



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

**Case Reference** : **LON/00AX/LBC/2018/0017**

**Property** : **Flat 2, Osborne Court, Ewell Road, KT6 6AD**

**Applicant** : **Osborne Court Residents Company (Surbiton) Limited**

**Representative** : **Mr Erol Topal (Counsel) instructed by Pain Smith solicitors**

**Respondent** : **Mr Luan Deda  
Ms Valbona Dhimitri**

**Representative** : **Self Representing and assisted by their daughter, Ms Noelani**

**Type of Application** : **Application for declaration of breach of lease**

**Tribunal** : **Mr M Martyński (Tribunal Judge)  
Mrs L West**

**Date of hearing** : **29 June 2018**

**Date of Decision** : **6 July 2018**

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**DECISION**

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**Decision summary**

1. The Respondents are in breach of clause 15 of their lease by carrying on the business of child minding at the subject premises.
2. The Respondents did not breach their lease when they placed a padlock on the gate to the communal area.

## **Background**

3. Osborne Court ('the Development') is a small purpose-built development consisting of 18 flats, 16 garages and some communal gardens.
4. The freehold of the Development is owned by the Applicant company. The various long leaseholders at the Development are all shareholders in the Applicant company.
5. In or about 2008, the Respondents moved to Flat 2 Osborne Court ('the Premises') under a short-term tenancy. They purchased the long lease of the property on 9 July 2010.
6. The Respondents, who were married, have now separated and only Ms Dhimitri lives at the Premises with her adult daughter and 13-year-old daughter.

## **The Respondents' lease**

7. The lease is for a term of 999 years from 25 March 1959.
8. In the lease, the premises demised are described as:

ALL THAT maisonette known or intended to be known as Plot/number 2 Osborne Court Ewell Road aforesaid (being the ground floor of the building now standing upon the piece of land particularly shown on the said plan and thereon coloured blue.....

9. The lease goes on to set out the following restrictions:-

14. 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 and not without such licence as aforesaid to make any alteration in the plan or elevation of the maisonette 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.

15. NOT without such licence as aforesaid to carry on or suffer to be carried on in or upon the demised premises any trade manufacture or business of any description but to keep and use the demised premises and all buildings for the time being standing thereon as a private dwellinghouse only and for no other purpose.

## **The application**

10. The Applicant's application is dated 1 March 2018. The application sought a declaration that the Respondents were in breach of clauses 14 & 15 of their lease by virtue of;

- (a) Running a child minding business at the Premises
- (b) Fitting a padlock on to a gate in a fence surrounding some common parts.

### **The parties' cases - Accepted facts**

11. Many of the facts in this case were accepted. The Respondents accept that they had, since they first rented the Premises, undertaken paid child minding at the Premises and that, certainly in the case of Ms Dhimitri, this constituted her only income. Ms Dhimitri accepted that the Premises were registered with Ofsted and that she advertised her child minding services via the local authority. She had children (other than her own) in the Premises during the week and looked after them there.
12. Ms Dhimitri accepted that in the recent past, she had attached a padlock (with a key code) to the gate leading to the communal garden area outside the Premises. It was however accepted by all parties that she had removed this lock after being asked to do so.

### **Relevant factual background**

13. We were provided with some conveyancing documentation from the Respondents' purchase of the Premises in 2010. In particular, we were shown some additional enquiries made on behalf of the Respondents which asked for confirmation that there are no breaches of the covenants under the lease and that there are no disputes with the landlord or other leaseholder. These enquiries were replied to by 'Barber Titleys'. It was not clear who this was, the tribunal assumed that Barber Titleys were the Vendor's solicitors. The responses to the questions were that the 'sellers' were not aware of any such breaches or disputes.
14. We were provided with the minutes of the Applicant company's AGM which was held on 2 September 2010. Those minutes recorded that there was a discussion regarding whether Ms Dhimitri was running a child minding business at the Premises and whether this was a breach of her lease. The minutes then record the following:

Mrs Dhimitri clarified that she is not running a business but was looking after a few children during the day but within her own premises. Mrs Dhimitri believes that under rules, this does not constitute a business. It was agreed, for the benefit of those attending the AGM as well as the other members, that Mrs Dhimitri would provide further information in support of her argument that child minding in her premises is not a business.
15. Ms Dhimitri followed up this promise with an email to another Director (and fellow leaseholder) of the Applicant company dated 8 September 2010 attaching some documents. It is not entirely clear exactly which documents are attached to that email but they appear to include documents to show that, for certain purposes, childminding in domestic

premises is not considered as the running of a business. For example, planning permission is not required if the premises are used mainly as a private residence; the premises are not treated as 'business properties' for the purposes of mortgage interest payments; a guidance document (it is not clear where this is from) which states that most childminders are not classed as businesses because the areas in the premises used in a "domestic" capacity are the same as those used during the business. The document goes on to warn that if a part of the premises is designated for childminding only, there may be consequences for Capital Gains Tax and business rates.

16. The matter appears to rest there until early July 2017. Around that time Ms Dhimitri attached a padlock to a gate leading to a communal area outside the Premises. The Applicant's solicitors wrote to the Respondents by letter dated 1 March 2018. That letter referred to the padlock and demanded its removal. It is agreed that the padlock was then removed by Ms Dhimitri. This in turn seems to have led to the issue of child minding being resurrected.

### **The Applicant's case**

17. We were provided with a joint witness statement signed by five of the Applicant's directors. Of those directors who signed the statement, two of them attended the hearing and gave evidence. We were not prepared to accept this statement. There was no indication of which of the signatories to the statement had personal knowledge of which part or parts of the statement.
18. The main oral evidence at the hearing was given by Mr Krishna Vishnubhotla. He was able to confirm those parts of the joint witness statement that he could personally attest to and he was the subject of extensive questioning from both parties and from the tribunal. Mr Vishnubhotla confirmed that the Applicant Company did not use managing agents to run the Development and that this work was done by him and fellow directors. He had lived in his property at the Development up until around 2010. He continues to own his flat and to be a director and visits the Development regularly in the course of his voluntary role as director.
19. Mr Vishnubhotla stated that he remembered first becoming aware of the Respondents at the AGM in September 2010. He then recalls being provided with information by Ms Dhimitri after the AGM (as referred to above) but made the point that the email containing this information also referred to other building issues. He recalls that the Company was concerned that there was no breach of the lease by virtue of the fact of a business being run there. Ms Dhimitri had provided the information referred to above and the matter was not taken any further at that time.
20. Mr Vishnubhotla agreed that he would have been aware that the childminding was continuing in October 2011 as he received an email from Ms Dhimitri complaining about external lighting where she

mentioned that parents were coming to collect minded children from her property. He admitted that he would have continued to be aware of the childminding in 2015 as, again, he received an email from Ms Dhimitri dated 26 August in that year referring to her childminding (in the context of other unrelated matters).

21. The other director to attend the hearing, Ms Kathryn Newnham, also gave evidence. She has been an owner of a flat at the development only since 2016 and has been a director since 2017. She was not therefore able to add anything beyond the agreed facts of the case and Mr Vishnubhotla's evidence.

### **The Respondents' case**

22. Mr Deda made a witness statement (in the form of a letter to the tribunal) and attended the hearing. In his statement, Mr Deda said as follows:-

To the best of my knowledge the issue of childminding activity at 2 Osborne Court has been discussed early in our tenancy at the flat. The board of directors at that time, asked Miss Dhimitri to not carry out childminding activity in the premises as this was considered a bridge [sic] of the lease and tenancy agreement. At that time Miss Dhimitri presented official government documents whereby this activity was technically not to be considered a business. On this evidence, the board of directors were satisfied with such interpretation and definition of the activity and decided to no longer pursue their case. Miss Dhimitri was allowed to carry on with the activity, which was deemed not to be in bridge [sic] of the regulations.

