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LON/OOBK/LBC/2007/0016

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Applicant: Morshead Mansions Ltd

Respondent: Mactra Properties Ltd

Premises: Flat 57 Morshead Mansions, Morshead Road, London W9 1LF

Date of Consideration: 17 May 2007

Applicant's Representatives: Wismayers Solicitors

Respondent's Respresentatives: Mischon de Reya Solicitors

Members of the Leasehold Valuation Tribunal:

Mr S E Carrott, LLB
Mr L Jarero, BSc, FRICS
Mrs E Flint, DMS FRICS IRRV

Date of Decision: 21 June 2007

1. **Background**

This is an application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of covenant or condition in the lease has occurred.

2. The Applicant landlord is Morshead Mansions Ltd and the Respondent tenant is Mactra Properties Ltd. The subject property is 57 Morshead Mansions, Maida Vale, London W9.

3. This application has been determined without an oral hearing pursuant to regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. Both the Applicant and Respondent have made written representations through their respective Solicitors. The Applicant is represented by Wismayers and Mishcon de Reya represent the Respondent.

4. The Respondent has been the tenant of 57 Morshead Mansions since 28 May 1993 when it was granted a long lease for a term of 999 years from 1 January 1993.

5. The lease contains a qualified prohibition against subletting at clause 3.19(b) in the following terms -

> Not to sublet the whole of the property without the Landlord's written prior consent such consent not to be unreasonably withheld.

6. Clause 3.20 the lease goes on to state -

> Within one month ... of every subletting, to give notice of it to the Landlord or the Landlord's Solicitors and to pay a reasonable registration fee such fee not to be less than £25 plus VAT if any. At the same time, to produce for inspection a copy of ... a counterpart of the sublease.

7. Thus the position under the terms of the lease is that if the Respondent wants to sublet the flat it must first obtain the landlord's consent in writing and in any event it must give to the Applicant notice of the subletting within one month of the commencement of the subletting, pay a registration fee and provide the Applicant with a copy of the agreement made between the Respondent and its subtenant. The landlord cannot unreasonably withhold consent to the subletting.

8. **Facts**

The facts as determined by the Tribunal on the material before it are that in February 2007 the Respondent sublet the flat to a Mr and Mrs Ciurlionis. The Respondent did not request the permission of the Applicant before the sub-tenancy was granted but as will be seen from below the Applicant has subsequently been given information about the nature of the tenancy and the Respondent has offered to pay a reasonable registration fee. The date of the commencement of the tenancy on the agreement is 10 February 2007 although the agreement to grant the sub-tenancy would have predated the commencement of the tenancy. The tenancy agreement itself created an assured shorthold tenancy for a term of 12 months. In the Tribunal's view there was nothing unusual about the terms of the tenancy save perhaps for the obligations on the tenant some of which were quite onerous and running to some sixty separate obligations in all.

9. Meanwhile by a letter dated 7 February 2007 the Applicant wrote to its tenants and in particular to the Respondent giving notice that from that date it would apply the provisions of clause 3.19 and 3.20 to every leaseholder and that they would require the names and contact details of the prospective sub-tenants together with references, a copy of the tenancy agreement and that the subtenants must execute a Deed in favour of the landlord company, as well as paying the Applicant's reasonable costs for dealing with the application.

10. On 10 February 2007 Mr David Wismayer, who is the sole director of the Applicant landlord and who resides at 81 Morshead Mansions, discovered that Mr and Mrs Ciurlionis were moving into the property. He instructed Solicitors to write to the Respondent about the subletting. The Applicant's Solicitors wrote to the Respondent on 12 February 2007 requesting that that the Respondent admit the breach of covenant pursuant to section 168(2)(b) of the Commonhold and Leasehold Reform Act 2002. The Respondent's Solicitors Mischon de Reya replied on 21 February 2007 pointing out that the subletting was arranged prior to receipt of the Applicant's letter of 7 February and pointed out that the subtenants in question were previously resident at Morshead Mansions being the former subtenants of Mr Crowther a former director of the Applicant company. That letter also pointed out that the Applicant had been aware for many years that the Respondent was in the business of subletting and that at one stage the sister of Applicant's director had in the past acted as a letting agent for the Respondent.

12. By a letter dated 27 February 2007 the Applicant through its Solicitors requested references for the subtenants, a copy of the tenancy agreement, a signed deed, a £25 fee and legal costs of £479.40. After some further correspondence between the parties Mishcon De Reya wrote to the Applicant's Solicitors on 9 March 2007 stating that it would ask the subtenant to execute the deed, pay the registration fee and provide a copy of the tenancy agreement but removing the amount of the rent paid and any commercially sensitive information. The Respondent however through its Solicitors refused to pay the legal costs stating that these were in reality connected to the previous proceedings between the parties.

13. The Applicant's Solicitors in their reply dated 13 March 2007 insisted on payment of the legal costs and also refused to accept a redacted tenancy agreement. In response to this the Respondent's Solicitors asked for more time to take instructions. However the Applicant's

Solicitors refused to give more time and on 14 March 2007 sent an application to the Tribunal.

