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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/31UC/LBC/2016/0009**
Property	:	**24 Old Station Road, Syston, Leicester, LE7 1NT**
Applicant	:	**Riverside Housing Association Ltd**
Respondent	:	**Mr and Mrs Shephard**
Type of Application	:	**Under section 168(4) Commonhold and Leasehold Reform Act 2002 (the Act) for an order that a breach of covenant has occurred**
Tribunal Members	:	**Judge S McClure** **V Ward FRICS**
Date of Decision	:	**23 February 2017**

DECISION

Decision of the tribunal

(1) A breach of the covenants contained in Clauses 3.15.2 and 3.30 has occurred.

The application

1. The Applicant seeks an order under section 168(4) Commonhold and Leasehold Reform Act 2002 (the Act) for an order that a breach of covenant has occurred.

The Background

2. The Applicant is the owner of the freehold of a block of four flats (the Building) which includes 24 Old Station Road, Syston, Leicester, LE7 1NT (the Property).

3. The Respondents, Mr and Mrs Shephard, are the leaseholders of 24 Old Station Road.

4. The section 168(4) application was made to the Tribunal on 28 November 2016. On 17 February 2017 the Tribunal conducted an inspection of the Property.

5. Neither party requested an oral hearing, nor did the Tribunal find that an oral hearing was necessary. The Tribunal came to its decision on the basis of the written submissions of the parties, which are mentioned specifically below where necessary.

The law

Commonhold and Leasehold Reform Act 2002

Section 168

(1) A landlord under a long lease of a dwelling may not service a notice under section 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 subsection 2 is satisfied.

(2) This subsection is satisfied if
   (a) it has finally been determined on an application [to a First-tier Tribunal] that the breach has occurred...

6. It is important to appreciate that an application by the landlord under section 168 (4) of the Act may lead to the service of a section 146 notice under the Law of Property Act 1925 and a subsequent application to the Court for an order for forfeiture of the lease.

The Lease

7. The lease contains the following provisions:

   (i) 3.15.2 *"Not to underlet the whole of the Premises."*

   (ii) 3.17.1 *"The Leaseholder shall not during the period of twenty-one years after effecting a Final Staircasing in accordance with the Fifth Schedule..... 3.17.1.2 underlet pursuant to an underlease for a term of more than twenty-one years otherwise than at a rack rent the whole of the Premises..."* (the rest of this lengthy clause sets out the conditions upon which such an underlet is permissible under the lease)

   (iii) 3.17.2 This clause deals with notice provisions when underletting the whole.

   (iv) 3.30 *"Not to use the Premises...for any purpose whatsoever other than as the Leaseholders only and principal private residence...."*

   (v) Schedule 5 at 1.5 provides a definition of Final Staircasing, which occurs when the Leaseholder obtains 100% of the lease.

Inspection and submissions

8. There were written submissions from both parties.

9. On 17 February 2017 the Tribunal conducted an inspection of the Property. In attendance were Ms Leech from Riverside Housing Association Ltd, and Mr and Mrs Shephard.

10. Nothing material to the application arose from the inspection.

Facts not in issue

11. Mr and Mrs Shephard purchased the lease to the Property in 2016. The Property was a shared ownership property. The previous leaseholder owned less than 100% of the lease. Upon their purchase of the lease, Mr and Mrs Shephard obtained a 100% share.

12. Mr and Mrs Shephard do not occupy the Property as their only or principal home, or at all.

13. Mr and Mrs Shephard have let the Property to their daughter-in-law under a 6 month rolling Assured Shorthold Tenancy, who lives there with her young child, the grandchild of Mr and Mrs Shephard.

Issues for determination

14. The issues for determination by the Tribunal are:

(i) Whether the Respondents have underlet the whole of the Property as prohibited by Clause 3.15.2.

(ii) If the Respondents have underlet the whole of the Property, whether that is a breach of the lease, specifically whether Clause 3.17.1.2 confers a right on the Respondents to underlet the whole despite the provisions of Clause 3.15.2.

Clause 3.15.2 – Prohibition of Underlet of the whole

15. It is not disputed that the Respondents have let the whole of the Property to their daughter-in-law on an Assured Shorthold Tenancy. It is accepted by both parties that the only occupants of the Property are the Respondents' daughter-in-law and her child.

16. The Respondents submit that the letting of the Property to their daughter-in-law is not subletting, because there is no restriction within the lease on allowing family members to occupy the Property.

