

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/18UJ/LBC/2009/0038

REASONS

Application : Section 168(4) Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”)

Applicant/Landlord : Melcombe Avenue Management Ltd

Respondent/Leaseholders : Mr Andrew William Jarvis and Mrs Sarah Margaret Jarvis

Premises : Flat 6 Willow Court, 25 Melcombe Avenue, Weymouth, Dorset, DT4 7TF

Lease : the lease of the Premises dated the 20 January 2006 and made between Betterment Properties (Weymouth) Limited (1) Mr and Mrs Jarvis (2) and Melcombe Avenue Management Ltd (3)

Date of Application : 30 September 2009

Date of Directions : 9 October 2009 and 9 November 2009

Date of Hearing : considered by the Tribunal on the 25 January 2010 without a hearing pursuant to notice dated the 9 November 2009 to the parties to that effect under Regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 as amended

Members of the Leasehold Valuation Tribunal : Mr P R Boardman JP MA LLB (Chairman), and Mr K M Lyons FRICS

Date of Tribunal’s Reasons : 25 January 2010

Introduction

1. This Application by the Applicant/Landlord is under section 168(4) of the 2002 Act, namely for a determination that a breach of a covenant or condition in the lease has occurred
2. The grounds for the application were that :
 - a. the lease contained covenants by the Respondent/Leaseholders not to underlet the premises without consent, not to use the premises for business purposes, not to permit any act which became a nuisance or annoyance to other occupiers
 - b. the Respondent/Leaseholders were in breach of covenant by refusing to cease holiday

letting

- c. holiday lettings significantly increased the Applicant/Landlord's responsibilities to comply with the Regulatory Reform (Fire Safety) Order 2005, and could lead to costly modifications to the building to protect the safety of "paying guests" and to meet insurance requirements

Documents

3. The documents before the Tribunal are :
 - a. the application and supporting documents numbered 1 to 229 in the Tribunal's bundle
 - b. the Applicant/Landlord's statement of case and supporting bundle
 - c. the Respondent/Leaseholders' statement of case and supporting bundle

The lease (copied in the Respondent/Leaseholders' bundle)

4. For the purposes of these proceedings the material parts of the lease are as follows :

Clause 4 [tenant's covenants]

Paragraph (7)(f)

Not to underlet the whole of the Demised premises unless the prior written consent of the Management Company has been obtained (such consent not to be unreasonably withheld or delayed) save that the Tenant may grant sub-lease(s) for between 6 months and 3 years on assured shorthold or other terms which do not allow the sub-tenant security of tenure without the prior written consent of the Management Company provided that prior to or on the granting of each such sub-lease(s) (whether or not it requires the prior written consent of the Management Company) the Tenant procures except in the case of an underletting for a term of three years or less which does not require the Management Company's consent that the sub-tenant enters into a deed in the form contained in the eighth schedule.....

Paragraph (7)(g)

Without prejudice to or in any way derogating from the foregoing covenants..... neither the Tenant nor any person deriving title under the Tenant (including any undertenant whether immediate or not) shall.....underlet the Demised Premises as a whole without the prior written consent.....of the Management Company (such consent not to be unreasonably withheld or delayed) save as specifically provided in sub-clauses (d) (e) and (f) hereof

Fourth schedule

Regulations

Paragraph 2

Not at any time to use the Demised Premises or any part thereof for business purposes

Paragraph 3

Not to do or permit.....upon the Demised Premises.....any act or thing which may be or become a nuisance or annoyance or cause damage to the Landlord the Management Company or any of the Flat Owners.....

Paragraph 4(a)

Not to do or permit.....any act or thing which may render void or voidable any policy of insurance maintained in respect of the Building.....or may cause an increased insurance premium to be payable.....and to repay to the Management Company all sums paid by way of increased premium and all expenses incurred in the renewal of any such policy.....rendered necessary by a breach of this regulation.....

Paragraph 12

Not to permit.....the children or animals of the Tenant or any.....visitor.....or licensee of the Tenant to play upon the staircases landings or passageways in or about the Building or the Common Parts of the Estate

Paragraph 14(1)

At all times when not in use to keep shut any entrance door.....to the Demised premises.....

