



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

Case Reference : **LON/00/00BK/LBC/2014/0054**

Property : **Flat 19, Heron Place, 9 Thayer Street, London W1U 3JL**

Applicants : **Eskmuir Properties Limited**

Representative : **Rebecca Cattermole- Counsel instructed by Ever sheds Solicitors**

Respondent : **Khaled Saleh Abdulrahman Al-Sharthry**

Representative : **Hannah Curtain- Instructed by Philip Brown Solicitor**

Type of Application : **Application for a determination UNDER Section 168 (4) of THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002 in respect of whether the Respondent has breached a covenant in the lease**

Tribunal : **Ms M W Daley LLB (hons)
Ms S Coughlin MCIEH
Mrs J Hawkins MSc**

Date and venue of paper determination : **21 August 2014 at 10 Alfred Place, London WC1E 7LR**

Date of Decision : **05 October 2014**

DECISION

Decisions of the Tribunal

- (1) The tribunal makes the determinations The Tribunal find that the Respondent is in breach of paragraph 5 of the lease by the actions of Mr El Waleed his occupier by causing or permitting water to leak from the premises into the flat below.
- (2) The Tribunal finds that the Respondent failed to permit access to the premises, between 6-8 May 2014, in breach of paragraph 10 of the lease.

The application

- a. The Applicant on 8 July 2014, made an Application for an order that a breach of covenant or condition in lease had occurred pursuant to Section 168(4) of the Commonhold and Leasehold Valuation Act 2002.
 - b. The background to this matter was that the Applicant the owner of Heron Place which comprised commercial units and "... a number of high value residential flats" received complaints concerning the occupier of Flat 19 Heron Place. The complaints concerned (i) anti-social behaviour (ii) that the occupier's use or work undertaken at the flat had led to water penetration to the premises below, which had caused extensive damage. (iii) The Applicant further alleged that the Applicant despite written request and oral requests had not been provided with access to enable an inspection of the premises to be carried out, to ascertain the state of repair.
 - c. The actions were alleged to have been carried out by the Respondent's son/step son, in breach of the covenants contained in the lease.
- (3) Directions were given on 10 July 2014. The directions were settled on the papers without a case management conference.
- (4) The directions stated that -: "*...The tribunal will reach its decision on the basis of the evidence produced to it. The burden of proof rests with the applicant. The Tribunal will need to be satisfied: (a) that the lease includes the covenants relied on by the applicant; and (b) that, if proved, the alleged facts constitute a breach of those covenants.*"

- (5) The Directions also provided that the parties send to the Tribunal, and exchange bundle of documents by 7 August 2014, and thereafter that the matter be set down for hearing on 21 August 2014.

The Background

- (6) The Premises are a 2 bedroom flat in a purpose built block of 18 flats, with 5 apartments in the process of being converted from office use on the ground floor.
- (7) The Respondent holds a long lease of the flat, which requires the landlord to provide services and the Respondent leaseholder to observe specific covenants under the terms of the lease. The specific provisions of the lease will be referred to below, where appropriate.

The Hearing

The Respondent's application for an adjournment

- (8) At the hearing the Applicant was represented by Ms Rebecca Cattermole, Counsel. The Respondent was represented by Ms Hannah Curtain also counsel.
- (9) Also in attendance on behalf of the Applicant were Julianne Treacy, Solicitor from Eversheds Solicitors, Mr Paul Hodgson managing director and Ross McAllister senior associate for the managing agents (Workman).
- (10) Mr Philip Brown of Philip Brown solicitors and his secretary Grace Laville were in attendance on behalf of the Respondent.
- (11) At the hearing the following additional documents were provided:-
- (i) The Respondent's Skeleton Argument
 - (ii) The second witness statement of John James Sullivan
 - (iii) The second witness statement of Ross McAllister
 - (iv) Together with exhibits including Photographs and various emails from Eversheds Solicitors.
 - (v) A letter dated 19 August 2014 from Philip Brown & Co Solicitors

(10) At the hearing, Counsel Ms Curtain, made an application for an adjournment on the Respondent's behalf. The grounds for the request were set out in her skeleton argument.

