All

FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LBC/2020/0025**
Property	**:**	**Flat 6, Park View Court, 115 Tulse Hill, London SW2 2QB**
Applicant	**:**	**Park View Court Owners Ltd**
Representative	**:**	**Mr S Datta of Counsel**
Respondent	**:**	**Mr A Hanna**
Representative	**:**	
Type of application	**:**	**Determination as to whether there has been a breach of covenant**
Tribunal member(s)	**:**	**Judge S Brilliant** **Tribunal Member A Hamilton-Farey**
Date and venue of hearing	**:**	**23 September 2020, 10 Alfred Place, London WC1E 7LR (Remote)**
Date of decision	**:**	**5 October 2020**

DECISION

Decision of the tribunal

The Tribunal determines that the Respondent is in breach of clauses 2(8), 2(10), and 2(11) of the Lease, and paragraphs 4, 5 and 9 of schedule 4 to the Lease (which by virtue of clause 6 of the New Lease are incorporated into the New Lease). The breaches arise by reason of his failure to observe and perform certain of the covenants, conditions and restrictions set out therein. The individual breaches are set out below.

The application

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 that breaches of covenant in the Lease have occurred.

2. The relevant legal provisions are set out in the Appendix to this decision.

The background

3. Park View Court, 115 Tulse Hill, London SW2 23QB ("the Block") comprises a post-war purpose-built block of six flats with garages . There are three floors with two flats on each floor.

4. The Block is a single L-shaped building set back by gardens from Tulse Hill. There is a footpath over the gardens and a front entrance to the Block. There is no vehicular access to the Block from Tulse Hill. The Block has a flat roof.

5. Behind the building there is a pathway leading to a pedestrian gate. Behind the gate there are situated six garages, one for each flat. There is an area of open hardstanding in front of each of the garages. There is vehicular access to the garages and the pedestrian gate from the rear of the hardstanding.

6. Flat 6 is situated on the top floor of the Block. The living room of Flat 6 has a balcony at the rear.

7. The Respondent is the long lessee of Flat 6 ("Flat 6") under a lease and surrender dated 17 October 1989 for a term of 130 years from 24 June 1989 ("the New Lease"). The freeholder is the Applicant company. As is often the case, each of the long lessees has a share in the Applicant. The current director of the Applicant is Mrs E Doyle.

8. The New Lease provided for the surrender of an earlier lease of Flat 6 dated 21 October 1960 ("the Lease"). By clause 6 of the New Lease, the lessee's covenants in the Lease were incorporated and read into the Lease. For the sake of convenience , reference will be made in this decision to the relevant clauses in the Lease, rather than to clause 6 of the New Lease. The specific provisions of the Lease will be referred to below, where appropriate.

9. The Respondent occupies Flat 6. A number of the other lessees let out their respective flats.

10. The instant application in general terms arises from (a) the construction of an extension to the flat on and over the balcony without permission ("the Conservatory"), (b) the construction of a greenhouse on the roof of the Block without permission ("the Greenhouse"), (c) the installation without permission of a set of wooden framed double doors with a glass surround in the common parts near to the entrance of Flat 6 ("the Double Doors"), (d) the installation without permission of a flue in the side of the Block to service a wood burner ("the Flue"), (d) depositing items in the inside common parts and (e) causing a nuisance by the depositing of items and the use of a hosepipe on the outside common parts.

Preliminary matters and the hearing

11. The Tribunal did not conduct an inspection of the flat, partly because of the coronavirus pandemic and partly because good, coloured photographs were presented to us in the electronic bundle which more than adequately enabled us to understand the case. This has been a remote hearing on the papers which prior to the hearing had not been objected to by the parties. The form of remote

hearing was V.

12. The Applicant was represented by Mr S Datta of counsel. The Respondent appeared in person.

13. Directions were given on 10 August 2020. The Respondent was directed to provide a full statement in response to the Applicant's case setting out in full the grounds for opposing the application, and any signed witness statements by 4 September 2020. Further directions were given substituting 9 September 2020 for this date.

14. The Respondent sent an email to the Applicant and the Tribunal dated 26 August 2020. He denied any breaches of his lease, also saying that the Applicant was aware of any alterations he had made and had not objected. He claimed that the greenhouse was for the sprouting of seeds and propagation of plants for self-reliance.

15. The Respondent did not accept the Applicant had any standing to make this application, as he was a member himself of the Applicant and he had not consented to the application. He also made a large number of allegations that other lessees in the block had also carried out activities in breach of the covenants in their respective leases.

16. On 10 September 2020, the Respondent provided a 20 page statement. No point was taken by Mr Datta that it was out of time, and indeed he referred to in his submissions.

17. Late on the day before the hearing the Respondent sent two emails to the Applicant. First, he provided a list of the ways in which he said any breach of covenant has been waived. We did not admit this email as any question of waiver is best left for the County Court to rule upon. In any event, there was no good reason for such late evidence to be admitted.

18. Secondly, the Respondent asked for an adjournment because he needed another two weeks in which to obtain the Articles of Association of the Applicant from Companies House.

