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

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| **Case Reference** | : | **CAM/38UB/LBC/2015/0001** |
| **Property** | : | **88 West Street, Banbury, Oxfordshire, OX16 3HD** |
| **Applicant** | : | **Varennes Development 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**<br>**Judge J Oxlade**<br>**Mr D Barnden MRICS** |
| **Date and venue of Determination** | : | **Friday 13th February 2015**<br>**Holiday Inn Express Banbury Stroud Park, Ermont, Banbury, OX16 4AE** |
| **Date of Reasons** | : | **25th February 2015** |

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**DECISION**

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

- **by reason of the findings made in paragraph 37(a) above, the Respondent has been in breach of Schedule 8 paragraph 11 between 17th to 27th November and 1st to 10th December 2014,**
- **by reason of the findings in paragraph 37(1)(b), the Respondent has been in breach of Schedule 4, Part II (6),**

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**Schedule 8 paragraph 7 and Clause 5 up to and During December 2014.**

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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 received on 29th and 30th December 2014, requiring a determination of a breach of covenant. Directions were issued on 6th January 2015.

(3) It is maintained that the Respondent is in breach of the subject lease in respect of leaving furniture in the grounds of the House; allowing dogs to foul the grounds to the House and by leaving the external door to the entrance for flats 2 and 3 unsecured.

**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 Development 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.

(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, Part II sets out the Lessee's covenants with the Lessor, the Management Company and the Lessees of the other flats in the House. In particular 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*".
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> The Eighth Schedule sets out the Regulations for the building and 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*".
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> Paragraph 11 states "*The entrance doors of the Flat shall be kept shut when not in use and the Lessee shall not on any account leave boxes parcels refuse or rubbish in the common access areas of or the grounds of the House*".

(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 an external inspection of the subject property in the company of Mr Satterley and Miss Barlow.

(9) The subject property 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. This area was observed and there were a number of animal faeces at various stages to decomposition. The front door providing access to the first and second floor flat is a timber door with a single deadlock. The Tribunal noted that it closed with ease. There were signs of damage to the door and the frames. It was explained that the damage was caused as a consequence of the police trying to gain entry to the property at some stage.

**Hearing:**

(10) Written representations were received from the Applicant, but no representations were received from the Respondent. A hearing was held on Friday 13th February 2015 at 11.00 am, at the Holiday Inn Express, 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.

(11) As mentioned above the application was received by the Tribunal on 29th and 30th December 2014 and Directions were issued on the basis of the contents of the application form. In particular the Directions required the Respondent to put in a statement of reply to the alleged breaches by 21st January 2015. In the bundle the Tribunal noted two letters from the Applicant, sent to the Tribunal and copied to the Respondent. These letters of 21st and 29th January 2015 sought to widen the scope of the application to include other terms of the lease, which the Applicant stated had been breached by the Respondent. Mr Satteley explained that the circumstances in this case changed on a regular basis and he considered that it would be prudent to deal with all the issues at one time, rather than incur additional

costs to the public purse by making a further application and consequently a further hearing.

(12) Whilst the objectives expressed at the hearing by Mr Satterly are laudable, it would be inappropriate for the Tribunal to consider extending the grounds of the current application. The consequences of a party breaching its lease obligations are serious and it is proper that any allegation of a breach should be notified to such a party and that they are given sufficient time to put in a considered response. As the Directions required Miss Barlow to make her statement of reply by 21st January 2015, she would not have been in a position to give her response to the allegations made. As a consequence and in the interests of justice it would be inappropriate to extend the grounds of the application. Therefore the Tribunal only considered the breaches identified in the original application.

(13) It was also explained that any the determination of this Tribunal would be limited to any relevant evidence of issues prior to the date of the application.

**Applicants' Case**

(14) Mr Satterly asked whether Mr Burr could provide evidence of the breaches and give some background information. However, the witness statement provided by Mr Burr was only limited to events in January 2015 and therefore post-dated the application. To allow Mr Burr to speak of other matters on which he had not provided a witness statement would have been unfair to Miss Barlow. The unfairness would arise as Miss Barlow would not have notice of what was being alleged, or to provide any evidence to rebut that evidence.

