FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/LBC/2021/0064**
HMCTS code	**:**	**V: VIDEO**
Property	**:**	**Flat 80 and Flat 113 Ocean Wharf, 60 Westferry Road, London E14 8JS**
Applicant	**:**	**Ocean Wharf 2000 Freehold Company Limited**
Representative	**:**	**Thackray Williams LLP**
Respondent	**:**	**Daniel John Cunliffe**
Representative	**:**	**No appearance**
Type of Application	**:**	**Determination that a breach of covenant has occurred (Commonhold and Leasehold Reform Act 2002, s 168(4))**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms E Flint DMS FRICS**
Date and venue of Hearing	**:**	**Remote** **12 November 2021**
Date of Decision	**:**	**12 November 2021**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the Applicant. The Respondent has not responded to any communication from the Tribunal. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. We were referred to an Applicant's bundle of 251 pages, plus a skeleton argument and schedule of costs, which have been noted.

The application

1. The Applicant seeks a determination under the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), section 168(4) that the Respondent has breached covenants in the leases of the two properties.

2. Section 168 of the 2002 Act may be found here: https://www.legislation.gov.uk/ukpga/2002/15/section/168

The property

3. In the application, the property is described as follows:

> "Ocean Wharf is a development built in about 2000 consisting of four blocks of flats of which Blocks A and B are the largest. Block A is ten storeys high and contains 52 flats, being flats 55-106. Block B is seven storeys high and contains 32 flats, being flats 107-128, 96 flats in total."

The leases

4. The leases of flats 80 and 113 are in similar form.

5. The leases are tripartite between the freeholder, a management company and the lessee. They are dated in December and April 2000, for terms of 999 years.

6. The relevant terms in respect of the alleged breaches are the following lessee's covenants.

7. Clause 3(10):

> "Not to carry on or permit upon the Demised Premises any trade or business whatsoever nor do or suffer to be done on the Demised Premises any other thing which may be or become a nuisance to the Lessor or to the owners or occupiers

of other parts of the Block or whereby any insurance effected by the Management Company under this Lease may be rendered void or voidable or whereby the rate of premium may be increased but so that the Demised Premises shall at all times during the said term be used for the purpose of a private residence only".

8. Clause 3(11):

> "At all times during the said term to perform and observe the regulations set out in the Sixth Schedule including any reasonable addition to or variation of the said regulations written notice of which shall be given to the Lessee and which the Management Company may reasonably deem necessary for the safety care and cleanliness of the Development or for securing the comfort and convenience of the owners and occupiers of the flats in the Development".

9. The relevant paragraph in the sixth schedule is regulation 1:

> "No piano or other musical instruments record player television wireless or other mechanical instrument for the reproduction of sound of any kind shall be played or used nor shall singing be practised in the Demised Premises so as to cause annoyance to the owners and occupiers of the other parts of the Block or so as to be audible outside the Demised Premises between the hours of 10.30 pm and 8.00 am".

10. Clause 3(14):

> "Not to assign underlet or part with the possession of part only of the Demised Premises".

11. Clause 3(15):

> "(i) Not to assign the demised premises except to a person who becomes a member of the Management Company and enters into a Deed of Covenant in the form set out in the Seventh Schedule
>
> (ii) Not to underlet or part with possession of the demised premises except to a person who covenants with the Lessee to observe and perform the regulations contained in the Sixth Schedule hereto".

12. In relation to legal costs, by clause 3(12) the lessee covenants to:

> "From time to time to pay on demand all reasonable costs charges and expenses (including legal costs and surveyor's fees) incurred by the Lessor or the Management Company for the purposes of or incidental to the preparation and service of a Schedule of Dilapidations and Notice to repair or any Notice

> under the provisions of Sections 146 or 147 of the Law of Property Act 1925 (as amended from time to time) notwithstanding that forfeiture be avoided otherwise than by relief granted by the Court".

13. The application also alleged a breach of a term requiring compliance with legislation (clause 3(6)) on the basis that gatherings in flat 113 breached covid regulations then in force, but this was not pursued before us.

The issues and the hearing

Introduction

14. The Applicant is the freeholder. The Respondent lives in flat 80. The alleged breaches of covenant in respect of that flat relate to the playing of loud music, including late at night. Flat 113 is let. The breaches alleged relate to the letting of the flat on short term holiday-type letting apps, including consequent nuisance caused by those renting the flat.

