FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/34UF/LBC/2023/0005**
Property	**:**	**Flat 16 Denbeigh House, Hamblin Court, Rectory Road, Rushden, Northamptonshire NN10 0AT**
Applicant	**:**	**Warrenden Limited**
Representative	**:**	**Andrew Martin (Counsel)**
Respondents	**:**	**(1) Nathan Andrew Leigh** **(2) Matthew Richard Leigh**
Representative	**:**	**(1) Sarah Leigh** **(2) Unrepresented**
Type of application	**:**	**Determination of an alleged breach of covenant under section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal	**:**	**Judge K. Saward**
Date of hearing	**:**	**6 September 2024**
Date of decision	**:**	**9 September 2024**

DECISION AND REASONS

Decisions of the Tribunal

(1) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, the Respondents have breached Clause 2 and paragraph 5 of the First Schedule to their Lease (more particularly described below) by keeping a dog in the flat without the written consent of the lessor.

(2) The Applicant has not demonstrated that the Respondents have committed a breach of the aforesaid clauses to the Lease by keeping a dog in the flat which may cause annoyance to any owner or occupier of the other flats comprised in Hamblin Court.

REASONS

The Application

1. By an application dated 2 June 2023, the Applicant freeholder seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ('**the 2002 Act**') that the Respondent leaseholders are in breach of their lease of Flat 16, Denbeigh House, Rectory Road, Rushden, Northamptonshire ("the Property"). It is alleged in the application form that the Respondents are keeping a dog in Flat 16 without the written consent of the Applicant since at least 23 March 2018, in breach of paragraph 5 of the First Schedule to the Lease.

2. On 3 April 2024 the Tribunal gave Directions naming Nathan Leigh as the sole respondent. The Tribunal subsequently added Matthew Leigh as second respondent under rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"), and re-issued the Directions to all parties on 13 May 2024.

3. Those Directions highlighted how the purpose of the proceedings was not entirely clear if the First Respondent had, as indicated, admitted that he keeps his dog in the Property. The parties were encouraged to liaise and, if both agreed, they were invited to use the Tribunal's free mediation facility. In the Applicant's subsequent statement of case, it is stated that an Order of the Tribunal is needed determining that a breach has occurred in order for the Applicant to approach the County Court for enforcement by way of forfeiture of the Respondents' lease.

4. The Respondents did not provide a full statement in response to the application, as directed, or any witness statements. However, the First Respondent's sister alerted the Tribunal to health issues said to prevent participation by Nathan Leigh and set out a response on his behalf by email. These emails prompted a procedural application by the Applicant at the hearing as described below.

The hearing

5. The hearing took place remotely using the CVP platform.

6. The Applicant was represented by Andrew Martin (Counsel). Neither Respondent attended the hearing. The Tribunal had received advance notification that this would be the case from Sarah Leigh, the Respondents' sister from whom email submissions had been received. Ms Leigh attended the hearing.

7. At the start of the hearing, the Applicant opposed Ms Leigh representing one or both Respondents. Neither Respondent had provided written notice of her appointment as their representative, as required by Rule 14(2) of the 2013 Rules. By letter dated 11 June 2024, the Tribunal had required the Applicant to copy Sarah Leigh into correspondence and noted that written evidence was required of her appointment by the Respondents for her to be considered as such. The Applicant considered there to be no excuse for the omission of a letter of authority when the Applicant's solicitors had informed Ms Leigh of the requirement as early as 25 April 2024.

8. During a short adjournment, Ms Leigh produced a copy of a signed (but undated) handwritten letter of authority from Nathan Leigh consenting to her representing and acting on his behalf at the hearing. She also produced a copy GP's letter dated 2 May 2024 confirming the health issues relied upon by Nathan Leigh as the reason for his non-attendance. Having seen the handwritten letter, Mr Martin acknowledged that Ms Leigh appeared to have authority to act for Nathan Leigh and on that basis, he did not pursue the point further.

