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DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002 SECTION 168(4)

REF: LON/00BJ/LBC/2011/0101

PROPERTY: 36A, OUSELEY ROAD, LONDON SW12 8EF

Applicant: BRIAN A.F. AGNEW

For the Applicant

Respondent (1) CHRISTOPHER TWIGG
(2) RACHEL BASEBY

For the Respondent

Date of Application: 24 October 2011

Date of Directions for Preliminary Hearing: 1 November 2011

Date of hearing of Preliminary Issue: 30 November 2011

Date of Decision on Preliminary Issue: 9th December 2011

Members of Tribunal: Mr S Shaw LLB (Hons) MCI Arb
M. Mathews FRICS

DECISION

Introduction

1. This case involves an application by Mr Brian Agnew ("the Applicant") in respect of 36A, Ouseley Road, London SW12 8EF ("the Property").

2. The property comprises the ground and basement floors of a Victorian house. Those floors make up one flat of which the Respondent, namely Christopher Twigg and Rachael Baseby ("the Respondents") are the leasehold owners. The first and second floors are 36 Ouseley Road and they comprise a second floor flat of which the Applicant is the leasehold owner. The freehold of the house of which the two flats form part is jointly owned by both the Applicant and the Respondents who appear in the Land Registry office copy as the registered proprietors.

The application

3. Section 168(4) of the Commonhold and Leasehold Reform Act 2002 provides that:

   "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 covenant or condition in the lease has occurred."

4. The Applicant had made just such an application and seeks a determination from the Tribunal that the Respondents are in breach of covenants in the lease. Such applications are often brought to the Tribunal as a preliminary to the service of a Section 146 Notice pursuant to the Law of Property Act 1925, and an application to the Court for a possible order for forfeiture of the lease.

5. After the application had been made, the Tribunal wrote to the parties by letter dated 1 November 2011 indicating that a preliminary hearing would take place to determine whether the Tribunal had jurisdiction in this matter. The letter stated:

> *"The issue is whether one of two joint freeholders may bring proceedings under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 against the other joint freeholder for breaches of covenant in that other freeholder's lease."*

6. The letter provided that, at the hearing, the parties to the proceedings may be heard in person or represented by a lawyer or other person. There were some difficulties in fixing the date for the hearing but ultimately a date was fixed, although it was not a convenient date for the Applicant. By email dated 28 November 2011, he confirmed to the Tribunal that he was happy for the Tribunal to determine the issue of jurisdiction without the presence of either himself or the Respondents. In the event the Respondents did in fact attend the hearing, but were unable to expand in any way on the legal issue before the Tribunal, beyond that which had already been submitted to the Tribunal and seen by the Applicant in the context of the Respondents' solicitors submissions. The Tribunal elected to proceed with the matter in all the circumstances.

7. The Applicant's written submissions in respect of jurisdiction are essentially those contained within his email to the Tribunal dated 22 November 2011. In that email he states that:

> *"I'm (obviously) not a lawyer, but I believe that the Tribunal should have jurisdiction in this instance, given that it's a shared freehold/ leasehold agreement and one party should be able to enforce the terms of the lease on the other."*

8. He cites clause 3(6) of the Lease (which deals with an entitlement on the part of the lessor to have access to draw up a list of alleged defects in respect of repair, with concomitant rights to enter and make good those repairs if not carried out by the lessee). He states that there are clearly responsibilities between the lessor and the lessee and if the lessor is unable to enforce them, then the structure and value of the building will deteriorate, as one party could veto the carrying out of works.

