LRX/115/2007

LANDS TRIBUNAL ACT 1949

Landlord and tenant - right to manage

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **CONNAUGHT COURT RTM COMPANY LIMITED** **Appellant**

and

ABOUZAKI HOLDINGS LIMITED **Respondent**

Re: Connaught Court
45-49 Edgware Road
London W2 2AJ

Before: His Honour Judge Reid QC

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 4 November 2008

Mr C Challenger instructed under the Bar Council Direct Access Scheme for the Appellant
Mr S Gallagher instructed by Needleman Treon, Meridien House, 42 Upper Berkeley St, London W1H 5QJ for the Respondent

The following cases are referred to in this decision:

Gaingold Ltd and another v WHRA RTM Ltd [2006] 1 EGLR 81
Indiana Investments Ltd v Taylor [2004] 3 EGLR 63
Posner v Scott-Lewis and others [1987] Ch 25

DECISION

1. This is an appeal against a decision of the Leasehold Valuation Tribunal dated 6 June 2007. Permission to appeal was granted by the LVT on 6 August 2007. By its decision the LVT determined that the Appellant's application for the right to manage Connaught Court, 45-49 Edgware Road London W2 should be dismissed on the ground that the non-residential parts of the building taken together exceeded 25 per cent of the internal floor area of the premises taken as a whole and the property was therefore excluded from the right to manage provisions of the Commonhold and Leasehold Reform Act 2002 by para 1 of Schedule 6 to the Act.

2. Connaught Court, which was built in about 1925, lies on the corner of the Edgware Road and Connaught Street. It comprises a block containing business premises (a delicatessen with offices) on the ground floor and in the basement and twelve flats, one on the ground floor and eleven on the upper floors. There is a boiler room in the basement providing heating and hot water to the residential accommodation.

3. The issues on the appeal are as to whether in reaching its conclusion the LVT was correct to determine that three areas of the premises were non-residential for the purposes of computing the internal floor areas of the premises. The three areas were (1) some vaults with restricted headroom under the pavement in the Edgware Road ("the Edgware Road vaults"), (2) an area described as "office/former caretaker's flat" ("the porter's flat") and (3) an area described as "lower ground floor lobby WC and fire escape" ("the third area").

4. Surveyors instructed by respectively the Appellant and the Respondent agreed, and the LVT accepted, that the measurements of the various areas of the premises were as follows: flats 1222.58sm; balconies 32.04sm; ground floor and basement shop and offices 353.00sm; the Edgware Road vaults 30.83sm; the porter's flat 53.60sm; the third area 4.28sm; and some vaults under Connaught Street 12.58sm. The LVT held that the flats and balconies were residential parts of the premises but that the ground floor and basement shop and offices, the Edgware Road vaults, the porter's flat and the third area were all non-residential for the purposes of the Schedule. It was accepted that the Connaught Street vaults were common parts and so were to be disregarded for the purpose of ascertaining the internal floor area: see Schedule 6, para 1(4).

5. On the LVT's view of the matter 26 per cent of the total net internal floor area (excluding common parts) was non-residential and 74 per cent was residential. The Appellant was therefore not entitled to the right to manage the premises. As will have been observed if either the Edgware Road vaults or the porter's flat should properly have been classified as residential for the purposes of Schedule 6 the Appellant would have been entitled to succeed. As a matter of arithmetic the inclusion in, or exclusion from, the residential area of the third area could not affect the result of the appeal and it followed that little time was spent in argument in considering the third area.

6. It was common ground that the date as at which the Tribunal had to determine whether more than 25 per cent of the floor area was non-residential was the date of service of notice of claim to manage the premises, which was agreed to be 8 June 2005. The date was referred to in the course of argument as "the snapshot date."

7. The relevant statutory provisions are to be found in section 72(6) and Schedule 6 of the Act. Part 2, Chapter 1 of the Act makes provision for the acquisition and exercise of rights to manage premises to which the chapter applies. Section 72 sets out the premises to which the Chapter applies. By section 72(6) "Schedule 6 (premises excepted from this Chapter) has effect." Para 1 of Schedule 6 provides as follows:

> "(1) This Chapter does not apply to premises falling within section 72(1) if the internal floor area-
>
> (a) of any non residential part, or
>
> (b) (where there is more than one such part) of those parts (taken together), exceeds 25 per cent of the internal floor area of the premises taken as a whole).
>
> (2) A part of premises is a non-residential part if it is neither-
>
> (a) occupied, or intended to be occupied, for residential purposes, nor
>
> (b) comprised in any common parts of the premises….
>
> (4) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded."

