FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/45UC/LBC/2021/0005** **CHI/45UC/LBC/2021/0008** **V:CVP REMOTE**
Property	**:**	**Flats 17, and 25 First Floor 25 Sea Road East Preston Littlehampton West Sussex BN16 1JN**
Applicant	**:**	**Manorground Ltd (Landlord)**
Representative	**:**	**Mr Pask of Counsel**
Respondent	**:**	**Ms C Merrydew (Flat 17)** **Ms K Hartley (Flat 25) (Tenants)**
Representative		**Mr Davis of Counsel**
Type of Application	**:**	**Breach of covenant**
Tribunal Members	**:**	**Judge F J Silverman MA LLM** **Mr K Ridgeway MRICS**
Date of Hearing	**:**	**06 July 2021**
Date of Decision	**:**	**10 August 2021**

DECISION AND ORDER

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V:CVPREMOTE. A face to face hearing was not held because it was not practicable and

all issues could be determined in a remote hearing. The documents which the Tribunal was referred to are contained in electronic bundles the contents of which are referred to below. The orders made in these proceedings are described below.

Decision of the Tribunal

1 The Tribunal refuses the Applicant's application for a postponement of the hearing and to debar evidence from Mr Goacher.

2 For the reasons cited below the Tribunal finds that the first Respondent, Clare Merridew, is or has been in breach of clauses 3(8)(a), 3(9)(a), 3(9)(o) and 3(9)(s) of her lease.

3 For the reasons cited below the Tribunal finds that the second Respondent, Kerry Hartley, is or has been in breach of clause 3(9)(a) of her lease.

4 The Tribunal makes an order in favour of Clare Merrydew and Kerry Hartley under s20C Landlord and Tenant Act 1985 limited in each case to £500.

Reasons

1 The Applicant landlord filed two applications seeking declarations from the Tribunal that the Respondent tenants were in breach of the covenants of their respective leases. Directions were issued by the Tribunal on 23 May and 03 June 2019. The two cases were related and an order was made by the Tribunal to join the applications which were therefore heard together (page 87). Except where the context otherwise states, this Decision and Reasons applies to both cases.

2 The hearing on 06 July 2021 took place by way of a remote video (CVP)link to which the parties had previously consented. In accordance with current Practice Directions relating to Covid 19 the proceedings were recorded and the Tribunal did not make a physical inspection of the property but were able to obtain an overview of its exterior and location via GPS software. Five bundles of documents were filed by the parties and were read in electronic form by the Tribunal. For ease of reference the page numbers referred to below are those given at the bottom of each page of the original hard copy and cited in the index prepared by the Applicant's solicitor.

3 The Applicant was represented by Mr Pask of Counsel and both Respondents by Mr Davis of Counsel.

4 The Applicant landlord is the freeholder of the premises known as Flats 17 and 25 Sea Road East Preston Littlehampton West Sussex BN16 1JN which form the upper floor above a parade of commercial premises, including a dentist's surgery in Sea Road.

5 Ms Merrydew is the tenant of flat 17 and Ms Hartley of flat 25.

6 The lease under which Ms Merrydew holds flat 17 was made between the Applicant and Julie Anne Grice and is dated 13 September 2005 (page 26). Ms Hartley's lease dated 30 March 2007 was made between the Applicant and herself. Both leases demise the respective flats for a period of 125 years and in the context of the current applications contain identical covenants.

7 On 24 June 2021 the Applicant's solicitor made an application asking the Tribunal to postpone the hearing scheduled for 06 July 2021, for an extension of time to comply with the Tribunal's Directions and to debar 'expert' evidence from Mr Goacher submitted by the Respondents. The application was not received by the Tribunal Judge until two working days before the scheduled hearing. In response, the Tribunal indicated that the application would be dealt with at the commencement of the full merits hearing.

8 The Applicant contended that the Respondents' lateness in serving their evidence had prejudiced the Applicant's case and had denied it the opportunity properly to respond. According to the Tribunal's Directions the Respondents had been due to serve their response by 03 June 2021. In fact it was served on them one week later on 10 June 2021. Although the Tribunal does not condone the late service of documents or the disregard of its Directions, it notes that the Applicant did not raise any objection with the Tribunal about the delay for a further 14 days during which time the Tribunal considers that they would have had ample time in which to contact their client and either to make an application for a postponement or to attempt to reply to the Respondents' case. They did neither. The burden of proof in this case rests firmly with the Applicant; it is inappropriate for them to suggest that the Respondents' short delay in providing their defence denied them the opportunity to make their case. An action for breach of covenant can have very serious consequences for the Respondents, resulting ultimately in the forfeiture of their leases and it is important that they should be given the chance to present their defence. The Tribunal considers that this factor outweighs any minor inconvenience caused to the Applicant by the slightly late service of documents. The Applicant also asked the Tribunal to exclude from the Respondents' evidence a statement from Mr Goacher whose statement had been annexed to the witness statement of Mr Grice. In his own witness statement Mr Grice described Mr Goacher as being an 'expert'. The Applicant asserted that this was expert evidence which should not be permitted as no leave had been given by the Tribunal to adduce expert evidence in this case. It appears that the

