



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

Case Reference : CAM/38SUB/LBC/2015/0004

Property : Flat 3, 88 West Street, Banbury,
Oxfordshire, OX16 3HD

Applicant : Varennes Developments Limited

Representative : Mr A Satterly

Respondent : Miss E E Barlow

Representative : In person

Type of Application : Determination of an alleged breach
of covenant

Tribunal : Mrs H C Bowers MRICS
Judge J Oxlade
Mr D Barnden MRICS

**Date and venue of
Determination** : Friday 15th May 2015
The Court House, Court 2, Warwick
Road, Banbury,
OX16 2AW

Date of Reasons : 9th June 2015

DECISION

The Tribunal finds that the Respondent has been in breach of the terms of her lease,

- by reason of the findings made below, the Respondent has been in breach of Clause 5;
 - by reason of the findings made below, the Respondent has been in breach of Schedule 4, Part I (5);
 - by reason of the findings made below, the Respondent has been in breach of Schedule 4, Part II (6);
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- by reason of the findings made below, the Respondent has been in breach of Schedule 4, Part II (7);
 - by reason of the findings made below, the Respondent has been in breach of Schedule 8 paragraph 5;
 - by reason of the findings made below the Respondent has been in breach of Schedule 8 paragraph 7;
 - by reason of the findings made below, the Respondent has been in breach of the Deed of Covenant dated 12th August 2013.
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Background:

(1) The Applicant landlord seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 (“the Act”), that the Respondent tenant is in breach of the lease dated 16th December 1988 under which Flat 3, 88, West Street, Banbury, OX16 3HD (“the subject property”) is held.

(2) An application was dated 20th February 2015, requiring a determination of a breach of covenant. Directions were issued on 6th March 2015.

(3) It is maintained that the Respondent is in breach of the subject lease in respect of creating noise and nuisance and interfering with the comfortable enjoyment of the tenant of flat 2. To provide some context it should be noted that this is the third application that has been made by the Applicant in respect of breaches of lease by the Respondent.

The Law:

(4) 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 (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-dispute arbitration agreement, has finally determined that the breach has occurred.

(3)

(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.*"

Terms of the Lease:

(5) The "subject lease" is dated 16th December 1988 and was originally between Varennes Developments Limited as Lessor; 88 West Street (Banbury) Management Company Limited as the Management Company and Susan Lynn Sargent as the Lessee. The bundle submitted to the Tribunal included a Deed of Covenant relating to the subject property and this indicated that the lease was assigned to the Respondent on 12th August 2013. Under this Deed Miss Barlow covenants to observe and perform the covenants and stipulations within the lease.

(6) The clauses that the Applicant claims that the Respondent has breached are set out below:

Clause 5 states that "The lessee covenants with the Lessor and as a separate covenant with the lessees from time to time of the other flats within the House and as a separate covenant with the Management Company that the Lessee will at all times hereafter observe and perform the restrictions stipulations and covenants set out in Part 1 and Part 2 of the Fourth Schedule hereto".

The Fourth Schedule sets out the Lessee's covenants. In particular the Fourth Schedule, Part I paragraph 5 states *"Not to use or permit the use of the Flat or any part thereof for any illegal or immoral activity or in any manner that may be or become a nuisance or annoyance to the lessees owners or occupiers of any other flat in the house or neighbouring properties not to use any unsuppressed electrical appliances."*

The Fourth Schedule, Part II sets out the Lessee's covenants with the Lessor, the Management Company and the Lessee of the other flats in the House. Paragraph 6 states *"Not to do or permit to be done upon or in connection with the Flat anything which shall be or taken to be a nuisance annoyance disturbance or cause damage to the Lessor or the Lessor's Tenants or to any neighbouring adjoining or adjacent property or the Owner or Occupiers thereof"*.

The Fourth Schedule, Part II, paragraph 7 states *"To observe the Regulations specified in the Eighth Schedule hereto and such other reasonable regulations consistent with the terms of this Lease or which the Management Company may give notice in writing"*.

The Eighth Schedule sets out the Regulations. The Eighth Schedule, paragraph 5 states *“Not use any musical instrument radio television set tape recorder gramophone or similar apparatus in the Flat between the hours of 11.00 pm and 7.00 am in such a way as to be audible in any other part of the House”*.

