



**FIRST - TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/OOBH/LBC/2012/0039**

**Property** : **212 Markhouse Road, London E17 8EP**

**Applicants** : **Mr Andrew Martin and Mrs Fiona Martin**

**Representative** : **In person**

**Respondent** : **Mr Karl Khan**

**Representative** : **Mr James Sandham, Counsel**

**Type of Application** : **Determination of alleged breach of covenant**

**Tribunal Members** : **Tribunal Judge Dutton  
Mr H Geddes JP RIBA MRTPI  
Mr J E Francis**

**Date and venue of  
Hearing** : **10 Alfred Place, London WC1E 7LR on 10<sup>th</sup> June  
2015**

**Date of Decision** : **1st July 2015**

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**DECISION**

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## DECISION

The Tribunal determines that the Respondent has breached a term of the lease as set out in the findings section below.

The Tribunal does not consider that the Respondent has acted in such an unreasonable manner so as to be liable for costs under the provisions of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and accordingly makes no order in that regard.

### BACKGROUND

1. The Applicants are the owners of the freehold at Markhouse Road, Walthamstow in which is to be found two flats, numbered 212A, the upper flat owned by the Respondent who in the lease is referred to as Khalid Khan and the lower floor 212B occupied by the Applicants as their residence.
2. Mr Khan holds under the terms of a Surrender and Lease dated 12<sup>th</sup> May 2005. In their application to the Tribunal the Applicants allege that Mr Khan is in breach of paragraph 6 of the third schedule of the lease which says as follows:  
*“6. Not to do or omit to be done on the property or the estate any matter or thing: -  
(a) which may be or become a nuisance, annoyance or disturbance or inconvenience to the lessor or the lessee of the lower flat and in particular without prejudice to the foregoing not to play or use any piano, record player, radio speaker or other electric, electronic, mechanical, musical or other instrument of any kind nor shall any singing be practised on the property in each case between the hours of 12.00pm and 7.00am,  
(b) whereby any insurance effected by the lessor in respect of the property and the lessor’s estate may be rendered void or voidable whereby the rate of premium may be increased.”*
3. It is said that Mr Khan, in being aware of the nuisance create by his tenant, a Mr De Silva, since October of 2014, has taken no steps against his tenant to prevent this behaviour continuing, in particular to seek to evict the tenant from the flat.
4. In addition to the above, it is alleged that Mr Khan is in breach of the Second Schedule to the lease which contains reserved rights and in particular paragraphs 1. a. iv and b. which state as follows:-  
*iv. Entry. To enter upon the property at all reasonable times (and at any time in an emergency) so far as may be necessary for the purposes of inspecting, maintaining, repairing and renewing the buildings, the lower flat, garage number 212B and the service installation comprised in the property and access  
b. the right for the owners and occupiers for the time being of 212 Mark House Road, Walthamstow and all persons authorised by them to pass on foot only and without vehicles along that part of the access way shown hatched blue on the plan.*  
In this instance it is alleged that the gate, which has been historically locked to provide security, allowed access to the Applicants to carry out repairs and that they have a key for that purpose. In October 2014 upon a request to access the gate to carry out guttering repairs, it appeared that the lock had been changed without the

Applicant's consent and indeed without Mr Khan's knowledge and that as a result access was denied to the Applicants to the rear of the property. The application went on in some detail to set out the grounds relied upon Mr and Mrs Martin to allege that Mr Khan had breached the terms of his lease insofar as taking no action to prevent the behaviour of Mr De Silva. There is no need for us to set out in any detail the allegations made relating to Mr De Silva, although it includes shouting profanities, threatening Mr and Mrs Martin, making noise by banging, playing music, striking the external railings and singing unacceptably loudly.