(11) In the Skeleton argument prepared on the Respondent's behalf, counsel refers to a letter dated 19 August 2014, from Philip Brown Solicitors which set out the grounds upon which an adjournment were sought. Paragraph three of the letter states-: *"... Mr Al-Shathry instructed us on Friday 8 August, having received the Applicant's bundle on Sunday 3rd August, delivered to him by DHL in Saudi Arabia. We understand that the bundle was originally sent by email on 24 July 2014 to [email address given], which is the email address of Mr Al-Shathry's brother; this did not reach him. We also understand that your client's application was issued on 8th July 2014 and again this was not served on Mr Al-Shathry. The first he knew of the hearing listed for this Thursday was on receipt of the bundle, on 3rd August..."*

Clearly, our client has had insufficient time to consider his position and to prepare his case for the hearing..."

(12) The Tribunal were informed that the Respondent had travelled to England from Saudi Arabia on 6 August 2014 and had instructed Philip Brown Solicitors on 8 August 2014.

(13) In her Skeleton Argument counsel set out the following factors as being material considerations in respect of the request for an adjournment. Firstly it was denied that the Applicant had taken all reasonable steps to draw the proceedings to the Respondent's attention. The Tribunal were referred to various letters between the parties sent on 23, 29 and 30 July 2014 regarding leaks into the flat below the Respondent's, and the fact that none of these letters refer to an application to the Tribunal being made. The Skeleton acknowledges that there was a letter dated 4 July which referred to the proceedings, however this was sent to the Respondent's brothers email address and was not received by the Respondent.

(14) In Paragraph 7(ii) of the Skeleton Argument Ms Curtain submitted that the Respondent had-: *"... not had sufficient time to carry out his own investigations and to take expert advice in relation to, in particular, the nature, extent and cause of the alleged disrepair in the premises "...It is not anticipated that the Respondent will be disputing that there have been leaks in the flat below. However, the Respondent must be afforded the opportunity to consider, with the assistance of expert opinion, how those leaks have occurred and whether there is a connection to the refurbishment works that have been carried out in his own flat. Presently the Respondent is unable to respond in any substantive way to the allegations advanced..."*

(15) Mr Brown also put forward on the Respondent's behalf the fact that the Respondent had removed his son/step son Mr Al Waleed from the premises the day before the hearing. The Skeleton argument statement *"...The Respondent's understanding is that there have been no further complaints or incidents of disturbance since..."*

(16) Mr Brown further stated that he had had some difficulties in obtaining detailed instructions from his client as although his everyday English was reasonable; he had had to use an interpreter to assist him in explaining the documents to Mr Al-Shathry and this had proved difficult and time consuming. This had hampered their ability to progress matters.

(17) Mr Brown further apologised for his clients non- attendance at the hearing, Mr Brown stated that he had not been able to secure an interpreter, and in the circumstances he had considered that there would be little value in his client attending, and it was this, rather than any discourtesy to the Tribunal, which had kept his client away.

(18) Ms Curtain further submitted that an adjournment of 21 days would enable the Respondent to provide detailed instructions and would enable the parties to enter into negotiations which might render the hearing unnecessary. She further submitted that the Respondent was prepared to give undertakings to ensure that his son did not occupy the premises (he had put him up in a hotel). In regard to this, the Respondent had taken steps to increase the security at the flat, so that Mr El Waleed would not be able to simply reoccupy the premises once Mr Al-Shathry was no longer in London.

(19) In reply Ms Cattermole indicated that the application for an adjournment was opposed. Firstly Ms Cattermole queried the Respondent's reason for not attending the hearing, stating that there had been no real explanation for his absence, as her clients had had dealings with the Respondent in English, and it was not apparent that Mr Al- Shathry had difficulties in understanding and making himself understood in English. The Tribunal were referred to an email sent by Mr Al-Shathry dated 17 June 2014 to the Applicant's Mr Sullivan, the email also referred to a conversation which had taken place between the Respondent and John Sullivan.

(20) Ms Cattermole cited that the Respondent had also been sent a letter on 4 July 2014, which had informed him of the proposed proceedings and had asking for him to provide a further or alternative correspondence address. A copy of this letter had also been sent in Arabic. The Applicant did not accept that the Respondent was unaware of the proceedings, or indeed that there was a sufficient language barrier, which would have prevented him from engaging with the proceedings.

