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Residential Property
TRIBUNAL SERVICE

Jim May
Regional Manager
Southern RPTS
1st Floor, 1 Market Avenue
Chichester
PO19 1JU

RPTS
07 DEC 2009
SOUTHERN

Friday, December 04, 2009

Dear Jim,

LANDLORD & TENANT ACT 1985 – SECTION 27A(1)
COMMONHOLD & LEASEHOLD REFORM ACT 2002 – SECTION 168(4)
LANDLORD & TENANT ACT 1987 – SECTION 35(1)

PREMISES: 30A Lyndhurst Road, Worthing, West Sussex, BN11 2DF.

Please find enclosed a copy of the LVT decisions for the above case.

Case No: CAM/45UH/LSC/2009/0038 & CAM/45UH/LBC/2009/0005
Date of Application: 7 March 2009
Date received: 1April 2009
Date of Hearing: 2 November 2009

Yours sincerely,

Mark Allbut
Regional Manager

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	30A Lyndhurst Road Worthing West Sussex BN11 2DF
Applicant	:	MOIRA K. BYRNE
Respondent	:	M.G. GRAHAM
Case numbers	:	CAM/45UH/LSC/2009/0038 and CAM/45UH/LBC/2009/0005
Date of Applications	:	7th March and 17th June 2009
Type of Applications	:	Applications for determination of liability to pay a service charge, pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and for determination under Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent is in breach of a covenant or condition in a lease and for determination of an application to vary the terms of the lease, pursuant to section 35 of the 1985 Act
Hearing	:	2nd November 2009
Venue	:	The Clanctonbury Room Chatsworth Hotel Steyne Worthing West Sussex BN11 3DU
Tribunal	:	Miss Joanne Oxlade — Lawyer Chairman Mr. Jeremy Sims — Lawyer Member Mr Roland Thomas MRICS — Valuer Member
Attendees	:	Brian Dodd and Richard Howes (Managing Agents from Glawood Limited)

DECISION

For the reasons given below we make the following decisions:

1. The Tribunal does not have jurisdiction under section 27A of the 1985 Act to determine the sum demanded by the Lessor on 18th November 2008.

2. Pursuant to section 168(4) of the 2002 Act and for the reasons given below the Lessee is in breach of covenants set out in clauses 4(a),4(b), and 4(e) of the lease in respect of flat 30a Lyndhurst Road dated 1st December 1984.

3. Pursuant to section 35 of the 1985 Act we vary clause 4(c)(i) and Part 1 of the Second Schedule of the lease.

REASONS

Background

1. On 14th July 2003 Moira Byrne ("the Lessee") bought Flat 30a Lyndhurst Road, Worthing, West Sussex ("the flat"), subject to a 99 year lease commencing on 1st December 1984.

2. On 11th October 2006 Mrs. M. G. Graham ("the Lessor") bought the freehold of the building, consisting of the flat and two ground floor shops. The building is managed through Agents, Glawood Limited ("the Managing Agents").

3. On 7th March 2009 the Lessee made an application under section 27A of the 1985 Act for determination of the payability of service charges of £608.32 in respect for repairs to a flat roof (the service charge demand"). In the application she raised as an issue whether the roof terrace belonged to her flat, and therefore whether she was liable to pay charges in respect of it. She said that on her reading of the lease she could not see that she was liable for it.

4. In accordance with Directions made on 24th April 2009 for the filing of evidence, the Lessor's Managing Agents, Glawood Limited ("Managing Agents") filed a response to the application on 12th May 2009. It was acknowledged that there was no service charge provision within the lease, and identified as the principal issue whether the flat roof was part of the flat. In addition the response made an application for determination of breaches pursuant to section 168 of the 2002 Act.

5. In light of that response, further Directions were made on 23rd June 2009 for the filing of evidence in respect of the application for the findings of breach preparatory to forfeiture of the lease. The Lessor complied with the Directions, which included a detailed schedule of alleged breaches of the lease on which the Tribunal was invited to make findings. Despite the Directions, the Lessee filed no evidence and made no response to the application.

