

+

MAN/00BU/LBC/2009/0006

RESIDENTIAL PROPERTY TRIBUNAL SERVICE**LEASEHOLD VALUATION TRIBUNAL**

of the

NORTHERN RENT ASSESSMENT PANEL**Commonhold and Leasehold Reform Act 2002
Section 168(4)**

Property: Flat 3 Heather Lea Green Walk Altrincham Cheshire WA14 2SJ
Applicant: Heather Flat Freehold Limited
Respondent: Barry Levy
The Tribunal: Mr G C Freeman
Mr J Rostron MRICS

DECISION

The Leasehold Valuation Tribunal declines to determine that there is a breach of covenant by the tenant in the lease of the Property dated 13th January 1981

Application

1. Heather Flat Freehold Limited applies under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination that a breach of covenant has occurred in the Lease of the above property. The Lease of the Property is dated 13th January 1981 and is made between Heather Flat Management Limited (1) Heather Lea Services Limited (2) and Robert Morris Lipman and Bernadette Lipman (3).
2. Section 168 (4) 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 (which deals with the restriction on forfeiture of a Lease in respect of a breach by a Tenant of a covenant or condition in the Lease) unless subsection (2) of section 168 is satisfied.

3. Section 168(2) states that the section 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 Tribunal in proceedings pursuant to a post dispute arbitration agreement has finally determined that the breach has occurred.
4. Section 168(4) states that 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 covenant or a condition in the Lease has occurred.
5. The application was made by letter dated 16th June 2009 from the Applicant's solicitor, Peter D Greenhalgh of 10 Edward Street, Glossop, SK13 7AF. Directions were issued by the Leasehold Valuation Tribunal on 16th July 2009 following which the Applicant provided a statement dated 20th August 2009, supporting the application, together with a statement from Mr G Cauchi, a Director of the Applicant, and a bundle of documents. Further statements were lodged from Mr and Mrs Cauchi, Mrs B Blankstone and Mr S Lentin, all directors of the Applicant.
6. The Respondent, the successor in title to Mr and Mrs Lipman, is represented by H.L.Law solicitors of 301 Hollyhedge Road, Gatley, SK8 4HH. The Respondent submitted statements from himself, Ms Sharon Aarons, Mr Barry Mason and bundle of documents, in support of the response.
7. The Applicant states that the Respondent has erected a close boarded wooden fence dividing the Property from the adjoining property known as Flat 1 Heather Lea. It is alleged that the lease requires the consent of the Respondent freeholder to the erection of such fence and that no consent has been granted. The fence is approximately 6 feet in height above ground. The relevant covenant in the Lease is clause 2 (12) which states:-

*“not at anytime without the licence in writing of the Lessor nor except in accordance with plans and specifications previously submitted in triplicate to the Lessor and approved by the Lessor and to its satisfaction to make any alteration or addition whatsoever in or to the Flat either externally or internally or make any alteration or aperture in the plan, external construction, height, walls, timbers, or architectural appearance thereof nor to cut or remove the main walls or timbers of the Flat **unless for the purpose of repairing and making good any defect therein** nor to do or suffer in or upon the Flat any wilful or voluntary waste or spoil” [Emphasis added]*

8. In the alternative, the Applicant complains that the erection of the fence has caused a nuisance and annoyance to the Lessor Management Company and other occupiers of the Estate (as defined in the Lease) in breach of clause 2(16) which states:-

“Not to do or permit to be done upon or in connection with the Flat or the Building or any other part of the Estate anything which may be or tend to be a nuisance annoyance or cause damage to the Lessor, the Management Company or the owners or occupiers of any other part of the Estate or any of them or to any neighbouring adjoining or adjacent property or the owner or occupier thereof”.

9. The Respondent claims that the erection of the fence was to replace an existing and dilapidated fence which divided the respective properties. The Respondent further claims that consent was granted at an Annual General Meeting of Heather Lea Services Limited on 22nd February 2008 attended by Sharon Aarons on behalf of the Respondent. The Applicant, by its Director, Mr Cauchi, denies such consent was granted at that meeting.
10. There is clearly a conflict of evidence as to what was agreed or not at the meeting on 22nd February 2008, with regard to the erection of the fence. Fortunately, the Tribunal’s decision does not turn on the acceptance of either party’s recollection of what took place at that meeting.

