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Case references: LON/00AX/LBC/2011/0010 and LON/00AX/LBC/2011/0016

DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Properties:	(1)	15 & 16 St Mark's Heights, 2 Lamberts Road, Surbiton, Surrey.
	(2)	17, St Mark's Heights, 2 Lamberts Road, Surbiton, Surrey.
Applicant:		Daleday Property Management Limited
Respondents:	(1)	Lackner Properties Limited
	(2)	Josef Vasyl Lackner
Application dates	(1)	31 January 2011
	(2)	15 February 2011
Date heard:		1 April 2011
Appearances:		For the applicant; Mr L Goodship, lessee of flat 11 and Director Mr K Miers, lessee of flat 18 and Director
		For the Respondents
	(1)	Mr J Lackner of Lackner Properties Limited
	(2)	Mr J V Lackner
Tribunal		Mr D D Banfield FRICS Mr A Ring
Date of decision:		19th April 2011

Summary Decision

That the following breaches have occurred;

Clause 7(a) of part I of the sixth schedule	Flat 15 only.
Clause 5 (e) of part II of the sixth schedule	Flats 15 and 16
Clause 5 (i) of part II of the sixth schedule	Flats 15, 16 and 17

Background

1. These are two separate landlord's applications under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for determinations that breaches of covenants or conditions in the respondents' leases have occurred.

2. Both applications allege similar breaches of covenant and the Respondents are related. Directions were therefore issued on 17 February 2011 that both cases should be heard together.

3. Other directions were made in respect of the preparation of bundles by both applicant and respondent.

4. An inspection of the properties was neither requested by the parties nor considered necessary by the tribunal. It is understood however that the flats form part of a purpose built block of 20 constructed by Martin Grant Homes Limited in 2003. There are said to be 18, 2 bed units, 1 of 3 beds and 1 of 1 bed.

5. The tribunal were provided with a copy of an underlease between Daleday Property Management Limited (the Lessor), Martin Grant Homes Limited (the Developer) and an un-named lessee which was said to be common to all units.

6. The relevant clauses of the lease referred to are as follows;

The sixth schedule

Part 1

7 (a) *The Lessee shall not make any alteration in the Demised Premises without the approval in writing by the Lessor to the plans and specifications thereof and shall make those alterations only in accordance with such plans and specifications when approved and in connection with any application for such consent to pay the proper fees of the Lessor and its Architects Surveyors and solicitors in connection therewith The Lessee shall at the Lessees own expense obtain all licences planning permissions and other things necessary for the lawful carrying out of any such alterations and shall comply with all byelaws regulations and conditions applicable generally or to the specific works undertaken*

14 *Neither the Demised Premises nor any part thereof shall be used for any illegal or immoral purpose nor shall any trade or business be carried on there but the Lessee shall use the same for the purpose of a single private residence only*

18 *The Lessee shall not during the term hereby created*
(I) assign underlet or part with possession of part only of the Demised Premises
(ii) assign this Underlease to any person or to a limited company who does not at the same time become the holder of the Lessees share in the Lessor
(iii) during the last seven years of the term hereby created assign underlet charge or part with or share the possession or occupation of the Demised Premises or any part thereof without the previous written consent of the Lessor such consent not to be unreasonably withheld

Part II

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(e) shall not permit any singing or the playing of any musical instrument or the use of any gramophone wireless television or recording instrument so as to cause or in the opinion of the Lessor be likely to cause a nuisance or annoyance to any other occupiers on the Property

(l) shall not leave any perambulator bicycle or other vehicle (except for cars which shall be in the car parking spaces provided) nor deposit or permit to be deposited any goods parcels cases refuse litter or any other thing in or upon the staircases passages or any other part of the Property nor to do

or suffer to be done any act or thing on the Property or any part thereof to the annoyance or injury of the Lessor or other tenants of the Flats or of adjoining premises

7. At the start of the hearing Mr J Lackner said that he and his son Mr J V Lackner were also Directors of the Applicant Company, had no prior knowledge that these applications had been made and therefore questioned their validity. The Chairman explained that these were not matters within the jurisdiction of the tribunal and such disputes would have to be argued elsewhere.

