Residential
Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 168 AND SCHEDULE 12 OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Reference number:	LON/00AH/LBC/2006/0046
Property:	Property, 35A Galpins Road, Thornton Heath, Surrey, CR7 6EL.
Applicants:	Mr M and Mrs S Bharwani
Respondent:	Ms J Okagbue
Appearances:	The Applicants appeared in person The Respondent did not appear and was not represented.
Tribunal Members:	Mr A J Andrew Mr C Kane, FRICS Ms T L Downie, MSc
Application Dated:	4 July 2006
Directions:	25 July 2006
Hearing:	16 November 2006
Decision:	11 December 2006

DECISION

1. We determined that the Respondent had, as lessee, breached the following covenants and conditions contained in a lease of the Property dated 16 June 1988 and registered at HM Land Registry under title number SGL 517456: Sub-clauses 2(19)(i) and (ii) and paragraphs 1 and 11 of the Fourth Schedule.

2. We declined to make an order for costs against the Respondent.

BACKGROUND

3. 35 Galpins Road ("the Building") was originally a two-storey, semi-detached house that was converted into two flats in or about 1987. Both flats were then sold on long residential leases.

4. The Applicants purchased the lease of the First Floor Flat on or about 25 June 2000 and moved into the flat in November of that year. Until very recently they lived there with their two children now aged four and six.

5. On or about the 28 November 2002, the Applicants purchased the freehold reversionary interest in the Building so that they became the lessor of the Property which had been demised by a lease dated 16 June 1988 for a term of 99 years from 25 March 1988 ("the Lease"). On 25 June 2003, the Respondent purchased the Lease of the Property and on 21 August of that year she was registered as the proprietor of the leasehold interest under title number SGL517456.

6. The Applicants were previously represented by McMillan Williams, Solicitors. It would seem that in or about July 2005 that firm served notice on the Respondent under Section 146 of the Law and Property Act 1925. It seems likely that it was unaware of the provisions of Sections 168 of the Commonhold and Leasehold Reform Act 2002 which, in the context of this case, requires a determination from the Leasehold Valuation Tribunal before such a notice can be served. At that time the Respondent was represented by South Bank, Solicitors.

7. On 4 July 2006, McMillan Williams lodged an application under Section 168 of the Commonhold and Leasehold Reform Act 2002 ("CLRA") on behalf of the Applicants. Thereafter the Applicants represented themselves because they could not afford the substantial legal costs that were being incurred.

8. A pre-trial review was held on 25 July 2006. The Respondent was represented by Mr R Awoloye-Kio who subsequently described himself as *"a qualified solicitor of the Supreme Court of England and Wales who did not at present possess a practicing certificate"*. The directions issued were comprehensive. At the pre-trial review, the Respondent had questioned the validity of a subsequent Deed of Variation. This was to be taken as a preliminary issue and she was required to serve a statement of case, relating to that issue, by 25 August 2006. The point was subsequently abandoned.

9. That apart, the Applicants were required to serve their statement of case by 25 August 2006 and the Respondent to serve a statement in reply by 22 September 2006. The Applicants were to prepare the hearing bundles which were to be lodged by 13 October 2006 with a hearing on 23 October 2006.

10. The Applicants complied with the directions and served their statement of case. On 15 September 2006, Mr Awoloye-Kio wrote that the Respondent *"had an accident and suffers from severe high blood pressure"* and he produced a medical certificate for the period from 25 August 2006 until 11 September 2006. On 18 October 2006, he wrote that the Respondent's condition had not improved and he requested the postponement of the hearing scheduled for 23 October 2006. The postponement application was granted and the hearing was re-scheduled for 16 November 2006. The case having been considered by a procedural chairman, the Tribunal wrote to Mr Awoloye-Kio on 24 October 2006 requesting him to provide medical evidence *"as to the Respondent's ability to instruct you and to attend the hearing"*. On 31 October 2006, Mr Awoloye-Kio provided a short medical certificate for his client in respect of the period from 1 November 2006 to 15 November 2006.

11. At that time no request was made for a further postponement of the hearing. On 13 November 2006, Mr Awoloye-Kio wrote to the tribunal that he would not be able to obtain his client's instructions until after 15 November 2006, the date upon which the medical certificate expired. His letter did not however expressly request a further postponement of the hearing. Nevertheless in view of the ambiguous nature of his letter, a member of the tribunal staff telephoned him and he said that he did not see how the hearing could proceed. The matter was referred to a procedural chairman who declined to postpone the hearing but directed that a postponement application could be made at the commencement of the hearing. This direction was communicated to Mr Awoloye-Kio who said that he would not attend the hearing but that he would send a faxed application for a further postponement. No such communication was received from Mr Awoloye-Kio.

