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HM COURTS AND TRIBUNALS SERVICE

**LEASEHOLD VALUATION TRIBUNAL
OF THE
MIDLAND RENT ASSESSMENT PANEL**

BIR/37UE/LBC/2011/0015

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

<u>Applicant:</u>	Mr R Burton
<u>Respondent:</u>	Ms E Sissons
<u>Subject property:</u>	19 Mansfield Lane Calverton Nottingham NG14 6NP
<u>Application to LVT:</u>	1 November 2011
<u>Hearing:</u>	24 January 2012
<u>Members of the Tribunal:</u>	Professor N P Gravells Mr R Healey
<u>Date of determination:</u>	30 JAN 2012

Introduction

- 1 This is a determination on an application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") made to the Leasehold Valuation Tribunal by the Applicant, Mr Richard Burton, for a determination that the Respondent, Ms Emma Sissons, leaseholder of 19 Mansfield Lane, Calverton, Nottingham NG14 6NP ("the subject property"), has breached a covenant contained in the lease of the subject property.

Background to the application

- 2 The subject property is one of four flats in a block. The freehold of the block is jointly owned by the leaseholders of the flats in the block, namely the Applicant (leaseholder of 21 Mansfield Lane), the Respondent (leaseholder of the subject property), Ms K D Launders (leaseholder of 23 Mansfield Lane) and Mr R Jacques (leaseholder of 25 Mansfield Lane). The same four persons are therefore (i) jointly the lessor of the four flats and (ii) individually the lessees of the four flats.
- 3 It appears that the Respondent acquired a dog sometime in early 2009 and that she has continued to keep the dog in the subject property since then. Almost from the outset the Applicant objected to the presence of the dog; and he alleges that he was disturbed by the barking, that the Respondent failed to clear up the dog's excrement and that, in order to prevent the dog escaping from the common external area, the Respondent also obstructed the Applicant's access to that common external area. The Applicant explained his concerns to the Respondent, alleging that she was in breach of a term of the lease. However, the Respondent states that the other two leaseholders confirmed that they did not find the dog to be a nuisance.
- 4 In April 2009 the Applicant obtained legal advice but did not pursue any legal action until the present application.
- 5 By the present application, dated 31 October 2011 and received by the Tribunal on 1 November 2011, the Applicant seeks to commence the necessary preliminary stage to the statutory forfeiture procedure, which was introduced by section 168 of the 2002 Act.
- 6 Section 168 provides (so far as material):
 - (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,
...
 - (4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for determination that a breach of covenant or condition in the lease has occurred.
- 7 In the present application the applicant seeks such a determination from the Tribunal.
- 8 By clause 2(6) of the lease of the subject property the Respondent covenants "to observe the restrictions specified in the Third Schedule"; and paragraph 9 of the Third Schedule states -

"No bird dog or other animal which in the opinion of the Lessor may cause annoyance to any other Lessee or occupiers of the other flats comprised in the [block] shall be kept in the flat."

- 9 The Applicant alleges that the Respondent has breached those provisions by reason of the matters referred to in paragraph 3 above. The Respondent denies the allegation.

Hearing

- 10 The hearing was attended by (i) Mr R Burton and Mr J Burton and (ii) Mr P Tomkins and Ms J Shaw, representing the Respondent.
- 11 At the hearing the parties expanded upon their written representations, which they had previously submitted. So far as relevant those representations are outlined below in the context of the determination.

Determination of the Tribunal

- 12 In determining the issues in dispute between the parties the Tribunal took account of all relevant evidence and submissions presented by the parties.

Preliminary issue: standing of the Applicant

- 13 From the outset Mr Tomkins, on behalf of the Respondent, questioned the standing of the Applicant, specifically his entitlement to make the application to the Tribunal under section 168(4) of the 2002 Act.
- 14 Mr Tomkins referred to three provisions of the 2002 Act.
- (i) Section 168(4) states: "A landlord ... may make an application to a leasehold tribunal ..."
 - (ii) Section 169(5) states: "'landlord' and 'tenant' have the same meaning as in Chapter 1 of this Part ..."
 - (iii) Section 112(5), the definition section of Chapter 1, states: "Where two or more persons jointly constitute either the landlord or the tenant ... in relation to a flat, any reference ... to the landlord or to the tenant ... is (unless the context otherwise requires) a reference to both or all of the persons who jointly constitute the landlord or the tenant"
- 15 Mr Tomkins submitted that the Applicant is one of four individuals who, by reason of their joint ownership of the freehold of the subject property, collectively constitute the one landlord of that property; and that by himself the Applicant is not "a landlord" for the purposes of section 168(4) of the 2002 Act and is therefore not entitled to make an application under that section *in his individual capacity*.
- 16 Furthermore, Mr Tomkins referred to general principles of the law of property and equity to the effect that co-owners of the legal freehold title to property are necessarily joint tenants of that title; and that they must act unanimously and cannot act unilaterally. Mr Tomkins submitted that, contrary to those principles, the Applicant is seeking to act unilaterally.
- 17 Mr Burton understandably did not fully appreciate the finer points of the joint tenancy, which the House of Lords itself has described as an "esoteric concept ... remote from the realities of life". He explained to the Tribunal that he had endeavoured to obtain the support of the other freehold owners

but that they seemed neither to understand the nature of their interest in the subject property nor to want to become involved in legal action.

- 18 The Tribunal acknowledges the Applicant's frustration at the procedural impasse that follows from the Respondent's argument; but the Tribunal is persuaded that the Respondent's argument is correct.
- 19 The Tribunal therefore (i) determines that the Applicant is not entitled to make an application under section 168(4) of the 2002 Act in his individual capacity and (ii) dismisses the application.

Substantive issue: breach of covenant

- 20 In the light of its determination on the preliminary issue, it is not necessary to determine the substantive question as to whether a breach of covenant has occurred.

Costs

- 21 Mr Tomkins sought an order for costs against the Applicant. He argued that, if Mr Burton had sought legal advice, he would have discovered that he was not entitled to make an application under section 168(4) of the 2002 Act in his individual capacity.
- 22 Mr Burton stated that he had sought legal advice in April 2009 and he produced a letter from his solicitor, which set out possible practical and legal steps that might be pursued.
- 23 The jurisdiction of the Tribunal to order the payment of costs is contained in paragraph 10 of Schedule 12 to the 2002 Act. Paragraph 10 provides:
- (1) 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 sub-paragraph (2).
- (2) The circumstances are where—
- (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
- (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- ...
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.
- 24 In the circumstances of the present case, a determination under paragraph 10(1) could only be made pursuant to paragraph 10(2)(b), namely where the other party had, in the opinion of the Tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- 25 In the view of the Tribunal, Mr Tomkins' argument does not establish that Mr Burton acted in such a manner. Contrary to Mr Tomkins' assertion, Mr Burton did seek legal advice, which, although not of the highest quality, did not rule out legal action. However, financial constraints prompted Mr Burton to seek to resolve his dispute with the Respondent without further legal advice. To suggest that such a course of action can be characterised as frivolous,


vexatious, abusive, disruptive or otherwise unreasonable would seem to question one of the principal arguments in favour of tribunal justice.

26 The Tribunal therefore makes no determination for the payment of costs.

Summary

27 The Tribunal determines that the Applicant is not entitled to make an application under section 168(4) of the 2002 Act in his individual capacity and dismisses the application.

28 The Tribunal makes no determination for the payment of costs.

Signed 
(Professor Nigel P Gravells (Chairman))

Dated 30 JAN 2012