FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/LBC/2017/0032**
Property	:	**Flat 9, 47-49 Cornwall Crescent London W11 1PJ**
Applicant	:	**47/49 Cornwall Crescent Freehold Company Limited**
Representative	:	**Mr Richard Granby of Counsel instructed by PM Legal Services Ltd**
Respondent	:	**Ms Siew Kem Choo**
Representative	:	**Mrs Thanh-Thuy Nguyen (Godmother of Respondent)**
Type of application	:	**Determination of an alleged breach of covenant under S.168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal member(s)	:	**Judge - N Haria**
Date and venue of hearing	:	**28 June 2017 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**4 September 2017**

DECISION

Decisions of the tribunal

1. The Tribunal is satisfied that the Lease is a long lease within the meaning of Section 169(5) of the Commonhold and Leasehold Reform Act 2002 ("the Act"). The Lease contains covenants that are binding and may be enforced by the Applicant.

2. The Tribunal finds that the Respondent has breached to breach the covenants under the Lease as detailed in the decision below. There is insufficient evidence before the Tribunal to make a finding that the breaches are continuing.

The application

1. The Applicant seeks a determination pursuant to subsection 168(4) of the Act that the Respondent is in breach of clauses 2 and 3 and the Seventh Schedule of the Lease. The Applicant alleges that the Respondent's tenant has consistently caused noise nuisance, particularly late at night, has verbally abused and intimidated other residents and has left items such as furniture and litter in the common parts of the building.

2. The alleged breaches are detailed in:

    (i) the application dated 17 March 2017, and

    (ii) the Applicant's statement of case.

Background

3. The Applicant holds the freehold title to the land and buildings known as 47/49 Cornwall Crescent London W11 1PJ ("the Building"). The freehold title is registered at the H M Land Registry under Title Numbers 394598 and 129183. The Respondent holds the leasehold title to a third floor flat known as flat 9, 47/49 Cornwall Crescent London W11 1PJ ("the Property") pursuant to a lease dated 22 September 2006 between Peter Parbhu Dass and Neil William Nugent (1) Siew Kem Choo (2) ("The Lease") for a term of 99 Years commencing 24 June 2006. The leasehold title is registered at the H M Land Registry under Title Number BGL59941.

4. 47/49 Cornwall Crescent is a residential development of 10 flats let under long leases. The occupiers of the flats are either tenants (under assured shorthold tenancies) or owner/occupiers. The building

comprises of a basement and three floors. The Respondent holds a long lease of Flat 9, a third floor flat.

5. The Applicant relies on the following witness statements in support of the alleged breaches:

   (i) the witness statement of Nicola McSorley,

   (ii) the witness statement of Lea Dickley, and

   (iii) the witness statement of Shelia Tormey.

Directions

6. Directions were issued on 23 March 2017 and the case was set down for a determination on 10 May 2017.

7. On 24 April 2017, further Directions were issued in the matter as the Applicant's witnesses were unavailable on the 10 May 2017 and the Respondent stated that she was unable to obtain legal advice until 8 May 2017. The case was set down for hearing on 28 June 2017.

8. The Respondent failed to comply with the Tribunal Directions of 23 March 2017. In particular, she did not send a statement in reply to the application notwithstanding that the time for doing so was extended from 7 April 2017 to 19 May 2017. The Respondent was given every opportunity to comply with the Directions but failed to do so. On 24 May 2017 the Tribunal pursuant to rules 9(3)(a), (7) and (8) of the Tribunal Procedure (First –tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") to bring finality to the litigation between the parties barred the Respondent from taking further part in these proceedings.

The Hearing

9. The Respondent's representative attended the hearing. The Respondent was accompanied by the tenant of the Property Mr Murrad Haad and a friend Ms Deega Delmar.

10. The Applicant was represented by Mr Richard Granby of Counsel. Ms Ursula Woodruff and Ms Sheila Torney attended the hearing as witnesses for the Applicant.

11. At the start of the hearing, I heard from the Mr Granby and Mrs Nguyen on the preliminary issue of the application by the Respondent's representative for the Respondent to be reinstated and be allowed to take further part in the proceedings.

12. The day prior to the hearing the Tribunal had a Respondent's Bundle from Mrs Nguyen. Mr Granby objected to the Respondent's bundle being admitted in evidence as he had not had sufficient opportunity to consider it. Mrs Nguyen requested further time to instruct a solicitor to deal with the matter.

