FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LBC/2019/0097**
Property	**:**	**Flat 2, 26 Elsham Road, London W14 8HB**
Applicant	**:**	**26 Elsham Road Management Company LLP**
Representative	**:**	**Mr Mats Lindh, co-director of Applicant Company**
Respondent	**:**	**Mr Carl Georg Risberg**
Representative	**:**	
Type of application	**:**	**Application for a determination in respect of an alleged breach of covenant – section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Judge D Brandler** **Mr M Taylor FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date and venue of hearing	**:**	**5th March 2020 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**24th March 2020**

DECISION

Decision of the Tribunal

- The Tribunal has determined that the Respondent is in breach of the following terms of the lease of the subject property:-

- Clauses 2(4), 2(8), 2(11), 3(1), and 3(5), and under the Fourth Schedule, paragraphs 1,2,3,8,14,15,17,18,19,22 and 25

- The Tribunal makes no order under section 20C of the Landlord and Tenant Act 198 and no order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

The Application

1. An application dated 15th November 2019, was received by the Tribunal under section 168(4) of the Commonhold and Leasehold Reform Act (CLARA) for a determination as to whether there has been a breach of covenant under the terms of the lease granted for Flat 2, 26 Elsham Road, London W14 8HB ('the Flat').

2. The flat is described as a two-bedroomed ground floor flat in a stucco fronted Victorian block of 4 flats over 5 floors.

3. The Applicant, 26 Elsham Road Management Company LLP, holds the freehold interest in 26 Elsham Road, London W14 8HB (the Building) under title number 425986.

4. The Respondent, Carl Georg Risberg, holds a long leasehold interest of the flat under title number BGL84403. It appears that the lease was extended under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993. The extended lease is dated 4th August 2011 and is for a term of 999 years from 24th June 1972. The original lease is filed under title number NGL221058.

5. On 19th December 2019, the Tribunal gave Directions at a case management conference. Mr Lindh attended for the Applicant. The Respondent did not attend and was not represented and the Tribunal has not received any explanation for this non-attendance. It was clear that the Respondent knew about the CMC as he telephoned the case officer to check that the hearing was still proceeding.

6. The Directions set out the issues that the Tribunal would need to consider.

7. Prior to the hearing the Applicant provided bundles of documents upon which they rely. The Respondent made no representations.

The Hearing

8. A hearing was held on 5th March 2020 at 10:00am at 10, Alfred Place, London, WC1E 7LR. The Applicant, 26 Elsham Road Management Company Limited was represented by Mr Lindh, a director of that company and the owner occupier of flat 4 of 26 Elsham Road. The Respondent, Mr Risberg was not in attendance. He had made no contact with the Tribunal about the hearing and was not represented. The Tribunal, having checked the file, noted that he had been advised of this hearing by the letter dated 19th December 2019, addressed to him at flat 2, 42 St. Stephens Gardens, London W2 5NJ. The Tribunal were satisfied that Mr Risberg had been notified of the hearing, and was aware that these proceedings had been issued against him. Mr Risberg's correspondence address is that provided by him to the Land Registry. Mr Risberg has made no attempt to take part in these proceedings despite his knowledge of them. The tribunal considered that it was in the interests of justice to proceed in his absence.

9. As set out in the Directions the Tribunal will reach its decision on the basis of the evidence produced and the burden of proof rests with the Applicant.

10. The relevant sections of CLARA are set out in an Appendix to this decision.

The Lease

11. As mentioned above the lease for the flat is dated 4th August 2011 for a term of 999 years from 24th June 1972. The relevant clauses for this application are under Clauses 2 and 3 and under the terms of the Fourth Schedule. A copy of the lease was available to the Tribunal together with the Land Registry documentation. The relevant clauses are set out below.

12. Clause 2 provides that "*The Tenant HEREBY COVENANTS with the Lessor as follows*

(1) ...
(2) ...
(3) ...
(4) In accordance with the Tenant's covenants in that behalf hereinafter contained to repair decorate and make good all defects in the repair decoration and condition of the Demised Premises within two months after receiving notice thereof from the Lessor to the Tenant
(5) Not at any time during the Term to make any structural alterations in or additions to the Demised Premises or any part thereof or to cut maim alter or injure any of the walls or timbers thereof or to alter the landlords' fixtures therein without first having made a written application (accompanied by all relevant plans and specifications) in respect thereof to the Lessor and secondly having received the written consent of the Lessor thereto which consent shall not be unreasonably withheld
(6) ...
(7) ...
(8) Within four weeks next after any transfer assignment subletting charging or parting with possession (whether mediate or immediate) or devolution of the Demised Premise to give notice in writing of such transfer assignment subletting charging parting with possession or devolution and the name and address and description of the assignee sublessee charge or person upon whom the relevant term or any part thereof may have devolved (as the case may be) and to deliver to the Lessor or his Solicitors within such time as aforesaid a copy of every instrument of transfer assignment subletting charging or devolution and every probate letters of administration order of the Court other instrument effecting or evidencing the same and to pay to the Lessor a fee of Five pounds for the registration of every such notice
(9) To pay to the Lessor all reasonable and property costs charges and expenses including Solicitors' Counsels' and Surveyors' costs and fees at any time during the said term incurred by the Lessor in or n contemplation of any proceedings in respect of this Lease under Sections 146 and 147 of the Law of Property Act 1925 ...
(10) ...
(11) Not at any time to do or permit to suffer to be done any act matter or thing on or in respect of the Demised Premises which contravenes the provisions of the Town and Country Planning Act 1962 to 1971 or

any enactment amending or replacing the same and to keep the Lessor indemnified against all claims and liabilities in respect thereof
(12) …
(13) …"