Applicant may have misinterpreted the Respondents' evidence. In his witness statement Mr Grice referred to Mr Goacher as an expert (page 389). This statement does not make Mr Goacher an expert (in terms of giving evidence to a court) and there is nothing in Mr Goacher's statement to suggest that it is a statement made by an expert witness ie there is no expert's statement or declaration and it is not signed as such. Further, since Mr Goacher did not appear before the Tribunal to testify and be cross examined the Tribunal was unable to place great reliance on the contents of the statement itself. The Applicant's application in this respect had been totally misconceived and unnecessary. On that basis therefore, and after having adjourned to consider its decision, the Tribunal refused the Applicant's request for a postponement, which makes their request for further Directions otiose and declines to debar the Respondents' so called 'expert' evidence.

9 The written submissions prepared by the Applicant for the hearing only addressed the postponement and related issues. They did not deal with the substantive case. The Applicant's solicitor was not in attendance during the morning session of the Tribunal and Mr Pask, who had only been instructed over the preceding weekend, said that he had been told that the Applicant's witness would not be available until 12 noon. Mr Berlinger, the only live witness for the Applicant was not in fact available at 12 noon and when he did join the hearing some 20 minutes later had considerable difficulties with his connection to the hearing. These were eventually resolved to the extent that the hearing could proceed. The Tribunal asked Ms Lamb the Applicant's solicitor to be present when the Tribunal resumed the hearing at 14.00 after the lunch adjournment. She was asked to explain why her witness had not been available at the start the hearing and why the written submissions which she had prepared had only addressed the postponement issue and not her client's substantive case. She admitted to the Tribunal that she had assumed that the postponement would be granted. Following a family bereavement, her principal witness had had to attend to matters (unspecified) on the morning of the hearing and was not available before 12 noon. While this might have been an acceptable reason to grant a postponement it had not been mentioned in the postponement application. Her client's second witness Dr Steffin did not attend the hearing and the Tribunal read his evidence but was unable to give great weight to it since it was not subjected to cross examination. Dr Steffin had been effectively the only actual witness to many of the allegations raised by the Applicant and their failure to call him was not explained.

10 Relevant sub-clauses of the lease are set out below:

Clause 3(8)(a) :

Not to ….make any alterations additions or improvements to the property …

Clause 3(9)(a) :

'not to use the Property nor permit the same to be used for any purpose whatsoever other than as a private residence in the occupation of one household only nor to use the property for any purpose from which a nuisance can arise or which may cause damage or annoyance to the owners Tenants or occupiers of the Building or of other property in the neighbourhood nor for any illegal or immoral purpose'.

Clause 3(9)(b)

Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance of the building or any shop or flat therein or may cause an increased premium to be payable in respect thereof

Clause 3(9)(o):

Not to cause or permit any obstruction whereby access and egress to the common parts of the building as aforesaid are obstructed and not place leave or cause to be placed or left any chair seat furniture cycle vehicle perambulator toy box parcel bottle or other things nor any refuse or rubbish in any common part of the building as aforesaid nor shall the tenant throw or allow to be thrown anything whatsoever nor any refuse or rubbish out of any window of the property.

Clause 3(9) (s)

Not to keep or allowed to be kept any bird animal or reptile in the Property without the written permission of the landlord which if given shall be deemed to be by way of licence revocable at will

11 In relation to Flat 17 (Ms Merrydew) the Applicant alleged nine separate breaches as follows:

11.1 drug production and cultivation (clause 3(9)(a))

Ms Merrydew admits the police raid on 02 February 2021 at which an arrest was made and cannabis plants were removed from the adjoining flat (page 125). It appears that no illegal substances were recovered from Flat 17 and no arrests or criminal proceedings ensued in relation to this flat. The Tribunal concludes that there is insufficient evidence to make a determination that a breach of this covenant occurred in respect of this one incident alone.

11.2 use of flat roof area and

11.3 erection of fencing around roof area (clause 3(8)(a))

An area of flat roof/terrace area is demised with Flat 17 (Schedule 2 page 44). However, the Applicant's complaint is that Ms Merrydew had been using an area to the side of her flat, not demised with the lease, as her own and additionally had erected a fence around the perimeter of the entire area used by her which was attached to the structure of the building by fencing posts. Photographs of the area show the fencing in place (see page 137). These actions are agreed by Ms Merrydew who says however that her lease did not prohibit her from using the adjoining terrace and that the fencing had now been taken down. It is clear that Ms Merrydew had been using an area of terrace outside her demise but although this is trespass it is not in itself a breach of any covenant in the lease. The erection of the fence is a clear breach of Clause 3(8)(a) (not to make alterations improvements etc) and the fact that the breach may now have been remedied is irrelevant to the present jurisdiction.

