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Residential
Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL
LONDON RENT ASSESSMENT PANEL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002 (the Act)
Section 168

Ref:	**LON/00AG/LBC/2006/0001**	
Property:	**15 Douglas Court, West End Lane, London NW6 4PT**	
Applicant:	**Typeteam Limited**	
Represented by:	**Mr M Gien, Director**	
Respondent:	**Mr L El-Alami**	
Represented by:	**No Appearance**	
Date of Hearing:	**11 April 2006**	
Date of Decision:	**19 Aril 2006**	
Tribunal:	**Mr John Hewitt** **Mr Anthony Mellery-Pratt** **Mr David Wills**	**Chairman** **FRICS** **ACIB**

Decision of the Tribunal

Decision

1. The Tribunal determines that breaches of covenant in the lease of the Property have occurred as follows:

1.1 Over the period 31 July 2004 to 10 April 2006, Respondent has caused or permitted the Property to be used other than as a high class residence in the occupation of one family only, contrary to

clause 2(o) and paragraph 1 of the Third Schedule to the lease of the Property, and

1.2 The Respondent has failed, omitted and neglected to

1. Produce to the landlord:
   (a) the original document(s) of each subletting of the Property (whether whole or part thereof) over the period 31 July 2004 to 10 April 2006, and
   (b) a certified copy of each such document effecting a subletting, and
2. Pay to the landlord a fee of £6 plus VAT in respect of each such document

within one month after each subletting was effected, contrary to clause 2(q) of the lease of the Property.

2. The findings of the Tribunal and the reasons for its decisions are set out below.

Background

3. The Applicant is the landlord of the Property which is let on the terms of a long lease dated 20 May 1983 (the Lease). The Lease was granted by Peppercorn Properties Limited to Yorkbuild Limited for a term of 99 years from 29 September 1977 at relatively modest ground rent gradually increasing over the term and on the other terms and conditions therein set out.
4. The Respondent is the lessee by assignment of the lease and evidently it was vested in him in November 2002.
5. The Property is a three bed-roomed flat within a purpose built development.
6. By an application received by the Tribunal on 15 November 2005 the Applicant seeks a determination that a breach of covenant or condition contained in the Lease has occurred.
7. An oral pre-trial review was held on 1 February 2006. The Applicant was represented by Mr J Galliers of BLR Property Management, the Applicant's managing agents. The Respondent did not attend and was not represented. Appropriate directions were given and the case listed for hearing on 11 April 2006. Directions have been followed in the main by the Applicant, but the Respondent has not complied with them and has taken very little part in the proceedings.
8. On 21 March 2006 Bark & Co, solicitors to the Respondent sent to the Tribunal a letter and enclosed a copy of a freezing injunction dated 15 October 2005 granted by The Honourable Mr Justice Cresswell sitting in the Commercial Court of the High Court of Justice, Queen's Bench Division (the High Court proceedings).
9. The injunction was a world wide freezing injunction obtained without notice by Barclays Bank Plc. The injunction prevented the Respondent (and others) from removing from England and Wales any assets up to the value of £24m, or from disposing, dealing or diminishing in value any assets inside or outside England and Wales to the same value. The prohibition was said to include (but was not limited to) a number of specified assets which included the Property.

The injunction said that a further hearing was to take place on 25 October 2005, and the Respondents to the injunction were given permission to apply to vary or discharge it on terms set out.
The injunction was endorsed with a penal notice in standard form.

10. In their letter, Bark & Co expressed a concern that any determination which the Tribunal may make may amount to a dealing with the assets or diminish the value thereof and thus contravene the terms of the injunction. They suggested that if the proceedings continued both Applicant and the Tribunal were at risk of contempt of court. They suggested that the Tribunal proceedings be adjourned pending the outcome of the High Court proceedings.
What Bark & Co did not condescend to say was what order, if any, was made on 25 October 2005, and what the current state of the High Court proceedings then was.

11. By letter dated 27 March 2006 the Tribunal directed that the directions already given should be complied with and at the hearing the question whether the LVT proceedings amount to a dealing with the Property within the terms of the injunction would be dealt with as a preliminary issue at the commencement of the hearing.

