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**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/00AR/LBC/2014/0074**

**Property** : **52 Arterial Avenue, Rainham,  
RM13 9PD**

**Applicants** : **Mr F. Marley and Mrs D. Marley**

**Representative** : **In person**

**Respondent** : **Mrs S. Awan**

**Representative** : **Mr M. Awan**

**Type of Application** : **Determination of Breach of  
Covenant; Section 168(4)  
Commonhold and Leasehold  
Reform Act 2002**

**Tribunal Members** : **Judge Lancelot Robson  
Mrs E. Flint DMS FRICS IRRV  
Mr J. E. Francis QPM**

**Date and venue of  
Hearing** : **12<sup>th</sup> November 2014  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **2<sup>nd</sup> December 2014**

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**DECISION**

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## **DECISION SUMMARY**

- (1) The Tribunal determined that a breach of a covenant or condition in the Lease had occurred and granted the application made by the landlord pursuant to Section 168(4) of the Act.
- (2)

### **Preliminary:**

1. By an application dated 3<sup>rd</sup> September 2014 the Applicant applied for a determination under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the Act) that breaches of the lease of the property dated 11<sup>th</sup> October 1962 (the Lease) had occurred, prior to the issue of a notice under Section 146 of the Law of Property Act 1925. The Respondent is the current Lessee. An extract from Section 168 is attached as Appendix 1.
2. A Case Management Conference was held on 17<sup>th</sup> September 2014. Directions for a hearing were given on the same day. The Applicants made written submissions dated 2<sup>nd</sup> September 2014 supported by their witness statements both dated 10<sup>th</sup> October 2014. The Respondent and Mr M. Awan made written submissions in their statements both dated 6<sup>th</sup> November 2014.

### **Hearing Applicants' case**

3. At the hearing, the Applicants outlined the relevant provisions in the Lease. Clause 3(1) requires the lessee to observe the stipulations in the Third Schedule of the Lease. The relevant paragraphs of the Third Schedule provide:
  2. *No temporary or permanent building to include a garden shed a garage or greenhouse of any kind shall at any time be erected on the property hereby demised unless plans drawings and siting thereof shall have previously been submitted to and approved by the Lessor or the Lessors Surveyor for the time being.*
  3. *The Lessee will not make any alterations in or addition to the height sides front back roof walls timbers or elevations of the maisonette or the yard or garden wall or fences thereof.*
  4. *The Lessee will not use or suffer or permit to be used the maisonette for the purpose of any manufacture trade or business of any description nor shall any intoxicating liquor of any description be sold on the maisonette for consumption on or off the same.... But will use and occupy the same as and for one private dwelling only.*
- (5)...
- (6) *The Lessee will use the garden forming part of the premises hereby demised as a garden only and will keep the same clean neat*

*and properly tended and will not convert the same to any other use whatsoever.*

4. In addition Clause 5(4) required the lessee to insure the property in a specified insurance office against certain risks and to provide a copy to the lessor on request.
5. The Applicant submitted that the Respondent had committed the following breaches of the Lease by:
  - a) placing a shed and a container on the rear and side gardens of the premises without prior approval (in breach of paragraphs 2, 4 and 6 of the Third Schedule)
  - b) damaging the front garden wall and failing to repair it, also removing a brick gas flue on the flank wall and failing to make good the damage satisfactorily (in breach of paragraph 3 of the Third Schedule)
  - d) storing building materials in the garden in breach of paragraph 6
  - c) failing to provide a copy of the insurance policy on demand in breach of Clause 5(4).
6. The Applicants submitted that the Respondent had admitted the breaches in writing. The breaches had mostly commenced in about 2009, when the Respondent's site office for the development of his neighbouring block of flats had been burned down. They agreed in answer to questions that the breaches relating to the insurance, maintenance of the rear garden, and the garden wall had now been remedied. The flue had been repaired badly, but ultimately they agreed that this issue had now been remedied. The container and shed had not been removed, although the Applicants' surveyor had contacted the Respondent in the last few weeks suggesting a retrospective licence might be granted. The Applicants stated that the shed and the rear garden had been used for storage of building materials. After a complaint to the local authority by the Applicants, much of this material had been removed in about 2011. It was their belief that the shed was still being used for storage of building materials, but accepted that the garden was now neat and tidy, and being used as a garden.

