FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BB/LBC/2020/0058**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Apartment 177, Westgate Apartments, 14 Western Gateway, London, E16 1BN**
Applicant	**:**	**MG GR Limited**
Representative	**:**	**Mr Piers Harrison (counsel); Scott Cohen Solicitors Ltd (solicitors)**
Respondent	**:**	**Mrs Hansa Vrajlal Pau**
Representative	**:**	**Mr Graeme Kirk (counsel); Gandecha & Pau (solicitors)**
Type of application	**:**	**Determination of an alleged breach of covenant**
Tribunal members	**:**	**Judge Nicola Rushton QC** **Ms Marina Krisko FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**10 February 2021**
Date of decision	**:**	**18 February 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same. The documents that we were referred to were in an Applicant's bundle of 121 pages and a Respondent's bundle of 59 pages, together with further documents as described in the decision. The tribunal has noted the content of all of these documents. The decision made is described at the start of these reasons.

Decisions of the tribunal

(1) The tribunal determines pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") that there was no breach by the Respondent of her obligation under the lease which, so far as relevant, was to ensure that her subtenant Mr Oladipupo ensured that his guests or invitees while in the building conformed to the stipulations under the lease not to keep a dog and not to do, permit and/or suffer to be done anything which might cause inconvenience or become a nuisance.

(2) The tribunal makes the further determinations as set out under the various headings in this Decision.

The application

1. The Applicant seeks a determination pursuant to section 168 of the 2002 Act that the Respondent has breached the terms of her lease of Apartment 177, Westgate Apartments, 14 Western Gateway, London E16 1BN ("**Apartment 177**") during the period 15 October to 21 November 2020 because her subtenant or his guests or invitees kept a dog in the apartment and/or caused, permitted or suffered nuisance or inconvenience to other occupiers of the block through the discharge of foul liquid apparently containing dog urine from the balcony of the apartment onto the balconies of the apartments below.

2. The application is dated 27 November 2020.

3. Directions were issued by Judge Robert Latham on 4 December 2020 and have essentially been complied with.

The hearing

4. The hearing took place remotely by video on 10 February 2021. The Applicant was represented by counsel Mr Piers Harrison and the Respondent was represented by counsel Mr Graeme Kirk.

5. In addition to the two bundles, the tribunal received a skeleton argument from the Applicant's counsel. The Respondent's bundle included written submissions on behalf of the Respondent. During the hearing the tribunal and the Respondent were also sent by email by the Applicant copies of a one-page document headed "Resident Details" and 4 short videos, which the tribunal viewed during a short break in the hearing.

6. The tribunal heard live evidence from the Applicant's witnesses Mr Alexander Martinez and Mr Yaron Hazan, and from the Respondent's witnesses Mrs Reema Pau and Mrs Susan Bennett, all of whom were cross examined and answered questions from the tribunal. The tribunal's assessment is that all of the live witnesses were honest and doing their best to assist the tribunal in giving their oral evidence.

7. The Applicant also relied on a signed witness statement from Mr Ruchin Gupta (an occupant of Apartment 159), who was travelling and so unable to attend the hearing. In addition the tribunal was provided with a signed witness statement from the Respondent, Mrs Hansa Pau, who was present but whose evidence was accepted by the Applicant without cross examination. The tribunal has taken into consideration both of those statements. So far as Mr Gupta's is concerned, the tribunal takes into account the fact that its author could not be cross examined.

8. Extracts of relevant legislation are set out in an appendix to this decision.

The property and the personnel

9. Apartment 177 is a three-bedroom apartment with a balcony on the tenth floor of a 13-storey block of flats known as Westgate Apartments ("**the Building**"). There are around 224 flats in the Building, with about 18 flats per floor. There is a car-park in the basement and a lift. The tribunal was provided with a floor plan of the tenth floor.

10. The Applicant is the registered proprietor of the Building. It has engaged Y&Y Management ("**Y&Y**") to manage the Building. Y&Y employ Mr Martinez as a full time site supervisor at the Building (Monday to Friday), where he sits at Reception. Mr Hazan is employed by Y&Y as property manager for the Building but he does not work there.

11. The Respondent is the owner of a long lease of Apartment 177, granted on 25 March 2008 for a term of 200 years from 9 April 1999 ("**the Lease**"). She is registered as sole proprietor at HM Land Registry under title number EGL539567. The Respondent has never resided at the apartment, which is sub-let. She is a 72-year old woman who lives in Stanmore with her daughter-in-law Reema Pau ("**Mrs Pau**"), to whom she has entrusted all matters relating to the apartment since it was purchased in March 2008.

