



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

Case Reference : **CHI/00HC/LBC/2017/0034.**

Property : **109 Guillemot Road, Portishead,
North Somerset, BS20 7PG.**

Applicant : **Westpoint (Portishead) Management
Company Limited.**

Representative : **Brady, solicitors.**

Respondent : **Rebecca Louise Attwood.**

Representative : **In person.**

Type of Application : **Determination of breach of covenant,
S168(4) Commonhold and Leasehold
Reform Act 2002.**

Tribunal Member : **Judge J G Orme.**

**Date and Venue of
Hearing** : **19 October 2017.
Determination without a hearing.**

Date of Decision : **19 October 2017.**

Decision

This decision relates to the lease dated 25 March 2010 of the property known as 109 Guillemot Road, Portishead, North Somerset, BS20 7PG. The Applicant, Westpoint (Portishead) Management Company Limited, is the management company under that lease. The Respondent, Rebecca Louise Attwood, is the leaseholder of that lease. For the reasons set out below, the Tribunal determines that a breach has occurred of the covenants or conditions at Clause 6.1 in the lease in that:

- 1. The Respondent has kept 2 dogs in the property in breach of paragraph 18 of part 1 of schedule 4 of the lease without the written consent of the Applicant.**
- 2. The Respondent has caused a nuisance to the owners or occupiers of other plots within the estate in breach of paragraph 2 of part 1 of schedule 4 of the lease.**

Further the Tribunal makes no order in respect of costs.

Reasons

Background

1. 109 Guillemot Road, Portishead, North Somerset, BS20 7PG (“the Flat”) is a first floor flat within a modern residential development. The Freehold owner of the development is Freehold Managers (Nominees) Limited. The leaseholder of the Flat is the Respondent, Rebecca Louise Attwood (“Miss Attwood”). The Applicant, Westpoint (Portishead) Management Company Limited (“Westpoint”) acts as manager of the development.
2. On 1 June 2017, Westpoint applied to the Tribunal for a determination under *Section 168(4) of the Commonhold and Leasehold Reform Act 2002* (as amended) (“the Act”) that Miss Attwood had acted in breach of the terms of her lease of the Flat by keeping 2 dogs at the Flat without consent and that the behaviour of the dogs was causing a nuisance and disturbance to other occupiers of the building and neighbouring properties.
3. The Tribunal issued directions on 29 June 2017 providing for the parties to submit written statements of case. By the directions, the Tribunal gave notice pursuant to Rule 31 of the *Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013/1169* that it intended to determine the application without a hearing. Neither party has objected to that notice or requested a hearing.
4. Westpoint submitted its statement of case in accordance with the directions. Miss Attwood did not submit a statement of case by the time set out in the directions. The application was listed for determination on 2 October 2017. By email dated 29 September 2017, Miss Attwood asked

for further time in which to submit her statement of case, pleading stress and depression as the reasons for her failure to communicate with the Tribunal. The Tribunal extended Miss Attwood's time for submitting her case until 6 October and extended Westpoint's time for submitting a reply until 13 October. Miss Attwood submitted her statement of case within that time and Westpoint has not submitted a reply.

5. By letter dated 29 August 2017, Westpoint's solicitors asked the Tribunal to assess its costs of the application on the basis that it is contractually entitled to recover its costs under the terms of the lease or alternatively to award costs pursuant to Rule 13 of *the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013/1169* on the basis that Miss Attwood had acted unreasonably.

The Law

6. Section 168 of the Act provides:
 - 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 (c20) (restriction on forfeiture) 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, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.*
 - 3) *But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.*
 - 4) *A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.*
 - 5) *But a landlord may not make an application under subsection (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 a determination by a court, or*
 - c. *has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.*
 - 6) *For the purposes of subsection (4), "appropriate tribunal" means-*
 - a. *in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and*
 - b. *in relation to a dwelling in Wales, a leasehold valuation tribunal.*

The Lease

7. The Tribunal had before it a copy of a lease dated 25 March 2010 made between BDW Trading Limited as lessor, Miss Attwood as lessee, Westpoint as the management company and Port Marine Management Limited (“the Lease”).

8. By the Lease, the lessor demised the Flat to Miss Attwood for a term of 155 years from 1 January 2007 at a yearly rent of £225. The Lease has been subsequently registered at HM Land Registry under title number ST284149.

9. Clause 6.1 of the Lease provides:

The Lessee covenants with the Lessor and as separate covenants with Westpoint Management Company and with the owners and lessees of the other Dwellings ... that the Lessee and the persons deriving title under him will at all times after the date of this Lease observe the restrictions and stipulations set out in as relevant part 1 and part 2 of schedule 4 ...

