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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

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| **Case Reference** | : | **CHI/00HN/LAC/2013/0013** |
| **Property** | : | **Flat 8 Stewart Court, 50 St Michaels Road, Bournemouth, Dorset, BH2 5DY** |
| **Applicant** | : | **Mr Adrian Woolley** |
| **Representative** | : | **-** |
| **Respondent** | : | **New Era Investments Limited** |
| **Representative** | : | **E&J Estates** |
| **Type of Application** | : | **Administration charges : schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), and section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act")** |
| **Tribunal Members:** | | **Judge P R Boardman (Chairman)** |
| **Date and venue of Hearing** | : | **26 November 2013 Decided on the papers without a hearing** |
| **Date of Decision** | : | **26 November 2013** |

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**DECISION**

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## Introduction

1. This is an application by the leaseholder for a determination about the liability to pay an administration charge

2. The Tribunal decided the application on the papers pursuant to rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, neither party having made any objection following the Tribunal's directions in that respect dated 13 September 2013

## The grounds for the application

3. The Applicant stated that his lease was dated 24 June 1990 and was for a term of 99 years. He purchased the lease on 30 March 2010

4. Paragraph (m) of part I of the third schedule to the lease [covenants by the lessee] was in the following terms:

> "Not to part with possession of the Flat or any part thereof except by way of assignment"

5. Shortly after purchasing the flat, the Applicant received from E&J Estates, then known as Eyre & Johnson, a "licence to sublet" form with a demand for payment of £235 on the grounds that paragraph (m) of part I of the third schedule to the lease stated that the lessee should not "assign, underlet or part with possession of the premises without the Landlord's written consent". The Applicant wrote to E&J Estates explaining that the paragraph was actually worded "not to part with possession of the property or any part thereof except by way of assignment", informing them that there was no mention anywhere in the lease of a licence to sublet, and asking them to remove the fees from his account

6. E&J Estates advised him that they had reworded the licence to sublet form to reflect the actual wording of the lease clause, but refused to remove the fee from his account on the grounds that he needed the landlord's permission in order to sublet

7. The Applicant did not believe that paragraph (m) of part I of the third schedule to the lease required him to obtain the landlord's permission before he could sublet, nor that the clause prohibited subletting. At no stage had he parted with possession of the flat, or any part of the flat. He had given up occupation of the flat but remained fully responsible for payment of the ground rent, maintenance charge and other sums for which the flats might be liable and he was the responsible person for any queries which had arisen in relation to issues at the block relating to flat 8

8. In addition to refusing to withdraw the charges from his account, E&J Estates had also refused to pass his request for a lease extension to the landlord until such time as the fee was paid

9. In support of his claim that permission was not required and subletting was not prohibited, he had pointed out to E&J Estates that paragraph 3 of part II of the third schedule to the lease contained a restriction :

> "Not to display any plate placard advertisement or board of any kind except a plate (bearing the Lessees name only) and the number of the Flat at the front door of the flat but this restriction shall not extend to the usual notice that the Flat is being let or sold"

10. E&J Estates had replied that if permission to sublet was granted then he was free to erect a to-let board but that, although the lease did not require permission to sublet, subletting was prohibited. That argument was irrational

**The Respondent' response 3 October 2013**

11. The Respondent stated that there was no conflict between the covenant on the part of the lessee not to part with possession of the flat or any part thereof except by assignment, and the permission to display a notice that the flat was being let. If the lessor permitted the lessee to sublet the flat notwithstanding the express terms of paragraph (m) of part I of the third schedule to the lease then the lessee required no additional consent from the lessor to display a notice. Alternatively, if the lessee parted with possession without the lessor's permission the lessee was at liberty to display a notice, but that did not mean that the lessee was not in breach of paragraph (m) of part I of the third schedule to the lease

12. The Applicant had sublet in breach of paragraph (m) of part I of the third schedule to the lease. Subletting necessarily involved the grant of exclusive possession to the sub-lessee. The Applicant's assertion that he had given up occupation but had not parted with possession was mistaken in both fact and law. Continuing responsibility for ground rent, maintenance charge and other sums was irrelevant

13. Faced with such a breach of covenant, it was open to the lessor to grant consent. It was a long recognised right of a lessor to impose terms and conditions when deciding whether or not to grant consent, including the right to demand costs as part and parcel of the granting of consent. Moreover, there was a long established practice that the lessee paid the reasonable costs of the lessor on an application for consent to assign or underlet

14. Paragraph (r)(c) of part I of the third schedule to the lease [lessee to pay the lessor all costs incurred in the granting of any consent under the lease] was not relevant. The consent offered by the Respondent was not granted under the lease, as the Respondent was not obliged to give, or consider giving, consent under the lease. Rather, the consent was offered in connection with a breach of covenant

