



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

Case Reference : LON/00BH/LBC/2017/0108

Property : 2 Bridge Court, 340-354 Lea Bridge Road, London E10 7JS

Applicant : Triplerose Limited

Representative : Mr Robert Brown, Counsel

Respondents : Pareshkumar Patel, Minaxiben Patel and Brijesh Patel

Representative : Brijesh Patel in person

Type of Application : Application for determination under section 168(4) Commonhold and Leasehold Reform Act 2002 (breach of covenant in lease)

Tribunal Members : Judge P Korn
Ms S Coughlin

Date and venue of Hearing : 29th January 2018 at 10 Alfred Place, London WC1E 7LR

Deadline for further written submissions : 12th February 2018

Date of Decision : 14th March 2018

DECISION

Decisions of the tribunal

- (1) The Respondents are in breach of a covenant contained in paragraph 6 of the First Schedule to the Lease (in conjunction with clause 2(5) of the Lease), namely the covenant that “no clothes or other articles shall be hung or exposed outside the Flat”.
- (2) The Respondents are not in breach of any of the other covenants to which this application relates.

The application

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (“**the 2002 Act**”) that one or more breaches of covenant has/have occurred under the lease of the Property (“**the Lease**”).
2. The Applicant is the current freehold owner of the Property and the Respondents are the current leasehold owners. The Lease is dated 31st January 1990 and was originally made between Guadalmina Management Limited (1) and Hassan Nidai (2).
3. Prior to the hearing the Tribunal members inspected the Property.
4. In its application the Applicant alleges that the Respondents are in breach of covenants contained in clause 2(16) of the Lease and in paragraphs 2, 3, 6 and 7 of the First Schedule to the Lease (in each case coupled with clause 2(5) of the Lease). The wording of the relevant part of each of those covenants is set out below:-

Clause 2(16): “Not during the said term (i) without the consent in writing of the Lessor and the Superior Lessor to cut or maim any of the walls floors timbers stanchions or girders of the Flat (ii) commit or permit any waste or damage whatsoever to the Flat or make or permit to be made any alteration in the elevation or in the external decoration thereof or in the means of access thereto”.

Clause 2(5): “To observe the restrictions specified in the First Schedule hereto”.

First Schedule

Paragraph 2: “Not to use or permit to be used the Flat or any part thereof ... for any purpose from which a nuisance can arise”.

Paragraph 3: "Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance on any flat in or part of the Building or may cause an increased premium to be payable in respect thereof".

Paragraph 6: "... No clothes or other articles shall be hung or exposed outside the Flat ...".

Paragraph 7: "The exterior of the Flat shall not be decorated otherwise than by the Lessor".

Applicant's case

Mr Yaron Hazan's witness statement

5. Mr Hazan is employed by Y&Y Management Limited, the Applicant's managing agents. In his witness statement he states that he believes that a window at the Property leading to the external roof area has been replaced with a door without landlord's consent and that the Respondents have used the external area for storage of personal effects, for hanging clothes and as a recreation space.
6. Mr Hazan states that the Applicant first became aware of the issue in February 2016 when it erected scaffolding to carry out external works and noted the existence of the door and the use of the external area as shown by a photograph attached as an exhibit to his witness statement. He adds that the Property is on the first floor and that 6 of the other 7 flats on the first floor do not provide access to the roof areas. The 1 other flat did contain a door but the leaseholder removed it and replaced it with a window after receiving objections from the Applicant. Mr Hazan has also exhibited to the witness statements photographs of the windows installed in other flats.
7. As regards the Respondents' assertion that the alleged door is in fact a window, he does not accept this and states by reference to another photograph that it is an easily accessed door with a handle. Mr Hazan also refers in his statement to correspondence which he believes shows that the Respondents had specific knowledge about the installation of the door.
8. In cross-examination Mr Hazan accepted that not all of the windows in the block were the same and that the brick wall of the Property itself had not been damaged.

