FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/45UH/LBC/2019/0012**
Property	**:**	**Flat 7, 85 Marine Parade, Worthing, West Sussex BN11 3QF**
Applicant	**:**	**Francham Estates Ltd (Landlord)**
Representative	**:**	**Mr B Maltz of Counsel**
Respondent	**:**	**Dr R Melsom (Tenant)**
Representative	**:**	**Mr P Harrison of Counsel**
Type of Application	**:**	**Breach of covenant**
Tribunal Members	**:**	**Judge F J Silverman Dip Fr LLM** **Mr N Robinson FRICS**
Date and venue of Hearing	**:**	**Havant** **11 October 2019**
Date of Decision	**:**	**14 November 2019**

DECISION AND ORDER

Decision of the Tribunal

The Tribunal determines that the Respondent Tenant is not in breach of covenant under the terms of her lease.

The Tribunal makes an order in favour of the Respondent under s20C Landlord and Tenant Act 1985.

Reasons

1 The Applicant landlord sought a declaration from the Tribunal that the Respondent tenant was and remained in breach of the covenants of her lease. Directions were issued by the Tribunal on 23 May and 03 June 2019.

2 The matter was heard by a Tribunal sitting in Havant on 11 October 2019 at which the Applicant was represented by Mr B Maltz of Counsel and the Respondent by Mr P Harrison of Counsel.

3 The Applicant landlord is the freeholder of the building known as 84 and 85 Marine Parade Worthing West Sussex BN11 3QF (the building) of which the Flat 7, the penthouse flat (the property), occupies most of the roof area.

4 The Respondent is the tenant of the property.

5 The lease under which the Respondent holds the property is dated 24 February 2006 (the lease) (page 104) and was made between Lorenz Denney (1) and Heinrich Gunter Philipp (2).

6 The Tribunal inspected the property on the morning of and immediately before the oral hearing. The property comprises a self-contained flat on the roof of a pair of converted six storey Victorian terraced houses facing the sea-front in Worthing. The exterior and common parts of the building are in good condition. Access to the property is through the main front door of 84 Marine Parade (shared with other leaseholders) and up four carpeted staircases, the uppermost one being set behind the front door to the penthouse flat and is exclusively used by that property. The property comprises a small rear facing galley kitchen, two en suite bedrooms and a main living area with double glazed full length doors opening on to a small roof terrace overlooking the sea. The Tribunal understands that the roof terrace is normally covered in removable rubber tiles some of which had been lifted at the time of the Tribunal's visit to allow inspection of the roof covering. Four patched areas of asphalt were visible on the roof surface together with a circular mark where a further potential inspection hole may have been intended but had not been executed. The exposed surface of the roof was in a poor condition with water was pooling towards but not directly in line with the exit drain area. The lead flashing which protected the joins between the

roof edge and walls of the building was not well sealed. The front of the terrace area is protected by a waist high parapet wall. The weather at the time of inspection was inclement with heavy rain with high winds.

7 The Applicant alleged that the Respondent's failure to repair the roof, contrary to the duty said to be imposed on her by the repairing covenants in the lease, had caused damp to penetrate into two flats on the floor below. The Respondent denied that the roof was a part of her demise or that the repairing covenants in the lease extended to the repair of the roof or that the Applicant had established any causation between the state of the roof and the water penetration suffered by the other flats.

8 For the Applicant the Tribunal heard from Mr Coleman, a surveyor, who presented his evidence to the Tribunal as an expert. Mr Coleman's witness statement failed to include an expert's declaration in the mandatory form of wording prescribed by the RICS (page 71). He accepted that he had altered a paragraph of his witness statement (page 68) after having discussed its content with the Applicant's solicitor. The Tribunal had reservations concerning Mr Coleman's partiality because he had not only prepared the specification of major works (including roof repairs) recently effected by the Applicant, he had also been responsible for overseeing those works as contract administrator and had accompanied and supported the Applicant during the course of a meeting with the Respondent which sought to persuade the Respondent to pay for new patio doors in exchange for a concession on the service charges relating to the roof repairs (page 178). It was the Tribunal's view that these factors created a conflict of interests. Given the above facts the Tribunal told Mr Coleman that they could not accept his evidence as an expert witness but would regard it as being evidence given on behalf of the Applicant.

