RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/42UF/LBC/2007/0008

Property	:	**32 St John's Street, Bury St Edmunds, Suffolk IP33 1SN**
Application	:	For determination that the Respondent is in breach of a covenant or condition in a lease between the parties [Commonhold and Leasehold Reform Act 2002, s.168(4)]
Applicants	:	Peter & Avril Hay, Troston Cottage, Troston, Bury St Edmunds, Suffolk IP31 1EX
Respondent	:	Nicholas Tomkins, 32 St John's Street, Bury St Edmunds above

DECISION

following a paper determination

Handed down 10th March 2008

Tribunal : G K Sinclair, R Thomas MRICS, R S Rehahn

Summary

1. For the reasons which follow the tribunal determines that the Respondent is in breach of the covenant contained in clause 2(17) of his lease dated 13th November 1981, namely by failing to comply with the following regulations set out in the Fourth Schedule :
   a. By permitting dirt, namely dog excrement, to be thrown down and thereby block the waste or soil pipes in the flat, contrary to regulation (5)
   b. By keeping a dog on the premises without the permission of the freeholder; contrary to regulation (9).

2. The tribunal regards as not proven the following alleged breaches of covenant :
   a. Failing to pay the rents reserved by the lease, contrary to clause 2(1)
   b. Failing to pay the rates or council tax assessed on the flat, contrary to clause 2(2)
   c. Parting with possession of the whole of the flat, contrary to clause 2(6)
   d. Allowing the entranceway to become obstructed with rubbish, contrary to clause 2(8)
   e. Failing to pay the landlord's costs in relation to bringing these breaches to the tenant's attention, contrary to clause 2(9)
   f. Permitting or suffering in or upon the flat regular noise at weekends, such as to cause a nuisance or annoyance to adjoining occupiers, contrary to regulation (3)
   g. Keeping two or three cats, contrary to regulation (9).

The law

3. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides :

(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 (c 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if-

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

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(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) ...

4. Section 169 contains supplementary provisions which this decision need not record.

5. The question whether a lease is forfeit therefore remains one for the court, as is the exercise of its discretion to grant relief against forfeiture; an issue which in the context of a long lease is likely to be of considerable concern to any mortgagee of the tenant's leasehold interest.

The lease

6. As noted above, the relevant lease is dated 13th November 1981. The original parties were Christopher John Whatling and his wife Janet Yvonne Whatling (as landlord) and Nicholas Tomkins (as tenant). The term granted is a period of ninety nine years from 1st November 1981, at a yearly rent of £12 payable in half-yearly instalments and

> ...by way of further rent such sum as shall be equal to 15% or £52 whichever shall be the greater (hereinafter referred to as "the Service Charge") towards the costs expenses outgoings and matters incurred or to be incurred by or on behalf of the landlord in discharging the obligations mentioned or set out in Clause 3 hereof and in the Fifth Schedule hereto...

7. The demised premises are described as being

> ALL THAT suite of rooms (hereinafter called "the Flat") known as 32 St Johns Street Bury St Edmunds aforesaid as the same is more fully described in the First Schedule hereto being part of the building shown on the plan attached hereto and marked "A" and thereon edged red (hereinafter called "the Building") ...

The plan provided to the tribunal is uncoloured, and only after some considerable study of both plan and the many photographs provided by the Applicant is the tribunal satisfied that the demised premises include the roof patio to which access is obtained via a french window.

8. The tenant's principal covenants appear in clause 2, although by clause 2(17) the tenant

also covenants to observe and perform the regulations appearing in the Fourth Schedule.

Manner of determination

9. As the tribunal office has received no response to the application and directions from the Respondent (who was served at the address of the demised premises), the evidence and photographs provided disclosed that it was unlikely that anyone would be in occupation save for a large dog, and that an inspection would be of little assistance, no inspection was arranged. The tribunal received no request for an oral hearing so elected to deal with the application by way of a determination on the papers provided.

10. At the tribunal's request, by letter dated 7th February 2008 the Applicant's solicitors notified HBOS plc, believed to be the Respondent's mortgagee of these unregistered premises, of the making of this application to the tribunal. HBOS plc has not responded either to the Applicant's solicitors or to the tribunal office

11. In making its determination the tribunal had before it, in addition to the application form, two witness statements by Peter Hay, co-owner with his wife of the freehold reversion in the premises. The statements are dated 23rd November 2007 and 1st February 2008. His first witness statement exhibits a copy of the lease, many photographs, and some financial statements. Mr Andrew Paul Philips, owner of a business known as Gymphobics at 31 St Johns Street, immediately below the demised premises, also made a statement dated 23rd November 2007 dealing in particular with a leakage incident from a drain leading from the roof terrace above, at the end of October 2007.

