FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BH/LBC/2019/0020**
Property	**:**	**Ground Floor Flat, 14 Folkestone Road, London, E17 9SD**
Applicant	**:**	**Mrs Anna Kyriacou**
Representative	**:**	**Mr Andreas Kyriacou (Spouse)**
Respondent	**:**	**Ms Vanessa Louise Linden**
Representative	**:**	**Ms Nicola Muir of counsel**
Type of Application	**:**	**Determination of an alleged breach of covenant**
Tribunal Members	**:**	**Judge L Rahman** **Mrs Flynn** **Mr Piarroux**
Date and venue of Hearing	**:**	**13/5/19 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**6/7/19**

DECISION

The application

1. The applicant landlord seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the respondent tenant is in breach of 2 covenants contained in the lease, namely:

   Clause 16 of the Third schedule which states *"Not to do or permit or suffer to be done upon the demised premises or any part thereof any act or thing which may be or become a nuisance annoyance damage or inconvenience to the lessor or the owners or occupiers of the other maisonette in the property*" (" the nuisance covenant"), and;

   Clause 22 of the Third schedule which states "*Within one month after every assignment transfer legal charge instrument of charge or underlease (whether absolute or by way of mortgage) of the demised premises or any devolution of the interest of the lessee under this present lease in the demised premises to give notice in writing with particulars thereof to the lessor or his agents and produce such assignment transfer legal charge instrument of charge mortgage or underlease or in the case of any such devolution the probate of the will or letters of administration under which such devolution arises and to pay to them their fee of eight Pounds (£8.00) together with value added tax for registration of such notice"* ("the notice covenant").

2. In particular, the applicant asserts that the respondent had breached the nuisance covenant by allowing her tenants to deposit rubbish and furniture in the front garden in February 2019 and that the respondent had breached the notice covenant by failing to give notice of the most recent assured shorthold tenancy granted in January 2019.

The hearing

3. The applicant attended with her husband. The applicant confirmed at the hearing that her understanding of English was limited and that her husband would give evidence on her behalf. The respondent attended with Ms Muir of counsel.

4. Immediately prior to the hearing the respondent handed in further documents, namely, a skeleton argument, a chronology, and case law. The start of the hearing was delayed while the tribunal considered these new documents.

5. The applicant's husband and the respondent both gave oral evidence at the hearing and closing submissions were made on behalf of both the parties. The oral evidence and the closing submissions have been noted by the tribunal and are not repeated here save for specific reference.

The background

6. The property which is the subject of this application is a ground floor flat with a rear garden. The respondent holds a long lease of the property. The applicant and her husband hold a long lease of the upstairs flat and the front garden. The applicant and her husband had lived in the upstairs flat until 1996. The freehold for both the flats was purchased by the applicant in 1992. Both flats are sublet on assured shorthold tenancies.

7. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The issues

8. Whether there has been a breach of covenant.

9. The burden of proof rests with the applicant, on the balance of probabilities, to prove the lease includes the covenants relied upon and that the alleged facts constitute a breach of those covenants.

The tribunal's findings and conclusion

Was there a breach of the nuisance covenant?

10. There has been an ongoing problem between the parties, over a number of years, with regards to whether or not rubbish / wheelie bins were left in the front garden. By way of example, the tribunal notes that the applicant had written to the respondent in a letter dated 27/10/00, stating that she had been informed by the leaseholders of the upstairs flat that the respondent was using the front garden to deposit rubbish and for the respondent to confirm whether this was correct. The respondent stated in reply, in a letter dated 29/11/00, that she was bemused by the comment made by the applicant and that she did not know where this complaint had arisen from. The applicant's husband wrote to the respondent in a letter dated 5/1/04 stating that the respondents tenant was using the front garden to store a refuse wheelie bin and that this should be removed immediately. The respondent replied in a letter dated 19/1/04 that she would look into the matter and be in contact shortly. The applicants husband again wrote to the respondent in a letter dated 17/2/04 stating, amongst other matters, "*Meantime is nearly 3 months and still I have not heard from you what you are planning to do with using my garden to store your bin. You have two options either to remove it completely from my garden or we can come to an agreement to pay me rent*". Whilst the respondent dealt with the other matters raised in the applicant's letter, the respondent did not deal with this specific issue in her letter dated

