CHI/43UG/LBC/2008/0022

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD & LEASEHOLD REFORM ACT 2002

Address:	20 The Lodge, St Jude's Close, Englefield Green, Surrey, TW20 0DN
Applicant:	Retirement Care Group
Respondent:	Mrs A M Pegg
Application:	17 October 2008
Inspection:	N/A
Hearing:	20 February 2009

Appearances:

Landlord

Miss T Silver	Counsel
Miss M. Madderson	Solicitor of Maddersons

For the Applicant

Tenant

Mrs Pegg	Leaseholder

For the Respondent

Members of the Tribunal

Mr I Mohabir LLB (Hons)
Mr R Potter FRICS
Mrs M. Phillips

IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/43UG/LBC/2008/0022

IN THE MATTER OF SECTION 168(4) OF THE COMMONHOLD & LEASEHOLD REFORM ACT 2002

AND IN THE MATTER OF 20 THE LODGE, ST JUDE'S CLOSE, ENGLEFIELD GREEN, SURREY, TW20 0DN

BETWEEN:

RETIREMENT CARE GROUP PLC

Applicant

-and-

ANN MARIA PEGG

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made by the Applicant pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") predetermination that the Respondent has breached one or more covenants of the lease she holds in relation to the subject property.

2. The Respondent is the tenant of the subject property known as 20 The Lodge, St Jude's Close, Englefield Green, Surrey, TW20 ODN by virtue of a lease dated 14 July 1993 made between (1) Village Residential PLC (2) Lovell Homes Limited and (3) Hanorah Mary Kinley for a term of 125 years from 1 June 1990 (" the lease"). The subject property is one of twenty four flats that comprise the estate.

3. The estate was developed by Lovell Homes Limited, the builder, and was completed in the early 1990s. On 21 May 1987, Village Residential Limited applied for planning permission to Runnymede Borough Council to refurbish and convert the existing building with two-storey extensions to provide 24 apartments for the elderly ("the 1987 agreement"). By an agreement dated 8 December 1987 made between Runnymede Borough Council and Village Residential Limited planning permission was granted. However, a restriction contained in paragraph 1(i) of the Third Schedule of the agreement provided that the development shall not be occupied other than by persons having reached pensionable age as defined by section 27 of the Social Security Act 1975.

4. By a subsequent agreement dated 11 March 1991 made between (1) Runnymede Borough Council (2) Village Residential PLC and (3) Lovell Homes Limited it was agreed, at paragraph 2, that the planning restriction imposed by paragraph 1(i) of the 1987 agreement was amended to allow occupation by men or women of 55 years of age or more ("the 1991 agreement").

5. Paragraph 3 of the Recitals of the lease records and acknowledges that Retirement Care Group PLC has specialist knowledge and expertise in the management of sheltered housing accommodation and in particular developments of this nature.

6. Paragraph 4 of the Recitals states that the Applicants had agreed with the landlord, Village Residential PLC, by way of a separate agreement dated 27 July 1990 to manage and maintain the estate in accordance with the covenants on the part of the landlord contained in clause 5 of the lease as the agent of the landlord and to take a transfer or the estate on completion of the development.

The Issues

7. The alleged breaches of the lease complained of by the Applicants are:

(a) that the Respondent has breached clauses 4.7 and 4.8 by subletting the subject property to persons who do not fall within the definition of an approved occupier in the lease and has parted with possession other than by way of an assignment.

(b) that the Respondent has failed to pay any ground rent from April 2003 2 November 2007 totalling £137.50.

(c) that the Respondent has failed to pay the service charge and/or ground rent from April 2003 2 November 2007 totalling £6,787.37. It seems that the Applicant has issued debt recovery proceedings in the Staines County Court to recover the sum. On 18 August 2008, the Applicant obtained judgement in default for the sum of £6,816.27 together with interest of £347. Apparently, this judgement has been set aside and proceedings are ongoing in the County Court. At the hearing, the Respondent informed the Tribunal that she had also issued a separate application under section 27A of the Landlord and Tenant Act 1985 seeking a determination of her liability to pay and/or the reasonableness of the service charge is claimed by the Applicant. In the circumstances, it was agreed by both parties to stay this part of this application generally unless and until a determination had been made of the Respondent's liability for the service charges claimed. It was open to either party to restore this application thereafter. For this reason, it is not necessary in this Decision to refer to the relevant service charge provisions contained in the lease and their effect.

8. The Tribunal, therefore, limited its determination to points (a) and (b) above and these are considered below.

The Relevant Lease Terms

9. Clause 1.5 of the lease defines, *inter alia*, as being a person or persons qualifying under the provisions of the 1987 agreement or any amendment thereto.

10. By clause 3.2 of the lease, the tenant covenanted that the landlord to pay the (ground) rent in accordance with the provisions in the Fifth Schedule of the lease. This schedule provides that the ground rent for the first 25 years of the term of the lease is £50 per annum and rising thereafter.

11. By clauses 4.7 and 4.8 of the lease the tenant covenanted with the landlord:

"4.7 *Not to allow any person other than an Approved Occupier to permanently reside at the Flat.*

"4.8 *(a) Not to assign underlet or part with or share the possession or occupation of the whole or any part of the Flat save by way of an assignment pursuant to paragraph (b) of this sub-clause*

(b) Not to assign the whole of the Flat except to an Approved Occupier or to a person or persons taking an assignment of the Lease solely on behalf of or solely for the benefit of an Approved Occupier... and provided that the Tenant shall first give to the Landlord not less than one week's written notice of his intention to assign please..... and at the Assignee shall execute a Deed of Covenant with the Landlord..... to the effect that the Assignee... and his successors in title will at all times from the date of the assignment pay or rents (and) *service charges....."*

Decision

12. The hearing in this matter took place on 20 February 2009. The Applicant was represented by Miss Silver of Counsel. The Respondent appeared in person. She confirmed to the Tribunal that she was no longer pursuing her application to adjourn the hearing. In the circumstances, the Tribunal proceeded to hear submissions made by both parties. For the avoidance of doubt, the Tribunal's decision in this matter is based on these submissions made and the documentary evidence adduced.

