RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Premises: Flat A11 Swanston Grange, 798-802 Dunstable Road, Luton LU4 0HF7

Applicant (Landlord & Freeholder): Swanston Grange (Luton) Management Limited

Applicant's Managing Agent: Trust Property Management plc, Cavendish House, Ground Floor, East Wing, 369-391 Burnt Oak Broadway, Edgware, Middlesex HA8 4DY

Respondent: Mrs Eileen Langley-Essen

Case Number: CAM/00KA/LBC/2006/0002

Application: An application pursuant to section 168 Commonhold & Leasehold Reform Act 2002 for a determination whether a breach or breaches of covenant have occurred.

Tribunal: Mr JR Morris (Chairman)
Miss M Krisko BSc (Est Man) BA FRICS
Mr D Wills ACIB

Date of Hearing: 12th October 2006

Attendance:

Applicant: Mr A Rieck Director of the Applicant
Ms J Daboul, Property Manager
Mr Clargo, Counsel for the Applicant

Respondent: Mr Pithers, Counsel for the Respondent

DECISION

The Application

1. This is an application pursuant to section 168 Commonhold & Leasehold Reform Act 2002 for a determination whether a breach or breaches of covenant have occurred. This appears to include consideration of whether the landlord has waived compliance with the covenants relied upon as regards some or all of the breaches alleged.

The Parties

2. The Applicant is the Landlord and freehold owner of the Premises and holds the reversion immediately expectant upon expiry of the respondents Lease. The Respondent is the leaseholder of the Premises under a lease dated 16th April 1986 between the Applicant as Lessor and Anthony Richard Broom as Lessee for a term of 125 years from 25th March 1986 at a rent of £25 per annum.

The Lease

3. The clauses of the Lease in which the Applicant states the Respondent is in breach are:

   2(ixx) "Not to ...underlet...the entirety of the demised premises or any part thereof without first obtaining from the intended...underlessee...a duly executed deed containing a direct covenant with the Lessor to observe and perform all the covenants on behalf of the Lessee in this lease contained other than in the case of any intended underlessee the covenant to pay rent less than those herein before reserved such Deed to be prepared by the Lessor's solicitors whose proper costs and disbursements shall be discharged by the Lessee."

   2(xx) "Within one month after any...Underlease...to give written notice to the Solicitors for the time being of the Lessor of the Deed of Instrument affecting the same and to pay them a reasonable fee plus VAT or any other tax payable in respect of the fee for the registration thereof."

   2(xxiv) "Not to...effect any Underlease...without a transfer of the share or shares held by the lessee in the Company to the assignee or under lessee with a covenant in the case of an Underlease for the re-transfer by the under lessee of the said share or shares upon termination of the term of the Underlease and to procure that the said re-transfer is effected and not to nominate the said share in favour of anyone other than the person becoming beneficially entitled to the demised premises on the Lessee's death every such transfer duly executed and stamped to be forwarded to the Secretary of the Company within one month of the ...Underlease being completed. Provided further that if at the date of such transfer of his said share the Lessee shall be a director of the Company then he shall forthwith deliver to the Company Secretary his resignation in writing as such director."

The Law

4. Commonhold and Leasehold Reform Act 2002

   Section 168
   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 (c20) (restriction of forfeiture in

respect of a breach by a tenant of a covenant or condition in the lease unless (2) is satisfied.
(2) This subsection is satisfied if it has been finally determined on an application under subsection (4) that the breach has occurred or the tenant has admitted the breach
(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

Section 76 defines a long lease as being granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice by the tenant, by re-entry to forfeiture or otherwise.

The Alleged Breaches and Determinations Requested

5.

a) The Respondent has failed to obtain a duly executed deed from the under lessee containing a direct covenant with the Applicant to observe and perform all the covenants on behalf of the Lessee in the Lease as set out in Clause 2(ixx).

b) The Respondent has failed within one month of the Underlease to give written notice to the Applicant's solicitors of the Underlease and to pay a reasonable fee plus VAT for the registration of the Underlease.

c) The Respondent has failed to transfer the share in the Applicant to the under lessee in accordance with Clause 2(xxiv) of the Lease.

