Southern Rent Assessment Panel and Leasehold Valuation Tribunal

Case No. CHI/00ML/LBC/2006/0002

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
ON AN APPLICATION UNDER SECTION 168(4) of the COMMONHOLD AND LEASHOLD REFORM ACT 2002
and SECTION 20C of the LANDLORD AND TENANT ACT 1985**

Property:	Ground Floor Flat, 4 Burton Villas, Hove, BN3 6FN
Applicant:	Mr M A Pellant (landlord)
Respondent:	Mr P R C West and Mrs S West (tenants)
Date of Application:	2 March 2006
Directions:	24 March 2006
Inspection:	24 May 2006
Decision:	31 May 2006

Member of the Leasehold Valuation Tribunal

Ms J A Talbot MA Cantab (Solicitor)
Chairman

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Property: Ground Floor Flat, 4 Burton Villas, Hove BN3 6FN

Application

1. This was an application made on 2 March 2006 by the landlord, Mr M A Pellant, for a determination as to whether breaches of covenant by the tenants, Mr P R C West and Mrs S West, have occurred.

2. Directions were give by the Tribunal on 24 March 2006, proposing that the matter should be dealt with on the fast track without an oral hearing or inspection. Neither party requested a hearing. Accordingly, the matter was determined by a chairman sitting alone on the consideration of documents. An inspection was carried out.

Law

3. Section 168 subsections (1) and (2) of the Commonhold and Leasehold Reform Act 2002 provide that a landlord may not serve a notice under Section 146 of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Leasehold Valuation Tribunal under Section 168(4), that the breach has occurred.

4. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred.

Lease

5. The Tribunal was provided with a copy of the lease of the ground floor flat at the property. The lease is dated 28 February 1983, and is for a term of 99 years from 25 December 1982, at a ground rent of £50.

6. Insofar as is material to the application, the lease contains the following covenants on the part of the tenants:

Clause 3(4):

> *"at all times during the said term to keep the Flat and all additions thereto and the Landlord's fixtures and fittings therein in good and tenantable repair and decorative condition (but no* [sic] *to decorate any part of the exterior of the Flat) and forthwith to replace all broken glass"*

Clause 3(6):

> *"not without the Landlords prior written consent (such consent not to be unreasonably withheld) to concrete or pave over any part of the gardens which were not concreted or paved at the date hereof and not to erect or place or suffer to be erected or placed upon any part or parts of the gardens any shed outhouse building or structure whatsoever".*

Clause 3(11):

> *"not to cut maim or injure any of the structural parts roofs or walls of the Flat or make any structural alterations or additions to the Flat".*

7. The flat is stated at Clause 1 to be the ground floor flat, and is more fully described in sub-clauses 1(i) to (iv) of the lease. It includes:

Clause 1(i) *"all drains pipes ventilating ducts and wires solely serving the Flat*

(ii) *all windows frames doors and door frames and all internal non-load bearing "walls"*

(iii) *the linings and surfaces of the interior of all walls*

(iv) *the ceilings of the Flat together with the boards or other surface of the floors of the Flat but excluding the floor and ceiling joists".*

8. The Flat also includes *"the grounds of the Building ... (hereinafter called "the gardens") which expression shall include all boundary walls fences and hedges belonging to the Building".*

Alleged Breaches

9 Mr Pellant alleged that Mr and Mrs West had breached Clause 3(6) of the lease by erecting a shed in the rear garden of the flat, and had breached Clause 3(4) of the lease by failing to repair and re-instate the plasterboard ceiling of the flat, the same having been subject to damage by the previous lessee by the installation of holes to install recessed down-lights.

10. It was further claimed by Mr Pellant that as a result the holes caused by installing the down lights allowed for the uninterrupted passage of sound between the two flats and the passage of cigarette smoke which creates an invasive presence in his flat above.

Inspection

11. The Chairman of the Tribunal inspected the property on the morning of 24 May. It comprised a semi-detached house built in the 1900's of brick construction under a pitched tiled roof, with part brick part roughcast front elevations. There was a square bay window to the ground floor, a smaller bay and second window to the first floor. The property had been converted into 2 flats, one on the ground floor and an upper maisonette on the first floor extending into a converted attic on the second floor. Each flat had its own separate front door side by side at the main entrance

12. Internally, both flats were spacious and converted to a high standard. The upper maisonette had a large front room, an smaller rear room, kitchen and bathroom on the first floor, with 2 further rooms in the attic conversion. From the first floor rear room used as work room was a view over the rear garden. The property backed on to Bigwood Avenue and also overlooked the rear of houses in that street.