23. In giving evidence to the tribunal, Mr Deda stated that he did not mean to say in his statement that Ms Dhimitri was asked not to carry out child minding and that this part of his statement was a mistake.
24. Ms Dhimitri made a witness statement for the proceedings dated 25 April 2018 and attended the hearing and gave evidence.
25. In her oral evidence, Ms Dhimitri pointed out that childminding was not considered a business for various purposes; she did not need planning permission, she was not allowed to set off mortgage payments against her takings and there was no issue with her mortgage company in her carrying out child minding at the Premises. She admitted that she had been paid for the child minding over the years and that this was her only source of income. She stated that her daughter, Ms Noelani, was assisting her in the business but stated that she was not paying her a wage at present.
26. Ms Dhimitri stated that she would never have bought the property if she was aware during her time of renting the property that she would not be allowed to earn money from childminding there. She had been allowed to carry out the childminding activities by the letting agents, Lords, when she had been renting the property. She made the point that it had never been said to her, prior to 2017, that she was in breach of her lease.

27. Ms Dhimitri confirmed that she was licensed by Ofsted to look after up to 6 children at any one time and that at the moment she was looking after 5 children at the Premises from 8am to 6pm Monday to Thursday.
28. In her written statement, Ms Dhimitri stated that if there were a breach, it was of no actual consequence to any other person in the development. She was not causing a nuisance or any issue to any other person by carrying out her child minding. She had only put a lock on the gate due to an issue with workmen leaving the gate open and materials lying about which could be a danger to her minded children.
29. Ms Dhimitri produced written statements from other residents as follows:
  - (a) Two statements in the same form from Mr Larkin at Flat 4 and Mr Marshall (who is a short-term tenant as opposed to leaseholder) from Flat 12 who signed to confirm that they were not caused any nuisance by the child minding.
  - (b) An email from Mr Clements (another leaseholder) saying the following:

During one of the AGMs in particular (2012) your childminding work was brought up as the parents were noticed parking to collect their kids. There was no objection at the time to your work and I recall everyone was happy the parents were using the visitors parking for a brief time to collect.

### **Decision and reasons**

30. Taking a broad view of Ms Dhimitri's witness statement and bearing in mind that she is not legally qualified, we took the view that her case was based on four general grounds as follows:
  - (a) Child minding at the Premises was not a business.
  - (b) In respect of her childminding, clause 15 of the lease regarding the carrying on of a business had been waived by the Applicant
  - (c) Again, in respect of the childminding, if clause 15 had not been waived in itself, the breach of clause 15 had been waived
  - (d) There had been no breach of clause 14 in respect of the padlock

#### *Clause 14 – the padlock issue*

31. Counsel for the Applicant sensibly took the view at the hearing that this was not the Applicant's strongest ground. In our judgment, the affixing of a padlock to the gate of the communal garden clearly was not a breach of clause 14 of the Respondents' lease. The affixing of a padlock could not come within any of the terms of that clause. The only part of that clause that is relevant to the garden gate is the very last part of the clause and that part only prohibited *the construction* of any gateway or opening in any of the fences bounding the demised premises.

#### *Childminding as a business*

32. Whilst we accept that, for certain purposes, child minding at private domestic premises is not treated as a business (i.e. for planning, Council

Tax business rates and tax relief etc.) we have to consider the child minding and the prohibition of carrying on a business ***within the specific wording of the lease and in particular clause 15.***

33. Counsel for the Applicant referred us to *Woodfall: Landlord and Tenant* at chapter 11.208 where it is made clear that the courts have given a wide meaning to the word 'business' in leases of dwelling houses.
34. The clause itself is set in very wide terms. The clause prohibits "*business of any description*" and allows the use of the Premises as "*a private dwellinghouse only and for no other purpose*".
35. It seems to us that it is impossible to describe Ms Dhimitri's child minding at the Premises for the purposes of this clause as anything other than a business. She is advertising her services, the parents pay for the service, the service is carried out at the Premises, the activity generates Ms Dhimitri's sole income.