12. The matter came on for hearing on 11 April 2006. The Applicant was represented by Mr M Gien, a director (and retired solicitor) and he was accompanied by Mr John Galliers. The Respondent was neither present nor represented. He did however send a fax on 10 April 2006. In his fax he expressed concern that his attendance at the hearing would constitute a breach of the freezing injunction and the consequences that he could face a fine or imprisonment. He asked for his attendance to be excused. He did however make some representations on the issues in the proceedings and we shall return to them later.

The Preliminary Issue

13. Mr Gien for the Applicant submitted that the freezing injunction does not preclude the Tribunal from making a determination on the application. He said that the Respondent was not present to prosecute the argument that the Tribunal is precluded from making a determination. He said that simply making a determination is not a disposal of or dealing with the Property or an act which diminishes the value of the Property within the context of the injunction. Mr Gien said that the injunction was not directed to or addressed to the Tribunal. He repeated submissions made in Mr Gallier's letter to the Tribunal dated 21.03.06.

14. The Tribunal accepted the submissions made by Mr Gien because they appeared to be correct. The statutory obligation on the Tribunal was simply to make a determination on the application as to whether or not a breach of covenant or condition in the lease had occurred. Any determination as may be made would have no effect on the ownership of the lease or its value. The injunction was plainly to preserve assets pending a decision of the High Court as to the claims of the bank. The Tribunal did not consider that making a determination on the application was in conflict with the terms if the injunction.

15. Moreover the Tribunal noted that the injunction was made in October 2005 and provided for a further hearing on 25 October 2005. Neither Bark & Co in their letter dated 21 March 2006, nor the Respondent in his letter dated 10 April 2006 condescended to inform the Tribunal of the position current at the time that those letters were written. No evidence was provided to the effect that the injunction was still in force on the date set for the hearing of the present application.

16. In all of the circumstances the Tribunal decided that it was not precluded by the terms of the injunction of which it had been made aware from making a determination on the application. It therefore proceeded with the hearing.

The Relevant Lease Provisions

17. So far as material to the matters for the Tribunal to determine the lease provides as follows:

1. A term of 99 years from 29 September 1977.
2. A covenant on the part of the tenant in clause 2(o) in the following terms:
   'During the term hereby created to observe and perform the regulations set forth in the Third Schedule hereto and...'
   'Third Schedule
   Regulations imposed on the Flat and the user thereof
   1. Not to use the Flat nor permit the same or any part thereof to be used for any illegal or immoral purpose or for any purpose other than a high class residence in the occupation of one family only nor...'
3. A covenant on the part of the tenant in clause 2(q) in the following terms:
   'Within one month after the date of any assignment of the Flat the grant of any underlease or sub-underlease or any assignment of such an underlease or sub-underlease...produce or cause to be produced (without demand by any person) to the Solicitor to the Lessor for registration the original deed document or instrument effecting such assignment underlease sub-underlease...and leave or cause to be left with the said Solicitor to the Lessor a certified copy thereof and pay or cause to be paid to the said Solicitor to the Lessor a fee of Six pounds together with Value Added Tax thereon in respect of each deed document or instrument for registration thereof'

The Relevant Legal Provisions

18. The statutory framework under which this application is made is set out in Appendix 1 hereto which forms part of this determination.

19. The purpose of the legislation is plain. A landlord of a long lease of residential premises is precluded from serving a notice under section 146 Law of Property Act complaining of a breach of covenant or condition in the lease unless either the tenant has admitted the breach or a leasehold valuation tribunal has determined that a breach has occurred.

20. In order to be clear whether a breach of covenant or condition has occurred it is necessary to be clear as the construction, meaning and effect of the relevant covenants and conditions and then apply the facts as found to covenant or condition so construed.

21. The legal approach to the construction of the lease, as with any commercial contract is set out in Appendix 2 hereto which forms part of this determination.

The Applicant's Case

22. Mr Gien presented the case for the Applicant. He outlined the background. He explained that the Applicant had received numerous complaints from lessees that flat 15 appeared to have been converted into a number of bed-sitting rooms and sublet to disparate persons, quite often young Australians who came and went on a regular basis. Mr Gien submitted that such persons did not constitute one family in the context of paragraph 1 of the Third Schedule to the Lease. Further he said that the Respondent had not submitted the originals and certified copies documents creating the sublettings nor had he paid the registration fees all as required by clause 2(q) of the Lease. Mr Gien acknowledged that the Applicant had not given to the Respondent details of the name and address of the solicitor nominated by the landlord to receive such documents and fees. He submitted that in the absence of such nomination it was to be implied into the Lease that the documents should be sent to the landlord for registration at the address given by the landlord in conformity with sections 47 and 48 of the Landlord and Tenant Act 1987.