12. On 25 October 2006, the Applicants had vacated the First Floor Flat and moved to temporary accommodation, with their young children. They said that they had decided to leave their home because they could no longer endure what they considered to be a continued campaign of harassment conducted by the occupiers of the Property although we made no finding of fact in that respect.

PRELIMINARY ISSUES

Postponement Application

13. Neither the Respondent nor Mr Awoloye-Kio attended the hearing and we had to decide whether it would be appropriate to proceed in their absence.

14. We were mindful of guidance issued by appellate courts to the effect that adjournments should only be granted where necessary and justified. In

particular, we were aware of the judgements of Lord Justice Judge in R v Chaaban [CA (CrimDiv) 2003] and R v Jisl [CA (CrimDiv) 2004] where he indicated that it was reasonable to have regard to the limited resources of courts and tribunals. Those judgments were issued in the context of criminal proceedings where the liberty of the individual was at risk and they must therefore apply with at least equal force where public funds are expended in the resolution of what are essentially private disputes. In a world of limited resources the postponement of listed hearings results in a disproportionate allocation of resource that deprives others of their proper entitlement.

15. Mr Bharwani had taken time off work to attend the hearing and Mrs Bharwani had made appropriate provision for childcare. They would be severely inconvenienced by a further postponement. The Respondent and her representative had totally failed to engage with the tribunal's directions and although short medical certificates had been provided, they accounted for only four of the sixteen weeks between the pre-trial review and the hearing and they did not, as directed, deal with the Respondent's ability to instruct Mr Awoloye-Kio. We considered that the failure of both the Respondent and her representative to appear before us amounted to an abuse of the tribunal's process.

16. As a specialist tribunal with inquisitorial powers, we considered that we could adequately proceed with the hearing in the absence of the Respondent. Consequently and for each and all of the above reasons, we decided not to postpone the hearing.

CCTV Evidence

17. The Applicants had, apparently at the suggestion of the police, installed a rudimentary form of closed circuit television to monitor the common parts and exterior of the property. With their statement of case, they submitted a number of CCTV and audio tapes which they requested us to take into account in reaching our determination. From a practical point of view, we had no means of viewing or listening to these tapes. More fundamentally, we did not consider it appropriate to have regard to recordings that had been taken covertly and which could not be independently authenticated or verified. In any event the Applicants had observed many of the recorded events and could themselves give appropriate evidence. For each of these reasons we declined to have regard to this evidence.

Monetary Payments

18. A large number of the breaches pleaded in the original application related to arrears of ground rent and unpaid service and administration charges. No criticism attaches to the Applicants because, as observed, the original application was prepared on their behalf by solicitors. Nevertheless, we had no jurisdiction, under the application, to consider such issues. In particular, subsection 169(7) of CLRA exempts the failure to pay service or administration charges from the scope of Section 168. Before taking forfeiture proceedings for non-payment of a service or an administration charge, a lessor must first obtain a determination of payability under Section 27A of the

Landlord and Tenant Act 1985. In the absence of the Respondent, it would be inappropriate to deal with the application as if it had been made under Section 27A of that Act.

19. That apart, the Applicants alleged that the Respondent had breached a large number of covenants and/or conditions of the Lease. In respect of each such allegation, we set out below the Lease provision relied on, our findings of fact, and our conclusion as to whether or not there had been a breach of the Lease provision.

REASONS FOR OUR DECISION

Clause 2(6)

20. *"To permit the Lessor and his agents with or without workmen or others at all reasonable times of the day upon giving forty-eight (48) hours notice (except in emergency) of their intention to enter the Demised Premises to view the state of repair decoration condition and use thereof ...".*

21. The Applicants said that they had been denied access to the Property. They were however unable to draw our attention to any specific written request to the Respondent, in the comprehensive hearing bundle, requesting access. In answering our questions, it became apparent that the Applicants had throughout assumed that the occupiers of the Property would deny access. Indeed the Applicants accepted that the behaviour of the occupiers of the Property was such that they *"didn't feel able to make a direct request for access"*.

22. The lessee's obligation to give access is conditional upon the lessor giving 48 hours notice except in emergency. No such notice had been given and it was not suggested that an emergency had arisen. Consequently there had been no breach of the covenant.