13. The ground floor flat was renovated by the previous owner in 2004. It had 2 rooms used as bedrooms at the front and in the middle of the flat, separated by a bathroom. A living room at the rear gave access to the kitchen, both overlooking and leading to the garden. There were small spotlight style down-lighters in each room, approximately 6 in the bedrooms, living room and kitchen and 3 in the bathroom.

14 The rear garden was well maintained, partly lawned with well stocked flowerbeds. Immediately outside the kitchen and living room, and along the north border, was a decking area. Also in the garden along the north wall was the item in dispute, a large wooden shed, measuring approximately 5m by 2.6m, the shorter side facing the rear of the house. The door had 2 rectangular glass panels. The shed was divided into 2 areas: at the rear, a garden shed used for storage including garden tools and a bicycle, and at the front, a small area used as a home office with a desk, computer and sound system. This structure took up about one third of the garden area.

Consideration

Garden shed/home office

15. The most significant allegation by Mr Pellant was that Mr and Mrs West had built a shed in the rear garden in breach of an absolute prohibition in the lease. The shed-like structure was used as a home office providing a work space for Mrs West and extra storage following the birth of their baby

16. Mr and Mrs West moved into the ground floor flat on 24 August 2004. On 26 February 2005 they wrote to Mr Pellant giving "formal notice" of their intention to build a "home office" in their garden, stating that they were ready to apply for planning permission and attaching drawings on the proposed design. Mr Pellant replied on 2 March 2005 saying that the structure was too large, would dominate the small garden, reducing the green space, and adversely affect the view from his work room at the rear.

17. In a further letter dated 21 March Mr Pellant, at that stage without the benefit of legal advice, stated: "a covenant in your lease requires that written consent from the landlord must be obtained before any shed, outhouse building or structure can be erected in the garden". This letter also referred to the issue of recessed down-lighters installed in the ground floor flat, and noise problems and smoke ingress between the flats (discussed further below).

18. On 23 August, the Wests wrote to inform Mr Pellant that they had obtained planning permission for their proposed shed/home office and asking for his written consent. They stated that the Planning Department found that the shed "would not harm the character or appearance of the area" and would not "appear overly prominent or dominate the surrounding open space . the materials are considered acceptable in this location".

19. On 8 September Mr Pellant confirmed that he was "not prepared to consent to the erection of any structure of the proportions proposed in the garden of flat 4". The Wests replied on 16 September stating that he had "no legal right to withhold written consent for the garden shed without a valid reason". In their view the structure would "improve both the aesthetics of the garden, creating an attractive feature, and 'improve the overall value of the property" with "no negative effect" on Mr Pellant's interests in the property

20. Both parties then instructed solicitors and from then on the argument turned on the construction of Clause 3(6) of the lease (considered further below). A suggestion that the matter should be referred to arbitration was not pursued and the dispute remained unresolved.

21. Despite this, the Wests went ahead with the building. In January 2006 they removed the old garden shed and erected the new one. In February 2006 the structure was inspected by the Panning Department of Brighton and Hove City Council and no problems were found. At that time Mr Pellant also instructed Austin Gray to inspect the property to consider a potential claim for diminution in value. This has not been pursued before the Tribunal.

Construction of the lease

22. Mr Pellant's solicitors, Howlett Clarke Crowther Wood, argued in correspondence that Clause 3(6) of the lease (see paragraph 6 above) provided for 2 separate situations: "in the first instance the landlord's consent (which is not to be unreasonably withheld) is required in order . to concrete or pave over any part of the gardens which were not concreted or paved at the date of the lease. The second part of the clause is an absolute prohibition on the erection of any 'shed outhouse building or structure whatsoever'. That prohibition is not subject to any application for the landlord's consent and accordingly is a complete and absolute prohibition". In their view the covenant was clear and unambiguous.

