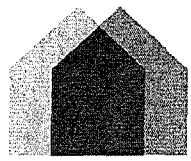

Residential
Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Application made under Section 168(4) Commonhold and Leasehold Reform Act 2002 ('the Act'): LON/00AZ/LBC/2008/0004

RE: Flat 19, Taymount Grange, Taymount Rise London SE23 3UH

BETWEEN:

Applicant: Metropolitan Properties Co (FGC) Limited

Respondent: Miss Christina Mavis Dineen

Representation:

The Applicant was represented by Ms C Taskis of Counsel instructed by Mr S Jones of Cripps Harries Hall LLP

The Respondent was represented by Ms N Muir of Counsel instructed by Miss M Williams of Stafford Young Jones, Solicitors

The Tribunal: Professor James Driscoll LLM, LLB, Solicitor, Mr M Cairns MCIEH, and Mrs Gerda Barrett JP

Date of Application: 10 January 2008

Date of Pre-Trial Review: 22 January 2008

Date of Hearing: 20 March 2008

Date of Decision: 10 May 2008

DECISION

The Application made under Section 168(4) of the Act seeking a determination that the Respondent is in breach of her lease is dismissed. On hearing the evidence and the submissions made by and on behalf of the parties, the Tribunal concludes that the Applicant has failed to prove that the Respondent committed breaches of the terms of her lease

THE APPLICATION

1 This application is made under Section 168(4) of the Act for a determination by the Tribunal that breaches of a lease have occurred.

2 In summary, the Applicant alleges that the Respondent has on numerous occasions breached the terms of her lease by nuisance, or nuisance-related behaviour to other residents in the block and to the caretaker. The Applicant contends that this behaviour, which took place over a lengthy period, constitutes a breach of covenants in the lease. The Respondent denies these allegations. She also argues that the behaviour complained of does not, in any event, amount to a breach of her lease. She also submits that as the Applicant has accepted payment of the ground rent during the relevant period, that it has waived the right to forfeit. In an allied submission she contends that the Tribunal should summarily dismiss the application as pointless because the Applicant has waived the right to forfeit.

3 The Applicant is the freehold owner and registered proprietor of a block of residential flats known as Taymount Grange, Taymount Rise, London SE23 ('the Block') and the Landlord under the Leases of the 72 flats in that block.

4 The Respondent is the leasehold owner and registered proprietor of Flat 19 Taymount Grange ('the flat'), one of the 72 flats in the block. The Respondent holds the flat under a lease dated 4 September 1987 which was granted by the Applicant to the Respondent for a term of 99 years from 25 March 1976.

5 Following the application to the Tribunal under Section 168(4) of the Act a pre-trial review was held on 22 January 2008 when Directions were given. In particular the Applicant was directed to prepare a bundle of documents relevant to the Application to include, amongst other things, "any witness statements of fact (to include statement of truth) and any legal submissions in support of the application". In turn the Respondent was also directed to prepare a bundle of documents. In the event the parties produced a

combined bundle of documents in two parts: the first consisting of the Applicant's case, the second the Respondent's reply.

THE HEARING OF THE APPLICATION

6 The hearing of the Application took place on 20 March 2008 when both parties were represented by solicitors and by Counsel. After the hearing the Tribunal wrote to the parties' representatives asking if they had any additional submissions to make on a decision of the Lands Tribunal in *Swanston Grange (Luton) Management Limited v Eileen Langley-Essen* (LRX 12 2007). In response counsel for the parties prepared submissions and lodged them with the Tribunal. The Tribunal's consideration and application of this decision is in paragraphs 54 to 59 below.

7 At the beginning of the hearing on the 20 March, Counsel for the parties addressed the Tribunal on several matters and raised certain preliminary issues. With the agreement of the parties the Tribunal heard argument on these preliminary submissions first before hearing the evidence and argument on the merits of the application. In the event the Tribunal decided that the application should proceed and it heard evidence and submissions. In reaching this final decision the Tribunal also has had the benefit of the post-hearing submissions made by the parties.

