

In the Leasehold Valuation Tribunal

Ref LON/00AH/LBC/2011/0012

Applicant	Vapstar Ltd
Represented by	Trust Property Management
Respondent	Mr S L Ashitey
Represented by	Connells LPA Hamblins LLP
Premises	Flat E, 5/7 Penge Road, London, SE25 4EJ

Tribunal

Ms E Samupfonda (LLB) Hons

Mr P Roberts DipArch RIBA

1. The Applicant seeks a determination under s168 (4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent is in breach of various covenants contained in his lease. In particular the Applicant asserts that the Respondent is in breach of clause 9 of the fourth schedule of the lease in that animals are being kept at the above named premises without consent.
2. A pre trial review was held on 17th February 2011 and directions for the future conduct of the case made.
3. At the hearing on 6th June 2011, Ms Griffiths, managing agent of Trust Property Management represented the Applicant. Ms Murphy of Counsel represented Hamblins LLP, solicitors for Anthony Gene Salata and Anthony Melvin Jordan who are LPA agents and receivers for the Respondent (LPA receivers). The LPA receivers instructed

Connells LPA to act for them in the day to day management of the premises.

4. Ms Murphy made an application for the hearing to be adjourned. She submitted that the application is pointless because there is an order for possession. She explained that the actions complained of are the actions of the Respondent's tenants Christopher Wiggins and Donna Daws who live in the premises under an assured shorthold tenancy granted on 3 November 2003. She said that there is an order for possession from Croydon County Court dated 20th May 2011. Hamlins LLP have already applied for a warrant for possession. She added that the application is pointless because Ms Griffiths has indicated that forfeiture proceedings would not be brought. She concluded that her clients have incurred costs, which they may not be able to recover, in issuing possession proceedings and in defending this application and this was unfair, as Ms Griffiths had indicated that she would be seeking to recover the cost of these proceedings from the service charge.
5. Ms Griffiths opposed the application. She said that the application was not pointless. She said that she had received numerous complaints from other leaseholders in the block about the Respondent's tenants and their pets. The other lessees had threatened to withhold their service charge unless action was taken. She said that it had taken her a great deal of time and effort to identify the Respondents and his managing agents' whereabouts. She said that because she had been given the run around she felt that she had no option but to make this application. She said that when she made the application, she had contemplated forfeiture proceedings but had reconsidered her position following discussions at the pre trial review.
6. The Tribunal considered the application and its power to adjourn proceedings under Regulation 15 of the Leasehold Valuation Tribunals (Procedure)(England) Regs 2002. It decided that it was not reasonable to grant the adjournment given the grounds of the request and the time of the application. It was clear that Ms Griffiths had been put to considerable time and effort in trying to get the matter resolved without resorting to the LVT. The issues were not

complex and both parties were able to deal with the matter today. No purpose would be served in adjourning the proceedings as the Applicant was entitled to a determination irrespective of the possession proceedings.

7. Ms Griffiths explained that in July 2010, she received a letter from Mr Mouny, leasehold owner of flat of F. Mr Mouny was complaining about the stench emanating from the premises. Mr Mouny was of the view that there were pets kept in the premises. As Mr Mouny cleans the block and visits on a regular basis he was in a good position to make such complaints. On making enquiries, Ms Griffiths found that similar complaints had been made to her predecessors in 2006, 2007, and 2009. Letters had been written to the tenants and to the Respondent but they were ignored. Ms Griffiths said that she visited the premises but was denied access. At the time of her visit the smell was not too bad. She then forwarded copies of the letters to Connells in December 2010 but it was not until February 2011 that she was given the correct address for Connells. Although Connells managed the premises, they did not have any idea who occupied them and how many bedrooms there were. She was advised that the tenants would be vacating the premises on 2 April 2011 but they did not.
8. She relied on two statements in support of her claim that the Respondent had breached a term of his lease by allowing his tenants to keep pets. She conceded that the statement from Mr Mouny dated 28th April 2011 simply states that he has "heard" a dog and "seen" a cat and that Miss Kim Krause-Walker's statement of the same date states that "I have never ever seen any dog or cat coming from this flat but the strong smell of ammonia is unmistakable". She added that there were a number of statements, which she could not rely upon as they were written out of time. The leaseholders complained of the smell and plastic bags left in the common parts and some had lost rental income from tenants refusing to continue their tenancies.
9. She said that the Applicant had not granted consent for these pets and Connells could not produce evidence of such consent. In those circumstances the Respondent was in breach of clause 9 of the lease.

10. Ms Griffiths indicated that the Applicant would be seeking to recover the costs of these proceedings through the service charge. It was her view that that the lease entitled the Applicant to recover legal costs. She invited the Tribunal to consider exercising its power under schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002.
11. Ms Murphy submitted that the burden of proof is on the Applicant to establish that there has been a breach of covenant. She said that clause 9 of the lease is permissive and not an absolute prohibition and there was no evidence to say that permission had not been given, given that the tenants moved in in 2003; Trust Property Management began managing the premises in 2007 and Ms Griffiths in 2010, it was in her view conceivable that consent may have been given.
12. She submitted that the statements provided by the Applicant were insufficient to conclude that pets were kept on the premises given their content, there was conflicting evidence. Ms Walker complains of the smell of urine and Mr Mouny complains about the smell of excrement. She said that there was no evidence to suggest that the smells were caused by tenants' pets rather than arising from structural defects. There was no evidence that the tenants had pets. And as such the Applicants have failed to establish a breach.
13. Ms Murphy submitted that the Applicant is not entitled to recover legal costs or the costs of these proceedings under the terms of the lease particularly in the circumstances where Ms Griffiths has indicated that forfeiture proceedings will not be issued. She added that if costs were recoverable then it is the Respondent who should be entitled to recover them.
14. She submitted that the LVT can only order costs where one party has acted unreasonably under schedule 12 paragraph 10. In her view it was the Applicant that had acted unreasonably by pursuing this application when there are possession proceedings pending.

15. In determining the application, the Tribunal had regard to the law, the terms of the lease and submissions made. Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 states that “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 covenant or condition in the lease occurred.” Clause 9 of the Fourth Schedule to the lease states that the lessee covenants “Not to keep any bird reptile dog or other animal in the demised premises without the previous consent in writing of the Lessor....”
16. In support of the application, Ms Griffiths relied on the two statements from Ms Walker and Mr Mouny. From these statements and Ms Griffiths submissions, it was clear that there were numerous complaints about unpleasant smells emanating from the premises. Neither witness recorded that they had seen any pets belonging to the tenants. At its highest, Mr Mouny said that he had “heard” a dog and “seen” a cat. The cat seen was not expressly identified as belonging to the tenants. Ms Walker said that she had “never ever seen any cat or dog.” Whilst the statements complained of smells there was no evidence that these smells were caused by pets owned by the Respondent’s tenants.
17. In the light of the above, there was insufficient evidence upon which the Tribunal could safely conclude that a breach of covenant in the lease had occurred.
18. The Tribunal considered the Applicant’s application for costs under the terms of the lease and Schedule 12 paragraph 10. The Tribunal has limited jurisdiction to award costs and by virtue of Schedule 12 paragraph 10 can only do so only in the circumstances set out therein. The Tribunal is not satisfied that those circumstances have been made out and therefore declines to exercise its jurisdiction accordingly. The Tribunal considered the terms of the lease and found that there were no express provisions that entitled the Applicant to recover the costs of these proceedings through the service charge in the light of the fact that this application was not a prelude to forfeiture proceedings.

19. In the circumstances no order for costs was made.

Chairman Evis Samupfonda

Dated 13th June 2011