IN THE RESIDENTIAL PROPERTY TRIBUNAL
LEASEHOLD VALUATION TRIBUNAL
SOUTHERN PANEL

IN THE MATTER OF S168 COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case No	CHI/21UG/LBC/2008/0021
Property	Garage at 15/17 Mitten Road Bexhill
Applicant	Ms S Cooper C/o Stephen Rimmer Solicitors
Respondent	Ms S J Pellett
Date of hearing	15 January 2009
Date of decision	5 February 2009
Tribunal	Ms H Clarke (Chair) Mr B H R Simms FRICS MCIArb

1. **THE APPLICATION**
The Applicant landlord asked the Tribunal to determine whether a breach of covenant under a Lease of the Garage at 15 Mitten Road dated 8 April 1988 had occurred.

2. **THE DECISION**
The Tribunal determined that no breach had occurred.

3. **THE LAW**
Section 168(4) of the Commonhold and Leasehold Reform Act 2002 provides as follows:
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.

4. **THE LEASE**
The Tribunal was shown two Leases. The first was a lease of Flat 1 15 Mitten Road dated 21 June 1962 for 999 years. The second was a Lease dated 8 April 1988 ("the Second Lease") which demised the "detached lock-up garage at 15 Mitten Road Bexhill ..shown red on the annexed plan..together with a right of way...over the forecourt" together with the easements and reservations contained in the First Lease. The plans were not coloured but there was a bold black line around the perimeter of the garage building and a further bold black line around the forecourt area in front of the garage building. There was no bold line around the areas to the side of the garage. The Second Lease contained express covenants to "use the (garage) only as a private garage for the storage of a private motor vehicle and not to use (the garage) for any other purpose whatsoever". It also contained a provision that the covenants provisos and conditions in the First Lease would apply to the garage and would be "performed and observed as fully as if the same covenants provisos and conditions had been herein repeated in full with such modifications only as are necessary to make them applicable" to the garage.

5. The First Lease contained various obligations and covenants of the kind that might be expected to be found in the lease of a flat forming part of a converted building. In particular it contained a prohibition against either party making "any structural alteration or structural additions to their respective Flats without the consent of the other party (such consent not to be unreasonably withheld)". There were also covenants against jeopardising the insurance cover and against carrying on any business or trade, and a user covenant restricting both parties to the Lease (both landlord and tenant) to the use of their respective flats as private residences only.

6. It was common ground that the leasehold interest in Flat 1 15 Mitten Road was now owned by someone else. The Respondent, Ms Pellet, had acquired only the leasehold interest in the garage. The conveyancing documents were not provided to the Tribunal save for the Deed of Transfer which did not assist the Tribunal in construction of the Leases.

7. **THE INSPECTION**
The Tribunal inspected the garage in the company of the Applicant's solicitor and the Respondent in person. The garage was accessed from the road across a paved forecourt. The Tribunal observed the garage to be a detached block-built building with a corrugated flat roof. At the front of the roof there was a board panel about 3 feet high supported on battens and extending at an angle above the height of the roof. This was what the Applicant meant by a 'fascia'. There were double wooden doors to the front of the garage facing the paved forecourt, a second single door giving access from the rear side of the garage, and a double window at the rear. Alongside the paved area of the forecourt was a brick wall of about 3-4 courses high with an earth bed behind it. To the left of the garage there was a path between the garage and the fence bordering the garden of 15A Mitten Road, which led behind the garage to the rear door of 17 Mitten Road, occupied by the Respondent. Perspex sheets formed a roof covering over the path, and a door, frame and panel had been added at the forecourt end of the path to close it off. The garage was completely filled by a large car. The interior was not rendered or decorated and had no fittings and there were a number of electric cables running into the garage. One led to a single ceiling light bulb inside the garage and another led to an external light. There was also a thicker cable entering the garage which did not appear to be connected to anything.