24/2/04. The applicant's husband wrote a further letter to the respondent dated 2/3/04, thanking the respondent for her letter dated 24/2/04 and noting that the respondent "*had ignored the rubbish bin completely*". The letter further stated "*I have given you enough time to take it away but you are ignoring me. Today I am writing to the council to come and take it away as you have no right to put it in my garden*". The respondent wrote to the applicant in a letter dated 24/8/05, stating, amongst other matters, "*With regard to the issue of bin storage, I have asked the tenants once again to store their bin in the rear garden, which you will see they have done. However, you did offer to rent a space in the front garden to me for this purpose and I wonder if you could let me know the rental figure you would require for this, per annum*". The applicant wrote to the respondent in a letter dated 17/2/12 in which she stated, amongst other things, "*After reading the AST agreement there is no reference to the storage of the refuse bins. This is an ongoing problem and you are failing to comply with the lease agreement. You should inform your tenants in writing that the front garden is not for their use…*" The tribunal notes the reply from the respondent in her letter dated 2/3/12 in which the respondent states "*This matter is rather difficult for me as I'm afraid I have seen no evidence myself of the bin belonging to my ground floor flat being stored in the front garden of your husband's flat. However, in good faith I have spoken to my tenant to remind him of his responsibilities in this regard and he has assured me he is adhering to this stipulation. Should this matter cause you or your husband concern in the future it would be very helpful if you could share with me the information that you have seen by providing a dated image of any occurrence so that I am able to take this up with my tenant. Of course, I sincerely hope this would not be necessary and I shall be doing my very best to ensure this is the case*".

11. With respect to the specific incident in February 2019, the respondent's new tenant had left a sofa, and a bag of rubbish in a red bag on the sofa, in the front garden (photographs on pages 168 to 173 of the applicant's bundle). The applicant's husband told the respondents tenant to remove the items. He was told that the items would be removed that evening, however, when he attended the next evening, he saw that the items had not been removed. He again asked the tenant to remove the items and explained that it was also a health and safety hazard. He was told by the tenant that she could not remove them and would do so on the following Sunday. The items were eventually removed on the following Sunday. Both parties agree that the front garden had been cleared by 10/2/19.

12. The applicant wrote to the respondent in a letter dated 7/2/19, the material parts of which stated as follows: "*…Further to my numerous letters/notices in the past regarding the front garden, your empty promises and assurances and various other excuses, you proved to me that you don't care. Last Saturday 2/2/19 you had new tenants in your flat. As usual broken furniture's and rubbish in the front garden*

because of mismanagement. The leaseholder of the first floor flat complained to me that since last Monday 4/2/19 is trying to carry out some work at his flat, but as the garden is fully occupied by your tenants broken furniture's and rubbish is unable to do that. This happened on the 5/2/19 and 6/2/19. He spoke to your tenants but the rubbish is still there. Before I apply to the first-tier Tribunal, although admitted by your tenants by email, I want to hear from you by return your excuse and how you will rectify this systematic abuse and not allowing a quiet enjoyment the leaseholders and owners of the first floor flat. The gas valve is blocked by the broken furniture; it would require two people to move them in case of emergency…Enclosed please find one of the pictures taken".

13. The material parts of the respondent's reply in her letter dated 21/2/19 stated "*In response to your notice of breach of tenant's covenants dated 7 February 2019, I again dispute that this is a valid notice. I have neither done, nor permitted to be done nor suffered to be done anything at all in relation to the front garden. The first I heard of the matter was your notice and the matter seems to have been remedied now. Such notices do you no credit and further serve to demonstrate the bullying nature of your ongoing conduct towards me…*"

14. The applicant agreed at the hearing that the respondent had not put the sofa and the red bag in the front garden. The applicant further agreed that so long as the respondent warned her tenants not to leave rubbish or wheelie bins in the front garden, the respondent was not required to do anything more under the terms of the lease.

15. The tribunal notes that in a letter dated 10/1/17, the respondent's solicitors had written to the applicant and had stated, in relation to the front garden, that the respondent was happy to confirm that she intended to require all future tenants to covenant not to keep or store any refuse in the gardens at the building except in storage facilities provided for the purpose.

16. The tribunal notes that the assured short hold tenancy granted by the respondent to her tenant on 9/1/19 (to start on 12/1/19) contains the two following clauses, namely, "*Not to do or permit or suffer to be done in or on the property any act or thing which may be a nuisance damage or annoyance to a person residing, visiting or otherwise engaged in lawful activity or the occupiers of the neighbouring premises*" (clause 4.4) and "*Refuse collections are weekly on Tuesday morning. Bags should be put out for collection on Monday night before collection day. Bags must be placed on the entrance path (not garden) on the edge of the boundary line. Please refer to agent for bag supplies*" (clause 15).

