



REF/2015/0625

**PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

CHEERUPMATE2 LIMITED

APPLICANT

and

FRANCO DE LUCA CALCE

RESPONDENT

**Property Address: Land on the North side of 2 Railway Bank, Hyde
Title Number: GM710548**

Before: Judge Michell

**Sitting at: Piccadilly Exchange, Manchester
On: 18th July 2016**

Applicant Representation: Mr Ahmed Hassay, employee of the Applicant
Respondent Representation: Mrs Simeone, lay representative

DECISION

*APPLICATION TO CLOSE LEASEHOLD TITLE-ALLEGED PEACEABLE RE-ENTRY FOR
NON-PAYMENT OF GROUND RENT-SS.166 & 167 COMMONHOLD AND LEASEHOLD
REFORM ACT 2002- WHETHER TENANT LIABLE TO PAY THE RENT- WHETHER*

LANDLORD ENTITLED TO RE-ENTER UNDER THE TERMS OF THE LEASE-WHETHER LANDLORD ENTITLED UNDER S.167 TO EXERCISE A RIGHT OF RE-ENTRY

Cases referred to

Ravenseft Properties Ltd v. Hall [2001] EWCA Civ 2034

Chasewood Park Residents Association v. Kim [2010] EWHC 579 (Ch)

1. The Applicant, Cheerupmate2 Ltd has applied to HM Land Registry to close the leasehold title number GM710548. This is the leasehold title to land described on the register as land on the north side of 2 Railway Bank, Hyde. It is held under an Underlease dated 10th July 1948 (“the Underlease”). The Applicant is the successor in title of the underlessor and is the registered proprietor of a leasehold title number GM221765, which includes the reversion expectant on the term granted by the Underlease. The Applicant claims to have forfeited the term of the Underlease by peaceable re-entry. The Respondent is the registered proprietor of title number GM710548. He objects to the application and asserts that the Underlease has not been forfeited.

2. The Underlease was made between Mary Annie Smith as underlessor and Thomas Stuart as underlessee. The land demised by the Underlease is described as follows

“All That dwellinghouse situate in and numbered 121 Croft Street, Hyde aforesaid (being part of the property comprised in the recited Assent) Together with the land forming the site thereof and used and occupied therewith and the site of the yards ways and outbuildings thereto And Together with the appurtenances thereto and in particular (so far as the Underlessor can grant the same) and in common with the Underlessee and her heirs and successors in title a right of way over and along the passage at the rear of the adjoining premises comprised in the Lease ...”

3. The Underlease demised the premises for a term of 900 years from 10th July 1948.

4. The Underlease reserves a rent. The words of reservation are as follows

“Yielding and Paying therefore during the term hereby granted the yearly rent of Two pounds by equal half yearly payments on the twenty fifth day of March and the twenty ninth day of September in every year clear of all deductions (except landlord’s property tax) the first payment or a proportionate part thereof to be made on the twenty ninth day of September next”.

5. The Underlease includes at clause 3 a forfeiture clause. The clause reads as follows (so far as is material)

“Provided Always and it is hereby declared that in case the said rent hereby reserved or any part thereof shall at any time or times ... be in arrear for the space of two years after the same shall have become due (whether any formal or legal demand thereof shall have been made or not) ... then and in any such case it shall be lawful for the Underlessor or any person or persons duly authorised by her in that behalf into and upon the said land and premises hereby demised or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in her former estate anything herein contained to the contrary notwithstanding and thereupon the term hereby created shall cease...”

6. The leasehold interest created by the Underlease was registered at HM Land Registry on 19th February 1979 under title number GM171613. By a transfer dated 17th November 1995 the then registered proprietor of title number GM171613, Tameside Metropolitan Borough Council transferred to David and Caroline Mellors the larger part of the land in that title. The land transferred was registered under title number GM710548 and it is that land of which the Respondent is the current registered proprietor.

7. The leasehold reversion immediately expectant on the term created by the Underlease is registered at HM Land Registry under title number GM221765. The proprietorship register shows the Applicant as having been registered as proprietor on 9th March 2015 and that the price stated as having been paid on 4th March 2015 was £2,000. For reasons which are not clear from the evidence, the proprietorship register was not altered to show the Applicant as proprietor until the end of March. I assume that it was then altered retrospectively to show the Applicant as the proprietor from the date on which its application for registration was entered by HM Land Registry in the Day List.

8 Section 166 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) provides (so far as is relevant) as follows:

“(1) A tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment, and the date on which he is liable to make the payment is that specified in the notice.

(2) The notice must specify

- (a) the amount of the payment,
- (b) the date on which the tenant is liable to make it, and
- (c) if different from that date, the date on which he would have been liable to make it in accordance with the lease.

