



**Residential
Property**
TRIBUNAL SERVICE

**LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

Case Reference: LON/00AM/LBC/2006/0059

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

Applicant: Globedex Limited

Respondent: Mr B Povarsky

Premises: Flat A, 14 Castlewood Road, London N16 6DW

Date of Application: 6 September 2006

Date of Hearing: 20 December 2006

**Appearances for Applicant: Mrs L Kinnerney – Director
Mr P Lannen - Director**

**Appearances for Respondent: Mr M Biberfeld – Agent and Friend
Mr M Burns – Agent and Friend**

Also in attendance:

**Leasehold Valuation Tribunal: Mrs F R Burton LLB LLM MA
Mr N Martindale
Mrs A Moss**

Date of Tribunal's Decision: 29 January 2007

FLAT A, 14 CASTLEWOOD ROAD, LONDON, N16 6DW

BACKGROUND

1. This was an application dated 9 September 2006 by the Lessor of the subject property for the determination that a breach of a covenant or condition in the lease had occurred, pursuant to s 168(4) of the Commonhold and Leasehold Act 2002 (“the Act”).

2. On 12 October 2006 the Leasehold Valuation Tribunal issued its standard Directions having considered that a Pre Trial Review was not necessary. The Respondent, Mr B Povarsky, who is resident overseas, is represented in this matter by Rabbi M Biberfeld.

3. The following issues to be determined were identified as set out in the application, which was directed to stand as the Applicant’s statement of case:

- Refusal of access to the freeholder to maintain the rear boundary in accordance with the freeholder’s obligation under the Lease
- Refusal of access to electricians to check the wiring in accordance with the freeholder’s rights of access for such purposes under the Lease
- Permitting use of the subject flat for use as a children’s play space and storage area for toys for another property contrary to the terms of the Lease
- Failure to implement the terms of a court order by consent

4. The Directions set the case down for hearing on Wednesday 20 December, prior to which the Tribunal required the usual exchanges of information and relevant copy documents, including an Office Copy of the Leasehold Title, and that the Applicant should collate a bundle of documents which the Applicant or Respondent

Mr Biberfeld since their confidence had been eroded by the sequence of events they had experienced in relation to the subject flat, when inspections had been repeatedly cancelled on the flimsiest of excuses. A visit arranged for the morning of 7 November 2002 had been cancelled by telephone at 8.50 a.m on that day. A request had been made for a replacement inspection to take place on 2 December 2002, which had not taken place, whereupon convenient dates were requested by letter of 10 December 2002 (which apparently was not replied to). A further request was made on 20 May 2003 for an appointment at 9 a.m. on 29 May 2003 but this was refused (and an electrician's certificate offered instead) on 21 May 2003. This was followed by a further letter from Mrs Biberfeld on 28 May 2003 declining the electrician's visit and payment of any fee for it, and promising the electrician's certificate which she stated she thought "we had already sent". Mr Lannen replied to this on 29 May 2003, rearranging the appointment for 5 June 2003 at 9 a.m. and declining the suggested certificate since their engineer had confirmed that he had not received any such certificate and in any case had not approved any electrical contractor other than the Lessor's own to conduct a fire risk assessment. The letter pointed out that Mr Biberfeld had been given plenty of notice on the earlier occasions and that if access was not given to which the Lessor was entitled under the terms of the Lease redress would be sought from the court. This appointment was also declined (this time on too short notice to cancel the electrician's attendance) on the grounds that Mr and Mrs Biberfeld were preparing for a holiday starting on the evening after the proposed inspection, and when the electrician attended he was duly refused access by Mrs Biberfeld. Following notification to the Lessor's engineer that the occupants of the flat above had reported that their floors were noticeably warmer when the kitchen lights in the flat below were on, a further appointment was arranged for 10 July 2003, which was refused on the ground that the Biberfelds were carrying out new wiring work. Further correspondence on the file revealed that the Lessors were still unsuccessfully seeking access for the purpose of inspecting the electrical works in the subject flat on 6 December 2004.

10. Finally, Mrs Kinnerney said that Clause 3(1) of the Consent Order had required Mr Biberfeld to pay a licence fee for a retrospective licence for the unauthorised works and to pay for "legal charges and disbursements and the third party surveyor's fees and disbursements incidental to the grant of the licence" but that

7. Mrs Kinnerney said that when the Lessee purchased the subject flat there was a boundary fence in place which had been erected by the occupiers of 15 Craven Walk during building works in 1992, that this was still in place in August 1998 as proved by photographs on the file, and that a section was still in place at the present time along the boundary with 13 Craven Walk. The fence had replaced an earlier boundary wall of brick (which had predated the Applicant's acquisition of 14 Castlewood Road in 1988 and had apparently fallen down) and when replacing the wall with a fence the occupiers of 15 Craven Walk had pushed the rubble onto the Castlewood Road side of the boundary, so that repeated requests had had to be made for removal of the rubble. She said that she believed that the freeholder, and Lessor of the subject property had a duty to maintain the boundaries of 14 Castlewood Road pursuant to Clause 4(3) of the Lease, and that the open access between 14 Castlewood Road and 15 Craven Walk had been created for the sole convenience of Mr and Mrs Biberfeld who were in reality the beneficial owners of the subject flat which they used, together with the rear garden, as they saw fit.

