FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CL/LBC/2021/0008**
Property	**:**	**285 Alice Street, South Shields, Tyne & Wear NE33 5PJ**
Applicant	**:**	**Philippa Wilson-Buys**
Representative	**:**	**Hardings Solicitors**
Respondent	**:**	**Alan Wilson Clint**
Type of Application	**:**	**Commonhold and Leasehold Reform Act 2002 (the "Act") Section 168(4)**
Tribunal Members	**:**	**Judge W.L. Brown** **Mr I D Jefferson FRICS**
Date of Decision	**:**	**9 August 2022**

DECISION

DECISION

The Application is granted. The Tribunal determines pursuant to section 168(4) of the Commonhold & Leasehold Reform Act 2002 that breaches of a covenant or condition in the lease have occurred, as recorded in paragraphs 38 and 39 of this decision.

The Tribunal orders the Respondent to pay the costs of the Applicant in the sum ordered in paragraph 46 of this decision, upon compliance by the Applicant with the direction appearing there.

Background

1. By Application dated 13 July 2021 (the "Application") the Tribunal was requested to make a determination under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "Act") that a breach has occurred of one or more covenants in the lease dated 5 February 1982 between John Martin and Janet Martin (1) and Theresa Marjory Shaw (2) for an initial term of 99 years (subsequently extended to 199 years by a Deed of Variation dated 24 January 2003) ("the Lease") of the Property.

2. The Property is described in the Application as a "One bedroom first floor 'Tyneside' terraced flat". It has its own front and rear entrances and use of a shared rear yard.

3. The Applicant owns the freehold title in the pair of upper and lower flats comprising the Property and 287 Alice Street, South Shields, NE33 5PJ, registered at the Land Registry under title number TY28775. The Applicant lets 287 Alice Street, a ground floor flat, to paying guests on a short-term basis.

4. On 24 January 2020 the Respondent became the sole owner of the leasehold interest in the Property, registered at the Land Registry under title number TY103409, but he has not lived there.

5. The covenants alleged to have been breached are those obligations binding the Respondent in clause 3 of the Lease, being:

   "*The Lessee hereby covenants with the Lessor as follows:*
   .....

   (n) Not to do or permit or suffer anything to be done in or upon the demised premises or any part thereof which may become a nuisance or annoyance or cause inconvenience to the Lessor or the tenants or occupiers of the retained premises or neighbouring dwellings.
   .....

   (p) No musical instrument television radio loudspeaker mechanical or any other noise making instrument of any kind shall be played or used nor shall any singing be practised in the demised premises so as to cause annoyance to the Lessor or to any neighbouring owners occupiers or so as to be audible outside the demised premises between the hours of midnight and 7p.m."

6. Directions were made by the Tribunal on 13 January 2022.

7. A hearing took place on 23 May 2022 at North Shields County Court Kings Court North Shields NE29 6AR. The Applicant attended, represented by Ms V Vodanovic, Counsel. Her witnesses were Miss Hallimond and Mr Ferguson. Also present was her Solicitor, Mr Askins. The Respondent attended alone.

Issues

8. In support of the Application the Applicant relied upon acts of nuisance, disturbance and inconvenience to neighbours, alleged to be caused by the occupier of the Property, the Respondent's tenant. The Tribunal had to consider, on a balance of probabilities, if any of the allegations were made out and, if so, whether the Respondent was responsible for permitting or suffering the behaviour such as to amount to a breach of the obligation in clause 3(n) of the Lease and/ or whether the behaviour amounted to noise nuisance for which clause 3(p) is drafted to avoid.

Preliminary

9. In advance of the hearing the Applicant requested permission to admit as late evidence video footage of alleged misbehavour by the occupier of the Property and of recorded music being played from the Property. These were presented as corroboration of items numbered 43 and 44 on the Applicant's Schedule of Allegations, appearing at pages 16 – 24 of the hearing bundle. Although the Respondent denied receiving the evidence, the Tribunal was satisfied from the oral confirmation given at the hearing by the Applicant's Solicitor, Mr Askins, that the material had been hand-delivered to the Respondent in the week before the hearing and therefore available to him. The Tribunal granted permission for admission of the video evidence, which was played to the Respondent at the hearing.

