

664



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

Case Reference : LON/00BK/LBC/2015/0033

Property : 5 Raynham, Norfolk Crescent,
London W2 2PG

Applicant : Raynham Property Company
Limited

Representative : Dale & Dale Solicitors Limited

Respondents : S. Mazen El Sayed Salem (1)
T Salab Eldin Abdel Azim el
Boosaty (2)
W. Salab Eldin Abdel Azim el
Boosaty (3)

Representative : Jeffrey Green Russell Solicitors

Type of Application : Determination of an alleged breach
of covenant

Tribunal Members : Judge Dickie
Mr P Casey, MRICS

DECISION

SUMMARY

The Respondents have breached the covenants in Clause 4 and Paragraph 4(b) of the Fifth Schedule of the Lease.

REASONS

1. The applicant freeholder seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the respondent leaseholders have breached covenants contained in the lease.
2. The Applicant is the registered freeholder of premises registered under title NGL842247 known as Raynham Norfolk Crescent, 1 to 8

Cambridge Square, 12 to 20 Oxford Square and Raynham Garden, Hyde Park Crescent, London. The subject premises are a self contained two bedroomed flat within a purpose built block of 77 flats and registered as title NGL859633.

3. The lease dated 19 September 2005 is for a term of 999 years from 22 October 2004. In Clause 4 the Lessor "covenants with the Lessee as set forth in the Fifth Schedule"
4. The Lessee thereby covenants in Paragraphs 4(a) and 4(b) of the Fifth Schedule as follows:
 - "(a) Not assign underlet or part with possession or occupation of part of the Demises Premises for all or any part of the said term nor share possession or occupation of the Demised premises or any part thereof nor underlet the whole of the Demised Premises for a term of less than six months.
 - (b) Not (but without prejudice to the other provisions in this Lease contained) assign underlet or part with possession or occupation of the whole of the Demised Premises without the written consent of the Lessor first obtained such consent not to be unreasonably withheld"
5. The Applicant asserted in the application that the Respondents have breached these covenants in that:
 - they have sublet the premises for less than six months; and
 - have sublet the premises without having first obtained the Lessor's written consent.
6. The Respondents' case is that they have, through their agent, Mr Fahad al Fahad, sub-let the subject premises to Four Seasons Investments from 3 November 2010 by a succession of 12 month tenancy agreements, the last of which is dated 1 November 2014 and is for the period 1 November 2014 to 1 November 2015. Copies of these five tenancy agreements are produced in evidence, and the landlord accepts that each was for a period of 12 months.
7. The Respondents deny that the sub-lettings were made without the consent of the Applicant, and rely on a copy of a letter dated 10 January 2012 from the Applicant's managing agent, Parkgate Aspen, to the Respondents care of the mortgagee. In that letter, which concerns a complaint regarding the activities of the then occupants, the managing agent refers to "your tenant". The Respondents furthermore argued that the Applicant has waived any right that it may have had to claim breach of covenant and forfeiture by the demand and acceptance of rent which accrued due after the date on which they became aware of the sub-tenants' occupation.
8. The Respondents have, by way of a Reply to the Applicant's Response to the Respondents' Statement of Case, objected to the tribunal having

regard to the Applicant's Response as it was not provided for within the tribunal's directions on this application. It is plainly right that the Applicant should have the opportunity to respond to entirely new evidence and argument raised by the Respondents, and the Respondents have had the opportunity to reply. The tribunal would comment, however, that the issues in the application are such that it would have reached the same determination without these subsequent representations.

9. The Applicant produces a form, said to have been completed in front of the porter by the occupant of the subject premises showing the length of stay and hence the sub-tenancy. The Respondents do not accept that the document proves the same. The document is largely in Arabic and is not supported by a witness statement and translation, and the tribunal has disregarded it.
10. The other issues raised by the Applicant in the Response to which the Respondents object, are that:

The tenancies produced by the Respondents prohibit underletting, and they have allowed the sub-tenant to breach this obligation.

- The Respondents assert in their Reply that they were unaware of any breach of its sub-tenancy agreement and that the evidence does not support the allegation.
- The tribunal takes the view that this is not an issue relevant to the breach of covenant in the Lease with which it is concerned in this application.

As the sub-tenants have sublet the property for short term lets, the Respondents have allowed their sub-tenant to let the premises in breach of Paragraph 4(a) of the Fifth Schedule to the Lease.

- However, the covenant in question must be strictly interpreted. It is a covenant not to "underlet the whole of the Demised Premises for a term of less than six months". The covenant is not against allowing to be underlet for such a period. The tribunal is not persuaded there has been a breach by the Respondents of Clause 4(a).

The letter of 10 January 2012 does not constitute consent to subletting and that whether or not there had been a waiver of the right to forfeit would be a matter for the court.

- The Applicant rightly observes that this tribunal has no jurisdiction to determine whether the landlord has waived a right to claim for forfeiture.
- The Applicant draws the attention of the tribunal to the decision of the Upper Tribunal in *GHM (Trustees) Limited v Glass (LRX/153/2007)*, a case in which the decision in *Swanston Grange*

(Luton) Management Ltd. v Langley-Essen (LRX/12/2007). In that case, Judge Huskinson distinguished the question of waiver of the right to forfeit from the tribunal's jurisdiction to determine whether an actionable breach of covenant had occurred, in that it had jurisdiction to consider whether the landlord was estopped from asserting the facts on which the breach of covenant was based. For so long as this waiver or estoppel operates the obligation in the covenant is suspended.

- Whilst this letter demonstrates that the landlord's agent was aware that the property was tenanted in January 2012, the property has been sublet since November 2010 and continues to be so. There is nothing in that letter which could be construed as operating as a waiver throughout that period and continuing of the covenant to obtain the landlord's consent to subletting. The tribunal is satisfied that the Respondents have been in breach of the covenant in Paragraph 4(b) of the Fifth Schedule.
11. Clearly the landlord is concerned at the situation which has apparently arisen, in that the premises are being used for short term "holiday" lettings to which it would doubtless not consent. Such a prohibition would be imposed by the landlord in the grant of consent to subletting if it had been requested. Subletting in breach of the terms of the landlord's consent would be a further breach of Paragraph 4(b).

Name: F Dickie

Date: 20 May 2015