Mr Satterly's Evidence:

(15) Mr Satterly gave evidence that he had observed a bed placed on the driveway on 17th November 2014. The bed was still there on Thursday 27th November 2014. He had no photographs of the bed. However, he had taken a photograph on 1st December 2014 of the sofa located on the driveway. He had observed the sofa being moved down the stairs on 1st December and then noted that the sofa was removed on 10th December 2014.

(16) Mr Satterly had taken photographs of the dog faeces on 10th December 2015 and these were included in the trial bundle on page 23.

(17) On the 5th December 2014 Mr Satterly had sent two letters to Miss Barlow. The first letter identified that during a visit to the property on that date, Mr Satterly had observed a "substantial amount of excrement" and required Miss Barlow to rectify the problem by the following week. The second

letter detailed the leaving of furniture in the driveway and requesting that the sofa that was seen on 1st December 2014 should be removed by 9th December 2014. It also noted an incident in early December when the door that had been locked by Mrs Heritage had been found unlocked on a subsequent day.

(18) Mr Satterly explained that it was his practice to hand deliver to all of is tenants in the Banbury area. He visits the subject property every Monday evening with his wife and had hand delivered these letters to Miss Barlow's flat. The correspondence may be in re-used franked envelopes, but he places the correspondence in the hallway just outside Miss Barlow's flat. He attends the property on a weekly basis.

Mrs Heritage's Evidence:

(19) Mrs Heritage had provided a written witness statement that was dated 12th December 2014. It was explained that she had previously complained to Miss Barlow regarding the dogs fouling the driveway at the property. On a visit from her granddaughter, the granddaughter's bike had gone through the dog faeces. The excrement had caused a mess and her daughter had been very angry about the situation. This had been the single incident since the last hearing in June 2014. She acknowledged that Miss Barlow had apologised and there had been a change is how this problem was being managed. The problems with dog excrement on the driveway had reduced, but had not gone away and in the past the problems had been extensive.

(20) In response to questions from Miss Barlow, Mrs Heritage agreed that she had on several occasions, observed a Jack Russell in the locality, being walked off the lead and on one occasion this dog had entered onto and fouled the subject driveway.

(21) Regarding the items left on the driveway, Mrs Heritage confirmed the presence of the dismantled bed and sofa. The bed had been left from 17th to 27th November 2014 and the sofa had been left from 1st to 10th December 2014. When Mrs Heritage confronted the Respondent about the bed, Miss Barlow confirmed that the bed had belonged to her. These items were placed against the far wall and had not caused her any problems with access to her premises.

(22) In her witness statement Mrs Heritage claimed that the Respondent regularly leaves the entrance door unlocked. There was a notice on the inside of the door, stating that the door should remain shut at all times. Mention is made of an incident on 29th August 2014 regarding an intimidating individual who had entered the building from the entrance door. A further incident had occurred on 5th December 2014 when Mrs Heritage had locked the door the previous evening when she was leaving the property, and had returned the following morning to find the door unlocked. She did acknowledge that the door is now constantly locked. This change had happened about four months

ago. Mrs Heritage did confirm that in wet weather the door had a tendency to swell and stick.

Submissions:

(23) Regarding the lease covenants, it was submitted that if any of the paragraphs in the Fourth Schedule were breached, then consequentially clause 5 of the lease is also breached.

(24) Whilst it was accepted that the driveway was demised to Miss Barlow, reference is made in the Eighth Schedule paragraph to "*the common access areas of or grounds of the House*". The driveway is a common access area and is part of the grounds to the House. Arrangements should have been made for the swift disposal of the furniture. However, the excuses provided by Miss Barlow were irrelevant as the actual presence of the items on the driveway was a breach of the Eighth Schedule paragraph 11. It is also suggested that the actions of Miss Barlow in allowing her dogs to defecate in the area and not clearing up, is a nuisance and amounts to a breach of the Fourth Schedule Part 2, paragraph 6.

(25) Whilst Mrs Heritage's evidence is that the situation with the dogs fouling the driveway has improved, it has been a problem. The Jack Russell had only been observed on once on the driveway and fouling the area. The photographs are clear and demonstrate the problem. The dog excrement is a health and safety issue, the driveway is a common access area and it is reasonable that people should be able to cross the area without the risk of soiling items with the dog faeces. This occurrence is a problem from which "justifiable complaints" will arise and it interferes with the occupiers' access to the property. Accordingly, it is suggested that there is a breach of the Eighth Schedule paragraph 7.