6. The Applicant seeks a determination that:

a) The Respondent is in breach and therefore is entitled to service notice pursuant to section 146 Law of Property Act 1925

b) The Applicant's costs of and occasioned by this application be recoverable in due proportion as service charges under the Lease pursuant to clause 3 c and directly recoverable from the Respondent pursuant to clause 2 (xvii) of the Lease.

Applicant's Case

7. Counsel for the Applicant directed the Tribunal to the relevant pages of the bundle to show the Applicant's freehold title to the Property by reference to the Land Registry Entry Title Number BD14411 together with the entry in the Charges Register relating to the Respondent's Lease of Flat A11 registered at the Land Registry Title number BD117764

8. Counsel then directed the Tribunal to the Lease in particular referring to Clause 2 and sub clauses (ixx), (xx) and (xxiv) the text of which is set out

above. In addition the Tribunal were directed to Articles 4 and 9 of the Applicant's Articles of Association.

Failure to obtain a Direct Covenant and Notify the Underlease

9. It was agreed between the parties that an Assured Shorthold Tenancy was an underlease within the provisions of Clause 2 of the Lease. It was also agreed that no deed had been executed containing a direct covenant (Direct Covenant) with the underlessor to observe and perform all the covenants on behalf of the Lessee as required by Clause 2 (ixx). It was also agreed between the parties that although notice of the underlease had been given no copy had been received and the notice was not within one month of the grant of the underlease as required by clause 2 (xx). Reference was made to a letter dated 28th January 2005 from Dawson Hart Solicitors for the Respondent to Mrs Ellis, Property Manger of Nesbitt & Mire who were the Applicant's Managing Agents at that time to demonstrate that the Respondent had conceded these points.

10. It was accepted that there might be an argument as to waiver or even estoppel in respect of these two breaches. However with regard to waiver it was submitted that the Tribunal had no jurisdiction and referred to a recent text: Dymond, Caffertey and Gallagher Leasehold Valuation Tribunals pub Thomson & Sweet and Maxwell at p 158. If the Respondent sought relief from forfeiture following the service of a Section 146 Notice then it was at that stage that the court should consider whether or not there had been a waiver. In any event it was submitted that there had been no waiver and reference was made to a letter dated 6th August 1996 sent to Lessees which stated that "No flat shall be sublet before a properly executed Deed (to be prepared by the Lessor's solicitors) together with a copy of the proposed Tenancy Agreement, is lodged with the Lessors solicitors and the necessary approval given."

11. It was further stated that no evidence had been adduced as to either waiver or to justify a claim of proprietary or promissory estoppel. Reference was made to Chitty on Contract 29th Edition 204 Volume 1 paragraphs 22-040 to 22-046, which it was said indicated that for there to be a waiver there needs to be some consideration and a variation needs to be by deed, and there has been no suggestion of either.

12. Counsel for the Applicant referred to matters raised in the Statement by Ms Daboul that there are a number of practical reasons ensuring good management of the Development that the Applicant and its Managing Agent should know that the Property is being sublet and to have a contractual relationship by virtue of the Direct Covenant to enable enforcement of the terms of the Lease. It was acknowledged that if the underlease was for less than 7 years then the Respondent would continue to be liable in respect of the repairing provisions under section 11 of the Landlord and Tenant Act 1985 notwithstanding the Direct Covenant. The mere fact that liability under the covenants of the Lease would be divided between the Applicant as a tenant and the underlessee would not preclude the provisions of clause 2 (ixx) being complied with. It was also still open to the Applicant to grant an underlease of

over 7 years with full repairing obligations whereupon the underlessee would be fully liable under the Direct Covenant.

Failure to Transfer Share

13. It was agreed between the parties that the Respondent had failed to transfer her share in the Applicant pursuant to Clause 2 (xxiv). Reference was again made to a letter dated 28th January 2005 from the Dawson Hart Solicitors for the Respondent to Mrs Ellis, Property Manager of the Applicant's Managing Agents at that time to show this was conceded.

14. It was also accepted that by transferring the share as required by Clause 2 (xxiv) the Respondent as a tenant was transferring her share in the freehold of the company, as she would then cease to be a member of the company. However it was pointed out, firstly, that under the terms of the underlease the transfer should be returnable to the Respondent and secondly that under article 9 (iii) of the Articles of Association the Directors may transfer the share. In response to the view that therefore the Respondent would not be able to participate in any decision made by the Company it was submitted that it was open to the Respondent to require an underlessee to execute an irrevocable power of attorney giving authority to the Respondent to vote at a company meeting as the Respondent thinks fit.

