UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LP/16/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – discharge or modification – leasehold flat in block of 31 flats – covenants against subletting and restricting user to lessee and his family – application refused – Law of Property Act 1925 s 84(1)(aa)

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BY

MATTHEW LEWIS LEE

Re: Flat 21
Courtenay Gate
Courtenay Terrace
Hove
East Sussex BN3 2WJ

Before: The President

Sitting at: 43-45 Bedford Square, London, WC1B 3AS
on 28 March 2012

Charles Harpum instructed by Howlett Clarke LLP of Hove for the applicant
Seb Oram instructed by Dean Wilson LLP of Brighton for the objector, Courtenay Gate Lawns Ltd

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The following case is referred to in this decision:

Souglides v Tweedie [2012] EWHC 561 (Ch)

The following cases were also cited:

Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2) [1979] 1WLR 1397
Re Strand Music Hall Co Ltd (1865) 35 Beav 153
Goldmile Properties Ltd v Lechouritis [2003] 1 EGLR 60
Dobbin v Redpath [2007] 4 All ER 465
Shephard v Turner [2006] 2 P&C R 28

DECISION

Introduction

1. The applicant in this case, Mr Lee, is the lessee of a flat that is one of 31 flats in a 1930s block called Courtenay Gate on the sea-front in Hove. The lease contains an absolute covenant against subletting, and Mr Lee seeks the discharge of the covenant or, alternatively, its modification so as to permit him to sublet with the lessor's consent. He also seeks the consequential modification of a user covenant. The lessor, Courtenay Gate Lawns Ltd, the company that owns the freehold of the building and whose shareholders are the lessees of the flats, objects to the application.

2. The lease under which Mr Lee holds was initially granted for a term of 125 years from 1 January 1973, but the term was later extended to 215 years by a deed of variation and supplemental lease made pursuant to section 56 of the Leasehold Reform, Housing and Urban Development Act 1993. He is entitled under section 84(12) of the Law of Property Act 1925 to seek discharge or modification under subsection (1) because the lease was created for a term of more than 40 years, of which 25 years have expired. The covenants to which the application relates are tenant's covenants in Schedule 4 to the lease. The first, at paragraph 9, the subletting covenant, is one of a number of covenants dealing with subletting and assignment. These provide as follows:

> "8. (a) Not to assign transfer underlet or part with possession of any part of the Flat (as distinct from the whole) in any way whatsoever
>
> (b) Not to assign transfer or part with possession of the Flat as a whole without the previous consent in writing of the Lessor such consent not to be unreasonably withheld and to be subject to compliance by the tenant with the provisions of paragraphs 9 and 10 of this Schedule
>
> 9. Not at any time during the term hereby granted to underlet or permit the flat to be underlet
>
> 10. Upon any assignment of this Lease to cause the assignee to enter into a direct covenant with the Lessor to observe and perform the covenants and conditions hereof
>
> 11. Upon every assignment transfer or charge thereof and upon the grant of letteres of probate or administration affecting the term hereby granted and upon devolution of any such term under any assent or other instrument or otherwise howsoever or by any Order of the Court within one month thereafter to give to the Lessor or to his Solicitors for the time being notice in writing of such underletting assignment transfer charge grant assent or other with full particulars thereof and to produce to the Lessor or to its said Solicitors every such document as aforesaid and to pay to the Lessor the fee of four pounds for the registration of the said notice."

3. The application seeks the discharge of covenant 9 or alternatively its modification by the addition at the end of it of the words “save with the prior consent in writing of the Lessor, such consent not to be unreasonably withheld”.

4. The second covenant, at paragraph 24, the user covenant, is in these terms:

> “24. Not to use or occupy the Flat otherwise than as a private residence for the sole occupation of the Tenant and his family and in particular not to use the Flat or any part thereof for the purposes of any business defined by Section 23(2) of the Landlord and Tenant Act 1954 or any statute amending or re-enacting the same.”

The modification sought would substitute for “the Tenant and” the words “either the Tenant or any lawful sublessee and that person’s”.

5. The lessor’s covenants included the following (in Schedule 7):

> “3. If so required by the Tenant to enforce the covenants and conditions similar to those contained herein on the part of the Tenant entered into or to be entered into by the tenants of the other flats in the Building so far as they affect the Flat…
>
> 4. That every lease or tenancy of a flat in the Building hereafter granted by the Lessor for a term similar to that created by this Lease shall…be substantially in the form of this Lease and contain covenants on the part of the tenant similar in all material aspects to those contained in this Lease except for such variations only as may be necessary in the case of flats let at rack rents.”

