FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	: CHI/00HN/LBC/2017/0017
Property	: Flat 1, Clifton Court, Heathcote Road, Bournemouth BH5 1EY
Applicant	: Haysport Properties Limited
Representative	: Morgan Management Ltd
Respondent	: Mr Maximillian Ziegfried De Kment
Representative	: Sherwood Wheatley solicitors
Type of Application	: Determination of breach under s.168 Commonhold and Leasehold Reform Act 2002
Tribunal Member	: Judge A Johns QC
Date of Decision	: 5 July 2017

DECISION WITHOUT A HEARING

Introduction

1. The applicant landlord, Haysport Properties Limited ("Haysport"), seeks an order that the respondent tenant, Mr De Kment, is in breach of his lease of Flat 1, Clifton Court, Heathcote Road, Bournemouth BH5 1EY ("the Flat") by reason of an unlawful subletting of the Flat. Mr De Kment now admits that he has sublet the Flat but denies that he is in breach of covenant.

Procedure

2. The application is dated 21 March 2017. Directions were given on 3 April 2017. Those provided for the application to be determined without a hearing unless a party objected in writing within 28 days of the receipt of the directions. There was no objection in that period or at all. Both sides submitted statements of case in accordance with the directions. The last provided for was a reply of Haysport. Mr De Kment then submitted a further response for which the directions had not made provision and I will return to that later in this decision.

Jurisdiction and law

3. S.168(1) of the Commonhold and Leasehold Reform Act 2002 restricts a landlord's right to forfeit a long lease of a dwelling by providing that a notice of forfeiture under s.146(1) of the Law of Property Act 1925 in respect of a breach of covenant may not be served by a landlord unless subsection (2) is satisfied. One way of satisfying subsection (2) is a determination, on an application to the Tribunal, that the breach has occurred.

Lease and factual background

4. The lease of the Flat is dated 6 December 1985 and is for a term of 99 years from 29 September 1985 ("the Lease"). It includes a forfeiture clause and, at clause 2(16)(b), an absolute covenant against subletting in these terms:
"Not to create any sub-tenancy or other occupancy of the premises or any part thereof PROVIDED that the Lessee may create a sub-demise by way of mortgage or charge".

5. Clause 2(17) is a covenant to give notice in writing to the lessor of certain dispositions of the Flat including every assignment or sublease within 28 days.

6. The office copy entries for the leasehold title to the Flat show that Mr De Kment has been the registered proprietor since 30 July 2002, having purchased the Flat on 22 July 2002 for £60,000.

7. By an email of 6 May 2015 Mr De Kment complained to Goadsbys, local managing agents for Haysport, about disrepair at Clifton Court and threatened a claim for loss of rent. Haysport responded by a letter dated 3 June 2015 referring Mr De Kment to the covenant against subletting in the Lease and informing him that his "account has been frozen", which I take to mean that sums due under the Lease would not be accepted from him. There was no response and Haysport's head agents, Morgans, wrote to Mr De Kment on 24 March 2016, requiring a response confirming

that the Flat was indeed sublet. Still there was no response and Morgans wrote again on 7 June 2016 making clear that absent a response there would be an application for determination of breach as a prelude to forfeiture proceedings.

8. The silence continued and this application was made on or about 21 March 2017.

9. Haysport submitted evidence of breach of the covenant against subletting relying on, amongst other things, Mr De Kment's failure to answer the allegation of subletting, that he advertises himself online as an investor in rental properties and that the electoral showed other persons as in occupation of the Flat, most recently a Mr Kus.

10. By his statement in response and a letter to the Tribunal dated 8 May 2017 with accompanying documents including a series of assured shorthold tenancy agreements, Mr De Kment accepted that he had been subletting the Flat. The most recent sublet was to Mr Kus and his wife by an agreement dated 14 May 2015 for a tenancy beginning on 23 May 2015. Oddly, the landlord under such agreement was named as European Equities plc.

11. It is plain from the evidence that he has been subletting the Flat since his purchase in 2002. He says that he did not seek to conceal such subletting and that, having demanded and accepted rent and service charge from the date of his purchase until 3 June 2015, Haysport cannot now complain by reason of waiver.

12. As part of its further statement of case in answer, Haypsort says that it has no record of ever having received notices of subletting under clause 2(17) of the Lease. That fits with some of the contents Mr De Kment's 8 May 2017 letter to the Tribunal in that he says he was not advised of the prohibition on subletting by his conveyancer when purchasing and, it seems, only read the Lease for the purposes of this application.

The parties' cases

13. Mr De Kment's statement of case refers at some points to waiver of breach and at another to waiver of the right to forfeit. He states that Haysport was "aware or ought to have been aware of the letting and re-letting" of the Flat by him "over a period of 15 years".

14. His letter to the Tribunal makes a further point expressed as follows: "as I have always let this property on assured shorthold tenancy agreements, I believe that I am only giving up half possession not full possession. If the tribunal agree with this then I do not think that I am in breach".

15. Haysport denies waiver and says that such issue is not for the Tribunal. While it does not admit knowledge of subletting before the grant of the subtenancy to Mr Kus in May 2015, its principal case on waiver is that any such knowledge is irrelevant because the letting to Mr Kus is a fresh breach. No sums have been demanded or accepted from Mr De Kment since then.