23. Mr Gien called Mr John Galliers to give evidence. Mr Galliers told us that he was a director of Basicland Registrars Limited, which traded as BLR Property Management, which had been appointed as the managing agents by the Applicant. He said at all material times day to day responsibility for management had been with his colleague Jacqueline Katz, until she left his employ on 30 March 2006.

24. Mr Galliers said that two lessees (Mrs Corinne Coleman and Mr Colin Gordon) in particular had tried to keep track of the comings and goings at flat 15 and kept notes of the names of recipients of mail at the flat. Mr Galliers produced correspondence from Mrs Coleman and Mr Gordon. He also produced witness statements signed by Mrs Coleman, Mr Gordon and Mrs Katz. The general tenor of the correspondence and witness statements was that from about 31 July 2004 about six persons resided at flat 15 and that the identity of them changed regularly with new people coming. Further the occupants of the flat often had visitors, were often noisy, left beer cans on the staircase and hung laundry over the balconys.

25. Mr Galliers said that in response to the complaints, Mrs Katz wrote to the Respondent on 2 August 13 September 24 September 2004 but no replies were received. He produced copies of the letters.

26. The letter dated 13 September 2004 gave notice of an inspection to take place on 23 September 2004. The letter of 24 September 2004 noted that the access to the flat was not given the previous day,

reminded the Respondent of the relevant provisions of the lease, called for copies of the subletting documents and gave notice that if the matter was not resolved within 7 days it would be put in the hands of solicitors.

27. Mr Galliers said that the address of the Applicant as given pursuant to s48 of the Landlord and Tenant Act 1987 and the address given on rent demands in conformity with s47 of that Act is the address of his office.

28. Mr Gien made submissions to us as to the meaning of 'one family' within the context of paragraph 1 of the Third Schedule to the Lease.

The Respondent's Case

27. The Respondent has not complied with directions and has not submitted a statement of case in reply to that of the Applicant and he has not stated whether he admits or denies a breach of clause 2(o) and paragraph 1 of the Third Schedule to the Lease.

28. On 10 April 2006 the Respondent sent a fax to the Tribunal. As noted above the first part of the fax explained why the Respondent had decided not to attend the hearing. The fax went on to say that there were no tenants in 15 Douglas Court and that he had no plans to rent it out. He attached a letter from his lettings agents which he said confirmed that the flat is empty. He invited the Applicant to contact his solicitors to arrange an appointment for them to inspect the flat.

29. Attached to the above letter was a letter written by Hampstead Homes. They confirmed they were the agents of the Respondent, they said they had inspected 15 Douglas Court (but did not say when) and confirmed that it was vacant with no signs of any occupancy. The letter was signed by a Mr Paul Marks.

Findings and Reasons

30. The Tribunal found Mr Galliers to be an honest witness doing his best to assist the Tribunal. We accept his evidence and the genuineness of the documents produced by him. On that evidence we are satisfied that, at least over the period 31 July 2004 to 10 April 2006, a variety of disparate persons have occupied the Property and that such persons came and went on a regular basis.

31. The question we have to determine is whether the persons occupying the Property over this time occupied it in such a way that it was not occupied as a high class residence in the occupation of one family within the meaning of paragraph 1 of the Third Schedule to the Lease. The Lease has to be construed by reference to the intention of the parties in 1983 when it was granted. We noted Mr Gien's submissions as to what 'one family' means. He relied upon the Rent Act 1977 and the definition of a member of the family for succession purposes. He also relied upon the Housing Act 2004 and the definition of a single household for the purposes of s258 in connection with HMOs. We accept that a broad, common-sense man of the world view should be taken. This means that a family will include husband and wife, whether formally married or not and also stable relationships between persons of the same sex. We find that family also includes relatives by

blood. The Lease also makes reference to a high class residence. We find that such expression connotes not merely luxury and expensiveness but also some degree of respectability.

