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HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**Flat 10, 23 Holmlea Road, Datchet, SL3 9HG**
Applicant	:	**Lakeside Developments Ltd**
Respondents	:	**Lauren O'Hara**
Application number	:	**CAM/00ME/LBC/2011/0007**
Date of Application	:	**18th November 2010 (received 23rd May 2011)**
Type of Application	:	**For a determination that the Respondent is in breach of a covenant or condition in a lease (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair) David Brown FRICS MCI Arb**
Date of Decision	:	**15th July 2011**

DECISION

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1. The Tribunal is not satisfied that the Respondent is in breach of any covenant in a lease ("the lease") dated 28th March 1985 and made between the Focus 21 Developments Ltd (1) Horton Road (Datchet) Management Co. Ltd. (2) and Mark Adrian Huggett (3) wherein the property was let to Mark Adrian Huggett for a term of 999 years from 1st January 1984.

2. The Tribunal makes an order under Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Applicant from including the cost of representation in these proceedings in any future service charge demand.

3. The request by the Respondent for an order that the Applicant pays her costs is refused.

Reasons

Introduction

4. The Applicant is the freehold owner of the property. Horton Road (Datchet) Management Co. Ltd. is a party to the lease and would normally have been made a party to this application but in view of the decision made, the Tribunal has not delayed this case in order to take what would appear to be a pointless procedural step. The Respondent is the current lessee.

5. The application alleges that the Respondent is subletting the property in breach of the terms of the lease and agrees that the Respondent has made no admission about this. In the usual way, the Tribunal chair made a directions order on the 1st June 2011 stating that the Applicant should file and serve a statement of any witness evidence which could verify the allegation endorsed with a statement of truth. The Respondent was also ordered to file a statement of case admitting or denying the allegation.

6. No statement has been filed on behalf of the Applicant to verify its allegation. It relies on letters written making accusations that the property is being sublet. Although it does not expressly say so, it also presumably relies on the fact that the Respondent writes from an address which is not the property address.

7. The Respondent does not admit that the property is sublet. However, she does say that this matter has been before the court on a previous occasion and was resolved in her favour on the basis that any breach had been waived.

8. The directions order also recorded the fact that the Applicant considered that an oral hearing was not necessary and the case could be determined by the Tribunal considering the papers alone. The Tribunal agreed and notice was therefore given that the case would be determined after the 15th July 2011 on a consideration of the papers filed but that if anyone wanted a hearing, arrangements would be made. The Respondent wrote on the 20th June 2011 saying that she wanted an oral hearing. A few days later, she contacted the Tribunal office and withdrew that request, saying that she had, by then, obtained legal advice. She was content for the matter to be determined on the papers.

The Law

9. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the **Law of Property Act 1925** he must first make "*...an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred*".

The Lease

10. Clause 8(a) of the lease is a covenant by the lessee which is binding on the Respondent. It says "*the Lessee will not during the term*

hereby granted...sub-let or part with possession of the whole or any part or parts of the demised premises..."

The inspection

11. The Tribunal notified the parties in the directions order referred to above that it would not inspect the property unless a party requested such an inspection. No such request was received.

The Respondent's case

12. The Respondent produces a copy of a letter from the Applicant's then managing agents, Basicland Registrars dated 10 December 2001 alleging a breach of the terms of the lease because the property was then being sublet. The letter talks about contacting their solicitors about a possible variation to the lease.

13. She then produces a copy of a Section 146 notice dated 8th August 2002 alleging breach of the terms of the lease because of an alleged subletting together with a copy claim form for proceedings issued in the Barnet County Court on the 29th November 2002. The proceedings are instigated by the Applicant but do not seek possession or forfeiture. They merely seek recovery of the fee for producing the Section 146 notice.

14. Ms. O'Hara then says that she attended before the District Judge at Wandsworth County Court, to which the case had been transferred, and the Judge dismissed the claim on the basis that the alleged breach had been waived. A representative from the Applicant was present.

15. Further, when she received a letter from the Applicant's agent last year, she wrote on the 13th November 2010 referring to this case and in fact quoting the case number. The Applicant's agent apparently tried to find details of this but was unable to locate anything. In view of the evidence produced by the Respondent, it seems that the Applicant's records are not complete.

16. This letter is also interesting in that Ms. O'Hara says "*You will also recall that the Court ordered in my favour in the subsequent proceedings for costs which you brought (claim No BT207105). The subletting to which you refer is the same*". One reading of this could be that she is saying that the subletting now being referred to was this one. However, that subletting was upwards of 10 years old and it is unlikely that it is the same as now. It is the Tribunal's view that she is saying that the subletting in the claim for costs was the same as when the Section 146 Notice was served.

Conclusions

17. In order to make a determination that there has been a breach of a covenant in a lease, it is necessary for a Tribunal to be satisfied by the production of evidence that, on the balance of probabilities, such a breach has occurred.

18. In this case, there is no evidence one way or the other. There is merely an assertion in the application that the property that "*the lessee is subletting*". There is no evidence or statement explaining how the

Applicant comes to this conclusion and no response from the Respondent accepting such assertion. It is true to say that she does not deny that she is subletting and she does write from a different address.

19. However, in order to establish a breach of the terms of a lease which could lead to forfeiture, there has to be clear evidence, not merely inferences. The Tribunal cannot therefore be satisfied to the requisite standard of proof that a breach has occurred.

20. Furthermore, the Tribunal accepts the evidence of Ms. O'Hara that a court has said, in effect, that a previous alleged similar breach was of no effect because it had been waived. It is noted from a letter written by the Applicant's agent in this case, that any alleged breach was going to be waived if the Respondent agreed to pay a very large fee to the Applicant's agent.

21. As far as costs are concerned, the Respondent's letter of the 20th June referred to above makes 2 requests as far as costs are concerned. She asks that the costs of the Applicant's representation in these proceedings should not be deemed to be relevant costs in any future service charge demand. In view of the result of this case, the Tribunal agrees that it would be just and equitable to make an order pursuant to Section 20C of the 1985 Act as requested.

22. She also asks that the Applicant pay her costs incurred in these proceedings because, she says, the application was vexatious. She gives no indication as to what those costs may be or the amount of such costs. In the circumstances, the Tribunal cannot see that such an order is justified.

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Bruce Edgington
Chair
15th July 2011