CHI/29UN/LBC/2009/0003

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

FLAT 4, 11 CHURCHFIELDS, MARGATE, KENT CT9 1LS

Applicant: Thanet District Council (landlord)

Represented by: Mr Colin Evans (Assistant Litigation solicitor)

Respondent: Mr Norman Berry (lessee)

Represented by: In person

Date of Hearing: 28 May 2009

Date of application: 9 March 2009

Members of the Leasehold Valuation Tribunal:

Mr M Loveday BA(Hons) MCIArb
Mr R Athow FRICS MIRPM
Ms L Farrier

1. This is an application under s.168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of a covenant or condition in a lease has occurred.

2. The matter relates to a flat 4, 11 Churchfields, Margate in Kent. The applicant is the landlord and the respondent is the lessee. By an application dated 9 March 2009, the applicant sought a determination that the respondent was in breach as a result of a course of conduct which was said to be a nuisance. Directions were given on 13 March and 27 March 2009. A hearing was held on 28 May 2009 and the Tribunal inspected the premises before that hearing.

3. The applicant's Statement of Case dated 31 March 2009 states that the respondent was in breach of the terms of paragraph (m) of the Second Schedule to his lease. The statement relies on "an incident on 18 April 2008" as a result of which the respondent was convicted of the offences set out below and a single further incident on 21 December 2008, further details of which are set out below.

INSPECTION

4. 11 Churchfields forms part of a block of flats c.1970 on a local authority estate close to the centre of Margate. Each element of the block has a separate access controlled street door and staircase. 11 Churchfields is on three storeys with six flats – two on each floor. Flat 4 is situated on the first floor. Flat 6 is on the second floor immediately above the subject premises, with Flat 5 opposite on the same landing.

5. On inspection, there was considerable amount of rubbish in the immediate surroundings of the block, a soiled nappy directly in front of the main entrance and the patios to the front and rear of 11 Churchfields were weed infested and generally neglected. The block itself, which is brick built under a pitched tiled roof, was in fair decorative condition. To the rear, there are signs of historic damp from leaking overflow pipes and a broken window at second floor level. Internally, the common parts of the block were tiled or bare concrete and they were decorated to a basic

standard. The common parts appeared not to have been cleaned recently and there was rubbish throughout. There appeared to be solid floors between the flats.

6. Flat 4 comprised 3 rooms bathroom/WC and kitchen. The bathroom walls had been stripped back to the brick in parts and in other parts there was new tiling. The bathroom suite was also new.

THE FACTS

7. The primary facts are not in dispute. By a 'right to buy' lease dated 8 June 1983, the Council demised the subject premises to Lily Goodwin for a term of 125 years. By clause 3 the lessee covenanted with the Council to observe the covenants in the Second Schedule to the lease. Paragraph (m) of the Second Schedule was a covenant by the lessee:

> *"(m) Not to do or permit any waste spoil or destruction to or upon the demised premises nor to do or permit any act or thing which shall or may become a nuisance damage annoyance or inconvenience to the Lessor or its tenants or occupiers of adjoining premises and in particular of any other flat or to the neighbourhood or whereby any insurance for the time being effected on the demised premises may be rendered void ar voidable or whereby the rate of premium may be increased."*

8. The applicant was registered as proprietor of the lease on 15 January 2008, the register noting that the price paid on 14 December 2007 was £94,500. There is no note on the register of any charge or mortgage.

9. It is common ground that the respondent was convicted by Margate Magistrates Court on 29 September 2008 of:

   (a) On 18 April 2008 at Margate using threatening words and behaviour contrary to s.4(1) and (4(4) of the Public Order Act 1986

   (b) Between 1 December 2007 and 18 April 2008 harassing (without violence) Alys Hemming contrary to s.2(1) and 2(2) of the Protection from Harassment Act 1997.

   On each count the respondent received a concurrent prison sentence of 112 days. He was further ordered not to have any contact with Alys Hemming and her partner

Chainy Rabbit and further that he should not go to flats 5 and 6 at 11 Churchfields – the order remaining in force for 1 year.

