



Residential  
Property  
TRIBUNAL SERVICE

**LONDON RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL**

**Case Reference: LON/OOBC/LBC/2009/0026**

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN  
APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND  
LEASEHOLD REFORM ACT 2002**

Applicant: Raj Properties Limited

Respondent: Mrs T Toor

Premises: Ground floor flat, 108B Elgin Road, Ilford, Essex  
HIG3 8LW

Date of Application: 27th March 2009

Date of Decision: 2nd July 2009

**Tribunal: Mr P Korn**

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**Background**

- A. The Tribunal has received an application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("**the Act**") for a determination that there has been a breach of covenant of the lease of the ground floor flat, 108B Elgin Road, Ilford, Essex HIG3 8LW ("**the Premises**").
- B. The lease ("**the Lease**") is dated 6th September 1988 and made between Robert John Mulvey (1) and Paul Norman and Alison Jane Lunn (2). Based on the documentation and statement of case provided by the Applicant it appears that the Applicant is the current freeholder and landlord under the Lease and that the Respondent is the current leaseholder.

- C. The Tribunal issued its Directions on 30th April 2009.
- D. The matter was initially set down for a hearing, as is more normal in cases of this nature. However, due to the Respondent's personal circumstances which would have made it difficult for her to attend it has been agreed by both parties that this matter can be determined on the papers alone without the need for an oral hearing.
- E. The Applicant has submitted its statement of case but the Respondent has not provided a response.

### **The Applicant's case**

1. The Applicant seeks a determination that the Respondent is in breach of clause 4(d) of the Lease.
2. Clause 4(d) reads as follows (including the preamble that governs the whole of clause 4):-

*"The Lessee HEREBY COVENANTS with the Lessor and with the lessees of the other flats comprised in the Building that the Lessee will at all times hereafter ... Permit the Lessor and others authorised by them with or without workmen and others at all reasonable times on notice (except in the case of emergency) to enter into or upon the demised premises or any part thereof for the following purposes namely:-*

*(i) to repair any part of the Building or adjoining or contiguous premises and to make repair maintain rebuild cleanse and keep in order and good condition all sewers drains pipes cables cisterns water tanks watercourses gutters wires party structures and other conveniences belonging to or serving or used for the same to lay down maintain repair and test drainage gas and water pipes and electric wires and cables and for similar purposes ...*

*(ii) make good all defects decays and wants of repair of which notice in writing shall be given by the Lessor to the Lessee and for which the Lessee may be liable hereunder within three months of the giving of such notice"*

3. The Applicant states that the Premises are one of three flats in a converted house with front and rear gardens. The Premises were demised without a share of the back garden, unlike the neighbouring ground floor flat, the leaseholder of which was expressly demised the half of the garden adjacent to his flat in his lease. The half of the garden adjacent to the Premises (i.e. adjacent to the Respondent's flat) is owned by the Applicant with vacant possession as it has not been demised to any of the leaseholders or to anyone else.

4. The Applicant states that it has sought permission from the Respondent on numerous occasions to enter onto the Premises in order to erect a fence at the boundary between the Premises and the garden *"in order to secure their interest and/or repair their part of the Building/adjoining premises or to make, maintain and keep in order and good condition party structures or convenience belonging to or serving or used for the same"*. The Respondent has failed to give access to the Applicant and the Applicant's position is that this failure to give access is a breach of clause 4(d) of the Lease. The statement of case also contains various details of the dealings between the parties on this issue and on another issue since July 2003.
5. According to the Applicant, the reason given by the Respondent for failing to allow access was that if a fence was erected blocking a rear door from the Premises to the garden this would prevent the Respondent from using the rear door as a fire escape. The Applicant's view is that (a) the Respondent has no right of emergency escape through the rear door and (b) that it is sufficient for her to be able to use the front door and/or the windows (after alterations, if necessary) as a means of escape.