17. The tribunal notes the email from the respondent to the managing agent looking after the relevant property, dated 10/2/19, states "*As I've*

mentioned on the phone [yesterday]…, the front garden… belongs solely (not jointly) to that of the first floor flat… No rubbish, cycles/any other item are to be placed in this garden by my tenants at all under any circumstances. This also applies to bags for the private weekly refuse collection…as detailed in the AST special clause. I received a letter yesterday from the freeholder who was very upset claiming that the tenants have put a sofa in the front garden… Whilst you're talking to them [the tenants] could you be clear to remind them that the front garden is not for their use as it does not belong to the flat - only the rear garden and to follow the guidelines on the contract about refuse…"

18. The tribunal notes the email from the tenant to the managing agent, dated 15/2/19, states "*I explained to him [the applicant's husband] that his tenants kindly allowed me to use the space [front garden] as they had no immediate need for it and they saw me struggling all that weekend. I then assured him we are aware the front is for upstairs use only and we have no intention of leaving the sofa there for a prolonged period…*"

19. The tribunal further notes the respondent stated in oral evidence that she had told the managing agent at the end of 2018 that the front garden must not be used by her tenants and that the managing agent had in turn told the tenants not to use the front garden. The tribunal notes that when the applicant's husband was asked in cross examination whether he had any evidence to the contrary, he replied "*none*".

20. Given the contents of the letter dated 10/1/17 (that the respondent would tell her tenants not to use the front garden), the respondents oral evidence that through her managing agent she had notified the tenants not to use the front garden (and no evidence to the contrary from the applicant), the specific provisions in the AST informing the tenant not to cause any nuisance or to use the front garden (clause 4.4 and 15), the email from the respondent to her managing agent telling them to "*remind*" the tenant that the front garden is not for their use, and the email from the tenant to the managing agent acknowledging that she was aware that the front garden was for the use of the upstairs flat only, on balance, the tribunal is satisfied that the respondent did not "permit" her tenants to breach the nuisance clause. The respondent had done all that was reasonably required of her.

Was there a breach of the notice covenant?

21. There has been an ongoing problem between the parties, over a number of years, with regards to the respondent's adherence to the notice covenant. The tribunal notes that the applicant had written to the respondent in a letter dated 16/7/00, reminding the respondent of the requirement under the terms of the lease to give notice in writing to the

lessor within one month of every assignment. The tribunal notes the letter from the respondents lender to the applicant, dated 19/7/00 (page 53 of the applicants bundle), which states that the respondent had been informed that she must forward to the applicant the notice in writing of registration of any sublet. The applicant stated that in reply, the respondent had provided a copy of the relevant assured short hold tenancy agreement which included the details of the tenants (page 57 of the applicants bundle).

22. However, the tribunal notes that despite this, on 9/3/05, the respondent provided a tenancy agreement which did not include the details of the tenants (page 67 of the applicants bundle).

23. The tribunal notes that the applicant wrote to the respondent in a letter dated 21/6/11 (page 72 of the bundle) which states, amongst other things, "*I also need to stress that you are not following the rules of the lease agreement which you have signed. For the last four years you have not given me any details of your tenants and assignments as per lease agreement*". The applicant wrote a further letter dated 25/11/11 to the respondent (page 73 of the applicants bundle) in which the applicant again informed the respondent that she was not complying with the terms of the lease and the respondent was reminded to read the lease regarding letting out the property. The applicant stated that the respondent did not provide any reply to these letters at all and the tribunal notes that the respondent did not provided any evidence to the contrary.

24. The tribunal notes the applicant wrote a further letter to the respondent dated 25/1/12 (page 77 of the bundle) in which the applicant states "*…Copy of assignments or underleases were previously requested and we have had the same argument where you have claimed to be unaware of the fact you are obliged to provide them. You are in breach of your lease agreement…*" The tribunal notes that in response to this letter, the respondent did not provide a copy of the actual tenancy agreement but provided a "summary of principal terms" which provided the tenant's name and confirmed the duration of the tenancy.

