**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2013] UKUT 0443 (LC)**
**Case Number: LRA/123/2012**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LEASEHOLD ENFRANCHISEMENT – flat – effect of covenant to use only as a dwelling for lessee and family – whether sub-letting prohibited – power to vary terms of lease on enfranchisement – Leasehold Reform, Housing and Urban Development Act 1993, s.57(6) - appeal dismissed***

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

**BETWEEN:**

**AARON WILLIAM M BURCHELL** **Appellant**

**and**

**RAJ PROPERTIES LIMITED** **Respondent**

**Re: Third Floor Flat**
**344 City Road**
**London EC1V 2PY**

**Before: Martin Rodger QC, Deputy President**

**Sitting at: 43-45 Bedford Square, London WC1B 3AS**
**on 5 September 2013**

*Mr Sandham* instructed by Housing and Property Law Partnership, solicitors, for the appellant
*Mr Matthew Boyden,* instructed by Mr Ajay Arora, in-house solicitor for the respondent

The following cases are referred to in this decision:

*Raj Properties Limited v Costello* LON/00AM/LBC/2007/0025

*Sweet & Maxwell Limited v Universal News Services Limited* [1964] 2 QB 699

*Lewis Lee's application* [2012] UKUT 125 (LC)

*Direct Travel Insurance v McGeown* [2003] EWCA Civ 1606; [2004] 1 ALL ER (Comm) 609

*Gordon v Church Commissioners for England* LRA/110/2006 (Lands Tribunal)

## DECISION

### Introduction

1. If a lessee covenants to use a flat as a private dwelling for himself and his family and for no other purpose, is he thereby precluded from sub-letting the flat to a person who is not a member of his own family? If the answer to that question is affirmative, has a leasehold valuation tribunal the power to vary such a covenant so as to permit the sub-letting of the flat under the terms of a new lease to be granted pursuant to Part I of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").

2. Those two short questions arise on this appeal from a decision of the leasehold valuation tribunal for the London Rent Assessment Panel ("the LVT") given on 20 May 2011, subsequently corrected by a correction certificate issued on 12 March 2012.

### The relevant statutory provisions

3. The 1993 Act confers the right on qualifying tenants of flats to acquire a new lease of their flat on the terms and subject to the procedures contained in Chapter II of Part 1 of the Act. The new lease is in substitution for the existing lease and is granted at a peppercorn rent for a term expiring 90 years after the term date of the existing lease.

4. Section 57(1) of the 1993 Act establishes the general principle that the new lease is to be "on the same terms as those of the existing lease, as they apply on the relevant date". Subsections (1) to (5) of section 57 identify a number of specific exceptions to that basic rule. Section 57(6) then provides that:

> "Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or any agreement collateral thereto; and either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as –
>
> (a) It is necessary to do so in order to remedy a defect in the existing lease or
>
> (b) It would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease."

### The facts

5. From the facts found by the LVT and the documents included in the appeal bundle I take the following facts as the basis of my consideration of the appeal.

6. Mr Burchell, the appellant, is the lessee of a flat ("the Flat") on the 3rd floor of a converted house at 344 City Road, London EC1V 2PY ("the Building"). Raj Properties Limited, the respondent, owns the freehold of the Building and is the appellant's immediate landlord under the terms of a lease of the Flat granted on 11 May 1988 by Inner City Estates Limited to Mr Robert McCairley ("the Lease").

7. The Lease was granted for a term of 99 years from 31 December 1987. The parties are referred to throughout the Lease as "the Lessor" and "the Lessee" and on the first reference to those terms they are stated to include "where applicable their respective successors in title". On 9 November 2007 the appellant acquired the Lease and became the Lessee for the time being.

8. The Lease includes at clause 2(16) a covenant by the Lessee with the Lessor:

> "To use the flat as a private dwelling for the lessee and his family and for no other purpose".

9. The Lease contains no conventional alienation covenant expressly restricting assignment, sub-letting or other forms of dealing but at clause 2(13) the Lessee covenants:

> "Within one calendar month after every assignment transfer charge mortgage or devolution of any interest in the demised premises or any part thereof to give to the Lessor's Solicitors notice in writing of such assignment transfer charge mortgage or devolution specifying the name and place of abode of the assignee transferee chargee mortgagee or other person in whom the said interest is thereby vested and to pay to the Lessor's Solicitors a fee of £20 plus VAT for the registration of every such notice".

