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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/LBC/2015/0013&0014**
Property	:	**Flats 2 and 3, 135 Ladbroke Grove, London W11 1PN**
Applicant	:	**Queensbridge Investments Limited ("the landlord")**
Representatives	:	**Forsters LLP, solicitors**
Respondents:	:	**(1) Puja Chandra Davda & Konrad Patricio Callao Heksel (Flat 2)** **(2) Sara Arora (Flat 3)**
Respondents Representatives	:	**Northover Litigation, solicitors**
Type of application	:	**For an order that a breach of a covenant or condition contained in a leases has occurred**
Tribunal members	:	**Angus Andrew** **Mrs E Flint DMS, FRICS, IRRV**
Date and venue of hearing	:	**15 April 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**7 May 2015**

DECISION

Decisions

1. The landlord waived the restrictions in the tenants' leases that regulate their right to sublet the flats and consequently the tenants were not in breach of those restrictions.

2. The landlord may not recover the costs of these proceedings from the tenants through the service charge provisions of their leases.

The application and the hearing

3. The landlord applied under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination that the tenants are in breach of a number of covenants contained in their leases that regulate their right to sublet their flats ("the sub-letting restrictions").

4. The applications were heard on 15 April 2015. The landlord was represented by Mr G Healey, a barrister instructed by Forsters, solicitors. The tenants were represented by Mr J Sandham, a barrister instructed by Northover Litigation, solicitors.

5. Mrs S Erkman is a director of the landlord. She attended the hearing but did not give evidence. Both Ms Davda and Ms Arora attended the hearing and gave oral evidence having previously submitted witness statements in accordance with the tribunal's directions. Mr Healey did not challenge either their witness statements or their oral evidence and he declined the opportunity to cross examine them. Consequently the background that is central to our decision derives from the tenants' unchallenged evidence.

6. By letter of 9 April 2015 the tenants applied for a postponement of the hearing but the application was rejected by another tribunal judge. At the start of the hearing Mr Sandham reapplied for a postponement of the hearing and his application was opposed by Mr Healey on behalf of the landlord. After a short adjournment to consider the submissions made by both barristers we rejected the application. Given our ultimate decision it seems unnecessary for us to explain our reasons for rejecting the tenants' postponement application but if that decision is subsequently put in an issue we may do so at a later date.

7. At the hearing Mr Sandham on behalf of the tenants applied for an order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from recovering its costs incurred in these proceedings through the service charge.

8. The relevant statutory provisions are set out in the appendix to this decision including section 143 and 148 of the Law of Property Act 1925.

Background

9. Both tenants purchased their flats in August 2006 and they knew each other as neighbours.

10. Ms Arora described the landlord as being an *"absentee landlord"* and it is apparent that it delegated the management of 135 Ladbroke Grove to managing agents that were throughout the hearing simply called "Urang" and they issued the demands for service charges and the like.

11. Ms Arora lived in flat 3 with her husband. In 2008 they were expecting their first child and decided to move to a larger family home. They wanted to sell the flat but their efforts were frustrated by Urang's apparent inability to obtain instructions from the landlord. In the meantime the property market crashed and they decided to rent the flat until it recovered. After some difficulty Ms Arora eventually managed to speak to Ms Erkman who attended the hearing. She agreed to the proposed sub-letting. The flat was sublet for about two years and no point was taken by Mr Healey in respect of that sub-letting. The sub-letting ceased in 2010 because Mr Arora was by that time working nights at St Charles' Hospital in Charing Cross and used the flat during the week.

12. By end of 2010 Mr and Mrs Arora had two children and they decided to sell the flat and purchase a family home in Maidenhead. Two sales were negotiated but both buyers withdrew when a serious structural fault was discovered in the flank wall to 135 Landbroke Grove and Urang were unable or unwilling to provide a copy of the building insurance policy. In her unchallenged evidence Ms Arora explained that the wall was *"leaning out by as much as 170mm and considered seriously dangerous"*.

13. As a result of their inability to sell the flat Mr & Mrs Arora also lost the family home that they had intended to purchase in the catchment area of their chosen school. Ms Arora was *"incredibly upset, tearful and anxious about it all"*. She described herself as being at her *"wits end"*. Her efforts to obtain information from both the landlord and Urang about the repair of the structural defect were unsuccessful. Eventually Ms Arora met James Mark of Urang at 135 Ladbroke Grove. He was extremely sympathetic but was unable to offer a practical solution that might result in an early sale of the flat. Instead he suggested to Ms Arora that she *"rent out the flat until the wall was fixed"*.

14. Ms Arora acted on that suggestion and sublet the flat. The first sub-letting commenced in about July 2011 and since then both Urang and the landlord's solicitors have corresponded with Ms Arora at her new home in Maidenhead and all demands for rent and service charges have been sent to that address. The flat was last let to Mr Michele Montonati for a term of 12 months from 19 December 2014 on an assured shorthold tenancy. Mr Montonati exercised a break clause and the sub-tenancy will now come to an end on 19 June 2015.

