Ref: LON/00/AC/LBC/2008/0031

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 168(4) AND SCHEDULE 12 PARAGRAPH 10 OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Applicant: Mr G La Porta

Respondent: Lilyford Limited

Premises: 38A and 38B North End Road, London NW11 7PT

Hearing date: 9 February 2009

Appearances: For the Applicant: Mr A Beswetherick of Counsel
For the Respondent: Mr D Kerr of Counsel

Members of the Leasehold Valuation Tribunal: Mrs F R Burton LLB LLM MA
Mr I Thompson BSc FRICS
Mrs L Walter MA

Date of the Tribunal's decision: 5 March 2009

LON/00AC/LBC/2008/0031

38 NORTH END ROAD, LONON NW11

BACKGROUND

1. This was an application dated 10 July 2008 for determination under s 168(4) of the Commonhold and Leasehold Reform Act 2002 that the Respondent Company was in breach of various covenants contained in its Lease dated 18 December 2001 (which demised the property for 25 years from that date) including of a covenant to keep in repair and a covenant not to underlet without the Landlord's written consent. On 16 July 2008 the Tribunal issued its usual Directions setting out the procedural framework for preparation of the case, and setting it down for hearing on 18 September 2008: this was subsequently amended, following an oral Pre Trial Review on 11 November 2008, to 1.30pm 9 February 2009, prior to which an inspection was arranged for the morning of the same date. The supplementary Directions of 11 November 2008 gave permission for both parties to instruct an independent surveyor to provide expert evidence if so advised, and directed that such experts must meet and attempt to narrow the issues no later than 9 December 2009.

THE INSPECTION

2. The Tribunal duly inspected the subject property on the morning of 9 February 2009, in the presence of Mr A Beswetherick, Counsel for the Applicant, the Applicant, Mr G La Porta and his son Mr A La Porta, Mr D Kerr, Counsel for the Respondent, and Mr T Cacciapaglia, Director of the Respondent Company and personally Guarantor under the Lease. The Tribunal was in possession of the Expert's Report dated 29 January 2009 of Andrew Jonathan Mazin BSc FRICS FCIArb MAE, Consultant to Integrated Surveys Ltd, who had been instructed on behalf of the Applicant Landlord, which Report contained a Schedule of Dilapidations which guided the Tribunal's inspection. Although it was raining heavily the Tribunal inspected the exterior of the building from the street, before approaching the upper parts of the building containing the two flats over a tiled staircase and a flat roof to the entrance door of the communal parts giving access to the two flats. In passing they noted the flat roof over the separate restaurant within

the commercial premises on the ground floor, since this roof was visible from the tiled staircase.

3. Within the upper part of the building the Tribunal noted that the common parts giving access to the internal front doors of the two flats were clean and well decorated, although they also noted a light fitting on the landing between the two flats had some stray wiring which required attention (although the light fitting itself was working). This was the only light fitting on the staircase. The Tribunal also noted the section of bowed leaded light and glazing to the stained glass window on the staircase.

4. The Tribunal first visited Flat A, on the first floor, where they viewed the locations of all the alleged defects revealed in a Schedule of Dilapidations which had been prepared for the Landlord Applicant. The flat had been designed to have 2 bedrooms, a bathroom, kitchen and living room, but was currently arranged as 3 bedrooms with bathroom and kitchen. They noted two tenants were on the premises. In the front large bedroom (which appeared to have been designed as a living room) they noted 1 squeaking floor board and the door and fanlight complained of as not complying with fire regulations; in the middle bedroom (the larger of the two apparently designed as such) they noted another loose floorboard, some slight damp staining above the window, and the door and fanlight complained of as before; similar points were noted in the small bedroom; a loose floorboard in the bathroom; and repainting of a damaged ceiling (including filled cracks over the sink unit) and the same door and fanlight complained of in the kitchen.

5. In Flat B (up two flights of stairs) the Tribunal noted that the layout mirrored that of the flat below. They noted similarly alleged defects, including staining to the kitchen ceiling, which had been part repainted (suggesting that a further coat was yet to be applied) and there was similar staining on the ceiling of the small bedroom. Outside the flat, there appeared to be no light switch for the staircase lighting and at this level the woodchip wallpaper indicated wall surfaces more visibly defective than at the lower level. Returning to the exterior the Tribunal noted that in places the uneven surface of the flat roofs indicated some patch repairs. They then entered the ground floor restaurant where it appeared there had been an allegation of

leaks from the flat roofs but found that there was not at the present time any water ingress. There were signs of water penetrating in the WC ceiling which may have come from the area of the steps above.