Clause 2(4)

23. This is a covenant in a fairly standard form to keep the demised premises in repair. The covenant extends into both the interior and exterior of the demised premises and to all *"boundary walls fences"*. The covenant includes an obligation to redecorate the interior in every fifth year and the exterior in every third year.

24. The Applicants alleged that the Respondent had failed to comply with these repairing and redecorating obligations. Their evidence was however inconclusive. Included within the hearing bundle were photographs of the exterior of the property taken in May 2002 which showed it to be in good external condition. The Applicants' evidence was that the Respondent had carried out substantial works to the Property after she purchased it in 2003 and in any event the Applicants said that they had not had access to the interior. It was only just over three years since the Respondent had completed her purchase and we were not persuaded that her failure to redecorate the

exterior during that time could be said to amount to a breach of the covenant when read as a whole.

25. Ultimately the Applicants relied on two very specific facts. They said that the occupiers of the Property had consistently left refuse on the front forecourt of the Building no doubt because, as will be seen, the Respondent had not provided a refuse bin. Although we could appreciate the Applicants' concerns, we did not consider that the behaviour described amounted to a breach of a repairing and redecorating obligation.

26. The original rear garden has been divided into two sections. The section nearest the Building forms part of the Property whilst the Applicants, as lessees of the First Floor Flat, have the use of the rear section of the garden. They access that part of the garden by a fenced passage that runs the length of the garden. They said that the occupiers of the Property used one section of the fence as an unauthorised gate to obtain access to the rear garden, without having to go through the Property. That section of the fence was *"swung"* backwards and forwards across the side passage to permit access.

27. The burden of proof lay with the Applicants. We considered that it had not been discharged. Although the fence panel was clearly not intended to be used as a gate, there was no evidence to suggest that it had been damaged by such use and we were not persuaded that that use amounted to a breach of the repairing obligation referred to.

Clause 2(5)

28. *"Not without the previous consent in writing of the Lessor to make or permit or suffer to be made any alteration in the construction or arrangements of the Demised Premises nor any cutting or alteration of or injury to any of the walls timbers ceilings floors doors or windows thereof".*

29. The exterior of the front door to the Property had previously been painted in mahogany and varnished. When the Respondent carried out the renovation works referred to above, after her purchase, the door was repainted in brilliant white gloss. We considered that on any common sense interpretation of the word *"alteration"*, it did not extend to repainting a door in a different colour. We concluded that there had been no breach of the covenant.

Clause 2(10)

30. *"Not to assign sub-let share or part with possession of part only of the Demised Premises".*

31. The Applicants' evidence was explicit. The Respondent had never lived at the Property. Since her purchase, it had been occupied by a number of individuals of which she was not one. The Applicants concluded that the Respondent had sublet the Property in its entirety and they considered that this amounted to a breach of the covenant recited above. Although they did not quite put it in these terms they contended that the covenant prohibited the Respondent from assigning or subletting the Property as a whole and from

sharing or parting with possession of part only of the Property. We did not consider that the words recited bore that interpretation. If correct, the flat could not be sold and in any event such an interpretation was inconsistent with the following subclause which prohibited any dealing with the whole of the demised premises during the last seven years of the term.

32. The status of the occupiers of the Property was unclear. There had clearly been a parting with possession of the whole of the Property by the Respondent but that did not amount to a breach of the covenant.

Clause 2(12)

33. The covenant requires the lessee within 28 days of any assignment to give notice to the lessor's solicitors and to produce a copy of the relevant document for registration.

34. The Respondent purchased the Property on 25 June 2003. On the following day, her solicitors gave notice of the transfer to N H & J Khan in accordance with the covenant referred to. N H & J Khan were the previous owners of the freehold reversion and were property investors. The Applicants said that in giving notice to their seller rather than to them, the Respondent had breached the obligation.

35. However, in answer to our questions, the Applicants accepted that after purchasing the freehold reversion, they had continued to instruct N H & J Khan to manage the property and to collect insurance premium contributions. In such circumstances it was hardly surprising that the Respondent's solicitors had given notice of the transfer to N H & J Khan rather than to the Applicants. Service on the Applicants' agents was good service and we concluded that the Respondent had complied with the obligation.

Clause 2(14)

36. This is a covenant in fairly standard form that prohibits the lessee from doing anything which may result in an additional premium becoming payable in respect of the buildings insurance policy, which is the responsibility of the lessor.