17. The Applicant has not contended that there is any such restriction within the lease. However, this is not the point in dispute. The point in dispute is whether or not there is a right to let the whole of the Property, not the identity of those to whom the Property is let.

18. The Tribunal finds that the Respondents have underlet the whole of the Property. This is contrary to Clause 3.15.2.

Clause 3.17.1.2 – Provision for Underlet of the whole

19. The Applicant contends that the Respondents are in breach of Clause 3.15.2 as they have underlet the whole of the Property on an Assured Shorthold Tenancy.

20. The Applicant contends that nothing in the lease overrides or cancels out Clause 3.15.2.

21. In correspondence dated 28 July 2016, the Applicant contends that Clause 3.17 does not state that sub-letting for a period of less than 21 years is permitted.

22. The Respondents contend that Clause 3.17.1.2 does allow for underletting for a term of less than 21 years if a certain process is gone through. They rely on advice given to them by the solicitors who dealt with their purchase of the lease, that they have the right to underlet the whole on an assured shorthold tenancy.

23. The Respondents contend that Clause 3.15.2 and Clause 3.17 are contradictory.

24. Each party has interpreted Clause 3.17 differently. The Applicant contends that Clause 3.17 does not provide for an underlet of the whole property for a period of less than 21 years. The Respondents contend that it does.

25. The Tribunal finds the wording of Clause 3.17 to be clear and unambiguous.

26. The Tribunal finds that Clause 3.17 allows for an underlet of the whole property for a term of more than 21 years, so long as certain conditions are met.

27. The Tribunal finds that Clause 3.15.2 prohibits an underlet of the whole, and Clause 3.17 provides for an exception to that prohibition in respect of a term of an underlet of more than 21 years.

28. Clause 3.17 does not confer a right to underlet the whole for a term of less than 21 years.

29. Neither party has referred the Tribunal to a clause in the lease which confers a right to underlet the whole for a term for less than 21 years. The Tribunal did not find such a term upon its examination of the lease.

30. The Tribunal finds that the Respondents have underlet the whole of the Property for a term of less than 21 years, and so are in breach of Clause 3.15.2.

31. The Tribunal finds that the relevant clauses are not contradictory, nor are they unclear. If the Tribunal found there was some uncertainty as to how the clauses should be interpreted, then it may need look to other matters to assist with that interpretation, for example, points raised by the Respondents in their Statement of Case and not dealt with in this decision, such as the content of the Applicant's Leaseholder's Guide. However, where the Tribunal finds that the meaning of the relevant clauses is clear, unambiguous and not contradictory, no further consideration is necessary.

Removal of the prohibition on underletting upon obtaining 100% of the lease

32. In its Statement of Case, the Applicant contends that Clause 3.15.2 does not 'fall away' once the leaseholder owns 100% of the lease.

33. In correspondence from the Applicant to the Respondents, dated 28 July 2016, the Applicant referred to Clause 2.12 of Schedule 5 (the Staircasing provisions), which lists the Clauses of the lease which no longer applied once the leaseholder obtained 100% of the lease. Clause 3.15.2 is not included in that list.

34. The Respondents cited the advice from their solicitor who advised that the prohibition on underletting the whole does not apply to the Respondents as they have 100% of the lease. The Respondents did not refer the Tribunal to a clause in the lease which removes the prohibition on underletting the whole in circumstances where the leaseholder owns 100% of the lease.

35. The Tribunal did not find such a term upon its examination of the lease.

36. The Tribunal finds that there is no provision within the lease that removes the prohibition on underletting upon the leaseholders obtaining 100% of the lease.

Clause 3.30 – occupation as principal home

37. The Tribunal finds, as not disputed by the Respondents, that the Respondents do not occupy the Property as their only or principal home. The Tribunal finds that the Respondents are in breach of Clause 3.30.

In reaching their determination the Tribunal has had regard to the evidence and submissions of the parties, the relevant law and their own knowledge and experience as an expert Tribunal but not any special or secret knowledge.

If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Prior to making such an appeal, an application must be made, in writing, to this Tribunal for permission to appeal. Any such application must be made within 28 days of the issue of this decision which is given below (regulation 52 (2) of The Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rule 2013) stating the grounds upon which it is intended to rely on in the appeal.

Name: **Judge S McClure**

Date: **23 February 2017**