(21) Counsel for the Applicant also considered that Mr Al-Shathry had had sufficient time to consider the allegations. Counsel relied upon the

fact that there had been complaints made as early as September 2013 when an email had been sent to the Respondent's then project manager, Mr Edgily about the water leaking. The Applicant had also made further complaints to the Respondent in April 2014 and there had been no response or undertaking given by the Respondent.

(22) Counsel also stated that there was "... *overwhelming evidence of the breach of the lease*" and as such there could be no real dispute of facts. The Respondent had had notice of repair served in September 2013, 7 May 2014, and 9 May 2014. Mr Sullivan (on the Applicant's behalf) had also met Mr Al-Shathry at the premises, and the Respondent at that stage was aware of the problems.

(23) Counsel in her final ground stated that it was in all the circumstances fair and just to proceed with the hearing. Mr Cattermole stated that the Tribunal should consider not only the damage at the premises, but the totality of the breaches; including the serious nature of the anti-social behaviour at the premises, which had involved an actual assault and had placed the occupiers at fear of their own safety. The Applicant was also in the process of negotiating the sale of one of the units, below the Respondent and there was evidence that the behaviour of the occupant's son had jeopardized the sale of the premises.

(24) Ms Curtain in her reply, reminded the Tribunal that the letter dated 4 July 2014 had not been sent to the Respondent's email address, and as such he was unaware of the contents of that letter. Further it was also the case that correspondence which raised various issues was not the same as notice of proceedings. Counsel also stated that the Respondent was entitled to properly consider the evidence before making any admissions of the allegations.

The Tribunal's decision and reasons on the application for an adjournment

(25) The Tribunal in determining whether to grant the request referred to the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 rule 15 which states:-

- (1) Subject to paragraph (2) the tribunal may postpone or adjourn a hearing or pre-trial review either on its own initiative or at the request of a party.
- (2) Where a postponement or adjournment has been requested the tribunal shall not postpone or adjourn the hearing except where it considers it is reasonable to do so having regard to-
 - (a) The grounds for the request;
 - (b) The time at which the request is made; and
 - (c) The convenience of the other parties.
- (3) The tribunal shall give reasonable notice of any postponed or adjourned hearing to the parties.

(26) The Tribunal noted that the grounds of the request concerned Mr El Shathray's late awareness of the proceedings and the fact that this had caused him prejudice in dealing with the Application. The Tribunal accepted that this would have caused Mr El Shathray some difficulties in dealing with the application. However the Tribunal noted that at the time of purchasing the premises, the Respondent was aware of his intention to continue to reside abroad. Given this, it was up to him to ensure that he had provided an address which could be used for serving documents, and that any such documents served would promptly come to his attention. Any failure of the documents to reach the Respondent was caused by the lack of a proper address for service, rather than any default of the Applicant.

(27) The Tribunal have heard of the efforts made by the Applicant and are satisfied, in all the circumstances that the Applicant's took reasonable steps to alert Mr El-Shathry to the proceedings.

(28) The Tribunal noted that Mr El-Shathry had instructed solicitors on 8 August 2014, The Tribunal consider that the Respondent had had some time to either prepare his case, or promptly make a request for an adjournment. In considering the preparations that the Respondent may have wished to make and the purpose that those preparations would serve, the Tribunal noted firstly the serious nature of the breaches which were alleged coupled with the limited nature of the Tribunal's jurisdiction.

(29) The Tribunal's jurisdiction in this matter was limited in that the Tribunal were specifically tasked with considering whether or not there had been a breach of the lease. The Tribunal did not consider any issues of remedying the breach or wavier, or indeed relief from forfeiture. Notwithstanding any steps that the Respondent may take, to remedy any alleged breach, it was not within the jurisdiction of the tribunal to grant relief from forfeiture. Therefore any steps taken to remedy were unlikely to affect the findings of the Tribunal.

(30) In respect of the timing of this hearing, the Tribunal considers that there was sufficient time to commence at least some of the investigations that the Respondent considered could be of assistance in determining whether or not a breach existed. There was no evidence, that such steps had been commenced by the Respondent.

