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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/38UB/LBC/2014/0008**
Property	:	**Flat 3, 88 West Street, Banbury, Oxfordshire, OX16 3HD**
Applicant	:	**Varennes Developments Ltd** **Represented by its M.D. Mr. A. Satterly**
Respondent	:	**Emma Elise Barlow** **Unrepresented**
Date of Application	:	**25th April 2014**
Type of Application	:	**Section 168(4) Commonhold and Leasehold Reform Act 2002 ("2002 Act")** **Determination of breaches of lease**
Tribunal	:	**Judge J.Oxlade** **H. Bowers MRICS** **D. Barnden MRICS**
Date and venue of Hearing	:	**30th June 2014** **Best Western Banbury House Hotel, Oxford Road, Banbury**

Attendees

Applicant	*Respondent*
Mr. A. Satterly, MD of Applicant **Mr. K. Hudson, tenant of flat 1** **Ms. K. Heritage, tenant of flat 2**	**non-attendance**

DECISION

For the following reasons, the Tribunal finds that:

1. the Respondent has been in breach of the terms of her lease,

- **as to Schedule 4 Part I (5), Schedule 4, Part II (6), and Schedule 8(7), by reason of the findings made in paragraph 28(1)(a) below,**
- **as to Schedule 4, Part II (6), Schedule 7 (7), by reason of the findings in paragraph 28(1)(b) below,**
- **as to Schedule 8 paragraph 12, by reason of the findings in paragraph 28(2) below.**

2. the application to make an order for costs on the grounds of the Respondent's unreasonableness is refused.

REASONS

Background

1. The Applicant is the freeholder of 88 West Street, Banbury, Oxfordshire ("the premises"), an end of terrace brick-built turn of the century house, divided into three flats and located on the corner of West Street and North Street, Banbury.

2. The Respondent is the lessee of flat 3, located on the second floor of the premises, pursuant to a lease ("the lease") made on 16th December 1998 between the Applicant, 88 West Street (Banbury) Management Company Limited ("the Management Company) and Susan Lynn Sargent.

Application

3. On 25th April 2014 an application was issued by the Applicant, for findings of breach of the lease by the Respondent, who had occupied the premises since August 2013. The application recited relevant covenants in the lease, and complained that there had been breaches of those covenants, by reason of the following:

- the lessee keeps two dogs which cause nuisance and annoyance to other occupiers, namely the tenants of flats 1 and 2, and which have been allowed to soil the communal areas (hall, staircase, landing),
- the lessee has failed to make good the soiled communal areas,
- the front entrance door to the communal area for flats 2 and 3 has been left unsecured and on occasions been left open, so likely to void any insurance claim,
- the lessee had failed to keep in working order the lighting in the common access areas.

4. No specific dates of the breaches were given but the Applicant said that the lessee had admitted breaches of the lease, having agreed that she had deposited unwanted items of furniture in the grounds and had agreed to make good the communal areas, but not done so.

5. Directions were made for the filing of evidence, pursuant to which the Applicant filed a bundle of documents; the Respondent did not comply with directions, and played no part in the proceedings.

Hearing and Inspection

6. The application was listed for hearing before the Tribunal on 30th June 2014, prior to which the Tribunal inspected the common parts of the premises. The Respondent did not attend the inspection but Mr. Satterly, Managing Director of the Applicant Company, did so.

7. So far as material to the issues in the case, the Tribunal noted that the shared communal entrance to flats 2 and 3 is set back from the road, to the rear of a parking space/small courtyard; flats 2 and 3 share a front door and common entrance hall with stairs leading to the first floor, at which point the doors to each flat are located. The Tribunal noted that the hallway and stairs are carpeted, and the walls painted; the carpets are stained and the walls marked and grubby; the only smell noted was a musty, wet, smell in the communal hallway. The hallway lighting was working. The general standard of upkeep of the building was mirrored by that seen in the communal hallway.

8. The entrance to flat 1 was located on North Street, also accessed from the rear car parking space/courtyard.

Hearing

9. At the commencement of the hearing the Tribunal explained the narrow jurisdiction of the Tribunal; namely, to consider the available evidence to establish breaches of the lease, which findings could (at the Applicant's later election) be a precursor to the Applicant seeking forfeiture of the lease in the County Court. The Tribunal also explained that it would only make findings on breaches of covenants which took place before the application was issued, as the Respondent must – because of the seriousness of the possible consequences – have been notified of the allegations in the application.

Oral Evidence - Keith Hudson

10. The tenant of flat 1, Keith Hudson, attended and confirmed that his letter dated 12th May 2014 was true and accurate, and it was his signature on the letter. His statement spoke of the Respondent leaving furniture in the small courtyard/parking space at the entrance to flats 2 and 3, consisting of two settees and a collapsible bed that she no longer wanted. He had made arrangements to rent the space from the Respondent to park his car there, but because of the furniture he could not do so; eventually, having spoken to the Respondent he called the Council to remove it, after about 6 weeks.

11. He was aware of dog noise from the flat, although in the past whenever he has heard the dogs barking and he has spoken to the Respondent, she has

done something about it. For example, she would arrange to have someone come and sit in with the dogs to keep them company. So, as she had responded positively to his comments he did not think it fair to treat this as *his* complaint.