19. We refused this application for an adjournment. In our view it was wholly without merit. If the Applicant really needed to rely on the Articles of Association he had had plenty of time in which to have obtained them. But the real objection is that the Articles of Association are of no relevance to this application. This goes back to the Respondent's submissions in paragraph 15 above that the Applicant has no standing to pursue this application.

20. It is frequently the case that a freeholder company in which all of the long lessees are shareholders has to take proceedings against one of the long lessees. This could be to recover ground rent or service charges or, as in this case, seeking a declaration that covenants in the lease had been broken.

21. A freeholder company in the circumstances is fully entitled to take such proceedings. In the instant case the Applicant's decisions are made by the director. The decision taken to commence these proceedings is within the powers of that director. Moreover, there is a presumption of corporate capacity to be found in s.39 Companies Act 2006, and the matter of a company's powers are not an issue within our jurisdiction.

22. Another general point much canvassed by the Respondent was that the instant application should fail because so many other long lessees in the Block had themselves broken a number of covenants. Again, this submission is wholly without merit. This has no relevance at all as to whether the Respondent himself has committed breaches of covenant. The submission may be relevant if the Applicant seeks to forfeit the Lease We had to remind the Respondent frequently during his cross-examination that questions directed to the witnesses about their conduct was not a matter for this hearing.

23. During the opening stages of the hearing the Respondent informed us that he had technology issues and was unable to hear what was being said sufficiently clearly. He wanted an adjournment (preferably to when the coronavirus pandemic has abated). It is to be noted that Mr Ward who lives on the floor beneath the Respondent had no such issues. Nevertheless, we were prepared to give the Respondent the benefit of the doubt that this was not another time wasting tactic like his earlier application for an adjournment.

24. The Respondent was then able to join in the hearing by telephone. We were entitled to conduct the hearing in this manner under our case management powers. We are satisfied that Respondent was able fully to take part in the hearing and that no disadvantage was suffered by him by being connected in this manner.

25. The Applicant called the following witnesses to give oral evidence:

(1) Mr Reeve, who has been the managing agent of the block since 2016.

(2) Mrs Doyle, who together with her husband has been the owner of Flat 1 since 2008, and is the director of the Applicant.

(3) Mr O'Kane, who has been the owner of Flat 5 since 2014.

(4) Mr Ward, who is the owner of Flat 4 and has lived there on and off all his life.

26. A timetable was imposed for cross-examination of these witnesses to enable the case to be heard in one day. We are satisfied that more than sufficient time was afforded to the Respondent for this. Unfortunately, the Respondent was unable to refrain from persistently asking questions about irrelevant matters (such as corporate governance or breaches by other long lessees) despite constant reminders not to do so.

27. As is appropriate for an unrepresented party, the Respondent gave evidence and made submissions in one go after the close of the Applicant's case. He was asked questions by Mr Datta and the Tribunal. We are satisfied that the Respondent had ample opportunity to present his case.

28. The Respondent did not call any other witness evidence.

The lease

29. Clause 2(8) provides:

Not to make any alteration in or to the flat or garage without the consent in writing of the Lessor and to pay the reasonable charges arising for the approval of the plans and specifications in respect of such alterations.

30. Clause 2(10) provides:

*Not to do or permit or suffer to be done **in or upon the flat** (our emphasis) anything which may be or become a nuisance annoyance or cause damage or inconvenience to the Lessor or the Tenants of the Lessor or neighbouring owners or occupiers.*

31. Clause 2(11) provides:

To observe the regulations specified in the Fourth Schedule hereto and to comply with all such regulations from time to time made by the Lessor under the provisions of Clause 3(6) hereof.

33. Schedule 4 paragraph 4 provides:

Not to permit vehicles used by the Lessee or her visitors to remain in attendance outside the building in such manner as to obstruct the entrance to the building or the same private road or way.

34. Schedule 4 paragraph 5 provides:

No household refuse shall be deposited except in the refuse bin which must be kept in the enclosure covered blue on the said plan.

35. Schedule 4 paragraph 9 provides:

*No perambulators bicycles or articles of any kind to be **left or deposited** (our emphasis) in the entrance hall passages or landings of the building.*

The evidence in respect of the alleged breaches and a discussion of the evidence

36. It is convenient to take the alleged breaches in the same order as Mr Datta's draft order, but excluding those matters which Mr Datta, having heard the evidence, properly conceded he could no longer rely upon.

The Conservatory

37. The Respondent admitted that he had constructed the Conservatory which consists of a timber-framed structure upon the external balcony of Flat 6, including windows and a canopy roof. The Respondent admits that he has never sought the permission of the Applicant to make this alteration. There is a photograph of the Conservatory in the appendix to this decision.

38. The Applicant has produced evidence that the building of the Conservatory was in breach of planning permission and Lambeth Council has issued notices in respect of it. The Respondent rather brushed this aside, but we are satisfied for what it is worth that an enforcement notice has been served.

39. The Respondent could not give a relevant answer to this allegation of a breach of covenant. We find without hesitation that the construction of the Conservatory without permission was a breach of clause 2(8) of the Lease.

