FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LBC/2017/0009 & LON/00AG/LBC/2016/0111**
Property	:	**Flats 27 & 43 Darwin Court, Gloucester Avenue, London NW1 7BH**
Applicant	:	**Trustees of Central & Metropolitan Estates Retirement & Benefit Scheme**
Representative	:	**Mr Fraser of Counsel**
Respondent	:	**Mr Salar Zahed**
Representative	:	**Mr Palfrey of Counsel**
Type of Application	:	**Determination of an alleged breach of covenant**
Tribunal Members	:	**Judge W Hansen (chairman)** **Ms Coughlin MCIEH** **Ms Dalal**
Date and venue of Hearing	:	**6th March 2017 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 April 2017**

DECISION

Decision of the Tribunal

(1) The Tribunal determines that the Respondent is in breach of Clause 2 of a lease dated 8 September 1993 (Flat 27) in that he has failed to observe and perform the Regulations contained in the First Schedule to the said lease, in particular Regulation 1 thereof by which he covenanted *"not to... do or allow to be done in or upon the Flat or in or about any part of the Buildings any act or thing which may annoy or tend to cause annoyance nuisance damage or danger to the Lessor or any of the lessees or occupiers of any part of the Buildings or the owners or occupiers of any nearby or adjacent property or which may injure or tend to injure the character thereof for residential purposes"*. Details of the breaches which the Tribunal have determined as having occurred are set out below in paragraphs 28-50 of this Decision.

(2) The Tribunal determines that the Respondent is in breach of Clause 2 of a lease dated 16 March 1973 (Flat 43) in that he has failed to observe and perform the Regulations contained in the First Schedule to the said lease, in particular Regulation 1 thereof as set out above. Details of the breaches which the Tribunal have determined as having occurred are set out below in paragraphs 28-50 of this Decision.

Background

1. The Applicant is the freehold proprietor and landlord of Darwin Court, Gloucester Road London NW1 ("the Building") which comprises five blocks of flats, together with car parking spaces and garages. Its title is registered at HM Land Registry under title number NGL119427. There are 104 flats in total. The blocks are managed by Residential Management Group ("RMG"). Block B contains 20 flats. The Respondent is the long leasehold owner of 2 flats in Block B, Flat 27 and Flat 43. He lives in Flat 43 with his mother and, until recently, sub-let Flat 27.

Applications

2. By applications dated 7 December 2016 and 10 January 2017 the Applicant seeks the Tribunal's determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002" Act") that the Respondent is in breach of a number of leasehold covenants arising out of his use and/or occupation of Flat 27 and 43, Darwin Court.

Flat 27

3. The Respondent's leasehold title is registered at HM Land Registry under title number NGL710274. He holds Flat 27 pursuant to a lease dated 8 September 1993 which contains a covenant at Clause 2 "*to observe and perform the Regulations in the First Schedule*". The Regulations in the First Schedule include Regulation 1: "*... to keep and use the Flat as and for a single private residence in the occupation of one family only...*" ("the single family residence covenant"). In fact Regulation 1 imposes a number of other obligations on the lessee, including an obligation "*not to... occupy the same or any part thereof or permit the use or occupation of the same or any part thereof for any unlawful immoral noisy or noxious purposes nor to do or allow to be done in or upon the Flat or in or about any part of the Buildings any act or thing which may annoy or tend to cause annoyance nuisance damage or danger to the Lessor or any of the lessees or occupiers of any part of the Buildings or the owners or occupiers of any nearby or adjacent property or which may injure or tend to injure the character thereof for residential purposes...*" ("the nuisance covenant"). The expression "the Buildings" is defined as meaning the five blocks of flats together with the garages and grounds.

4. On 19 October 2016 the Applicant's solicitors wrote a letter (sent by email and Special Delivery) to the Respondent requesting that he admit a breach of the single family residence covenant (Flat 27 bundle, pp.107-108), following reports from other residents that there were large groups of people occupying Flat 27. The Respondent claimed not to recall receiving the letter but the

Tribunal is satisfied that he did as it was sent by email to his email address. There was no reply to the letter.

