



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/OOAK/LBC/2014/0018**

Property : **23B Tewkesbury Terrace, New Southgate, London N11 2LT**

Applicant : **Mr Richard Wall**

Representative : **Mr Gillian Ackland-Vincent
(Counsel)
Vanderpump & Sykes LLP
(Solicitors)**

Respondent : **Mr Paramanatharajah Shivarajan**

Representative :

Type of Application : **Determination of an alleged breach
of covenant under S.168(4) of the
Commonhold and Leasehold
Reform Act 2002**

Tribunal Members : **Mr Jeremy Donegan – Tribunal
Judge
Mr Richard Shaw FRICS – Valuer
Member**

**Date and venue of
Hearing** : **30 April 2014
10 Alfred Place, London WC1E 7LR**

Date of Decision : **15 June 2014**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that breaches of covenants in the lease of 23B Tewkesbury Terrace, New Southgate, London N11 2LT (the Flat) have occurred. Further details of the breaches are to be found at paragraphs 33 - 35 of this decision.

The application

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) that the Respondent is in breach of various covenants within his lease, by subletting the Flat on a room by room basis to a series of unconnected occupiers.
2. The application was submitted to the tribunal on 28 February 2014 and directions were issued at a pre-trial review on 17 March 2014. These provided for each party to serve bundles of documents in support of their respective cases, to include any signed witness statements of fact. Paragraph 5 of the directions provided:

The tribunal may decline to hear evidence from any witness who has not provided a statement in accordance with the above directions.

3. The Applicant served a bundle of documents in accordance with the directions. This included copies of the application, directions, lease, a witness statement of the Applicant dated 28 February 2014, Land Registry searches, photographs and relevant correspondence and documents. The Respondent did not serve a bundle or any witness statements.
4. The full hearing of the application took place on 30 April 2014. The Applicant was represented by Counsel, Ms Ackland-Vincent. There was no appearance by the Respondent but his ex-wife, Mrs Sarah Shivarajan attended the hearing as did his son.
5. On the morning of the hearing, Mrs Shivarajan lodged a short bundle of documents. This consisted of copy letters from her to "whomever it may concern", the Applicant and Humrose Limited (Humrose), all dated 05 February 2014 and an unsigned and undated Claim Form that relates to County Court Proceedings that she and the Respondent are pursuing against the Applicant and Humrose. The address given for Mrs Shivarajan and the Respondent on the Claim Form was the Flat.
6. The relevant legal provisions are set out in the Appendix to this decision.

The background

7. The Applicant is the sole freeholder of 23 Tewkesbury Terrace (the Building). He purchased the freehold from Humrose. The Applicant also is one of the joint leaseholders of the Ground Floor Maisonette at the Building (23A), where he lives. The other joint leaseholder is Mrs Marian Merrifield. The Building comprises of two flats, 23A and the Flat.
8. The Respondent holds a long lease of the Flat. The specific provisions of the lease are referred to below, where appropriate.

The issues

9. The application relates to the occupation of the Flat. The Applicant contends that the Respondent has breached the restrictions to be found at paragraphs 3, 4 and 5 of the schedule to the lease over a prolonged period, by the manner in which he sublets the Flat.
10. In the original application to the tribunal, the Applicant also alleged that the Respondent was in breach of clause 3 (17) of the lease, which relate to the insurance of the Building. This allegation was not pursued at the hearing.

The lease

11. The lease is dated 23 September 1987 and was granted by Don Cecil Rajit Wickramarachichi and Uma Chandler (Landlord) to Saraswathy Sivapathasundaram (Tenant) for a term of 99 years from 29 June 1987.
12. The Lessee's covenants are set out at clause 3 of the lease and include:
 - (19) *To observe and perform the covenants if any affecting the freehold title and the restrictions and stipulations contained in the Schedule hereto and to indemnify the Landlord against any demands and claims in respect of any breach thereof*
13. The schedule referred to the sets out various restrictions and stipulations that the Tenant must comply with, including:
 1. *The Tenant will not make any structural alteration in or structural addition to the height sides front back roof walls timbers or elevations of the Demised Premises or the yard or garden wall or fences thereof without the Landlords written consent which shall not be unreasonably withheld*

