12394

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AN/LSC/2017/0168**
Property	:	**8 and 12 Spencer Mews Greyhound Road Fulham London W6 8PB**
Applicant	:	**Mr Thomas Edmund Short and Mrs Lynette Short**
	:	**Mr T E Short in person**
Respondent	:	**Proxima GR Properties Limited**
	:	**Mr S Allison**
Type of application	:	**For the determination of the reasonableness of and the liability to pay administration charges**
Tribunal members	:	**Mrs E Flint DMS FRICS** **Mr M C Taylor FRICS**
Date and Venue of hearing	:	**8 August 2017** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**14 AUGUST 2017**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £240 inclusive of VAT is payable by the Applicant in respect of the administration charges for legal costs.

(2) The Tribunal declines to make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The Applicants seek a determination pursuant to paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 whether administration charges in respect of subletting one of the flats and the car parking spaces are reasonable and payable. The Applicant seeks a determination under section 20C of the Landlord and Tenant Act 1985 in respect of the landlord's costs in relation to the tribunal proceedings.

2. The relevant legal provisions are set out in the Appendix to this decision.

The background

3. The Applicants are joint leaseholders of the premises 8 and 12 Spencer Mews London W8 8PB (the premises). The premises comprise two studio flats, a car parking space is demised with each flat.

4. The Applicants original application was made under Section 27A of the Landlord and Tenant Act 1985 however the matters in dispute related only to administration charges. The parties agreed during the hearing and the Tribunal consented to the application being amended to deal with the disputed administration charges since the grounds within the original application and the evidence within the bundles related to the disputed administration charges. The parties accept that there are no service charge provisions within the lease.

5. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The Lease

6. The original lease which is dated 29th July 1982 is for a term of 99 years from 1st January 1975 at an initial ground rent of £20pa.

7. By paragraph 1 of the Third Schedule the Lessee covenants *"Not to use the demised premises nor permit the same to be used for any purpose whatsoever other than as a private dwellinghouse in the occupation of one family"* .....

8. The Lessee covenants under paragraph 6(i) of the Fourth Schedule to *"not sublet the whole or any part of the demised premises save that an underletting of the whole of the demised premises (with the prior consent of the Lessor.....) is permitted in the case of a term certain not exceeding three years at a rack rent"* and under 6(ii) *"the Lessee shall not assign part only of the demised premises"*. The Lessee also covenants to give the Lessor prior written notice of an intention to assign the lease.

9. The demised premises are defined in the Seventh Schedule as comprising (a) the studio solo flat, (b) the parking space and (c) the common parts (as defined within the lease).

10. Each flat is subject to a supplemental lease dated 12th February 2016 extending the original term to 210 years from 25 March 1982 on the same terms, other than rent, as the original lease.

11. **The Issues**

12. The relevant issues set out for determination are as follows:

13. The payability of the administration charges of £65 for each time permission is sought to sublet the premises. Did the agreement to refund all fees include the sums paid (£2600) in respect of the car parking spaces.

14. Is the annual charge of £200 per year in respect of the car parking spaces reasonable?

15. Having read the submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The Applicant's case

16. Mr Short said that the applicants had applied for consent to sublet the flats. The Respondent had sought what he considered to be very high fees, an application had been made to the tribunal and settlement had been reached between the parties to agree a fee of £65 per sublet. As part of the agreement the respondent had agreed to refund all fees in excess of the agreed amount. There had been no refund received. The respondent had taken the view that the fees charged in relation to a

licence relating to the car parking spaces was a separate matter. He did not think that the car parking spaces could be both a separate matter and their use indivisible from that of the flats.

17. Mr Short said that the arrangement with Streetcar was a sharing, non-exclusive use arrangement as the spaces were used for only a few hours at a time. The company did not prevent him from using the space himself although the advantage of the arrangement was that he was a member of the car pool scheme and did not need to have his own car when he stayed in the flat. He did not consider that the use made by Streetcar could constitute use as a residence and therefore the covenants in the lease not to sublet a part had not been breached. Moreover clause 6 was included in the leases of the ground floor flats which did not have any parking spaces therefore the clause must relate to the residential part of the demised premises.

18. Mr Short referred to 43 Nemcova v Fairfield Rents Ltd 2016 UKUT 303 (LC) where it was held that using the premises for very short term lettings for part of the year breached the covenant to use the flat as a private residence; in order for a property to be used as the occupier's private residence there must be a degree of permanence.