8 These preliminary submissions may be summarised in the following way:

- Did the allegations of misconduct amount in principle to a breach of the terms of the lease as contended by the Applicant?
- In bringing these allegations could the Applicant rely on an allegation at the hearing of breach of another term of the lease not previously referred to in correspondence or in the Application?
- If the Applicant succeeded in proving to the satisfaction of the Tribunal that the Respondent's conduct was such as to amount to a breach or several breaches of the lease, whether the Applicant had waived the right to complain about these breaches and/or the right to seek forfeiture of the lease.
- Whether the Tribunal should dismiss the Application on the basis that any findings of past breaches of the lease by the Respondent had been waived by the Applicant

9 Section 168 of the Act (no forfeiture notice before determination of breach) is as follows:

168 No forfeiture notice before determination of breach

(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,

(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) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(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.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which--

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

10 This is one of a series of reforms made to the forfeiture of residential leases by Part 2 of the Act. The effect of Section 168 is that a landlord under a long lease of a dwelling may not serve a notice under Section 146 of the Law of Property Act 1925 (commonly known as a 'Section 146 notice') unless the leaseholder has admitted the breach or, if not admitted, that it has been finally determined on an application under Section 168 that the breach has occurred. These restrictions on serving a Section 146 notice do not apply where 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. A landlord may also make an application to the Tribunal for a determination that a breach of covenant or condition in the lease has occurred. This is the course that the Applicant has chosen in this matter.

11 Part 2 of the 2002 Act also introduced two other reforms to forfeiture of residential leases. The first is a prohibition on exercising a right of re-entry or forfeiture for failure by a leaseholder to pay a small amount for a short period (2002 Act, section 167 and regulations made under that section). The second change was by way of an amendment to sections 81 and 82 of the

Housing Act 1996. Those sections were passed by Parliament in 1996 to prevent landlords under residential leases from forfeiting in relation to non-payment of service charges, unless the leaseholder either admitted that the amounts are due or that in the event of a dispute over them that this has been finally determined by a court or tribunal. Before the amendment made by the 2002 Act it was possible for a landlord to serve a forfeiture notice under section 146 of the 1925 Act provided the landlord referred to the limitations on forfeiture in section 81 of the 1996 Act. But these provisions as amended by the 2002 Act now prohibit the landlord from serving a section 146 notice except where the leaseholder has either admitted that the service charge is owing or in the event of a dispute over this that this has been determined by a court or tribunal.

12 Taking these various changes and restrictions on forfeiture together, they appear to express a legislative policy that owners of leasehold flats should not face a threat of forfeiture alleging a breach of the lease or a condition in the lease unless the landlord has first established that they are in breach of their leases. For these purposes 'forfeiture' includes serving forfeiture notices under Section 146 of the 1925 Act.

13 It is also relevant to note that under section 2 of the Protection from Eviction Act 1977 provides that no right of re-entry or forfeiture can be enforced otherwise by court proceedings while any person is lawfully residing in the premises or part of them.

THE LEASE

14 A copy of the Respondent's lease was included in the Applicant's bundle of documents at tab 2. Under clause 2 and schedule 3 to the lease the lessee covenants in the usual way to pay rent, service charges and - most relevantly for the purposes of this application - agrees to comply with the conditions in schedule 3 to the lease. The latter, amongst other things, contain provisions governing the use of the premises by the leaseholder.

15 In this application the Applicant alleges that the Respondent has on several occasions broken the obligation in paragraph 2 of schedule 3 of the lease. This paragraph reads as follows:

> "Not to use or permit to be used the Flat or any part thereof or the other parts of the Buildings used by the Lessee in common as aforesaid for any purpose from which a nuisance can arise to the Lessor or to the owners lessees and occupiers of the other Flats comprised in the Buildings or in the neighbourhood nor for any illegal or immoral purpose and not to bang doors or use any electrical device without an effective suppressor fitted thereto."

In the course of the hearing of the application the Tribunal suggested to the parties that the acts alleged might also amount to a breach of paragraph 9 of the Third Schedule to the Lease which reads as follows:

> "Not to leave the entrance doors of the Flat or of the Buildings open and not to leave or deposit or permit to be left or deposited any perambulators, bicycles or goods parcels cases or any other thing in or upon the entrance halls staircases balconies passages and landings or any other part of the buildings used in common with other lessees in the Buildings nor to permit any children to play upon any staircase or landing nor to do or suffer to be done any act or thing to the annoyance or entry of the lessor or other lessees of the Buildings or other adjoining premises."