9. Whilst the letter of authority should have been presented much earlier, the Tribunal was mindful of Nathan Leigh's health considerations. Moreover, there was substantive compliance with Rule 14(2) albeit late in the process. Having regard to the overriding objective in Rule 3 to deal with cases fairly and justly, including ensuring that the parties are able to participate in the proceedings, the Tribunal permitted Ms Leigh to speak as the representative of Nathan Leigh.

10. Ms Leigh stated that she had been unable to contact Matthew Leigh. Whilst Ms Leigh said she had authority to represent him also, the Tribunal declined to treat her as his representative in the absence of any form of written confirmation.

11. The documents before the Tribunal comprised an Applicant's bundle of some 104 pages. During the course of the hearing, I received a 'skeleton argument' for the Applicant which had been sent to the Tribunal earlier in the week.

12. The Tribunal received three emails (sent on 5 and 6 June 2024 and on 12 August 2024) from Sarah Leigh responding to the application. The Applicant took issue with the production of these emails given that there was no formal statement of case or witness statement.

13. Nevertheless, the Applicant's solicitors were copied into each email. The first two emails were sent before the 26 June 2024 deadline for production of a Respondents' statement of case. Whilst the final email was sent outside that window, the Applicant's legal representatives had plenty of notice of the points therein. They were already aware that Nathan Leigh denied that the dog barks or is a nuisance to neighbours in any way from his email response (sent by Ms Leigh) to the Applicant's solicitors on 20 July 2022. This email is included within the Applicant's bundle. There can be no question of prejudice to the Applicant in all the circumstances. Recognising that the Respondents are without legal representation, the Tribunal has accepted the emails sent by Ms Leigh as forming the statement of case of Nathan Leigh.

14. Of course, Ms Leigh could not give witness evidence, but I invited submissions from her on the content of the emails already provided, taking a flexible approach to the conduct of proceedings in accordance with the overriding objective and Rule 3(2)(b). Such flexibility was appropriate in order to address imbalance between the parties, arising from the Applicant being represented by Counsel and the Respondents being without professional representation. However, I have disregarded points made by Ms Leigh which strayed into the giving of evidence.

15. Live evidence was heard from Anne Parsons of Northants Property Management Limited, who manage Hamblin Court on behalf of the Applicant. Mrs Parsons had provided a witness statement and answered questions from Ms Leigh and the Tribunal.

16. No inspection of the Property was requested, and the Tribunal did not consider that one was necessary to determine the issues.

Agreed Facts

17. The First Respondent owns a 'Staffy' (short for 'Staffordshire Bull Terrier'), which lives with him in the Property.

18. At the outset of the hearing, Ms Leigh admitted on behalf of Nathan Leigh that the dog has been kept in the Property since July 2014 and it remains there. Written consent to keep the dog in the Property has never been obtained.

The Lease

19. The lease to the Property was granted on 16 May 1990 for a term of 125 years from 22 December 1989. The Respondents became the registered proprietors of the leasehold interest following assignment of the lease to them on 4 June 2014. The Property is a one-bedroom, second (top) floor flat within a purpose-built block of 22 flats. It is located on a development known as Hamblin Court comprising a mix of 72 flats and 7 shops within five separate blocks arranged around a car park and courtyard. The lease of Flat 16 includes one parking space.

The Issues

20. The issue to be determined in this case is whether there has been a breach of covenant of clauses contained within the lease. That requires consideration of:

    (1) Are the clauses relied upon by the Applicant within the lease of the Property?
    (2) What are the facts giving rise to the claimed breach or breaches?
    (3) If proven, do those facts constitute a breach of the lease

21. The Tribunal is not concerned on this application with the seriousness of any breach, whether it has been remedied or whether any right to forfeiture for any breach was waived by the Applicant. These would all be matters for the County Court if the Applicant makes a separate application for forfeiture of the Lease following service of a notice under section 146 of the Law of Property Act 1925 in reliance on any breaches found by the Tribunal.