5. On 7 December 2016 the Applicant therefore lodged an application to this Tribunal seeking a determination under s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent was in breach of the single family residence covenant in relation to Flat 27 (Flat 27 Bundle, pp.11-20) by reason of the fact that the Respondent was "*using Flat 27 for bed and breakfast accommodation*".

6. Alongside this issue, other issues arose between the Applicant, RMG and the Respondent, arising out of his alleged anti-social behaviour, culminating in the Respondent's arrest on 30 September 2016 when he was "*charged with a number of criminal damage and drugs offences and later convicted*": see Witness Statement of PC Sam Sharpley dated 8 February 2017 (Flat 43 Bundle, pp.60-61). PC Sharply also said that he had "*personally viewed CCTV of [the Respondent] causing criminal in the basement areas of Darwin Court, as well as moving objects around and behaving peculiarly in the early hours of the morning. This includes 9, 31 July, 14, 23, 24 September 2016 for which he was charged and convicted of criminal damage to cameras*".

7. The tenants of Flat 34 (Mr Miller) and Flat 28 (Ms Panchal) have also had cause to complain about the Respondent's alleged anti-social behaviour as well as about noise nuisance and disturbance arising out of the multiple occupation of Flat 27 by licensees of the Respondent's erstwhile sub-tenant.

Flat 43

8. The Respondent is the leasehold proprietor of, and lives at, Flat 43. His title is registered at HM Land Registry under title number NGL228376. He hold under a lease dated 16 March 1973 on the same or substantially the same terms as the lease of Flat 27.

9. Following his release from custody on 30 December 2016, PC Sharpley recounts that "*police attended the address ... to reports of smashing and*

screaming in his flat". On 30 December 2016 Julian Dromgoole, a Building Manager with RMC, sent an email to Sabrina Cordara, Property Manager with RMG, at 21.20 as follows: "[*The Respondent] was arrested this evening. I was at the gym but he broke the glass in the entrance of Block B, apparently forgot his keys, and admitted it to other residents who found him lying on the floor outside his flat. The police broke into his flat and found he's trashed it*".

10. Following this incident, RMG recommended that the Applicant instruct solicitors to commence forfeiture proceedings.

The Further Application

11. Following the events which had occurred since 7 December 2016, the Applicant filed a further application seeking more extensive determinations that breaches of covenant had occurred in relation to Flat 27 *and* Flat 43. Reliance was placed on both the single family residence covenant and the nuisance covenant. In addition to the previous limited allegation of breach in relation to Flat 27, page 4 of 10 of the new application added the following allegations under the heading "*Details of Covenant or Condition in lease alleged to have been breached*":

> *"In relation to both Flat 27 and Flat 43, the tenant has breached Regulation 1 by allowing to be done in the flats and other parts of the Building acts which "may annoy or tend to cause annoyance nuisance damage or danger to the Lessor or any of the others Lessees or occupiers of any part of the Buildings" in particular*
>
> *(a) occupants making excessive noise*
> *(b) smoking*
> *(c) causing criminal damage to the building, including breaking video cameras, urinating in the stairwells and on 30th December 2016, throwing a brick through the front door of the block, smashing the glass and causing a security risk*
> *(d) being arrested by the police for criminal damage and being found in possession of Class A and B drugs*
> *(e) playing loud music;*
> *(f) throwing things out of the window;*
> *(g) leaving belongings in the stairs and in the garage;*
> *(h) verbal abuse to the porter, other tenants and builders;*
> *(i) moving furniture in the garage late at night, which disturbed sleep because the back door was repeatedly opened and closed."*

12. By directions dated 31 January 2017 Judge Powell consolidated the new application with the earlier application and gave directions for it to be heard at the same time as the earlier application.

The Response of the Respondent

13. In his Statement of Case in response to the original application, the Respondent admitted that he had let Flat 27 to City of London Apartments Limited ("City") for a term of 2 years and that City "*may have let the Flat out on short term lets to various people, including the occasional group*". He went on to say that following the Applicant's complaint, City had agreed to an early termination of the term, executed a deed of surrender with immediate effect and handed back the keys to him. He said he "*would take all necessary steps to ensure that Flat 27 is in future let in accordance with the terms of my lease*". This was, in effect, an admission of breach in relation to the single family residence covenant, an admission confirmed in the Respondent's Closing Submissions dated 14 March 2017, and we treat it as such and therefore need say no more as this breach has been admitted.

