FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LBC/2015/0021**
Property	:	**701 Courtenay House, 9-15 New Park Road, London, SW2 4DP**
Applicant	:	**Laxcon Developments Ltd**
Representative	:	**Gisby Harrison, Solicitors**
Respondent	:	**St John Guy Rogers**
Representative	:	**In person**
Type of Application	:	**Application under section 168(4) Commonhold and Leasehold Reform Act 2002 for order that a breach of covenant in lease has occurred**
Tribunal Members	:	**Tribunal Judge Lesley Smith** **Mr C Gowman MCIEH** **Mr C Piarroux, JP, CQSW**
Date and venue of Hearing	:	**Thursday 14 May 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**8 June 2015**

DECISION

Decisions of the Tribunal

(1) The Tribunal refuses the Respondent's request for an adjournment

(2) The Tribunal determines that the Respondent is not in breach of paragraph 25.1 of Eighth Schedule Part I to the Lease by subletting the whole or part of the Property without prior written consent of the Lessor

(3) The Tribunal determines that the Respondent is in breach of paragraph 1 of the Eighth Schedule Part II to the Lease by allowing the Property to be used "otherwise than as a private residence for occupation by a single household" and for carrying out a trade, business or profession from the Property.

(4) The Tribunal determines that the Respondent is in breach of paragraphs 6 and 8 of the Eighth Schedule Part II to the Lease by allowing or suffering the Property to be used for "any act or thing which shall or may become a nuisance damage annoyance or inconvenience to the Lessor or to the lessors or occupiers" of other properties in the building in which the Property is situated.

The application

1. The Respondent is the lessee of a property at 701 Courtenay House, ("the Property") pursuant to a lease dated 21st November 2003 ("the Lease"). The Property is a 3 bedroom penthouse on the seventh floor of a building at 9-15 New Park Road, London SW2 ("the Building"). The Applicant is the lessor of the Property. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent is in breach of various covenants in the Lease. In particular the Applicant asserts that the Respondent has sub-let out part or whole of the Property, has used the Property otherwise than as a private dwelling for occupation by a single household, has carried out a business from the Property and has caused a nuisance to other occupiers by reason of his activities, in particular noise nuisance caused by those who he has allowed into the Property.

2. The relevant legal provisions are set out in the Appendix 1 to this decision. The relevant clauses of the Lease are set out in Appendix 2 to this decision.

The hearing

3. The Applicant was represented by Ms Cullen of Counsel and the Respondent appeared in person. The hearing was also attended by Mr Moss, property manager, Mr McCarthy, Mr Hodson and Miss Woolf who reside in other flats in the Building.

4. By a letter received on 6 May 2015, the Respondent sought a postponement of the hearing. That request was refused. He repeated the application to adjourn the hearing at the start of the hearing. The basis of his application was that he had received notice of the application late in the day – on 24 March 2015 – and had been unable to secure the services of Counsel for the hearing. He considered that, in particular, the issue in relation to subletting was a legal one which required legal representation. He had written to solicitors following receipt of the application, on about 30 March 2015. He had consulted with the solicitors that same week but he was told that they would be unable to secure Counsel for a hearing on 14 May. He did not receive the bundle for the hearing until 14 April although he accepted this had been sent on 9 April as directed by the Order for directions. He also sought an adjournment on the basis that he was on medication for anxiety and had gone into lock down following receipt of the application which had delayed him taking action after he had met with the solicitor and was the reason he had not sought an adjournment earlier.

5. Ms Cullen objected to the application. A significant period had passed since the Respondent admitted having received notice of the application. She accepted that he was in person and that the Applicant was legally represented but submitted that this was not a complex matter and in any event it ought to have been possible to find representation within the period of about 6 weeks from when he first consulted solicitors. There was no evidence of the medical condition asserted. The original written request to postpone had not mentioned this condition. The Applicant intended to call 3 witnesses, 2 of whom had to take time off work to attend. It would be unfair to adjourn. Whilst she accepted that in particular the subletting issue was one of law, this was a matter for the Tribunal to determine. The Tribunal pointed out that in her skeleton argument, she sought to preclude the Respondent from giving evidence on the basis that the Applicant would have had no prior notice of that evidence and asked whether this might not prejudice the Respondent. She accepted that, provided this did not extend to factual matters which the Applicant could not investigate, she was willing to concede that the Tribunal could hear submissions from the Respondent.