PARTIES SUBMISSIONS ON THE PRELIMINARY ISSUES

16 The preliminary issues may be summarised in this way: if proved would the complaints about Respondent's conduct amount to a breach of her lease as a matter of construction on the lease? Has the Applicant waived any past breaches? If the Applicant has waived the right to forfeit should the Tribunal dismiss the application?

The submissions of the Applicant

17 Counsel on behalf of the Applicants made a number of submissions. She told the Tribunal that the Applicants would produce evidence which would establish that the Respondent had on numerous occasions been guilty of a nuisance to other lessees and occupiers and to the caretaker. She submitted that the history of these events (which she contends started in 2001 and continues to date) amounts in effect to a continuous breach of the Respondent's obligations under her lease not to cause nuisance or annoyance to others.

18 Whilst Counsel acknowledged that the Applicant had accepted payment of ground rent from the Respondent throughout the period, she denied that this amounted to a waiver of the right to seek forfeiture of the lease. Further, she submitted that the function of the Tribunal in hearing an application under section 168(4) of the 2002 Act was simply to determine as a matter of fact whether the Respondent had broken the lease or not.

19 She also submitted that as, the breaches alleged amounted to a continuing pattern of behaviour by the Respondent that amounted to a continuing breach of the lease, that in any event there could be no waiver of forfeiture. It is well established on the authorities, she submitted, that any waiver could

amount only at most to a waiver of past breaches; a landlord can, she submitted seek to forfeit and re-enter in relation to continuing breaches despite a waiver of past breaches.

20 She also submitted to the Tribunal that in any event, the Tribunal has no jurisdiction to determine whether the right to serve of a forfeiture notice under section 146 of the 1925 Act has been waived. This is because, in her view, the purpose of section 168 of the 2002 Act was to simply restrict the landlord from serving a section 146 notice unless either the leaseholder had admitted the breach or the Tribunal had determined that the leaseholder was in breach. Where a Tribunal makes such a determination the restrictions on the landlord's right to serve a forfeiture notice fall away.

21 She agreed with the suggestion of the Tribunal that the acts alleged of would amount to a breach not only of clause 2 but also clause 9 of the lease. She accepted that prior to the application that the Applicant had not put the matter in that way to the leaseholder or her representatives; however, as the complaints about the Respondent's behaviour would amount to both as a breach both in paragraphs 2 and 9 of the Third Schedule of the lease she saw no disadvantage to the Respondent in the Applicant's case being put in such a way. Finally, she contended that there were no waivers by the Applicant of the different breaches committed by the Respondent during the relevant periods.

Submissions made on behalf of the Respondent

22 Counsel for the Respondent's primary submission was that as the Applicant has waived the right to forfeit that the application for a determination of breach made under Section 168 of the 2002 Act is, therefore, pointless. Even if the Tribunal were to find a breach, she argued, the Applicant could not then serve a Section 146 notice as it has waived the right to forfeit by accepting payment of ground rents from the Respondent.

23 She argued that as it is common ground that ground rent had been demanded and had been accepted throughout the relevant period, that is to say the period when the Applicants allege that the Respondent was in breach of the lease meant that even if the Applicant succeeded in its application to the Tribunal under section 168(4) of the 2002 Act that this would be a fruitless exercise. This is because, in her submission, the landlord's later service of a forfeiture notice under section 146 of the 1925 Act would be fruitless as the Applicant had waived the right to serve such a notice.

24 In the course of her submissions she went further and argued that the Tribunal should dismiss the application: there is no point, she submitted, in the Tribunal hearing the evidence as any breach of the lease had been waived by the Applicants.

25 The Tribunal suggested to counsel for the parties that that if the breaches complained of proved to be of an episodic nature, that is to say a series of individual breaches rather than a continuing breach, there might be evidence that the right to complain about such breaches had been waived. Counsel for the Applicants accepted that in principle there could be waiver of individual breaches by a landlord, although she submitted that only a clear indication by the landlord that it would not be pursuing a particular breach could amount to such a waiver. Counsel for the Respondent accepted this point in principle but she preferred to argue the waiver point on the basis that the acceptance of ground rent amounted to a waiver the right to serve a section 146 notice.