6. In 2009 Mr Lee went to work in Australia, and in November 2009 he asked the company for permission to underlet the flat. Although it appears (from documents that I will refer to) that the board of the company were initially disposed to grant such consent, they ultimately decided not to do so. The company’s solicitors wrote to Mr Lee and to his agents, Hamptons, who had advertised the flat to let, stating that Mr Lee was not authorised to sublet. Despite this, on 15 February 2010 Mr Lee granted an assured shorthold tenancy of the flat. On 18 April 2011 a leasehold valuation tribunal determined on the application of the company that Mr Lee was in breach of the subletting covenant in his lease. Mr Lee appealed to this Tribunal against that decision, but he later abandoned the appeal. On 22 August 2011 he entered into a further assured shorthold tenancy agreement.

7. There was a witness statement from Mr Lee, but he could not be called to give evidence as he was in Australia. His counsel, Mr Charles Harpum, said that Mr Lee was in an unfortunate position. He could not allow the flat to be occupied by a friend. He could not sublet it. But he wished to come back to it on his return from Australia. Mr Harpum submitted that the restrictions should be modified on ground (aa) in section 84(1). The company had objected on the grounds that the restriction had been imposed, as in leases of other flats in the block, in order to ensure that the persons responsible for the upkeep, maintenance and decision-making for the flats were those who had their primary residence there, thereby insuring a distinct community. In the light of this, the company said, a subletting would not be a reasonable user of the flat, and in preventing

such use the restrictions secured to it practical benefits of substantial advantage. Mr Harpum placed reliance on the fact that in the case of two flats, numbers 8 and 12a, the company had agreed to modifications of the leases so as to permit subletting subject to conditions; and he submitted that the terms of the leases of seven other flats, numbers 5, 6, 19, 22, 23, 29 and 30, permitted subletting also. Moreover in the case of the subject flat the board had been prepared to contemplate subletting. In view of this it could not be said that use by a sublessee would be unreasonable nor, since nine flats could be occupied by sublessees, could it be said that that the prevention of such occupation in the case one additional flat secured to the company any practical benefit of substantial value or advantage. In any event, the assertion that there was a distinct community, with the benefits claimed for it, was unsubstantiated.

8. Evidence for the objector was given by Professor Richard Harrison, since February 2010 the tenant of flat 3 and since December 2010 the chairman of the board of directors of the company. He said that in his opinion blocks of flats that were owner-occupied tended to be better kept and better managed and to have a better environment than blocks that were tenanted. He would not have purchased his flat, and would certainly not have paid the price that he did, if the block had not been essentially owner-occupied. He was unaware when he purchased the flat that the leases of flats 8 and 12a had been varied so as to permit subletting. As far as he was aware, the company had always sought to enforce covenants against subletting, and the leases of flats 8 and 12a as varied could only be sublet with the company's consent. Only flat 8 was currently sublet. Professor Harrison said that it was very important to the board and to lessees to ensure that the building remained as an owner-occupied block. The restrictions on subletting ensured that only people with a long-term interest in the building and its repair and management were responsible for the daily management and decision-making. The fact that people making the decisions all lived there was a huge benefit in that decisions could often be made more quickly, ensuring that repairs were dealt with in a timely manner, thus saving costs and ensuring the continued desirability of the block. On a practical level it was not desirable to live in a block where tenants were continually moving in and out and where there could be lengthy periods of vacancy.

9. Mr Harpum did not seek to contest the objector's case on the benefits of owner-occupation, and I accept Professor Harrison's evidence on this. The principal issue between the parties is whether owner-occupation of the block has been so diluted by the grant or variation of the leases of other flats so as to permit subletting that occupation by a sublessee would be a reasonable user of Mr Lee's flat and that the covenant preventing it does not secure to the company practical benefits of substantial value or advantage. As far as the question of reasonable user is concerned, I would not think that occupation by a subtenant would fail this test, and (as almost always is the case under ground(aa)) it is the practical benefits test that is decisive. In order to address the principal issue is necessary to consider first which flats can, under the terms of their leases, be sublet.

