



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case References : **MAN/36UD/LBC/2022/0006**

Property : **Flat 1, Dunorlan, 2 Park Road,
Harrogate HG2 9AZ**

Applicant : **Dunorlan Freehold Association
Limited**

Representative : **Clarion Solicitors Limited**

Respondents : **Yoshiko Yatabe Urquhart**

Representative : **N/A**

Type of Application : **Application under section 168 (4) of
the Commonhold and Leasehold
Reform Act 2002**

Tribunal Members : **J A Platt FRICS, FIRPM
W Reynolds MRICS**

Date of Decision : **12 October 2022**

DECISION

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DECISION

The Tribunal finds that there have been breaches of covenant of clauses 3(c),(d),(f),(g),(i) and para 10 of 3rd Schedule of the lease of the Property for the purpose of section 168 of the Act.

Application

1. The Applicant, Dunorlan Freehold Association Ltd made an application under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 (“the Act”) for a determination that a number of breaches of covenant have occurred in the lease of the above Property. The Application is dated 11th February 2022.
2. Directions were issued on 6th June 2022. The Applicant has complied with those directions. The Respondent has not complied with the directions, has not engaged with the Tribunal nor provided any statement of case or witness evidence. On 22nd July 2022 the Tribunal wrote to the Respondent advising that unless a statement of case and supporting documentation were received by 5th August 2022 the Tribunal will proceed to determine the application upon consideration of the Applicant’s written submissions alone.
3. Neither party has requested a hearing and, in accordance with the Directions, the Tribunal considered the matters on the papers submitted by the Applicant.

The Lease

4. The Lease of Flat 1 Dunorlan is dated 19th October 1981 and is made between John Nichols and Audrey Pearson Nichols and Accorsi Urquhart and Yoshiko Yatabe Urquhart. The term of the lease is 999 years from 1st August 1980. The registered proprietor of the leasehold title is now Yoshiko Yatabe Urquhart.
5. The lease contains the following obligations on the part of the tenant:
 - i. Clause 3(c): *“to observe and perform the restrictions stipulations and conditions set forth in the Third Schedule hereto.”*
 - ii. Clause 3(d): *to keep the Flat and every part thereof (including floors) in good and tenantable repair and condition throughout the term hereby granted*
 - iii. Clause 3(f): *“to keep in repair and replace where necessary cisterns pipes wires ducts radiators and other things installed for the purpose of supplying water (cold or hot) gas electricity central heating or for the purpose of draining away water or sewage or for allowing the escape of steam or other deleterious matter from*

the Flat in so far as such things are installed for the purposes of the Flat”

- iv. *Clause 3(g): “to permit the Lessors and her duly authorised agents with or without workmen and others twice a year upon giving previous notice in writing at reasonable times to enter upon and examine the condition of the Flat and thereupon the Lessors may serve upon the Lessee notice in writing specifying any necessary repairs to be done and requiring the Lessee forthwith to execute the same and if the Lessee shall not within one month after the service of such notice proceed diligently with the execution of such repairs then to permit the Lessors to enter upon the Flat and execute such repairs and the cost thereof shall be a debt due to the Lessors from the Lessee and be forthwith recoverable by action.”*
- v. *Clause 3(i): “not to do or permit- or suffer to be done in or upon the Flat or the Retained Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessors or the occupier Of the Retained Premises or neighbouring owners or occupiers or whereby any insurance for the time being effected on the house and the Retained Premises or any of them of any contents thereof may be rendered void or voidable or whereby the rate of premium may be increased.”*
- vi. *3rd Schedule, para 1: “Not to use or suffer or permit the Flat to be used otherwise than as a private residential flat without the previous consent in writing of the Lessors.”*
- vii. *3rd Schedule, para 110: “Not to do or permit any act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessors or their tenants or the tenants or occupiers of the Retained Premises Or to the neighbourhood*

The Law

6. Section 168 (4) provides that 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 (which deals with the restriction on forfeiture of a Lease in respect of a breach by a Tenant of a covenant or condition in the Lease) unless subsection (2) of section 168 is satisfied.
7. Section 168(2) states that the section 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.

8. Section 168(4) states that a Landlord under a long lease of a dwelling may make an application to a First-tier Tribunal Property Chamber, (Residential Property) for a determination that a breach of covenant or a condition in the Lease has occurred.
9. For the purposes of deciding an application under this section of the Act, the Tribunal must decide whether there has been a breach of a covenant in the Lease, not whether, at the time of its determination, there is a continuing breach, or even whether there was a breach at the time of the application. See *Forest House Estates Ltd v Dakhil Allah R Al-Harathi* [2013] UKUT 0479 (LC); LRX/148/2012