13. Clause 3 provides that "*The Tenant HEREBY COVENANTS with the Lessor and with and for the benefit of the Flat Owners that throughout the Term the Tenant will :-*

(1) Repair maintain renew uphold and keep the Demised part of or are within the Demised Premises all windows glass and doors (including the entrance door to the Demised Premises) lock fastenings and hinges sanitary water gas and electrical apparatus and walls and ceilings drains pipes wires and cables and all fixtures and additions in good and substantial repair and condition save as to damage in respect of which the Lessor is entitled to claim under any policy of insurance maintained by the Lessor in accordance with his covenant in that behalf hereinafter contained except in so far as such policy may have been vitiated by the act or default of the Tenant or any person claiming through the Tenant or his or their servants agents licensees or visitors
(2) …
(3) …
(4) Pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such Charges to be recoverable in default as rent in arrear
(5) Observe and perform the regulations in the Fourth Schedule hereto PROVIDED that the Lessor reserves the right to modify or waive all or any of such regulations in his absolute discretion in so far as the same may be reasonable"

14. The Fourth Schedule provides as follows "

1. *Not at any time to use or occupy or permit the Demised Premises to be used or occupied except as a private residential flat only*
2. *Not at any time to use or permit the use of either the Demised Premises or any part thereof for business purposes*
3. *Not to permit or suffer in or upon the Demised Premises or any part thereof any sale by auction or any illegal or immoral act or any act or thing which may be or become a nuisance or annoyance or cause damage to the Lessor the Flat Owners and or the Tenants of the Lessor or the occupiers*

of any part of the Building or of any adjoining or neighbouring premises

4. *Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance maintained in respect of the Building or may cause an increased premium to be payable in respect thereof nor to keep or permit to be kept any inflammable substances in or about the Demised Premises and to repay to the Lessor all sums paid by way of increased premium and all expenses incurred in or about the renewal of any such policy or policies rendered necessary by a breach of this regulation all such payment to be recoverable as rent in arrear*
5. *...*
6. *...*
7. *...*
8. *Not to hang or expose in or upon any part of the Demised Premises so as to be visible from the outside any clothes or washing of any description or any other articles nor to place outside the Demised Premises any flower box pot or other like object nor to shake any mats brooms or other articles inside any part of the Building (other than the Demised Premises) or out of the windows either of the Demised premises or of any other part of the Building*
9. *...*
10. *...*
11. *...*
12. *...*
13. *...*
14. *At all times to cover and to keep covered with carpet and underlay the floors of the Demised Premises other than those of the kitchen and bathrooms and at all time suitably and properly to cover and keep covered the floors of the kitchen and bathrooms in the Demised Premises*
15. *At all times when not in use to keep shut the entrance door to the Demised Premises and between the hours of Eleven p.m. and Eight a.m. to ensure that no noise is made in any part of the Building by the Tenant or any of the friends servants visitors or employees of the Tenant or others under his control and in particular between such hours to ensure that the main entrance door to the Building and the entrance door to the Demised Premises are closed as quietly as possible and that no disturbance or annoyance is caused to the Flat Owners by the Tenant or such persons aforesaid*

16. ...
17. *Not at any time to do or to permit to be done any damage whatsoever to the Building the fixtures fittings or chattels therein the curtilage thereof or the paths adjoining thereto fair wear and tear only excepted and forthwith on demand by the Lessor to pay to the Lessor the cost of making good any damage resulting from a breach of this regulation*
18. *At least once in every month of the said term to cause to be properly cleaned all windows of the Demised Premises both internally and externally and at all times to keep such windows properly curtained in a style appropriate to a private residence*
19. *Each morning to empty rubbish of the previous day suitably wrapped into the refuse receptacles or other means of refuse disposal (if any) provided by the Lessor*
20. ...
21. ...
22. *To pay the cost of making good any damage at any time done by the Tenant or any person claiming through the Tenant or his or their servants agents licensees or visitors to any part of the Building or to the Common Parts or to the person or property of the Flat Owners by the carrying in or removal of furniture or other goods to or from the Demised Premised or otherwise howsoever*
23. ...
24. ...
25. *At all times to observe and perform all such further or other regulations as the Lessor may from time to time in his absolute discretion think fit to make for the management care and cleanliness of the Building and the comfort safety and convenience of all the occupiers thereof"*

The Evidence and Submissions:

The Allegations

15. Of the Applicant's witnesses, only Mr Lindh attended the hearing both to present the case and as a witness. The Tribunal had the benefit of witness statements from Mr Abdolrazaghi who is a sublessee of Flat 3, Mr Sivananthan who is the son of the non-resident leaseholder of Flat 3, Ms Culhane who is a non resident leaseholder of Flat 1, and from Ms Hansen and Mr Lindh who

are both owner occupiers of flat 4. As well as documentary evidence included in the bundle which includes photographs of the alleged breaches, the meeting notes and email correspondence between the parties.