10. The sequence of the grant or variation of the relevant leases was as follows:

30 August 1974 lease of flat 21
7 June 1976 lease of flat 12a
21 July 1976 lease of flat 8

22 September 1977 lease of flat 30
11 November 1977 lease of flat 6
12 May 1980 lease of flat 23
7 October 1980 lease of flat 5
31 December 1982 lease of flat 29
17 October 1984 lease of flat 19
21 August 1985 lease of flat 22
26 November 1998 variation of lease of flat 8
10 May 1999 variation of lease of flat 12a
17 March 2009 variation and supplemental lease of flat 21.

11. The leases of flats 12a and 8 were, as originally granted, in material particulars in the same terms as the lease of Mr Lee's flat.

12. The lease of flat 30 as typed contained covenants in identical terms to paragraphs 8, 9 and 10 in Schedule 4 to Mr Lee's lease, but as executed all of these paragraphs with the exception of 8(a) were struck through and the subsequent paragraphs were re-numbered to reflect the alterations. Paragraph 24 (renumbered 22) remained unaltered.

13. In the lease of flat 6 paragraph 9 (the covenant against subletting the flat as a whole) was omitted, and the prohibition in paragraph 8(b) was limited to the last 7 years of the lease. The user covenant (paragraph 24, renumbered paragraph 23) was the same.

14. The lease of flat 23 omitted the provisions corresponding to paragraph 9 in Mr Lee's lease and it also omitted 8(b). The user covenant was the same.

15. The lease of flat 5 was in material respects in the same terms as the lease of flat 6 (omitting, therefore, paragraph 9, the covenant against subletting the flat as a whole, and limiting the prohibition in paragraph 8(b) to the last 7 years of the lease) except that the user clause was amended in manuscript so that it read:

> "Not to use or occupy the Flat otherwise than as a private residence for the sole occupation of the Tenant and his family or (if the tenant is a Company) of a member director employee or nominee of the Tenant…"

16. The leases of flats 29, 19 and 22 were in material respects in the same terms as the lease of flat 5, incorporating therefore the amendment that had been made in manuscript to the user covenant for flat 5.

17. All of these seven leases contained covenants in the same terms as those in paragraphs 3 and 4 of Schedule 7 to Mr Lee's lease.

18. The leases of flats 8 and 12a were the subject of amendments, which provided that paragraphs 8, 9 and 10 should be deleted and new paragraphs inserted. Paragraph 8

was to the same effect as before. Paragraph 9 contained 9 sub-paragraphs, the first two of which were in these terms:

> "(a) Not to underlet the flat without complying with the provisions of this paragraph and of paragraph 10(b)
>
> (b) The prior consent in writing of the Flat Reversioner to the proposed underletting and to the form of underlease must be obtained and such consents shall not be unreasonably withheld or delayed."

Paragraph 10(b) required the tenant upon any underletting to cause the undertenant to enter into a direct covenant with the lessor, among the provisions of which was to be the following:

> "(i) Not to use or occupy the Flat otherwise than as a private residence for the sole occupation of the undertenant and [his] family and not to allow any person to reside there who has not been previously approved in writing by the [Lessor] such approval not to be unreasonably withheld."

19. For the objector Mr Seb Oram submitted that the absence of a restriction against subletting in the leases of each of the seven flats was of no assistance to the applicant because each lease contained a user covenant that restricted occupation to the tenant and his family (or, in the case of flats 5, 19, 22 and 29, to a member etc of any company tenant). Mr Harpum drew attention to clause 1(a) of each lease, which provides: "The 'Lessor' and the 'Tenant' shall where the context admits include their respective successors in title." He said that "successor in title" was not a term of art, and he referred to a recent decision of Newey J in *Souglides v Tweedie* [2012] EWHC 561 (Ch), in which the judge held that a mortgagee was a successor in title of a lessee under an option agreement. So, he said, the user covenant in these leases should be read so as to include a subtenant. I do not accept this. "Successor in title" would not in its normal usage include a sublessee, and there is nothing about the nature of these leases in general (including that of flat 21) that would suggest that the term as used in clause 1(a) required to be read as doing so; and I do not think that it could have acquired an extended meaning through the deletion of the subletting covenant in each of the seven leases. Whether the user covenant does exclude subletting is, in my judgment, to be determined as a matter of construction of each individual lease. And for this purpose it is proper to take into account, as part of the matrix of facts, the terms of other leases of flats in the building granted before the lease that is being construed, since the terms of those leases were known to the lessor. It is appropriate, therefore, to consider them in sequence.