22. The burden of proof is on the Applicant to establish the facts and that these constituted a breach of the leaseholder's covenants. The alleged breaches are in respect of the obligations on the part of the leaseholder:

    Under **clause 2**, the lessee covenants to observe the restrictions set out in the First Schedule.

    Paragraph 5 of the First Schedule imposes a restriction on the lessee "*..not to keep in the Flat or outside any bird dog or other animal which may cause annoyance to any owner or occupier of the other flats comprised in Hamblin Court and in any event not to keep any dog cat or other animal in the Flat without the written consent of the Lessor which consent may be revoked at the discretion of the Lessor*".

23. Before presentation of the Applicant's case, I sought clarification of the basis of claim given that the application form identified the breach solely as the keeping of a dog in the Property without written consent. Once the statement of case was filed the Applicant added issues alleging

that the dog was causing a "nuisance". It was confirmed that the Applicant argues breaches both from the unauthorised keeping of the dog and from the dog causing "annoyance".

24. As emphasised at the hearing, the Tribunal is not being asked to rule on whether the dog can stay or must go, nor can it do so. Its focus is on establishing whether there is any breach of covenant from the keeping of the dog at the flat.

The Law

25. The material provisions of section 168 of the 2002 Act state:

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 for a determination that a breach of a covenant or condition in the lease has occurred.

26. As made plain by the Court of Appeal in *Eastpoint Block A RTM Company Limited v Otubaga* [2023] EWCA Civ 879, an application to the tribunal under section 168(4) is not itself an application for forfeiture of the lease. A determination under section 168(4) is no more than a declaration of whether a breach has taken place. If a declaration of breach is made, any proceedings for forfeiture or any other remedy must be pursued, if at all, in the county court. Furthermore, whilst section 168(4) may be a step towards forfeiture, that is not its sole function. The applicant is doing no more than seeking to obtain a determination by a specialist tribunal that may be used for a number of

purposes, including (but not limited to) the service of a notice by the landlord under section 146.

The Applicant's case

27. In summary, the Applicant says that the Respondents have kept, and continue to keep a dog in the Property. It is not only a dog that "may cause annoyance" but is one that has actually caused, and continues to cause, annoyance to the owners and occupiers. It barks. It defecates in communal areas of Hamblin Court and the Respondents have not cleared up after it. It also consistently urinates on the landing and stairwell areas within Denbeigh House as illustrated in photographs, resulting in specialist cleaning services being brought in on six occasions since 14 November 2023, with further urine patches evident the day after the last clean on 24 April 2024. This has been at a cost to all the other leaseholders on each occasion.

28. Even if the Tribunal did not find that the dog is one that may cause annoyance, the Applicant has never given written consent to keep it.

29. It was the evidence of Mrs Parsons that she has worked for Northants Property Management Limited as a PA and Property Co-ordinator since July 2020. During this time, Mrs Parsons stated that leaseholders in both Denbeigh House and Hadleigh House have contacted her regularly to complain that the First Respondent has a dog and about it barking.

30. Two or three tenants who have seen that Nathan Leigh keeps a dog have in turn bought a dog as a pet. On each occasion the dog has been removed once the leaseholder has been informed that dogs are not allowed.

31. Mrs Parsons describes the dog as "a complete nuisance if I see it". She has never seen it on a lead, and it gets in the way and under her feet. In oral evidence Mrs Parsons added that the dog goes around her legs and sniffs, which she dislikes even if the dog is harmless.

32. On 14 April 2022, a resident found a poo bag left by Nathan Leigh on the external step of the entrance to Denbeigh House. On many occasions, Nathan Leigh has allowed the dog to foul on the grassed area outside Hadleigh House without cleaning up after. The cleaner and residents complain that dog mess has been walked through the hallway and stairs of Hadleigh House.