THE HEARING

10. At the hearing, the respondent appeared in person. The applicant was represented by Mr Evans, an assistant litigation solicitor with the Council.

11. The applicant's case. Mr Evans stated that it was the landlord's intention to serve a notice under s.146 of the Law of property Act 1925. He relied on eight incidents which he submitted were breaches of paragraph (m) of the Second Schedule to the lease. These were incidents on 25 December 2007, 26 December 2007, 23 January 2008, 9 February 2008, 20 March 2008, 5 April 2008, 18 April 2008 and 21 December 2008. Mr Evans stated that the first seven incidents led to the convictions set out above. The allegation in relation to 21 December 2008 was that on that date the respondent threatened to cut up a neighbour with an angle grinder.

12. The applicant called Lena Crockett, a leasehold management officer, to give evidence at the hearing. Ms Crockett produced a witness statement dated 5 March 2009 which had been served on the respondent. Ms Crockett described incidents related to her "*by the police*" over the Christmas holiday period in 2007. She stated that the police told her that the respondent attempted to force open a neighbour's door on Christmas Day and appeared to be very drunk. She also stated that in the early hours of Boxing Day, the respondent was inside the flat shouting out. She had been informed by police that there were further incidents on 23 January 2008 (loud music), 9 February 2008 (loud drilling and abuse), 20 March 2008 (loud music, abuse and threats to kick in the door or a neighbour) and 5 April 2008 (loud music). Ms Crockett stated that she was informed by police that on 18 April 2008 the respondent was banging on a neighbour's door screaming and shouting that he was going to kill her. Later on the same day, the respondent was found outside another neighbour's door threatening to kill the neighbour with a hammer. This led to the conviction referred to above. Ms Crockett stated that she was also informed by police that on 21 December 2008 the respondent threatened to cut up a neighbour with an angle grinder - the

threat being made in front of the young son of a neighbour. As a result, the respondent was arrested for threats to kill and was given a "*penalty notice*" for this. Ms Crockett produced the following documents:

(a) a warning letter to Mr Berry about noise dated 14 April 2008.

(b) a document from Kent Police Thanet Crime Reduction Unit headed "*Information Disclosure*" giving details of the arrest of the respondent on 18 April 2008 and various court appearances. This document also recorded the conviction on 29 September 2008. The document includes a 'conviction summary' which states as follows:

> *"Following an incident which occurred on 18/04/08 Berry was found guilty and sentenced at court. The circumstances of the incident were as follows: Berry has harassed the I/P since Christmas 2007 by banging on her door and challenging her frequently about noise type issues. Then on the 18th April 2008 Berry on several occasions banged on the IP's door which she ignored as she was scared and later put a postcard through her letterbox with a picture of a man who looked as if he had been shot in the head and was dead lying in a pool of blood. On the reverse of the card were comments like 'your leaking water in the back yard Bitch'. The IP found this very threatening and intimidating. This escalated to the point that Berry saw the IP later in the day and said he wanted to talk to her. She hurried to her flat as she feared for her safety but he followed her. He began to shout and bang on the door. A while later Berry returned to her flat with a hammer and was shouting 'I'll fucking kill her'. When a neighbour came to see what was happening she was told by Berry 'if you want to stick your nose in you can have some of this too.'"*

(c) A log sheet from an unnamed "Amicus Duty Officer" in the applicant's Housing department recording a complaint made on 5 April 2008. This referred to loud music being played at Flat 4, but all further details of the complainant were redacted.

(d) Two "*Neighbour Complaint Incident Diary*" logs dated 3 December 2008 and 21 December 2008 apparently completed by residents. The second of these recorded that:

> *"THE LAD IN FLAT 3 CAME OUT TO SPEAK TO ME. [DELETED] CAME OUT OF HIS FLAT AND CONFRONTED THE LAD THREATENING TO CUT HIM UP WITH AN ANGLE GRINDER IN FRONT OF HIS YOUNG SON WHO WAS TERRIFIED."*

The person who was responsible was named as Mr Berry in Flat 4. Again all further details of the complaint were redacted.