10. The Flat is one of five flats in the building each of which is let on a long lease granted in a five month period between the end of March and the middle of August 1988; each lease contains a covenant by the Lessor at clause 4(iii) that the remaining flats in the Building would be let on substantially the same terms, and a further covenant that in the event of default the Lessor will enforce each lessee's obligations at the request (and expense) of any other lessee.

11. On 4 February 2010 the appellant gave notice under section 42 of the 1993 Act exercising his right to claim a new lease of the Flat at a peppercorn rent for a term equal to the unexpired residue of the term of the Lease plus a further 90 years. He proposed that the new lease should be substantially on the same terms as the existing Lease. In its subsequent counter-notice the respondent admitted the appellant's right to a new lease but suggested a number of very minor modifications to the existing terms. The parties failed to reach agreement on those terms or on the premium payable for the new lease and on 22 October 2010 the appellant applied to the LVT for it to determine the terms of acquisition.

12. The application came before the LVT on 8 March 2011. By that time a premium of £11,845 had been agreed and the principal issue between the parties was whether the Flat included a small loft area which had been incorporated into the main living room by the removal of a previous ceiling. Apart from trivial drafting points, the only disputed term of the new lease was contained in a rider proposed by the appellant to a deed of grant which had been prepared by the respondent. The applicant's contentious proposal was that the words "for the lessee and his family" should be deleted

from clause 2(16) of the Lease, so that it would become a covenant by the Lessee "to use the flat as a private dwelling and for no other purpose".

**The LVT's decision**

13. On 20 May 2011 the LVT issued a decision finding in favour of the appellant that the disputed loft space was part of the demise. It then dealt quite briefly with the only contentious term of the new lease, whether the words "for the lessee and his family" should be deleted from clause 2(16). It recorded the appellant's submissions that, in principle, a lessee had the right to sublet unless restricted from doing so by clear words, and that clause 2(16) of the Lease contained no words sufficient to prohibit or restrict dispositions. It expressed its conclusion on the dispute in a single sentence at paragraph 22 of its decision where it said:

> "The new lease should be granted in the form as amended on pages 100-102 in the bundle: The Tribunal considered that there was no right to delete the user clause."

14. The parties are agreed that the LVT's original treatment of the proposed alteration to clause 2(16) was inadequate. The difficulty arose because the "form as amended on pages 100-102 in the bundle" to which the LVT referred, included the appellant's rider modifying the user covenant. The LVT's apparent acceptance of that amendment sat uncomfortably with its explanation that "there was no right to delete the user clause". The only user covenant was clause 2(16) which neither party had suggested deleting; what was proposed was a relaxation of the covenant to make it less restrictive of the use to which the Flat could be put, and the LVT appeared to be saying that it had no power to accede to that proposal.

15. Both parties were dissatisfied by this ambiguity and a dispute arose over what had been intended. On 12 March 2012, following a request for clarification from the appellant, the LVT issued a correction certificate under Regulation 18(7) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. The certificate deleted the sentence from the decision which I have quoted in paragraph 13 above and substituted the following:

> "The new Lease should be granted in the form as amended on pages 100-102 in the bundle, except clause 3.2.3 on page 102 ("3.2.3 the words "for the lessee and his family" shall be deleted from clause 2(16)") should be deleted. Additionally, LR8 on page 98 of the bundle should include the phrase "this lease contains a provision that prohibits or restricts dispositions.". The Tribunal considered that there was no right to delete the user clause."

16. The effect of the correction certificate was to reject the appellant's proposed variation of the original Lease and to confirm that the new lease was to contain the same covenant restricting the use of the premises to that of a dwelling house for the Lessee and his family and for no other purpose.

17. The correction certificate also addressed a satellite issue which had arisen after the LVT's decision concerning the prescribed information to be included in the new lease to satisfy the Land Registration Rules 2003 (as amended). The prescribed information is required to indicate whether or not a lease contains a provision that prohibits or restricts dispositions, but the parties could not agree how this paragraph should be completed. By its correction certificate the LVT directed that

paragraph LR8 should be completed in the affirmative, thereby suggesting (since the new lease contained no other relevant restriction) that it regarded clause 2(16) as a provision that prohibited or restricted dispositions.