14. **Submissions of the Parties**

The Applicant's case as put in the witness statement of Mr David Wismayer dated 11 April 2007 is that the Respondent has not sought the consent of the landlord either prior to or indeed after the subletting.

15. The Respondent's case is that there has been a waiver of the breach given the long standing practice adopted by the landlord over the years not to insist upon strict compliance with clause 3.19 or 3.20 and indeed they rely upon the fact that Mr Crowther, who himself was until recently the sole director of the Applicant landlord did not comply with the clauses.

16. In response to this, the Applicant maintains that no evidence has been submitted in support of the allegation of an uninterrupted policy of tolerance towards sub-lettings and that in any event a mere passive acquiescence in a breach of covenant is not a waiver for all future time of the right to complain and that following the case of Sayers v Collyer (1884) 28 Ch.D 1603 the issue is whether or not it is unjust for the court to grant the relief sought by the party relying on the covenant. The Applicant then goes on to make submissions as to why the enforcement of the covenant would not be unjust in the present case relying on the matters set out in the letter dated 7 February 2007 and further highlighting the dangers of a finding that the covenant has been waived.

17. **Determination**

The issues in the present case were twofold -

(1) Was there a waiver of the breach of covenant; and

(2) If there was not a waiver of the covenant did the Applicant unreasonably withhold consent to the letting.

18. The Applicant's criticism of the fact that the Respondent had not called any evidence in support of the long standing policy with regard to subletting was ill founded. It is clear that Tribunals are entitled to act on any material which is logically probative even though it would not be admissible as evidence in a court of law, provided that the requirements of natural justice have been observed: see T.A. Miller Ltd. v. Minister of Housing and Local Government, [1968] 1 W.L.R. 992 at 995.

19. There was ample material before the Tribunal to demonstrate that there had indeed been such a long standing policy of toleration and the inference to be drawn from the terms of the Applicant's letter of 7 February 2007 is that prior to that date, neither the landlord nor tenants observed clause 3.19 or 3.20. The Applicant could not escape that inference by merely stating in its Statement of Case that it made no admission to such policy. Indeed it is notable that, if there was no such policy of toleration that the Applicant did not state a positive case to that effect.

20. The case of Sayers v Collyer was of little assistance to the Tribunal since that was a case concerned with the equitable defence of acquiescence to a claim for injunctive relief. In that case a building estate was sold by the owners in lots to purchasers who had covenanted with the owners and with each other not build a shop on his land or to use his house as a shop or carry on any trade there. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an 'off' licence, to restrain him from breaking his covenant and for damages. The Plaintiff had been aware for some three years before the claim that the house had been used as a beershop and had himself purchased beer from there. The Court held that although the change in character of the estate did not affect the right of the Plaintiff to make his claim, his right to injunctive relief or damages was barred by reason of acquiescence.

21. In the present case the Tribunal is not concerned with acquiescence as an equitable defence it is concerned with waiver of the breach of covenant in the narrow sense - that is consent. If there has been consent then there is no breach.

22. The Tribunal was of the view that in the present case there was consent. The manner of dealing over many years was that the Respondent and others had been allowed to sublet without insistence on the requirements of clause 3.19 or 3.20 being fulfilled.

23. It was open to the Applicant as in the present case to insist on compliance with the terms of the lease. The letter of 7 February 2007 however reached the Respondent after the subletting had been negotiated but even then the Respondent quite reasonably had agreed to enter into the deed insisted upon by the Applicant, disclose the tenancy agreement (subject to removing the amount of rent paid and any further commercially sensitive material) and to pay the registration fee of £25. The Applicant nevertheless refused this simply applying to the Tribunal without even waiting to see the tenancy agreement or indeed waiting for the Mishcon de Reya to take further instructions from the Respondent.

24. Moreover the insistence on the part of the Applicant that the Respondent should pay legal costs on account of correspondence went above and beyond what was required by either clauses 3.19 or 3.20 of the lease in the instant case.

25. Clause 3.19 was a qualified covenant against subletting and in terms provided that consent could not be unreasonably withheld. Insofar as Mr David Wismayer had asserted in his witness statement dated 11 April 2007 at paragraph 3 that 'neither before nor since the said date has the Respondent sought consent for nor registered the letting whether in the manner provided by the lease or othewise', this was

simply wrong. Mishcon De Reya's letter of 9 March 2007 offered to comply with the conditions save for the question of legal costs which requirement was in any event unreasonable. The Applicant through its Solicitors had unreasonably withheld consent.

26. The effect of unreasonably withholding consent whether under the terms of the lease or under section 19 of the Landlord and Tenant Act 1927 was that consent was deemed to be given.

27. Accordingly, the Respondent is not in breach of clause 3.19 or 3.20 of the lease.

Chairman ..... S E Cannott

Dated 21/6/07