LON/00AQ/LBC/2005/0015

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

Applicants: Glenville Investments limited

Respondents: Mr Mustafa Padhani

Re: 70B High Street, Edgware, HA8 7EJ

Application received on 23 August 2005

Hearing date: 01 November 2005

Appearances:

Mr T Robinson of Counsel (for Applicants)
Mr R Berland - Trainee Solicitor

Mr M Padhani (for Respondent)
Mr E Peters of Counsel
Mr A Padhani - Witness

Members of the Leasehold Valuation Tribunal:

Mrs B Hindley - LLB
Mr F Coffey - FRICS
Mrs L Walter - MA (Hons)

1. This is an application under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002, dated 22 August 2005, for a determination that a breach of a covenant in a lease has occurred.
2. The applicants had become the registered proprietors of the freehold title of 70B High Street, Edgware, on 17 February 2005.
3. At the commencement of the hearing Mr Robinson said that, after discussion with Mr Peters, there was agreement between the parties that a breach of covenant had occurred. Contrary to Clause 2(16) of the lease of the second floor subject flat, for a term of 99 years from 25 December 1983, of which the respondent took an assignment on 18 August 1993, the respondent had used the premises for commercial rather than residential purposes in that he was operating his computer company, PCCI Ltd, from there.
4. The Tribunal was informed that the nature of the business was the provision of computer software services to clients at the premises of such clients. This meant that the public did not resort to the flat.
5. Mr Robinson said that, whilst in the bundles before the Tribunal, the respondent had put forward five defences to the admitted breach, (estoppel, waiver of, acquiescence in, consent to, and abandonment of, the breach) counsel were now in agreement that the only issue for consideration by the Tribunal was the latter. Accordingly, and with the burden of proof on him, it was necessary for the respondent to prove that the landlords, knowing of the breach, had done nothing about it for so long that they could be said to have abandoned any reliance they might otherwise have placed on the clause.
6. Mr A. Padhini gave evidence to the effect that the subject flat was located in a building which also comprised a ground floor shop (the lease of which he and the respondent, his brother, had sold in 1999) together with premises on the first and part of the second floor until recently used as a snooker hall. He said that a Peter Curwen had been the landlord of the building between 1968 and 2002. In 1968 the whole building had planning permission for light industrial use and the flat had been in commercial use when his brother had taken the assignment of the lease in 1993.
7. Mr Padhini went on to explain that in 1999, when the sale of the flat had been under consideration, he had applied to Barnet Council for a declaration that use of the flat for residential purposes was lawful. He produced a document, issued by the Council on 20 November 2000, seemingly on receipt of an application dated 18 October 2000, which stated that residential use was lawful. The document gave as the reason for the determination the fact that sufficient evidence had been produced to show a four year consecutive use of the property as a self contained residential unit.
8. Mr Padhini said that Mr Curwen had periodically called in person to collect the ground rent and that they had chatted. He added that there was in a place a sign above the ground floor street entrance to the flat reading 'Padhini's Computer Centre International Ltd'. On the basis of both of these statements he concluded that Mr Curwen had known in general terms the use to which the flat was being put and had not objected.
9. Mr Peters relied on three cases which he handed in at the hearing – Attorney General for Hong Kong and Fairfax Ltd, a Privy Council case, and two High Court (Chancery Division) cases, Chelsea Estates Ltd v. Kadri and Hepworth v Pickles. He drew the Tribunal's attention to a statement in the first case made by Lord Brown Wilkinson which he had adopted from the judgment of

Farwell J. in the third case – 'if you find a long course of usage, such as in the present case for 24 years, which is wholly inconsistent with the continuance of the covenant relied upon, the court infers some legal proceeding which has put an end to that covenant, in order to show that the usage has been and is now lawful, and not wrongful.' In that case one of the houses, erected on land subject to a covenant preventing any use as an inn, was so used for that period..

10. In the Privy Council case, for a period of 40 years, multi storey blocks had been built on land subject to a lease covenant restricting development to villa residences.
11. In Chelsea Estates Ltd v. Kadri, Goff J. found that 'it must have been apparent that ever since 1920 the premises had been let off in four separate dwellings on four different floors. There was evidence that it was obvious from the doorbells and curtains that premises in the district, and in this road in particular, were in multiple occupation' in contravention of the lease covenant.
12. Accordingly, Mr Peters submitted that in the present case it had not been challenged that the respondent had always used the premises for commercial premises and that the landlord had known this and had, thus, abandoned any reliance he might have placed on the covenant restricting user of the flat to residential purposes.
13. The Tribunal was not persuaded by the evidence produced by the respondent that the landlord had necessarily known, either at all or for any continuous period, to what use the flat was being put. Given the nature of the business and the discreet sign above the front door it could not be said to have been obvious from the outside, and there was no evidence that Mr Curwen had ever actually inspected the interior of the flat. Barnet Council's satisfaction with evidence of four years of continuous residential use cast further doubt on the issue.
14. Moreover, the Tribunal noted that no evidence whatsoever was provided by the respondent as to the knowledge of the un-named landlord in the period after Mr Curwen and before the applicants.
15. Further, the Tribunal noted that all of the cases cited to them involved a period of time considerably longer than that in the present case and usage that would have been considerably more obvious.
16. Accordingly, and adopting the language of Lord Brown Wilkinson, the Tribunal was satisfied that the 'compelling evidence' required to rebut the inference that the landlord was 'well aware' that the flat was not being used for residential purposes was lacking.
17. Therefore, the Tribunal determines that a breach of a covenant of the lease, (Clause 2(16)) has occurred.

Chairman R N Hadley

Date 7/11/05