The Applicant/Landlord's statement of case

5. Mr Mark Barsby, director of the Applicant/Landlord stated that Willow Court comprised eight two-bedroom flats built by Betterment Properties (Weymouth) Ltd in 2005. The flats were marketed and sold during the spring of 2006, mostly for residential purposes. The Premises were on the first floor. It shared a communal access with residential leaseholders
6. The Respondent/Leaseholders had since 2006 offered the Premises under the name of "Melcombe Apartment" through the Dorset Holiday Cottages website for all year round short term holiday letting
7. In May 2006, when the sales of all eight flats had been completed, Betterment Properties (Weymouth) Ltd handed over the management company, Melcombe Avenue Management Ltd, and the freehold to the leaseholders
8. Since that time residential leaseholders had expressed concerns about the disruption caused by the weekly turnover of holiday visitors. Those concerns were exacerbated by the fact that the residential leaseholders had not been made aware when considering purchasing their properties that the developers had had no objection to holiday lettings taking place. They had also not been made aware of an amendment to the lease during the subsequent legal process of purchasing their properties, which had since become apparent, namely the deletion of the following clause from all subsequent drafts of the lease, referred to in a letter dated the 23 December 2005 from

Pengillys, the developer's solicitors :

Clause 4(7)(f)(ii)

Not to permit any under letting for holiday purposes or occupation by any person for a continuous period of less than six months save for non paying bone fide guests of the tenant

9. To the management company's knowledge, no deed of variation had been filed with the Land Registry
10. In addition to the amendment to the lease Betterment Properties (Weymouth) Ltd stated in a letter to the Respondent/Leaseholders dated the 2 May 2006 that they had no objection to holiday letting
11. During 2008 solicitors acting for an individual leaseholder sought clarification from Pengillys about holiday lettings at Willow Court. Pengillys' response dated 20 May 2008 stated that all leaseholders held the same lease and that there was a covenant contained in each lease which prevented underletting except in certain prescribed circumstances or to permit a flat to be used for business purposes. They also pointed out that their clients, the developers, had handed over the freehold to the residents in 2006 and that matters relating to the lease were now in the hands of the residents and the directors of the management company
12. In November 2008, Mr Barsby, the leaseholder of Flat 5, and Miss Catherine Lambie, leaseholder of Flat 8, were appointed as new directors to run Melcombe Avenue Management Ltd, the management company and freeholder of Willow Court
13. The new directors sought to address the residential leaseholders long-running concerns about holiday lettings, with complaints about the continual disruption to their home lives caused by the constant turnover of visitors on a weekly basis of most of the year and about the safety and security issues involved in, for example, the main door of the building regularly being left open or locked inappropriately by holiday visitors
14. Mr Barsby, on behalf of Melcombe Avenue Management Ltd, sent a letter dated 31 December 2008 to all leaseholders asking for holiday lettings to cease immediately and attaching photocopies of relevant pages of the lease
15. The Respondent/Leaseholders replied on the top of January 2009 that they would not cease holiday lettings as they believe that the developers initial assurances still applied
16. Notwithstanding the developers' having had no objection to the Respondent/Leaseholders' intention to holiday let, and the developers' instructions to remove a relevant clause from the lease, the directors of Melcombe Avenue Management Ltd, endorsed by the majority of residential leaseholders, had the legal right to request that all short term holiday lettings ceased

and that all underlettings at Willow Court be for a period of six months to 3 years and approved by the management company as specified in the lease

Documents attached to the Applicant/Landlord's statement of case

17. Documents included :

- a. an extract from Dorset Holiday Cottage website
- b. a copy lease
- c. a letter from Pengillys to Wessex Conveyancing Services 23 December 2005, in relation to Flat 3 Willow Court, including the following statement ".....our clients have instructed us that clause 4(7)(f)(ii) underlettings.....should be deleted from the lease and all future drafts will be treated as so amended. Please therefore delete this clause from the drafts in your possession"
- d. an extract from a draft lease showing the following clause deleted : "(f)(ii) not to permit any underletting for holiday purposes or occupation by any person for a continuous period of less than 6 months save for non paying bona fide guests of the Tenant"
- e. a letter from Betterment Properties (Weymouth) Ltd to the Respondent/Leaseholders dated 2 May 2006, including the following statement "We had always been aware that it was your intention to let the flat for short term holiday lets, and we can confirm by way of this letter that we have no objection to that arrangement"
- f. a letter from Pengillys to Carrit & Co 20 May 2008, stating that ".....we cannot see that the draft leases we hold are any different from the engrossments we have provided for each flat;.....there is a covenant.....in each lease that prevents underletting save in certain prescribed circumstances;.....the freehold was transferred to Melcombe Avenue Management Ltd in 2006 and that company is operated entirely by the residents....."
- g. a letter from Melcombe Avenue Management Ltd to the Respondent/Leaseholders 31 December 2008, including the following statement "It has now been confirmed by Pengillys, solicitors of Weymouth, that all owners have the same lease and that there was never any provision in the lease for holiday letting. Therefore we ask that all holiday letting ceases immediately. The minimum let period is 6 months and all underletting must be approved by the management company"
- h. a letter from the Respondent/Leaseholders to Melcombe Avenue Management Ltd 12 January 2009

