FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00FN/LBC/2023/0002**
Property	**:**	**Flat 4, Madeleine House, Clarendon Park Road, Leicester, LE2 3AL**
Applicant	**:**	**Sarum Properties Limited**
Respondent	**:**	**Ms Lola Ojomo**
Type of Application	**:**	**Application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of covenant or condition in the lease of the property has occurred.**
Tribunal Members	**:**	**Judge C. P. Tonge, LLB, BA.** **Mrs K. Bentley**
Date of Decision	**:**	**11 January 2024**

DECISION

Application and background

1. The Applicant freeholder brings this case before the Tribunal by an application dated 25 January 2023. The application requests that the Tribunal determine whether or not Ms Lola Ojomo, the Respondent tenant, is in breach of covenants in relation to Flat 4, Madeleine House, Clarendon Park Road, Leicester, LE2 3AL “the property".

2. The Applicant alleges that multiple breaches have occurred. Briefly these are; failure to pay the rents, failure to pay interest on the rents, failure to pay legal costs in relation to recovering the rents, failure to comply with covenants relating to the assignment of the lease from Mr Smith to herself, assigning or underletting the lease to Property Malak Limited without consent and in doing so permitting the property to be used for short term lets and permitting the occupiers of the property to cause a nuisance to other residents of the building housing this flat.

3. This is a case in which, if a breach of covenant is found to have taken place, a County Court may be asked to consider making an order that the lease be forfeit. The Applicant has made it clear in the written evidence that this is being considered. One of the covenants that the Applicant alleges has been breached provides for legal costs to be payable when the landlord takes action in contemplation of proceedings under section 146 and 147 of The Law of Property Act 1925 that deal with forfeiture.

4. Directions were issued on 9 February 2023. In those Directions it is noted that the Applicant has indicated that this case can be dealt with without the need for the evidence to be considered at a hearing, to be decided upon the written evidence in the papers. The Directions indicate agreement with this course of action, but provide for an oral hearing to be arranged, if the Respondent so requests. There has not been a request for an oral hearing.

5. In compliance with these Directions the Applicant has served a bundle of evidence that is 206 pages in length, but unfortunately the bundle does not have an index and is not paginated. This will make reference to individual pages within the bundle more difficult than it would otherwise have been.

6. In compliance with these Directions the Respondent has served a 28 page bundle of documents. Unfortunately the bundle does not have an index and is not paginated. This will make reference to individual pages within the bundle more difficult than it would otherwise have been.

7. The written evidence referred to paragraphs 5 and 6 will be referred to where necessary in this Decision.

8. The case has involved an unusual amount of prehearing procedural work involving further Directions, an order to strike out the case, an order to

reinstate the case and a warning that the Respondent might be barred from further involvement in the case, procedural work undertaken by a procedural Judge. This Tribunal has considered these issues and has determined that the parties have not acted unreasonably during the prehearing procedures.

9. Management agents were initially Warwick Estates, but on 1 May 2022 Block Property Solutions were appointed.

10. This is a case in which it is clearly not necessary for the Tribunal to inspect the property. No inspection has been held.

The property

11. The property is a flat in a block of flats that contains 13 flats. The freehold of the building is held by the Applicant.

Relevant provisions of the lease

12. The Respondent holds the remainder of a lease on the property with a term of 125 years, commencing on 1 January 2016. The lease on the property was first acquired by Lee Mark Smith and was assigned to the Respondent on 30 March 2022.

13. It is necessary to consider the definitions section of the lease when considering the meaning of each clause of the lease.

14. Clause 5.1. This creates a covenant that the lessee shall pay the rent on the flat (currently £300 per year) and a proportion of the service charges and cost of insuring the building.

15. Clause 5.3.1. This creates a covenant that the lessee shall pay interest upon payments that are due under the lease if they are overdue at a rate of 4% above the base rate at Barclays Bank.

16. Clause 5.5. This creates a covenant that the lessee shall pay the landlord's costs, including legal costs involved in serving a notice , or contemplation of taking proceedings under section 146 or 147 of The Law of Property Act 1925 (forfeiture of the lease).

17. Clause 5.7. This creates a covenant that the lessee shall pay the landlord's costs (including legal costs) in connection with recovery of arrears of payments due under the lease.

18. Clause 5.15.2. This creates a covenant that the lessee shall not assign, underlet or part with possession of the property without the landlord's

prior written consent unless this is by way of assured shorthold tenancy for no more than 12 months.

19. Clause 5.17. This creates covenants that prevent a number of things being done in relation to a permitted assignment or underlet, but these are not relevant to this case because there has not been a permitted assignment or underlet made by the Respondent.