6. A pre-Trial Review (PTR) was arranged for the 14th September 2009, preceded by an inspection of the premises. In August 2009 the Lessee contacted the Tribunal to say that she was unable to attend the PTR and so asked for the matter to be adjourned. However, she did not file documentary evidence as requested to show that she was unable to attend the PTR was heard on the due date in the absence of the Lessee. The Lessee has not made any further contact with the Tribunal since this date, and has not complied with any of the Directions.

7. At the PTR the question of varying the lease was raised. This alternative was considered in the event that the Tribunal determined that the flat roof was not part of the demised premises. We indicated that we would wish to determine all applications at the same time and so in anticipation that such an application would be made on 14th September 2009 we made further Directions. The application was made 4th October 2009 in which the proposed variations were set out, and they were served on the Lessee on 13th October 2009. No response to the application was made by the Lessee.

8. Accordingly, when the matter came before us on 2nd November 2009 there were 3 applications to be heard.

Inspection

9. Prior to the hearing we inspected the exterior of the flat and hairdressing shop, and both the exterior of the interior of the upholstery shop. The building is a corner building of brick construction under a tiled roof, in a terrace of shops with living accommodation above, probably built in the Victorian era.

10. The upholsters shop has its entrance on the corner of Lyndhurst and Selden Road, its frontage onto Lyndhurst Road, but has a corridor and back office which wrap around the hairdressing business, the entrance

to which is located on Selden Road. The flat is accessed at the rear of the building, by a metal staircase to the first floor, and which has the benefit of the accommodation of the building on the first and second floors, located above the upholstery shop. The interior of the upholstery shop showed that there was damp penetrating into the corridor in several places and the back office. The flat roof and top of the staircase leading to the front door of the flat were directly above the corridor and back office. We did not have access to the inside of the flat, but were able to peer over a parapet wall to see the flat roof, observe the condition of the flat roof, surrounding wall, rainwater goods, staircase and its covering on the top step which are illustrated in photographs of the building at pages 65 to 69 of the bundle

Hearing

11. The Lessor was represented by Mr Dodds and Mr Howes from the Managing Agents, but the Lessee was neither present nor represented. On file was a copy of a letter dated 18th September 2009 which notified both parties of the hearing date. This had been received by the Lessor, and the Lessee's notice had not been returned unserved. We were satisfied that the appellant had been properly notified of the hearing date and had had more than 21 days notice of hearing, which is the minimum prescribed by Regulation 14 (3) of the Leasehold Valuation Tribunals (Procedure)(Eng) Regulations 2003 ("the 2003 Regs").

12. Whilst we are mindful that the application in relation to the variation of the lease was only notified to the Lessee by correspondence dated 13th October 2009, this would have given at least 12 clear working days notice that a new application was to be considered by the Tribunal, as previously anticipated by the Directions order of 14th September 2009. In the circumstances the Tribunal considered that there were exceptional circumstances for permitting short notice of the application to vary.

Evidence

13. The Lessor had filed a bundle in accordance with the Directions, which included the following:

    - the 3 applications and covering letters
    - the witness statement of Mr. Dodds, Managing Agent
    - a Surveyors report from Mr. C Spratt BSc FRICS dated 6th August 2009
    - a Structural Engineer Mr. N de Silva BSc (Hons) C. Eng. M.I. Struct. E. dated 20th March 2009
    - the service charge demand of 18th November 2008 and invoices which supported the service charge demand
    - various letters from the Managing Agents to the Lessee and Contractors

- a copy of a deed of variation of the lease dated 14th February 2003
- a copy of the alleged breaches of the lease
- a copy of the requested prospective deed of variation.