12. Mr. Hudson provided some background. The Respondent has two rescue dogs (a greyhound/lurcher and a small Welsh terrier) which he described as traumatised; it is only when they are left on their own that they cause a problem. In the winter (with windows closed) it causes less of a problem than in the summer, when the windows are left open. He has heard neighbours grumbling to him about the noise, and he is aware of the problems suffered by Ms. Heritage, the tenant in flat 2. The Respondent does regularly walk the dogs, but the lurcher seems to evacuate his bowels as soon as he gets outside the front door in the courtyard, and the Respondent does not clean this up. The lady who lives next door (and who has made a little garden fronting onto the street) cannot sit out there because of the smell.

13. He described the Respondent as 22/23 years of age, not terribly worldly, and wondered if this was the first time that she had lived away from home. She does not really understand generally about living in a community; for example, he has mentioned to her the shared responsibility to keep the bins clean, but she plays no part in sorting this out. However, when he had spoken to her about the dogs, she has been apologetic and takes on board his points.

14. He knew that she was aware of today's hearing. Whilst he is sympathetic to her circumstances, he does not feel that this is reciprocated.

Oral Evidence – Karen Heritage

15. The tenant of flat 2, Karen Heritage attended to give oral evidence and confirmed that her letters dated 12th and 26th May 2014 were true and accurate, and which she had signed.

16. Prior to the Respondent moving in, Ms. Heritage and the lessee of flat 3 had operated a rota for cleaning the communal hallway which is shared between flats 2 and 3. The Respondent has never taken her turn. However, her dogs contribute to the need for the work to be done; they come in from their walk, wet and muddy, and shake themselves, so that the carpet is wet and stained, and the walls have dogs hair up them. She was clear that the stains were not caused by the dogs urinating or defecating in the hallway – which happens right outside the front door and in the courtyard/parking space, to such an extent that the witness had stopped her granddaughter coming over to visit her. Only this weekend - when she walked across the car park/courtyard to get something from the shed - she had to step over 4 or 5 piles of faeces. She wished to dispel any impression that the Respondent had left the doors open to let the dogs run freely in the hallway/corridor and outside – that was not the case at all.

17. When the Respondent is in the flat, the dogs are quiet and there is no problem. As soon as she leaves they bark a lot. The witness had seen the cage

in the living room used to stop him the lurcher (Prince) biting the furniture, but when the Respondent first leaves the flat he barks, howls, and bangs the cage which in turn hits the wall, and sets off the terrier (Rolo) - who had been a quiet occupant until the lurcher arrived some months later. Ms. Heritage has spoken to a housing officer about this, and there is an email on file.

18. Ms. Heritage's flat is directly below the Respondent's flat. She had successfully spoken to the Respondent in the past about this, who has been very apologetic and been in tears; the Respondent has arranged for her boyfriend to come and sit in with the dogs, who have then been quiet. The witness had also left notes, but the Respondent has on occasions avoided dealing with the problem by not answering the door, though she is in. However, the problem continues to recur and no real solution has been found by the Respondent.

19. As for locking the front door, this has been left unlocked (not open) on several occasions. Since the witness left a note for the Appellant about this, the witness has found the door locked.

20. The noise and smell of the dogs have affected her enjoyment of the flat and she has had to use air fresheners in the hallway because the smell is bad. A colleague dropping her home one day commented on the smell. The witness has stopped her granddaughter coming over, which she otherwise would have done regularly.

Submissions

21. In closing submissions Mr. Satterly said that the Applicant regarded these breaches of the lease as serious, the facts giving rise to 11 breaches of covenant. He took the point that the Respondent is young and inexperienced and perhaps not used to living in a community; it is not said that the breaches were malicious or deliberate. Mr. Hudson had given his evidence with some sympathy for the Respondent. However, the promises to deal with the problems are short-lived. The occupants remain aggrieved and the breaches are continuing; Ms. Heritage has had to put off family visits, and she should not have to do that. Though he conceded that there was no evidence filed in relation to the communal light not being kept fully operational, otherwise there was no doubt that the other breaches had occurred, and the Respondent had admitted breaches.

22. The Applicant had applied for costs, to meet the out-of-pocket expenses of the Applicant, the witnesses loss of work, and the estimated costs of making good the hallway. He appreciated that the Tribunal would not ordinarily make costs orders, but he considered that these were truly exceptional circumstances and the Respondent had been warned of the opportunity to put the breaches right, but not done so.

23. At the end of the hearing the Tribunal reserved its determination.

Relevant Law

24. Section 168 of the 2002 Act provides as follows:

"(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if –

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a Court in any proceedings... has finally determined that a breach has occurred.

(3) ....

(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 a covenant or condition in the lease has occurred".

