LRX/153/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – breach of covenant – whether a breach has occurred – covenant requiring notice of assignment – notice not given but landlord acquiring knowledge by other means – held breach had occurred – Commonhold and Leasehold Reform Act 2002 s 168

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE NORTHERN RENT ASSESSMENT PANEL

by

GHM (TRUSTEES) LIMITED
and
BARBARA GLASS
and
DAVID GLASS

Re: 19 Snowdrop Street
Liverpool
Merseyside L5 7RT

Before: The President

Appeal by written representations

DECISION

1. This appeal by the landlords (to which the tenants do not respond) is against a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel refusing their application for a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant had occurred under a lease dated 18 February 2004 of the subject property, 19 Snowdrop Street, Liverpool. The LVT granted leave to appeal. The appeal is dealt with on the basis of the appellants' written representations.

2. The appellants are the registered freehold proprietors of the subject property, and the tenants hold under a lease dated 18 February 2004 for a term of 125 years from 1 June 2003. The lease was made between Priorclaim Ltd as landlord and Owl Securities Ltd as tenant. Clause 4.11 of the lease contains the following tenant's covenant:

> "4.11 within 28 days of any assignment, charge, underlease or sub-underlease or any transmission or other devolution of any interest in or relating to the Property to give notice to the Landlord of such deed or document or transmission or devolution and to pay the Landlord's solicitor's charges of £25.00 together with value added tax thereon for the registration of every such document."

3. Section 168 of the 2002 Act, so far as material, provides:

> "(1) 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 (c 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
>
> (2) This subsection is satisfied if –
>
> (a) it has been finally determined on an application under subsection (4) that the breach has occurred,
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> (b) the tenant has admitted the breach, or
>
> (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
>
> (3) ....
>
> (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."

4. The appellants sought a determination that the tenants were in breach of the covenant contained in clause 4.11. The respondents to the application were James Campion and Marie Campion. The LVT found that the respondents, who were not the original tenants, were registered as proprietors of the lease on 7 September 2005. It said that there was no dispute that there was a failure to give notice as required by clause 4.11.

5. A letter of 5 February 2007, referred to by the LVT in its decision, from the appellants to the respondents said this:

> "Our Managing Agents have come to us with their file. With substantial arrears outstanding for ground rents and buildings insurance, they obtained information from the Land Registry in preparation to have proceedings issued. The Land Registry records show that you purchased the leasehold interest sometime ago. Neither our Managing Agents nor ourselves have even been notified either by your Solicitors or yourself. This of course is in breach of Lease.
>
> We will wait ten days only to enable your Solicitor to remedy the breach by providing us with the appropriate Notice of Transfer and/or Charge together with the registration fee of £58.75 for each Notice. Provided this is received within ten days, we will then provide you with details of all outstanding arrears which remain on this account. Be advised as undoubtedly your Solicitor will advise you that the arrears run with the property. We would make it clear too that at no time have either our Managing Agents or ourselves issued what in lawful terms is called 'a clear ground rent receipt'. Your Solicitor will again advise you as to what this means."

6. In its conclusions the LVT said:

> "A. Despite opportunities to do so we note that the Respondents do not dispute the underlying facts. We accept that notice was not given in accordance with the terms of paragraph 4.11 of the Lease within 28 days of the assignment as it specifies.
>
> B. It is clear from the information that the Applicant freeholder, the party entitled to the benefit of the covenant, has become aware of the identity of the Assignees of the leasehold interest in the Property and of any charges that might have subsisted at least until 29 January 2007, the date of the office copy.
>
> C. We have considered the Lease and do not find that time is of essence in relation to the obligation under consideration. Notwithstanding a requirement for notice within 28 days, we conclude that later notification would suffice to remedy non-compliance. Our view is reinforced by the Landlord's own comments in its letter of 5 February 2007 in which reference is made to remedying a breach by providing notice of transfer at that point.
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> D. Taking into account the information required under the covenant we are satisfied that the Landlord now has possession of that information and is aware and in contact with both the Respondent Assignees and their solicitors. We do not consider there remains a material or actionable breach of that covenant. We conclude that any breach at the time has been remedied and no longer subsists.
>
> E. We find that the Applicant does not expect or has not put the Respondents in a position to comply with the exact terms of the covenant in that he has not at any time identified his solicitors and the fees requested are not those specified in the covenant."

7. The appellants say that the LVT was in error in concluding that, despite the requirement for notification within 28 days, time was not of the essence and that later notification would suffice to remedy non-compliance. A covenant which requires an act to be performed within a definite time, they say, is a covenant that is broken once and for all if the act is not performed within that time, and they refer to Woodfall on Landlord and Tenant para 17.105. Thus the breach would still subsist until such time as relief is agreed between the parties or ordered by the court.

