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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

MAN/00DA/LBC/2012/0013

On an application under section 168(4) of the Commonhold & Leasehold Reform Act 2002 to determine whether a breach of covenant has occurred

Property:	**33 Maplecroft Moortown Leeds West Yorskhire LS17 6AN**
Applicant:	**Domus Services Limited represented by Accent Foundation Limited**
Respondent:	**Mr Barrie Finch and Mrs Betty Hazel Finch**
Date of Application:	**6th September 2012**
Date of Directions:	**4th October 2012 (as amended)**
Date of Determination:	**1st February 2012**
Tribunal:	**Mrs J. E. Oliver**
	Mr M. Hope

Decision

1. There has been a breach of the covenant provided for by Clause 5.2 of the Lease dated 26th May 1988 by the Respondents.
2. In view of the Applicants confirming they were not seeking any costs in respect of the application no order is made in respect of the Respondent's application pursuant to section 20C of the Landlord and Tenant Act 1985.

Reasons

Introduction

3. This is an application made by Accent Foundation Limited as managing agent for the Landlord Domus Service Limited (the Applicant) in respect of 33 Maple Croft Moortown Leeds (the Property) for an order pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2012 (the Act),namely that there has been a breach of covenant under which the Property is held.
4. The Respondents to the application are Mr Barrie Finch and Mrs Betty Hazel Finch (the Respondents) who own the leasehold interest in the Property. This was acquired by them on the 28th March 2003.
5. Directions relating to the application were given on 4th October 2012 and after various amendments, the matter was listed for hearing on 1st February 2013.

The Lease

6. The Property is held under a Lease (the Lease) dated 26th May 1988 and made between Domus Services Limited (1) Bradford and Northern Housing Association Limited (2) and Thomas Boyle and Margaret Boyle (3). The Lease is for a period of 99 years from 1st January 1987 and is therefore a long lease for the purposes of clause 168(4) of the Act.
7. The Property is within a complex designed for the occupation of people over the age of sixty years. The Lease allows for the provision of a warden to the Scheme within the Service Charge as paid by the Tenants to the complex (including the Respondents).
8. Clause 5 of the Lease contains the covenants made to the Landlord in respect of the Property and in particular Clause 5 (2) provides as follows:

" Not to use or permit the use or occupation of the Flat or the Estate or any part thereof for any dangerous offensive noxious noisome illegal or immoral activity or in any manner that may be or become a nuisance or annoyance to the Landlord or to the Tenant or occupier or any other part of the Estate or any other neighbouring property."

9. The Applicant claims that by reason of numerous events the Respondents are in breach of Clause 5.2 of the Lease.

The Law

10. The Application is made pursuant to section 168(4) Of the Act which provides as follows:

"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."

This application is generally a precursor to an application for forfeiture in respect of a lease and it is therefore worthwhile noting other provisions of section 168 which are as follows:

"(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 (c20) (restriction on forfeiture) in respect of a breach by a tenant of 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 court in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.....

The Hearing

11. At the hearing the Applicant was represented by Mr Tom Tyson, Counsel and the Respondents by their son Dr Stuart Finch.

12. In their written evidence and legal submissions prior to the hearing the Applicant maintained the Respondents were in breach of the covenant under the Lease by reason of their behaviour at the Property and in particular their anti-social behaviour towards the resident warden at the complex of which the Property forms part. A Schedule of allegations, outlining 58 incidents, was filed in support of the application. The Tribunal was provided with witness statements by the warden, Janet Sanderson and her manager Antony Owen.
13. There was no dispute between the parties that there had been criminal proceedings against the Respondents resulting in restraining orders being made against the Respondents in Leeds Magistrates Court on 6th November 2012. These orders provided for the Respondents "not to cause harassment, alarm or distress to Janet Sanderson", each order to remain to last until 5th November 2014. An order for costs was also made in the sum of £100.
14. The Tribunal also had sight of a witness statement provided to the Court by Pc Anthony Sweeney in connection with the criminal proceedings. Due to the untimely death of Pc Sweeney the Tribunal was provided with a confirmatory statement of PC Julie Howell who had been closely involved with the earlier proceedings before the Court.
15. The Respondents, in their written submissions to the Tribunal prior to the hearing, stated that the warden Janet Sanderson and her manager Antony Owen "have not acted in a way befitting of their position" and further that they had "received great provocation" both from Janet Sanderson and her husband Mick Sanderson. It was said that both the Respondents had lived peaceably at the Property for a number of years and problems had only arisen since the appointment of the current warden.
16. Dr Stuart Finch further advised that the Respondents had health issues, Mr Finch suffering from high blood pressure and anxiety and Mrs Finch from "liver, heart and kidney problems, diabetes and long standing mental health issues"
17. It was also stated by Dr Finch that the Respondents had admitted to their guilt in respect of the criminal proceedings "up to 1st July 2012" but maintained that this did not amount to a breach of Clause 5.2 of the Lease.
18. The allegations made were also "exaggerated and fabricated".
19. Dr Finch provided a witness statement setting out his knowledge of events at the complex and the actions of other tenants.
20. Dr Finch further maintained that since the alleged breach of Clause 5.2 the Applicant had continued to demand and receive ground rent and service charges for the Property amounting to a waiver of the breach and in support of this relied upon **Raj Properies v**