5. In the papers provided for the hearing we had copies of the directions made by the Tribunal, copies of the register of title for both flats, the application and lease for the Respondent's flat. We were also provided with photographs, copies of letters sent to the Respondent from the Applicants' solicitors, communications passing between the Applicant and Respondent. In addition we had before us an anti-social behaviour sheet maintained by the local authority, communications passing between the Applicants and the local authority and copies of statements made to the police in respect of Mr De Silva's harassment. A Respondent's bundle of documents had also been provided, which included an amended statement of case, the Respondent's witness statement of 2<sup>nd</sup> June 2015 and what purported to be a copy of a notice to quit dated 25<sup>th</sup> March 2015. On the morning of the Hearing, we received from Mr Sandham on behalf of Mr Khan a skeleton argument with a number of authorities relied upon, a further witness statement of Mr Khan dated it appears 9<sup>th</sup> June 2015 and handed in during the course of the Hearing a copy of an email from Andrew Martin to Mr Khan which we will refer to in due course.

## HEARING

6. Mr Khan for reasons that were not known to us, or it seems to Mr Sandham, did not attend the Hearing. We had before us his two witness statements, the first dated 2<sup>nd</sup> June which included a copy of the alleged notice and which bore a statement of truth and the second witness statement which appears to be dated 9<sup>th</sup> June but which does not contain any statement of truth.
7. The Applicants' case was much as set out in their application and supported by the documents before us.
8. Mrs Martin provided the advocacy for herself and her husband and confirmed that they have lived at the property for some eight years. Mr Khan had owned the property from 2005 and there had been no major issues with the tenants that had been living in the flat until Mr De Silva moved in, it is thought in 2011. It is from October 2014 that problems really came to a head since when the Applicants say they have suffered from exceptional noise, shouting and swearing. The police have been called and the Applicants now have a designated police officer who deals with the problems caused by Mr De Silva. It is said that although they had kept the Respondent updated throughout, there has been no communication from him since January 2015. He had been told that various threats had been made by Mr De Silva and Mr Khan had indicated that he was taking steps to remove him from the property. This was supported by a copy of an email, dated 7<sup>th</sup> October 2014, handed in during the course of the proceedings, which records that Mr Khan appeared to be considering new tenants at this time. Subsequent to that, solicitor's letters have been sent to Mr Khan concerning the actions of his tenant. Copies of

those letters were contained in the bundle sent by Cavendish Legal Group on 2<sup>nd</sup> February 2015 and from Ronald Fletcher Baker LLP on 10<sup>th</sup> April 2015. Both letters complain of Mr Khan's failure to respond to approaches by the Applicants and the solicitors. Further confirmation was sought that steps had been taken to evict Mr De Silva from the property and that keys were provided to the gate to allow access or confirmation that the gate would be removed. In the letter from Ronald Fletcher Baker Mr Khan was warned that an application to the Tribunal would be made and that this might lead to forfeiture of the lease. There was no response to these letters by Mr Khan.

9. Mrs Martin told us it was not until she received the Respondent's papers in the course of these proceedings that she discovered that a notice to quit had apparently been sent to Mr De Silva in March this year.
10. It was submitted by the Applicants that Mr Khan was liable because he had taken no action to prohibit Mr De Silva from acting in the way that he had. He had not communicated with Mr and Mrs Martin when requested so to do and had failed to take the necessary steps to remove Mr De Silva from the property. They were not alleging that he had adopted or authorised the nuisance but they were saying his inaction and failure to manage the property had caused nuisance and inconvenience to the Applicants. We were also told that the Applicants have a six year old daughter who is exposed to the behaviour of Mr De Silva.
11. There then followed some questions by Mr Sandham and it was accepted that Mr Khan had been contemplating new tenants since October 2014 and that some flooring work had been undertaken some time ago. It was submitted by Mr Sandham that Mr Khan's view was that the Martins were difficult to please. In response Mrs Martin said that they had lived in the property for eight years and had four tenants and that there had been no issues with the second and third tenants and no real issues with Mr De Silva until 2014. They confirmed that they were reluctant to come to the tribunal it being a daunting, expensive and time consuming exercise and also they recognise they must have an ongoing relationship with Mr Khan but that his failure to curb the actions of his tenant caused a very stressful situation.
12. On behalf of Mr Khan it was said that the defence to this application was essentially one of construction of the terms of the lease and authority in respect of the liability of a lessee for actions of a sub-tenant. It was said that Mr Khan was not defending the behaviour of Mr De Silva but Mr and Mrs Martin were going after the wrong person. The nuisance it was said was being caused by Mr De Silva. The lease did not, it would appear, prohibit the under-letting of the property. In support of the proposition that the Respondent had no liability for the actions of his sub-tenant we were referred to the cases of Lawrence v Coventry (No 2) [2014] HLR42. Paragraph 22 of the judgment of Lord Neuberger says "*the fact that a landlord does nothing to stop or discourage a tenant from causing a nuisance cannot amount to "participating" in the nuisance (to use the expression employed by Lord Millet and Lord Cozens-Hardy). As a matter of principle, even if a person has power to prevent the nuisance, inaction or failure to act cannot on its own, amount to authorising the nuisance. As already discussed this is strongly supported by the reasoning in Malzy.*" In Mr Sandham's view this was a tortious matter that should be the subject of proceedings between Mr and Mrs Martin and

