FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HX/LBC/2019/004
Property	:	The Bath Building, Bath Road, Swindon, SN1 4AT
Type of Application	:	Determination as to alleged breach of covenant: section 168(4) Commonhold and Leasehold Reform Act 2002
Applicant	:	Qdime Limited
Representative	:	Allsquare Law
Respondent	:	Mr M Whale
Tribunal Member	:	Judge Martin Davey
Date of Decision	:	19 February 2020

Decision

The Tribunal determines, under section 168(4) of the Commonhold and Leasehold Reform Act 2002, that there has been a breach of the covenant contained in Paragraph 9 of Part 2 of Schedule 4 to the Lease(s) of Flats 2, 6, 10 and 11 of The Bath Building, Bath Road, Swindon SN1 4AT

Reasons for decision

The Application

1. By an application ("the Application"), dated 7 October 2019, Qdime Limited ("the Applicant"), being the freeholder Landlord of the building containing Flats 2, 6, 10 and 11 ("the Flats"), The Bath Building, Bath Road, Swindon SN1 4AT ("the Building") applied to the First-tier Tribunal (Property Chamber) ("the Tribunal"), under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for a determination as to breach of covenant by the Respondent leaseholder of Flats 2, 6, 10 and 11, Mr. Martin Whale. The terms of section 168 of the 2002 Act are set out in the Annex to these reasons.

2. The Tribunal issued Directions to the parties on 1 November 2019, 17 December 2019 and 23 January 2020. The Tribunal listed the Application as suitable for a determination on the basis of written submissions unless either party requested an oral hearing. No such request was made and the Tribunal accordingly considered the matter, on the basis of the written submissions, on 12 February 2019.

The Lease

3. The leases for the Flats were made between the Landlord at the time, Linden Homes Western Limited, the Bath Building (Swindon) Management Company Limited and the various long leaseholders at the time. The leases are for 125 years. The leases of the Flats are all in the same form and are referred to hereafter as "the Lease". The Lease was granted for a premium and a rent of £200 per annum was reserved for the first 25 years, £400 per annum for the next 25 years, £800 per annum for the next 25 years, £1,600 per annum for the next 25 years and £3,200 per annum for the last 25 years. The Lease also reserved a service charge (referred to as the Maintenance Charge).

4. The leases were granted on 16 December 2005 (Flat 2), 19 September 2005 (Flat 6), 30 September 2005 (Flat 10) and 12 August 2005 (Flat 11). The Applicant acquired the registered freehold of the Building on 2

May 2006. The Respondent was registered as leasehold proprietor of the leases of the Flats on 18 January 2006, (Flat 2), 6 October 2014 (Flat 6), 6 March 2013 (Flat 10) and 17 April 2015 (Flat 11).

5. By Clause 3.1 of the Lease the Tenant covenanted, "with the Landlord to observe and perform the obligations set out in Part 1 of Schedule 4 hereto" and by Clause 3.2 the Tenant covenanted "with the Landlord the Company and with the tenants of all other flats in the Building to observe and perform the obligations set out in Part 2 of Schedule 4 and in Schedule 9".

6. Paragraph 8.1 of Part 2 of Schedule 4 is as follows.

8.1

8.1.1 Not to assign transfer underlet or part with possession of any part of the Demised Premises (as distinct from the whole) in any way whatsoever

8.1.2 Not at any time during the Term to underlet or permit the Demised Premises to be underlet except upon the terms that the undertenant shall be liable to pay throughout the terms (*sic*) of such underlease not less than the aggregate of the rent hereby reserved and the Maintenance Charge

8.1.3.1 To cause to be inserted in every underlease (whether mediate or immediate) except in the case of a subletting at a rack rent without payment of a premium for a period not exceeding seven years a covenant by the undertenant with the Landlord and with the Tenant to observe and perform all covenants and conditions of this Lease contained (*sic*) (except the covenants for payments of rent or Maintenance Charge) with a condition permitting re-entry in case of any breach of any of the said covenants or conditions (except as aforesaid) and provided that in such underlease there is a covenant not to underlet the whole or any part of the Demised Premises

8.1.3.2 Upon any assignment of this Lease to cause the assignee to enter into a direct covenant (in accordance with **Appendix 1**) with the Landlord to observe and perform the covenants and conditions hereof and to cause any underlease (except in the case of a subletting at a rack rent without payment of a premium for a period not exceeding seven years) to contain a similar provision.