Clause 2(4) and Clause 3(1) of the Lease

16. The alleged breaches of these clauses relate to issues within the flat. Mr Lindh took the Tribunal to the evidence demonstrating the dilapidated windows in the in the Flat, which are included under these clauses, and the Respondent's failure to remedy the defects. The photographs [3,4,20,21] demonstrate that the windows are dilapidated and require attention.

17. In oral evidence Mr Lindh explained that Mr Risberg had promised to carry out remedial works. These promises were made in emails and during meetings. An email dated 16th January 2018 contains the notes of the meeting held on 12th January 2018. Within the notes at paragraph 2, it states that "*Carl will decide whether he can repair or refit his windows on the front side of the building*"[62].

18. At a meeting on 30th January 2019 recorded in notes [59] at paragraph 26 *"Window replacement – individuals. SC reiterated that it was up to the individual leaseholders to maintain the windows of their property and that work should be done to rectify any decayed windows for the façade of the building is repainted. Action: leaseholder to rectify window decay ASAP"*.

19. At a meeting on 4th September 2019 the issue of window replacement was on the agenda and it was noted *"Action: Flat 2 (CR) is in breach of their Lease not rectifying the issue in a timely manner nor paying for the costs. Leaseholder to rectify window decay ASAP or the Freehold will be forced to take action…"* [52]

20. At a meeting on 13th November 2019 the decayed woodwork on windows was again raised at paragraph 31 [60].

21. Samantha Culhane ("SC"), one of the Applicant's directors, sent a written notice to repair to the Respondent dated 10th February 2019. A copy of this was provided to the Tribunal at the hearing. That notice states "*Further to a number of emails over many months, requesting that repairs are made to the bay window in Flat 2, 26 Elsham Road, 26 Elsham Road Management*

Company Limited gives form notice for you to make repairs to this window and make good all defects. Windows are the responsibility of the leaseholder as per section 3(1) of the lease. This work needs to be completed by 10th April 2019 but preferably earlier…". There is no evidence of any response.

Clause 2(5) of the Lease

10. The alleged breach here relates to the Respondent's structural alterations within the flat without first having made a written application. However, in oral evidence Mr Lindh confirmed that the Respondent had made an application to the Freeholder for permission to make structural alterations to the Flat and he further confirmed that the Freeholders had granted that licence. The terms of the licence had been drafted by the Respondent's solicitor. None of this evidence was before the Tribunal. Mr Lindh was granted a short adjournment for him to access these documents and to provide a copy to the Tribunal. He was able to locate this document which was printed and provided to the Tribunal. However only an unsigned and undated copy of the document was available. It is not disputed by the Applicants that they granted approval for the alterations that the Respondent sought to carry out. They argue only that the Respondent exceeded his permission under the terms of the Licence because they say he extended the demised area of the flat by taking part of the communal area for an under stairs cupboard in which he installed an electricity meter. The Tribunal spent some time considering the plans which indicate the plan of the flat both pre [116] and post [117] alterations.

11. The Tribunal asked Mr Lindh about the Respondent's responsibilities under the terms of the Licence. Specifically whether the Freeholders were aware paragraph 3 had been complied with in terms of obtaining all the permissions required under planning legislation (paragraph 3.2.1) and all other permissions (paragraph 3.2.2), whether the works complied with the drawings (paragraph 3.4.5) and whether the Landlord's surveyor had been satisfied with the works (paragraph 3.4.7). Further whether the insurers had been advised about the alterations and the works (paragraph 5.1). Mr Lindh was not aware that any of the above had been complied with by the Respondent, but also was not aware that the Freeholders, the Applicants, had requested any information or inspection.

12. Although Mr Lindh was able to confirm that during his contact with the Local Authority planning team, he was told him that no planning application had been made. Mr Lindh had also

carried out a search online, and could find no applications made in relation to the Flat.

Clause 2(8) of the Lease

13. The alleged breach under this clause relates to the requirement to notify the freeholder of any assignment, subletting, charging or parting with possession of the flat. The application asserts that the Respondent, since renovating the property, has continually sublet the property on short often nightly holiday lets by way of his advertisement on Airbnb and which indicates that this is a business. At no point has the Respondent ever complied with the requirement under the lease to inform the freeholders of the identity of the sublessees, and has not paid the requisite fee of £5 on each occasion.

14. Mr Lindh took the tribunal to the relevant documents in the appeal bundle to demonstrate the alleged breach.

15. The Respondent's internet advertisement placed on Airbnb shows photos of the flat and indicating that he has 12 listings. The advertisement states *"Hi, I'm Elizabeth And Carl joined in 2011 We live in London UK. We are a family owned business. If you have any questions or queries please feel free to get in touch"* [80].

