SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

CHI/18UC/LBC/2009/0044

Decision of the Leasehold Valuation Tribunal on application made under Section 168 of the Commonhold and Leasehold Reform Act 2002

Applicant and Landlord:	Messrs B Kelly & T Kelly
Respondent and Tenant:	Mrs R Gillam
The Premises	**Flat 19A New North Road, Exeter, Devon EX4 4HF**
Date of Application	24th November 2009
Date of Inspection	10th February 2010
Date of Hearing	10th February 2010
Venue	Exeter Racecourse
Appearances for Applicant	Mr B Kelly
Appearances for Respondent	Mrs R Gillam
Also attending	none

Members of the Leasehold Valuation Tribunal

M J Greenleaves	Lawyer Chairman
W H Gater FRICS ACIArb	Valuer Member
J Mills	Lay Member

Date of Tribunal's Decision: 16th February 2010

Decision

1. The Tribunal determines for the purposes of Section 168 of the Commonhold and Leasehold Reform Act 2002 (the Act) that the following breaches of covenant have occurred on the part of Mrs R Gillam (the Respondent), in respect of the Flat known as Flat 19A New North Road, Exeter Devon (the Premises), the covenants being contained in a lease (the lease) dated 10th July 2003 and made between C P Kelly, J MJ Kelly, D F Nolan, P H Nolan &C A Nolan (the then landlord) and C P Kelly, J M J Kelly(the then tenant).

[In the remainder of this text Clause numbers are to clauses of the lease; Paragraph numbers are to paragraphs of the First Schedule to the lease]

a. Clause 4.17 & 4.17.1. On 28 November, 2009 the Respondent failed to give the Applicant entry to all of the Premises in that the Respondent failed to provide entry to one room, the south west room of the Premises.

b. Paragraph 1. From about 1 September 2009 until the date of the hearing the Premises have, without the previous consent in writing of the landlord, been used or occupied by 3 occupiers not constituting one family.

c. Paragraph 3. On 31 October, 2009 a nuisance was caused to the landlord or the occupiers of adjoining or neighbouring flats or any other part of the building in that rubbish was ejected from the premises.

d. Paragraph 4. On frequent occasions from 1 September, 2009 continuing to the date of the hearing television radio or music has been played or noise made in the premises in such a manner as to cause annoyance or disturbance to occupiers of flats in the building.

e. Paragraph 8. An advertisement or notice, in the form of a poster was, on the 2 November, 2009 displayed in the south west window of the premises.

Reasons

Preliminary

2. This was an application by the Applicant under Section 168 of the Act for determination that the Respondent was and is in breach of covenant of the lease in respect of the premises. The lease of the premises was at all material times assigned to the Respondent.

3. The Applicant alleged the following breaches by the Respondent of covenants of the lease:

a. Failing to give the Applicant access to all of the premises on 28 November, 2009.

b. Permitting the premises to be occupied since 1 September 2009, without the Applicant's previous written consent, by 3 occupiers not constituting one family only.

c. Causing a nuisance to the Applicant and other occupiers of adjoining flats in the building on 31 October, 2009 by ejection of assorted garbage on to a roof and in the guttering and into the back yard of the building.

d. Emitting various forms of excessive noise from the premises such that occupiers of the other flats in the building have been

constantly and repeatedly disturbed, woken up and kept awake at night, particularly during the hours of 10 pm to 4 am.

e. On 2 November, 2009 displaying a poster in the south facing window at the west end of the premises.

f. Inadequately carpeting the Premises and in some places excluding the kitchen and bathroom not carpeting at all, but merely covering the floorboards in vinyl.

Inspection

4. The Tribunal inspected 19 New North Road, Exeter externally in the presence of Tristan Kelly for the Applicant and Mrs Gillam, Respondent. The Premises were locked and access could not be obtained.

5. 19 New North Road comprises 3 storeys, the flat constituting the premises being on the first floor, its front door adjoining the front door to the 2nd floor flat, access to both front doors being gained by an external stairway. To the rear are some outbuildings including in particular a pitched roof single-storey extension and a yard. The property appears to be maintained in reasonable condition for its age and character.

6. It was understood that the ground floor flat is occupied by Brendan Kelly and his father and that the 2nd floor flat is occupied by Tristan Kelly and his partner.

Hearing

7. Prior to the hearing the Tribunal had received written submissions and evidence from the Applicant only. The Applicant was represented at the hearing by Brendan Kelly.