18. The appellant was granted permission to appeal by the LVT on limited grounds which were widened by an additional permission granted by the Tribunal (Mr George Bartlett QC, President) on 24 September 2012. As a result, the issues which I have had to consider are those identified in paragraph 1 of this decision.

**Submissions for the appellant**

19. For the appellant, Mr James Sandham of counsel submitted that clause 2(16) should be interpreted as a requirement that the Flat be used for no purpose other than as a private dwelling, and that the words "for the lessee and his family" did not impose a further restriction on the persons entitled to use the Flat. Instead, those words were descriptive of a general residential use intended to emphasise that use for any other purposes, in particular for business, was prohibited.

20. Mr Sandham suggested that it was significant that the covenant referred to use as a private dwelling "for" the Lessee and his family, rather than "by" the Lessee and his family. This indicated that personal use by that category of persons was not essential and led to the submission that the covenant should be construed as requiring use "for the benefit of the lessee and his family". That benefit, Mr Sandham submitted, could legitimately take the form of a rent received from a tenant to whom the Flat was sublet.

21. Mr Sandham derived support for this approach from the interpretation of a similar covenant by an earlier leasehold valuation tribunal in a case involving the same landlord. In *Raj Properties Limited v Costello* LON/00AM/LBC/2007/0025 decided on 25 July 2007, the landlord had sought a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that one of its tenants had sublet her flat in breach of a covenant identical to clause 2(16). Mr Sandham relied on the following passage, from paragraph 23 of the decision, which he said was persuasive:

> "Mr Arora endeavoured to argue before the Tribunal that the use of the words "to use the flat as a private dwelling for the lessee" meant that the lessee and only the lessee could use the premises as a private dwelling. The Tribunal does not agree with this construction. The covenant does not provide that the flat has to be used "by" the lessee himself or occupied by the lessee, merely that the flat has to be used as a private dwelling for (or as the covenant could be read "for the benefit of") the lessee. In any event, in so far as there is any ambiguity, the agreement has to be construed strictly and against the Landlord in cases of such covenants. There are well recognised forms of covenant excluding alienation by way of sub-letting or otherwise, familiar to all property lawyers and there is a complete absence of any such provision in this lease. It is the view of the Tribunal that any lawyer reading this lease would come to be conclusion there is no prohibition against sub-letting and that the covenant relied on goes to the use of the property as a private dwelling for residential purposes, as opposed to business or multiple occupation."

22. Mr Sandham also relied on other indications in the Lease that sub-letting was either contemplated or not ruled out which, he submitted, supported his preferred construction of clause 2(16). He highlighted the following features of the Lease in particular:

(1) First, the absence of any express covenant against alienation, including sub-letting, whether in absolute or qualified terms. Mr Sandham cited the decision of the Court of Appeal in *Sweet & Maxwell Limited v Universal News Services Limited* [1964] 2QB 699 in which Buckley LJ (at page 737) pointed out that:

> "To underlet is an important incident of the normal property right which belongs to a tenant; it is one of the ways that he can turn his property to good account and make it profitable to himself; and as a matter of construction I think a tenant should not be treated as deprived of that right except by clear words or circumstances that make it clear that the parties so intended."

(2) Clause 2(13) required that the lessee give notice of any assignment, transfer, charge, mortgage or devolution of any interest in the demised premises or part thereof. Mr Sandham suggested that the words "devolution of any interest" were wide enough to include the grant of a sub-lease or sub-tenancy.

(3) Clauses 2(10) and 2(12) both referred to "the owners tenants and occupiers of other flats in the Building" to whom the lessee was to provide access for certain purposes and to whom he was not to cause or permit nuisance or damage to occur. Mr Sandham submitted that this indicated that other flats in the building might be sub-let to tenants. On reflection he accepted that this point was of limited significance, since the Lessor's covenant at clause 4(iii) permitted short term tenancies of flats held directly by the lessor, so that the parties need not have had in mind the possibility that there might be tenants of other leaseholders.