6. Following a short deliberation, the Tribunal refused the request for an adjournment. The Respondent accepted that he had notice of the application at some time in mid-late March. He took legal advice soon after but was told that there was inadequate time to get legal representation for the hearing. The Tribunal finds that somewhat surprising given that this was 6 weeks' notice but has no reason to doubt what the Respondent said is true. However, the Tribunal accepted Ms Cullen's submission that this was not a complex matter and the Respondent had represented himself at a previous hearing in the Tribunal also for breach of covenant. The Tribunal also accepted that the Respondent had received the bundle a couple of days later than in the normal course of post but it appeared that the bundle was posted

on the date provided for in the directions. The bundle had been received in mid-April in any event and that still gave the Respondent time to prepare for the hearing or apply for a postponement at that stage. In fact, he did not write to the Tribunal until early May. The Tribunal noted what was said by the Respondent about his medical condition but this was not supported by any medical evidence. The Tribunal indicated that it would allow the Respondent to make submissions notwithstanding the lack of prior written evidence and might be prepared in the circumstances to give him more latitude than would be normal to give evidence notwithstanding the lack of a written statement provided that this did not prejudice the Applicant.

The background

7. The Property is a 3 bedroomed penthouse flat on the seventh floor of the Building. The Building is a block of flats converted from an office building in or about 2003. The Tribunal was not asked to inspect the Property and in light of its determination below did not consider it necessary to do so.

8. By a decision dated 21 January 2013, the Tribunal had determined that the Respondent had breached the same covenants in the Lease as now alleged. However, that decision had been made following admissions made by the Respondent and Ms Cullen accepted that the only relevance of that decision was as "similar fact" evidence. She accepted that although a section 146 notice had been served after that decision, it had not been pursued as the Respondent had indicated that he was trying to sell the Property. There had been no Court proceedings following that decision. The Respondent indicated that the situation was different from 2013 since he had been actually subletting rooms at that time whereas this was no longer the position. He did not therefore make any admissions as he had done on the last occasion.

The issues

9. The issue for the Tribunal's determination is whether the Respondent has breached certain covenants in the Lease, namely paragraph 25.1 of the Eighth Schedule Part I and paragraphs 1,6 and 8 of the Eighth Schedule Part II to the Lease.

The Tribunal's determination

10. The Tribunal determines that the Respondent is not in breach of paragraph 25.1 of the Eighth Schedule Part I to the Lease by subletting the whole or part of the Property without prior written consent of the Lessor.

11. The Tribunal determines that the Respondent is in breach of paragraph 1 of the Eighth Schedule Part II to the Lease by allowing the Property to be used "otherwise than as a private residence for occupation by a

single household" and for carrying out a trade, business or profession from the Property.

12. The Tribunal determines that the Respondent is in breach of paragraphs 6 and 8 of the Eighth Schedule Part II to the Lease by allowing or suffering the Property to be used for "any act or thing which shall or may become a nuisance damage annoyance or inconvenience to the Lessor or to the lessors or occupiers" of other properties in the building in which the Property is situated.

Reasons for the Tribunal's determination

13. The same factual background is relied upon by the Applicant in relation to all breaches. The Applicant asserts that the Respondent is subletting rooms within the Property by advertising on various websites including Air BNB, Prime Location and Holiday Lettings, contrary to paragraph 25.1 of the Eighth Schedule Part I to the Lease. Those who are renting those rooms are using the Property for noisy and at time riotous parties which involves the playing of loud music after the hours of 11pm (contrary to paragraph 8 of the Eighth Schedule Part II to the Lease) and is causing noise nuisance and annoyance to other occupiers in the Building (contrary to paragraph 6 of the Eighth Schedule Part II to the Lease). By the letting of rooms and separately to whether this amounts to a breach of paragraph 25.1, the Applicant asserts that letting rooms in this way amounts to use of the Property "otherwise than as a private residence for occupation by a single household" and that the Respondent is carrying out a trade or business from the Property. The Applicant also asserts that the Respondent is letting out the Property to other commercial agents for photo shoots which lends support to him using the Property as a trade or business. This constitutes a breach of paragraph 1 of the Eighth Schedule Part I to the Lease.

