Southern Rent Assessment Panel and Leasehold Valuation Tribunal

Case No. CHI/00ML/LBC/2006/0002

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
ON AN APPLICATION UNDER SECTION 168(4) of the COMMONHOLD AND LEASHOLD REFORM ACT 2002
and SECTION 20C of the LANDLORD AND TENANT ACT 1985**

Property:	29B Buckingham Place, Brighton BN1 3PQ
Applicant:	Lyndale Development Ltd (landlord)
Respondent:	Mr & Mrs Nasseraldeen (tenants)
Date of Application:	7 July 2010
Directions:	12 July 2010
Hearing:	21 September 2010
Decision:	29 October 2010

Member of the Leasehold Valuation Tribunal

J A Talbot MA Cantab. Chairman
N I Robinson FRICS

Ref: CHI/00ML/LBC/2006/0002

Property: 29B Buckingham Place, Brighton BN1 3PQ

Application

1. This was an application made on 05/07/2010 by agent Marcus Staples of Deacon & Co, on behalf of the landlord, Lyndale Development Ltd, for a determination as to whether a breach of covenant by the tenant, Mr Nasseraldeen, has occurred under the lease for 29B Buckingham Place, Brighton BN1 3PQ.

2. Directions were issued on 12/07/2010 for an oral hearing and for both parties to provide written statements of case. Mr Staples complied with the directions. Mr Nasseraldeen (known as Mr Deen) did not respond to the application or comply with the directions (despite being a solicitor). However, he attended the inspection and the oral hearing accompanied by Counsel Mr Petts.

Law

3. Section 168(1) & (2) of the Commonhold and Leasehold Reform Act 2002 provides that a landlord may not serve a notice under Section 146 of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Leasehold Valuation Tribunal under Section 168(4), that the breach has occurred.

4. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred.

Lease

5. The Tribunal was provided with a copy of the lease of the property. It is dated 26 May 2003, and is for a term of 99 years from that date, at a ground rent of £50 per year.

6. Insofar as is material to the application, the lease contains the following covenants on the part of the tenants:

Clause 2:

> *"the Tenant hereby covenants with the Landlord ... that the Tenant and ... will at all times hereafter observe the restrictions set forth in the First Schedule hereto".*

Clause 3(h):

> *"not at any time during the term hereby granted to divide the possession of the demised premises by as Assignment or Underletting or parting with possession of part only and not during the last seven years of the term hereby granted without the previous consent in writing of the Landlord (such consent not to be unreasonably withheld) assign underlet or part with the possession of the demised premises or the said fixtures if any".*

Schedule 1, paragraph 1:

> *"Not to use the demised premises nor permit the same to be used for any purpose whatsoever other than as a private dwelling house in the occupation of one family onlynot from any purpose from which nuisance can arise to the owners, lessees or occupants of the other flats in the Building or in the neighbourhood ...".*

Alleged Breach

7. Mr Staples alleged that Mr. Deen had breached Clause 2 and paragraph 1 of Schedule 1 to the lease by sub-letting the property on a room by room basis undermining the quiet enjoyment of other occupiers.

Inspection

8. The members of the Tribunal inspected the property on the morning of 24 May. It comprised a converted mid-terraced Victorian town house with painted rendered elevations under a pitched tiled roof. The property was converted into 3 flats. Ground floor flat, basement flat with the subject property being an upper maisonette on the first floor and second floors. Each of the upper flats had its own separate front door side by side at the main entrance with a further separate entrance for the basement. Externally the property was in fair condition only.

9. Internally, the upper maisonette had a large front room, a smaller rear room, small living room/TV room, kitchen and bathroom on the first floor, with 2 further rooms including one ensuite plus utility area in the attic conversion. The bedrooms all had locks on the doors. It was obvious that 3 rooms were occupied as separate bedsitting rooms by individual occupiers. A 4th room appeared unoccupied. The Tribunal saw notes in the kitchen about bill sharing and cleaning arrangements in the names of Yuki, Cat and Carla, consistent with a typical flat-sharing arrangement.