20. Clause 5.21. This creates a covenant that the lessee shall not assign the lease unless, before the assignment a deed is entered into by the new lessee as printed in schedule 8 of the lease. This would apply to the assignment of the lease by Mr Smith to the Respondent and may apply to the relationship between the Respondent and Property Malak Limited.

21. Clause 5.23.1. This creates a covenant that the lessee (Ms Ojomo) shall, within one calendar month of any assignment or underletting of the property, give notice thereof to the landlord's solicitors. This clause involves the payment of the solicitors reasonable fee, being not less than £50. This clause will apply to the assignment of the lease from Mr Smith to Ms Ojomo and may apply to the transaction between Ms Ojomo and Property Malak Limited.

22. Clause 5.27. This creates a covenant that the lessee shall not permit the property to be used for any other purpose than as single private dwelling for residential purposes.

23. Clause 6.10. This additional covenant requires the lessee at all times to comply with the regulations in Schedule 5 of the lease. Regulation 1 in that schedule prohibits the occupiers of the property from causing a nuisance.

The Law

The Commonhold and Leasehold Reform Act 2002

Section 168. No forfeiture notice before determination of breach

(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 (c. 20) (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 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.

Determination of the issues in the case

24. The Tribunal met on 11 January 2024 to determine the issues raised in this application. The Applicant submits that the Respondent has breached all of the covenants dealt with above.

25. The contents of the Applicant's evidence bundle that are particularly relevant are as follows.

26. The Applicant's legal submissions. These refer to the Respondent's email of 24 March 2023 in which the Respondent admits that she is breach of the covenants in the lease, but the Applicant points out that the admissions are equivocal. As such the Applicant goes on to set out a reasoned argument as to why the Applicant considers the Respondent to be in breach of the various covenants in the lease.

27. In relation to the contractual arrangement between the Respondent and Property Malak Limited. The Applicant submits that this is s subletting of the property to Property Malak Limited made without the Applicant's permission or agreement. The Applicant adds that Property Malak Limited then commenced to advertise the property for rent on a daily basis if required via Airbnb, Booking.com, and other similar sites. The Applicant exhibits various advertisements downloaded from the internet for a flat in Madelein House. The Tribunal has considered these advertisements and is satisfied from the descriptions given, the photographs that they contain and the addresses of the flat on offer that they do refer to the property. In addition to Airbnb and Booking.com they are also placed by Blue Pillow and Agoda. There are 5 reviews from short term tenants.

28. The Applicant adds a paragraph entitled costs. In that paragraph the Applicant states that he does not make an application for costs, but that "costs should follow the event". The Tribunal does not agree with this submission and will return to it later.

29. The witness statement of Matthew Knight, the Applicant's solicitor. In this statement the solicitor produces a demand for payment of rent, dated 16 November 2021, still not paid. There is also a demand for a proportion of the cost of building insurance of £507.46, dated 27 August 2021, still not paid. On 25 January 2021 the then lessee Mr Smith raised leasehold conveyancing enquiries with the Applicant as a precursor to sale of the lease on the property. These would have informed any potential buyer of these debts and the requirements of the covenants of the lease in relation to assignment of the lease. A service charge demand was made on 10 March 2022 of £2,493.40, still not paid.

30. The assignment of the lease on the property from Mr Smith to the Respondent was completed on 30 March 2022, but this was not notified to the Applicant or the Applicant's solicitor until 50 days after the assignment had been made, in breach of clause 5.23.1. Mr Knight points out that the assignment is not dated and that therefore it is not a properly completed assignment. A copy of the assignment is produced.

31. Mr Knight refers to correspondence between the parties in which the Respondent on several occasions indicates that she is seeking to amend the agreement with Property Malak Limited, so that the company could then only let the property on longer lets. Mr Knight chose to put this to the test on 25 January 2023 and was still able to book the property for a week's stay, being 29 January 2023 to 5 February 2023, through Booking. com.

32. Mr Knight produces a copy of the agreement between the Respondent and Property Malak Limited. Further a complaint from another tenant at Madelein House is attached, dated 9 December 2022, relating to the short term tenants then occupying the property, amongst other things causing a nuisance, relating to noise and leaving the exterior door of the building unlocked.

33. Mr Knight includes in the Applicant's bundle a copy of the application form and grounds of the application in a separate 7 page document. The lease on the property is attached. Copies of land registration documents are attached.

34. The Respondent states that she was badly advised by the solicitor who conducted her purchase of the lease of the property from Mr Smith. The Respondent makes various references to the conveyancer but does not include a statement from that person. The Respondent bought this lease as

a financial investment. The Respondent makes references to the short term tenants that Property Malak Limited put into the property, but does not include a statement from any representative of that company.