11.4 having a barbecue on the flat roof (clause 3(9)(a)and (b))

Ms Merrydew admits that a fire was lit on the roof terrace, that the fire brigade attended the premises and that occupants of the dentist's surgery on the ground floor were evacuated on account of the smoke. In her defence she said that she was only burning confidential papers in an old barbecue and had placed wood on top of the papers to keep them from blowing away. She insisted that the fire had been contained and was not dangerous. The Tribunal considers that Ms Merrydew may have understated her recollection of the incident. The fact that the fire brigade was called and that the smoke caused an adjacent business premises to be evacuated confirms that, even if the fire did not get out of control the incident was nevertheless serious. As such, and irrespective of the fact that the incident has not been repeated, it does constitute a breach of clause 3(9) (a) (nuisance annoyance) and potentially also clause 3(9)(b) (insurance).

Ms Merrydew says she did not know what the Applicant's insurance policy contained. That may be true, but as a house/flat owner she must have known that the landlord would have an insurance policy which covered fire risks and have realised that lighting a fire in a confined area could be a fire risk which a reasonable insurer might not find acceptable. In the absence of further evidence the Tribunal is reluctant to hold that a breach of sub-clause (9)(b) has occurred.

11.5 blocking the rear access road with vehicles (clauses 3(9)(a) and (o))

The lease gives Ms Merrydew a right 'to pass and repass on foot only for the purpose only of access to and egress from the property ' over the roadway at the rear of the property (second Schedule page 44). While Ms Merrydew admits that cars were parked in the roadway (see photo page 153) she avers that they were not all her cars and that the wording of the clause did not prohibit parking

in the road. In this latter respect she is clearly wrong. The wording of the clause limits the right to on foot *only* (emphasis added) and for access and egress *only* (emphasis added) which precludes use by any other form of transport and any right to park in that area. Ms Merrydew has admitted that her car was or had been parked in the area and she is therefore in breach of the rights given to her under her lease. Although the precise wording quoted is an easement not a covenant the action complained of does constitute a breach of clause 3(9)(o) because her actions have obstructed the access way to the property. Further examples of this behaviour resulted in the refuse collection being missed and the rear door of the dentist's surgery being partially blocked. These actions also constitute nuisance or annoyance under sub clause 3 (9)(a).

11.6 antisocial behaviour (clause 3(9)(a) and (o))

The Applicant asserts that Ms Merrydew was in breach of clauses 3(9)(a) by causing a nuisance or annoyance to neighbours (including the dentist occupying the ground floor premises) and 3(9)(o) by throwing rubbish from the first floor to the ground floor and misuse of the dustbins. Dr Steffin's witness statement describes rubbish being thrown from the roof area to the alleyway on 9 August 2019 and the use of his dustbin by Ms Merrydew and her husband (page 129). It is unfortunate that Dr Steffin did not attend the hearing to present his evidence to the Tribunal and accordingly his statements were not subjected to cross examination. However, Ms Merrydew does confirm Dr Steffin's statement in so far as she admits that goods were removed from her flat and, according to her account, were carefully passed by hand to a person on the ground floor. Given that the flat is a first floor flat accessed by a staircase or fire escape the Tribunal finds it unlikely that goods could have been literally passed from hand to hand but must have been thrown from the first floor to a person hopefully catching them on the ground floor. On balance, Dr Steffin's account of the incident is more likely to be realistic and he describes noise and disruption which would indeed be an annoyance to other occupiers and neighbours in breach of the lease. The Tribunal finds this allegation proved. Ms Merrydew also denied Dr Steffin's allegation about misuse of dustbins. Again, on balance, the Tribunal prefers Dr Steffin's account, bearing in mind that he felt the need to put padlocks on to his own bins to protect them, and finds this allegation also to be substantiated. The Respondents placed great emphasis on Dr Steffin's dislike of them and his alleged campaign to get them evicted. The Tribunal considers that this is an over-exaggerated view of the situation but accepts that there may have been ill feeling between these parties arising in part from the behaviour of the Respondents and their households.

