REF: LON/00AF/LBC/2006/37

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE

LONDON RENT ASSESSMENT PANEL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002, SECTION 168(4)

Premises: Flat 2, 99 Marlow Road, London SE20 7XW

Applicant: Townplot Limited

Represented by: Mr A. Hammond, Counsel
and CLL Solicitors

Respondent: Mr David Appleby

Represented by: Miss S. Palmer, Counsel
and William Heath & Co, Solicitors

DECISION

Background

1. This is the landlord's application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of a covenant in a lease dated 12th April 1990 made between BCM Development Limited (1) and Frank Brian Sangster (2) in respect of Flat 2, 99 Marlow Road has occurred. The landlord alleges there has been a breach of clause 2.6 of the lease which reads:

> "*The Lessee hereby covenants with the Lessor as follows:*
>
> *Not to cut maim injure or make any structural alterations or additions to any part of the demised premises or the building.*".

It is alleged by the landlord that the current internal layout of Flat 2 does not match the original lease plan and the landlord seeks a declaration that alterations have been carried out in breach of clause 2.6 of the lease.

2. The original application from the landlord is dated 28th April 2006. However this application did not comply with the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 as amended and the application was supplemented by a letter dated 9th June 2006 and an application endorsed with a statement of truth by Ashton Doherty a solicitor employed by CLL Solicitors dated 9th June 2006. An oral pre trial review was held on 7th July 2006 when the Applicant was represented by Counsel. The Respondent was neither present or represented. Directions were given

and the hearing date set together with a time and date for the inspection of the property by the Tribunal. The hearing took place at 10 Alfred Place, London WC1E 7LR on the 12th of September 2006.

The Law

3. Section 168 of the Commonhold and Leasehold Reform Act 2002, so far as is relevant, provides as follows:

> "(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c.20)(restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
>
> (2) This subsection is satisfied if –
> (a) it has been finally determined on an application under subsection (4) that the breach has occurred…
>
> (3) …..
>
> (4) 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 a covenant or condition in the lease has occurred.
>
> (5) ….."

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

Preliminary

5. Documentation submitted to the Tribunal shows that the Applicant purchased the freehold of 99 Marlow Road, London SE20 on 20th May 1999. The freehold was subject to three leases in respect of Flats 1, 2 and 3. The Land Registry entries show that the proprietor of Flat 2, the subject of this application, is Mr David Paul Appleby and that he purchased this property on 29th April 2002. However the conversion of 99 Marlow Road took place in 1988/89 and the three leases run for 125 years from 29th December 1989.

6. The application is based on an allegation that the internal layout of the Flat 2 is different from that shown on the lease plan and that consequently alterations must have taken place in breach of clause 2.6 of the lease.

7. The landlord's evidence is based on a reply by the Respondent to a letter from the landlord dated 25th June 2005. To this letter was attached what is described as "a lease plan" and the letter asked if the lease plan shows and/or details the correct/existing layout of the premises. The Respondent, although under no obligation to respond to this letter, informed the landlord that the lease plan as attached to the

letter was not correct and marked on the plan the current layout of Flat 2 and confirmed this was as it was when he purchased the flat in 2002.

8. The landlord then obtained an affidavit from Mr Colin McMurdo dated 24th April 2006. Mr McMurdo was a director of BCM Development Limited which was responsible for converting the property in 1989/90. To this affidavit is exhibited as "CM1" a plan referred to as the "lease plan". This affidavit is at pages 33 – 37 of the bundle and makes a number of assertions about the internal layout of Flat 2 in 1990, 1999 and 2005. There is no reference in the affidavit to an inspection of the premises at any time by the Deponent.

