

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL &  
LEASEHOLD VALUATION TRIBUNAL**

In the matter of Applications under Section 168 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) (Breach of covenant) and Paragraph 10(2)(B) of Schedule 12 of the 2002 Act (Application to pay costs incurred by one party)

Case No. CHI/00MR/LBC/2009/0032

Property: Upper Maisonette, 29 Devonshire Square, Southsea, Hampshire, PO4 0JJ

**Between:**

Mr Carlton De Gare Deane &  
Miss Claire Louise Howcroft  
 (“the Landlords”)

and

Miss Victoria Westlake  
 (“the Tenant”)

Attendances: The Landlords: Mr Deane and Miss Howcroft  
Represented by Mr K.M. Pain (Counsel)

The Tenant: Miss Victoria Westlake

Members of the Tribunal: Mr J.B. Tarling, MCMI, Lawyer/Chairman  
Mr D. Lintott, FRICS  
Mr R. Dumont

Date of the Decision: 27<sup>th</sup> November 2009

**THE DECISION  
OF THE LEASEHOLD VALUATION TRIBUNAL**

1. **The Tribunal determines under Section 168 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) that the following breaches of covenant of the Lease of the Upper Maisonette dated 27<sup>th</sup> October 1981 (as amended by a Deed of Variation dated 6<sup>th</sup> March 1998) have occurred:**
  - (a) **Clause 2(a) of the Lease. The Tribunal determines that a breach of this covenant has occurred in that the Tenant has permitted the premises to be used otherwise than as a “private dwellinghouse in the occupation of one family only.”**
  - (b) **Clause 2 (c) of the Lease. The Tribunal determines that a breach of covenant has occurred in that the Tenant has failed “to keep the premises in good repair and condition and in particular so as to give shelter and protection to the lower maisonette.”**

2. **The Tribunal makes an Order under Paragraph 10(2)(b) of the 2002 Act that the Tenant is to pay the costs incurred by the Landlords in connection with the proceedings limited to £500. Such amount is to be paid within 14 days from the date of this Decision.**

## **REASONS FOR THE TRIBUNAL'S DECISION**

### **1. Background to the Application**

There are Two Applications before the Tribunal:

- (a) An Application under Section 168 (4) of the 2002 Act for a determination that a breach of covenant in the Lease has occurred.
  - (b) Under Paragraph 10 (1) of Schedule 12 of the 2002 Act for an Order that the Tenant is to pay the costs incurred by the Landlords in connection with these proceedings.
2. The Tribunal had made Directions as to the preparation and exchange of various documents with a view to preparing for a full Hearing of the Applications. The Landlords had prepared their own Bundle of documents and this had been sent to the Tenant and copies had been forwarded to the Tribunal prior to the Hearing. The Tenant had failed to comply with the Directions and had not submitted any bundle of documents prior to the Hearing. On the day of the Hearing the Landlords had submitted a further Bundle of documents including a skeleton argument and submissions on law with supporting case authorities.

### **3. The relevant law**

The relevant parts of Section 168 of the Commonhold and Leasehold Reform Act 2002 that apply to this application are as follows:

#### Section 168(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 (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

#### Section 168(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 a breach has occurred

#### Section 168(4)

A landlord under a long lease of a dwelling may make an application to a

leasehold valuation tribunal for a determination that breach of covenant or condition in the lease has occurred.

Paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002

Paragraph 10(1)

A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2)

Paragraph 10(2)

The circumstances are where:

(b) He has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonable in connection with the proceedings.

Paragraph 10(3)

The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed (a) £500

Paragraph 10(4)

A person shall not be required to pay costs incurred by another person in connection with the proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph

**4. Inspection**

The Tribunal carried out an Inspection of the Property on the morning of 16<sup>th</sup> October 2009 accompanied by the parties and Mr Pain (Counsel for the Landlords). The Building is a three-storey Building comprising a Ground Floor Flat owned and occupied by the Landlords and the First and Second Floor Maisonette owned by the Tenant, but unoccupied at the time of the inspection. The following matters relating to the items in dispute were inspected.