13. Ms Crockett supplemented this with oral evidence at the hearing. She had taken the case over from another colleague Ms Janet Edwards in April 2009, and she had few dealings with the case before then. The sources of the information in the statement were statements prepared for the police prosecution by Ms Alys Hemmings (Flat 6) and Ms Merry (Flat 5), and restricted information provided to her and Ms Edwards by the police. Ms Edwards had first prepared the witness statement while she had conduct of the files and Ms Crockett later made amendments and signed it. The respondent declined to cross-examine Ms Crockett.

14. Mr Evans stated that the allegations in relation to 25 and 26 December 2007, 23 January, 9 February and 20 March 2008 were based on the restricted information supplied by the police to the local authority. As far as he was aware, there was no direct evidence of these incidents because the victims had not wanted their names and addresses to be disclosed, and the Council did not want to disclose their details either. There was no hearsay notice under the Civil Evidence Act 1968. In closing, Mr Evans accepted that his evidence was all hearsay. Most of the evidence was supported by the certificate of conviction. In relation to the events of 21 December 2008 he was unable to produce the "penalty notice" referred to by Ms Crockett or to say exactly what it was. Mr Evans additionally submitted that the cumulative effect of the allegations and the one certificate of conviction confirmed the veracity of the evidence set out in the application.

15. The respondent's case. The respondent gave evidence and made submissions. He relied on letters dated 27 October 2008 and 19 February 2009 which set out his case. He produced witness statements made under section 9 of the Criminal Justice Act 1980 by Ms Barbara Merry (dated 19 April 2009) and Ms Alys Hemmings (undated). These were apparently the statements referred to by Ms Crockett which had been made for the purposes of the criminal prosecution. The statements gave details of the

incidents in Christmas day 2007, Boxing day 2007 and in particular the events of 18 April 2008.

16. The respondent produced a written response to the statement of Ms Crockett, a commentary on the statements of Ms Merry and Ms Hemmings and a written note about Mr Rabbits (Ms Merry's partner). To summarise these, the respondent stated that he had moved into the flat in December 2007 and had since had nothing but trouble with neighbours which included loud banging, begging, criminal damage, abuse, drunkenness and so on. On 25 December 2007 he had visited Ms Hemmings because of the noise of hammering and chiselling. She denied knowledge of any noise, although he could see a vacuum cleaner and rubble on the landing. The respondent gave evidence of incidents in January 2008 (when Ms Merry had pulled faces at his friend), 23 January 2008 (when he played the guitar), 9 February 2008 (when Alys Hemmings complained about him cutting up an old bath in the evening and she had become abusive), 14 February 2008 (when water had come through his ceiling from flat 6 above), 20 March 2008 (when he was woken by banging and Alys Hemmings had come up to complain), 18 August 2008 (when a glass panel to his door had been broken by someone at flat 6), 25 October 2008 (when he had been threatened by Mr Terry Chittenden from flat 3). In respect of the two main incidents, the respondent stated that on 18 April 2008, he was woken early in the morning by banging on his ceiling. He had climbed on a chair and banged on the ceiling – when Alys Hemmings had shouted "*fuck off*" from above. He admitted he had put a picture through her letter box which a friend had printed the night before. He then gave an account of the events in the evening which led to the prosecution. He admitted shouting through the letterbox of flat 6 and banging on the landing walls with a hammer. At some stage, Ms Merry had shouted that "*we are going to get rid of you*". The police came later in the evening. After being arrested, the trial of the respondent's case was delayed as a result of Ms Hemmings' illness. He had been unable to recover diaries and other documents which had been seized by the police and was unable to have access to the advanced disclosure which had been sent to his flat. As a result, the respondent was unable to prepare a defence or get a fair trial. On 29 September 2008, he therefore agreed a "*deal*" with prosecutors for him to be released the following day. He also

suggested that he should not speak to Ms Merry again, so this was included in the court order. As far as 21 December 2008 was concerned, Mr Chittenden from flat 3 had been peering through his letterbox. When challenged, Mr Chittenden shouted abuse. Ms Merry was not telling the truth about what had happened.

