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

**Case Reference** : **LON/00AL/LBC/2013/0047**

**Property** : **1<sup>st</sup> Floor Flat, 26 Brent Road,  
Plumstead, London SE18 3DS**

**Applicant** : **26-28 Brent Road Limited**

**Representative** : **Mr P Dunbar of Ashfords LLP  
Solicitors**

**Respondent** : **Jem Management Limited**

**Representative** : **Mr R Butcher, Counsel**

**Type of Application** : **Section 168(4) Commonhold and  
Leasehold Reform Act 2002**

**Tribunal Members** : **Mr P Korn (Chairman)  
Mr T Sennett, MA FCIEH**

**Date and venue of  
Hearing** : **26<sup>th</sup> June 2013 at 10 Alfred Place,  
London WC1E 7LR**

**Date of Decision** : **15<sup>th</sup> July 2013**

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**DECISION**

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## Decisions of the Tribunal

- (1) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002 a breach of covenant in the Lease has occurred.

## The application

1. The Applicant seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that there have been breaches of covenant of the Respondent's lease of the Property.
2. The relevant legal provisions are set out in the Appendix to this decision.

## The background

3. The Property is a self-contained first floor flat in a two-storey semi-detached property comprising two flats (one on each floor), each with a separate entrance door.
4. The Tribunal did not inspect the Property. Neither party requested an inspection and the Tribunal did not consider that one was appropriate given the extent of the information provided in written and oral submissions and mindful of the need to take a proportionate approach to the use of the Tribunal's resources.
5. The Respondent holds the Property under a lease ("**the Lease**") dated 29<sup>th</sup> July 1974 and made between Hashulan Company Limited (1) and Bertha Reynolds (2). The Applicant is the Respondent's landlord.

## The issues

6. The Applicant alleges that the Respondent has allowed the Property to fall into a state of substantial disrepair and that by virtue of its alleged failure to address the disrepair is in breach of the covenants contained in clauses 3(c) and 4 of the Lease, which respectively read as follows:-
  - *"[The Lessee HEREBY COVENANTS with the Lessors as follows:-] To maintain uphold and keep the demised premises and all walls party walls sewers drains pipes cables and wires and appurtenances thereto belonging in good and substantial repair and condition"*
  - *"The Lessee HEREBY COVENANTS with the Lessors and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flats"*

*comprised in the Mansion that the Lessee will at all times hereafter:- (i) repair maintain uphold and keep the demised premises so as to afford all necessary support shelter protection and access to the part of the Mansion other than the Flat (ii) Not to do or permit to be done any act or thing which may render void or voidable the policy or policies of insurance of the Building hereinbefore referred to”.*

### **Applicant's case**

7. In written submissions the Applicant states that the extent of the disrepair is detailed in a report prepared by Mr Andrew Mouldsdale BSc MRICS of BS Initiative Limited dated 23<sup>rd</sup> October 2012. Water ingress caused by defective plumbing to the bathroom of the Property had caused damage to the timbers in the intermediate floor between the Property and the flat below. In an attempt to identify the source of the water ingress the Respondent's workmen made holes in the ceiling and the Respondent has not repaired these holes despite having been asked by the Applicant to do so.
8. The Applicant states that the survey report notes the general poor state of the Property and the potential for vermin infestation and the likelihood that water ingress would continue. The Applicant wrote to the Respondent on 21<sup>st</sup> November 2012, 21<sup>st</sup> December 2012 and 12<sup>th</sup> March 2013 drawing the repair to its attention but no substantive response had been received by the date of the Applicant's statement of case, the Respondent merely denying that a state of disrepair exists.
9. At the hearing Mr Dunbar said that the Applicant had received complaints about the state of the Property from the occupiers and that the Applicant had attempted to contact the Respondent on many occasions. He drew the Tribunal's attention to the comments in the surveyor's report on rotten timbers and on the surveyor's assessment that damage had been caused by the ingress of water.
10. Mr Dunbar commented specifically on the Lease covenants in respect of which the Respondent was alleged to be in breach. He considered that clause 3(c) should be construed as containing a general repairing obligation in respect of the Property as a whole supplemented by more specific obligations in relation to particular parts of the Property including the pipes, and that the failure to deal with the plumbing problem was a breach of this clause. He also submitted that the constant dampness caused to other parts of the building by the Respondent's neglect of the Property constituted a breach of clause 4 of the Lease.
11. In addition, Mr Dunbar noted the definition of the Property in the Fifth Schedule as specifically including the floors and the joists, stating that

