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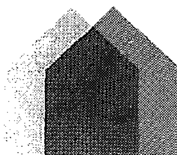

Residential Property
TRIBUNAL SERVICE

DECISION BY THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002 SECTION 168(4)

Ref: LON/00AM/LBC/2007/0025

Property:	Ground Floor Flat, 11B Goulton Road, London E5 8HA
Applicant:	Raj Properties Ltd
Respondent:	Ms Mikeen Costello
Appearances:	Mr Ajay Arora, Arora Solicitors For the Applicant Ms Mikeen Costello - in person
Date of Hearing:	9 July 2007
Members of Tribunal:	S Shaw LLB (Hons) MCIArb Mr P M J Casey FRICS Ms T L Downie MSc
Date of Decision:	25th July 2007

DECISION

INTRODUCTION

1. This case involves an application dated 10 May 2007 ("the Application") and concerns the property situate and known as the Ground Floor Flat, 11B Goulton Road, London E5 8HA ("the Property"). The Freeholder of that property and the Landlord for present purposes is Raj Properties Ltd ("the Applicant"). The Property has been let on a long lease dated 21 April 1988 and the present Leaseholder is Ms Mikeen Kostello ("the Respondent"). Directions were given for the disposal of this matter by the Tribunal on both 17 May and 14 June 2007, and the matter came before the Tribunal for a hearing on 9 July 2007. On that occasion Mr Ajay Arora of Arora Solicitors, appeared for the Applicant. Ms Costello, the Respondent, appeared in person and represented herself.

THE ISSUES

2. The application is for a determination, for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, to the effect that the Respondent is in breach of covenant of this lease by having sub-let the Property to a third party. It is that issue upon which the Applicant seeks a determination in the context of this hearing.

FACTUAL BACKGROUND

3. Both parties prepared bundles of documents disclosing the background to this matter and also made oral representations to the Tribunal expanding upon that background. Large parts of the background are not in dispute. The position is that Office Copy entries disclose that the Respondent took an assignment of the lease which assignment was registered in June 1998. The Property was purchased by the Respondent with the assistance of a mortgage from Mortgage Express Ltd and was specifically a "Buy to Let" mortgage. She wrote to the Applicant Landlord on 22

February 1999 confirming that there were tenants in occupation and asking for correspondence for her attention to be addressed to her own address at 67 Brooke Road, London N16 7RA.

4. That letter was returned to her on 25 February 1999 with a hand written note signed by a Director of the Applicant company (in fact he remains a Director) acknowledging receipt of certain ground rent, and stating that *"You need the freeholders' (our) permission for letting the property. Agreement is to be drawn and insurance is to be affected accordingly. Kindly telephone us to discuss the matter. If we don't hear from you, we will have to inform Mortgage Express. Give us your phone number".*

5. It is worth observing that that note does not in terms suggest any objection to the sub letting; it asserts that permission is required and *"insurance is to be affected accordingly."* There is an indication that in the absence of contact being made, the Respondent's mortgagees would be informed - a course of action which would cause no concern to the Respondent, since letting was specifically the reason for mortgage having been obtained.

6. The Respondent in evidence and in written submissions to the Tribunal, informed the Tribunal that she responded to the invitation to *"give us your phone number"* by phoning that very day and speaking to a woman called Ruby at the Applicant's offices. Ruby, according to the Respondent, explained that her main concern on learning that the Respondent had a "Buy-to-Let Mortgage" was not there was any breach of condition of her mortgage or the lease, but that there may be insurance implications both for the Applicant and the Respondent. She told the Respondent that she would "find out" and phone her back.

7. According to the Respondent, there was indeed a subsequent telephone conversation when Ruby told the Respondent everything was all right, that she could rent out her flat and that future correspondence would be directed to the Respondent at her home address and that there was no danger that the insurance premium would increase. Thereafter the

Applicant did indeed correspond with the Respondent always at her home address at 67 Brooke Road. She told the Tribunal she was left with the clear impression she had been given permission to sub-let and, in so far as any such permission was required, it had been granted. She was not told to apply for any further licence and the fact that the correspondence was subsequently directed to her home address, makes it strongly supportive of her understanding that the Applicant was well aware that the property was being sub-let.

8. The Applicant in response, through Mr Arora, told the Tribunal that the woman called Ruby did indeed exist, and that she had been employed in the Applicant's office at the time. No attempt had been made to check the Respondent's account of the conversation with Ruby, although Mr Arora confirmed that it was perfectly possible for the Applicant to have made contact with her. Mr Arora's contention was that the manuscript note referred to on the letter bore the meaning that the Applicant was expecting the Respondent to apply for permission to sub-let if she proposed to continue with the subletting, which application they would have granted had she in addition paid them an annual fee for the privilege of being allowed to sub-let. In the event, she did not make such application and, contended Mr Arora, the Applicant therefore assumed that the subletting had been brought to an end.

