

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE****LEASEHOLD VALUATION TRIBUNAL**

**Premises:** Flat A11 Swanston Grange, 798-802 Dunstable Road, Luton  
LU4 0HF7

**Applicant (Landlord  
& Freeholder):** Swanston Grange (Luton) Management Limited

**Applicant's  
Managing Agent:** Trust Property Management plc, Cavendish House, Ground  
Floor, East Wing, 369-391 Burnt Oak Broadway, Edgware,  
Middlesex HA8 4DY

**Respondent:** Mrs Eileen Langley-Essen

**Case Number:** CAM/00KA/LBC/2006/0002

**Application:** An application pursuant to section 168 Commonhold &  
Leasehold Reform Act 2002 for a determination whether a  
breach or breaches of covenant have occurred.

**Tribunal:** Mr JR Morris (Chairman)  
Miss M Krisko BSc (Est Man) BA FRICS  
Mr D Wills ACIB

**Date of Hearing:** 12<sup>th</sup> October 2006

**Attendance:**

**Applicant:** Mr A Rieck Director of the Applicant  
Ms J Daboul, Property Manager  
Mr Clargo, Counsel for the Applicant

**Respondent:** Mr Pithers, Counsel for the Respondent

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**DECISION**

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**The Application**

1. This is an application pursuant to section 168 Commonhold & Leasehold Reform Act 2002 for a determination whether a breach or breaches of covenant have occurred. This appears to include consideration of whether the landlord has waived compliance with the covenants relied upon as regards some or all of the breaches alleged.

## **The Parties**

2. The Applicant is the Landlord and freehold owner of the Premises and holds the reversion immediately expectant upon expiry of the respondents Lease. The Respondent is the leaseholder of the Premises under a lease dated 16<sup>th</sup> April 1986 between the Applicant as Lessor and Anthony Richard Broom as Lessee for a term of 125 years from 25<sup>th</sup> March 1986 at a rent of £25 per annum.

## **The Lease**

3. The clauses of the Lease in which the Applicant states the Respondent is in breach are:

2(ixx) "Not to ... underlet... the entirety of the demised premises or any part thereof without first obtaining from the intended... underlessee... a duly executed deed containing a direct covenant with the Lessor to observe and perform all the covenants on behalf of the Lessee in this lease contained other than in the case of any intended underlessee the covenant to pay rent less than those herein before reserved such Deed to be prepared by the Lessor's solicitors whose proper costs and disbursements shall be discharged by the Lessee."

2(xx) "Within one month after any... Underlease... to give written notice to the Solicitors for the time being of the Lessor of the Deed of Instrument affecting the same and to pay them a reasonable fee plus VAT or any other tax payable in respect of the fee for the registration thereof."

2(xxiv) "Not to... effect any Underlease... without a transfer of the share or shares held by the lessee in the Company to the assignee or under lessee with a covenant in the case of an Underlease for the re-transfer by the under lessee of the said share or shares upon termination of the term of the Underlease and to procure that the said re-transfer is effected and not to nominate the said share in favour of anyone other than the person becoming beneficially entitled to the demised premises on the Lessee's death every such transfer duly executed and stamped to be forwarded to the Secretary of the Company within one month of the ... Underlease being completed. Provided further that if at the date of such transfer of his said share the Lessee shall be a director of the Company then he shall forthwith deliver to the Company Secretary his resignation in writing as such director."

## **The Law**

4. Commonhold and Leasehold Reform Act 2002

### **Section 168**

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 of forfeiture in

respect of a breach by a tenant of a covenant or condition in the lease unless (2) is satisfied.

(2) This subsection is satisfied if it has been finally determined on an application under subsection (4) that the breach has occurred or the tenant has admitted the breach

(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

Section 76 defines a long lease as being granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice by the tenant, by re-entry to forfeiture or otherwise.

