FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/LBC/2021/0008**
HMCTS Code	**:**	**P: CVPREMOTE**
Property	**:**	**GFF, 26a Bournevale Road, London, SW16 2BA**
Applicant	**:**	**Mr Ian Carrington**
Representative	**:**	**Miss Mattsson of Counsel**
Respondent	**:**	**Ms Johanna Rosin Byrne**
Representative	**:**	**N/A**
Type of Application	**:**	**Determination of an alleged breach of covenants**
Tribunal Members	**:**	**Tribunal Judge I Mohabir** **Mr T Sennett MA FCIEH**
Date of Decision	**:**	**10 May 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing, which has been consented to by the parties. The form of remote hearing was V: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Introduction

1. Unless stated otherwise, the page references in this decision are to the evidence found in the Applicant's expert report [EP] and the Respondent's statement [RS].

2. This is an application made by the Applicant under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") for a determination that the Respondent has breached various covenants and/or conditions in her lease.

3. The Respondent is the leaseholder of the property known as Ground Floor flat, 26a Bournevale Road, London, SW16 2BA ("the property") pursuant to a lease dated 5 February 1982 ("the lease"). The property is one of 2 residential flats in a converted house arranged over three floors. The Applicant and the Respondent are the current lessor and lessee respectively.

Lease Terms

4. Clause 3 of the lease provides:

> The Lessees with the intent to bind so far as may be the flat and all persons who shall for the time being be the owner of any estate or interest in or the occupier of the flat or any part thereof (but save as hereinafter provided not so as to be personally liable under this clause after the Lessee shall part with all of their estate and interest in the flat) hereby covenants with the Lessor and as a separate covenant with the Lessee of the other flat forming part of the said property (all of whom the Lessor and the said Lessee hereinafter collectively called the covenantees). For the benefit and protection of the property respectively vested in the covenantees and each and every part thereof from time to time and at all times hereafter:
>
> 1. To put and keep and maintain the flat at every part thereof in good and substantial repair order and condition generally and in particular as respects the structure, decorative condition cleanliness and tidiness thereof and without prejudice to the generality of the foregoing to keep and maintain such state of repair order and condition all floors floor joists walls pipes drains conduits wires and cables as form part of the flat provided that before carrying out repairs to any joists or beams to which is attached the laths and plaster or plasterboard or any non-structural material forming the ceiling of the

flats or repairs to any other part of the flat the carrying out of which requires access or occasional inconvenience to any other flat forming part of the said property the Lessee shall (except in the case of emergency) give not less than 7 days' notice in writing to the occupier or occupiers of the said other flat or flats of the lessee intention so to do and in carrying out any of the said repairs, the lessee shall take all reasonable steps and precautions so as to cause as little damage disturbance and inconvenience as possible to the occupier or occupiers of such other flats and shall make good all the damage done thereto.

2. Without prejudice to the foregoing covenant

a. Once in every three years of the said term and in the last year thereof (where the term shall be determined by effluxion of time or in any other way) to paint all of the outside wood and iron work stucco rendering or cement work and other outside parts of the flat previously or which ought to be painted with two coats at least of proper oil colours or cement paint (as the case may require) in a proper and workmanlike manner in such colour or colours as may be agreed between the lessee and the covenantees other than the Lessors or in default of agreement in the same colour or colours as the same were previously painted or as near thereto as practicable.

b. Once every seven years of the said term and in the last year thereof (whether the term shall be determined by effluxion of time or in any other way) to paint with two paints of good oil and white lead paint with suitable quality paper grain varnish whitewash and colour all of the inside parts of the flat and any additions thereto hereto for or usually papered painted grained varnished whitewashed and coloured.

