



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

**Case Reference** : CHI/43UE/LBC/2019/0048

**Property** : Lower Flat, Silvermere, 12 Brockham Lane,  
Brockham, Betchworth, Surrey RH3 7EL

**Applicant** : Michael James Treagus

**Representative** : Charles Russell Speechlys LLP

**Respondent** : Oliver James Langdale Nicolson

**Representative** :

**Type of Application** : Determination of breach of lease

**Tribunal Member(s)** : Judge D. R. Whitney

**Date of decision** : 23<sup>th</sup> March 2020

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DECISION

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## **Background**

1. The Applicant seeks a determination that the Respondent is in breach of the terms of his lease.
2. The Applicant is the owner of the freehold of Silvermere, 12 Brockham Lane, Brockham (“the Building”). The Respondent is the registered proprietor of a leasehold interest in the Lower Flat, Silvermere, 12 Brockham Lane, Brockham (“the Property”).
3. The original application sets out an extensive list of breaches.
4. Directions were issued on 29<sup>th</sup> November 2019. The Respondent failed to comply with the original directions and the tribunal issued a notice that it was minded to bar the Respondent from taking any further part in the proceedings. The Respondent did then serve a statement of case and subsequently the Applicant filed and served a reply. The Applicants had previously filed a bundle prior to the Respondents statement of case and the Applicants reply.
5. The original directions proposed that the matter would be dealt with on paper. Neither party has objected to the same and this is the tribunals determination of this application.
6. References in [ ] are to page numbers within the bundle supplied. Counsel for each party provided skeleton arguments and copies of various authorities relied upon.

## **The Law**

7. The relevant law is set out in section 168 of the Commonhold and Leasehold Reform Act 2002.

## **Determination**

8. The tribunal has before it a bundle of documents, the Respondents belated statement of case and a reply from the Applicant. The tribunal has also received a document stated to be a further reply from the Respondent.
9. This document was not provided for in the directions. The tribunal has read the same but it adds little to the matters before the tribunal.
10. It is noteworthy that the Applicant freeholder lives in a property in close proximity to the Respondent and they share use of a driveway owned by the Applicant. Further whilst the Respondent has only been the registered proprietor of the leasehold interest in the Property since

about March 2008 the Property has been owned by family members for very many years with the Respondent residing there during this time.

11. Mention is also made of without prejudice discussions of which the Applicant has waived privilege. It appears that the Building may be of interest to developers and discussions have taken place as to the parties entering into an option agreement with a developer. The Applicant contends this is advantageous to all in terms of the price which would be achieved for the respective interests but the Respondent has not accepted the proposal. The tribunal comments that this is not relevant to its determination.
12. The tribunal reminds itself and the parties that its role is simply to determine whether or not the Respondent is in breach of any of the covenants contained within his lease with the Applicant. In so doing it is not determining whether or not such breaches would allow the Applicant to forfeit the lease for which many other arguments including as to waiver may be raised. It is for the Applicant, on a balance of probabilities to prove that the Respondent has breached the terms of his lease.
13. A copy of the lease of the Property which is dated 27 June 1975 between Alfred Black and Ernest Swinburne and Norman Leslie Harry Andrews and Dorothy Andrews is in the bundle [31-44] (“the Lease”). The lease is in a relatively common form in that the Applicant covenants to maintain the main structure of the Building and the Respondent will maintain the Property.
14. The Applicants Statement of Case [25-30] relies to a large extent upon an expert report of Patrick Moyle BSc MRICS [45-103] which appears to be undated but follows an inspection on 8<sup>th</sup> April 2019. This report whilst indicating it was prepared in contemplation of these proceedings includes an inspection of the Upper Flat and the Building generally which is helpful for the tribunal to understand the current situation.
15. The tribunal notes that the Upper Flat is currently unoccupied and appears to have been so for some time. The Building as a whole appears to be in disrepair and nowhere within the documents provided to the tribunal is there any evidence of any work having been undertaken by the Applicant as freeholder to the Building as a whole. We note as set out in Mr Moyles report [52] that pursuant to Clause 5(d) of the Lease [37] the Applicant covenants, subject to payment of the defined contribution by the Respondent, to maintain the main structure and roof.
16. Mr Moyle suggests that works totalling in the order of £202,500 [99-101] are required to the Building and Property to place the same in repair. Further the Applicants in their reply have produced a quotation from a company called ADV (UK) Limited which appears to suggest an even higher cost.