8. The relevant conveyancing and background history of Connaught Court is as follows: by a lease dated 29 August 1975 the Church Commissioners let

> "ALL THAT piece or parcel of land with the buildings erected thereon and known as Numbers 45,47 and 49 Edgware Road and Connaught Court Edgware Road in the City of Westminster which said buildings are shown coloured red on the plan hereto annexed"

to Ultrapoint Ltd for a term of 57 years from 25 March 1975. At this time there was no flat on the ground floor. By an underlease dated 22 February 1977 Ultrapoint sublet the residential parts of the property to Arab European International Trading Company for a term of 57 years less ten days from 25 March 1975. By this time three of the flats had been underlet on long leases, but some were still let on regulated tenancies or tenancies described as being "for life". At this stage it appears that the porter's flat was being used to house a resident porter.

9. By deed dated 1 July 1977 the headlease was varied so that the ground floor and basement could be used as a bank or high class administrative offices

10. In 1989 BCCI acquired Ultrapoint's interest under the 1975 underlease. It operated a branch of its bank in most of the ground floor and basement, but pursuant to a licence dated 2 August 1990 a flat (Flat 1) was created on the ground floor. A long underlease of Flat 1 was granted dated 24 August 1990. By this time most, if not all, of the flats had been let on long underleases: one example of such a long dated 15 February 1989 (of Flat 6) was produced. In about 1990 the porter's flat became vacant and remained vacant until December 2001.

11. In or shortly before 1997 the residents of the flats formed a company, Connaught Court Residents Management Ltd ("CCRM"), which in 1997 acquired the 1977 underlease.

12. Following the failure of BCCI the head lease became vested in the National Bank of Dubai. In December 2001 CCRM installed a caretaker, Mr Osei, in the porter's flat without reference to or permission from the National Bank of Dubai and on 23 January 2002 an order for possession was made in the Central London County Court against Mr Osei which was executed in February. The state of the porter's flat was at this time one of great disrepair.

13. By a transfer dated 10 December 2003 the head leased was assigned to the Respondent. At this time the non-residential part of the premises was vacant. The transfer was registered on 25 February 2004. In February 2004 the Respondent and the Church Commissioners' agents commenced negotiations in relation to variations of the head lease and on 18 March 2004 agreement in principle (requiring payment of a premium of £75,000) was agreed. This included change of use of the commercial part of the premises from bank to delicatessen, the use of other ground floor premises as offices in connection with the delicatessen and the incorporation of the porter's flat in the offices.

14. In May 2004 (without the licence having been executed and without planning permission for change of user having been obtained) building work started, including work stripping out the porter's flat and incorporating it into the new offices, and converting the Edgware Road vaults into an area for wine storage. The works were finally completed in November 2004, the delicatessen having already opened on 17 October 2004. On 20 December 2004 the landlords finally gave their licence to the alterations and on 17 March 2005 planning consent to the change of user was given.

15. On 8 June 2005 the right to mange notice was served and a counter notice was served on 15 July 2005.

16. On 20 July 2005 the deed of variation, varying the terms of the headlease was finally granted.

The Edgware Road vaults

17. On behalf of the Appellant it was submitted by reference to the plans attached to the headlease and the 1977 underlease that the vaults did not form part of the demised premises and should therefore be left out of account in determining whether the non-residential parts of the premises exceeded 25 per cent. It was said that the plans defined the premises being let and did not show the vaults and so the vaults were never part of the demise. It was further submitted that if the Edgware Road vaults did form part of the demise they were common parts.

18. On behalf of the Respondent it was submitted that the vaults did form part of the demise and were not common parts. The LVT had inspected the premises and found as a fact, based upon its inspection, that the vaults were within the building and were part of the non-residential part of the building. The Appellant's surveyor had not sought to exclude the vaults and had expressed the view that they were non-residential. The question of whether the vaults formed part of the building was largely one of fact and degree, depending on the relationship between the vaults and the remainder of the building: see the analysis by Judge Roger Cooke in *Indiana Investments Ltd v Taylor* [2004] 3 EGLR 63 at para 9. The issue was one of fact for the LVT whose decision should not be upset.

19. It was further submitted that even if the demise did not include the vaults they had become a part of the demise under the doctrine of accretion.