3. To permit the covenantees or any of them and their respective agents or surveyors with or without workman and others at all reasonable times on 48hours notice in writing (except in the case of emergency) to enter into and upon the flat and any part thereof the purpose of:

a. Viewing and examining the state and condition thereof for the purpose of the covenants and provisions herein contained; or

b. Repairing the other flat forming part of the said property or other part of such flat and for the purpose of making repairing inspecting cleansing renewing and testing all pipes drains wires conduits flues chimneys and chimney stacks serving the other flat and for similar purposes. However that the works repair inspection and cleansing shall be carried out with all despatch causing as little disturbance as possible and the person or persons who exercise the right hereby converge that at their expense make good all damage done to the flat as expeditiously as reasonably possible in carrying out the same and to all decorations, and moveable chattels therein.

Clause 2 of the lease provides:

The Lessees hereby COVENANT with the lessors as follows:
(1) …
(2) …
(3) To do and execute or cause to be done and executed during the said term all such works as under or by virtue of any Act or Acts of parliament for the time being in force are or shall be directed or necessary to be done or executed upon or in respect of the flat or any part thereof whether by the owner Landlord tenant or occupier and at all times to keep the Lessors indemnified against all claims demands and liabilities in respect thereof..

The Fourth Schedule in the lease provides:

(2) Not (save in the course of executing repairs pursuant to other provisions contained in the lease) to do or permit or suffer to be done on the flat or any other part thereof anything that may be or become a nuisance or annoyance or cause damage or inconvenience of the lessors or to the lessee or occupier for the time being of the other flat.

(10) Not to do or permit to be done any act of thing which may render void or voidable any policy of insurance on the said building or any part thereof or cause an increased premium to be payable in respect thereof.

5. In support of the application, the Applicant almost exclusively relied upon the uncontroverted expert report and supporting Schedule of Condition prepared by Mr Schendel MRICS of Select Surv Limited dated 10 July 2020 following an inspection of the property on 6 July 2020.

Decision

6. The remote video in this case took place on 9 March 2022. The Applicant was represented by Miss Mattsson of Counsel. The Respondent did not attend and was not represented although having been provided with the video link for the hearing. The Tribunal also attempted to contact the Respondent by telephone so that she could participate by way of a hybrid hearing without success. The Tribunal proceeded with the hearing on the basis that the Respondent was on notice as to the hearing and had, in any event, filed the evidence on which she relied upon.

7. By way of background, the Applicant gave evidence that that the property was deemed uninhabitable by the Council approximately 3 months earlier, which resulted in the Respondent's tenants vacating the property. Furthermore, the Respondent appealed a prohibition notice issued by the Council to the Tribunal, which was dismissed (LON/00AY/HIN/2021/0012).

8. The Tribunal gave careful consideration, in particular, to the findings in the expert report of Mr Schendel and the written statements of the

Respondent. It is important to note that, whilst the Respondent appears to have an architectural qualification, she is not a qualified Surveyor and is, therefore, unable to properly comment on the findings in the report of Mr Schendel nor can the various assertions made by her in her witness statement about the findings made by Mr Schendel be considered to be independent. Having done so, the Tribunal accepted the evidence of Mr Schendel and made the following findings.

9. The Respondent is in breach of the repairing and maintaining obligations in clauses 3(1) and (2) and paragraph 6 of the Fourth Schedule of the Lease as:-

(1) The front bay window is rotten and is not in good and substantial repair, order and/or condition [ER/18]. This is admitted by the Respondent [RS/point 1]. There was no evidence to support the Respondent's assertion that the damage was being caused by any subsidence.

(2) The structure and external walls are not in good and substantial repair, order and/or condition [EP18, 20-21, 25, 27-28], including:-

(a) The damp-proof course has failed allowing damp penetration;
(b) Gaps between plinth and bricks in the walls allow damp penetration. There was no evidence to support the Respondent's assertion that no damp proof course ever existed [RS/272/point 2(a)]. Indeed, her own evidence indicated otherwise with the presence of extensive damp throughout the property as long ago as August 1987 [RS/251].

(3) The rainwater fittings are not in good and substantial repair, order and/or condition, allowing damp penetration [ER/20]. This was conceded by the Respondent [RS/280/point 6].