14. A schedule of the incidents relied upon by the Applicant is contained in Ms Cullen's skeleton argument. The Tribunal also received witness statements from Richard McCarthy and Dominic Hodson of flats 607 and 604 respectively and both gave evidence. The Tribunal also received a witness statement from Sarah Smith who lives at flat 702 Courtenay House, the penthouse opposite the Respondent. She did not give evidence but the Tribunal has read and taken into account what she says, particularly since the Respondent did not dispute the factual matters raised in that statement. The Tribunal also received a witness statement from Ashley Tilley from flat 601 which is directly below the Property. He did not give evidence but, again, there was no dispute in relation to the facts alleged. The main disputes in relation to the evidence was whether the events complained of were regular or "one off", whether the Respondent was responsible and a minor issue in relation to an incident when a party goer had escaped on to the balcony of Mr McCarthy. The Respondent believed that this had happened in relation to the balcony of another flat but did not dispute that the event had occurred and little turns on that dispute.

15. Although the schedule relied on "numerous occasions" when there had been noise and other disturbances caused by parties in the Property, the main allegations focussed on 2 particular incidents on 6 February 2015 and 1 March 2015. On 6 February, Mr Hodson called the anti-social behaviour department as there was "extremely loud music" until 3am. The music had apparently stopped before they arrived because the police had already intervened. On 1 March, there had been another police intervention following a party which had got out of hand (by the Respondent's admission). On that occasion, Mr McCarthy complained that a party-goer had landed with a crash on to his balcony from above and knocked on the window to gain access. This man asserted to Mr McCarthy that *"someone had tried to steal from him and the only way he could get away was to jump onto the balcony. He asked that I call the police."* Mr McCarthy called "999". The police escorted the man away. There is a contemporaneous account of this event as Mr McCarthy sent an e mail to the property manager on the following day.

16. Miss Smith also complained of other occasions on 14 March and 11 April when she and her husband had been disturbed by those using the Property coming in and out of the Property or mistakenly ringing her doorbell at unsociable hours (although it is fair to point out that she had no objections to the Respondent as a neighbour and mentioned that he had always been a *"friendly and hospitable neighbour"*). She too complained of the party on 1 March by way of an e mail on 2 March to the property manager. She thought there had been a fight outside her door at 1.25am. She had also complained of the party on 6 February by an e mail on 27 February. What she said in that e mail is worth noting in full to give a flavour of the evidence which the Tribunal received from the occupiers who gave oral evidence:-

"As you may have heard already, there was an Air BNB party that went very wrong in the early hours of 7th Feb in Flat 701 (Singe's place). I live in 702 across the hall and at 2am I was woken by loud screaming in the hall, one voice saying "Call the police!" I looked out my peep hole and there were 10 men crowded in front of the door. All of whom, I've never seen before. It's not getting any quieter, so I tell them to be quiet (mind you, I am home alone). Two guys come over, who are friends of Singe, say that they are trying to get them out of the flat. Then, 5 of the guys standing outside, storm the flat. It's obvious that the party is out of control and especially out of Singe's control. I call the cops, and they arrive straight away, though I don't think I was the only one who called them. The time now is 2.50am and the police bang on the door. No one opens it, so 5 minutes later they break in. 50-60 people pile out of the flat. They are finally out of earshot range 40 minutes later.
Singe has been a delightful neighbour and very courteous, and my heart in a way goes out to him because he was man-handled but I am not sure this is permitted in the building? To rent out your flat to AirBNB?? It also was a dodgy group of people at the party, and now

they are exposed to the building and who lives here. I don't feel safe having strangers every week coming in and out of the flat across the hall. Singe said that he would pay better attention to who was coming and going and be at the flat most of the time, but that is not a great reassurance. I don't want to be a rat, but I am concerned by the nature of this. We are new homeowners and look forward to having a family here. It doesn't make us feel very comfortable and secure with such activity around us. You can look up the place on Air BNB and it is advertised like a party place."

