FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference :	CHI/00HN/LBC/2019/0022
Property :	Flat 3, Durley Chine Court, 36 West Cliff Road, Bournemouth BH2 5HJ
Applicant :	Durley Chine Court Residents Limited (the Landlord)
Representative:	Coles Miller Solicitors LLP
Respondents:	Svetlana Fleming and Anthony Michael Fleming (the Tenants)
Representatives:	---
Types of Application:	Section 168(4) Commonhold and Leasehold Reform Act 2002 – alleged breaches of covenant
Tribunal Members:	Judge P.J. Barber Mr D Barnden FRICS Valuer Member

Date of Decision: 23rd October 2019

DECISION

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Decision

(1) The Tribunal determines in accordance with the provisions of Section 168(4) of the Commonhold and Leasehold Reform Act 2002, that breaches of covenant have occurred, being breaches by the tenant of the obligations imposed pursuant to Clauses 6.1.9.8 and 6.1.12.1 of the Lease dated 5th February 1996.

(2) The Tribunal makes no order for costs either under Rule 13, or under Paragraph 5A(1) Schedule 11 Part 1 Commonhold and Leasehold Reform Act 2002.

Reasons

INTRODUCTION

1. The application received by the Tribunal was dated 16th May 2019 and was for determination of an alleged breach of covenant in regard to the keeping of a cat at the Property. Directions were issued on 4th July 2019 and, following an application to vary the application made on 18th July 2019, further directions were issued on 19th July 2019, allowing the request to add a further breach allegation in regard to denial of access. On 10th September 2019, following a telephone case management hearing (CMH), further directions were issued on that same date; the directions provided that the parties had agreed during the CMH that the matter may be determined by way of a paper determination, rather than by an oral hearing.
2. The Applicant has provided a bundle of documents to the Tribunal which variously included copies of the titles, the application, an application to vary, the directions, statements of case and a witness statement for the Applicant. By letter dated 10th October 2019, the Respondents made application to allow them to introduce a witness statement made by Reshat Hoxhaj and dated 10th October 2019 and to which application, the Tribunal duly consented.
3. Flat 3 Durley Chine Court, 36 West Cliff Road, Bournemouth ("the Flat") is a first floor flat and demised pursuant to a Lease dated 5th February 1996 made between Durley Chine Court Residents Limited (1) and Hazel Fay Garner (2) ("the Lease") for a term of 125 years from 24th June 1992.
4. In broad terms, the complaint made by the Applicant as landlord, is that firstly the Respondent tenants have kept a pet cat in the Flat in breach of Clause 6.1.9.8 of the Lease, and secondly the Respondent tenants have failed to permit the lessor to inspect the Flat in breach of Clause 6.1.12.1 of the Lease.

THE LAW

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

"168 – No Forfeiture Notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c.20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied

(2) This subsection is satisfied if -

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach; or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection 2(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or a condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which-

(a) has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party

(b) has been the subject of determination by a court, or

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

(6) For the purposes of subsection (4), "appropriate tribunal" means-

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal"

WRITTEN REPRESENTATIONS

10. The bundle includes the Applicant`s statement of case dated 25th July 2019, together with a witness statement made by Andrew Taylor and also being dated 25th July 2019, in which Mr Taylor is described as being both the Company Secretary to the Applicant company and also the managing agent, in his capacity as a director of Bourne Estates Limited. In broad terms the Applicant submitted that the Respondent tenants have kept a cat at the Flat in breach of Clause 6.1.9.8 of the Lease and further that they have failed to permit the Applicant landlord to inspect, in breach of Clause 6.1.12.1 of the Lease.

Clause 6.1.9.8 in the Lease provides as follows:-

"6.1.9.8 Not to keep in the Premises any animal bird or reptile without obtaining the prior approval of the Lessor in writing which approval may be revoked at any time in the absolute discretion of the Lessor."

Clause 6.1.12.1 in the lease provides as follows:-

"6.1.12.1 To permit the Lessor to inspect the Premises for any reasonable purpose upon prior written appointment or at any time in case of emergency."