9. The Respondent's case is set out at pages 45 – 57 of the bundle. He denies that the plan exhibited as "DM1" to the affidavit of Mr McMurdo is a copy of the lease plan and exhibits a correct copy of the lease plan. The Respondent denies that any alterations have been carried out since the date of the lease or in the alternative if they have that any of these were structural. The Respondent arranged for Mr Graham Rix, the architect responsible for the conversion of the property, to inspect the flat on 23rd November 2005 and Mr Rix confirmed in a letter the following day that the layout of the flat appeared to be as it was originally converted by BCM Development Limited in 1988. There is therefore a direct conflict of evidence between Mr McMurdo and Mr Rix. Further the Respondent obtained a professionally drawn plan of the current internal layout of his flat on 14th August 2006 and this was included at page 60 of the bundle.

Inspection

10. The Tribunal carried out an inspection in accordance with the directions in the morning of 12th September 2006. The Respondent was present but neither the landlord nor its representative was present. The Tribunal inspected the exterior of 99 Marlow Road, and the interior of Flat 2. It was obvious to the Tribunal that the enlarged window opening to the flank wall that was shown on the plan submitted to the Local Authority in connection with planning/building regulation approval had never been formed; the window openings clearly date back to when the building was first erected. The soil and waste water drainage arrangements are not as shown on the plan either. They have clearly not been changed since the conversion of flats; the proposed locations of the kitchen and bathroom were swapped around during the conversion works. Inside the flat there were no signs that partition walls, doorframes or the position of door hinges had been changed since the 1989/90 conversion that formed this flat.

The Hearing

11. At the hearing both parties produced the original lease and counterpart lease for inspection by the Tribunal. This enabled us to identify beyond doubt the lease plan. The plans attached to the lease and counterpart lease were exactly the same. However they were not the same as the plan exhibited to Mr McMurdo's affidavit and referred to as "the lease plan" nor the same as the plan attached to the letter sent by the landlord to the Respondent on 25th June 2005 (referred to in paragraph 7 above). The Tribunal indicated to Counsel for the Applicant our concern about the quality of the evidence in this case and in particular that Mr McMurdo whose affidavit was the

cornerstone of the Applicant's case, was not present to give evidence and be cross-examined. Two of the members of the Tribunal were experienced chartered surveyors and we were therefore able to give the parties a preliminary view that following our inspection it did not appear that any alterations structural or otherwise had been made to the layout of Flat 2 since 1990.

12. After a short adjournment to take instructions Counsel for the Applicant explained that Mr McMurdo was not able to attend in person because he was abroad and requested an adjournment of the hearing so that Mr McMurdo could be present to give evidence.

13. Miss Palmer for the Respondent strongly opposed the application on a number of grounds in particular:

(a) that it must have been obvious from the papers that Mr Rix had inspected the premises and that there was a direct conflict of evidence;

(b) there had been a directions hearing in July which gave the Applicant an opportunity to decide what evidence was required;

(c) it must be evident that there was confusion about the plans at an early stage;

(d) that the Applicant's paperwork was not in order, and

(e) that it was disproportionate and unnecessary to adjourn for the purposes of calling Mr McMurdo at this late stage.

Decision In Respect of Application To Adjourn

14. Paragraph 15 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 deals with postponement and adjournment as follows:

(1) Subject to paragraph (2) the Tribunal may postpone or adjourn a hearing either on its own initiative or at the request of any interested party.

(2) Where a postponement or adjournment has been requested the Tribunal shall not postpone or adjourn the hearing except where it is reasonable to do so having regard to –
(a) the grounds for the request
(b) the time at which the request was made
(c) the convenience of the parties.

(3) The Tribunal shall give reasonable notice of any postponed or adjourned hearing to the parties.

15. After a short adjournment to consider the submissions of the parties and the regulations, the Tribunal informed the parties that we did not consider it reasonable to adjourn the proceedings at this late stage taking into account in particular the following points:

(a) This is an application by the landlord and the onus is on the Applicant to prepare and prove its case. A determination of a breach of covenant has very serious consequences for a lessee.

(b) The landlord has had ample time to prepare this case. Mr McMurdo swore his affidavit as long ago as 24th April this year and the initial application was made on 28th April this year. The substantive application was made on 9th June 2006 and there was a directions hearing on 7th July 2006.

