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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UN/LBC/2016/0011.**
Property	:	**Flat 2, 56 Westgate Bay Avenue, Westgate-on-sea, Kent CT8 8SN.**
Applicant	:	**Mrs. Hilda Van Der Veken.**
Representative	:	**Girlings, solicitors.**
Respondent	:	**Maria Vittoria Warren and Derek Andrew Warren.**
Representative	:	**Boys and Maughan, solicitors.**
Type of Application	:	**Determination of breach of covenant, S168(4) Commonhold and Leasehold Reform Act 2002.**
Tribunal Member	:	**Judge J G Orme.**
Date and Venue of Hearing	:	**23 August 2016.** **Determination without a hearing.**
Date of Decision	:	**23 August 2016.**

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Decision

The Tribunal determines that the Respondents, Maria Vittoria Warren and Derek Andrew Warren, have not acted in breach of the lease dated 28 July 1982 relating to Flat 2, 56 Westgate Bay Avenue, Westgate-on-sea, Kent, CT8 8SN by subletting the flat to June Maddocks on or about 24 February 2015.

Reasons

Background

1. The Applicant, Mrs. Hilda Van Der Veken, is the freehold owner of the property known as 56 Westgate Bay Avenue, Westgate-on-sea, Kent, CT8 8SN ("the Property"). The freehold title of the Property is registered at HM Land Registry under title number K722657. The Property is a period town house which has been converted into 3 flats.

2. The Respondents, Maria Vittoria Warren and Derek Andrew Warren, are the leasehold owners of Flat 2 at the Property ("the Flat"). The Flat is on the first floor of the Property. The leasehold title of the Flat is registered at HM Land Registry under title number K538140.

3. On 19 April 2016, the Applicant applied to the Tribunal for a determination under *Section 168(4) of the Commonhold and Leasehold Reform Act 2002* (as amended) ("the Act") that the Respondents had acted in breach of the terms of their lease of the Flat by subletting the Flat.

4. The Tribunal issued directions on 19 May 2016. In accordance with the directions, both parties have submitted written statements of case. By the directions, the Tribunal gave notice pursuant to Rule 31 *of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013/1169* that it intended to determine the application without a hearing. Neither party has objected to that notice.

The Law

5. Section 168 of the Act provides:
    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 (c20) (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 a 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 Lease

6. The Tribunal had before it a copy of a counterpart lease dated 28 July 1982 made between Irene Stock as lessor and Florence Parsons as tenant ("the Lease").

7. By the Lease, the lessor demised the Flat to the tenant for a term of 99 years from 1 January 1981 at a yearly rent of £25. The Lease has been subsequently registered at HM Land Registry under title number K538140. The register of title shows that the Lease was assigned to the Respondents on 7 August 2013.

8. In the Lease, Irene Stock is defined as ""*the Lessor" which expression shall where the context so admits include the successors in title of the Lessor*". Florence Parsons is defined as ""*the Tenant" which expression shall where the context so admits include the successors in title to the Tenant*".

9. Clause 2 of the Lease provides:

> *The Tenant hereby covenants with the Lessor as follows: ...*
> *(6) Within one month next after any transfer assignment underlease change (whether mediate or immediate) or devolution of the demised premises or any part thereof to give notice in writing of such transfer assignment or devolution and of the name and address and description of the transferee assignee or person upon whom the relevant term or any part thereof may have devolved or of the lessee (as the case may be) to the Lessor and to produce to the Lessor the instrument of*

transfer assignment or devolution or the counterpart of the Lease and pay a reasonable fee to be determined by the Lessor for the registration of such notice.

10. Clause 3 of the Lease provides:

> *The Tenant hereby covenants with the Lessor and with each tenant of a flat in the Building as follows: ...*
> *(7) At all times during the term to observe the regulations specified in the First Schedule hereto.*

11. The first schedule to the Lease sets out regulations in 10 paragraphs. Paragraph 1 provides:

> *Each flat shall be used and occupied as a private dwellinghouse only for the sole occupation of its tenant and his family.*

12. The other paragraphs of the first schedule deal with use for business purposes, causing a nuisance to neighbours, suppressing electrical devices, permitting children to play in the common parts of the building, hanging flower pots out of windows, entering the building quietly during night hours, playing musical instruments, keeping pets and covering floors with carpets.

The Evidence

13. The Applicant has filed a witness statement in which she says that she lives in flat 1 at the Property and that there is one other flat apart from the Flat. She says that the Respondents acquired the leasehold interest in the Flat on 7 August 2013. She says that in July 2014 she refused the Respondents permission to sublet the Flat. She says that she has never permitted any subletting of any of the flats whilst she has been the freeholder of the Property. It came to her attention on 24 February 2015 that the Respondents had sublet the Flat to June Maddocks. She exhibited to her witness statement copies of correspondence between her solicitors and the Respondents in which she notifies the Respondents that they have acted in breach of covenant by subletting the Flat and asking them to determine the subletting. By an email dated 29 March 2015, the Respondents confirmed that the Flat had been let. By an email dated 12 April 2015, the Respondents notified the Applicant that they did not consider the sub-letting to be in breach of the terms of the Lease.

14. The statement of case filed on behalf of the Respondents does not dispute any of the facts set out in paragraph 13. The Tribunal finds the facts set out in paragraph 13 to be true.