13. Having considered the matter and taking into account the overriding objective under Rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, although it is in the interests of justice to ensure that all parties are able to participate fully in the proceedings, it is not in the interests of justice to adjourn the case and further delay matters simply to allow the Respondent's representative further time to instruct a solicitor. I appreciate that Mrs Nguyen is not a lawyer but she had been given adequate time to take legal advice and instruct a solicitor. It would be unfair to the Applicant to adjourn the hearing at this late stage when the Applicant had complied with the Tribunal Directions and had instructed Counsel and was ready to proceed.

14. At the start of the hearing, Mr Granby produced a witness statement from Ursula Woodruff the leaseholder of Flat 4. This witness statement was not included in the Applicant's bundle.

15. Mr Granby agreed that he would be prepared to proceed on the basis of submissions only without the need for the witnesses to give evidence. Mrs Nguyen wanted to be heard and wished to take part in the proceedings she agreed that the documents in the Respondent's bundle did not address the issues and the matters raised in the application were not relevant to the alleged breaches of covenant. Mrs Nguyen accepted that the matter could proceed on the basis of submissions only. Mrs Nguyen had wanted Mr Haad, the tenant of the Property to give evidence but she agreed to proceed on the basis of submissions only.

16. In the circumstances, it was just and fair to exclude the witness statement of Ursula Woodruff and similarly to exclude evidence from Mr Haad. The Respondent's bundle would also be excluded as it had only been served on the Applicant and the Tribunal the day before the hearing and did not address the matters in issue. I directed that the case proceed on the basis of submissions only.

The Lease

17. Pursuant to Clause 3.3.1 of the Lease the Respondent has covenanted as follows:

"Not to use or permit the use of the Demised Premises or any part thereof for any dangerous offensive noxious noisome illegal or immoral activity or in any manner that may be or become a nuisance

or annoyance to the Landlord or to the tenant or occupier of any part of the Building or any neighbouring property..."

18. Pursuant to Clause 3.4 of the Lease the Respondent covenanted to observe and comply with the regulations set out in the Seventh Schedule of the Lease. The Seventh Schedule provides as follows:

"Nothing shall be done in the Demised Premises to cause inconvenience to the Landlord or to other occupiers of the Building or to prejudice the character and value of the Building as a building of high class residential flats and in particular (but without prejudice to the generality of the foregoing) :

Noise

1.1 No television or radio set or tape player or other device for the reproduction of recorded or transmitted sound shall be used in the Demised Premises so as to be audible outside them.....

1.2 .....

Common Parts

2 In using the Common Parts neither the Tenant nor any member of its household shall

2.1 Make any noise

2.2 Leave any litter other than in a receptacle provided for that purpose

2.3 Leave any post parcels newspapers or other such material other than in any receptacle provided for that purpose

2.4 Leave or cause to be left unattended any furniture packages bicycles toys or other thing"

The Statutory Provisions

19. The relevant provisions are set out under the Commonhold and Leasehold Reform act 2002 (the 2002 Act). These provide as follows:

Section 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-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 a leasehold valuation 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 determination by a court, or

(c)has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement

Section169: Section 168: supplementary

.....

(5) In section 168

"long lease" has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.

Section 76: Long leases

(1) This section and section 77 specify what is a long lease for the purposes of this Chapter.

(2) Subject to section 77, a lease is a long lease if—

(a) it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise"

The Applicant's Case

20. It is the Applicant's case that the Respondent is in breach of the above covenants under the Lease.

21. The Respondent is the leasehold owner of the Property and has let the Property on an assured shorthold to Mr Haad. It is the Respondent's tenant who is failing to comply with the covenants of the Lease. The Applicant alleges that the following are a non exhaustive list of the examples of behaviour on the part of the Respondent's tenant which the Applicant claims amounts to a breach of the Lease:

    (i) Consistent noise emanating from the Property and/or common parts of the Building,

    (ii) Items of rubbish being left outside the building and the Property,

    (iii) The tenant of the Respondent appeared at the Building in an inebriated state,

    (iv) The tenant of the Respondent has appeared to the other residents of the Building in a agitated and aggressive state causing the other residents to feel intimidated and fearful.

