

S. 41



FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : CHI/24UF/LBC/2013/0033

Property : Flat 1 Fowey Court, Hayling Close, Gosport,
Hampshire PO12 4LZ

Applicant : Wenghold Limited (the Landlord)

Representative : Mr J E Torrington FRICS of Parker Torrington
Chartered Surveyors

Respondent : Mr Philip Mansell (the Tenant)

Representative : --

Type of Application: Section 168(4) Commonhold and Leasehold
Reform Act 2002 – Application for an order that a
breach of covenant or a condition in the lease has
occurred

Tribunal Members : Judge P.J. Barber Chairman
Mr D. Lintott FRICS Valuer Member

Date and venue of Hearing : 18th October Tribunal Offices, 1st Floor,
2013 Midland House, 1 Market
Avenue, Chichester, West
Sussex PO19 1JU

Date of Decision: 24th October 2013

DECISION

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Decision

The Tribunal determines in accordance with the provisions of Section 168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant has occurred, being a breach by the tenant of the obligations imposed pursuant to Paragraph 11, Part B, Ninth Schedule of the Lease dated 26th February 2001.

Reasons

INTRODUCTION

1. The application is made by the Applicant, for the Tribunal to determine whether or not a breach of covenant in the lease dated 26th February 2001 granted by Barratt Homes Limited ("the Lease") in respect of the Respondent's flat being Flat 1 Fowey Court, Hayling Close, Gosport, Hampshire PO12 4LZ ("the Flat") has occurred in relation to the keeping by the Respondent of a dog in the Flat. Fowey Court forms one of six neighbouring blocks which are collectively managed; the other blocks being Canada Court, Hermes Court, Netley Court, Shannon Court and Sussex Court ("the Estate").
2. In broad terms, the complaint made by the Applicant as landlord, is that the Respondent tenant is keeping, or allowing to be kept, a dog in the Flat, contrary to the provisions of the Lease. The dog in question, a small yorkshire terrier, appears to have been introduced to the Flat in or about February 2013. Certain correspondence ensued as between the Respondent and Mr Torrington in conjunction with Admiral's Quay Residents' Association ("AQRA"). Parker Torrington Chartered Surveyors were appointed by the Applicant on 1st April 2012 to act as managing agents and to work with AQRA. When it became apparent to Mr Torrington that the Respondent was keeping a dog in the Flat, a telephone conversation occurred between Mr Torrington and Mr Mansell, as a result of which Mr Mansell explained that his daughter who was a policewoman, had taken the dog in temporarily in association with her work. The matter was considered by a meeting of AQRA on 5th March 2013, as a result of which Mr Torrington wrote to the Respondent stating that the dog should be removed from the Flat by 31st March 2013. By June 2013 it was evident that the dog was still being kept in the Flat and consequently Mr Torrington wrote to the Respondent on 25th July 2013 indicating the Applicant's intention to apply to the Tribunal for determination regarding whether a breach of covenant has occurred.
3. A copy of a generic form of lease for the development in which the Flat is located, was produced to the Tribunal; Mr Mansell indicated to the Tribunal that he accepted that the terms of such copy reflected substantially the terms of the Lease of the Flat. Accordingly it was accepted by both parties that the Lease contains the following relevant provisions :-

Clause 3:

“The Lessee for the mutual protection of the Lessor and Management Company and of the lessees of the Properties HEREBY COVENANTS :

- (a) With the Lessor and as a separate covenant with the Management Company to observe and perform the obligations on the part of the Lessee set out in Parts A and B of the Ninth Schedule hereto*
- (b) With the lessees of the Properties to observe and perform the obligations on the part of the Lessee set out in Part B of the Ninth Schedule hereto*
- (c)”*

Paragraph 11, Part B, Ninth Schedule of the Lease provides :

“Not to keep any dog bird or other animal or reptile in the Demised Premises without the prior written consent of the Management Company which consent may be revoked at the reasonable discretion of the Management Company”

- 4. Directions were issued by the Tribunal on 21st August 2013 inter alia requiring the Respondent, if he wished to oppose the application, to serve a statement in response together with a bundle similarly indexed and paginated.