The Greenhouse

40. The Respondent admitted that he had constructed the Greenhouse on the flat roof of the Block. It is 6 foot by 8 foot greenhouse. He also admits that he has left all sorts of building material and ancillary equipment upon the roof. There is a picture of the Greenhouse on page 98 the bundle.

41. Although the Respondent brushed this aside, it is apparent to us that some of the material has been left perilously close of the edge of the roof.

42. The construction of the Greenhouse without permission is not in itself a breach of clause 2(8) of the Lease. It is not suggested that the flat roof falls within the demise of Flat 6. It is clearly an act of trespass, but that is not a matter for this Tribunal.

43. Mr Datta submitted that leaving material so perilously close to the edge of the roof was a breach of clause 2(10) as it constituted and a nuisance or annoyance to the other long lessees. We accept that the other long lessees are quite reasonably in fear of an accident happening. Already a piece of wood has fallen from the Conservatory onto a barbecue situated in a flat below.

44. After some thought we have come to the decision that it would be wrong for us to determine that there has been a breach of clause 2(10). Building the Greenhouse was not doing anything in or upon the flat. It was doing something on the flat roof. The flat roof may be above Flat 6, but in our judgment the phrase in or upon is not wide enough to cover an activity carried on above the flat.

45. Support for this interpretation can be derived from the following. If Mr Ward had built the Greenhouse he clearly would not be in breach of clause 2(10). It would be strange if the long lessees of the two upper flats had a more onerous burden imposed on them than the remaining long lessees.

46. Secondly, the phrase in or upon is often used in legislation to refer to activities within a set of premises, not above them. For example, the recently inserted s.27F(2) of the Civic Government (Scotland) Act 1982 provides that:

Where a constable who is not in uniform is about to enter, is entering or has entered any premises under the powers conferred under section 27E(2) he must, if required to do so by a person ***in or upon*** *the premises, produce his identification.*

47. Clearly this is a reference to someone who is inside the premises.

The Double Doors

48. There is a picture of the Double Doors at page 48 of the bundle. In the draft order Mr Datta submits that the existence of the Double Doors is a breach of clause 2(11) of the Lease and paragraph 9 of the Regulations. In his oral submissions Mr Datta also relied on clause 2(10) the Lease.

49. There Double Doors are unlocked. They are situated in the common parts. Again, this constitutes a trespass in respect of which Applicant will have remedies in the County Court.

50. The hatch which gives access to the roof is within the area now enclosed by the Double Doors. We agree with Mr Datta that the Double Doors constitute

an annoyance or inconvenience to the Applicant and the other long lessees, despite being unlocked. However, the Double Doors are not situated in or upon Flat 6, so there cannot be a breach of clause 2(10) of the Lease.

51. Moreover, we do not accept his submission that there has been a breach of paragraph 9 of the Regulations. This requires an article to be left or deposited in the landings. It would be correct to say that the Double Doors had been fitted, erected or constructed. It would be twisting language to say that the Double Doors have been left or deposited.

The Flue

52. We are satisfied that the construction of the Flue is a breach of clauses 2(8) and 2(10) of the Lease. It is no defence to save were already a lot of other flues in the Block.

Chattels left inside

53. We are satisfied that the Respondent is in breach of clause 2(11) of the Lease and paragraph 9 of the Regulations in respect of (a) a bicycle under the stairs on the ground floor; (b) plasterboard and a table in the top floor communal landing and (c) a two seater settee also in the top floor communal landing.

54. We are not satisfied that the Respondent is in breach of these provisions in respect of two paintings (one of Che Guevara) he has put up near his front door.

55. It would be correct to say that the paintings have been displayed, hung or exhibited in the landing. It would be twisting language to say that they had been left or deposited in the landing.

Chattels left outside

56. We are satisfied that the Respondent is in breach of clauses 2(10) and (11) of the Lease and paragraphs 4 and 5 of the Regulations in respect of (a) an electric vehicle number VRN KX10; (b) an electric vehicle number VRN KX06; (c) various sections of wood, including logs and broken pallets (the use of which has been adopted by the Respondent even if he did not place then there originally); (d) a trailer; (e) scaffolding planks over the roof to the Block and (f) various items of plant or debris. All of these items have been left in the outside common parts.

57. The Respondent has also run a yellow hosepipe from the outside communal water tap to the roof. It runs across the lawn and underneath a paving slab. The paving slab is slightly raised, and Mr Datta submits this is a breach of clause 2(10) of the Lease and paragraph 4 of the Regulations.

58. There is a picture of this slab at page 44 of the bundle. A slight raising of the paving slab can be seen. There is not sufficient evidence to show that there would be civil liability for breach of s.41 of the Highways Act 1980 if this were a highway. The same test must apply to private land, and we are unable to say that this raising affords any danger.

Conclusion

59. We have found a number of breaches of covenant. This is an extremely serious matter for the Respondent. If the Applicant were to serve a s.146 notice and issue a claim for forfeiture in the County Court, the Respondent would be at risk of losing his home. We strongly advise him now to seek legal advice.

Name: Simon Brilliant **Date:** 5 October 2020

Appendix of relevant legislation

Section 168(4) of the Commonhold and Leasehold Reform Act 2002: a

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.

The conservatory

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).