Clauses 4.7 and 4.8 – Approved Occupier

13. It was a matter of common ground that the subject property was presently occupied by a Mr Stewart and a Ms White, who were tenants of the

Respondent. Miss Silver's primary submission was that this occupation was in breach of clauses 4.7 and 4.8 of the lease. The Respondent's tenants were not "an Approved Occupier" within the definition set out in clause 1.5 of the lease. In other words, the tenants were not 55 years of age or more has expressly provided for in the 1991 agreement. Miss Silver submitted that this was a breach of clause 4.7 of the lease.

14. Further or alternatively, Miss Silver submitted that clause 4.8(a) expressly provides that the tenant of the subject premises can only part with possession, whether in whole or in part, save by way of an assignment that satisfied the requirements with clause 4.8(b). The assignment could only be made to an Approved Occupier and before any such assignment took place, the tenant had to give the landlord not less than one week's written notice of the intention to assign the lease. Moreover, on assignment, the Assignee had to execute a Deed of Covenant with the landlord to pay the rents and service charges and other sums payable under the lease and to observe and perform the covenants. Miss Silver contended that no assignment had taken place, no written notice of any such assignment had been given to the landlord and no Deed of Covenant had been entered into between the landlord and the Respondent's tenants. She submitted, therefore, all of these matters amounted to a breach of clause 4.8.

15. The Respondent admitted that she had sublet the subject property to Mr Stewart and Ms White, who were her friends, in May 2008 under an undated assured shorthold tenancy agreement. This agreement terminated on 14 May 2009. She contended that her tenants were older than 55 years of age and produced for the first time at the hearing a letter from an estate agent confirming this. The Respondent accepted that she did not immediately notify the landlord when she had sublet the premises but she later did so in December 2008.

16. The Tribunal firstly considered whether clause 4.7 of the lease had been breached. The express requirements imposed by this clause are that an Approved Occupier, that is, someone who is over the age of 55 years, could

occupy the flat and had to reside there permanently. The letter from the estate agent adduced by the Respondent appeared to be *prima facie* evidence that her tenants were over 55 years of age and, therefore, fell within the definition of an Approved Occupier in the lease. However, this letter has been produced by the Respondent during the course of the hearing and had taken the Applicant by surprise. The author of the letter did not attend the hearing to give oral evidence or be cross-examined by the Applicant. The Tribunal, therefore, placed little or no weight on the evidential value of the letter. Given the paucity of any conclusive evidence regarding the age qualification imposed by clause 4.7, the Tribunal made no finding as to whether the Respondent's tenants did meet the definition of being an Approved Occupier. It follows from this that the Tribunal was not in a position to make a positive finding that the Respondent was in breach of clause 4.7 of the lease.

17. The Tribunal then considered the position in relation to clause 4.8 of the lease and had little difficulty in concluding that the Respondent was in breach of this clause in a number of ways. The Tribunal accepted the submission made by Miss Silver that any parting with possession of the flat had to be with by way of an assignment and that the Respondent's assured shorthold tenancy agreement did not meet this requirement. It created a different legal interest than the interest in the lease, namely, the beneficial interest, which can be asssigned. It is for this reason that the requirement to give the landlord a notice in writing of the intention to assign the lease must also provide details of the proposed purchase price. It was truly intended that the beneficial interest would be assigned to the Assignee and this could not be achieved by a tenancy agreement. Given that the Tribunal has found that there had been no assignment of the lease, the notice purportedly given by the Respondent in December 2008 could never have amounted to an intention to assign the lease in any event. It should be noted that, save for the Respondent's assertion, there was no other evidence that any such notice had in fact been given in writing to the landlord. Furthermore, the requirement for any Assignee to enter into a Deed of Covenant with the landlord was truly intended to make the covenants in the lease directly enforceable by the landlord against the Assignee. There was no evidence whatsoever that the Respondent's tenants had entered into

any such Deed with the landlord whether separately, in the tenancy agreement or otherwise. Accordingly, the Tribunal concluded that the Respondent was in breach of clause 4.8 of the lease.

Clause 3.2 - Ground Rent

18. In the application it was contended by the Applicant that the Respondent had not paid any ground rent from April 2003 2 November 2007 and the total arrears stood at £137.50. The Respondent asserted for the first time at the hearing that she had made a payment of £3,000 to the Applicant on 12 February 2009, which included as part of that figure payment of the ground rent arrears. Not surprisingly, the Applicant was not in a position to confirm whether any such payment had been received and whether it was in cleared funds. Nevertheless, it was contended by Miss Silver that no payments of ground rent had been made by the Respondent and she was, therefore, in breach of clause 3.2 of the lease.

19. There was no evidence before the Tribunal that the Respondent had paid the sum of £3,000 to the Applicant, whether payment had in fact been received and how the payment had been allocated as between the ground rent and service charge arrears claimed. The Tribunal, again, found itself in the position of not being able to make a positive finding that the Respondent was in breach of clause 3.2 of the lease by failing to pay the ground rent as alleged. It was open to the Applicant to make a further application for a determination of breach regarding any unpaid ground rent and any such application should be properly supported by evidence.

Dated the 19 day of March 2009

CHAIRMAN..... I. Mohabir .....

Mr I Mohabir LLB (Hons)