



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

Case Reference : LON/00AX/LBC/2014/0055

Property : Flat 21 Osiers Court, Steadfast Road, KT1 1PL

Applicant : Osiers Court Properties Ltd.

Representative : Carter Bells LLP

Respondent : Stephen Raymond Guest

Representative : None

Type of Application : Determination of an alleged breach of covenant

Tribunal Members : Judge Dickie
Mr I Thompson, FRICS
Mr A Ring

DECISION

SUMMARY

The Respondent has breached the covenant in Paragraph 27 of the Eighth Schedule.

INTRODUCTION

1. The applicant freeholder seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the respondent leaseholder is in breach of various covenants contained in the lease. In particular the Applicant asserts that in breach of the terms of the lease the Respondent has failed to keep the property in repair, has not given notice of subletting and had not provided a copy of the tenancy agreement he has entered into.

2. The Applicant is the registered freeholder of premises registered (along with other premises) under title TGL 125523 known as Osiers Court. The subject premises are a self contained two bedroomed flat within a block of 30 flats and registered as title TGL 141776. The Applicant company is owned by the leaseholders of the residential flats. The Respondent is the leaseholder of the subject premises and also holds one share in OCPL.
3. The lease for Flat 21 is dated 24 November 1997. Pursuant to Clause 3 of the lease the lessee covenants to observe and perform the obligations set out in the Eighth Schedule.
4. The tribunal's decision on this application was sent to the parties on 15 September 2014. After an application for review by the Applicant, on 8 December 2014 the tribunal set aside part of its decision on the application.
5. There has been no review of the tribunal's decision to dismiss the parts of the application made on the grounds that the tenant has breached Paragraph 9 of Part A of the Eighth Schedule (covenant to keep the property in repair) and Paragraph 25(a) of Part A of the Eighth Schedule (subletting for more than 3 years). For convenience, the tribunal's decision on those grounds in the application is restated herein at paragraphs 6 to 14 below, such that the tribunal's decision on the application is contained within this single document. The tribunal set aside its decision dismissing the part of the application made on the ground that there has been a breach of Paragraph 27 of Part A of the Eighth Schedule (Notice of Subletting)).

BREACH OF REPAIRING COVENANT

6. The lessee covenants in Paragraph 9 of Part A of the Eighth Schedule "To repair and keep the Demised Premises and all Service installation exclusively serving the same and every part thereof ... in good and substantial repair, order and condition at all times during the said term..."
7. The alleged breach of this covenant relates to a water leak that has been occurring for around six months. The Applicant states that this application has been brought "due to concerns about the Respondent not paying the Applicant's costs that will be incurred in serving formal notices, carrying out the work and then recovering the cost of the work from the Respondent, this application process is considered appropriate".
8. The Applicant's evidence of the source of the leak in question is disputed. Various items of correspondence have been produced by both parties. The Applicant relies on the evidence of Mr Izzee/ Misri, trading as M&M Property Development and Maintenance, who has provided plumbing and maintenance services to the landlord since 2008. He concludes in his report dated 28 May 2014 that the leak originates from Flat 21 and is caused by either a faulty central heating

PRV or the overflow from the header tank of the Gledhill water heater. No photographs or plan accompany the report and Mr Misri does not appear to have any professional qualifications.

9. The Respondent relies on a report produced by Dyno Rod dated 11 April 2014 and a further report produced by Patrick Towers Plumbing dated 20 March 2014 both of which found no evidence of a defect within the flat. It appears that there has been a breakdown in relations between the company directors and Mr Guest.
10. The tribunal has not been asked to carry out an inspection, and nor would it be appropriate to do so in order to remedy shortcomings in the Applicant's evidence. The tribunal has considered ordering that this matter be listed for an oral hearing, but considers it unlikely on the present evidence that its decision would be different.
11. The Applicant bears the burden of producing sufficient evidence to satisfy the tribunal on the balance of probabilities that the Respondent is in breach of covenant. The tribunal finds that the Applicant's witness does not have sufficient credibility as an expert witness, and the content of the report is insufficiently persuasive given that it is disputed by another experienced person.
12. The landlord brings this application and must produce persuasive evidence to support it. The landlord will have rights of access to the subject premises and, in the absence of cooperation from the Respondent in providing it, may take legal advice on the merits of an application to the County Court for an injunction requiring such access. A suitably qualified independent expert (such as a chartered surveyor), preferably jointly instructed by both parties, should be able to establish the cause of this ongoing leak. The tribunal will not act on inadequate evidence to find a breach of a lease, which is a serious matter which can lead to a liability for costs under the lease and in some cases to an application for forfeiture.

SUBLETTING

13. The lessee covenants in Paragraph 25(a) of Part A of the Eighth Schedule "not at any time during the said term to sublet the whole or any part of the Demised Premises save that an underletting of the whole of the Demised Premises for a term of three years or less on an assured shorthold tenancy or such other tenancy as precludes the undertenant from obtaining security of tenure is permitted..."
14. The Applicant's solicitors in their legal submissions rightly infer that such a breach cannot be established on the present evidence. The landlord must produce evidence to demonstrate that the premises have been sublet on terms which breach the lease. There is no such evidence before the tribunal.