(4) If the date on which the tenant is liable to make the payment is after that on which he would have been liable to make it in accordance with the lease, any provisions of the lease relating to non-payment or late payment have effect accordingly.

(5) The notice

- (a) must be in the prescribed form, and
- (b) may be sent by post.

(6) If sent by post, it must be addressed to the tenant at the dwelling ...

(9) In this section –

- “dwelling” has the same meaning as in the [Landlord and Tenant Act 1985]
- “long lease” has the meaning given by sections 76 and 77 of this Act ...”.

A “dwelling” means a building or part of a building occupied or intended to be occupied as a separate dwelling together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it – Landlord and Tenant Act 1985 s. 38. “Long lease” is defined in section 76 of the 2002 Act so as to include a lease for a term certain exceeding 21 years.

9. Both parties accepted and proceeded on the basis that the Underlease is a “long lease of a dwelling” within section 166 of the 2002 Act. The demised premises are described in the Underlease as being a dwellinghouse and “the site of the yards ways and outbuildings thereto”. That description is apt to describe a “dwelling” within the definition in Landlord and Tenant Act 1985 section 38. The Underlease is for a term certain exceeding 21 years. It was not submitted that the Underlease is no longer a long lease of a dwelling because there is now no dwelling on the land.

10. Regulation 2 of the Landlord and Tenant (Notice of Rent)(England) Regulations 2004 (“the 2004 Regulations) makes provisions as to the content and form of a notice under section 166 of the 2002 Act:

- (1) A notice under subsection (1) of Section 166 of the 2002 Act (requirement to notify long leaseholders that rent is due) shall contain (in addition to the information specified in accordance with paragraphs (a) and (b) of subsection (2) of that section and, if applicable, paragraph (c) of that subsection) -

- (a) the name of the leaseholder to whom the notice is given;
- (b) the period to which the rent demanded is attributable;
- (c) the name of the person to whom payment is to be made, and the address for payment;
- (d) the name of the landlord by whom the notice is given and, if not specified pursuant to subparagraph (c) above, his address; and
- (e) the information provided in the notes to the form set out in the Schedule to these Regulations.

(2) A notice under subsection (1) of section 166 of the 2002 Act shall be in the form set out in the Schedule to these regulations”.

11. The form set out in the schedule to the 2004 Regulations was altered on 26th April 2011. The alteration was to the wording of one of the notes to leaseholders set out on the form. The relevant note used to read as follows

“Section 167 of the Commonhold and Leasehold Reform Act 2002 and regulations made under it prevent your landlord from forfeiting your lease for non-payment of rent, service charges or administration charges (or a combination of them) if the amount owed is £350 or less, or none of the unpaid amount has been outstanding for more than three years”.

The note as altered reads

“Section 167 of the Commonhold and Leasehold Reform Act 2002 and regulations made under it prevent your landlord from forfeiting your lease for non-payment of rent, service charges or administration charges (or a combination of them) unless the amount owed is more than £350 or consists of or includes, an amount that has been outstanding for more than three years”.

12. Section 167 of the 2002 Act provides

“(1) A landlord under a long lease of a dwelling may not exercise a right of re-entry or forfeiture for failure by a tenant to pay an amount consisting of rent, service charges or administrative charges (“the unpaid amount”) unless the unpaid amount

- (a) exceeds the prescribed sum, or
- (b) consists of or includes an amount which has been payable for more than a prescribed period.

(2) The sum prescribed under subsection (1)(a) must not exceed £500.”

The period prescribed for the purposes of s. 167(1)(b) is three years – Rights of Re-entry and Forfeiture (Prescribed Sum and Period)(England) Regulations SI 2004 3086.

13. The Applicant sent to the Respondent a handwritten letter dated 12th March 2015. The letter stated that the Respondent was the registered owner of the former 121 Croft Street “save for a small dog-eared portion of garden that extends behind 119 Croft Street”, asked what steps the Respondent was going to take to comply with the terms of his underlease with respect to the erection and maintenance of a dwellinghouse, asked if he accepted he was in breach of covenant and then stated

“We inform you that we are your new immediate landlord”.

Under an illegible signature was written the name of the Applicant and the address, “Shed Street Farm, Shed Street, Colne BB8 8AH”. I was informed by the Applicant’s representative that this is the address of the Applicant’s registered office.