(c) The landlord had failed to inspect the premises at any time including this morning with the Tribunal.

16. The Chairman informed the parties that the application for the adjournment was refused and that either the landlord could proceed with its application today or they could withdraw and issue new proceedings at a later date if they so wished.

17. After another short adjournment Counsel for the Applicant informed the Tribunal and the Respondent that the landlord wished to withdraw the application.

Application Under Section 20C Landlord and Tenant Act 1985 (the 1985 Act)

18. The Respondent had included in his response a claim for an order under Section 20C.

The Law

19. Section 20C – Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a Leasehold Valuation Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made
(a) ....
(b) in the case of proceedings before a Leasehold Valuation Tribunal to the Tribunal before which the proceedings are taking place or if the application is made after the proceedings have concluded to a Leasehold Valuation Tribunal.
(c) .....

(3) The Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

20. The original ground for the application for a Section 20C order was because the application for a declaration in respect of a breach of covenant did not fall within the service charge provisions of the lease and secondly that in the event that the Respondent was successful it would be unjust for the Applicant to recover his costs

through the service charge. Miss Palmer confirmed that she wished to proceed with this application in view of the fact that the landlord had withdrawn his application.

21. Counsel for the landlord opposed this application. He submitted it would be reasonable to add the costs of this aborted application to the service charge and pointed out that the landlord had purchased the property after the original development.

22. In reply Miss Palmer submitted to the Tribunal that she struggled to understand how her application could be opposed. The onus was on the landlord to seek expert guidance and the fact that Mr McMurdo was not present at the hearing could not be laid at the door of the Respondent. She submitted that the only just and equitable outcome on the basis that the application had been withdrawn was that an order should be made under Section 20C.

Decision

23. The Tribunal was surprised that the landlord opposed this application. The purpose of Section 20C is to protect a tenant from having to pay all or some of the landlord's costs as an additional service charge where a tenant has won his or her case before the Leasehold Valuation Tribunal. Our duty is to make an order which is just and equitable in all the circumstances. In our view there can be no doubt that it would be wholly unreasonable for the landlord to make an application to the Tribunal, to put the Respondent to considerable expense, and then to withdraw his application and expect the three lessees in the property to pay the costs of these proceedings. We therefore make an order that all of the costs incurred or to be incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

Costs

24. Counsel for the Respondent then made an application for costs.

The Law

25. Paragraph 10, Schedule 12 Commonhold and Leasehold Reform Act 2002 (the 2002 Act) provides as follows:

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where –

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.

Submissions

26. Counsel for the Respondent submitted that an award of costs should be made in her client's favour because of the way that these proceedings have been conducted by the landlord. She submitted that all the deficiencies in his case which had become apparent at the hearing were clear from the beginning. She repeated the points she had made in respect of the Section 20C application and pointed out the expense to which her client had been put simply to be told at the full hearing that the landlord intended to withdraw the application.

27. Counsel for the Applicant opposed this application. He submitted that his client had not behaved in any way frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. He said that although the matter had been withdrawn it would have been his intention to fight this case. It remained his client's view, on the basis of the plan at page 60 of the bundle, that the Respondent was in breach of his lease. It was not unreasonable on his client's part to bring proceedings.

28. In reply Miss Palmer submitted that costs were not punitive but compensatory. It was unreasonable of the landlord to make this application without an inspection bringing the matter all the way to a hearing and then when the defects in his case were pointed out he withdrew it but refused to make any offer to compensate the Respondent for all his expenses including solicitors' and Counsel's fees and having a plan of his flat drawn up.

29. Finally Counsel for the Applicant asked the Chairman to record in the Tribunal's decision that a member of the Tribunal had informed Counsel for the Respondent of the Tribunal's power contained in Schedule 12 of the 2002 Act and that she had not been aware of this. He accepted however that the Tribunal had the power to make an order under paragraph 10 of Schedule 12 of its own motion.