22. The Applicant sent a letter before action to the Respondent dated 20 April 2016.

23. The letter of the 20 April 2016 alleged that the Respondent's tenant caused excessive noise nuisance for a number of years. He moves furniture around the Property throughout the day, talks in raised voices and slams doors. The letter also alleges that on 2 January 2016 the Respondent's tenant removed a large amount of furniture from the Property and left these on the pavement outside the Property and the items remained on the pavement for a number of days. The letter also

alleges that in removing the furniture items from the Property the tenant broke the lock to the main door, leaving the door open and rendering the Building vulnerable. The letter also alleges that the tenant in moving the furniture knocked a fire extinguisher from the wall in the common are of the Building.

24. A response was received from Nucleus Legal advice Centre which confirmed they had been instructed to respond to the letter before action and the Respondent's tenant had denied the breaches. In particular he denied that either television or radio was played so as to be a nuisance, he denied causing excessive noise or that voices were raised or doors slammed. In relation to the furniture the tenant stated that it was on the pavement on the 22 April 2016 between 2:30pm and 3:30 pm and not days as alleged. He denied knocking the fire extinguisher from the wall.

25. Following this correspondence, the residents of the Building collated evidence of the ongoing nuisance and this is detailed in their witness statements.

26. The witness statement of Nicola McSorley of Flat 5 makes several allegations about Mr Haad causing a nuisance going back a number of years. The allegations in the witness statement are supported by the following documentary evidence:

(i) An email dated 2 August 2010 from Annie Smith of Homes Property Management Limited to the Respondent informing her about the noise nuisance created by her tenant,

(ii) An email dated 09 August from Ms McSorley to Steve Burgess of the Metropolitan Police and the response dated 10 August 2013 from Steve Burgess, confirming that he had spoken with Mr Haad and he didn't deny he'd been behaving in appropriately but assured the Police officer that he would conduct himself appropriately in the future.

(iii) Email correspondence between Ms McSorley and Steve Burgess of the Metropolitan Police dated 4 and 5 January 2016 regarding the movement of large and small boxes through the Building. Further email from Ms McSorley of the 30 January 2017 alleging that Mr Haad was knocking on her door at 10:15 pm asking that he is forgiven and saying there will be no more disturbances.

(iv) An unsigned undated note from Ms Deega Gare apologising for any noise caused by a celebration event on 10 January and saying that it will not happen again.

(v) A letter dated 11 January 2016 from the Environmental Health Department of the Royal Borough of Kensington and Chelsea to Ms McSorley relating to a complaint received by the Noise and Nuisance Team regarding raised noises and impact noise from the Property confirming that a warning letter had been sent to the occupier of the allegation.

27. The witness statement of Lea Dickley the tenant of Flat 7 also makes various allegations a number of incidents of noise nuisance emanating from the Property and caused by Mr Haad. Ms Dickley's witness statement is accompanied by a log kept by her of the incidents from January 2016. There is also a letter dated 11 January 2016 from the Environmental Health Department of the Royal Borough of Kensington and Chelsea to Ms Dickley regarding a complaint received by the Noise and Nuisance Team regarding raised noises and impact noise from the Property confirming that a warning letter had been sent to the occupier of the allegation.

28. Ms Dickley's witness statement also exhibits a copy of an unsigned undated note from Ms Deega Gare apologising for any noise caused by a celebration event on 10 January and saying that it will not happen again.

29. The witness statement of Sheila Tormey the leaseholder of flat 7 alleges noise nuisance in the form of loud television blaring, Mr Haad shouting on the phone, a large number of guests in the flat running up and down the communal stairwell and claiming the nuisance goes on well into the night frequently until 3am or 4am. Ms Tormey states that she initially tried to resolve matters with Mr Haad by speaking to him but he was frequently intoxicated and he would either say he would stop the noise but then failed to do so or shouted at her in a hostile manner to leave him alone. Since her efforts to resolve the problems directly with Mr Haad failed Ms Tormey contacted the Respondent and entered into correspondence with her and her representative. Ms Tormey also called the Royal Borough of Kensington and Chelsea Noise Nuisance service many times. There is a letter from the Royal Borough of Kensington and Chelsea Noise Nuisance Officer dated 18 November 2012 confirming that the officers visited the Property and substantiated the disturbance and that they had spoken to the residents and requested that the noise level be reduced.

The Respondent's case

30. Mrs Nguyen the Respondent's representative admitted that there may have been some noise nuisance in the first two years after Mr Haad moved into the Property from 2010 until 2012. She sought to explain his behaviour saying that he worked 12- 14 hours a day as a kitchen porter. She said that if matters are explained to him slowly and clearly he would have understood. She stated that Mr Haad complained that he could hear noise of people talking from the other flats. Ms Nguyen claims that the sound insulation in the Building is not good as it is a period brick built building with wooden floors.