THE TRIBUNAL'S DECISIONS ON THESE PRELIMINARY ISSUES

Continuing breaches?

26. The Tribunal was referred to *Woodfall on Landlord and Tenant* at paragraphs 17.092 to 17.106. At paragraph 17.092 the editors of Woodfall summarised the legal basis of waiver of forfeiture in the following way:

> "The occurrence of a breach of covenant or other event giving rise to a right to forfeit puts the landlord to his election. He may choose either to enforce his right of forfeiture and to treat the lease as being at an end; or he may choose not to enforce his right to forfeiture and to treat the lease as continuing to exist."

27 At paragraph 17.105 of *Woodfall* the following comments are made on the effect of waiver for once and for all breaches where a distinction should be drawn between a once for all breach of covenant and those of which are continuing breaches. Waiver of the right to forfeit the former precludes the landlord from ever forfeiting in relation such a breach.

28 But in the case of continuing breaches the breach arises "each day" and will accordingly survive an active waiver. *Woodfall* goes on to give the most common examples of once and for all breaches of covenant as failure to keep the demised premises in good repair, failure to keep them insured in a certain manner during the term, and using the premises in a prohibited manner.

29 On the basis of this and the parties' submissions the Tribunal concludes that even if the Applicant makes out the various specific allegations of nuisance behaviour by the leaseholder that it would not be correct to regard this as a continuing breach. It would be more accurate to describe them on the Applicant's case as a series of specific episodes.

Has the Applicant waived the right to complain about individual breaches of the lease?

30 It follows that in principle the right to forfeit may have been waived in the case of any of those episodes. It is also possible that the Applicant may have lost the right to allege a breach of covenant at all and so fail on that basis alone to establish that the leaseholder is in breach of the lease. There is no evidence that the Applicant has waived any of the individual episodes. Indeed the documentary evidence in the bundle shows a series of episodes where the Applicant (and sometimes their solicitors) wrote to the Respondent complaining of her behaviour. It is impossible to fairly regard the Applicant having waived any of the individual episodes. It is also relevant to note that the Applicant stated that its' letters had some effect as complaints would cease for a period after the Respondent received the letter. (But it is fair to note that the Respondent has always denied the complaints and that she has often instructed her solicitors to write on her behalf).

If proved do the Applicant's complaints about the Respondent's behaviour amount to a breach of her lease?

31 Counsel for the Respondent argued that clause 2 of schedule 3 to the lease was in essence a user clause restricting a leaseholder to using the premises for residential purposes. In reply counsel for the Applicant suggested that the user covenant is contained in paragraph 1 of that schedule and that it is evident that the purpose of paragraph 2 is to regulate the manner in which a leaseholder uses both the flat demised and the common parts of the building and to prohibit a leaseholder in particular from causing nuisance to others living in or residing in the building.

32 Counsel for the Respondent urged the Tribunal not to allow the Applicant to proceed on the alternative basis that there is a breach of paragraph 9 of schedule 3 to the lease whilst the Applicant urged the Tribunal to consider whether the evidence purported a breach of that part of the lease as well.

33 On balance the Tribunal prefers the Applicant's arguments on the interpretation of the lease. It seems to the Tribunal reasonably clear that one of the purposes of paragraph 2 is to prohibit leaseholders from acting in such a way as is to amount to a nuisance to others. The Tribunal does not think it unreasonable for it to consider whether there might be like breaches to paragraph 9. This is because throughout the complaints which have been made since 2001 that it has been evident to the Respondent and her various advisers that the Applicant has expressed concerns about her behaviour to others in the building. If these are proved they would amount to a breach of both paragraphs 2 and 9 of the lease. (Counsel for the Applicant also relies on *Clerk & Linsdale on Torts,* 19th Ed., 2006 paragraphs 20-09 on, which the Tribunal noted but did not find of assistance to this decision).

Should the application be summarily dismissed?