it followed that maintenance of the floors and joists clearly fell within the tenant's repairing covenants.

12. Mr Dunbar noted the suggestion by the Respondent that it needed access to the ground floor flat to effect repairs to the Property but disputed that this was the case.

### **Respondent's case**

13. In written submissions the Respondent denies that the Property has been in a state of disrepair for any length of time. It also states that there is nothing in the Applicant's survey report to indicate that the state of the joists is due to the water leakage that occurred. The Respondent states that around July 2012 the Applicant notified the Respondent of a water leak, whereupon the Respondent arranged for repairs to be carried out forthwith. The reason why the Respondent has not been able fully to comply with its repairing obligations is that access has not been provided to the ground floor as and when required.
14. In a witness statement, Naveen Talluri, who is employed by the Respondent to manage its properties, states that on being notified that there was a leak he arranged for a plumber to check the issue and carry out emergency works. The plumber re-visited the Property two days later to check on the repairs and to carry out repairs to the ground floor flat but was unable to do so as the ceiling was still wet. When he visited again four days later he was unable to gain access to the ground floor flat. The Respondent was then contacted again three weeks later by the owner of the ground floor flat complaining of a further leak. Again its plumber could not gain access to the ground floor flat but carried out the necessary works to the Property to stop any leaks, at the same time making a small hole in the wall to check the pipes. On at least three occasions since then, in August, September and October 2012 the Respondent's builder visited the ground floor flat to check the ceiling – having first booked an appointment – but there was nobody there to let the builder in. In December 2012 the builder was instructed to cover the hole in the wall as there was no sign of any further leaks.
15. Mr Butcher for the Respondent said that when the Respondent first took over the Lease it was initially hard to trace the landlord who did not take an active management role. The Applicant was considered to be difficult to co-operate with, in that the Respondent had wanted to enter onto other parts of the building to investigate the cause of the leaks but access had been refused.
16. It was conceded that the Respondent had not replied in writing to any of the Applicant's letters, preferring instead to deal with the issues by telephone.

17. The Respondent did not accept that the water ingress was necessarily due to the Respondent's own failings, as it was possible that it could have resulted from the Applicant's own failings elsewhere in the building. In addition, if the damage was so longstanding as the survey report seemed to suggest, how could a recent leak have caused it? Mr Butcher submitted that the Applicant had brought this case too early, before it had been clearly established that the Respondent had caused the problem.
18. A further argument on the part of the Respondent was that this sort of risk should have been covered by insurance. Mr Butcher also noted that the survey report referred to the existence of condensation and poor ventilation but he questioned whether these constituted breaches of the repairing covenants.

### **Applicant's further comments**

19. Mr Dunbar said that it was clear from the survey report that the disrepair had not been remedied, and the Respondent had had plenty of time to remedy the problem. Mr Dunbar also noted that the Respondent had in fact appointed his own surveyor to report on the state of the Property but that interestingly he had not provided any written report or even any written counter-arguments to any of the points made in the Applicant's surveyor's report. The Respondent had in fact not supplied any technical evidence whatsoever.
20. The occupiers of the ground floor flat had suffered a large amount of leaks from the Property and had put buckets out to catch the water.
21. The Applicant's surveyor's report was very clear and the Respondent should have no difficulty carrying out the work.
22. The owners of the Applicant company visit the building on a daily basis and the Respondent has full contact details for the Applicant's solicitors and there was therefore no reason why the Respondent should have had any difficulties in gaining access to the ground floor flat. In the face of a large number of letters from the Applicant or its solicitors no attempts had been made by the Respondent to contact the Applicant apart from a few very brief telephone calls.
23. On the specific point about the landlord initially being difficult to contact when the Respondent first bought the Property, Mr Dunbar said that the Applicant only acquired the freehold in late 2010.
24. Regarding the Respondent's builder, Mr Dunbar said that its invoices did not comply with legal requirements and that it has since been struck off the Companies House register of companies.

