

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

S.168 (4) of the Commonhold & Leasehold Reform Act 2002

Case Number: CHI/21UG/LBC/2010/0001

In the matter of 15 Mitten Road, Bexhill-on-Sea, East Sussex, TN40 1QL

Applicant: Mrs. Samantha Cooper

Respondent: Mrs. Susan Pellet

Date of Application: 8th October 2009

Date of Inspection: 25th February 2009

Date of Decision: 26th February 2010

Tribunal Members: Mr. S Lal LL.M (Legal Chairman)
Mr. R. Athow FRICS MIRPM
Mr. B. Mire BSc FRICS

The Application

1. The Applicant in this matter seeks a determination from the Tribunal that the Respondent has committed a breach of the Lease made between the Applicant on the one part and the Respondent on the other.
2. If such a determination is made the Applicant will then be in a position to serve a notice under Section 146 of the Law of Property Act 1925 as a precursor to possible action for the forfeiture of the lease.
3. Specifically the Applicant alleges that the Respondent has parked her vehicles and those of her friends and family on an area of garage forecourt which is the subject of the demise. The Respondent lives at 17 Mitten Road and the Applicant at 15 Mitten Road and the subject of the demise concerns an area of forecourt leading to a garage. The freeholder is the Applicant and the Respondent leased the garage and forecourt area at some point in 1998 from a previous freeholder.
4. The matter was the subject of a PTR on 11th January 2010 where it was directed that the matter be the subject of a fast track hearing on the papers only. Directions were made on that occasion and both parties have complied with the Directions and the Tribunal has been served with the relevant statements of case.

The Inspection

5. The Tribunal did inspect the subject premises on the morning of the 25th February 2010. It consists of a block paved forecourt area leading to a double garage to one side of 15 Mitten Road. There is side access to the latter and the garage has a doorway entrance to the left of the garage doors. The Tribunal did not observe any vehicles parked immediately in front of the garage doors.
6. The Tribunal has also had regard to the decision of the LVT in CH1/21UG/LBC/2008/0021, 5th February 2009 which concerned the same parties and the same garage, albeit that case alleged breach of use in respect of the garage. That was a decision in which the Applicant failed in their case.

The Case for the Applicant

7. The Applicant alleges in her Statement of Case that the relevant lease is quite clear in that it states that *"the lessor hereby demises unto the lessee all that detached lock up garage at 15 Mitten Road, Bexhill aforesaid shown edged red on the annexed plan together with a right of way at all time for all purposes incidental to the use of the said garage over the forecourt, shown edged blue on the annexed plan."*
8. The Applicant alleges that the terms of the relevant demise could not be clearer and that it only permits a right of way over the forecourt to the garage rather than a right to park on the forecourt to the garage. She has attached a numbers of photographs that appear to have been taken without consent and which are undated and purport to show vehicles parked on the forecourt area. The Tribunal have also considered a statement from Mr. Relton.

The Case for the Respondent

9. The Respondent is represented by Menneer Shuttleworth, Solicitors and they have made written submissions on her behalf as well as providing the Tribunal with witness statements from the Respondent herself as well as Carolyn Turner and Anne Nurse.
10. The Respondent raises three distinct points; the first is that of estoppel, the second is that of an implied right to park and the third is that of a right to park generally.

11. In summary they say that the Respondent is estopped from denying a right to park because of the long continued conduct of the Applicant in allowing a vehicle to be parked; further and in the alternative that there is an implied right to park in the sense of a reasonably necessary use following the decision in *Waterman and others* [2009] EWCA Civ 115 and lastly and in the alternative s. 62(2) of the Law of Property Act 1925 confers a right to park as the same is capable of acting as an easement.

The Law

12. In terms of the jurisdiction of this Tribunal, this is determined by s.168 (4) of the Commonhold & Leasehold Reform Act 2002 (the "Act") which says as follows:

"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)

(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.

The Decision

13. In the instant case the starting point must be the lease itself. The Tribunal has considered the lease as well as having regard to its own previous decision above. The Tribunal determines that the relevant lease (dated 8th April 1988) could not be clearer in its scope and definition and Clause 1 refers to a "right of way for all purposes incidental to the use of the garage."

14. Further support can be derived by reference to Clause 1(e) which refers to the running of the engine of the motor-car within the garage except of the purposes of entering or leaving the garage. The Tribunal finds that the Lease is not ambiguous or unclear and that the forecourt is for access only to and from the garage and not for parking. The previous Tribunal found in 2009 that "the right of access across the forecourt appeared to be limited to the area directly in front of the double garage doors." This was because both parties had described the area to the right of the garage and the next boundary fence as a pathway and was not surrounded by a bold line on the plans. This Tribunal accepts that the Respondent has a right to park her car to the right of the garage and up to her boundary fence but not in front of the double garage doors. Such a view is both consistent with the lease, the plans and the decision of the LVT in 2009.
15. The Tribunal places little weight on the arguments raised by the Respondent as regards estoppel. The lease is unambiguous and clear and the doctrine of estoppel has limited value in determining what could not be clearer terms in the lease. The fact that it was not raised by the Applicant in previous proceedings does not mean it could not have been done so and the Tribunal has no credible evidence to conclude that there has been estoppel by representation.
16. Likewise the Tribunal rejects the argument that there is an implied right to park. This may have had some currency if the lease was unclear but the lease is extremely clear that the right shall only be a right of way. The Tribunal does not accede to the argument that it is reasonably necessary to park in the forecourt in order to use the garage. The case of *Waterman* cited by the Respondent actually determines that the inference of a reasonable right to park was initially derived from an earlier authority (*Moncrieff*) where the facts were held to be quite exceptional. In the instant case the Respondent can still use the garage and does not have to park in front of the double doors.
17. The Tribunal rejects any argument under Section 62(2) of the LPA 1925 that a right to park may be viewed as an easement providing it does not interfere with the servient owner's reasonable use of the land. The Applicant has no use of the land and to create an easement, in effect undoing the express terms of the lease, in the absence of showing why this would be necessary to have access and to use the garage, cannot possibly succeed.

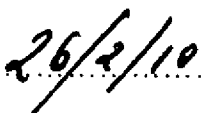
Whether a Breach has occurred?

18. The Tribunal have considered this with some care. The Tribunal notes that the previous Tribunal in 2009 had concluded when finding against the Applicant that she had "not demonstrated impressive powers of observation or recall." In the present case it is difficult to conclude that the vehicles pictured (the pictures are not dated) in the Applicant's bundle, establish that the Respondent was either the registered keeper of these vehicles or was in some way connected to them. The Tribunal finds that on balance the Applicant has evidentially failed to establish that a breach has occurred or is occurring. The Tribunal were able to observe no vehicles parked immediately in front of the garage doors and the Tribunal must evaluate the situation as it finds it. The Tribunal accepts that the Respondent may have parked in the forecourt area in the past but has no credible or cogent evidence to suggest that that breach is ongoing or is recent and therefore on balance finds that the Applicant has not discharged the evidential burden upon her in terms of this application.

Conclusion

19. For the reasons above the Tribunal finds that the area immediately in front of the garage doors is not to be used for the parking of motor vehicles although the area to the right of the doors up to the boundary fence can be used for such purpose.
20. The Tribunal finds that the Applicant has failed to establish a breach of the terms of the lease.
21. The Tribunal makes no further Order.

Chairman... 

Date... 

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Applicant: Mrs. Samantha Cooper

Respondent: Mrs. Susan Pellet

Date of Application: 8th October 2009

Date of Inspection: 25th February 2009

Date of Decision Original Decision: 26th February 2010

Date of Application for Leave to Appeal: 17th March 2010

Date of Decision: 19th April 2010

Tribunal Members: Mr. S Lal LL.M (Legal Chairman)
Mr. R. Athow FRICS MIRPM
Mr. B. Mire BSc FRICS

RESPONSE TO NOTICE OF APPEAL


1. Following the above decision, the Applicant has submitted by way of letter dated 17th March 2010, a letter seeking to appeal the decision (the "Decision"). The Respondent's solicitors asked for more time, by way of letter dated 25th March 2010, in which to take further instructions from their client. They have subsequently not corresponded with the Tribunal in any event.

Ground One

2. The Applicant raises the issue that the Respondent opening her car door would mean that the arc of the opening door would cross beyond the 6 foot designated space and therefore the Respondent would be parking in the forbidden area in front of the double garage doors.
3. The Tribunal finds such an argument to be specious. The opening of door is a temporary movement and the presence of the door during its arc of movement cannot be described as being parked in the area. It is an action in the area in front of the garage doors and has no permanent or enduring nature.

Ground Two

4. In respect of whether the lease has been breached, the Tribunal made a decision on the basis of the evidence before it and its own observation at the inspection. Neither party opted for an oral hearing of the matter; both parties were content for the matter to be determined on the papers. The Tribunal were perfectly entitled to find on the civil standard that the Applicant had failed to make out her case and proper reliance was placed in assessing the credibility of the evidence presented to the Tribunal decision in 2009 which had concluded when finding against the Applicant on that occasion, that she had "not demonstrated impressive powers of observation or recall."
5. The Applicant says it is her intention to ask the Respondent "to attend the hearing." Both parties were content to deal with the matter on the papers and therefore the evidential part of the hearing has concluded.
6. If the Applicant alleges further breach of the lease than the correct course of action is to make a new application at which point she ought to present sufficient evidence capable of discharging the evidential burden upon her.
7. For the Reasons above the Tribunal refuses leave to appeal.

.....Chairman

19/7/10.
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