



**Residential
Property**
TRIBUNAL SERVICE

LON/00AP/LBC/2008/0021

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN
APPLICATION UNDER THE COMMONHOLD AND LEASEHOLD
REFORM ACT 2002 Section 168(4)**

Property: 2c Truro Road, Wood Green, London, N22 8EL

Applicant: Mr M Illovy

Respondent: Mr J D Kotecha
Paddington Churches Housing Association

**Determination without a hearing under Regulation 13 of the Leasehold
Valuation Tribunals (Procedure) (England) Regulations 2003**

Tribunal: Ms E Samupfonda LLB (Hons)
Mr P Roberts DipArch RIBA

In the Leasehold Valuation Tribunal

Ref LON/OOAP/LBC/2008/0021
Applicant Mr. M Illovy
Respondent Mr. J. D Kotecha (1)
Paddington Churches Housing Association (2)
Premises 2c Truro Road, Wood Green, London N22 8EL

Tribunal

Ms E Samupfonda LLB (Hons)
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1. This is an application under section 168(4) of the Commonhold and Leasehold Reform Act 2002. The Applicant seeks a determination that the Respondent has breached a covenant in the lease.
2. The lease in question is for a term of 99 years from 10th August 1972 between Mr D Illovy and Mr & Mrs Rebello.
3. A pre trial review was not considered necessary and the parties consented to the matter being dealt with by way of a paper determination.
4. The alleged breach relates to clause 2(8)(a) which requires that the lessee will not "underlet the demised premises save that an underletting for a period not exceeding three years at any one time may be permitted subject to satisfactory references being submitted to the Lessor in respect of any prospective underlessee and also arrangements being made to the Lessor's satisfaction for the observance and performance of all the covenants on the lessee's part and the conditions herein contained"
5. The Applicant contends that the Respondent is in breach of covenant by subletting the premises to Paddington Churches Housing Association by a lease dated 12th January 2004, without the knowledge or consent of the Applicant and without providing references or making arrangements to the Applicant's satisfaction for the observance and performance of the covenant as required by clause 2(8) thereby causing the Applicant loss and damage.
6. The Respondent's case is that the application should be dismissed as the breach has been remedied in that the premises were vacated in 2006 as evidenced by a letter dated 2nd June 2006. The Respondent admits that references were not provided to the Applicant in advance of the under lease with PCHA being entered into. Despite this admission, the Respondent contends that there has been no actionable breach of covenant. It is submitted that the Applicant had waived compliance with the covenant each and every time a quarter's rent was paid given that the underlease is dated 12th January

2004 and the Applicant did not raise any concerns as to the under lease until January 2005.

7. The Applicant refutes this and states that he first became aware of the under lease in January 2005. He then wrote letters dated 12 January, 28th January and 12 February 2005 all by recorded delivery asking for further information. He was notified on 17 February 2005 that the property was rented. By letter dated 20th February 2005, the Applicant requested details of the letting. This was ignored and a further letter dated 1 March 2005 was sent by second recorded delivery. The Respondent then telephoned the Applicant's office and explained that the premises were let to a housing association. The Respondent's solicitors wrote on 14th March 2006 indicating that the illegal subtenant was to vacate the premises. The Applicant wrote on 23rd March 2006 asking for confirmation of the date. On 18th May 2006 the Applicant advised the Respondent that he would take legal action to resolve the matter and the flat was then vacated on 2nd June 2006.
8. Section 168 of the 2002 Act, so far as material, provides
 - (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 in respect of a breach by a tenant of a 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 admitted the breach, or
 - (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
 - (3)-
 - (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.
9. From the information provided, it is clear that the Respondent does not dispute the underlying facts and admits that he is as he puts it "technically speaking" in breach of clause 2(8) (a) by not providing references in advance of the underlease with PCHA.
10. The jurisdiction to determine whether a breach of covenant has occurred lies with the leasehold valuation tribunal as provided by s168 (4) of the Act. The Tribunal noted the Respondent's submissions that the Applicant is acting in "manner that can best be described as vexatious" in bringing an application 2 years after the breach has been remedied. The Tribunal rejects that suggestion as in our view s168(4) is not time limited. Therefore, the Tribunal determines that the Respondent's failure to provide references and failure to make arrangements for the performance of covenants constituted a breach of the

covenant contained in clause 2(8)(a) of the lease. As to the question of waiver, in **Swanston Grange (Luton) Management Ltd v Langley-Essen (LRX/12/2007**, 12 November 2007, His Honour Judge Huskinson held "For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show an unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants regarding underlettings either at all or for the time being. The Respondent would need to establish that she had altered her position to her detriment on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenant would be unconscionable." In **GHM (Trustees) Limited and Barbara Glass and David Glass LRX/153/2007**, George Bartlett QC, President of the Lands Tribunal held "the question whether the breach has been remedied so that the landlord has been occasioned no loss is a question for the court in an action for forfeiture or damages for breach of covenant."

11. In the circumstances the Tribunal determines that the Respondent has breached clause 2(8)(a) of the lease.
12. The Tribunal considered the Respondent's application for costs. The Tribunal's jurisdiction to award costs is set out in Schedule 12 paragraph 10 of the Act. This provides that a "leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within subparagraph (2)
 - (2) The circumstances are where
 - (a) he has made an application to the leasehold valuation tribunal which is dismissed... or
 - (b) he has in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, disruptively or otherwise unreasonably in connection with the proceedings."
13. Since schedule 12 is not satisfied the Tribunal makes no order as to costs.

Chairman

Dated

23.7.08

