HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/00KF/LBC/2012/0013

Property	:	**Flat D, 21 Valkyrie Road, Westcliff-on-Sea, Essex SS0 8BY**
Applicant	:	**Chamber Estates Ltd.**
Respondent	:	**Aleksej Beresnev**
Date of Application	:	**4th October 2012**
Type of Application	:	**For a determination that the Respondent is in breach of a covenant or condition in a lease between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair) Evelyn Flint DMS FRICS ARRV David W Cox**
Date and venue for hearing	:	**1st February 2012 at The Court House, 80 Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. The Tribunal's decision is that there is insufficient evidence to determine that the Respondent is in breach of the covenant set out in Clause 3.1.8 in his lease dated 26th November 2007 ("the lease") wherein the property was let to the Respondent for 99 years from 1st January 2000.

2. No order for costs is made pursuant to paragraph 10, Schedule 12 to the 2002 Act

Reasons

Introduction

3. The Applicant has applied to the Tribunal for a determination that the Respondent is in breach of clause 3.1.8 of the lease. The application form states that clause 3.1.8 is in the following terms:-

"Within four weeks next after any transfer assignment subletting charging parting with possession whether mediate or immediate or devolution of the Property to give notice in writing of such transfer assignment subletting charging parting with possession or devolution and of the name and address and description of the assignee sub Tenant charge or person upon whom the relevant term or any part thereof may have devolved and to deliver to the Landlord or his Solicitors within such time as aforesaid a verified copy of every instrument of transfer assignment subletting charging or devolution and every probate letter of administration affecting or evidencing the same....".

4. Evidence to support the application is in the hearing bundle and this takes the form of a written statement by Mr. Martin Paine – from the Applicant's managing agent, Circle Residential Management Ltd – which sets out the contents of a telephone conversation which was alleged to have taken place on the 7th September 2012 between him ("MP"), on behalf of the Applicant and the Respondent ("AB"). This conversation is important and is therefore recorded in this decision in full:-

MP: "who lives in the top floor flat"
AB: "the tenant"
MP: "sorry"
AB: "the tenant is living upstairs, I live downstairs"
MP: "okay, so the top floor is let out"
AB: "yeah"
MP: "okay, and when did you notify us that it was let out?"
AB: "sorry"
MP: "when did you notify us that it had been let out?"
AB: "its been let out five years let out (sic)"

5. The form of application said that the Applicant was content for this matter to be dealt with on a consideration of the papers only. The Tribunal agreed and in the directions order made by the Tribunal chair on the 16th October 2012, it was said that the Tribunal considered that it could deal with this matter on paper with the necessary written representations from the parties.

6. The parties were informed that they could seek an oral hearing at any time prior to the matter being considered. On the 6th November 2012, the Applicant's agent sent an undated letter to the Tribunal office saying that the Applicant wanted an oral hearing and, hence, this hearing was programmed.

The Law

7. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the **Law of Property Act 1925** ("the 1925 Act") he must first make "*...an application to a leasehold valuation*

tribunal for a determination that a breach of a covenant or condition in the lease has occurred".

The Lease

8. In the hearing bundle was a copy of the counterpart lease which is dated 26th November 2007 and is for a term of 99 years from 1st January 2000 with an initial ground rent of £250 per annum which is subject to review. The lease plan indicates that Flat D is a first floor flat and the application says that the building in which the property is situated is a 2 storey semi-detached property.

9. Much to the Tribunal's surprise, clause 3.1.8 is not as quoted by the Applicant in the application form. It is broadly similar but the initial part of the clause reads:-

> "*Within four weeks next after any transfer assignment subletting (but not in the case of a letting under an assured shorthold tenancy) charging parting with possession whether mediate or immediate....*".

The Hearing

10. The hearing was attended by Mr. Paine only. He explained that he had been instructed to apply for the hearing as his client had recently had a bad experience in a case before another panel of RPTS.

11. It was then put to him that there was a discrepancy between the application form and the lease and this discrepancy was read out to him. He responded by saying that this was a typographical error and there was no intention to mislead the Tribunal.

12. It was pointed out to him that the omission was extremely important because the Tribunal had no evidence as to the contractual terms of occupation of the sub-tenant and without such evidence the application would fail.

13. Mr. Paine then said that he wanted to expand on his evidence. It was put to him that as the Respondent was not present, this would be unfair. His response was that the Respondent had the opportunity to attend the hearing and it was, in effect, his fault that he was not present. As to why he had not filed a further statement, he said that the further evidence was recent and arose from a conversation he had with the Respondent in "early January".

