



**RESIDENTIAL PROPERTY TRIBUNAL SERVICE**

**LEASEHOLD VALUATION TRIBUNAL**

**The Property:** 44 Hardwicke Place, St Anne's Road, London Colney, St Albans, Hertfordshire AL2 1PX

**Applicant (Landlord & Freeholder):** Orchid Base Limited

**Respondent (Tenant):** Ms EM Gordon

**Case Number:** CAM/26UG/LBC/2007/0001

**Application:** An application pursuant to section 168 Commonhold & Leasehold Reform Act 2002 for a determination whether a breach or breaches of covenant have occurred.

**Tribunal:** Mr JR Morris (Chairman)  
Miss M Krisko BSc (Est Man) BA FRICS  
Mrs HC Bowers MRICS

**Date of Hearing:** 24<sup>th</sup> May 2007

**Attendance:**

**Applicant:** Ms A Becker, Solicitor  
Mr A Norman, Managing Agent  
Ms AJ Riseman, Tenant of Flat 41 and Witness  
Mr R Bennett, Tenant of Flat 40 and Witness

**Respondent:** Ms EM Gordon  
Mr S Flynn

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**DECISION**

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**The Application**

1. This is an application pursuant to section 168 of the Commonhold & Leasehold Reform Act 2002 for a determination whether a breach of covenant has occurred.

**The Law**

2. The section 168 of the Commonhold and Leasehold Reform Act 2002 states:  
  
(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 (c20) (restriction of forfeiture in respect of a breach by a tenant of a covenant or condition in the lease unless (2) is satisfied.  
(2) This subsection is satisfied if it has been finally determined on an application under subsection (4) that the breach has occurred or the tenant has admitted the breach

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

3. Section 76 defines a long lease as being granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice by the tenant, by re-entry or forfeiture or otherwise.

### **The Parties**

4. A copy of the Land Registry Entry for HD121370 of the freehold title of 37-54 Hardwicke Place, London Colney which included the Property and a copy of the Entry for HD110774 of the Leasehold title of the Property was provided. The Entries show the Applicant is the current Landlord and freehold owner of the Property and holding the reversion immediately expectant upon expiry of the Respondent's Lease and the Respondent is the current Lessee under the Lease dated 3<sup>rd</sup> April 1978 between the Bayglen Properties Limited, the original Lessor and Paul Leslie Thompson and Jacqueline Hill the original Lessees. The Lease is granted for a term of 99 years from 25<sup>th</sup> December 1976 at a rent of £25 per annum for the first 33 years £50 for the next 33 years and £75 for the final 33 years.

### **The Inspection**

5. The Property is a flat in a three-storey block of flats in communal grounds (the Block). The rear gardens are enclosed and the front is an open plan grassed area. There are 9 flats in the block, 3 on each floor. The Block was in fair condition. Internally the common areas are utilitarian. The Property comprised an entrance lobby, living room kitchen, bathroom and bedroom. The living room and bedroom were carpeted. The entrance hall had laminate flooring and the bathroom and kitchen had vinyl flooring. The Tribunal did not detect a smell of dog nor was there any evidence of scratches on the doors. The floors appeared to be solid concrete.

### **The Lease**

6. The clauses of the Lease relevant to this Application are:
  - Under Clause 3 (4) of the Lease the Respondent covenanted to "perform and observe all and singular the obligations and restrictions set out in Part III of the Schedule hereto"
  - Under Paragraph 2 of Part III of the Schedule to the Lease the Respondent covenanted "Not to do permit to be done any act or thing in or upon the demised premises or any part thereof or any part of the Property which may grow to be a damage nuisance or annoyance to the Lessor or the Company or any of the occupiers of other parts of the Property or the neighbourhood."
  - Under Paragraph 8 of Part III of the Schedule to the Lease the Respondent further covenanted: "Not to keep or permit to be kept any bird dog or other animal in or upon the demised premises which may cause a nuisance damage or annoyance to the Tenants or occupiers of any parts of the Property or to which an objection shall be notified by the Company"

## **The Alleged Breaches and Determinations Requested**

7. The Applicant states that the Respondent has sublet the Property or permitted it to be occupied by Mr Winston Taylor who keeps a large dog as part of his household which dog causes nuisance damage and annoyance to at least one other lessee within the Block and applies for a Determination that the Respondent is in breach of covenant.

