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

Case Reference : LON/00BD/LSC/2015/0067

Property : Flat 4 and Parking Space, Richard Burrbridge Mansions, London SW13

Applicants : The Village Estate Management Company Limited

Representative : Dale & Dale Solicitors Limited, 3 Threshers Yard, West Street, Kingham, Oxfordshire, OX7 6YF

Respondent : Professor Khalil Alizadeh

Representative : Thomson Webb & Corfield

Type of Application : Application for a determination under Section 168 (4) of THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002 in respect of whether the Respondent has breached a covenant in the lease

Tribunal : Ms M W Daley LLB (hons)
Mr A Manson FRICS

Date of Paper Determination : 2 November 2015 at 10 Alfred Place, London WC1E 7LR

Date of Decision : 2 November 2015

DECISION

The tribunal makes the determinations as set out in paragraphs 65 of this Decision

The application

- a. The Applicant on 14 July 2015, made an Application for an order that a breach of covenant or condition in lease had occurred pursuant to Section 168(4) of the Commonhold and Leasehold Valuation Act 2002.
- b. The background to this matter was set out in the grounds of the Application which stated-: *“By Clause 1.3 of the Lease the Respondent is entitled to exclusive use of the Parking Space. ...By Clause 2.10 the Respondent is to use the Parking Space for the parking of private motor vehicles only. The Respondent has constructed a large storage container on the Parking Space... The Applicant and its solicitor has corresponded with the lessee in this regard but the Respondent refuses to remove the same...”*

- (2) Directions were given on 23 July 2015. The directions were settled on the papers without a case management conference.
- (3) The directions stated at paragraph 2, that -: *“...The tribunal will reach its decision on the basis of the evidence produced to it. The burden of proof rests with the applicant. The Tribunal will need to be satisfied: (a) that the lease includes the covenants relied on by the applicant; and (b) that, if proved, the alleged facts constitute a breach of those covenants.”*
- (4) The Directions also provided that the Applicant shall prepare a bundle of documents by 14 September 2015, and thereafter that the matter be set down for hearing on 30 September 2015.
- (5) As a result of a request for a postponement, the matter was adjourned and was dealt with as a paper determination on 12 November 2015.

The Background

- (6) The Premises are a one bedroom flat situated in purpose built blocks of 37 residential flats.
- (7) The Respondents hold a long lease of the flat, which requires the landlord to provide services and the Respondent leaseholders to observe

specific covenants under the terms of the lease. In particular clause 2.10 which states:- Not to carry on or suffer to be carried on in or upon the Demised Premises or any part thereof any profession trade manufacture or business of any description but to keep and to use the flat as a private dwelling in the occupation of one family and for no other purpose and further to use the Parking Space and Garage for the parking of private motor vehicles only...”

(8) The specific provisions of the lease will be referred to below, where appropriate.

The Paper Determination

(9) The Tribunal were provided with a witness statement from Joanna Biles a property manager of Rendall and Rittner Limited. In her statement she stated that the application was in respect of car parking spaces at the premises known as Richard Burbidge Mansions. The premises are subject to a lease dated 23.12. 1998. The parties to the lease are (1) Berkeley Homes (Thames Valley Limited (2) Harrods Village management Company Limited (3) Richard Burbidge Management Company Limited. The lease having since been assigned to the Respondent.

(10) In paragraph 6 of her statement Ms Biles stated:- *The Applicant leaves matters of management to Richard Burbidge Management Limited and it was felt that as flats tend to have less storage space than houses that the lessees of the parking spaces could place a small removable shed provided it does not impede car park users...*

(11) Ms Biles stated that in December 2014 the Respondent requested a storage unit. Permission was granted provided that the shed was “... similar to the other sheds that had been installed on the various other parking bays...”

(12) In her statement Ms Biles stated that the Carol Mullery estate manager noticed that a large metal structure was being constructed on Parking Bay. Despite the Applicant’s managing agent asking the Respondent’s workmen to cease the construction the respondent’s workmen continued to erect the structure.