8. **THE HEARING**
A hearing took place at Hastings which was attended by the Applicant Ms S Cooper represented by her solicitor Mr Waters of Stephen Rimmer solicitors, and by the Respondent Ms S J Pellett. Evidence was given by both parties and also by Mr N Relton and Mr S Smith on behalf of the Applicant.

9. **THE ISSUES**
The case for the Applicant was that at some time between 2002 and the present, the Respondent was in breach of her obligations as regards the garage in that she (or someone on her behalf) had done the following without consent:
- used the garage as an office, commercial unit, or for residential purposes, in breach of the covenants regulating use;
- erected a wooden fascia on top of the garage, roofing around the side and rear of the garage, and a wooden "wall" and door at the side of the garage; all these were said to be a breach of the covenant against making any structural addition to the property;
- made internal modifications to the garage (these were unspecified);
- erected a brick wall at the side of the driveway; this was said to be a breach of the covenant against making any structural addition to the property.

10. The case for the Respondent was that the garage had been in use only for storage of a car belonging to her father. She said she had permission from the previous freeholder to put the low brick wall, the Perspex sheets and the path door in place, and the 'fascia' panel was a replacement for a concrete parapet which fell from the garage. There were no internal modifications. The Respondent said that the first she had ever heard from the Applicant in connection with any of these matters was the service on her of a section 146 notice in June 2008. That was not disputed by the Applicant.

11. No authorities or case law were quoted or relied upon by either party.

12. **REASONS FOR THE DECISION**
The Tribunal directed itself that the Applicant had to discharge the burden of proof, on a balance of probability, as to whether the Respondent was or had been in breach of covenant. The Tribunal first considered the liability of the Respondent under the terms of the Second Lease. It was the Applicant's submission that all the covenants of the First Lease were to be imported into the Second Lease, making adjustments as necessary in order to interpret them as applying to the garage.

13. The Tribunal took the view that this approach presented many difficulties. Several covenants in the First Lease could not be read as applying to the garage with any ease or clarity, such as the obligation on the tenant to pay service charges and insurance charges for the building at 15 Mitten Road. The First Lease required the lessor to carry out all repairs; the Second Lease required the lessee to do so. The user covenant under the First Lease restricted use to that of a residence; the Second Lease restricted use to that of a garage. However, the Respondent did not dispute that the covenants relied upon by the Applicant applied to her use of the garage, and in the light of that position, the Tribunal proceeded to determine the case on the evidence whilst retaining significant doubts as to the extent to which the covenants deriving from the First Lease were enforceable against the Respondent.

14. The Tribunal determined on the evidence that the demise under the Second Lease did not include the area between the side of the garage and the boundary fence of the garden to 15A, or the rear of the garage and the next boundary fence, which in practice was used as a path and was described by both parties as a 'pathway'. This area was not surrounded by a bold line on the plans, and the right of access across the forecourt appeared to be limited to the area directly in front of the garage double doors.

15. The Applicant contended that the perspex roof, side door and side wall were attached to the garage, and this amounted to a structural addition. The Tribunal did not accept the Applicant's submission. It appeared from the evidence (including the inspection) that the perspex roof and the door frame were supported at one side by the garage, and were attached to it, although there was no evidence as to how they were attached. The roof and the panel adjacent to the door frame were supported at the other side by the fence belonging to the garden of Flat 15A. However, the purpose of the perspex roof was evidently to shelter the area between the garage and the fence. The purpose of the side wall and door was to make that area secure and enclosed. They did not add any function or enhancement to the garage itself, nor could they reasonably be said to have extended the garage. In those circumstances the Tribunal took the view that the roof, side wall and door did not constitute an addition to the garage. The Applicant did not contend that the perspex roof, side wall and door constituted a structural alteration, and the Tribunal would in any event have found that they did not,

as the integrity of the garage remained complete. There was therefore no breach of the covenants relied upon by the Applicant by virtue of the erection of the perspex roof, the side wall, or the side door.