14. We heard supplementary oral evidence from Mr. Dodds.

Extent of the Demise

15. In respect of the issue as to the inclusion of the flat roof as part of the demise Mr. Dodds said that he has received advice from Mr. Barry and a second Solicitor (through the Institute of Directors) both of whom had advised him that the flat roof formed part of the flat. The second Solicitor however, did not have a copy of the lease available to her. In addition to the submissions already made they relied on the following wording: "All that flat being on the first floor of the Block" in preamble (3) and "All flat on the first" as distinct from just "the flat on the first floor" or part of the first floor in the preamble to Part 1 of the Second Schedule; clause 4 (a) which required the Lessee to give support and shelter and protection to the parts of the Block other than the flat. Further, that since the inception of the lease each successive Lessee of the flat had accepted responsibility for the flat roof, as had the current Lessee until the upholsterer complained that she had not repaired the roof and the job she was having done was botched. This was such that the Managing Agents had to intervene when a hole was left in the roof by the Lessee contractor having been told to stop work when he revealed to the Lessee the likely costs of making proper repairs.

16. Mr Dodds responded to questions asked by the Tribunal on specific provisions of the lease: he thought that the reference to "the flat" and "the balconies" in the restriction at clause 5 of the First Schedule was of no matter as it was probably a standard clause added in, as he thought that the flat roof/roof terrace would not be referred to as a "balcony"; he thought that the lack of restriction on use of the flat roof as a terrace which might otherwise have been found in the First Schedule, was a feature of it being an old lease; he thought that there was no specific reference to the flat roof/roof terrace in Part 1 of the Second Schedule because there was no need to do so; the deed of variation dated 14th February 2003 which granted "the right to used the flat roof over 40 Seldon as a terraced Garden" was corrective as the flat roof stretched over both 30 Lyndhurst and 40 Selden and yet the lease had provided only for the former; although he considered that the right to use it as a *terraced* garden suggested the grant for a specific use he did not consider as material the absence of provision in respect of the limitation on the weight or materials to be used.

17. In respect of the service charge bill of £608.32, this arose because the Managing Agents used a contractor engaged by them to make repairs,

as they were entitled to do pursuant to clause 4 (b) of the lease. In respect of the legal bill they took legal advice on this matter and unauthorised alterations to the second floor which had resulted in structural problems. He could not say exactly how the Solicitor's time should be apportioned, but thought that a 50/50 time split would be fair. He accepted our observation that a service charge bill only became due and owing if the demand complied with statutory requirements of advising the Lessee of their rights, pursuant to section 21 of the 1985 Act. As this did not do so, on any view it was not yet payable.

Alleged Breaches of the Lease

18. Mr Dodds made the additional points in relation to the alleged breaches on which findings were sought, set out at page 81 of the bundle:

Clauses 3(c) and 4 (e)

19. Mr Dodds had seen inside the flat, and was aware that the roof space had been turned into living accommodation so that there was an open-plan bedroom and bathroom. He said that there was no proper support or handrails and it was a "death –trap". The structural engineer had been involved, and had been concerned to cure the roof spread which had resulted. He reported that the Lessee had claimed that it had been done by the previous Lessee and that she (Ms Byrne) had spent £10,000 putting it right. In answer to our questions he fairly said that he could not say exactly when the works were done, but found it hard to believe that the valuer/surveyor who must have seen it to authorise the lending would not have picked up on it, had it been done by that time. He said that he had made it clear that he believed that she had done the works and she had not denied it. In respect of the alleged breach caused by the poor roof covering, he agreed that this would hinge on the flat roof being part of the demise, but said that in the alternative this would have been in breach of clause 4(e), in that she had caused damage to common parts. The Lessee's contractor had been asked to come and take a look to advise her what needed doing to cure the problems, and after exposing the hole and telling her what it would cost, she advised him to do nothing further. This left a large hole, as seen at pages 36-39 of the bundle, and prompted the letter from the Upholster (page 35).

Clause 3(d)

20. In respect of the failure to make payment of sums expended by the freeholder recoverable under clause 3(d) Mr Dodds accepted that of the £988.50 claimed for *Solicitors costs*, the demand for payment of £747.50 had only been sent the Friday before the hearing, and as such the Lessee could not have been said to have been in breach of the liability to pay before a demand was made of her. In any event he could

not say of the sum what was attributable to the flat roof issue and was attributable to the case generally.