Applicant's written and oral submissions

9. In relation to the covenant in paragraph 2 of the First Schedule to the Lease, Mr Brown for the Applicant said that this covenant related to using the Property for any purpose from which a nuisance **can** arise. The Applicant's position was that the Respondents had been entering onto the external roof area and that this constituted a trespass which in turn was a "nuisance" to the Applicant and to the leaseholder of the adjoining flat.
10. In relation to the covenant in paragraph 3 of the First Schedule, in the Applicant's submission accessing the roof area is a matter which may compromise the insurance policy for the block or increase premiums. At the hearing Mr Brown argued that it might be a health and safety risk.
11. In relation to the covenant in paragraph 6 of the First Schedule, the Applicant submits that the Respondents are in breach by reason of the use of the external roof area as a recreation space with a table and chairs and the hanging of clothing.
12. In relation to the covenant in paragraph 7 of the First Schedule, the Applicant initially argued in written submissions that the installation of a door in place of a window constituted an alteration to the external decoration, but at the hearing Mr Brown said that the Applicant was not really still relying on this paragraph.
13. As regards clause 2(16)(i), this sub-clause is no longer being relied on by the Applicant although it has not been formally abandoned.
14. As regards clause 2(16)(ii), the Applicant submits that the installation of a door in place of a window constitutes an alteration to the elevation and external decoration of the Property and that the installation of the door will have caused some damage. It is accepted by the Applicant that there has been no change in the size of the aperture but there has been a change in the elevation as the word 'elevation' relates to appearance. It is also arguably a change to the external decoration, based on the ordinary dictionary definition of 'external decoration'. It is also an alteration in the means of access, as it is easier to enter onto the balcony through the door than through the window which it has replaced and therefore it follows that there has been an alteration in the means of access.
15. Mr Brown also referred the Tribunal to a letter dated 25th February 2016 from the Applicant's solicitors to the Respondents in which they drew the Respondents' attention to the alleged breaches of covenant and to which he said there had been no real response from the Respondents.

Respondents' case

16. In written submissions the Respondents state, by reference to a photograph, that the alleged door has a window opening with a plastered brick upstand at the bottom of the opening. The opening cannot easily be entered through, unlike a normal door. Furthermore, the Property was purchased by the Respondents in October 2014 with the same opening in situ.
17. At the hearing Mr Brijesh Patel added that there was no evidence that the size of the opening had been increased. In addition, the brickwork had not been damaged or altered. As regards the placing of items on the flat roof area, Mr Patel did not accept that the Respondents had placed any items there. As regards the insurance issue, he said that there was no evidence of any insurance problems.

Further submissions on meaning of 'elevation'

18. At the hearing the Tribunal drew the parties' attention to the case of *Joseph v London County Council (1914) 111 LT 276* and invited them to make written submissions on the relevance of that case to the current application.
19. In that case Astbury J is reported as saying "... *the first thing was to ascertain the meaning of 'elevation' in the covenant. In most dictionaries it was treated as referring to plans on a vertical plane as distinct from ground plans; but in the 'Standard Dictionary' it was stated to include the 'front view' of a building or similar object, and it might be taken that ordinarily elevation meant the front view of a building as distinct from the horizontal plan*".
20. The Applicant notes Lord Neuberger's summary of the principles of construction in the Supreme Court decision in *Arnold v Britton (2015) UKSC 36* and argues that the above statement by Astbury J does not mean that 'elevation' in a lease always means only the front view. Any covenant referring to 'elevation' needs to be considered in its own context. For example, the word may well now mean something different to a reasonable person compared to what it meant to a reasonable person at the time of the *Joseph* case.
21. The Applicant also refers to the definition of 'elevation' in the Concise Oxford English Dictionary (9th edition, 1995) as being "*a flat drawing of the front, side or back of a house etc*" and adds that a search on Westlaw suggests that the decision in *Joseph* has only been referred to in one reported case in over 100 years (in that case, for reasons which are not relevant here, that other case does not address the definition of 'elevation').