THE HEARING

6. At the commencement of the hearing Mr Beswetherwick, Counsel for the Applicant Landlord, introduced a joint experts' statement in which the respective experts had, on the previous Thursday, 5 February 2009, agreed what work as set out in the Schedule of Dilapidations still required doing and what was now considered satisfactory. He told us that the experts had agreed that all the external work listed should be done by the Tenant, and that it was the Landlord's contention that this was appropriate pursuant to his interpretation of the Lease, which he submitted had to be read as a whole, resulting in this conclusion. He submitted that such an interpretation followed from reading the definition of "the Premises" leased which was to be found in Clause 1.14 and which referred to "Two residential Flats on the Upper Floor of 38 North End Road London NW11 shown coloured red on the plan attached and all and any part of such property and any additions thereto including fixtures and fittings whenever fixed …". He referred us to the plan attached on which he pointed out that the property circled appeared to cover the entire footprint of the building, from which it was surmised that the "Premises" were the two flats and their common parts on the upper floors above the commercial unit below which was separately demised.

THE CASE FOR THE LANDLORD

7. Mr Beswetherwick continued that he accepted that it was for the Applicant to prove the breaches of covenant and while the Respondent Company admitted that work needed doing and that the flats were occupied otherwise than by the Company they did not admit that there was a breach of covenant. However it was appreciated that any issues of waiver or estoppel were for another forum. He drew our attention to the two clauses in respect of which it was alleged that Tenant's covenants were breached: these were clause 7.1 which obliged the Tenant to "keep the Premises at all times in good and substantial repair and condition" and clause 11.1 which prohibited alienation save in certain circumstances set out in clause 11.2(a) which permitted the

Tenant to "sublet the two residential flats together or separately with the written consent of the Landlord (such consent not to be unreasonably withheld or delayed) providing that only such subletting shall be on assured shorthold tenancies for a period not exceeding 12 months and shall be at the market rent with a written tenancy agreement containing the usual conditions found in the 1998 Oyez Agreement 20". Also in clause 11.3 the Tenant was prohibited from underletting or charging the whole of the Premises without the consent of the Landlord whose consent may not be unreasonably withheld or delayed.

8. Mr Beswetherwick then called the Landlord, Mr G La Porta. It emerged that Mr La Porta was unable to read English, although he was able to identify his signature on his witness statements and to confirm their truth, whereupon it was agreed that his son, Mr A La Porta, should be allowed to sit beside him to enable him to find those statements in the hearing bundles so that he might identify his signature. Mr La Porta said that he had no personal knowledge of the conveyancing process whereby he had granted the Lease to the Respondent company, as he was a restauranteur by profession and had relied on his solicitors for the necessary documentation. However he was quite sure that he had never given any consent for the flats to be occupied other than in the circumstances set out in the Lease (as had been drawn to our attention by his Counsel) and he had no knowledge of any tenants being in the flat at the time when it had been taken over, subject to their tenancies, by the Respondent company.

9 In particular Mr La Porta had no recollection of two Turkish women who were alleged to have remained after he had granted the Lease, as was apparently suggested to indicate his approval to the flats being let out to sub tenants without his written consent as set out in the Lease. He had never given any such consent, and was shocked to find (when told of the over population of the flats by a friend of his who had observed several people going into the residential premises) that as many as 5 people per flat were being allowed to live there, and that all were paying rent to the Respondent company. He described how he had come to England to inspect, had spoken to the person (called "Juliano") to whom the Respondent company had sub let the restaurant on the ground floor, and found out about that subletting too, although it had been dressed up as only a "management agreement". What had particularly

annoyed him about the numerous people living in the flats was that the Respondent company was making a very substantial profit from such lettings while the over crowding was having a detrimental effect on the property. He said that he had observed this adverse effect himself when he had visited both flats and found them in a very poor state, with numerous breaches of the repairing and cleaning covenants including a good deal of unrepaired external damage. He reiterated that he had thought that staff from the restaurant would be living in the flats as he had had no request for any written consent to alternative arrangements. He had reported these matters to his solicitors who had taken the necessary steps to obtain a schedule of dilapidations and to address the sub letting, in respect of which 10 sub tenancy agreements were in our hearing bundle. He maintained this account when cross examined by Mr Kerr on behalf of the Respondent company.