31. Mrs Nguyen denied that there had been any noise nuisance over the last 4 years.

32. Ms Nguyen admitted that the photographs exhibited to the witness statement of Ms McSorely show Mr Haad's furniture but claimed that it was collected the same day and not left on the pavement for days as alleged.

33. Ms Nguyen stated that the residents in the Building had misunderstood Mr Haad, due to cultural differences.

34. In relation to the celebrations on the 10 January she stated that these were due to Mr Haad's Cousin Ms Deega getting married. She had lived at the Property with Mr Haad for the previous 7 years.

35. Ms Nguyen confirmed that a valid Notice to Quit has been served on Mr Haad and he will definitely move out.

The tribunal's decision

36. A determination under Section 168(4) of the Act does not require the tribunal to consider any issue relating to forfeiture other than the question of whether or not a breach has occurred. The tribunal does not have jurisdiction to consider whether the landlord has waived the right to forfeit the lease, this is a matter for the court to determine when considering an application for forfeiture. Accordingly, the tribunal limits this decision to the narrow issue of whether or not the Respondent is in breach of the covenants in the Lease.

37. It is not uncommon for leases of residential properties to include covenants similar to the covenant included in this Lease.

38. The most important principle when interpreting a lease is to read the lease as a whole that the wording in the lease its ordinary common sense meaning, so far as possible. Lord Hoffman in **Investors Compensation Scheme v West Bromwich Building Society**[1989] 1 All ER 98 identified five broad principles for interpretation of contracts:

1. What would a reasonable person, having all the relevant background knowledge reasonably available to the parties to the lease, have understood the clause to mean?
2. Does the 'matrix of fact' affect the language's meaning? The 'matrix of fact' essentially involves ascertaining what the parties intended their rights and obligations to be, considering the background of the case.
3. Prior negotiations between the parties should be excluded.
4. Regard must be had to the context in which words are used, not just given their literal meaning.
5. Words should be given their natural and ordinary meaning, however if it can be concluded from the background that something must have gone wrong with the language, i.e. a spelling mistake, then a common sense approach should be taken.

39. Interpreting the Lease, I consider that the covenant in Clause 3.3.1 is widely drawn and contains a number of specific prohibitions against permitting or using the demised premises in a manner that may be nuisance and annoyance to the Landlord or other occupiers of the Building. Clause 3.3.1 provides as follows:

"Not to use or permit the use of the Demised Premises or any part thereof for any dangerous offensive noxious noisome illegal or immoral activity or in any manner that may be or become a nuisance or annoyance to the Landlord or to the tenant or occupier of any part of the Building or any neighbouring property..."

40. Meaning must be given to each of the prohibitions mentioned in the covenant whilst striving to give meaning and effect to all the provisions of the Lease construed as a whole with a presumption against redundant drafting[1].

41. I find that the covenant binds the Respondent and it benefits the Applicant.

42. I appreciate that the Respondent may not be familiar with the nature of a leaseholders obligations under a Lease, but it is not reasonable for the Respondent to ignore the provisions of the Lease and fail to ensure compliance with the requirements of the covenants under the Lease.

43. The evidence put before me in support of the alleged breaches in particular in relation to noise nuisance is consistent in the witness statements from different residents of the building.

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44. The allegation of noise nuisance in November 2012 is corroborated by the letter from Royal Borough of Kensington and Chelsea Noise Nuisance service. The noise nuisance on the 10 January is admitted as Mrs Nguyen explained that it related to the celebration of Ms Gare's wedding and although the note from Ms Gare is undated and unsigned on a balance of probabilities it is likely that it was sent to the residents as an apology for the noise on the 10 January.

45. I consider that the nuisance element of the covenant covers conduct that would fall short of amounting to a nuisance in common law as otherwise it would be otiose. The covenant is so widely drawn that it catches not only conduct which amounts to a nuisance but also conduct that causes annoyance.