20. In my judgment the Edgware Road vaults were part of the demise. The plan annexed to the headlease is a ground floor plan. It would not show the subterranean vaults. The underlease had two plans annexed to it: an identical ground floor plan to that which was annexed to the head lease and a basement plan which clearly shows the Edgware Road vaults. It was interesting to note that the original letting particulars for the flats back in about 1925 apparently had a basement plan annexed which did show the vaults as part of Connaught Court.

21. The vaults themselves (apart from, it has been assumed, plates in the pavement of Edgware Road to enable the delivery of coal) were and are only accessible from the basement of Connaught Court. There is not, and never has been, any open area between the basement walls of Connaught Court and the vaults. The vaults were properly a part of "the piece or parcel of land with the buildings erected thereon and known as 45, 47 and 49 Edgware Road and Connaught Court…" even though they did not show up on the ground level plan. The measurements for the vaults were agreed and it could not be argued that the fact that the vaults had restricted headroom meant they were not part of the premises or not part of the demise.

22. The LVT inspected the premises and formed a clear view (from which it is clear the Appellant's expert did not dissent) that the vaults (a) formed part of the premises and (b) were non-residential. In my judgment their finding was primarily one of fact, discloses no error of law and was correct.

23. So far as the suggestion that the Edgware Road vaults were common parts was concerned, it is far from clear that this was ever suggested to the LVT. It was in any event this was an issue of fact for the LVT. There was no evidence as to the use of the vaults as common parts. There was, at its highest, a suggestion that in the days when there was a resident porter (ie 1990 or earlier) tenants on occasion had given things to the porter for storage and he had placed them in the vaults. The LVT was correct not to treat the Edgware Road vaults as common parts.

Porter's flat

24. The Appellant's argument in relation to the porter's flat was more complex. It was accepted that the porter's flat was not "occupied for residential purposes" at the snapshot date (8 June 2005) but it was submitted that it was then "intended to be occupied for residential purposes". It was said that the LVT had erred in their assessment of the evidence and in ignoring the intentions of the residential occupiers.

25. The argument ran that until 1990 there had been a resident porter and that again very briefly in December 2001 and January 2002 the flat had been used by a caretaker, Mr Osei. Whilst the Respondent had no intention of ever again making use of the flat for residential purposes, the tenants of the flats wanted a resident porter and intended they should have one. Therefore, it was said, the flat was intended to be occupied for residential purposes.

26. The argument was fortified by reference to the headlease and the 1977 underlease. It was accepted that there was nothing in any of the leases of the individual flats which obliged the landlord to provide a resident porter, but it was argued that regard must be had to the obligations imposed by headlease and the 1977 underlease.

27. By clause 2(17) of the headlease the lessee covenanted

> "not at any time during the said term to use or allow to be used the said property or any part thereof (save as hereinafter mentioned) other than for a high class administrative office only FURTHER PROVIDED THAT … (b) the upper part of the whole of the said property known as Connaught Court shall be used as and for one block of eleven self-contained private residential flats and the basement flat shall be used as a flat for a Caretaker employed by the lessee in or about the said property."

28. The Appellant accepted that this covenant had been varied before the snapshot date but pointed out that the terms of the 1977 underlease had not been varied. By clause 5(3) of the 1977 underlease the sub-lessor ("the Landlord") covenanted with the sub-lessee ("the Tenant")

> "(3) So far as practicable … to perform the following services:- [there then follows a long list of services] (f) to employ such staff as the landlord may at its absolute discretion deem desirable or necessary to enable it to carry out or maintain the said services or any of them and for the general conduct management an security of the

> Building and all parts thereof …. (h) to provide a full time porter or caretaker in or about the Building who will be permitted to reside in the basement caretaker flat in the Building for this purpose PROVIDED ALWAYS that the Landlord may withhold add or extend vary or make any alteration in the rendering of the said services or any of them from time to time if reasonable to do so for the more efficient conduct and management of the Building."

29. Whilst the Appellant accepted that after the snapshot date the head landlord had varied the headlease so as to remove the requirement that the porter's flat should be used as a flat for a caretaker employed by the lessee in or about the said property, it was argued that this was irrelevant because there remained the obligation on the Appellant to comply with clause 5(3) of the 1977 underlease. It was submitted that this obligation could be enforced by an action for specific performance and reference was made to *Posner v Scott-Lewis and others* [1987] Ch 25. Thus, it was said, CCRM's intention that the porter's flat should again be used for a resident porter was important.