Evidence of the Applicant

10. The Applicant avers the following breaches have occurred:
 - i. Failure to undertake required electrical re-wiring works at the Property in breach of clause 3(f) of the Lease;
 - ii. Failure to keep the Property in repair and to resolve leaks emanating from the Property and damaging the flats below in breach of clauses 3(d), 3(f), 3(i) of the Lease and paragraph 10 of Schedule 3 to the Lease;
 - iii. Failure to undertake required works to the door and glass dome to ensure that the same is compliant with Fire Safety in breach of clauses 3(d) and clause 3(i) of the Lease;
 - iv. Failure to cease operating a business from the Property in breach of paragraph 1 of Schedule 3 to the Lease; and
 - v. Failure to permit the Applicant and their duly authorised agents to enter upon and examine the condition of Flat 1 in breach of clause 3(g) of the Lease.
11. The Applicant's evidence includes copies of correspondence between the parties from 2017 onwards on alleged disrepair and other matters. The Applicant's solicitors issued 'letters before action' of forfeiture on 21st May 2021 ("the 21st May letter") and again on 10th January 2022 ("the 10th January letter") which led to several exchanges of correspondence between the parties, including a response from the Respondent on 22nd January 2022 ("the 22nd January letter") which indicates that the Respondent disputes some of the Applicant's history of events. The Tribunal has regard to the Respondent's letters presented in evidence by the Applicant but is mindful of the fact that the Respondent has provided no evidence to the Tribunal certified by a statement of truth.
12. The Tribunal considered the alleged breaches individually and summaries of the relevant evidence are included below.

Deliberations and decisions

Electrical services within Flat 1

13. In 2017, concerns as to the Health & Safety implications for the building arising from the occupation, use and state of repair of Flat 1 were raised by the Landlord. Those concerns received no response from the Tenant. As a consequence, the Landlord arranged an inspection by an electrical contractor, following which the Respondent was advised in 2017 that electrics in three rooms were not working due to a break in a live electrical circuit. The Respondent was asked to take urgent remedial action but failed to do so. The Applicant has provided copies of letters sent to the Respondent over a protracted period of time requesting that the work be undertaken and offering assistance by organising estimates and entering into an agreement with the Respondent on 21st March 2018, to assist by arranging for room-by-room clearance to facilitate the required electrical works.
14. A subsequent inspection by the Landlords contractor on 29th March 2018 was nevertheless frustrated by the quantity of personal belongings and furnishings still present within Flat 1, however it was determined that the current wiring was too old and fragile to repair and that a full rewire was required. The Respondent was advised accordingly with attempts also made to agree for further removals and clearance to be organised though this became impractical owing to the Respondents failure to participate in the process as agreed and concerns raised by the Respondent about the process itself.
15. In March 2019, renovation works to Flat 2, above Flat 1, damaged the electrical installation in Flat 1. Repair works were unable to be carried out due to the state of the Respondent's electrical circuits and therefore an agreement was reached between the owners of Flat 2 and the Respondent that the owners of Flat 2 would pay for replacement cabling with the remainder of the rewire works to be completed and paid for by the Respondent.
16. In February 2020 and 4th May 2021, the Applicants managing agents and lawyers respectively wrote to the Respondent advising that legal action would ensue if works to rewire Flat 1 were not undertaken. Further letters from the Applicants lawyers followed later in May and in June. The Respondent replied to the 4th May letter on 15th June 2021 advising that works to the lighting circuit had been completed and that she was "negotiating with an electrician for the sockets". In its response on 22nd June 2021 the Applicant's solicitor noted that the discussions with an electrician had allegedly been ongoing since 2019 and provided a deadline of 3 months for the Respondent to provide independent verification that all works had been satisfactorily completed.
17. The Applicant alleges that necessary electrical works have either not been completed and / or that the Respondent is in breach of covenant by not providing independent verification that the works have been completed.

18. It is not necessary for the Tribunal to ascertain if works have been satisfactorily completed or not. The Tribunal is satisfied from the evidence before it that a breach of Clause 3(f) of the lease has occurred. It is not for the Tribunal to consider whether that breach has been remedied. The Tribunal notes however that the Applicant is only likely to be certain on that point once it has been able to inspect the Flat and complete any requisite schedule of disrepair (see below)

Failure to permit Inspection of the Flat

19. On 10th January 2022 , the Applicant’s solicitor gave notice under Clause 3(g) of the lease of its client’s intention to arrange for an independent surveyor instructed by the Applicant to undertake an inspection on 27th January 2022 at 10am. The Respondent replied to this correspondence on 22nd January 2022 by letter, in which (inter alia) the Respondent states: *“I cannot accept the proposed inspection at this time since I do not see the person as independent, because of the timing in the midst of the disputes and because i see it as an extension of bullying. Intimidation and harassment which is ongoing.”*
20. The Respondent covenants at Clause 3(g): *“to permit the Lessors and her duly authorised agents with or without workmen and others twice a year upon giving previous notice in writing at reasonable times to enter upon and examine the condition of the Flat ...*
21. There is no evidence that the Applicant had already inspected the Flat twice within 2022. The Respondent made no representations that the time of the proposed inspection was unreasonable and made no attempt to make alternative arrangements. The Tribunal considers reasonable notice was given by the Lessor of its intention to undertake an inspection at a reasonable time. The Lessor was not permitted to undertake its inspection which the Tribunal determines was a breach of Clause 3(g) of the lease.

