

**SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL**

**In the Matter of Section 168 of the Commonhold and Leasehold Reform
Act 2002 ("the Act")**

Case No: CHI/00ML/LBC/2010/0006

Between:

Berriedale House Limited (Applicant)

and

Mr P and Mrs E Crawford (Respondents)

Premises: 51 Berriedale House 251 – 255 Kingsway, Hove BN3 4HD
("the premises")

Date of Hearing: 31 March 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr J N Cleverton FRICS
Mrs J K Morris

1. On 15 February 2010 the Applicant applied to the Tribunal for a determination that the Respondents were in breach of a covenant in their lease of the premises by keeping a dog there contrary to paragraph 8 of the seventh schedule of their lease.
2. On 12 March 2010 the Respondents filed and served their Statement of Case in reply to the Application in which they did not accept that there had been a breach of the lease as the Applicant claimed.
3. The Tribunal inspected the premises immediately before the hearing on 31 March 2010. The Tribunal saw no dog at the premises at that time as Mrs Crawford explained that it had been taken somewhere to be looked after that day as the hearing was expected to last for some time.
4. The Inspection:
 - 4.1 Berridale House is a large modern eight storey purpose-built block of flats situated on the seafront in Hove. The premises are on the top floor of the building. On the ground floor there is a communal hallway leading to a pair of lifts. Each lift is very shallow from front to back and carries only three adults comfortably. On reaching the top floor it is necessary to pass through a door and along a corridor to reach flat 51.

The flat is reasonably spacious with a narrow kitchen. A small balcony with views out to sea leads off from the living room. This balcony adjoins that of the flat next door and the two balconies are separated by a waist high panel.

5. The Lease

5.1 By clause 2 of the Lease the tenant covenants with the landlord and as a separate covenant with the Maintenance Trustee that the tenant "will observe and perform the obligations on the part of the tenant set out in the fourth and sixth schedules hereto."

5.2 By paragraph 14 of the fourth schedule to the lease it is provided that "the tenant shall at all times comply with and observe the regulations contained in the seventh schedule hereto ..."

5.3 By paragraph 8 of the seventh schedule to the lease it is provided that "not without the landlord's prior consent in writing (which shall be revocable at any time) to keep any dog bird or other animal in the flat and to ensure that any such dog bird or other animal shall when in or upon any part of the grounds or building (other than the flat) be at all times on a leash or carried or caged."

6. The Law

6.1 By Section 168(1) of the Act it is provided that "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". Subsection (2) states that the said subsection (2) is satisfied if "(a) it has been finally determined on an application under subsection (4) that the breach has occurred ..."

6.2 Under Section 168(4) of the Act "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".

7. The Applicant's Case

7.1 The Applicant stated in its application that the Respondents had not sought to deny the existence of the dog in the premises but they had not acknowledged that by keeping a dog there without the landlord's consent they are in breach of their lease.

7.2 The landlord's agent contended that the Respondents' dog has "an aggressive temperament and represents a potential danger to residents, visitors and contractors". They said that there had been a number of incidents involving the behaviour of the dog in the common parts of the building the most recent of which prompted a referral to the Local Authority's dog warden. There was also a complaint from the Respondents' next door neighbour that his flatmate was "snapped at by the dog" whilst on the balcony where the balconies are separated only

by a frosted glass panel. There had also been complaints of a dog barking, although the dog in question was not specifically identified.