20. In the lease of flat 30 the covenant in paragraph 9 was deleted in manuscript from the typed version of the lease. That, it seems to me, is only explicable on the basis of an intention to exclude the prohibition on subletting. It is in my view highly improbable that the parties would have deleted the provision whilst intending that the user clause should nevertheless preclude subletting. The only reasonable inference is that they did not turn their minds to the user covenant. In the circumstances reconciliation between the provisions is properly to be achieved, in my judgment, by construing "Tenant" in the user clause in this lease as including by implication a subtenant. The next two leases, of flats 6 and 23, also excluded paragraph 9 (although they differed as between themselves and from the lease of 30 in the parts of the adjacent

paragraphs that they omitted or retained), but the user clause remained the same. It is reasonably to be inferred that these were drafted with the precedent of clause 30 in mind, and for this reason, in my judgment, I incline to the view that the user covenant in these leases requires to be read as extending to a subtenant.

21. When we come to the lease of flat 5, however, it is no longer possible to infer that the parties did not turn their minds to the user covenant in the context of a subletting. It was the subject of a manuscript amendment, and this was then adopted in the typed versions of the next three leases, those of flats 29, 19 and 22. If it had been intended that the permitted use should extend to use by a subtenant, provision to that effect could have been made in this covenant, and the fact that it was not points strongly against the implication that, as I have concluded, should be read into the earlier three leases.

22. My conclusion, therefore, is that the leases of flats 30, 6 and 23 do not preclude subletting but that the leases of flats 5, 29, 19 and 22 do preclude subletting. I will consider the consequences of this conclusion later.

23. Mr Harpum placed reliance on the fact that, not only had the company amended leases, and granted new ones, that did not prevent subletting, it had shown itself favourably disposed to allowing subletting in other suitable cases, including that of Mr Lee. The consideration given by the company to Mr Lee's request for permission to sublet appears from the minutes of the company's 2009 AGM and subsequent minutes of the board of directors. At the AGM, which was held on 24 November 2009, the issue was raised under other business, and the minutes record as follows:

> "Acting Chairman reported Leaseholders of four different Flats were seeking to sub-let, in breach of the strict terms of their Lease. Legal advice had been taken from Dean Wilson Laing and in response our solicitors had drafted a suitable letter, for consideration prior to despatch.
>
> The policy issue of sub-letting was discussed at length by Members, with different viewpoints expressed, and it was left to the Board to consider sub-letting in certain circumstances and subject to strict conditions."

24. The matter was then considered at the board meeting held immediately after the AGM:

> "Following discussion at the formal AGM, the Directors considered the various requests to sub-let received from four Flats.
>
> After discussion, it was decided to refuse consent with regard to Flats 4 (Merila), 7 (Zinkin) and 9 (Farndell deceased).
> However, in the case of Flat 21 (Lee), the Directors were prepared to agree in principle, subject to conditions (e.g. satifactory references)
> Juliam Wills to instruct Dewan Wilson Laing (Emily Fitzpatrick) to advise the relevant Leaseholders accordingly of the Board's decision."

25. At the board meeting on 9 February 2010 the question was dealt with as follows as a matter arising from the previous meeting:

> "Board considered latest correspondence from our solicitors, Dean Wilson Laing (Emily Fitzpatrick acting), covering various sub-letting issues.
>
> Draft letters to Ms. Merila (Flat 4) and to Hamptons (letting agents for Flat 21) were duly approved. It was also confirmed that Lisa Zinkin would have no permission to sub-let Flat 7. The Board's views were in accordance with the firm legal advice received.
> Company Secretary to instruct Emily Fitzpatrick accordingly."

26. The matter was then considered further at the board meeting on 18 May 2010, the minutes of which record as follows:

> "There was a general discussion regarding the problem of sub-letting and whether possible consent to sub-let could be given under certain criteria and subject to strict guidelines, if a future request was received.
>
> In the meantime, no permission to sub-let had been granted, in accordance with the strict terms of the relevant lease and the firm legal advice received from Dean Wilson Laing. As a result it appears various Leaseholders have responded (e.g. Flats 4 and 9) by terminating unauthorised tenancies and putting Flats on the market for sale. However, this course of action has not been adopted by the Leaseholders of Flat 21, where solicitors claim the refusal to allow sub-letting is unreasonable in view of the consent granted several years ago in respect of Flat 8.
>
> Board considered further background research would be necessary in respect of Flat 8 (the Booth case), where at the time the Freehold Company felt obliged to grant consent following a court hearing and the threat of legal proceedings.
>
> In the meantime, it was agreed not to pursue legal proceedings in respect of Flat 21, but to first obtain counsel's opinion as to whether or not refusal to sub-let had been compromised by the Flat 8 case."