9. After that exchange in February 1999 the Applicant sent out repeated demands for ground rent, insurance and service charges to the Respondent at her home address at 66 Brooke Road, - in January 2001, December 2001, December 2002, January 2003, January 2004 and February 2005. It was not in dispute that these demands were sent and some monies received during this period from the Respondent. Mr Arora's contention on behalf of the Applicant was that these demands had been made and monies received on the understanding by the Applicant that the subletting had come to an end.

10. However, there is a significant letter dated 5 July 2005 from the Applicant to the Respondent expressed to have arisen upon *"an internal audit of our records"* which alleges against the Respondent that she has been *"letting without permission"*. Mr Arora confirmed to the Tribunal that the Applicant had no more information at that stage than it had had in the preceding six years, which would appear to make it difficult to contend that the previous understanding was that the subletting had come to an end.

11. The letter goes on to assert:

"To let your flat is a breach of the covenants of the lease. According to our records you have been in breach of that covenant since at least 9 February 1999..... On 22 February 1999 we advised you that lessor's permission to let was required.
At our discretion. a licence to let could be granted to remedy your breach for a fee of £500 per annum renewable annually plus legal charges of £200 to prepare an initial licence. This fee is under review now and will increase. Without prejudice we are willing to offer to waive your breach on the following basis: ..."

The letter then purports to require a licence fee for seven years from February 1999 to February 2006 at a rate of £500 per annum (£3,500), together with legal fees to prepare the initial licence to let, amounting to £200 thus producing a total of £3,700. The letter then concludes that in the absence of hearing from the Respondent or an effort to remedy the breach, legal proceedings will be commenced for forfeiture of the lease.

12. It is perhaps worth recording that when asked by the Tribunal upon what basis the £500 per annum was being demanded, Mr. Arora told the Tribunal that this was a reasonable sum for investigating the suitability of the sub-tenant in the premises. Of course there would have been no such investigation for the period preceding to July 2005 and in relation to that, Mr Arora told the Tribunal that the sum claimed was by way of *"recouping the lost revenue- producing opportunity of the past years."*

13. The Respondent replied to that letter by letter dated 19 August 2005, and informed the Applicant that she had always bought the property with the specific intention of *"renting it out"*, and that that fact had always been made known to the Applicant. She pointed out that correspondence had always been directed to her home address, and that the Applicant had known perfectly well that she was not living at the property. She specifically referred to the telephone conversation that she had had with Ruby, and the indication that she had been given that the sub-letting was not problematic. Having heard no further from the Applicant, and given their clear knowledge of what had happened, she had assumed they were content concerning the terms of her mortgage and her "lease" - (by which she explained to the Tribunal, she meant the agreement which she had understood she had received by telephone).

14. Notwithstanding that clear assertion from the Respondent in correspondence, there is then an hiatus in the correspondence put before the Tribunal by both sides of some seven months, before the Applicant reverts to the Respondent, again asserting that she is in breach of covenant and threatening legal proceedings. However, at that stage, at any rate, no proceedings were commenced, and indeed by letter dated 7 June 2006 the Applicant continues to correspond with the Respondent at her home address, addressing her as *"Dear Leaseholder"* and telling her about various changes in policies in respect of the insurance cover. It is not until 8 June 2006 that they deal substantially with her letter of 19 August 2005, asserting that they had not received that letter until 23 March 2006. They assert in that letter that it was her duty to follow up the position after the exchange in February 1999 (an assertion repeated by Mr Arora before the Tribunal) and again assert that there is continuing breach of covenant of the lease. They go on to add however:

"To resolve matters outside legal recourse we are willing to accept compensation and arrears as calculated in the enclosed invoice.... ....." The accompanying statement with that invoice (headed "without prejudice"

and dated 8 June 2006) makes a demand for £4,675.71 as a basis for granting permission to sublet, a total of £4,294 of which relates to purported licence and legal fees and administration charges relating to a breach of covenant.

15. At that stage the Respondent sought legal advice. A letter was written to the Applicant in August 2006 by the Respondent which letter was either drafted by solicitors whom she had consulted or was otherwise with legal advice. Reference will be made to that letter later in this decision. After that letter had been written the matter moved towards the Application to this Tribunal for a determination, which application was made earlier this year.