21. In relation to the *Chartered Surveyors* fees of £575 this related to the charge for the report dated 6th August 2009 (page 61), which dealt with the flat roof, brickwork of the parapet and poor rainwater goods. The Structural Engineers fees of £178 relate to roof spread, and he accepted that if we were not satisfied that she had undertaken the works which gave rise to a complaint that she had done it without permission and caused damage, then this sum would also fall by the wayside.

Clause 4(b)

22. Mr. Dodds said that the liability to let the Lessor/Agents/ Surveyor/Workmen inspect the premises had been broken repeatedly by the Lessee. Requests made by the Chartered Surveyor and Structural Engineer had been repeatedly ignored. Mr. Dodds had made requests at least fortnightly from April to July 2009 for the Structural Engineer and every other day during the first two weeks of July 2009 for the Surveyor to go in. In respect of the former it was only the intervention of the Mortgagee which resulted in access being given. These were serious matters because one concerned roof spread and the structural integrity of the building, the other was water pouring into the upholstery business downstairs. Mr. Dodds had asked for access so that he could inspect on many occasions, and been given the run around by the Lessee.

Clause 4(f)

23. Mr Dodds said that the current tenants have been in possession for about a year, they are friends of the Lessee and are in the building trade. He was fairly sure that they were not in a relationship.

Lease Variation

24. Mr Dodds sought a variation of the lease in two ways: firstly to ensure that the Lessee had an obligation to repair the flat roof, and to ensure that it was suitably surfaced so as to provide shelter to the rest of the block; secondly, to ensure that the Lessee took out appropriate insurance cover in keeping with modern standards and that the Lessee provide to the Lessor a copy of the Policy/Policy Schedule/ premium receipt. Both were to ensure that future problems do not arise in the way that they have in the past, as to the flat roof and uncertainty as to whether or not the flat is insured.

Findings

25. Having considered all of the evidence filed and oral evidence given, we make the following findings:

- the lease does not provide that the flat roof is part of the demise
- the lease entitles the Lessor to make repairs to the Block which damage was caused by the Lessee, but the lease does not provide that the Lessee should reimburse the Lessor for costs expended
- the Lessors have not proved that the current Lessee undertook structural repairs to the roof space without the Lessor's permission
- the Lessee started to but failed to make satisfactory repair to the covering of the flat roof, resulting in the ingress of water and damage and damp to the two businesses below
- the Lessee failed to maintain rainwater goods, in particular guttering which took water from the roof terrace
- the demand for payment of Solicitors costs of £747.50 was made on the Friday before the hearing such that the Lessee cannot be said that have failed to pay it
- the demand for payment of Solicitors costs made in November 2008 for £241 should be reduced by 50% as it relates in part to the allegation that the Lessee altered the flat without permission and the demand for payment of the structural engineers costs of £178 should be discounted for the same reason
- the Lessee should have but has not discharged the surveyors costs of £575, but as they have not yet been demanded in accordance with section 21 of the 1985 Act, they are not yet payable and so the Lessee is not in breach of the lease
- the Lessee was not required to give notice for letting the flat as a complete unit
- we were not satisfied that the flat is being used by one family only
- the lease is defective in that it does not include the flat roof as part of the demise and fails to make adequate insurance provision, and so should be varied.

Reasons

26. We give the following reasons for our findings of fact.

The Section 27 Application

27. The first point to make is that a lease must be read as a whole in order to interpret the terms of the agreement reached by the original contracting parties. It is well-settled law that any ambiguity must be resolved in favour of the Lessee. That the parties and their predecessors have conducted themselves in any particular way does

not necessarily assist in the interpretation of the Lease, because parties can and do vary their obligations over time. Simply because parties have assumed various responsibilities in the past does not mean that their conduct should govern the meaning of the original contracting parties.

