LRX/12/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT– Breach of covenant – Commonhold and Leasehold Reform Act 2002 s.168 – whether a breach has occurred – jurisdiction of leasehold valuation tribunal to consider whether landlord has waived the covenant (in the sense of being estopped from relying on its strict rights under the covenant) – whether landlord in fact so estopped.

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE EASTERN RENT ASSESSMENT PANEL

BETWEEN **SWANSTON GRANGE (LUTON) MANAGEMENT LIMITED** **Appellant**

and

EILEEN LANGLEY-ESSEN **Respondent**

**Re: Flat A11 Swanston Grange,
798-802 Dunstable Road,
Luton,
Bedfordshire LU4 OHF**

Before: His Honour Judge Huskinson

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 22 October 2007**

Mr John Clargo instructed by Dale & Dale for the Appellant
No appearance or representation on behalf of the Respondent

The following cases are referred to in this decision:

Continental Property Ventures v Whites [2006] 1 EGLR 85

DECISION

Introduction

1. The Appellant appeals to the Lands Tribunal, with permission, from the decision of the Leasehold Valuation Tribunal for the Eastern Rent Assessment Panel ("the LVT") dated 13 December 2006 whereby the LVT decided, on an application by the Appellant under section 168 of the Commonhold and Leasehold Reform Act 2002, that there was no breach of the three covenants in the relevant lease which the Appellant contended had been breached.

2. The Appellant is the freehold owner of premises at Swanston Grange. By a lease dated 16 April 1986 Flat A11 Swanston Grange was demised to the original lessee for a term of 125 years from 25 March 1986. In due course the term became vested in the Respondent. The lease contains covenants in clauses 2 (ixx), (xx), and (xxiv) whereby the lessee covenanted, in brief summary, not (inter alia) to underlet the demised premises without obtaining a deed executed by the underlessee containing a direct covenant with the Respondent (as lessor), a covenant to give written notice of any underlease within one month, and a covenant not to effect any underlease without a transfer of the share held by the lessee in the Appellant to the underlessee.

3. It is not necessary for me to set out the words of the foregoing covenants in full or to consider the construction of these covenants, because for the purposes of the LVT's proceedings

> "... it was agreed by the parties that the Respondent had underlet without first obtaining from the intended underlessee a duly executed deed containing a direct covenant with the [Appellant] to observe and perform all the covenants on behalf of the Respondent as required by Clause 2 (ixx). The Tribunal also found that it was agreed by the parties that the Respondent had not within one month after the underlease given the written notice to the [Appellant's] solicitors of the underletting as required by Clause 2 (xx)"
>
> (See paragraph 31 of LVT decision)

And also in paragraph 35 of its decision the LVT stated that:

> "The Tribunal found that it was agreed by the parties that no transfer had been made by the Respondent of her share in the [Appellant] pursuant to Clause 2 (xxiv)."

These agreements are further evidenced in paragraphs 9 and 19 of the LVT's decision. In the light of the foregoing it is not necessary or appropriate for me to give any consideration to these matters or to make any comment on the nature of the covenants. I simply proceed on the agreed basis as recorded above.

4. It was however submitted by the Respondent (and held by the LVT) that the Appellant had waived compliance with these covenants and that accordingly there was no breach of these covenants for the purposes of section 168 of the 2002 Act, see paragraphs 32 to 36 of the decision.

5. There were in summary two matters before the LVT:

(a) whether the LVT had jurisdiction to consider the question of whether the Appellant had waived the right to rely upon the relevant covenants; and

(b) whether, if the LVT had such jurisdiction, the Appellant had waived the right to rely on the relevant covenants.

The LVT decided both matters adversely to the Appellant. The Appellant appeals against both of these findings which therefore fall to be considered by this Tribunal. I reject the suggestion at one stage raised by the Respondent that the terms of the grant of permission to appeal (permission being granted by the LVT) were insufficiently wide to allow the second matter (b) also to be argued.

6. It is important to note that the LVT, when concluding that the Appellant had waived the relevant breaches, was using this expression to mean not that the Appellant had waived the right to forfeit the lease on the basis of the relevant breaches but in the sense that the Appellant had waived the right to assert against the Respondent that the admitted facts constituted a breach of the covenants at all.

7. At the hearing before me there was no appearance or representation on behalf of the Respondent. This was because an accommodation has been reached between the Appellant and the Respondent to the effect that, even if this Tribunal allows the Appellant's appeal and concludes that the alleged breaches have occurred for the purposes of section 168(2)(a), the Appellant will not serve a section 146 notice in respect of these breaches. It is recognised by the Appellant (see their solicitors' letter of 14 June 2007) that

> "... your client has to all intents and purposes remedied the breaches of covenant so far as they are capable of being remedied".