14. The evidence he wanted to add was to say that the Respondent owned the leasehold interest in 2 flats at 21 Valkyrie Road and during the conversation referred to he had said that he was in financial trouble and an approach should be made to his mortgagee for any payment. The Respondent had further stated that he did not occupy either flat and that he had let both flats on "short term arrangements with no tenancy agreements".

15. Mr. Paine was specifically asked for the date of this conversation. He could not give one but referred to "weekly 'phone conversations with the Respondent". He was specifically asked if he had made a record of the conversation and his reply was evasive. He said "I don't have any notes with me".

16. Mr. Paine was asked whether he had any other representations to make and he said that he did not. The hearing started 15 minutes after the listed time i.e. at 10.15 am in case the Respondent was late and it lasted less than 15 minutes.

Conclusions

17. It is clear that the requirement to give the Applicant notice of a subletting does not apply if the subletting is by way of an assured shorthold tenancy.

18. The failure to put the whole of the relevant lease clause in the application form could not, with the greatest of respect to Mr. Paine, be a simple typographical error. It was a very serious omission which would be known to have a material effect on the outcome of this case. It was an omission which was repeated in paragraph numbered 2 of Mr. Paine's written statement.

19. Indeed, if the members of the Tribunal had not taken the precaution of checking this wording against the wording of the lease itself, the result of this case was likely to have been very different. Thus, the omission did have the potential to seriously mislead the Tribunal.

20. In the papers and the written evidence, the Applicant has not produced any evidence of the status of the 'tenant' in the 'top floor flat'. It was only when the lack of evidence was pointed out to Mr. Paine that he sought to rely upon his further 'evidence'. His only evidence about when the alleged conversation between himself and the Respondent took place was that it was 'early January'. A reasonable inference from that comment is that it was in the first week in January i.e. 3 weeks before the hearing. Therefore there was more than sufficient time to have produced a further written statement of this most important piece of evidence so that it could be served on the Respondent.

21. If this further evidence was to be accepted by the Tribunal at face value, it still does not get over the hurdle that if the occupier of the subject flat is, or was at the time of the application, an assured shorthold tenant, then no notice would be required. In the Tribunal's experience, it is more likely than not that a sub-tenant would be an assured shorthold tenant, particularly if this is a buy to let property. From the fact that the Respondent seems to have acquired another flat in the same building, it is more likely than not that it was a buy to let property.

22. It is quite normal nowadays for an assured shorthold tenant to have such tenancy renewed and nothing can therefore be assumed from the fact that the sub-tenant has been there for 5 years which was the way in which the evidence was put in Mr. Paine's written statement.

23. The Tribunal was very concerned about Mr. Paine's whole approach to the evidence in this case. Whether the omission of the most important words in the transcription of the lease clause was a deliberate attempt to mislead the Tribunal is not a matter upon which a decision has to be made. However, if Mr. Paine had been in possession of evidence that the occupier of the flat was not an assured shorthold tenant since early January, it is inconceivable, in the Tribunal's view, that he would not have put this immediately into a written statement. He is a very experienced property manager who appears very regularly before LVTs.

24. Instead he left it until the hearing and proffered the evidence only after it had been pointed out to him that the Tribunal lacked evidence that there was no assured shorthold tenancy. The Tribunal has grave reservations about the truthfulness of the evidence given at the hearing.

25. The Respondent was clearly unaware of the fact that this evidence was going to be given. The Directions Order issued by the Tribunal chair on the 16th October 2012 made it clear that any oral evidence had to be the subject of a written statement and any failure to do this may result in the Tribunal refusing to accept such evidence. As the evidence given at the hearing was potentially vitally important to the outcome of the case, the Tribunal decided that it would not accept it. Even if it had been accepted, it is still not conclusive evidence as to the status of the occupier of the property.

26. On the balance of probabilities, the Tribunal finds that it would be extremely unlikely for someone acquiring a buy to let property to allow someone into possession without a tenancy and such tenancy was likely to be an assured shorthold.

27. The Applicant seeks an order that the Respondent pays its costs. That application is refused. There is no application for an order pursuant to Section 20C of the **Landlord and Tenant Act 1985** preventing the landlord from recovering its costs as part of a future service charge. If there had been such an application, the Tribunal would have had no hesitation in making such an order.

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Bruce Edgington
Chair
4th February 2012