**External Inspection**

The roof appeared to have many slipped or broken slates and in places there were signs of patches of black or dark material where repairs had been done. The windows and window-frames in the Upper Maisonette were in a poor state of repair. One of them appeared to be permanently open. The external brickwork in the part of the Building that comprised the Upper Maisonette was also in a poor state of repair with some bricks loose and missing and holes in the external pointing. By contrast the brickwork of the Ground Floor Flat was in a good state of repair and the windows on the Ground Floor were mainly double glazed upvc and in a good condition.

**Internal Inspection**

- a. First of all the Tribunal members inspected the interior of the Lower Flat which was occupied by the Landlords. The Landlords and the Tenant accompanied the Tribunal members at that inspection. In the

front bedroom part of the ceiling had come down leaving a hole in the plasterboard ceiling. There were signs of water staining on the ceiling of that room and the bathroom, hallway and other rooms. From its subsequent inspection of the Upper Maisonette it appeared that the signs of water staining were immediately below the bathroom, wc and kitchen in the upper Maisonette. There was some minor damp damage to the walls and ceilings of the lower Maisonette which did not appear to be plumbing related. In the bedroom at the other end of the Flat there were signs of water staining running down the inside of the external walls.

- b. The Tribunal members then inspected the Upper Maisonette in the presence of the Tenant and the Landlords. The Upper Maisonette was unoccupied at the time of the inspection. On the first floor there was a Bathroom, separate WC, Kitchen and 3 bedrooms, two of which were large enough to be bed-sitting rooms. On the Second floor were rooms and one extra room with its own staircase. The Tribunal members also inspected part of the roof void and noticed holes in the roof where daylight could be seen. At the time of the inspection the weather was clear and not raining. On the ceilings of the rooms on the Second floor there were signs of water stains. In all the rooms the windows and window-frames were in disrepair.

#### **5. FIRST HEARING 16<sup>th</sup> October 2009**

A Hearing took place at the Tribunal's Office at Chichester on 16<sup>th</sup> October 2009. This was attended by the Landlords and they were represented by Mr Pain of Counsel. The Tenant also attended the Hearing but she was not represented. On the morning of the Hearing the Landlords had produced a further Bundle with a Skeleton Argument and supporting case law. A copy of the Bundle was handed to the Tenant prior to the start of the Hearing and she was given a brief opportunity to read them.

#### **6. The matters in dispute**

The Landlords allegations of breach of covenant were set out in their skeleton argument details of which were as follows:

- (1) Clause 1 of the Lease, the allegation that the tenant had failed to pay the peppercorn rent due on 31<sup>st</sup> December in each year
- (2) Clause 2(a) of the Lease, the allegation that the tenant had permitted the Upper Maisonette to be used otherwise than as a "private dwelling house in the occupation of one family only" in that she had (a) permitted the Upper Maisonette to be occupied by students and (b) permitted the upper Maisonette to be used for the cultivation of cannabis.
- (3) Clause 2(c) of the Lease, the allegation that the tenant had failed to keep the Upper Maisonette in repair by reason of (a) the numerous occasions on which water had penetrated into the Lower Flat from the Upper Maisonette and (b) a series of failures to keep in repair the exterior and roof of the Upper Maisonette

(4) Clause 2(d) of the Lease (now clause 3(E) following the Deed of Variation) that the tenant had failed to evidence the engagement of insurance in respect of the Upper Maisonette.

#### **7. Preliminary matters**

Following discussions between the parties and the Tribunal the Landlords were invited to withdraw their allegations under Paragraph 6 (1) and 6 (4) above and those allegations of breach of covenant were withdrawn. In view of the obvious state of disrepair of the Upper Maisonette which the Tribunal members had seen at the inspection the Tenant was invited to admit the breach of covenant contained in Clause 2(c) of the Lease in that the Upper Maisonette was in disrepair. In particular the roof, external walls and windows and window frames were all in disrepair. The Tenant admitted those allegations of breach of covenant. The Tribunal recorded the withdrawal of the two allegations of breach of covenant by the Landlords and the Tenant's admission of breach of covenant in an Order in writing in accordance with the provisions of Section 168(2)(b) of the 2002 Act.

