FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LBC/2018/0072**
Property	:	**Flat 8, 12-14 St. Marys Road, London SE15 2DW**
Applicant	:	**12-14 St Marys Road Management Limited**
Representative	:	**Robin Jamieson, a director of the applicant**
Respondent	:	**Mr T R Jones**
Representative	:	**Mrs M C Jones**
Type of application	:	**Determination of an alleged breach of covenant**
Tribunal member(s)	:	**Judge Pittaway** **Mr C Gowman BSc MCIEH** **Mr C Piarroux JP**
Date and venue of hearing	:	**6 December 2018** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**19 February 2019**

DECISION

Decision

The tribunal determines that the respondent is in breach of the following covenants;

1. Decorating the exterior of his property; and
2. Obstructing the Common Parts, as the same are defined in the lease under which the respondent holds the property.

Background

1. The applicant landlord seeks a determination, under section 168(4) Commonhold and Leasehold Reform Act 2002 ("the **Act**") that the respondent tenant is in breach of various covenants contained in the respondent's lease dated 3 July 1992 made between Her Majesty's Principal Secretary of State for the Home Department (1) Terence Ronald Jones (2) (the "**Lease**").

2. The alleged breaches listed in the application received by the tribunal on 24 September 2018 and in the directions of 25 September 2018 are

   (i) Causing a nuisance or annoyance by repeatedly placing rubbish on doorsteps, making verbal and racist threats, disturbing an asbestos roof in breach of paragraph 1 Fifth Schedule of the Lease;

   (ii) Disposing of rubbish in breach of paragraph 9 of the Fifth Schedule of the Lease;

   (iii) Decorating the exterior of the property in breach of paragraph 15 of the Fifth Schedule of the Lease;

   (iv) Causing annoyance by noise in breach of paragraph 10 of the Fifth Schedule of the lease;

   (v) Obstructing the "Common Parts" (as defined by the Lease) in breach of paragraph 17 of the Fifth Schedule of the Lease;

   (vi) Resigning from the management company in breach of clause 6.2 of the Lease;

   (vii) Carrying on a business at the property in breach of paragraph 5 of the Fifth Schedule.

3. Directions were issued on 25 September 2018 which provided for the exchange of information between the parties, the preparation of bundles for the hearing by the applicant and fixed the date for the hearing of the application as 6 December 2018.

4. Mrs Jones, the respondent's wife, acted as the respondent's litigation friend at the hearing. Mr Jones attended the hearing and, on being questioned by the

tribunal, confirmed that he understood the proceedings and was happy for Mrs Jones to act on his behalf, as he had difficulty remembering things. By reason of the respondent's ill health Mrs Jones had been unable to read the bundle sent to her by the applicant before the hearing, although she accepted that it had been delivered to her by 10 October 2018.

5. As the applicant had six witnesses, all of whom attended the hearing in the expectation of giving evidence on that day. In order to enable the tribunal to deal with the case justly and fairly the tribunal heard their evidence and Mrs Jones was given the opportunity of cross-examining them.

6. The hearing was then adjourned and by further directions dated 12 December 2018 Mrs Jones was given the opportunity to further consider the bundle and to make submissions on the basis of the bundle and the evidence heard by the tribunal at the hearing. Mrs Jones provided a witness statement, received by the tribunal on 3 January 2019.

7. The further directions also provided for the applicant, by 18 January 2019, to make any legal submissions that it wished the tribunal to take into account when making its decision. These were received by the tribunal on 15 January 2019.

8. Mrs Jones then submitted further papers to the tribunal dated 18 January 2019 in response to the applicant's submissions.

9. Finally the further directions recited that the tribunal considered that the matter might be determined on the basis of written representations unless either party requested an oral hearing before the 11 January 2019 or the tribunal determined that a hearing is required. Neither party requested an oral hearing.

10. The bundle before the tribunal at the hearing included a previous decision of the tribunal LON/00BE/LSC/2013/0639, dated 27 February 2014, which also related to the property and in which the tribunal had determined that there had been a breach of covenant by the respondent of paragraph 1 of the Fifth Schedule of the Lease (the "previous decision")

Reasons for the decisions of the tribunal

The identity of the applicant

(1) The tribunal noted that the application had named Mr Jamieson as the applicant, not the landlord of 12-14 St Marys Road Management Limited as required by s168(4) of the Act. The directors of 12-14 St Marys Road Management Limited (including Mr Jamieson) present at the hearing confirmed that they wished that company to be the applicant and the tribunal substituted 12-14 St Marys Road Management Limited for Mr Jamieson as the applicant pursuant to its powers to do so under Rule 10 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (the **"Rules"**)

Basis of the tribunal's decision

(2) The tribunal makes the determinations in this decision on the basis of the bundles before it at the hearing, the evidence heard at the hearing and the subsequent submissions of the parties (treating Mrs Jones statement as submissions on behalf of the respondent and not as a witness statement), and were relevant refers to these in its reasons.

(3) In its further directions the tribunal reserved to itself the right to determine the matter on the basis of written representations, and without a further hearing if neither party requested one. Neither party requested a further hearing. Rule 3(2) of the Rules requires the tribunal to deal with any case in a way that is proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and the tribunal. In the circumstances of there already having been a day's hearing and that only written submissions were requested by the tribunal from the parties the tribunal considered that it was not appropriate for there to be a further hearing.