The Respondent/Leaseholders' statement of case 21 December 2009

18. The Respondent/Leaseholders stated that they believed that they had acted fully in accordance with the lease and its original intent and believed that the management company's request for them to cease holiday letting was unreasonable

19. They purchased their flat in January 2006, having first viewed in October 2005. They believed that they were the first to complete a sale. They bought in the full understanding by all parties that holiday letting was allowed under the terms of the lease. That had been confirmed both by the selling agent, Hull Gregson Hull of Weymouth, and by the developer, Betterment Properties (Weymouth) Ltd prior to the Respondent/Leaseholders making an offer on the property. The selling agent said that holiday letting was allowed, even though unusual in Weymouth, because the developer felt that it was appropriate to this development because of its location and nature of the flats
20. They bought the flat as a second home, and decided to holiday let in order to help with costs and to allow themselves and their family to use a flat regularly during the year
21. They were not professional landlords and owned no other property apart from their main home. They did not operate as a business and had no intention of doing so
22. They had always acted in good faith in the desire to act fully in accordance with the terms of the lease. They had never sought to act against any of the lease terms
23. During the purchase process, their solicitors, Mustoe Shorter, sent them the draft lease for checking. It contained a specific clause stating that letting for holiday purposes was not permitted. They queried this through their solicitors, and it was confirmed that the clause had been wrongly included. It was subsequently removed by the developers and their solicitors before signing the lease. This was confirmed in a letter from Pengillys to Mustoe Shorter dated 22 December 2005
24. The management company was a party to the lease and, at the time the lease was granted, Pengillys were acting for the management company as well as for the developers. The management company, therefore, not only acquiesced in the use of the flats as holiday lets, but positively agreed to it. The management company was therefore bound them to continue to allow holiday lets, since otherwise it would be in breach of contract, albeit a collateral contract
25. The Respondent/Leaseholders exchanged contracts in December 2005 and completed the sale on 20 January 2006
26. Betterment Properties (Weymouth) Ltd were fully aware of the Respondent/Leaseholders' intention to holiday let. In accordance with clause (7)(f) of the lease the Respondent/Leaseholders obtained written consent in May 2006 to allow them to let for holiday use. They commenced holiday letting on 21 May 2006
27. Of the eight flats in the block, three were let as holiday lets

28. Betterment Properties (Weymouth) Ltd, the developer, continued to hold the freehold and the management company until handing over the freehold and the running of the management company to the residents in June 2006
29. At an AGM of the management company in October 2007, the Respondent/Leaseholders were surprised to learn that a number of leaseholders had not been informed by the developers or selling agents that other owners were intending to use their flats for holiday letting
30. In October 2008 Mr Barsby took over the running of the management company. In a letter dated the 31 December 2008 he requested that lettings ceased. The Respondent/Leaseholders replied on 12 January 2009 that they believed that they were acting fully in accordance with their lease and with the written consent of the management company to holiday letting
31. Their flat had been let through a reputable and bone fide holiday agency, Dorset Country Cottages. Guests agreed to behave in an appropriate and considerate manner. The number of guests was limited to a number appropriate to the size of the property. Guests were made aware that there were permanent residents in the building and that they should behave in a quiet and considerate manner. If any guest was not behaving in such a way, every other leaseholder had the Respondent/Leaseholders' personal contact details and were asked to get in touch with the Respondent/Leaseholders so that the agents could be contacted to take necessary action
32. The Respondent/Leaseholders believed that the guests were, on the whole, extremely pleasant people who did not affect the right to quiet enjoyment of Willow Court. Indeed during the last three seasons only one issue had been raised with the Respondent/Leaseholders verbally at the AGM in 2007 regarding a one-week letting during that summer. No other complaints had been received to date from any resident in the building
33. Mr Barsby was the leaseholder of Flat 5. He used the property as a holiday and weekend accommodation from his permanent home in Hertfordshire
34. The Respondent/Leaseholders believed that of the owners of the eight flats three wished holiday lettings to continue, three full-time residents wished holiday lettings to cease, one second home owner wished holiday lettings to cease, and the eighth leaseholder's thoughts on the matter were not known
35. The Respondent/Leaseholders had not currently taken any holiday bookings for 2010 pending the Tribunal's decision