16. On 18th September 2019 The Royal Borough of Kensington and Chelsea ("The Council") served an enforcement notice upon the Respondent as it appeared that there had been a breach of planning control under section 171A(1)(a) of the Town and Country Planning Act 1990, that *"The use of the property for the purpose of temporary sleeping accommodation in excess of 90 nights is unacceptable because it leads to an unsustainable loss of permanent residential accommodation within the Royal Borough of Kensington and Chelsea."* [45-50] No evidence was before the Tribunal to indicate that the Respondent had appealed that Notice.

17. Various witness statements included in the appeal bundle refer to the flat being rented out on a short term basis.

18. Mitra Abdolrazaghi is a sublessee of flat no. 3 who confirms in her statement dated 5th January 2020 that the renovations caused a nuisance to her and that *"I have witnessed several of Mr Risberg's short-term holiday rental guests causing disturbance. For example, leaving doors open, leaving*

rubbish in the common areas, leaving laundry in the common areas, and in general making unusual and unnecessary levels of noise…. Multiple different people on the property makes us feel insecure in our own home as we are not sure if these strangers belong in our building". [31]

19. Arun Sivananthan who is the son of the leaseholder of flat 3 provides a witness statement dated 9th January 2020 in which he confirms works at the flat were disruptive and *"we are of the understanding that there is short term letting in Flat 2 with requests for key replacements, doors being regularly left opened and I have indeed seen the property advertised online for short term lets. This is rightly a safety concern raised by our tenant*" [32]

20. Samantha Culhane is a shareholder of the freehold company for the building, and a leaseholder of flat 1. Her witness statement is dated 11th January 2020. She sublets flat 1. In her statement she sets out details of nuisance caused by building works, rubbish being left in communal areas, and reports *"I have witnessed several of Mr Risberg's short-term holiday rental guests (Email 18/10/18) causing disturbance in a number of ways"* in particular because of noise from uninsulated floors, short term tenants leaving the communal front door and the flat door open, leaving rubbish in common areas, leaving laundry in the common areas, and making noise. [33-35]

21. The witness statement of Ulrika Hansen who is an owner occupier with Mr Lindh in flat 4 sets out in her witness statement dated 8th January 2020 the disruption caused by the *"holiday makers coming and going to and from flat 2 for more than 90 days during 2019. Not only have this caused excessive noise levels, but people have been coming and going all times – leaving the door to the building open as well as leaving the door to flat 2 open. These holiday "guests" have left rubbish in the common areas resulting in a great mess. Also the holiday makers have not exactly been careful with the building, for example, banging suitcases against doors and walls….. encountered people in the garden looking for "hidden" keys to the building and flat 2…. On June 14, 2019, I was approached by a woman by the front door. She asked to borrow my key to the front door. As she did not introduce herself, I asked who she was. She said she worked as a cleaner for Carl Risberg's business and that they had lost all keys and needed to make a copy of mine. I told her to tell Carl to contact the Freehold. It is obviously a concern if there are multiple keys gone missing"* [36]

22. Mr Lindh provided a witness statement dated 9th January 2020 in which he confirms that he has witnessed *"numerous short-term lettings arriving and departing – during all sorts of hours – often with large suitcases – making noise and in some cases damage to the building. I have spoken to numerous short-term holiday makers that confirmed they rented for only a night or two – or some longer like a week or a month."* [37]

23. The photographs of the flat show two single beds in a very small bedroom, a double bed in another room, and a sofa in the living room which may or may not be a sofa bed [11-12]. Photos also indicate various shoes left in the hallway and on the external window sills [18,19,22]

24. In oral evidence Mr Lindh stated that since around September 2019, since the service of the Enforcement Notice from the Council, there has been a longer-term tenant in the flat. Mr Lindh had an opportunity to speak to an adult female who confirmed that they are a couple with one teenage child and that they would stay for a year. Mr Lindh makes the point that even though there appears to be a longer term sublessee, the Respondent has failed to comply with the terms of the lease, has failed to make the relevant application, has failed to notify the freeholders of the identity of the sublessee and has failed to pay the requisite fee.

Clause 2(9) of the Lease

25. The lease refers under this heading to being able to recoup legal expenses from the leaseholder incurred as a result of contemplation of proceedings in respect of sections 145 and 147 of the Law of Property Act 1925. Mr Lindh made no submissions on this point.

Clause 2(11) of the Lease

26. The alleged breach under this clause relates to an alleged contravention of the provisions in the Town and Country Planning Acts. Evidence of the Enforcement Notice served by the Council under the terms of the Town and Country Planning Act 1990 are detailed above under the heading for clause 2(8).

27. Mr Lindh referred the Tribunal to the Enforcement Notice (Change of Use) issued to Mr Risberg by the Royal Borough of Kensington and Chelsea ("The Council") on 18th September 2019. That notice is issued under s. 171A(1)(a) of the

Town and Country Planning Act 1990 because it appeared to them that there had been a breach of planning control at the Flat. The breach refers to an unauthorised change of use from permanent residential accommodation (Use Class C3) to Temporary Sleeping Accommodation (Sui Generis) as defined by the Greater London Council (General Powers) Act 1973.