- 7.3 The landlord's agent, Mr Bowles, explained how in order to deal with what they thought was going to be a temporary situation where the Respondent kept a dog at the premises pending the Respondent's move abroad he had drafted a pet policy. The final draft of this policy had been approved by the Board but almost immediately thereafter there was an incident which had frightened one of the lessees, Mrs Gill. As a result of this the Board had authorised the managing agent to write to the Respondents requiring them to remove the dog from the premises.
- 7.4 A copy of the proposed pet policy, which had never progressed to a stage where it had been promulgated to the lessees contained the following provisions:-
"1. Under the terms of the lease no animals may be kept in any of the flats without the prior written consent of the landlord (currently Berridale House Limited). The lease includes a provision entitling the landlord to revoke such consent at any time and stipulates that such animals must be on a lead or caged when in the internal common parts of the building or on the grounds of Berridale House."
"6. Animals to be kept for therapeutic reasons on medical advice by those suffering from recognised conditions will require prior written consent to be obtained. The Board would ordinarily approve such applications, subject to receipt of written confirmation of the advice from a recognised medical professional".
- 7.5 The landlord's managing agent produced a copy of a number of letters from residents of the building asking that the no pets provision of the lease be enforced. Mrs Gill who is a director of the Applicant company and the owner of Flat 4 Berridale House, gave evidence to the Tribunal of an incident where she came out of her flat into the communal hallway. She came across the Respondents' dog which was being held on a lead by Mrs Julie Oakley who was talking to another lessee outside the doors of the lifts. The dog seemed to have been startled by the sudden appearance of Mrs Gill and Mrs Gill says that the dog snapped at her. Mrs Gill recoiled and was frightened and upset by the dog's behaviour. Although she was intending to go shopping she had to retire to her flat where she was comforted by her partner.
- 7.6 The Applicant's managing agent produced a copy of a letter from Mrs Crawford's GP which stated that Mrs Crawford was known to suffer from Multiple Sclerosis and that there were periods when she was housebound. He said that he understood that "to combat the obvious loneliness that this engenders she has a pet dog. I believe there are extenuating circumstances regarding the keeping of pets in Berridale House and I would recommend to the Board that Mrs Crawford be allowed to continue to keep a pet in her flat as she still is often housebound for long periods of time". Mr Bowles' interpretation of that letter was that it did not constitute evidence that Mrs Crawford required

to keep a dog due to her medical condition. It was not in the same category as a trained dog such as a guide dog for the blind or similar. The doctor was in effect saying that Mrs Crawford benefited from the dog's presence as a companion. In Mr Bowles' view therefore the letter from Mrs Crawford's GP would not have constituted sufficient evidence for the Board to have granted consent to it being kept in the premises under the terms of the pet policy even if the said policy had been disseminated to the lessees.

- 7.7 The Applicant also produced copies of correspondence between the managing agent and the Respondents and their solicitors, the last of which was a letter to the Respondents dated 15 February 2010 which stated as follows:-
- "Further to my letter of 15 January, I understand your dog has not been removed from the building and I therefore write to advise you steps to enforce the lease will now be taken, commencing with an application to the Leasehold Valuation Tribunal to be followed, if necessary, by County Court proceedings.
- If it is your intention to remain in breach of the terms of your lease I would urge you to seek legal advice, and it may also be prudent for you to notify your mortgage lender, if you have one."
- The letter of 15 January 2010 addressed to the Respondents had stated as follows:-
- "You have been invited on three occasions over the last twelve weeks to come forward with a realistic proposal for the removal of the dog but have elected not to do so. I must therefore advise you that the Board permanently removed from the building on or before 12 February 2010".

8. The Respondents' Case

- 8.1. The Respondents admitted that they were keeping a dog at the premise and they produced a photograph of the dog. They also admitted that they had not obtained written permission for this dog although they maintained that they had received written permission for their previous dog which had died shortly after the present dog arrived at the Premises. (This latter point was denied by the Applicant.) They denied, however, that they were in breach of the lease. They alleged that paragraph 8 of the seventh schedule to the lease had been "amended or enhanced" when the Applicant adopted and implemented the pet policy at a meeting of Directors held on 3 February 2009. They said that the dog was initially acquired temporarily with full consent of a Director (although not in writing) in December 2008. When the new policy was adopted they obtained the letter referred to above from Mrs Crawford's GP and applied for written consent to keep the dog in the premises. They maintained that all the requirements for the pet policy had been fulfilled and that there was therefore no reason for the Board not to approve their application. Indeed, they say, the pet policy states that "such applications would ordinarily be approved". They point out that eleven months has elapsed but that they had no formal response to their application for written consent. During that time the dog has become a very much loved and integral part of the home as well as being "essential therapy"

for Mrs Crawford's Multiple Sclerosis condition. They say that it is therefore unreasonable for the landlord to request the dog's removal after such a long period of time. They deny that the dog has an aggressive temperament and that it is an unreasonable exercise of the Board's discretion to refuse permission for this dog when permission had been granted for a previous dog which died shortly after the current dog arrived at the premises. Finally they say that they consider the failure to grant written consent for the keeping of this current dog has been prompted by "ill will on the part of a few influential tenants" which was the result of Mrs Crawford having been instrumental in uncovering alleged misdeeds on the part of the previous managing agent.

