



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

Case Reference : **MAN/00CJ/LBC/2017/0003**

Property : **169 Helmsley Road, Newcastle NE2 1RD**

Applicant : **David John Lawtie**
Representative : **N/A**

Respondents : **Jonathan Garry Clark**
Helen Nora Clark
Representative : **N/A**

Type of Application : **Commonhold & Leasehold Reform Act 2002**
– section 168(4)

Tribunal Member : **Deputy Regional Valuer N Walsh**
Judge J Holbrook

Date and venue of Hearing : **Determined without a hearing**

Date of Decision : **23 August 2017**

DECISION

DECISION

Breach of covenant in the lease of the Property (dated 17 July 1987) has occurred by reason of the Respondents having permitted the Property to be used otherwise than as a private residence in the occupation of one family only at a time.

The costs application is refused but the Respondents are ordered to reimburse the Applicant his Tribunal application fee of £100.00.

REASONS

Background

1. On 3 April 2017, an application was made to the First-tier Tribunal (Property Chamber) under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of a covenant or condition has occurred in a lease of a property known as 169 Helmsley Road, Newcastle, NE2 1RD (“the Property”).
2. The lease in question (“the Lease”) is dated 17 July 1987 and was made between (1) R.J. Dodds & Son (Contractors) Limited and (2) William James Foster and Mary Beatrice Foster. It was granted for the term of nine hundred and ninety-nine years from 22 May 1987 with a reserved annual rent of one peppercorn.
3. The original house is in two flats known as Nos. 167/169 Helmsley Road. The Property, together with 167 Helmsley Road, are “Tyneside Flats”, wherein each “owner” is the freeholder of one flat and the leaseholder of the other, under mirror leases.
4. The Applicant is the leaseholder of the lower flat, 167 Helmsley Road, and the freeholder of the upper flat, 169 Helmsley Road, and resides at 167 Helmsley Road. The Respondents to the application are the leaseholders of 169 Helmsley Road, and the freeholders of 167 Helmsley Road. They do not reside at 169 Helmsley Road.
5. On 4 May 2017, the Tribunal gave directions for the conduct of the proceedings. The parties were informed that this matter was considered suitable for a determination without an oral hearing unless either party gave notice that they wished a hearing to be listed. As no such notification was received, the Tribunal has determined the matter on the basis of the evidence provided in the application and in written submissions provided by the Applicant in response to directions. The Respondents failed to comply with the Tribunal’s directions and subsequent Order dated 26 July 2017. The Respondents were therefore barred from taking further part in these proceedings by an Order dated 15 August 2017. To date no response has been received from the Respondents.
6. The Tribunal did not inspect the Property.

Law

7. A prerequisite for the forfeiture of a lease (otherwise than for a breach of a covenant to pay rent) is the service of a notice under section 146(1) of the Law of Property Act 1925. However, section 168(1) of the Commonhold and Leasehold Reform Act 2002 provides that a landlord under a long lease of a dwelling may not serve such a notice unless section 168(2) of the 2002 Act is satisfied.
8. One of the ways in which section 168(2) may be satisfied is for it to be finally determined by the Tribunal (upon an application by the landlord under section 168(4)) that a breach of a covenant or condition in the lease has occurred.

The relevant covenant in the Lease

9. Clause (m) of the Fifth Schedule to the Lease contains the following tenant's covenant:

"To use the Demised premises for the purpose of a private residence in the occupation of one family only at a time".

Evidence and submissions

10. The Applicant asserts that the Property has been sub-let on or around 14 March 2017 to six young females as a student let or 'House in Multiple Occupation'. The Applicant advises that the Property is registered and licenced with Newcastle City Council as a House in Multiple Occupation (HMO) in accordance with the Housing Act 2004 (reference 13/03422/HMOREN).
11. The Applicant advised the Tribunal in his Statement of Case that Clark Residential Limited acted as the letting agent for the property and that this company is or was materially associated with the Respondents, both of whom are or were directors of the company.

Conclusion on breach of covenant

12. On the basis of the Applicant's submissions it would appear, on the balance of probability, that the Property has been underlet by the Respondents to six unrelated persons. The fact that the Property is registered and licenced as House of Multiple Occupation under the Housing Act 2004 supports the Applicant's assertions and demonstrates that this was the intention of the Respondents. This has been done in breach of clause (m) of the Fifth Schedule of the Lease, requiring the property to be used as a private residence in the occupation of one family only. In the absence of any submissions to the contrary from the Respondents, we find that such a breach has occurred on the facts presented. The Applicant is therefore entitled to a determination to that effect.

The application for costs

13. The Applicant is also seeking an order for costs against the Respondents in the sum of £671.34. The Applicant asserts that by failing to comply with the Tribunal's directions, the Respondents have acted unreasonably during these proceedings. The Respondents were invited to make submissions as to costs but none were received.

The relevant law on costs

14. The Tribunal's powers to make orders for costs are governed by rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The general principle (set out in rule 13(1)(b)) is that the Tribunal may only make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings before the Tribunal. The application of rule 13 was considered and explained by the Upper Tribunal (Lands Chamber) in the case of Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC). The correct application of the rule requires the Tribunal to adopt the following approach when determining an application for costs:
 - a. Is there a reasonable explanation for the behaviour complained of?
 - b. If not, then, as a matter of discretion, should an order for costs be made?
 - c. If an order for costs should be made, what should be the terms of that order?
15. The starting premise in relation to costs is that this is a 'no costs' Tribunal, where parties should expect to be able to instigate proceedings and defend cases on the basis that each party will bear their own costs. While the Tribunal has powers under rule 13 to award costs, where a person has acted unreasonably, these powers should not be exercised lightly and generally only in connection with behaviour related to the conduct of the proceedings themselves.
16. Clearly in this case the Respondents have not engaged with the proceedings and their behaviour eventually resulted in them being barred from taking any further part in the proceedings. Is there a reasonable explanation for this behaviour? It could be argued that the Respondents did not instigate these proceedings and may not have been able to offer a defence, and therefore this could be a reasonable explanation for their behaviour. On balance, however, we find the fact that the Respondents repeatedly failed to comply with the Tribunal's directions, letters and orders was not reasonable behaviour.

17. Having found that the Respondents acted unreasonably, it then falls to the Tribunal to decide whether to exercise its discretion and award the Applicant some or all of the costs claimed. The schedule of costs submitted by the Applicant helpfully detail clearly the activities and expenses claimed for, which, in the main, relate to the preparation and submission of the application and the Applicant's bundle in accordance with the Tribunal's directions of 4 May 2017. The Tribunal notes however that all the cost items claimed are prior to when the Respondents were to have provided their submissions and Statement of Case, in compliance with the Tribunal's directions.
18. While the Respondents lack of engagement with these proceedings has undoubtedly delayed the Tribunal in determining this matter, it does not appear to have incurred additional expense for the Applicant. In fact, had the Respondent served his Statement of Case and bundle then undoubtedly this would have resulted in further work and expense for the Applicant. The Tribunal is therefore not inclined to exercise its discretion and award costs.
19. Whilst the Tribunal is not minded to make a formal costs award, the test for reimbursement of fees is different under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 because the Applicant's application has been successful. We consider it to be just and equitable for the Respondent to reimburse the Applicant's Tribunal fees of £100.00.