#### **8. The matters remaining in dispute**

The matters remaining in dispute are the allegations set out in Paragraphs (2) and (3) of Paragraph 6 above.

#### **9. Application for an adjournment**

The Tenant applied for an adjournment of the Hearing so that she could take legal advice. The Landlords opposed the application for an adjournment. After hearing arguments on both sides the Tribunal retired to consider the matter. After careful deliberation the Tribunal decided to grant the adjournment to enable the Tenant to take legal advice.

#### **10. Landlords Application for reimbursement of costs**

The Landlords made an application under Paragraph 10 (2)(b) of Schedule 12 of the 2002 Act for an Order that the Tenant reimburse the Landlords for the costs incurred in connection with the proceedings (limited to £500). The Tribunal made Directions for written submissions by both parties so that the Tribunal could deal with that application at the adjourned Hearing.

#### **11. The Adjourned Hearing 19<sup>th</sup> November 2009**

On 16<sup>th</sup> October 2009 the Tribunal had given Further Directions requiring both parties to file further documents and Witness Statements as to the evidence they wished to refer to at the adjourned Hearing. The Landlords had complied fully with those Directions and had filed a bundle of documents relating to their application under Schedule 12 of the 2002 Act. The Tenant had not complied with those Further Directions and had not filed any documents nor communicated with the Tribunal or the Landlords in any way. Shortly before the adjourned Hearing was due to begin the Tenant had telephoned the Tribunal office to say that her car had broken down and she would attend the Hearing as soon as she could. The Tribunal decided to delay the Hearing for a short time to enable the Tenant to attend. Nothing further was heard from the

Tenant and it was not known when, or indeed if, she would arrive at the Hearing. As the Landlords and their Counsel were ready to commence, the Tribunal decided to commence the Hearing in the absence of the Tenant.

12. Mr Pain, Counsel for the Landlords, took his Client, Mr Deane, through his Witness Statement and he gave evidence as to the facts in support of his Application. Dealing firstly with the alleged breach regarding the occupation of the premises as “a private dwellinghouse in the occupation of one family only” he said that the premises had been let to students for ten years. He produced a letter from the University of Portsmouth dated 6<sup>th</sup> February 2001 which referred to “the students at No. 29”. The letter was in response to a complaint made by Mr Deane about loud music. He also alleged that “contractors” were also occupying the premises at the same time as the students. He did not believe the premises were ever occupied by couples or a family.
13. Mr Deane also maintained that the occupation of the premises by 375 cannabis plants was also a breach of this covenant as such occupation was not “in the occupation of one family only.” He told the Tribunal that he saw the Police removing objects from the property and was told by a police officer that 375 cannabis plants had been removed. He saw those plants being removed in a van. Mr Deane also saw the police fill a rubbish skip with venting pipes that might have been used to assist in the cultivation of the cannabis.
14. In respect of the allegation of the failure to keep the premises in repair and the matter of water penetration, Mr Deane said that water was still penetrating the Lower Maisonette particularly during recent storms. He believed this was due to the disrepair of the Upper Maisonette. However the water ingress through the ceilings under the bathroom, wc and kitchen had now ceased. As the Upper Maisonette had been unoccupied for a year he had concluded that such previous water ingress through the ceilings had been due to disrepair of the plumbing which was no longer in daily use as the premises were unoccupied.
15. Following the conclusion of the Landlord’s evidence Mr Pain made a number of submissions in support of his client’s case. He referred to the evidence which Mr Deane had given and whilst there was no actual evidence as to the lifestyle of exactly how the students had been living, he asked the Tribunal to determine that such occupation was not “in the occupation of one family only.” In his written submissions Mr Pain had included reference to the case of *Roberts v. Howlett and Others (2002) 1 P & CR 19* which was a Decision of the Chancery Division of the High Court. The covenant in that case had been worded slightly differently namely “Not to use the property or permit the same to be used for any purpose other than as a single private dwelling-house...” More particularly in that case there was no covenant requiring the use to be “in the occupation of one family only” as in the present case. Mr Pain asked the Tribunal to accept the evidence of Mr Deane that the occupation by students was in breach of this covenant as there was no evidence that the students lived as one family along the lines decided by the case of *Roberts v. Howlett* .