Mr De Silva. The lease did not deal specifically with the behaviour of any sub-tenants. There is reference to sub-letting and accordingly that must have been contemplated but nothing in the lease makes Mr Khan liable for the actions of his sub-tenant. A further authority relied upon by Mr Sandham was that of Roadside Group Limited v Zara Commercial Limited [2011]1P&CR.DG5. The terms of this authority, were it is said, supportive of the propositions voiced by the Supreme Court in the Coventry and Lawrence case.

13. It was submitted to us that to find in favour of the Applicants we had to construe the acts and omissions of Mr De Silva as though these were the acts of Mr Khan, which would be incorrect. Mr Khan had not acted in any manner which was a nuisance under the provisions of the lease. If it was intended to fix Mr Khan with the sins of the sub-tenant, then the lease should have said so. Insofar as the gate was concerned, comments were made with regard to the terms of the lease and whether or not the gate in fact formed part of Mr Khan's demise. It was suggested that it was not. The lease did not cover the conduct of a tenant beyond the terms of the demise and if it was intended that the reservations would refer to the tenant, then it should clearly say so. There was, Mr Sandham said, no provision in the lease which clearly covered the alleged breach. It was also requested that we ignore the provisions of paragraph 27 of the skeleton argument as the question of rights of way were clarified to an extent at the Hearing.
14. On the question of the validity of the notice to quit under Section 21 of the Housing Act 1988, purportedly issued in March of this year, Mr Sandham thought that it was possibly ineffective although it may be saved by the additional wording concerning the two month period. Whilst the tenancy agreement was entered into some time in 2011 the exact dates were not known but it was thought that it was for a term of 12 months. It was conceded that a possession action could be started but there was uncertainty as to its success. The notice, having been issued in March of 2015, it would be unlikely that proceedings could have led to an order for possession by the date of the hearing before us. There was no evidence that proceedings had been started. He reminded us that time was not of the essence in the lease and the question of the delay from October 2014 to March 2015 was he thought reasonable. He accepted that Mr Khan had done little but it was more complicated than first seemed. The mental health of Mr De Silva may be an issue and that anything short of eviction would make no difference. His views were that the only rights the Martins had were under private law and that nothing under the lease contained remedies that would be actionable against the Respondent for the actions of his sub-tenant. Mr and Mrs Martin made further short submissions concerning the gate and reminded us of the death threats made by Mr de Silva since October 2014. Their view was that Mr Khan should have acted sooner. She told us that Mr De Silva was on police bail in respect of the harassment case, which was ongoing and Mr Khan's lack of engagement was their main cause for concern. On the question of costs under Rule 13 of the Tribunal Procedure Rules, it was indicated by both parties that dependent upon our decision they would wish to respond to the question of costs in due course.

## THE LAW

15. The law applicable to the application is to be found at section 168(4) of the Act. Our role is to determine whether or not a breach of the lease has occurred. It is

not for us to determine whether or not any enforcement action should be taken and whether any circumstances arise which might inhibit the Court in respect of any forfeiture claim.