11.7 keeping an unauthorised dog (clause 3(9)(s))

Clause 3(9)(s) of the lease prohibits the tenant from keeping (inter alia) a dog at the property without the landlord's consent. Ms Merrydew admits that she

does keep a dog but pleaded that she had consent in the form of a letter from the landlord addressed to her mother who had been the previous owner of the flat. The letter was written to Mrs Grice and refers to 'a dog' and does not expressly limit the permission to Mrs Grice. The current dog occupant is not the same dog as the one who belonged to Mrs Grice. Although the permission letter does not specifically restrict its use to the addressee only (ie Mrs Grice) or to a specific dog, it is not in the form of a licence and in the Tribunal's opinion, does not act as a permanent variation of the lease. In the Tribunal's view the letter is unlikely to have been intended by the landlord as a permanent waiver of this particular covenant. The Tribunal considers that on balance Ms Merrydew should not have relied on a letter sent many years ago to her mother and should have confirmed with the landlord that it did not object to her keeping her dog at the property. She is therefore in breach of this covenant because she failed to apply for consent.

11.8 arrears of ground rent and service charge

This allegation is not being pursued by the Applicant and is not further discussed here .

11.9 alteration to the windows.

The Applicant's case is that Ms Merrydew had replaced the windows of her flat without obtaining the landlord's prior consent and that the installation had damaged the structure and exterior of the property. The windows and window frames are demised to the tenant under the lease (Schedule 1 page 44). There is no right therefore for the landlord to demand that the tenant obtains its consent for the installation of new windows. The Applicant did not produce any evidence to demonstrate either that there was structural damage to the property or that such damage had been caused by the installation of the new windows. Mr Grice, Ms Merrydew's father, gave evidence in relation to this matter (page 388) and appended to his own evidence a report from Mr Goacher, a surveyor who had concluded that damage to the structure of the property had not been caused by the window installation (page 399). The Tribunal considers that a second-hand report prepared by someone who did not attend the Tribunal to give evidence in person is insufficient to prove whether or not damage had been caused to the structure of the building. The Applicant who made the allegation provided no evidence of damage in support of their contention. Most of Mr Grice's evidence consisted of complaints against the Applicant's management of the property which are not relevant to the issues under discussion. Since the windows in question belong to the tenant there cannot have been a breach of this covenant (clause 3(8)(a) (unauthorised alterations)) and there is no evidence of damage to the structure of the property or of its causation .This allegation is ill founded.

12 In relation to Flat 25 (Ms Hartley) the Applicant alleged

12.1 drug production and cultivation (clause 3(9)(a))

It is admitted by Ms Hartley that the police raid described above (pare 10.1) did take place and that 7 cannabis plants were taken from the premises (pages 289, 386r). Mrs Hartley also admits that her flat was being used by her brother at that time. She said she was residing in Spain but no evidence of her residence in Spain at that or any other period has been produced to the Tribunal. Her brother's brief letter addressed to Counsel on 11 May 2021 (page 386b) admits the offence but says that Ms Hartley was in Gibraltar at the time. He did not give live evidence to the Tribunal. Irrespective of Ms Hartley's residence at the time her actions in allowing her brother to use the property facilitated the criminal act which took place at the premises in breach of clause 3(9)(a) of the lease and for which she bears responsibility. The Tribunal therefore finds her to have been in breach of this provision.

12.2 change of windows and damage caused

The situation here is identical to that pertaining to Flat 17 above. The windows belong to the tenant as part of the demise. No consent for their replacement was required. No evidence of damage to the structure and exterior of the property has been demonstrated, there is thus no actionable breach of covenant in this situation.

13 Under s168 Commonhold and Leasehold Reform Act 2002 the Tribunal must assess whether there has been a breach of covenant on the balance of probabilities. For the purposes of this jurisdiction the cessation or remedy of the breach is immaterial.

14 In their own statements both Respondents made a number of allegations about the state of (dis)repair of the property, asserting that the Applicant had not complied with its own repairing responsibilities in the lease and of a supposed vendetta waged by Dr Steffin against the first Respondent's partner. Neither of these issues is of any relevance to the subject matter of this application.

15 Mr Berlinger gave evidence for the Applicant. He appeared to have little actual knowledge of the property or its condition and relied on the statement given by Dr Steffin, tenant of the ground floor dentist's practice for his information. As noted above, Dr Steffin did not give live evidence to the Tribunal.

16 The Respondents asked the Tribunal to make an an order under s20C Landlord and Tenant Act 1985. Although such an order is infrequently made in favour of a party who has not succeeded in the substantive issues

in the case, in the particular circumstances of this case the Tribunal will make such an order in favour of Clare Merrydew and Kerry Hartley limited in each case to £500. The reason for this order is that the Tribunal considers that the Applicant failed properly to prepare their case by coming to a full merits hearing having briefed counsel only in respect of a postponement application, and wasted the Tribunal's time by not having their only witness available at the start of the hearing.

The Law

17 **Commonhold and Leasehold Reform Act 2002 s 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 a leasehold valuation 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.

Section 20C Landlord and Tenant Act 1985

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge

payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Name:	Judge F J Silverman as Chairman	**Date:**	10 August 2021

Note:

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 by email to rpsouthern@justice.gov.uk.
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.