9 The Tribunal had noted from its inspection that the four main areas of softening to the decking abutted the parapet walling and on questioning Mr Coleman ascertained that the majority of the parapet wall internal face had been re-rendered, including with new flashings. It seemed to the Tribunal that the defects to the decking could have been at least partly attributed to the previous condition of the parapet render and flashings although Mr Coleman was not able to agree this.

10 Having completed Mr Coleman's evidence and after an adjournment the Applicant invited the Tribunal to find that no breach of covenant had occurred and conceded to the Respondent's request for an order under s20C Landlord and Tenant Act 1985. Both parties recognised that the present situation had arisen in part because of ambiguities in the drafting of the lease and in order to prevent future disputes asked the Tribunal to provide a fully reasoned decision which the Tribunal agreed to do.

11 In reaching a decision that there had been no breach of covenant, a conclusion which, as noted above, the parties had themselves reached after

hearing Mr Coleman's evidence, the Tribunal needed to consider three main areas: firstly, whether the roof had been demised to the Respondent or remained as part of the structure and exterior under the Applicant landlord's ownership; secondly, whether the covenants contained in the lease imposed a repairing obligation on the Respondent in respect of the roof and thirdly, whether the disrepair of the roof was the cause of the water ingress into the flats on the floor below.

12 Clause 1(3) of the lease refers to a definition of 'demised premises in the First Schedule which defines the Property as including:

"*(a) The internal plastered coverings and plaster work of the walls bounding the Flat and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such doors door frames and window frames) and the glass fitted in such window frames and….*

(c) The plastered coverings and plaster work of the ceilings and the surfaces of the floors including the whole of the floorboards and supporting joists (if any)" and …
(e) All fixtures and fittings in or about the Flat and not hereafter expressly excluded from the demise…

(f) Any balcony from the premises to which the Tenant has exclusive access

But not including:
(i) *Any part or parts of the Building other than any conduits expressly included in this demise) lying above the said surfaces of the ceilings or below the said floor surfaces…..*"

13 The issue is however, complicated by the physical structure of the roof itself which, as described by the parties and confirmed on inspection, is made up of three layers. The top layer comprises removable rubber tiles which formed a protective layer above the roof structure. Both parties appeared to agree that this layer belonged to the tenant. The second layer was the roof terrace itself which had been constructed on top of the original roof but with a void between them. The original roof (ie that which had existed prior to the conversion of the building and creation of the penthouse flat) comprised the third layer, the underside of which formed the ceilings of the flats on the floor beneath.

14 In construing the wording of a lease regard needs to be paid to Lord Neuberger's comments in ***Arnold v Britton*** **[2015] UKSC 36** where he set

out six matters pertinent to the assessment of the meaning of the relevant words:

- The natural and ordinary meaning of the clause;
- Any other relevant provisions of the lease;
- The overall purpose of the clause and the lease;
- The facts and circumstances known or assumed by the parties at the time that the document was executed; and
- Commercial common sense,
- But, disregarding subjective evidence of any party's intentions.

15 Construing the wording of the lease as drafted the Tribunal concludes firstly, that the roof terrace cannot reasonably be called a 'balcony' within sub-clause (f) above of the lease, and secondly, that nothing in the above wording suggests that any part of the roof structure was intended to be demised to the tenant. To hold otherwise would create and anomalous and commercially unworkable situation where one tenant was responsible for the upkeep of the entire roof of the building. The landlord would thereby have demised and have lost control over a major part of the structure which could effectively prevent him from being able to comply with his own repairing covenants and obligations to other tenants in the building.

16 The Tribunal adopts the reasoning in ***Ibrahim v Dovecorn Reversions Ltd*** **[2001] 82 P. & C.R. 28**, as authority for the proposition that the roof terrace should be considered to form a part of "the main structure" of the building and therefore fall with the Applicant's repairing obligation. In that case it was held that only the surface area of the fixed floor tiles were demised to the tenant. In the present case the Tribunal considered whether the same rationale should apply with the Applicant assuming the ownership and repairing obligations for the removable rubber tiles covering the terrace and the other two layers of the roof being regarded as part of the structure of the building, with ownership and repairing obligations remaining with the Respondent landlord. However, we do not know what type of tiles were used in the Ibrahim case and the division of ownership and responsibility could lead to new difficulties. In the present case it appears that the main purpose of the removable layer of tiles is to protect the relatively delicate surface (and much more delicate than the asphalt used in the Ibrahim case) of the landlord's roof from damage and it could be considered unreasonable to impose on the tenant any responsibility of repair for an item from which the landlord derives the main benefit. Taking these matters into account, the Tribunal's view is that the facts of this case are sufficiently different from those in Ibrahim to allow the Tribunal to distinguish it from Ibrahim and to find that the ownership, and thus responsibility for repairs of all three layers rests with the Applicant landlord.