14. In his second Statement of Case dated 24 February 2017 filed in response to the application dated 10 January 2017, the Respondent made a number of further apparent admissions which we identify as follows:

    (i) He admitted a breach of the nuisance covenant arising out of the use and occupation of Flat 27 whilst sub-let as he accepted that "*this sub-letting to [City] has resulted in nuisance and annoyance being caused to other lessees*";

    (ii) He also accepted that "*occupiers of Flat 27 have on occasions made excessive noise which in turn I appreciate is likely to have caused nuisance and annoyance to other lessees or occupiers of the Buildings*";

(iii) He also admitted that he had "*caused damage to the CCTV camera in the Building which I now appreciate would or could cause annoyance to my Lessor and other Lessees*";

(iv) Finally, he accepted that he had "*left belongings in the stairwells and the garage area and have moved furniture which I own down the garage late at night*" and accepted that this may have caused nuisance or annoyance.

15. The Respondent did not accept any of the other breaches alleged against him.

The Proceedings

16. We heard evidence from Ms Hobbs on behalf of the landlord who was vigorously, but entirely properly, cross-examined by Mr Palfrey. Her statements are at pages 100-103 of the Flat 27 Bundle and pages 48-52 of the Flat 43 Bundle. The landlord also relied on the written evidence of PC Sharpley contained in the above-mentioned witness statement and the documentary evidence in the bundle, in particular the various emails from tenants and others complaining about the Respondent's conduct. We were told that the intention had been to call PC Sharpley but he was required to attend another court. His evidence was admissible as of right in any event but in the circumstances we were prepared to place considerable reliance upon it, given his long-standing and personal involvement in the matters in issue and the detailed contents of his witness statement, which struck us as having been carefully prepared. Mr Palfrey chose not to call his client, and there was therefore no detailed rebuttal evidence from the Respondent. We have however had regard to his statements of case.

17. At the conclusion of the hearing both sides expressed a desire to put in written closing submissions and, given the late hour, we agreed to proceed in this way.

18. We received Closing Submissions from the Applicant dated 9 March 2017, Closing Submissions from the Respondent dated 14 March and a brief Reply from the Applicant dated 16 March 2017.

The Issues

19. In its Closing Submissions, the Applicant said this:

> *The Applicant seeks a determination as to the following allegations of breach in relation to both flats (either because they are not admitted, or the Respondent's position is vague or unstated):*
>
> *(1) By smashing the glass panel in the front entrance door on 30 December 2016, the Respondent caused damage to the Lessor and nuisance and/or annoyance to other lessees. The Respondent's case, albeit the wording of his statement is quite opaque, appears to be that he admits smashing the glass, but argues that he acted with reasonable excuse. A determination is needed due to the lack of clarity from the Respondent. The criminal charges were dropped when Mr Zahed appeared before Highbury Corner Magistrates' Court on 1 March 2017 at 10am (the reason is unclear) but this does not mean that a breach of the covenant has not occurred. Regulation 1 only requires that the act "may tend to cause" damage/nuisance/annoyance. Damage is admitted to have been caused, and the existence of a reasonable excuse is irrelevant.*
>
> *(2) By causing damage to the "strip light" in the garage on 12 January 2017, the Respondent committed an act which "may tend to cause" damage/nuisance/annoyance. This allegation was aired in PC Sharpley's statement and was not addressed by the Respondent. The Respondent pleaded guilty on a "reckless" basis to this charge of criminal damage at the Magistrates' Court on 1 March 2017, and was fined £50 and ordered to pay compensation in the sum of £200. In those circumstances, a determination should be made.*
>
> *(3) By causing damage to the fire escape door in the garage on 30 December 2016 by spraying it with an aerosol, the Respondent committed an act which "may tend to cause" damage/nuisance/annoyance. This allegation was aired in PC Sharpley's statement and was not addressed by the Respondent. The Respondent pleaded guilty on a "full-fact" basis to this charge of criminal damage at the Magistrates' Court on 1 March 2017, and was fined £50 and ordered to pay compensation in the sum of £120. In those circumstances, a determination should be made.*
>
> *(4) By causing damage to a CCTV camera for a second time on 13 December 2016 (separate to the CCTV damage admitted in the Respondent's statement, for which he was convicted in November 2016), the Respondent committed an act which "may tend to cause" damage/nuisance/annoyance. The Respondent pleaded guilty on 14 January 2017. At the Magistrates' Court on 1 March 2017 the Respondent was fined £50 and ordered to pay compensation in the sum of £450.*