Costello LON/00AM/LBC/2007/0025 and **Swanson Grange (Luton) Management Ltd v Langley Essen [2008] L&TR 20**

21. Dr Finch indicated that the Respondents wanted to move away from the Property which was on the market for sale. The asking price for the Property had already been reduced on two occasions. It was proposed that the Respondents would be willing to move to temporary accommodation, pending any sale as a possible solution to the application.
22. Mr Tyson provided a response to the written submissions made by the Applicant . In respect of the proposal that the Respondents move to temporary accommodation it was stated the Applicant wished to proceed with the application.
23. Upon the issue of waiver Mr Tyson submitted:
    (1) The acceptance of rent is "no general waiver"(s.148(1) Law of Property Act 1925)
    (2) A Waiver of the breach can only come about where there is an agreement to waive it. The Acceptance of rent can lead to a presumption of waiver, but only in circumstances where rent has been accepted "for a long period of years" with full knowledge of the breach (Woodfall para 11.044.2)
    (3) There is nothing in the evidence in this case to suggest that the Applicant (or its managing agent) agreed to waive any of the alleged breaches simply by the demand and acceptance of rent. There is no room for the presumption of acquiescence.
24. It was agreed by both parties that the Tribunal has jurisdiction to consider whether any breach has been waived pursuant to **Swanson Grange (Luton) Management Ltd v Langley Essen [2008] L&TR 20.**
25. At the hearing the Tribunal indicated that it would not reconsider the allegations which had already been determined by the Court within the criminal proceedings. It invited the Respondents to indicate which of the remaining allegations, of the 58 made by the Applicant were either admitted or were in dispute. The allegations which had been considered by the criminal court were from the period 11th February to 23rd June 2102. However the schedule ran from 20th June 2010 to 17th August 2012 leaving 44 of the allegation outside the scope of the criminal proceedings.
26. Dr Finch indicated that in respect of some of the allegations, those would be admitted to some extent, namely that they had probably taken place but the language used was disputed. Of the 44 allegations made outside the criminal proceedings the Respondents admitted to 23 unconditionally, 12 were denied and the remaining 9 were admitted with qualifications. Dr Finch stated that one of the allegations made within the criminal

proceedings, namely that the Respondents had damaged a tree outside the warden's flat had been "thrown out" by the Court.

27. The Tribunal allowed time for the Applicant to consider whether, in the light of the admissions made by the Respondent, any further evidence was to be called in support of the application. Mr Tyson subsequently confirmed that the Applicant would rely upon the admissions made and no further oral evidence in support of them was therefore given.
28. The Tribunal considered the offer made by the Respondents to vacate the Property pending sale. Mr Tyson confirmed ,as in written evidence, that the Applicant did not accept this offer. The Tribunal determined and confirmed at the hearing that it had no jurisdiction to put in place anything which would safeguard the Applicant should this offer be accepted. For example it could not accept any enforceable undertaking to prevent the Respondents from returning to the Property, having vacated the same were the matter not to proceed. The Tribunal therefore confirmed that it was unable to deal with the application as proposed by the Respondents.
29. In respect of the argument of waiver Dr Finch stated that the Applicant had continued to demand and accept both ground rent and service charge payments for the Property since becoming aware of the alleged breach of covenants. He referred to the decision in **Raj Properties v Costello LON/00AM/LBC/2007/0025** which stated:

    "the tribunal does not consider that it is open to a landlord in circumstances where a breach is being relied upon as a peg which to hand a claim for forfeiture, to treat the tenancy as continuing on a "without prejudice" basis. It is trite law that is not necessary that the Landlord should intend to waiver" and

    "If objectively, his act recognises the continues existence of the tenancy, a waiver will result irrespective of intention. Thus the acceptance of rent because of a clerical error will amount to a waiver, as will the receipt of rent without prejudice."