<u>SUMMARY OF EACH PARTY'S POSITION</u>

16. A condensed version of the parties' respective positions, as appearing in the written representations to the Tribunal and expanded in oral argument is as follows. The Applicant on the basis of the background set out above contends that the upshot of the exchange described in February 1999 was to put the Respondent on notice she was required to make a formal application for Licence to Sublet, and that unless she did so the Applicant was entitled to assume, and did assume, that the sub-letting of which they had been specifically informed had been brought to an end. That remained the position until the *"internal audit"* some six years later on 5 July 2005 when, by letter of that date, for reasons unexplained, somebody within the Applicant's administration took a different view of the correspondence and background and concluded that the Respondent had not ceased subletting, and that the result of this was she had been *"in breach of that covenant since at least 9 February 1999"*.

17. Although there was continuing correspondence with her after that date at an entirely separate address, coupled with invitations that she should pay a substantial premium for being allowed to sublet, this was all *"without*

prejudice" and on the basis that the Applicant was preserving its right to forfeit if no agreement could be reached.

18. The Respondent, in the context of the letter written in August 2006, with legal advice, makes three contentions:

    (i) There is a common law entitlement to sublet which entitlement can only be prevented or hampered by a clear covenant to the contrary - see ***Old Grovebury Manor Farm Ltd v Seymour Plant Sales and Tier Ltd [1973] 3All ER504***

    (ii) The particular covenant relied upon (which will be referred to below) by the Applicant does not constitute a prohibition against sub-letting and there is no other covenant in the lease precluding sub-letting.

    (iii) Even if, contrary to this contention, the covenant to be referred to does preclude sub-letting, the Applicant is not entitled to rely upon it by virtue of the consent given in 1999, or to be deduced from the failure to make any particular formal objection thereafter, and the continuing correspondence and demands for and acceptance of payments, constituting a waiver.

19. In addition, the Respondent makes a general point, that in so far as there is any ambiguity in the provision relied upon by the Applicant, that ambiguity is to be resolved in favour of the Respondent rather than the Applicant, - in other words *"contra proferentem."*

20. It is appropriate that the covenant relied upon by the Applicant is set out in full. It appears at clause 2(16) of the lease and provides that the lessee covenants with the lessor:

    "To use the flat as a private dwelling for the lessee and his family and for no other purpose".

21. There is long standing authority (which was not disputed on behalf of the Applicant) that at common law, a tenant has the right, unless restrained by his lease or agreement from so doing, to sub-let the demised premises or

part of them. Further, it has been held *that ".... a tenant should not be deprived of that right except by clear words or circumstances which make it clear that the parties so intended"* - see **Sweet and Maxwell v Universal News Services [1964] 2QB 699.**

22. At paragraph 11.113 of Woodfall on Landlord and Tenant, it is provided that:

"Even where the tenancy does contain an obligation not assign or sub-let. the landlord may be estoped by his conduct from relying upon the covenant, if both parties have acted on the assumption that no such covenant was contained in the tenancy." .... see ***Troop v Gibson [1986] 1EGLR1.***

23. It seems clear to the Tribunal that the covenant referred to above is in the nature of a "user" covenant and not a covenant against alienation. Mr Arora endeavoured to argue before the Tribunal that the use of the words *"to use the flat as a private dwelling for the lessee"* meant that the lessee and only the lessee, could use the premises as a private dwelling. The Tribunal does not agree with this construction. The covenant does not provide that the flat has to be used "by" the lessee himself, or occupied by the lessee, merely that the flat has to be used as a private dwelling for (or as the covenant could be read *"for the benefit of")* the lessee. In any event, in so far as there is any ambiguity, the agreement has to be construed strictly and against the Landlord in cases of such covenants. There are well recognised forms of covenant excluding alienation by way of sub-letting or otherwise, familiar to all property lawyers and there is a complete absence of any such provision in this lease. It is the view of the Tribunal that any lawyer reading this lease would come to the conclusion there is no prohibition against sub-letting and that the covenant relied upon goes to the use of the property as a private dwelling for residential purposes, as opposed to business or multiple occupation.

24. That view is fortified by an earlier covenant in the lease whereby the Tenant covenants with the Landlord at clause 2(13):

"Within one calendar month after every assignment transfer charge mortgage or devolution of any interest in the demised premises or any part thereof, to give the lessors solicitors notice in writing….."

It does not seem to the Tribunal that this covenant sits well with the Applicant's construction. Clause 2(16) read with clause 2(13) clearly envisages that the Tenant can indeed create an interest out of the lease in relation to the demised premises or any part thereof.