(5) *By "allowing" to be done by occupants in Flat 27 acts, i.e. making excessive noise and allowing smoke to enter other flats, which "may tend to cause" nuisance/annoyance (see paragraphs 9(a) and 16 of Nicole Hobbs' statement for Flat 43), the Respondent was in breach of Regulation 1. To "allow" is the same as to "permit". In a covenant not to permit certain use of the premises (emphasis added) "the word "permit" means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it": see Berton v Alliance Economic Investment Co. [1922] 1 K.B. 742., 759, per Atkin L.J.. Woodfall's Landlord and Tenant, para. 11.119 on the words "permit" or "suffer", summarises Commercial General Administration v Thomsett [1979] 1 E.G.L.R. 62 as follows:*

> *"the tenant covenanted not to do or permit to be done on the premises anything which might be a nuisance. She was pestered by an admirer who would persistently telephone her, and persistently called at the building where the tenant lived. He would also stand outside the building and shout to her. The tenant installed an answerphone to stop the persistent ringing of her telephone; disconnected the entryphone; and began proceedings against her admirer for an injunction, the nature of which was unclear. It was held that she had done all that could reasonably have been expected of her, and had, therefore not permitted the nuisance."*

In the present case, the Respondent has not given evidence that he took any reasonable steps to prevent the acts complained of from occurring. He explains in his statement that the short-term letting occurred "without any further consultation with me nor more particularly my agreement". However, the email from the tenant at Flat 34 (see Flat 34 Bundle, [62]) makes it clear that the Respondent was well aware of the use of Flat 27 in an "AirBnB" type arrangement. When that tenant complained to the Respondent about noise in Flat 27, the Respondent told that tenant to "speak to the agent", thereby suggesting that it was nothing to do with him. Further, he lived in the same block, and so must have been aware of what was going on in Flat 27. No evidence is given of steps being taken by the Respondent to enforce the terms of the sub-lease at Annex 1 of his first statement (e.g. clauses 2.3 and 2.18), and no evidence is given as to whether the superior lease of Flat 27 was given to the sub-tenant (see clause 2.15). In these circumstances, it is submitted that the Respondent "allowed" the acts set out at paragraphs 9(a) and 16 to be committed in Flat 27, which caused nuisance/annoyance to other lessees, and thereby breached Regulation 1.

(6) *By playing loud music late at night in Flat 43, the Respondent committed an act which "may tend to cause" annoyance/nuisance to other lessees. The Applicant has provided evidence of emails from the*

tenants of Flat 34 and Flat 28: see Flat 43 Bundle, [64] and [67]-[68], and PC Sharpley stated "I have been told by a number of residents that ZAHED plays music at unsociable hours and is known to point the speakers in his flat out of the window whilst they are open which can be heard around the block" [61].

(7) By throwing items out of the windows of Flat 43, the Respondent committed an act which "may tend to cause" annoyance/nuisance to other lessees. The Applicant has provided evidence of emails from the tenants of Flat 34 and Flat 28: see Flat 43 Bundle, [64] and [67]-[68].

(8) By allowing cigarette smoke and cannabis smoke to annoy other lessees, the Respondent has committed an act which "may tend to cause" annoyance/nuisance. PC Sharpley records that "I have been told by a number of residents that the smell of cigarette smoke and often cannabis smoke has come from both flats causing distress".

(9) By parking his car so as to block others from using the garages/parking spaces, the Respondent has committed acts which "may tend to cause" annoyance/nuisance to other lessees. This is referred to in the email by the Flat 28 tenant ([67]-[68]) and PC Sharpley stated: "a number of incidents I have dealt with have involved residents clashing with ZAHED after he obstructs the garage or their vehicles by leaving his own car blocking the basement. I have seen this on CCTV".