46. Lord Millett in the House of Lords case **Southwark LBC v Mills**[2]when considering the law of nuisance agreed that Tuckey LJ [2001] QB 1, was correct in stating that the:

> *".....ordinary use of residential premises without more is not capable of amounting to a nuisance.....this is why adjoining owner-occupiers are not liable to one another if the party wall between their flats is not an adequate sound barrier so that the sound of every day activities in one flat substantially interfere with the use and enjoyment of the other".*

47. Bowden LJ in relation to the meaning of the term "annoyance" stated[3]:

> *"It implies more, as it seems to me, than 'nuisance.' The language of the covenant is, that nothing is to be done, 'which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor or the inhabitants of the neighbouring or adjoining houses.' Now, if 'annoyance' meant the same thing as 'nuisance' it would not have been put in. It means something different from nuisance. If guided strictly by the Common Law, we know what nuisance is. Whether the term is employed in the covenant in the exact sense of the term at Common Law or not, is a matter that may be doubted, but I will assume as matter of argument only, that 'nuisance' in this covenant means only a nuisance at Common Law. 'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house – if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort. You must take sensible people,*

[2][2001] 1 AC
[3]Tod- Heatley v Benham (888) 40 Ch. D. 80

you must not take fanciful people on the one side or skilled people on the other; and that is the key as it seems to me of this case.'

48. The issue is whether the conduct of the Respondent's tenant and his guests is such as to amount to a breach of the Nuisance covenant. On a literal interpretation of the Nuisance covenant the activities of ordinary everyday living would amount to a breach of the Nuisance covenant. This cannot have been in the contemplation of the parties when the Lease was drawn up as it would frustrate the use and occupation of the flat for residential purposes as it could not be occupied without there being a breach of the covenant. The ordinary use of a premises which has been lawfully constructed or converted for the purpose for which it was constructed or converted cannot without more amount to a breach of the Nuisance covenant.

49. I find that the Nuisance covenant although widely drawn is not breached by reasonable ordinary every day residential use of the flats. Reasonable ordinary every day residential use would include amongst other things, coming and going to and from the flat and the building, moving around within the flat, moving furniture and goods, opening and closing doors, using the facilities such as bathrooms, toilets, kitchen and appliances within them, cleaning including vacuuming as well as entertaining guests.

50. Having considered the evidence in detail including the log entries made by Ms Dickley I find that the majority of noises complained of are noises of everyday living. The noises complained of relate to matters such as taking off shoes, heavy footsteps walking around the flat, talking on the telephone, vacuuming at 8:30pm and moving furniture without lifting. This is not dissimilar to the sort of noises complained of by Mrs Tanner and Miss Baxter in the **Southwark LBC v Mills** where it is said that:

> *"They both complain of being able to hear all the sounds made by their neighbours. It is not that the neighbours are unreasonably noisy. For the most part, they are behaving quite normally. But the flats have no sound insulation. The tenants can hear not only the neighbours' television and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making".*

51. I am guided by the comments of Lord Slynn of Hadley in **Southwark LBC v Mills** on the issue as to whether the noise caused by the normal residential use of a flat can amount to a nuisance:

"But I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a

nuisance to the other. As Lord Goff of Chieveley said in Cambridge Water Co. v. Eastern Countries Leather Plc [1994] 2 A.C. 264 , 299:

> *"Liability [for nuisance] has been kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which 'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action': see Bamford v. Turnley (1862) 3 B. & S. 62 , 83, per Bramwell B."*

Of course I accept that a user which might be perfectly reasonable if there was no one else around may be unreasonable as regards a neighbour."

52. There is no evidence before me as to the quality of any sound insulation in the Building. I appreciate that Mrs Nguyen raised the issue at the hearing and so the Applicants did not have an opportunity to address the matter but it seems to me to be something that the Applicant or the managing agent of the Building should have considered prior to the issue of proceedings given that the building is a period building and the residents are complaining of noise.

53. However on the evidence, I find that there have been specific incidents in particular the incident in November 2012 and the incident on the 10 January amongst other incidents over the years whereby the Respondent's tenant has caused noise beyond that which could be considered normal for a residential flat. These incidents have resulted in the occupiers of the other flats reporting the matter to Royal Borough of Kensington and Chelsea Noise Nuisance service. In addition the Respondent's tenant's behaviour over the years has been such that it has caused annoyance to the residents. The fact that Ms McSorley was so concerned as to Mr Haad's behaviour that she considered it necessary to contact the Police and they took it seriously enough to speak to Mr Haad about his behaviour is indicative of the fact that the behaviour complained of was beyond that which would be considered normal in a residential block of flats. I find that these incidents amount to a breach of covenants under Clause 3.3.1 of the Lease.

54. There is insufficient evidence before me to make a determination that the alleged breach is still subsisting. On the basis of the evidence before me, I cannot be satisfied that the breaches that occurred from time to time are still subsisting.

Name: N Haria **Date:** 04/09/2017

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.