23 This argument was developed further by counsel Simon Sinnatt, instructed on behalf of Mr Pellant, in a Statement of Case (really more of a skeleton argument) dated 18

April 2006. He asked the Tribunal to determine that the true construction of Clause 3(6) provides the landlord with an absolute right to refuse consent to the erection of a structure in the garden.

24. In support of this contention it was submitted that Clause 3(6) was an example of a hybrid covenant, being absolute in part and conditional in part. Quoting from Woodfall's Landlord and Tenant at 11.26, using an example of a covenant against alterations: "it is common to find covenants which are hybrid; the covenant being absolute in respect of some alterations (e.g structural alterations) and qualified in respect of others (e.g non-structural alterations)

25. It was argued that the covenant in issue was a hybrid covenant, the opening section of Clause 3(6) being a conditional prohibition and the second section absolute. The words "*not without the landlord's consent*" did not apply to the second section, because that section began with the words "*and not to*" with no preceding qualification. If the qualification of written consent was to apply to the second section then it should begin with the word "*or*" rather than re-stating a prohibition.

26. In addition it was argued that the use of the word "*whatsoever*" at the end of the second section supported this analysis because the word applied to the absolute nature of the prohibition rather than to the list of structures that may not be placed in the garden.

27. In the alternative it was submitted that even if the Tribunal were to determine that both sections of Clause 3(6) were qualified, then the landlord's consent had not been unreasonably withheld.

28. The solicitors acting for the Wests, Griffith Smith Conway, argued that if the lease draftsman had intended an absolute prohibition on the erection of sheds and other structures in the garden, "he would have used an alternative method of drafting that would have avoided all possibility of ambiguity; either (a) he would have placed the absolute and qualified covenants in separate clauses (the most obvious solution) or (b) he would have placed the absolute restriction first and the qualified restriction second". Therefore the true construction was that written consent was intended to apply to both sections of Clause 3(6).

29. It was further argued that absolute prohibitions were unusual in a long lease, that the landlord's interpretation was strained, and that in any event the rule of "contra proferentem" suggested that any doubt or ambiguity should be resolved in favour of the tenant. In the light of the grant of planning permission it was also submitted that the landlord was not acting reasonably in withholding consent.

Internal Alterations to the Ground Floor Flat

30. Before the Wests bought the property, the previous owner, Mr C Warnock, had renovated the entire flat internally in early 2004. As part of this work, recessed down-lighters had been installed in the ceilings throughout the flat. Mr Warnock confirmed by letter to the Wests in March 2005 that the down-lighters were of standard type and fitted by a qualified electrician. The Wests confirmed with Mr G Ritchie of the Building Control Department at Brighton & Hove City Council that the renovation works had been inspected and approved, and that certification for the lighting works was not required at the time the works were carried out. The relevant regulations have subsequently changed.

31. Mr Pellant in his letter of 21 March 2005 stated that he had not approved the installation of down-lighters at the time the works were carried out, and that as a result "the integrity of the floor separating our two flats has been 'peppered' with holes that allows both sound and smoke to pass through". To rectify the situation he

proposed 2 course of action: either the removal of the recessed ceiling down-lighters and making good the ceilings or installing fire and acoustic down-lighter covers. In this letter he also demanded payment of ground rent by 25 March.

32. In their letter of 16 September 2005 the Wests stated that their home was "a smoke free environment" and that they suffered from excess noise from Mr Pellant's flat because of laminate flooring and lack of sound insulation. They offered to install acoustic hoods behind the recessed down-lighters in exchange for Mr Pellant fitting carpets with underlay but they regarded the complaints about the lights as an incident of harassment

Construction of the Lease

33. The correspondence between solicitors did not deal with the question of alterations. In Counsel's Statement of Case it is argued for the landlord that the Wests are in breach of Clause 3(4) of the lease (see paragraph 6 above) to keep the flat in good and tenantable repair, because they have failed to repair and reinstate the plasterboard ceiling which has been damaged by the previous tenant by the installation of holes to install the recessed down-lighters.