22. The Applicant also refers to certain other cases in which phrases such as 'rear elevation' or 'front elevation' have been used.
23. In response, the Respondents argue that the Lease in the present case refers to 'elevation' in the singular, not to 'elevations'. In the *Joseph* case the logic was to apply the front as being the first item of elevation in the absence of any other words or context to suggest otherwise. In the Respondents' submission the relevant clause in *Joseph* is nearly the same as the relevant clause in the present case, and there is no basis for suggesting that 'elevation' would have meant something different to ordinary people when the lease in *Joseph* was drafted. Had the original landlord wanted to prohibit alterations to all of the elevations the relevant clause would have read "... not to permit any alteration to **any** elevations ...".

The statutory provisions

24. The relevant parts of section 168 of the 2002 Act provide as follows:-

"(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 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.*

(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."

Tribunal's analysis

Clause 2(16) of the Lease

25. Sub-clause 2(16)(i) is no longer being relied on by the Applicant. However, as it has not been formally abandoned a decision still needs to be made as to whether the covenant in this sub-clause has been breached. The covenant is not to cut or maim any of the walls, floors, timbers, stanchions or girders of the Property. There is no evidence that any of these elements of the Property has been cut or maimed and therefore there has been no breach of the covenant contained in sub-clause 2(16)(i).

26. Sub-clause 2(16)(ii) contains a covenant against committing or permitting damage or making or permitting to be made any alteration in the elevation or in the external decoration of the Property or in the means of access.
27. We do not accept that the Applicant has shown that there has been 'damage'. There is no evidence that the brickwork has been damaged or that the aperture has been changed in size and nor is there evidence of anything else having taken place which would constitute 'damage'.
28. As regards whether there has been any alteration in the 'elevation', we note the parties' respective submissions in relation to the meaning of the word 'elevation'. Whilst the decision in *Joseph v London County Council* was made over 100 years ago and has hardly been quoted since, nevertheless it would seem to be the only available legal authority on the meaning of 'elevation' in the context of a claim for breach of covenant. The fact that it has hardly been quoted since does not show that there is anything wrong with Astbury J's decision; the more likely explanation is that the issue has not come up in quite this way since then. The relevant prohibition in the *Joseph* case was against "any alteration in the elevation of the buildings", which is very similar to the wording in our case. Whilst obviously we accept, following *Arnold v Britton*, that the construction of a clause in a contract needs to have regard to the context, we see nothing in the context of this case which distinguishes it from the *Joseph* case based on the information available. In addition, we do not accept that a non-legal dictionary definition as to the general meaning of elevation should take precedence over a decision made by a Judge in the context of a breach of covenant case.
29. As to the fact that in some cases there have been references to phrases such as 'rear elevation' or 'front elevation', this may well demonstrate that when needing to distinguish between different sides of a building it is convenient to talk in terms of 'rear elevation', 'front elevation', north elevation etc, but in our view it does not show that the word 'elevation' used by itself in a lease covenant against alterations has a wider meaning than that attributed to it by Astbury J. Furthermore, there is a logic to attributing such a meaning to the word in this context, as a landlord may well be much more concerned about the appearance of the front of the building than the back because it will generally be more visible. Therefore, we do not accept that there has been an alteration in the elevation.
30. We also do not accept that there has been an alteration in the external decoration. The evidence indicates that nothing has been done which affects the brickwork or the size of the aperture, nor is there any evidence of anything having occurred which could reasonably be described as an alteration in the external decoration.

31. We also do not accept that there has been an alteration in the means of access. Access to the Property remains, as before, through the front door. Even if it is the case that a back window has been converted into a door then at most this will have created a means of **temporarily leaving** the Property as there is no proper means of egress via the flat roof area and no means of access to that roof area otherwise than from the Property.
32. In conclusion, there has been no breach of the covenants contained in sub-clause 2(16)(ii).