(31) The Tribunal also noted that the letter dated 19 August 2014 had not been a request to the Tribunal to grant an adjournment. Had such a request been made and granted, then it would have avoided the expense of attendance at this hearing. In this regard, the Tribunal noted that the Applicant had attended and had witnesses who were prepared to give evidence. The Tribunal also needed to consider the overriding objectives as set out in The Tribunal Procedure (First- tier Tribunal) (Property Chamber) Rules 2013 which states-: (1) *the overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*

(2)

Dealing with a case fairly and justly includes—

(a) *Dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;*

(b) *Avoiding unnecessary formality and seeking flexibility in the proceedings;*

(c) *Ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*

(d) *Using any special expertise of the Tribunal effectively; and*

(e) *Avoiding delay, so far as compatible with proper consideration of the issues.*

(3) *The Tribunal must seek to give effect to the overriding objective when it—*

(a) *Exercises any power under these Rules; or*

(b) *Interprets any rule or practice direction.*

(4) *Parties must—*

(a) *Help the Tribunal to further the overriding objective; and*

(b) *Co-operate with the Tribunal generally.*

The Tribunal has carefully balanced the interest of the Applicant and the Respondent in considering the Overriding Objective, and has determined that in all the circumstances the application for an adjournment ought to be refused.

(32) The Tribunal considered that it was appropriate to allow the Respondent's instructing solicitor a short adjournment to take instruction. Accordingly the hearing was postponed until 1pm to enable further instructions to be taken and to give both parties an opportunity to see, whether it was possible to narrow any of the issues before the Tribunal.

(33) At the re-commencement of the hearing, Ms Cattermole informed the Tribunal that the Respondent made no admission of anti-social behaviour in breach of the terms of the lease, concerning the nuisance at the premises and accordingly she would present her case to the Tribunal.

(34) The relevant clauses of the lease, were set out in the skeleton argument and the Statement of Case, and were listed as follows:- "*...By clause 2 of the lease, the Lessee covenants with the Lessor that the Lessee will observe and perform the obligations on the part of the Lessee set out in the Sixth Schedule.*

1. *"The Premises" means the property demised as described in the Third Schedule.*

2. *The Third Schedule reads:*

"ALL THAT the self-contained residential flat situate on the Second floor of and forming part of the Building and known as flat number 19 Heron Place aforesaid as the same is for the purposes of identification only delineated on the plan annexed hereto and thereon edged pink and so that the Premises shall (for the purposes of obligation as well as grant include:-

...(v) All cisterns tanks pipes wires cables and other conducting media drains or gutters which are laid or placed in any part of the Building and which exclusively serve the Premises and in particular the pipes wires and apparatus forming the underfloor electric heating system serving the Premises only and

(vi) All fixtures and fittings and sanitary and water apparatus in or about the Premises (other than tenants fixtures and fittings)."

3. *Paragraph 5 of the Sixth Schedule provides, where relevant:*

“(a) The Lessee shall to the satisfaction in all respects of the Lessor keep the Premises and all parts thereof and all fixtures and fittings therein in a good and substantial state of repair decoration and condition throughout the continuance of this demise...”

4. Paragraph 8 of the Sixth Schedule reads:

“The Lessor may with or without workmen and others at all reasonable times enter upon and examine the condition of the Premises and may thereupon serve upon the Lessee notice in writing specifying any repairs or works necessary to be done for which the lessee is liable hereunder and require the Lessee forthwith to execute them and if the Lessee shall not within two months (or sooner if requisite) after the service of that notice have commenced and then proceeded diligently with the execution of those repairs or works then (without prejudice to any other rights or remedies of the Lessor) the Lessor may enter upon the Premises and execute them and the cost shall be a debt due to the Lessor from the Lessee and will be recoverable forthwith by action.”

5. By paragraph 10 of the Sixth Schedule,

“The Lessee shall not do or permit or suffer to be done in or upon the Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor or to the occupier of any other Flat or Shop or the offices or any part thereof...”

6. Paragraph 14 of the Sixth Schedule reads:

“Neither the premises nor any part thereof shall be used for any illegal or immoral purpose nor shall any trade profession or business be carried on there nor shall any boarders or lodgers be taken in by the Lessee shall use the Premises only for the purpose of a private residence for the occupation of one family only.”