16. At approximately 11:15am Miss Westlake arrived and joined the Hearing. Mr Pain then continued his submissions and referred to the evidence that Mr Deane had seen the Police remove 375 cannabis plants from the premises and asked the Tribunal to accept this evidence and conclude that such occupation was in breach of the covenant. Turning to the allegations of disrepair and water penetration Mr Pain asked the Tribunal to accept the evidence of Mr Deane as to the water penetration and determine that this was a breach of both the covenant to repair and also for shelter and protection. He also reminded the Tribunal as to the evidence of water staining and water ingress which they had seen at the Inspection of the premises immediately prior to the first Hearing.

**17. Application under Schedule 12 of the 2002 Act**

Mr Pain then made submissions regarding his Application for reimbursement of his Clients costs made under the provisions of Schedule 12 of the 2002 Act. He referred to a bundle of papers which he had prepared in accordance with the Tribunal's Further Directions. Miss Westlake said that she had received the Tribunal's Further Directions but had not received the Applicants bundle. After reference to the Tribunal's case file, it appeared that the Landlords Solicitors, Messrs Larcomes LLP of Portsmouth had served that bundle of papers on the Tenant "personally". Miss Westlake was unable to explain why she had received the Tribunal's Further Directions, but not the Landlords Bundle of papers. In any event a further copy of the Landlords Bundle was produced and Miss Westlake was given an opportunity to read them and comment.

18. Mr Pain maintained that the Tenant had acted unreasonably. He based his claim for reimbursement of costs on the additional costs that his Client had incurred due to the adjournment of the previous Hearing. That application for an adjournment had been made by the Tenant because she wished to take legal advice. It now transpired that she had failed to instruct Solicitors to represent her, nor had she complied with the Tribunal's Further Directions as to the filing of documents and a Witness Statement. Prior to the application for an adjournment at the previous Hearing, she had made a previous application for an adjournment which had been refused. The Landlords had been put to the expense of two lots of costs because the previous Hearing had been adjourned. Mr Pain took the view that the Tenant had acted unreasonably in the way in which she had conducted herself in applying for an adjournment to enable her to take legal advice and then not doing so. He took the view that she was playing around with the proceedings.

19. Miss Westlake said in reply that she had contacted a Solicitor but she could not afford to be represented. She had not given instructions to a Solicitor as she could not afford it. She had failed to comply with the Tribunal's Further Directions even though she had received them. She now wished to produce some documents she had prepared. Mr Pain objected to the late production of documents which had not been produced in accordance with the Tribunal's Further Directions. The Tribunal declined to allow Miss Westlake to produce the documents she had brought with her to the Hearing because they had not

been produced in accordance with the Tribunal's Further Directions and this might cause further and unreasonable delay or prejudice to the Landlords.

20. Miss Westlake was then shown a copy of the letter from the University of Portsmouth dated 6<sup>th</sup> February 2001 which referred to "the students at No. 29" and she admitted that in 2001 the premises were occupied by students. The Hearing then concluded and the Tribunal retired to consider their determinations.

