FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AX/LBC/2019/0103**
HMCTS code	**:**	**REMOTE: V: VIDEO**
Property	**:**	**Flat A, 5 Minerva Road, Kingston Upon Thames, KT1 2QA**
Applicant	**:**	**5 Minerva Road Freehold Limited**
Representative	**:**	**Mr D Moore, Solicitor Advocate (Rogers and Burton)**
Respondent	**:**	**Miss Rebecca Cox**
Representative	**:**	**Dr Zhen Ye of counsel**
Type of application	**:**	**Determination of an alleged breach of covenant under Commonhold and Leasehold Reform Act 2002, s 168(4)**
Tribunal members	**:**	**Tribunal Judge Professor R Percival** **Mr T Sennett MA FCIEH**
Date of hearing	**:**	**19 August 2020**
Date of decision	**:**	**1 September 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing as provided for in directions made by the Tribunal communicated to the parties in a letter dated 5 March 2020. The form of remote hearing was REMOTE V Video, using CVP. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The application

1. The Applicant landlord seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent tenant has committed a breach of a covenant in the lease.

The property

2. The property is the ground floor flat in a house converted into three flats. The property includes the back garden (possibly subject to an issue relating to one small area).

The lease

3. The lease is dated in 2003, for a term of 99 years. The Respondent acquired the leasehold interest in 2011. The Applicant company bought the freehold in 2017. The sole director is Ms Pei Lin, who also holds the leasehold of flat B.

4. By clause 3, the lessee covenants to observe the obligations in part 1 of the fifth schedule to the lease. Paragraph (17) of that part reads

> "Not to hold on any part of the Demised Premises any sale by auction nor to use the same or any part thereof nor allow the same to be used for any illegal or immoral purposes but only to use the same as a self-contained residential flat with appurtenances in one family occupation only"

The hearing and the issues

Preliminary

5. The Applicant was represented by Mr D Moore, Solicitor-advocate at Rogers and Burton, solicitors. The Respondent was represented by Dr Zhen Ye, of counsel, instructed by Battens Solicitors. Ms Adlogan of Battens attended the hearing. Both the director of the Applicant, Dr Pei Lin, and the Respondent, Ms Rebecca Cox, attended and gave evidence. Hereafter, we may refer to Dr Lin as "the Applicant", where the context so allows. Evidence was also given by Mr Cummings. In addition, we had

the benefit of three short video films of the flat and the garden, in lieu of an inspection.

6. The application form alleged two breaches of covenant by the Respondent. These were that the carrying on of a child-minding concern by the Respondent breached paragraph (17) of part 1 of the fifth schedule to the lease; and that there was a breach of the lease on account of the incorporation of a parcel of land into the garden of the property. Some way into the evidence, Mr Moore made it clear that the Applicant abandoned the second of these two allegations, on the basis that it related to the demise, and so could not amount to a breach of covenant. It was therefore not within this jurisdiction of the Tribunal. Accordingly, this decision only deals with the issue relating to child minding.

7. The Applicant argued that the conduct of the Respondent's childminding concern amounted to a breach of paragraph (17) of part 1 of the fifth schedule to the lease. The Respondent argued, first, that there is no breach; secondly and alternatively that if the Respondent's conduct did constitute a breach, then permission for the breach had been given by the Applicant's predecessor in title; and, in the further alternative, that the Applicant had waived the breach or was estopped from asserting it.

8. In the light of our decision, it is not necessary for us to relate the evidence we heard in great detail. We are, however, grateful to all of the witnesses for their evidence, in conditions which were at times trying.

9. We consider first the question of breach.

Does the conduct of the childminding constitute a breach of the covenant?

10. The Respondent's uncontested evidence was that had been undertaking some childminding since 2016. She is a single parent of a son, who was of pre-school age when the child-minding commenced. During this period, she has looked after one child of a friend, for which she is not paid, and undertaking childminding for one further, paying, parent. She is registered as a childminder, and has advertised her services.

11. The Applicant's brief argument in its statement of case was on the basis that the childminding was a business use and that was sufficient to constitute breach. The latter step – that use for a business necessarily breached the covenant – was assumed rather than argued. The statement referred to the Tribunal decision in *Osbourne Court Residents Company (Surbiton) Limited v Deda and Dhimitri* (LON/00AX/LBC/2018/0017), and paragraph 11.208 of Woodfall's Landlord and Tenant, which emphasises the broad nature of a reference to a "business" in a lease.

12. In his submissions at the hearing, Mr Moore, wisely, acknowledged that there was no covenant forbidding the use of the flat for a business or

trade in the lease. However, he argued that the running of the business was a breach of the covenant to use "only" as a residential flat.

13. Mr Moore submitted that there was a spectrum of business or work-related use of a residential flat. At one end of the spectrum was the situation where an office worker brought papers home to read or work on. This, he said, would not contravene a covenant such as that in paragraph (17). At the other end, if a tenant converted the front room into a grocer's shop, it clearly would be a breach. The question for us was where on that spectrum the Respondent's use fell.