28. In this case the flat roof is not specifically referred to in *either* the preamble where "the Flat" is defined as "ALL THAT the flat numbered 30a Lyndhurst Road Worthing aforesaid and being on the First Floor of the Block and more particularly described in Part 1 of the Second Schedule hereto" *or* Part 1 of the Second Schedule which refers to "ALL THAT flat on the first floor of the Block shown edged on the plan annexed hereto and shall include ...". We have carefully considered the submission that the inclusion and emphasis of "ALL THAT" is significant but we do not find that it is so, indeed we do not consider that it is significant. "Being" on the first floor which is mentioned in the preamble simply locates it within the building as do the words "ALL THAT flat on the first floor of the BLOCK". It is notably different in meaning to (as an example of a clause) "All that flat located over and using/covering the entirety of the first floor". We have considered the relevance of the plan annexed to the lease, but consider that the plan shows the footprint of the building as a whole and not just the first floor. The lease is ambiguous as to whether the plan relates to the Block or the flat.

29. There are indicators in the lease contrary to the Lessor's arguments: the flat roof/roof terrace is not specifically referred to in the definition of flat whereas the roof and roof space above the flat was so mentioned; the restrictions imposed by the First Schedule make no specific mention of the Lessee's conduct in respect of this, which given the possibilities of nuisance/annoyance/damage to the building and businesses below, is significant; clause 5 of the restrictions suggests that there is a demarcation between the flat and something to which the Lessee has access to but which they must not use, referred to as a "balcony".

30. Further, a deed of variation made on 14th February 2003 provided the Lessees with the "right to use the flat roof over number 40 Selden Road Worthing as a terraced garden". If, as the Lessor, contends the flat roof was already within the demise, the Lessor would have no power to make the grant. It is phrased as a right of way or an easement, and not a restriction on how the roof terrace might be used, which was contended for by the Lessor. Further, if declaratory to give peace of mind the simplest way of doing so would be to add it to the definition of the "flat" under Schedule 2 Part 1.

31. Finally, the layout of the premises – a door leading from the living accommodation to the flat roof – does not assist because there is no evidence that this was in place at the date of the demise. Whilst the

removal of a roof light from the flat roof, and substitute light added to the rear wall of the building suggests that it enabled safer and more convenient use of the flat roof, this does not aid our interpretation of the lease.

32. We have therefore concluded that the flat roof is not demised under the lease with the flat and so not covered by the Lessees repairing covenants under clause 4(a) to "remedy all defects in and keep *the flat* in good and substantial repair", "the flat" being the material limit to liability. Further, whilst clauses 4(b) and 5 entitle the Lessor to gain access to the flat and remedy defects which are chargeable to the Lessee, again recovery of funds is limited to defects to *the flat*. Accordingly in view of our finding that the flat roof is not part of the flat, the sum of £608.32 spent by the Lessor in sorting out the damage to the flat roof is not a sum which is reserved under the terms of the lease.

33. We have carefully considered the wording of section 18 of the 1985 Act in which "service charge" is defined as "an amount payable by a tenant of a dwelling as part of or in addition to the rent". As liability to reimburse in such circumstances is not reserved under the terms of the lease, we have no jurisdiction to assess the reasonableness of sum of £608.32.

34. Whilst we are mindful that clause 4 (e) provides that the Lessee must not "to any part of the Block do anything which might become a nuisance or annoyance or cause damage". So if a sum could be recovered by the Lessor as damages for breach of covenant, we have no jurisdiction to assess this under section 27A of the Act.

The Application for Findings of Breach of the lease

35. In light of our finding that the flat roof was not part of the demise, the alleged breaches arising from a failure to comply with repairing covenants in this regard largely fall away. Accordingly, we will consider in turn all the remaining alleged breaches and adopt the headings and order of page 81 of the bundle.

Clause 3 (c)

36. It is apparent from the expert evidence of Mr. de Silva Structural Engineer, and the oral evidence of Mr Dodds that there have been structural alterations made to the flat. However, there is no evidence of when or by whom they were made. This is pertinent because the breach alleged is that the Lessee failed to get prior written consent of the Lessor to do it. The only evidence which touched on this point was the evidence given by Mr Dodds when he recounted a conversation with the Lessee in which she said that she spent £10,000 rectifying her predecessor's mistakes. Whilst we accept that Mr Dodds has asserted

that the Lessee made the alterations, and that she has not denied it, this absence of denial does not prove the allegation. Whilst it might be assumed that the Lessee's mortgagee had a survey done before lending money secured on the property and that the surveyor should have noted this structural alteration, those assumptions fall short of evidence. We are not therefore satisfied that the appellant made structural alterations to the inside of the flat without the Lessor's prior written permission.

