession of part only of the flat

(b) Not to underlet the flat as a whole or part with possession thereof save by way of an assignment of the whole.

1. THE DISPUTE

1.1 The substance of the landlord's complaints against the tenant is set out in the statement of Mr William Hugh Muldoon (the solicitor whose offices are below the flat) dated 7 March 2013. In the summer of 2012 Mr Peck told Mr Muldoon that he was moving to Cyprus but did not say when. It appears that Mr Peck then left without informing Mr Muldoon and subsequently let a friend, Mick Venables, into occupation of the flat. Mr Peck says he allowed Mr Venables to move into the flat, on what terms, he does not say, though this may be an issue of some importance.

1.2 Between 7 and 9 November 2012 members of Mr Muldoon's staff visited the flat 4 times to complain about noise. On 8 November 2012 Mr Muldoon himself had to interrupt a meeting for the same reason and went with his colleague Angela Zarrabi to speak to the occupiers of the flat. They were met by a tall young man who said he was living there with his father Mick Venables, Mr Peck having left. He apologised and promises to keep the noise down. Mr Muldoon left with the impression (from the conversation) that the flat had been sublet "in various parts to various people".

1.3 The next day, Mr Muldoon wrote to Mr Peck at the flat (having no other address for him) asking him to remedy the subletting "which is a clear breach of covenant of the lease and the insurance for the building". It appears that the letter eventually reached Mr Peck, who telephoned Mr Muldoon some time in December 2012. He said he would be giving his tenants one month's notice and that they would be vacating in January 2013. In the event, the occupiers did leave, though not until about the end of March 2013. It seems that Mr Venables did not want to leave, as he had nowhere to go, but Mr Peck finally served notice on him and he moved out.

1.4 On 14 January 2013 water came through the ceiling of Ms Zarrabi's office, which is immediately below the kitchen and bathroom of Flat 2 (the water pipes of kitchen and bathroom being on opposite side of a partition wall). Miss Zarrabi informed the "tenants" and they said they would notify their landlord, Mr Peck, to whom a letter was also sent (again addressed to Flat 2) by Mr Muldoon. However, on 23 January 2013 there was a further leak, of which Mr Peck was informed by a letter of the same date (also addressed to Flat 2). There was a further leak on 21 February 2013. On this occasion, the water ingress caused a certain amount of damage to Ms Zarrabi's office furnishings and working papers. Ms Zarrabi went to the flat and was told that the earlier leak had been identified as coming from the washing machine and had been fixed. On the present occasion, Mr Venables' daughter had just finished a shower. Mr Venables said he woud get in a plumber.

1.5 On 21 February 2013 Mr Muldoon wrote to Mr Peck (still at Fat 2, as he still had no other address) enclosing an "invoice" for the estimated costs of damage. Mr Muldoon accepted that this was simply an estimate; he told the Tribunal he did it to emphasise the seriousness of the issue. Mr Peck did not reply directly to this letter, but on 1 March 2013 he sent an email to Mr Muldoon informing him that "the person living in my flat" would be moving out at the end of March and that the flat was up for

sale. On 12 March he sent an email to Ms Zarrabi apologising for the trouble caused by the leak and saying his "tenet" [sic] Mick would be out by the end of the month.

1.6 The current position (at the date of the hearing) appears to be that a sale of the flat has been agreed subject to contract and will hopefully proceed.

2. THE ISSUES

2.1 The Application relies upon two alleged breaches of covenant, namely, unauthorised subletting and permitting escapes of water into the offices below on two occasions. Paragraph 5 of the Application mentions the noise nuisance but does not cite it as a breach of covenant. Paragraph 5 also mentions that the "landlord" (obviously it should say "tenant") has been informed of the second leak; but does not expressly cite as a breach failure to repair upon due notice.

3. THE EVIDENCE

3.1 Mr Peck gave authority to Mrs Bide to represent him. Neither he nor Mrs Bide attended the hearing. In consequence, the case was decided primarily on the basis of the documentary evidence and correspondence, supplemented as regards some of the background by the evidence of Mr Muldoon, who was accompanied by Ms Zarrabi in case we wanted to ask her any questions about her part in the matter. As it turned out, there were no conflicts of evidence to be resolved. However, Mr Muldoon was able to give the Tribunal some additional useful information.

3.2 Mr Muldoon told the Tribunal he did not want to forfeit the lease; but he did want the situation resolved. He felt that the most satisfactory outcome would be for Mr Peck to assign the lease. He explained that in 1990 a petrol bomb had been thrown into the entrance to the flats, causing a serious fire. That was why the entry phone system was installed. The door was supposed to be kept locked (though that was not the case at the time of our inspection). He found out about the subletting of Flat 2 because other tenants complained that they did not know who was coming and going there. His concern was to keep all the occupants safe and avoid disturbance to the offices beneath.

