



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

Case Reference : **BIR/OOGA/LBC/2019/0002**

Property : **The Dragons Den, Forbury Cottage, Kimbolton,
Leominster HR6 OEP**

Applicants : **Graham Clarence Davies (1)
Teresa Davies (2)**

Representative : **Ms N Kearney of counsel
instructed by Lanyon Bowdler solicitors**

Respondent : **Mair Lyn Martin**

Representative : **Mrs French (Lay representative)**

Type of Application : **Breach of Covenant**

Date of Hearing : **20th June 2019
Hereford Justice Centre**

Members of Tribunal : **Judge D Jackson
Mr R Bryant-Pearson FRICS**

Date of Decision : **5 July 2019**

DECISION

Background

1. The Applicants are freeholders of Forbury Cottage, Kimbolton, Leominster HR6 OEP title to which is registered at HM Land Registry under Title No. HR2826.
2. The Respondent is the leaseholder of the Property which is built on land forming part of the above Title. The Property is held under a Lease dated 1st January 2019 made between the Applicants (1) and the Respondent (2) (“the Lease”).
3. The Respondent is the mother of the Second Applicant.
4. On 14th February 2019 the Applicants applied to the Tribunal for an Order that a breach of covenant in the Lease has occurred. The covenant, the subject of this application, is clause 2(c) of the Lease.
5. This matter had been listed for mediation. However, the Applicants withdrew their consent to mediation and on 26th March 2019 the Tribunal issued Directions.
6. The Tribunal has considered Grounds of Application dated 14th February 2019, Applicants Reply to Respondent’s Statement of Case dated 25th April 2019, Witness Statement of the First Applicant dated 13th June 2019 and Statement of the Second Applicant dated 13th June 2019. The Tribunal has also considered Statement of Case of the Applicant dated 13th April 2019 and Response dated 15th June 2019.
7. At the hearing the First Applicant and the Respondent gave oral evidence. The Applicants were represented by Ms Kearney of counsel. The Respondent was most ably represented by Mrs French, her lay representative.

Inspection

8. The Tribunal inspected the Property on the morning of the hearing.
9. The Property was formerly a garage/garden room which has been converted into a “granny annexe” (see page 6 to Exhibit “GDC1”).
10. The Property is a single storey wooden clad building with a galvanised aluminium roof situated at the rear of Forbury Cottage approached over a footpath from the main car parking area. The Property comprises lounge/kitchen, a single bedroom and toilet/shower room. The Property has underfloor heating. The boiler and hob are powered by Calor Gas.
11. On inspection it appeared that the occupier’s possessions had been packed into cardboard boxes. However, the sofa remained in the living room and there was sugar and porridge oats in a bag on the worksurface in the kitchen. There were toiletries and towels in the bathroom. In the bedroom there was a wardrobe and other bedroom furniture. The bed had a bottom sheet but no other bedding. There were personal items on the dressing table.

The Lease

12. The Lease has been dated 1st January 2015. However, the signature of the Respondent indicates “March 2015”. A file note prepared by the Respondent’s solicitors on 4th February 2015 (exhibited to Response dated 15th June 2019) shows that the Lease had not in fact been signed by that date. Accordingly, we find that the Lease has been backdated and was not made until 15th March 2019, at the earliest, when it was signed by the Respondent.
13. The main provisions of the Lease are as follows:
 - “Term of ninety-nine years or for so long as the Tenants so wish to reside therein” (clause 1).

- “Not to assign underlet or part with possession of the demised premises or any part thereof and to use the demised premises for the purposes of a private dwelling in the personal occupation of the Tenant” (clause 2(c)).
 - “It is hereby agreed between the parties hereto that this lease is personal to the Tenant and for the Tenant’s occupation of the demised premises and for no other purpose whatsoever” (clause 3).
 - “Provided always and it is hereby agreed that if at any time after the death of the Tenant or if the Tenant shall cease to reside personally at the aforesaid property either the Landlord or persons to whom the term shall then be vested may give one month’s notice in writing of their desire to determine this tenancy...” (clause 4).
14. The grounds of application are that there has been a breach of clause 2(c) of the Lease because “The Respondent vacated the premises in November 2018 and no longer resides at the Property”.
 15. Does clause 2(c) compel the Respondent to occupy the Property? We apply the principles of construction set out in **Arnold v Britton** [2015] UKSC 36. We find that clause 2(c) has not been framed “so as to compel the tenant to make positive use of the premises” (Woodfall – 11.187). We find that the requirement “to use the demised premises for the purposes of a private dwelling in the personal occupation of the Tenant” is no more than “an emphatic statement of the prohibition on uses other than that specified”. We reach this conclusion because firstly, clause 3 repeats that emphasis and secondly, because clause 4 entitles the Landlord to determine the tenancy if “the Tenant shall cease to reside personally at the aforesaid property”.
 16. The parties cannot have intended the second half of clause 2(c) to be a positive obligation following on from a negative user obligation. Clause 1 makes it clear that the term is for “...for so long as the Tenants so wish to reside therein”. Clause 4 allows for termination by the Landlord in circumstances where the Tenant no longer resides at the Property. Such provisions would have been otiose if clause 2 (c) was intended to be a positive user covenant. Properly construed the Lease provides that Respondent could live at the Property for as long as she wanted: whilst she lives there she cannot use the Property other than as her own private dwelling: if she leaves the Property the Landlord can determine the Lease.
 17. However, the terms of the Lease give rise to an even more fundamental problem for the Applicants.