14. Enclosed with the letter was what was described in the letter as a “s.166 Rent Demand Notice”. The notice was in the form of the prescribed notice prior to the alteration to the notes made in 2011. The notice required the Respondent “to pay rent of £11 on 20th April 2015” and said that the rent “is payable in respect of the period 25/3/2010 to 25/3/2015 (five half years rent payable in advance). In accordance with the terms of your underlease the amount of £1 is/was due on 25/3/2010 (plus 5 years arrears already accrued £10)”. After the printed words “Payment should be made to (insert name of landlord(s) or, if payment to be made to an agent, the name of agent) at (insert address), was written in manuscript

“Landlord Cheerupmate2 Ltd, in cash, at Shed Street farm, Shed Street, Colne BB8 8AH Lancashire

Your underlease is that dated 10 July 1948 between Mary Annie Smith to Thomas Stuart”.

On the next line, after the printed words “This notice is given by (*insert name of landlord(s) and, if not given above, address*) was written in manuscript

“We inform you that we are your new landlord and our address is as above for correspondence”

These words are followed by an illegible signature.

15. On 18th March 2015 the Applicant made an application to the First-tier Tribunal (Property Chamber)(Residential Property) for a determination under section 168(4) of the

2002 Act that a breach of covenant in the Underlease had occurred. The details given in box 5 of the covenant alleged to have been breached were as follows

“The Underlessee is required to ... keep dwellinghouse in good and sufficient repair or replace with equal value as stated in Clause 2 of the underlease dated 10 July 1948 between Mrs Mary Annie Smith to Mr Thomas Stuart”.

Although the Residential Property Tribunal subsequently on 8th May 2015 made a determination that the Respondent was in breach, it did so on paper and without hearing anything from the Respondent. The determination was subsequently set aside.

16. On 21st April 2015 the Applicant purported to peaceably re-enter 121 Croft Street for breach of the covenant to pay rent. On the same day, it sent an application in Form AP1 to HM Land Registry, applying to close the leasehold title on the grounds that the Underlease had been determined by the exercise by the Applicants of a right to re-enter for non-payment of rent.

17 The Applicant was not entitled to re-enter for the following three reasons.

18. Firstly, the Respondent was not as at the date of the purported re-entry liable to make the payment of rent under the Underlease because the Applicant had not given him a notice under Section 166 of the 2002 Act in the prescribed form. Compliance with section 166 is a condition precedent to the tenant’s liability for ground rent – see *Chasewood Park Residents Association v. Kim [2010] EWHC 579 (Ch)*. The notice given did not include the notes required to be given in the wording used in the prescribed form since 2011. Section 166(5) states clearly that the notice must be in the prescribed form. The Landlord and Tenant (Notice of Rent)(England) Regulations 2004 state that the prescribed notice “shall be” in the form set out in the Schedule to the regulations. The notice served was not in the form set out in the Schedule to the regulations. The requirements of Section 166 and of the 2004 Regulations were therefore not complied with.

19. I was not referred to any authority concerning the effect of a failure to serve a notice complying in all respects with the prescribed form and I am not aware of any such authority. There is authority as to the validity of a notice served under section 20 of the Housing Act 1988 – *Ravenseft Properties Ltd v. Hall [2001] EWCA Civ 2034*. That case does not provide

any direct assistance because the regulations made under the Housing Act 1988, the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988 SI No. 2203 contain the following provision

“In these Regulations ... any reference to a numbered form is a reference to the form bearing that number in the Schedule to these Regulations, or to a form substantially to the same effect”.

The issue for the Court of Appeal to decide was whether the notice under section 20 was “substantially to the same effect” as the form in the Schedule to the 1988 Regulations. There is no provision in Section 166 of the 2002 Act or in the 2004 Regulations permitting the service of a notice “substantially to the same effect” as the prescribed form. There is a statutory obligation to use the prescribed form and until that prescribed form is used, the tenant is not liable for the rent.

20. Secondly, even if the Applicant had given the notice in the prescribed form, it would not have been entitled to forfeit under the terms of the Underlease. The Underlease provides that the underlessor may re-enter if

“rent hereby reserved or any part thereof shall at any time or times ... be in arrear for the space of two years after the same shall have become due”.

Section 166(4) provides that

“If the date on which the tenant is liable to make the payment is after that on which he would have been liable to make it in accordance with the lease, any provisions of the lease relating to non-payment or late payment have effect accordingly”.

The date on which the Respondent would have been liable to make the payment of rent had the section 166 notice been in the prescribed form would have been 20th April 2015. That is a date after that on which the Respondent would have been liable to make it in accordance with the terms of the Underlease. The effect of section 166(4) is that the proviso for re-entry in the Underlease is to have effect as if the rent was due on the date specified in the section 166 notice, being 20th April 2015. It follows that the right to forfeit for non-payment of the rent claimed by the section 166 notice would not have arisen until 2 years from 20th April 2015. The right to re-enter under the terms of the Underlease had not arisen as at the date of the purported peaceable re-entry.