34. It was submitted that where holes were made in the ceiling to accommodate the down-lighters "there will clearly be holes and given the seal between the two flats has been broken a greater propensity for noise and smoke ingress"; and that "where no permission has been sought or granted for alteration the holes must be seen as disrepair". It was also the landlord's case that the tenants had failed to keep the flat in repair because they had not reinstated the plasterboard ceilings

35 In relation to alterations it was submitted that the putting of holes in the ceiling was certainly cutting and altering the flat, in that "rather than having a light fitting hanging down of necessity there needs to be an incursion into the ceiling space which are an alteration".

36 There was no direct response by or on behalf of the Wests on this point, save that they relied on the lack of any issue raised at the time or by Building Control as evidence that the down-lighters were not problematic.

37. The Tribunal was asked to determine whether the down-lighters, in their present state, constitute disrepair to the ceiling, and by implication whether the tenants were in breach of their obligation to keep the flat in good repair; and whether putting the down-lighters into the ceiling amounted to cutting, maiming, injuring or altering the structure of the flat.

Decision

Garden Shed/Home Office and Lease Construction

38. The Tribunal first considered the true construction of Clause 3(6) of the lease, which was crucial to the question of whether the building of the shed/home office was a breach of covenant by the tenants.

39. The Tribunal had little difficulty in agreeing with the legal argument put forward by the landlord's advisers. The covenant at Clause 3(6) was clear and unambiguous, although it required careful reading. At first sight it might appear that both sections of the Clause need the landlord's written consent, and this is indeed what Mr Pellant thought before he took legal advice

40. However, the words "and not" as opposed to "or" are conclusive and make it clear that the two sections of the clause are separate. The first section is qualified and the second section is absolute, and the covenant is indeed a hybrid

41. The word "whatsoever" is less important to the true construction of the covenant; its purpose is rather to add emphasis. It could either refer to the prohibition, meaning that no shed or structure *at all* may be built, or to the type of structure, meaning no shed or structure *of any kind*

42. The effect therefore was that the landlord's consent (not to be unreasonably withheld) was required, if the tenant wished to concrete or pave over any part of the garden that was not concreted or paved when the lease was entered into. However, the tenant was prohibited from building any shed or building or structure of any kind in the garden, so the question of the landlord's consent was irrelevant.

43. Accordingly it was not necessary for the Tribunal to consider the issue of whether the landlord's consent had been unreasonably withheld in this instance.

44. The arguments put forward on behalf of the tenants did not address the actual wording of the covenant. It was merely asserted that hybrid covenants are unusual, that qualified and absolute covenants are usually separate, and that the absolute covenant usually appeared first. None of these points were convincing when construing the true meaning of the covenant in this lease.

45. The result was that the tenants were in breach of the covenant at Clause 3(6) by building the shed/home office in the garden of the flat.

Internal Alterations to the Ground Floor Flat

46. It was clear from the definition of the extent of the flat at Clause 1(iv) that the demise included the ceilings in which the down-lighters in question were installed, and that the ceilings formed part of the "structural parts of the Flat" to which Clause 11 applied. This Clause contains a covenant with an absolute prohibition against making any alterations or additions to the flat and also required the tenant not to "cut maim or injure any of the structural parts roofs or walls of the Flat".

47. The question of whether the down-lighters in their present state constitute disrepair is a question of fact. Disrepair to property means that the property is in a state of poor repair to the extent that remedial action, in the form of undertaking the appropriate type of repair work, is needed.

48. From the inspection, it was clear to the Tribunal that the ground floor flat as a whole, and the ceilings with the down-lighters in particular, were not in a state of disrepair, applying the ordinary and common-sense meaning of the word. The recessed down-lighters were properly fitted into the ceilings and were essentially part of the ceilings. There were no holes visible around the down-lighters. In their present condition the ceilings with the integral down-lighters *in situ* are intact. They are not in need of any repair works.

49 While it is true that small holes (a maximum of 6 in each room and 3 in the bathroom) had been cut in the ceilings in order to fit the down-lighters, it is self-evident that there are no holes currently in the ceiling. To say that the ceilings are "peppered with holes" is incorrect. It seems inherently unlikely to the Tribunal that the integrity of the ceilings has been so compromised by the installation of the down-lighters so as to make any significant difference to their structure

50 The submission that "the holes must be seen as disrepair" because "no permission has been sought or granted for alterations" is, in the Tribunal's view, misconceived. The question of whether the down-lighters amount to disrepair is entirely separate from whether there has been an alteration. In any event, the prohibition against alterations is absolute so the issue of permission does not arise.