21. **The Lease**

Copies of the Leases of the Upper Maisonette and the Ground Floor Flat were before the Tribunal. Relevant to the matters remaining in dispute the Lease of the Upper Maisonette was dated 27<sup>th</sup> October 1981 and it contained the following covenants which are relevant to the application:

**Clause 2(a)**

The Tenant covenants with the Landlords "not to use the said upper maisonette nor permit the same to be used for any purpose whatsoever other than as a private dwellinghouse in the occupation of one family only"

**Clause 2(c)**

The Tenant covenants with the Landlords "to keep the said upper maisonette in good repair and condition and in particular so as to give shelter and protection to the said lower maisonette"

22. **The Tribunal's determinations as to the alleged breaches of covenant**

Dealing firstly with the use of the premises as a private dwellinghouse in the occupation of one family, the Tribunal noted that at the very end of the adjourned Hearing Miss Westlake had admitted that the premises had been occupied by Students. She had made that admission only after having been shown the letter from the University of Portsmouth which referred to student occupying the premises. She could have made that admission at an earlier stage in these proceedings and it would have saved everyone a lot of time and trouble. The Tribunal accepted the evidence of Mr Deane that students and contractors had occupied the premises in the ten years he had been in occupation of the lower maisonette. Students and contractors do not normally come within the natural definition of "one family only". No evidence had been produced by the Tenant to show that the premises had been occupied at any time by persons who could be described as a family.

23. In respect of the allegation that the premises were at one time occupied by 375 cannabis plants, the Tribunal accepted the evidence of Mr Deane that he had seen the plants being removed from the premises. However the Tribunal read through the Lease and Deed of Variation and noted that neither document contained the usual covenant not to use the premises for any illegal or immoral use. The allegation was that the Tenant "permitted the upper Maisonette to be used for the cultivation of cannabis." The Tribunal considered the matter carefully and concluded that the wording of the covenant related to "occupation" by persons, rather than by inanimate objects such as plants. To



that extent the Tribunal concluded that the occupation by cannabis plants did not amount to a breach of this covenant for the reasons given above.

24. In respect of the allegations relating to keeping the premises in good repair and to give shelter and protection to the lower maisonette, the Tribunal noted the Tenant's admission as to failure to repair made at the first Hearing and referred to in Paragraph 7 hereof. Indeed it had become obvious from the Inspection of the premises by the Tribunal members that the property was in considerable disrepair. Similarly, the water stains on the ceilings of the Lower Maisonette seen by the Tribunal members at the Inspection appeared to be obvious signs of water ingress from the Upper Maisonette. The Tribunal accepted the evidence of the Landlords that such water ingress had occurred as he had described. For these reasons the Tribunal made a determination that there had been a breach of this covenant as alleged.

25. **Determination as to the Application under Schedule 12 of the 2002 Act**  
The Tribunal reviewed the grounds of this Application and the written and oral submissions made by the parties. There was no doubt that the Landlords had incurred additional costs due to the adjourned Hearing and accepted that those costs exceeded the amount of £500 which was the limit of the Tribunal's power to award reimbursement of costs. So far as the merits of the Application were concerned, the Tenant had applied for and been given an adjournment to enable her to take legal advice and seek representation. It appeared that while she had been to see a firm of Solicitor, she had not given them instructions either to represent her or advise her. She had failed to comply with the Tribunal's Further Directions and had failed to respond in any way to the Tribunal or the Landlords Solicitors between the date of the adjournment and the final Hearing. At the very end of the final Hearing she had made an admission that the premises had been occupied by Students in 2001. She could have made that admission at the commencement of these proceedings or at any time during them. This might have saved some additional costs. In all the circumstances and for the above reasons the Tribunal determined that it would be plainly unfair to allow the Landlords to incur additional costs at their own expense just because the Tenant wished to take legal advice or representation, and then fail to do so. For these reasons the Tribunal determined that the Tenant should reimburse the Landlords legal costs limited to the maximum of £500. Such payment shall be made within 14 days from the date of this Decision.

Dated this 27<sup>th</sup> day of November 2009

J.B. Tarling 

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John B. Tarling, MCMI Lawyer/Chairman

A member of the Panel appointed by the Lord Chancellor