17. There is some dispute between the parties as to whether or not the report of Mr Moyle was sent to the Respondent prior to the issue of these proceedings. The tribunal does not consider this relevant to the issues it has to determine. In the tribunal's directions permission was given to each party to allow them to rely upon one expert witness if they so choose and the Applicant relies upon Mr Moyle.
18. The Respondent in his witness statement (see paragraph 10 of the same) confirmed he accepted that the report was "mostly accurate". The tribunal comments that they have no reason to doubt the report. The tribunal is satisfied that both the Building and the Property appear to be in a state of disrepair. This is apparent in all the various photographs contained within the report that ably demonstrate this.
19. In connection with this application which relates to the Property the tribunal relies particularly on the description as to the internal condition of the Property [75-85].
20. The Applicant has also provided a witness statement [122-154]. This sets out the history of the Building and how the Applicant came to own the same, the surrounding properties and the allegations relating to other breaches. In particular the Applicant suggests that other breaches arise from the Respondent trespassing on to adjoining properties (including that belonging to the Applicant), allowing his dogs to roam without a lead and playing of various musical instruments so as to cause a nuisance. The Applicant relies on various photographs some of which have date and time stamps exhibited to his statement.
21. The Applicant also refers to the growing of cannabis at the Property by the Respondent and for which he was subject to a criminal prosecution. No further details are provided of the conviction.
22. The Respondent submitted belatedly a statement of case and a witness statement.
23. The Respondent in his statement of case admits that he was prosecuted for growing cannabis in the Property at some point in the past. It is not clear when this took place although looking at the parties respective witness statements it would appear that this was some years ago and probably prior to 2016. The Respondent suggests that such breach has been remedied.
24. The Respondent agrees he currently has two dogs. He denies that they are a nuisance.
25. The Respondent admits playing his flute but denies this causes a nuisance or is played in breach of the lease terms.
26. The Applicants statement of case [25-30] sets out the various breaches of lease which are alleged. Paragraphs 7, 9 and 10 effectively set out the matters complained of which amount to a breach. The tribunal will

consider each in turn referring to the paragraph numbers contained within the statement of case.

27. In respect of paragraphs 7.1, 7.2, 7.3 and 7.5 the tribunal is satisfied that the report of Mr Moyle identifies that the garages, garden and internal parts of the Property have not been kept in “tenantable repair and condition”. Whilst the tribunal has considered the witness statement of the Respondent it prefers the evidence contained within Mr Moyle’s report and his conclusions. The respondent himself acknowledged that the report was largely true and accurate. The Respondent does appear to admit no works have been undertaken for many years and that certain works may be required. Turning to the garden the Respondent appears to suggest he prefers it overgrown. This may be the case for him but does not satisfy the covenants of the lease. The tribunal determines that the Respondent is in breach of Clause 4(i) of the lease in that the Respondent as Lessee covenants to:

*4(i) Keep the demised premises and all walls party walls sewers drains pipes cables wires and appurtenances thereto belonging in good and tenantable repair and condition and in particular (but without prejudice to the the (sic) generality of the foregoing) so as to support shelter and protect the parts of the building other than the lower flat*

28. The Applicant suggests at 7.4 that the Respondent has breached his lease as they suggest that the sinks and baths appear blocked. Further it is suggested that the “condition of the electrics is believed to be poor”. We note Mr Moyle undertook a visual only inspection and no further checks have been undertaken. The Respondent denies these breaches. This tribunal finds that the Applicant has not proved on a balance of probabilities that the Respondent is in breach of the covenants of his lease. The tribunal is not satisfied there is evidence that the sinks and bath is blocked or that the condition of the electrics are in breach of the lease.

29. The Applicant contends that there is a breach of clause 4(i) as set out above in that the Property is infested with vermin, namely rats. Mr Moyle refers to the infestation and attaches a photograph showing rat droppings [78]. The tribunal is satisfied that this amounts to further evidence which on the balance of probabilities the tribunal accepts supports its determination that the Respondent is in breach of clause 4(i) of the Lease.

30. At paragraph 7.7 the Applicant contends that the growing of cannabis and the Respondent’s prosecution are a breach of paragraph 1 of the Fifth Schedule which sets out the regulations which the Respondent covenants under his lease to be bound by. This states:

*“Not to use the Lower Flat nor to permit the same to be used for any purpose whatsoever other than as a private dwelling-house in the occupation of one family only for any purpose of one family only nor*

*for any purpose from which a nuisance can arise to the owner lessee and occupier of the other flat comprised in the Building or in the neighbourhood nor for any illegal or immoral purpose”*

31. The Respondent at paragraph 9 of his witness statement admits growing cannabis. It appears he admits he was prosecuted for the same although the tribunal notes the Applicant has not provided any memorandum of conviction. The tribunal also records that this was some years ago and it may be that any breach caused by this growing of cannabis, which all appear to accept has ceased, may have been waived by the Applicant.
32. The tribunal does find that the admitted growing of cannabis was a breach of paragraph 1 of the Fifth Schedule in that the same is illegal.
33. At paragraph 7.8 it is suggested that the accumulation of personal items making the rooms difficult to access/inspect is a breach of Clause 4(i). The tribunal has reviewed carefully all of the photographs within Mr Moyle’s report. Whilst many of the rooms can be described as cluttered and containing very many personal items the tribunal is not satisfied that this of itself amounts to a breach of the covenant complained of.
34. The Applicant contends at the Respondent is in breach of paragraph 2 of the Fifth Schedule:

*“Not to do or permit to be done any act or thing which may render void or avoidable any policy or insurance on a flat or part of the Building or may cause an increased premium to be payable in respect thereof”*
35. The Applicant relies upon Mr Moyle’s report as set out in paragraph 8 of the Statement of Case [29]. This finds the Property is squalid and unfit for human habitation.
36. The tribunal notes no evidence is produced as to the terms of any existing policy or as to any communications with the insurer or the Applicants broker over the state of the Property. The tribunal is not satisfied on the balance of probabilities that the Applicant has proved its case in respect of this alleged breach as no evidence has been adduced in support of the contention.
37. Paragraph 10.1 suggests that the keeping of dogs without the Applicants permission and allowing them to run on the shared driveway amounts to a breach of paragraph 1 and 5 of the Fifth Schedule. Paragraph 1 is set out above and paragraph 5 provides:

*“...no bird dog or other animal which may be a nuisance to any owner lessee or occupier of the other flats comprised in the Building shall be kept in the Lower Flat.”*

38. The Applicant refers to this breach within his witness statement [124]. He contends that the Respondent should not have dogs and in short that he lets them roam unsupervised. The Respondent states in his evidence that both he and his predecessors (being his mother and step-father) have always had dogs as did a previous occupant of the Upper Flat. The Respondent appears to accept that he does not always walk his dogs on a lead but suggests he does so when appropriate. He admits his two dogs have bitten him and one of his dogs bit a friend but he states the “bite was not bad”.
39. The tribunal is not satisfied that the clause amounts to an absolute prohibition on the keeping of dogs. We find it cannot be said that the keeping of all dogs may be a nuisance. Further the tribunal finds that the Applicant has been aware that the Respondent, his predecessors and occupants of the other flat have had dogs without evidence of complaint on the part of the Applicant. As a result we find the Applicant has waived his right to pursue any breach based upon the ownership of a dog.
40. Turning to whether or not the Respondents dogs’ amount to a nuisance this tribunal is not satisfied on a balance of probabilities this is the case. Save for the Applicants complaints no other complaints are referred to. Whilst the Applicant exhibits various photographs showing a person said to be the Respondent (and the Respondent does not deny this person is him) and a dog we are not satisfied the dog itself is causing a nuisance. Further the photographs are supposedly taken of the Respondent standing on part of the driveway over which the Respondent has no rights under his lease.
41. The Applicant contends that the Respondent plays musical instruments so as to breach paragraph 4 of the Fifth Schedule which provides:
- “No piano pianola gramophone wireless loudspeaker or mechanical or other instrument of any kind shall be played or used nor shall any singing be practised in the Lower Flat so as to cause annoyance to the lessee of the other flat comprised in the Building or so as to be audible outside the Lower flat between the hours of 11pm and 9am.”*
42. The Applicant relies upon his witness statement and the various photographs. The photographs appear to show on various dates and times the Respondent playing a musical instrument, principally a flute, on the driveway. The Applicant contends that the driveway being used is not part of the driveway which the Lease provides the Respondent with any right of way over but is part of the driveway used by the Applicant and other persons to access their homes.
43. The Respondent states that he does play a flute and other instruments. He states at paragraph 18 of his witness statement that he plays his flute whilst walking his dog and in the garden and front of the house. The Respondent states only once did the then occupant of the Upper Flat complain at a date unknown in the past.

44. The tribunal finds that it is not satisfied that the Applicant has proved on a balance of probabilities that there is a breach of the covenant complained of. The conduct which the Applicant appears to rely upon is playing the flute and other instruments in the vicinity of the Applicants home. This is not in this tribunal's determination any use in connection with the Property or the Lease. The Applicant may have other remedies but it is not a breach of the Lease.
45. Finally at 10.3 it is suggested that the Respondent harassed the occupant of the Upper Flat and that this was be a breach of paragraph 1 of the Fifth Schedule. Suffice to say the Applicants case contains no evidence of this allegation and the tribunal is not satisfied that any breach of covenants has occurred in respect of this allegation.
46. The tribunal records both parties refer to various other matters in their evidence. The tribunal has confined itself to the alleged breaches contained within the Applicants statement of case. It is clear that there is a substantial history between the parties.
47. The Applicant refers to seeking its costs. The tribunal notes as yet no demand has been issued and so this is not a matter for the tribunal to determine as part of these proceedings.

## **Conclusion**

48. The tribunal finds that the Respondent is in breach of clause 4(i) of the Lease in that he has failed to keep the Property in good and tenable repair and condition and the growing of cannabis was a breach of paragraph 1 of the Fifth Schedule.

Judge D. R. Whitney

## **RIGHTS OF APPEAL**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission



to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