The Submissions

15. The Applicant relies on paragraph 1 of the first schedule to the Lease as being a covenant binding on the Respondents which prohibits the sub-letting of the Flat. She says that this is the natural meaning of the words in paragraph 1. She says that the term "*tenant*" in paragraph 1 is

the appropriate term to refer to the leaseholders of the other flats in the building and it would be inconsistent to interpret that term as referring to a sub-tenant or other occupier of the Flat. She says that clause 2(6) of the Lease is a covenant to notify the Lessor of any alienation of the Lease and is drafted in a "*boiler plate*" fashion to cover as broad a range of circumstances as is reasonable. It is a passive clause which does not grant any particular right and does not conflict with the interpretation of the Lease which prohibits subletting. She prays in aid of her submissions the decision of the Upper Tribunal in the case of *Burchell v Raj Properties Ltd [2013] UKUT 443*.

16. The Respondents submit that taking the Lease as a whole, paragraph 1 does not prohibit subletting and that it only relates to the permitted use of the Flat and that its effect is intended to be that each flat should be for the use solely of "*its tenant and their family*", i.e. one family occupation. They say that the regulations are intended to deal with the everyday conduct of the parties actually living in the building whomsoever their legal relationship may be with. They say that clause 2(6) clearly contemplates a subletting of the Lease by using the word "*underlease*" and "*counterpart of the lease*". They seek to distinguish the decision in Burchell on the basis that in that case the Upper Tribunal was considering a direct covenant contained in clause 2(16) and that there was a similar but materially different clause (2(13)) relating to notification of transfer which did not envisage the creation of an underlease. They say that the Lease does not prohibit subletting and that clause 2(6) is reconciled with paragraph 1 in the consistent position that whilst subletting is permitted it can only be to a single tenant and their family. In the alternative, if that is not the correct interpretation, they say that there is a clear ambiguity in the Lease and that it should be construed in favour of the Respondents.

Conclusions

17. At common law a tenant has a right, unless restrained by his lease or agreement from doing so, to sublet demised premises or part of them (see *Woodfall on Landlord and Tenant paragraph 11.113)*.

18. For the Applicant to succeed, she must satisfy the Tribunal that the Lease contains a prohibition on subletting.

19. When construing the terms of the Lease, the Tribunal is mindful of the guidance given by the Supreme Court in the case of *Arnold V Britton [2015] UKSC 36* at paragraphs 15 and 17 to 23. At paragraph 15, Lord Neuberger says:

> *When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", ... And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases,*

in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

20. Clause 2(6) of the Lease cannot be construed on its own as containing any prohibition on subletting. It deals with another situation, namely the giving of notice following alienation. The fact that it refers to "*underlease*" and "*counterpart of the lease*" does not mean that subletting is or is not permitted. That clause could exist beside an express and clear prohibition on subletting.

21. The question to be considered is whether paragraph 1 of the first schedule combined with clause 3(7) expressly prohibits subletting. The Tribunal's conclusion, bearing in mind the guidance given in *Arnold v Britton*, is that the natural and ordinary meaning of that paragraph, read in the context of the Lease as a whole, does not prohibit subletting.

22. It would be possible for a regulation in the first schedule to amount to such a prohibition but it must be expressed in clear terms. Paragraph 1 refers to "*its tenant*". In the opening recital of the Lease, Florence Parsons, the lessor, is defined as "*the Tenant*". That definition includes her successors in title. If paragraph 1 had read "*for the sole occupation of the Tenant and his family*", the Applicant might have succeeded but it does not. "*its tenant*" refers back to "*each flat*" (i.e the tenant of each flat) and therefore it is necessary to find out who is the tenant of each flat before deciding who is entitled to occupy each flat.

23. Paragraph 1 on its own does not prohibit subletting. On its proper construction, it means that whoever is the tenant of the Flat for the time being (and that might be a sub-tenant) must use and occupy the Flat only as a dwelling for him and his family.

24. The Tribunal is reinforced in its view by looking at the context in which paragraph 1 occurs. The first schedule is a list of common restrictions found in leases of residential property which are designed to regulate the occupation of the property for the benefit of all residents.

25. Clause 2(6) provides further support to the Tribunal's conclusion by clearly contemplating that there might be an underlease. That is part of the context in which the meaning of paragraph 1 must be considered.

26. The Tribunal does not consider that the decision in Burchall assists the Applicant. That decision was based on the facts of that case. The clause on which the lessor relied to prevent subletting was "*To use the flat as a private dwelling for the lessee and his family and for no other*

purpose." "the lessee" referred directly to the leaseholder and to no-one else.

27. If paragraph 1 of the first schedule does not prohibit subletting, there is no other term in the Lease on which the Applicant relies to suggest that subletting is prohibited. The conclusion must be that the Lease does not prohibit subletting and that the subletting which has been acknowledged by the Respondents was not a breach of a covenant in the Lease.

Right of Appeal

28. Any party to this application who is dissatisfied with the Tribunal's decision may appeal to the Upper Tribunal (Lands Chamber) under section 176B of the Commonhold and Leasehold Reform Act 2002 or section 11 of the Tribunals, Courts and Enforcement Act 2007.

29. A person wishing to appeal 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 this application. 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. 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 allow the application for permission to appeal to proceed. 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 the party making the application is seeking.

30. The parties are directed to Regulation 52 of the Tribunal Rules . Any application to the Upper Tribunal must be made in accordance with *the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 SI 2010/2600.*

J G Orme
Judge of the First-tier Tribunal
Dated 23 August 2016