Plumbing repairs and leaks from the Flat into neighbouring properties

22. The Applicant alleges that there is a history of water leaks within Flat 1, that those water leaks have caused damage to neighbouring properties and have led to an increase in insurance premiums and the level of excess applied by the insurers on claims for water damage. The 10th January 2022 letter alleges water ingress from the boiler of Flat 1 into Flat 10 causing damage to an en-suite shower room.
23. In the 22nd January letter, the Respondent denies any knowledge of water ingress into neighbouring properties and advises that she has the benefit of emergency plumbing insurance. She also alleges historical causes of water ingress into her property from leaking gutters and that a previous incident of water ingress into a neighbouring property from Flat 1 was caused by negligence on behalf of a plumber engaged by the Landlord’s agent. She also notes the increase in insurance premium and excess but denies they are as a direct result of disrepair in Flat 1.

24. The Applicant's evidence includes a maintenance report by Fox Group Facilities Management dated 25th October 2021. On a repeat visit, Fox Group was permitted to enter Flat 1 and confirmed via a 'dye test' that: *There is a substantial leak from the bottom of the boiler which is finding its way between the concrete pad and the walls down into the shower room below.*
25. The evidence of Fox Group has not been challenged by the Respondent. It is unclear if the leak has been remedied and the Applicant is only likely to be certain on that point once it has been able to inspect the Flat and complete any requisite schedule of disrepair. The Tribunal is satisfied from the evidence before it that a breach of clauses 3(d), 3(f), 3(i) and paragraph 10 of Schedule 3 to the Lease has occurred.
26. From the evidence presented by the Applicant, it is not clear to the Tribunal that the increases in insurance premiums or excess are a direct result of breaches of covenant by the Respondent, but it is unnecessary for the Tribunal to consider this point further as it has already decided that a breach of clause 3(i) has occurred.

Business use of the premises

27. The Applicant provided a copy of the Minutes of its Annual General Meeting held on 5 April 2018. Resolution 3 (below) is documented as being carried by 6 votes to 1 with 1 abstention.

Resolution 3: Using the Flats for 'Business use' was contrary to the terms of the lease however, the owner of Flat 1 advised they were given consent to conduct business from the Flat approximately 30 years ago. The owner had no written confirmation of consent however, following legal advice from a barrister, it was concluded that as no objections had been raised during this course of time it would be difficult to revoke the lease; as such, the resolution was proposed to provide the owner of Flat 1 with written approval to provide treatments from the property.

28. The alleged breach is of 3rd Schedule, para 1: *"Not to use or suffer or permit the Flat to be used otherwise than as a private residential flat without the previous consent in writing of the Lessors."*
29. It is unclear whether historic consent was granted in writing or not but the Tribunal considers the minutes of the Lessors' Annual General Meeting which resolved that "written approval to provide treatments from the property" was to be issued, to be 'consent in writing' and hence determines that no breach has occurred.
30. The Applicant avers that the Respondent is in breach because the consent has since been withdrawn. The Tribunal finds there is no requirement within the lease for ongoing or repeat consent. The lease requires 'previous consent' which the Tribunal finds as a matter of fact was granted.

Works to Flat entrance door and glass dome

31. The Applicant has received recommendations following a fire risk assessment to make the internal staircase a 30 minute protected fire escape route. It has sought the Respondent's assistance in meeting the fire safety requirements by replacing the Flat entrance door and the glass in an internal ceiling dome.
32. The lease is not entirely clear on the extent of the demised premises and hence the repairing liability in relation to the entrance door and glass dome. Both parties appear to accept however that both form part of the demised premises and fall outside the Landlord's repairing obligations.
33. The Applicant does not aver any disrepair to either the entrance door or glass dome but avers that the Respondent has failed to undertake required works to ensure that the same is compliant with Fire Safety in breach of clauses 3(d) and clause 3(i) of the Lease.
34. The Tribunal has not had the benefit of an inspection of the property however it is not entirely clear to the Tribunal why a 30 minute escape route is required within the building which already benefits from an external fire escape. The Tribunal does not, however, need to consider this issue which is for the Landlord alone. The Applicant is the 'responsible person' under the Regulatory Reform (Fire Safety) Order 2005, not the Respondent.
35. There is no requirement within the lease for the Respondent to improve the entrance door or glass dome nor to carry out any material alternations. The Tribunal finds the Respondent's failure to undertake such works at the request of the Applicant is not a breach of covenant within the lease.

J A Platt
Chairman
12 October 2022