(4) Mr Sandham also drew attention to the fact that, in clause 2(16) the expression "the lessee" did not use an upper case "L". This typographical quirk contrasted with all other references to "the Lessee" elsewhere in the Lease and indicated that "the lessee" mentioned in clause 2(16) need not be the person in whom the Lease is vested for the time being, and could instead be any person who was a lessee of the flat, whether directly from the Lessor under the terms of the Lease, or under a sub-lease or short term tenancy granted by Lessee.

23. In support of his submission that "lessee" in clause 2(16) could mean sub-lessee or sub-tenant, Mr Sandham referred to a decision of the Tribunal (Mr George Bartlett QC, President) in *Lewis Lee's application* [2012] UKUT 125(LC) which concerned an application to vary an absolute covenant against sub-letting in the lease of one flat in a block of flats so as to permit it to be sub-let with the consent of the landlord. The Tribunal considered the terms of a number of different leases in the building, which were not identical. In one lease, of Flat 30, a covenant against sub-letting had been deleted in manuscript from the typed text of the document before it was executed. In paragraph 20 of his decision the President said:

> "In the lease of Flat 30 the covenant in paragraph 9 was deleted in manuscript from the typed version of the lease. That, it seemed to me is only explicable on the basis of an intention to exclude the prohibition on sub-letting. It is in my view highly improbable that the parties would have deleted the provision whilst intending that the user clause should nevertheless

> preclude sub-letting. The only reasonable inference is that they did not turn their minds to the user. 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 sub-tenant."

Mr Sandham suggested that the same approach should be taken to the construction of clause 2(16), allowing "lessee" to include "sub-lessee".

24. Finally, Mr Sandham relied on the *contra proferentem* principle that, in the event of ambiguity, the covenants in a lease should be construed against the landlord who, it was to be assumed, had been responsible for drafting the document in the first place and who could have stipulated for a clear covenant against sub-letting if that was what had been intended.

25. When it came to the statutory power to vary the original terms of the Lease, Mr Sandham's submissions were quite conservative. He did not argue that there was jurisdiction under section 57(6)(a) of the 1993 Act to rewrite the covenant to permit sub-letting generally if the Tribunal found that the effect of clause 2(16) was to prohibit the use of the Flat by anyone other than the Lessee and his family, with a knock-on restriction on the extent to which it could lawfully be sub-let. Rather, Mr Sandham's case on this aspect of the appeal depended on the Tribunal accepting that, albeit imperfectly, clause 2(16) indicated an intention that the Flat was to be capable of being sub-let to any person wishing to use it as a dwelling house for himself and his family. In the event that the Tribunal was so persuaded, Mr Sandham submitted, the lease was nonetheless insufficiently clear in expressing that intention; that lack of clarity was itself a "defect" which could be corrected under section 57(6)(a). In order to avoid confusion in the future the covenant should be modified by the omission of the words "for the lessee and his family" or by the incorporation of other words making it clear that sub-letting was permissible.

26. As a final string to his bow, Mr Sandham relied on the power in section 57(6)(b) which permitted the exclusion or modification of any term of the Lease if it would be unreasonable to include it in view of changes occurring since the date of commencement of the lease which affected the suitability of the relevant provision. He relied on two changes: first, the diminished security of tenure afforded to short term tenants of flats since the introduction of the assured and assured shorthold tenancy regime by the Housing Act 1988 (enacted six months after the execution of the Lease) and, secondly, an alleged practice on the part of the respondent of waving the equivalent covenants in the leases of other flats in the building in return for a payment. These changes, Mr Sandham submitted, justified a variation of clause 2(16) to permit sub-letting.