16. The Tribunal found on the facts that the 'fascia' erected by the Respondent was put in place of a concrete parapet which had become defective and had fallen from the garage. There was no expert evidence, or evidence of any kind, relating to the function and purpose of the fascia or the parapet which it had replaced. The Tribunal therefore applied its own expert knowledge and, with the benefit of the inspection and the photographs, reached the conclusion that the fascia did not form part of the structure of the garage because it was essentially decorative in character and had no apparent function.

17. The Tribunal considered the evidence relating to the use of the garage. Direct evidence was given by the Applicant and by her witness Mr Relton, that they had seen someone sitting in the garage in front of a screen of some kind, a monitor or TV screen. Mr Relton estimated that he had seen this about 15 times over a period of several months. The Applicant was unclear about how often she had seen such a thing. The Applicant produced photographs said to support this direct evidence, but the quality of the photographs was so poor that the Tribunal did not consider them to offer any support. The Applicant and Mr Relton also said that they had observed bags of dismantled furniture, which they believed to be a desk, on the forecourt outside the garage; that a heavy duty electric cable had been run into the garage; the Applicant said she had seen the Respondent walking from the side of the garage carrying trays of food; Mr Relton said that he had heard the sound of power tools from inside the garage. They said that they had not seen the doors of the garage open at any time.

18. The Respondent denied that the garage had been used for any purpose other than storage of the Respondent's father's car since about 2004. The Respondent and her brother in law drove the car occasionally, but the Respondent's father no longer drove. The electric cable (which was visible on the inspection) had been put in place before the Applicant acquired the freehold, with the permission of the former freeholder, to keep a freezer in the garage, but in the event this had never happened. The only dismantled furniture was a bed, which had come from the Respondent's house, and which had been placed on the forecourt awaiting collection.

19. The Tribunal weighed the evidence available. The evidence of Mr Relton did not seem to the Tribunal to be independent evidence. Although he described himself as the 'friend' of the Applicant, he lived at the same address, and frequently referred in his evidence to things which 'we' had seen or done in relation to the property, meaning himself and the Applicant. His evidence was therefore to be treated as associated with that of the Applicant. There was therefore a direct conflict of evidence between the parties, and only the most circumstantial of evidence upon which the Applicant's suspicions were based. The Applicant had not even formed a clear view of what the alleged breach consisted of, suggesting variously that the Respondent may have been cooking in the garage, using it as an office, or some other unspecified activities including looking at a TV or computer screen. It was impossible to form a view of how often, or for what period of time, any of these alleged activities had taken place. The Tribunal also took into account the fact that the Applicant said she was unaware that the garage had a window at its rear. Bearing in mind the fact that the Applicant had lived in the house adjoining the garage since she acquired the freehold reversion, the Tribunal concluded that the Applicant had not demonstrated impressive powers of observation or recall. On a balance of probabilities the Applicant had not discharged

the burden of proving that the Respondent had breached the user covenant.

20. The Applicant contended that the Respondent was in breach of her covenants by the erection of a 12" wall alongside the drive way area to the front of the garage. However this referred to a wall which was not within the area of the Respondent's demise, and did not therefore fall within the scope of the covenants in either the First Lease or the Second Lease.

21. Both parties offered a great deal of evidence intended to establish when the Perspex sheets, the wooden 'fascia', the power cable and the brick wall were put in place. Given the Tribunal's decisions on the liability and construction of the covenants, it was not necessary to make any findings of fact on those points, but the Tribunal considered the evidence generally to be conflicting, weak and circumstantial. It was noteworthy that there was a complete absence of any direct evidence as to the state of the garage and its surroundings dating from the time when the Applicant acquired the reversion to the Second Lease. The same applied to the Respondent's contention that the previous freeholder (now deceased) had agreed that she could erect the Perspex and the door. There was no other evidence about this nor had the Respondent raised this allegation prior to the hearing; the Tribunal did, however, note that as the Applicant had failed to comply with the Directions, the Respondent had not seen the Applicant's case until very shortly before the hearing.

Signed ____

Dated 5 Feb 2019