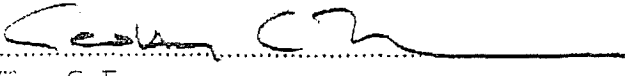
Inspection, Hearing and Findings

11. The Tribunal inspected the property on the morning of its deliberations. It consists of a flat within a Victorian house, converted a number of years ago into four self-contained flats. Flat 3 is situated on the first floor of the house. Three flats each own a part of the garden. The fence which is the subject of the application divides the garden of Flat 3 from the garden of Flat 1, which belongs to Mrs Blankstone. The Tribunal noted that the fence dividing Mr Lentin’s garden (Flat 2) from the adjoining property not in the ownership of the Applicant, consists of concrete posts with concrete bases and wooden interwoven panels. It is approximately six feet in height above ground. The Applicant states that consent to the erection of this fence has been granted by the Applicant, pursuant to the lease of Flat 2.
12. Neither party requested a hearing so the Tribunal considered the application following the inspection.
13. The Tribunal referred to the Lease dated 13 January 1981. There is a definition of the Flat in the Second Schedule. It is described as:-

“ALL THAT Flat forming part of the Estate known as Flat 3 Heather Lea Green Walk Bowden aforesaid being edged in red on the plan numbered 1 annexed hereto together with a garden area shown edged red on the plan numbered 2 annexed hereto together with”

- 14 No coloured copy of the plan referred to above was provided in either party's bundle of documents. However, it is clear from the Land Registry filed plan, an uncoloured copy of which was provided, that it includes a substantial area of garden. The fence which is the subject of the application forms the south easterly boundary of the Property. Both parties agree that prior to the erection of the fence by the Respondent, there was a fence dividing the garden of Flat 1 and the garden of Flat 3. In his statement dated 17th August 2009, Mr Cauchi states that this fence was allowed to fall into decay. Nevertheless, there was a fence there. The Respondent's photographs show it.
- 15 The Tribunal noted that clause 2 (7) of the Lease provides that the Tenant is:-
- “throughout the said term and from time to time and at all times to keep the Flat and everything demised hereunder and additions thereto well and substantially repaired, cleansed maintained and renewed, and to replace from time to time all Landlord's fixtures and fittings and appurtenances in the Flat which may be or become beyond repair at anytime during or at the expiration or sooner determination of the said term”* [emphasis added]
- 16 The Applicant contends the fence is part of the Flat, and that an unauthorised alteration or addition has been made to it. If this is so, then there must be a corresponding obligation on the Tenant to repair, maintain and renew the fence, because it is part of “the Flat”. For the Tenant not to do so would invite an action by the freeholder for breach of his repairing covenant. In the Tribunal's view this repairing obligation extends to replacing the fence from time to time, and the Respondent is entitled to replace it in order to comply with his repairing covenants.
17. Irrespective of what took place at the meeting on 22nd February 2008, the Respondent produced an email from Ms Aarons dated 29th April 2009 addressed to the Respondent's solicitor and copied to Mr and Mrs Cauchi and the managing agents, which stated that during the course of the next two weeks they would be erecting “the wooden fence, as agreed by all directors at the meeting I attended last year between the gardens of Flat 3 and Flat 1”. The Tribunal finds that it is significant that no response has been produced to that email by Mr Cauchi on behalf of the Applicant. It was only after the fence has been erected and completed when Mr Cauchi stated that consent had not been granted and sought to serve Notice under section 146 of the Act. The Tribunal consider that if no consent had been granted to the erection of the fence, the Applicant should have responded immediately to that email advising the Respondent that consent had not been granted and inviting the Respondent to make an application for consent. Instead, the Respondent waited for the fence to be completed, before objecting.

18. Be that as it may, the Tribunal must next consider whether the erection of the fence constitutes an alteration or addition within the meaning of clause 2(12) of the lease of the Flat, and thus requires the consent of the Applicant.
19. The Tribunal noted that the fence has been erected to replace a defective fence which previously divided the gardens of Flats 1 and 3. As such, in the opinion of the Tribunal, the replacement of the fence, being part of "the Flat", is a repair or renewal within the meaning of clause 2(7) of the lease. Furthermore, it falls within the exception to clause 2(12), as being the making good of a defect in the previous fence. There is thus no requirement for the Respondent to seek consent for its erection.
20. Finally, the Applicant contends that the Respondent is in breach of clause 2(16) of the Lease by causing a nuisance or annoyance. No evidence was put before the Tribunal to support this contention. In the absence of such evidence the Tribunal rejects this allegation, and finds that the Respondent is not in breach of this covenant.



Geoffrey C. Freeman
Chairman

Dated 20th October 2009