**Submissions for the respondent**

27. Counsel for the respondent, Mr Matthew Boyden submitted that clause 2(16) should be given its natural meaning which was that the Lessee was entitled to use the Flat only as a dwelling house for himself and his immediate family. That use could extend to sub-letting the Flat to a family member since the Lease included no specific prohibition on sub-letting, but a sub-letting to an individual who was not a member of the Lessee's family would break the close connection between ownership of the lease and occupation of the premises which it was the function of this type of covenant to secure. Although there was no evidence explaining why the covenant had been included in the Lease (nor would it have been admissible on the issue of construction) Mr Boyden referred to

the explanation given in *Lewis Lee's Application* for the incorporation of a similar covenant, restricting the use of flats in a mansion block to use "as a private residence for the sole occupation of the Tenant and his family". The evidence of the landlord (recorded at paragraph 7 of the decision) was that the restriction had been included to ensure that those responsible for the upkeep, maintenance and decision-making for the flats had their primary residences there, thereby "ensuring a distinct community".

28. Mr Boyden submitted that none of the other features of the Lease relied on by the appellant were of significance, and none could displace the natural effect of the covenant. Nor was there any ambiguity calling the *contra proferentem* principle into action or any defect which required to be corrected by a modification under section 57(6)(a) of the 1993 Act. Moreover, the suggestion that there had been a change in circumstances sufficient to permit a modification under section 57(6)(b) had not been made to the LVT and needed to be supported by evidence. Since the appeal was a review of the LVT's decision, rather than a rehearing, there was no factual basis for the appellant's submissions on this aspect of the appeal.

**The effect of clause 2(16)**

29. In any issue of interpretation the starting point must be to consider the natural or ordinary meaning of the words to be construed, read together with the whole document in which they appear, and having regard to all of the relevant circumstances of the transaction which would have been known to both parties. Only in the event of a real ambiguity which conventional methods of construction are incapable of resolving, is it permissible to resort to the convenient but artificial approach of construing the document against the interests of the party who is presumed to have drawn it up. It is wrong in principle to seize on the presence of any ambiguity or difficulty of construction as sufficient justification immediately to resort to the *contra proferentem* doctrine as a trump card. This was made clear by Auld LJ in *Direct Travel Insurance v McGeown* [2004] 1 ALL ER (Comm) 609:

> "A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the contra proferentem rule without first looking at the context and, where appropriate permissible aids to identifying the purpose of the commercial document of which the words form part. Too early recourse to the contra proferentem rule runs the danger of "creating" an ambiguity where there is none."

30. The relevant context in this case includes the fact that the Lease was one of five similar leases of flats in the Building completed in a relatively short period in the middle of 1988. Each of the leases was for an identical term and it is to be inferred from the Lessor's covenant at clause 4(iii) that each was granted on substantially the same terms; in particular it is to be inferred that each lease included a covenant restricting the use of the premises to a dwelling house for the lessee and his family and for no other purpose. The Flat itself, as is demonstrated by the Lease plan, comprises two rooms of similar size, one a bedroom, the other a living room one corner of which is used as a kitchen, and a bathroom. It does not lend itself naturally to occupation by more than one person or two living as a couple.

31. In the context of a residential building comprising flats let on standard terms which were intended to be enforceable by the lessees against each other, through the agency of the lessor, I do not find an intention to restrict use to the lessees and their families alone either improbable or even surprising. The considerations of estate management and good housekeeping relied on by the landlord of the building in *Lewis Lee's application* seem to me to provide a rational explanation why parties to such a lease might very well regard it as being in their mutual benefit to restrict occupation to those with a direct interest in the lease and their families. To an owner-occupier, neighbours who are themselves owner-occupiers may be preferable to neighbours with a more limited interest. *Lewis Lee's application* itself provides no support for the appellant's argument since it is clear from the passage cited in paragraph 23 above that it was the striking out of the alienation covenant on the face of the document that drove the interpretation; indeed, as part of the same decision, leases in similar form which contained no such obvious amendment and which had been executed at different times were interpreted more literally and against the construction preferred by the appellant.

32. The natural and ordinary meaning of clause 2(16) seems to me to be the literal meaning, namely that only the Lessee i.e. the person in whom the Lease is vested for the time being, and his family, may use the Flat and that their use must be as a private dwelling. The words "for the lessee and his family" are additional words of limitation which cannot simply be ignored. I do not find the alternative construction proposed by Mr Sandham (and which appealed to the leasehold valuation tribunal in the *Costello* case) at all convincing. To read the covenant as if the relevant restriction was use as a dwelling house *for the benefit of* the Lessee and his family, where that benefit is said to extend to the exploitation of the Flat by sub-letting to third parties who have no connection with the Lessee or his family, would strip the critical words from the covenant and reverse its clear intention.

