Southern Rent Assessment Panel and Leasehold Valuation Tribunal

Case No. CHI/00ML/LBC/2009/0004

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
SECTION 168(4) of the COMMONHOLD AND LEASHOLD REFORM ACT 2002

Property:	Flat 3, 14 Compton Road, Brighton BN1 5AN
Applicant:	Headline Developments Limited (landlord)
Respondent:	Mrs L Clarke (formerly Ms L Barnard) and Mr S Chopping (tenants)
Date of Application:	09 March 2009
Directions:	13 March 2009
Hearing:	30 June 2009
Decision:	24 July 200

Member of the Leasehold Valuation Tribunal

Ms J A Talbot MA
Mr N J Cleverton FRICS
Mrs J Morris

Case No. CHI/00ML/LBC/2009/0004

Property: 14A Compton Road, Brighton BN1 5AN

Application

1. This was an application made on 9 March 2009 by the landlord, Headline Developments Limited, for a determination as to whether a breach of covenant had occurred, pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")..

2. Directions were given by the Tribunal on 13 March 2009, proposing that the matter should be dealt with on the fast track without an oral hearing. Mrs Clarke requested an oral hearing and further Directions were issued on 24 April 2009. The parties were each directed to produce a statement of case together with any documents on which they sought to rely. The landlord's solicitors complied with the directions but Mrs Clarke did not. She did however produce some relevant documents at the hearing.

Law

3. Section 168 subsections (1) and (2) of the 2002 Act provide that a landlord may not serve a notice under Section 146 of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Leasehold Valuation Tribunal under Section 168(4), that the breach has occurred.

4. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred.

Lease

5. The tribunal was provided with a copy of the lease of the property. It is dated 6 November 1987 between James Stephen Davis & Ann Louise Davis, and Steven Robert Davis and Amanda Georgina Stacey, for a term of 99 years from 25 March 1987 at a ground rent of £30 rising thereafter.

6. Insofar as is material to the application, the lease contains the following covenants on the part of the tenants:

Clause 3(4):

> *"not without the previous written consent of the Lessor to make or allow to be made and structural alteration in the plan elevation or appearance of the Premises nor make any addition thereto nor cut maim alter or injure any of the walls or timbers thereof nor erect or remove any internal partition for dividing rooms".*

Clause 3(14):

> *"to pay all costs charge and expenses (including legal costs and fees payable to the Lessor's surveyor) incurred by the Lessor in or in*

contemplation of any proceedings under Section 146 and 147 of the Law of Property Act 1925 in respect of the Premises (...) ".

Clause 3(16):

"not to do or permit or suffer anything which may render any increased or extra Premium payable for the Insurance of the Premises or the Building or which may render void or voidable any Policy for such insurance ..."

7. The flat, described in the recitals as the Premises, is defined as the lower ground floor flat, more particularly described in the First Schedule and edged red on the lease plan.

Alleged Breaches

8. The landlord alleged that the tenants had breached Clause 3(4) of the lease by erecting an extension - a lean-to or conservatory – onto the back of the property building onto garden space, without obtaining the landlord's prior written consent.

9. It was further alleged in the application that the tenants were in breach of Clauses 3(14) and 3(16) of the lease.

Inspection

10. The members of the tribunal inspected the property before the hearing accompanied by Mrs Clarke and her stepfather Mr Tasker. Mr Chopping, the joint lessee, no longer lived at the property. It comprised a Victorian terraced house of brick construction under a pitched tiled roof, converted into flats some years ago. The subject flat was on the lower ground floor and was accessed from the rear garden around the corner in Inwood Crescent. Entrance to the flat itself was via the lean-to, which was built to the side of the house on part of the garden. The lean-to was of wood and breeze block construction with UPVC ship lap boarding and glazed windows, and had a sloped pitched plastic roof with flashings abutting the side of the house. It was in poor condition. The structure was clearly visible from the road outside the property.

Hearing

11. A hearing took place on 30 June 2009. The landlord was represented by Ms M Knowles, solicitor, of Osler Donegan Taylor, accompanied by Mr M Surman and Mr O Judge of the managing agents, Parsons Son & Basley ("PSB"). Mrs Clarke attended in person accompanied by Mr Tasker.

12. At the hearing Ms Knowles conceded that as no S.146 Notice had yet been served, no costs had yet been incurred in that connection so it was premature to allege a breach of Clause 3(14) and this was not pursued. Regarding insurance, although this had been investigated Ms Knowles did not adduce any evidence that the landlord's insurance had been rendered void or voidable and this allegation was not pursued.