15. In the meantime but for different reasons Ms Davda and Mr Heksel were experiencing similar problems. They had lived at flat 2 as a couple but their relationship broke down in October 2010. They decided to sell the flat and go their separate ways. However, they too were unable to sell their flat because of the structural defect to the flank wall. They were aware of Ms Arora's conversations with James Mark of Urang and his suggestion that Ms Arora should sublet her flat until such time as the flank wall was repaired. By December 2012 they came to the conclusion that they also would have to sublet their flat until such time as the flank wall was repaired. Ms Davda spoke to James Mark of Urang in December 2012 when he told Ms Davda that she *"should proceed with the sub-letting"* of the flat. In consequence Ms Davda and Heksel put their flat in the hands of letting agents and in March 2013 the flat was let to Ms Ella Jaramillo. The flat was re-let to Ms Jaramillo on 13 November 2014 for a term of 12 months but Ms Davda and Mr Heksel have exercised a break clause and the tenancy will now come to an end on 14 May 2015.

16. Both tenants were exasperated by the landlord's failure over a considerable period of time either to communicate with them or to repair the flank wall. Consequently on 19 September 2014 they applied to the tribunal for the Appointment of a Manager pursuant to section 24 of the Landlord and Tenant Act 1987. That application was heard by a different tribunal on 24 March 2015 but at the time of the hearing before us the tribunal had not issued its decision.

17. On 16 February 2014 and some four months after the tenants applied for the Appointment of a Manager the landlord applied under section 168(4) of the Act for a determination that the tenants are in breach of the sub-letting restrictions.

Issues in dispute

18. The applications related only to the current sub-lettings to Mr Montonati and Ms Jaramillo and in answer to our questions Mr Healey confirmed that the landlord did not take issue with any of the previous sub-lettings.

19. The sub-letting restrictions are to be found in paragraph 7 of part 1 of the 4th schedule to the two leases. The restrictions are not identical but Mr Healey and Mr Sandham agreed that the differences were not material. The leases do not prohibit the sub-letting of whole nor do they require the landlord's approval of a proposed sub-tenant. They simply regulate the terms of any sub-letting and require its registration. Given the issue before us it is unnecessary to recite the lease provisions. In respect of the current sub-lettings the landlord asserted that the tenants were in breach of the sub-letting restrictions because:-

    a. The terms of the assured shorthold tenancies had not been approved by the landlord; and

b. The assured shorthold tenancies did not prohibit the sub-tenants from breaching the provisions of the leases held by the tenants; and

c. The assured shorthold tenancies did not prohibit further sub-lettings but rather permitted them with consent; and

d. The assured shorthold tenancies did not require the head landlord's consent to any assignment of the sublet term; and

e. The tenants had failed to register the assured shorthold tenancies with the landlord within 21 days of their completion.

20. In their statement of case the respondents took two drafting points in respect of the landlord's statement of case. At the hearing Mr Sandham did not pursue those points with any vigour and he was right not to do so: they had little merit because the tenants understood exactly the case that they had to answer.

21. The issue in this case is not whether the tenants were in breach of the sub-letting restrictions when they granted the current assured shorthold tenancies but whether the landlord through its authorised agent had waived the those restrictions until such time as the structural defect in the flank wall is repaired.

22. Applying Swanston Grange (Luton) Management Limited v Eileen Langley-Essen [LRX/12/2007] both Mr Sandham and Mr Healey agreed that we had jurisdiction to consider whether the sub-letting restrictions had been waived by the landlord.

23. The landlord's case was that Mr Mark had no express or ostensible authority to waive the sub-letting restrictions. Even if he did have authority the words used by him did not amount to a waiver of the sub-letting restrictions. Even if they did amount to a waiver they could only have waived the initial sub-lettings and not the current sub-lettings granted on 19 December 2014 and 13 November 2014 (by the application of sections 143 and 146 of the Law of Property Act 1925).

Reasons for our decisions

24. Emails sent by the landlord to Ms Arora in 2010 confirmed that Urang had been appointed to manage the property and they have throughout acted as managing agents. In that context we do not accept Mr Healey's bald assertion unsupported by any evidence that Urang were not the landlord's managing agent. We have similar difficulty with his assertion that even if Urang had been appointed to manage the property Mr Mark had no actual or ostensible authority to waive the sub-letting restrictions. When managing agents are appointed tenants will invariably approach them to obtain any consents that are required under the terms of their leases: it is

part and parcel of the job of a managing agent to deal with such applications in particular where there is an absentee landlord, as in this case. Even if Urang and Mr Mark in particular did not have any express authority to grant consent or to waive the sub-letting restrictions they nevertheless had ostensible authority and the tenants were entitled to rely on any consent or waiver granted by Mr Mark and/or Urang.

25. The more difficult issue is whether the words used by Mr Mark amounted to a waiver of the sub-letting restrictions. In the Swanston Grange case HH Judge Huskinson decided that there had been no waiver of similar sub-letting restrictions. However the facts of two cases are entirely different. In Swanston Grange the tenant was relying on the landlord's past failure to actively enforce the restrictions: as HH Judge Huskinson pointed out past inactivity could not amount to an unequivocal waiver of a future breach.