37. The Applicants alleged that the Respondent had breached this covenant by subletting the Property.

38. The Applicants had not included a copy of the buildings insurance policy in the hearing bundle and consequently we were unable to ascertain whether or not it included a prohibition on subletting. Certainly the Applicants produced no evidence to demonstrate that subletting would result in an increased premium becoming payable. To that extent they had failed to discharge the necessary burden of proof. However, more fundamentally, we considered that the lessor's obligation to maintain comprehensive insurance cover required the Applicants to maintain cover for any authorised use contemplated by the lease which, as observed above, includes the subletting of the Property.

Clause 2(16)

39. The lessee covenants not to erect any aerials on the exterior of the Building.

40. The Applicants said that the Respondent had fitted an aerial to the exterior of the Building in breach of the obligation. However, in answer to our questions, it became apparent that the allegation was based solely on the attendance of a B-Sky-B van at the Building. The Applicants accepted that they had not observed an aerial being fitted to the exterior and no aerial was visible when the Building was viewed either from the front or the rear elevation. The Applicants had not discharged the necessary burden of proof and we concluded that the Respondent had not erected an aerial in contravention of the covenant.

Clause 2(19)(ii)

41. *"To lay and maintain carpets to all rooms within the Demised Premises other than the kitchen and bathroom thereof for the purposes of minimising any possible noise".*

42. The Applicants' evidence was that when the Respondent had renovated the Property, following her purchase, laminate floors had been laid which were not covered with carpets. They said that they had observed the laminate floors, devoid of carpets, in the hall and front reception room when the front door to the Property had been open. Although we were slightly surprised that such a point should be taken in respect of a ground floor flat we nevertheless accepted the Applicants' unambiguous evidence and concluded that there had been a breach of the covenant.

Paragraph 1 of the Fourth Schedule

43. By subclause 2(19) (i), the lessee covenants *"At all times during the said term to perform and observe all and singular the regulations set forth in the fourth schedule hereto ...".* Paragraph 1 of the Fourth Schedule is as follows: *"No piano or other musical instrument or wireless set shall be used or played upon between 11.30pm and 7.00am so as to be audible outside the Demised Premises and no piano pianola gramophone wireless loudspeaker or other musical instrument of any kind shall be used or any other noise made so as at any time or times to cause annoyance to any of the occupiers of the Building or after the use thereof or noise made shall have been objected to by the Lessor by notice in writing given to the Lessee or left for the Lessee on the said premises".*

44. This was the nub of the Applicants' complaint. There are clearly three limbs to the restriction, the second of which prohibits the making *of "any other noise ... so as at any time or times to cause annoyance to any of the occupiers of the Building".* The Applicants had reported the behaviour of the occupiers of the Property to both the police and Croydon Council and they had been advised to keep a contemporaneous record of all relevant incidents. A transcript of that record was included in the hearing bundle which the Applicants confirmed as being accurate. It recorded a large number of

occasions on which the Applicants were either kept awake late into the night or awoken in the early hours by loud music being played in the Property. It was equally apparent from copy correspondence in the hearing bundle that the Applicants had complained about the noise to the Respondent's solicitors in a letter dated 20 April 2005. In addition, they had complained to Croydon Council who, in a written response, said that they were *"satisfied that there is a problem with noise"* although they did not consider that there was enough evidence to take any legal action against the persons responsible. We were however satisfied on the basis of the evidence produced to us that there had been persistent breaches of the obligation in particular during the period February and March of this year.

Paragraph 1 of the Second Schedule

45. The Second Schedule sets out the easements, rights and privileges which are included with the demised premises. Paragraph 1 in essence grants the lessee a right of way over the common parts of the Building which clearly includes the path leading to the front door of the Building and the communal hall *"but not further or otherwise"*.

46. The Applicants' case was that the occupiers of the Property had, in breach of this right, either trespassed on property included within the demise of the First Floor Flat or had prevented the Applicants from gaining access to the front door. In part they alleged that the occupiers' behaviour amounted to a campaign of harassment in response to the Applicants' complaints about their conduct. It was, they said, this campaign that had ultimately led to their vacating the First Floor Flat on 25 October 2006.

47. We considered that the Applicants' case was misconceived. Paragraph 1 of the Second Schedule granted a right to the lessee of the Property. It could not be construed as imposing a covenant or condition upon the Respondent, as lessee, not to obstruct the Applicants' access to the Property or to trespass upon the property included within the demise of the First Floor Flat. Section 168 of the Commonhold and Leasehold Reform Act 2002 was simply not engaged by the limitation placed on the right granted to the lessee.