30. Dr Finch submitted that the acceptance of rent was clear evidence of a continuing relationship between the Applicant and the Respondents. He referred to a letter sent by the Applicant dated the 3rd August 2012 which confirmed the intention of the Applicant to issue proceedings to forfeit the Lease but further letters were sent, later in August 2012 demanding payment of both service charge and ground rent. This was therefore the clearest acceptance of estoppel. There was a change in the Applicant's position in September 2012 when the Applicant returned an undrawn cheque for the payment of ground rent in the

sum of £25.00. Dr Finch argued that none of the allegations relied upon were after this date. Therefore the principle of waiver still applied.

31. Mr Tyson argued that, the Respondents having admitted the allegations of behaviour at the hearing, section 168(2) of the Act was satisfied.
32. In respect of the issue of waiver Mr Tyson stated that the Tribunal could not consider whether there had been a waiver of the right to forfeiture since the action for forfeiture had not yet commenced. The only issue was whether the breach of covenant had been waived. In this Mr Tyson relied upon the arguments made in written submissions as referred to at paragraph 23 above.
33. The Tribunal invited submissions upon the issue of costs, the Respondents having issued an application for an order pursuant to S20C of the Landlord and Tenant Act 1985. Mr Tyson confirmed that no order for costs was being sought upon the application. In the light of this Dr Finch confirmed no order was necessary upon the Respondents' application.

Determination

34. The Tribunal considered the admissions made by the Respondent at the hearing, together with the outcome of the proceedings before the criminal court and determined that those incidents amounted to a breach of covenant contained within Clause 5.2 of the Lease. It took into account the submissions made on behalf of the Respondent, namely that many of the allegations were exaggerated or untrue. Whilst the Tribunal heard no oral evidence from any of the witnesses it did consider that in the statements of both Janet Sanderson and Antony Owen there were some allegations for which there was no corroboration. Similarly some of the evidence produced from other tenants within the complex was not supported elsewhere. However, despite this, the Tribunal found those allegations which had been admitted were of sufficient weight for it to find that there was a breach of covenant. Clause 5.2 particularly provides for there to be no activity which is "offensive" or which is "illegal". Clearly the criminal convictions satisfy the latter whilst the foul and abusive language used by the Respondents (and which were admitted) satisfies the former.
35. Upon the issue of waiver the Tribunal considered the submissions made by both parties. It accepted the arguments put forward by Mr Tyson, namely that the only issue upon which it can determine is waiver for breach of covenant, the right to forfeiture not having yet arisen **Swanston Garage (Luton) Management Ltd v Langley Essen [2008] L &TR 20.**

36. The Tribunal considered the submissions made by Dr Finch upon the issue of waiver in his further statement. The Tribunal also considered **Raj Properties Ltd v Costello** but determined this to have been superceded by the later decision of **Swanston Garage Ltd.**
37. In **Swanston Garage (Luton) Management Ltd v Langley Essen** HHJ Huskinson indicated that " the Respondent would need to establish that she had altered her position to her detriment".
38. Mr Tyson submitted that for a waiver to apply the Respondent would need to establish that the Applicant would not enforce its strict legal rights contained within the Lease and the Respondents had thereafter acted to their detriment.
39. The Tribunal did not consider that the correspondence between the Applicant and the Respondents reflected that the Applicant would not take action to enforce Clause 5.2 of the Lease. Although the correspondence did not state whether or not the Applicants would take action to forfeit the Lease nevertheless the Applicant had made clear over a significant period of time that there were concerns regarding the Respondents behaviour.
40. The Tribunal similarly did not consider that the Respondents had altered their position to their detriment (per HHJ Huskinson). There was no evidence before the Tribunal to suggest that they had. The Tribunal noted the submissions made by Dr Finch in respect of this, namely that the Respondents were themselves the victims of harassment from the Applicant and that losing their home without any recompense would be to their detriment. Whilst the Tribunal accepted there would be financial consequences to the Respondents should the Applicant succeed in any application for forfeiture that was not within the criteria to be applied upon the issue of waiver for breach of covenant.
41. The Tribunal therefore finds that Clause 5.2 has been breached in the terms admitted at the hearing and there has been no waiver of that breach.

Dated this 8th day of March 2013

Mrs J. E. Oliver Chair