15. The Respondent's costs amounted to £235 inclusive of VAT at 17.5%. Those costs constituted an administration charge being payable in connection with a breach of covenant in the lease

16. The Respondent set out details of how the sum had been calculated

17. The Respondent conceded that the lease did not require the Applicant to pay interest

18. The Respondent submitted that the application under section 20C was misconceived and should be dismissed. The lease did not permit the Respondent to include the costs of the present proceedings as part of a service charge

## The Applicant's response 9 October 2013

19. The Applicant stated that paragraph (m) of part I of the third schedule to the lease did not prohibit subletting. It ensured that when the lease was sold to another party or possession of the lease otherwise changed hands, perhaps because of the death of the lessee, the change of ownership was completed by an assignment, thus ensuring that the lessor was notified of the change. When the Applicant purchased the lease he gave notice of assignment and paid the relevant fee

20. The permission in paragraph 3 of part II of the third schedule to display the usual notice that the flat was being let highlighted that the probability that the flat would be sublet was not only considered but also catered for when the lease was being drawn up. It was not realistic to suppose that subletting was prohibited by the lease and yet permission to display a to-let board was granted just in case the lessee breached this prohibition, as the Respondent claimed

21. This was reinforced by the Respondent's own licence to sublet form, which, in its original version, set out the wording which the Respondent supposed paragraph (m) of part I of the third schedule to the lease to be, namely "not to assign, under let, or part with possession of the Premises without the landlord's written consent". If, as the Respondent now stated, the words "not to part with possession" meant that sub-letting was prohibited, than there would have been no need to mention subletting separately on the original licence to sub-let form, or, indeed, on the amended licence to sub-let form

22. The Applicant was not in breach of paragraph (m) of part I of the third schedule to the lease. He had not granted the sub tenant "possession" of the flat. He had granted the sub tenant occupation of the flat, subject to observance of the terms of the tenancy agreement. The Applicant remained responsible for all the costs mentioned in the lease and for maintenance issues and behavioural issues connected with the flat. The sub tenant paid the Applicant a monthly fee, which proved that the Applicant had retained constructive possession of the flat. The

applicant had granted the sub tenant occupation of the flat and clause 3.11.2 of the tenancy agreement provided that the "Tenant shall deliver up to the Landlord the Premises"

23. Any costs or conditions imposed by the lessor on the lessee should be determined by the Tribunal by reference to fairness, and not determined by tradition

24. The Respondent claimed that the fee of £200 plus VAT was a charge for breach of covenant. However, the Applicant was not in breach of covenant. In any event, there was no mention of the charge being for a breach of covenant in E&J's letter dated 10 May 2010, requesting payment of the license to sublet fee, their statement dated 11 May 2010, describing the charge as for "licence to sublet", not breach of covenant, or their letter dated 21 April 2010, requesting the Applicant's signature to the "landlord's form of licence"

25. The Applicant commented on the Respondent's details of how the sum had been calculated

26. The Applicant agreed that the lease did not require the Applicant to pay any interest charges

27. The Applicant agreed that if the Respondent was confirming that they would not attempt to include the costs of these proceedings as part of the service charge, or as part of any other charge, the application under section 20C could be dismissed

**Respondent's reply 4 November 2013**

28. The Respondent stated that parting with possession included, but was not limited to, subletting

29. It was trite law that it was of the essence of a lease, or a sub lease, that the tenant should be given the right to exclusive possession, ie the right to exclude all other persons from the premises. Under the terms of the sub tenancy agreement produced by the Applicant, exclusive possession of the flat was granted to the tenant by the Applicant. The keys to the flat had been delivered to the tenant by the Applicant. The Applicant would commit trespass if he entered without the tenant's permission and without authority under the agreement. That consequence was not avoided by use of words and phrases such as "occupation" and "constructive possession"

30. The Respondent resolved to grant licence to sublet notwithstanding the Applicant's breach of covenant. If it was not clear to the Applicants from the outset that the Respondent regarded him as being in breach of covenant, he was in no doubt upon receipt of E&J Estate's letter dated 17 May 2010

31. The Respondent conceded that the Applicant had not made an

application for licence to sublet. Rather, the Respondent offered to grant licence to sublet in response to the Applicant's breach of covenant

32. The Respondent conceded that there were errors in the original draft, but these were corrected

33. The Respondent made further comments about the work done and the calculation of the charge

34. The Respondent concluded that if, as the Applicant asserted, the lease permitted subletting than that was all that the Applicant needed to say. In such circumstances, an administration charge was not payable, and further comment was unnecessary