34 The Tribunal did not think that the Respondent had pursued the application to dismiss summarily the Applicant's claim with great enthusiasm. The Tribunal drew the Respondent's counsel's attention to regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 which allows the Tribunal to dismiss an application as frivolous or vexatious or otherwise an abuse of the process of the Tribunal. There is no suggestion by the Respondent that the application was made frivolously or vexatiously. Even if the Respondent is correct in submitting that finding that there had been breaches of the lease during the periods complained of that the landlord's prospect of forfeiting is fruitless because of the evidence of waiver does not in the Tribunal's view prevent the landlord from exercising his right to seek a determination from the Tribunal. It seems to the Tribunal that one of the reasons for the introduction of the statutory restrictions on serving a section 146 forfeiture notice without first establishing a breach allows the landlord to test and seek to prove that the leaseholder is in breach of his obligations.

35 The Tribunal therefore concluded that the Applicant was entitled to proceed with this application under section 168(4) of the 2002 Act. It then heard evidence and further submissions from the parties.

EVIDENCE

36 The Applicant relied on three sources of evidence: a statement that Mr Robin Gammon, an area manager for the Applicants, a witness statement of Mr Peter Wilson-Jones who has been employed as the caretaker in the building since 2002 and a series of statements made by various leaseholders in the building made since 2001. The Tribunal noted that none of the latter statements were signed witness statements in accordance with directions given by the Tribunal on 14 January 2008.

37 Mr Gammon gave oral evidence to the Tribunal which was essentially in two parts. In the first he recalls written and telephone complaints that he is aware of since 2001 on the part of other leaseholders in the building. However, he told the Tribunal that his principal concern was the effect that the Respondent's behaviour had on the current caretaker. Mr Gammon told the Tribunal that the Respondent had made life very difficult for two previous caretakers. He described it as misbehaviour, as he sees it, as consisting of harassing the caretaker, following them and making life unpleasant for them.

38 Under cross-examination he accepted that he could not give direct testimony as to any of these specific complaints that had been made. He also agreed

under cross-examination that his description that some residents felt threatened by the Respondent was an overstatement.

39 Mr Peter Wilson-Jones also gave evidence based on a signed witness statement to the Tribunal. He complained of several types of harassment - to use his expression - on the part of the Respondent over the years since 2002. He said that this behaviour manifested itself in making unwarranted complaints to him and in front of other leaseholders about his performance as porter. He also complained that she had accused him of being a paedophile. He said that she often followed him, impeded his work and that he often felt physically threatened by her. She makes 'cat noises' occasionally in order to provoke him. She also makes enquiries about her cats.

40 He told the Tribunal that there was a serious event that took place in September and October 2007. He said that the Respondent had informed the police that he had been guilty of an assault on her and that had tampered with her mail.

41 Under cross-examination he admitted that there had been an incident with the Respondent at the time when he met her in the common parts and declined to move to one side when she walked past him. He said that he was seriously embarrassed when the police were called and interviewed him about allegations of assault and tampering of mail. He strenuously denied tampering with mail. But he remembers an occasion when the postal delivery simply consisted of leaving all the residents' mail in the hall of the common parts whereupon he had taken it upon himself to have it delivered properly.

42 He says that the Respondent's behaviour has driven him to exasperation and this is why in one of his e-mails he told his superiors that he felt like "punching her in the face". He also accepted that in 2006 that in protest against her behaviour he had withdrawn his services from all the residents in the block.

43 The Respondent gave evidence on the basis of her signed witness state which included statements from two neighbours of hers but neither of which had been signed as directed in the directions given on 14 January 2008.

44 She vehemently and categorically denied that she had accused Mr Wilson-Jones of being a paedophile. She accepted that she and he have had a difficult relationship and she told the Tribunal that she tries to avoid him whenever possible. She accepted his point that she frequently makes enquiries about her cats. But she could see nothing wrong with this.

45 Under extensive cross-examination she denied that she had broken her lease by harassing or being a nuisance to Mr Wilson-Jones or to the other leaseholders. Asked why the other leaseholders had written to the landlords to complain about her she told the Tribunal that those leaseholders were in league with Mr Wilson-Jones.