The Applicant further indicated that the Respondents had purchased the Flat in October 2018 and shortly afterwards requested, by email, consent from the Applicant landlord to keep a cat. The Applicant submitted that there was a longstanding policy by the Applicant never to give consent to the keeping of pets and that this information had been included within the pre-contract pack supplied to solicitors on the occasion of the Flat being sold. An extract from such pre-contract pack was included at Page 76 of the bundle providing "*Pets: Permission is not granted to pets and this will not change in the foreseeable future*". The Applicant referred to a request being made by Mrs Fleming for permission to keep a cat, which was considered by the directors of the Applicant at a meeting held on 28th January 2019 (Page 72 of the bundle), when consent was declined. The Applicant wrote to Mrs Fleming on 7th February 2019 advising as to the refusal of permission and at some point, a deadline for removal of the cat on 7th April 2019, appears to have been communicated to her. The Applicant`s statement of case referred to the Respondents not having moved into the Flat for several months and that Mrs Fleming had in a letter dated 17th April 2019 sent by her to the Applicant`s solicitors (Pages 83-85 of the bundle), questioned the no pet policy as not being within the spirit of Clause 6.1.9.8 of the Lease. Mrs Fleming had also stated in that letter that she had noticed a number of animals/pets permitted and still remaining in Durley Chine Court. The Applicant referred to an admission by Mrs Fleming as to keeping the cat, in her letter dated 17th April 2019 which included the following:-

"*Nevertheless as a peaceful resolution, I have communicated my agreement in writing, to remove my cat from Durley Chine Court…*"

The Applicant further referred to a letter dated 10th June 2019 from Mrs Fleming to Bourne Estates Limited (Page 87 of the bundle), stating that "*The cat has been removed from the premises and will not be returning*." The Applicant referred to requests made in writing by the Applicant to arrange an appointment to inspect the Flat, variously in a letter dated 17th June 2019 (Page 88 of the bundle) suggesting times and dates on 26th June 2019, 27th June 2019 and/or 28th June 2019. The Applicant wrote to Mrs Fleming on 4th July 2019 (Page 92 of the bundle) proposing further times and dates on 9th July 2019, 10th July 2019 and/or 11th July 2019. The Applicant`s solicitors had written to the Respondents on 17th July 2019 (Page 96 of the bundle) proposing times and dates on 23rd July 2019, 24th July 2019 and 25th July 2019. In his witness statement (Pages 64-68 of the bundle), Mr Taylor had referred to a "*long standing practice*" whereby the landlord does not give consent to the keeping of an animal, but said that when such blanket policy had been introduced, there were already a cat and a dog being kept at certain of the flats and that such historic consents were allowed to continue until those animals died, but no consent would be granted to keep another animal at those flats. Mr Taylor referred to a request made in 2015 by the lessee of Flat 1 to keep a cat, which had been refused on the basis of the landlord`s long standing policy. Mr Taylor also referred to Mrs Fleming having sent an email to him on 21st June 2019 (Page 89 of the bundle), saying that acceptance of inspection of the Flat could compromise her position and referring to certain mental and verbal abuse, continuing for over six months and for which she was under intense medical treatments and also receiving help from Victim Support and the Hate Crime team at the CAB, adding that any inspection should be conditioned at a time when she was mentally and physically recovered from the abuse, and by an impartial person,

who was not a part of this "*discriminatory group*". Mr Taylor said he had written to Mrs Fleming on 4th July 2019 (Page 92 of the bundle) offering further dates for an inspection, and advising that "*You are perfectly at liberty to have an additional third party of your choosing in attendance for verification if that is your wish*." Mr Taylor added that Mrs Fleming had responded to the Applicant`s solicitors' subsequent letter of 17th July 2019 offering further inspection dates, by a letter also dated 17th July 2019 (Page 98 of the bundle) saying:

"*Due to occurrence of the racial abuse by your client and its managing agent, and whilst this case is under police investigation I do not feel safe to allow Mr Andrew Taylor or any of the current directors of Durley Chine Residents Ltd to enter my home. I have been advised to call the police immediately should any attempt be made… I consider an inspection by a mediator/impartial person…"*

Mr Taylor said that the Applicant had then sought to vary the application made to the Tribunal by adding the further allegation of breach, in regard to Clause 6.1.12.1 of the Lease.