17. The respondent supplemented this with oral evidence at the hearing. He stated that on 25 December 2007 he met Ms Merry for the first time. There had been loud banging from above and the noise became unbearable. He went upstairs and knocked on the door of no.6 and spoke to Alys Hemmings – he had to shout above the noise. The police attended and asked the respondent to keep the noise down. He had not been drunk and had not "banged" on the door – he had knocked using the letterbox. It appeared that on that day someone in Flat 6 had been breaking up the thermoplastic floor tiles to the floor of the flat using a "Kango" hammer drill and that that person was installing laminated flooring.

18. The following day, the respondent had had to shout upstairs because of the noise – although the respondent also said he was not even sure he had been in his flat on Boxing Day. On 23 January 2008, he had been playing his electric guitar in the flat. However, he couldn't hear himself think because of the banging from Flat 6. He did not remember anyone banging on his door to complain. On 9 February 2008, the respondent had been cutting up an old iron bath with an angle grinder. He had overrun on the work because he ran out of cutting disks. At about 8.10pm Ms Hemmings knocked on the door to complain that the children needed to sleep. She shook cigarette ash on his floor and was abusive. The respondent had stopped work as a result. On 20 March 2008, he had been woken at 5.10am and put up with noise all day. Banging started again in the evening and he had put on some music. Ms Hemmings banged on his door swearing at him – so he had turned off the music. On 5 April 2008, he had no record of anyone complaining. As to the incident on 18 April 2008, the respondent admitted that he had pleaded guilty in court on 29 September 2008. He was represented by solicitors and made a deal with the Crown Prosecution Service. There was "no truth at all" in the matters set out in the summary of conviction sheet. He was the person who was being harassed. In relation to 21 December 2008,

the respondent stated that Mr Chittenden was someone who persistently begged for money and cigarettes, and who often got drunk and damaged doors in the property. On that day he saw Mr Chittenden peering through his letterbox shouting and swearing. He seemed drink or under the influence of drugs. Mr Chittenden threatened to take the respondent downstairs for a fight. A long time later two policemen came to his door and grabbed him. The respondent had never spoken to Mr Chittenden about an angle grinder. Ms Merry wanted to get rid of him and made this allegation up. He was arrested and spoke to a duty solicitor who told him either to go to court the next day or pay a fine. He was advised that the fine was not an admission of guilt and as a result he "took the notice".

19. When cross examined by Mr Evans, the respondent accepted that the police had on occasions asked him to keep the noise down. He had also played the electric guitar in the flat and had cut up the bath with an angle grinder. These incidents did occur. As for the sentence of imprisonment, he was not really sentenced to 112 days. This was carefully calculated to result in the respondent being released immediately, taking into account the time spent in custody awaiting trial. It "had to look that way to avoid any compensation being paid to me for the time in custody". As to the penalty on 21 December 2008, he accepted this but made no admission of guilt.

DISCUSSION

20. The Tribunal does not consider that there are any issues of law arising from either s.169 or from the terms of the lease. The words "*nuisance damage annoyance or inconvenience*" in paragraph (m) of the Second Schedule are wide enough to encompass the allegations made by the applicant, and if made out they are breaches of terms of the lease.

21. As far as the breaches are concerned, the applicant's statement of case of 31 March 2009 relies on only two alleged breaches of covenant, namely the incidents on 18 April and 21 December 2008. However, the respondent did not object to consideration of each of the eight incidents mentioned above.