Determination

12. *Clause 2(1)* The only evidence of non-payment of ground rent by the Respondent comprises the statements of account (one undated but referring to invoice 1001 dated 27th January 2004) and the other dated 21st November 2007. No lawful demands for payment have been produced. The tribunal cannot therefore be satisfied that such payments are due. The tribunal also notes that the service charges for years ending June 2002, 2003, 2004 and that for a new period (December 2005–December 2006) are all £52. No service charge is claimed for the period June 2004–December 2005. There is no reference to any service charge accounts actually being served on the tenant, as required by the Fifth Schedule. Where does the figure of £252.68 in Mr Hay's paragraph 14 come from? It does not feature on the documents produced, but seems to be a lumping together of ground rent, service charges and water and sewerage charges. What are the mysterious £27 credits appearing on the statement dated 21st November 2007?

13. *Clause 2(2)* No evidence has been produced explaining how arrears of rates or council tax are alleged to have arisen, nor whether they are payable via the landlord or directly to the local authority. On the morning that the tribunal met a letter was received from the Applicant's solicitors stating that "our client has tried to seek corroborative evidence of this from the local authority" but that it had failed or refused to provide it, adopting the by-now usual excuse of the Data Protection Act. The tribunal is not satisfied that it has any evidence of breach, let alone corroborative evidence.

14. *Clause 2(6)(b)* The evidence before the tribunal is that Mr Tomkins has allowed his daughter to reside in the flat. It is alleged that by so doing the tenant is in breach of

covenant. This sub-clause refers to assignment or parting with possession. However, there is no evidence of any legal parting with possession by assignment of the term or the creation of any irrevocable licence or sub-tenancy. There is no evidence that the Respondent is charging or receiving rent from his daughter, whom the tribunal suspects would have considerable difficulty in claiming Housing Benefit in respect of premises where the landlord interest was held by so close a family member. In the absence of evidence suggesting anything more than an informal family arrangement entitling the Respondent to recover legal possession at any time, the tribunal does not find that any such breach has been proved.

15. *Clause 2(8)* The tribunal notes that the only evidence before it of any obstruction to the passageway is a brief mention in paragraph 11 of Mr Hay's first statement. There is no photograph showing the extent of such rubbish, nor evidence of how much rubbish there was, when, for how long, or (crucially) whether it **obstructed** the emergency doors leading from the ground, first and second floors of the building to the entrance passageway, staircases and landings. How can the Applicant prove that the rubbish is the responsibility of the Respondent? It may well be that only the Respondent or occupants of his flat can obtain access to the passageway, but that is not the evidence before the tribunal.

16. *Clause 2(9)* The allegation made is that the tenant has failed to pay the landlord's costs in relation to bringing these breaches to his attention. There is no evidence that the tenant has failed to pay "all costs charges and expenses including solicitors' counsels' and surveyors costs and fees at any time during the said term incurred by the landlord in or in contemplation of any proceedings in respect of this lease under sections 146 and 147 of the Law of Property Act 1925". This application is a condition precedent to the service of any section 146 notice and any subsequent court action. How can the landlord's costs have yet been quantified, let alone formally demanded, even if the matter were to go no further than this determination?

17. *Clause 2(17)* It is alleged that the tenant is in breach of three separate regulations listed in the Fourth Schedule, viz regulations (3), (5) & (9).

18. *Regulation (3)* Unusually for an allegation of noise nuisance, there is no direct evidence of any complaints from neighbours about noise. Why not? What type of noise is it? The only mention in paragraphs 4 & 12 of Mr Hay's first statement are two brief non-specific observations about weekend noise. No dates are given. If noise were causing a regular disturbance, one might expect to see reference to complaints being made to the local authority's Environmental Health Officer. The tribunal also notes that the demised premises are 2–3 doors down from a public house, where some noise may be expected. The tribunal is not satisfied on the evidence before it that any such breach has been committed.

19. *Regulation (5)* the tribunal is satisfied, on the basis of the photographic evidence of dog excrement lying on the patio, paragraphs 5 to 9 of Mr Hay's first statement, and that in Mr Phillips' statement (concerning October 2007) that dog excrement has on more than one occasion caused a blockage to the soil pipe and unpleasant flooding in the premises below, thus causing a nuisance.

20. *Regulation (9)* The tribunal is satisfied, on the basis of the clearest evidence, that the tenant or those for whom he is responsible have been keeping a large German shepherd dog on the premises without the landlord's consent. Although an abandoned cat basket can be seen in at least one photograph of the patio, the tribunal has no evidence that a cat or cats are on the premises. To that extent, any proven breach is limited to the keeping of a dog.

21. Had there been an oral hearing of this application then it is possible that by questioning the Applicant the tribunal may have elicited evidence establishing breaches of more of the covenants specified. However, as the consequences to a tenant and its mortgagee of such a determination are potentially very serious, the burden must therefore rest upon the Applicant landlord to prove his case. This explains what to the Applicant may seem an unduly prescriptive approach.

Dated 10th March 2008

Graham Sinclair – Chairman
for the Leasehold Valuation Tribunal