30. The Appellant went on to submit that the alterations which had effectively obliterated the porter's flat before the snapshot date were unlawful because

(a) they were made in breach of covenant with the head landlord, no consent having been given to the change of use at the time of the alterations,

(b) they were in breach of covenant with the head landlord because no consent to change of user of the flat had been given even at the snapshot date; and

(c) the work had been done before planning consent had been obtained.

Reference was made to *Gaingold Ltd v WHRA RTM Ltd* [2006] 1 EGLR 81 at 83 where the President of the Lands Tribunal said at para 14:

> "I accept also Mr Gallagher's contention that an unlawful use would have to be ignored for the purposes of applying para 1, and that the use of the living accommodation in the basement must be assumed to be in accordance with the user restriction in clause 2(13)…."

The works ought therefore, it was submitted, to have been disregarded and the LVT ought to have held that the flat was still intended to be occupied for residential purposes.

31. In answer the Respondent submitted that the words in para 1(2)(a) "intended to be occupied" did not bear the meaning that the Appellant sought to place on them. The intention of the occupiers of the flats was irrelevant. It was no more than a wish. They had no right to compel the Respondent to put a caretaker or porter in the flat. There was no covenant in any of their leases to that effect. The only persons whose intentions were to be taken into account so far as the paragraph was concerned were those people with the power to put their intentions into practice ie those with an immediate right to possession and those who had the legal power to compel the intention to become a reality.

32. So far as CCRM was concerned, it had itself raised the issue of the obligation to provide porterage in other proceedings brought by CCRM against the Respondent before another LVT in relation to the determination of service charges and the LVT had held against it. Permission to appeal had been refused. Although this was not res judicata so far as the Appellant was concerned because CCRM was a separate company (despite Mr Jaquesson of Flat 6 being deeply involved in both) the decision was correct. *Posner v Scott-Lewis and others* was, as the LVT had held, a decision on a markedly different covenant. There was no absolute obligation to provide a porter's flat. The landlord could decide not to do so in accordance with the proviso to clause 5(3) of the 1977 underlease because "the more efficient conduct and management of the Building" included financial considerations such as the real cost of providing a flat and the cost that would then have to be passed on to the occupants of the flats.

33. In any event, the Respondent submitted, the paragraph was concerned with situations such as those where on the snapshot date there was no occupation for residential purposes because, for example, one porter had left and a new one had not yet taken up post. It could not cover the situation where (as here) there had been no residential occupation for 15 years except for the couple of months when Mr Osei was trespassing there in squalor.

34. The Respondent further submitted that even if the conversion of the flat into part of the office area fell to be disregarded because technically it was done in breach of covenant and without planning consent for change of use having come through by the snapshot date, this was of no assistance to the Appellant. Disregarding what had been done did not mean either that the porter's flat was somehow to be treated as being in notional residential occupation or that the Respondent was to be treated as intending it should be occupied for residential purposes.

35. In my judgment there is nothing to suggest any error on the part of the LVT. The question as to whether the porter's flat was at the snapshot date occupied or intended to be occupied for residential purposes was essentially a question of fact. The LVT correctly had regard to the clear intention of the Respondent and disregarded the wishes said to be held by the occupiers of the flats who had no right to seek the use of the flat for a resident porter. So far as CCRM was concerned, the LVT was correct to hold that *Posner v Scott-Lewis and others* was a case turning on the wording of a different covenant. Even if the wording had been so similar as to have entitled CCRM or its predecessor in title to bring proceedings for specific performance, such proceedings would now be doomed to failure, there having been a delay since 1990 in seeking to enforce the covenant. It was noticeable, for example, that after Mr Osei was unlawfully inserted into the flat at the end of 2001 and then evicted no attempt was made to require the Respondent to comply with the covenant.

36. The LVT was entitled to hold, and was correct in holding, that the porter's flat was neither occupied nor intended to be occupied for residential purposes at the snapshot date.

The third area

37. Submissions in relation to the third area were understandably extremely brief, given that whether the LVT was right or wrong in relation to this area the result of the appeal would be the same. Suffice it to say that the issue whether the third area comprised common parts or not was an issue of fact for the LVT and nothing was put forward in argument to show that the decision to which the LVT came on the facts was one which was impermissible. The appeal therefore also fails on this point.

Conclusion

38. None of the grounds of appeal have been made out and the appeal is therefore dismissed.

Dated 10 November 2008

His Honour Judge Reid QC