12. Mrs Bennett is a letting agent who has been engaged by Mrs Pau over many years to find tenants for Apartment 177. On 28 September 2020 she arranged for Mr Olalekan Oladipupo to sign an Assured Shorthold Tenancy of Apartment 177, commencing 1 October 2020 ("**the AST**"). A copy of the AST was in the Respondent's bundle.

13. Apartment 159, where Mr Gupta resides, is immediately below Apartment 177. Apartment 123 is 2 floors below apartment 159.

14. Neither party requested an inspection and the tribunal did not consider that one was necessary for the resolution of the issues, nor would it have been appropriate given the current Covid-19 pandemic restrictions.

The Lease

15. Clause 4 of the Lease provides:

> "*4. THE TENANT FURTHER COVENANTS with the Landlord and with the lessees from time to time of all other parts of the Building to perform and observe the stipulations set out in the Fifth Schedule hereto to the intent that such stipulations shall be mutually enforceable between the Tenant and the said lessees of other parts of the Building.*"

16. Clause 8 of the Lease provides, so far as relevant:

> "*8. It is hereby agreed that notwithstanding anything herein contained or implied to the contrary:-*
>
> *… (c) Any covenant by the Tenant whether positive or negative shall be deemed to extend to an obligation to ensure that subtenants and any third parties who can be directed by the Tenant or by any of the foregoing comply therewith…*"

17. Paragraph 1(a) of the Fifth Schedule to the Lease provides, so far as relevant:

"*1(a) Not to do or permit or suffer to be done in the Apartment and/or in the Building anything which may cause damage or inconvenience or be or become a nuisance or annoyance to the Landlord or to the lessee or occupier of any other flat or part of the Building…"*

18. Paragraph 15 of the Fifth Schedule to the Lease provides:

"*15. Not to keep any bird dog reptile or other pet or animal whatsoever… in the Demised Premises without the previous consent in writing of the Landlord (and the Landlord shall have an absolute discretion as to whether to issue such consent)…"*

19. Paragraph 8 of the Fifth Schedule to the Lease provides:

"*8. To ensure that all guests and other invitees or licensees of the Tenant while in the Building conform to the stipulations and regulations contained or referred to in this Schedule."*

20. The AST signed by Mr Oladipupo included the following clauses:

"*2… The tenant agrees to the following: …*

2.49 Not to do anything at the premises… which is a nuisance or annoyance or causes damage to the premises or adjacent or adjoining premises or neighbours or might reasonably be considered to be anti-social behaviour."

"7. ADDITIONAL CLAUSES…

Pets exclusion

The tenant agrees neither to keep any animals, birds or reptiles or rodents in or on the premise nor to allow his invited guests or visitors to do so. In breach of this clause to be responsible for the reasonable costs or rectification of any damage caused or for any appropriate de-infestation, cleaning, fumigation etc. required."

The issues

21. This is an application under section 168(4) of the 2002 Act for a determination by the tribunal that a breach of a covenant in the Lease has occurred.

22. Such a determination (or an admission or finding by a court of breach) is a necessary pre-requisite to the Applicant serving a notice of breach under section 146(1) of the Law of Property Act 1925, which in turn would be needed before forfeiture proceedings could be issued in the county court based on any such a breach. On the present application, the tribunal is only concerned with whether a breach of the Lease has occurred as alleged; it is not concerned with the seriousness of any breach or whether it has been remedied and certainly not with whether the Lease should be forfeited as a consequence.

23. In summary, the allegation is that between 15 October and 21 November 2020 Mr Oladipupo or one or other of two guests who he had permitted to reside in Apartment 177, kept a dog (or possibly two dogs) in the apartment. It is further alleged that on several occasions from at least 24 October to 21 November 2020 foul water which smelt strongly of urine was discharged from the balcony of Apartment 177 onto the balconies below and in particular the balconies of Apartments 159 and 123. There is also an allegation that barking was heard on one occasion at 10pm.

24. It is alleged that these events constituted a breach by the Respondent of her obligation to ensure that her subtenant, Mr Oladipupo complied, and to ensure that he ensured that his guests complied, with the obligations she had under the Lease not to keep a dog and not to cause a nuisance.

25. Accordingly, the issues for the tribunal to determine are:

    (a) On a balance of probabilities, the facts as to the events which occurred;

    (b) The proper interpretation of the relevant covenants of the Lease, and so whether the facts proved constitute a breach or breaches of the Respondent's covenants.

26. There is no dispute that the Lease included all the covenants relied on by the Applicant.

27. There is also no dispute that no consent was ever given by the Applicant (or the Respondent) to a dog being kept in Apartment 177 by any person.