10. Mr Beswetherick submitted that he was not going to call either of the witnesses, a Mr G Ferrari (the restaurant sub tenant "Juliano" earlier referred to) and a Mr C Barbieri who had accompanied Mr La Porta to inspect the flats when he had discovered the multi occupation, as the evidence contained in these was conceded by the Respondent. Mr Kerr agreed that these statements could be admitted without oral evidence being called. He contended that the breach of covenant by sub letting without written consent of the Landlord was proved by the evidence of Mr La Porta and that the alleged AST lettings supposedly evidenced in the 10 "AST agreements" only underlined that there had been no written consent, since first two of them were only home made agreements purporting to last for only 3 months (whereas an AST had to run for at least 6 months) and none of them were on the required Oyez form. He relied on the recently agreed report of the experts containing their updated Schedule of Dilapidations to establish the breach of the repairing covenants.

THE CASE FOR THE RESPONDENT COMPANY

11. Mr Kerr, for the Respondent Company, said that he was not going to call any other evidence other than the experts' report as the hearing bundle contained sufficient documentation to which the Tribunal was referred in respect of the Respondent's position, including the witness statement of Mr Cacciapaglia, Director of the Respondent Company and Guarantor under the Lease, who was present at the

hearing . He did however wish to address the issue of alleged breach of the Building Regulations, in respect of which he produced an extract from Chapter 17 of Dowding and Reynolds on Dilapidations, 4th edition, 2008. He said that liability under a Tenant's repairing covenant was a question of construction in every case and a requirement to comply with Building Regulations might require the Tenant to carry out works which were not within his repairing covenant obligations. These were therefore sometimes relied on in terminal dilapidations claims although their inclusion in interim dilapidations was unusual since no liability to comply with any statute or regulations would usually arise until a compliance notice was served.

12. Mr Kerr then turned to the agreed experts' report and to the annotations by the experts in the updated Schedule of Dilapidations. He said that the burden was on the Landlord to prove both the breaches of the covenants and the relevant breaches of the Building Regulations. The Tenant was not admitting the alleged breaches. He then went through the Schedule identifying those items which he contended the Landlord must prove, those which were unparticularised , those which must be struck out as not being in want of repair (or as in the case, for example, of the allegedly missing Gas certificates, had been manifestly complied with since the necessary certificates were in the hearing bundle) and those of which there was no breach yet as they were prospective. He submitted that the Respondent Company's position was neutral, requiring the Landlord to prove them, in respect of 25 out of 62 allegations of breach and in respect of the remainder contended that there was no liability.

13. With regard to the subletting the Tenant was, he conceded, obliged to have regard to the strict wording of the Lease. The Respondent Company had no document showing the Landlord's written consent. It was a fact that the company had inherited at least two tenants whom it was considered were there with the Landlord's consent but it was accepted that no written consents could be produced for subsequent lettings. However he reiterated that he was not admitting the breach since the case was that there was apparently no written document by which Landlord's consent could be proved.

FINAL SUBMISSIONS

14. Mr Kerr had nothing further to add to his earlier submissions.

15. Mr Beswetherick reverted to his earlier references to the terms of the Lease. He submitted that there was no evidence even of oral consent to the sub letting. Mr La Porta had clearly envisaged the flats being rented out, as provided for in the Lease, but he had also envisaged the conditions in the Lease being met, with written consent and AST agreements in the Oyez form. He pointed to the numerous different names on the supposed AST agreements which were in the hearing bundle, which indicated that there had plainly been a breach of the covenant in sub letting to at least 15 people, leading to overcrowding in the flats much of the time if not all of it, and without permission or compliance with the form required by the Lease. He submitted that it was a pity that it was not admitted.

16. With regard to the dilapidations, he submitted that it was clear that the definition of the "Premises" included the exterior of the building. He added that the words "all or any part of the property" could only refer to the outside of the building. He submitted that the fact that there were 2 Leases, one for the flats and one for the restaurant, indicated that there were no other parts of the building left to which the words could apply,. He said that the external decorating covenant in clause 7.4 supported this interpretation. The external decorations obligation was in respect of the "Premises" so that it must follow by objective deduction that the "premises" includes the exterior of the building. Moreover there were extensive breaches of the obligations in respect of the interior. He added that while a Schedule of Dilapidations had been prepared in October 2005 and served in March 2006, in view of the Respondent's position another report had been commissioned containing the defects already mentioned which had not in the meantime been remedied. He submitted that the breaches were clear and requested a declaration to that effect.