THE TRIBUNAL'S CONCLUSIONS ON THE CLAIM

46 In this application the Applicant makes very serious allegations that the Respondent has been guilty of nuisance behaviour to the current caretaker Mr Wilson-Jones, to his predecessors and to a number of leaseholders in the building. If any of these allegations have been substantiated to the satisfaction of the Tribunal, the Tribunal would have had no hesitation in finding that the Respondent's behaviour was in breach of paragraphs 2 and 9 of schedule 3 of her lease.

47 The burden of proving these allegations lies, of course, with the Applicants and their advisers. The Tribunal concludes there having regard to the totality of the evidence led on behalf of the Applicants that they have failed to prove any of these specific incidents of nuisance behaviour. It is noteworthy that none of the leaseholders who had provided statements complaining about the Respondent was called upon to give evidence at the Tribunal. The Tribunal repeats the point that contrary to the directions given by the Tribunal on 14 January 2008 that the Applicant has failed to obtain signed witness statements from any of the leaseholders. The Tribunal also notes that these episodes even if proved amount to specific episodes over a period of some seven years. This could not, in the Tribunal's view, amount to a case where the Applicant has been guilty of continuous cause of nuisance behaviour.

48 As to the evidence given at the hearing, the Tribunal was generally impressed with Mr Gammon's evidence. It noted that his main concern as he told the Tribunal is over the welfare of the caretaker. He also told the Tribunal that in his experience the leaseholders in the block were generally kindly disposed towards one another. He said also that he had not encountered such problems in managing the particular block in all his years in working in leasehold management. All these points made, and as Mr Gammon and the Applicant would accept, Mr Gammon does not himself have any direct evidence to bring to bear on the issue of whether the Respondent has been guilty of any of these specific acts of nuisance behaviour.

49 In contrast with Mr Gammon the Tribunal did not, find Mr Wilson-Jones' evidence convincing. For example his habit of recording by e-mail and note to his immediate superiors of his disputes, as it might be put in that way, with

the Respondent, including complaints about the Respondent rattling keys noisily, staring at him and pretending that some of her comments came from her cat sounded even less impressive to the Tribunal when made orally by Mr Wilson-Jones than they did as they appear on paper. Mr Wilson-Jones complains about other matters such as a complaint that the Respondent unnecessarily uses the lift late at night and bangs the door. However he was unable to bring any specific corroboration or confirmation of these complaints. Nor was he able to explain why he had concluded that it was the Respondent on these occasions who had been slamming her doors or using the lift in an unreasonable way rather than other residents.

50 Nor did the Respondent's evidence particularly impress the Tribunal. However the Tribunal noted the vehement manner in which she denied the most serious accusation that she had accused Mr Wilson-Jones of being a paedophile. But the Tribunal was not impressed with her explanation that some of her neighbours had complained in writing about her because they were in league with Mr Wilson-Jones.

51 The Tribunal concludes that the Applicant has fallen a long way short of its burden of establishing on the balance of probabilities that the leaseholder has broken her lease on any of the occasions they have complained about. As counsel for the Respondent put it, forfeiture means not just the loss of a home but also loss of the value of the property. There must be clear proof of allegations that a leaseholder has broken the terms of the lease.

52 The Tribunal therefore concludes that the Applicant's application for a determination of breach must fail.

53 Since on the evidence there is no finding that the Respondent was in breach of her lease, issues relating to waiver do not have to be decided on this particular occasion. That said, the Tribunal notes the continuing acceptance of rent, without qualification, by the Applicant throughout the period 2001 to date. It also notes that on four separate occasions and through two different firms of solicitors the Applicant had instructed solicitors to write to the Respondent complaining about her misbehaviour and threatening to seek injunctive relief and damages. In all of those cases they were met with what can only be described as robust responses on two occasions by solicitors instructed by the Respondent denying any misbehaviour.

54 The Tribunal has also had the benefit of post-hearing submissions by counsel on the decision of the Lands Tribunal on a breach of lease application in *Swanston Grange (Luton) Management Limited v Eileen Langley-Essen* (LRX 12 2007).