28. The burden of proof is on the Applicant to establish the facts and that these constituted a breach of the Respondent's covenant(s).

Facts concerning the dog

29. Mr Martinez signed his witness statement on 18 December 2020. By the time of the hearing, things had happened which had caused him to re-evaluate who he said had kept a dog in Apartment 177. He dealt with this at the start of his evidence. He said that on 23 December 2020 he had met for the first time a man who had introduced himself as Mr Oladipupo. This man has been living in Apartment 177 since 23 December, but it is unclear to what extent he was living there before that.

30. Prior to this, from early October until early December 2020, Mr Martinez said that two different men were living in Apartment 177. Those two men appear to have moved out sometime between 7 and 9 December 2020, when a sofa was abandoned in the corridor near the apartment. It is one of these two men who Mr Martinez says was keeping a dog in the apartment. They and the dog have not been seen since. Mr Martinez said that on 23 December 2020 he had been surprised to hear sounds over the intercom from Apartment 177, as he thought it was empty, had gone up to investigate and met Mr Oladipupo there, for the first time.

31. There is therefore no evidence that Mr Oladipupo himself was keeping a dog in Apartment 177 at any time (or causing any nuisance).

32. Mrs Bennett also said in her oral evidence that she had had a video call with Mr Oladipupo, who was in the apartment, the previous day (i.e. 9 February 2020). She said she had been told a cleaning team had arrived and cleaned the whole flat on 11 December 2020, which is consistent with previous occupants having moved out at that time.

33. Mr Martinez's evidence was that the first time he saw either of these other two men was on 15 October 2020, when he met one of them in the carpark at the Building. The man had a dog with him. Mr Martinez said he had been told by a colleague that new tenants had moved in, so he asked the man if he was the new tenant of Apartment 177. The man said yes, so Mr Martinez asked him to fill in the register. He also informed the man that dogs were not allowed and the animal should be removed. He said he took a photograph of the dog, as proof, having obtained the man's consent. A copy of that blurred photograph, showing a large dog, was in the bundle. He said the man then became verbally abusive and proceeded to take the dog into the Building.

34. Mr Martinez said that he knew persons other than Mr Oladipupo would be staying in the Apartment 177. He had received a written request signed by Mr Oladipupo asking that the keys be released to someone else. In his oral evidence (but not his statement), Mr Martinez said the names of these two men who were living in Apartment 177 were Richie Chandri and Tawid Islam. During the hearing, the Applicant's solicitors produced a photograph of a Y&Y form headed "Resident Details" which recorded the names of 3 people as residents of Apartment 177, under a

tenancy starting 1 October 2020: Mr Oladipupo, Richie Chandri and Tawid Islam.

35. Mr Kirk pressed Mr Martinez in cross examination as to how sure he could be that the man he had seen with the dog was one of these two men, given there might be 500 people living in the Building. Mr Martinez maintained that these were the same men, that subsequently he kept seeing them going in and out and so recognised them, although he wasn't sure which was which and the names had only been provided later.

36. In her statement Mrs Bennett confirmed that on 8 October 2020 she had asked Mr Oladipupo for the full names of anyone else who would be staying in the flat, and he had given her the names Richie Chandri and Tawid Islam, as friends who would be staying with him temporarily. It appears probable therefore that the information on the Y&Y form came from Mrs Bennett, although it is unclear whether it was completed by her or using information provided by her.

37. Accordingly, the balance of the evidence from both sides is that two men called Richie Chandri and Tawid Islam resided at Apartment 177 from early October until early December 2020, with the agreement of the subtenant, Mr Oladipupo. The tribunal does not therefore accept the submission of Mr Kirk that there is inadequate evidence of a link between two men with these names and Apartment 177.

38. The tribunal also accepts that the man who Mr Martinez met and photographed with a dog on 15 October 2020 was probably either Mr Chandri or Mr Islam (and it does not matter which it was). It accepts Mr Martinez's evidence that the man he met on that occasion was one of the two men he subsequently came to know as Mr Chandri and Mr Islam.

39. Mr Martinez also stated in his statement that on 21 October 2020 he was told by a gas engineer, who had attended Apartment 177, that there was a dog in that apartment. Although this would not be sufficiently strong evidence on its own, when combined with other evidence it supports the link between the dog and Apartment 177. Mr Martinez himself did not ever see the dog in the apartment, but he says this was because whenever he knocked on the door, nobody answered.