33. Nor do I find recourse to the general proposition that a tenant should not be treated as deprived of the right to sub-let except by clear words or circumstances helpful in this case. The *Sweet & Maxwell* case in which that approach was adopted concerned a lease of office premises for a term of five years. While it is obviously true that the right to deal with leasehold premises in any way the lessee chooses, including sub-letting them, is an incident of any lease except where it is restricted, it is necessary to read the lease as a whole in order to determine whether, directly or indirectly the effect of any covenant is to impose such a restriction. The absence of an express covenant against sub-letting does not require that a strained or restricted meaning must be given to any other covenant the natural effect of which is to limit the category of persons by whom, or the circumstances in which, the premises may be occupied.

34. In a lease for a term of 99 years any substantial restriction or prohibition on assignment would be very surprising and its absence in this case casts no light on the meaning and effect of clause 2(16). The absence of any express prohibition on sub-letting also seems to me to be neutral on that question because with so lengthy a term there is no immediate prospect of the landlord's reversion falling in leaving it in a direct relationship with occupiers who may enjoy statutory security of tenure and hence no strong reason for a landlord to seek directly to prohibit or control sub-letting. The omission of an express covenant against sub-letting does not necessarily mean that the parties anticipated that the flats would be sublet since other aspects of their agreement might have an impact on the practicality of such arrangements; the only way to discern their intention is to read the Lease as a whole. Although the modern vogue might be for flats of this type to be acquired by "buy to let" landlords who would regard any restriction on sub-letting as unacceptable, these leases were granted in 1988 and considerable care must be taken before attributing current priorities and expectations to the original parties.

35. The other terms of the Lease on which Mr Sandham relied do not seem to me to add anything of substance to his argument or to detract from the ordinary meaning of the language of clause 2(16). He suggested only faintly that the reference to the "devolution of any interest in the demised premises" in clause 2(13) was capable of including a devolution by means of a sub-lease. It would be unusual (though not unknown) for a landlord of a long lease to require details of the grant of any sub-tenancy, and had that been the intention one would expect it to have been achieved without the use of opaque language. The more natural meaning of those words is that they refer to some vesting of an existing interest in the demised premises by operation of law, for example, on the death or bankruptcy of the lessee, rather than the creation of a new interest by sub-letting. Even if they were capable of including the grant of a sub-lease, they would not affect the restriction in clause 2(16) on the use of the premises as a dwelling for the Lessee or his family only.

36. Only if the expression "the lessee" in clause 2(16) bears a different meaning from its meaning in every other place in which it appears in the Lease could the covenant be construed as permitting the use of the Flat as a dwelling for someone who is not the person who for the time being holds the Lease or their family. The only support which Mr Sandham was able to find for that suggestion was the absence of an upper case "L" from the word "lessee" in clause 2(16). I have carefully considered whether that small typographical distinction is sufficient to support an interpretation of clause 2(16) which restricts the use of the Flat to a dwelling for any person who is a lessee or tenant of the dwelling, whether that status is conferred by the Lease or by a derivative interest. I have come to the conclusion that this change in the appearance of the text is insufficient for that purpose. While it is permissible to rely on punctuation and the layout of documents as an aid to their interpretation, such features can only be of limited significance and are unlikely to override what is otherwise the clear and obvious meaning of the contractual language. It will be a very rare case where a defined expression used consistently and unambiguously throughout the remainder of the document can acquire a different meaning by de-capitalisation. To reach that conclusion it would be necessary to be satisfied that the change from upper case to lower case was a deliberate act intended to change the meaning of the word.

37. The more obvious explanation for the inconsistency in usage is that it is a typing error overlooked when the document was proof read. In this case, although there appear to be no other examples of the use of "lessee" with a lower case "l", clause 2(16) itself contains a further instance of inconsistent drafting. Throughout the Lease the Flat is referred to as "the demised premises". As far as I can tell only in clause 2(16) is it referred to as "the flat". It is impossible to conceive that the parties intended to refer to a different property when they used the word "flat" rather than "demised premises" in clause 2(16), and the inconsistency in drafting signifies nothing. Nonetheless, the presence of that second inconsistency makes it impossible to suggest that the draftsman was so careful that the other flaw in the same covenant can only be explained as a deliberate change intended to signify that "the lessee" in clause 2(16) Flat need not be "the Lessee" encountered elsewhere in the document.