(10) By interfering with items belonging to other people in the garage, the Respondent has committed acts which "may tend to cause" annoyance/nuisance to other lessees. PC Sharpley records as follows [61]: "a number of residents have complained that their items have been removed or moved from the garage area and they believe ZAHED to be responsible. I have seen on CCTV ZAHED entering and leaving garages in the basement including ones that do not belong to him".

(11) By verbally abusing the Darwin Court porter/Building Manager Julian Dromgoole, the Respondent has committed acts which "may tend to cause" annoyance/nuisance to the lessor and/or other lessees. This is included in the email from the Flat 28 tenant ([67]-[68]) and PC Sharpley at [60] records verbal threats on 7 and 24 April 2015 and 5 May 2015 and harassment in October 2015.

(12) By screaming at the tenant of Flat 28 over the phone when they were having building work completed, and threatening the builders, the Respondent committed acts which "may tend to cause" nuisance/annoyance to another lessee. This is recorded in the email from the tenant of Flat 28 at [67].

(13) By urinating on the stairwell, the Respondent committed an act which "may tend to cause" damage/nuisance/annoyance to the

lessor and other lessees. This allegation is recorded in the email from the tenant of Flat 28 [67] and the statement of PC Sharpley [61].

20. In his Closing Submissions, the Respondent appeared to admit breaches (1)-(4) above. However, as to the effect and/or extent of his apparent admissions, the Respondent says this in his Closing Submissions: "*An express admission is made in the Statement of Case to the damage to a CCTV camera. [...]. In relation to a number of other allegations, whilst R accepts that the alleged conduct may tend to have resulted in nuisance and annoyance being caused to other lessees or would have caused nuisance or annoyance, it is still necessary by reason of the burden of proof being on the Applicant for it to make out its case that such nuisance and annoyance has been caused or permitted by the Respondent and that the offending act occurred*".

21. In these circumstances, we propose to proceed on the basis that the only "true" admission is in relation to the damage to the CCTV camera for which he was convicted in November 2016 and in respect of which we say no more. In the circumstances we propose to treat the 13 alleged breaches of the nuisance covenant relied on by the Applicant as set out above as denied or not admitted and requiring to be determined, subject to any pleading point (see below). Finally, we note that in his Closing Submissions the Respondent "*accepts that as a leaseholder of two flats, any admitted or proven incident of him having done or allowed to be done any act which may annoy or tend to cause annoyance, nuisance damage or danger will put him in breach of both leases...*"

22. It is, in our view, unsatisfactory that there should be any real doubt about what the allegations are and what is admitted and denied. It is also unsatisfactory that we should have had to spend so much time attempting to identify the issues that are properly before us. The blame for this lies not only with the Respondent but also with the Applicant. We have set out above the terms of the 10 January application. The only new allegation that is pleaded with any real precision is in relation to the brick thrown through the front door of the block smashing the glass on 30 December 2016. The other allegations are very general. The Respondent says in his Closing Submissions

that "*the scope of the application is governed by the allegations made in the Amended Application received by the Tribunal on 10 January 2017*". We agree, albeit that we accept that further detail about each of the alleged breaches can and should be a matter for evidence. When one considers the list of alleged breaches set out in paragraph 16 of the Applicant's Closing Submissions, we are persuaded that, subject to two exceptions, all of the alleged breaches fall within the scope of the new application and we note that the Respondent has dealt with each of the allegations on their merits. Having regard to the overriding objective, we propose to do likewise, subject to two exceptions.

23. Firstly, we are not satisfied that the allegation against the Respondent of parking his car to block others from using their garages and/or parking spaces is sufficiently pleaded. There is an allegation of "*leaving belongings in the stairs and in the garage*". We are not satisfied that this is sufficient to encompass the allegation that is now made. Secondly, we are not satisfied that the allegation against the Respondent of interfering with items belonging to other people in the garage is sufficiently pleaded. There is no such allegation in the new application and we are not satisfied that such an allegation can be spelt out of the terms of the new application.

24. *Preliminary Issue.* A preliminary issue arose as follows. Mr Palfrey on behalf of the Respondent submitted that we should do more than make a bare finding that his client was in breach of the nuisance covenant on the basis of his limited admissions to that effect. Mr Fraser on behalf of the landlord submitted that the Tribunal could and should make findings on each of the alleged breaches and deal with the specific facts relating to each of those alleged breaches.