(4) The sun room to the rear is not in good and substantial repair, order and/or condition, with the roof of the sun room allowing water ingress and rainwater fittings causing damp penetration [ER/21]. There was no evidence to support the Respondent's assertion that the water ingress was being caused by pipework from the Applicant's kitchen upstairs [RS/279/point 5]

(5) The rear gullies are blocked [ER/22]. This was not challenged by the Respondent in her witness statements.

(6) The external timber is not in good and substantial repair, order and/or condition [ER/18 and 28]. This was conceded by the Respondent [RS/249].

(7) The internal timber in the front bedroom is not in good and substantial repair, order and/or condition as a result of dry rot which is spreading [ER/22-24]. This was conceded by the Respondent [RS/249].

(8) The floors and walls in the kitchen and dining room are not in good and substantial repair, order and/or condition as a result of dry rot [ER/23-26 and 140]. This was conceded by the Respondent and there was no evidence to support her assertion that (part) of the cause of the damp was the shower on the opposite side of the party wall [RS/266].

(9) Electrical services are not in good and substantial repair, order and/or condition as a result of the moisture within the walls and may be in a dangerous state [ER/24 and 140]. There was no evidence to support the Respondent's bare denial that the electrical installation was compliant or that water damage to the pendant light in the conservatory room was being caused by the Applicant [RS/281].

(10) The walls in the bathroom are not in good and substantial repair, order and/or condition as the titles are loose and falling off [ER/25]. The Respondent's bare denial of the missing tiles [RS/281] was clearly untenable given the photographic evidence before the Tribunal.

(11) The ceiling and door frame into the sun room are not in good and substantial repair, order and/or condition as the ceiling has partially collapsed as a result of widespread rot [ER/26]. This is not specifically denied by the Respondent [RS/282/point 12]. She simply gives reasons for the disrepair being the result of vandalism and a pest invasion.

10. However, the Tribunal made no finding of breach in relation to the allegation that the pipework was not in repair. There was no such finding made by Mr Schendel in his report. His finding was limited to the condition of the guttering and no more.

11. It follows that the Tribunal also found that the Respondent is also in breach of paragraph 2 of the Fourth Schedule of the Lease as:-

(1) the Respondent has allowed the Flat to fall into a dilapidated state, including permitting dry rot to spread to the Upper Floor Flat and adjoining properties and that may be or become a nuisance or annoyance or cause damage or inconvenience of the lessors or to the lessee or occupier for the time being of the other flat.

(2) In addition, the Respondent has allowed Japanese Knotweed to grow in the garden that may be or become a nuisance or annoyance or cause damage or inconvenience of the lessors or to

the lessee or occupier for the time being of the other flat. The problems caused by this are a matter of common knowledge. The presence of Japanese knotweed is admitted by the Respondent [RS/243-247]. Furthermore, the Respondent has been aware of the problem since 2016 [RS/323].

12. It also follows that the presence of Japanese knotweed may render the buildings insurance policy void or voidable (see the policy wording at 'B' at page 167 of the Applicant's bundle). The Tribunal was, therefore, satisfied that the Respondent was in breach of paragraph 10 in the Fourth Schedule of the lease.

13. The Tribunal also found that the Respondent is in breach of Clause 2(3) of the Lease as:-

    (1) the front door does not comply with Fire Safety Regulations (see Applicant's bundle at page 364/item 5); and

    (2) the dry rot does or will soon render the Flat and the Top Floor Flat a "dangerous structure" under section 45 of the London Local Authorities Act 2000 and Part VII of the London Building Acts (amendment) Act 1939 [ER/27].

14. The Tribunal makes no finding that the Respondent is in breach of Clause 2(4) and Clause 3(3) by refusing to grant the landlord access to the Flat for inspections and to carry out repairs since July 2020. The limited evidence before the Tribunal does not demonstrate that the Respondent has been unreasonably refusing the Applicant access (see Applicant's bundle page 334). What the evidence demonstrates at best is access for a number of practical reasons has proved problematical from time to time.

Name: Tribunal Judge I Mohabir **Date:** 10 May 2022

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).