FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AF/LBC/2017/0047**
Property	:	**Flat 2, 26 Derry Street, Mary Cray, Orpington, BR5 4DT**
Applicant	:	**Ms P. S. Dennis**
Representative	:	**Judge and Priestly LLP**
Respondent	:	**Mr K. L. Reeves**
Representative	:	**In Person**
Type of Application	:	**Application for a declaration under Section 168(4) of Commonhold Leasehold Reform Act 2002**
Tribunal Members	:	**Judge Owusu Abebrese, Mr Richard Shaw FRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**19 July 2017**

DECISION

Decisions of the tribunal

(1) The tribunal determined that the alleged breaches of the covenant do fall within the terms of the respondents lease

(2) The Tribunal determined that the structure was constructed on the demised premises without the permission of the applicant either expressly or impliedly.

(3) The tribunal also determined that the shed had been removed by the respondent and that there is no longer a breach of the covenant.

(4) The tribunal determined that the gas pipe was pre-existing and not relevant to the issues before the tribunal.

(5) The two remaining pipes, contained electrical cables supplying to garage and a garden feature. The tribunal found that the applicant admitted that she provided consent to the work regarding electrical connection to the garage but could not remember permission she might have given in October 2015. However, she could remember consent being given in October 2013 in relation the sinking fund. The respondent did give evidence that permission in October 2015 was given to the garage and garden feature although he has only recently connected them both. On balance the tribunal find that it is likely that consent was indeed given in October 2015 for the connection of both supply to garage and garden.

(6) Therefore the tribunal finds that there is no breach regarding the formation of the pipe works.

(7) The tribunal makes does not make an order under section 20C of the Landlord and Tenant Act 1985 as no application was made by either party.

(8) The tribunal makes no order in respect of the reimbursement of cost of either party in respect of these proceedings.

The application

1. The applicant landlord seeks a determination under Section 168(4) of the Commonhold and Leasehold Reform Act 2002("the Act"), that the respondent tenant is in breach of various covenants contained in the lease. In particular the applicant asserts that the respondent has breached clause 8.1 of Schedule 4 to the lease, in that he has carried out, and continues to carry out prohibited external works to the building.

2. The tribunal needs to be satisfied that the lease includes the covenants relied on by the applicant and that if proved the alleged facts constitute a breach of the covenants.

The hearing

3. The Applicant was represented by Mr John Beresford of Counsel at the hearing and the Respondent appeared in person.

4. Prior to the hearing of the evidence the tribunal brought the letter of the applicant's solicitors dated 7 July to the attention of both parties, this letter confirms that the shed has been removed by the respondent and that the only outstanding works which may constitute a continuing breach of the lease concerns the pipe works and cables.

5. The applicants representative submitted to the tribunal that whilst in agreement with the above that the respondent acted in breach of the lease by erecting the shed and hence his past actions fall within the terms of Clause 8.1 and 8.3 of Schedule 4 of the lease.

6. The applicant's representative took the tribunal through the terms of the lease contained within the various paragraphs of the lease and submitted that the breaches fall within the terms of the demised part of the property. The respondent he submitted had acted in breach of his lease by erecting the shed without obtaining the consent of the applicant. He added that it was immaterial whether it formed part of the wall because there was a clear breach of his obligations as a tenant and also a lack of failure on his part under Clause 8.1 and 8.3 because the respondent had not sought consent from the applicant. Mr Beresford conceded that some sort of consent had been provided by the applicant to the respondent for something in 2015, but that this was never evidenced in writing by either party.

7. The applicant gave evidence and she adopted her witness statement at pages 62-65. In her written statement she states that the respondent has acted in breach of the lease and covenants 8.1 in that he erected a shed because he did not seek her consent before commencing the works. Furthermore, that the lack of consent is confirmed at Clause 8.3.

8. The applicant adds in her witness statement that on 10th April 2017 on her return from work that the applicant had added a wood and glass structure in the garden area to external wall of the property. There was also a grey pipe coming out of the external wall of the property. On 5th May 2017 she heard drilling to either side of the external wall or from the inside of his flat in the stair area. She states that she was not aware why the respondent was drilling. She heard further drilling on 8th May 2017. The applicant directed the tribunal to photographs attached to her statement within the main bundle, she asked the tribunal to note

that the photograph taken on 2 May 2017 showed that the shed was either touching or very close to the wall and that there are three identifiable cables which have drilled into the wall.

9. She stated that she recalls given him consent in 2015 in respect of electricity supply into the garage. She recalls also giving him consent not to pay money into the sinking fund back in 2013 because he was in financial difficulties but that she reinstated this in 2016.

10. The applicant was asked questions by the respondent in cross examination. She gave evidence that she has always allowed the applicant access on to her property. She reiterated that she did give consent for the electricity but could not remember giving consent for anything else. She was not aware when the work in respect in respect of electricity to the garage was being done but she expected him to run the cable for the electricity underground. In October 2016 she claims that she asked him to refrain from continuing the works which he claims he did but she was aware of works that he was doing in respect guttering and window frames. The applicant admitted that she was responsible for the window frames but she felt at this point that the respondent was dictating to her.

11. The photographs which have been provided were taken on 13 June 2017 and 5 May 2017. . The respondent in his evidence states that he erected the shed in the belief that he was entitled to do so under the terms of the lease, particularly under Regulation 5. He could not find anything in Regulations which prevented him from erecting a free standing shed. He erected the shed in April 2017 and took it down in July 2017. He did not ask the applicant for permission to erect the shed because there has been a breakdown in communications between them and they do not talk. Previously they had a very good relationship. He claimed that in October 2015 he was given consent for both the supply of the electricity to the garage and to his garden for his water feature. He conceded that he did not have proof of any consent having been granted in writing. The tribunal noted that neither party had evidence in writing of express permission having been granted.

