FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LBC/2017/0018 and 0019**
Property	:	**50 & 60 Reachview Close, London NW1 0TY**
Applicants	:	**Reachview Freehold Limited (1) Reachview Management Company Limited (2)**
Representative	:	**Ms Diane Doliveux (Counsel)**
Respondents	:	**El-Gamal & Co Limited (1) – Flat 50 Mr Fahmy El-Gamal (2) – Flat 60**
Representative	:	**Mr Fahmy El-Gamal**
Type of Application	:	**Section 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Mr Jeremy Donegan – Tribunal Judge Mr Neil Martindale FRICS – Valuer Member**
Date and venue of Hearing	:	**7 June 2017 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**11 July 2017**

DECISION

Decisions of the Tribunal

The Tribunal determines that breaches of covenants in the leases of 50 and 60 Reachview Close, London NW1 0TY have occurred. Details of these breaches are to be found at paragraphs 29, 44 and 52 of this decision.

The application

1. The applicants seek determinations pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 '(the 2002 Act') that the Respondents are in breach of covenants within their leases.

2. The Tribunal received two applications, both dated 27 January 2017; one for 50 Reachview Close and one for 60 Reachview Close. Directions were issued at a case management hearing on 9 March 2017 and both applications were listed for hearing on 7 June 2017.

3. The relevant legal provisions are set out in the appendix to this decision.

The background

4. The first applicant is the freeholder of Reachview Close, which is a substantial estate comprising a purpose-built block with 62 flats, 37 garages, parking spaces and communal grounds. The second applicant is the management company for Reachview Close.

5. The first respondent is the long leaseholder of 50 Reachview Close and the second respondent is the long leaseholder of 60 Reachview Close, both of which are two-bedroom flats with garages. The second respondent is referred to as Mr El-Gamal for the remainder of this decision.

6. The relevant lease provisions are referred to below.

The leases

7. The lease of 50 Reachview Close was granted on 14 September 1983 for a term of 999 years from 30 June 1982. The original parties were New Ideal Homes Limited ('the Lessor'), the second applicant ('the Management Company') and Vincent Ashe and Susan Angela Ashe ('the Lessee').

8. The lease of 60 Reachview Close was granted on 28 October 1983 for a term of 999 years from 30 June 1982. The original parties were New Ideal Homes Limited ('the Lessor'), the second applicant ('the

Management Company') and Keith Boniface and Marija Victoria Jervis ('the Lessee').

9. Both leases are in the same form. The demised premises are described in the first schedule and include a flat and garage, with corresponding numbers. At recital (1) the "*Estate*" is defined as "*...certain land situate on the south east side of Baynes Street and the north west side of St Pancras Way Camden Greater London together with a block of flats and garages now erected or hereafter to be erected thereon...*".

10. The Lessee's covenants with the Lessor are to be found at clause 2 and include:

> "*(5) from time to time and at all times during the said term well and substantially to repair reinstate uphold support cleanse maintain drain amend and keep the demised premises and all new buildings which may at any time during the said term be erected thereon and all additions made to the demised premises and the fixtures therein and all sewers drains gas electricity water telephone and other wires pipes cables and mains watercourses cisterns water storage tanks easements and appurtenances thereof in good and tenantable repair and condition*
>
> ....
>
> *(12) not to cause permit or suffer to be done in or upon the demised premises any waste spoil or destruction nor any act or thing which may be or become illegal immoral or a nuisance annoyance or danger or detrimental to any owner or occupier for the time being of any other part of the Estate*
>
> ...
>
> *(20) not to carry on or permit to be carried on within or upon the demised premises or any part thereof any trade business or manufacture whatsoever*"

11. At clause 4 the Lessee covenanted "*...with the Lessor and as a separate covenant with the Management Company at all times during the said term to perform and observe (1) the stipulations and restrictions set forth in the Second Schedule hereto...*".

12. Paragraph 1 of the second schedule requires the Lessee:

> "*To use the flat hereby demised as a single private residence in the occupation of one family only and for no other purpose and to use*

the garage hereby demised for the parking of one private motor vehicle only".

The hearing

13. Both applications were heard during the afternoon of 7 June 2017. The applicant was represented by Ms Doliveux and Mr El-Gamal appeared for both respondents.

14. The Tribunal was supplied with a bundle of documents that included copies of the applications, directions, leases, statements of case and witness statements. The bundle also included various photographs of the Estate and the Tribunal did not consider an inspection was necessary, nor would it have been proportionate to the issues in dispute.