## **Applicant's Case**

8. The Applicant made written representations, which are summarised below.
9. The Applicant produced a copy of a letter dated 19th January 2007 from Ms Riseman of Flat 41 complaining that the dog in the flat above was causing her a problem. She wrote that it was a Brindle Staffordshire dog, which ran up and down the lounge like an elephant. She said this was a big boned heavy dog and not a small dog. She added that on two occasions she had found dog stools in the garden. On the first occasion she said that Mr Taylor the occupier of the flat had said that he would move it but on the second occasion his brother had been dismissive. She said that she found this stressful, which exacerbated her Multiple Sclerosis. She said that she had complained to Mr Adam Goldwater of Michael Richards & Co who manage the Block but they had not responded. She said that she thought this a breach of the lease
10. The Applicant produced a statement of evidence which was made by Mr Norman, the Property Manager for the Alan Matthey Group of Companies of which the Applicant is one, in which Mr Norman stated that he was instructed to deal with the matter. The Applicant produced a copy of a letter dated 19<sup>th</sup> January 2007 from the Applicant to the Respondent, which referred to the complaint and stated that the Respondent was in breach of Paragraph 8 of Part III of the Schedule to the Lease. The letter then required the Respondent to remove the dog from the Property within 21 days. Failure to do so would result in an application being made to the Leasehold Valuation Tribunal and service a notice under section 146 Law of Property Act 1925 was contemplated and in consequence costs were accruing against the Respondent.
11. A copy of a letter dated 9<sup>th</sup> February from the Applicant to the Respondent was produced in which the Applicant noted that the Respondent had not responded to the letter to the 19<sup>th</sup> January and that the dog was still in the flat. The Applicant stated that it was intended to inform the Respondent's mortgagee that she was in breach of covenant. The Applicant also stated that the Respondent should instruct a solicitor and admit the breaches, to confirm that the dog has been permanently removed from the flat and to give proposals for payment of damages, costs and administration.
12. A copy of correspondence from the Respondent to the Applicant was produced in which she stated that the dog belonged to Mr Taylor's mother and did not live at the flat. She said that she had informed the Applicant's Managing Agents for the Block in a telephone conversation in the week beginning 29<sup>th</sup> January 2007 and on the 5<sup>th</sup> February had been thanked for her co-operation by Mr Goldwater and therefore assumed that the issue had been addressed.
13. The Applicant produced a letter date 14<sup>th</sup> February 2007 to the Respondent from the Applicant's Solicitor recording a telephone call between Mr Norman and the Respondent's partner Mr Flynn. It was stated that Mr Flynn had asserted that no dog or dogs were in the flat and that the large Brindle Staffordshire Terrier was an occasional visitor who attended the Property as part of the household of Mr Winston Taylor's mother.