Hearing

10. A hearing took place in Brighton on 21/09/2010 attended by Mr Staples for the applicant, Mr. Deen in person accompanied by Mr. Petts of Counsel.

11. On the balance of probabilities the Tribunal found the following facts. Mr Deen used to live in Hove, in a flat provided by his father as a gift when he was a student. He purchased the subject property in 2003 and lived there with his wife until 2006 when it was no longer suitable for his growing family and he moved to his current address.

12. Mr. Deen kept the property as a long term investment. He decided to sub-let it, but despite being a solicitor, he did not read or check the terms of his lease before doing so. He arranged the first letting himself, to 3 young professionals. Following a dispute they moved out after 5 months. Mr. Deen was then introduced to Lewis lettings agency. Around this time he started to work abroad and was not directly involved with the property. Lewis took on 4 individual students as tenants. Unfortunately these tenants proved troublesome. When they left after 12 months, Mr. Deen instructed a different letting agent, Houseen & Co, who arranged the current tenancies.

13. Mr. Deen admitted that the current tenants were 3 unrelated single women occupying separate rooms in the property under individual tenancies, sharing the bathroom, kitchen, small living room (used as a TV room) and utility area. The tenancy agreements were in the same form of standard assured shorthold. The tenants and rooms were: Yuki Maeda, double room, from 01/10/2009 to 20/03/2010; Catherine Des Baux, first floor double bedroom 1, from 07/10/2009 to 06/04/2010; and Carla Gabiola, en-suite room, from 13/01/2010 to 12/07/2010. The tenancy terms included the right to share common parts.

14. Mr. Deen contacted Mr. Staples' firm to inform them when he moved out of the property. He said they had noted his change of address and were aware that he had re-mortgaged with a buy-to-let mortgage. There was no discussion as to whether he was permitted to sub-let under the terms of his lease.

15. Deacon & Co had managed 29 Buckingham Place on behalf of the freeholder for 10 years and Mr. Staples had been the responsible person for the last 4 years. He was

aware of previous nuisance behaviour caused by Mr. Deen's sub-tenants, in the form of noise and groups of people congregating in the entrance. This was probably when the students were in occupation. There had also been a leak in 2008 from the bathroom of 29B into the premises below. Mr. Staples did not produce any direct evidence of current nuisance, and in fact the lessee of the ground floor flat, who had previously complained, had since moved out.

16. Mr. Staples had visited the property in 2008 and saw that it appeared to be let on a room-by-room basis, noting the locks on all the doors. However, he did not investigate further at that stage. He was prompted to do so and to ask Mr. Deen for copies of the assured shorthold tenancies following a further leak and insurance claim in 2010. He submitted that the sub-lettings had undermined good will, and there was also an ongoing service charge dispute with Mr. Deen (but there were no arrears of ground rent). He had hoped to resolve all the issues without resort to the Tribunal, but the sub-tenants were still in occupation.

17. On consulting the lease Mr. Staples took the view that Mr. Deen was in breach of the restriction in paragraph 1 of Schedule 1 in that the demised premises were clearly being used "other than as a private dwelling house in the occupation of one family". At the hearing he accepted that the actual obligation to observe the restrictions was contained in Clause 2 so this was the alleged breach of covenant.

18. Mr. Petts, Counsel for Mr. Deen, first argued that the application should fail because the wording of the grounds for the application was defective, alleging nuisance rather than occupation other than by one family, and no evidence of nuisance was forthcoming so the breach was not made out. In fact the wording of the application was a misnomer, as it referred to "quiet enjoyment", which is of course an implied covenant in every lease by a landlord to a tenant; but nothing turned on this, because it was clearly nuisance by the sub-tenants that was put in issue.