The Eighth Schedule paragraph 7 states *“Not to keep in the Flat any animal (other than a domestic pet) nor any animal or bird about which any other occupier of the House justifiably complains that it interferes with comfortable enjoyment of his premises and the facilities used with it”*.

(7) The lease defines House as meaning “the whole building of which the Flat forms part”. In the First Schedule the lease defines that Flat that comprises the subject property and in particular it states that it includes the parking space shown hatched red on the lease plan. In the Third Schedule that details the exceptions and reservations. The lease gives rights of access over the parking area and along any common external paths leading to the House.

Inspection:

(8) Prior to the hearing the Tribunal had an opportunity to make a brief external inspection of the subject building in the company of Mr Satterley.

(9) As described in previous decisions, the building is an end terrace house on three floors that has been converted into three flats. To the side of the subject property is a gravel driveway that provides access to the three flats. This driveway is demised to the top floor flat (Flat 3). The ground floor flat has a separate entrance door and access to the first and second floor flats is from a door on the ground floor and an internal staircase. The hallway and stairs are also included in the demise of the top floor flat. The driveway area provides access to the entrance door serving Flats 2 and 3 and to the separate entrance door for Flat 1.

Hearing:

(10) Written representations were received from the Applicant, but no representations were received from the Respondent. A hearing was held on Friday 15th May 2015 at 11.00 am, at the Court House, Warwick Road, Banbury. Mr Satterley attended on behalf of Varennes Development Limited, Miss Barlow attended in person. Also at the hearing was Mrs Heritage and Mr Burr. In coming to its decision the Tribunal had consideration of the written submissions and evidence, its inspection and the evidence and oral submissions made by both parties at the hearing. The position of each party is set out in summary below, insofar as those submissions relate to the issues under consideration.

Applicants' Case

(11) Mr Satterley set out the relevant terms of the lease that are claimed to have been breached. He then explained that from the evidence of Mrs Heritage and Mr Burr there had been activities by Miss Barlow that constituted a breach of lease. The various activities took place on a number of days in January 2015.

Mrs Heritage's Evidence:

(12) Mrs Heritage had provided a written witness statement that was dated 19th January 2015. It detailed a number of events from 11th to 19th January 2015. On 11th January between 20:14 and 20:31 dogs were let out of a cage and left running around; 23:50-00:15- dogs running about, can hear the Respondent shouting at them and doors banging. On the 12th January between 00:45 and 02:35 the Respondent and her partner walking and banging about, TV was on loud and tumble dryer was on that could be heard; 02:45 dogs taken outside, doors banging; 20:00 – 20:16 dogs had a run around the flat, TV on loud; 21:50 – 22:00 TV or music on loud; 22:10-22:24 dogs running around really noisy, barking, heard someone shouting, doors banging and dogs running up and down the stairs; 22:30 – 22:43 dogs running about; 23:00-23:45 banging about, TV on loud can hear talking and laughing, throwing ball for one of the dogs. On 13th January between 04:00 and 04:10 the dogs were running about and then taken outside. 14th January 21:07 – 22:05 dogs barking washing machine on and tumble dryer running waking Mrs Heritage. On 15th January 11:47- 00:00 doors banging and talking can be heard. On 17th January from 18:00 onwards the dogs were howling and in the cage trying to get out and banging the cages. On 19th January between 20:00 and 20:30 there was loud music. On 23rd January from 20:00 to 23:50 there was banging of the doors, heavy footsteps and the TV. At midnight the noise had ceased, but at 00:10 the noise re-commenced with walking around, dogs padding about and loud music. This continued until 01:00. Eventually the police (Police URN no. 442401) were called and attended at 01:38 and the problem was resolved. In summary the problems in January had related to the dogs running around and the loud levels of TV and music noise. She had sent an email to Mr Satterley on 19th January 2015 that explained the levels of stress caused by the nuisance.