### The Law

6. Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") states:  
  
**"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"**
7. Section 168(5) of the Act sets out certain circumstances in which a landlord may not make an application but none of these circumstances apply here.

### Application of law to facts

8. The Respondent has not provided any evidence in response to the Applicant's case and in the absence of an oral hearing the Tribunal only has the Applicant's statement of case on which to base its decision.
9. It appears that no part of the back garden forms part of the Respondent's demise and that the Respondent has no express right of access over it. In the Tribunal's view, it is outside the scope of its remit in an application of this nature, particularly as the point has not been argued, to consider whether the Respondent has an implied easement by reason of necessity or for any other reason. In any event, the Applicant has argued that there is an acceptable alternative

escape route, and whilst the Respondent may not agree on this point she has not written to the Tribunal to dispute it.

10. The Applicant's stated position is that it wanted access on to the Premises to erect a fence at the boundary between the Premises and the garden *"in order to secure their interest and/or repair their part of the Building/adjoining premises or to make, maintain and keep in order and good condition party structures or convenience belonging to or serving or used for the same"*.
11. However, in its letter to the Respondent first raising the point, namely a letter dated 17th July 2003, the Applicant wrote *"You are occupying our garden at rear of your flat, this doesn't belong to you. You are in breach of lease terms by occupying piece of land not belonging to you. Kindly liaise with your tenants and give us an appointment so that we may erect fence at the boundary of your flat. However, if you prefer we will consider giving licence to use the rear garden at a reasonable rent."* Similarly, the Applicant's letters of 18th August 2006 and 1st May 2007 and the letter dated 8th October 2007 from its new managing agents to the Respondent also stressed the issue of unauthorised occupation of the garden by the Respondent.
12. Therefore, contrary to the assertions made in the Applicant's statement of case, it would seem that the purpose for which entry was sought was not "to repair their part of the Building/adjoining premises" nor to "maintain and keep in order and good condition party structures or convenience belonging to or serving or used for the same".
13. Looking closely at the wording of clause 4(d), it requires the lessee under the Lease to permit the lessor (and workmen) to enter into the Premises for certain specified purposes only. Does the purpose which has been communicated to the Respondent constitute one or more of these purposes?
14. Paragraph (i) of clause 4(d) begins the list of purposes to which this covenant applies by referring to repair of the building or adjoining/contiguous premises and then goes on to refer generally to circumstances in which the purpose would be to make, repair, maintain, rebuild, cleanse and keep in order and good condition various listed conduits, structures and conduits belonging to or serving or used for the building or adjoining/contiguous premises. Paragraph (i) then continues by referring to laying down, maintaining, repairing and testing various conduits.
15. It seems clear that erecting a new fence for purposes unconnected with repair or maintenance is not covered by any of the above. Conceivably one might try to argue that the erecting of the fence is covered by the word "make", but in the context of the items that follow this seems a forced interpretation as to why the word "make" is used. It would seem to be contemplating an activity such as adding a piece of

guttering rather than erecting a new fence in order to prevent the Respondent from having either full or emergency access over the garden without paying further rent. Equally, the Tribunal does not consider that the use of the words "and for similar purposes" assists the Applicant as the erection of a new fence for the purposes stated in correspondence is not similar to any of the specific purposes listed.

15. Paragraph (ii) of clause 4(d) adds to the list of purposes the making good of defects, decays and wants of repair of which notice has been given, and the erecting of a fence for the purposes communicated to the Respondent is not covered by this either.
16. Determining that there has been a breach of covenant is a prelude to forfeiture and therefore in order to make such a determination the Tribunal must be absolutely satisfied that a breach has occurred. The Tribunal is not so satisfied.

**Determination**

17 The Applicant has failed to demonstrate to the Tribunal's satisfaction that the Respondent is in breach of clause 4(d) of the Lease and the Tribunal therefore **does not** determine that a breach of covenant has occurred.

18 No costs applications have been made.

Signed.....

**Chairman: Mr P Korn**

**Date 2nd July 2009**