40. The written statement of Mr Gupta states that on 21 November 2020 his wife witnessed a man with two dogs trying to sneak them into a car in the basement. He says this was immediately reported to Mr Martinez who checked the CCTV recordings. One of the videos produced to the tribunal was CCTV of a man exiting a lift with two dogs, date stamped 21 November 2020 and timed at 20:45. Mr Martinez identified the camera number as being in the basement. He said he recognised the man as being the same one who he had photographed with the dog.

While Mr Kirk made the valid point that the person is only seen from behind in the video clip, this is a man with whom the tribunal accepts Mr Martinez was reasonably familiar by the end of November 2020.

41. Finally there is the evidence of copious amounts of yellow-coloured water, which smelt strongly of urine, coming from the balcony of Apartment 177 on a number of occasions between about 24 October and 20 November 2020. Aside from the unpleasant impact on the other residents, this evidence of waste tends to support the other evidence of the presence of a dog in that apartment.

42. Contemporaneous emails complaining of waste water from the balcony which smelt strongly of urine are dated 24 October 2020 (from Apartment 123 - the flat number is ineffectively redacted in the email); 9 November 2020 (from Apartment 159 – also ineffectively redacted and confirmed by Mr Gupta); plus an email extract quoted by Mr Martinez and sent on 24 November 2020 (Apartment 159 again). The email from the residents of Apartment 123 refers to multiple incidents of "urine-smelling foamy water" coming probably from the balcony two floors above. On the balance of the evidence this probably originated with Apartment 177.

43. Mr Gupta, who with his wife is the sub-tenant of Apartment 159, says in his statement that foul water which smelt strongly of urine had spilled onto their balcony from the one above, over two weeks up to 13 November, and then again on 20 November 2020. Mr Gupta took a photograph of an overflow pipe on his balcony producing yellow liquid which is in the bundle, and was sent to Mr Martinez on 20 November 2020.

44. In cross examination Mr Martinez was pressed as to how confident he could be that the liquid emanated from Apartment 177. Mr Martinez said in response to one of the later complaints, he had checked the balconies of the two corresponding flats immediately above Apartment 177, having requested access, and found no wetness there.

45. Mr Martinez also referred to one complaint of barking, on 20 November 2020. This on its own would not be sufficient evidence of a dog in any particular apartment, but tends to support the other evidence.

46. The tribunal's conclusion, based on all of these pieces of evidence taken together, is that on the balance of probabilities either Mr Chandri or Mr Islam was keeping a dog in Apartment 177 over at least the period from 15 October to 21 November 2020. Furthermore, there is no real evidence which has been put before the tribunal which is inconsistent with that conclusion. Although Mr Gupta could not be cross examined on his statement, its contents are consistent with the other evidence available, including contemporaneous emails, videos and photographs.

47. In addition the tribunal is satisfied on the evidence of the emails and the statement of Mr Gupta that complaints about the foul-smelling water had been made directly to the occupants of Apartment 177 by other residents (including both the owner of Apartment 159 and the occupiers of Apartment 123) by at least 13 November 2020, but that such incidents still continued until about 20 November 2020.

Actions of the Respondent and Mrs Pau

48. On 15 October 2020 at 09.34, i.e. the same day Mr Martinez first encountered the man with the dog in the carpark, Mr Hazan emailed Mrs Pau stating that he understood her tenants had a dog living in the apartment, which was a breach of her lease. He said she, the leaseholder, must remove the dog in accordance with the lease and unless it was removed within 48 hours, Y&Y would add initial costs "*for breach of lease*" and refer the matter to their solicitors. He continued: "*We will have no option but to issue proceedings to forfeit lease and costs will be high and charged to you the landlord.*" He asked for an update within 48 hours. (As explained above, the Applicant could not in fact then have properly issued immediate proceedings for forfeiture.)

49. Mrs Pau immediately forwarded this email to Mr Oladipupo. Her copy email, timed 09:48 on the same day, read: "*Please see below and act upon this immediately I will not be paying any fines and will have reason to terminate the tenancy…*" In her statement she said she also sent him a text message to alert him that if there was a dog, it must be removed straight away. The email was copied to Mrs Bennett and her assistant. Mrs Pau said Mr Oladipupo ignored all correspondence from her and she did not hear from him for more than a week.

50. Mrs Pau did not communicate with Y&Y while she was waiting to hear from Mr Oladipupo. Under cross examination her explanation was that because she had not heard anything from him she did not know what to respond and was still investigating whether there was a dog present.