(26) Mr Satterly stated that this area of Banbury had a high crime rate and therefore security was an important issue. If the entrance door to the two flats is left unsecured there is a higher risk of a problem occurring. The actions of Mrs Heritage are irrelevant, it is alleged that Miss Barlow has left the door unlocked and as such there is a breach. The Eighth Schedule paragraph 11 provides that the entrance doors are to be kept shut. It was accepted that this clause is ambiguous. A notice has been posted on the back of the entrance door to request that the door is locked. The mention of "*entrance doors*" of the Flat in the lease should be taken as meaning the main entrance door as well as the individual door to the flat.

**Respondent's Case**

(27) Miss Barlow explained that in the past there had been a disagreement between herself and Mrs Heritage, but now they were speaking and trying to find a common solution to the issues between them.

(28) Miss Barlow explained that the animal faeces deposits that were observed at the inspection were historic. She had an arrangement with someone to come and sit with the dogs to minimise the noise impact and to take the dogs out. However, now Miss Barlow takes the dogs out very early in the morning, prior to her leaving for work. She has a torch and removes and faeces as she observes them. On her return from work if she notices any deposits that she previously missed she takes steps to remove these. In conclusion she does acknowledge that on occasions the deposits may have been caused by her dogs and she has missed cleaning them up. However, there may be other animals, such as cats or foxes, that are contributing to the problem.

(29) Regarding the bed she acknowledged that both a dismantled bed and on a separate occasion a sofa had been left on the driveway for several days as claimed by Mr Satterly. It was also acknowledged that the items were rubbish and were awaiting collection to be taken to the tip. Miss Barlow stated that she had made arrangements for the items to be collected but these arrangements had been cancelled. On one occasion there had been items left on the driveway by a neighbour and Miss Barlow had offered for those items to be included with the disposal of her own items. The sofa had been a bulky item and as the communal staircase is narrow with a dog leg, it had taken a couple of hours to move the sofa to the ground floor. Accordingly when the collection had been cancelled she was not minded to return the item to the flat, so had left the sofa outside to be collected at the earliest time. She now was more organised about the timing of such collections. She had tried to contact the local authority, but it had not been possible to co-ordinate the collection of the items.

(30) Regarding the notices sent by Mr Satterly, it was explained that Miss Barlow had problems with her mail and her postal correspondence was being re-directed to her parents' address. There were delays in her parents bringing her post to the property. The warning letters that had been sent by the Applicant were received after the deadline set out in the second letter.

(31) Mrs Heritage had admitted that she had left the front door open, so they had both been guilty of leaving the door unlocked. However, there had been discussions between them and now both Miss Barlow and Mrs Heritage ensure that the door is locked. The doorbell to Miss Barlow's flat is not working so in the past, there had been problems with visitors being heard. This problem is now remedied, as friends call her to give notice of their

arrival. Miss Barlow provided her account of the two incidents mentioned in Mrs Heritage's statement. On 29th August 2014 a friend had left Flat 3 and closed the door behind them, but when they got to the ground floor door it was found to be deadlocked. This incident actually showed that the door was locked. On the 5th December 2014 neither Miss Barlow of her partner had left the flat as they had been cleaning and preparing the flat for Christmas.

(32) As to the interpretation of the clause then the Eighth Schedule paragraph 11 could be read to mean just the individual door to her own flat.

**Tribunal's Findings:**

(33) As mentioned in the previous decision on this property (CAM/38UB/LBC/2014/008) a breach of covenant of the nature under consideration in this case is usually supported by logs detailing the alleged breaches and providing evidence in the form of letters/notices of warning and photographs. There has been some attempt to provide that evidence. However, the Tribunal does note that this evidence is quite sparse.