13. The chief issue before the tribunal concerned the building of the lean-to. The landlord, Headline Developments, had owned the freehold since 1988 (i.e.

one year after the grant of the lease). The previous managing agents were Brighton & Hove Estates. PSB had been the managing agents since about 2003. The landlord had assumed that Mrs Clarke and Mr Chopping had built the lean-to without informing the landlord or obtaining prior written consent. This was a breach of Clause 3(4) as it amounted to a structural alteration. Ms Knowles contended that the lease plan identified the description of the flat, and the lean-to did not appear on the plan. It showed the rear garden and access to the flat via a door opening straight into the lounge.

14. The evidence for the landlord was in the form of a written statement and situation report from Mr Surman and statement from Mr Judge. In summary, Mr Judge, property manager from the managing agents, noticed the lean-to extension during an inspection on 12 June 2008. The tenants of the ground floor flat had reported water ingress. It was alleged that this was the first time the landlord or agents had discovered the existence of the extension.

15. Subsequently on 3 March 2009 Mr Surman, a surveyor employed by PSB, carried out a situation survey. He concluded that the lean-to was unsuitable, did not enhance the value of the property and should be demolished. It was not known whether the lean-to had caused or contributed to the damp problem, and this was not relevant for the purpose of this application. On 13 October 2008 Mr Judge wrote to Mrs Clarke to the effect that there was no correspondence on file to confirm that the lean-to was built with the freeholder's consent, and that if this was the case she would need to obtain retrospective consent, undertake to meet the landlord's associated reasonable costs, and a deed of variation or licence for alterations would have to be prepared. Mrs Clarke did not reply to that letter. Ms Knowles was instructed and wrote three letters to which she did not receive a reply.

16. Mrs Clarke told the tribunal that she and Mr Chopping had not built the lean-to, but that it was already there when they bought the flat in 1990 from Mr and Mrs Davis, who had previously occupied the whole house and had carried out the conversion. She thought it was previously used as a greenhouse. The lean-to had been a selling point in that she could use it for a baby's pram. She produced a copy of her mortgage valuation report dated 15 March 1990 which twice mentioned the extension, first that the flat had its "own front door conservatory" and secondly that "at least one of the roof timbers to the conservatory has decay and will require replacing in the foreseeable future".

17. The valuation recommended that Mrs Clarke's solicitor "should confirm that Planning Consent was obtained for the conversion and that a Final Certificate has been issued by the Building Control Department". Mrs Clarke said that her solicitor had not given her any specific advice about the extension either in relation to the lease plan or any planning or buildings control requirements. She had no reason to suspect that there was any problem. She had always assumed that the maintenance of the lean-to was her responsibility and over the years had carried out minor repairs at her own cost. She had not received Mr Judge's letter, and there were problems with postal delivery as post was often put through the main house front door to which she had no access.

18. Mrs Clarke produced a letter from PSB dated 10 February 2005 signed by Andrew Martin, who used to manage the property but no longer worked there. This letter described the extension as a "loggia" and showed that Mr Martin had checked the lease plan and commented that "there is no outline of any structure representing the loggia which is currently standing". He went on to

state that "in relation to the repairs required, it would appear that there is no provision in the lease for this to be covered from the service charge account". No further steps were taken at that time. Mrs Clarke also had a selection of letters from Brighton & Hove Estates of varying dates, including one dated 11 July 1996 referring to an increase in number of exterior inspections from two to three per year and an appointment to inspect on 25 July 1996. She also had some service charge and ground rent demands.

19. In addition, Mrs Clarke had brought an undated but recent letter in support addressed "to whom it may concern", from her next-door neighbour, Janet Pearce, of 12 Compton Road, giving a telephone number. This stated that Ms Pearce had lived at her property for 25 years, her back garden adjoined Mrs Clarke's, and that she knew the Davis family very well. She stated: "I can assure you with every certainty that the conservatory was there when we moved in December 1984 and has not changed since".

20. In reply to questions from the tribunal, Mrs Clarke confirmed that she had paid ground rent and service charges over the years, which were regularly demanded in March and September. She had fallen into arrears a few times and her mortgage lender had paid some of the arrears. Mr Judge confirmed that PSB's practice was to issue demands twice yearly in accordance with the lease terms. Ms Knowles told the tribunal that a County Court judgment had been obtained against Mrs Clarke in June 2008 for historic arrears which had subsequently been settled by the mortgage lender.

21. The tribunal pointed out to Ms Knowles that on these facts even if there had been a breach of covenant before Mrs Clarke took a transfer of the lease, it had plainly been waived by the demands and payment of ground rent. She submitted that the tribunal did not have jurisdiction to make any determination on waiver which would be a matter for the County Court.

22. Finally, Ms Knowles submitted that the landlord had attempted to resolve the situation without recourse to the tribunal but without success. The immediate practical problem for the landlord was to address the water ingress to the ground floor, but there was no mechanism in the lease for any repairs to the lean-to, if it was neither part of the demised flat nor the exterior structure of the house. There was no obligation on either the landlord or tenant to repair it, or for costs to charged to the service charge account. Mrs Clarke did not see how she could be held liable for the building of the lean-to and thought the landlord had behaved in a heavy handed manner.