51. Mrs Bennett said in her evidence that she also tried to contact Mr Oladipupo. When she could not get a response, on 16 October 2020 she emailed his employer to ask that he contact her urgently about his tenancy. She said he then responded by email that he was on holiday but wanted to resolve any issues. She said Mrs Pau sent an email (not in the bundle), copied to her, saying in block capitals that pets were not allowed in the apartment under any circumstances. In her oral evidence she said she spoke to Mr Oladipupo who told her he did not have a dog, that he had friends staying and they had had a dog visiting. She said she told him that under no circumstances were pets allowed in the Building, pointing out the clause excluding pets in his AST. He had responded that there was no dog visiting any more.

52. On 26 October 2020 the Applicant's solicitors, Scott Cohen, wrote to the Respondent stating that it had been brought to their client's attention that a dog was being kept in Apartment 177. The letter said that in addition, complaints had been received about dirty water which smelt of urine pouring down from the balcony of the apartment onto other balconies on more that one occasion, potentially as a result of clearing waste from an animal. The letter stated that they considered the Respondent was in breach of specified terms of the Lease and asked whether the breach was admitted. It said that in the absence of an admission, the Applicant intended to issue proceedings for determination of a breach. This letter must have been written as a consequence of the email of 24 October 2020 from the tenants of Apartment 123.

53. Mrs Pau said she had received the letter on the same day, but said she did not admit the breach as she had had no communication from the tenant and could not confirm the allegations. Mrs Bennett said that they had acted immediately but that it is very difficult when you have a tenant who has presented well but you then start getting complaints. She said she had to try and find out the truth because they did not know.

54. On 29 October 2020 Mrs Pau and Mrs Bennett received an email from Mr Oladipupo stating, "*The dog is no longer in the apartment and the building management might issue a breached of lease agreement to You Reema base that the dog was in the apartment and that is in the past now [sic]…*".

55. On being pressed by Mr Harrison in cross examination, Mrs Pau accepted that by using the words "no longer", Mr Oladipupo had said a dog had been in the apartment. However, she said he was also saying no dog remained in the apartment. She said that he had said it was his friend's dog and the impression given to her was that there had possibly been a dog there for a week.

56. The tribunal considers that although poorly expressed, this email from Mr Oladipupo was clearly an acknowledgement that a dog had been in the apartment, but also an assertion that it was no longer there. Given the findings made above that it was Mr Chandri or Mr Islam who had kept the dog, not Mr Oladipupo, it is unsurprising that Mr Oladipupo was then pressing on Mrs Pau that there was no longer a dog present.

57. In her statement Mrs Pau said she emailed the Applicant's solicitors on 30 October 2020 explaining that they had reminded the tenant that no pets were allowed at the property, and that he would be in breach of his AST if there were. She said in that email that she was trying her best to deal with the tenant, and she asked for any evidence by pictures or video which she could send to him, as he was adamant there was no dog at the property. She said she would also be seeking legal advice.

58. Mrs Pau said she also tried to contact Mr Hazan and the Applicant's solicitors by telephone to try to resolve the problem, because she had no idea what the proper process was, but that they would not take her calls.

59. On 6 November 2020 Mrs Pau received an email from Lorraine Scott of the Applicant's solicitors which said there had been further confirmed sightings of the dog and further complaints about urine being discharged from the balcony and unbearable smells. The email said the Applicant required her to admit to a breach of the Lease, and pointed out the obligation to ensure subtenants complied. It also asked for details of the steps she was taking to resolve the breach and said they could not advise her as she was not their client.

60. Mrs Pau said in evidence that she could not admit a breach as she had been told by her tenant that there was no longer a dog at the property. She said Mrs Bennett again emailed Mr Oladipupo on 9 November 2020 (there is no copy of this email).

61. On 10 November 2020 Mrs Pau replied to Ms Scott saying she had repeatedly emailed the tenant and he had "*confirmed to me that the dog is no longer at the property*." She said she and Mrs Bennett had repeatedly called him but to no avail, and she asked for any video footage of the offences which she could forward to Mr Oladipupo.

62. Mrs Scott replied by email to Mrs Pau at 11.13 on the same day, saying said that the dog had been sighted after the tenant had confirmed it had been removed. Also she said there was an ongoing problem with the deposit of urine. She said while they had asked the occupants to capture the problem on video, they considered the complaints were sufficient to proceed with action. She asked for evidence of steps taken by Mrs Pau to address the problem, the timeframe for the advice she was taking, and emphasised that the occupants of the Building required prompt attention to the problem given they were now in lockdown.

63. A national Covid-19 lockdown in England had started on 5 November 2020 for one month. Mrs Pau said it was therefore difficult for her or Mrs Bennett to safely visit the property. She said they tried "desperately" to contact Mr Oladipupo but there was no response.