Clause 2(5) combined with paragraph 2 of the First Schedule

33. Paragraph 2 of the First Schedule contains a covenant against using the Property for a purpose from which a nuisance can arise. The word 'nuisance' has a specific meaning in the law of tort, but Mr Brown for the Applicant argued that the word should be given its ordinary English language meaning, which is much wider. No legal authority was offered for this proposition and we do not accept it. Leases are generally drafted by, and negotiated between, solicitors, and the difference between the word 'nuisance' on the one hand and words such as 'inconvenience' or 'annoyance' is in our view generally agreed and understood.
34. To show nuisance the Applicant would essentially need to show substantial and unreasonable interference with the use and enjoyment by the adjoining leaseholder and/or by the Applicant itself of their respective parts of the building. Whilst it is arguable that a sustained pattern of use of the flat roof area could have caused substantial and unreasonable interference with the use and enjoyment of the adjoining flat, there is insufficient evidence for us to be satisfied that there has been such a sustained pattern of use. As regards the point that the Applicant only need show that a nuisance **can** arise, the same problem applies in that there is insufficient evidence of a sustained pattern of use and we are not satisfied that a one-off use of the roof area in the manner complained of can by itself give rise to a nuisance.
35. In conclusion, there has been no breach of the covenants contained in paragraph 2 of the First Schedule.

Clause 2(5) combined with paragraph 3 of the First Schedule

36. Paragraph 3 of the First Schedule contains a covenant against doing (or permitting to be done) any act or thing which may render void or voidable any policy of insurance on any flat in or part of the Building or may cause an increased premium to be payable in respect thereof.

37. In our view the Applicant's case is very speculative on this point. The argument seems to be that placing clothes or a table and chairs on the flat roof area could render the insurance policy void or cause insurance premiums to increase. One issue is that the phrase "policy of insurance on any flat in or part of the Building" is ambiguous and might only be referring to the insurance policy for one of the other flats rather than for the Property itself or for the building as a whole. In any event, to show that there has been a breach of this covenant the Applicant would need to do more, for example by providing an opinion from an insurance expert or by demonstrating that the acts complained of are dangerous or are otherwise objectively significant for insurance purposes.
38. In conclusion, there has been no breach of the covenant contained in paragraph 3 of the First Schedule.

Clause 2(5) combined with paragraph 6 of the First Schedule

39. The relevant part of paragraph 6 of the First Schedule is a covenant that no clothes or other articles shall be hung or exposed outside the Property. The factual position is disputed, with the Respondents denying that any items have at any stage been placed outside the Property.
40. The Applicant has provided a witness statement from Mr Yaron Hazan who is employed by the Applicant's managing agents. He has presented credible evidence that there has been a table and chairs on the flat roof area and that clothes have been hung there. He has exhibited colour copy photographs to his witness statement and he made himself available for cross-examination. In addition, the Tribunal noted on its inspection that it was relatively easy to access the flat roof area from the window/door at the rear of the Property.
41. Considering the available evidence in its entirety we find on the balance of probabilities that clothes have been hung outside the Property and that other items have been exposed outside the Property. Mr Brown for the Applicant referred at the hearing to the Upper Tribunal decision in *Forest House Estates v Al-Harhi (2013) UKUT 479* which, as he correctly stated, is authority for the principle that the correct question on an application for determination of breach of covenant is whether a breach has occurred, not whether it has been remedied. Therefore, a breach can have occurred even though it is not ongoing.
42. In conclusion, one or more breaches of the covenant contained in paragraph 6 of the First Schedule (in conjunction with clause 2(5) of the Lease) has/have occurred.

Clause 2(5) combined with paragraph 7 of the First Schedule

43. Paragraph 7 of the First Schedule contains a covenant against the exterior of the Property being decorated otherwise than by the landlord. For the reasons already given above, in our view there is no evidence that the Respondents or their predecessors have done anything to the Property which constitutes external decoration.
44. In conclusion, there has been no breach of the covenant contained in paragraph 7 of the First Schedule.

Costs

45. No cost applications were made.

Name: Judge P Korn

Date: 14th March 2018

RIGHTS OF APPEAL

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.