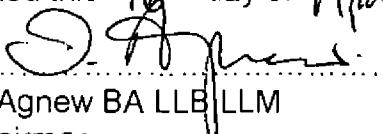
- 8.2 They produced part of the report of a case namely *Lymington Marina Limited v Macnamara* in which the Court of Appeal said that in the exercise of a discretion as to whether or not to grant a licence the discretion had to be exercised in good faith and not capriciously. It was not necessary, however, that the decision be objectively justifiable.
- 8.3 Finally, the Respondents produced Mrs Julie Oakley and asked that her evidence be admitted, notwithstanding the fact that she has not previously supplied a witness statement. Mr Bowles did not object on the basis that Mrs Gill would be given the opportunity of giving her version of the incident when she encountered the dog, which she was and her evidence was as set out in paragraph 7.5 above. Mrs Oakley produced a witness statement, albeit unsigned, which she had prepared at the request of the Respondents' solicitors. She said that the contents of that witness statement were true. She said that she did not think that Mrs Hollingsworth, another resident who reported the matter to the caretaker, could have witnessed the incident because at the time she was round the corner out of sight of what happened. Mrs Oakley accepted that the Respondents' dog of which she was in control at the time, was startled by Mrs Gill's sudden appearance in the communal hallway and that it started to bark for 3-5 seconds, possibly less. At all times Mrs Oakley had the dog held tightly on a lead. She accepted that Mrs Gill was clearly startled by the dog's barking and that she stepped backwards. She considered that at no time was Mrs Gill in any danger and that she had possibly over-reacted to the dog barking at her. She said that this was a minor incident and that Mrs Gill's reaction was out of all proportion.

9. The Determination

- 9.1 The Respondents' admission that a dog was being kept at the premises and that they had no written consent from the landlord or the landlord's managing agent for this constitutes on the face of it a breach of paragraph 8 of the seventh schedule to the Respondents' lease. The Tribunal has, however, to consider whether the Applicant has waived the covenant or is in some way estopped from claiming that the Respondents are in breach of covenant.

- 9.2 In this respect, the Tribunal considered that the pet policy was something of a red herring. Even if the policy were currently in force (which is disputed by the Applicant as they say it was never promulgated to lessees) it seems to the Tribunal that this does not assist the Applicant. First, paragraph 1 of the policy points out that written consent of the Applicant is necessary and the Respondents accept that no written consent has ever been given for the keeping of the current dog. Secondly, the pet policy reiterates that consent can be revoked at any time and, it is clear, that if any consent had been given, it was revoked by the letters from the managing agent to the Respondents culminating in those of 15 January and 15 February, 2010. Thirdly, the policy does provide that consent would ordinarily approve applications where animals were being kept "for therapeutic reasons on medical advice" but, strictly construed, the letter from Mrs Crawford's GP did not go so far as to say that the dog was being kept on medical advice "for therapeutic reasons" and even if the Board would ordinarily approve such applications that still leaves the Board with a discretion.
- 9.3 The Tribunal accepts the general proposition that the discretion to grant or refuse consent should be exercised in good faith and not capriciously. In the Tribunal's judgment, however, the Respondents have failed to provide any evidence that the Applicant was acting in bad faith or capriciously in refusing to give its consent to the Respondents keeping the dog in question at the premises. The suggestion that certain lessees had taken against the Respondents due to Mrs Crawford being instrumental in uncovering alleged misdoings of the previous managing agent was not supported by any evidence. On the other hand, there was evidence that other lessees were opposed to the keeping of animals in general at Berriedale House and some lessees who had written letters of opposition who were not Board members were opposed to this animal in particular being kept at the premises. Just because a lessee was against the Respondents keeping a dog at the premises did not mean to say that they were prejudiced against the Respondents or bore them any ill will. It could be simply that they just did not want a dog to be kept on the premises. Even if that had been an unreasonable position to take, that was insufficient to make the exercise of the discretion invalid or unlawful. Furthermore, the Respondents had not produced any evidence from any other lessee of Berriedale House that they were in favour of the Respondents being given permission to keep the dog at the premises.
- 9.4 The Tribunal concluded, therefore, that the Applicant had neither waived the covenant nor was it estopped from asserting the breach of the covenant and that accordingly the Respondents were in breach of the covenant in paragraph 8 of schedule seven of the lease at the date of the hearing.