8. The Respondent applied for an adjournment on the basis that she had had inadequate time to prepare for the hearing largely on the basis of the difficulties in receiving mail in a rural location and not having received the case papers back from her solicitors until 5th February. It appears that she did not receive the first set of papers issued by the Tribunal to her by letter dated 1 December 2009 but had received the second set later in December and then forwarded those to her solicitor before Christmas 2009. She had received some advice from her solicitors and subsequently decided to represent herself.

9. The Tribunal adjourned for consideration and then refused the adjournment application on the basis that the Respondent had since December 2009 been fully aware of the proceedings and of the Applicant's case but either she or her solicitors failed to take any steps. Due notice of the hearing had been given to both parties and it would be contrary to the interests of justice that the case be adjourned. Accordingly the Tribunal proceeded to hear and determine the case.

10. The substance of the evidence from the parties, so far as relevant to the issues, and our consideration is summarised below:

11. Failure to give access. By letter dated 24th of November 2009 the Respondent and the occupiers of the premises had been notified of the Applicant's intention to inspect the premises no earlier than Saturday 28th November. At 12 noon that day Tristan Kelly had entered the premises and was able to inspect it all except the south west room, being told that the occupant was asleep. The Respondent did not deny this; she had not been present. Accordingly we found that to that extent the Respondent was in breach of clause 4.17 and 4.17.1.

12. Permitting the premises to be occupied by 3 occupiers not constituting one family only.

    a. The Applicant submitted that there were 3 unrelated male undergraduate students occupying the premises and as such they did not constitute one family. The Applicant had not seen the tenancy agreement for use of the flat but produced documents. There is a letter dated 1 September 2009 from the Deposit Protection Service (DPS) addressed to Richard Kane and Others at the premises referring to the premises as the rental property, the start date of the tenancy as 1 September 2009, the name of the lead tenant as James Hipperson, and the other tenants Richard Kane and Alexander Welsh. We also had a copy of a letter dated 20th November 2009 written by James Hipperson which referred to "my flatmates guests"; "I'm going to make it very clear to Richard and his friends"; "caused by Richard's unruly guests ... they will no longer be welcome in our flat"; "I will be away again this weekend so I will pass on the community liaison officer's words to Richard and trust him and Alex with maintaining order and not causing disturbance". An e-mail dated 2 November, 2009 from the Respondent's agents, Gillams Properties, addressed to the Applicant stating "I have ... recently returned from a meeting with the said tenants"; "they have most profusely apologised for any interruptions which may have been caused. Which I am told they have apologised in person to you also ".

    b. The Respondent denied there was more than one tenant. There was one tenant, Richard Kane, who paid the rent; that if he chooses to have friends to stay, she cannot stop him. She had not given information to DPS about other alleged tenants but did not know if her son Mark, who trades as Gillams Properties, had done so. The Respondent submitted that a family these days means where people work together cooperatively and as far as she was aware, Richard Kane works with the others. In relation to the rental being paid for the premises, the Respondent had initially told us that this was £75 per week including various services but then that the rental covered her mortgage of £ 650 per month and property insurance in which

she together accepted might be around £800 per month total. She considered that Richard Kane alone on a student loan would be able to afford that sum himself.

c. We were satisfied that there was clear evidence, as outlined above, that there have been 3 occupiers in the premises since on or about 1 September 2009 right up to the date of the hearing, possibly except during holidays; the information from DPS could only have been obtained from the Respondent or her agent; the Respondent's evidence was unsupported (she had not brought the tenancy agreement to the hearing) and, as regards rent, contradictory. The tenancy is for 11 months which would mean a tenant paying about £8800 over the period and our subsequent enquiries of the relevant website[1] shows a maximum maintenance loan of £4745 for one individual. The Respondent's assertions did not stand scrutiny and all the evidence points us to there being 3 occupiers who are all tenants of the flat. There is no suggestion from the Respondent that written consent as referred to in paragraph 1 was given.

d. However, we had to determine whether they are 3 occupiers, whether or not tenants, who constitute one family. We found that the 3 occupiers each had their own bedrooms and that they shared the kitchen and bathroom. We have no evidence at all that they are related and we decided that it would stretch the intention of the lease to justify those 3 individuals being called a family. We accordingly decided there was a breach of the relevant paragraph.