25. A further case relied upon by the Respondent is that of ***Downie v Turner and Another [1951]2KB112.*** In that case the Tenant covenanted that he would not use the premises for any purpose other than as a private dwelling house. Somerville L J stated that:

"I have considerable doubt whether on the construction of this lease, a sub tenancy of part of the house to be used as dwelling house by a sub tenant is a breach of a covenant whereby the Tenant agrees that he will not use the said premises for any purpose other than as a private dwelling house…. Of course, if a lessee sub-lets for some purpose other than as a private dwelling house, both covenants are broken, but where he sublets for the purpose of use as a private dwelling house, it seems to me difficult to say that that is a breach of the first covenant….."

26. The case is not exactly on all fours with the present scenario but is some support for a contention that a subletting of the kind which exists in the present case is not a breach of the user covenant.

27. For the reasons indicated, the Tribunal is satisfied that there is no prohibition against sub-letting in this lease, and for that reason alone this Application must fail.

28. In case the Tribunal should be wrong in this finding, it is appropriate that the other arguments raised in this case are dealt with, albeit shortly. The view of the Tribunal is that the Respondent is correct in her contention that even if, contrary to the findings made above, the user covenant indeed precludes subletting, such subletting has either being consented to, or the breach of covenant waived by or on behalf of the Applicant. The reason for this is that so far as consent is concerned, the Tribunal accepts the evidence of the Respondent that she was told during the telephone conversation which took place with the woman called "Ruby" in the Applicants offices in early 1999, that the Applicants prime concern was that insurance cover should not be put at risk, - and having satisfied themselves that this was not a concern, the sub-letting could continue and was in effect consented to.

29. This is completely consistent with the subsequent conduct in correspondence referred to above, which repeatedly recognises the continued existence of the tenancy and indeed is all directed to the Respondent at a completely different address which she has expressly told the Applicant is her home address. The conversation with Ruby was not expressly challenged before the Tribunal and no evidence was forthcoming on behalf of the Applicant from this lady to deal with the Respondent's evidence, not withstanding the fact that she is apparently still accessible to the Applicant, albeit no longer working for the company.

30. Secondly, the Tribunal does not consider that it is open to a Landlord in circumstances where a breach is being relied upon as a peg upon which to hang a claim for forfeiture, to treat the tenancy as continuing on a *"without prejudice"* basis. It is trite law that it is not necessary that the Landlord should intend to waive the right to forfeit. If, objectively, his act recognises the continued existence of the tenancy, a waiver will result irrespective of his intention. Thus the acceptance of rent because of clerical error will amount to a waiver, as will the receipt of rent without prejudice and under protest - see generally Woodfall of paragraphs 17.095 - 17.098.

31. It seems to the Tribunal that the continuous correspondence from 1999 demanding and accepting monies from the Applicant - and particularly after 5 July 2005 (when even the Applicant concedes there was knowledge of sub-letting) could only be consistent with a recognition that the lease is continuing, and amount to a waiver of any alleged breach of covenant.

32. A late argument was made by Mr Arora on behalf of the Applicant that since there had been an increase in the rent during the past year this amounted to the creation of a new tenancy agreement, and that that particular tenancy agreement had not been consented to by any particular conduct on behalf of the Applicant. However, it seems to the Tribunal upon the evidence before it, and in particularly in light of the evidence given by the Respondent, that there has been a clear representation in this case to the Respondent to the effect that objection was not being taken to the subletting, and that in all the circumstances the Applicant is estopped from relying on subletting as a breach of covenant by the Respondent.

33. The Respondent told the Tribunal, and the Tribunal accepts, that she would never have purchased this apparently very tiny flat for her own occupation or that of her family, and would certainly not have continued to pay an annual licence fee given that she would have to pass this on to any Tenants, and would be unlikely to be able to recover such a fee. She said, and the Tribunal accepts, that after the Respondent had threatened legal proceedings, but took no such proceedings, she was satisfied that they had investigated the position and discovered that she was indeed entitled to sub-let, and accordingly she continued to do so.

CONCLUSION

34. In this case the Tribunal determines that the Application fails for the primary reason that there is no express prohibition against subletting in this lease. If, contrary to this conclusion, the user clause is to be construed as a prohibition of sub-letting, the Tribunal finds for the subsidiary reasons referred to as above, that sub-letting has either been consented to or waived, or that the Applicant is estopped from relying upon the sub-letting referred to in evidence before the Tribunal as a basis for alleging breach of covenant.

35. No applications for costs by either party were made and no orders for costs are made.

Chairman: S Shaw

Dated: 25th July 2007