Breaches

- (35) Counsel for the Applicant stated in her skeleton argument That the breaches could be categorised under three broad headings:
- a. *Water leaks (i.e. failure to repair and use of premises leading to water leaks);*
 - b. *Failure to grant access;*
 - c. *Anti- social behaviour.*

The evidence of Paul Hodgson

- (36) In support of the Applicant’s claim Counsel tendered Paul Hodgson to give evidence.
- (37) In his witness statement, Mr Hodgson stated that he was the managing director of Eskmire Properties, and that in that capacity he had been informed of all of the issues at the premises, by John Sullivan the building manager, and also Ross McAllister, and Mark Haldane of Workman LLP (the managing agents).
- (38) In paragraph 8 of the witness statements Mr Hodgson stated as follows-: *“.. two of Eskmuir’s agents, the building manager Miss Lynn Mackay and the property manager Mr Mark Haldane of Workman, have been subjected to death threats and aggressive behaviour from Al Waleed. I understand that Al Waleed has been*

charged by the police with assault against Mr Mark Haldane. I also understand he is due to appear in court in respect of both incidents later this year. This is clearly unacceptable and Eskmuir takes its responsibility towards its agents very seriously...

- (39) Mr Hodgson's statement also detailed difficulties that were reported to him as occurring at the premises due to disturbances caused by loud music and "... *the regular presence of the smell of what is believed to be cannabis smoke as well as threatening and intimidating behaviour by Al Waleed.*"
- (40) In paragraph 10 of the statement Mr Hodgson set out the impact that the breaches had on the Applicant "...*We are currently marketing and in the process of selling five newly refurbished luxury residential apartments. Our ability to market and sell these apartments is being hindered by the Respondent's failure to properly address the situation with the leaks coming from the premises as well as his continued permission to allow Al Waleed to reside in the Premises despite his knowledge of Al Waleed's anti-social behaviour.*"
- (41) In answer to questions from the Tribunal, concerning Mr Hodgson's direct knowledge of breaches of the lease Mr Hodgson stated that he was aware of the assault on Lynn Mackay as she had spoken directly to him concerning the assault and also seen evidence of the assault (i.e the bruises).
- (42) As a result of the assault Mr Hodgson had accommodated Ms Mackay working elsewhere, so that she did not come into contact with the Respondent's son. This had directly impacted on the Applicant, as they had had to engage someone else to work on the site on a temporary basis.
- (43) The Tribunal were also shown photographs which provided proof of the nature and extent of Ms Mackay's facial injuries.
- (44) The Tribunal were also informed that Westminster Council had served five noise abatement notices and that the council had also seized equipment at the premises. This was referred to in the witness statement of Ross McAllister.
- (45) Mr Hodgson stated that he was aware that leaseholders in the premises felt intimidated and frightened as some, although they had complained, had asked to be anonymous. He was aware that others had come forward and had reported their complaints to Westminster Council in relation to the noise nuisance. These concerns had also been reported to Mr McAllister.
- (46) The Tribunal asked about whether there were copies of any of the notices served by Westminster included in the bundle. The Tribunal were informed that this information was not before the Tribunal.

The evidence of Mr Ross McAllister

- (47) The Tribunal also heard directly from Mr Ross McAllister who was tendered as a witness in order to answer questions and to expand upon the contents of his witness statement.

- (48) Mr McAllister set out that there had been no serious history of complaints concerning water leaking prior to the occupation of the Respondent's son. He informed the Tribunal that the freeholder had converted the commercial premises into apartments and that this work had been completed in September 2013. After that date there had been problems with water penetration from the Respondent's flat.
- (49) Mr Mc Allister had logged various complaints at the premises. Mr McAllister had a spreadsheet which detailed complaints that had been made concerning Anti-Social behaviour, such as drug use and water leaking at the premises. Mr McAllister stated that he had received numerous complaints concerning Mr Al Waleed's behaviour, which involved noise nuisance and intimidating behaviour towards residents and other nearby occupiers of business premises. There had been numerous allegations of a strong smell of Cannabis reportedly coming from the premises.
- (50) In his second witness statement Mr McAllister stated that there had been further water ingress to the newly refurbished flat below over the weekend of 26/27 July 2014.
- (51) Mr McAllister had tried to telephone Mr Al Waleed to arrange access, and was unsuccessful as he did not receive any response. In paragraph 9 of his witness statement Mr McAllister stated:- *"The extent of the damage to flat 1 as a result of the leak was severe. The ceiling collapsed in the master bedroom and it was necessary to put wheelie bins in the Premises in order to prevent large pools of water collecting on the floor."* Mr McAllister further stated that in order to prevent further damage, the decision was taken to temporarily cut off the water supply to the Premises.
- (52) Mr McAllister stated that when the contractors inspected the premises on 30 July 2014, they reported that it appeared that Mr Al Waleed had deliberately caused damage by pouring water on the kitchen floor and that Mr Al Waleed was seen doing this whilst the contactor Cresco were in attendance at the premises.
- (53) The Tribunal were informed that although Mr Sullivan and Mr Haldene were not attending the hearing they had provided statements which were put before the Tribunal together with a statement from Mr Cohen an occupier of nearby commercial premises.
- (54) In his witness statement Mr Sullivan set out the Landlord's attempts to bring the alleged breach of the lease to the Respondent's attention, prior to proceedings being brought.
- (55) He stated that on 6 May 2014 the Applicant's solicitors served a notice of repair on the Applicant. This notice set out detailed works to the En-suite such as replacing the shower screen and the cracked shower tray, replacing, mastic and grout as well as the leaking waste pipe. The Respondent was also required to remove an unauthorised bidet hose and pipe work and cap off redundant pipe work etc.
- (56) In Mr Sullivan witness statement he stated at paragraph 17 of his witness he stated:- *"As there had been a number of recent leaks*