51. Whilst it is not for the Tribunal to make findings on the allegations of noise and smoke nuisance, it is worth commenting that the laminate flooring in the maisonette is likely

to cause noise in the ground floor flat, and that as the Wests do not smoke inside their flat (which was obvious from the inspection) it is impossible for smoke to invade the maisonette.

52. Turning to the question of whether the installation of the down-lighters is cutting, maiming, injuring or altering the structure of the flat, the Tribunal takes the view that the making of several small holes to enable the down-lighters to be put in does not amount to cutting, maiming or injuring within the meaning of the covenant. Although the ceiling is part of the structure, the mere installation of a few down-lighters is not a structural alteration for the reasons given above; the integrity of the ceilings is not compromised.

53. The Tribunal is not required to consider any issue relating to the forfeiture other than the question of whether a breach has occurred. However, it may be helpful to point out that, even if the installation of the down-lighters was a breach of covenant, the renovation works were carried out by the previous tenant, and the making of prohibited alterations would be a once-and-for-all breach for which the current tenants are not liable.

54. Furthermore, as the works were carried out in early 2004, with the landlord's knowledge, and the landlord has demanded and/or collected rent from the former and present tenants (payment of ground rent was demanded in his letter of 21 March 2005) any breach would have been waived.

Section 20C

55. The tenants made an application dated 14 April 2006 under Section 20C of the 1985 Act. This Section provides that the Tribunal may make an order that all or any of the costs incurred by the landlord in connection with the proceedings before it are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant. The order may be made by the Tribunal if it considers it just and equitable in the circumstances to do so.

56. The Wests made their application because Mr Pellant by letter dated 2 March 2006 had demanded payment by them of £490.27, being 50% of the costs he had incurred. The letter reads: "With reference to clause 1(b)(iii) of your lease please accept this letter as an invoice for legal and professional fees incurred in connection with the administration and enforcement of the terms of your lease in respect to the shed you have erected in breach of that lease". The total cost in the attached invoices was £804.28 solicitors costs and £176.26 and surveyors costs for inspection and considering a potential claim for diminution in value of the property.

57. In a further letter dated 30 March, Mr Pellant stated that the invoices "related to costs incurred prior to the LVT procedure". If this is right then the costs would not fall within Section 20C. This was indeed the case with the surveyors costs as the Tribunal has no jurisdiction over diminution in value claims, which in any event, according to the documentation has not been pursued.

58 As the landlord's application concerns allegations of breaches of lease covenants, and the legal advice was about this, the Tribunal considers that the solicitors costs were relevant to the preparation of the application.

59. Under the terms of the lease, at Clause 1(b), the proportion of service charges payable by the tenant is one third, not 50%. Clause 1(b)(iii), referred to by Mr Pellant in his letter, relates to amounts (*inter alia*) expended in providing services and carrying out works or incurring expenditure "as the landlord shall reasonably deem necessary for the benefit of the building". It does not refer to legal or professional costs.

60. Clause 1(b)(iv) provides for expenditure "in complying with any of the covenants entered into *by the landlord*" (italics added). There is no mention in any of the sub-clauses of expenditure incurred in enforcing covenants entered into by the tenant. Professional costs are recoverable under Clause 1(b)(ii), but only in relation to carrying out repairs and maintenance and collecting rent. There is no provision for legal costs.

61 The Tribunal therefore concluded that there is no liability for the tenants to pay any of the landlord's legal or professional costs. If Mr Peliant has already taken the money claimed from the service charge account then he should re-imburse the account, as he is personally liable as landlord for these costs.

Determination

62 For the reasons given above, the Tribunal determines that the construction of a shed/home office in the garden of 4 Burton Villas is a breach of Clause 3(6) of the lease.

63. For the reasons given above the Tribunal determines that the installation of down-lighters in the ceilings of the ground floor flat is not a breach of either Clause 3(4) or 3(11).

Dated 31 May 2006

J Talbot

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Ms J A Talbot MA Cantab.
Solicitor
Chairman of the Tribunal