15. The hearing finished at approximately 4.45pm on 7 June and the Tribunal reconvened on 21 June, to make its decision.

The issues

16. The applications concern the condition and use of garages 50 and 60 ('the Garages'). At the start of the hearing Ms Doliveux identified the following alleged breaches of the lease:

    (a) a failure to repair, cleanse, maintain and keep the Garages in good and tenantable repair and condition, in breach of clause 2(5) of the leases;

    (b) the respondents use of the Garages has caused, permitted or suffered to be done a nuisance or annoyance in breach of clause 2(12);

    (c) the respondents has carried on a trade or business from the Garages in breach of clause 2(20); and

    (d) the respondents have failed to use the Garages for the parking of private motor vehicles, in breach of paragraph 1 of the second schedule.

17. Ms Doliveux also referred to an alleged breach of the alienation provisions on the lease, arising from the subletting of the respondents' flats. This had not been addressed in the applications of the statements of case and the Tribunal explained it could not determine this issue.

The evidence

18. The Tribunal heard oral evidence from Mr Andrew Crompton and Mr Lester May, on behalf of the applicants and Mr El-Gamal, on behalf of the respondents.

19. Mr Crompton is the leaseholder of 29 Reachview and is the sole director and company secretary of both applicants. He has lived at the Estate for over 30 years but had been away for the 6 weeks preceding the hearing.

20. Mr Crompton spoke to a witness statement dated 4 April 2017, which gave brief details of the applicants' complaints. These referred to garages 34, 36, 50 and 60, yet the applications only concern numbers 50 and 60. Mr Crompton also relied on various photographs that he had taken during the period September 2014 to March 2017. Copies of these photographs were in the bundle but, unfortunately, were undated. Some of the photographs were of garage 34, which did not form part of the applications.

21. Mr May is the leaseholder of 24 Reachview and was a director of the second applicant between February 2008 and November 2016. He has lived at the Estate since 1983 but with periods away during the 1980s, when he was serving as an officer in the Royal Navy.

22. Mr May spoke to a statement dated 4 April 2017, which added some flesh to the applicants' complaints. These were generalised, save for complaints relating to garage 50. Neither Mr Crompton nor Mr May provided details of specific incidents, identifying the dates when the alleged breaches occurred.

23. Mr El-Gamal is the sole director of the first respondent. He spoke to a statement dated 28 April 2017, in which he responded to the applicants' complaints and criticised their lack of evidence. Various date stamped photographs were appended to his statement.

24. Much of the evidence was contested but the following, undisputed facts emerged:

    (a) Many of the flats at the estate are sublet and the applicants turn a blind eye to this.

    (b) Many of the garages at the estate are used by residents for storage of personal effects.

    (c) Mr El-Gamal operates two businesses; the first respondent which is a property investment company and Regent 2000

Properties Limited (R2PL) which is a property management company.

(d) R2PL manage seven flats at the Estate, including numbers 50 and 60, which require frequent maintenance.

(e) Flats 50 and 60 are each sublet on their own (without the Garages). The Garages are used by R2PL to store equipment and materials for all seven flats under their management; not just personal effects for flats 50 and 60. The applicants contend the Garages are used as a general storage facility by R2PL and their use is not restricted to the seven flats. This was denied by Mr El-Gamal.

(f) Employees of R2PL use the Garages for reasons connected to the management of the seven flats, including clearing furniture and rubbish from these flats. They also deliver storage items to and from the Garages, using an R2PL van.

(g) The up and over door for garage 50 was defective for several years and was replaced in early 2017.

Determination

25. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

Clause 2(5)

26. The applicant made two complaints. Firstly, the door for garage 50 had been in substantial disrepair and secondly, the respondents had failed to keep the Garages clean and tidy. The first complaint was uncontentious. Mr El-Gamal acknowledged the former disrepair, which had been remedied.

27. As to cleanliness and tidiness, the applicants relied on Mr Crompton's photographs. Some of these showed equipment and materials, including ladders, outside the front of garage 50. In his statement, Mr May likened the interior of this garage to a builder's skip and complained of builder's waste outside the door.

28. Mr El-Gamal suggested that he was being singled out and that many leaseholders used their garages for storage, as they are too small to accommodate most cars. He relied on photographs dated 28 April 2017 that showed items outside another garage.

The Tribunal's decision

29. The Tribunal determines that the first respondent breached clause 2(5) of the lease by failing to repair the door of garage 50 within a reasonable period.

