



S168 COMMONHOLD & LEASEHOLD REFORM ACT 2002

DECISION & REASONS

Case Number: CHI/45UH/LBC/2007/0005

Property: Flat 4
27 Shakespeare Road
Worthing
West Sussex
BN11 4AS

Applicant: Townplot Ltd
(rep by Gandercliffe Ltd)

Respondent: Ms Karen L Hoare
(rep by Osler Donegan Taylor)

Members of the Tribunal: Ms H Clarke (Chair)
Mr J Tarling (Legal Member)

Date of Decision: 10 August 2007

DECISION

1. Application under S. 168 Commonhold and Leasehold Reform Act 2002: A breach of the Lease covenant has occurred in that the Lessee failed to produce for registration the Will, the grant of Probate and the Assent and to pay the necessary fee within one month of the Lease vesting in the Lessee.
2. Application under Paragraphs 7 and 10 of Schedule 12 of the Commonhold and Leasehold reform Act 2002: The Tribunal determined that the application had not been made frivolously nor vexatiously nor did it amount to an abuse of process and accordingly it refused the Lessee's request to dismiss the application.
3. Application under Section 20C of the Landlord and Tenant Act 1985: The Tribunal makes an Order but limits the Landlord's costs to only part of the costs claimed by the Landlord.

THE APPLICATION

4. This concerns an application by the Applicant Landlord under s168(4) of the Commonhold & Leasehold Reform Act 2002 for the determination of whether there has been a breach of covenant.
5. The Respondent Lessee requested the Tribunal to dismiss the application on the grounds that it is frivolous or vexatious or an abuse of process in accordance with the Tribunal's power to do so under the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003.
6. The application was decided without an oral hearing, and having regard only to written representations and evidence submitted by the parties.
7. Directions for the conduct of the case were issued following a pre-trial review hearing on 23 April 2007. The directions included written notice of the Tribunal's intention to determine the case without an oral hearing, in accordance with Regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations as amended. Neither party made any objection.
8. The Landlord and the Lessee each provided a statement in support of their case and filed various documents and correspondence in addition.
9. Following the PTR, the Landlord in a letter dated 20 June 2007 withdrew its allegation that there had been a breach of Clause 2(12) of the Lease.

THE RELEVANT LAW

10. Under s168(4) of the Commonhold & Leasehold Reform Act 2002, *"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"*.

THE LEASE

11. The Lease of the property was made on 2 September 1987 between Lawrence Walter Guille and David Victor Cornelius and Terence Anthony King.

12. The Tribunal has had regard to the entire Lease when coming to its decision, but the covenant in the lease directly relevant to this application reads as follows:
"2(13): the Lessees will throughout the whole of the said term upon every assignment underlease mortgage by demise or legal charge whether by deed or will or otherwise or devolution in title of the whole or any part of the Lessees interest under and by virtue of this Lease in the demised premises or any part thereof within one month after the execution or coming into effect of such assignment underlease mortgage legal charge or devolution in title give to the Lessors Solicitors notice in writing of such assignment underlease mortgage legal charge or devolution in title and produce at the office of such Solicitors for registration the deed or other instrument of such assignment underlease mortgage legal charge or devolution in title and if such instrument be a Will or Codicil then the Probate and in the case of an Intestacy the Letters of Administration and in the case of an Order of the Court a certified or office copy of such Order and also the Lease in cases where production of the Lease is necessary or appropriate in order that such Solicitors may place and sign on such instrument as ought to be noted in respect of such registration a memorandum of registration and will pay to them a fee of Ten pounds (£10.00) plus Value Added Tax in respect of every such notice and for registering every such instrument"

EVIDENCE

13. The Tribunal did not inspect the property.
14. The Landlord submitted a Witness Statement by Kim Buckingham, a director of the Landlord company, and a bundle of documents. Mr Buckingham stated that the Landlord became aware of the demise of the previous Lessee on about 10 October 2005 by email and telephone. On 8 March 2007 the Landlord discovered that the Lessee had been registered at the Land Registry as proprietor on 6 July 2006. Despite letters from the Landlord to the Lessee as representative of the former Lessee's Estate, no documents of transfer were provided and no fee was paid.
15. By a letter dated 5 July 2007, nearly 4 months after the application was issued, the Landlord confirmed that it had at last received the necessary documents of transfer and fee as required by the lease.
16. The Lessee submitted a witness statement by Osler Donegan Taylor Solicitors, and a bundle of documents. The witness statement asserted that notice of the assignment was given in writing on 11 July 2006 which was within one month of the

transfer, and that it was normal practice to enquire what fee would be required (even where the lease made provision for a fee). The Lessee contended that as the Landlord knew the firm was instructed, it could and should have asked for the documents it required.