8. Mrs Kinnerney said that the residents of the Upper Ground Floor flat at 14 Castlewood Road (Flat B) had for some years experienced noise and nuisance, sometimes late at night, coming from the rear garden as a result of its use by the occupants of 15 Craven Walk, and their guests and tenants, and that guests or tenants staying in the subject flat regularly used the rear garden to access 15 Craven Walk, as did Mr and Mrs Biberfeld when visiting the subject flat. A further noise nuisance was created by a gate on the boundary which is regularly left open and which swings and bangs in windy conditions, keeping the Lessors awake. She said they had written to Mr and Mrs Biberfeld requesting them to keep this gate shut for the reasons stated.

9. Mrs Kinnerney continued that there was concern about an electrical inspection of the subject flat (which it had proved impossible to arrange despite repeated attempts) as the unauthorised alterations to the subject flat had included the installation of recessed ceiling lights in a ceiling void which had created a fire hazard. Following the legal proceedings mentioned above it had been agreed that Mr Biberfeld would undertake remedial works and pursuant to Clause 2(9) and 2(12) of the Lease (and pursuant to the Consent Order) the Applicant was entitled to inspect these. The Applicant company was not satisfied with any certificates submitted by

wished the Tribunal to read and refer to at the hearing, and should send one copy to the Respondent and four copies to the Tribunal by Thursday 9 December.

THE HEARING

5. At the hearing, Mrs L Kinnerney and Mr P Lannan, Directors, represented the Applicant company and the Respondent was represented by Mr Biberfeld. It was established that the subject property was a converted house divided into 3 flats and that the basement flat (Lower Ground Floor Flat A) which was purchased by the Lessee in June 1998 was held on a Lease for a term of 99 years from 29 September 1987. Mr Biberfeld and his wife, who live in an adjacent property (15 Craven Hill), manage this flat for the Lessee. The remaining flats in the building were retained by the Lessor company, the freeholder, and the Directors are the sole shareholders in the Applicant company. David Glass Associates, local managing agents, are the current managers of the property.

THE APPLICANT'S CASE

6. For the Applicant company, Mrs Kinnerney (with periodic assistance from Mr Lannen) said that the Lessee, a foreign national residing permanently abroad, had never communicated directly with the freeholder or to her knowledge ever visited his investment flat, which was managed for him by his business associates Mr and Mrs Biberfeld, who were property developers, and whose home, 15 Craven Hill, shared a rear boundary with the subject property. The owner of 15 Craven Hill was a Mr Meisels, Mrs Biberfeld's brother. Shortly after the purchase of the subject flat Mrs Biberfeld had supervised major unauthorised structural alterations to the subject flat and had opened up and altered the rear boundary fence in order to create open access between the two properties, 14 Castlewood Road and 15 Craven Hill. This had created a lengthy court dispute in 1998-2000 between the Applicant company and the Lessee (which had been conducted on the Lessee's behalf by Mr Biberfeld) and which had culminated in a Consent Order of the Court on 18 September 2000 the terms of which Mr Biberfeld has failed to observe.

he had not done so. Some of the charges had arisen having been caused to the Applicant company because of the failure of Mr Biberfeld to pay the costs for which he was obligated under the Consent Order and the LVT had, in their Decision dated 14 June 2006, following a hearing on 10 April 2006, determined that these costs were reasonable and payable by Mr Biberfeld but he had still not paid them. She said that the Applicant company had attempted to progress the retrospective licence in June 2004 by instructing solicitors, Lattey & Dawe, who had estimated their fees at £750+ VAT. These solicitors had written to the Lessee on 7 September 2004 with a reminder on 22 September 2004 requesting to be put in funds, or given a suitable undertaking, for the fees but no reply had ever been received either from the Lessee himself or from Mr Biberfeld when such requests were renewed to him as the Lessee's agent. In summary she said that Mr Biberfeld's refusal to answer correspondence on most occasions and his failure to honour the terms of the Consent Order had caused many problems in administering the property and commencing overdue remedial works.