28. The reason given by the Council for issuing the notice is that *"The use of the property for the purpose of temporary sleeping accommodation in excess of 90 nights is unacceptable because it leads to an unsustainable loss of permanent residential accommodation within the Royal Borough of Kensington and Chelsea. The use of the property for temporary sleeping accommodation has adversely affected the quality of life and amenity of nearby residents, for example, by the frequent comings and goings resulting in excessive noise and disturbance, as well as a reduction in the amenity of the area. It is harmful to living conditions of nearby residents. The use of the Property for the purposes of temporary sleeping accommodation is therefore contrary to Policy CF9 and CL5 of the Consolidated Local Plan 2015"*. [45-47]

29. There was no evidence before the Tribunal that Mr Risberg had appealed. Mr Lindh was not aware of any appeal against that Notice. Mr Lindh had contacted the Council but they stated merely that they were concerned only with periods exceeding 90 days in one calendar year, and they could not provide him with any additional information in relation to this particular Notice.

Clause 3(4) of the Lease

30. Mr Lindh explained that part of the service charge had been paid, but this matter is to be dealt with under the terms of a s.20 application in relation to works and no further evidence was taken on this point.

By Clause 3(5) of the lease, there is a requirement to comply with the regulations in the Fourth Schedule:

Paragraphs 1 and 2 of The Fourth Schedule to the Lease

31. Paragraph 1 sets out that the flat must not be used other than as a *"private residential flat only"*, and Paragraph 2 that *"not at any time to use of permit the use of either the Demised premises or any part therefore for business purposes"*. The allegation by the applicant is that the flat is not being used either as a private residential property, because it is used for short term holiday lets, and further that it is a part of the Respondent's business.

32. The Local Authority appear to be satisfied of frequent short term lets, as evidenced by their Enforcement Notice [45-50].

33. In oral evidence Mr Lindh said that the applicant is aware that the Respondent has around 5 short term let flats in the area and that he advertises this flat on Airbnb. [80]. This advert states that it is a family run business and the evidence from Ms Hansen is that the Respondent's cleaner says she works for the Respondent's business and all the keys have been lost [36].

34. Witness statements prepared in support of the application confirm frequent short term holiday lets and the nuisance and distress that this causes them, both in terms of not knowing whether the people who appear in the building are supposed to be there, or are there illegally, as well as the nuisance caused by these short term paying holiday guests in terms of noise nuisance, rubbish not being disposed of correctly, leaving communal front doors open as well as the flat door being left open, washing being left in the communal areas as well as damage to the building having been caused by one of the guests in particular with nail varnish dropped onto communal stairs, floor and the flat door. [31-37]

35. Mr Lindh expressed extreme concern that with various people coming and going into the communal areas, there was concern children resident in the property coming home from school alone were potentially not safe.

Paragraph 3 of The Fourth Schedule to the Lease – nuisance

36. The application alleges that the Respondent has caused nuisance to other occupiers in the building.

37. In oral evidence Mr Lindh took us to the documents which demonstrate what he says show these breaches.

38. The nuisance caused by the Respondent and his builders started with the alteration works being carried out in the Flat at the time of purchase. In addition to noise and dust created from the works, Flat 1, directly below the Flat, experienced leaks as a result of the works. The leaks and the consequent damage to flat 1 was reported to the Respondent who was asked to compensate flat 1 for this nuisance. Mr Lindh took the Tribunal to photographs of the alleged damage to flat 1 [7-10]. There is further evidence of the damage caused to flat 1 contained in the witness statement of Samantha Culhane, the leaseholder of flat 1, which describes the history to works by the Respondent's builders, the history of the water ingress, and describing the history of correspondence between her and the Respondent in relation to the damages being sought to remedy the damage.

39. The details are also set out in the letter before action dated 21st October 2019.

40. The disruption from the Respondent's works are also set out in the witness statement of Mitra Abdolrazaghi of Flat 3 [31].

Paragraph 4 of The Fourth Schedule to the Lease

41. Relates to the actions by a leaseholder that may render void or voidable any insurance policy or increase a premium. In oral evidence Mr Lindh confirmed that the Applicants had not informed the insurance provider about the alterations to the property by Mr Risberg nor had they contacted the insurance providers about the Airbnb lettings. He also confirmed that although the licence provided for insurance cover, and for reinspection of the property by a surveyor, these had not been enforced by the applicant. He also confirmed that they now had a different insurance provider and no documentary evidence was before the Tribunal in relation to that.

Paragraph 8 of The Fourth Schedule to the Lease – laundry in communal areas

42. Mr Lindh took the Tribunal to the photographs demonstrating the alleged breach. There are photographs of washing on a rack on the communal decking in the garden, as well as mats being hung out of the flat windows. [16-18]

43. This matter is addressed in the witness statement of Mr Lindh [37] and in the letter before action [38-44]

Paragraph 14 of The Fourth Schedule to the Lease – incorrect floor covering

44. Mr Lindh directed the Tribunal to the photographs showing that the flat's flooring has no carpet, contrary to the requirement under this term of the lease. [11-15].

