



**PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00AH/LBC/2021/0052
V:CVPREMOTE**

Property : **155 Tollers Lane Coulsdon Surrey CR5
1BJ**

Applicant : **Ms A Neophytou**

Representative : **Mr Deeljur, Counsel**

Respondents : **Mr and Mrs Salmon**

Representative : **Mr Salmon**

Type of Application : **Breach of covenant**

Tribunal Members : **Judge F J Silverman MA LLM
Ms S Phillips MRICS**

Date and venue of Hearing : **Remote CVP hearing
01 November 2021**

Date of Decision : **08 November 2021**

DECISION

1 The Tribunal determines that the Respondent Tenants are in breach of covenant under the terms of Clause 17 of their lease in that they have erected a building in the garden of the demised property without first obtaining the Applicant landlord's licence to do so.

2 The Tribunal finds the Applicant's assertion that the Respondent tenants have committed a nuisance contrary to Clause 19 of their lease is not substantiated.

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V:CVPREMOTE. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents which the Tribunal was referred to are contained in electronic bundles comprising approximately 300 pages the contents of which are referred to below. The orders made in these proceedings are described above.

REASONS

- 1 The Applicant landlord sought a declaration from the Tribunal that the Respondent tenants were and remained in breach of the covenants of their lease. Her application was received by the Tribunal on 19 July 2021 and the Directions were issued on 09 September 2021.
- 2 The Applicant landlord is the freeholder of the building known as 155 Tollers Lane Coulsdon Surrey CR5 1BJ which comprises two maisonettes. She has a lease of and lives in the upper maisonette and the Respondents are the leaseholders of the ground floor (the subject property described in the lease as the lower maisonette). Each party has a defined share of the front garden and parking space. The rear garden is similarly divided between the two leaseholders with the subject property having direct access to the part of the garden nearest to the building which is separated by a fence from the rear part of the garden belonging to the Applicant.

- 3 The lease under which the Respondents hold the property is dated 28 June 1957 made between James West and Charles Baxter Pye (the Lease) (p55); as varied by a Deed of Variation dated 18 March 2002 which extended the Lease to a term of 155 years from 25 March 2001 (p71).
- 4 The Tribunal received and read a bundle comprising approximately 300 pages of electronic documentation which are referred to in this document.
- 5 The hearing took place by way of a remote video (CVP) link to which the parties had previously consented. The Applicant was represented by Mr Deeljur of Counsel and Mr Salmon appeared on behalf of himself and his wife.
- 6 In accordance with current Practice Directions relating to Covid 19 the proceedings were recorded and the Tribunal did not make a physical inspection of the property but were able to obtain an overview of its exterior and location via GPS software and from photographs included in the hearing bundle.
- 7 The Applicant gave evidence on her own behalf. Mr Salmon was offered the opportunity to cross-examine her but chose not to do so. His evidence on behalf of himself and his wife was subject to cross-examination by Counsel for the Applicant.
- 8 Clause 17 of the Respondent's lease contains the following covenant by the tenant:

“Not at any time during the said term without the licence in writing of the Lessor first obtained to erect or place any additional building or erection on any part of the demised premises other than a radio and television aerials and a shed for domestic purposes only on the land coloured pink on the said plan and not without such licence as aforesaid to make any alteration on the plan or elevation of the maisonette building hereby demised or in any of the party walls or the principal or bearing walls or timbers thereof nor construct any gateway or opening in any of the fences bounding the demised premises.”