14. It was, Mr Moore said, clear that the childminding use fell further along the spectrum than the use approved in *Flat 1, 20 Northdown Road* (CHI/29UN/LBC/2013/0021), upon which the Respondent relied (see below). In that case, the Tribunal set out considerations which mitigated against use which breached a similar covenant, which included, among other things, that the Respondent did not receive customers at the property and did not advertise in connection with it. These are not true of the Respondent in our case.

15. We asked Mr Moore if there would be a breach if the Respondent were looking after more children, but all on a social and gratuitous basis, or whether the exchange of money for a service was critical. His answer was that the purpose of the covenant was fundamentally "regulatory of use", but that it was nonetheless key that money did change hands, which rendered the activity not purely residential, but something more than that.

16. The Respondent argued that the clause did not prohibit business use of the premises, and that the childminding activities were ancillary to the residential use of the premises.

17. The Respondent invited us to adopt the reasoning and approach of the Tribunal in *Flat 1, 20 Northdown Road* at paragraphs 14 and 15. The lease in that case included a covenant "not to use the Premises other than as a self contained flat in one family occupation only". In those paragraphs, the Tribunal said this:

> "14. …The first reason [for rejecting the application] is that on a proper construction of the lease, the lease deals only with the physical configuration of the 'flat', not a covenant against carrying on a business. The words are 'use as a self contained flat'. The qualification … that the premises must be used 'in one family occupation only', would ordinarily prevent entirely business use, but again these words can be satisfied by single occupation by a family. Provided the premises can be said to be configured as a flat … and that they are occupied by a single family unit, … the covenant is not broken. The terminology may

> be contrasted with the usual wording of a covenant preventing business use of the property…".
>
> "15. Secondly, even if the covenant can be construed as a covenant not to carry on a business, such a covenant is not broken by ancillary or subsidiary commercial use of a residential property: *Florent v Horez* (1984) P&CR 166 … Whether such a business use exceeds what is ancillary or subsidiary is a matter of degree. In this case the Tribunal finds that the business use is minimal. The Respondent plainly eats and sleeps in the flat and uses all the rooms for residential purposes …".

18. In *Florent*, there was a covenant preventing the use of the flat for a business, but not a covenant to use only as a private dwelling, the reverse of the position in the instant case. Paragraph 15 of *Flat 1, 20 Northdown Road* was posed in the alternative, on the basis that the covenant could, contrary to the primary conclusion, be interpreted as one limiting business use.

19. Both parties, at the hearing, took the position that the covenant in issue here was not of the familiar form prohibiting business or trade use, and that the cases which concentrated on business or trade use were of little assistance to us. We agree.

20. We further agree with Mr Moore's statement that the covenant is "regulatory of use". We find the approach of the Tribunal in paragraph 14 of *Flat 1, 20 Northdown Road* to a degree helpful, insofar as it is consistent with Mr Moore's formulation.

21. The formula "only to use the same as a self-contained residential flat with appurtenances in one family occupation only" fundamentally requires that the use of the flat be residential, and not some other use. To the extent that this is a restriction on user, we consider that the approach in *Flat 1, 20 Northdown Road* to purely physical differences goes rather too far. To take Mr Moore's example, even if there were no physical change to the structure, fixtures or fittings of the flat, use as a grocery shop would be a breach. Similarly if the flat were to be furnished and used only as an office.

22. The question for us, then, is whether the use to which the Respondent put the flat should be seen as broadly a residential use or a something else.

23. In so doing, we think it important to adopt an approach to the relationship between home and work appropriate to modern conditions. We are writing at a time of particular intensity of home working – both members of the Tribunal, after all, took part in the hearing of this case at

our respective homes. But the intensification of the integration of work and home was proceeding apace before the effects of the coronavirus pandemic, and is, if anything, likely to increase after it. Even in normal times, it is routine for many people to work from home for a set number of days in a week. It is sufficiently ubiquitous that the abbreviation "WFH" is widely used and understood. If working from home is common for those in employment, it is even more so for the self-employed. In both cases, working from home may be full time.

24. As to space and equipment, a craftsman or woman may require specialised space and equipment for work, the creation of which may lend some ambiguity to the user. However, for most people, the increased possibility of home working is driven by information technological advances. For the most part, this will involve using facilities – a desk in a spare bedroom or the corner of a reception room, a computer, a wifi connection – that they would have in any event for personal use. The permanence or specification of these resources may be enhanced to better work from home, but it starts from a base that is purely personal.

25. So conceptually, a house or flat may be our home, in residential use, but still be the place from which we work, sometimes or all of the time. Being a residence, and being the place where we work, are not, nowadays, inherently contradictory. Whether they are in a particular case depends on the nature of the work and of what it imposes on the premises.

26. The Respondent is not an office worker, employed or self-employed, working from home on her own IT equipment. But there are significant parallels. The flat is clearly her, and her son's, home. It is accepted that there have been no physical changes to the layout of the flat for the purposes of that work. As is clear from the evidence, including that of the video films, the flat has an enhanced number of facilities appropriate for the care of pre-school children. But these amount to a somewhat higher number and prominence, rather than being different in kind to those which the flat of a family with small children would in any event be equipped.