into Flat 1 as well as complaints from residents about drug use in the Premises and Al Waleed's threatening behaviour, it became imperative that we make contact with the Respondent directly."

- (57) The Tribunal were informed that as a result of the Applicant and Respondent's attempts to make contact, the Applicant and Respondent's contractors met at the premises on 9 May 2014. Mr Sullivan spoke with the Respondent directly and was informed that the Respondent had problems with his contractors, and that a new builder had been instructed. Mr Sullivan asked the Respondent to manage Mr Al Waleed's behaviour and was assured by the Respondent that he would.
- (58) Mr Sullivan also stated in his statement that he had spoken with Mr El Waleed concerning the cannabis use at the premises, and that although Mr El Waleed had denied using cannabis, he stated that guest to his premises may have smoked cannabis on the balcony.
- (59) In his statement Mr Haldene who was employed by Workman (the managing agent's set out his involvement with the management of the premises. He stated that he visited the premises on 1 April. He stated "*... I did not enter the premises but noted the strong smell of what I believed to be cannabis outside it...*"
- (60) Mr Haldene stated that he contacted the building manager who confirmed that she had spoken with Mr Al Waleed concerning the use of cannabis and rubbish from the refurbishment works to the premises being left in the common parts. Mr Haldene stated in his witness statement: "*... I contacted the police about the smell of cannabis and they allocated the crime reference number...I understand that they did attend the Premises and were invited in to search it, but they did not find anything suspicious.*"
- (61) Mr Haldene stated that five reports had been made to the police concerning possible cannabis use and anti-social behaviour.
- (62) In the chronology prepared for the hearing details are given of attempts to gain access to the premises for the purpose of carrying out inspections on 28 & 29 April 2014 and on 6 May 2014. Inspection of the premises did not take place until 8 May 2014.
- (63) The Tribunal also had sight of the witness statement of Jeremy Cohen owner of Jeremy James and Company the estate agents, for the development. He provided details of his visit to the premises on 3 July with a prospective purchaser and his encounter with Mr El Waleed. In paragraph 12 he stated -: "*... I then took the prospective purchaser into Flat 1. She told me that Al Waleed had screamed and shouted at her before I arrived. The prospective purchaser was visibly shocked and concerned by the behaviour she had witnessed...She was rethinking the purchase of the property as she was particularly concerned about living beneath someone who had behaved like that...*"
- (64) In her legal submissions Ms Cattermole submitted that the Tribunal could be satisfied that breaches had occurred at the premises for the purpose of Section 168(4), and that if the

breaches had been remedied it was sufficient for the Tribunal to be satisfied that the breaches had occurred.

- (65) Counsel classified the breaches under three headings (i) water leaks (ii) access and (iii) anti-social behaviour. Counsel referred to paragraphs 5, 8 and 10 of the sixth schedule of the lease. In her skeleton argument counsel stated:-

"Water leaks

By paragraph 5, the Respondent was required to keep the Premises and all parts thereof and all fixtures and fittings therein in a good and substantial state of repair decoration and condition throughout the continuance of this demise.