Dated this 16th day of April 2010


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D. Agnew BA LLB LLM
Chairman

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL**

**In the Matter of Section 168 of the Commonhold and Leasehold Reform
Act 2002 ('the Act')**

Re: 51 Berridale House 251 – 255 Kingsway, Hove BN3 4HD

Case No: CHI/00ML/LBC/2010/0006

Between:

Berridale House Limited (Applicant)

and

Mr P and Mrs E Crawford (Respondents)

DETERMINATION AND REASONS

DETERMINATION

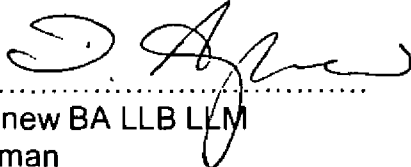
1. The Tribunal refuses under paragraph 24 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (hereafter referred to as the 2003 regulations) to extend to 7th June 2010 (the date when the Respondent's grounds of appeal were received at the tribunal office) the period prescribed by regulation 20 of the 2003 regulations within which application for permission to appeal to the Tribunal may be made.
2. Even if the Tribunal had been prepared to grant permission under paragraph 1 above the Tribunal would have refused permission to appeal.

REASONS

3. The Tribunal's determination of the application under Section 168 of the Commonhold and Leasehold Reform Act 2002 was sent out to the parties by the Tribunal office on the 19th April 2010.
4. On the 7th May 2010 Mrs Crawford sent a fax to the Tribunal office stating that she wished to ask for leave to appeal in this case and that reasons would follow in seven days. Although no reason for her being unable to supply grounds of appeal with her fax was given it is understood that Mrs Crawford told the case officer that someone was assisting her with her grounds of appeal and that they were unable to finalise the grounds within the prescribed period of 21 days.

5. The grounds of appeal were not received within seven days of the aforesaid fax. They were not received at the Tribunal office until 7 June 2010, approximately one month late. Again, no explanation for the late submission for the grounds of appeal was offered by the Respondent.
6. In the absence of any reasonable explanation for the Respondent's inability to provide any grounds of appeal either within the time prescribed by the regulations or within the seven days referred to in the Respondent's fax of 7th May 2010 the Tribunal has no reason to grant an extension of time. Indeed, regulation 24(2) states that any request to extend the period prescribed by the regulations must be done before the period expires. That was not done in this case. Accordingly the Tribunal finds that permission to appeal was sought out of time and no extension of time will be granted in respect of the application for permission to appeal.
7. Even if the Tribunal had been able or was minded to extend the period of time for seeking permission to appeal the application would have been refused on its merits. The grounds of appeal are simply a restatement of the Respondent's case at the hearing which the Tribunal had considered carefully and had rejected. The grounds of appeal do not assert that the Tribunal erred in law or that its procedure was flawed. The Tribunal was entitled on the evidence given at the hearing to reach the findings of fact that it did upon which its determination was founded. Mrs Crawford points out that the Tribunal was wrong to state that the incident with the dog and Mrs Gill in the entrance hall of the block did not take place almost immediately after the Board had resolved to adopt the pets policy and that it was in fact almost a year later. The tribunal accepts that this is so but the timing of this incident was not a fact which on its own determined the Tribunal's decision. The Tribunal's reasons for reaching the decision it did are fully set out in paragraph 9 of its determination.
8. The Respondent is now entitled to pursue an application for permission to appeal to the Upper Tribunal (Lands Chamber) if she so wishes but must do so within fourteen days of the issue of this decision.

Dated this 24th day of June 2010


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D. Agnew BA LLB LLM
Chairman