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LEASEHOLD VALUATION TRIBUNAL

Case Reference: CAM/11UF/LBC/2011/0016

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002 (the Act)

Applicant:	James Noel Harvey
Representative:	Mr D J Moore (Rodgers & Burton – solicitors)
Respondent:	Goodsense Homes Limited
Representative:	Ms S Robertson (Head Partnership – solicitors)
Property:	33a Priory Avenue, High Wycombe, HP13 6SN
Date of Application:	8th February 2011
Date of Hearing:	16th March 2012
Leasehold Valuation Tribunal:	**Mrs H C Bowers** **Mr J Sims** **Mr A Kapur**
Date of Tribunal's Decision:	**28th March 2012**

DECISION

The Tribunal determines that there is a breach clause 3(f)(ii) of the lease under the provisions of section 168(4) of the Act.

REASONS

Introduction

1. The Tribunal received an application dated 12th December 2011 under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination that there has been a breach of covenant of the lease of 33a, Priory Avenue, High Wycombe HP13 6SN ("the subject property").

2. A copy of the lease of the property was provided to the Tribunal. The lease is dated 30th April 1987 and was made between James Noel Harvey as Landlord and Christopher Brian Harvey as Tenant. The lease is for a term of 99 years from 1st January 1087 at the initial rent of £50 per annum and rising every 33rd year and subject to the terms and conditions contained therein. The leasehold is registered under Title Number BM233330 and the Proprietorship Register indicates that the current Respondent under the name of Goodsense Homes Limited acquired the leasehold interest as Tenant in 1998.

3. A pre trial review was undertaken to consider the issues within the application and the Tribunal issued its Directions on 20th December 2011.

The Lease:

4. The terms of the lease that the subject to the current application are:

"3 The Tenant hereby covenants with the Landlord as follows:- .....
(f)(ii) Not at any time to sub-let one whole of the demised premises provided that nothing herein contained shall prevent the Tenant from taking in a paying guest (not being a tenant).

The Law:

5. Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") states:

"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"

Inspection:

6. Prior to the Hearing the Tribunal carried out an inspection of the subject property in the company of Mr Harvey (the Applicant), Mr Padfied (of the Respondent company) and Mr Moore (solicitor for the Applicant).

7. The subject property is a first and second floor maisonette located in a converted Victorian semi detached property. At the rear of the property is a more recent development, proving extra flats. At first floor level there is a kitchen, bathroom, one bedroom and a living room, at second floor level there is a further bedroom. At the time of our inspection we observed that a family was in occupation and at the hearing it was confirmed that Ms E Krasleva held an assured shorthold tenancy on the subject property.

Hearing:

8. A Hearing was held on Friday 16th March 2012 at 11.00 am at the High Wycombe Magistrates Court in High Wycombe. There was a trial bundle available to the Tribunal prior to the hearing. Mr Moore submitted a skeleton argument, together with authorities he relies upon. Whilst the full details of the parties' submissions were considered by the Tribunal, a brief summary of each case is detailed in the following paragraphs.

Background

9. At the hearing it was confirmed that the clause of the lease subject to the current application is clause 3(f)(ii). It was undisputed that the property is currently occupied by Ms Kraslava on an assured shorthold tenancy basis. Prior to Ms Kraslava's tenancy there had been previous tenancies including to a Ms Cleere and a Miss Bourke.

10. In a letter dated 14th September 2011 from Rodgers & Barton to the Respondent, a reminder was sent about the provisions of the lease. It was acknowledged that the in the past the Applicant may have waived the right to enforce the covenant by forfeiture, but this was not a waiver of the covenant itself. The letter contained a warning that if the flat was subsequently sublet, then action would be taken against the respondent,

11. It was acknowledged that there are no disputes of the facts. The only issue between the parties was a legal issue as to the nature of the breach and whether it had been waived.

12. Included in the trial bundle were witness statements from the Applicant, Mr J N Harvey; his wife Mrs D Harvey and Mr M Padfield, director of the Respondent company.

The Applicant's Case

13. Mr Moore acknowledged that in the past the Applicant had acquiesced to the past sub-lettings and had assisted in providing parking permits to the sub-tenants. It was only in recent years where there had been problems with the sub-tenants that the Applicant had wanted to re-solve the situation and

was therefore relying on the covenant not to sub-let. It was acknowledged that the current occupier was not a problem.

14. It was submitted that there were three levels of waiver: the waiver of the right to forfeit; waiver of a breach and the waiver of the covenant. The only issue to consider is whether the covenant has been waived. The authorities would appear to be contradictory at first glance, but it is suggested that overall there is a trend in support of the Applicant's position.