The reference to fixtures and fittings must refer to all fixtures and fittings in the Premises because: (a) the use of the word "all" would suggest both landlord and tenant fixtures, (b) no distinction is drawn between landlord and tenant fixtures in paragraph 5 in contrast to the definition of Premises in the lease which is limited to landlord fixtures and fittings;

d. Counsel further submitted that:- Paragraph 8 of the Sixth Schedule confers on the Applicant a right to enter the Premises in two circumstances:

e. at all reasonable times, to examine the condition of the Premises at all reasonable times; and

f. for the purposes of executing the works contained in the Notice to Repair which the Respondent has failed to do.

7. *This provision obliges the Respondent to provide access but, if this is not express it must be implied (Liverpool City Council v Irwin [1911] AC 239 and Barnes v City of London Real Property Co. [1918] 2 Ch 18).*

8. *It is submitted that the Respondent failed to provide access on the following occasions on 28th April 2014, 29th April 2014, 6th May 2014, 11th June 2014, and 13th June 2014*

Anti- social behaviour

9. *Paragraph 10 of the Sixth Schedule prohibits the Respondent from permitting or suffering to be done in or upon the Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Applicant or to the occupier of any other flat, shop or offices or any part thereof.*

10. *Nuisance in this context is not limited to an actionable nuisance at common law and should be construed "according to robust common sense standards" (Tod-Heatley v Benham (1888) 40 ChD 80 and Hampstead Properties Ltd v Dimoedous [1969] 1 Ch. 248 at 258).*

"if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or a skilled person who knows the truth, but of an ordinary English inhabitant of a house, that seems to me to be an annoyance, although it may not appear to amount to a physical detriment to comfort."

11. *If a tenant covenants not to "permit" or "suffer" a nuisance or annoyance then he may be liable if a nuisance or annoyance is caused by someone other than himself or his agents*

- (66) Counsel submitted that the Respondent had allowed his step-son to reside at the premises and that in so doing; he had permitted or suffered matters to become a nuisance, at the premises. In that he had failed to remedy matters expeditiously.
- (67) Ms Curtain could not address the specific allegation on the Respondent's behalf however she addressed the Tribunal in very general terms stating, that the Respondent had not buried his head in the sand. He was out of the county and had lacked control over Mr El Waheed. Mr El Waleed was in his thirties and was a difficult character to control.
- (68) He had taken action by authorising the changing locks and had agreed to the temporary suspension of the gas and water at the Applicant's request. Mr Al Shrathy had made arrangements for Mr El Waleed to no longer occupy the premises, and he has taken steps to put security measures in at the premises. These were matters that the Tribunal should consider when reaching its determination.

The Tribunal's decision and reasons for the decision

- (69) The Tribunal having listened to the evidence and submissions of counsel on behalf of the Applicant, and the limited submissions made on behalf of the Respondent; have reached the following determinations.
- (70) The Tribunal firstly considered the serious nature of the allegations and the quality and cogency of the evidence presented on behalf of the Applicant to proof that breaches of the lease had occurred. In doing so the Tribunal noted that whilst some of the evidence was direct, first hand evidence, much of the evidence presented by the Applicant was hearsay evidence, which was unattributed to a particular source. Where there was evidence which was from a particular source, for example Mr Haldene, Mr Sullivan, or Mr Cohen the makers of the statement were not present, and the Tribunal had no means of testing the veracity of their evidence.
- (71) The Tribunal noted that this case was brought by the Applicant, in the knowledge that key witnesses would not be available to give their evidence, and that the Applicant had opposed an adjournment, which might then have made their attendance more likely.
- (72) In the circumstances, the Tribunal have had to consider the proper weigh to give to all of the Applicant's evidence, in particular the written witness statements.
- (73) The Tribunal considers that although hearsay evidence is admissible, in weighing up the weight to attribute to this evidence, it was appropriate for the Tribunal to consider the serious consequences of any findings in relation to breaches of the lease, given the implications for the Respondent.
- (74) Accordingly where the Tribunal have made findings which are adverse to the Respondent, the Tribunal have made those findings

where the Tribunal is satisfied on the basis of the evidence presented, to the appropriate standard, on a balance of probabilities that the breaches occur, and in so doing, it has preferred direct oral evidence to written witness evidence which was unsupported by the maker of the statement.