33. On one occasion captured on CCTV when the dog urinated inside, Nathan Leigh is seen kicking the dog to reprimand it and rub/brush the urine with his training shoe into the carpet. The rubber stair treads are visibly wet. Another resident walked through the urine seconds later. Residents say the urine has a strong stringent smell.

The Respondents' case

34. The Respondents position is that Nathan Leigh (the First Respondent) has had his dog with him ever since July 2014. When he first moved in "loads of residents" had dogs. It was never an issue until 2018/19 when the previous managing agents wrote to Nathan Leigh "a couple of times" regarding his dog. After Ms Leigh telephoned to explain the situation and reason for Nathan Leigh keeping the dog, they heard nothing further and assumed matters were resolved. At the hearing, Ms Leigh confirmed that the letters concerned are those produced by the Applicant from Michael Charles Chartered Surveyors dated 23 March 2018, 8 May 2018 and 25 July 2019.

35. Suddenly, a letter was received from the Applicant's Solicitors in January 2021. Ms Leigh replied by email. Another Solicitors letter was received July 2022 to which Ms Leigh again replied. There was no response until a further Solicitor's letter came in February 2023. Ms Leigh responded with doctors' letters explaining Nathan Leigh's health issues. Nothing further was heard until April 2024.

36. As the dog is a Staffy, it is submitted that it is a breed which does not bark. The First Respondent maintains that the dog is well behaved and loved by the residents. No-one would know the dog is in the flat.

37. It is acknowledged that the dog unfortunately urinated on the stairwell in the communal area once whilst being taken out and Nathan Leigh forgot to clean it up. This had never happened before. Mrs Parsons has not provided any evidence that dog poo has not been picked up. The content of Mrs Parsons witness statement is disputed.

38. Nathan Leigh wants to sell the Property but claims to be prevented from doing so due to the roof leaking with water coming into the flat each time it rains and causing damp. There is said to be an ongoing dispute with the Applicant on this matter.

39. The dog is now 10-years old and has been at the flat for 10 years. It is queried why action is being taken now. It is submitted that the managing agents have always known the dog was at the Property.

40. It is maintained that a neighbour from Hamblin Court only complained to the managing agents because he got a dog himself and was asked to remove it, having only recently moved in. Once the circumstances were explained to him, he completely understood.

41. Details are given of Nathan Leigh's health and personal circumstances. As personal data, the particulars are not recorded in this Decision.

The Tribunal's determination

42. The Tribunal is required to determine the question of whether there has been a breach of covenant on the civil standard of proof, i.e., on the balance of probabilities.

43. A main strand of the First Respondent's case is the reasonableness of the Applicant seeking to rely on the restriction upon keeping a dog given the lapse of time, and his attachment to the dog along with the benefits to his well-being. Whilst the Tribunal can empathise with his personal circumstances, these are not arguments that can influence my findings on whether a breach of covenant has occurred as a matter of fact. Nor can disputes on other issues, such as the condition of the roof.

44. Arguments over the landlord being aware of the dog, and not pursuing action after an explanation was provided may potentially raise a defence that a breach of covenant has been waived. The Tribunal is mindful that there is a distinction between whether (i) a covenant has been waived, and (ii) whether the right to forfeit for a particular breach of covenant has been waived. The Upper Tribunal in *Bedford v Paragon Asra Housing limited* [2021] explained at paragraph 28 that: "Before the right to forfeit for a breach of covenant can be waived, it is necessary that a breach of covenant must first have been committed. It is the determination of that prior question which has been allocated by statute to the FTT [First-tier Tribunal]."

45. In *Bedford*, it was noted that the Upper Tribunal had previously refused in *Tripelrose Ltd v Patel* [2018] UKUT 374 (LC) to determine whether a landlord had waived any breach of covenant by accepting ground rent and service charge, explaining [at paragraph 22]:

> "Whether that is correct or not is not in issue in these proceedings. Neither the FTT nor this Tribunal is concerned with whether there has been a waiver of any breach of the covenant. If, as I will have to consider shortly, there has been a breach of covenant the Tribunal's function is to make a determination to that effect. It would then be a matter for the landlord to consider whether it wished to pursue proceedings for forfeiture and only at that stage would the issue of waiver become a live one before the County Court."