The facts

8. The relevant leases are referred to above. As there stated it is not necessary to set out the terms of the covenants relied on. It should also be noted that Clause 2 (xxiii) contained a covenant on the part of the lessee

> "to comply with and observe the regulations set out in the schedule hereto and such further reasonable regulations as the Lessor shall make from time to time for the use of the Building in the interest of all the Lessees thereof".

9. By a notice given to all the lessees dated 6 August 1996 the Appellant stated that in the interest of good management of the Building the Appellant had, in accordance with Clause 2 (xxiii) of the lease, authorised a new regulation with immediate effect. The regulation included a requirement that no flat should be sublet before a properly executed deed (to be prepared by the Appellant's solicitors) together with a copy of the proposed tenancy agreement was lodged with the Appellant's solicitors and the necessary approval given. The Respondent did not purchase her lease until substantially after August 1996 and claimed to be unaware of this additional regulation.

10. The facts which the Appellant alleged constituted breaches of the Clauses 2 (ixx), (xx) and (xxiv) were briefly these. The Appellant complained that by an underletting dated 22 December 2004 the Respondent underlet the flat for a fixed term of six months plus 10 days by way of an assured shorthold tenancy and that she did so without obtaining a deed of covenant between the undertenant and the Appellant in accordance with Clause 2 (ixx), and that the Respondent failed to notify the Appellant of this underletting within one month and also failed to transfer the relevant share in the Appellant to the undertenant.

11. At the hearing before the LVT it appears that no oral evidence or indeed written evidence was submitted on behalf of the Respondent beyond the Respondent's statement of case. The copy of this document before me purports to be signed by Mr Marshall a partner of the Respondent's solicitors but is in fact unsigned (the document includes a form of statement of truth). There was also the evidence contained in the documents which were laid by consent before the LVT. For the Appellant oral evidence was given by Ms Joanna Daboul, whose written statement is before me. So far as concerns the Respondent's statement of case this appears to contend that the facts which had occurred did not constitute a breach of covenant (this position was retreated from at the hearing, see paragraph 3 above). So far as concerns the allegation of waiver this was based on the following evidence on behalf of the Respondent in the statement of case, paragraphs 4 and 5 containing the following material:

> "4. It is further the Respondent contention that prior to the new managing agents taking over this matter no previous requests were made by the Applicant in relation to underlessee's to either her or any other Lessors in the premises.
>
> 5. As to the contention in paragraph 5.3 the Respondent will contend that it is unreasonable for the Lessee to transfer the share to the underlessee when in all cases the underlessee is in occupation under a 6 months assured shorthold tenancy and there is no guarantee that upon the cessation of the tenancy the Tenant would transfer the same back. Again this has never been enforced by the previous managing agents on behalf of the Lessor nor enforced by the Lessor. In the circumstances the Respondent asked the Tribunal to consider this matter specifically taking into account the above representation."

12. The LVT in its decision in paragraph 30 considered the question of whether the LVT had jurisdiction to consider the question of waiver:

> "The Tribunal did not agree with Counsel for the Applicant that the Tribunal could not consider whether or not a failure to comply with a breach by a tenant had been waived

by the words or conduct of a landlord. The Legislation requires the Tribunal to "finally" determine whether a breach has occurred. The Tribunal is of the opinion that a final determination cannot be made without considering all the circumstances which will include whether the breach has been waived. To merely determine whether technically a breach has occurred but that it may have been waived would mean that the determination would only be an interim one leaving a final decision to be made by a court following an application by the tenant for relief against forfeiture."

Having decided it did have such jurisdiction the LVT gave its decision on the question of waiver in paragraph 32:

> "However the Tribunal found that the Applicant knew of the underlettings by the Respondent, which had taken place in the past. The letter from the Applicant's Managing Agent date 6 August 1996 showed that the Applicant's had been aware that Lessees had underlet and in her written statement Ms Daboul stated that 'around 21 flats are investment properties and are sublet'. She also stated at paragraph 8 that 'it is accepted that the Applicant may not have taken formal action in the past with regard to the Respondent'. The Tribunal therefore found that on the balance of probabilities the Applicant was aware that the Respondent had underlet for a number of years. It was also found that the Applicant had not, until the Application, taken any steps to enforce the covenants and therefore the Tribunal found that the Applicant had waived compliance with the covenants up to that time."