8. It was a therefore agreed to proceed taking evidence both for and against each alleged breach separately.

9. Clause 7(a) of part I of the sixth schedule (not to make alterations)

   This refers to Flat 15 only.

   Mr Miers compared the floor plan at p.106 of the bundle which he said was obtained from a letting agent's website with the original sales particulars plan of flat 15 on page 104. he said it clearly showed that the kitchen/living room had been divided to form an extra bedroom. He also referred to a letter from the freeholder (page 76) referring to unauthorized alterations in an unidentified flat which he believed to be flat 15.

10. Mr J Lackner said that the alterations was a light weight partition to provide private study space and that someone from Martin Grant Homes had visited the flat but had not raised any objection. He accepted that no consent had been obtained in writing as required under the lease.

11. <u>Decision</u>

The Tribunal determines that alterations have been carried out without written consent and that Clause 7 (a) of the lease for Flat 15 has therefore been breached.

12. <u>Clause 14 of part I of the sixth schedule (illegal or immoral use)</u>

This refers to Flat 16 only.

Mr Miers referred to a police raid on the flat in 2009 relating to possible drug offences and incidences of mail theft from the letter boxes in the common hallway resulting in cases of identity theft. He referred to a series of photographs which he considered demonstrated that residents of flat 16 were involved in some manner. He said that initially Mr J V Lackner identified some of those shown in the photographs as his tenants but later refused to confirm the same to the police. He also made reference to occasions when it had been noticed that an extension lead had been run from the flats' common supply into a flat which was presumably using electricity at the other lessees' expense.

13. Mr J Lackner said that whilst the man in the photograph may have looked like one of the flat's tenants his son was not certain enough to make a positive identification. The police raid had been part of a larger operation but in any event had not resulted in any prosecution. In any event the tenancy was not renewed and the tenants vacated in July 2009.

14. <u>Decision</u>

Allegations have been made that illegal activities have taken place in the flat contrary to Clause 14 of part I of the sixth schedule to the lease. Despite police investigations no prosecutions have been made and the tribunal does not accept that the evidence presented is sufficient to prove that such a breach has occurred.

15. Clause 18 of part I of the sixth schedule (underletting of part only)

Mr Miers said that all three flats were used as "multiple occupation properties" although flat 16 had been returned to single use in June or July 2010. He had not been able to obtain copies of the letting agreements but referred to a witness statement from Lisa Brand of letting agents Humphrey and Brand (page 75) In this Ms Brand described a visit to Flat 15 during which Mr J V Lackner told her that the flat was let to individual sharers or students all sharing the sitting room, kitchen and bathrooms and that he wanted to let the flat on a licence basis.

Mr Miers also referred to an internet advert from letting agents Bonums (page107) advertising what he said was clearly Flat 15 as being "suitable for couples sharing" and "Suits students or sharers" He said that in the event it was Foxtons who eventually let the flats. He said that the advertised rent of £2,500 was way in excess of the market rent and could only be explained by the flat being let on a room by room basis at what is accepted as the "Student room rate" for the area.

Mr Miers then referred to a conversation he had had with a tenant during a visit he had made to Flat 17 in which, it was said that the two bedroom flat was being occupied under three tenancies at rents of £600, £550 and £450 per month inclusive of utility bills respectively.

Mr Miers then referred to an internet advert from "Estate Agent.co.uk" advertising a room in Flat 17 with the contact being Mr Josef Lackner. He also referred to an internet advert placed by a tenant of one of the flats seeking a tenant for a "double bedroom" with use of kitchen etc.. at £504 per month inclusive of utility bills.

Mr Miers accepts that whilst there would be no objection to a group of friends taking a tenancy together this is not the case. Occupiers unknown to each other are "assembled" by the letting agents and then

offered a property to share. As such it did not form a single letting as required under the lease.

