Residential
Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
(LONDON PANEL)

Commonhold and Leasehold Reform Act 2002 section 168

Property:	**Roof Space, 15 Upper Park Road, London NW3 2UN**
Tenants:	**Timothy Paul Geoffrey Drewitt and Marie-Josee Drewitt**
Landlord:	**15 Upper Park Road Management Co Ltd**

Tribunal Members:
Mr Adrian Jack (Chairman)
Mr B Collins FRICS

Ref: LON/00AG/LBC/2007/0056

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1. This is an application by the landlord for a declaration that the tenants in breach of the terms of their lease in that the roof space is not being used for residential purposes.
2. 15 Upper Park Road is a semi-detached house. No 17 is the other half. No 15 is divided into flats. The only access to the roof space is through the second floor flat. The roof space is not in use: its sole function is to house the water tank.
3. The Respondents hold the roof space under a lease dated 28th January 1994 for a term of 99 years from 24th June 1977. The Respondents are in fact divorced and as part of the divorce settlement the lease of the roof space should have been transferred into the sole name of Mr Drewitt. Mrs Drewitt has accordingly taken no part in the current proceedings.
4. The Tribunal held a hearing today. The landlord was represented by Mr Cordell, its solicitor. Mr Drewitt was represented by Mr Carr of counsel.

Section 168

5. Mr Cordell raised a preliminary issue as to whether the Tribunal had any jurisdiction under section 168 of the Commonhold and Leasehold Reform Act 2002. Section 168(1) provides that:

> "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 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless [this Tribunal makes a determination of breach]"

6. Section 169(5) provides that "dwelling" has the same meaning as in the Landlord and Tenant Act 1985. Section 38 of the 1985 Act in turn provides that:

> "'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling..."

7. The roof space, Mr Cordell argued, is not currently occupied as a dwelling. It merely stood empty. Nor, he said, was there any intention that it be occupied as a separate dwelling. It was now fourteen years since the lease was granted. No steps had been taken to convert the roof space and no steps could be taken. The most likely way of using the roof space was to convert it into an addition to the second floor flat, so as to create a second and third floor maisonette, but that would not be a "separate dwelling" as required by section 38.
8. We find the following facts. It was common ground between the parties that the only access to the roof space was currently through the second floor flat. Mr Drewitt owns the freehold of No 13, which is the mirror of No 15. There he had installed a ladder system from the common staircase to the roof space. Although such a system could be installed at No 15, the landlord's consent would be required and such consent was unlikely to be forthcoming. Equally any change in the staircase, so as to extend it to the roof space would require the consent probably of both the lessee of the second floor flat and the landlord. Mr Drewitt considered that access might be gained from the roof space over No 17, but no agreement had been made with the freeholder there and there would in any event be difficulties because the water tank for No 15 was in the roof space.
9. The current position is therefore in our judgment that there is no immediate prospect of converting the roof space into a dwelling, either freestanding or as an extension to the second floor flat.
10. Mr Cordell argued that section 168 only applies if there is a current existing intention to occupy the roof space as a dwelling. He accepted in argument that it necessarily followed that there could be an intention to occupy one day, but that that intention might be lost the following day. Thus a lease might fall within section 168 one day but fall outside the section the following day.
11. We do not agree. In our judgment the applicability of section 168 should be determined at the time the lease is granted. Here the lease provided in clause 3(7) that "the demised premises shall be kept and used as and for residential purposes only." In 1994 the intention of the parties was that Mr Drewitt would develop the roof space as a separate dwelling. The fact that there were and are practical difficulties with carrying out that intention does not mean that the lease falls outside section 168.
12. There is another reason why the Tribunal has jurisdiction under section 168. The landlord has previously served a notice under section 146 of the Law of Property Act 1925 seeking forfeiture of the lease on the grounds that the Respondents were not using the premises for residential purposes. After

service of that notice, Mr Drewitt began proceedings in the Central London County Court seeking relief from forfeiture.

13. The matter came before District Judge Gilchrist at that Court on 30th October 2007. He gave permission to Mr Drewitt "to amend the claim to include a declaration that the notice under section 146... was invalid as having been served in breach of section 168 of the Commonhold and Leasehold Reform Act 2002" and made a declaration to that effect.
14. There is thus a decision of a competent court that section 168 applies to the current lease. Mr Cordell said that that decision was given without a full trial and thus could not give rise to any res judicata.
15. In our judgment, however, the matter was heard by the district judge after hearing solicitors for both Mr Drewitt and the landlord. The order was not appealed and in our judgment is binding on the parties.
16. For both these reasons, therefore, we hold that this Tribunal has jurisdiction to make a determination under section 168.
17. We should add that there is an oddity in that it is the landlord who is bringing the claim under section 168. It is strange that landlord should be arguing that the Tribunal has no jurisdiction to consider the application which the landlord itself has brought.