2. *The Tenant will not during the last seven years of the term hereby granted assign transfer underlet or part with possession of the Demised Premises without the previous consent in writing of the landlords*
 3. *The Tenant will not at any time during the said term assign transfer underlet or part with possession of any part (as distinct from the whole) of the Demised Premises*
 4. *The Tenant will not without such licence as aforesaid use the Demised Premises or permit the same to be used otherwise than as and for a private dwellinghouse for the occupation of one family*
 5. *The Tenant will not do or permit to be done any act or thing in or upon the Demised Premises which shall or may be or grow to the annoyance nuisance damage or disturbance of the Landlords or their Tenants of the other part of the Building or use or permit to be used the premises for any illegal or immoral purpose*
14. Paragraph 4 refers to the requirement for a licence if the Flat is to be used “otherwise than as and for a private dwellinghouse for the occupation of one family”. There is no reference to such a licence or consent in paragraph 3. Paragraphs 1 and 2 both refer to consents from the Landlord. Paragraph 1 relates to alterations rather than alienation. It follows that the requirement for a licence must relate to paragraph 2 and applies to underletting or parting with possession of the Flat during the last 7 years of the term. It follows that restriction at paragraph 4 is absolute for the rest of the term.
15. The Applicant is the successor in title to the Landlord and the Respondent is the successor in title to the Tenant.

The hearing

16. At the start of the hearing the tribunal queried if Ms Ackland-Vincent had been supplied with a copy of the bundle of documents, lodged that morning by Mrs Shivarajan. She advised that she had not seen the bundle and was not in a position to deal with the documents in the bundle. Ms Ackland-Vincent also advised that she was not instructed in relation to the County Court proceedings.
17. Ms Ackland-Vincent invited the tribunal to exclude Mrs Shivarajan from taking part in the hearing. This was upon the basis that Mrs Shivarajan had not been appointed as the Respondent’s representative, in writing, in accordance with rule 14 (2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the 2013 Rules).

Further the Respondent was not present at the hearing so the exclusion at rule 14 (5) does not apply.

18. Mrs Shivarajan then applied for permission to act as the Respondent's representative. She advised the tribunal that she and the Respondent were divorced, that the Flat was their former matrimonial home and they no longer live there. Mrs Shivarajan now deals with the subletting of the Flat. She does not know where the Respondent lives but is in contact with him by telephone. Mrs Shivarajan has not discussed the tribunal proceedings with him.
19. Mrs Shivarajan informed the tribunal that she acquired a beneficial interest in the Flat upon her divorce from the Respondent. However the Land Registry entries for the Flat make no reference to this interest. Further there was no application by Mrs Shivarajan to be joined as a Respondent to the tribunal proceedings.
20. Mrs Shivarajan also informed the tribunal that she and the Respondent were seeking to set aside the transfer of the freehold to the Applicant, within the County Court proceedings. There had been a recent hearing within those proceedings and she was awaiting notification of the outcome of that hearing.
21. The tribunal then adjourned to consider Mrs Shivarajan's standing. The application for her to act as the Respondent's representative was refused, as there were no documents before the tribunal suggesting that he had agreed to this. Indeed Mrs Shivarajan contended that she had not discussed the tribunal proceedings with him. The tribunal informed Mrs Shivarajan that she could continue to sit in on the hearing, which is public, but could not take part as she was not a party to the proceedings or a representative.
22. The Respondent's son then requested an adjournment of the hearing, to enable the Respondent to attend. The tribunal refused this request upon the basis that this would cause unnecessary delay and additional costs. The hearing date had been fixed when the directions were issued on 17 March 2014. The Respondent had failed to comply with the directions or engage in the tribunal proceedings in any way. Further no reason was given for his failure to attend the hearing.
23. The tribunal is satisfied that the Respondent had been given proper notice of the proceedings and the hearing. The address used by the tribunal and the Applicant was the Flat, which is the address given on the County Court Claim Form. Further Mrs Shivarajan and the Respondent's son were clearly aware of the hearing date, as they attended the hearing. This suggests that the Respondent has received the correspondence from the tribunal.

24. The tribunal then proceeded with the hearing. At the end of the hearing the tribunal gave its decision orally and explained that a detailed written decision would follow.
25. The tribunal has made determinations on the various issues as follows.