64. On 11 November 2020 Mrs Bennett's assistant Cozy emailed Mr Oladipupo notifying him that Mrs Pau requested an inspection between Friday 13 and Monday 16 November 2020. The email said "*We understand you have repeatedly told us that there is no longer a dog in the flat. However, we have been informed that balconies further underneath yours have recently reported that soapy liquid smelling of urine may have come from your balcony."* In her evidence Mrs Bennett said that they needed to find out if there was still a dog or not, and to investigate the accounts of water which smelt of urine coming

from the balcony. She and Mrs Pau said there had previously been problems with drainage from balconies which might have caused a discharge of foul smelling water. Mrs Bennett said she did not wish to go herself and inspect because of Covid-19 restrictions but Mrs Pau had been willing to carry out an inspection.

65. On 13 November 2020 Lorraine Scott again emailed Mrs Pau, stating they had received more complaints about the ongoing deposit of urine and attaching video evidence. The tribunal has seen what it believes is these video clips, which show a lot of liquid running down the outside of the glass walls of the balcony and from an overflow pipe at ground level on the balcony. The liquid is not obviously yellow. Ms Scott said her client required clear and definitive evidence that steps were being taken to resolve the issue at the earliest opportunity. She also said they required breaches of the lease to be formally admitted, failing which they would apply for a determination of breach. She enclosed a draft statement of admission for Mrs Pau to complete and said that if an admission was not received by 16 November 2020, they were instructed to issue an application for determination of breach of lease, as they intended to serve a notice under s.146 of the Law of Property Act 1925.

66. Mrs Pau replied by email on the same day, saying she had forwarded the videos to the tenant, asking that he immediately stop this. She said she planned to visit the property "next week" to assess what was going on. She said, "*I cannot admit to any of the breaches as I have not visited the property myself and the tenant has been out of communication with me.*" She asked for time until 24 November to assess what was going on and asked if there was any video footage of the dog in the Building. She agreed that from the videos it appeared there was water coming from the flat above, but said she could not comment on the smell until she visited the property herself.

67. Mrs Pau said in her statement that she visited Apartment 177, by prior appointment, on 16 November 2020. She said the balcony looked very dirty and was full of stagnant water which was not draining properly. She said a man appeared, who was living there, who said there was no dog at the property. There was no dog present. She said in her statement that in the evening she received another email from Mr Oladipupo telling her there was no dog in the property. She said she emailed him back the next day reminding him of his obligations under the AST.

68. When cross examined she said the man she met had said he was one of the tenant's friends and had not given a name. She agreed the flat was very smelly and that the smell got stronger towards the balcony, but she could not say if it was urine. Mr Harrison took her to an email she had sent to Ms Scott the following day, in which she had said there was stench of urine or blocked drains at the property which they were addressing with drain specialists. She then agreed it was a strong smell,

possibly urine. She said that after visiting the apartment she had spoken to Mr Martinez about the bad smell which might be a drain problem. In her statement she said Mr Martinez also told her that the occupiers might leave their dog in the car and bring it up after he had left for the day.

69. In that email to Ms Scott of 17 November 2020 Mrs Pau said an inspection had been carried out at the apartment on the 16th and there had been no dog there and no evidence of any pet. She said she had warned the tenant about the regulations of the Building and in his contract. She said that the tenant had confirmed he had not poured any liquid from the balcony. She suggested that the stench might have been caused by a blocked drain on the balcony and sitting water.

70. Mrs Pau was pressed hard in cross examination to acknowledge that it was much more likely that dog urine was the cause of the strong smell, rather than drains. She accepted that it was the most likely explanation, but emphasised that she herself did not know.

71. On 23 November 2020 Ms Scott emailed Mrs Pau attaching a copy of the CCTV footage showing the man with two dogs leaving the lift, and also referred to video footage of more liquid flowing onto the balcony of the flat below which was yellow and smelled of urine. The email again required Mrs Pau formally to admit breaches of the Lease, failing which an application would be issued for a determination of breach. A draft admission was enclosed. Ms Scott said if an admission was not received by the end of 24 November 2020, an application would be issued. As noted above, the application was issued on 27 November 2020.

72. On 26 November 2020 solicitors Gandecha & Pau wrote to Mr Oladipupo, on Mrs Pau's instructions. The letter said that by an express term in his tenancy it was clear he was not allowed pets, but that he was in breach of his obligations. They said that when their client had recently called him, he had said there was no dog at the premises but that CCTV from the managing agent had clearly showed he had a dog in the flat [this does not accurately describe that CCTV footage]. The letter said that if he failed to remove it, their client would have no alternative but to take action against him and asked for confirmation that the dog did not remain on the premises. The tribunal has seen no response to that letter.