### **Respondent's case**

7. Mr Awan, for the Respondent, submitted that the Applicants' complaints were unreasonable, although he admitted that the terms of the Lease were clear. (Mr Awan was not always clear in oral submissions as to whether he was speaking for the Respondent, who is his wife, or himself, but it appeared that their interests were very closely linked). He referred to a previous business transaction involving the Applicants as the result of which the Applicants had obtained the freehold interest in the block. He considered that he was morally entitled to the freehold interest in this property. He had purchased his interest in the building prior to the Applicants. The garden wall had been damaged before he bought his property. He had not damaged it. He had repaired it to a good standard. The flue had now been made

good on a second occasion to match the existing wall. There had been a serious fire at his building site in 2009. As a result he had had to move the site office and yard to the garden of the property. The container had been used as a site office for the night security officer until construction on the site had been completed. He had sent a copy of the insurance policy to the Applicants recently. The shed was only used for domestic storage. He submitted photographs of the interior of the shed showing what he considered to be domestic items.

### **Decision**

7. The Tribunal considered the submissions and evidence. It decided that the previous dealings between the parties relating to the freehold had no relevance to this case, nor had the state of the gardens of the properties belonging to the Applicants. The Tribunal had no jurisdiction under Section 168 to deal with such matters. They were matters for the court, if the parties could not agree. It was common ground between the parties that the breaches relating to the wall, flue, garden and insurance had been remedied. Nevertheless, the Applicants were entitled to a determination that the Respondent was in breach of paragraph 3 and 6 of the Third Schedule, as well as Clause 5(4) of the Lease.
8. In his written submissions, Mr Awan had submitted that the container would be removed the day before the hearing. However the Applicants submitted that it had not been removed as promised. Mr Awan stated that the removal company had attended to remove it the previous day, but cars belonging to third parties were in the way, and it could not be moved. An appointment had been made for the remover to return on the following Tuesday. He would confirm to the Tribunal when it had been moved. (Although not relevant to this decision, Mr Awan reported that it had not been removed the following Tuesday, as once again cars were blocking the way.) The Tribunal noted that in April 2011 the Respondent had emailed Mr Marley stating that the container would be removed within 6 weeks. The Respondent admitted in answer to questions from the Tribunal that part of the reason he had failed to move it was because the Applicants had threatened legal proceedings. The Tribunal gained the impression at the hearing that, at least between 2011 and the start of this application, the removal of the container was not a priority for the Respondent. In any event, the Tribunal decided that at the date of the hearing the presence and use of the container was in breach of paragraphs 2, 4, and 6 of the Third Schedule to the Lease.
9. The current situation relating to the shed was less clear cut. The Tribunal noted from the photographs that the shed was not a typical garden shed, it was a stout windowless structure with a heavy lock. It was in fact a typical builder's site store. The contents of the store included a strimmer and a fridge, but all the other materials and objects which could be identified from a rather dark photograph were strongly connected with building. There also seemed to be large quantities if they were for domestic use. Mr Awan did not contest that it

had been used as a builder's store in the past. The Tribunal decided, on balance, that the store was still being used for commercial purposes in breach of the Lease. The Tribunal therefore determined that the presence and use of the shed was in breach of paragraphs 2, 4, and 6 of the Third Schedule to the Lease.

10. The Tribunal therefore determined that multiple breaches of covenants or conditions in the Lease had occurred and granted the application made by the landlord pursuant to Section 168(4) of the Act.
11. For clarity, the Tribunal noted the copy invoices from the Applicants' solicitors. The question of costs payable in contemplation of Section 146 proceedings is a matter governed by the Lease, and ultimately for the County Court to decide if the parties cannot agree. The Tribunal has no jurisdiction to decide such costs in a Section 168 determination.

Signed: Lancelot Robson  
Chairman

Dated: 2<sup>nd</sup> December 2014

## **Appendix 1**

### **Section 168 Commonhold and Leasehold Reform Act 2002**

- (1) A landlord under a long lease of a dwelling may not serve a notice under Section 146(1) of the Law of Property Act 1925 (c20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
- (2) This subsection is satisfied if-
  - (a) it has been finally determined on an application under subsection (4) the breach has occurred
  - (b) the tenant has admitted the breach, or
  - (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
- (3) But a notice may not be served by virtue of subsection 2(a) or (c) until after the end of a period of 14 days beginning with the day after that on which the final determination is made.
- (4) 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.
- (5) But a landlord may not make an application under subsection (4) in respect of a matter which-

- (a) has been, or is to be, referred to arbitration pursuant to a post-dispute resolution agreement to which the tenant is party,
- (b) has been the subject of determination by a court, or
- (c) has been the subject of a determination by an arbitral tribunal pursuant to a post-dispute resolution arbitration agreement.

**169 Section 168: supplementary**

(1) – (6) ....

- (7) Nothing in Section 168 affects the service of a notice under Section 146(1) of the Law of Property Act 1925 in respect of a failure to pay-
  - (a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
  - (b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).