Paragraph 5 of the Fourth Schedule

48. *"The flat entrance door shall be kept shut and the Lessee or others using the common parts of the said building between the hours of 11.30pm and 7.00am shall do so as quietly as possible and take special care quietly to close the said main entrance door and flat entrance door and not cause any disturbance or annoyance to the other tenants or occupiers".*

49. In their evidence the Applicants made no complaint about the front door to the Property being left open. Their complaint related to the front door to the Building which they said was frequently left open by the occupiers of the Property. However, the Applicants' evidence was not given with any conviction and in answer to our questions they were only able to identify two occasions when the main entrance door had been left open. Although they had complaints about visitors to the Property ringing the wrong entrance bell,

and about the Respondent's failure to repair the bell to the Property, we did not consider that that behaviour fell within the ambit of the obligation under consideration. In any event, the obligation to *"shut"* the door only extended to the flat entrance door and there was no evidence that the occupiers of the Property had failed to observe the obligation to *"quietly"* close the main entrance door. In short, we did not consider that the case had been made out.

Paragraph 7 of Schedule 4

50. This imposes an obligation upon the lessee not to *"do any damage whatever"* to the Building, which is specifically said to include *"the grounds and path adjoining"*.

51. The Applicants alleged three breaches of this clause. The first related to the use of a fence panel as a *"doorway"* to the rear garden. This is considered above and for the reasons there set out we did not consider it to be a breach of the obligation.

52. The second related to the use by the occupiers of the Property of a water supply in the Applicants' portion of the rear garden, without authorisation. We were at a loss to understand how such use could be said to be a breach of the obligation.

53. Finally, the Applicants complained that the occupiers of the Property had disposed of some guttering that had become detached from the Building by removing it from the front forecourt and placing it in a skip. The Applicants had apparently requested their contractors to attend that property to reinstate the guttering although there was no suggestion that this was known to the occupiers of the Property. Again we considered that the case had simply not been made out. The occupiers had caused no damage as such and their decision to place the detached guttering in a skip did not strike us, in the circumstances, as being either unreasonable or irrational.

Paragraph 10 of the Fourth Schedule

54. *"Any dispute, difference or complaint that may arise between the Lessee and the other tenants in respect of the use or occupation of the Demised Premises or of the said Building shall be referred to the Lessor whose decision shall be final and binding on all parties"*.

55. The Applicants alleged that the Respondent had breached this obligation by failing to refer the current dispute to them for determination. We considered the argument to be wholly misconceived. The Applicants could not determine a dispute to which they were the other party. The obligation was clearly confined to a situation in which the freehold reversion is held separately from two leasehold interests so that any dispute between the two lessees can be dealt with by the lessor as a neutral third party. In the current situation, where the Applicants were both the freeholders and the lessees of the First Floor Flat, the obligation was not engaged.

Paragraph 11 of the Fourth Schedule

56. This requires the lessee to provide a refuse bin and to put "rubbish" in it on a daily basis.

57. We accepted the Applicants' clear evidence (supported by a photograph in the hearing bundle) that the Respondent had failed to provide such a bin from the date of her purchase until March 2006 when Croydon Council provided bins to all householders. During that time there had been a breach of the covenant.

Cost Application under Schedule 12 of CLRA

58. The Applicants requested us to order the Respondent to reimburse the costs that they had incurred in making their Application. There were legal costs of £1,500.66 (incurred in connection with the preparation of a Section 146 Notice and the application to the Tribunal) and estimated travel expenses and copying charges of £150; £1,650.66 in total.

59. Our jurisdiction to award costs is currently limited to £500. Furthermore, in the context of these proceedings, we could only make a cost order if we were satisfied that one party had *"acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings"*. In this case it was appropriate to take into account the conduct of both parties. The Respondent's failure to engage with the tribunal or to comply with any of its directions amounted to an abuse of its process as observed above and might in some circumstances justify the making of a cost order. We were not without sympathy for the Applicants' position: there was clearly a longstanding neighbour dispute between themselves and the occupiers of the Property although whether it was appropriate to deal with that dispute in the manner currently contemplated by the Applicants would be for others to decide. The essence of the dispute was the noise nuisance created by the occupiers and their reaction to the complaints made by the Applicants. However, in making their case to the tribunal, the Applicants had adopted a *"scattergun"* approach and had in particular relied on a large number of covenants and conditions of which, for the reasons set out above, we either had no jurisdiction or there had been no discernable breach. That approach had substantially and unnecessarily increased the length of the hearing.

60. Taking each and all of these factors into account, we considered that it would be inappropriate to make any order for costs.

Chairman: ..... (A J Andrew)

JG