27. The activity itself, that of looking after small children, is evidently one that is of a home-like nature (unlike, indeed, some of the activities of desk based home workers). And in this case, the number of children concerned – one paid child, in addition to her own, and one unpaid – is not out of keeping with that of a normal family.

28. Accordingly, our conclusion is that the Respondent, in undertaking the child-minding of one paid child, is working from home. Residential use is not negatived by working from home. Her paid work is of a nature consonant with residential use of the flat. We find that the covenant in paragraph (17) is not breached.

29. There was no allegation of a breach of the nuisance clause in the lease. We accept that inconvenience or disturbance to other leaseholders could be relevant to the nature of the user of the flat in principle. Dr Lin did give some evidence of noise nuisance when the children were dropped off and collected, and from them playing in the garden. To be fair to Dr Lin, she did not lay great stress on these concerns. She was also challenged on them by Dr Ye, and the Respondent gave evidence of the context, which included that the garden was adjoined by the playground of a primary school. We record that we were not impressed with the evidence of Dr Lin on this point, and did not consider that the Respondent's work created significant un-home-user-like disturbance.

30. We emphasise that the scale of the child-minding operation was relevant to our conclusion. If the scale of the operation were to be larger, that might (we emphasise might) be relevant to breach or otherwise of the covenant.

31. *Decision:* The Applicant has not demonstrated a breach of paragraph (17) of part 1 the fifth schedule to the lease.

Permission and waiver

32. Given our finding above, it is not necessary for us to come to a conclusion on whether the use, if it were a breach, had been permitted, or if the Applicant had waived or been estopped from asserting a breach.

33. We considered whether we should record what our findings of fact would have been in relation to these issues, if we had found there had been a breach, and concluded that we should not. While to have done so might be of assistance if our conclusion as to breach were to be overturned by the Upper Tribunal, a particular feature of the evidence rendered recording a conclusion inappropriate.

34. Potentially, the key evidence in relation to these issues was that which could be provided by Mr Cummings. Mr Cummings is the developer who converted the house into flats, and was, with his wife, a director of the company that held the freehold before it was purchased by the Applicant. He acted as manager of the property up to the point of sale. He provided a (brief) witness statement. There were, in the bundles, apparently contradictory emails from him as to whether he had given permission or not for the Respondent to start child-minding.

35. Mr Cummings did try to give oral evidence at the hearing. As noted above, the hearing was conducted using the CVP platform, a feature of which allows a participant to join by telephone only. For reasons not vouchsafed to us, Mr Cummings was unwilling to telephone into the hearing. It is not possible (so far as we were advised) for the normal telephone link to be initiated by the Tribunal calling the witness. Accordingly, Ms Adlogan, after a failed attempt to use a conference call

facility, called Mr Cummings on her own phone, whilst she was taking part in the normal way. This proved unsatisfactory. While those in the hearing could, for the most part, hear Mr Cummings, it became clear that he could not hear, or hear only with difficulty, the questions put to him. Despite the efforts of those concerned, it was not possible to secure clear answers to questions from him, whether in chief from Dr Ye, in cross-examination by Mr Moore, or from the Tribunal. In the end, all he could say was that he stood by what he had written, in his witness statement and in the correspondence before the Tribunal. Since the key reason to secure his oral evidence was to test contradictions between these statements, this did not help.

36. In connection with the efforts to secure oral evidence from Mr Cummings, we commend the efforts, albeit eventually unsuccessful, of Ms Adlogan.

Application for costs under rule 13, Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

37. The Respondent had given notice of an application for costs against the Applicant. At the close of the hearing, and following discussion with the parties, we said that we would consider any application for costs after we had made our decision.

38. Accordingly, if the Respondent so wishes, she may submit a written submission applying for costs under rule 13 within seven days of the date on which this decision is emailed to the parties. The submission must be emailed to the Tribunal and to the Respondent.

39. The Applicant, if it so wishes, may submit a submission in response within seven days of the receipt of the Respondent's submission.

40. For the guidance of the parties, first, the submissions, if made, should apply themselves to the proper approach to costs under rule 13 as set out in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), [2016] L & TR 34.

41. Secondly, the Tribunal will not entertain a claim for costs on the basis of the Applicant's application in respect of breach of paragraph (17) of part 1 of the fifth schedule to the lease. The Tribunal will consider (without giving any indication as to success) an application in relation to the claim that there was a breach of the lease within the jurisdiction of the Tribunal in relation to the alleged incorporation of the dustbin area into the Respondent's garden. If such a submission is made, it should particularise the costs associated with that application that are claimed.

42. Finally, the Respondent may make a free-standing application for orders under Landlord and/or Tenant Act 1985, section 20C or Commonhold

and Leasehold Reform Act 2002, schedule 11, paragraph 5A. If such an application is made, it will be reserved to the Tribunal as constituted for this decision, and the application should state that it is so reserved.

Rights of appeal

43. By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

44. 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.

45. 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.

46. 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.

47. 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.

48. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Name: Tribunal Judge Professor Richard Percival **Date:** 1 September 2020