12. In their statement of case dated 23rd September 2019 (Pages 99-107 of the bundle), the Respondents broadly submitted that the Applicant is not the freeholder of the Flat, as under the Commonhold Regulations 2014, each unit holder owns the shared freehold of the unit. The Respondents further indicated that prior to purchasing the Flat, they had received information regarding a "*blanket strictly no pet policy*" which they said appeared contradictory to the Lease, but they had not questioned it, as they had at the time intended to re-home the cat; only whilst they were refurbishing the Flat had they noticed other pets apparently permitted in other flats. The Respondents questioned the fairness and "*undemocratic approach*", and said that no copy of the "*no pets*" policy had been provided to them; they added that they had decided to move out of the Flat, but asked for an extension of time for removal of the cat, by a few months, to allow them to find alternative accommodation. The Respondents indicated that the cat had been unwell and that as soon as it had recovered after an operation, they had fostered her away. The Respondents complained that on 13th / 14th June 2019, loud music had been played after midnight by a neighbour who had verbally abused Mrs Fleming when she politely asked for the music to be turned down, indicating they said, underlying motives against the Respondents based on racial identity. Mrs Fleming had complained to the police and cited a crime number, as well as Dorset Police having appointed a representative from Victim Support Group, to assist Mrs Fleming. The Respondents further stated "*…the Applicant and its managing agent seem made certain inappropriate/derogatory comments against Mrs Fleming nationality. We wanted to justify that this was not the ground for seemingly discriminatory and excessive unnecessary actions taken against us…*" The statement referred to Mrs Fleming being unwell and under intense medical treatments, referring to the incident on 13th/14th June 2019 and to the effect that Mr Andrew Taylor could not be trusted to enter their home. The Respondents also referred to certain incidents regarding an unnotified change of key fobs to an external door and an issue regarding payment of service charges, as being actions by the Applicant which were detrimental to the Respondents. The Respondents further complained at the inclusion in the Applicant`s statement of case, of appended letters sent by or on behalf of the Applicant having been marked "*without prejudice*", that Mr Andrew Taylor is not "*our Lessor but appointment*", that no other persons had been proposed for carrying out the inspection and that

they have the right to choose who enters their home. The Respondents further averred that they had followed Clause 6.1.9.8 in the Lease, having requested approval in writing, and that the "*no pets*" policy was not in line with Clause 6.1.9.8 and had not been amended under any "*Commonhold community statement*", also saying that the Office of Fair Trading considered a blanket ban on pets to be unfair and that alternative routes for resolving the dispute should have been pursued. The Respondents also requested that the Tribunal should make orders against the Applicant in respect of costs for unreasonable conduct under both Rule 13, and under Section 5A(1) Schedule 11 Part 1 Commonhold and Leasehold Reform Act 2002 in respect of litigation costs.

13. The Applicant`s Reply to the Respondents' statement of case broadly provided that the title to the block is freehold and not commonhold, that the Respondents had accepted that they kept an animal at the Flat without prior written approval, that any alleged discrimination was a fabrication and strenuously denied, and appending a further statement by a director of the Applicant, being the lessee of Flat 7 who had come to the UK from Algeria in 2014 and whose request to keep a cat in his flat had been turned down due to the blanket no pets policy. The Applicant said that it waived privilege in regard to any "*without prejudice*" correspondence which it may have sent or had sent on its behalf, that "*the Lessor*" is entitled to inspect the Flat for any reasonable purpose upon prior written appointment and that inspection had not been allowed, notwithstanding the offer of nine different dates. In regard to costs, the Applicant denied having acted unreasonably, and repeated that two months had been allowed for removal of the cat, and adding that there was no evidence of the proceedings having been conducted unreasonably.

14. The Respondents' application and letter of 10th October 2019 broadly stated that they felt they had been pushed out of their home by the Applicant`s bullying and discriminatory actions based on race, having a devastating effect on both mental and physical health and resulting in them being in financial difficulties. In addition the witness statement of Reshat Hoxhaj dated 7th October 2019 broadly stated that Mr Hoxhaj and his wife had, as Kosovo refugees, moved to Flat 8 in 2015, and had been told by the managing agents that they had done many things wrong, suspected falsely of burglary of another flat, had their key fob removed, been criticised by a director for not speaking English, accused of damaging a communal carpet, failing to display a parking permit and various other issues seemingly resulting in their letting agent having received allegations for their eviction.