22. As far as the allegations in relation to 25 December 2007, 26 December 2007, 23 January 2008, 9 February 2008, 20 March 2008 and 5 April 2008, the applicant's evidence is hearsay. Indeed, it is largely second or third hand hearsay. Ms Crockett gave oral evidence to the Tribunal which (1) summarised witness statements given by others and (2) summarised conversations between her (unnamed) police officers about their conversations with (unnamed) witnesses and (3) summarised conversations between her and Ms Edwards about conversations between Ms Edwards and (unnamed) police officers about their conversations with (unnamed) witnesses. In each case these related to serious criminal allegations against the respondent which were disputed. Although the Tribunal has sympathy with a local authority which wishes to protect the sources of complainants about alleged anti-social behaviour, it must approach such evidence with a great deal of caution. No formal application was made to adduce hearsay evidence under the Civil Evidence Act 1968 in respect of any of the statements and the respondent was given no opportunity to test the evidence by cross examination. The letter of 14 April 2008 and the AMICUS log were of limited assistance (the latter was heavily redacted) and the makers of those documents were not called. A tribunal must necessarily attach limited (if any) weight to evidence of this nature unless it is not supported by other admissible material.

23. Similar comments can be made about the quality of the evidence relating to the alleged incident on 18 April 2008. There are of course also the statements from Ms Merry and Ms Hemmings under the Criminal Justice Act 1967 – although these statements were put in by the respondent. Although there is more direct evidence of the alleged breaches of covenant, the two statements still suffer from the difficulty that the makers were not made available for cross-examination at the hearing. Again, insofar as any of these statements are admissible, a tribunal must necessarily attach limited (if any) weight to them where they are not supported by other material.

24. Different considerations apply to the 'information disclosure' document. Section 11(1) of the Civil Evidence Act 1968 is as follows:

11 Convictions as evidence in civil proceedings

11(1)*- The fact that a person has been convicted of an offence by or before a court in the United Kingdom or by a court martial there or elsewhere shall (subject to subsection (3) below) be admissible in evidence for the purpose of providing, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty of otherwise and whether or not he is a party to the civil proceedings; but no convection other than a subsisting one shall be admissible in evidence by virtue of this section.*

(2)In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere—

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

The Act applies to leasehold valuation tribunals: see s.18(1)(a). The respondent accepts that he has been convicted for the offences set out above and in accordance with s.11(2)(a) he is therefore taken to have committed that offence unless the contrary is proved.

25. Although the respondent denies committing the offences, the tribunal finds that the respondent has not discharged the burden of showing he did not do so. No satisfactory explanation has been given for the plea of guilty, at a time when the respondent was represented by solicitors. Moreover, the respondent's own evidence admits a number of matters relied on the by the applicant, such as that he played an electric guitar in the flat on 21 January 2008 and cut up a bath with an angle grinder on the evening of 9 February 2008.

26. The issue then turns to what facts the Tribunal may find as a result of the conviction. Although the Information Disclosure document provided by the applicant is not an *"information, complaint, indictment or charge-sheet"*, s.11 expressly extends to other documents provided they are *"admissible as evidence of the conviction"*. The Tribunal

finds that this is such a document and it is therefore satisfied that it may accept the facts set out in the "Conviction Summary sheet". The Tribunal rejects the respondent's evidence insofar as that evidence is inconsistent with the facts in the sheet. This does not mean that the Tribunal rejects the entirety of the respondent's oral and written evidence, since his evidence is helpful in identifying individuals who are not specifically identified in the conviction summary sheet. Based on that sheet, the Tribunal therefore finds as follows:

(a) The respondent harassed Ms Hemmings between 25 December 2007 and 18 April 2008 by banging on her door and challenging her frequently about noise type issues.

(b) On 18 April 2008 the respondent on several occasions banged on the door of Ms Hemmings at Flat 6.

(c) He later put a postcard through her letterbox with a picture of a man who looked as if he had been shot in the head and was dead lying in a pool of blood. On the reverse of the card were comments like "*your leaking water in the back yard Bitch*".

(d) Later in the day the respondent began to shout and bang on the door of Ms Hemmings.