26. In this case however the tenants are relying not upon the landlord's past inactivity but upon statements made by Mr Mark on behalf of the landlord. Furthermore those statements have to be construed in the context of the facts recorded above. The tenants were not seeking permission to sublet. They wanted to sell their flats but could not do so because of a serious structural defect in the property that had to be repaired by the landlord under its repairing obligations contained in the leases. As Mrs Arora put it they were at their *"wits end"* and they wanted to sell their flats so that they could get on with their lives.

27. The suggestion that they sub-let their flats as a temporary measure was not theirs but was made by Mr Mark. No doubt with the best of intentions he was offering a temporary solution until such time as the structural defect was repaired by the landlord. In that context the tenants were entitled to regard Mr Mark's suggestions that they *"rent out the flat until the wall was fixed"* and to *"proceed with the sub-letting"* as assurances or representations that they could let their respective flats without further ado and without the necessity of complying with the minutiae of the sub-letting restrictions. Certainly the tenants interpreted the suggestions in that way and we are satisfied that they were entitled to do so.

28. Equally we do not accept Mr Healey's argument that any waiver could only have applied to the initial sub-lettings. The waiver was time limited in that it related to a period *"until the wall was fixed"*. The end date of the waiver was under the landlord's control and landlord must account for its apparent failure to undertake the repairs over a period of more than 4 years. Section 148 of the Law of Property Act 1925 does not restrict or nullify a time limited waiver of a covenant or condition and neither did the waiver in this case operate as a general waiver: it would come to an end when the structural defect was repaired.

29. The Swanston Grange decision conflates waiver and promissory estoppel. They appear however to be separate doctrines. The Law of Property Act

1925 refers only to waiver and there is no suggestion that the beneficiary of the waiver must have suffered a detriment. In answer to our questions Mr Healey said that he did not suggest that the tenants must demonstrate that they had suffered a detriment. We are nevertheless satisfied that they did indeed alter their position to their detriment: they proceeded with the sub-lettings, they did not investigate the possibility of selling their flats at discounted prices and they forbore for the better part of 4 years to take any action to require the landlord to remedy the structural defect.

30. Consequently and for each of the above reasons we conclude that the landlord waived the sub-letting restrictions until such time as the flank wall is repaired and that consequently there has been no breach of those restrictions.

31. Finally we turn to the section 20C application. To the extent that the costs might be recovered through the service charge the right to recover them is a property right which should not be lightly disregarded. Section 20C however provides that a tribunal may *"make such order on the application as it considers just and equitable in the circumstances"*. Those words permit us to take into account the conduct of the parties in deciding whether to make an order.

32. The tenants have been wholly successful in these proceedings. Furthermore it is reasonable to consider the landlord's motive in bringing the proceedings. It is significant that these applications were only made after the tenants had applied for the appointment of manager even though the landlord must have been aware that Ms Arora at least had been sub-letting her flat for a considerable period of time.

33. Even if we are wrong about the waiver of the sub-letting restrictions it seems to us inconceivable that any court having regard to the background facts would sanction the forfeiture of these two valuable residential leases. When we asked Mr Healey if his client actually intended to seek forfeiture he sidestepped the question by saying that he had no instructions despite the fact that instructions could have been obtained from Ms Erkman who was sitting behind him. We are satisfied that these proceedings were brought by the landlord principally in retaliation for the tenants' application for the appointment of a manager and to that extent may be regarded as an abuse of process.

34. For each and all of these reasons it would be wholly unjust and inequitable if the landlord were permitted to recover any part of the cost of these proceedings from the tenants through the service charge and accordingly we make the order sought by the tenants.

Name: Angus Andrew **Date:** 7 May 2015

Appendix of relevant legislation

The Commonhold and Leasehold Reform Act 2002

Section 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 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.

Landlord and Tenant Act 1985

Section 20C Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in

determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

The Law of Property Act 1925

Section 143 – Effect of licences granted to lessees

(1) Where a licence is granted to a lessee to do any act, the licence, unless otherwise expressed, extends only—

(a) to the permission actually given; or

(b) to the specific breach of any provision or covenant referred to; or

(c) to any other matter thereby specifically authorised to be done;

and the licence does not prevent any proceeding for any subsequent breach unless otherwise specified in the licence.

(2)Notwithstanding any such licence—

(a)All rights under covenants and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, condition or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and

(b)The condition or right of entry remains in force in all respects as if the licence had not been granted, save in respect of the particular matter authorised to be done.

Section 148 – Waiver of a covenant in a lease

Where any actual waiver by a lessor or the persons deriving title under him of the benefit of any covenant or condition in any lease is proved to have taken place in any particular instance, such waiver shall not be deemed to extend to any instance, or to any breach of covenant or condition save that to which such waiver specially relates, nor operate as a general waiver of the benefit of any such covenant or condition.