32. The Respondent's case was not persuasive. No statement of case was put in. There has been no denial of past sublettings. The Respondent clearly has a letting agent which reinforces us in our view that in the past sublettings have taken place. No evidence has been produced that the persons occupying the Property pursuant to such sublettings constitute a family.

33. In the circumstances, having regard to the evidence before us and to our experience and expertise in these matters we conclude that over the period 31 July 2004 to 10 April 2006 the Respondent has caused or permitted the Property to be used other than a high class residence in the occupation of one family only, contrary to clause 2(o) and paragraph 1 of the Third Schedule to the Lease.

34. The next question we have to address is the alleged failure of the Respondent to provide the original of the each subletting document and a certified copy for registration, and to pay the registration fees.

35. Clause 2(q) expressly refers to the documents being submitted to the 'Solicitor to the Lessor'. Clearly this can only be done where the Lessor gives notice to the lessee nominating the name and address of a solicitor to whom the documents should be sent. Mr Gien acknowledges that such notice of nomination was not given to the Respondent. Mr Gien submits that where such notice is not given, it is to be implied into the Lease that the documents are to be submitted to the landlord at the address given by the landlord in conformity with sections 47 and 48 of the Landlord and Tenant Act 1987. We accept Mr Gien's submission. We find that it is necessary and reasonable to imply such a provision and that the relevant conditions for implying such a term into the Lease are met.

36. We note that the BLR Property Management letters dated 2 August, 13 and 24 September 2004 all called on the Respondent to provide documents relating the sublettings. The Respondent well knew to whom he could and should send such documents but he failed, omitted and neglected to do so, He also ignored the three letters.

37. In these circumstances we do not hesitate to find that a breach of covenant 2(q) of the Lease has occurred because the Respondent has failed to produce to the Applicant or his agent the originals and certified copies of documents relating to sublettings of the Property or part thereof entered into over the period 31 July 2004 to 10 April 2006 and to pay the registration fees in connection therewith.

John Hewitt
Chairman
19 April 2006

Appendix 1

Commonhold and Leasehold Reform Act 2002

Section 168: **No forfeiture notice before determination of breach**

'(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 (c20) (restriction of forfeiture) in respect of a breach by a tenant of a covenant or condition in he lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has finally been determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) ...

(3) ...

(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.

(5) ...'

Section 169: **Section 168: supplementary**

'(1) ...

(2) ...

(3) ...

(4) ...

(5) In section 168 and this section—
'long lease' has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's share

(6) ...

(7) ...'

Section 76: **Long Leases**

'(1) Thus section and section 77 specify what is a long lease for the purposes of this Chapter.

(2) Subject to section 77, a lease is a long lease if—

(a) it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by the tenant, by re-entry or forfeiture or otherwise...'

Appendix 2

Construction of Legal Documents

The Legal Approach

The Starting Point
The general legal principles.

Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201E, that

> *'...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'*

The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of set out interpretation.

> '***The principles may be summarised as follows:***
>
> *(1) Interpretation 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.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are inadmissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man Is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.*

(5) *The rule that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. ON the other hand, if one would nevertheless 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....'*

Lord Hoffman added a slight qualification to these principles when in *Jumbo King Ltd v. Faithful Properties* Unreported 2 December 1999, Hong Kong Court of Final Appeal, he said,

> *'The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.'*

Emphasis was made on the correct approach and the importance of the background in *Holdings and Barnes plc v. Hill House Hammond Ltd (No.1)* [2001] EWCA Civ 1334 when Clarke LJ said, about the above authorities,

> *'Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that the reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.'*

Lord Bingham in *BCCI (SA) v. Ali* [2002] 1 AC 251; [2001] 2 WLR 735 said,

> *'In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties'*

relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913 apply in a case such as this.'

Sometimes as part of the process of construction of a document it is necessary to imply a term or terms into it. In order for a term to be implied the following conditions must be fulfilled:

1. the term must be reasonable;
2. the term must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
3. the term must be so obvious that it goes without saying;
4. the term must be capable of clear expression;
5. the term must not contradict any express term of the contract.

A clear statement of the criteria was set out in *B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings* [1978] 52 ALJR 20.