Terms of the Lease

25. The Tribunal has carefully considered the terms of the lease of the Respondent's flat. It is noteworthy that the same terms are repeated in several places in the lease, and that the same act complained of can amount to several different breaches of lease. The Tribunal noted that:

- the lease does not prohibit the keeping of dogs or other domestic pets in the flat save where the keeping of the animal gives rise to justifiable complaints by other occupiers of the house that it interference with their comfortable enjoyment of the premises and the facilities (Schedule 7, clause 7), and where it amounts to the lessee permitting anything to be done in the flat or in connection with it which shall be taken to be a nuisance or annoyance or a disturbance or causes damage to the lessors tenants or neighbours (Schedule 4, Part II (6),
- though the stairwell and courtyard/parking space are part of the demise of the Respondent's flat, they form part of the "grounds of the house" and over which the other occupants exercise a right of way (to get to the front door to flats 2 and 3, and to get to the shed located in the far left handside) and a place where the lessee is prohibited from leaving any "refuse or rubbish" (Schedule 7, clause 7),

- the lessee must not permit or suffer to be done any act which may require an additional premium for insurance or which might make it void (Schedule 4, Part II (5),
- the lessee must make good all damage caused through act or default to any part of the house (Schedule 4, Part II (4).

Findings of Fact and Reasons

26. To establish its case, the Applicant did not produce logs detailing times and dates of alleged breaches, nor tape recordings of nuisance, nor photographic evidence of the abandoned furniture and dogs mess. Neither did the Applicant produce in evidence any letters or notes of warnings, which were said to have been issued.

27. The case therefore rests solely on the credibility of the witnesses. The witnesses gave their evidence in a clear and straightforward way, without hesitation or exaggeration. The witnesses both showed sympathy and tolerance for the Respondent, who is perhaps young, inexperienced, and unused to living in such a community, and had perhaps taken on a very energetic and disturbed dog (Prince), with little appreciation for how much noise he would make in her absence. The witnesses were quick to make points in her favour, and did not exaggerate the effect on them of the noise, smell and mess. The Tribunal found both witnesses to be have been slow to complain and reluctant to do so. The Tribunal found them to be accurate in their descriptions of events. The Tribunal found the witnesses to be both credible and reliable.

28. The Tribunal therefore finds the following facts:

> (1) the Respondent keeps two dogs which have caused nuisance and annoyance to the occupants of flats 1 and 2, on a frequent basis between August 2013 and April 2014, by (a) barking and banging in flat 3, for protracted periods of time and (b) defecating in the courtyard/parking space, which has not been cleaned up quickly and regularly,
> (2) the Respondent deposited unwanted furniture, namely two sofas and a collapsible bed, in the courtyard/parking space, which remained in place from February to April 2014,
> (3) the Respondent failed on several occasions between August 2013 and April 2014 to lock the communal door to flats 2 and 3.

28. However, there was no evidence adduced of the Respondent's failure to keep the communal hallway lighted, and so we dismiss that allegation.

29. The Tribunal accepts the evidence of Ms. Heritage that when the dogs come in from their walk, they can be wet and muddy, and that this causes stains on the carpets, hair up the walls, and a general dog smell. However, as the lease permits the keeping of dogs and this is all that is complained of is reasonably envisaged when keeping dogs – and not extraordinary user – the Tribunal does not find that this is of a level of consequence that can be classed

as a nuisance or damage and so does not give rise to a breach of the lease. Further, the Tribunal noted that the standard of the hallway was in keeping with the standard of upkeep of the building generally. It follows that the complaint that the Respondent has not made good damage, also falls away.

30. The Tribunal received no evidence of the terms of the insurance policy for the building. As block policies may vary in what they specify as to locking the front communal door, in the absence of a copy of the terms of the policy, the Tribunal is not satisfied that the Applicant has established that this failure could void the policy.

Findings of breach

31. The Tribunal has applied the findings of fact to the terms of the lease, noting that each finding of fact could give rise to breaches of several different covenants, which we state here for completeness.

32. The Tribunal finds that:

- by reason of the findings made in paragraph 28(1)(a) above, the Respondent has been in breach of Schedule 4 Part I (5), Schedule 4, Part II (6), and Schedule 8(7) between August 2013 and April 2014,
- by reason of the findings in paragraph 28(1)(b), the Respondent has been in breach of Schedule 4, Part II (6), Schedule 7 (7) between August 2013 and April 2014,
- by reason of the findings in paragraph 28(2), the Respondent has been in breach of Schedule 8 paragraph 12 between August 2013 and April 2014.

Costs

33. The Applicant sought costs as detailed in the application. However, the Tribunal declines to make any cost orders as the Tribunal's jurisdiction when considering this application is limited to making orders for costs under Regulation 13 of the Tribunal (First-tier Tribunal) (Property Chamber) Rules 2013, which can be made "if a person has acted unreasonably in bringing, defending or conducting proceedings". The basis of the application is that the Respondent's conduct has lead to making the application, but as the focus of the Rules is the Respondent's conduct *in the proceedings*, this does not establish the grounds for making the order. Whilst the Respondent has not participated in the proceedings, this does not of itself amount to acting unreasonably.

34. This decision on costs would not preclude the Applicant seeking these costs if the matter procedures to forfeiture in the County Court, being a necessary precursor to the service of a section 146 notice.

.....

10th July 2014

Judge Oxlade

Judge of the First tier Tribunal (Property Chamber)