17. The Lessee produced with her bundle of documents the Grant of Probate which is dated 9 June 2006. In correspondence dated 4 July 2007 the Lessee produced the Assent of Title Transfer document dated 3 July 2006.
18. The Lessee admitted that the Grant of Probate had not been supplied to the Landlord at any earlier stage. The Lessee made no comment as to whether the Assent had been produced earlier.
19. The Lessee submitted that the application was frivolous or vexatious or an abuse of process and relied on the fact that the breach was minor, and that the Landlord could have obtained the information by other means (ie by phoning the Lessee's solicitors). The Lessee asserted that the Landlord had received all the necessary documents, and alleged that the Grant of Probate was 'not in issue' before the PTR.

CONSIDERATION

20. The Lease clause clearly states that on any transfer of the leasehold interest the Lessee is required to produce the transfer instrument within one month. In this case the relevant documents would have been the Will, the grant of Probate and the Assent. Likewise, the fee is clearly stated in the Lease and should have been paid within 1 month of the transfer.
21. The Tribunal decided on the balance of probability that the Lessee's solicitors' letter of 11 July 2006 giving notice of the transfer was sent to the Landlord, even if it was then overlooked. However, it did not amount to compliance with the covenant. The Tribunal rejected the assertion that the Landlord could and should have taken further steps to chase up the documents; the responsibility to comply with the covenant is clearly that of the Lessee, and the Tribunal accepted that the Landlord had sent letters asking for the matter to be addressed.
22. The Tribunal rejected the Lessee's contention that the Landlord had received all the relevant documents, as on the Landlord's own case the Probate had not been supplied and on the evidence the Tribunal determined that the Assent was not supplied until July 2007. The Landlord relied from the outset on clause 2(13) which refers to the Probate document, amongst others.

23. The Tribunal determined that the application had not been made frivolously nor vexatiously nor did it amount to an abuse of process, because it concerned a breach of a clear covenant which was not addressed until very late in the proceedings. The covenant is incapable of being fully remedied because it required the documents to be provided and the fee to be paid within a month. Whilst the Tribunal accepted the Lessee's submission that this was a relatively minor breach, the Tribunal observed that conversely the documents could easily have been supplied at a much earlier stage.
24. The Tribunal notes that its jurisdiction under s168 is to determine whether a breach has occurred, even if that breach appears to be minor or steps have been taken to attempt to correct it.

DETERMINATION

25. A breach of the Lease covenant has occurred in that the Lessee failed to produce for registration the Will, the grant of Probate and the Assent and to pay the necessary fee within one month of the Lease vesting in the Lessee.
26. The Tribunal determined that the application had not been made frivolously nor vexatiously nor did it amount to an abuse of process and accordingly it refused the Lessee's request to dismiss the application.

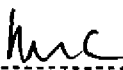
COSTS

27. The Tribunal considered an application by the Lessee for an Order under s20C Landlord & Tenant Act 1985 that the Landlord's costs of these proceedings be not recoverable as service charge.
28. The Tribunal decided that the application was properly brought, the breach was clear, and considering that the relevant documents had still not been supplied even at the stage when evidence was filed, it was proper that the costs incurred by the Landlord should in principle be regarded as relevant costs.
29. However, the Tribunal determined that the costs sought by the Landlord exceeded the amount which would be just and equitable in the circumstances. The Landlord was 'represented' in the proceedings by Gandercliffe Ltd, and the Landlord's sole witness Mr Buckingham is a director of both companies. An invoice was produced in which Gandercliffe Ltd charged the Landlord for 'advising' in relation to the case, but there was no evidence before the Tribunal of Mr Buckingham's competence nor

qualifications to advise nor any professional body to which he belongs. The hourly rate charged by Mr Buckingham appeared to the Tribunal to be commensurate with a rate chargeable by a legally qualified person (such as a legal executive) and there was no justification on the evidence for such a rate to be applied. No information was provided concerning the relationship between the two companies, and although the Lessee had pointed out that they shared an address, no company search had been done. In particular, the Tribunal was not informed whether Gandercliffe Ltd was retained under any agreement to provide routine management services to the Landlord the costs of which would be recovered as service charge. Some items on the schedule of costs appeared to the Tribunal to be matters which should be dealt with under normal administration and as such not payable as a specific item in connection with the proceedings.

30. The Tribunal noted that a landlord should in any event be familiar with the terms of a Lease to which it is a party, so that no charge should be made for time spent considering the Lease.
31. Doing the best it could upon the information available the Tribunal decided that Mr Buckingham's work could reasonably be charged at £30 per hour, and that a total of 6.35 hours should be allowed. The Tribunal did not see the need for a second Land Registry search after the proceedings had been issued, and allowed only the first disbursement.
32. The amount of costs which would be just and equitable in the circumstances was determined to be limited to £193.50 which the Landlord may recover as service charge.

Dated 10 August 2007



H Clarke Barrister-at-Law
Chair