17. The Tribunal received a witness statement and heard oral evidence from Mr Moss who is the property manager for the Building. Mr Moss has only been manager since January 2014 although had spoken to his colleagues who had dealt with the Building previously. There were no similar complaints about other flats in the Building. He had received about 8-10 complaints about the Property in the period on about 5-6 separate occasions. He was not though able to produce a schedule of those complaints and was quite vague about the detail and so the Tribunal did not find his evidence particularly helpful on this aspect.

18. In fairness to the Respondent, although he did dispute that there was regular loud music played in the Property, he did accept that there had been 2 occasions when things had got out of hand and he assumed that these were the 2 main occasions alleged by the Applicant. On both occasions, his "guests" were from lettings via Air BNB. On one occasion, the letting had been to 6 guests. He had been present until midnight and then went out for a couple of hours until 2am and returned to about "150 people" in the Property. He was horrified. He could not find the person he had checked in. In relation to the other incident, the letting was for a residential stay for 6 people and he did not think the music was particularly loud but he was shocked by the numbers allowed in to the Property.

19. On 1 March, the letting had been to a musician friend who said he was having 10 people round. He had been present. The numbers doubled and he then saw 2 more cars unloading. He called his friend Serge to help him deal. He went downstairs to block the door. As he got out of the lift, 8-9 people were going in to go to the Property. Another 7-10 were going up the stairs. He explained that there was a door entry system in the Property so guests could buzz people in to the main door to the Building. This was about 10.30pm. He called Serge who told the Respondent that he would deal. The Respondent went to the pub to find some friends to assist. He called Serge again. By this time it was midnight and people had started to leave. The Respondent felt that he had to go back. He stood in the background. There had been a few leaving. A few people were leaving but there was one young man who was very drunk and angry and it appeared a fight was going to break out so he called the police. It then appeared to calm down so he hung up. The police then phoned back and sent assistance although there was on that occasion only a presence downstairs. He had been horrified that this had happened.

20. On one of the occasions, riot police had to be called because of numbers and it took 45 minutes- 1 hour for the Property to be cleared. Those who had rented the rooms had taken in a stereo system without permission. His own stereo system was not huge and he had taken out the bass to ensure there was not too much noise. He had now made it clear in the Air BNB advertisement hat no parties were allowed and he had always made clear to those renting rooms that no music was permitted after 11pm. He blamed the sound insulation between flats in the Building for some of the problem. In terms of numbers, he did not allow more than 6-10 people to occupy the Property.

21. The Respondent said he had apologised to some of the other residents. He had not apologised to Mr McCarthy and Mr Hodson as he did not realised they had been affected. However, he pointed out that most of the complaints arose from the 2 main incidents and he continued to insist that he had not been responsible, these were not "real guests" and he had tried to deal with the incidents which he admitted had got out of hand. The Respondent went so far as to say that those who had caused the incidents on these occasions were "criminals" and it could not be said that it was his fault.

22. In terms of the letting of rooms and of the Property for photo-shoots, the Tribunal was shown a number of advertisements produced by Mr Hodson from Air BNB, Prime Location and Holiday Lettings. Mr Hodson referred in his e mail to the Applicant of 2 March to a music video being filmed on the roof of the Building. Mr Moss confirmed that no permission had been sought by the Respondent for subletting under paragrpah 25.1 of the Eighth Schedule Part I to the Lease.

