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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number:	BIR/00CW/LBC/2011/0022
Property:	Flat 60 and Garage 47, The Lindens, Newbridge Crescent, Wolverhampton, WV6 0LR
Applicant:	Inktown Ltd or Lawrence House, Goodwyn Ave, London, NW7 3RH
Applicant's representative:	Amelia Becker, Solicitor of Goodwyn ave, London, NW7 3RH
Respondent:	Mark Louis Ridley
Respondent's representative:	Rowland Tildesley & Harris, Solicitors of 1 Rose Hill, Willenhall, West Midlands, WV13 2AR
Application:	Application for a determination under s168 Commonhold and Leasehold Reform Act 2002 that the Respondent has breached a covenant or condition in his lease.
Tribunal:	Mr C Goodall MBA LLB (Chair) Mr C Gell FRICS

Date: 26 MAR 2012

Decision

The application, under s168 of the Commonhold and Leasehold Reform Act 2002, for a determination that Mr Mark Louis Ridley is in breach of a covenant in his lease, is refused.

Background

1. Inktown Ltd (the Applicant) is the freehold owner of a block of flats which includes a property known as Flat 60 and Garage 47, The Lindens, Newbridge Crescent, Wolverhampton, WV6 0LR (the Property). Mark Louis Ridley (the Respondent) is the immediate lessee by assignment of a lease of the Property dated 20 October 1976, for a term of 99 years from 25 March 1976, for which a premium of £6,450 was paid and a ground rent reserved of £25pa, rising every 33 years firstly to £37.50pa, and then to £50pa (the Lease).

2. On 7 December 2011, the Applicant applied to this Tribunal for a determination under s168 of the Commonhold and Leasehold Reform Act 2002 that the Respondent is in breach of a covenant in the Lease (the Application).

3. Directions were made on 15 December 2011 setting out the procedure to be followed for determination of the Application.

4. The first Direction required the Applicant to set out a full statement of its case by 28 Jan 2012. The Respondent was then to file a response by 25 Feb 2012, and the Application would then be determined by a paper hearing (i.e. no party being required to attend) unless either party indicated they wished for an oral hearing to take place. The Directions indicated that the target date for determination of the Application was 11 March 2012.

5. In the event, the Applicant did not comply with the first direction, but applied for the Application to be withdrawn by letter dated 9 Feb 2012. The Respondent refused to agree to the request for withdrawal. Under the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, in the absence of agreement to withdraw, the Tribunal must determine the Application. Accordingly, the Tribunal indicated that it would proceed.

6. The Respondent then filed a response to the Application dated 16 February 2012, and the Applicant filed a response to that response dated 23 February 2012.

7. A paper hearing took place on 16 March 2012 to determine the Application on the basis of this documentation.

The basis of the Application

8. The Applicant says that the Respondent has breached a covenant in the Lease. If this is right, the Applicant has various options which it can pursue, including the possibility of forfeiting the Lease. The Application is made as a first step in this process, as the procedure to forfeit a lease requires the landlord to serve a notice on the tenant under s146 of the Law of Property Act 1925, and s168 of the Commonhold and Leasehold Reform Act prevents a landlord from serving that notice unless certain criteria are met. One criteria is a determination by a Leasehold Valuation Tribunal that the lease has been breached (see para 17 below), hence the Application.

9. The Applicant claims the Respondent has breached the covenant against alienation, which is clause 3(28) of the Lease. The clause says:

   "Not to underlet the Demised Premises or any part thereof and not during the last seven years of the term to assign underlet or part with possession of the Demised Premises or any part thereof *without the consent of the Lessor such consent not to be unreasonably withheld.*"

10. The section in italics is an integral part of the clause in the original lease, save that it is clear that the italicised words have been added in after the engrossment of the lease itself. There is no issue that the Tribunal can see, or which the parties have raised, about the timing of this addition, so it can be presumed to have taken place before execution.

11. There is no dispute between the parties about the fact that the Respondent has underlet the Property without consent. On the 7 October 2011, the Respondent underlet the Property by way of an assured shorthold tenancy for 12 months to Dr Saidunnabi Piyal. The Applicant first complained of an underletting in May 2011. The Tribunal has no evidence that at that point any underletting had occurred, but clearly by the time the Application was made, an underletting was in place.

12. The parties have different views as to whether the underletting is a breach of clause 3(28). The Applicant says clause 3(28) is an absolute bar to underletting, and so there is a clear breach. Even though the Applicants statement is a response to that of the Respondent, the Applicant has made no substantive comment at all on the Respondents main argument that

section 19(1)(b) Landlord and Tenant act 1927 prevents the Applicant relying on clause 3(28), merely commenting that it disagrees with the Respondent on this point.