10. Part 1 of Schedule 4 contains the following restrictions and stipulations:

2. Not to cause a nuisance to the owners or occupiers of other plots within the Estate or to BDW Trading Limited.

18. No bird, dog, cat or other animal or reptile shall be kept in or on the Property or the Private Parking Space(s) without written consent of Westpoint Management Company which consent may be revoked at the discretion of Westpoint Management Company.

11. Clause 5 of the Lease contains a covenant by Miss Attwood with the lessor to observe the covenants in the Charges Register and to indemnify the lessor against any claims arising from non observance of them.

12. Clause 7.3 of the Lease contains a covenant by Miss Attwood with the lessor and with Westpoint to pay all costs, charges and expenses incurred by the lessor in connection with a notice under section 146 of the Law of Property Act 1925.

13. Clause 7.4 of the Lease contains a covenant by Miss Attwood with the lessor and with Westpoint to pay all costs, charges and expenses incurred by the lessor and/or Westpoint for the purpose of enforcing compliance with the provisions of the Lease.

Westpoint’s Evidence

14. Westpoint filed a statement of case supported by photographic evidence and 3 witness statements.

15. Janet Hill says that she lives at 107 Guillemot Road, the flat below 109. She says that the dogs are left in the Flat unattended during working hours and that she has to “*endure constant loud barking and howling*”

from the dogs” which often continues through the night until the early hours of the morning. She also complains of additional noise caused by the dogs running around on the laminated flooring of the Flat and playing with bouncing balls. She also complains of loud shouting and swearing coming from Miss Attwood and her companions. She says that these disturbances are causing stress and anxiety and affecting the quality of life and well-being of herself and her husband.

16. Aleksandra Jablonska says that she lives at 111 Guillemot Road, the flat above 109. She complains of “*constant loud barking coming from the dogs*” which she can hear when she returns home at about 5.30pm and that it can continue through the night until 5am. She also complains about noise caused by the dogs running around on the laminated floors and playing with bouncing balls. She refers to stains on the carpets in the corridor which she says are caused by the dogs. She also complains about “*loud quarrelling and vulgar language*” coming from Miss Attwood and her companions. She says that this affects her enjoyment of her flat.
17. Melanie Watkins says that she lives at 113 Guillemot Road which is opposite 109. She says that Miss Attwood leaves her dogs alone in the Flat for long stretches of time and that she can hear “*constant loud barking and howling*” which sometimes occurs throughout the night. She says that the dogs bark at her when she tries to sit in her garden. She also complains of “*shouting, swearing and disgusting language*” from Miss Attwood and her companions. She says that this affects her enjoyment of her property.
18. Attached to the statement of case are copies of 2 letters written by Westpoint to Miss Attwood. The copies bear the date 19 July 2017 but the statement of case says that they were sent on 3 February and 9 March respectively. The letters refer to the fact that Miss Attwood is keeping 2 dogs at the Flat and that there have been complaints from several residents about the dogs constantly barking when Miss Attwood is not at home. The statement of case also exhibits a letter dated 19 April 2017 sent by Westpoint’s solicitors to Miss Attwood asking her to remedy the breaches. It alleges that Miss Attwood was keeping 2 dogs at the Flat which were causing a nuisance and disturbance to her neighbours.

Miss Attwood’s Evidence

19. As already noted, Miss Attwood submitted her statement of case extremely late. In addition it is unsigned and contains no statement of truth.
20. Miss Attwood admits that she is keeping 2 dogs at the Flat without consent and that she is in breach of paragraph 18 of part 1 of schedule 4 of the Lease. She admits that she has kept one dog at the Flat since 3 October 2015 and a second dog since 9 September 2016.
21. Miss Attwood disputes that she is in breach of paragraph 2 of part 1 of schedule 4 of the Lease. She says that her dogs are walked daily by her,

her father, a dog walker and her mother. She says that she lives continuously in the Flat and does not hear any barking and howling during the night and early morning. She says that she has a professional job and would not be able to tolerate such disturbance. She denies each and every one of the allegations made by Janet Hill, Aleksandra Jablonska and Melanie Watkins. She alleges that they have, in turn, acted in breach of the regulations in their leases. She takes issue with the dates on the letters exhibited by Westpoint and says that she has not received any report following a site visit.

