



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

Case Reference : **MAN/00BW/LBC/2020/0010P**

Property : **269 Twist Lane, Leigh, WN7 4EH**

Applicant : **G & O Properties (London) Ltd**

Representative : **GSL Administration**

Respondent : **Mr David Baxter and Mrs Lynn Baxter**

Representative : **McCarthy Bennett Holland Solicitors**

Type of Application : **Commonhold & Leasehold Reform Act
2002 Section 168(4)**

Tribunal Members : **Tribunal Judge J.E. Oliver
Tribunal Member S.A. Kendall**

**Date of
Determination** : **1st December 2020**

Date of Decision : **17th December 2020**

DECISION

Decision

1. The Tribunal determines Mr & Mrs Baxter are in breach of the covenants contained within the Lease, namely:
 - (1) Not to assign the Property without the consent of the lessor
 - (2) Not to part with possession of the Property without the consent of the lessor in writing.
 - (3) Fail to insure the Property in the joint names of the lessor and lessee.

Application

2. This is an application, dated 31st March 2020, by G&O Properties (London) Limited (“G&O Properties”) for an order, pursuant to Section 168(4) of the Commonhold & Leasehold Reform Act 2002 (‘the 2002 Act’) that there have been breaches of the covenant by the Lessee contained within the Lease relating to 269 Twist Lane, Leigh (“the Property”).
3. The Tribunal was provided with a copy of the Lease dated 12th July 1889 for a term of 999 years from the date of the Lease and made between The Corporation of the Scottish Provident Institution (1) and Peter Kearsley (2) (“the Lease”).
4. G&O Properties acquired the freehold interest in the Property on 20th January 1999.
5. Directions relating to the application were issued on 25th September 2020, providing for the filing of additional documentation and statement by both the parties and thereafter for the application to be determined without an inspection or hearing.
6. Neither party requested a hearing.
7. The matter was listed for determination on 1st December 2020.

The Law

8. Section 168 of the 2002 Act provides that before a landlord may apply to forfeit any lease for a breach of either a covenant or condition of the lease by the tenant, it must have been determined that a breach has occurred. This can be done either by a determination under 168(4) of the 2002 Act, by the tenant admitting the breach, or by a court making a determination.
9. Section 168 (4), under which the present application is made, provides as follows:

“A landlord under a long lease of a dwelling may make an application to a First-tier Tribunal for a determination that a breach of covenant or condition of the lease has occurred”

The Lease

10. The Lease contains the following covenants:

“And should not or would not during the term thereby granted assign or underlet or part with possession of the said premise or any part thereof or do or permit any act or thing whereby or by means whereof the said premises or any part thereof might be assigned or otherwise disposed of or the possession thereof parted with to any person or persons whomsoever for the whole or any part of the said term without the consent in writing of the Lessors first had and obtained for that purpose such consent however not to be unreasonably withheld in the case of a respectable and responsible person”

“The Lessee his heirs executors administrators and assigns would insure and keep insures in the joint names of the Lessors and Lessee for their successors heirs or assigns the said dwelling house and all buildings from time to time on the said demised premises against loss or damage by fire in some Insurance Office to be approved of by the Lessors successors or assigns for the sum of £500 at the least...”

Submissions

Not to assign the Property without the consent of the lessor

11. In its application to the Tribunal, G & O Properties stated its consent to the assignment had not been obtained when Mr & Mrs Baxter acquired their interest in the Property on 10th July 2014, nor had any notice of the assignment been served. It had only learned of the assignment in 2016 and had then begun correspondence with the solicitors acting for Mr & Mrs Baxter. This and the other alleged breaches of the Lease had not been resolved in correspondence, resulting in the application to the Tribunal.
12. In response to this, it was said that when Mr & Mrs Baxter purchased the Property, they had been told the previous owners had never received any ground rent demands and the freeholder was unknown. Consequently, they had not sought any consent to the assignment, nor served any notice of it.
13. Mr & Mrs Baxter submitted the breach was that of the vendors, when selling the Property. They should have sought consent to assign the lease since no requirement to obtain consent existed before Mr & Mrs Baxter had purchased the leasehold title. Alternatively, the breach had been waived by G & O Properties. It was said it was aware Mr & Mrs Baxter had acquired the Property in 2014 and had demanded ground rent on 15th July 2015 and on 21st March 2016. The ground rent demanded was paid on 25th July 2016.
14. G & O Properties argued the covenant was breached when the assignment was completed at which point Mr & Mrs Baxter was the tenant. Further, s168(4) of the 2002 Act only requires a determination that a breach has occurred and not by whom. In the matter of waiver, this is a matter for determination by the Court upon any application for forfeiture and not the Tribunal. G & O Properties did not accept the argument they had accepted ground rent after they had become aware of the assignment, such to waive the breach.

Not to part with possession of the Property without the consent of the lessor in writing

15. Upon the issue of sub-letting, Mr & Ms Baxter accepted they had sub-let the Property and this had been notified to Urbanpoint Property Management Company (“Urbanpoint”) on 12th July 2106. On 1st September 2016 Urbanpoint had written to Mr. & Mrs Baxter requesting payment of ground rent. The failure to obtain consent is said to be a “once and for all breach” that has been waived by the demand of rent. The Tribunal was referred to ***Segal Securities v Thoseby [1963] 1. Q B. 887*** and to 17.098 Woodfall: Landlord & Tenant.
16. G & O Properties submitted the information provided on July 2016 was insufficient for it to have knowledge of the breach, the letter having denied the Property was sub-let, but admitting it was let on an AST. Further, it was said its letter of 1st September 2016 does not contain a demand for ground rent; ground rent is only referred to within the letter.