(13) In responding to questions from Miss Barlow and the Tribunal, Mrs Heritage further explained that the dogs were not causing any problems at that moment. That she had also caused a noise nuisance and that the Local Authority had become involved in the relationship between Mrs Heritage and Miss Barlow. There had been an offer to mediate between them, but it had never got to that stage. They had arranged a meeting between themselves and had explored their issues and had agreed a way forward. Essentially there had

been a mutual problem and now they had resolved issues and found a mutual solution. Although Mrs Heritage can still hear the dogs, she no longer regards them as a nuisance. The noise from the flat is just normal day-to-day noise, but the rugs help to reduce the noise.

Mr Burr's Evidence:

(14) Mr Burr provided a written statement dated 25th January 2015 that confirmed the details of the statement given by Mrs Heritage in relation to the events on 23rd January 2015. In response to questioning from the Tribunal Mr Burr explained that he thought that the problems in January had resulted from a lack of communication between Mrs Heritage and Miss Barlow. Now that they have started to talk to each other the problems have been resolved. He was aware that Miss Barlow's partner had problems sleeping and therefore there had been much more activity during the night.

Submissions:

(15) Mr Satterley stated that it was useful to have the background information to give context to the particular breaches. He also appreciated that the relationship between Miss Barlow and Mrs Heritage has now been resolved. However, the Tribunal is not required to consider the current circumstances or any noise nuisance arising from Mrs Heritage, it is required to determine the alleged breaches in respect of the incidents in January 2015.

(16) He expressed his sympathy to Miss Barlow's circumstances. He also explained the role that the landlord had in providing accommodation to tenants that had been referred from Cherwell District Council. He has tried to resolve issues in a genuine concern to the well-being of the tenants.

(17) He accepted that the property was a conversion to provide the three flats, but the constructional details of the conversion are not unusual and he suggested that this had no relevance to the issues.

(18) The lease sets out the rules guiding the behaviour of the parties. If there is a nuisance there is a requirement in the lease for the landlord to become involved. It is suggested that the complaints made to Cherwell District Council and the police by Mrs Heritage is an indication that there was a nuisance. The landlord had become involved due to the email from Mrs Heritage.

Respondent's Case

(19) Miss Barlow accepted that the dogs do move around and cause a noise on the laminate floors. However, now there were rugs that helped to muffle the sound. Mr Satterley had wanted to provide sound proofing to her flat, but that it would have required her to move out. This was not an acceptable

solution. The nature of the construction of the flats has meant a lot of noise through creaking floorboards and stairs and that in each of the flats the doors bang close.

(20) In challenging the diary evidence of Mrs Heritage, it was disputed that on 14th January 2015 there was noise from both the washing machine and the tumble drier as the electrical arrangements prevented this.

(21) Miss Barlow explained that her job was a care assistant and this involved long hours with her being absent from the house between 7.00am to 10.00pm, with only six days leave in a month and a roster that permitted two random days off each week. It is because of these working arrangements and that she may have soiled clothing that means that she has to carry out her domestic chores in the evening.

(22) She also explained that in January 2015, she was suffering from some personal problems and that she has been prescribed anti-depressants and is still having trouble sleeping. Her partner has hearing difficulties and as such originally had high levels of volume for the TV and music. However, he now uses headphones to reduce the disturbance. Her partner has helped with caring for the dogs and they have undertaken work to deal with one of the dog's anxiety issues at being left.

(23) Miss Barlow explained there had been a two way conflict between herself and Mrs Heritage, involving some episodes of excessive noise on both sides, but this has now been resolved. She has adapted her behaviour to ensure that any noise is minimised. Mrs Heritage agreed that this was the case.

(24) The Tribunal asked why Mr Satterley was taking action solely against Miss Barlow, given that Mrs Heritage had also been responsible for excessive noise at times. He replied that he was unaware of the issue, but he did not consider that it was relevant to the issue of whether this had implications for whether the behaviour of Ms. Barlow could be considered to be "nuisance".

Tribunal's Findings:

(25) It would be useful to remind the parties that this decision of the Tribunal is just one stage in any action for the forfeiture of the lease. This Tribunal makes findings of facts and considers those facts against the lease provisions. If any findings of breach of lease are found, then a landlord may only pursue forfeiture with a claim in the County Court. Such a claim would naturally be subject to the court considering whether there should be "relief" against forfeiture.