55 In this matter the Land Tribunal heard an appeal by a landlord against a decision of the leasehold valuation tribunal (LVT) in an application made

under section 168 of the 2002 Act. The LVT decided that the landlord had waived the leaseholder's breach of their lease with the result that is not therefore entitled to a determination that the leaseholder was in breach of their lease. The Lands Tribunal agreed that in principle a landlord might establish an alleged breach of the lease by the leaseholder yet would not be entitled to a determination if the landlord had waived that breach. In paragraphs 21 of the decision it was said:

> "Accordingly, I conclude that what is contemplated in section 168(2)(b) is an admission by the tenant that an actionable breach of covenant has occurred. Similarly what is contemplated in section 168(2)(a) is a determination that an actionable breach of covenant has occurred, not a determination that facts have occurred which, on the strict interpretation of the lease, amount to a breach of covenant but with it being left over future consideration as to whether the landlord is or is not estopped from asserting that these facts constitute a breach of covenant."

56 However, the Lands Tribunal decided that on the facts of the case, the LVT was incorrect in concluding that the landlord had waived the right to rely on the breach of covenant. The Tribunal went further and said that for a landlord to be prevented by waiver, or promissory estoppel, from relying on the relevant covenants the leaseholder would have to show an unambiguous promise or representation that the landlord would not insist on its legal rights under the relevant covenants either for the time being or at all. However the leaseholder would need to establish that he or she had altered the position to her detriment on the strength of such promise or representation such that the assertion by the landlord of a its strict legal rights would be unconscionable (the Lands Tribunal referring to Halsbury's Laws 4th Edition reissue volume 16(2) paragraph 1082).

57 Applying this to the appeal the Lands Tribunal concluded that no such waiver or estoppel could be made out. It therefore allowed the landlord's appeal and found that there had been breaches of the covenant in the lease (relating to unauthorised subletting).

58 A copy of this decision was sent to the representatives to the parties and the following comments were received. For the Respondent Counsel submits that a distinction was drawn between waiver of a breach and waiver of the right to forfeit. She also submitted, as she did during the hearing, that where a Tribunal has evidence that a landlord has waived the right to forfeit, no order should be made under Section 168 of the Act. For the Applicant counsel agreed that the Lands Tribunal drew a distinction between waiver of a breach and waiver of the right to forfeit; the latter question in her submission is not a matter for the Tribunal.

59 The Tribunal prefers the Applicant's submissions on this point. It seems clear that the Lands Tribunal drew a distinction between acts, omissions or other behaviour that could amount to a breach of a term of the lease. It is possible that the landlord could waive the right to treat the event as a breach of the lease. Waiver of a right, such as the right to forfeit or to serve a forfeiture notice is a separate matter. A leasehold valuation tribunal can properly consider if a landlord has lost the right to complain that a leaseholder is in breach and so find that the landlord cannot prove that the leaseholder is in breach. In this matter, and as explained above, this Tribunal concludes that the Applicant did not waive the right to complain about the alleged breaches of covenant on the part of the Respondent. It may have waived the right to forfeit, but that is not a matter for this Tribunal. (It is arguable that the Tribunal does have the discretion to dismiss an application if it is unreasonable and this might include a case where a landlord seeks a determination under Section 168 in circumstances where it has clearly waived or lost the right to serve a forfeiture notice).

60 The application under section 168(4) of the 2002 Act therefore fails. The Tribunal repeats its conclusions that the Applicant failed to prove that the Respondent was guilty of the nuisance behaviour complained of during the relevant period. If such misbehaviour had been established it would have amounted to a clear breach of the lease.

61 As the Tribunal has found as a fact that the complaints are not proved it is unnecessary to decide the other issues relating to waiver. That said and applying the Lands Tribunal decision in *Swanston Grange (Luton) Management Limited v Eileen Langley-Essen* there was no evidence that the Applicant had waived the right to complain about any of the incidents. In the event it failed to prove them to the satisfaction of this Tribunal. It is also unnecessary to decide if the Applicant has waived the right to serve a Section 146 notice and nor does the Tribunal have jurisdiction to make such a decision.

62 It remains only for the Tribunal to suggest to the parties that they consider other ways of resolving differences which have clearly arisen between the Respondent and the current caretaker.

SIGNED James Driscoll

(James Driscoll, LLM, LLB, Solicitor)

DATED: 10 May 2008