7. Paragraph 8.2 of Part 2 of Schedule 4 is as follows.

8.2 Not to assign transfer part with possession or underlet (except at a rack rent without charging a premium and for a period not exceeding seven years) the Demised

Premises unless contemporaneously with such assignment or transfer or underlease:

8.2.1 the Tenant first notifies the Landlord and the Company in writing of his intention to do so

8.2.2 the Tenant requires the transferee to accept a transfer of his share in the Company

8.2.3 the assignee or transferee or undertenant executes a deed of covenant with the Landlord and the Company (in accordance with **Appendix 1** and **Appendix 2** respectively) that he and his successors in title will at all times from the date of the assignment or transfer duly pay all rent becoming due and all sums payable under this Lease and observe and perform all covenants restrictions and stipulations herein contained and on the part of the Tenant to be observed and performed (whether running with the lease or of a purely personal or collateral nature) to the same extent as if the assignee or transferee were the original tenant party hereto"

8. Paragraph 9 of the same Schedule provides that

> "Upon every underletting of the Demised Premises and upon every assignment transfer or charge thereof and upon the grant of probate or letters of administration affecting the Term and upon the devolution of the Term under any assent or other instrument or otherwise howsoever or by any Order of the Court within one month thereafter to give to the Landlord and the Company or to their respective solicitors for the time being notice in writing of such underletting assignment transfer charge grant assent or Order with full particulars thereof and to produce to the Landlord and the Company or their respective solicitors every such document as aforesaid and to pay to the Landlord and the Company each a reasonable fee for the registration of the said notice (not being less than £65) plus any Value Added Tax or similar tax payable thereon at the rate for the time being in force and to deliver to the Landlord and the Company each deed of covenant referred to in this Schedule.

The Applicant's case

9. The Applicant asserts that the Respondent has underlet the Flats, by granting AST's thereof, but has failed to comply with paragraph 9 of part 2 of Schedule 4 to the Lease. It says that an AST is an underletting and is therefore caught by paragraph 9. It relies on a decision by the First-tier Tribunal in *Harris v Ahuja and Mehta* LON/OOBK/LBC/2019/0030 where the Tribunal held that a tenant had breached a covenant "not to assign or underlet or part with or

share possession of the whole of the demised premises without the licence in writing of the lessor" by granting an AST of the flat.

10. The Applicant infers that, in the present case, the Respondent must have bought the flats as investments and therefore let them as a consequence. The Applicant's solicitor, Andrew James Duncan of Allsquare Law, says that he visited the Building and observed that someone was audibly using a vacuum cleaner in Flat 2 and noted that people were entering and leaving Flat 11. Mr Duncan says that being satisfied that at least 2 of the four flats were occupied he commissioned a report by Chris Booth of Palatine R&D Group to establish the identities of potential occupiers. Mr Booth reported as to the names of such occupiers in relation to all four flats.

The Respondent's Case

11. Mr Whale's case is set out in his witness statement of 2 February 2020 where he states that each of the Flats has been let at various time on assured shorthold tenancies ("ASTs"). He supplied a spreadsheet which showed when the flats have been let and when they have been vacant. Mr Whale also referred to a letter dated 5 February 2013 that the Bath Building (Swindon) Management Company Ltd had written to Hazelvine Ltd. Mr. Whale signed the letter as a Director of the Company. The letter appears to be a response to the argument that paragraphs 8 and 9 applied to any sub-lettings of the Flats.

12. Mr Whale's case, as contained in his witness statement and the letter of 5 February 2013, is that paragraph 9 does not apply to an AST for the following reasons. First, that paragraphs 8 and 9 need to be read together. Mr Whale argues that paragraphs 8.1 and 8.2 exclude an AST from the obligation of a Tenant who has underlet to obtain a direct covenant between the underlessee and the Landlord. He says therefore that the obligation in paragraph 9 does not apply because in the case of an AST there are no "documents as aforesaid" (as referred to in paragraph 8). Second, that alternatively an AST is not an underletting and is therefore not caught by clauses 8 or 9. He refers to a leasehold valuation tribunal ("LVT") decision of 2012 (MAN/OOCX/LAC/2012/0022) in support of his argument that an AST is different from an underletting. Mr Whale also refers to section 33 of the Land Registration Act 2002 with regard to short tenancies. Finally, Mr Whale says that even if there has been a breach of paragraph 9 it would be a remediable breach.

Discussion

13. At the heart of this Application is a seemingly long running dispute over various matters between the Applicant Landlord and the Respondent Tenant of four flats at The Bath Building, Bath Road, Swindon SN1 4AT. However, the Application concerns the single issue of whether there has been a breach of a covenant in the Lease.