13. Causing a nuisance on 31 October, 2009. We were again referred to the letter of James Hipperson dated 20 November, 2009 which says "I was unaware of the incident involving rubbish being thrown out of the window. This was apparently also caused by Richard's unruly guests and I'm going to tell them that if anything like that happens again they will no longer be welcome in our flat. I will endeavour to ensure there are no further problems for you". That is a clear acceptance by one of the tenants of an incident of which the Applicant complains. It is further corroborated by e-mails. We received a letter written by the Applicant to the Respondent on 1 November, 2009 referring to the rubbish thrown out, (as well as to the emanating of noise from the flat to which we refer below). An e-mail of 1 November, 2009 from Brendan Kelly to the Respondent refers to photographs being attached showing the garbage. The Respondent's agent replied to that on the 2nd November, apparently after a meeting with the tenants and there is no denial concerning the garbage. We were provided with photocopies of photographs on various topics but they were so indistinct as to be largely unhelpful. We were satisfied that the

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1 http://www.direct.gov.uk/en/EducationAndLearning/UniversityAndHigherEducation/StudentFinance/ApplyingforthefirsttIme/DG_171542

ejection of rubbish/garbage from the demised premises was a nuisance to the Applicant and other occupiers of flats in the building and was a breach of paragraph 3.

14. Emitting excessive noise. The Applicant's case is as set out in some detail in their application letter of 24 November, 2009. Additionally we received evidence at the hearing that loud noise, music etc continues up to the hearing date; that the north-east room is used for boxing practice, the sound of hitting the equipment being transmitted through the floor and that this occurs very frequently late at night; that it seems to make the building shake. Indeed that the night before the hearing it could be felt through all floors in the building. Brendan Kelly denied that he had offered to share the boxing equipment but had simply referred the tenant to a boxing gym elsewhere. The loud music was to be heard about 3 times a week from the south west room of the premises right up until the end of the week before the hearing. It occurs generally between 2 am and 4 am but is variable. Brendan Kelly emphasised the loudness by reference to the fact that he and his father both have hearing problems. The Respondent considered that in relation to this allegation and others that there was some exaggeration on the Applicant's part. In support she referred us to a letter written by Brendan Kelly to her on 2 November, 2009 in relation to the poster. We felt that that was written in a very emotive terms and might either be evidence of exaggeration or reaction to the problems they were faced with in relation to the premises. Whatever the position about that, we were satisfied on all the evidence that the allegation of breach was made out and that it was a continual ongoing problem not only as set out in the letter of 24 November, 2009 but since then also.

15. Displaying a poster. The Respondent does not deny that a poster was displayed in the window but she does not accept it was an advertisement or notice in breach of paragraph 8. We have a very indistinct photograph of a window in which, at the top right hand side appears to be 3 or 4 lines of large text. Brendan Kelly wrote to the Respondent on 2 November, 2009 about that as a consequence of which the poster was removed within 24 hours. We accept that the poster, whatever its content, displayed as it was in the window of the premises constituted an advertisement or notice within the meaning of paragraph 8 and as such a breach of covenant occurred in this respect for about 24 hours.

16. Carpeting or otherwise.

    a. The Respondent told us that she had replaced the pre-existing carpeting and floor coverings to at least the standard previously existing. The carpet had a pimpled underlay. The floor areas referred to as covered with vinyl were covered with cushion floor with a plywood base and underlay as well. The Applicant's case was that the premises were inadequately carpeted and in some places, excluding the kitchen and bathroom, not

carpeted at all, and that the floorboards were merely covered in vinyl.

b. There is more than one interpretation available in respect of paragraph 9. The words "but will keep them adequately soundproofed" might refer not only to the kitchen and bathroom but also to other floors in the premises. We do not interpret it in that way. We consider that there are 2 parts to the paragraph:

    i. Firstly that all of the Premises but the kitchen and bathroom floors must not be left un-carpeted or inadequately carpeted;

    ii. Secondly, that the kitchen and bathroom floors must be adequately soundproofed.

c. In relation to the kitchen and bathroom, we found that the requirement of adequate soundproofing would be satisfied if it dealt with the normal sound of people walking around. We accepted the Respondent's evidence as to the work she had done in respect of the vinyl flooring and underlays and that would be sufficient and adequate soundproofing to the limited extent intended by the paragraph.

d. In relation to the rest of the premises we were satisfied that all floors, save for a small area around a washbasin in one of the rooms, was carpeted to an extent adequate to deaden the sound of walking.

e. In respect of both such areas, we could not construe either part of this paragraph to require absolute soundproofing. We are quite satisfied as to the extent of noise emanating from the premises as referred to above, but that noise could not be taken also as demonstrating a breach of the carpeting/flooring covenant.

f. In respect of this allegation, we accordingly found it was not proven.

17. The Tribunal made its decisions accordingly.

Chairman
A member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor