460

HM COURTS & TRIBUNALS SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.168 (4) of the Commonhold and Leasehold Reform Act 2002
(Breach of Covenant) and

S.20C of the Landlord and Tenant Act 1985

Case Number:	**CHI/45UH/LBC/2012/0020**
Property:	**Flat 20** **Winchelsea Court** **Winchelsea Gardens** **Worthing** **BN11 5NU**
Applicant:	**Harlington Management Company Limited**
Respondents:	**Mr. and Mrs. Cooper-Goldthorpe**
Appearance for the Applicant:	**Rita Tasker**
Date of Inspection/Hearing:	**23rd October 2012**
Tribunal:	**Mr. R T A Wilson LLB (Lawyer Chairman)** **Mr. A Mackay FRICS (Surveyor Member)** **Mr. R Dumont (Lay member)**
Date of the Tribunal's Decision:	**14th November 2012**

THE APPLICATIONS

1. This is an application made by the freeholder Applicant under section 168 (4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination that a breach of covenant or condition in the Respondents' lease has occurred.

2. The alleged breaches consist firstly of the parking by the Respondents of their vehicles on the property in such a manner as to cause obstruction contrary to paragraph 12 of the Fourth Schedule of the lease and secondly by parking two vehicles in the grounds of the property, the Respondents are in breach of the lease car parking regulations which allow only one vehicle per resident.

3. The Respondents also seek an order pursuant to S20C of the 1985 Act that the Applicant's costs incurred in these proceedings not be relevant costs to be included in the service charge for the property.

THE PROPERTY AND THE LEASE PROVISIONS

4. The Respondents hold their lease from the landlord, Harlington Management Company Limited, under a lease for a term of 99 years from the 29th September 1974. Their flat is one of 24, all understood to be held on long leases in a purpose-built block of flats close to the seafront in Worthing, East Sussex.

5. The property stands in grounds that have largely been tarmacked to provide unmarked parking for 26 vehicles. The surrounding roads contain no parking restrictions.

6. By paragraph 12 of the Fourth Schedule to their lease the tenant covenants *"not to leave or park or permit to be left or parked so as to cause any obstruction in or on any approach roads or passageways adjacent or leading to the Building any motor car motorcycle bicycle perambulator or other vehicle belonging to or used by the tenant or occupier of the Demised Premises or by any of his or their friends servants or visitors and to observe all regulations made by the lessors from time to time relating to the parking of such vehicles"*

7. By paragraph 26 of the Fourth Schedule to their leases, the tenant covenants *"at all times to observe and perform all such variations or modifications of the foregoing regulations and all such further or other regulations as the lessors may from time to time in their absolute discretion think fit to make for the management care and cleanliness of the Building and the comfort safety and convenience of all the occupiers thereof"*

8. The Tribunal was told that at an annual general meeting of the Applicant held on the 22nd August 2009 the Applicant Company resolved to make regulations with regard to car parking in accordance with Section 4(5) of the lease and in accordance with the Fourth Schedule thereto. These rules were contained and evidenced in the form of two written appendices; Appendix A consisting of a parking plan at the property with the comment thereon that *only one vehicle per flat is permitted;* Appendix 2 consisting of the parking rules. The parking rules are brief and are stated as follows:

   - Rule 1. Vehicles are to be parked in accordance with Appendix A.

- Rule 2. Owners of unused parking spaces may loan their spaces to another resident, this should be in the form of a written agreement, which may contain any agreed restrictions.

- Rule 3. Car parking spaces must not be rented out.

- Rule 4. It is the responsibility of each flat owner to notify any purchaser of the regulations when selling their property.

- Rule 5. It is the responsibility of each flat owner or occupier to ensure their visitors are aware of the parking restrictions.

AGREED FACTS

9. At the hearing the Respondents readily admitted that they were in the habit of parking two vehicles at the property and they confirmed that they were the owners of the two vehicles shown in the pictorial evidence submitted by the Applicant. They did not dispute this evidence rather they disputed that the parking of the vehicles in the manner depicted in the photos constituted a breach of any of the covenants or conditions contained in their lease.

THE CASE FOR THE APPLICANT

10. The Applicant's case is set out in their statement of case dated 22nd August 2012. Summarised in the briefest possible terms they contend that the parking of two vehicles constitutes a breach of the car parking regulations, which were validly created following an AGM held in August 2009.

11. Secondly, they contend that the parking of two vehicles constitutes and amounts to an obstruction to other residents who find it difficult to park their cars. They further contend that the parking in this manner blocked the view of the resident of Flat 21 and together these two facts constitute a breach of paragraph 12 of the Fourth Schedule to the lease.

12. In support of the first allegation they exhibited a number of coloured photographs which show two vehicles occupying the site reserved for Flat 20. Their statement points to the admission made by the Respondents that both vehicles shown in the pictures belong to them.

13. In support of the second allegation they exhibited copy correspondence with residents. This correspondence largely takes the form of e-mails passing between residents and the management company in which the parking by the Respondents of two vehicles is complained of. More often than not the complainant is a Ms. Canney whose bedroom window faces the area allocated for the parking for Flat 20. Ms. Canney alleges that the parking of two vehicles is an invasion of her privacy and makes it difficult for her to park in her allotted space. She also contends that the continued parking of two vehicles will lead to the Respondents obtaining prescriptive rights allowing them to continue their unlawful practice to the detriment of the amenities of her flat. There is also a letter of concern from the lessee of Flat 19 who suggests the implementation of white lines to delineate the allotted areas.

THE CASE FOR THE RESPONDENTS

14. The case for the Respondents is set out in their statement of reply dated 11th September 2012. The Respondents admit that they regularly park two vehicles at the subject property, however they deny that in so doing they are in breach of the lease or the regulations made pursuant to the lease.

15. In the first place they contend that the regulations relating to car parking were not validly created due to voting irregularities at the annual general meeting.

16. Secondly, they contend that the regulations unlawfully attempt to demise or grant individual spaces, which interferes with their prescriptive right to park in any of the areas comprising the Common Parts as identified in their lease. In this connection they refer to the decision of the Leasehold Valuation Tribunal CHI/00HN/LBC/2011/0016 The Moorings (Bournemouth) Limited and Mr McNeil. ("The Moorings case")

17. Thirdly, they contend that the regulations are not reasonable or fair in so far as they fail to take into account their individual personal special circumstances, which include their son who suffers from learning difficulties and the Respondent's business which entails him storing heavy equipment in his store in the basement of the property.

18. Fourthly, they contend that the regulation, which allows owners of unused parking spaces to loan to another resident provided there is a form of written agreement, is unfair, potentially divisive and as a result unreasonable.

19. In relation to the allegation that their double parking amounts to an obstruction, they say that this has no foundation in fact. They submit that the double parking does not prevent others parking in their allocated spaces and that the complaints relating to the blocking of a window view do not constitute a breach of any clause in the lease.

20. The Respondents deny all other allegations in relation to dangerous driving and parking manouvers and they reiterate that the personal circumstances of each resident need to be taken into account and they consider that the current scheme unreasonably fails to take their needs into account and are not workable because the residents of the property are territorial over their own spaces.

THE TRIBUNAL'S CONSIDERATION

21. The Tribunal first considered the complaint that the car parking regulations have not been validly created due to voting irregularities. The Respondents produced no documents in support of this contention and in particular the case papers did not include a copy of the Applicant Company's articles of association. Accordingly the claim amounts to no more than an unsupported assertion. In any event in the judgment of the Tribunal, the provisions of S.39 of the Companies Act 2006 apply and prevent the Respondents from pleading the doctrine of ultravires to render the creation of the Regulations flawed and therefore of no effect. S.39 of the Companies Act 2006 states that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution. In the judgment of the Tribunal the effect of this provision is that any voting irregularities do not at this stage render the regulations invalid. That is not to say that the Respondents may not be able to take up the matter of the alleged irregularities internally in their capacity as shareholders in the company but this is not a matter for this Tribunal. For these reasons the Tribunal finds that the car parking regulations were properly created in 2009 and bind the residents subject to the comments set out below.

22. The Tribunal then considered the terms of the lease to see if it contains provisions for the creation of new parking regulations. Such provisions do exist and they are to be found in paragraph 26 of the Fourth Schedule the wording of which is contained in paragraph 7 of this decision. The Tribunal considered that this clause does enable the Applicant to create new regulations to regulate on site parking, subject to two conditions. The first condition is that the rules must be reasonable and the second is that the new regulations must not materially conflict with existing rights set out in the lease.

23. The Tribunal has concluded that the parking regulations created by the Applicant in August 2009 meet both these conditions. Having viewed the site, the Tribunal is satisfied that with the tendency for households to own at least one car if not more, some regulation is justified and reasonable to ensure that all residents are treated fairly and all have the opportunity to use at least one space.

24. The site is relatively small and restricted and although there is room for 26 cars there are 24 flats. Whilst it may be the case that the parking by the Respondents of two vehicles in their space does not currently prevent others from using their own spaces, the site is restricted and if all residents were to park two vehicles in their allocated spaces then chaos would ensue and orderly parking would be lost. In these circumstances a restriction of just one car per space is considered reasonable.

25. Furthermore the Tribunal considers that the regulations, which prevent the renting out of spaces but allow residents to loan their space to another resident by way of written agreement, are also fair and reasonable. The Tribunal rejects the Respondents' argument that these arrangements are divisive. In the Tribunal's experience such regulations are often found in similar properties and ensure that the spaces are used to their maximum for the benefit of the residents.