10. At the start of the hearing the Applicant made oral application for the Respondent to be barred from participation in the hearing, or in the alternative to be prevented from challenging the Applicant's evidence. The application was on the basis that the Respondent had failed to engage in the proceedings.

11. The Respondent informed the Tribunal that he believed he had submitted a reply to the Application, dated 25 February 2022, being a letter to the Applicant's Solicitors (confirmed by him as appearing at page 412 of the hearing bundle). He indicated he understood from a telephone conversation with the Tribunal's Office that he did not have to copy that document to the Tribunal. He also advised the Tribunal that he had no questions to put to the Applicant's witnesses.

12. While the said letter is not a substantive response to the Application, as directed by the Tribunal on 13 January 2022, the Respondent orally persuaded the Tribunal to accept it as a Reply and now stand as such. While we found limited credibility in the Respondent's explanation of why it had not also been

sent to the Tribunal, the Applicant had been aware of its content well in advance of the hearing, therefore was at no material disadvantage.

13. Therefore, the Tribunal refused the Applicant's preliminary application referred to in paragraph 10.

The Law

14. Section 168(1) of the Act states:

"*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 in respect of a breach by a tenants of a covenant or condition in the Lease unless subsection (2) is satisfied*".

Section 168(2)(a) states:

"*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"

Section 168(4)(a) states:

"A *landlord under a long Lease of a dwelling may make an application to the First-Tier Tribunal for a determination that a breach of a covenant or condition in the Lease has occurred*".

The Evidence and Submissions

The Applicant

15. It is the position of the Applicant that since around Christmas 2019 the Property has been occupied by David Clint, whom the Respondent has confirmed is the Respondent's son.

16. The Applicant presented a Schedule of Allegations (attached Annex A) which she represented amounted to incidents of behaviour such as to breach the Lease covenants referred to above.

17. In support, the following evidence was presented:

a. Witness statement of the Applicant dated 12 July 2021;

b. Witness statements of Iris Hallimond of 289 Alice Street, dated 5 July 2021 and 12 April 2022;

c. Witness statement of Harold Ferguson of 281 Alice Street, dated 10 June 2021;

d. Disclosure from Northumbria Police regarding call-outs to the Property;

e. Community Protection Warning under the Anti-Social Behaviour, Crime and Policing Act 2014, dated 23 September 2021, issued to David Clint by the local authority;

e. Iris Hallimond's anti-social behaviour diaries;

f. Photographic images taken by Harold Ferguson, Iris Hallimond, and Jonathan Askins.

18. It was asserted that the anti-social behaviour of David Clint and his visitors has caused nuisance, annoyance or inconvenience to the Applicant, to her paying guests occupying the lower flat, and to the occupants of neighbouring dwellings, in particular Iris Hallimond and Harold Ferguson.

19. It was asserted that the Respondent has refused to acknowledge that David Clint is the cause of nuisance behaviour, or to take steps to moderate the behaviour of David Clint or to remove him from the Property. The Applicant avers that the Respondent's failure to acknowledge the nuisance caused by David Clint and take action to mitigate it amounts to permitting or suffering that conduct and consequently places him in breach of clause 3(n) of the Lease.

20. In addition, it is asserted that the noise nuisance created by David Clint amounts to a breach of clause 3(p) of the Lease.

The Respondent

21. In his letter dated 25 February 2022 to the Applicant's Solicitors the Respondent accepted that he had furniture in the backyard, which he stated would be removed. He also indicated his tenant suffers from mental health difficulties, had been responding to treatment, but harassment and bullying had affected his behaviour.

22. In oral evidence he explained that he had been mis-advised by his lawyer that he only had a right of way through the rear yard, whereas he now understood it was an area for use to be shared between the Property and the lower flat. Due to his misunderstanding he had informed his son, the occupier of the Property, that he could not sit in the rear yard and in consequence when his son wanted to sit in the fresh air he sat on the front entrance step.