9. The Respondents' arguments are essentially contained within a letter dated 22 November 2011 written to the Tribunal by their solicitors, namely Birketts LLP. That letter points out that under Section 168(4) as recited above, it is *"a landlord"* who is entitled to make the application for a determination. By virtue of Section 169(5) of the Act the expression *"landlord"* has the same meaning as in Chapter 1 of the Act. In Chapter 1 at Section 112(5) it is provided that:

> *"Where two or more persons jointly constitute ... the landlord ... any reference in this chapter to the landlord ... is ... a reference to both or all of the persons who jointly constitute the landlord ..."*

10. On behalf of the Respondents the point is made that the freehold of the property is held in the joint names of both the Applicant and the Respondents and accordingly since the reference to the landlord is *"a reference to both or all of the persons who jointly constitute the landlord"*, it is not open to the Applicant to make the application to the Tribunal in his sole name.

11. Moreover, the Respondents' solicitors refer to an earlier decision of the Tribunal dated 12 December 2007 in the case for which the reference is CHI/45UC/LBC/2005/0005. In that case the Tribunal, dealing with a similar point, decided that:

"By virtue of Section 112(5), the application could only be made by all joint landlords acting together, and therefore the Tribunal concluded that Mr Nixon was not entitled to make the application acting alone. This meant that the Tribunal did not have jurisdiction to proceed to determine whether there had been a breach of covenant under Section 168(4)."

Findings of the Tribunal

12. For the reasons stated on behalf of the Respondents as set out above, the Tribunal has concluded that it does not have jurisdiction to entertain this application made by one freeholder alone. This is a conclusion reached by the Tribunal with some unease because, as ventilated at the hearing, it appears to produce a curious result. The purpose of Section 168(4) would appear to be to enable the Tribunal to make a factual finding as to whether or not there has been a breach of covenant. In order so to do, it is not clear what is added to the application by having all named registered proprietors added as parties to the application. Indeed, on one construction of the Act, it might be contended that this is unnecessary. This would be because Section 168(4) expressly refers to "**a** landlord under a long lease ...". Using the indefinite rather than the definite article. The definition in Section 112(5) covers a situation where two or more persons jointly constitute "... **the** landlord ...". In such circumstances "... any reference in this chapter to the landlord ... is a reference to both or all of the persons who jointly constitute the landlord ..., as the case may require."

13. On this reading, it might be argued that the definition in Section 112(5) covers references to "*the landlord*" but not "*a landlord*" in the Act. Section 168(4) could have used the definite rather than the indefinite article, but Parliament chose not to do so.

14. After some reflection, the Tribunal considers that this alternative construction is strained. In addition, if any application for forfeiture under Section 146 of the Act were brought, all freeholders would have to be party to such an application, which may be why consistency is sought in the 2002 Act. However it does result in the unsatisfactory situation to be found in this case, which is that in a small property of this kind where the freeholders are the leaseholders as well, it is not possible to obtain a determination from the Tribunal as to an alleged breach of covenant or covenants.

15. Nonetheless this is the result of the wording of the Act and as indicated above, the Tribunal determines that it has no jurisdiction to deal with this application, made by one only of the joint landlords.

16. Both in the written representations on behalf of the Respondents and at the hearing, an application was made on behalf of the Respondents for the Tribunal to make an order against the Applicant pursuant to paragraph 10(2)(b) of Schedule 12 of the Act on the basis that he was invited prior to the hearing of the application to withdraw his application, and declined to do so, and that to proceed in the circumstances was either an abuse of process or unreasonable behaviour on his part. The maximum amount capable of being ordered is £500 under this head. The Respondents in person attended and the second Respondent in particular suffered lost earnings as a result.

17. The Tribunal does not consider this a case appropriate for the making of an order under Schedule 12 of the Act. The issue of costs in this regard is discretionary and the Tribunal does not consider that the outcome of the application was so predictable as to render the making of the application either an abuse or unreasonable. Indeed in some respects the result produces the anomaly referred to above. Although the Tribunal appreciated the courtesy of the personal attendance at the hearing by both Respondents, such attendance was not entirely necessary and the Respondents were unable to add in any particular way to the written representations on the law already made on their behalf. Accordingly, no further order as to costs is made.

Legal Chairman: S. Shaw

Dated: 9th December 2011