Jurisdiction

18. At the hearing the Tribunal raised of its own volition the question of jurisdiction. As this issue had been raised for the first time the Tribunal continued to hear the substantive application and gave the Applicants 7 days to make submissions on the question of jurisdiction.
19. Under section 168(4) of the Commonhold and leasehold Reform Act 2002 a Landlord may only make an application to the Tribunal in respect of a “long lease”. Under section 169(5) “long lease has the meaning given to it in sections 76 and 77 of this Act, ...”.
20. Section 77(1) provides:

A lease terminable by notice after a death, a marriage or the formation of a civil partnership is not a long lease if—

- (a) the notice is capable of being given at any time after the death or marriage of or the formation of a civil partnership by, the tenant,
- (b) the length of the notice is not more than three months, and
- (c) the terms of the lease preclude both its assignment otherwise than by virtue of section 92 of the Housing Act 1985 (assignments by way of exchange) and the subletting of the whole of the demised premises.

- 21. In her Written Submissions on Behalf of the applicants dated 24th June 2019 Ms Kearney concedes that the Lease is terminable at any time after the death of the tenant, with a notice period of one month, and that clause 2(c) precludes its assignment. Accordingly, the Lease cannot be a long lease for the purposes of the Act and the Tribunal must strike out the application for want of Jurisdiction.
- 22. That concession is sufficient to dispose of the application. However, in view of the close family relationship between the parties and to assist any future settlement discussions that the parties may see fit to enter into, the Tribunal sets out its material findings as follows.

Findings

- 23. The Respondent has three children: Lavinia Macwinnie (youngest), Teresa Davies (Second Applicant) and David Martin (eldest).
- 24. In October 2014 the Respondent sold her house. She had been considering purchasing a retirement apartment. However, at that time her relationship with the Second Applicant had not yet broken down and it was decided that the Respondent would move into Forbury Cottage. Meanwhile, planning permission had been obtained to convert the Property into ancillary residential accommodation. The Respondent moved into the Property on Christmas Eve 2014.
- 25. As set out at paragraph 12 above the Lease has been backdated and was not completed until, at the earliest, 15th March 2015. On 15th December 2014 (page 22 to Respondent's Statement of Case) the Respondent paid £5628.04 to Howdens to fund the costs of a Kitchen at the Property. The Respondent gave the Second Applicant a cheque for £50,000 on 5th February 2015 and two further cheques totalling £17,250 in February and March 2015. In total the Respondent gave the Second Applicant a little over £72,000. It is clear that sum was paid out in connection with the Lease which was not completed until it had been paid. It is not for the Tribunal to make a determination as to whether the sum of £72,000 was in consideration of the Lease, an outright gift or entrusted by mother to daughter for safekeeping.
- 26. In or around September 2017 the relationship between the Respondent and the Second Applicant broke down. As a result, in October 2017 the Respondent instructed solicitors to register a Unilateral Notice against Forbury Cottage to protect her Lease (see pages 12 and 13 of Applicant's Statement). Since that time the family relationship has continued to deteriorate. Proceedings have been taken before the Land Registration Division in relation to the Unilateral Notice. It is understood that those proceedings are currently stayed.
- 27. In October 2018 the Respondent suffered a stroke and went to live with her daughter Lavinia in Hereford. However, the Respondent was having to sleep on a sofa and found stairs very difficult. Accordingly, in November 2018 she borrowed £30,000 from a friend, Mr Rees to purchase a mobile home at Fayre Oaks Home Park in Hereford (see letter dated 10th April 2019 from Mr Rees at page 23 of Respondent's Statement). The Respondent stayed with her daughter Lavinia at Christmas 2018. In

- February 2018 the Respondent moved into her park home. In February 2019 the Respondent suffered a heart attack and was in hospital for 10 days.
28. Negotiations between the parties have been ongoing since August 2018 with a view to resolving all issues. The Tribunal accepts the evidence of the Respondent that she has not been living at the Property since November 2018 as she believed that a settlement would be reached and moved out in anticipation of such a settlement. Her agreement with Mr Rees, who loaned her £30,000 to purchase her park home, was that he would be repaid once monies were received from the Second Applicant. By the time of the hearing the Respondent's position was that in the absence of a settlement she would have to sell her park home to repay Mr Rees and, depending on circumstances, could consider returning to the Property.
 29. The telephone at the Property has been cut off since December 2018 and mail redirected since January 2019
 30. The Respondent has returned to the Property from time to time to collect her possessions. She has taken clothing, bedding and crockery as well as her TV and reclining chair. Her bed, sofa, wardrobe and bedroom furniture remain at the Property.
 31. The Respondent's present intention in relation to the Property is still undecided. She was told by her medical advisors that once she had recovered from her heart attack that she could return to the Property. However, the Respondent also has a mental health condition and has been told that because of the isolated location of the Property and the breakdown of her relationship with the Second Applicant she should not return.
 32. Had we the jurisdiction to do so we would have found, on the facts and applying the construction of the Lease set out at paragraphs 15 and 16 above that a breach of clause 2(c) of the Lease has not occurred.

Decision

33. The Tribunal does not have jurisdiction to make a determination under section 168 of the 2002 Act because the Lease is not a "long lease" for the purposes of the Act.
34. Accordingly, the Tribunal does not have jurisdiction in relation to this application and strikes out the whole of these proceedings under Rule 9(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

D Jackson
Judge of the First-tier Tribunal

Either party may appeal this decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends this written Decision to the party seeking permission.