35. The Respondent in representations, dated 3 May 2023 accepts that she has inadvertently "breached the lease", without being specific as to which covenants she accepts that she has breached. Further, the Respondent offers to pay the overdue rent, service charges, insurance charges, legal costs and interest upon the overdue charges as demanded in the Applicant's list entitled "Arrears 4 Madeliene House" as of 28 September 2022, being a total of £5,123.60. The Applicant's legal costs that the Respondent agrees to pay is £907.50.

36. Having made these admissions the Respondent asserts that it has not been necessary for this case to be put before the Tribunal because the Respondent has been attempting to resolve this matter for some time and has previously made these admissions. Further, the Respondent submits that the Applicant has refused to accept the admissions, causing the debt to increase (presumably because of the covenant requiring interest to be paid). That to do this was improper and that as such the Respondent asks the Tribunal to dismiss the application.

37. The Tribunal points out that it does not have the power to dismiss a case. There is a power to strike a case out in appropriate circumstances but those circumstances do not exist. This case has been properly brought and properly continued in the face of vague admissions. Both parties have brought the attention of the Tribunal to an email from the Respondent, dated 24 March 2023. In that email the Respondent makes the same vague admission as is referred to above and offers to pay the Applicant's costs. The Tribunal determines that these two sets of admissions are too vague to expect the Applicant to accept them. This Tribunal will still have to go through each clause of the lease and decide whether on not they have been breached. In considering each clause reference should be had to the Tribunal's summary of the appropriate clause, above.

38. Clause 5.1. and 5.3.1. The Tribunal has seen demands for payment of the rent, service charge and insurance charge and all these sums have been properly demanded. Interest was due on the overdue payments. The Tribunal accepts evidence given by the Applicant's solicitor, Mr Knight, that during pre-assignment correspondence Mr Knight expected the Respondent to be advised of these amounts. The Tribunal accepts that the charges that relate to Mr Smith that have been referred to above have not been paid. The Tribunal accepts the evidence of the Respondent that she was led to believe that those charges would be paid by Mr Smith, where appropriate. The Tribunal notes that the Respondent admits that she is liable to pay all the costs, that include interest charges on the unpaid rents

detailed in "Arrears 4 Madeliene House" as of 28 September 2022, being a total of £5,123.60.

39. The Tribunal therefore determines that the Respondent is in breach of the covenant in clause 5.1. and clause 5.3.1. These breaches continuing until the point when the Respondent made a clear offer to pay them. In that regard the Tribunal notes that on 8 November 2022, the Respondent was not admitting responsibility to pay the rent and buildings insurance, referred to above and was therefore denying responsibility for any interest on those sums (see a letter from the Respondent of that date). However by the letter to the Tribunal on 3 May 2023 there is a clear offer to pay the full amount as calculated on 28 September 2022.

40. Clause 5.5. and 5.7. These relate to the Applicant's costs and in particular, the Applicant's solicitor's costs involved in contemplation of forfeiture proceedings and recovery of arrears, being payments that are overdue. Both covenants apply to this case. The Respondent appears to accept that she is liable to pay such costs in her admission that she is liable to pay the costs included in "Arrears 4 Madeliene House" as of 28 September 2022, being a total of £5,123.60 and the agreement to pay costs generally in the same offer made on 24 March 2023. The Tribunal determines that by accepting a liability to pay costs, but in not paying them, the Respondent has been in breach of these covenants up until the date that the Respondent offered to pay them. However, the Tribunal has not seen any evidence to suggest that the Applicant has claimed the payment of such costs by means of claiming an administration charge. As such only the County Court might be able to enforce these clauses, as regards payment.

41. Clause 5.15.2. This requires a determination to be made as to the true nature of the agreement between the Respondent and Property Malak Limited. This 9 page document is entitled 'Management Agreement' and the Respondent contends that this document is properly entitled, it is merely a management agreement. The Respondent had the lease of the property assigned to her on 30 March 2022. On 4 April 2022 the Respondent signed this management agreement "document". The effect of the document is transferring possession of the property from the Respondent to Property Malak Limited for a period of three years (with a break clause after 18 months, being 3 October 2023).

42. During that three year period Property Malak Limited is required to pay the Respondent £1,100 per month (adjusted to reflect overheads). Property Malak Limited is then able to let out the property on lease or licence to any person that Property Malak Limited finds is willing to take on a lease or licence. Property Malak Limited keeps all rents paid by the occupiers of the property. Hence for the duration of the agreement possession and control of the property is given to Property Malak Limited, upon payment of a rent of £1,100 per month to the Respondent (adjusted

for overheads). The Tribunal determines that this is an underlet of the lease of this property from the Respondent to Property Malak Limited and is a breach of clause 5.15.2.