25. We indicated at the hearing that we preferred the submissions of Mr Fraser and proceeded on that basis. We did so because we are satisfied that that is what the statute envisages as being the function of the Tribunal under s.168(4). Insofar as Mr Palfrey submitted that the Tribunal lacked jurisdiction to do so, we disagree. Unless the tenant admits the facts which are said to give

rise to each alleged breach of covenant and admits that those facts, in each case, amount to a breach of the covenant(s) relied on as a matter of law, the Tribunal must make the necessary findings of fact and law or mixed fact and law. It must be remembered that the landlord must establish each alleged breach of covenant upon which it relies before serving a section 146 notice and a section 146 notice, in order to be valid, must "*specify the particular breach complained of*". It is hard to see how the statutory scheme could work if the Tribunal declined to adjudicate properly on each alleged breach.

26. *Adjournment.* Following our resolving this preliminary issue in this way, Mr Fraser on behalf of the landlord applied for an adjournment. He did so for a variety of reasons, but primarily because he wanted to rely on further alleged breaches which were said to have arisen only on 1-2 March, i.e. very shortly before the hearing. Whilst we can understand the desirability of dealing with all matters at one hearing, this was not, in our view, a sufficiently good reason for adjourning. The matter has been listed for some time. The parties were otherwise ready to proceed. The tenant had previously sought an adjournment which had been refused by Judge Dowell. All or most of the reasons given by Judge Dowell for refusing the adjournment, which we need not repeat here, apply with equal force now. We therefore declined to adjourn and proceeded with the hearing.

Determination

27. Section 168(4) of the Commonhold and Leasehold Reform Act 2002 provides a follows:

> *A landlord under a long lease of a dwelling may make an application to [the appropriate tribunal] for a determination that a breach of a covenant or condition in the lease has occurred.*

28. *Breaches (1)-(4).* We have set out above under paragraph 19(1)-(4) the breaches alleged. The Respondent admits the underlying facts. He also admits that what he did "*may tend to cause annoyance to another lessee or other lessees*". However, the Respondent then says that "*it is still necessary by*

reason of the burden of proof being on the Applicant for it to make out its case that such nuisance and annoyance has been caused or permitted by the Respondent and that the offending act occurred". In fact, the covenant only requires that the offending act *"may annoy or tend to cause annoyance nuisance damage"* and this is clearly made out by the very nature of the alleged breaches and the admitted facts. In any event, we are satisfied that the acts complained of in relation to breaches (1)-(4) did in fact annoy and cause nuisance and annoyance and/or damage to the lessor and other lessees. We accept the evidence of Ms Hobbs and that of PC Sharpley. We find these alleged breaches proved on the balance of probabilities.

29. *Breach (5).* We have set out above at paragraph 19(5) the breach alleged and how the Applicant puts its case on this allegation.

30. The Respondent in his Closing Submissions said this: *"Allowing acts of excessive noise and smoke to enter other flats. There was no evidence that R permitted or allowed excessive noise to emanate from Flat 27. Under Clause 2.49 of the sub-tenancy granted by R (a copy of which is attached to his First Statement of Case) the sub-tenant covenanted "not to do anything at the premises (including the playing of loud music) which is a nuisance or annoyance or causes damage to the premises ... or neighbours or might reasonably be considered to be anti-social behaviour". This incident in relation to excessive noise is only referred to in the email from Mr Miller (Flat 34) on 12th September 2016. There is no other evidence of any contemporaneous complaint by any other resident. There is no direct evidence this incident was brought to R's attention at the time or that he knew it was going on. In such circumstances, can it sensibly be said that he failed to take reasonable steps to prevent the act at the time? The matter would be somewhat different if there were frequent parties or that he had immediate control over what was actually going on in No.27. It is noteworthy that Flat 27 was subsequently occupied by a group of 8 adults without complaint of excessive noise. No evidence was adduced to show that any repetition occurred. As far as the allegation on smoke is concerned, it was accepted that the complainant's flat (Mr Miller's) is not directly above*

No.27 (2 floors above and on a diagonal). The only evidence is hearsay from someone who has failed to make a witness statement or who was available for cross-examination. No other complaints were made by any other occupiers or lessees. Again, there is no evidence of this incident being repeated. The sub-lease granted by R contained a clause (2.7) prohibiting smoking in or on the premises and at 2.16 a covenant prohibiting the use of any illegal drugs at the premises. In all the circumstances, A has not made out its case in respect of either of these alleged breaches".