Subsections (4) and (6) of section 168 of the Commonhold and Leasehold Reform Act 2002 provide that a landlord under a long lease of a dwelling may make an application to the Tribunal for a determination that a breach of covenant or condition in the lease has occurred. The present Application for such a determination appears to have been made because section 168(1) of the 2002 Act provides that "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 (c20) (restriction on forfeiture) in respect of any breach by a tenant of a covenant or condition of the lease unless subsection (2) is satisfied." In so far as relevant, section 168(2) provides that the 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….."

14. In the present case the Applicant argues that the Respondent is in breach of the Tenant covenant contained in paragraph 9 of Part 2 of Schedule 4 to the Lease. Paragraph 9 (in so far as relevant to the circumstances of this Application) provides that in the case of "every underletting" the Tenant is obliged, within one month thereafter, to give to the Landlord or its solicitors for the time being (a) notice in writing of such underletting with full particulars thereof (b) to produce to the Landlord or its solicitors every such "document as aforesaid" and (c) to pay to the Landlord a reasonable fee for the registration of the said notice (not being less than £65) plus any Value Added Tax or similar tax payable thereon at the rate for the time being in force.

15. The Applicant says that the Respondent, having at various stages since acquiring the respective leases underlet the Flats, has failed to comply on every such occasion with the obligations set out in paragraph 9. In their respective cases neither the Applicant nor the Respondent produced documentary evidence of any sub-lettings. The Applicant relied on inferences drawn by its solicitor and the report of a firm of private investigators whose report stated, without any accompanying evidence, that various named persons were at different times in occupation of the Flats. This led the Applicant to conclude that the Flats must have been sub-let and therefore the Respondent was in breach of paragraph 9 not having complied therewith at any time.

16. The Tribunal finds it unnecessary to determine whether this evidence is compelling evidence of a breach because the Respondent freely admits that the flats have been let on ASTs at various times, as specified in the spreadsheet attached to his witness statement of 2 February 2020.

17. I therefore turn to the Respondent's submission that his failure to comply with the requirements of clause 9 in respect of these sublettings did not amount to a breach of covenant because clause 9 did not cover such lettings.

18. The Respondent's argument appears to be twofold. First that paragraphs 8 and 9 need to be read together. He argues that because paragraph 8.2, which contains a covenant against underletting,

excludes from the covenant any underlease at a rack rent for a term not exceeding 7 years, there is no obligation to give notice etc. under clause 9 of an AST, which is excluded from clause 8. Second, in the alternative, the Respondent argues that the grant of an AST is not an underletting and therefore clause 9 does not apply to such a tenancy.

19. Mr Whale relies on a LVT decision in 2012 in support of his argument that an AST is not an underletting. (*Grayson and Grayson v Adderstone Limited* MAN/OOCX/LAC/2012/0022). The case was concerned with whether the lease required the tenant to notify the landlord of an AST that he had granted and to pay a fee in respect of registration of the same by the landlord. The relevant clause provided that within one month of any of a number of specified dispositions including any "underlease or tenancy agreement", the tenant was obliged to give notice in writing to the landlord of the disposition with full particulars thereof "and in the case of an underlease (and if so required by the Landlord) a copy thereof for registration and retention by the Landlord and at the same time to pay to the Landlord such reasonable fees including value added tax for such registration (being not less than £65 plus VAT thereon) in respect of the registration of each such document or instrument so produced."

20. The LVT decided that there was no requirement for the AST to be registered and therefore no need to pay a fee. It did so on the basis that the clause distinguished between "an underlease" and a "tenancy agreement" and that whilst both needed to be notified only the former required registration. The LVT said that an AST was a "tenancy agreement" and therefore did not require registration or payment of a fee in connection with the same. It thus construed the lease as drawing a distinction between an AST and other types of underletting.

21. However, in the present case paragraph 9 does not purport to distinguish between ASTs and other sub-leases. Thus the reference to underlettings in paragraph 9 applies to all types of underletting including an AST. There is no general legal rule that the term "underletting" does not encompass the granting of an AST. The terms underletting and subletting are synonymous and an AST is no less an underletting or subletting than any other type of under lease or sub-lease.

22. Indeed the reason that paragraph 8 exceptionally excludes a letting at a rack rent for a term not exceeding seven years, is that it would have otherwise have been covered by the relevant obligations in paragraph 8 as an underletting. It follows that the grant of an AST is an underletting and as such is not excluded from clause 9.

23. Mr Whale also refers to section 33 of the Land Registration Act 2002. That provision is concerned with the need for protection of interests in registered land by entry of a notice on the register of the relevant registered title of the land affected maintained by HM Land Registry. It provides an exception in the case of a leasehold estate created for a

term of 3 years or less from the date of the grant. The section thus has no bearing on the circumstances of the present case.