Decision

30. The philosophy of the Leasehold Valuation Tribunal is as an accessible low cost vehicle for the hearing and resolution of disputes. The power to award costs was introduced with the 2002 Act and is to be used sparingly. Generally an order under section 20C of the 1985 Act is sufficient to protect a lessee from any unfairness which would arise if the costs of proceedings before the Leasehold Valuation Tribunal were placed on the service charge. However in a case such as this, where it is apparent that

the application should never have been brought, was ill-conceived and unmeritorious, this is an appropriate case to make an order under paragraph 10 that the Applicant should pay the sum of £500 in costs to the Respondent. Although we did not have a breakdown of costs before us we have no doubt, relying on our own knowledge and experience, that solicitors' costs, counsel's fee for attending the hearing and instructing an architect to prepare a plan would amount to at least £500 inclusive of VAT. Our jurisdiction in these proceedings is the first step in forfeiture proceedings which are conducted in the county court. Although the costs provisions in the Leasehold Valuation Tribunal are different from those of a county court, it is relevant to us in this case that if these proceedings had been commenced in a county court and then discontinued, the landlord would automatically be liable for the Respondent's costs (Civil Procedure Rules 38.6).

31. In our view the landlord has behaved wholly unreasonably in connection with these proceedings. The only basis on which he made this application was a form completed by the Respondent in response to a request for information from the landlord. We are extremely concerned that having had the benefit of inspecting the original lease plan, we are satisfied that the plan which was attached to the questionnaire sent by the landlord to the Respondent in 2005 was not the lease plan. Furthermore and even more serious in our view, are the gross inconsistencies apparent in the sworn affidavit of Mr McMurdo. Mr McMurdo had never inspected the property and did not attend the hearing. Mr McMurdo in paragraph 4 of his affidavit exhibits "the lease plan exhibited at CM1". This was not the lease plan. Mr McMurdo went on to depose to the fact that when the Applicant bought the freehold the layout of the property was as set out in the lease plan CM1. He gave no information as to how he knew this nor any explanation of his connection with Townplot Limited. Paragraph 2 of his affidavit states that the submitted plans to the local authority of the conversion were attached to the leases. This is not true. He also states in this paragraph that the local authority issued confirmation that the work had been complied with based on the submitted plans. The letter from Bromley Building Control dated 31st October 2005 suggests that this was not the case. This letter states there is "no recorded inspection of works in progress". The landlord produced no documentary evidence to support the contention of Mr McMurdo that the local authority had issued confirmation that the works had been complied with based on the submitted plans.

32. The Respondent arranged for the architect responsible for the conversion works in 1990 to inspect the premises and Mr Rix provided a letter for the Tribunal confirming that the internal layout appeared to be exactly as it was originally converted in 1988. The landlord and his representatives took no steps to challenge this.

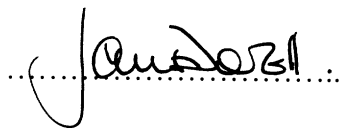
33. The landlord did not show that he had suffered any loss or damage even if the internal arrangement of the flat had been changed. This application is the first step to recovering possession of a long leasehold flat. The consequences are very serious for the lessee and yet the landlord sought to bring a case which was spurious and not supported by any evidence. Mr McMurdo appeared to be willing to swear an affidavit without making any enquires as to the true situation either in relation to the original lease plan or the current situation.

34. Counsel for the landlord submitted that it was likely that the landlord would make a further application and he specifically referred to page 60 of the bundle. Page 60 of

the bundle is a plan obtained by the Respondent's solicitors showing the current internal arrangement of Flat 2. This plan was drawn on 14th August 2006 as verified on page 61 of the bundle. It is difficult to understand how the landlord in those circumstances can support an application which he commenced in April 2006 on these grounds.

35. In all the circumstances we have no hesitation in making an order that the Applicant should pay the Respondent the sum of £500 in respect of his costs in this application within twenty-one days of the date of this decision.

Tribunal: Miss J. Dowell BA (Hons) (Chairman)
Mr P. Casey MRICS
Mr N. Martindale FRICS

Signed: 

Dated: 4th October 2006