INSPECTION

- 5. The Tribunal's inspection took place in the presence of the Respondent, Mr Mansell together with his daughter, the dog`s carer, Ms Jo Mansell. The Applicant was neither present nor represented at the inspection.
- 6. The Flat is a ground floor flat; Fowey Court consists of a block of six purpose built flats arranged over three floors and constructed in or about the early 2000s. The block has a pitched and tiled roof; the external elevations to the ground floor are of rendered blocks with yellow face brick elevations at first and second floor levels.
- 7. The Flat is approached via a main communal front door which provides access to Flats 1-6 Fowey Court. There is no lift; access to the Flat is obtained via the ground floor entrance hall.

THE LAW

- 8. Section 168 of the Commonhold and Leasehold Reform Act 2002 (as amended by Regulation 141 of the Tribunals and Inquiries, England and Wales Order No. 1036 of 2013) provides that :

“168 – No Forfeiture Notice before determination of breach

(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 (c.20) (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 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 a 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 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"

HEARING & REPRESENTATIONS

10. The hearing was attended by Mr Torrington of the managing agents Parker Torrington. Mr Mansell was accompanied by his daughter, Ms Jo Mansell.
11. Mr Torrington submitted for the Applicant that there was only one issue, namely whether a breach of the relevant covenant in the Lease had occurred; he referred to Paragraph 11 in Part B of the Ninth Schedule of the Lease and confirmed that no written permission had ever been given for the dog to be kept in the Flat. Mr Torrington had written to the Respondent on 25th March 2013 saying "With regard to the `temporary` keeping of the dog on behalf of your daughter, I must advise you that this needs to be brought to an end by 31st March 2013".
12. Mr Mansell said that the dog "Harry" had originally been brought to live in the Flat owing to the ill health of his elderly owner and originally it was planned that the dog would remain only temporarily until summer 2013 whilst Mr Mansell`s daughter was refurbishing her own separate accommodation, to which he would then be removed. Mr Mansell said that unfortunately the dog`s owner had subsequently died and since the animal had settled so well with him in the Flat and was, he said, causing no disturbance to neighbours, he sought formal consent for it to stay. Mr Mansell said that the previous managing agent Solitaire, had a policy of allowing one cat or dog per flat although in the case of dogs, they should be of a breed consistent with flat living.
13. Mr Mansell further submitted that it was unfair that Solitaire`s policy had been changed and that the decision in respect of his dog was unreasonable. Mr Mansell referred to copies of letters in his bundle from the flat occupiers at Numbers 2, 3 &

6 Fowey Court each indicating that they were aware of the dog's presence in the Flat but had no objection to him staying there. Ms Jo Mansell indicated to the Tribunal that there had been delay in her purchase of a property but she was still intending to move and at that stage she would take the dog with her.

14. Mr Torrington said that although his firm had a contract with the Applicant, Wenghold Limited, his instructions effectively came via a linked intermediary firm "Estates & Management", but that in practice, his brief as managing agent was to liaise with AQRA and follow their guidance and instructions on day to day management issues. This reflected a pro tem arrangement with Wenghold Limited although Mr Torrington admitted that some greater clarity in such arrangements may be desirable. Mr Torrington said that the view of the AQRA committee, as it had been expressed to him, was clear to the effect that no dogs should be allowed to be kept on any part of the Estate. Consequently Mr Torrington said he considered that the application was entirely justified.

CONSIDERATION

15. The Tribunal, have taken into account all the oral evidence and those case papers to which we have been specifically referred, and the submissions of the parties. The Tribunal noted that the covenant contained at Clause 11 to Part B of the Ninth Schedule of the Lease is expressed in absolute terms, without any qualifying provisions which might for example require that any consent must not be unreasonably withheld or delayed, or providing for any appeal mechanism or for the imposition of conditions to any consent. The only requirement in the covenant for exercise of reasonable discretion would be in regard to any revocation of a consent previously granted. In this case the evidence given was to the effect that no consent had ever been granted. In coming to a decision the Tribunal must give significant weight to the words actually contained in the Lease, as opposed to extraneous matters; accordingly it followed that the keeping of a dog in the Flat is in breach of the relevant covenant.
16. The Tribunal's decision is of necessity made by reference to the provisions of the Lease and is not in any way a reflection of the behaviour of the dog concerned which, during the inspection, appeared to be quiet and well behaved.
17. We made our decisions accordingly.

Judge P J Barber

A member of the Tribunal
appointed by the Lord Chancellor

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. 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.

3. 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.

4. 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.