27. The company has clearly not, either in general meeting or in its board, regarded subletting in general as acceptable. The board was at one stage disposed to agree to Mr Lee subletting, but it later changed its mind. It has moreover shown itself determined to take action against breaches of the subletting covenant. Although I have concluded that subletting is not excluded in the case of five of the flats, it does not follow from this that the power to prevent the subletting of other flats, and flat 21 in particular, does not confer on the company a practical benefit of substantial value. I have accepted the company's case on the advantages of having a block of owner-occupied flats, and 26 out of the 31 flats can only, under the terms of their leases, be owner-occupied. In relation to three of the flats, my view is that as a matter of construction of the leases subletting is not excluded. But in each of these cases the contrary is clearly arguable, and it is not to be assumed that a lessee would seek to sublet in the face of resistance by the company and incur the inconvenience and costs of a dispute. The evidence moreover is that at present only one flat is sublet, so that the owner-occupied character of the block

remains. The ability to prevent an additional flat being sublet is a practical benefit of substantial value to the company, in my judgment, whether or not it is unable to prevent the subletting of up to five other flats.

28. The applicant has failed, therefore to make out ground (aa). I would add that the lessor's covenants at paragraphs 3 and 4 of Schedule 7 of each lease (to enforce tenant's covenants in other leases and to include in all leases tenant's covenants that are similar in all material aspects to one another) seem to me to be material in two respects. Firstly they show that the covenants in issue, like all other tenant's covenants, are part of a scheme intended to apply to every flat in the block, and to make exceptions to the scheme would be contrary to the basis on which the great majority of tenants took their leases. It is the company's function to uphold the scheme. Secondly, the duty of the company under paragraph 3 remains despite its inability to prevent the subletting of five flats, but it could clearly become more difficult to perform this duty if applications to modify the subletting and user covenants were to succeed. These considerations, in my view, add to the reasons for rejecting ground (aa).

29. Mr Oram submitted that, even if ground (aa) were made out, it would be appropriate to refuse discharge or modification as a matter of discretion because of the conduct of the applicant. He had sought permission to sublet, and this had been refused; but despite this he went ahead and granted a sublease. Moreover, after the LVT had determined that he was in breach of covenant in doing this he granted a further sublease. Those actions demonstrated a total unwillingness to comply with the terms of his lease and could give no confidence that he would comply with the terms of any modified restriction. In addition it was as recently as 17 March 2009 that he had entered into a variation of his lease, and the deed of variation included express confirmation that the covenants in the lease (including, therefore, the ones that are the subject of the present application) should continue in full force and effect. Since the applicant has failed to make out the case for discharge or modification, no question of discretion arises. But I accept that the matters referred to by Mr Oram would have been likely to argue quite strongly against an order in his favour in the event that he had made out a case.

30. The application is refused. The parties are now invited to make submissions on costs, and a letter dealing with this accompanies this decision, which will become final when the question of costs has been determined.

Dated 23 April 2012

George Bartlett QC, President

Addendum on costs

31. The objector applies for its costs. The applicant resists this. He says that, although he failed on the application itself, he succeeded in persuading the Tribunal that two of the other leases did allow subletting; that the objection flew in the face of the resolution at the AGM of November 2009; and the fact that the applicant was in breach of the covenant should not be held against him.

32. I can see no reason why the objector, having successfully resisted the application, should not have its costs. Its successful contention in relation to two of the leases was not significant in the overall context. The objection was not contrary to the AGM resolution, which was to leave the question of subletting to the board. I would have considered that the objector should receive its costs even if the applicant had not been in breach; but the fact that he was in breach is an additional factor that justifies the award. Accordingly the applicant must pay the objector's costs, such costs if not agreed to be the subject of detailed assessment by the Registrar on the standard basis.

Dated 6 June 2012

George Bartlett QC, President