Decision

23. The tribunal carefully considered all the written and oral evidence. It was regrettable that Mrs Clarke had not complied with the Directions, as the documents she produced at the hearing were significant and put matters in a different light. Ms Knowles was given time to consider the new information with her clients and wished to pursue the application.

24. It was crystal clear from the evidence that Mrs Clarke (and Mr Chopping) did not build the extension, which was obviously there when they bought the flat, and they had no reason to believe there would be any problem with it. It was equally clear that the Davis family had previously lived in the whole house and converted it into flats at some time before the grant of the lease in 1987 between Mr and Mrs Davis senior and their son Steven, which suggested a

family arrangement. What was not so clear was when and by whom the extension was originally built.

25. If the extension was built after the grant of the lease, then plainly a breach of Clause 3(4) had occurred, because this would amount to a structural alteration without the landlord's prior consent, even though Mrs Clarke was not responsible for it. The language of S.168(4) is passive in that the tribunal has to determine whether a breach "has occurred", rather than whether it was committed by the current tenant. However, if the extension was built before the grant of the lease – or even before the conversion of the house into flats – then equally plainly, no breach of the lease could have occurred.

26. It was not possible to establish exactly when the extension was built, but the tribunal gave weight to the letter from Janet Pearce. It was regrettable that this was not in the form of a witness statement provided in advance, and that Ms Pearce did not attend the hearing as a witness to give oral evidence and to be cross-examined. It was not for the tribunal to contact Ms Pearce, but for Mrs Clarke to present her case. That said, the tribunal saw no reason to doubt Ms Pearce's identity or credibility. Her letter had the ring of authenticity about it and was couched in strong and definite terms. She was certain that the extension had been there since 1984 when she moved in. A quick check of the Brighton telephone directory shows a J Pearce at 12 Compton Road with the same telephone number as that given on the letter.

27. The tribunal was not impressed by the evidence of Mr Judge and Mr Surman. Whilst they personally may not have previously been aware of the extension, the documents produced by Mrs Clarke showed that their firm, PSB, had known of it at least as long ago as February 2005. Moreover, the landlord's former agents, Brighton & Hove Estates, had carried out regular inspections, and therefore must also have been aware for many years. Indeed, even a drive-by inspection would have revealed the existence of the extension, as it is visible from the road outside the property. In short, it is inconceivable that the applicant landlord, who has owned the freehold since 1988, did not know, via its agents, that the extension was there.

28. The landlord's strongest point was the lease plan, as relied upon by Ms Knowles. The extension is not shown on the plan. However, in the tribunal's view, this was not conclusive. Its provenance is unknown, although it appears to have been professionally drawn. It is signed by Mr Davis senior and Mr Davis junior but is undated. It could well have pre-dated the grant of the lease and could have been prepared for the purpose of the conversion of the house into flats, or for the convenience of the related parties, to show the internal layout of the flat. It could have been a simple omission or error. The plan does not in any event cross-refer to the description of the flat in the First Schedule, which includes, for example, a reference to a balcony, which the subject flat does not have. In other words it is a standard catch-all description.

29. Evaluating all this evidence, the tribunal concluded, on the balance of probabilities, that it was more likely than not that the extension was built by the Davis family before 1984, when they owned the whole house, and before the grant of the lease (and possibly even before the conversion into flats). It follows, therefore, that no breach of the lease has occurred.

30. Even if the tribunal is wrong about that, and the extension was built by Steven Davis after the grant of the lease by his parents in 1987 but before Mrs

Clarke's and Mr Chopping's purchase in 1990, it is crystal clear on the facts of this case that any breach of the lease has been waived. The tribunal accepted that it was not required under the wording of S.168(4) to consider any issue relating to forfeiture other than the question of whether a breach has occurred. There are conflicting Lands Tribunal decisions as to whether the tribunal has jurisdiction to determine issues of waiver. The tribunal does not seek to make a determination, but simply to assist the parties by pointing out that in this case, if there was a breach, it was a once-and-for-all breach capable of being waived, and it has been so waived by the landlord demanding ground rent from Mrs Clarke twice yearly from 1990 onwards.

31. Finally, the tribunal would observe that the solution is straightforward. All that needs to be done is for the lease plan to be amended. It appears to the tribunal that the exterior of the extension forms part of the structure and exterior of the property, so that the repair and maintenance obligations lie with the landlord, and the reasonably incurred costs are to be met by the tenants by way of service charges.

Determination

32. For the reasons given above, the tribunal determines that no breach of the lease as alleged by the landlord has occurred.

Dated 24 July 2009

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Ms J A Talbot MA Solicitor
Chairman of the Tribunal