23. The Respondent did not dispute that he let out rooms on a short-term basis but denied that this amounted to subletting. Although the Property was advertised on Prime Location this was an old advertisement left from 2012 and he had not let the Property in that way since the decision where he was found to be in breach of his Lease by subletting. He did not now sublet as he did not give exclusive possession at any time of the Property. The Property was used in common with him and he was only letting out rooms. Although he did accept that he would not walk into any of the rooms without permission if they were occupied he did shift his evidence in this regard and indicated that he would go in to rooms when his "guests" were there. He also said at one point that one of the rooms was lockable but then said that there was no key. He indicated though that the lets were of very short duration and that he provided services such as bedding and he did not consider that this constituted subletting since in his view he would not need permission for flatmates or lodgers and this was essentially what he was doing by the letting of rooms. He said that the lettings had become more frequent. He had started by letting 1 or 2 rooms for 1 or 2 days per week. This has grown to about 50% occupancy. He continued with this notwithstanding the 2 incidents as he did not consider this was a breach of the Lease.

24. When asked by the Tribunal why, if he needed to sublet rooms in the Property, he did not do so via the proper channels with permission and via a proper tenancy arrangement. The Respondent initially denied understanding that this was a possibility and said that he needed to gain some income from the Property to pay the "extortionate" service charges. However, when pressed, he did indicate that this was because he was trying to sell and it would not suit his purposes to go down this route.

25. The Respondent also accepted that he did let the Property for video shoots on occasion (probably once every couple of months) although never via Carol Hayes Management who was advertising it and who Ms Smith said were using it on one occasion. The Respondent pointed out that there might be some confusion between shoots on the terrace of the Property and the adjoining communal roof terrace of the Building which was also used on occasion for these purposes. In fact, he had been approached to arrange a film shoot over 1-2 days for £5000-6000. He had approached the property manager for the Building about this as he considered it might be too intrusive. The property manager had said he would listen to any proposals and had not ruled it out of hand.

26. Ms Cullen submitted that there was clearly evidence of use otherwise than as a private residence even if the lettings did not amount to subletting in breach of paragraph 25.1 of the Eighth Schedule Part I to the Lease. The Respondent had admitted to there being as much as 50% occupancy by others than himself. She did though submit that there was subletting in breach of paragraph 25.1 since that paragraph precluded also the parting with exclusive possession of part which would include a room. She accepted that these were short-term sublets but that would still be sufficient to amount to subletting.

27. In relation to permitting a nuisance, Ms Cullen pointed out that the Respondent accepted that the incidents on 6 February and 1 March had occurred. Whilst he had claimed that these were not his fault, a breach of paragraphs 6 and 8 of the Eighth Schedule Part II would be made out whether or not he caused the nuisance or allowed visitors into the Property who had caused the breach. A breach of paragraph 8 required no more than there being music audible outside the Property between the hours of 11pm and 9am and even if sound insulation contributed to the problem, this was not sufficient to refute the breach.

28. In relation to the subletting, the Tribunal did not find this an easy issue to resolve. The Tribunal accepts the Applicant's submission that a parting with possession of even one room would amount to subletting under the Lease. However, on the facts here what the Respondent is doing is more akin to running a guest house from the Property. He is letting rooms for a day or possibly a week but on a serviced basis (eg providing bedding). Although he did say that one of the rooms was capable of being locked, and although one of the advertisements does refer to the Property being "generally" offered hosted, the Tribunal had

no reason not to accept the Respondent's evidence that he is present during the lets and indeed the reviews read as from "guests" and not from persons who consider themselves to be obtaining any right to possession of any part of the Property exclusively.

29. However, the difficulty with this from the Respondent's perspective is that he is thereby using the Property otherwise than as a private residence and in reality what he appears to be doing is using the Property as a guest house for overnight, weekend or longer stays. It simply cannot be argued that this is use of the Property as a private residence for a single household. As the Tribunal pointed out, whereas if the Respondent was actually subletting he would at least have the option of seeking the Applicant's permission to do this and that could not be unreasonably withheld, he is not permitted to use the Property otherwise than as a private residence for a single household in any circumstances. Furthermore, he cannot run a business in the Property and this he is also clearly doing both by letting out rooms for commercial gain but also by permitting the Property to be used for video shoots and the like, again for commercial gain. The Tribunal was unimpressed by the Respondent's arguments that he was not running a business from the Property as he was not making any money beyond that needed to pay the service charges. It matters not whether a business is lucrative or the purpose for it being run in order for it to be termed a business.