(26) In this case there is a detailed factual account from Mrs Heritage of activities for a few days in January 2015. There are 14 entries in the log that

has been produced. It is interesting to note that ten of those entries relate to activities in the evening and into the morning of the following day on two occasions.

(27) Other than the dispute of the washing machine and the tumble drier on at the same time on 14th January 2015, there is no challenge to the factual evidence of Mrs Heritage relating to those few days in January 2015. In the absence of any real challenge, the Tribunal accepts this account of what occurred.

Findings of Breach

(28) The next stage is for the Tribunal to consider those facts in the context of the lease clauses in order to determine whether there have been any breaches of covenant. In coming to their conclusions the Tribunal considered that the layout and nature of the conversion of the property was a relevant consideration as to whether the activities amounted to a breach of nuisance. The Tribunal finds that the following facts would give rise to a nuisance, i.e. the playing of the TV or music between 11.00 pm and 7.00 am in a way as to be audible in any other part of the House or that the keeping of the dogs in a manner that gives rise to a justifiably complaint in that it interferes with comfortable enjoyment of the premises in the following instances:-

- i. 11th January 2015 - 23:50-12:15 dogs running around, Respondent shouting and doors banging;
- ii. 12th January 2015 - 00:45-02:35 the Respondent and her partner walking and banging about, loud TV and the noise of the tumble dryer;
- iii. 12th January 2015 - 22:10-22:24 dogs running around, barking, shouting, doors banging and dogs running up and down the stairs;
- iv. 12th January 2015 - 22:30 - 22:43 dogs running about;
- v. 12th January 2015 - 23:00-23:45 banging, loud TV, loud talking and laughing, throwing ball for one of the dogs;
- vi. 13th January 2015 - 04:00-04:10 the dogs running about and then taken outside;
- vii. 23rd January - 20:00-23:50 banging of the doors, heavy footsteps and the TV;
- viii. 23rd January 2015 - 00:10-01:00 the noise re-commenced with walking around, dogs padding about and loud music.

(29) The Tribunal considered that the following activities did not constitute a breach and reflected the normal activities one would anticipate in the occupation of the subject flat. On 11th January between 20:14 and 20:31 dogs were let out of a cage and left running around; On the 12th January between

20:00 – 20:16 dogs had a run around the flat, TV on loud; 21:50 – 22:00 TV or music on loud; On 14th January 21:07 – 22:05 dogs barking washing machine on and tumble dryer running waking Mrs Heritage. On 15th January 11:47- 00:00 doors banging and talking can be heard. On 17th January from 18:00 onwards the dogs were howling and in the cage trying to get out and banging the cages. On 19th January between 20:00 and 20:30 there was loud music.

(30) Accordingly the Tribunal makes the following findings in respect of the terms of the lease:

- by reason of the findings made in paragraph 28(i - viii) above, the Respondent has been in breach of Clause 5;
- by reason of the findings in paragraph 28(i - viii) above, the Respondent has been in breach of Schedule 4, Part I (5);
- by reason of the findings in paragraph 28(i - viii) above, the Respondent has been in breach of Schedule 4, Part II (6);
- by reason of the findings in paragraph 28(i - viii) above, the Respondent has been in breach of Schedule 4, Part II (7);
- by reason of the findings in paragraph 28(ii, v, vii and viii) above, the Respondent has been in breach of Schedule 8 paragraph 5;
- by reason of the findings in paragraph 28(i, iii, iv, v, vi, and viii) above the Respondent has been in breach of Schedule 8 paragraph 7;
- by reason of the findings in paragraph 28(1 - vii) above, the Respondent has been in breach of the Deed of Covenant dated 12th August 2013.

(31) Finally, this Tribunal considers that, although not part of this decision, it is very important to record the current relationship that exists between Miss Barlow and Mrs Heritage. It is fair to say and acknowledged by those individuals that there was a mutual conflict and this appeared to reach a climax in January 2015. They have appreciated the problem and worked to resolve those problems. Both individuals expressed that there is a more harmonious situation where both are conscious of the other's needs.

Name: H C Bowers

Date: 9th June 2015