30. The tribunal determines that no breach has been proved in relation to the cleanliness or tidiness of the Garages.

Reasons for the Tribunal's decision

31. The former disrepair of the garage door was acknowledged by Mr El-Gamal. In his statement, Mr May referred to it needing *"...repair for the best part of a decade..."*. This was not challenged in cross-examination. The failure to repair or replace the door within a reasonable period is a clear breach of clause 2(5). This breach was remedied when the door was replaced at the start of this year.

32. The respondents are obliged to "*cleanse*" the demised premises under clause 2(5). It was for the applicants to establish a failure to cleanse. The witness evidence was conflicting, so the Tribunal relied on the photographs in the bundle. These showed rubbish spilling out of garage 34, but this property did not form part of the applications. The photographs of garage 60 showed it to be clean and tidy. There were some photographs of materials and equipment outside garage 50 but this appears to have been temporary, whilst items were moved in or out of this garage. Clause 2(5) only applies to the demised premises. Placing items outside the garage cannot be a breach of this clause. The photographs showing the interior of this garage were inconclusive.

Clause 2(12)

33. The applicants complain that the respondents, or their employees or agents have caused a nuisance to other occupiers by bringing vans onto the Estate, obstructing other vehicles. When asked to stop they had been rude and aggressive. Ms Doliveux relied on photographs of R2PL's van parked on the Estate. She also relied on photographs showing three men outside garage 34. In his oral evidence, Mr Crompton said he had encountered a hostile response when taking photographs of these men.

34. In their statement of case, the respondents suggested that visiting contractors could park on the Estate when undertaking work to flats under R2PL's management.

35. In his statement, Mr El-Gamal reiterated that he was being singled out. He relied on photographs showing other leaseholders parking outside

their designated spaces. He also referred to the absence of supporting evidence or details of the alleged aggressive behaviour.

36. Mr El-Gamal was cross-examined on the various photographs but was unable to comment in any detail, as he was not present when they were taken and had not been provided with dates or times of the alleged incidents.

The Tribunal's decision

37. The Tribunal determines that no breach has been proved in relation to clause 2(12) of the lease.

Reasons for the Tribunal's decision

38. Parking of the vans on the Estate could amount to a nuisance if this obstructs other vehicles. The photographs did not show any obstruction and neither Mr Crompton nor Mr Lester provided specific details of the alleged obstruction. This allegation has not been made out.

39. The photographs of the three men referred to at paragraph 33 do not establish nuisance. They suggest some form of encounter between these men and Mr Crompton but there was no evidence of when this took place, who initiated it or what was said. It would be unsurprising if the men reacted angrily to having their photograph taken, without their consent. This, on its own, does not amount to nuisance.

40. The applicants have not established any nuisance to other owners or occupiers at the Estate, let alone establish nuisance caused, permitted or suffered to be done by the respondents.

41. In any event, clause 2(12) relates to the use of the demised premises. The applicants' complaints all relate to alleged acts of nuisance in the communal grounds. These acts if proved, cannot amount to a breach of clause 2(12) as they did not take place *"...in or upon the demised premises..."*.

Clause 2(20)

42. The applicants contend that that the respondents have carried on (or permitted to be carried on) a trade or business from the Garages. In his statement, Mr Crompton referred to Mr El-Gamal's staff using *"...garages 34, 36, 50 and 60 in the course of his estate agency business..."*. Ms Doliveux invited the Tribunal to make a finding that the Garages are used as a general storage facility for R2PL and the use is not restricted to the seven flats at the Estate.

43. Mr El-Gamal denied there had been any trade or business use and reiterated that the Garages had only been used for storage for the seven flats. He submitted there had been no recent complaints about this use and referred to an email from Mr Crompton dated 18 October 2014, in which it was said "*...your clients appear to have stopped carrying on their business and loading, unloading and parking their works van in Reachview Close.*" Ms Doliveux referred to letters from applicants' solicitors dated 12 October and 16 December 2016, complaining about business use of the Garages. The former was incorrectly headed "*Unlawful use of Garages at 57 and 60 Reachview Close, London NW1 0TY*" but the latter correctly referred to numbers 50 and 60.

The Tribunal's decision

44. The Tribunal determines that a breach of clause 2(20) has occurred, as the respondents have permitted a business to be carried on within the Garages.

Reasons for the tribunal's decision

45. There was insufficient evidence to establish the Garages are used as a general storage facility for R2PL. However, Mr El-Gamal admitted they are used to store equipment and materials for all seven flats at Reachview that are managed by R2PL. This use is not restricted to personal effects for flats 50 and 60 and amounts to business use. The Garages are being used for the benefit of R2PL's business, which means a business is being carried on within them. The respondents have clearly permitted this use, by allowing this form of storage.