24. This brings us to Mr Whale's argument based on the construction of paragraphs 8 and 9. His contention was that it is only in cases where paragraph 8 requires the Tenant to ensure a direct covenant between the Landlord and the sub-tenant that paragraph 9 comes into play. Therefore because that requirement does not apply in the case of an AST, neither does the obligation in paragraph 9.

25. The structure of paragraph 8, which it must be said is not a model of clarity, is as follows (emphasis supplied). Paragraph 8.1.1 contains an absolute covenant against an assignment, transfer underletting or parting with possession of *any part of* the Demised Premises (i.e. the Flat) *as distinct from the whole*, in any way whatsoever. It therefore has no application to the present case.

26. With regard to dealings with *the whole* of the Demised Premises paragraph 8.2 contains a covenant against an assignment, transfer, parting with possession or underletting of the same unless certain conditions are satisfied. The first is that the Tenant notifies the Landlord of his intention to do any such act (paragraph 8.2.1). The second is that the Tenant requires *the transferee* to accept a transfer of his share in the Company (paragraph 8.2.2). The third requirement is that *an assignee or transferee* of the Lease, enter into a direct covenant with the landlord to perform the covenants under the Lease (paragraph 8.2.3). However, the conditional prohibition in paragraph 8.2 expressly does not apply *in the case of a sub-letting at a rack rent without payment of a premium for a period not exceeding seven years*. (In any event the second and third conditions only apply to a transfer of the Lease and not to an underletting).

27. However, paragraph 8.1.2 also contains a covenant by the Tenant not at any time during the Term to underlet or permit the Demised Premises to be underlet except upon the terms that the undertenant shall be liable to pay throughout the terms of such underlease the aggregate of the rent hereby reserved and the Maintenance Charge. It does not provide for any exceptions.

28. Paragraph 8.1.3.1 places a further obligation on the Tenant in the case of all underlettings *except in the case of a sub-letting at a rack rent without payment of a premium for a period not exceeding seven years*. In the case of those underlettings to which it applies it obliges the Tenant to cause to be inserted in the underlease (a) a covenant (by the undertenant) with the Landlord and with the Tenant job to comply with all the covenants and conditions of the Lease (except the covenants for payment of rent or Maintenance Charge) (b) a right of rentry for breach of any such covenants and (c) a covenant not to underlet the whole or any part of the Demised Premises. It would appear to exclude, in the case of those underlettings to which it applies,

the covenants for payment of rent or Maintenance Charge because these are covered by paragraph 8.1.2.

29. Paragraph 9 is simply about giving notice of certain dealings with the Lease. It is widely worded and applies to a number of transactions including "every underletting" without any specified exceptions. It contains a threefold obligation on the part of the Tenant (or their successor in title) to (1) give notice of the transaction with full particulars thereof to the Landlord (and the Company) or their solicitors (2) to produce the relevant document and (3) pay to the Landlord (and the Company) "a reasonable fee" for the registration of the notice (not being less than £65) plus VAT.

30. The effect of Clause 8 is therefore that the Tenant is free to grant an AST without having to comply with the requirement in clause 8.2.1 to notify the Landlord and the Company of his intention to grant the tenancy. The Tenant is also free to grant an AST without being obliged to compel the sub-lessee to enter into a direct covenant with the Landlord (Clause 8.1.3.1). However, clause 9 and its threefold obligation does not admit of any exception where the Tenant grants an underlease (which includes an AST). It is not linked to clause 8. Thus the Tribunal does not agree with Mr Whale's argument that the obligation in paragraph 9 does not apply to an AST where the tenant is not required to procure a direct covenant between the subtenant and the Landlord. The reference in paragraph 9 to the requirement to produce to the landlord and the Company "every such document as aforesaid" is a reference to the opening words of paragraph 9 and not to paragraph 8.

31. It follows that in so far as the Respondent has granted ASTs without complying with paragraph 9 he has committed a breach of covenant. Whether the breach is remediable or not is not a matter for the Tribunal. It is a matter for the court in any action for forfeiture or damages for breach of covenant (*GHM (Trustees) Limited v Glass* (2008) LRX 153/2007).

RIGHTS OF APPEAL

1. 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.

2. 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.

3. If the person wishing to appeal does not comply with the 28 day time limit, that 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.

4. 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.

Martin Davey

Annex: The Law

Commonhold and Leasehold Reform Act 2002

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 or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.