Documents attached to the Respondent/Leaseholders' statement of case

36. Documents included :

- a. an e-mail from the Respondent/Leaseholders to Mustoe Shorter 20 December 2005
- b. a letter from Pengillys to Mustoe Shorter 22 December 2005, in the same terms as the letter in the Applicant/Landlord's bundle from Pengillys to Wessex Conveyancing Services 23 December 2005
- c. a letter from Mustoe Shorter to the Respondent/Leaseholders 9 January 2006
- d. the lease of Flat 6
- e. the letter from Betterment Properties (Weymouth) Ltd to the Respondent/Leaseholders 2 May 2006
- f. a letter from Mustoe Shorter to the Respondent/Leaseholders 3 May 2006
- g. a letter from Marc Hester of Corner Capstone Lettings Property Management Services to the Respondent/Leaseholders 16 May 2006
- h. the letter from Melcombe Avenue Management Ltd to the Respondent/Leaseholders 31 December 2008
- i. the letter from the Respondent/Leaseholders to Melcombe Avenue Management Ltd 12 January 2009

Inspection

37. The Tribunal had not been asked by either party to inspect the building or the Premises, and the Tribunal did not do so, because the issues in this case appeared to be Tribunal to relate to the construction of the wording of the lease, and the consideration of other documents submitted, rather than to the structure, layout, appearance or condition of the building as such

Tribunal's findings

38. Having considered all the representations made by the parties in the round, and drawing on the Tribunal's collective knowledge and expertise in these matters, the Tribunal makes the following findings
39. There is no restriction in the lease specifically against holiday lettings as such. A proposed restriction was removed at the drafting stage
40. The only restriction on underlettings generally, whether by way of holiday underlettings or otherwise, is contained in clauses 4(7)(f) and 4(7)(g)
41. Although the wording of clause 4(7)(f) could have been more happily drafted, its effect is to divide potential underlettings, whether by way of holiday underlettings or otherwise, into 3 categories so far as requiring consent is concerned :
- a. underlettings up to 6 months : prior written consent of the management company

required

- b. underlettings for between 6 months to 3 years : no prior written consent of the management company required for assured shorthold tenancies or other tenancies not allowing the undertenant security of tenure
- c. underlettings for more than 3 years : prior written consent of the management company required

42. The wording of clause 4(7)(g) is not happily drafted either, but does not materially alter or add anything to the effect of clause 4(7)(f) for the purposes of these proceedings
43. The majority of holiday lettings are usually, by their very nature, for less than 6 months. A holiday letting of the Premises is therefore likely to require consent under clause 4(7)(f). As an aside, the Tribunal takes judicial notice of the fact that in relation to a genuine holiday letting of the Premises for, unusually, between 6 months and 3 years, the holiday letting would be unlikely to be an assured tenancy by virtue of section 1(1)(c), section 1(2) and paragraph 9 of the schedule 1 part 1 of the Housing Act 1988
44. The lease also provides that in cases where the prior written consent of the management company is required, the undertenant also has to enter into a deed in the form set out in the eighth schedule to the lease
45. The lease does not provide for any particular form of consent to an underletting, but merely that it has to be in writing
46. The lease does not expressly require a separate consent for each underletting
47. The lease was completed on the 20 January 2006
48. The parties to the lease included Betterment Properties (Weymouth) Ltd as landlord and Melcombe Avenue Management Ltd as management company. Betterment Properties (Weymouth) Ltd, or its directors controlled Melcombe Avenue Management Ltd until the transfer of the freehold and running of Melcombe Avenue Management Ltd to the leaseholders in either May 2006, according to the Applicant/Landlord's statement of case, or June 2006, according to the Respondent/Leaseholders' statement of case
49. The letter of the 2 May 2006 Betterment Properties (Weymouth) Ltd included the following statement "We had always been aware that it was your intention to let the flat for short term holiday lets, and we can confirm by way of this letter that we have no objection to that arrangement"
50. That statement :
 - a. corroborates the Respondent/Leaseholders' evidence that they bought their lease in the full understanding by all parties that holiday letting was allowed under the terms of the