Second schedule, paragraph 1

46. This paragraph contains two user restrictions; firstly it requires the flat to be used as a single private residence in the occupation of one family and, secondly, the garage is to be used for the parking of one private motor vehicle only.

47. In its statement of case, the applicants complained that the Garages were being used to store trade goods and materials and are not in residential use. At the hearing, Ms Doliveux sensibly focused on the second restriction. She acknowledged that other leaseholders used their garages for storage but distinguished between the storage of personal effects and business storage.

48. Mr El-Gamal submitted that the applicants had waived the second user restriction or were estopped from asserting a breach of this restriction, based on the respondents' long use of the Garages. The first respondent purchased flat 50 in 2004 and he purchased flat 60 in 2008. Neither respondent had ever parked cars in the Garages. The

applicants were aware of this and have continued to accept service charge payments from the respondents.

49. Mr El-Gamal relied on the High Court's decision in ***Hepworth v Pickles [1900] Ch 108***. This involved an action by a purchaser to rescind a contract for the sale of a house on the grounds of an undisclosed restrictive covenant, preventing its use as an inn, tavern or beerhouse. Beers and spirits had been openly sold from the house for a period exceeding 24 years and it was held there had been a waiver or release of this covenant.

50. Ms Doliveux rejected this argument, relying on the Lands Tribunal's decision in ***Swanston Grange (Luton) Management Limited v Langley-Essen [2008] L&TR 20***. She referred to the opening sentence of paragraph (3) of the headnote, which reads "*For waiver of promissory estoppel to apply, the tenant has to show an unambiguous promise or representation that led her to understand that the landlord would not insist on its legal rights under the relevant covenants, either at all or for the time being, and that she had altered her position to her detriment on the strength of that, such that reliance by the landlord on its strict rights would be unconscionable.*"

51. Ms Doliveux pointed out there was no evidence of; (a) any promise or representation from the applicants, or (b) detrimental reliance by the respondents that could establish waiver or estoppel.

The Tribunal's decision

52. The Tribunal determines that a breach of paragraph 2 of the second schedule has occurred as the Garages have not been used for parking private motor vehicles.

Reasons for the tribunal's decision

53. The first user restriction refers to "*the flat*", rather than "*the demised premises*" and does not apply to the Garages. Unsurprisingly, there is no requirement that the Garages are used as a single private residence in the occupation of one family only.

54. The Tribunal is satisfied that the second restriction, which does apply to the Garages, remains effective. There was insufficient evidence to establish waiver or estoppel. The applicants' failure to take enforcement action previously does not amount to a promise or representation and Mr El-Gamal did not identify any detrimental reliance on the part of the respondents.

55. The applicants' acceptance of service charges, after they became aware of the breach of the second restriction, does not amount to a waiver of

this restriction. It may, possibly, amount to waiver of any right to forfeit the leases. However, that is outside the Tribunal's jurisdiction and would be a matter for the County Court on any subsequent forfeiture/possession proceedings.

56. The respondents have never used the Garages for the parking of private motor vehicles, during their periods of ownership. The argument that the Garages are too small to accommodate most cars would have some force if they had been left empty. However, the respondents have consciously used the Garages for a purpose outside the second user restriction, by storing equipment and materials for all seven flats. The Tribunal has already found that a business is being carried out from the Garages and this is a clear breach of the second restriction.

57. The fact that other leaseholders use their garages for storage does not alter the position. They may also be in breach of the second restriction but the Tribunal is only concerned with the Garages. The use of the other garages would be a matter for another Tribunal, if further section 168 applications are made.

The next steps

58. The applications have been partially successful. Breaches of clauses 2(5) and (20) of the lease and paragraph 1 of the second schedule have been proved.

59. The breach of clause 2(5) has already been remedied. The respondents should remedy the other breaches, if they have not already done so. If the breaches continue then they risk further action, which could include the service of section 146 notices and possible forfeiture/possession proceedings. Given this risk and the potential consequences, the respondents may wish to seek independent legal advice.

Name: **Tribunal Judge Donegan** **Date:** **11 July 2017**

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.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 168 No forfeiture notice before determination of breach

(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 (c. 20) (restriction on forfeiture) 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.

(3) But a notice may not be served by virtue of subsection (2) (a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

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

(6) For the purposes of subsection (4), "appropriate tribunal" means –

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.