30. In relation to the nuisance and annoyance to other occupiers of the Building, the Tribunal finds this breach also to be made out. Even if the only incidents were those on 6 February and 1 March which was the focus of the evidence (and there was some evidence of other more minor disturbance to at least one occupier), this would be sufficient. This amounted to 2 incidents within 2 months and these can scarcely therefore be said to be one-off incidents. The Respondent said he had taken steps to avoid reoccurrence by indicating in the Air BNB advertisements that parties were not permitted. However, in the same breath he made the argument that a party could not be defined and it depended how one termed a party as to whether he would allow guests to invite friends to the Property. He also openly admitted that he had no control over the 2 main incidents and so, as Ms Smith herself said, the fact that he was taking steps to avoid such incidents reoccurring was no reassurance. The Respondent said that he could not be held to be at fault for causing the nuisance complained of since he had not permitted it and had tried to stop it. However, if he had not let rooms in the Property via Air BNB to others who had either caused the nuisance or allowed others to do so, these incidents would not have occurred at all. The paragraph in the Lease provides for a breach if the nuisance or annoyance is permitted or suffered to be used for the purpose which causes the nuisance. By permitting his "guests" to use the Property and those guests either having parties or allowing others to do so, he is just as responsible as he would be if he were hosting the parties himself. Under paragraph 8, there is a breach if music is played in the Property so as to cause annoyance to other flats in the Building or

simply if the music is "audible outside" the Property. That is clearly happening, whoever is responsible for that music and whatever the reasons why the music is so audible.

Tribunal Judge Lesley Smith

Dated 8 June 2015

APPENDIX 1

Appendix of relevant legislation
Section 168 of the Commonhold and Leasehold Reform Act 2002

(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 (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.

.....

(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 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.

APPENDIX 2
Appendix of relevant clauses of the Lease

THE EIGHTH SCHEDULE
Part I
Covenants by the Lessee
Covenants Enforceable by the Lessor

Alienation

25. Not:

25.1 at any time during the said term to sublet the whole or any part of the Demised Premises save that an underletting of the whole of the Demised Premises with (sic) the prior written consent of the Lessor not to be unreasonably withheld or delayed (and which consent shall be deemed not to be unreasonably withheld where the Lessor shall require the under-tenant to enter into a deed directly with the Lessor requiring the under –tenant to observe and perform the covenants on the part of the Lessee contained in this Lease) is permitted in the case of a term not exceeding 3 years let on an assured shorthold tenancy agreement or letting to a company or any other tenancy agreement whereby the tenant does not obtain security of tenure on expiry or earlier termination of the term

THE EIGHTH SCHEDULE
Part II
Covenants enforceable by the Lessor and Lessees of the Properties

1. Not to use or suffer to be used the Demised Premises for any purpose whatsoever other than as a private residence for occupation by a single household and in particular not to carry on or permit or suffer to be carried on in or from the Demised Premises any trade business or profession.

6. Not to use or permit or suffer the Demised Premises to be used for any illegal immoral or improper purpose and not to do or permit or suffer on the Demised Premises any act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor or to the lessees or occupiers of the Properties or any of them or to any owners or occupiers of any neighbouring property and to pay all costs charges and expenses of abating a nuisance and executing all such work as may be necessary for abating a nuisance or for carrying out works in obedience to a notice served by a local authority insofar as the same is the liability of or wholly or partially attributable to the default of the Lessee.

....

8. No piano record player radio loudspeaker computer or other electric electronic mechanical musical or other instrument of any kind shall be played or used nor shall any singing be practised in the Demised Premises in any case so as not (sic) to cause annoyance to the occupiers of the Properties or so as to be audible outside the Demised Premises between the hours of 11.00pm and 9.00am.