37. However, we are satisfied that the Lessee had re-covered the flat roof with unsuitable material which over time and use of the flat roof allowed water to penetrate, and caused damp and damage to the joists and the upholsterers premises below. This problem was not remedied by the Lessee when she was made aware of it in the summer of 2008. In fact the evidence was that whilst she allowed her contractor to make investigations, she then stopped him doing any remedial work when he advised her of the costs, with the result that there was a hole in the flat roof which was covered by tarpaulin. The upholsterers business below was affected by the ingress of water and the Lessor had no alternative but to effect remedial works, at her cost. This is a **clear breach of 4(e)** of the lease which provides that the Lessee will not "do or permit to be done in.....any part or parts of the Block anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor or occupiers of any other part or parts of the Block". This allegation also forms the basis for the allegation under heading "clause 4(e)". We find that this alleged breach of the lease is established.

Second Schedule Part 1(e)

38. This clause provides that the flat includes "all cisterns, tanks, sewers, drains, sanitary and water apparatus pipes *exclusively serving the Flat*". Whilst it is alleged that the rainwater goods taking water from the roof terrace to a soak away have led to a breach of this clause, we must conclude that having found that the roof terrace is not part of the flat, it cannot be said that the rainwater goods at this location "exclusively" serve the flat. However, from our inspection it is apparent that the gutters serving the flat are poorly maintained. This is in breach of clause 4(a) of the lease which provides that the lessee must "remedy all defects in and keep the flat in good repair and condition", and the definition of "flat" includes "water apparatus and pipes". We find that this alleged breach of clause 4 (a) of the lease is established.

Clause 3(d)

39. Clause 3(d)(i) of the lease provides that the Lessee "is to pay all expenses including Surveyor's costs and the Surveyor's fees incurred by the Lessor for the purpose of or incidental to or in contemplation of the preparation and service of section 146 notice ". Clause 3(d)(ii) provides that the Lessee is to "pay all expenses including Solicitors'

costs and Surveyors' fees incurred by the Lessor of and incidental to the service of all notice and schedules relating to wants of repair to the flat". Clause 3(d)(iii) provides that the Lessee is to pay "all expenses incurred by the Lessor in connection with the recovery or attempted recovery by the Lessor from the Lessee of any monies due to the Lessor under the lease which have not been paid on the due date".

40. In respect of the Solicitor's fees of £988.50, we find that as £747.50 of it had only been demanded from the Lessee on the Friday before the hearing, her failure to pay by the Monday, was not a default. Of the remainder (£241), in accordance with Mr Dodds' evidence, we find that half related to the structural problems, and having determined that this did not arise from a breach of the lease by this Lessee in failing to get the prior written permission that sum is not recoverable. In respect of the remainder (£120.50) this related to advice given in relation to the breach of covenants. Having found that the appellant has been in breach of 4(e), this sum is clearly recoverable under the lease. However, it has not been demanded in the proper form, namely in accordance with section 21 of the 1985 Act, and so in such circumstances the Lessee is not obliged to pay it yet. Accordingly, the appellant is not yet in breach of the terms of the lease and so we do not find that allegation proved.

41. In respect of the Surveyor's fees of £575, these were incurred in the preparation of the report used in these proceedings, and so the Lessee is obliged to pay them under clauses 3(d)(i) and (ii) of the lease. We also find the costs reasonable. However, they are payable only when demanded in the proper format, and as this has not yet occurred, the Lessee's failure to pay does not yet give rise to an breach of the lease.

42. In respect of the Structural Engineers report, as these were incurred as a result of what were claimed to be the predecessor's unauthorised alteration, we do not consider that the Lessor has established a liability to pay for these sums under the terms of the lease.