## FINDINGS

16. What in fact we were being asked to consider by Mr Sandham, on behalf of Mr Khan, was whether or not it was right that the lessee can sub-let the property and have no responsibility under the lease in respect of actions by his sub-tenant, which if undertaken by the lessee would give rise to a claim that the lease terms had been breached. In this case this includes the nuisance clause, but as Mr Sandham conceded could include further potential breaches by the sub-tenant. These could, for example include actions or inactions which might affect the insurance provisions and or carrying out structural alterations to the flat, erecting advertising, constructing on any part of the property additional buildings or erecting or constructing on the garage or car parking space any additional buildings.
17. We find as a matter of fact that nuisance has been caused by Mr De Silva. Mr Khan was not at the Hearing to be able to challenge any of these issues and to be fair to Mr Sandham he did not seek to claim that the allegations made by Mr and Mrs Martin were erroneous or unsupported by the evidence. The question we need to consider is whether or not the authorities cited to us and the submissions made by Mr Sandham on behalf of Mr Khan, in effect absolve Mr Khan from any responsibility for the actions or inactions of his tenant. The cases to which we were referred were commercial matters involving user clauses. It does not, it seems to us, to assist in going through the details of those cases but we have considered them and borne them in mind when reaching our decision in this matter. It is not alleged by Mr and Mrs Martin that Mr Khan is participating in the nuisance caused by Mr De Silva. Their complaint is that Mr Khan could and should have taken action against Mr De Silva to stop the nuisance but he has failed to do so. This failure constitutes a nuisance within the terms of the lease.
18. We agree with that complaint. We find that a tenant permits or suffers a breach of covenant to occur if he abstains from taking legal proceedings against his sub-tenant when there could be no good defence to such proceedings. In this case Mr Khan has been aware since October 2014 that Mr De Silva, his sub-tenant, has been acting in a manner that breaches paragraph 6 of the third schedule to his lease. We find that he has had ample opportunity to take action against Mr De Silva, which in reality would have been to have commenced eviction proceedings. It is clear also that Mr De Silva is in breach of the terms of his tenancy agreement in acting in this way. Although a copy of a purported notice under section 21 of the Housing Act 1988 was produced in Mr Khan's witness statement of 2<sup>nd</sup> June 2015 it is not clear why a copy of this notice was not sent to Mr and Mrs Martin when it had been issued, which appears to be on 25<sup>th</sup> March 2015. It is not wholly clear in any event whether this is the correct notice as it refers to a fixed term tenancy whereas if the tenancy was one for 12 months then we consider the letting had been extended by the tenant holding over. The first witness statement of Mr Khan states that the notice was served on Mr de Silva on 23<sup>rd</sup> March 2015 but does not indicate how it was served and no evidence relating to service, for example a copy

of the recorded delivery slip or a statement, has been produced. Mr Khan did not attend to clarify matters

19. We consider that the notice to quit could and should have been issued before the end of 2014. In October Mr Khan had already voiced a view that he was seeking to install new tenants and we are therefore unclear as to why he delayed taking that course of action. Although Mr Sandham raises the spectre of human rights and potentially Mr De Silva's mental state, it seems to us that if the correct notice was served the accelerated possession route could be followed and there would seem, on the face of it, to be no defence that Mr De Silva could raise. Certainly no evidence was put to us that possession would be a difficulty. We have therefore come to the conclusion, and find that in respect of Mr Khan's failure to commence possession proceedings and to pursue those against Mr De Silva this is in itself a breach of the terms of paragraph 6 of the lease and that accordingly we find that such a breach has occurred.
20. Insofar as the gate is concerned, that is a matter upon which we do not think it necessary to make any particular ruling. The lease plans are unclear as to whether or not the gate forms part of the demise of Mr Khan's flat and if it does not it seems to us that Mr and Mrs Martin would be entitled to affect an entry into the area if needs must. This is not the real nub of the issue.
21. Insofar as any claim for costs are concerned and so as to forestall any further unnecessary legal costs being incurred, we consider that although we have dismissed Mr Khan's submissions they were reasonable ones to raise and there is no suggestion that during the course of the proceedings he has acted unreasonably. It is a pity that he did not consider it necessary to attend the Hearing when other matters might have been clarified. However, that was his decision but it cannot be said that this increased the costs liabilities of Mr and Mrs Martin. An order under Rule 13 should not be lightly made. We do not consider that Mr Khan has acted so unreasonably in the course of the proceedings whether in defending them or in his conduct of same, that a cost order should be visited upon him.

Judge: Andrew Dutton  
A A Dutton

Date: 1st July 2015