### **The Alleged Breaches and Determinations Requested**

5.
  - a) The Respondent has failed to obtain a duly executed deed from the under lessee containing a direct covenant with the Applicant to observe and perform all the covenants on behalf of the Lessee in the Lease as set out in Clause 2(ixx).
  - b) The Respondent has failed within one month of the Underlease to give written notice to the Applicant's solicitors of the Underlease and to pay a reasonable fee plus VAT for the registration of the Underlease.
  - c) The Respondent has failed to transfer the share in the Applicant to the under lessee in accordance with Clause 2(xxiv) of the Lease.
6. The Applicant seeks a determination that:
  - a) The Respondent is in breach and therefore is entitled to service notice pursuant to section 146 Law of Property Act 1925
  - b) The Applicant's costs of and occasioned by this application be recoverable in due proportion as service charges under the Lease pursuant to clause 3 c and directly recoverable from the Respondent pursuant to clause 2 (xvii) of the Lease.

### **Applicant's Case**

7. Counsel for the Applicant directed the Tribunal to the relevant pages of the bundle to show the Applicant's freehold title to the Property by reference to the Land Registry Entry Title Number BD14411 together with the entry in the Charges Register relating to the Respondent's Lease of Flat A11 registered at the Land Registry Title number BD117764
8. Counsel then directed the Tribunal to the Lease in particular referring to Clause 2 and sub clauses (ixx), (xx) and (xxiv) the text of which is set out

above. In addition the Tribunal were directed to Articles 4 and 9 of the Applicant's Articles of Association.

***Failure to obtain a Direct Covenant and Notify the Underlease***

9. It was agreed between the parties that an Assured Shorthold Tenancy was an underlease within the provisions of Clause 2 of the Lease. It was also agreed that no deed had been executed containing a direct covenant (Direct Covenant) with the underlessor to observe and perform all the covenants on behalf of the Lessee as required by Clause 2 (ixx). It was also agreed between the parties that although notice of the underlease had been given no copy had been received and the notice was not within one month of the grant of the underlease as required by clause 2 (xx). Reference was made to a letter dated 28<sup>th</sup> January 2005 from Dawson Hart Solicitors for the Respondent to Mrs Ellis, Property Manger of Nesbitt & Mire who were the Applicant's Managing Agents at that time to demonstrate that the Respondent had conceded these points.
10. It was accepted that there might be an argument as to waiver or even estoppel in respect of these two breaches. However with regard to waiver it was submitted that the Tribunal had no jurisdiction and referred to a recent text: Dymond, Cafferty and Gallagher Leasehold Valuation Tribunals pub Thomson & Sweet and Maxwell at p 158. If the Respondent sought relief from forfeiture following the service of a Section 146 Notice then it was at that stage that the court should consider whether or not there had been a waiver. In any event it was submitted that there had been no waiver and reference was made to a letter dated 6<sup>th</sup> August 1996 sent to Lessees which stated that "No flat shall be sublet before a properly executed Deed (to be prepared by the Lessor's solicitors) together with a copy of the proposed Tenancy Agreement, is lodged with the Lessors solicitors and the necessary approval given."
11. It was further stated that no evidence had been adduced as to either waiver or to justify a claim of proprietary or promissory estoppel. Reference was made to Chitty on Contract 29<sup>th</sup> Edition 204 Volume 1 paragraphs 22-040 to 22-046, which it was said indicated that for there to be a waiver there needs to be some consideration and a variation needs to be by deed, and there has been no suggestion of either.
12. Counsel for the Applicant referred to matters raised in the Statement by Ms Daboul that there are a number of practical reasons ensuring good management of the Development that the Applicant and its Managing Agent should know that the Property is being sublet and to have a contractual relationship by virtue of the Direct Covenant to enable enforcement of the terms of the Lease. It was acknowledged that if the underlease was for less than 7 years then the Respondent would continue to be liable in respect of the repairing provisions under section 11 of the Landlord and Tenant Act 1985 notwithstanding the Direct Covenant. The mere fact that liability under the covenants of the Lease would be divided between the Applicant as a tenant and the underlessee would not preclude the provisions of clause 2 (ixx) being complied with. It was also still open to the Applicant to grant an underlease of