FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LBC/2015/0106**
Property	:	**84 Maitland Court, Lancaster Terrace, London W2 3PE**
Applicant	:	**Maitland Court Limited**
Representative	:	**Angela Piears instructed by Wagner & co**
Respondent	:	**Dugald Komla Agble**
Representative	:	**-**
Type of application	:	**Determination of an alleged breach of covenant: s168(4) CLRA 2002**
Tribunal members	:	**Judge Hargreaves** **Alan Manson FRICS**
Date and venue of hearing	:	**9th December 2015 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**9th December 2015**

DECISION

The Tribunal directs as follows:-

1. The Tenant is in breach of the covenants contained in clauses 3(7)(c) and 3(8) of the lease of flat 84 Maitland Court, Lancaster Terrace, London W2 3PE dated 11th February 2013 and made between the Applicant as landlord of the first part, and the Respondent as tenant of the second part.

2. The Respondent must pay the Applicant the sum of £2599.44 in respect of its costs of the proceedings pursuant to Tribunal Rule 13 by 5pm 30th December 2015.

REASONS

1. By an application dated 7th October 2015 the Applicant applied to the Tribunal for an order pursuant to *s168(4) Commonhold and Leasehold Reform Act 2002* that the Respondent had breached clauses 3(7)(c), 3(7)(d), 3(8),and clause 4(4) of the lease referred to above (see p12 of the Applicant's bundle). In its submissions those covenants were referred to as 3(7)(b), 3(7)(c), 3(8) and 4(4). For the avoidance of doubt we will refer to all alleged breaches in this decision, having notified the parties orally at the end of the hearing that we found the breach made out in the case of clauses 3(7)(c) and (8). Ms Piears, who appeared for the Applicant, did not actually address the provisions of clause 3(7)(d). The crux of the case is that the Applicant's case that the Respondent sub-let his flat without applying for the Applicant's consent, is proved.

2. Directions were given on 22nd October 2015, and implemented by both parties with something of a hit and miss approach. The Applicant decided that as there was no apparent factual dispute, it would save costs by relying on a limited number of emails exhibited between pages 48-60 of its bundle, and not put in any witness statements or other evidence, reserving the right to do so should it become necessary, which is gambling on compliance with directions. The Respondent, who sent the Applicants a bundle on or about 30th November (a few days late, it does not appear to have been received by the Tribunal, but a spare was available), provided a witness statement which started with the sentence *"I informed the building manager and [the Applicant] of the new tenancy and they were aware of the new tenancy commencing (see email correspondence around 4th September 2015)"*. That suggested that the Applicant's confidence that there was no factual issue might be misplaced so it would have been helpful had the Applicant dealt with the Respondent's allegations by way of evidence in reply before the hearing. As it was the Tribunal spent time considering the Respondent's evidence, and he was cross-examined by Ms Piears. Our findings on the facts are set out below.

3. Before we turn to the facts, the relevant provisions of the lease are as follows. The Respondent covenanted by clause 3 of the lease (which is a long lease for the purposes of *s168*) as follows. Pursuant to clause

3(7)(c) he covenanted *"Not at any time to sublet the demised premises for a term of less than six months"*. As it turns out, there is no breach of this covenant (see below). More critically the Respondent covenanted by clause 3(7)(c) *"Not at any time to sublet the Demised Premises without the Lessor's written consent (not to be unreasonably withheld or delayed) provided that the Lessor may withhold its consent where the lessee is in material breach of any of his obligations in this Lease."* By clause 3(7)(d) the Respondent covenanted to include certain required covenants *"in any deed or other agreement for the sub-letting of the Demised Premises"*.

4. By clause 3(8) the Respondent covenanted to give notice in writing (with the usual relevant details and information as required) to the Applicant or the managing agent of any such subletting within fourteen days. As the relevant tenancy agreement is dated 11th September 2015 and a copy was first served on the Applicant as an exhibit to the Respondent's evidence on or about 30th November, there is a clear breach of the clause 3(8) covenant without further explanation. It is also clear from the tenancy agreement that as the flat was let to Notting Hill Housing Trust for a term of three years from 11th September 2015, there is no breach of clause 3(7)(b) of the lease.

5. By clause 4(4) the Respondent covenanted to *"observe and perform the regulations in The Fourth Schedule hereto ..."*. The Applicant says there the Respondent has breached the provisions of paragraphs 1 and 20 of the Fourth Schedule. Paragraph 1 requires the flat to be used *"as a single private dwelling only and in a manner appropriate to a block of high class residential flats."* Paragraph 20 refers to observing the regulations for *"the comfort safety and convenience of all the occupiers thereof."* The Tribunal declines to find this alleged breach made out on the basis that the Applicant simply did not bring any proper evidence to the Tribunal on the point which would enable it to do so. This type of allegation requires factual evidence set out in witness statements which enable the Respondent to understand the particularity of the case being made against him. Secondhand or hearsay allegations suggesting the undesirability of the current occupier of flat 84 are insufficient to discharge the burden of proof.

