FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LBC/2017/0053**
Property	:	**Flat 349 Riverside Mansions Milk Yard London E1W 3SU**
Applicant	:	**Riverside Management Company Limited (landlord)**
Representative	:	**PM Legal Services, Solicitors, Doncaster**
Respondent	:	**Andrew Leigh and Gillian Leigh**
Representative	:	**Simon J Vollans & Co, Solicitors, Cardiff**
Type of Application	:	**For the determination of an alleged breach of covenant; Rule 13 costs application by the Respondent**
Tribunal Member	:	**Mr Charles Norman FRICS (Valuer Chairman)**
Date of Decision	:	**10 August 2017**

Determination based on Written Representations

DECISION

Decisions of the tribunal

(1) The Tribunal determines that the tenant is IN BREACH of clause 3(1) (h)(c) of the lease.

(2) The application for costs under Rule 13 of the The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules") by the respondent is REFUSED.

The application

1. The applicant landlord seeks a determination pursuant to s. 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the respondent tenant is in breach of covenants contained in their lease.

2. The respondents have made an application under rule 13 of the Tribunal Rules for a costs order against the applicant.

Background

3. The respondents hold the property known as Flat 349 Riverside Mansions Milk Yard London E1W 3SU (the "flat") pursuant to a lease dated 6 December 1985 and made between Regalian (Urban Renewal) Riverside Management Company Limited and John and David Collins ("the Lease").

4. Directions were made dated 9 June 2017 which set out the steps to be taken by the parties. The Directions indicated that the matter would be determined by written representations unless a party requested a hearing, which neither has.

5. The relevant legislation is set out at the appendix below.

The Section 168(4) Application

The Applicant's Case

6. The gist of the case was as follows. The applicant was the freehold owner. The respondents are registered proprietors of the leasehold interest. Office copy entries supported this. The lease prohibits sub-letting without the consent in writing of the applicant. The relevant lease covenant stated:

"3(1) The lessee hereby covenants with the lessors and have separate covenants with the Management Company and with the lessees of the other flats comprised in Riverside as follows:

[...]

(h)(c) Not at any time to sub-let the whole of the demised premises without the consent in writing of the Management Company which consent shall not be unreasonably withheld."

7. The property was currently sublet on an assured shorthold tenancy made between Mr Leigh and a Mr S Nezamul and a copy was annexed. The applicant has not given consent in writing and consequently the respondent was in breach of the lease.

8. The applicant sought an order from the tribunal, that by virtue of the matters above, the respondent is in breach of clause 3(1) (h)(c) of the lease.

9. In a supplemental statement of case, under cover of a letter dated 19 July 2017, Ms Cassandra Zanelli solicitor for the applicant stated that the respondent had failed to supply a bundle; the tribunal retained jurisdiction to make a determination under s 168(4) notwithstanding that a breach has been admitted. This was because the restrictions on jurisdiction set out at s 168(5) of the Act do not include a prior admission by a respondent. Ms Zanelli contrasted the position in relation to service charges under section 27A of the landlord and Tenant Act 1985.

10. Ms Zanelli contended that the tenant's letter of 23 November 2016 was a far from clear admission. Breach of covenant was a serious matter requiring absolute clarity. The application was properly made. On 25 July 2017, James Catchpole, a Director of the applicant produced a witness statement confirming that no consent to sublet had been granted to the respondents.

The Respondents' Case

11. The gist of the respondents' case, set out in a letter dated 30 June 2017 was that the breach of covenant was previously admitted in a letter to the applicants' former solicitors, Taylor & Emett LLP dated 23 November 2016, where Ms Zanelli had also acted. The letter of 23 November 2016 stated "Our clients accept that they did not obtain your client's consent to sublet..." The applicant had failed to state whether or not the breach had been admitted on its application form to the tribunal and had been less than full and frank. The application should be dismissed.

12. On 2 August 2017, the respondents' solicitor produced a witness statement from Mr Leigh, who provided a detailed background to the matter. On 3 August 2017 the respondents served a reply to the statement of case. Contrary to a submission from Ms Zanelli the

Tribunal waives relevant breaches of the directions and allows the witness statement and reply into evidence. In summary, Mr Leigh admitted the breach which was caused by oversight, set out the steps he had taken to rectify the position (including taking possession proceedings) and summarised complaints that had been made about the behaviour of the subtenant, which were denied. There was also a submission that consent to sublet had been unreasonably withheld.

Decision in Relation to the Section 168(4) Application.

13. The tribunal's jurisdiction is confined to determining whether or not a breach of covenant has occurred. As further proceedings may arise in the County Court it would be inappropriate for the Tribunal to comment on evidence which relates to matters not directly in issue in these proceedings.

14. As stated above the restrictions on jurisdiction set out at s 168(5) of the Act do not include a prior admission by a respondent. By contrast, as alluded to by the applicant's solicitor, in service charge disputes section 27A(4) of the Landlord and Tenant Act 1985 states "No application under subsection (1) or (3) [that is, for a determination by the tribunal] may be made in respect of a matter which—(a)has been agreed or admitted by the tenant." That provision predates the drafting of section 168(5) and in the tribunal's judgment the difference in drafting is clear and deliberate. The tribunal therefore finds that it retains jurisdiction to consider the application even if the breach has been admitted.

15. The tribunal finds based (i) on admissions by the respondent including a witness statement from Mr Leigh and the reply (ii) a copy of the sub-tenancy agreement (iii) the witness statement of Mr Catchpole and (iv) the letter of 23 November 2016 that the respondents are in breach of clause 3(1) (h)(c) of the lease, by virtue of sub-letting without landlord's prior written consent.

The Application for Costs under Rule 13

16. The respondents made an application under rule 13 for costs on the grounds that the application was improper, unreasonable, negligent and unnecessary. There was also an assertion that the applicant had breached directions. The gist of the case was that the application was unnecessary as the breach had been admitted in November 2016. A schedule of costs was attached.

17. For the applicants Ms Zanelli's supplemental statement of case set out reasons why the costs application should be refused. She relied on a number of decisions of the Upper Tribunal including *Willow Court Management Company v Alexander* [2016] UKUT 0290. The effect of that decision is to restrict and limit the circumstances where rule 13

orders can be made to clear cases of serious misconduct or unreasonable behaviour in which case a sequential test applies, with the tribunal retaining discretion.

18. The tribunal agrees with Ms Zanelli that it was not unreasonable for the applicant to avail itself of a right conferred by statute. That amounts to a reasonable explanation of the conduct within the meaning of *Ridehalgh v Horsfield* [1994] 3 All ER 848, to which she referred. The tribunal does not consider that breaches of the directions by the applicant come close to justifying a rule 13 order. Further, the applicants have been successful. Having regard to these findings there is no basis upon which a rule 13 order could properly be made. Accordingly, the application is refused.

Name: C Norman FRICS **Date:** 10 August 2017

ANNEX - RIGHTS OF APPEAL

- **The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.**

- **If a party wishes to appeal against 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.**

- **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.**

- **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.**

- **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

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 a leasehold valuation 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.