46. At paragraph 31 of *Bedford*, it is recognised that: "Exceptionally, there are circumstances in which it is necessary for the FTT to determine whether a breach of covenant has been waived in order to determine some other question." The example provided is where a landlord seeks to rely on a tenant's contractual obligation to pay costs incurred by the landlord in taking steps in contemplation of forfeiture. In that scenario, it may be necessary to determine if opportunity to forfeit existed at the time the costs were incurred.

47. In this case, the Tribunal does not need to determine whether a breach of covenant has been waived in order to decide the question before it. Accordingly, I do not address arguments relevant only to the issue of possible waiver.

48. In essence, there are two limbs to the relevant part of paragraph 5 of the First Schedule: (1) whether a dog has been kept in the Property "which may cause annoyance to any owner or occupier of the other flats comprised in Hamblin Court", and (2) whether a dog has been kept in the Property "without the written consent of the Lessor".

49. The first limb of the covenant refers only to the "annoyance" of other residents. The wording does not require actual annoyance to occur, only that annoyance *may* be caused. The word "annoyance" is potentially very broad. Self-evidently the keeping of a dog "may cause annoyance" for any manner of reasons. It is appropriate to consider the covenant in terms of whether reasonable, sensible people would be annoyed by the keeping of the dog in the individual circumstances. Indeed, as Mr Martin accepted, it is well established by caselaw that an objective test of reasonableness and commonsense should apply in the interpretation of such a restrictive covenant.

50. The Applicant's statement of case says the dog is causing a "nuisance" to the other leaseholders. Mrs Parsons similarly describes the dog as "a complete nuisance" in her witness statement, reflecting references to a "nuisance" throughout the Applicant's bundle including correspondence from its Solicitors on 25 April 2024 and 22 May 2024. However, the covenant is not directed at "nuisance", only "annoyance". They are not the same. "Annoyance" is recognised as a wider term than "nuisance". Whilst a nuisance may also be an annoyance, but it does not automatically follow that the terms are synonymous in this case, as I am so invited to conclude by the Applicant.

51. The Applicant asserts that not only may annoyance be caused but has actually occurred and continues. The Applicant has the burden of proof and that requires evidence of sufficient standard before the conclusion can be drawn of a breach of covenant.

52. Much in the same way that the Applicant claims that their witnesses refused to participate for fear of repercussions from Nathan Leith, Ms Leith suggested that his witnesses did not wish to upset the managing agents.

53. When Mrs Parsons was asked about the dog barking, she said she just took the residents word that it barked. Her initial response was that she could not be sure how often complaints about barking were received. Upon my seeking clarification, she thought it was "maybe once every couple of months".

54. None of the complaints received had been logged. In consequence, Mrs Parsons' evidence of the frequency and nature of complaints was vague and generalised. She said that 3 residents of Hadleigh House and 3 from Denbeigh House had complained about a dog being kept by Nathan Leigh. As described, it strikes me that the complaints were not necessarily annoyance that Nathen Leigh was keeping a dog in the flat, but other residents being aggrieved that they had not been allowed to keep their own dog.

55. It is undisputed that a poo bag was left on the external step of the entrance into Denbeigh House on 14 April 2022. As far as Mrs Parsons was aware it had not happened before or since.

56. It is further undisputed that the dog urinated inside the internal stairwell on one occasion. This was captured on video with poor quality 'stills' provided in the bundle. Mrs Parsons says the dog had urinated in internal communal areas 14 times since November 2023 up to the time of writing her statement requiring attendance by cleaning contractors on six occasions. It emerged that Mrs Parsons was reporting what she had been told about the dog urinating by un-named persons on unspecified occasions.