(34) However, this limited evidence has allowed the Tribunal to reach its conclusions as to the facts of this matter. In respect of the leaving of items on the driveway, there was the evidence of both Mr Satterly and Mrs Heritage as to the dates involved with the two items. Miss Barlow accepted that the items were left on the driveway and did not take any issue with the dates recorded by Mr Satterly and Mrs Heritage. Miss Barlow stated that the items were left on the driveway prior to their disposal at the rubbish tip.

(35) Regarding the dog faeces, the evidence is a little more vague. It is a possibility that the faeces did come from different animals. However, given the amount of faeces observed on the inspection and recorded on the photograph, then on the balance of probabilities it is likely that Miss Barlow's dogs were a cause of the problem. In addition Miss Barlow accepted that her dogs had caused some of the dog faeces on the driveway, this is because she lets the dogs out to relieve themselves before she goes to work at 4.30 am when it is dark and though she uses a torch to see the mess, it can be missed; she then collects any residue if she sees it. The Tribunal accepts the evidence given by Mrs Heritage that the presence of the excrement on the driveway was the cause for a justifiable complaint and did impede her comfortable enjoyment of the flat that she occupies in the building.

(36) There is only evidence of two incidents regarding the securing of the main entrance door. The first incident was explained by Miss Barlow and accepted by Mrs Heritage as being an indication that the main entrance door was locked. The evidence about the second incident on 5th December 2014 is contradictory. The Tribunal accepts the explanation given by Miss Barlow and

finds that she did not leave the door unlocked on that date. However, even if the Tribunal is wrong about the evidential position, it goes onto consider the wording of lease in order to determine any breach on this point. It appears that the lease covenant only requires the door to be kept shut rather than locked, and there is possibly some ambiguity as to which door this refers to.

(37) The Tribunal therefore finds the following facts:

(a) the Respondent deposited unwanted furniture, namely a dismantled bed and a sofa, on the driveway. The bed remained in place from 17th to 27th November 2014 and the sofa remained from 1st to 10th December 2014.
(b) the Respondent's dogs have caused nuisance and annoyance to other occupiers of the property on a regular basis during and up to December 2014, by defecating in the driveway, which has not been cleaned up quickly and regularly,
(c) the Respondent did not fail to lock the main entrance door on 5th December 2014. There was no conclusive evidence on this point.

Findings of Breach

(38) The Tribunal has applied the findings of fact to the terms of the lease and makes the following findings in respect of the terms of the lease:

- by reason of the findings made in paragraph 37(a) above, the Respondent has been in breach of Schedule 8 paragraph 11 between 17th to 27th November and 1st to 10th December 2014,
- by reason of the findings in paragraph 37(1)(b), the Respondent has been in breach of Schedule 4, Part II (6), Schedule 8 paragraph 7 and Clause 5 up to and During December 2014,

(39) As explained in paragraph 37(c) the Tribunal found that the Respondent had not failed to lock the main entrance door on 5th December 2014. However, for the sake of completeness the Tribunal considers the provisions in the lease that the Applicant has relied upon in respect of this alleged breach. The Eighth Schedule paragraph 11 refers to "*entrance doors of the Flat*". Mr Satterly accepted that this wording was ambiguous. It could mean the two individual doors within the common parts; each serving the two flats (Flat 2 and Flat 3) or it could mean the main entrance door and the individual doors to the flats. If the lease is read "contra proferentum", then it would be the first interpretation of the lease that would apply and as such the failure to lock the main entrance door would not amount to a breach. However, a greater problem arises with the further wording of that paragraph. It is a requirement that the doors are to be kept shut rather than locked. The Applicant did not allege, nor provided any evidence to suggest that the main

entrance door was not shut. As such even if the Tribunal were wrong about the evidence as to whether the Respondent had left the door unlocked, this in itself would not have been sufficient to be a breach of the paragraph.

(40) As the Tribunal explained at the start of the hearing, it is the task of the Tribunal to make findings of fact and applying those facts to the terms of a lease in order to determine whether any breaches have occurred. The Tribunal accepts the explanations given by Miss Barlow that matters have improved as to the mechanics of removing the dog faeces from the driveway and the logistical problems in removing items of unwanted furniture. Indeed the Tribunal notes the comments made by Miss Barlow about her future conduct at the property. However, these are matters that are not for the consideration of this Tribunal.

**Name:** H C Bowers **Date:** 25th February 2015