- (75) The Tribunal find that the Respondent is in breach of paragraph 5 of the lease, that is that the fixtures and fittings within the premises deteriorated in such a way as to cause leaking from the premises to the flat below.
- (76) Further, the Tribunal are satisfied that if the water leaking was not caused by deterioration of the fixture and fittings, there was sufficient evidence that the water leaking was caused or was permitted to cause a nuisance in breach of Paragraph 10 of the Sixth Schedule which-: prohibits the Respondent from permitting or suffering to be done in or upon the Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Applicant or to the occupier of any other flat, shop or offices or any part thereof.
- (77) The Tribunal also noted that whilst there is no evidence that the Respondent caused the nuisance by his own acts, the Respondent was aware at the latest by April 2014 that the actions of Mr El Waleed were causing or contributing to the water penetration at the property.
- (78) The Respondent failed to address this adequately or at all. Although Mr Al Shathry stated that he was having problems with his builder, and that he would be appointing a new one, he failed to provide the Applicant with details of who he had appointed. Insofar as it was alleged that Mr El Waleed was responsible for the water leaks, he failed to address this and accordingly he permitted the actions of Mr El Waleed to become a nuisance and annoyance and to cause damage and inconvenience to the Applicant in breach of the lease.
- (79) The Tribunal considers that once it was established that there was a leak in the premises, an obligation arose to allow the Applicant access to the premises for the purpose of carrying out an inspection. This duty was in accordance with paragraph 8 of the sixth schedule.
- (80) The Applicant had stressed the urgency and set out why an immediate inspection was required, despite this, the Respondent through Mr El Waleed (who was acting as his agent, in his occupation of the premises) did not provide access until 8 May 2014 some days after the leaking commenced, and by this time the Tribunal accept that extensive damage could have occurred to the (recently converted) premises. Accordingly the Tribunal find that between 6-8 May the Respondent inappropriately failed to give access.
- (81) The Tribunal are not satisfied that on the other occasions that the Respondent failed to give access, as the Tribunal noted that access was provided on a number of occasions.

- (82) The Tribunal have heard from both Mr McAllister and Mr Hodgson that Ms McKay was assaulted by Mr El Waleed. In support of this, both gave evidence of what they were told by Ms McKay, this was supported by photographic evidence of her injuries, and the Tribunal accepted that both Mr McAllister and Mr Hodgson had seen her injuries and had heard an account from the Ms McKay concerning how she sustained the injuries.
- (83) The Tribunal accept that this assault occurred and that it was in breach of the terms of the lease. The Tribunal also accept that Mr El Shathray failed in his duty as a leaseholder to respond to this matter by taking action against Mr El Waleed with the purpose of terminating Mr El Waleed's occupation of the premises. The Tribunal find that Mr El Shathray had allowed Mr El Waleed to reside in the premises and as such he had a responsibility to ensure that Mr El Waleed's occupancy did not become a nuisance.
- (84) The Tribunal have heard limited evidence in relation to the smoking of cannabis at the premises, and although there is a report that the smell of cannabis was coming from the premises, the Tribunal regard this as largely anecdotal.
- (85) The Tribunal noted that the Applicant had reported the use of cannabis to the police and that the police had failed to find any evidence of cannabis at the premises, accordingly the Tribunal cannot be satisfied on the balance of probabilities that this occurred.
- (86) In relation to the acts of noise and other nuisance at the premises, the Tribunal noted that the Applicant did not provide any direct evidence concerning these acts. The Applicant in the bundle refers to abatement notices which had been served by the Westminster council however these were not included in the bundle, and no evidence was provided from any officer of the council to confirm this.
- (87) The Tribunal considers that it would be unfair to the Applicant to find that there was nuisance as alleged, caused by anti-social behaviour on the basis of the evidence before the Tribunal, as although considerable nuisance is alleged, by acts of noise nuisance and verbal aggression and threats, the Tribunal have not been given any direct evidence of these allegations.
- (88) The Tribunal therefore determine that there was a breach of the lease on the grounds set out in paragraphs 75-80 and 82-83 above.

Name:

Ms M W Daley

Date: 05 October 2014

Appendix of relevant legislation

A summary of the legislation is set out below

The Law

Appendix

Section 168 (2) of Commonhold and Leasehold Reform Act 2002

(4) A Landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under (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 post-dispute arbitration agreement