14. It was stated orally that it had been noted that in addition to the large Brindle there had also been a small Staffordshire terrier at the Property. Therefore the assertions were said in the letter to be believed to be inaccurate because subsequent to the telephone conversation Ms Riseman and Mr Bennett, the tenant of Flat 40, had seen the small dog urinate in the hallway of the Block. Ms Gordon or Mr Taylor cleaned up the urine later in the day.
15. An email from Ms Riseman sent to Mr Norman was produced which stated that during the night of 13<sup>th</sup> to 14<sup>th</sup> February it seemed that the dogs slept in Mr Taylor's car as the alarm kept going off and that Mr Bennett had heard it go off at 4.00 a.m. It was also stated that she had heard music and a Hoover, which she suspected, was to disguise the sound of the dogs when they were taken out of the car to the flat. Ms Riseman also stated that there were dog faeces in the garden, which she had photographed.
16. The Applicant produced a signed statement of evidence that was made by Ms Riseman in which she stated that she had no objection to dogs being in the block of flats provided they did not cause a nuisance. She said that across a very short corridor at Flat 40, Mr Bennett has two small dogs, which cause no nuisance. She said that when she moved into her flat the Property was occupied by a couple in their thirties who were renting. They did not have any animals and did not cause a nuisance.
17. The statement went on to say that in October 2006 after the young couple moved out Mr Taylor moved into the Property. Part of his household was a Brindle Staffordshire Terrier. Two days after he moved in Ms Riseman and Mr Bennett were distressed to hear loud barking and howling from a dog in the Property. When Mr Taylor returned home Mr Bennett spoke to him and Mr Taylor apologised and said that he had arranged for his brother to be in the flat but that he had let him down. Ms Riseman also wrote that the running about of the dog disturbed her and she assumed it was under exercised. She said that she was absolutely certain that the dog was resident as part of Mr Taylor's his household from the time he moved in until the making of the statement.
18. Ms Riseman also stated that there is a recognised dog walking area in the vicinity however it appeared that Mr Taylor just took the dog into the garden area of the block of flats where the dog ran about and caused damage to the grass. She later found dog faeces in this area, which she photographed. On or about 14<sup>th</sup> February 2007 Mr Taylor appeared to have a puppy as well as the dog and on one occasion the puppy urinated in the ground floor lobby area of the flats which Ms Riseman also photographed.
19. In addition to the statement Ms Riseman gave oral evidence, which confirmed her written letters and statements. She said that she had got on well with previous tenants of the flats and of the Property. She confirmed that she had found dog faeces in the rear-enclosed garden as well as in the front garden but conceded that she had not actually seen the dog fouling the garden.
20. Mr Bennett also gave oral evidence. He said that he was very knowledgeable about dogs and could confirm the breed of dog. He said that not long after Mr Taylor moved in the Property the dog had been left and had barked and howled for about 3 hours. He said that this breed of dog in particular did not like to be left alone and had a particularly disturbing howl, not dissimilar to a child crying. When Mr Taylor returned Mr Bennett said he spoke to him and he apologised. Mr Bennett advised him that if

he left the dog alone he should leave the radio on low and the dog would believe someone was there. Mr Bennett said that he did not hear the dog bark or howl again until a few days before Mr Taylor vacated the Property.

21. Mr Bennett said that he saw the dogs regularly although they did not cause him a nuisance and he did not hear the dog moving around from his flat. He confirmed that he had seen the urine in the ground floor entrance lobby and had been woken by the car alarm when the dogs were kept there one night. He said he saw the dog faeces in the front garden but not in the enclosed rear garden. He said the faeces he saw were clearly those of a dog and not another animal such as a fox. From the faeces it was evident the dog was fed on dry dog food. He said that he did not see the dog fouling in the front garden. He agreed that the flats are on the route to a dog walking area and so the faeces could be from another dog although added that after Mr Taylor vacated the Property the faeces were no longer apparent.