So far as concerns Clause 2 (xxiv) there was no separate analysis of waiver, the LVT stating in paragraph 35:

> "As with the Clauses 2 (ixx) and (xx) it was found that the Applicant had waived compliance."

The Statutory Provisions

13. Section 168 of the Commonhold and Leasehold Reform Act 2002 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 (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."

Section 169(2) makes provision as to what is meant by the expression "finally determined" in section 168.

Appellant's Submissions

14. On the first issue (the question of the LVT's jurisdiction) Mr Clargo advanced the following arguments:

(1) He contended that the LVT was wrong to place any significance, so far concerns the ambit of its jurisdiction, on the use of the word 'finally' in the expression 'finally determined'. He pointed out that this expression had a meaning attributed by section 169(2) and was not capable of indicating that the LVT's jurisdiction should be taken to be wider than it otherwise would be without the use of this word. It is convenient to note here that I agree with this submission.

(2) He contended that section 168 did not give to the LVT jurisdiction to decide upon whether a landlord had waived the right to forfeit the lease on the basis of a proved or admitted breach of covenant. He submitted that, by like token, the LVT did not have jurisdiction to decide whether a landlord had waived the right to rely upon a covenant at all as against the tenant.

(3) He contended that if a landlord has prevented himself by waiver or estoppel or limitation from an enforcing a breach of covenant, the breach of covenant will nonetheless have factually occurred. Assuming that a covenant still exists in a lease (rather than having been deleted by some deed of variation), the LVT's jurisdiction is confined to deciding as a matter of fact whether there has been a breach of this covenant. This is what the language of section 168 indicates. It is to be left to the Court to decide the question of whether the landlord is for some reason prevented from relying on this breach of covenant.

15. So far as concerns the second question, which arises if the LVT did have jurisdiction to consider the question of waiver, Mr Clargo argued that the mere fact that a landlord may have been inactive in making any complaint against a tenant in respect of the first (or the first few) breaches of a particular covenant does not of itself mean that the landlord is thereby forever after precluded from relying on the covenant, see for instance Woodfall's law of Landlord and Tenant para 11.044.3. He drew attention to the absence of any evidence sufficient to show either (i) a clear and unambiguous representation on behalf of the Appellant or (ii) reliance on behalf of the Respondent capable of leading to the conclusion that it would be unconscionable to allow the Appellant to rely upon the terms of the covenant. He also relied upon the terms of a letter from the Respondent's solicitors dated 30 November 2004, which is discussed in paragraph 24 below.

Conclusions

16. I am conscious of the fact that the question of the jurisdiction of the LVT to consider whether a landlord has waived a covenant (in the sense of being estopped from relying upon its rights against the tenant under the covenant) is a matter of some potential importance. While I am grateful to Mr Clargo for his assistance in this case, it is unfortunate that this point is raised in a case where there is representation on behalf of only one party. However, as the point was decided by the LVT and arises for the decision of the Lands Tribunal I must give my conclusions upon it. For the reasons set out below I agree with the LVT that it did have jurisdiction to consider this question of waiver of the covenant – using this expression in the sense mentioned above. 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 Mr Clargo'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.

17. The purpose of a determination under section 168(2)(a) is in my judgment to bring the parties to the same position as would be reached if section 168(2)(b) was engaged by reason that "the tenant has admitted the breach". This contemplates an admission by a tenant that it has committed an actionable breach of covenant. Paragraph (b) does not contemplate an admission by a tenant that it has done an act which, judged strictly, would be a breach of covenant but which the tenant asserts the landlord is not entitled to complain about for reasons of waiver/estoppel.

18. The nature of a promissory estoppel, if established, is helpfully summarised in Halsbury's Laws of England 4th Edition Re-issue Volume 9(1) at paragraph 1030:

> "1030 **The *High Trees* doctrine.** Similar to waiver is the doctrine of promissory or equitable estoppel, whereby a party who has represented that he will not insist upon his strict rights under the contract will not be allowed to resile from that position, or will be allowed to do so only upon giving reasonable notice."

Also at paragraph 1035 there is this

> 1035 **Promissory estoppel generally has effect of suspending obligation.** Like waiver, a concession giving rise to the *High Trees* doctrine of promissory estoppel will generally only suspend the strict legal rights of the party granting it (B); and he may revert to these rights for the future upon giving reasonable notice of his intention to the other party (A).

19. 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).