16. Mr J V Lackner said that the advert relating to a room in Flat 17 was not current and was at a time when he was in occupation himself. He denied that the evidence given in the witness statement from Ms Brand was correct and said that at the time referred to he was living there. He said that all the flats were let on single tenancy agreements but had no idea how Foxtons advertised for tenants or whether they received rent individually or for the flat as a whole. He said that he received the rent for Flat 17 himself and that except for a limited time in the past when each tenant paid separately a single rent payment was received.

    With regard to the advert placed by one of his tenants he said that when one occupier dropped out the remaining tenants advertised for a replacement to help pay the rent due.

17. Decision

    We acknowledge the difficulty in which the Applicant is placed in trying to demonstrate that the flats are let as individual rooms without access to the tenancy agreements and evidence from the letting agents. The Applicants acknowledge that whilst a letting to a group of friends is likely to be acceptable, lettings to groups of individuals not formerly known to one another is not. The difficulty is in showing which option has occurred here. The Respondents have assured us that the Flats are let on single tenancy agreements and that rents are not remitted if one of the group leaves and it is for this reason that tenants will advertise for a replacement to join the group. We are told that Foxtons advertise for tenants and then refer the offers to the Respondents to approve the references. We are told that the Respondents are unaware as to the make up of the group and only really consider their ability to pay the rent agreed.

The internet advertisements referred to for single tenants may well be the existing tenants simply seeking a replacement to join their tenancy and as such is not evidence of multiple letting. The Bonums advert refers to suiting students or sharers. Neither of these terms is incompatible with a group of friends taking on a tenancy. Bonums in fact did not achieve a letting and the terms upon which Foxtons advertised the properties are unknown to us. As such we cannot find sufficient evidence to show that there has been a breach of Clause 18 of part I of the sixth schedule.

18. Clause 5 (e) of part II of the sixth schedule (not to make noise)

Mr Miers referred to complaints received from his tenants and others in respect of noise during the night emanating from all of the flats. Although Flat 16 was now let to a couple in the past it had, like flats 15 and 17 been let to students who had late night parties and generally kept unsociable hours. He referred to a letter of complaint (page 89) and an exchange of emails between a lessee and a tenant of flat 15 (pages 94-96 and 98a) in which it was acknowledged that there had been disturbance caused by a resident of the flat.

19. Mr J Lackner said that it was acknowledged that there had been problems with noise in respect of Flats 15 and 16. With his help however the other tenants of Flat 15 had evicted the troublemaker. Prior to the current letting the flat had been let to Greek students whose lifestyle was to stay up late. With regard to Flat 16 he had decided not to renew the tenancy in July 2009 and there had been no problems since.

20. Decision

Whilst it is accepted that the Respondents may have carried out measures to mitigate the problem they also clearly acknowledge that a problem with noise has existed in the past at least. As such the tribunal

finds that in respect of Flats 15 and 16 there have been breaches of Clause 5 (e) of part II of the sixth schedule to their respective leases.

21 Clause 5 (i) of part II of the sixth schedule (not to leave items on the staircase, landings etc.)

Mr Miers explained that all three flats were situated together on the second floor and with a common landing. He referred to photographs showing a bicycle, dismantled bed and shopping trolley left on the landing and parts of a wardrobe stacked in the parking space for Flat 16. He said that after advising Mr J V Latner of the problem the trolley that had been acquired by the tenants of Flat 15 had been moved but then left outside the block. The other items from Flat 17 were as far as he knew still there.

22. Mr J V Lackner said that he had dealt with matters as soon as they had been advised to him but that the bicycle was there as the tenant had no access to the bike shed, the code of which had been changed. He also said that when he had seen dismantled furniture he had asked for it to be moved and it was now in the parking area.

Mr Miers said that the code hadn't been changed since 2009 when the lock was fitted, the letting agents simply hadn't asked for it.

23. Decision

Once again it is clear that when advised, the Respondents have made some effort to get their tenants to remove items from the landings. However, it is also clear that such incidents have occurred and that tenants from each of the flats has been involved. We find therefore that breaches of Clause 5 (i) of part II of the sixth schedule have occurred in respect of all three flats.

CHAIRMAN: D D Banfield **(signed electronically)**

DATE: 18th April 2011