Extent of decision

(4) Mr Jamieson explained to the tribunal that the present application included the breaches referred to at paragraphs 2(i) and (ii) above, although these had been dealt with in the previous decision, as the basis of the decision in the previous decision was a criminal conviction which had subsequently been overturned. The tribunal do not consider that the fact the conviction was overturned nullifies its previous decision. Its previous decision was not appealed and section 169 of the Act provides that for the purposes of section 168 it is finally determined that a breach of covenant has occurred unless the decision is successfully appealed or challenged, and the previous decision has neither been appealed nor challenged.

(5) No evidence was provided to the tribunal at the hearing that the respondent was carrying on a business at the property. The applicant sought to provide evidence in relation to this after the hearing (by way of a print out from Companies House only), but this evidence was not sought by, and has not been admitted by, the tribunal.

(12) The respondent's submission that breaches pre-2014 cannot be considered by the tribunal is not correct; it is only breaches that were dealt with in the previous decision that this tribunal will not consider.

Causing annoyance by noise in breach of paragraph 10 of the Fifth Schedule of the lease;

(13) Paragraph 10 of the Fifth Schedule provides that, *"No musical instrument television radio loudspeaker or mechanical or other noise making instrument of any kind shall be played or used nor shall any singing be practised in the Flat so as to cause annoyance to the tenants and occupiers of any other of the flats in the Building or so as to be audible outside the Flat between the hours of 11p.m. and 8 a.m."*

(14) Miss R Wilkinson, one of the tenants of the flat below the property, asserted that Mrs Jones sits on the communal balcony talking loudly, that she sings while cleaning between 10p.m. and 2a.m. at night and that she can hear chairs being dragged across the floor of the property. On being asked she confirmed that she had not addressed these issues directly with the respondent, only through the applicant company, and that environmental health had not been involved. Mr Ige, the tenant of the flat adjacent to the property, did not have any evidence of noise between 11p.m. and 8a.m. although he referred to loud talking, of which he had complained to the applicant company. He had not reported this to environmental health because it involved a neighbour. Ms Loakes of Flat 5 referred to loud talking in the garden. Mr Waterhouse provided a personal diary of noise events. Mr Jamieson referred to shouting and moving furniture at night. When questioned by the tribunal as to how the alleged noise fell within paragraph 10 he submitted that a chair moving was a "mechanical device", and that shouting might be considered "singing". He confirmed that he had moved out of the Building in 2016. He confirmed that there had been no recent letters sent to the respondent asking him (and Mrs Jones) to make less noise.

(15) The tribunal accept that the witnesses believe that the respondent and his wife are noisy but the noise complained of is not a breach of the narrowly defined parameters of paragraph 10. The tribunal did raise the possibility with Mr Jamieson (who accepted the suggestion) that the noise might also be considered a nuisance under paragraph 1 of the Fifth Schedule, which requires the tenant *"not to do or permit or suffer to be done in or upon the property anything which may be or become ....a nuisance damage or annoyance or inconvenience to the Landlord.*

(16) The tribunal do not consider that any of the witnesses have provided sufficient proof of the alleged noise, and are concerned at the lack of engagement by the applicant with the respondent to seek to resolve this issue before coming to the tribunal.

Obstructing the "Common Parts" (as defined by the Lease) in breach of paragraph 17 of the Fifth Schedule of the Lease;

(17) Paragraph 17 of the Fifth Schedule provided that the tenant must not *"obstruct the Common Parts or suffer or cause them to be obstructed".*

(18) It was the applicant's submission, not denied by the respondent, that the balcony outside the property had been fenced off for the respondent's use, that an area of the communal garden had been fenced off and that the respondent had sought to appropriate to himself the exclusive use of one car parking space by painting "8" on it.

(19) The respondent submitted that what had been done to the balcony did not amount to "obstruction" as it did not prevent anyone obtaining access to their own flat and that the garden was fenced to avoid it being used by dogs.

(20) The "Common Parts" are defined in the lease as the areas of the Development (which by definition includes the Building the landscaped areas and the parking spaces) over which the tenant is given rights to use the same *"in common with others".* The balcony, the garden and the car parking space are not demised to the tenant and do not form part of the property. The tenant is given rights in the Second Schedule to the lease to pass over the footpaths, passages and landings in the Building and to use the communal gardens. There is no express right granted in respect of any parking space. The wording of the lease is clear that none of the balcony, parking space or garden are demised to the tenant and they must therefore be regarded as "Common Parts".

(21) Fencing Common Parts so that other lessees in the Building are prevented from accessing them amounts to "obstruction" even if access over the area in question is not required by such lessee.

(22) Painting "8" on a car parking space does not of itself amount to obstruction.

Resigning from the management company in breach of clause 6.2 of the Lease;

(23) Clause 6.2 requires the tenant from time to time to be and remain a member of the Company, which is defined as 12-14 St Marys Road Management Limited.

(24) The parties do not dispute that the respondent proffered a resignation from the management company which the management company purported to accept. No evidence was provided to the tribunal by the parties of the constitution of this company. The tribunal has referred to Companies House which confirms that the company is a company limited by shares. Article 4.1 provides that *"the shares shall be allocated to the tenants one to each of them on the grant of his Lease."* Article 5.1 provides that a share may only be transferred to an assignee or transferee of a Lease and Article 5.3 that *"no share shall be transferred... not in accordance with these Articles."* Further by Article 5.5 *"The liability of a member shall continue until a transferee duly applies to be registered in his place."*

(25) Accordingly, although the applicant may have believed that the respondent had resigned from the management company he is not permitted to do so under the Articles of Association of the management company and therefore remains a member of that company. There is therefore no breach of clause 6.2.

Name: Judge Pittaway **Date: 19 February 2019**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).