21. Thirdly, the right of re-entry could not be exercised on the date on which the Applicant purported to exercise it because of the provisions of section 167 of the 2002 Act.

The unpaid amount did not exceed £350. The Applicant could therefore only have exercised a right of re-entry (supposing that such a right had arisen under the terms of the Underlease) if the arrears consisted of or included an amount which had been “payable” for more than 3 years. Rent cannot be said to be “payable” for the relevant period unless the tenant was liable to pay the rent throughout that period. Section 166 of the 2002 Act clearly provides that the tenant is not liable to pay the rent unless and until a notice in the prescribed form is served on him and upon service of the form, he becomes liable to pay the rent on the date specified in the notice. The Respondent was not liable to pay the rent claimed unless and until a notice was served under section 166 and then became liable to pay that rent on the date specified in the notice. The rent became “payable” for the purposes of section 167 of the 2002 Act on the date specified for payment in a valid notice served under section 166. As there was no valid section 166 notice, the rent had not been payable for more than three years on the date on which the Applicant purported to re-enter. Even if the notice served by the Applicant had been a valid section 166 notice, the rent would still not have been payable for more than 3 years on the date on which the Applicant purported to re-enter.

22. The Applicant’s representative submitted that I should construe sections 166 and 167 of the 2002 Act in such a way as not to require a landlord to have to wait for 3 years from the date of service of a notice under section 166 before he is able to forfeit for non-payment of rent but so as to permit the landlord to forfeit where under the terms of the lease and without regard to section 166, the rent became due more than three years prior to the re-entry. He submitted that to require the landlord to wait for three years from the date of service of a section 166 notice before permitting him to re-enter would be unjust.

23. I reject these submissions. Firstly, I do not consider that it is possible on the clear wording of the language of the sections to construe section 167 as permitting the landlord to re-enter where the rent would have been payable under the terms of the lease for more than three years but is not payable because of the terms of section 166. Secondly, I do not accept that there is an injustice in requiring the landlord to wait three years from the service of a section 166 notice before re-entering. It is entirely in the hands of the landlord whether or not the requirement to serve a section 166 notice delays the date on which he can re-enter for non payment of rent. There is nothing in the legislation to prevent a landlord from serving a section 166 notice prior to the date on which the rent becomes due under the terms of the lease and giving as the date of payment under the notice the date on which the rent becomes

due under the lease. Indeed, section 166(4) specifically recognises that the date for payment specified in the notice may be the date for payment specified in the lease. If the landlord does serve a section 166 notice requiring payment on a date which is the date for payment specified in the lease, the requirement to serve a section 166 notice will not have delayed the ability to forfeit.

24. Furthermore, it appears to me to be the clear effect of the legislation that all means of enforcement of the liability to pay rent are made dependant on the service of a section 166 notice. There is no liability to make a payment of rent until a notice is served and when a notice is served, the liability then arises on the date specified in the notice. Prior to the service of the notice, the tenant is not under a liability to pay the rent. Plainly, steps to enforce payment of the rent cannot be taken until the liability to pay the rent has arisen. The landlord is not entitled to his rent until the tenant becomes liable to pay it. Parliament has provided that a landlord who is entitled to rent (in a sum not exceeding £350) is not to be able to forfeit for the non-payment of the rent unless the rent has been “payable” for three years. That must mean in my judgment, unless the tenant has been under a liability to pay that rent for three years. The liability of the tenant to pay the rent arises on the date specified in the section 166 notice. The landlord must then wait three years from that date before he can forfeit for the non-payment of the rent demanded by that notice.

25. As the Applicant’s right of re-entry for non-payment of rent has not arisen for the three reasons set out above, I shall direct the Chief Land Registrar to cancel the Applicant’s application to close the Respondent’s title. The Applicant has not forfeited the lease.

26. My preliminary view as to the costs of the proceedings is that the Applicant must pay the Respondent’s costs. Any party who wishes to submit that some different order should be made as to costs, must serve written submissions on the Tribunal and on the other party by 5pm on 5th August 2016.

BY ORDER OF THE TRIBUNAL

Michael Mitchell

DATED this 25th day of July 2016



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FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

CHEERUPMATE2 LIMITED

APPLICANT

and

FRANCO DE LUCA CALCE

RESPONDENT

Property Address: Land on the North side of 2 Railway Bank, Hyde

Title Number: GM710548

ORDER

The Tribunal orders that the Chief Land Registrar do cancel the application of the Applicant, Cheerupmate2 Limited dated 22nd April 2015 to close the registered leasehold title GM710548.

Dated this 25th July 2016

Michael Michell

BY ORDER OF THE TRIBUNAL

