

**RE: 1 WOODCHURCH RD,
HAMPSTEAD,
LONDON NW6**

ADVICE

Introduction

1. I am instructed on behalf of the owners and/or occupiers of flats 1, 3 and 4 at 1 Woodchurch Rd, Hampstead, London NW6 (“the **Property**”), who are also individual shareholders representing 85% of Woodchurch Management Co Ltd (“the **Landlord**”) in respect of certain issues concerning the relationship between the terms of the lease between the Management Company and a tenant, Mr Mike Barson, (“the **Lease**”) of Flat 2 at the Property and a planning application (App Ref: 2015/7131/P – “the **Application**”), which he has made to Camden London Borough Council (the “**Council**”). Mr Barson is also a member of the Management Company along with the other residents at the Property. However, all the other members of the Landlord object to Mr Barson’s proposals to use an area to the front of the Property (“the **Area**”) as a roof terrace or to install a door to access such area for the purposes of cleaning/maintaining the Area.
2. In particular, I am asked to advise on whether:
 - a) under the terms of the Lease, Mr Barson is required to seek the permission of the other members of the Management Company before he begins to use the Area as a roof terrace or before installing a door to access the Area and making other alterations to the external of the building; and
 - b) the Landlord can withhold such consent.

3. In producing this advice, I have been provided with a copy of the Lease and plan, certain email correspondence between Mr Barson and members of the Management Company, legal advice provided by B.D. Laddie and photographs of the Area.

The Lease

4. Paragraph 7 of Schedule 1 of the Lease ("**Paragraph 7**") provides that:

The right to use as a roof terrace the area edged blue on the plan annexed hereto together with the right to carry out any works in connection with the formation thereof and access thereto subject to first obtaining all necessary local authority consents.

5. This paragraph confirms a right to use the Area as a roof terrace once it has been formed and subject to obtaining the necessary consents. The formation of the roof terrace would require works to ensure it was capable of being used as such because it is unsuitable for such use at the moment. The material local authority consents would certainly include both planning permission and building regulations consent. The Area at the Property currently benefits from neither but Mr Barson has made the Application "*for Enlargement of first floor window to create access to flat roof; installation of stone copings above wall of front bay window (revised application form and description)*".
6. Schedule 4 of the Lease provides for certain covenants by the tenant of the Property. Paragraph 4 of Schedule 4 of the Lease ("**Paragraph 4**") provides that:

Not without the previous consent in writing of the Landlord to make any structural alterations or structural additions to the Flat nor alter the external appearance thereof nor to erect any new buildings thereon or remove any of the Landlord's fixtures provided that the Tenant shall have the right to alter the position of the front door to the Flat subject to such work being carried out within a reasonable period of time and subject to making good the staircase decorations and to connect to any soil or waste pipes serving the Building together with any necessary rights of access thereto for the purpose of carrying out such works and no such consent shall be required for any works modernisation and refurbishment to the Flat which the Tenant or its immediate successors in title may wish to carry out during the period when the Term is vested in them[.]

Applicable Law

7. Paragraph 4 is a qualified covenant and therefore subject to section 19 (2) of the Landlord and Tenant Act 1927, which provides that:

(2) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without a licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.

8. The effect of this provision is that the consent of the landlord required under a qualified covenant such as Paragraph 4 must not be unreasonably withheld where the works envisaged amount to an “improvement” to the property.
9. Improvement is defined as something new for the benefit of the occupier of the premises (see *Morcom v Campbell Johnson* [1956] 1 Q.B. 106) judged from the tenant’s point of view (see *Balls Brothers Ltd v Sinclair* [1931] 2 Ch 325). A mere alteration, by contrast, is defined as any change affecting the structure or form of the premises (see *Bickmore v Dimmer* [1903] 1 Ch 158).
10. A refusal of consent simply on the basis, without more, that the landlord does not consider the alterations to be an improvement is likely to be unreasonable. However, refusal of consent (or conditional consent) to any structural alterations or alterations to the external appearance of the building based on, for example, maintenance issues is likely to be reasonable where the tenant is unwilling to contribute to the reasonable expenses that may arise from the proposed works to form the roof terrace. Consent could also be conditional upon payment by the

tenant of any required costs (such as legal, surveyor's, increase in buildings insurance premium) incurred in connection with the alterations.

Issue a) Does Mr Barson need Consent for the Proposed Works:

11. Paragraph 4 of Schedule 4 clearly requires that Mr Barson seek the Management Company's consent for any proposed structural alteration/work which alters the external appearance of the building. Paragraph 7 does not of itself constitute this consent and therefore Mr Barson must comply with Paragraph 4. Assuming that the planning application proposal and any subsequent applications for building regulations clearance will amount to either a structural alteration or work which will alter the external appearance of the building, Mr Barson will need to seek and obtain the Management Company's consent for the proposal. This is the case notwithstanding his qualified right to use the Area once it is formed as a roof terrace under Paragraph 7.
12. The logical sequence would be that consent is sought before any proposals for works to "form" the roof terrace are applied for. Once the Landlord's consent is obtained, then it would be appropriate for Mr Barson to apply to the Council for the requisite planning and building regulations consents. If these are obtained, then the roof terrace can be formed and Mr Barson will be able to use it as such.

Issues b) and c) Can Consent be withheld, and on what Grounds?

13. In this case, in my view, the presence of Paragraph 7, even absent any objective consideration of whether the proposed use of the Area is an improvement from the tenant's perspective, is likely to mean that the proposed use is an improvement. In such cases, consent must not be unreasonably withheld. Effectively then, while under Paragraph 4, consent must be sought by Mr Barson, it is likely that it would be unreasonable for that consent to be withheld by the Landlord. However, reasonable grounds for refusing consent or conditional consent may arise if the tenant refuses to act reasonably regarding the maintenance and/or other expenses which may arise from works to form the roof terrace. Crucially, the requisite Landlord consent

and the local authority consents must be obtained before the works to form the roof terrace are commenced.

14. The planning issues surrounding the Application are beyond the scope of this advice. However, it should be noted that the Application as currently made may fall short of an application sufficient, if granted, to satisfy the requirements of Paragraph 4. I am instructed that the Area has not been used as a roof terrace thus far and Mr Barson has stated in written correspondence with the other residents / members of the Landlord that he has abandoned plans to use the Area as a roof terrace. Therefore, regardless of the provisions in the Lease, the change by Mr Barson of the Area to use as a roof terrace may amount to a material change of use which, itself, would require planning permission unless it had been used as such for at least four years from the date of the breach. I am happy to advise on this in more detail if required.

Conclusion

15. The Lease requires that Mr Barson seek the Landlord's consent before any works are undertaken to form the roof terrace. In giving or withholding that consent, the Landlord should act reasonably because works necessary for the use of the Area as a roof terrace may be considered improvements.
16. For completeness, I have also considered possible consequences if Mr Barson fails to fulfil the terms of Paragraph 4 and Paragraph 7 of the Lease. Firstly, if Mr Barson fails to seek consent, as he is required to do under the Lease, then the remaining members of the Landlord will be able to bring proceedings for breach of covenant against him. Secondly, if Mr Barson seeks to use the roof terrace before it has been "formed" as a roof terrace then, unless he can show at least four years use, then the Council is likely to issue an enforcement notice against such use of the Area. Lastly, it would be open to the other members of the Landlord, in the absence of any request for consent, to pursue an injunction to ensure that, a) such consent is properly sought and, b) the requisite local authority consents are obtained before the works are carried out.

17. If I may be of further assistance on this, or any other, matter then please do not hesitate to contact me here in chambers.

DANIEL STEDMAN JONES

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