25. The tribunal notes that in a letter dated 21/5/15 (page 92 of the bundle), the respondent enclosed a cheque in the sum of £8 "*with regard to clause 22 of the above lease*" but the letter made no reference to a copy of any enclosed tenancy agreement. In a letter dated 16/6/15 (page 93 of the bundle), the applicant stated that she was returning this [presumably the cheque] "*as you have included no information as to what you are registering. Kindly provide me with full details*". The applicant did not receive a reply and therefore made reference to this in her letter to the respondent dated 8/7/15 (page 102 of the bundle), in which the applicant stated "*… You are also avoiding to send me the notices under the covenant clause 22 in order not to pay £8. I can easily within my rights I sent you a notice 146 of the property law*

1925 and apply to the County Court to re-enter the property for breach of your covenants…" The respondent replied in her letter dated 11/7/15 (page 103 of the bundle), stating "*…With regard to clause 22 of the lease I enclose a copy of the assured short hold tenancy agreement together with the necessary payment for registration. I thank you for your guidance in this matter and would be grateful if you could provide confirmation and receipt of registration*".

26. The next tenancy agreement provided by the respondent to the applicant was attached to her letter dated 13/6/16. This tenancy agreement referred to the property as "*14 Folkestone Road…*" and did not specifically make reference to the ground floor flat. The applicant therefore wrote to the respondent in a letter dated 16/6/16 informing the respondent that the tenancy agreement was "*legally void as you have assigned the whole property and not just your flat*" and the applicant returned the fee that had been paid and requested that the tenancy agreement be corrected (pages 107-110 of the bundle). On 6/12/16, the applicant served a section 146 notice which required the respondent to submit and register the sublease she had entered in May 2016 and pay the registration fee and the administration fee for correcting the original submission which was returned to the respondent. The attached letter reminded the respondent that she was failing to respond to previous letters and that the tenancy agreement sent with the letter dated 13/6/16 was wrong as it included the whole property instead of the respondents flat only and therefore the documents had been returned to the respondent to correct and resubmit but which the respondent had decided to ignore (pages 84-89 of the respondents bundle). In response to the section 146 notice, the respondent replied through her solicitors in a letter dated 10/1/17 (page 110 of the bundle), stating there was no requirement for the applicant to approve the terms of any tenancies granted by the respondent, but by way of general comment the respondent confirmed that she understood her obligation to give notice when she sublet her property, which was required as "*a matter of creating a record for you* [the applicant] *of who has a right to occupy her* [the respondents] *property*".

27. The respondent granted a new assured shorthold tenancy on 9/1/19 for a term of 12 months commencing on 12/1/19 (copy on page 141 of the bundle). A copy of the tenancy agreement, with the tenants name(s) deleted, was received by the applicant on 12/2/19 (Royal Mail proof of delivery note on page 147A of the bundle). The respondent directly paid the £8 registration fee into the applicants account.

28. The applicant served a notice dated 13/2/19, alleging that the respondent was in breach of the notice covenant as the notice was not received within one month of the assignment and the notice was invalid as it did not contain the "particulars" of the tenancy agreement as the names of the tenants had been deliberately deleted. The notice required the respondent to provide the correct particulars of the assignment and to pay the applicant's reasonable cost in the sum of £20 (page 149 of

the bundle). This was delivered to the respondent on 14/2/19 (Royal Mail proof of delivery on page 149A of the bundle).

29. The applicant wrote a further letter to the respondent dated 21/2/19, in which the applicant states "*…Your notice was delivered to me outside the timescale provided in your lease agreement and incomplete. In my letter dated 13/2/19 I have asked you to provide a revised notice with particulars - names of tenants. As of today you have ignored my letter. Enclosed please find your incomplete contract and the £8 payment. In order to save cost to avoid an application to the first-tier Tribunal I will keep the two matters above open until Friday, 1st March 2019. After 1/3/19 I will file a claim without any further notice*". This letter was delivered to the respondent on 22/2/19 at 10:18am (Royal Mail proof of delivery on page 150A of the bundle).

30. The respondent provided a reply in her letter dated 21/2/19, the material part of which states "*…You are aware of my tenants names. You have met them and exchanged emails with them over the front garden. For the avoidance of doubt they are Nicola Fowler and Rebecca Byham*". (Although this letter is dated 21/2/19, the tribunal notes that according to the information from Royal Mail, this letter was in fact accepted (i.e. posted) at the Post Office at 4:55 PM on 22/2/19 (page 151B of the bundle).