Paragraph 15 of The Fourth Schedule to the Lease – doors left open, keys lost

45. The lease requires communal doors and the door to each flat to be closed, Mr Lindh explained to the Tribunal that he and his neighbours are very concerned about the communal front door being left open. There are children living in the building, and they come home from school alone having to enter the unsecured building without knowing whether anyone unauthorised in the building and the danger that may pose. He took the Tribunal to evidence in the bundle to demonstrate the breach of this term of the lease.

46. In photographs the Tribunal noted the door to the flat being propped open by a towel [12-13]. Other photos taken from the communal staircase also show the flat door being open [14-15].

47. The witness statement of Ulrika Hansen provides a particularly graphic account of not only the communal front door being left open, but also her encounter with a woman who claimed to be a cleaner for the Respondent's business who explained that they had lost all the keys and needed to make a copy, and so asked Ms Hansen to lend her communal front door key. [36]

48. Mr Lindh's statement confirms that he has spoken to the Respondent's cleaning lady on multiple occasions and asked her to tell guests to stop leaving doors open. [37]

49. The witness statement of Mitra Abdolrazaghi reports that she has witnessed the short term holiday rental guests leaving doors open [31].

50. Her concerns are relayed by her landlord to the Respondent in his email 4.3.2019 reporting that the flat door had been open for 24 hours, and asking what is going. [66]

51. The witness statement of Samantha Culhane reports that the short-term tenants have left the communal front door and the flat door open on occasions [35]. This matter is also addressed in the letter before action.

52. There is correspondence between Mr Lindh and the Respondent in which Mr Lindh reports the doors being left open. The Respondent responds quite aggressively in suggesting that Mr Lindh has propped the door open himself, after the estate agent has in error left the flat door open.

Paragraph 17 of The Fourth Schedule to the Lease – damage to communal fixtures/fittings etc

53. The allegations include damage caused by the short term renters to the front communal stairs by carelessly dropping nail varnish on them, chipped and damaged tiles on the front stairs and damaged decking caused by the Respondent's builders.

54. Mr Lindh took the Tribunal to the photographs demonstrating the damages [5-6,64] and the email correspondence to the Respondent dated 2.9.2019 reporting that "*Your airbnb guests have poured some sort of paint (looks like nail polish) on the stairs, hallway and on your front door. In addition, there are broken dishes and glass in the garden as well as other rubbish. See pictures attached. You have previously promised to refurbish the stairs, when will this happen please?! Same goes for your windows….*" [64]

55. The meeting notes indicate that there has been communication between the Applicant and the Respondent in relation to these issues. At a meeting on 12th January 2018 it is noted that *"Chris to source the same tiles to repair the front steps"*. The Tribunal was told by Mr Lindh that Chris was the Respondent's builder. [62].

56. In respect of the damage to the front steps, pictures in the bundle [5, 6, 64] In those photographs there is clear damage of chipped and broken tiles [5] nail varnish spilt onto tiles [6] and varnish [64]. Mr Lindh confirmed that The Respondent had accepted responsibility for this damage and this is demonstrated in the notes of a meeting on 5th September 2019 at paragraph 5 *"Front steps were damaged by Flat 2 when doing renovations work to Flat 2(CR), and they are now dangerous. As per previous meetings (issue last raised on emails and in meeting on 20 March 2019), CR has several times promised to repair the*

front steps which his builders damaged. This has not been actioned in a timely manner." [52].

57. At a meeting on 12th January 2018 set out in an email dated 16th January 2018 [62] at paragraph 9 it states "Chris to source the same tiles to repair the front steps". Mr Lindh confirmed that Chris was The Respondent's builder. At a meeting on 20th March 2019 notes set out at paragraph 15 *"CR to source replacement tiles for the front steps so that they can be replaced before the owners of Flat 4 move in as they are dangerous. CR will contact Dominic for a quote"* [56]. Mr Lindh confirmed as per his witness statement [37] that he had seen a tenant of flat 2 sitting outside on the steps doing her nails with nail polish and after having seen her applying nail polish, he noted that front steps, hallway tiles and door to flat 2 all had dark red nail polish pain spilled.

58. In relation to the damage to the decking in the communal area, a photograph indicates some damage [5] showing some of the decking boards are raised which could cause a trip hazard. The witness statement of Mitra Abdolrazahhi of flat 3 reports that the Respondent's workmen damaged the garden decking and the front steps of the building. Although Ms Abdolrazaghi was not present at the hearing to confirm her statement, the Tribunal considered that it was a further piece of corroboration of the allegations made and evidenced by photographs, emails and meeting notes.[31]

Paragraph 18 of The Fourth Schedule to the Lease – window cleaning

59. Mr Lindh took the Tribunal to the relevant photographs indicating the flat's dirty windows. [3,4,20,21]

Paragraph 19 of The Fourth Schedule to the Lease – disposal of rubbish

60. Mr Lindh took the tribunal to the photographs showing rubbish which he says has been left by the Respondent's builders [78-79] and the short term Airbnb guests and/or the Respondent's cleaner [23-25]. Further documentary evidence in relation to problems with improper disposal of rubbish is in the form of emails from Mr Lindh to the Respondent on 2.5.19 and 10.6.19 reporting that *the cleaner/tenant needs to dispose of their rubbish in the bins in the shed, not simply put them outside as animals have ripped the bags and strewn it all across the walkway (pictures attached) – they have also left a cardboard*

box out that needs to be removed. Please inform them and ask them to clean up". To which the Respondent's wife responds on 10.6.19 *"I surely will ask her; I am sorry if she did and it shall not hppen again. Thank you for drawing this to our attention"* [65]