6. The Tribunal heard oral evidence from the Respondent, who was cross-examined by Ms Piears. The thrust of his evidence was that the emails exhibited and relied on by the Applicant at pages 48-60 of the bundle it served, were misleading, and that the Tribunal should take into account further emails he exhibited, which demonstrated that the Applicant was aware that he had granted a new tenancy, and he assumed that the usual grant of a licence would ensue. To this effect the Respondent exhibited emails passing between himself and the Applicant's managers in September 2014 which show that he entered into some form of agreement with an occupier called Trisha Williams who moved in before a licence was granted, but that a licence was granted fairly promptly, after what looks like contact being made by the managers with the Respondent's letting agents. The September 2014 emails do

not really assist the Respondent insofar as he suggests they establish a pattern of behaviour because they relate to a different transaction about which there is no allegation of a breach, and it is clear that the Respondent was applying for a licence which he received.

7. The Respondent also exhibited emails between himself and the managers dated 4th September 2015 but while they show that Notting Hill (NHHT) was being given keys and entry to the flat for carrying out works (and that the managers on site must have known this to be the case), there is no evidence on which the Respondent could argue that the emails amounted to an application to the Applicant for a licence to sublet to NHHT. In cross examination he agreed that he had made no application for written consent to sublet to NHHT. That on any view entitles the Tribunal to find a breach of clause 3(7)(c).

8. As Ms Piears submitted, it is clear that the managers took a strong line with the Respondent once it came to their attention that the flat had been let to NHHT and that one of their clients was to occupy it (email dated 22nd September). It is clear from their evidence (p48-60) that they took the view all along that the Respondent had to apply for written consent to sublet. The Respondent agrees that he still has not done so. His attempt to justify his position by suggesting that there was no application but there was *"a conversation"* which amounted to the same thing as an application (which again is not the same thing as obtaining the written consent), fails when considered against his acceptance in cross examination (recorded above), that he had not made the relevant application. Furthermore, vague references to conversations and other emails will not assist when the evidence is simply not before the Tribunal, despite directions on the point. Whether or not, as the Respondent suggests, the Applicant would be taking this hard line had he not let to NHHT who might have placed a client in the flat whose behaviour has been documented as unsatisfactory (see eg p59) is not to the point. Those issues might arise for consideration in the context of whether any refusal is reasonable or not but the behaviour of the current occupier is not a matter for the Tribunal in the context of this application – particularly given our decision on clause 4(4). It follows that the Applicant has made its case out on the facts before the Tribunal as determined above.

9. As to costs, Ms Piears made a Rule 13 application for costs on the basis that the Respondent had no real defence to the application, and what he argued was unmeritorious. Furthermore he had not even disclosed the NHHT lease until after the proceedings were issued, so it could not be said that the Applicant was at fault running the clause 3(7)(b) allegation which failed (and she is right about that). Although the Respondent accepted (at the hearing) that there was a breach of the lease he described it as *"technical"* which arguably demonstrates a failure to take the Applicant's concerns as raised in the emails, seriously. On balance the Tribunal has concluded that the Respondent did defend the application unreasonably: the evidence he brought to the Tribunal was plainly inadequate on a straightforward case.

10. It follows that the Respondent must pay the Applicant's costs of the application on the standard basis which will be summarily assessed.

11. Hourly rates: the application was managed by a grade A fee earner in London region, band 3, and the hourly rate is within the guideline rates. It could be argued that the proceedings could have been handled by a grade B practitioner, but the issue concerns the management of a block and on balance, justifies the use of a grade A fee earner. The hourly rate of £235 is therefore allowed.

12. The charges for attendance on the Applicant, the Respondent, and others are not unreasonable and are allowed.

13. Work on documents: items 1, 3, 4 and 5 are reasonable and allowed. Item 2 is excessive given the substance of the submissions, the size of the bundle, and the fact that counsel was instructed. The bundles could have been prepared by a much more junior fee earner. 1.5 hours will be allowed instead of 3.5 hours.

14. Counsel's fees: no skeleton argument or pleadings were prepared by counsel, for a relatively short hearing with very little evidence to deal with. The £800 brief fee is on the high side and a more reasonable figure for the Respondent to pay (bearing in mind that doubts on an assessment on the standard basis should be resolved in favour of the paying party) is £650.

15. The total amounts to £2158.70 plus VAT (£431.74) plus £9 disbursements, producing a grand total of £2599.44.

Judge Hargreaves
Alan Manson FRICS
10th December 2015