(e) A while later the respondent returned to her flat with a hammer and was shouting '*I'll fucking kill her*'.

(f) When Ms Merry at Flat 5 came to see what was happening she was told by the respondent "*if you want to stick your nose in you can have some of this too.*"

These matters all amount to breaches of paragraph (m) of the Second Schedule to the lease.

27. As far as the alleged incidents on 21 December 2008 are concerned, the Tribunal treats the hearsay evidence of Ms Crockett with similar caution. Once again, these are serious allegations and the respondent has not been given any opportunity to cross examine the primary witnesses of fact. There is no evidence of this event at all under s.11 of the Civil Evidence Act 1986 or no witness statements made under s.9 of the Criminal Justice Act 1967. The only written evidence is the heavily redacted

"Neighbour Complaint Incident Diary", but the maker of this document is not identified and was not before the Tribunal. Unlike the earlier incidents, Ms Crockett's evidence on this point is not supported by any certificate or record of a conviction. Indeed the very nature of the *"penalty notice"* which the respondent admits he signed is unclear. It is not known whether this was a bind over, caution or fixed penalty notice. In any event, the respondent states that he made no admission in signing this document and this is not challenged. Without any proper corroboration of the allegations made by the applicant, the Tribunal therefore finds that the applicant has not discharged the burden of proving that the respondent breached the terms of his lease on 21 December 2008.

DECISION

28. The Tribunal finds, albeit with some reservations, under s.168 of the Commonhold and Leasehold Reform Act 2002 that the respondent was in breach of the terms of paragraph (m) of Schedule 2 to his lease. The breaches are set out in paragraph 26 above.

FURTHER OBSERVATIONS

29. The Tribunal's function under s.168 is to decide on the balance of probabilities whether there has been a breach of covenant. Although s.168 is a precursor to possible forfeiture proceedings (and the consequences of forfeiting a lease may be serious for the lessee), these do not directly affect the question of whether there has been a breach or not. Furthermore, the Tribunal is not directly concerned with the particular circumstances of the breach or breaches, merely with whether a breach has in fact occurred.

30. Nevertheless, a number of matters were raised during the course of the hearing which may be material to any application for relief against forfeiture in future proceedings:

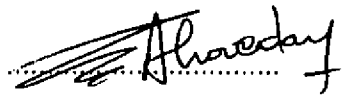
    (a) The applicants' evidence was unsatisfactory in a number of respects and there was a great deal of conflicting evidence given at the hearing. For example, the only witness statement relied on the applicant was prepared and signed by the witness on 5 March 2009 – some weeks before that officer

took over the files in the case. The Tribunal's decision above relies entirely on the fact of the conviction rather than on any other evidence put forward by the applicants.

(b) The respondent was unrepresented at the hearing and it was clear that it was most unlikely he had taken legal advice on the case. It was unclear whether he was aware of the significance of this case, until the applicants' representative stated at the outset that it intended to serve a s.146 notice and forfeit the respondent's lease.

(c) The respondent's evidence was that, having only just moved into the flat, he was subjected to a large amount of noise caused by the occupiers of the flat above including the use of heavy building equipment at antisocial hours. The respondent's evidence that this occurred on Christmas Day was not challenged with any direct evidence. This appears to have been the initial cause of the complaint to the residents in the flat above.

(d) The respondent's suggestion that the tenants of Flat 6 replaced their flooring with wood laminate was also not challenged. It should be noted that clause 1 of Schedule 3 to the respondent's lease includes a requirement for the lessee to keep all floors of the flat (except kitchen and bathroom) suitably carpeted. Insofar as it is material to any of the issues before the tribunal or the court, the Tribunal finds that the replacement of carpets with such flooring in Flat 6 would have greatly increased noise transmission between flats 4 and 6 and contributed to the noise complaints made by the occupants of the two flats. Furthermore, it appears that the applicants took no steps to deal with the removal of only effective sound insulation between the two flats.



Mark Loveday BA(Hons) MClArb
Chairman
03 July 2009