3.3 The Tribunal was concerned that, from the terms of her letter dated 29 April 2013, Mrs Bide appeared to believe that she need not attend the hearing because, as the flat was being sold, the landlord did not intend to take further action. Mr Muldoon said he had met Mrs Bide on 24 April and told her that he had no intention of forfeiting the lease. This account was consistent with the terms of Mrs Bide's letter and the Tribunal accepts it. Mrs Bide did not suggest that she thought the Application had been withdrawn. The landlord is entitled to have a determination of the Application as, if things do not go according to plan, such a determination will avoid the necessity for repetitive litigation.

3.4 The Tribunal questioned Mr Muldoon closely about the source of the leaks and the extent to which the damage caused might be covered by insurance. He told us that Mrs Bide had agreed that the landlord could send a plumber to inspect; but that has not been done. He therefore does not have definite information about the source of

the leaks. He expects that damage caused by negligence would be outwith the insurance cover; but he has not looked at the policy recently to check the position.

3.5 Mr Muldoon assumes that remedial action was taken, as there have been no further leaks since 21 February 2013; but he does not really know. His only express information about the source of the leaks came from Mr Venables and members of his household (though Mr Peck appears from his emails to accept responsibility).

4. THE LAW

Declaration of breach of covenant or condition

4.1 A landlord who wishes to forfeit a lease for breach of covenant or condition (other than for non-payment of rent) must first serve a notice under section 146 of the Law of Property Act 1925, setting out the breach and, where the breach is remediable, giving the tenant a reasonable opportunity to remedy the breach and pay compensation. Section 168 of the Commonhold & Leasehold Reform Act 2002 prevents a landlord under a long lease of a dwelling from serving a section 146 notice unless and until the breach has been admitted by the tenant or determined by a Court (in any proceedings); by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement; or by the Leasehold Valuation Tribunal on the landlord's application.

Costs

4.2 The Tribunal has no general power to award inter-party costs, though a limited power now exists to make wasted costs orders. Leases in general (and this lease in particular) give the landlord the right to recover from the tenant any cost reasonably incurred in connection with the service of a section 146 notice.

5. DISCUSSION AND CONCLUSIONS

5.1 It is clear on the Respondent's own admission that he has breached his covenants by using the flat other than as a private residential flat in the occupation of the tenant and the tenant's family only and by subletting to Mr Venables. The Tribunal so finds and makes a declaration accordingly.

5.2 It is also clear on the evidence that water was allowed to escape from pipe-work above the ceiling of Ms Zarrabi's office and, on the balance of the evidence, the Tribunal finds that the leaks emanated from Flat 2. However, that is not in itself a breach of covenant. If the leak was the result of disrepair within the flat, then that would amount to a breach of the covenant to keep the pipe-work within the flat in good repair. There is no evidence to show that the leaks were caused by disrepair. A leak from a washing machine might be caused by a blockage or a loose connection. Moreover, if there was disrepair in the case of the earlier leaks, it appears to have been addressed reasonably promptly.

5.3 The suggestion that one leak was related to the use of the shower (which obviously did not generally leak because the incident was isolated) is somewhat speculative; in any event, misuse of the shower would not amount to disrepair. The indications are that, on the last occasion, a plumber was to be called and, since the leak did not

recur during a further period of 5 weeks before the flat was vacated, that the issue (whatever it was) was resolved reasonably promptly.

5.4 It would be a breach of covenant if the tenant (or his subtenants, or other persons authorised by him) were responsible for leaks which caused damage not covered by insurance and the tenant failed to make good and indemnify the landlord. However, it is far from clear that damage to the office below and its contents is not a risk covered by insurance. In the experience of the Tribunal it is quite likely that any such damage was covered by insurance. In any event, the actual cost of the damage has not been established and Mr Muldoon's estimate of £1,000 appears to be no more than a wild guess (also the VAT would surely be recoverable). Thus no proper demand has ever been made for indemnity in any event. Of course, the incident on 21 February 2013 is not referred to in paragraph 5 of the Application as a breach of which the landlord now complains.

5.5 Accordingly, the Tribunal is not satisfied that there has been any breach of any of the covenants dealing with disrepair or its consequences. The landlord has had a fair opportunity to prove its case on that issue and ought not to be permitted to re-litigate it. The Tribunal will make a declaration showing that the issue has been determined in the tenant's favour.

6. COSTS

6.1 The Tribunal makes no order as to costs.

Geraint M Jones MA LLM (Cantab)
Chairman
28 June 2013