12. He stated that in respect of the shed he did apply some felt around the sides and that the shed was not touching the wall of the property. There are three pipes/cables in the wall, the white pipe in the photo has always been in existence to his knowledge and it is the gas pipe for the property. The middle cable is the power supply to the garage and the third cable provides power for his water feature.

13. In cross examination he conceded that in his letter 5 July 2017 it was put to the appellant that he mentions the cable in the singular, he accepted that he does and also that there is no reference to the garden. He maintained that he was given oral permission to do the works. The tribunal also note that the appellant at the bottom of the letter dated 5

July 2017 does make reference to the fact that the **works** could not have taken place without permission.

14. In submissions the following points were made by the parties. Mr Beresford on behalf of the applicant maintained that respondent had acted in breach of Clauses 8.1 and 8.3 of the lease. In respect of the shed it was submitted that it was immaterial whether or not it touched the wall it was erected without consent/ permission. It was accepted that the shed has now been taken down but he submitted that there was a breach before it was taken down between the periods April 2017 and July 2017. He accepted that there is no continuing breach as the breach has now been rectified by the respondent.

15. The respondent submitted that he was given permission for both the power supply to the garage and his garden water feature. He did erect the shed without permission but he has now taken it down because he has an opportunity to relocate elsewhere in the country because of work.

16. Mr Beresford on behalf of the applicant directed the tribunal to the letter of the respondent dated 5 July 2017 and he submitted that this letter provided evidence that the respondent was never given consent for the pipes in respect of the garden and consent was only given in respect of the electricity supply to the garage. The pipe in respect of the gas was it accepted already in existence. The respondent did not even have a water feature in October 2015.

The background

17. The property which is the subject of this application is located on the upper floor of a maisonette, it also includes a garage

18. An inspection had been arranged but the tribunal on the day of the hearing determined that the matter could be disposed off without the assistance of an inspection. Both parties at the hearing agreed to matter proceeding without an inspection.

The issues

19. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) Whether the breaches complained off form a part of the covenants in the lease.

    (ii) Whether evidence had been provided to show that there have breaches of the covenants.

(iii) Whether evidence had been provided to show that consent/permission was provided to the respondent for the works to be carried out.

20. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The tribunal's decision

21. The tribunal finds that the breaches complained off do form a part of the covenants of the lease.

Reasons for the tribunal's decision

22. The tribunal considers that the definitions of the property and the covenants in the lease as detailed at pages 20, 21, 22 and 32 of the hearing bundle that this aspect of the claim has been satisfied. The respondent at the hearing accepted that the shed was erected on premises had been demised to him and he provided no evidence to the tribunal on this point.

The tribunal's decision

23. The tribunal determines that evidence was provided by the applicant to show that the respondent did not seek consent/ permission from the applicant to erect the shed and this was a breach of the terms of lease under Clause 8.1 and 8.3 of the lease. The respondent accepted that he had not acted in accordance with the terms of the lease. The tribunal finds that the breach in respect of the shed it was erected in April 2017 and taken down in July 2017. The Tribunal finds that the breach was now been rectified, this is not disputed by the parties

Reasons for the tribunal's decision

24. The respondent accepted that he had not acted in accordance with the terms of the lease with regard to the seeking of consent and or permission from the applicant. The tribunal finds that the breach in respect of the shed between a finite period, it was erected in April 2017 and taken down in July 2017. The Tribunal finds that the breach has now been rectified this is not disputed by the parties.

25. The tribunal finds that the evidence of the applicant was vague, unconvincing and selected in relation to whether permission was granted to the respondent in respect of the supply of electricity to the garage and garden. The applicant gave evidence that she gave permission for the works in respect of the garage. Initially she stated

that she could not remember if she gave consent for anything else, but later she stated that she only gave evidence for works for the garage. She could not remember when the works had started and was not aware that any works were being carried out. The applicant however could remember vividly that back in 2013 she allowed the respondent to refrain from paying money into the sinking fund because he was in financial difficulties. The applicant in her witness statement makes no mention of the fact that she gave the respondent permission for the supply of electricity to the garage which is inconsistent with her oral evidence at the hearing.

26. The respondent's evidence however, was consistent in relation to the shed and he admitted he had not sought consent but had in any event taken the structure down. The tribunal did not accept his evidence that schedule 5 of the lease gave him permission to erect the shed. The tribunal also find that he was consistent that permission had been granted to him for the works in respect of supply of electricity to garage and water feature even though he did not act on the permission until recently. The has taken into consideration the wording used by the respondent in his letter dated 5 July 2017 where in the second paragraph he confusingly refers to 'other cables' and also him being granted access and permission to excavate 'the cable'. The tribunal finds on balance that taking into consideration all the evidence and submissions that it is more likely than not permission and access was granted to the respondent.

Application under s.20C and refund of fees

27. At the end of the hearing neither party made an application under Section 20c and or refund of fees and therefore no orders are made in respect of both.

Name: Judge Abebrese **Date: 17 July 2017**

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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 or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

168 Notice forfeiture notice before determination of breach

(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 (c. 20) (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) that 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 the 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 arbitration agreement to which the tenant is a party,

(b)has been the subject of determination by a court, or

(c)has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
- (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).