15. The contention by the Respondent that there was a conflict between the Lease and the Articles, which in effect prevented a breach, was not accepted. Article 4 in the Articles of Association defines a Flat owner as "the owner for the time being holding any of the flats". It was therefore submitted that a flat owner included a person who held an Assured Shorthold Tenancy. It was stated that it was not possible to distinguish between an underlessee for 6 months and one for 124 years. Either they were both flat owners or neither of them were. If neither was a flat owner and only an original tenant or assignee was a flat owner then this is what should be stated in the Articles whereas in fact it states the holder of the flat is the owner. In any event notwithstanding the Articles the Lease requires the Respondent to transfer her share to an underlessee.

16. It was submitted that there was no evidence that the Applicant knew of the lettings or that the Directors have or have not used the power under article 9 (iii) of the Articles to transfer a share.

17. It was agreed between the parties that there was no issue as to payment of fees under the Lease.

18. It was agreed that initially it would be sought to settle the matter of costs by agreement following the Determination.

Respondent's Case

19. Counsel for the Respondent admitted that:

- No deed had been executed containing a Direct Covenant with the underlessor to observe and perform all the covenants on behalf of the Lessee as required by Clause 2 (ixx)
- No formal notice of the underlease had been given within one month of the of the grant of the underlease as required by clause 2 (xx)
- No transfer had been made by the Respondent of her share in the Applicant pursuant to Clause 2 (xxiv).

Failure to obtain a Direct Covenant and Notify of the Underlease

20. It was submitted that there was no breach to obtain a Direct Covenant or give notice of an underlease as both these obligations under the Lease had been waived.

21. The Respondent had owned the Property for 5 years during which time she had let it on Assured Shorthold Tenancies and the Applicant was well aware of this. The Applicant had not received a request to comply with the sub clauses in Clause 2 until the present case. It was considered unreasonable for the Applicant to now seek to enforce the sub clauses while a tenancy was subsisting when it had not sought to enforce them in relation to previous lettings. In relation to the present letting it was stated that the Property had been let on the 22nd December and notice had been given on the following 28th January and therefore only out of time by a few days which it was suggested not to be unreasonable considering the notice was given over a holiday period.

22. Counsel for the Respondent said that the Respondent had not been aware of the letter dated 6th August 1996 addressed to all lessees from the Applicant's Managing Agent at that time which referred to the requirement in Clause 2 (xx). It had been sent some five years before she purchased the Lease. So far as the Respondent was aware the provision of Clause 2 (xx) had not been enforced in the last 5 years.

23. Counsel for the Respondent submitted that waiver was possible in these circumstances as this was not a waiver that varied the lease which would require consideration or to be in writing. It was waived by conduct of compliance with the requirement to notify of an underlease or obtain a Direct Covenant.

24. In addition it was submitted that in relation to underleases such as Assured Shorthold Tenancies of less than 7 years it was not practical or appropriate to obtain a Direct Covenant from the underlessee. The Respondent would be liable for the repairing obligations under s 11 Landlord and Tenant Act 1985. In addition, if Clause 2 (xxiv) were effective the Respondent would have a liability and no share in freehold and the underlessee would have a share in the freehold but no liability.

25. Counsel also commented on the statement by Ms Daboul which indicated that the Lessees who are owner occupiers were concerned that the shorthold tenants may lack commitment to the Property and its community. It was noted

that there is no prohibition against a Lessee granting a short underlease. If the transfer of the share in the Applicant, which also represents the Lessee's interest in the freehold, is insisted on by the Applicant and the proxy arrangement referred to is not made then it may mean that shorthold tenants will be able to take part and influence the management of the Property.

26. Counsel stated that when the Applicant requested that the Respondent comply with the Lease she did so as far as she was able in that she sent the fees and costs. She was not able to send a copy of the underlease with a view to the Direct Covenant being drafted as it had come to an end.