Breach of covenant

18. Clause 3(7) of the Lease provides "that the demised premises shall be kept and used as and for residential purposes only." This parallels paragraph 1 of the Fourth Schedule to the Lease by which the lessee covenanted "not to carry on or permit to be carried on upon any part of the demised premises any manufacture trade or business but to keep or occupy the same as for residential purposes only."
19. Mr Cordell argued that clause 3(7) was a positive covenant to use the premises for residential purposes, but he submitted that paragraph 1 was a negative covenant. The Tribunal has difficulty accepting the submission that there is a difference between clause 3(7) and paragraph 1. In our judgment either both are positive covenants or both are negative covenants. Since, however, Mr Cordell made it clear that he relied solely on clause 3(7), it is not necessary for us to consider this further.
20. If clause 3(7) was solely a negative covenant, then it was common ground between the parties that there had been no breach of it, because there was no use of the premises for any other purpose. By contrast, if there was a positive obligation to use the premises for residential purposes, then there was a breach, because the premises were not being used for residential purposes.
21. Whether a covenant is positive or negative is in our judgment a matter of substance rather than form. User covenants are typically negative rather than positive. A covenant, for example, to use premises as a shop selling men's clothing is covenant not to use the premises for any other type of shop or business: it is not a covenant to open a men's clothing shop. A positive covenant requires a fair degree of detail as to what precisely needs to be done.
22. Mr Cordell relied on the case of *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136. The case is chiefly memorable for Mr Justice Harman's holding that the "working classes" continued to exist. The clause in question in that case provided:

"That save as hereinafter provided the demised premises shall not nor shall any part thereof be used for any art trade business or profession whatsoever but that the said demised premises with the offices thereto shall be kept and used only for the purposes of the Grosvenor Housing Scheme as dwellings for the working classes within the meaning of the Housing Act 1925 or any statutory modification or re-enactment for the time being in force and for no other purpose."

The judge held at 147 that:

"...the obligation here undertaken is a positive obligation. The word 'used' carries to my mind a connotation of a duty to use. The whole phrase suggests to me... that the purpose of the grant was to provide buildings in which the City of Westminster would keep tenants. It is not a covenant that could be performed by keeping the buildings empty with a view to reducing expenditure on maintenance. In my judgment the contrast in working between the negative prohibition in the first lines of the covenant followed by the words 'but that' shows a clear shift of meaning from restraint to activity. It is of course true that a duty to use land for some purpose necessarily means that the land shall not be used for other purposes. Nevertheless the duty to use remains a positive obligation although a negative implication may flow from it."

23. In the current case there are no contrasting phrases, one negative one positive. Moreover unlike the *Westminster* case there is no detailed description of what is to be done. If there was covenant to convert the roof space, then one would expect details of what had to be done and by when. By contrast the provision in *Westminster* that the premises be used "for the purposes of the Grosvenor Housing Scheme as dwellings for the working classes" is quite specific.

24. Accordingly in our judgment, the covenant here is solely a negative covenant. The Respondents are not in our judgment in breach of it.

Costs

25. As regards costs, Mr Drewitt makes an application under section 20C of the Landlord and Tenant Act 1985. However, Mr Cordell says that the landlord does not intend to seek any of the costs of these proceedings against the Respondents. Accordingly the Tribunal need make no section 20C order.

26. Mr Carr applies for £500 pursuant to paragraph 10 of Schedule 12 to the 2002 Act on the basis that the landlord has behaved frivolously vexatiously or otherwise unreasonably. In the Tribunal's judgment, however, the landlord has not behaved unreasonably. The landlord has admittedly lost its current application, but the application was in our judgment properly made on reasonable grounds. Accordingly we refuse Mr Drewitt's application for costs.

DECISION

The Tribunal determines that the Respondents are not in breach of the terms of the lease dated 28th January 1994 by reason of a failure to keep and use the demised premises as and for residential purposes only. The Tribunal makes no order in respect of costs.

adrianjack

Adrian Jack, chairman 17th January 2008