Discussion and conclusions

16. I start with Mr De Kment's argument that he is not in breach of covenant because by granting an assured shorthold tenancy he is only giving up "half possession".

17. There is nothing in this point. Quite apart from the fact that any subtenancy, whether an assured shorthold tenancy or not, involves a parting with possession, the prohibition in clause 2(16)(b) of the Lease is against subletting, not parting with possession. The grant of an assured shorthold tenancy to Mr Kus is a subletting and there is therefore a breach of covenant unless there has been a relevant waiver.

18. Turning to waiver, it is important to be clear about two different types of waiver, namely waiver of the right to forfeit and waiver of breach.

19. Waiver of the right to forfeit for breach of covenant only bars the remedy of forfeiture. There will be such a waiver in circumstances where the lessor unequivocally recognises the continued existence of the lease by an act communicated to the lesssee, for example by demand or acceptance of rent, with knowledge of the facts giving rise to the right to forfeit. But the lessee remains liable for the breach of covenant.

20. Waiver of breach is an answer to all liability. It depends on an inference of consent to what would otherwise be a breach of covenant. It is not enough for a waiver in this sense that the lessor has recognised the continued existence of the lease because that is not inconsistent with the lessee being liable for the breach.

21. As already noted, Mr De Kment has referred at points to waiver of breach and at another point to waiver of the right to forfeit.

22. It follows from the above explanation of these two different types of waiver, that waiver of the right to forfeit is no answer to this application. Such a waiver does not remove liability for breach. Indeed, the question of whether there has been a waiver of any right to forfeit is not an issue for the Tribunal at all. The question for the Tribunal under s.168(4) of the 2002 Act is whether a breach of covenant has occurred, not what remedies are available.

23. Waiver of breach is, however, an issue for the Tribunal. It goes to the question of whether there can be said to be a breach at all. That a waiver or an estoppel going to that question is within the Tribunal's jurisdiction under s.168 of the 2002 Act was confirmed by the decision of the Upper Tribunal in *Swanston Grange (Luton) Management Ltd v Langley-Essen* [2008] L&TR 20; a case of subletting in breach of covenant.

24. I must therefore consider whether there has been a waiver of the breach of covenant which would otherwise be the consequence of the subletting in May 2015 to Mr Kus.

25. In my judgment there has been no such waiver.

26. There is no act of Haysport after the breach from which consent could be inferred. No sums have been demanded or accepted from Mr De Kment since that letting; certainly since 3 June 2015.

27. Nor does Mr De Kment identify any particular communication from Haysport in the run up to the subletting to Mr Kus from which consent to this particular subletting should be inferred.

28. Rather he relies on the fact that Haysport has demanded or accepted rent from Mr De Kment from 2002 with assumed knowledge of other sublettings in breach of covenant. It is really a contention that Haysport has by long acquiescence abandoned the covenant against subletting.

29. I do not accept that contention. Demand or acceptance of rent may be a recognition of the continued existence of a lease (and so bar forfeiture) but it does not without more mean that the landlord has abandoned those covenants in the lease of which the tenant is in breach. There may be cases where additional circumstances mean, or perhaps the period of acquiescence in plain breaches is so long, that the lessor can only be understood to have abandoned the covenant. But it is my judgment that the simple fact of acceptance of rent by Haysport since 2002 does not, without more, justify such a conclusion in relation to the covenant against subletting in the Lease. That is particularly so given that notice was not given of sublettings as required by clause 2(17) of the Lease. Any acquiescence was in circumstances where the tenant was not drawing the landlord's attention to the sublettings by giving notice as it was obliged to do.

30. While Mr De Kment's resistance to this application was not put in terms of estoppel, it may be useful for me to add that I do not consider that such would have improved his case. There was nothing amounting to a clear representation that clause 2(16)(b) would not be enforced and Mr De Kment's understanding that he could sublet was born, in any event, not of any representation from Haysport about enforcement but on the fact that his conveyancer did not advise him of any restriction on subletting.

31. I should also make clear that I have had regard to Mr De Kment's statement dated 16 June 2017 despite such not being provided for by the directions. That statement deals first with the role of European Equities plc, being the entity named as landlord in the assured shorthold tenancy agreements of the Flat. But Haysport does not rely on the involvement of European Equities plc to establish breach. It relies on the fact of subletting. The statement also exhibits an events log said to support the assertion that Haysport knew, by Goadsby's, of sublettings at the Flat. But Haysport's case, which I have found to be correct, is that there is no waiver of breach even if it had such knowledge.

Costs

32. Haysport asks for an order for its costs of this application. But there is, importantly, no power in the Tribunal to make an order for costs against a party save in the limited circumstances set out in rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, namely where such party has acted unreasonably in bringing, defending or conducting proceedings.

33. While I have decided the case against Mr De Kment, there was nothing unreasonable about his defence of the application and I refuse the application for an order for costs.

34. Rule 13 does, however, provide for an order that a party reimburse fees paid by the other and, Haysport having been successful, I will make an order that its fees be reimbursed by Mr De Kment. I understand those are in the sum of £100.

Summary of decision

35. From the above, the Tribunal determines that Mr De Kment is in breach of the covenant against subletting and orders that he must reimburse Haysport's fees for the application in the sum of £100. The application for an order for Haysport's costs is refused.

Appeal

36. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) 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.

37. 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.

38. 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.

39. 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.

Judge A Johns QC

Dated 5 July 2017