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LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER S.168(4) COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case Reference: LON/00BB/LBC/2011/0102

Premises: Ground and First Floor Flats, 13 St. Martins Avenue, East Ham, London E6 3DU

Applicant(s): Chamber Estates Limited

Respondent(s): Musleh Uddin Mahmud

Leasehold Valuation Tribunal: Ms F Dickie, Barrister (Chairman)
Mr J Avery, FRICS

Date of decision: 6 February 2012

Summary of Decision

The applications are dismissed and no order for costs is made.

The Applications

1. Two Applications under section 168(4) of the Commonhold and Leasehold Reform Act 2002 were received on 31 October 2011 for determinations by the tribunal that a breach of covenant or condition in the lease had occurred. The Applicant is the freeholder of the property known as 13 Martins Avenue, East Ham, London E6 3DU, Land Registry title number EGL240323, comprising two self-contained flats let on separate leases made on 17 September 2004 demising each flat for 99 years from 1 January 2004.
2. Extracts from Land Registry Title Numbers EGL479614 and EGL479613 show a transfer of the leasehold title of the ground floor flat to Musleh Mahmud on 7 January 2011 and of the first floor flat to Musleh Uddin Mahmud on 17 November

2009. These leaseholders are understood to be the same person, who is the Respondent to these applications. Charges are registered in favour of The Mortgage Works (UK) PLC and the Bank of Ireland (UK) PLC as Mortgagees (of the ground floor and first floor flats respectively), and they have been served with notice of this application as interested parties.

3. The Applicant is represented by the managing agent, Circle Residential Management Ltd. Directions were issued on 3 November 2011 without a pre trial review. Neither party has requested an oral hearing, and we have determined these applications on the papers and without inspection.
4. Copies of both leases have been produced in evidence by the Applicant, and they are in the same form in all relevant respects. It is the Applicant's case that the Respondent is in breach of Clause 5(e) of each lease, under which the leaseholder covenants:

“Within four weeks next after any transfer assignment subletting (but not in the case of a lettering under an assured shorthold tenancy) charging parting with possession whether mediate or immediate or [sic] devolution of the Property to give notice in writing of such transfer assignment subletting charging parting with possession or devolution and of the name and address and description of the assignee sub lessee chargee or person upon whom the relevant term or any part thereof may have devolved (as the case may be) and to deliver to the Landlord or his Solicitors within such time as aforesaid a verified copy of every instrument of transfer assignment subletting charging or devolution and every probate letter of administration effecting or evidencing the same and to pay to the Lessor a fee of either £75.00 for the registration of every such notice together with Value Added Tax payable thereon at (if applicable) the current rate for the time being in force or such fee as equates to 0.075% of the disposition value (whichever is the higher).

The background

5. The Respondent has not complied with directions to submit a statement of case, and indeed has failed to respond at all to this application. In her Statement of

Case made on behalf of the Applicant, Ms Carol Nelson AIRPM of Circle Residential Management Ltd. states:

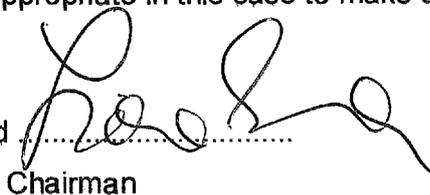
- a. She is authorised by the Applicant to make the statement of case
 - b. Under Clause 5(e) Notice of Assignment must be served on the Freeholder
 - c. The Respondent has "in the opinion of the Landlord" breached that covenant in that the tenant has failed to serve the lessor with any such notice.
 - d. The managing agent became aware that a breach of the tenant's covenant may have occurred as a result of obtaining an Office Copy of the leasehold title.
 - e. The Respondent failed to reply to a letter from the managing agent dated 15 July 2011 inviting him to admit the breach.
6. Upon the tribunal giving preliminary consideration to the Applicant's evidence. on 11 January 2012 a letter was sent to the Applicant's managing agent in the following terms:
- "You rely on Clause 3(17) requiring notice of assignment to be given to the Landlord or his solicitors, but you have not produced direct evidence from these persons that this has not taken place.
- The Tribunal directs you within 7 days to file on the Tribunal and serve on the Respondent a witness statement confirming whether the Landlord or his solicitors has received service in respect of either assignment, including a statement of truth."
7. The Applicant's managing agent replied in a letter received on 16 January referring the tribunal to its Statement of Case and provided no further evidence.

Determination

8. Clause 5(e) does not expressly provide for the person on whom "notice in writing of such transfer assignment" should be given. According to Clause 5(e) the "instrument of transfer" and the fee must be delivered to the Landlord or his Solicitors within the requisite timescale. Ms Nelson's executive summary makes no mention of whether the Applicant's solicitors are known to have been served.

9. The tribunal must determine the application on the basis of the evidence. The burden of proof in this matter lies with the Applicant, and the standard of proof is the balance of probabilities. Ms Nelson's case is that the managing agent became aware that a breach of covenant "may" have occurred as a result of obtaining an Office Copy of the leasehold title. No further evidence is advanced to support this belief and notably it is not stated that the managing agent has confirmed the position by thereafter making enquiries of the freeholder. In spite of the letter of 11 January, the managing agent has specifically failed to give any evidence of any enquiries with the freeholder or its solicitors, which causes the tribunal concern that such enquiries have not taken place.
10. Ms Nelson makes an assertion as to the opinion of the landlord but goes no further in giving evidence to make out the asserted ground in the application. The tribunal considers this a highly questionable approach to giving evidence. The agent may have authority to bring these proceedings on the landlord's behalf, though it is not clear whether this is a general authority or one specific to this application. However, that does not add evidential weight to the agent's assertion as to the opinion of the landlord – which is insufficient to prove that a breach of covenant has taken place. That an Applicant is of the opinion that a breach has occurred is not evidence that it has. The tribunal attaches little evidential weight to such an assertion - still less so when that opinion is put forward as hearsay by the managing agent.
11. A determination by the tribunal that a breach of covenant has occurred can be a preliminary to forfeiture proceedings, and the Leasehold Valuation Tribunal must ensure that an Applicant has discharged the burden of proof. An Applicant who has not produced evidence to prove its case on the balance of probabilities cannot expect to be successful, even when a Respondent fails to engage in proceedings. The application having been unsuccessful, we consider it inappropriate in this case to make an order for costs as sought by the Applicant.

Signed



Chairman

Dated 6 February 2012