61. Another email from Mr Lindh is dated 2.9.2019 reporting broken dishes and glass in the garden and attaching photos. [64]

Paragraph 22 of The Fourth Schedule to the Lease – pay for making good of damage caused

62. Mr Lindh confirmed that the damage to the front steps remains unremedied, as does the leak to flat 1 which occurred during the Respondent's alterations.

The Tribunal's Determination

Clause 2 (4)

63. The Respondent is the registered owner of the Flat and is bound by the terms of the lease as set out above. The photographic evidence of dilapidated windows together with the frequent mention of this in meetings is compelling. However, the Respondent has failed to carry out remedial works. There is evidence of a notice having been served upon the Respondent on 10th February 2019 asking him to remedy this breach. The Tribunal were satisfied that on the evidence, the Respondent is in breach of clause 2(4) of the lease.

Clause 2 (5)

64. The Tribunal found that the Respondent had applied for a licence to make alterations which had been granted by the Freeholder. Although the terms may not have been complied with to the letter in terms of planning requirements and insurance, there is no evidence that the Freeholder attempted to enforce those terms. The only issue the applicants now seek to rely upon is the allegation that space from the communal area was used by the Respondent to extend an under stairs cupboard in his flat to house an electricity meter. Whilst the plans indicating the before and after alterations might indicate a difference in the size of the flat, there is no indication that the plans are accurate, and there was no evidence to persuade the Tribunal on this point. The Tribunal found no breach of clause 2(5) of the lease.

Clause 2 (8)

72. There is overwhelming evidence that the Respondent had sublet the flat on short term holiday lets via Airbnb as evidenced by his own online advert, the Enforcement Notice from the Royal Borough of Kensington and Chelsea, as well as the witness evidence from the other occupiers in the building who report meeting seeing regular changes in occupiers of the Flat. It would of course been very difficult for the Respondent to comply with this term of the lease if his paying guests were changing nightly or even weekly. That is however what is required if he assigns the property. It was noted that even since installing a more permanent sublessee in the flat since September 2019, the Respondent has failed to comply with the terms of the lease and has not provided the Freeholder with the requisite information and payment. The Tribunal finds that clause 2(8) of the lease is breached.

Clause 2 (9)

73. The tribunal made no finding under this heading. This hearing is merely to establish whether or not there were breaches to the terms of the lease. No legal costs were claimed.

Clause 2 (11)

74. The Enforcement Notice served by the Royal Borough of Kensington and Chelsea is evidence that they considered the Respondent to be in breach of the provisions in the Town and Country Planning Act 1990, which is covered by the term of the lease as being *"any enactment amending or replacing the same*". There was no evidence to suggest that the Respondent had appealed that Notice, and his conduct since that Notice was to stop the nightly holiday lets and instead install a family for a period of about a year in the property. The Tribunal found that the evidence supported the allegation and found that there was a breach of clause 2(11) of the lease.

Clause 3 (1)

75. The evidence demonstrates that the windows are in disrepair and require works. This is sufficient to demonstrate that there is a breach under this term of the lease.

Clause 3 (4)

76. The issues of non-payment of service charge is not dealt with under this application because Mr Lindh says this will be under a separate application in relation to major works.

Clause 3 (5)

77. This clause requires the Respondent to comply with the terms of the Fourth Schedule. Details below :

Paragraph 1 of the Fourth Schedule

78. The evidence that the property has been used for short term holiday lets is compelling. The Respondent's own advert on Airbnb describing himself as a family run business with photographs of the property. In addition, the Tribunal heard oral evidence from Mr Lindh who lives in the building about the frequent turnover of temporary occupiers in the building causing nuisance and stress to the other occupiers. Also available to the Tribunal were the written witness statements. In considering what weight to place on these written statements, the Tribunal found that the contents of the statements were consistent with the Respondent's emails that had been included in the bundle, and meeting notes. The Respondent does not deny that the flat has been let out on short term lets. Indeed the Respondent's own declaration in his email of 22nd January 2019 [67-69] indicates that he should know better. He states that *"I have 25 ye4ars experience and own other houses in London in which I am and have been involved for the last 13 years"*

79. This sort of short term letting runs contrary to the requirement of this term of the lease that requires the occupier to use the premises "as a private residential flat only" (see *Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC)*)

80. The Tribunal finds the Respondent has breached Paragraph 1 of the Fourth Schedule to the Lease.

Paragraph 2 of the Fourth Schedule

81. The short-term holiday lettings appear to be a business model for the Respondent, evidenced by his own statement in the Airbnb advertisement for the flat and the description of this being a 'family run business'. The Enforcement Notice served by the Local Authority and the evidence of a cleaner describing herself as 'a cleaner for Carl Risberg's business provide further proof of this. The evidence demonstrates that the flat was never purchased as a home, but as a business and the Tribunal finds that Paragraph 2 has been breached.