11. Mrs Kinnerney said that there had also been problems about access to the rear garden to inspect and reinstate the boundary fence, about access for installation of a new boiler to the flat above (which had caused inconvenience as the engineer had been unable to do the job properly) and further concerns about a sycamore tree which required lopping, and about the removal of unsightly rubbish in front of the subject flat.

12. In summary Mrs Kinnerney said that Mr Biberfeld simply would not cooperate with the Lessors in any way with regard either to the ordinary obligations of the Lessee under the Lease or with processing the retrospective licence for the unauthorised building works for which the Applicant company had had to pay the RICS surveyor themselves but had completely failed to recoup their expenditure from Mr Biberfeld as agent for the Lessee who was responsible for all costs of the retrospective licence. The Lessor now needed to undertake major building works in respect of which they had duly served the statutory notices and were exasperated and out of patience with Mr Biberfeld's intransigent obstruction. Mr Kinnerney said that Mr Biberfeld was a Lessor of property himself and well understood his obligations but simply prevaricated and refused to cooperate in whatever way he could.

THE RESPONDENT'S CASE

13. For the Respondent Lessee, Mr.Biberfeld denied everything that had been said about him or his wife. He said that in seeking access the Lessor had always referred to his obligations under the Court Order, and not the Lease, and he had not therefore realised that he was in breach of any terms of the Lease in declining access to the electrician on the dates proposed. He insisted he had a certificate (although he was unable to say whether this was an NIC certificate, or other quality certificate likely to be accepted by most Lessors, or not) and that the reasons for non-access on each occasion were genuine. It was not true that he had refused access for purposes other than the inspection of the electricity but he would naturally give access for any reasonable purpose. He considered that the Lessors were at fault for deliberately prolonging the dispute and confirmed that if he had to give access he would now do so. He added that the freeholders had never repaired the boundary wall or fence. With regard to the gate, he said he would repair it, but that it was in any case locked and not used between 10pm and 8 am. He stated that the rear garden was not untidy. He had no explanation for the failure to enter into the retrospective Licence. In answer to questions from the Tribunal about his claimed misunderstanding of the terms of the Lease, he insisted that there had simply been a misunderstanding.

INSPECTION

14. It was not thought that an inspection would be helpful. The Tribunal had the benefit of seeing colour prints of the copy black and white photographs in the file.

DECISION

15. It is clear to the Tribunal that there has been breach of the terms of the Lease (in Clause 2(9) and 2(12)) by Mr and Mrs Biberfeld's refusal of access to the Lessor on numerous documented occasions, despite plenty of notice and on the flimsiest of grounds. Mr Biberfeld's explanations in this respect (i.e. that he did not know that refusal of access was in breach of the terms of the Lease) are not credible, inter alia, as Mr Lannen's letter of 29 May 2003 makes clear that in respect of refusal of the

request to inspect the electricity installation this is a breach of the terms of both the Consent Order of the Court *and* the terms of the Lease for access. The fact that he is now offering access for any reasonable purpose does not alter the fact that he has not complied with the terms of the Lease, despite having been asked many times by the Lessors to do so.

15. With regard to user, the Tribunal does not see evidence of any use of the subject flat or of the rear garden which would be in breach of the terms of the Lease.

17. Non compliance with the terms of the Consent Order of the Court does not breach any covenant, although it may well incline the Court to take a hard line about the further breach of the covenant for access. Any decision on the consequences of the breach of the Court Order is a matter for the Court and not for the LVT.

OTHER ISSUES

18. There is no application for reimbursement by the Respondent of the Applicant's fees for application to and hearing by the Tribunal, and the Applicant indicated that there was no intention to charge any of the costs of the Tribunal application to the service charge, although the Directors indicated that they had incurred small disbursements for e.g. photocopying. Nevertheless, the Tribunal does have a power pursuant to paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 to award costs up to a statutory maximum of £500 where a party has acted vexatiously, abusively or otherwise unreasonably in connection with the proceedings, and does in this instance consider that this power should be exercised. The Respondent will therefore pay, within 14 days of the date of this Decision, the sum of £400 (to include the £12 expended by them in preparation for the proceedings) to the Directors of the Applicant Company in recognition of their time spent in attendance to present their case, which would have been entirely unnecessary had MrBiberfeld complied with the obligations of the Lessee of whom he is UK agent.

19. The Tribunal therefore determines that the Respondent has breached the covenants in Clause 2(9) and 2(12) in refusing access to the Lessor, its surveyors, agents and others at all reasonable times for the purpose of viewing the condition of the subject property and carrying out any consequential remedial works. The Tribunal further orders that the Respondent do pay within 14 days of the date of this Decision the sum of £400 in costs pursuant to paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002.

Chairman.....

Date.....29.1.07.