Clause 5

43. Paragraph 32 of this decision sets out why these sums are not recoverable under the terms of the lease.

Clause 3(f)

44. Although it is alleged that the Lessee failed to give notice of a letting of the premises, clause 3(f) prohibits assignment, transfer, under letting, or parting with *part* of the flat. As it was the Managing Agents evidence that the Lessee had let the whole flat, she is not in breach of clause 3(f).

Clause 4(a)

45. For the reasons set out in paragraph 38, we find this alleged breach to be proved

Clause 4(b)

46. Having heard the oral evidence of Mr Dodds, and having seen some of the correspondence we find that during the first 2 weeks of August 2008 the Lessee repeatedly failed to meet requests for access made of her by the Managing Agent. This failure to grant access occurred from April to July 2009 for the Structural Engineer and every other day during the first two weeks of July 2009 for the Surveyor. We find that the alleged breach of 4(b) is proved.

Clause 4(f)

47. We heard very limited evidence about the current tenants of the flat and we do not consider that we heard sufficient evidence to conclude that they were not living as a "family". Accordingly, we are not satisfied that the allegation is proved.

Application to Vary the lease

48. The Tribunal has jurisdiction to vary the terms of the lease pursuant to section 35 of the 1987 Act, where the lease fails to make satisfactory provision. As the jurisdiction permits an alteration of the terms of an agreement reached at arms length and with equal bargaining power, it is proper to be cautious about varying the lease. We consider that the provision does not permit a general "improvement" of leases, but only where the lease is defective or unworkable.

49. In this case the Lessor proposes variations in respect of the Lessee's obligation to keep in repair the flat roof and to ensure that it is suitably surfaced. Further, that the insurance covenant be supplemented so that the Lessee must take out a comprehensive policy and to provide a copy of the documents to the Lessor.

Insurance

50. We have considered the wording proposed by the Lessor, and consider the request in the context that the Lessee is responsible for the roof and first and second floor structure, and that there is no general service charge clause. We accept that the lease is defective in not providing that the Lessee should provide a copy to the Lessor, to show that the flat is insured. Further, that the Lessees obligation to insure is narrow in the risks which are required to be covered. We do not consider that professional costs should be specifically added as industry practice is to include them.

51. Accordingly, we find that the lease should be varied so that clause 4(c)(i) reads "insure and keep insured the Flat against fire and other such risks as the Lessee acting reasonably shall determine in the sum equal to the full reinstatement value thereof and to cause all monies received by virtue of such insurance forthwith to be laid out in the rebuilding and re-instatement of the Flat and to supply not more frequently than once per annum a copy of the policy, the policy schedule, and the premium receipt".

Repairing Obligation

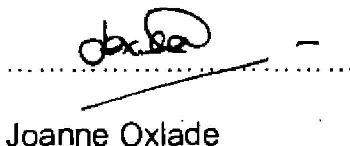
52. The Lessor had proposed that the lease be varied to make specific provision for the Lessee to keep the whole of the flat roof in repair and to suitably surface it.

53. However, in light of our findings above we conclude that to do so would be unsatisfactory. We consider it more appropriate to include in the definition of the flat found at Part 1 of the Second Schedule the words "(f) the whole of the flat roof over 40 Selden Road and 30 Lyndhurst Road, Worthing". This reflects the Lessees historic and current exclusive access to and usage of the flat roof, and that it is incumbent on users to use it appropriately and to maintain and repair it.

54. By specifically including the flat roof in the definition of "flat", no further variation is required, because the lease makes adequate provision for an obligation to maintain, and to ensure that no nuisance, or annoyance or damage occur. Accordingly, we find that a variation of the lease under section 35 would be appropriate.

Conclusion

55. It follows that we have concluded that we do not have jurisdiction under section 27A of the 1985 to determine the payability of service charges; that we have made some findings of breach of the lease pursuant to our powers under section 168(4) of the 2002 Act; that we have varied the lease in respect of the definition of the flat and the insurance clause.



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Joanne Oxlade

11th November 2009