8. The appellants submit further that the LVT's conclusion at D implied that a landlord could remedy a breach of covenant by the tenant. Only action on the part of the respondent assignees could remedy the wrong. The fact that the appellants could ascertain the name of the current owner of the leasehold interest from the Land Registry could not constitute a remedy for the breach of covenant.

9. The appellants' case, therefore, they say, is that the jurisdiction of the LVT in making a determination extends only to finding, as a fact, whether such breach has occurred and does not extend to finding whether such breach is actionable by reason of remedy or otherwise.

10. In my judgment the LVT was in error in refusing to make a determination that a breach had occurred on the ground that the breach had been remedied by the acquisition by the landlords of knowledge of the tenants' identity. The jurisdiction to determine whether a breach of covenant has occurred is that of the LVT. The question whether the breach has been remedied, so that the landlord has been occasioned no loss, is a question for the court in an action for forfeiture or damages for breach of covenant. In the present case the tenants were in breach of covenant in failing within 28 days to give notice to the landlords of the assignment and in failing to pay the landlords' solicitors' charges of £25 plus VAT. They did nothing to remedy the breach. The breach of covenant has not ceased to exist by reason of the fact that the landlords now know of the assignment and the names of the assignees.

11. In *Swanston Grange (Luton) Management Ltd v Langley-Essen* (LRX/12/2007, 12 November 2007, unreported) this Tribunal (Judge Huskinson) held that what was contemplated by section 168(2)(a) was a determination that an actionable breach of covenant has occurred, and that an LVT had jurisdiction to consider whether the landlord was estopped from asserting the facts on which the breach of covenant was based. At para 19, having considered passage in Halsbury on promissory estoppel, the Member said:

> "These passages show that if a landlord has waived or become estopped in the foregoing sense from relying as against a tenant upon a covenant, then for so long as this waiver or estoppel operates the obligation is suspended. It is wrong to conclude that a tenant who performs acts which strictly would be a breach of the suspended covenant has breached this covenant. Accordingly in answering the question posed by section 168(2)(a) as to whether the breach has occurred the LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of a waiver or estoppel (in which case a breach will not have occurred) or whether at the relevant date the covenant was not

> suspended (in which case a breach will have occurred if the facts show non-compliance with the terms of the covenant)."

12. The Member was concerned to make clear, however, that the LVT did not have jurisdiction to consider questions relating to the remedies available to a landlord in respect of a breach, and in particular whether the landlord had waived the right to forfeit the lease on the basis of a breach of covenant. At para 16 he said:

> "Nothing I say is intended to indicate any jurisdiction in the LVT to consider the separate question of waiver which arises when it is necessary to decide whether a landlord has waived the right to forfeit a lease on the basis of a breach of covenant. The latter question is dealing with the remedies available to a landlord on the basis of a breach of covenant which has been determined to have occurred or has been admitted by the tenant. The question with which this case concerned is the question of whether the landlord is estopped from asserting against the tenant that there has been a breach of covenant at all. This in my judgment is a wholly different question and I do not accept counsel for the landlord's argument that, if the LVT does not have jurisdiction to consider questions of waiver of the right to forfeit, it necessarily cannot have jurisdiction to consider questions of waiver in the sense of being estopped from relying upon a covenant at all."

13. The LVT concluded that there did not remain "a material or actionable breach" of the covenant because, as it concluded, the breach had been remedied. Whether a breach is material or has been remedied are, however, questions that go to whether any relief sought by the landlord should be granted, and that is not, under the terms of section 168, a matter for the LVT. It seems to me, in any event, correct to say, as the appellants assert, that remedying a breach is something that only the tenant can do.

14. It does not follow that, because the object of the covenant was to inform the landlords of the assignment and that they have ultimately acquired knowledge of it, the landlords can have suffered no loss at all through notice not having been given within the time provided for. That, and all other material considerations, would be for the court. It may well be that in any forfeiture proceedings the tenants would achieve relief, but that is not for the LVT or this Tribunal to judge.

15. Finally I note the LVT's conclusion E on the requirements set out in the letter of 5 February 2007. Whether that letter constituted notice for the purposes of section 146(1) of the Law of Property Act 1925 would, again, be a matter for the court, and I cannot see how conclusion E could be relevant to the question of whether a breach has occurred.

16. The appeal is therefore allowed, and I determined that the tenants' failure to give notice of the assignment constituted a breach of the covenant contained in clause 4.11.

Dated 11 June 2008

George Bartlett QC, President