Subletting

26. The Applicant's statement gave details of the subletting of the Flat and the nuisance caused by the occupants, which he updated in his oral evidence. The rooms in the Flat are sublet to different individuals, on a short term basis.
27. The occupants of the Flat change constantly. Typically there are 4 or more unconnected people living in the Flat any time. The number of occupants means that excessive noise is created, as they live separate lives and come and go at all different times. The noise levels fluctuate from time to time but often exceed reasonable levels. The higher the number of occupants the worse the noise. The noise has disrupted the Applicant's sleep and caused considerable stress, as evidenced by the various entries in the noise diary.
28. Various documents were exhibited to the Applicant's statement including a noise diary covering the period from 12 February 2012 to 27 February 2014. There has been considerable and frequent noise emanating from the Flat, often at unsocial hours. The Applicant reported the noise problems to Mrs Shivarajan and (prior to his purchase of the freehold) to Humrose but the problems continued.
29. In oral evidence, Mr Wall explained that the Flat consists of 4 rooms, a kitchen, bathroom and WC. Currently 3 of the rooms are occupied by unconnected tenants but normally all 4 rooms are let. There have been further noise problems since the end of February 2014. There is laminate flooring in the Flat without underlay, meaning that sound is readily transmitted to 23A. The occupant of one of the front rooms, Mr Tanguci, is particularly noisy, stomping up and down the hallway in the Flat and slamming doors.
30. Also exhibited to Mr Wall's statement were various photographs, showing the occupants of the Flat at different times and advertisements for rooms to let that give Mrs Shivarajan's telephone numbers. It is apparent from the advertisements that the rooms are let individually and on a short or long-term basis.
31. The Applicant has referred the matter to the Housing Enforcement Office at Enfield Council, which has confirmed that the Flat is a House in Multiple Occupation (HMO).

32. On 10 January 2014, the Applicant's solicitor sent a letter of claim to the Respondent advising that the occupation of the Flat amounted to a breach of the lease. However the subletting of the Flat continues.

The tribunal's decision

33. The tribunal determines that the Respondent has breached paragraph 3 of the schedule to the lease by subletting individual rooms in the Flat. This amounts to a subletting of part of the Flat. The breach is continuing.
34. The tribunal determines that the Respondent has breached paragraph 4 of the schedule to the lease by subletting the rooms in the flats separately. As a consequence the Flat has not been used as a private dwellinghouse in the occupation of one family. This breach is continuing.
35. The tribunal determines that that Respondent has breached paragraph 5 of the schedule to the lease by subletting the Flat to a number of individuals, which has caused or may cause annoyance, nuisance, damage or disturbance to the Applicant. Again the nuisance is continuing.

Reasons for the tribunal's decision

36. The Respondent has not contested the application and the tribunal accepts all of the evidence of fact given by the Applicant in his statement, noise diary and orally at the hearing. It is clear that the Respondent has sublet the rooms in the Flat individually and continues to do so. Further the Flat is not in the occupation of one family. Enfield Council has classified the Flat as an HMO.
37. Based on the Applicant's evidence, the tribunal is satisfied that the occupation of the Flat by several subtenants has caused, and continues to cause, excessive noise. This is clearly an annoyance and disturbance to the Applicant. The noise, as described by the Applicant, frequently goes beyond ordinary levels and also amounts to a nuisance, which has caused damage. It is inevitable that the occupation of the Flat by 4 or more unconnected people will cause unreasonable noise levels.

The next steps

38. The tribunal has determined that the Respondent has breached covenants in the lease and that these breaches are continuing. He will need to remedy the breaches if he is to avoid further action by the Applicant.

39. A failure to remedy the breaches could result in the service of a Notice under section 146 of the Law of Property Act 1925 and possible action to forfeit the lease and repossess the Flat. The tribunal strongly recommends that the Respondent seeks independent legal advice upon this decision.

Name: Jeremy Donegan Date: 15 June 2014

Appendix of relevant legislation

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 subsection is satisfied if—
 - (a) it has been finally determined on an application under subsection (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 subsection (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 the appropriate 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 subsection (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.
- (6) For the purposes of subsection (4), “appropriate tribunal” means –
 - (a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
 - (b) In relation to a dwelling in Wales, a leasehold valuation tribunal.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 14 Representatives

- (1) A party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings.

- (2) If a party appoints a representative, that party must send or deliver to the Tribunal and to each other party written notice of the representative's name and address
- (3) Anything permitted or required to be done by or provided to a party under these Rules, a practice direction or a direction may be done by or provided to the representative of that party except –
 - (a) signing a witness statement; or
 - (b) sending or delivering a notice under paragraph (2), if the representative is not a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to any activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act.
- (4) A person who receives due notice of the appointment of a representative –
 - (a) must thereafter provide to the representative any document which is required to be sent to the represented party, and need not provide that document to the represented party; and
 - (b) may assume that the representative is and remains authorised until receiving written notification to the contrary and an alternative address for communications from the representative or the represented party.
- (5) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) but who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.
- (6) Paragraphs (2) to (4) do not apply to a person who accompanies a party under paragraph (5).