31. The respondent agreed at the hearing that she had posted the notice / copy of the tenancy agreement on Saturday 9/2/19 and the same was received by the applicant on 12/2/19. The respondent further stated that she had naively deleted the tenants' names as she had made a "foolish mistake" in believing that she was not allowed to disclose such information to the applicant because of data protection issues. Nevertheless, she had provided the names of the tenants in her letter dated 21/2/19 and in any event provided a full copy of the tenancy agreement, which included the tenants' names, six weeks later.

32. When asked why the respondent was unable to comply with the notice covenant, which simply required her to provide a copy of the AST and to pay the £8 registration fee, and why the applicant had to chase her to provide this information, the respondent stated that this was the only property that she owned, she had a lot to learn, she was learning on the job, and she would occasionally "fall down". The respondent confirmed that she now understood that she was required to provide the names of the tenants. The respondent further confirmed that up until her recent concerns regarding data protection issues, she had believed that she must provide the names of the tenants.

33. The tribunal notes that the lease states *"Within one month after every assignment… or underlease…of the demised premises… to give notice in writing with particulars thereof to the lessor…and produce such assignment…or underlease… and to pay…fee of £8.00…"* The tribunal

finds this to mean that the written notice/ copy of the tenancy agreement must be received by the applicant within one month of the assignment / underlease. In this case, the AST was granted on 9/1/19. Therefore, the written notice / copy of the tenancy agreement should have been received by the applicant by 9/2/19. The notice / copy of the tenancy agreement was in fact received on 12/2/19, therefore not within one month of the assignment / underlease.

34. Even if the tribunal were to accept the respondent's submission, that the notice / tenancy agreement must be received within one month of the commencement of the term on 12/2/19, the respondent accepts that she had failed to provide the tenants' names by 12/2/19. The fact that the applicant had spoken with the tenants and may well have been aware of their names before the 9th or the 12th of February 2019 is irrelevant as the respondent was required to provide this in writing. The respondent only provided the tenants' names in writing in her letter dated 21/2/19, received by the applicant on 23/2/19. Therefore, the notice in writing with particulars was not provided within one month as required under the terms of the lease. Furthermore, the fact that the respondent provided the tenants' names in her letter dated 21/2/19 is inadequate in any event as the respondent was also required to provide a copy of the tenancy agreement within one month. The applicant was entitled to and had in fact returned the incomplete tenancy agreement to the respondent by then. The respondent only provided the complete tenancy agreement 6 weeks late.

35. For the reasons given, the tribunal is satisfied that there was a breach of the notice covenant.

36. The tribunal notes that the respondent had paid the £8 registration fee direct into the applicant's account. Although the applicant had sought to refund this fee by sending a cheque to the respondent in the sum of £8 on 21/2/19, the tribunal notes there is no evidence that the respondent had in fact cashed this cheque. Although the respondent agreed that she had not informed the applicant in writing or otherwise of her decision to not cash the cheque, and in the circumstances the tribunal found it reasonable for the applicant to presume that the fee had been refunded and remained payable, it is a matter of fact that the relevant registration fee had been paid.

Application under s.20C of the of the Landlord and Tenant Act 1985 and section 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 and refund of fees

37. The tribunal notes the persistent failure by the respondent, over a number of years, to provide the relevant notices with respect to the subletting of her property. It is not reasonable to expect the applicant to have to chase the respondent for information she was fully aware that she was required to provide under the terms of her lease. Despite the

previous problems, the respondent chose to redact the names of the tenants without providing any explanation to the applicant regarding any concerns she may have had with data protection issues. Therefore, although there was only a technical breach of the notice covenant, it was reasonable in all the circumstances for the applicant to have made the application to this tribunal.

38. Whilst the tribunal accepts the applicant's frustrations, given the ongoing problem concerning the front garden over a number of years, the applicant has failed in proving a breach of the nuisance covenant.

39. In the circumstances, taking a broad brush approach and concluding that each of the 2 main issues raised by the applicant were of equal significance and took an equal amount of time to prepare, the tribunal considers it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act and section 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 so that the applicant may only pass 50% of any costs incurred in connection with the proceedings before the tribunal through the service charge or as an administration charge. For the same reasons, the same applies to any fees paid by the applicant in connection with the proceedings before the tribunal.

Name: L Rahman **Date:** 6/7/19

Rights of appeal

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

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

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

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

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

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