COSTS

17. In respect of costs, Mr Beswetherick, Counsel for the Landlord, submitted that the Respondent had acted frivolously, vexatiously and otherwise unreasonably in opposing the application throughout, especially in respect of the wrongful subletting, and not even conceding at the present hearing that there was a

clear breach of covenant in either respect. He asked for costs up to the statutory maximum permitted by Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 on the grounds that the Respondent had acted unreasonably in refusing to admit the breaches and in seeking to strike out the claim at the Pre Trial Review (an application which was procedurally irregular as the Landlord had not received 21 days notice as required by the relevant Regulations and which relied on waiver and estoppel which were not within the LVT's jurisdiction). He said that the Respondent could have admitted and need not have opposed the application to the LVT so that unnecessary costs had been incurred as, if they had not brought the Applicant to an oral hearing, the matter could have been determined on paper. There had been no proactive narrowing of issues either. on the grounds that there was a high threshold for the Landlord to surmount in order to show the statutory basis for the order of costs, which had not been met as it was right for the Tenant to oppose the schedule of dilapidations. In addition to not admitting the breaches they had opposed the application whereas they might at least have.

18. Mr Kerr, Counsel for the Tenant, opposed this application. In response to Mr Bestwetherick's submissions, Mr Kerr said that a high threshold had to be cleared in order to establish that a costs order should be made pursuant to Schedule 12 of the Commonhold and Leasehold Reform Act 2002. The Tenant had been correct not to accept the Schedule of Dilapidations. While there might have been some truth in the previous schedule of works required the most recent one had been demonstrated to be incorrect both by the experts' agreement and by the Tribunal's inspection. Since 2005 the Landlord had done nothing to prosecute the dispute and in fact there was evidence in the hearing bundle that the Respondent company had notified his previous solicitors that they were undertaking the necessary works. He submitted that a costs order did not necessarily follow the present proceedings, and that it was in fact inappropriate to make such an order.

DECISION

19. **The covenant against subletting without consent**. The Tribunal considers that in respect of the sub letting there is a technical breach of the covenant in that no consent of the Landlord can be produced, in due form as set out in the Lease

or in any other form. The Tribunal is nevertheless concerned that it is submitted that the Respondent Company as Tenant apparently took over the flats in a tenanted state and that at least until those sub tenants left the Director of the Respondent Company believed that there was consent to their occupation, while there is no documentation apparently available of the parties' agreements at that time other than the copy Lease itself. Nor has the Tribunal seen any damage to the Applicant Landlord's reversionary interest proceeding from the occupation of the sub tenants who appeared to the tribunal to keep the property in a clean and orderly state. However any question of waiver or estoppel is not for this Tribunal to determine and the Tribunal therefore determines that, having seen 2 persons in one flat and 3 in the other flat who according to the Respondent Company's own documentation pay rent, **the covenant against subletting contained in clause 11 of the Lease is breached.**

20. **The repairing covenants.** The issues of disrepair are more complex. Items 1.1 to 1.21 inclusive of the Schedule of Dilapidations all relate to exterior work. The Tribunal is far from persuaded that the Tenant has liability for this work pursuant to the terms of the Lease, which is poorly drafted and lacks, for example, a formal Demise which could have been explicit as to the relevant parts of the building which are not adequately defined in the definition section. It is clear that the restaurant premises are not included in the Tenant's obligations under this Lease but that is about all that can definitively be deduced. There is no clause which outlines the Landlord's obligations other than his obligation to insure. Moreover his obligation to insure the building is odd if the Tenant is responsible for all work in connection with the structure of the building, such as the main roof of the upper part and the flat roofs of the restaurant. It is also odd that the interior common parts by which the 2 residential flats are accessed are treated by the Landlord's Counsel as part of the flats, when a "Flat" normally connotes rooms behind an entrance door and does not include, without express words, the approaches unless they are specifically demised to the Tenant. A Lease normally apportions liabilities in respect of the structure of the building to the Landlord (if necessary and in best practice explicitly setting out the demise for avoidance of doubt) and the interior of a flat to the Tenant, unless it is a full repairing Lease, in which case the document will normally say so. In summary the Tribunal does not consider that the exterior of the building is the Tenant's responsibility, although the Tribunal notes that the experts have agreed that

it *shall* be so, and that the Tenant is liable to do the repairs to the exterior. However while the parties may agree whatever they like, this is a matter entirely separate from liability under covenants in a Lease and the Tribunal considers that **the Tenant is not in breach of the repairing covenant in respect of any exterior works under items 1. 2. to 1.21 .**

21. Turning to **Flat A,** in respect of item 2.1 (Front bedroom loose floorboard) the Tribunal the experts agreed that this was a minor item of no consequence to the fabric of the building and inappropriate to an Interim Schedule of Dilapidations. Accordingly this is not pursued by the Landlord and **there is no breach**.

22. In respect of item 2.2. (door and glazed fanlight do not comply with Building Regulations and fire standard) the starting point is the Building Regulations in connection with the means of escape in case of fire. The doors, framework and fanlight do not comply with modern Building Regulations, but those part of the regulations are not retrospective and the Tenant's obligations under clause 12 (to comply with all statutory requirements) do not require the Tenant to address this matter, at least unless and until the regulations become retrospective and the Tenant is therefore required to do so by a compliance notice. This applies also to 2.3, in the same case in the side bedroom. **There is accordingly in either case no breach**.