13. The Respondent says clause 3(28) is not an absolute bar, and needs to be read in the light of s19(1)(b) of the Landlord and Tenant Act 1927, which, he says, makes a clause such as clause 3(28) unenforceable, as the landlord, where that section applies, may not impose a requirement for consent to an underletting to be obtained other than in the last seven years of the lease.

14. A second point was raised in the Application. The Applicant cited clause 3(29) of the Lease, which provides that the lessee of the Lease should pay all costs incurred by the landlord in or in contemplation of any proceedings under s146 or s147 of the Law of Property Act 1925, and on the basis of this clause asks that the Applicant's costs of the Application should be paid by the Respondent.

15. The Tribunal has two key tasks:
    - To interpret the meaning of clause 3(28) (Issue 1)
    - If the interpretation of 3(28) brings s19(1)(b) into play, to consider whether that section prevents the landlord from relying on 3(28) (Issue 2).

16. The Tribunal will then need to deal with the point raised in para 14 above.

The law

17. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides:

> (1) A landlord under a long lease of a dwelling may not serve a notice under s146(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-
>
> (b) it has finally been determined on an application under subsection (4) that the breach has occurred..
>
> ...
>
> (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.

18. Section 146 of the Law of Property Act provides that a right to forfeit a lease is not enforceable unless a notice is served on the tenant specifying the breach and containing certain other details. The precise operation of section 146 is not relevant to this decision, save that it is accepted that service of a s146 notice is necessary before the Applicant can seek to forfeit the Lease.

19. Section 19(1) of the Landlord and Tenant Act 1927 provides:

> (1) "In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject-
> (a) ...
> (b) (if the lease is for more than forty years, and is made in consideration wholly or partially of the erection, or the substantial improvement, addition or alteration of buildings, and the lessor is not a Government department or local or public authority, or a statutory or public utility company) to a proviso to the effect that in the case of any assignment, under-letting, charging or parting with the possession (whether by the holders of the lease or any under-tenant whether immediate or not) effected more than seven years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within six months after the transaction is effected.

Issue 1 – what is the correct interpretation of clause 3(28) of the Lease?

20. The Tribunal must try and ascertain what the mutual intentions of the parties were as to the legal obligations which each assumed by the clause. The intention of the parties must be objectively ascertained, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties (Woodfall on Landlord and Tenant Law para 11.007).

21. In Melanesian Mission Trust Board v Australia Mutual Provident Society (1996) it was stated that "The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of those words."

22. From the case of Investors Compensation Scheme v West Bromwich Building Society (1998) 1 WLR 896, if there is an ambiguity in a clause, relevant criteria which can be applied to resolve the ambiguity include:
(a) Interpretation of the clause is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(b) The meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even to conclude that, for whatever reason, the parties must have used the wrong words or syntax.

(c) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

23. In a covenant against alienation (i.e assigning, underletting, charging etc), a restriction may be said to be absolute, qualified, or fully qualified. An absolute covenant prohibits the alienation absolutely. A qualified covenant prohibits the alienation without the consent of the landlord, and a fully qualified covenant prohibits the alienation without the consent of the landlord, which is not to be unreasonably withheld.

24. Clause 3(28) is ambiguous. It may mean that there is an absolute bar on underletting, or it may mean there is a fully qualified bar on underletting. The difficulty is caused by the failure of the clause to be clear about whether the words identified in italics in para 9 above apply to both parts of the covenant, or only to the second part. Using punctuation and numbering, the two possible interpretations can be expressed as follows:

25. The first interpretation is:

- Not to underlet the Demised Premises or any part thereof, and
- not during the last seven years of the term to assign underlet or part with possession of the Demised Premises or any part thereof,

without the consent of the Lessor such consent not to be unreasonably withheld.

The final phrase applies to both restrictions. This would make the covenant against underletting fully qualified.

26. The second interpretation is:

    - Not to underlet the Demised Premises or any part thereof, and
    - not during the last seven years of the term to assign underlet or part with possession of the Demised Premises or any part thereof without the consent of the Lessor such consent not to be unreasonably withheld.

    The final phrase only applies to the second restriction. This would make the covenant against underletting absolute.

27. The Tribunal considers that an absolute restriction in a long residential lease against underletting is both unusual and unduly restrictive, and would not normally be a clause that a reasonable landlord would seek to impose, or one which a reasonable tenant would readily accept.