Failure to Transfer Share

27. The Respondent's Counsel submitted that:
    - the same argument as to waiver applied to the failure to transfer the Respondent's share in the Applicant in respect of the present case
    - the Clause 2 (xxiv) of the Lease was in conflict with the Articles of Association and therefore the sub clause could not be complied with.

28. It was stated that the argument as to waiver of the sub clause was reinforced by the failure of the Applicant to exercise article 9(iii) of the Articles of Association.

29. Article 9(1) states that a share can only be transferred to the owner of the flat. It was submitted that the owner of the flat is the person who holds the Lease not an underlease and in particular could not have been intended to be an Assured Shorthold tenant for the following reasons:

    - An Assured Shorthold tenant does not have the power of an owner e.g. a Shorthold tenant cannot mortgage the property.

    - Taking into account that over 50% of the flats are sub let on short tenancies the provision would allow 50% of the Applicant to be held by tenants on short leases of perhaps 6 months or periodic tenancies.

    - In addition as stated above an Assured Shorthold tenant of a lease of less than 7 years by virtue of s11 of the Landlord and tenant Act 1985 would not be liable for repairing covenants.

Determination

Failure to obtain a Direct Covenant and Notify the Underlease

30. The Tribunal did not agree with Counsel for the Applicant that the Tribunal could not consider whether or not a failure to comply with a breach by a tenant had been waived by the words or conduct of a landlord. The Legislation requires the Tribunal to "finally" determine whether a breach has occurred. The Tribunal is of the opinion that a final determination cannot be made without considering all the circumstances which will include whether the breach has been waived. To merely determine whether technically a breach

has occurred but that it may have been waived would mean that the determination would only be an interim one leaving a final decision to be made by a court following an application by the tenant for relief against forfeiture.

31. The Tribunal found that it was agreed by the parties that the Respondent had underlet without first obtaining from the intended underlessee a duly executed deed containing a direct covenant with the Applicant to observe and perform all the covenants on behalf of the Respondent as required by Clause 2 (ixx). The Tribunal also found that it was agreed by the parties that the Respondent had not within one month after the underlease given written notice to the Applicant's solicitors of the of the underletting as required by clause 2 (xx).

32. However the Tribunal found that the Applicant knew of the underlettings by the Respondent, which had taken place in the past. The letter from the Applicant's Managing Agent date 6th August 1996 showed that the Applicant's had been aware that Lessees had underlet and in her written statement Ms Daboul stated that "around 21 flats are investment properties and are sublet". She also stated at paragraph 8 that "it is accepted that the Applicant may not have taken formal action in the past with regard to the Respondent". The Tribunal therefore found that on the balance of probabilities the Applicant was aware that the Respondent had underlet for a number of years. It was also found that the Applicant had not, until the Application, taken any steps to enforce the covenants and therefore the Tribunal found that the Applicant had waived compliance with the covenants up to that time.

33. In respect of the failure to obtain the direct covenant the Tribunal took the view that it was not reasonable for the Respondent to obtain the deed referred to in the Lease after the letting had been entered into when compliance had been waived until then. The Tribunal also accepted the statement by Counsel for the Respondent that the underletting that had been the subject of the Application was now terminated. Therefore even if there was a breach it has already been remedied in this case.

34. Therefore in relation to Clause 2 (ixx) and Clause 2 (xx) the Tribunal determined that there was no breach in this particular instance.

35. The Tribunal found that it was agreed by the parties that no transfer had been made by the Respondent of her share in the Applicant pursuant to Clause 2 (xxiv). As with the Clauses 2 (ixx) and (xx) it was found that the Applicant had waived compliance. It appeared from the Articles that the directors of the Applicant could under article 9(iii) of the Articles of Association have sought to transfer the share to the underlessee however no evidence was adduced that this had ever been done. The Tribunal having found that the breach had been waived it was not considered necessary to seek to interpret the co-relation between the Lease and the Articles of Association.

36. The Tribunal therefore determined that there was no breach of Clause 2 (xxiv) in this particular instance.

37. The Tribunal made no determination as to costs as the parties agreed that this was a matter that would be dependent upon the determination. The Tribunal left it open to the parties to request a determination on costs should it be necessary. Any request for a determination of costs should be made within 60days of this Decision.

JR Morris, Chairman

Date: 8th November 2006