23. He stated that while the police had attended on occasions to ask his son to cease sitting on the front step, he had not been arrested or cautioned. He stated that between January and October 2020 he had visited his son at the Property weekly, but then due to COVID restriction he had only visited once in the next six months, to ensure there were no drugs at the Property.

24. The Respondent alleged that the Applicant was in breach of covenant regarding contributions he wanted to be made by the Applicant to the costs of certain repairs to the Property and its installations.

25. His position was that all incidents of disturbance were caused by actions of third parties, such as the occupier of the lower flat who had been trying out a bluetooth speaker, or uninvited people attending the Property. He denied that

any threats had been made by his son to any of his neighbours. The Respondent said he had investigated the allegations with his son and accepted his replies denying unreasonable behaviour.

26. He said he had not been contacted by the police about alleged disturbances, that he had kept an eye on his son and that third parties had caused damage to the front door of the Property when they had tried and failed to gain entry.

27. Regarding the video evidence (see paragraph 9), the Respondent said (by reference to the Schedule of Allegations) that item 43 was when his son had been "bored" from being stuck in the flat and item 44 was a karaoke machine playing in the lower flat.

28. The Respondent stated that so far as he was aware no complaint about noise had been made by "Hassan" (the person he understood occupied the lower flat between January and November 2021).

The Tribunal's Findings and Decision

29. The content, interpretation and effect of the Lease restrictions (paragraph 5) were not in dispute.

30. The suggestion of the Respondent that the Applicant may be in breach of certain of her obligations in the Lease was found by the Tribunal to be irrelevant to the matter before the Tribunal. A counter-allegation of that nature is not a defence to an action under Section 168(4)(a) of the Act. The Respondent's representations on facts he alleged relevant to this point had to be disregarded.

31. The Applicant did not allege that the Respondent himself was directly responsible for the creation of the incidents relied upon by the Applicant, listed in her Schedule of Allegations, but that he has suffered or permitted them to occur, so as to breach covenant 3(n). Tribunal first had to consider whether any of those incidents amounted to activity which "may become a nuisance or annoyance or cause inconvenience" to those protected by the restriction.

32. The Respondent did not challenge the evidence of the Applicant recorded in paragraph 17. He did not say he was present at, or nearby, the Property at the time of any of the incidents so as to be able to speak first-hand about any of the allegations. He relied upon assurances from his occupier and the contexts referred to in the presentation of his case, summarised above.

33. The Tribunal found the Applicant's witness statements credible. We found the police logs appearing in the hearing bundle between pages 84 and 103 to record a significant number of call-outs to the Property between 1 April 2020 and 1 March 2021. We found the logs to be corroborative of the allegations in recording complaints corresponding to entries in the Schedule of Allegations. There are numerous records identifying caller complaints about noise from the

Property and also of the attending officer having to speak to the occupier, David Clint and finding him intoxicated.

34. Further compelling evidence of commission of anti-social behaviour by the Respondent's occupier was found by the Tribunal in the Community Protection Warning of 23 September 2021, attached as Annex B, identifying noisy and threatening behaviour, affecting local residents. We found this evidence as additional corroborative of the Applicant's allegations.

35. The Tribunal considered carefully the denials and explanations / contexts presented by the Respondent. We give him credit for accepting that he was unable to challenge directly the factual basis of the Applicant's allegations, but we did not find them persuasive so as to dissuade us from our finding that they all amount to behaviour and disturbance contemplated to be prevented by causes 3(n) and (p).

36. The Tribunal found the weight of evidence of the 68 allegations overwhelming, supported by our finding of no evidence to contradict each allegation and therefore, in consequence we record that we found all of the incidents itemised in the Schedule of Allegations to be made out. On a balance of probabilities we are satisfied that the behaviours amount to acts of nuisance, annoyance or liable to cause inconvenience to neighbours.

37. The Tribunal next considered whether the Respondent permitted or suffered those acts – without which it may be said that no breach of the covenant in clause 3(n) occurred. We found from the Applicant's Grounds of Application document and her own witness statement that the Respondent had been put on notice of concerns from an initial letter dated 24 August 2020 and 7 further letters were sent from her through to 15 June 2021.