19. The Tribunal reminded the parties of its inquisitorial function, meaning that it had a duty to enquire into and establish all relevant facts on the balance of probabilities, rather than deciding cases on burden of proof. The application did in fact refer to the property being "sublet on a room by room basis" as well as "the undermining of quiet enjoyment". This raised the prior issue of whether or not the property was unlawfully sublet in breach of Clause 3(h) of the lease. The parties were given time in a brif adjournment to consider this point, as it had not been previously raised.

20. Mr. Petts argued that there was no breach of Clause 3(h). He submitted that an assignment or subletting of the whole did not "divide the possession of the demised premises" because this meant splitting up the flat, and this had not happened because the tenants shared the kitchen, bathroom, TV room, halls and stairs. Division of the flat was equivalent to parting with possession of part, so that if the lessee were in occupation, he could not then sub-let part.

21. Mr. Staples submitted that the terms of assured shorthold tenancies clearly demised individual rooms to the tenants, and this subletting did amount to division of the property within the meaning of Clause 3(h).

Decision

22. The Tribunal first considered the true construction of Clause 3(h) of the lease. It did not accept Mr Petts' submissions. In its view, the wording of Clause 3(h) was a prohibition against separate subletting of the individual rooms under different tenancies, which amounted to a division of possession (regardless of shared common parts) as opposed to a subletting of the whole. This was consistent with the restriction at paragraph 1 of Schedule 1, with the result that the whole maisonette could be sublet to a single family unit only. Consent from the landlord was only required during the final 7 years of the term. Therefore, Mr. Deen was in breach of Clause 3(h).

23. Even if the Tribunal is wrong about that, it is beyond doubt that Mr. Deen was in breach of Clause 2 and paragraph 1 of Schedule 1 because the property is quite clearly occupied by 3 single unrelated people on a typical flat-share basis, not by one family only, and indeed this was admitted.

24. The Tribunal is not required to consider any issue relating to the forfeiture other than the question of whether a breach has occurred. Therefore although Mr Petts asked the Tribunal to determine whether any determined breaches had been waived, it declined to do so, as waiver is more properly a defence to forfeiture and a S.168 determination is simply the first step a landlord must take before a S.146 Notice can be served and forfeiture applied for.

25. However, it may assist the parties for the Tribunal to comment that as a matter of law, an unlawful subletting is once-and-for-all breach, which is incapable of remedy, but can be waived. As all the sublettings since 2006 have occurred with the landlord's knowledge, and the landlord has demanded and/or accepted ground rent from Mr Deen, in the Tribunal's view, these breaches have been waived.

26. The breach of Clause 2 and failure to observe the restrictions is an ongoing breach, which can be remedied, but cannot be waived (because a continuing breach continually gives rise to new rights of forfeiture so waiver cannot affect future breaches). Therefore, in the Tribunals view, there can be no waiver of the breach of Clause 2, while the property continues to be occupied other than by one family only.

Determination

27. For the reasons given above, the Tribunal determines that the subletting of individual rooms at the property on different tenancies to 3 unrelated people who do not occupy it as one family, is a breach of Clauses 2 and 3(h) and paragraph 1 of Schedule 1 of the lease.

Dated 29 October 2010

Signed J A Talbot
Ms J A Talbot MA Cantab.
Solicitor
Chairman of the Tribunal

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21. Mr. Staples submitted that the terms of assured shorthold tenancies clearly demised individual rooms to the tenants, and this subletting did amount to division of the property within the meaning of Clause 3(h).

Decision

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Determination

27. For the reasons given above, the Tribunal determines that the subletting of individual rooms at the property on different tenancies to 3 unrelated people who do not occupy it as one family, is a breach of Clauses 2 and 3(h) and paragraph 1 of Schedule 1 of the lease.

Dated 29 October 2010

Signed J A Talbot
Ms J A Talbot MA Cantab.
Solicitor
Chairman of the Tribunal