38. I bear in mind also that, if the draftsman had intended to signify that the Flat could be used as a dwelling for any lawful occupier, he could have employed the expression "owners tenants and occupiers" used in clauses 2(10) and 2(12) to describe such persons.

39. For these reasons I conclude that clause 2(16) bears the meaning contended for by the respondent and not that suggested by the appellant.

**The statutory power to modify the covenant**

40. It is next necessary for me to consider briefly the suggestion that the Tribunal should exercise its power under section 57(6) of the 1993 Act to modify clause 2(16) so as to omit the words "for the lessee and his family".

41. The effect of section 57(6) was considered by the Tribunal (His Honour Judge Huskinson) in *Gordon v Church Commissioners for England* LRA/110/2006 where it concluded that there was no power under the sub-section to add an entirely new provision which is not to be found in the original lease. The power conferred by the statute was to exclude or modify a term of the existing lease only. Judge Huskinson explained in paragraph 41 of his decision that:

> "There is nothing illogical or unfair in this because, apart from the grant of the new lease, the parties would have continued to be bound by the terms of the old lease for the next X years where X may be a substantial period (over 50 years in the present case). It is one thing to exclude or modify a term or terms of the existing lease where a good reason (i.e. within paragraph (a) or (b) of section 56(6)) can be shown. It is another thing to permit a party to seek a rewriting of the lease by the introduction of new provisions."

42. In paragraph 47 of his decision Judge Huskinson considered the scope of the power to correct "a defect":

> "I conclude that a lease can only properly be described as containing a defect (in the sense of shortcoming, fault, flaw or, perhaps even, imperfection) if it can objectively be said to contain such a defect when reasonably viewed from the stand point of both a reasonable landlord and a reasonable tenant. It may be noted that once a defect is shown to exist in the existing lease then a party may "require" that for the purposes of the new lease any term of the existing lease "shall" be excluded or modified in so far as it is necessary to do so in order to remedy the defect. This mandatory language indicates that the concept of a defect is a shortcoming below an objectively measured satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the stand point of one or other party."

43. In my judgment Mr Sandham was right to make only a very limited submission on this aspect of the case. I do not think it is possible to regard clause 2(16) as a "defect" in the sense of a mistake which neither party can have intended to be included in the Lease as originally granted. I incline strongly to the view that the covenant was included deliberately. It is possible that its consequences may not have been appreciated by the original Lessee, although for the reasons I have given in paragraph 31 above, it is equally possible that both parties would have seen benefits for themselves in the covenant.

44. As for the suggestion that the existence of an ambiguity was sufficient to bring the jurisdiction into play, I do not agree since the alleged ambiguity is sufficiently cured by this decision. No particular form of modification was agreed and I do not feel in those circumstances that it is appropriate for me to order a change. If the parties wish to cure the inadequacies of the original drafting, in order to avoid a similar dispute at any point over the 150 years which remain of the

extended term, then they are free to do modify clause 2(16) by agreement when the new lease is executed.

45. Finally, it is not open to the appellant to base his case on section 57(6)(b) because of the lack of evidence of any change of circumstances. The supposed changes suggested by Mr Sandham were unconvincing in themselves. The first overlooked the introduction of the protected shorthold tenancy by the Housing Act 1980, a relaxation of statutory security of tenure which was in place well before the grant of the Lease; the second was unsupported by evidence before the LVT. Even if the developments were to be accepted as relevant changes of circumstance, neither persuaded me that the terms originally agreed are now unreasonable.

46. The appeal is therefore dismissed. The user covenant in the new lease will be in the form of clause 2(16) of the current Lease subject to any modification which the parties may agree between themselves. Paragraph LR8 of the prescribed information should be completed so as to state that the lease contains no restriction or prohibition on dispositions, although that statement has no impact on the proper interpretation of the user covenant.

Dated: 23 September 2013

Martin Rodger QC

Deputy President