CONSIDERATION

15. The Tribunal, have taken into account all the case papers in the bundle.

16. In regard to the alleged breach of Clause 6.1.9.8, the Tribunal considers that whilst such covenant is partly qualified, it is nevertheless clear that no animal bird or reptile may be kept without obtaining the Lessor`s prior approval in writing. It is clear that no such written approval was ever given. It is also apparent and acknowledged by the Respondents at Page 83 of the bundle, that the management company had provided information to their solicitors prior to purchase, with reference to the no pet policy which they had not challenged at the time because they thought such policy not to be within the spirit of Clause 6.1.9.8. Whilst it would have been helpful if the Applicant had produced the original minutes or

evidence as to the original creation of such policy, it is nevertheless clear, that the policy had been in operation and implemented both in 2014 in regard to a request then for consent from Flat 7, and also in 2015 in regard to a request then for consent from Flat 1. The covenant further provides that even if consent had been given, it may be revoked at any time in the absolute discretion of the Lessor. It was suggested by the Respondents that the refusal had been based upon a form of racial discrimination by the Applicant against the Respondents personally. However, whilst the Respondents refer to an incident on 13th/14th June 2019 when it appears that Mrs Fleming may have been the subject of racial or other abuse from a neighbour, no evidence has been provided to show that the perpetrator is or was directly connected with the Applicant limited company. There is no entirely clear or unequivocal evidence that the refusal of consent was solely or primarily based upon racial or other discrimination; there is however evidence that the policy of "*no pets*" had been operated by the Applicant since at least 2014 and that other similar applications for consent had also been refused. The Respondents admitted they had been aware of the policy prior to purchase. Accordingly, the Tribunal determines that by having kept a cat in the Flat without obtaining the prior approval of the Lessor in writing, a breach of covenant, namely Clause 6.1.9.8, has occurred. For the avoidance of doubt and the sake of completeness, the Tribunal accepts that the title to the block is freehold, and not commonhold, as evidenced by the register entries at Pages 1-4 of the bundle.

17. In regard to the alleged breach of Clause 6.1.12.1, the Tribunal considers in the context of this matter, that the Applicant`s request to inspect the Flat to verify removal of the cat, was a "*reasonable purpose*" and further notes that nine separate alternative dates had been offered to the Respondents by the Applicant. The Tribunal notes that the Respondents said they felt that "*the Applicant and its managing Agent seem made certain inappropriate/derogatory comments against Mrs Fleming nationality*". However, there is no specific evidence provided to support such concern, other than reference to the incident involving another lessee or occupier on 13th/14th June 2019. Clause 6.1.12.1 permits "*the Lessor*" to inspect; Mr Taylor appears at the time to have been both the Company Secretary of the Applicant limited company, and also the managing agent for that company, and on the face of it, in a justifiable position to represent the Lessor, being in this case an inanimate corporate body. Even if it is accepted that the Respondents had concerns about Mr Taylor entering their home, it was pointed out by him in his letter dated 4th July 2019, to Mrs Fleming that she would be perfectly at liberty to have an additional third party of her choosing in attendance. The Tribunal considers that the Applicant had acted reasonably in regard to proposing nine alternative dates and confirming that a third party may be present as it were, to ensure "*fair play*". In these circumstances, whatever misgivings the Respondents may or may not have had about Mr Taylor, the Tribunal does not consider that their refusal to permit inspection on any of the offered dates, was justifiable or reasonable, given the requirements of the covenant at Clause 6.1.12.1 of the Lease and that consequently there has been a breach of that covenant.

18. In regard to the Respondents' requests relating to costs, the Tribunal accepts that the Applicant was entitled to bring these proceedings and that there is no clear evidence that the proceedings have been conducted unreasonably. Accordingly, the Tribunal makes no order as to costs.

19. We made our decisions accordingly.

Judge P J Barber (Chairman)

A member of the Tribunal
appointed by the Lord Chancellor

Appeals

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

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.