Conclusions

22. Miss Attwood admits that she is in breach of paragraph 18 of schedule 4 of the Lease. She accepts that she has been keeping one dog at the Flat since 3 October 2015 and 2 dogs since 9 September 2016. She admits that she did not obtain any consent from Westpoint to keep the dogs at the Flat.
23. The 3 witness statements in support of the Application all refer to shouting and swearing by Miss Attwood and her companions. This complaint was not the subject of the 2 letters dated 19 July and the complaint was not included in the application. It was only raised at a late stage when Westpoint submitted its statement of case. The Tribunal does not consider that this complaint forms part of the application and it makes no finding in respect of that complaint.
24. What the application asks the Tribunal to determine is that the behaviour of the dogs has caused a nuisance and disturbance to other occupiers in the development.
25. The evidence before the Tribunal is in direct conflict. On the one hand, there are statements from 3 witnesses who give evidence that the behaviour of the dogs is causing a nuisance. That nuisance is being caused by the dogs barking and howling during the day and sometimes at night when they are left unattended and by the dogs making a noise by walking and playing with balls on the laminated floor coverings in the Flat. There is a separate allegation relating to staining of the carpet in the corridor. On the other hand, Miss Attwood's evidence (which is not supported by a statement of truth) is that the dogs are not causing such a nuisance and that she could not tolerate such a disturbance herself.
26. There are 2 factors which cause the Tribunal to prefer the evidence of the 3 witnesses on behalf of Westpoint. First, the allegation is that the dogs are causing a noise when Miss Attwood is not present. She admits that she goes out to work and that the dogs are, at times, left alone. She does not pretend to know what the dogs are doing when she is not present at the Flat. Second, it is highly unlikely that the managing agents would have written to Miss Attwood referring to complaints about noise caused by the dogs unless there had been such complaints. The Tribunal accepts that the date (19 July) on the 2 letters is not correct, as that is the same date as Westpoint's statement of case, and that the letters were sent on 3 February and 9 March.

27. The Tribunal prefers the evidence of the 3 witnesses on behalf of Westpoint and, on the balance of probabilities, finds as a fact that:
- 1) When the dogs have been left unattended in the Flat, they have barked and howled on occasions;
 - 2) The dogs have made a noise by running on the laminated floor coverings of the Flat and by playing with balls which noise could be heard in the flats above and below;
 - 3) The noise referred to in 1 and 2 above has caused a nuisance to Janet Hill, Aleksandra Jablonska and Melanie Watkins.
28. The Tribunal does not accept the evidence of Aleksandra Jablonska that the staining on the carpets was caused by the dogs. There is no direct evidence of a link between the dogs and the stains.
29. In the circumstances, the Tribunal finds that Miss Attwood has acted in breach of paragraph 2 of part 1 of schedule 4 to the Lease because she has caused the nuisance identified in paragraph 27 by allowing her dogs to remain in the Flat and make a noise which affects others.
30. By their letter dated 29 August 2017, Brady solicitors, on behalf of Westpoint, asked the Tribunal to make an order for costs against Miss Attwood. They put their request in 2 ways.
31. First, they say that Westpoint is entitled to recover its costs on a contractual basis under the terms of the Lease. They rely on clauses 5, 7.3 and 7.4. They ask the Tribunal to determine those costs on an indemnity basis. They say that the Tribunal has jurisdiction pursuant to schedule 9 of the *Crime and Courts Act 2013* which amended the *County Courts Act 1984*. The Tribunal does not consider that those provisions give the Tribunal jurisdiction to determine the costs in this application. It may or may not be the case that Westpoint is entitled to recover its costs under the terms of the Lease. However payment of those costs must be demanded of Miss Attwood and if she does not pay, they must be separately claimed through the County Court. If Miss Attwood disputes the reasonableness of the costs, the issue might be capable of determination by the Tribunal when considering the reasonableness of an administration charge. However, the Tribunal does not have jurisdiction to make such a determination in this application.
32. Second, they ask the Tribunal to make an award of costs under Rule 13 of *the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013/1169*. Under Rule 13, the Tribunal may only make an order for costs against a party if it is satisfied that a person has acted unreasonably in bringing, defending or conducting proceedings. Westpoint says that Miss Attwood has acted unreasonably by failing to submit her statement of case in accordance with the directions made on 29 June. The Tribunal bears in mind the guidance given by the Upper Tribunal in its decision in *Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 0290*. The Tribunal does not consider that the failure by Miss Attwood to comply with the directions is

unreasonable behaviour within the meaning given by *Ridehalgh v Horsefield* [1994] Ch 205. Miss Attwood's failure was due to the stress and depression from which she has been suffering rather than conduct which was vexatious or designed to harass the other side. The Tribunal refuses to make an order for costs under Rule 13.

33. If Westpoint wishes to pursue recovery of its costs, it must follow other procedures.

Right of Appeal

34. Any party to this application who is dissatisfied with the Tribunal's decision may appeal to the Upper Tribunal (Lands Chamber) under section 176B of the Commonhold and Leasehold Reform Act 2002 or section 11 of the Tribunals, Courts and Enforcement Act 2007.
35. A person wishing to appeal this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with this application. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal and state the result the party making the application is seeking.
36. The parties are directed to Regulation 52 of the Tribunal Rules . Any application to the Upper Tribunal must be made in accordance with *the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 SI 2010/2600*.

J G Orme
Judge of the First-tier Tribunal
Dated 19 October 2017