(13) The Applicant’s solicitor wrote to the Respondent in December 2014 indicating that unless the structure was taken down, they would seek a determination in respect of the alleged breach of covenant.

(14) In January 2015, the Respondent’s solicitors wrote asking for a temporary licence pending further discussion of the issue. This was refused and proceedings were issued in July 2015

(15) The Tribunal were provided with photographs of the car park which show the relevant structure which has now been removed.

(16) The Respondent replied to the statement of case on 19.08.2015, the reply from the occupier Dr Ali Alizadeh stated that –“... We have now removed the storage unit in dispute from our car park space, but we feel unhappy about being singled out in this case by the freeholder... there are 51 car park spaces... 19 on the right hand side and 32 on the left hand side ... Car park spaces in this building have been used for various purposes in addition to parking vehicles/motorbikes/bicycles...”

In his statement Dr Alizadeh set out that there were a total of 23 storage units, some of which protrude beyond the boundary of the car parking space. Dr Alizadeh also criticised the photographs provided by the Applicant as being “highly selective” (letter dated 18.08.2015).

(17) In the statement dated 19 August 2015 Dr Alizadeh stated that “...The intention to put a new storage unit in Flat 4 car park space was discussed with the estate manager at the time Mr Doody. The only guidance received was the unit needed to be fire proof. No size restriction was ever mentioned. Prior to erecting the unit the matter was also discussed with the gatehouse staff of Harrods Village.

(18) Dr Alizadeh states that the storage was fully fire proof and that it lay within the allocated space for flat 4, and notwithstanding this, the resident’s car could still be parked in the allocated space without protruding into the communal space.

(19), Dr Alizadeh also referred to air conditioning units which are individual to each flat and appear to have been constructed/installed on allocated car parking spaces. The Respondent provided photographs of the storage units and sheds

(20) The Applicant in reply stated that they had spoken to other leaseholders, who had complied by taking down non compliant structures

(21) The Tribunal noted that the Respondent in their correspondence stated that they believed that they had been singled out, and asked that action be taken against others who are in breach. The Applicant in reply referred to clause 8.6 which required the lessee where covenants are enforced to indemnify the Lessor against all costs and expenses of any such action.

(22) The Tribunal noted further correspondence received from the parties in which they both reiterate their respective positions.

The Tribunal’s decision and reasons for the decision

(23) The Tribunal has carefully considered the documentary evidence and submissions of both parties; and has reached the following determination.

(24) The Tribunal finds that clause 2.10 of the lease has been subject to an informal variation.

(25) The Tribunal note that the Applicant in the witness statement of Ms Biles acknowledged that the leaseholders had been allowed to erect *a small usage shed provided it did not obstruct other users*.

(26) The Tribunal have not been provided with any documentation which sets out the limits of this variation, or which provides a height or dimension which must not be exceeded

(27) From the photographs provided, the Tribunal noted that there has in practice been a wide element of discretion provided with how this has been implemented in practice. The Tribunal noted that although the Respondent's shed was larger, it did not impede or intrude into the communal parking space in the same manner as other structures. The Tribunal also note that there is no guidance given as to how the variation of the lease, specifically of clause 2.10 (which amounted to a licence or permission), would be applied in practice. Given this the Tribunal have determined that the permission given to the leaseholder to erect a shed amounted to a waiver of the terms of the lease.

(28) The Tribunal noted that the structure was larger than other structures in that it extended from floor to ceiling, however other than the statement of Ms Biles, no further information or written guidelines were provided by the Applicant which set out that such a structure would not be permitted.

(29) The Tribunal finds that where there is an informal variation of the lease, without specific guidance been given to the Respondent as to how this variation will be applied. Then this amounts to a waiver of the terms. In the circumstances of a waiver existing then the Respondent's actions do not amount to a breach of the lease.

The Tribunal accordingly determines that clause 2.10 of the lease has been varied, and the Respondent is not in breach of the terms of the lease.

Name:

Ms M W Daley

Date: 02 November 201

Appendix of relevant legislation

A summary of the legislation is set out below

The Law

Appendix

Section 168 (2) of Commonhold and Leasehold Reform Act 2002

(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 covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under (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