15. The Applicant was represented by Ms N Muir of counsel. The Respondent was not represented and did not appear. The Tribunal has not received any communication from the Respondent, and he has not adhered to any of the directions, made on 24 September 2021.

16. *The evidence*

17. The Applicant supplied copies of a number of letters from the Respondent's solicitors to the Respondent and to his mortgagees in respect of both flats, and correspondence indicating that (in relation to flat 113) the mortgagee had written to the Respondent.

18. On 28 April 2021, the Applicant's property manager emailed a letter to the Respondent alleging breaches of clauses 3(10), 3(14), 3(15)(ii), 3(11) and 3(6) in the lease of flat 113 in relation to short term letting and nuisance. The Respondent replied to the email saying "I can confirm that I will not be in breach of lease flat 113". The evidence was that this is the only response received to any of the communications addressed to the Respondent.

19. The Applicant supplied witness statements from five witnesses, all of whom appeared remotely before us.

20. Ms Danielle Woodford has been the property manager responsible for the blocks since February 2021. She is employed by the Respondent's managing agents, London Residential Management Limited.

21. Ms Woodford's evidence largely consisted of reports of the complaints she had received about nuisance relating to both flats 80 and 113. From

March 2021, she received complaints that flat 113 was being let for short periods via Airbnb, up to October 2021. In the hearing, she told us that the situation had remained much the same since in relation to both short term lettings and nuisance, even if there were occasionally somewhat quieter times. She referred to allegations of prostitution and drug dealing from flat 113.

22. Exhibited to Ms Woodford's witness statement was a schedule of complaints. These, she told us, were compiled by her into a spreadsheet from digital files of emails and other complaints kept on each flat by her and her predecessors as property managers. The most recent incident on the schedule was one on 23 September 2021 (see paragraph 35 below), the earliest from February 2012. The complaints were exclusively of loud or very loud music from flat 80 up to early 2021, when complaints about flat 113 started. The complaints in relation to flat 80 became much more frequent from 2019, although the extent to which that reflects a change of behaviour, rather than relating to record keeping, we cannot tell.

23. Miss Pauline Procter is a director of the leaseholder-owned freehold company, and chair of the resident's association.

24. Ms Procter too had received complaints about short term lets in relation to flat 113 from February 2021. She reports that Mr Siri (who also gave evidence) alerted her to the link to an Airbnb posting, the host being identified as "Daniel". She found and confirmed the listing herself, and her evidence was that she could identify the property illustrated in the posting as flat 113. At a later date, she became aware that the flat was being hosted on another similar app, Bookings.com, although the address given was misleading. She explained how she could recognise the flat as flat 113 by reference to external features of the block, and the view from the balcony. A screen shot of the latter posting was exhibited to her witness statement.

25. The other three witnesses were all near neighbours of one or other of the flats.

26. Mr Gavin Coates occupies a flat immediately adjacent to flat 80. He had experienced serious noise nuisance, in the form of loud music, from flat 80 since he and his wife moved in in 2012. A previous owner had installed additional sound insulation on the wall between his flat and flat 80; but nonetheless the volume of music regularly played in flat 80 was such as to constitute substantial nuisance.

27. Mr Coates gives an account of making numerous complaints to the Respondent. He had also involved the local authority's Environmental Health Enforcement Officers, complaining to them 17 times. Mr Coates' complaints were either ignored, or, on some occasions, met with abuse and threats of physical violence from the Respondent.

28. Mr Coates had complained to the managing agents and the freeholder. He also related complaints made by the neighbour the other side of flat 80.

29. In his witness statement, M Coates gives examples of recent occasions when noise nuisance persisted after 10.30 pm, and on occasions into the early hours of the morning.

30. Environmental Health Officers had, at Mr Coates' instigation, also attempted to contain the noise, attending on five occasions, but also with limited or no success.

31. Mr Coates explains the serious affects that the noise nuisance has had on him and his wife, affecting their sleep and ability to enjoy their flat, including the balcony.

32. Mr Coates produced a detailed log of incidents of noise nuisance from 2021 to August 2021. The document exhibited, he told us, is a Word document produced from a series of contemporaneous notes kept by him since that time in another format. The table extends over 11 pages of the bundle.