23. 2.4 (kitchen stain and water damage on the ceiling due to water penetration from the flat above) was agreed by the experts to have occurred but was seen at the inspection by the Tribunal to have been repaired. **Accordingly there is no material breach.**

24. Items 2.5 and 2.6 (kitchen cracked wall and ceiling plaster) were not pursued by the Landlord as the defect was agreed to be minor and not appropriate to an interim schedule as in 2.1 above. Item 2.7 falls into the same category as 2.2 above at paragraph 21, ie there is no liability on the Tenant, and therefore **no breach.**

25. Item 2.8 (Stained/water damaged rear bedroom ceiling). Remedial works have been carried out to this item. Technically there was a breach for the period during which the water damage was not corrected but it has now been dealt

with and the Tribunal is not persuaded that in practical terms the temporary technical breach was substantial or causing any lasting damage, and therefore regard this as a **minor technical breach**.

26. Items 2.9 and 2.10 (cracked uneven ceiling plaster and loose floorboard). Agreed minor and no obligation on the Tenant to repair, **no breach,** and in any event these items are not being pursued by the Landlord. Item 2.11 (door and fanlight) another 2.2 category item, **no breach.**

27. Items 2.12-2.14 (bathroom and hall) were not pursued by the Landlord, in any case minor and in one case remedial works had already been carried out), item 2.15 another 2.2 category item, 2.16 not pursued as no defects found, **no breach.**

28. Items 2.17 and 2.18 (electricity and gas certificates) were items in respect of which the Tenant had no obligation, and no breach was pointed out, although the Tenant had as a matter of fact agreed to send in any certificates to the Landlord's solicitors not on file (one of which was already in front of the Tribunal). **No breach.**

29 Items 2.19-2.21 (Decorations). All these decorations were in order as the obligation was only to redecorate where any remedial works had disturbed a surface, **no breach.**

30. **Flat B.** Items 3.1 – 3.2 were further category 2.2 items, **no breach.**

31. Item 3.3 (kitchen water damaged ceiling plaster) remedial work to be carried out, a **minor technical breach** pending repair.

32. Item 3.4 (gas certificate) see paragraph 28, any outstanding certificate agreed to be submitted, although no liability on the Tenant to submit. Item 3.5, a further category 2.2 item. Item 3.6, a minor item not pursued by the Landlord. Items 3.7-3.8 , further 2.2 category items. **No breaches.**

33. Item 3.9 (electrical test) and item 3.10 (gas test) further paragraph 28

category items, not pursued by the Landlord **no breach.**

34. Items 3.11-3.13 (decorations where works had disturbed the surface) not pursued by the Landlord but the decorations were in any case in sound order.

35. Items 4.1-4.8 (works to the communal staircase). The Tribunal was not persuaded that these items were the Tenant's responsibility. "The Premises" at clause 1.14 are defined as "2 residential flats on upper floor (sic) and all or any part of such property". The common parts in such a context are normally part of the "building" not part of such "residential flats". Thus these items fall to the Landlord and not the Tenant, including item 4.1 (repair of an electrical fitting). Alternatively it appeared that the Landlord was not pursuing these items, either because they were not required or works had been dealt with by the Tenant anyway (as in the case of item 4.3, loose and blown plaster, and 4.5, another electrical certificate as in paragraph 28). This leaves only item 4.4 for discussion (cracked panes of glass in the half landing window and the bowed and weakened stained glass screen on another landing, which is in any case arguably the Landlord's responsibility). It appeared that the two expert surveyors had agreed that the stained glass screen should be investigated for the best means of repair. Accordingly in the case of these items there were **no breaches.**

36. Accordingly the Tribunal finds that there are **minor technical breaches in the case of items 2.8 and 3.3.**

37. **Summary**. The Tribunal finds that there is **breach of clause 11 (sub letting) and minor technical breaches of items 2.8 and 3.3 in the schedule of works amounting to a technical breach of clause 7 (repair).**

DECISION ON COSTS

38. The Tribunal is not minded to make the order sought since it would appear that the Respondent had acted in any way unreasonably in resisting the Landlord's application for forfeiture of the Lease and it also appeared that the position of the parties had indeed been narrowed down, both at the experts' meeting

of the week preceding the hearing and at the hearing itself. Accordingly the Tribunal determines that an order would be inappropriate and that no such order should be made.

Chairman.....

Date.....5.3.09.....