



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

Case Reference : CHI/00MS/LBC/2022/0020

Property : 134 Radcliffe Road, (Ashcombe House)
Southampton, SO14 0PR

Applicant : Avon Ground Rents Limited

Representative : Mr P Harrison, counsel, instructed by Scott
Cohen Solicitors

Respondent : Fortitudo (103) Limited

Representative : Mr A Carr, director and Mr G Mellery-Pratt

Type of Application : Breach of Covenant S168(4) Commonhold
and Leasehold Reform Act 2002

Tribunal Members : Regional Judge Whitney
Mr P Smith FRICS
Ms T Wong

Date of Decision : 29 April 2024

DECISION

Background

1. The Applicant sought an Order under S168 (4) of the Commonhold and Leasehold Reform Act 2002 that the Respondent has breached covenants in their lease outlined in part 5 of the application form. The application was received on 8 August 2022.
2. The Applicant's grounds of application were that,

“Notices have not been given in accordance with the lease provisions with the requisite registration fees and the Tenant has failed to evidence that the sub leases have been granted by way of permitted sub leases.”
3. The subleases in question which were not provided are granted out of title HP836326 in respect of Flats 2, 3, 4, 38, 42, 43, 44, 45 and 46 Ashcombe House.
4. Directions were issued 4 November 2022 and 7 December 2022. The Respondent failed to respond to any of the Directions issued and so on 5 January 2023, it was barred from taking further part in these proceedings.
5. Directions were issued on 7 February 2023 setting the matter down for a hearing on 25 April 2023.
6. A hearing took place on the said date with only the Applicant in attendance, despite the Respondent having been notified of the date and venue.
7. In its decision dated 2 May 2023 the Tribunal stated,
 9. It was evident from the HM Land Registry day list that some sub-leases (thought to be 9) had been granted by the Respondent.
 10. The Respondent had not given notice of the creation of the sub-leases in accordance with the terms of the head lease neither had they cooperated with the Applicant's request to produce the sub-leases.
 11. Although the sub-leases appeared to have been granted some months ago the application for their registration was still pending and therefore it was not currently possible for the Applicant to obtain copies of the sub-leases to verify their contents.
 12. The Applicant was therefore in the position of being aware that a breach of covenant had probably been committed by the Respondent (failure to notify of creation of leases) but being unable to definitively ascertain their compliance (or otherwise) with the terms of the head lease without sight of copies of the sub-lease(s) which were presently unavailable due to a backlog in registrations at HM Land Registry.
 13. It was anticipated that the registrations would be completed by mid-June 2023.

8. The Tribunal decided that a further stay should be granted until 21 June 2023 with the case relisted for hearing on that date. Two further stays were issued until 7 August 2023 and again until 1 February 2024 following case management applications from the Applicant. There had still been no contact from the Respondent.
9. On 5 February 2024 the Applicant applied for a further six month stay. The Tribunal decided that it was necessary to take an alternative course of action to enable the case to be progressed, as it seemed clear from the Applicant's representations throughout the course of these proceedings that subleases were in existence and needed to be produced, in order to reach a final resolution of the matter.
10. Further Directions were issued on 15 February 2024 confirming that the Tribunal intended to use its powers under Rule 20(1) of Tribunal Procedure Rules 2013 including considering a witness summons against the Respondent.
11. On 1 March 2023, 2 emails from George Mellery-Pratt, on behalf of Fortitudo (103) Limited provided copies of 7 Leases in respect of Plots 1 (Flat 38), 2 (Flat 2), 3 (Flat 3), 4 (Flat 4), 5 (Flat 42), 7 (Flat 44), 8 (Flat 45) which do not appear to correspond with what is required.
12. The Tribunal listed the matter for a hearing and issued a witness summons on 5th march requiring Mr A Carr, director of the Respondent company to attend the hearing with copies of the leases. On the day prior to the hearing Mr Mellery-Pratt provided two further leases.
13. The Tribunal had an electronic hearing bundle and references in [] are to pages within that bundle. We also received a skeleton argument from counsel for the Applicant.

Hearing

14. The hearing took place in person at Havant Justice Centre. Mr Harrison represented the Applicant and his witness Mr Moskovitch was in attendance. Mr Carr, director of the Applicant attended with a Mr Mellery-Pratt who assisted him throughout. The hearing was recorded.
15. Mr Carr did not have the original leases but copies. He referred to being let down by his solicitors and the Tribunal reminded him he must take his own advice.
16. Upon questioning by the Tribunal he admitted the following breaches of the lease and deed of variation [58-97] held by the Respondent company:
 - The covenant to give notice of dealings (para 16.5 of the Seventh Schedule as amended– (para 16.3 of the original lease [80])

which is renumbered to 16.5 pursuant to the Deed of Variation [94])).

- The covenant not “to sublet part of the Demised Premises for residential purposes except by the granting of Permitted Sub Leases” (para 16.3 of the Seventh Schedule as amended [94]) in respect of granting of leases over 2,3,4,38,42 & 44.
17. Mr Harrison accepted on the basis that the documents produced were true copies of those lodged with HM Land Registry that the leases relating to 43, 45 and 46 were compliant with the subletting provisions. He was content to not pursue this point.
 18. In light of the admitted breaches which have been accepted by the Applicant there was nothing further for the Tribunal to determine.
 19. Mr Carr was advised to take legal advice as to what this could mean.
 20. Mr Harrison made submissions that the Tribunal should look to make an order that the Respondent should pay costs pursuant to Rule 13(1) on the basis that the conduct of the Respondent has been unreasonable in that they have taken no part in these proceedings until the Tribunal witness summonsed mr Carr when they attend and admit the breaches. Such admissions could have been made at the outset saving the costs of these proceedings and the two hearings.
 21. The Tribunal indicated it was minded to make such an order of its own motion. However it was mindful Mr Carr had not had notice of such application and indicated it would issue directions.

Directions

22. The Applicant shall send to the Applicant and the Respondent a costs schedule by 2nd May 2024.
23. By 16 May 2024 the Respondent shall send a reply to the costs schedule confirming whether or not it agrees that a costs order should be made and the amount of any costs.
24. If so advised the Applicant may send a reply by 23 May 2024.
25. Thereafter the Tribunal shall determine what if any costs order to make on the basis of the documents filed in accordance with this direction.