20. The provisions of section of 170 of the Commonhold and Leasehold Reform Act 2002 can also be noted. This amends section 81 of the Housing Act 1996 which imposes a restriction on the termination of a tenancy for failure to pay service charge or administration charge. Section 81(1) as amended provides

> "A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless –
>
> (a) it is finally determined by (or on appeal from) a leasehold valuation tribunal or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or
>
> (b) the tenant has admitted that it is so payable."

The admission contemplated in paragraph (b) "that it is so payable" is in my judgment an expression similar to the admission by the tenant contemplated in section 168(2)(b) namely that "the tenant has admitted the breach". What is contemplated under section 81 is an admission by the tenant that an amount is actually payable by the tenant, not an admission by a tenant that on the strict wording of the lease the amount is payable but that the landlord is estopped from recovering the sum or that the tenant enjoyed some defence of equitable set off against the claim. A qualified admission of such a nature would not constitute an admission that the amount was payable. It may be noted that the Lands Tribunal has jurisdiction, when

considering whether sums are payable by a tenant, to consider questions such as equitable set off, see section 27A of the Landlord and Tenant Act 1985 and *Continental Property Ventures v Whites* [2006] 1 EGLR 85.

21. 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 for future consideration as to whether the landlord is or is not estopped from asserting that these facts constitute a breach of covenant.

22. I now turn to the second issue namely whether the LVT was correct in concluding that on the facts of this case the Appellant had waived the right to rely on the relevant covenants.

23. For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show an unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants regarding underlettings either at all or for the time being. The Respondent would need to establish that she had altered her position to her detriment on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenants would be unconscionable, see Halsbury's Laws 4th Ed Reissue Vol 16(2) paragraph 1082 and following.

24. In the present case I cannot see how such a waiver or estoppel can be made out bearing in mind

(1) The absence of any evidence from the Respondent as to her understanding of the facts at any relevant time or as to any change of position by her in reliance upon such understanding. The very limited evidence contained in paragraph 4 and 5 of her statement of case are insufficient, nor can I see anything sufficient which has been identified by the LVT contained in any other material. At highest all that appears to have happened is that the Appellant has for a period in the past not actively enforced the covenants controlling subletting, but this of itself is insufficient to constitute a clear and unequivocal representation (capable of founding an estoppel) that it would not do so in the future.

(2) There is also the following point. There were certain documents before the LVT making it clear that the Appellant was concerned to enforce (rather than being unconcerned with and waiving) the terms of the lease regarding underlettings, see the 1996 letter whereby certain regulations were added to the lease under the provisions of Clause 2 (xxiii). Also there was before the LVT the letter dated 28 January 2005 from the Respondent's solicitors to the Appellant's agent which referred to the latter's letters of 30 November and 6 January to the Respondent and which stated that the writer wished in particular to respond on the Respondent's behalf

> "... in relation to your requirements concerning the 'unlawfully' underlet flats."

The letter then went on to complain about the nature of the relevant covenants and to suggest there was a defect in the lease. What however is of importance is this. It appears from this letter of 28 January 2005 to be recognised on behalf of the Respondent that the Appellant had written to her a letter dated 30 November 2004 (ie about three weeks before she granted the underletting complained of) in which the Appellant had made clear that it was exercised by the question of unlawful sublettings and was seeking to enforce rather than to waive the covenants. The underletting of 22 December 2004 was effected notwithstanding that the Respondent had so recently been put on notice that the Appellant was concerned to enforce the provisions regarding underletting. In these circumstances and in the absence of any further evidence from the Respondent I do not see how it can be said that the Appellant had waived the right to enforce the relevant covenants. Even if (and this is making an assumption in favour of the Respondent merely for the sake of argument) the circumstances prior to the letter of 30 November 2004 had been that the Appellant had indicated to the Respondent that, until further notice, the provisions regarding underlettings would not be enforced, the Appellant gave such further notice no later than 30 November 2004. However despite such notice the Respondent very soon thereafter performed acts in breach of the terms of the relevant covenants regarding underlettings. I can see no relevant unambiguous promise or representation that the Appellant would not rely on these covenants in relation to an underletting made on 22 December 2004 nor anything unconscionable in the Appellant doing so.

25. It follows that the Appellant's appeal is allowed. I hereby determine under section 168(2)(a) that the breaches of covenants 2 (ixx), (xx) and (xxiv) of the lease (being the breaches referred to in paragraph 3 above) have occurred.

26. Neither party sought any order for costs against the other and no such order is made.

Dated 12 November 2007

His Honour Judge Huskinson