15. The starting point is section 148 of the Law of Property Act 1925 that states:
"(1) Where any actual waiver by a lessor or the persons deriving title under him of the benefit of any covenant or condition in any lease is proved to have taken place in any particular instance, such waiver shall not be deemed to extend to any instance, or to any breach of covenant or condition save that to which such waiver specially relates, nor operate as a general waiver of the benefit of any such covenant or condition.

(2) This section applies unless a contrary intention appears and extends to waivers effected after the twenty-third day of July, eighteen hundred and sixty."

16. It was stated that the burden of proof is on the Respondent to show not only that there is a waiver, but that the Applicant therefore is estopped from relying on any remedy. Mr Moore considered the definition within legal texts to consider the circumstances where a waiver of a breach would not result in the loss of a right of action. He cited the decisions from a number of cases, beginning with *Western v MacDermott (1866) 2 Ch. App. 72*, and including *Central London Property Limited v High Trees House Ltd. [1956] 1 All ER., 256,* but particular reliance was placed on the decision in *Lloyds Bank Limited and Others v Jones – Re Lower Onibury Farm Onibury Shropshire [1955]2 ALL ER 409.* In this case it was held that a covenant was not extinguished by a long period of acquiescence. There had been a technical breach, but the landlord had not sought to enforce the covenant for a period of 27 years.

17. There may be circumstances where there has been a complete waiver of a covenant if there had been some consideration or in the circumstances of promissory estoppel. No consideration had been paid by the Applicant and in respect of the promissory point, there would need to be an promise either expressed or implied and the Respondent had altered their position in reliance of the promise. It was noted that promissory estoppel would only be suspensory and would cease once notice is given. There had been no promise made by the Applicant and the Respondent had not altered his position and therefore there estoppels would not apply.

18. There is no relevance to the Respondent's corporate status. The Applicant had not been a party to the assignment and had made no representation to the Respondent at the time the property was purchased.

19. In response to the point raised by Ms Robertson in respect of a "once and for all" breach it was stated that each time there was a sub-letting there was a new breach that became actionable. The Applicant was not acting on a whim. There had been some problems in respect of a two sub-tenants and this had prompted the Applicant into seeking advice and warning the Respondent of the consequences of any further breaches. Whilst there had been previous breaches that had been waived, it is the current breach that the Applicant is pursuing.

The Respondent's Case

20. The Respondent claims that the Applicant has waived his right to claim that a breach has occurred. From the date of the Respondent's purchase of the lease, the Applicant has always addressed rent demands to the Respondent company. Therefore there must have been an awareness that the Respondent as a limited company could not occupy the flat. In addition the Applicant required tenants of the flat to collect parking permits from his office. Included in the bundle were copies of correspondence indicating that the Applicant was aware of the various tenants who had occupied the flats over the years and at some stage had offered to assist in finding a suitable tenant for the property.

21. Ms Robertson submitted that the Respondent's case was that as the Applicant had accepted the past breaches, therefore the covenant had been waived. In order to establish a waiver, there had to be knowledge of the breach, unequivocal actions by the Applicant, such as acceptance of rent, and recognition of the breach. The Applicant had always been aware of the sub-letting and evidenced by correspondence on the matter. It was submitted the under-letting of the property was a "once and for all" breach. The lack of enforcement by the Applicant in the past has resulted in the Applicant losing the right to rely upon the covenant. Ms Robertson considered that the Applicant was acting on a whim, by allowing the breach in the past and then withdrawing the right.

22. In response to a question as to the effect of the *Lloyds Bank* case Ms Robertson acknowledged that the case did not support her position.

The Tribunal's Determination

23. The first issue the Tribunal needs to establish is whether there has been a breach. Clause 3(f)(ii) is a complete prohibition on sub-letting. It is acknowledged by all parties that there have been a number of sub-lettings in the past and that the property is currently sub-let. Accordingly there is a breach of clause 3(f)(ii). The next point is whether there is one continuing breach or is there a separate breach each time the property is sub-let? Having considered section 148, of the Law of Property Act 1925 and the cases referred to by the Applicant's solicitor, it appeared to the Tribunal that each time the property is sub-let there is a new breach of the covenant.

24. The next stage is to consider whether there has been a waiver of the covenant? It would appear to the tribunal that the acquiescence by the

Applicant in respect of the previous breaches is not an indication of a waiver of the whole covenant and as such there is no waiver in respect of the current breach.

25. The final question to consider is whether the status of the Respondent has any impact upon this issue. The Tribunal agrees with the submissions by the Applicant that the status of the respondent is not a relevant factor. The Applicant was not involved in the Respondent's purchase of the leasehold interest and there is no evidence to indicate that the Applicant has made any representation to the respondent on this issue.

26. The Tribunal determines that the is a breach of the clause 3(f)(ii) of the lease and this breach has not been waived by the Applicant.

Signed.....
Chairman: Mrs H C Bowers

Date.....28th March 2012.....