The Respondent's case

19. The history behind the application was that the Respondent's became aware that the applicants had sublet part of the properties, i.e. the car parking spaces, in breach of their lease. In or about August 2009, the parties reached an agreement to

    (a) enter into licences to allow the Applicants to sub-let the parking spaces;

    (b) Applicants agreed to pay a licence fee of £200 pa to be paid bi-annually

20. The parties entered into licences to underlet the parking spaces on 1 October 2010.

21. In early 2010 the Applicants sought consent from the Respondent to sub-let both of the flats. The Respondent confirmed its conditions for granting consent included payment of a fee per property.

22. In May 2010, the Applicants applied to the Tribunal for a determination as to liability to pay an administration charge or for the variation of a fixed administration charge. The parties reached an agreement and the proceedings were withdrawn.

23. The Respondent offered to "refund all fees above £130 (£65 per lease) ...". The applicants accepted the offer by a letter dated 22 July 2014.

24. Mr Allison of counsel represented the Respondent. He referred to the fact that the Tribunal's powers were limited to those set out in statute. He contended that the tribunal did not have jurisdiction to consider the status of the agreement with Streetcar and whether it was a licence or a lease. In this case the tribunal's jurisdiction was limited to the reasonableness and payability of administration fees.

25. The fees with which we were concerned were limited to the fee of £200 + VAT referred to in a letter dated 28 April 2017. The letter was sent in accordance with the Practice Direction on Pre-Action Conduct contained in the Civil Procedure Rules. The letter states that the flat has been sublet without the parking space in breach of the lease and that legal costs of £240 inclusive of VAT have been incurred. The costs are claimed under paragraph 4 of the Fourth Schedule of the original leases which is incorporated into the extended leases by Clause 3.1.

26. The fee for subletting the flats had already been agreed between the parties at £65 per subletting resulting in the withdrawal of the previous application to this tribunal. The agreement allowing the car parking spaces to be let separately from the flats included a licence fee of £200 per year for each space, therefore the fee was not an administration fee. The licence was a commercial agreement allowing the car parking spaces to occupied separately from the flat since the leases contained an absolute prohibition against subletting a part only of the demised premises.

27. Mr Allison confirmed that there is currently no licence to sublet in place.

28. Mr Allison's main argument was that there had been a breach of the user clause. He said that a flat and car parking space can be occupied together and treated as a private residence, however a car parking space occupied without the flat cannot be said to be occupied as a private residence. He also referred to Nemcova and the various cases summarised in the decision regarding use as a private dwelling-house. He drew our attention in particular to the exerts from Tendler v Sproule, a case concerning lodgers; Falgor Commercial SA v Alsabahia Inc where the lessee company granted occupational licences to visitors for monetary payment; and C & G Homes ltd v Secretary of State for Health which concerned two properties purchased by the Secretary of State for use as supervised housing for former mental hospital patients who were returning to the community. In all these cases the use was held not to comply with a covenant to use as a private dwelling-house since the properties were not being used as the occupier's home which involves the concept of permanence.

29. If he is wrong on the breach of the user clause then he contends that there has been a breach of the clause not to sublet a part.

The tribunal's decision

30. The tribunal determines that the only administration charges within its jurisdiction are the legal fees of £200 plus VAT. The tribunal determines that the fees are reasonable in amount and payable in accordance with the terms of the lease.

Reasons for the tribunal's decision

31. The tribunal does not have jurisdiction over matters which have already been agreed. The fee for subletting the flats of £65 per subletting was agreed between the parties and led to the previous application to the tribunal being withdrawn. The tribunal has no jurisdiction as regards other matters which were part of this agreement.

32. The licence fee payable in respect of the car parking spaces is part of a commercial agreement between the parties allowing the Applicants to enter into an agreement to allow Streetcar to use the car parking spaces despite there being an absolute prohibition in the lease for a part only of the demised premises to be sublet. The tribunal do not have jurisdiction over such a fee as it is not an administration charge as defined in the Act but a commercial licence fee.

Application under s.20C

33. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. The lease is drawn in such a way that the lessor does not have any responsibility for any of the common parts and consequently there are no service charge provisions within the lease. The Respondent considered that no Order should be made. Having considered the submissions from the parties, the tribunal determines that in the circumstances no order is to be made under section 20C of the 1985 Act, because there is no service charge regime under which such charges could be made.

Name: E Flint **Date:** 14 August 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).