38. We found no credible evidence that the Respondent had taken effective steps to prevent or remedy the behaviour of his occupier. While Mr David Clint may have personal difficulties they are not a persuasive matter for the Tribunal. The matter at issue is that the Respondent has failed to take any or any meaningful action to stop the anti-social behaviour occurring in or around the Property so as to affect neighbours. The Tribunal found that no such steps had been taken and that the Applicant therefore is in breach of covenant 3(n) by permitting and suffering the nuisance behaviour.

39. In addition, we found that those incidents set out in the Schedule of Allegations which comprise music being played between midnight and 7pm so as to be heard outside of the Property between those hours are, on a balance of probabilities, to be an annoyance and therefore to be activity in breach of clause 3(p). Our interpretation of the provision is that the Respondent is liable for those breaches from the mere fact of the incidents occurring.

Costs

40. The Applicant made application at the hearing that the Respondent should pay her costs of these proceedings. A schedule of costs had been provided to the

Tribunal dated 19 May 2022 (attached marked Annex C). The Respondent denied receiving the document, but the Tribunal was informed at the hearing by Counsel for the Applicant that he had been properly served on 19 May 2022 and we accepted that assurance.

41. The costs application was pursued under Paragraph 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Procedure Rules") which states, so far as relevant:

> *"(1) The Tribunal may make an order in respect of costs only –*
>
> *....*
>
> *(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in…*
>
> *(iii) a leasehold case….*
>
> *(7) The amount of costs to be paid under an order under this rule may be determined by –*
>
> *(a) summary assessment by the Tribunal."*

42. While the Tribunal has found breaches of the Lease it does not automatically follow in these proceedings that costs follow that outcome. However, the basis of the application concerns the conduct by the Respondent in the proceedings, not specifically the outcome. The Applicant represented that the Respondent had failed to engage in the proceedings, had failed to make formal admissions, had not sought to limit issues before the hearing and had presented no basis for challenging the evidence replied upon in support of the Application.

43. The Respondent accepted the Tribunal's offer for a short adjournment of the hearing so that he could consider his closing submissions, including regarding the costs application. The Tribunal invited the Respondent to make representations on the costs application, but he simply denied liability for costs.

44. The Tribunal found that the Respondent had failed to co-operate reasonably in the proceedings. We found that the four representations of the Applicant (last sentence of paragraph 42) were made out. In consequence we found that the Respondent acted unreasonably in his conduct of the proceedings. He informed the Tribunal that he was engaged with Solicitors about rights concerning the rear yard issue, but appears not to have taken advice on his legal position regarding the Application, despite this step being suggested to him in the Letter of Claim dated 22 April 2022 from the Applicant's Solicitors and being informed in that letter of the serious legal action which would be pursued, including threatening forfeiture of the Lease.

45. Although the Tribunal permitted the Respondent's letter dated 25 February 2022 to stand as his formal reply to the proceedings, we found it lacked substance and certainly did not set out comprehensively the positions he advanced at the hearing. We found that he did not provide that letter to the Tribunal office, so that it could be dealt with as his formal reply in accordance

with the directions dated 13 January 2022. We found that he failed to comply with the Tribunal's directions.

46. We found that the Respondent could have taken steps to prevent the need for the hearing by engaging more effectively and transparently with the Applicant and those representing her and through timely and constructive disclosure of his position.

47. In consequence of our findings we determined that the Respondent should pay the costs of the Applicant. As to quantification, the Applicant made no representations upon the Schedule of Costs. The Tribunal was satisfied that the sum could be the subject of summary assessment. We found the charging rate appropriate for the work involved in the action and the extent of work proportionate. We order costs payable in the total sum as set out in the Schedule of Costs, but the Applicant must within 7 days of the issuing of this Decision serve upon the Respondent, with a copy to the Tribunal, the fee note of her Counsel, to verify that fee currently appearing in the Schedule of Costs as an estimate.

WL Brown.
Tribunal Judge
9 August 2022