33. Mr Guillermo Siri has been a tenant of a flat next door to flat 113 since November 2020. From February 2021, when the previous long term tenants left, he noticed that flat 113 was occupied by a number of short term guests, and often hosted parties which, he noted, breached the then current covid regulations. He identified a posting relating to the flat on Airbnb in March 2021.

34. The parties were noisy – loud music, door slamming and shouting. After complaining of very late noise nuisance on at least two occasions to the Respondent, he said that the Respondent threatened to report him to the police for stalking. On at least one occasion, he was forced to sleep at a friend's property.

35. Mr Siri gave more detailed evidence of the incident on 23 September 2021, a (perhaps somewhat garbled) version of which also appeared on Ms Woodford's complaint's log. It appeared that a man and a woman had escaped from some form of captivity in the flat in the late afternoon, having been subjected to physical violence. The emergency services were called, and it appears that there is an ongoing police investigation into the circumstances.

36. Mr Stephen Georgieff purchased a flat above number 113 in January 2021. He and his wife stayed there briefly in late February/early March, moving in full time in late April. He relates loud and disruptive parties from early March onwards, throughout their time in the flat. On one occasion, he called the police (twice). The result has been that Mr

Georgieff and his wife are unable to sleep in their main bedroom, and his wife's pre-existing mental health problems have been exacerbated.

37. Since he gave his witness statement, he said, the issues had continued to a degree, but it was comparatively quieter now.

Submissions

38. Ms Muir submitted that, if we accepted the evidence tendered, there had been breaches of convents.

39. Clause 3(10) included a covenant "Not to … do or suffer to be done … any other thing which may be or become a nuisance to … the owners or occupiers of other parts of the block". Regulation 1 in the sixth Schedule, compliance with which is required by clause 3(11), prohibits *any* playing of a "mechanical instrument for the reproduction of sound" which causes annoyance to owners and occupiers of other parts of the block, and such playing which is (merely) audible outside the demised premises between 10.30 pm and 8.00 am.

40. The schedule of complaints exhibited by Ms Woodford and the evidence of Mr Coates (and his schedule) provided evidence of a breach of each of these covenants in respect of flat 80, by the playing of loud music over a long period of time.

41. In respect of flat 113, the evidence, again of Ms Woodford's schedule, and of Mr Siri and Mr Geogieff, establish breaches of the same covenants.

42. In respect of flat 113, Ms Muir also submitted that the letting of the flat via Airbnb and Booking.com breached the covenant in clause 3(10) requiring the flat to be used "for the purpose of a private residence only". Ms Muir relied on *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC), [2017] L & TR 10 and *Triplerose Ltd v Beattie* [2020] UKUT 0180 (LC), [2021] 1 P & CR 4 in both of which short term lettings of a similar nature to those undertaken in this case were found not to constitute use as a private residence.

43. Further in respect of flat 113, Ms Muir argued that the Respondent was also in breach of clause 3(14) and/or clause 3(15). We do not know, she said, whether the Airbnb/Booking.com lettings were for part only of the demised premises. If it were for part only, then that would be a breach of clause 3(14). If, however, the lettings were for the whole, then the Respondent was in breach of the clause 3(15) obligation to only do so to persons who become members of the management company and enter in to the relevant deed of covenant, and covenant to observe the regulations in the sixth schedule.

44. Ms Muir referred us to *Gibbins v Gibbins* [2020] UKUT 0335. At first instance in that case, the Tribunal had found a breach, in the alternative, on a similar basis. Although this finding was not the subject of the appeal, the Upper Tribunal did not adversely comment on it. Ms Muir agreed she was not contending that this amounted to binding authority. She also referred us to the authority of *Smith v Titanate Ltd* 2 EGLR 63 CC, in which lettings of a few weeks to a few months were found to be short tenancies, in the context of a challenge to the right to enfranchisement under Leasehold Reform Act 1967.

Conclusions

45. We have no hesitation in finding all of the witnesses honest and reliable, and we accept their evidence. This extends to the identification of the flat from the Airbnb and Bookings.com postings by Miss Procter and Mr Siri. It is true that they were not subject to cross examination. But that is the Respondent's responsibility for failing to engage in any way with these proceedings. In any event, we note that the evidence of all the witnesses showed a consistent picture in respect of both flats.