73. On 14 December 2020 Gandecha & Pau sent a letter to Mr Oladipupo said to enclose a Notice seeking possession of Apartment 177 pursuant to section 8 of the Housing Act 1988, and referring to earlier letters of 26 November and 8 December 2020. No copy of that Notice has been disclosed by the Respondent. It may be that it related at least in part to rent arrears, since Mr Oladipupo was significantly in arrears by this time.

74. In any event, as already noted, Mr Chandri and Mr Islam had left the apartment by 11 December 2020, when it was cleaned by external cleaners. There is no evidence of the presence of the dog or any continuing problem of discharge of waste water after 21 November 2020.

Whether a breach of the terms of the Lease

75. It is necessary for the tribunal to determine whether these factual findings constituted a breach by the Respondent of her covenants in the Lease, as quoted above.

76. The tribunal has determined that a dog was kept in Apartment 177 by Mr Oladipupo's guests/invitees Mr Chandri and/or Mr Islam. It is also satisfied that in discharging foul water from the balcony on several occasions, those guests/invitees caused inconvenience to other residents of the Building and did things which (subject to the issue of legal responsibility of the Respondent) would amount to a nuisance.

77. Splicing together the various relevant parts of the Lease, the issue is therefore whether the Respondent failed:

> … to ensure that her subtenant ensured that all of his guests and other invitees while in the Building conformed to the stipulations in the Fifth Schedule to the Lease including stipulations (a) not to keep any dog in the apartment and (b) not to do or permit or suffer to be done in the apartment anything which might cause inconvenience or be a nuisance.

78. The key area of dispute between the parties was therefore the meaning and effect of the word "ensure". No previous authority as to the meaning of that word was put before the tribunal by either counsel, both of whom submitted that this was an ordinary English word which should be interpreted as such.

79. When interpreting any provision in a lease, the tribunal must focus on the meaning of the words in their context and in the light of the natural meaning of the clause; any other relevant provisions; the overall purpose of the clause and the lease; the facts and circumstances known by the parties at the time; and commercial common sense (although the latter is not to undercut the importance of the actual words used) – *Arnold v. Britton* [2015] UKSC 36; [2015] AC 1619.

80. Mr Harrison's submission on behalf of the Applicant was that the word "ensure" meant to make certain that something happened, and that this obligation was absolute in nature. Once it was established that the requirements of the covenants had been breached by the subtenant or his guests or invitees, he submitted that she had inevitably failed to ensure that this did not happen. It was not a covenant to use reasonable

efforts to ensure and it was irrelevant to the question of breach whether it had been remedied. He said the clause was all about allocation of risk: once the Respondent had chosen to let the property to a subtenant so she was no longer in possession, she accepted a risk that if the subtenant breached the terms of the covenant, she would also be in breach. It did not matter whether she knew of the breach, still less what she had done to prevent or remedy it. In response to a question from the tribunal, he confirmed that his case was that the Respondent had been in breach of covenant from 15 October 2020 when Mr Chandri/Mr Islam began keeping the dog in the apartment. In this sense his position was that her liability was strict.

81. Mr Kirk submitted on behalf of the Respondent that the word "ensure" required something active on the part of the Respondent and imported a test of reasonableness. He said that on Mr Harrison's interpretation, it was not possible for the Respondent to comply with the covenant, because she could not absolutely ensure compliance by others. He said that the only way the covenant could be complied with on that interpretation would be by not subletting at all, which could not be correct. He submitted that the Respondent had taken all reasonable steps to ensure the covenants were complied with. He said she had done this by including an obligation in the AST not to keep a dog (which was more stringent than in the Lease, since there was no provision for consent by the landlord); she and Mrs Bennett had immediately sought to resolve the problem by contacting the tenant; had arranged an inspection on 16 November 2020 despite lockdown and had instructed solicitors who had served a possession notice on Mr Oladipupo. He submitted that the problem had been resolved within 5 weeks, during a pandemic, and that she had therefore ensured compliance by Mr Oladipupo.

82. In reply Mr Harrison submitted, in the alternative, that if the covenant was one to use reasonable efforts, then the Respondent had not complied with it because she had not acted quickly enough. He submitted that having been first notified of a breach on 15 October 2020, she did not arrange for a solicitor's letter to be sent to Mr Oladipupo until 26 November 2020, by which time she had received a string of solicitors' letters from Scott Cohen. He submitted that the urgency of the situation should have been appreciated by her much sooner and said that whereas Mr Hazan had initially asked for a response within 48 hours, Mrs Pau had left matters for 14 days.