43. Clause 5.17. The Tribunal has determined that the agreement passing control of the property to Property Malak Limited, upon payment of rent is an underlet of the lease that is not permitted by the lease. Clause 5.17 does not apply in these circumstances.

44. Clause 5.21. The Tribunal has determined that the agreement with Property Malak Limited is an underlet of the lease. A formal deed of assignment was not completed. As such the Tribunal determines that this clause does not apply to this transaction.

45. Clause 5.23.1. The deed of assignment of the lease from Mr Smith to the Respondent is not dated. The date section has not been completed and all that can be seen is that the assignment occurred during 2022. The Tribunal accepts evidence from the Land Registry and the parties to the case that the assignment was made on 30 March 2022. This clause clearly applies to this situation. It is not necessary for this Tribunal to determine whether or not the absence of a date on an assignment invalidates the assignment because it is clear from the evidence of Mr Knight that this clause has been breached in any event because notice of the assignment was not given to the Applicant's solicitor until 50 days after the assignment took place. Further there was no payment of reasonable solicitor's fees or an offer to £50, as required by the clause. The Respondent is in breach of this covenant.

46. In relation to the underletting from the Respondent to Property Malak Limited. This covenant would again apply. As such the Respondent should have given notice of this to the Applicant's solicitor and paid the required fee by 3 May 2022 and did not do so. This is a further breach of this covenant.

47. Clause 5.27. The Tribunal is satisfied on the evidence above that the Respondent, in sub-letting the property to Property Malak Limited has permitted that company to use Airbnb and similar companies to let out the property to visitors on very short term lets or licenses. In the Upper Tribunal case of Nemcova v Fairfield Limited [2016] UKUT 303 it was held that such a use of that property was a breach of this type of private user clause. That prior decision is binding upon the Tribunal and we follow it. The Tribunal determines that the Respondent has acted in breach of the covenant created in clause 5.27.

48. Clause 6.10 and schedule 5, regulation 1. The Tribunal accepts the evidence, above, that short term users of the property have caused a nuisance in Madelaine House. The Respondent has failed to prevent this

nuisance being caused and is in breach of the covenant created by these provisions of the lease.

49. The Tribunal therefore determines that the Respondent is in breach of the covenants contained within this lease as detailed above.

50. The Tribunal now returns to the issue of costs. The Applicant has not actually made an application for costs against the Respondent. The Applicant has made the submission that "costs should follow the event". The Tribunal points out that in this Tribunal that submission is not correct. This Tribunal can only make an order for costs if such an order is permitted pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 "the Rules".

51. Neither party has referred to rule 13 of the Rules.

52. The Respondent in an email dated 24 March 2023 has offered to pay the Applicant's costs. However, the Tribunal notes that there are two clauses in the lease to which attention had been draw that deal with costs (Clause 5.5 and 5.7). These clauses may be enforced by the County Court, but do not permit an order for costs being made pursuant to rule 13 of the Rules. Further, there are costs within the debt itemised in the document "Arrears 4 Madeliene House" as of 28 September 2022, being £907.50, that the Respondent has agreed that she is liable to pay. Since this is the only figure that the Tribunal has seen that refers to costs, it is likely that this is what the Respondent had in mind when she made the offer to pay the Applicant's costs.

53. Pursuant to rule 13 of the Rules this Tribunal can only make a costs order against a party to the proceedings if that party has acted unreasonably in bringing or defending or conducting the proceedings. Such an order will be made only if the party has acted in a very unreasonable manner. In the case of Ridehalgh v Horsfield [1994] 3 ALL ER 848, where the word unreasonable had to be considered in a costs application the following guidance was given in relation to unreasonable conduct. "The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded optimistic..... but it is not unreasonable".

54. This Tribunal is not of the opinion that either party has acted in an unreasonable manner within the meaning of rule 13 of the Rules.

Decision

55. The Tribunal Decides that the Respondent has breached the covenants of the lease created by clause 5.1, clause 5.3.1, clause 5.5, clause 5.7, clause 5.15.2, clause 5.17, clause 5.23.1, clause 5.27 and the additional clause 6.10 that relates to schedule 5, regulation 5.1.

56. The Tribunal Decides that that it is not satisfied that the Respondent has breached the covenant created in clause 5.17 and clause 5.21 of the lease.

57. The Tribunal does not make any order as to costs.

58. Appeal against this Decision is to the Upper Tribunal. If any party should wish to appeal, they have 28 days from the date that this Decision is sent to them to deliver to this First-tier Tribunal an application for permission to appeal, stating the grounds for that appeal, providing particulars of those grounds, stating the paragraphs of the Decision that are appealed against and the result that the party making the application for permission to appeal seeks as a result of making the appeal.

Judge Tonge

Date this Decision sent to the parties: 19 January 2024