26. The Tribunal also rejects the Respondents' claim that the personal circumstances of each resident need to be taken into account when operating the regulations. The Tribunal considers that to require the personal circumstances of each resident to be taken into account would place the directors of the Applicant board under an intolerable burden. Personal considerations involve a subjective analysis which would be very difficult to apply in an evenhanded consistent way. Personal circumstances are bound to change over time, which could present insurmountable problems for both the users and the persons responsible for policing the arrangements. Such a system would necessarily lack consistency and transparency and in the opinion of the Tribunal would not produce a workable set of controls.

27. The Tribunal accepts the principal that new Regulations created after the date of a lease should not materially reduce existing rights granted by a lease and it has considered very carefully the arguments advance by the Respondents in this respect and also the Moorings case cited by the Respondents. The Tribunal notes that the Moorings case is currently the subject of an appeal to the Upper Tribunal, which has not yet been decided. Accordingly the case is only of limited assistance and certainly it is not binding on the Tribunal. In any event, on the facts of this case the Tribunal has concluded that the 2009 regulations do not result in any practical reduction in the rights given by the lease.

28. The rights referred to by the Respondents lease are to be found in the Second Schedule entitled the included rights. Paragraph 1 confers the following rights, *full right and liberty for the tenant and all persons authorised by him..... at all times and for all purposes in connection with the permitted user of the Demised Premises to go pass and repass over and through and along the Common Parts including the main entrances and the passages landings halls and staircases leading to the Demised Premises provided*

always that the lessors shall have the right temporarily to close or divert any of the Common Parts and have the right to let on long leases or otherwise garages or garage spaces (if any) subject to leaving available reasonable and sufficient means of access to and from the Demised Premises.

29. The Common Parts are defined in clause 1 (10) *as all main entrances passages landings staircases gardens gates access yards roads footpaths parking areas and garage spaces (if any) passenger lifts means of refuse disposal and other areas provided by the lessors for the common use of residents in the Building and their visitors and not subject to any lease or tenancy to which the lessors are entitled to the reversion.*

30. The Tribunal finds that the areas designated for car parking by the 2009 car parking regulations were, from the inception of the lease, intended to be used for car parking and as such the original intention was that some parts of the Common Parts would be inaccessible because of the parking of cars. This position has not changed with the passing of the 2009 Regulations. All that the 2009 car parking regulations do is designate or assign residents cars to one particular area of the Common Parts. The Tribunal does not consider that this variation amounts to any material or practical diminution in those rights and therefore this in itself does not make the regulations unreasonable.

31. Taking all of these considerations into account the Tribunal finds that the 2009 car parking regulations have been validly created, are reasonable and fair, and that the parking by the Respondents of two vehicles in the Common Parts constitutes a breach of those Regulations and consequently a breach of a covenant or condition in the lease.

32. The Tribunal then directed its attention to the contention that the parking of the two vehicles constitutes a breach of paragraph 12 of the Fourth Schedule of the lease. Having reviewed the evidence the Tribunal is not persuaded that there has been any breach of this paragraph. On the day of the inspection the Respondents had parked their two vehicles one behind each other as depicted in the pictorial evidence filed by the Applicant. In this configuration the Tribunal found that there was no obstruction in or on any approach roads or passageways adjacent or leading to the building. The Tribunal also studied the photos, which showed two cars, one parked at an angle to the other. The Tribunal was not persuaded that this configuration would lead to any obstruction as alleged by the Applicant.

33. Furthermore the authorised car parking configuration as delineated on Appendix A to the regulation in itself results in a car being aligned close to the retaining wall of the building and the existence of a second car behind the first would not materially alter that position. The Applicant's representative conceded this point during cross-examination.

34. The Tribunal also rejects the contention that the parking of a second vehicle at an angle to the first would constitute an obstruction within the meaning of paragraph 12. The users of the surrounding spaces would still be able to navigate their vehicles to and from their space and they would also be able to access the Building and the passageways.

35. Neither is the Tribunal persuaded that paragraph 12 of the Fourth Schedule of the lease is drafted wide enough to capture the obstruction of a window view and accordingly it rejects the complaints of the resident of Flat 21 that the parking of two vehicles by the Respondents interferes with her view and constitutes a breach of this covenant. The resident of Flat 21 does not possess the right of light.

36. Accordingly on the evidence before the Tribunal it finds that the alleged obstruction allegation is not proven and therefore a breach of a covenant or condition in the lease has not occurred in this respect.

SUMMARY DECISION

37. The Tribunal determines that by parking two vehicles in the Common Parts of the subject property the Respondents have committed a breach of the 2009 car parking regulations, which form a condition of their lease. Accordingly a breach of a covenant or condition in their lease has occurred.

38. For the avoidance of doubt no other breaches have occurred and in particular the alleged breach of paragraph 12 of the Fourth Schedule is not proven.

S.20C COSTS APPLICATION

39. Although the Respondents had submitted a S20C application, at the hearing they confirmed to the Tribunal that they did not wish to pursue it and with the consent of the Applicant the application was withdrawn with no findings.

Signed _____
Robert TA Wilson Chairman.

Dated: 14th November 2012