- 9 The Applicant asserted that the Respondents were in breach of Clause 17 of the lease because they had, without her prior consent, erected a building in their garden which was being used as additional living space. It was common ground that the Applicant had agreed that the Respondents could have permission to erect a pergola but the Applicant insisted that the structure which had been erected and which was clearly visible from the windows of her flat was neither a pergola nor a garden shed but a permanent structure which was being used by the Respondents as a non-connected extension to their ground floor flat.
- 10 Photographs of the Respondents' building (pp118-151) showed it to have sets of full height UPVC glass patio doors along its length, a separate mains electricity supply, an electric doorbell (p148) and signs attached to the exterior reading 'man cave'(p140) and 'the Den'.
- 11 For the Respondents, Mr Salmon insisted that the building was just a shed and that it fell within the 'shed for domestic purposes' exception contained in Clause 17 (above) and thus did not require the Applicant's prior consent nor did it need planning permission. He said that the building measured about 26 feet across the width of the garden and was about 9 feet in depth but was restricted in height to the height of the fence dividing the parties' respective

garden areas. He said that the building was heated, insulated, plastered, soundproofed, painted and decorated and had carpet tiles on the floor. The photographs on pages 145-6 appeared to show a dinner party in progress with people sitting around a long table. Mr Salmon said that the area was used as a dining room because the flat did not have one and had been valuable additional living space during the pandemic lockdowns.

12 The Applicant's representative said that the interpretation of the word 'shed' in Clause 17 was the key to the parties' dispute. He referred the Tribunal to Lord Neuberger's comments in ***Arnold v Britton* [2015] UKSC 36** where he set out six matters (below) pertinent to the construction of the meaning of relevant words in the context of a lease:

- The natural and ordinary meaning of the clause;
- Any other relevant provisions of the lease;
- The overall purpose of the clause and the lease;
- The facts and circumstances known or assumed by the parties at the time that the document was executed; and
- Commercial common sense;
- But, disregarding subjective evidence of any party's intentions.

13 Starting with the dictionary definition of 'shed' :

the Merriam Webster dictionary cited by the Applicant defines a 'shed' as 'a slight structure built for shelter or storage especially: a single-storied building with one or more sides unenclosed'.

14 The Respondent's building does not appear to satisfy this definition. It is a solid immovable structure, not used for storage and has all its sides enclosed.
15 Beyond that, the Respondent's own description of the construction and use of the building (above) would seem to exclude it from that definition.
16 The Respondents relied on the use of the word 'domestic' in conjunction with 'shed' i.e. a 'domestic shed' which they argued must be a shed for domestic use with 'domestic' being given a meaning relating to 'household' or 'connected to family'.
17 While the Tribunal does not disagree with this interpretation of the phrase 'domestic shed' which would distinguish, and in the context of the clause under discussion prohibit the use of, such a structure for commercial or industrial use, it considers that extending that definition to include 'use as an extra living room' is stretching the interpretation into unrealistic areas far beyond the normal and sensible meaning of the words.
18 For the above reasons, and in particular taking into account the Respondent's own description of the structure and use of the building the Tribunal cannot accept the Respondent's interpretation of the words 'domestic shed' and agrees with the Applicant that the Respondents have erected a permanent structure in their garden, which they continue to use as an extra living room. The construction of this building required the Applicant's prior consent which was not sought or obtained, and this results in the Respondents having committed a continuing breach of Clause 17 of their lease.

- 19 The Applicant's second allegation related to a breach of Clause 19 of the lease which contains a covenant by the Respondents:

'Not to do or permit any waste spoil or destruction to or upon the demised premises nor to do or permit any act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor or his tenants or occupiers of the adjoining premises and in particular of the upper maisonette or to the neighbourhood'.

- 20 The Applicant asserted that there had been many and varied breaches of this provision including noise, the placement of cameras focussed on her flat (understood now to have been re-positioned) and slammed doors.
- 21 The Tribunal considers that the level of noise penetrating upwards to the Applicant's flat may well have increased with the Respondents' use of the new garden structure and in particular with the increase of family usage of the flat and garden during the past year when many families have been compelled to stay at home or work from home because of Covid restrictions. In the present case however, it does not consider that the Applicant has demonstrated sufficient tangible evidence of nuisance from noise or otherwise to suggest that the Respondents are in breach of Clause 19. The Tribunal finds this allegation unproven.

22 **The Law**

Commonhold and Leasehold Reform Act 2002 s 168

No 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.

Judge F J Silverman as Chairman
Date 08 November 2021

Note:

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rplondon@justice.gov.uk.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.