### **Respondent's Case**

22. The Respondent presented her case with the assistance of Mr Flynn her partner. It was stated that Mr Taylor had not intended to be a permanent resident and had been granted an Assured Shorthold Tenancy from October 2006 to April 2007. The complaints about the dog were made in January 2007.
23. Mr Flynn in written representations dated 18<sup>th</sup> April 2007 had stated that there is no prohibition in the lease against keeping dogs and that he was aware of at least 2 dogs at Flat 40. He said complaints had been made about these dogs being allowed out without leads and fouling but that no action had been taken. He said that he had sought to resolve the matter regarding the present case but had found Mr Norman patronising and partial and that Mr Norman had said that the Respondent should evict the Tenant. He referred to other issues and said that the Respondent was being harassed. He confirmed that as at the date of the letter the Property was empty.
24. The Respondent referred to a letter dated 28<sup>th</sup> February 2007 from her to Mr Norman in which she commented that the managing agents for the Block should have initially dealt with the matter rather than engaging the Landlord immediately. The letter said that this was one of several matters relating to the respondent and Ms Riseman and that the matter might be better dealt with by mediation. She added orally that the reason she had not responded to the letter from the Applicant dated 19<sup>th</sup> January was because she believed that the matter had already been settled. She referred to her correspondence dated 12<sup>th</sup> February in which she had said that she had informed the Managing Agents in a telephone conversation in the week beginning 29<sup>th</sup> January 2007 that the dog belonged to Mr Taylor's mother and did not live at the flat and on the 5<sup>th</sup> February had been thanked for her co-operation by Mr Goldwater.
25. The Respondent and Mr Flynn suggested that Ms Riseman was hyper sensitive. The Respondent stated that although Ms Riseman contends that she got on well with other tenants of the flats and previous tenants of the Property this is not correct. They produced four letters all addressed "to whom it may concern" which the Respondent had obtained and which the Respondent said indicated that Ms Riseman had a low tolerance level to noise.
26. The first letter, dated 20<sup>th</sup> March 2007, was from Langleys of 230 High Street, London Colney, who are the agents seeking to sell the Lease for the Respondent. It stated that on the 28<sup>th</sup> September 2006 at 3.00 pm a sales negotiator was showing a prospective purchaser with his 3 year old child around the Property. Ms Riseman

came to the Property and asked them to keep the noise down as apparently the child was running around.

27. The second letter, dated 23<sup>rd</sup> May 2007, was from Mr Winston Taylor. Mr Taylor said that the dog referred to was owned by his brother and had not stayed at the Property. He said that Ms Riseman had complained about the noise of his music, about him walking too heavily on the floor, closing doors and windows too loudly and talking too loudly on the telephone.
28. The third letter is undated and was from Mrs S Flanagan who was the previous tenant of the Property prior to Mr Taylor. She wrote that she and her husband had considered buying the lease but decided not to due to Ms Riseman's comments. Mrs Flanagan stated that Ms Riseman had commented on arguments that she believed she had overheard and complained about the noise, which she attributed to the laminate flooring in the entrance hall of the Property and the bathroom.
29. The fourth letter. Dated 17<sup>th</sup> April 2007 Mrs Barbara Kowalczyk of Flat 38 which is the flat below Ms Riseman's. Mrs Kowalczyk referred to a number of matters however the information relevant to the present proceedings concerned an occasion when some friends of Mrs Kowalczyk came to visit and at 6.00 p.m. Ms Riseman came to complain that they were making too much noise. The only sound was conversation and she and her husband felt the complaint unreasonable.
30. With regard to the dog faeces the Respondent said that the only she only knew of the isolated instance when the puppy urinated in the lobby and which the Tenant cleaned up. The Respondent and Mr Flynn re-iterated that so far as they were aware the dogs were only occasional visitors.
31. The Respondent and Mr Flynn also commented that the block of flats is on the route to the nature reserve which is a popular area for dog walkers. They pointed out that no one had actually seen Mr Taylor's dog fouling in the grounds and the faeces could have been from other dogs. They added that was very difficult for local authorities to prove dog fouling.

### **Determination**

32. The Tribunal accepted that Under Paragraph 8 of Part III of the Schedule to the Lease if the Respondent kept or permitted to be kept any bird dog or other animal in or upon the demised premises which may cause a nuisance damage or annoyance to the Tenants or occupiers of any parts of the block of flats then she would be in breach of that covenant.
33. The Tribunal firstly considered what amounted to "a nuisance damage or annoyance to the Tenants or occupiers of any parts" of the block of flats. With regard to the meaning of nuisance in this context the Tribunal took guidance from the common law definition of nuisance, which is generally accepted as being the unlawful interference by a person of another's enjoyment of property. Annoyance was perceived as being a less severe form of interference than a nuisance. Damage was not being claimed in this instance.
34. Secondly the Tribunal considered a) what might cause a nuisance or annoyance and b) whether a person would consider it to be an interference amounting to a nuisance or annoyance.