NOTICE OF SUBLETTING

15. By Paragraph 27 of Part A of Schedule 8 the Lessee covenants: "Within one month after the date of any and every assignment transfer mortgage charge discharge or mortgage or charge underlease or tenancy agreement (including any immediate or derivative underlease or tenancy agreement of the Demised Premises for any term) any assignment of such underlease or tenancy agreement or any grant of probate or letters of administration order of court of other matter disposing of or affecting the Demised Premises or the devolution of or transfer of title to the same to give or procure to be given to the Lessor notice in writing in duplicate of such disposition or devolution or transfer of title with full particulars thereof and also at the same time to produce or cause to be produced to them a certified copy of the document effecting or (as the case may be) evidencing such disposition or other matter for retention by the Lessor and also to pay or cause to be paid at the same time to the Lessor and also to pay or cause to be paid at the time of registration in each case a reasonable fee together with Value Added Tax thereon in respect of any such notice".
16. It is the Applicant's case that this paragraph requires the Respondent to supply to the landlord notice of the grant of a tenancy of the premises, and a certified copy of any tenancy agreement, within one month of grant. The Applicant's solicitors did not originally make any submissions as to the interpretation of Paragraph 27 and its application to the facts. They did so on in support of the application for review, upon the direction of the tribunal.
17. The Applicant's solicitor wrote detailed submissions dated 12 December 2014 suggesting that it had had insufficient opportunity to make representations as to the meaning of paragraph 27 or set out its argument as to what the Respondent had covenanted to provide to the Applicant. It did not include such representations in its letter, however. It subsequently did so by a letter dated 27 March 2015, though the tribunal found little of additional assistance in these further representations.
18. The tribunal was provided with a copy of a twelve month tenancy agreement granted on 6 December 2010. It is apparent on the evidence that further tenancy agreements were granted after its expiry and before the issue of this application to the tribunal.
19. The Respondent's case to the tribunal was made in written representations dated 23 December 2014 and received on 29 December. The Applicant's solicitor points out that the deadline for receipt in the directions of the tribunal was 24 December 2014, and that it was not copied to him. The submissions include a copy of a tenancy agreement granted on 25 November 2014 referring to the tenancy ending on 6 December 2011 having been renewed for further terms ending on 5 December 2013 and 5 December 2014. The Applicant places reliance on this evidence to demonstrate that tenancies have been granted without compliance with the provisions of Paragraph 27.

20. The Respondent acknowledged the provisions of paragraph 27 of the Eighth Schedule and attached the notice served in respect of the most recent grant of a tenancy agreement (and extension of the previous tenancy agreement) within the one month notice period.
21. The Applicant refers to a number of provisions within existing legislation that support the assertion that granting a sub-tenancy or a tenancy agreement is a "disposition":

S.205 of the Law of Property Act 1925 provides that:

(1)(ii) "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning;

S.205 (1)(xxxiii) "Lease" includes an under-lease or other tenancy.

22. The definition of a disposition in the Law of Property Act 1925 is applied in the Law of Property (Miscellaneous Provisions) Act 1989 by virtue of section 2(6) of that Act. Section 10(1) of the Legitimacy Act 1976 defines that a disposition "includes the conferring of a power of appointment and any other disposition of an interest in or right over property."
23. The tribunal is satisfied that it should apply the same definition of disposition, and that granting of a tenancy by the Respondent is a disposition under Paragraph 27 of Part A of Schedule 8, in relation to which (within one month of the grant of the tenancy) notice to the Lessor in writing in duplicate is required with full particulars thereof. Furthermore, by Paragraph 27 the Respondent has covenanted "at the same time to produce or cause to be produced to them a certified copy of the document effecting or (as the case may be) evidencing" that tenancy. The Respondent further covenants to make payment of the Lessor's reasonable fee in respect of the notice at the same time.
24. The tribunal is satisfied that no notice of subletting, or certified copy of the tenancy agreement or fee was given to the landlord within one month of the date of grant of at least one such tenancy prior to the date of application. Accordingly, the tribunal finds that the Respondent has been in breach of covenant under Paragraph 27 of the Eighth Schedule.
25. The Respondent states that he occupied the property as his home after purchasing it in June 2007 and first let it around 5 years ago without any issue ever having been taken by any shareholder of OCPL in respect of the service of notices under section 27 of the Eighth Schedule until these present proceedings. He also claims that the landlord has behaved inconsistently, in that other who let out their apartments as

Osiers Court have not complied with the obligation to serve such a notice.

26. There tribunal is not persuaded that the landlord has waived the Respondent's covenant to give notice of subletting and to pay a reasonable fee such that he cannot assert a breach of it. Whether the landlord has waived the breach such that it cannot forfeit the lease, or whether there are grounds for relief from forfeiture, is not a matter within the jurisdiction of this tribunal to determine (and falls for consideration of the County Court on an application for forfeiture).
27. The Applicant refers to further alleged breaches of covenant occurring after the application made to this tribunal, and which are not before it for determination. In particular, the Applicant refers to the manner of certification of the copy of the latest tenancy provided by the Respondent to the landlord.
28. It is evidently the case that relations between Mr Kay, Director of the Applicant company, and Mr Guest have broken down. It is only to be hoped that they can find a resolution to the disputes between them which does not involve further costly litigation.

Name: F Dickie

Date: 15 May 2015