lease

- b. amounts to a general consent to future holiday lettings by Betterment Properties (Weymouth) Ltd
- c. has effect as a general consent to future underlettings for holiday purposes under clause 4(7)(f) of the lease, even though given by Betterment Properties (Weymouth) Ltd rather than by the management company, Melcombe Avenue Management Ltd, in that at that time Betterment Properties (Weymouth) Ltd, or its directors, controlled Melcombe Avenue Management Ltd, as is evidenced by the fact that the signatures to the lease as director and secretary of Betterment Properties (Weymouth) Ltd and as director and secretary of Melcombe Avenue Management Ltd are the same
- d. continued to be effective even after the transfer of the freehold from Betterment Properties (Weymouth) Ltd to Melcombe Avenue Management Ltd, in that Melcombe Avenue Management Ltd continued to be the management company under the lease, even though the company now owned the freehold and was controlled by the leaseholders rather than by Betterment Properties (Weymouth) Ltd or its directors

51. The question whether that consent was, or is, capable in principle of being withdrawn, and, if so, on how much notice, requires consideration of matters such as estoppel, and is properly a matter for the court, rather than for the Tribunal

52. However, and in any event, in relation to the withdrawal of consent the only relevant document before the Tribunal is the letter from Melcombe Avenue Management Ltd to the Respondent/Leaseholders 31 December 2008 which contained the following statement “It has now been confirmed by Pengillys, solicitors of Weymouth, that all owners have the same lease and that there was never any provision in the lease for holiday letting. Therefore we ask that all holiday letting ceases immediately. The minimum let period is 6 months and all underletting must be approved by the management company”, and that statement was not effective to withdraw the consent contained in the letter from Betterment Properties (Weymouth) Ltd dated the 2 May 2006 because :

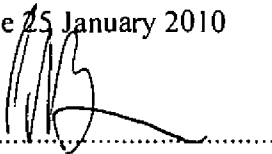
- a. it did not refer to the consent, and there is no indication in the letter that the author of the letter was even aware that consent had been given
- b. it proceeded on false premises, namely that :
 - it was necessary for there to be an express or implied provision in a lease allowing holiday lettings in order for a flat to be let for holiday purposes, whereas the Tribunal finds that holiday lettings are permitted under a lease unless there is an express or implied restriction to the contrary
 - the minimum period for underletting under the lease was 6 months, whereas the Tribunal finds that underlettings for less than 6 months are expressly provided for
 - all underlettings must be approved by the management company, whereas the Tribunal finds, for reasons already given, that :
 - underlettings for between 6 months to 3 years do not require prior written consent of the management company for assured shorthold tenancies or other tenancies not allowing the undertenant security of tenure

- o the lease does not expressly require a separate consent for each underletting

53. The Tribunal accordingly finds that the consent to holiday lettings given by the letter from Betterment Properties (Weymouth) Ltd dated the 2 May 2006 is still effective, and that no breaches of a covenant in the lease have occurred as a result of holiday lettings by the Respondent/Leaseholders

54. There is reference in the Applicant/Landlord's statement of case to alleged breaches of other covenants in the lease, such as continual disruption to the home lives of other leaseholders caused by the constant turnover of visitors on a weekly basis of most of the year, the main door of the building regularly being left open or locked inappropriately by holiday visitors, and the increasing of the Applicant/Landlord's responsibilities to comply with the Regulatory Reform (Fire Safety) Order 2005. However, the Tribunal finds that each of those allegations is unparticularised, and, in the absence of any detailed evidence, the Tribunal is not persuaded that there have been any breaches of covenant in the lease in any of those respects

Dated the 25 January 2010



.....
P R Boardman
(Chairman)

A Member of the Tribunal
appointed by the Lord Chancellor