31. We find the allegation relating to excessive noise proved on the balance of probabilities. We are satisfied that the Respondent allowed to be done in or upon the Flat 27 acts which may annoy or tend to cause annoyance and/or nuisance to the Lessor or any of the lessees or occupiers of any part of the Buildings. He allowed such acts in the sense that he took no reasonable steps to prevent the acts complained of from occurring and/or recurring. We are satisfied by the evidence, in particular the emails from Mr Miller at Flat 34 (pages 53 & 62, Flat 43 Bundle) that noise from Flat 27 was a recurrent problem ("*Last week it was kids making an absolute racket at 11 ... A few weeks ago it was a bunch of Spanish kids who threw a party during the week making loads of noise*") and there is no evidence that the Respondent took any reasonable steps to deal with the problem. The mere fact that there was a covenant in the sub-lease against nuisance behaviour does not absolve the Respondent from his responsibility to take reasonable steps to prevent the acts complained of. It is clear from Mr Miller's emails that the Respondent was on notice of the problems caused by excessive noise coming from Flat 27 and took no reasonable steps to stop it until the above-mentioned surrender which came much too late. We find the breach in relation to excessive noise from Flat 27 proved.

32. However, we are not satisfied that the Respondent can be held responsible for the one-off smoking incident in circumstances where there was a relevant covenant in the sub-lease and there was no evidence of this incident being repeated.

33. *Breach (6).* We have set out above at paragraph 19(6) the breach alleged and how the Applicant puts its case on this allegation.

34. The Respondent in his Closing Submissions said this: "*Playing loud music in Flat 43. There is no direct evidence this occurred. A's evidence is pure hearsay and is not supported by any other contemporaneous complaints notwithstanding the large number of other residents in the block. This issue was not raised with R prior to this application and he has not been given the opportunity to cross-examine in relation to this allegation. As far as PC Sharpley is concerned, he simply relies upon multiple hearsay and no attempt is made whatsoever to identify the complainant or give details of the incident so that the same could be rebutted. As far as the information concerned in the email from Shelia Panchal at pages 67 and 68 of the Second Bundle, this appears to be little more than the repetition of a complaint she had heard about and without any suggestion that she personally heard loud music emanating from Flat 43. In the circumstances, A has failed to make out its case in respect of this alleged breach*".

35. We note the Respondent's comments about the quality of the Applicant's evidence on this issue and indeed in relation to a number of the issues. We also note the Respondent's decision not to give any evidence at the hearing before us. He had the opportunity to, but chose not to give rebuttal evidence. In the circumstances, we are satisfied by the evidence provided by the Applicant that this breach is made out on the balance of probabilities: see in particular pages [64] and [67]-[68], Flat 43 Bundle and the witness statement of PC Sharpley where he stated *"I have been told by a number of residents that ZAHED plays music at unsociable hours and is known to point the speakers in his flat out of the window whilst they are open which can be heard around the block":* [61], Flat 43 Bundle.

36. *Breach (7).* We have set out above at paragraph 19(7) the breach alleged and how the Applicant puts its case on this allegation The dispute is similar here. The Applicant relies on email evidence from other tenants. The Respondent complains about the lack of any "direct" evidence. We repeat our comments

above. In the circumstances we are satisfied that this breach is made out on the balance of probabilities: see pages [64] and [67]-[68], Flat 43 Bundle.

37. *Breach (8).* We have set out above at paragraph 19(8) the breach alleged and how the Applicant puts its case on this allegation.

38. The Respondent in his Closing Submissions said this: "*Allowing cigarette smoke and cannabis smoke to annoy other lessees. The evidence relied upon is multiple hearsay without any indication as to the source of the original complaint. Further, it is not even clear if this allegation is different to that at No.(5) above. In any event, the same argument applies as to whether this was permitted by R in the absence of the same being brought to his attention. If it is the same incident, there is no evidence of any repetition in respect of which it can be said R has failed to prevent. In any event, it is questionable whether smoking within a flat is an actionable breach where there is only one complainant and that person does not even live adjacent to the flat in question. In the circumstances, A has failed to make out its case in respect of this alleged breach*".