Paragraph 3 of the Fourth Schedule

82. The evidence of nuisance caused to other occupiers in the building is compelling. The nuisance was initially from the building works and the leaks to flat 1. Once the flat was let under short term holiday lets the occupants of the building experienced noise at all hours with people arriving and leaving at all hours, stress caused by not knowing who was in the building particularly as the communal front door was left open along with the flat door, rubbish not being disposed of correctly, laundry being left in communal areas, and damage to the communal stairs and decking in the building.

83. The Tribunal finds that paragraph 3 has been breached.

Paragraph 4 of the Fourth Schedule

85, There is insufficient evidence before the Tribunal to assess whether or not there was a breach under this paragraph. The Freeholders have produced no evidence from the insurers in relation to the short term holiday lets and how that would affect the insurance, nor in relation to the alterations. No breach was made out.

Paragraph 8 of the Fourth Schedule

84. The photographic evidence of mats hanging on the flat's window sills as well as photographic and witness statement evidence confirms that laundy has been left by the Respondent in breach of this paragraph in the communal areas and the Tribunal found Paragraph 8 had been breached.

Paragraph 14 of the Fourth Schedule

85. The photographic evidence shows laminate flooring throughout the flat in breach of this term of the lease requiring the flat to be carpeted. The Respondent is therefore in breach.

Paragraph 15 of the Fourth Schedule

86. The witness evidence describes incidents of leaving the communal door open, as well as incidents of the flat door having been left open. While the Respondent in an email denies this, and blames alternately his estate agent for having made a mistake and Mr Lindh for having propped open the flat door himself, the Tribunal found this to be inconsistent with the evidence. This breach is made out.

Paragraph 18 of the Fourth Schedule

87. The photographic evidence of the windows shows them to be dirty in breach of this paragraph of the lease.

Paragraph 19 of the Fourth Schedule

88. The photographic evidence shows rubbish disposed of indiscriminately. This was reported to the Respondent's wife, who did not deny it. The witness evidence also reports this breach. This breach is made out.

Paragraph 22 of the Fourth Schedule

89. The witness evidence and photographic evidence together with meeting notes indicates that damage caused by the Respondent's builders and/or short term lets have not been remedied. The breach is made out.

Paragraph 25 of the Forth Schedule

90. The evidence is as set out above, that the Respondent and his builders and renters have failed to keep the building tidy and clean. A breach is made out.

Applications under s.20C Landlord and Tenant Act & Paragraph 5A to Schedule 11 of Commonhold CLARA

91. The Respondent was not present to make any application and the Tribunal made no order.

D. Brandler

Tribunal Judge Brandler **24th March 2020**

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

1. 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.

Appendix of Relevant Legislation

Landlord and Tenant Act 1985

Section 20C.— Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [, residential property tribunal] or leasehold valuation tribunal [or the First-tier Tribunal] , or the [Upper Tribunal] , or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to [the county court] ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking

place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the [Upper Tribunal], to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to [the county court].

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Section 168 - No forfeiture notice before determination of breach

(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 (c. 20) (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.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to [the appropriate tribunal][1] for a determination that a breach of a 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 postdispute arbitration agreement.

(6) For the purposes of subsection (4), *"appropriate tribunal"* means—

(a)in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

Section 169 - Section 168: supplementary

(1) An agreement by a tenant under a long lease of a dwelling (other than a postdispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or (b) on particular evidence, of any question which may be the subject of an application under section 168(4).

(2) For the purposes of section 168 it is finally determined that a breach of a covenant or condition in a lease has occurred—

(a) if a decision that it has occurred is not appealed against or otherwise challenged, at the end of the period for bringing an appeal or other challenge, or

(b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in subsection (3).

(3) The time referred to in subsection (2)(b) is the time when the appeal or other challenge is disposed of—

(a)by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any), or

(b) by its being abandoned or otherwise ceasing to have effect.

(4) In section 168 and this section *"long lease of a dwelling"* does not include— (a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies,

(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5) in relation to which that Act applies, or

(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).

(5)In section 168 and this section—

"arbitration agreement" and *"arbitral tribunal"* have the same meaning as in Part 1 of the Arbitration Act 1996 (c. 23) and *"post-dispute arbitration agreement"* , in relation to any breach (or alleged breach), means an arbitration agreement made after the breach has occurred (or is alleged to have occurred),

"dwelling" has the same meaning as in the 1985 Act,

"landlord" and *"tenant"* have the same meaning as in Chapter 1 of this Part, and *"long lease"* has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.

(6) Section 146(7) of the Law of Property Act 1925 (c. 20) applies for the purposes of section 168 and this section.

(7)Nothing in section 168 affects the service of a notice under section 146(1) of the

Law of Property Act 1925 in respect of a failure to pay—

(a)a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

Schedule 11 paragraph 5A

(1)A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013/1169

Rule 13.— Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) an agricultural land and drainage case,

(ii) a residential property case,

(iii) a leasehold case,

(iv) a tenant fees case; or (c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.