28. The second interpretation also contains a further oddity, in that there would be an absolute bar to underletting during the first 92 years of the lease, and then a fully qualified bar for the last 7 years. It would be strange for a reasonable landlord or tenant to accept this, as the normal approach is for a landlord to request provisions in the final 7 years of a lease that further restrict the tenant from alienation, not to agree to relax them.

29. When there is doubt about the meaning of a clause in a lease, doubt should be resolved against the grantor (the contra proferentem rule).

30. The addition of the final phrase after the initial engrossment of the lease indicates that the parties (probably the tenant, as the extra words seem only to favour the tenant) wanted to apply a more relaxed approach to the alienation provisions. It seems reasonable that the parties would have had in mind that the additional words applied to the whole covenant, rather than just a part of it.

31. For these reasons, the Tribunal considers that clause 3(28) imposes a fully qualified covenant against underletting. In other words, the first interpretation of the clause, as set out in para 25 above, is correct.

Issue 2 – What is the effect of s19(1) of the Landlord and Tenant Act 1927?

32. Having resolved Issue 1 as we have, it is clear that s19(1) may apply to the Lease; it is a lease which contains a covenant against underletting without consent. The greater difficulty is whether the further requirements of sub-section (b) are satisfied. This will only apply if the lease is for more than 40 years (which it is), if it is not a lease by a Government department, local authority, or utility company (which it is not), and if it is a lease "made in consideration wholly or partially of the erection, or the substantial improvement, addition or alteration of buildings". This final requirement requires further comment.

33. In requiring that the lease be made in consideration of the "erection ... of buildings", the statutory provision gives no help in determining from whom the consideration must pass. Should it be the tenant who gives the consideration to the landlord by promising to erect the buildings (a so called building lease), or can it be the landlord who gives the consideration to the tenant by way of promising to erect the building if the tenant will then buy it?

34. In this Application, it seems clear to the Tribunal from the terms of the Lease, and from the content of the landlord's title shown in the official copies, that a large number of the flats at the Lindens were constructed and leased together, probably in the period 1976 to 1977. In the expert opinion of the Tribunal, this is entirely consistent with the standard method employed by developers of developing a block of flats, which is to construct, and during the construction period to seek buyers who will pay for, and take a lease of the flat on completion of it. The Tribunal considers that it is much more likely than not that the block in which 60 The Lindens is contained was developed on this basis in or around 1976 and that the flats were then sold off to individual purchasers, who paid a premium for the newly constructed flats. On the balance of probabilities, the Tribunal finds that the lease consideration was a cash premium paid by a buyer to a developer in consideration of that developer constructing and selling the flat to the purchaser.

35. The Tribunal can see no reason to restrict the application of s19(1)(b) to situations where it is the tenant who erects the building. The Tribunal determines that the consideration for the Lease, namely the payment of the premium and ground rent in return for a flat which it seems to the Tribunal is likely to have been newly constructed, is within the meaning of the wording contained in s19(1)(b). It considers that the Lease is made "in consideration wholly or partially of the erection, or the substantial improvement, addition or alteration of buildings" namely the construction by the Lessor of the Property.

36. Whilst other LVT decisions are not binding upon this Tribunal, it is noted that the approach to s19(1)(b) which this Tribunal has adopted, was also adopted in two other LVT decisions both of which were referred to in the Respondent's statement. The references are CAM/00MC/LAC/2010/0003 and CAM/00MC/LAC/2011/0002.

37. Section 19(1)(b) therefore applies to the Lease and creates a statutory restriction preventing the Applicant from being able to impose a requirement that consent will be required for any assignment, underletting or charging of the Property other than in the last seven years of the term, even if the lease says otherwise. This is subject to an obligation upon the Respondent to give notice in writing of the transaction within 6 months of the transaction being effected. The Respondent, in this case, duly gave notice to the Applicant of the underletting on 14 February 2012, and therefore within the 6 month time limit.

38. For the reasons set out above therefore, the Application fails.

Costs

39. The Applicant seeks a determination that the Respondent should pay the costs of these proceedings, as set out in para 14 above. The jurisdiction of the LVT as to costs is limited to exercise of the powers contained in para 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002. In the opinion of the Tribunal, this does not extend to making the order sought by the Applicant as set out in para 14 above. If the Applicant considers that clause 3(29) of the Lease entitles it to charge the costs of these proceedings to the Respondent, and the Respondent does not agree, a dispute about that cannot be determined by the LVT.

40. The Tribunal has considered whether either party should be ordered to pay costs under para 10 of Schedule 12 to the 2002 Act, which can only be on the basis that the paying party has acted frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably. However, after careful consideration, the Tribunal does not make any costs orders against either party on this basis.

Signed C Goodall

Date 26 MAR 2012