83. The tribunal considers that the word "ensure" in these clauses does incorporate an element of taking active measures to make sure something does not happen, and so it does not consider that a person has automatically failed to ensure in the event that that thing does happen. It also considers that this clause must be read in the context of the Lease as a whole, which is a 200 year lease under which sub-letting is obviously contemplated. As such, the tribunal does not consider that these clauses should be interpreted in a way which means it is

essentially impossible for the Respondent to control whether she complies with them, or so that she will inevitably be in breach regardless of the steps she takes because the issue of breach depends solely on the actions of guests/invitees of the subtenant.

84. The tribunal has concluded that the requirement to "ensure" in these clauses, read together, means that the Respondent must both (a) have taken active steps to prevent actions in breach of those stipulations by her subtenant (and his guests and invitees), and also (b) where actions in breach of such stipulations are taken by guests or invitees of her subtenant, must take prompt action to require him to require those guests/invitees to cease those actions, and if necessary remedy the effects of those actions, once she is alerted to them. It considers that this is the meaning of the word "ensure" in that context and it is not necessary to read any additional words into the Lease.

85. As to whether the Respondent has breached her obligations (so far as they relate to both the keeping of a dog and the causing of a nuisance/ inconvenience), the tribunal has concluded, after carefully reviewing all of the evidence detailed above as to the actions of Mrs Pau, Mrs Bennett, and Mr Oladipupo, that she has not. This is because:

(a) To prevent any breach from happening in the first place, a specific clause was included in the AST prohibiting the subtenant from keeping any pet, or allowing his invited guests or visitors to do so. In addition the AST included at 2.49 a clause prohibiting him from doing anything at the premises which was a nuisance or annoyance or might reasonably be considered anti-social behaviour.

(b) When notified that there were persons in Apartment 177 who appeared to be keeping a dog, Mrs Pau and Mrs Bennett immediately took steps to find out whether this was happening and to require it to stop if it was. Mrs Pau was initially told by Mr Oladipupo that the dog had been there for a short period with a guest, but was no longer there. When it became apparent that despite his reassurances, the dog remained in the apartment and the consequent discharge of foul water was continuing, she arranged an inspection which, given the limitations of lockdown and the need for her to investigate whether the complaints were well-founded, the tribunal considers was sufficiently prompt. Once it became apparent that a dog was still being kept in the apartment despite the fact it was not there when she attended and the assurances of Mr Oladipupo that it had been removed, a solicitor's letter including service of a notice to commence possession proceedings was sent on 26 November 2020. There is no evidence of breaches after 21 November 2020 and the guests who had the dog moved out by 11 December 2020. The tribunal considers that the Respondent (by Mrs Pau and Mrs Bennett) did

therefore take prompt action to require Mr Oladipupo to require his guests to cease their actions in breach (the discharge of foul water being a consequence of the presence of the dog), and this happened within a reasonable time, given the difficulties of lockdown.

86. Accordingly, the tribunal declines to make the determination sought pursuant to section 168(4) of the 2002 Act that there has been a breach of the Lease by the Respondent in this case.

Name: Judge N Rushton QC **Date:** 18 February 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Schedule of Statutory Provisions:

Commonhold and Leasehold Reform Act 2002

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 [the appropriate tribunal]1 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.

(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.

169 Section 168: supplementary

(1) An agreement by a tenant under a long lease of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under section 168(4).

(2) For the purposes of section 168 it is finally determined that a breach of a covenant or condition in a lease has occurred—

(a) if a decision that it has occurred is not appealed against or otherwise challenged, at the end of the period for bringing an appeal or other challenge, or

(b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in subsection (3).

(3) The time referred to in subsection (2)(b) is the time when the appeal or other challenge is disposed of—

(a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any), or

(b) by its being abandoned or otherwise ceasing to have effect.

(4) In section 168 and this section "long lease of a dwelling" does not include—

(a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies,

(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5) in relation to which that Act applies, or

(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).

(5) In section 168 and this section—

"arbitration agreement" and "arbitral tribunal" have the same meaning as in Part 1 of the Arbitration Act 1996 (c. 23) and "post-dispute arbitration agreement" , in relation to any breach (or alleged breach), means an arbitration agreement made after the breach has occurred (or is alleged to have occurred),

"dwelling" has the same meaning as in the 1985 Act,

"landlord" and "tenant" have the same meaning as in Chapter 1 of this Part, and

"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.

(6) Section 146(7) of the Law of Property Act 1925 (c. 20) applies for the purposes of section 168 and this section.

(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).