#### *Waiver of clause 15*

36. We considered very carefully whether or not there was sufficient evidence to persuade us, as a matter of law and fact, that the Applicant company had waived the clause in relation to Ms Dhimitri's childminding business. We had regard to the comments of the Lands Tribunal in *Swanston Grange (Luton) Management Limited v Langley-Essen* [2008] L. & T.R. 20. In that case, the tribunal set out very clearly what a tenant needs to establish in order to maintain that a clause in a lease has been waived. At paragraph 23 of its decision the tribunal states as follows:

For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the respondent would need to be able to show an unambiguous promise or representation whereby she was led to suppose that the appellant was not insist on its legal rights under the relevant covenants regarding under lettings either at all or for the time being. The respondent would need to establish that she had altered her position to a detriment on the strength of such a promise or representation and that the assertion by the appellant appellants of the appellants strict legal rights under the relevant covenants would be unconscionable....

37. So far as this case is concerned, it is of no consequence that prior to 2010 the letting agents of the, then, owner of the Premises, knew that the Respondents were operating a business at the Premises. Those letting agents did not have the authority of the Applicant. The enquiries that were made prior to the Respondents' purchase of the Premises are not relevant as the responses to their enquiries about breaches of the place were made by the, then, owners of the Premises and were again not binding on the Applicant.
38. For our purposes the relevant events are the AGM which took place in 2010 and the sporadic email correspondence thereafter. So far as the AGM is concerned we find it impossible to conclude that what happened

at that meeting amounted to anything like an “unambiguous promise” or representation that the Applicant Company would not insist on its legal rights under clause 15. The Applicant Company was clearly concerned that there might be a breach of clause 15 and this concern was only allayed by information from Ms Dhimitri which, as it turns out, is irrelevant to the term in question. We also find it impossible to conclude that Ms Dhimitri, even if she had been given some unambiguous promise or representation, had altered her position to her detriment. By the time of the AGM in September 2010 she had already been operating her business for some years and had already purchased the Premises and in continuing to run the business she simply maintained her position. We do not consider that anything turns on the later correspondence so far as our jurisdiction is concerned.

#### *Waiver of the breach of clause 15*

39. The question of whether or not the Applicant Company waived the breach of clause 15 up until the point in 2017 when objection was taken to the business appears to be less clear. However, that question is not within our jurisdiction. The question of whether there has been a waiver of a breach of a lease is a question that only the County Court can consider in the course of proceedings started there by the Applicant Company for the forfeiture of the Respondents’ lease.

#### *Further submissions*

40. After the hearing finished, Ms Dhimitri sent to the tribunal some further documents. We have considered those documents but not referred them to the Applicants because, after considering those documents, our decision remains unchanged.
41. The first document sent to us with Ms Dhimitri’s email was a letter of advice from the advice agency LEASE. That letter suggested that she may want to apply for a licence to run her business at the Premises. That appears to be good advice and if Ms Dhimitri makes that application, we hope that it will be properly considered by the Applicant.
42. The second document was a previous decision of this tribunal; CHI/29UN/LBC/2013/0021 – *Flat 1, 20 Northdown Road, Margate*. That decision considered the degree to which the business activity at residential premises was merely ancillary or subordinate to the residential use and whether or not a term in a lease; “Not to use the Premises other than as a self-contained flat in one family occupation only” had been breached. The tribunal found that the leaseholder was using the flat in question to mix oils for her beauty/therapy business. It was alleged that she received clients at the flat but the tribunal found that there was no evidence of this. The tribunal found that, although there was some limited use of the flat for the leaseholder’s business, there was no express term in her lease prohibiting the use of the flat for a business and in any event, the business use of the flat was ancillary or subsidiary to her residential occupation.



43. We do not consider that the use of the Premises in this case, currently four days a week, ten hours a day, Ofsted registered, advertised and with minded children in the Premises all day and parents coming and going to collect those children, can in any way be described as ancillary to the residential use. The term of the Respondents' lease forbidding business use is clearly breached in this case

*Conclusion*

44. Accordingly, we come to the conclusion that whilst there has been no breach of clause 14 of the Respondents' lease; the child minding activity at the Premises does constitute a business so far as clause 15 is concerned; clause 15 has not been waived and accordingly the Respondents continue to be in breach of that clause.

**Mark Martyński, Deputy Regional Tribunal Judge  
6 July 2018**

**ANNEX - RIGHTS OF APPEAL**

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.