Fail to insure the Property in the joint names of the lessor and lessee

17. Mr & Mrs Baxter submitted that they were not in breach of the insurance covenant. Since June 2015 the interest of G & O Properties had been noted on the insurance policy for the Property and a copy of the policy schedule was provided. Further, the Lease provided that should any lessee fail to so insure, the Landlord could do so and seek reimbursement from the lessee.
18. G & O Properties argued that noting their interest on the policy did not equate to putting the policy in joint names, as required by the terms of the Lease. The Tribunal was referred to *11-093 Woodfall-Landlord & Tenant-*

“Similarly a covenant to insure in the joint names of the landlord and tenant is broken if the tenant insures in his name alone...”

19. The Tribunal was also referred to ***Denise Green v 180 Archway Raod Management Co Ltd [2012] UKUT 245 (LC)*** where it had been argued an insurance policy had not been effected in the joint names of the lessor and lessee:

“(3) As to the insurance for the four years from July 1, 2006 to July 1 2010, placing insurance in the name of the lessor and with no mention of the lessee’s name , with the lessee’s interest dealt with merely by a general interest clause, was not the same as placing insurance in joint names of the lessor and lessee.”

Determination

20. The Tribunal considered the submissions made by both parties. It is noted that for the Tribunal to find there had been a breach of the covenant contained within the Lease it must be satisfied, on the balance of probabilities that such a breach has occurred.
21. In their submissions, Mr and Mrs Baxter have argued the issue of waiver. The jurisdiction of the Tribunal is to determine whether or not there has been a breach of covenant, but not to determine upon the issue of waiver. The issue of waiver is one for a Court to determine upon any future forfeiture application. In **Swanston Grange (Luton) Management Ltd v Langley-Essen LRX/12/2007** HHJ Huskinson, at paragraph 16 said:

“Nothing I say is intended to indicate any jurisdiction in the LVT to consider the separate question of waiver which arises when it is necessary to decide whether a landlord has waived the right to forfeit a lease on the basis of a breach of covenant.”

22. Accordingly, it is for the Tribunal to determine whether there has been a breach of the covenants from the strict wording of the Lease.

Not to assign the Property without the consent of the Lessor

23. The Tribunal considered the argument that the responsibility for the breach not to assign without consent was with the vendor of the Property, prior to the purchase by Mr and Mrs Baxter. The Tribunal did not accept that this was the case. The legal estate of registered land does not pass until the purchase is registered at HM Land Registry. Here, this was on 10th July 2014. This is the point at which the covenant is broken. The vendors of the Property had no interest in the Property at that date and therefore could not be said to have breached the covenant.
24. It was said Mr. And Mrs Baxter had been told the previous owners of the Property had never paid any ground rent and were not aware of the identity of the Landlord. Consequently, they were unable to obtain consent to or give notice of any assignment. Whilst this may have been the case, it did not remove the need for Mr and Mrs Baxter, or their solicitors, to make reasonable enquiries to identify the freeholder. G & O Properties provided a copy of the freehold title that was registered on 20th January 1999. The identity of the freeholder is therefore a matter of public record that could have been found upon enquiry.
25. Whilst Mr and Mrs Baxter have argued waiver, they have not denied they failed to seek consent to the assignment. The wording of the Lease is clear in this matter, in that consent should be obtained. Accordingly, Mr and Mrs Baxter are in breach of Lease.

Not to part with possession of the Property without the consent of the lessor in writing

26. Mr and Mrs Baxter had not denied they had let the Property under an AST and had seemingly done so since 2016. Waiver had been raised as an argument in respect of this breach, but as already stated, that is not a matter for this Tribunal.
27. The Lease stipulates that any lessee should not “*assign, underlet or part with possession*”. Whilst it appears there may have been some argument, in correspondence, that an AST was neither an assignment nor an underlease it seems clear that it is a circumstance where Mr and Mrs Baxter have parted with possession of the Property. The wording of the Lease is clear and the Tribunal finds this has been breached.

Fail to insure the Property in the joint names of the lessor and lessee

28. The Tribunal notes Mr and Mrs Baxter have now insured the Property in the joint names of themselves and G & O Properties from 20th October 2020. However, prior to that date the interest of G & O Properties had only been noted on the policy. This was not in compliance with the terms of the Lease. The Lease specifies the policy must be in joint names. If the insurance is not so effected then a breach of the covenant has taken place. The fact the policy is now in joint names does not remedy the earlier breaches.
29. The Tribunal does not accept the argument put forward that G & O Properties could have insured the Property in joint names and then sought reimbursement. This is allowed for in the Lease, but it does not prevent or remedy a breach of the covenant having taken place by Mr and Mrs Baxter.
30. The Tribunal therefore finds Mr and Mrs Baxter to be in breach of the covenants as claimed by G & O Properties.

Tribunal Judge J Oliver

1 December 2020