## Other documents before the Tribunal

35. The other documents are as follows :
    a. a letter from Eyre & Johnson dated 21 April 2010
    b. a letter from Eyre & Johnson dated 10 May 2010
    c. a statement of account from Eyre & Johnson dated 11 May 2010
    d. a draft form of licence to sublet
    e. a sheet entitled "sublet information"
    f. a second form of licence to sublet
    g. a letter from the Applicant dated 12 May 2010
    h. a letter from Eyre & Johnson dated 17 May 2010
    i. a letter from the Applicant dated 19 May 2010
    j. a letter from Eyre & Johnson dated 2 September 2010
    k. a letter from the Applicant endorsed with the manuscript words "March 2011"
    l. a letter from Eyre & Johnson dated 7 April 2011
    m. a letter from Eyre & Johnson dated 11 April 2011
    n. a letter from Eyre & Johnson dated 27 September 2011
    o. a letter from Eyre & Johnson dated 8 August 2012 and statement
    p. a letter from the Applicant dated 23 August 2012
    q. a letter from Eyre & Johnson dated 26 September 2012
    r. a statement of account from Eyre & Johnson dated 17 May 2013
    s. a statement of account from Eyre & Johnson dated 21 May 2013
    t. the lease
    u. the tenancy agreement between the Applicant and Liene Dravniece for a term of 12 months starting on 14 April 2010

## Legal background

36. The material parts of part I of schedule 11 to the 2002 Act are as follows:

*Meaning of "administration charge"*

*1(1) ....."administration charge" means an amount payable by the tenant of the dwelling as part of or in addition to the rent is payable, directly or indirectly-*

*(a) for or in connection with the grant of approvals under his lease, or applications for such approvals*
*(b) .....*
*(c) .....*
*(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease*

## The Tribunal's decision

37. The Tribunal's findings are as follows

38. Under part I of schedule 11 to the 2002 Act the Tribunal has jurisdiction to determine the payability by a leaseholder of an administration charge only when the lease provides for the administration charge to be payable, and, for the purposes of this case, only :
    a. *for or in connection with the grant of approvals under his lease, or applications for such approvals,* or
    b. *in connection with a breach (or alleged breach) of a covenant or condition in his lease*

39. There is no provision in the lease for the lessor to give consent to sublettings, in that paragraph (m) of part I of the third schedule to the lease is an absolute restriction against parting with possession except by way of assignment. That paragraph contains no qualification such as "without the lessor's consent", which might have implied a power for the lessor to impose a reasonable fee for giving consent, as was the case in the decision of the Upper Tribunal (Lands Chamber) in **Freehold Managers (Nominees) Ltd v Piatti** [2012] UKUT 241 (LC)

40. There is no provision in the lease for the lessor to impose an administration charge for a breach of covenant in this case, in that, whilst paragraph (r) of part I of the third schedule provides for the lessee to pay the lessor's costs of any notice under section 146 of the Law of Property Act 1925, of any schedule of dilapidations, and of the granting of any consent under the lease, there is no evidence before the Tribunal :
    a. of the Respondent having served on the Applicant any notice under section 146 or any schedule of dilapidations
    b. of the Respondent having granted consent under the lease, in that the lease does not provide for the lessor to give consent for sublettings, for reasons already given

41. The fee which the Respondent Tribunal is seeking from the Applicant is accordingly not an "administration charge" for the purposes of part I of schedule 11 to the 2002 Act, and the Tribunal therefore has no jurisdiction to determine its reasonableness or payability

42. As the application before the Tribunal is an application by the lessee to determine the payability of an administration charge, and not an

application by the lessor for a determination whether there has been a breach of covenant by the lessee, the Tribunal has no jurisdiction in this application to determine whether a subletting by the Applicant is in breach of the covenant in paragraph (m) of part I of the third schedule to the lease is a breach of the lessee's covenant against parting with possession except by way of assignment

43. In relation to the Applicant's application for an order under section 20C of the 1985 Act, the Tribunal notes that the Respondent has conceded that the lease does not permit the Respondent to include the costs of the present proceedings as part of a service charge, and that the Applicant has agreed that if the Respondent was confirming that the Respondent would not attempt to include the costs of these proceedings as part of the service charge, or as part of any other charge, the application under section 20C could be dismissed. The Tribunal accordingly finds that this matter is no longer in issue before the Tribunal, and makes no order under section 20C accordingly

## Appeals

44. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case

45. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision

46. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to admit the application for permission to appeal

47. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result which the person is seeking

Dated 26 November 2013

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Judge P R Boardman
(Chairman)