39. The Applicant in its Reply says this: "*... this allegation relates to the Respondent's own activity at Flat 27 whereas allegation (5) is concerned with activity allowed by the Respondent at Flat 43*". We do not understand this. The Respondent lives at Flat 43. It may be that it was intended to say that this allegation relates to the Respondent's own activity in Flat 43. In any event, we consider that there is insufficient evidence to prove the alleged breach however it is put in relation to smoking.

40. *Breach (9).* We refer to our conclusion at paragraph 23 above. It is therefore not open to the Applicant to rely on this alleged breach as part of the current application.

41. *Breach (10).* We refer to our conclusion at paragraph 23 above. It is therefore not open to the Applicant to rely on this alleged breach as part of the current application.

42. *Breach (11).* We have set out above at paragraph 19(11) the breach alleged and how the Applicant puts its case on this allegation.

43. The Respondent in his Closing Submissions said this: "*Verbal abuse to Julian Dromgoole. There is no direct evidence to support this assertion. Mr Dromgoole has not made a witness statement. The email at page 67/68 is simply a consolidation of alleged complaints. It relies upon multiple hearsay. There is no good reason advances by way of evidence as to why Julian Dromgoole was not prepared to make a witness statement. In the circumstances and in the absence of compelling evidence, A has failed to make out its case in respect of this alleged breach*".

44. We have noted the Respondent's comments and the absence of any direct evidence from Mr Dromgoole. We have also noted the absence of any evidence from the Respondent. In the circumstances, we are persuaded that the evidence of PC Sharpley (see page 60, Flat 43 Bundle) is significant in this regard and can be relied on and, taken together with the email evidence referred to, is sufficient to persuade us that this allegation is proved on the balance of probabilities.

45. *Breach (12).* We have set out above at paragraph 19(12) the breach alleged and how the Applicant puts its case on this allegation.

46. The Respondent in his Closing Submissions said this: "*Screaming over the phone at the tenant of Flat 28. Again the evidence relied upon is hearsay. There is no reason given as to why Sheila Panchai did not make a witness statement. By not doing so, R has been prevented from having her cross-examined in relation to this incident and, indeed, the other matters referred to in her email. In the absence of direct or other cogent evidence, A has failed to make out its case in respect of this alleged breach*".

47. We have noted the Respondent's comments and the absence of any direct evidence from Ms Panchal. We have also noted the absence of any evidence from the Respondent. In the circumstances, we are persuaded that the email from Ms Panchal (see page 67, Flat 43 Bundle) is significant in this regard

("*He personally screamed at me over the phone when we were having building work completed on the flat and was threatening to the builders present*") and can be relied on and is sufficient to persuade us that this allegation is proved on the balance of probabilities.

48. *Breach (13).* We have set out above at paragraph 19(13) the breach alleged and how the Applicant puts its case on this allegation.

49. The Respondent in his Closing Submissions said this: "*Urinating in the hallway. The only evidence called in support of this allegation is the multiple hearsay of PC Sharpley or some unidentified complaint heard about by Sheila Panchal. As previously stated, this is without any particulars of the incident or who even saw the act complained of. In the circumstances, the Applicant has failed to make out its case in respect of this alleged breach*".

50. We are not satisfied that this allegation has been proved on the balance of probabilities. The highpoint of the Applicant's case is where PC Sharpley says this: "*Residents have made allegations to me that [the Respondent] has urinated in the stairwells*". There is no detail of where or when or who made the allegation. The Respondent denies it in his statement of case. We reject this allegation.

Conclusion

51. We have set out above under paragraphs 28-50 our findings on each of the alleged breaches of covenant. Where we have found a breach proved, we have found it so proved on the balance of probabilities, having regard to all the evidence. As already noted and accepted by the Respondent (in view of the nature of the alleged breaches), where we have determined that a breach of covenant has occurred, our findings cover both Flat 27 and Flat 43.

Name: Judge W Hansen **Date:** 18 April 2017