57. Three invoices are produced from a cleaning contractor from November and December 2023 and March 2024. Two refer to "carpet clean to 1st floor landing" and the third to "carpet clean to floor areas". The invoices do not give any information on the cleaning undertaken or the instructions provided. It cannot be gleaned from the invoices why the cleaning was undertaken and if it arose due to the dog or from other causes or reasons. A grainy monochrome image of a carpet stain said to remain after the last clean does not demonstrate that the dog had urinated in the hallway again.

58. Two photographs are supplied of the dog defecating in the outside communal area. Whilst it is asserted that the Respondents have not cleared up after it "on many occasions", there is no evidence or records of any form to support this. Nor is there anything to verify that residents have trodden in dog faeces. The absence of supporting evidence is material because, as Mrs Parsons explained, she is not at Hamblin Court and relies upon what people tell her when they phone up. As no records have been kept of any kind, it was wholly unclear who the complaints were from, what about or how often they were made. Just because a complaint is made does not mean that it is accurate or justified. Moreover, without knowing details, it cannot be gauged if the person making the report was 'annoyed' because of the dog.

59. It was indicated that Mrs Parsons had more information that may have assisted the Tribunal, yet it was not produced.

60. Mrs Parsons own experience of finding the dog a "nuisance" is not the evidence of an owner or occupier of another flat. There is nothing to say residents share that view. I am not swayed that a hypothetical reasonable person living in Hamblin Court would feel *annoyance* by encountering the dog as so described by Mrs Parsons.

61. Furthermore, I am not satisfied that a reasonable, sensible person would be annoyed by a poo bag being left outside the building on an isolated occasion. Nor by the dog urinating inside (with the carpet cleaned) on a single occasion, being the extent to which it is evidenced to the requisite standard.

62. There were letters sent by the managing agents to Nathan Leigh about the keeping of his dog from as early as March 2018. Notably, neither those letters nor the Solicitors letters mentioned anything other than a breach by the keeping of the dog until after the issue of these proceedings. The first time a "nuisance" appears to be alleged in correspondence to the Respondents is from May 2024.

63. Whether the keeping of a dog "may cause annoyance" concerns what may happen in future. In judging that, it is appropriate to consider what has happened in the past. There would be no purpose to the first limb of the covenant if it did not involve a consideration of the circumstances given that the second limb does not permit the keeping of a dog without written consent in any event.

64. Clearly, a dog barking, urinating in common internal areas, and faeces not being cleaned up, are all things capable of causing annoyance. However, on the balance of probabilities, I cannot be satisfied that there is sufficient cause to conclude that the dog in this case is one that may cause annoyance to the other residents. I am reinforced in that view from the Applicant's own communications to the Respondents having focussed, until recently, upon the keeping of the dog rather than incidents of annoyance.

65. The Tribunal therefore determines that no breach of paragraph 5 of Schedule 1 has been demonstrated in terms of the requirement not to keep a dog which may cause annoyance to any owner or occupier of the other flats comprised in Hamblin Court.

66. The position on the second limb is straightforward. Irrespective of my finding on the first limb, the wording of the covenant says "…. *and in any event* [*emphasis added*] not to keep any dog…. without the written consent of the Lessor….". Thus, it is clear that even when the keeping of a dog may not give rise to annoyance, written consent from the landlord to keep the dog in the flat was required. No written consent was obtained. It follows that there is a breach of Clause 2 and paragraph 5 by keeping a dog in the flat without the landlord's written consent.

67. Whether the breach has been waived by the landlord will be a matter for the Court should further proceedings be instigated.

68. For the avoidance of doubt, this decision is not an order to remove the dog from the flat. It is a determination that the keeping of the dog without the landlord's written consent is a breach of covenant within the lease.

69. No application for a refund of fees was made.

Name: Judge K. Saward Date: 9 September 2024

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).