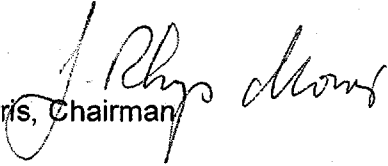
35. It has been held that both noise and deposits such as dust might cause a nuisance or annoyance. In this instance the Tribunal found that noise such as barking and deposits such as faeces could amount to both a nuisance and an annoyance.
36. Whether or not there is an interference with the enjoyment of property is an objective test i.e. would a reasonable person consider that there had been an interference with the enjoyment of property? In applying the test the courts have taken a "live and let live approach" which means that a single occurrence will not normally be seen to be a nuisance. In addition where particular circumstances prevail then what amounts to interference will be what a reasonable person in those circumstances will consider to be interference. In the present case the reasonable person must be taken to be the reasonable flat dweller.
37. For the noise of the dog barking and running or walking around the flat to be either a nuisance or an annoyance noise would need to be at a level, which a reasonable person who is a flat dweller would consider interference and occur more than a few times.
38. In relation to the dog barking the Tribunal found from the evidence that this only occurred on one occasion prior to proceedings being brought and therefore determined that this was not a nuisance or an annoyance. In assessing whether the sound of the dog on the floor of the Property amounted to a nuisance or annoyance to the reasonable person the Tribunal reflected on its inspection of the Property. It had been noted that the living room and bedroom floors were carpeted. The age of the carpet indicated that it had not recently been installed. Only the entrance lobby, bathroom and kitchen had hard surfaces. The floor was solid as opposed to being a wooden floor with void, which may be more likely to resound. The Tribunal therefore found that the transfer of sound would be limited and unlikely to be an interference to the reasonable person living in a flat.
39. The Tribunal also noted that Ms Riseman did seem from the letters submitted in evidence to be sensitive to noise and appeared to be more aware of the sound from other flats than the hypothetical reasonable flat dweller.
40. The Tribunal found from the evidence that the dog urine in the entrance lobby was a single event and therefore not in its interpretation of the clause a nuisance or annoyance. In addition the Respondent's tenant cleaning it up mitigated the event.
41. The Tribunal found from the evidence that the one admitted incident of dog fouling was not sufficient to amount to a nuisance or annoyance, as this was a single incident. In addition the Tenant may have mitigated this by cleaning it up although there was no conclusive evidence either way.
42. Other instances of fouling by the dog were inconclusive. The Tribunal noted on the inspection that there was no evidence of the grass being 'burnt' by urine or any remaining faeces in the rear enclosed garden or the open grassed area in front of the Block. The Tribunal also accepted that dog walkers passed the Block on their way to the recreational area and that faeces found on this area of grass were not necessarily that of the dog or dogs in question.

## **Decision**

43. The Tribunal therefore determined that based on the evidence put before it there was no breach of Paragraph 8 of Part III of the Schedule to the Lease and no breach has occurred.

44. By way of observation, whereas the Tribunal commend the Landlord for seeking to ensure that the Lease is complied with, nevertheless, in relation to the current proceedings the Tribunal were of the view that the Applicant ought to have undertaken further investigation of the complaint and attempted to settle the matter prior to the Application. The Tribunal note that there were only 21 days between the receipt of the complaint and the making of the Application and notifying the Respondent's mortgagee.

JR Morris, Chairman

A handwritten signature in cursive script, appearing to read 'JR Morris', is written over the typed name 'JR Morris, Chairman'.