46. The conclusion is therefore inescapable that the Respondent caused, in respect of flat 80, or allowed, in respect of flat 113, loud noise which breached the covenants in clause 3(10) and clause 3(11)/regulation 1 in the sixth schedule. The noise was on occasions both sufficiently loud to cause a nuisance/annoyance; and was audible after the stipulated times. These breaches extended over a very long time in respect of flat 80, and a not inconsiderable period (and at a high intensity) in respect of flat 113. They were, in both cases, egregious and serious breaches.

47. We also conclude that the Respondent breached the clause 3(10) requirement that the flat be used only as a private residence. As the Deputy President said in *Triplerose*, "short-term occupation by paying strangers is the antithesis of occupation as a private dwellinghouse. It is neither private, being available to all comers, nor use as a dwellinghouse, since it lacks the degree of permanence implicit in that designation." ([20]).

48. However, we consider that Ms Muir's submissions in relation to clauses 3(14) and 3(15) raise what may be difficult issues as to the status of occupiers under contracts governed by the terms of apps such as Airbnb and Booking.com, and the relationship between that status and the sorts of obligations contained in the relevant clauses. Ms Muir argued that the requirements of a tenancy were made out in respect of such occupancies, or at least they were if one ticked the box indicating a preference for self-contained accommodation, rather than a room in a shared house, in (for instance) Airbnb. We are not convinced, however, that it is possible to come to such a conclusion without a close examination of the terms of occupation required by a particular app, and we would be unwilling to do so in the absence of argument on both sides.

49. We have already found clear and serious breaches of covenant by the Respondent. In these circumstances, we do not consider it necessary to overcome our reluctance to come to a conclusion on the question. Better that it should wait for a more appropriate case where it can be fully argued and appealed.

Application for costs

50. Ms Muir noted that the costs of these proceedings would be recoverable from the Respondent under clause 3(12) as an administration charge. Such recovery would, however, be more remote in time, and, she argued, this is an appropriate case for the Tribunal to exercise its jurisdiction under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

51. It is a requirement of Rule 12(1)(b) that the party against whom an order may be made must act "unreasonably" in (in this case) defending the proceedings. The particular meaning to be given to "unreasonably" in this context is considered in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), [2016] L & TR 34. That case also sets out the proper approach that the Tribunal should take in deciding costs applications. Ms Muir argued that, in simply ignoring the proceedings and every communication connected with them, the Respondent had clearly acted unreasonably, and it was an appropriate case for the Tribunal to mark that by making an order for costs.

52. Rule 13(6) provides that the Tribunal must give a person against whom an order for costs is sought an opportunity to make representations before making an order.

53. Ms Muir submitted a schedule of costs in advance of the hearing. The total cost claimed under the schedule is £20,081, including VAT and disbursements.

54. We asked Ms Muir, and her instructing solicitor Mr Raby, to justify the level of costs claimed. The factors they pointed to were that it was a serious case, for a leaseholder-owned freehold company, involving a long term problem producing a large body of evidence and a significant number of witnesses. It was effectively two cases, given there are two flats. It had been appropriate to instruct counsel at an early stage, as it was clearly likely to be a case that would end up in a Tribunal at which the Applicant would wish to be represented by counsel. In any event, it was more cost-effective for counsel to draft the application (with which she was more familiar than her instructing solicitor), given the per hour costs charged by Mr Raby. It was also appropriate for Mr Raby, a partner, to act personally, given its seriousness. Mr Raby also noted that he charged out-of-London rates, the firm being based in Sevenoaks. Mr Raby also told us that there was no charge for his time for attendance at the hearing, which was as a result of technical

difficulties experienced by the trainee solicitor who would otherwise have attended.

55. We accordingly DIRECT:

(i) That the Respondent may provide the Tribunal and the Applicant with representations as to whether the Tribunal should make an order for costs; and if so, in what amount, within 14 days of the date on which this decision is sent to him; and

(ii) If the Respondent does provide such representations, the Applicant may provide a brief response within 7 days of receipt of those representations.

56. We will issue a separate decision on the application for costs once either we have received the representations and response provided for above, or if the period set down for receipt of representations or response elapses.

Rights of appeal

57. 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 London regional office.

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

59. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

60. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 12 November 2021