17 A further difficulty remains in respect of the replacement of the patio doors the ownership of which is undisputedly vested in the Respondent tenant but which the landlord requires to be replaced and effectively shortened in order to undertake the terrace covering replacement to a proper standard,

enabling a higher upstand to the terrace membrane and thus reducing the risk of water penetration at this point. While normally the cost of this replacement would fall on the tenant, in the circumstances of this case and in particular the fact that the patio doors are not currently out of repair, the Tribunal considers that the cost of the replacement should be borne by the Applicant landlord and chargeable through the service charge.

18 The Tribunal also took into account the fact that before her acquisition of the property the Respondent had sought advice about the responsibility for repair of the roof and had been told that it did not fall within her liabilities (pp 152 et seq. pp 181-2). Further, there was strong evidence that until recently the Applicant had always regarded the roof area as being part of its responsibility, had effected repairs to it and had charged for and recovered the costs of works to the roof from all the tenants as part of the service charge. The recent major works programme prepared by Mr Coleman on behalf of the Applicant had included repairs to the roof within the works schedule (p. 171) although ultimately those repairs had not been carried out leaving the roof in its current state of disrepair.

19 For the sake of completeness the Tribunal went on to consider both the extent of the repairing covenants in the lease and causation.

20 The lease sets out the tenant's repairing obligations as follows:

> [clause 4(1) of the Lease [p.106]]
>
> to "*Repair maintain renew uphold and keep the Demised Premises and all parts thereof including so far as the same form part of or are within the Demised Premises all windows glass doors…locks fastenings and hinges sanitary water gas and electrical apparatus and walls and ceilings drains pipes wires and cables and all fixtures and additions in good and substantial repair and condition…*"

21 By way of comparison clause 5(4)(a) of the Lease [p.107] sets out a covenant by the landlord :

> "*To maintain and keep in good and substantial repair and condition:*
>
> (i) *The main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof….(other than those included in this demise or in the demise of any other flat in the Building)…*"

22 It is clear from the landlord's covenant (Clause 5(4)(a)) that the landlord is bound to maintain and keep in repair, inter alia, the roof of the building; whereas the tenant's obligations in Clause 4(1), while being quite specific about the repair of such matters as windows, glass doors, drains, pipes, wires, and cables (matters often reserved to a landlord's covenant) omits any reference to an obligation to repair the terrace or roof. The repair of these last two items could impose a considerable

burden on the person with the responsibility for their upkeep and it is considered by the Tribunal to be unlikely that the draftsman of the lease would have failed to include express wording relating to these two items in the repairing clause had it been intended to pass these obligations to the tenant.

23 Taking into account the wording of both reciprocal clauses, the Tribunal finds that the tenant's repairing obligation as drafted cannot be interpreted to include the repair of the roof of the building which remains the responsibility of the Applicant landlord.

24 The final item for the Tribunal's consideration is the question of causation. Even if the roof structure were considered to be within the tenant's demise and if the tenant's repairing covenant were construed to impose a repairing covenant on the Respondent as part of the tenant's obligations, the Applicant would still need to establish that the water damage of which they complained had been caused by a breach of the tenant's repairing obligations.

25 In this respect the evidence before the Tribunal was straightforward. Mr Coleman, the Applicant's surveyor, was unable to say that the water ingress into flat 6 had been caused by disrepair to Flat 7's terrace (page 209) and said that there was no water ingress into Flat 5 (page 208). When questioned by the Tribunal he agreed that water penetration could have occurred through the parapet wall which formed the perimeter of the terrace at the front of the building.

26 The Tribunal concludes therefore, that the Applicant failed to prove any causal link between the alleged damage and a purported breach of covenant by the Respondent.

27 The Applicant conceded to the Respondent's application for an order under s20C Landlord and Tenant Act 1985 which order is made by the Tribunal in favour of the Respondent Dr Melsom.

The Law

28 **Commonhold and Leasehold Reform Act 2002 s 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 a leasehold valuation tribunal for a determination that a breach of a covenant or 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.

Section 20C Landlord and Tenant Act 1985

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2)The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Name: Judge F J Silverman as Chairman **Date:** 14 November 2019

Note:
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.