25. The Respondent's solicitors were sent a copy of the Applicant's surveyor's report at least as early as November 2012 and could easily have used this to figure out what works to do. In addition, these are not considered to be difficult works to undertake and therefore it is disproportionate to expect the Applicant to provide yet further proof of the cause of the leak. At the very least, there was a damaged shower unit to fix.
26. Mr Dunbar did not consider this to be an insurance issue. There were basic repairing obligations, such as repairing/replacing the seals around the shower and generally fixing it, and in any event the building insurance policy did not include contents.

### **Tribunal's analysis**

27. The Tribunal notes the written and oral submissions made on behalf of each party and has considered the Applicant's surveyor's report together with colour copies of the photographs referred to in the report.
28. The Tribunal considers that the evidence shows there to be disrepair within the Property. The only expert evidence that has been provided is that of the Applicant's surveyor, and it is noteworthy that the Respondent's own surveyor has provided no evidence whatsoever. The Tribunal considers the Applicant's surveyor report to be credible and to identify a serious lack of repair. It refers to damp staining in the flat below caused (in the surveyor's view) by leaks from the Property. The shower enclosure and associated details in the Property are in poor order, the kitchen floor tiling is extremely poor, and leaks have occurred to an elbow to the supply pipework to the shower causing some damage to the timber framework. In the surveyor's view the condition of the waterproof detailing to the shower and of the tiling is such that leaks will continue to occur during use of the shower, and the surveyor declares himself entirely satisfied that the damage occasioned to the ground floor flat emanates from defects within the Property's shower and water supply pipework.
29. The Applicant's surveyor also comments that the Property is generally in a very poor condition and suffers from inadequate ventilation and defective extract fans, leading to condensation throughout. As a consequence of the humid atmosphere the timber floor in the bedroom has expanded and rucked. There is also a slight leak to the roof which has caused damage to the living room ceiling.
30. On the basis of the evidence provided, including the Applicant's surveyor's report, the Tribunal considers that the Applicant is responsible for all or at least a significant part of the state of disrepair identified by the surveyor, in that it has failed to fix the defective shower unit and related pipework effectively and has failed to take reasonable steps to prevent the damage to the timber floor in the

bedroom. In any event, even in the absence of evidence that the Respondent had caused or at least contributed to the damage, it would still be the case that the Respondent was in breach of its repairing covenants.

31. As noted by Mr Dunbar, the repairing covenant includes the whole Property, including the floors, joists, drains and pipes, and the obligation in clause 3(c) of the Lease is simply to *"maintain uphold and keep the demised premises and all walls party walls sewers drains pipes cables and wires and appurtenances thereto belonging in good and substantial repair and condition"*. No legal authority was brought on behalf of the Respondent for the proposition that this only requires the tenant to remedy damage actually caused by it, but in any event the Tribunal finds that all or part of the damage was caused by the Respondent.
32. In addition, the Respondent is in breach of clause 4 of the Lease, in particular the covenant *"repair maintain uphold and keep the demised premises so as to afford all necessary support shelter protection and access to the part of the Mansion other than the Flat"*. It has failed, and continues to fail, to take reasonable steps to remedy the problem of water escaping from the Property, resulting in water damage to the ground floor flat.
33. The Respondent has argued that it has tried to take the necessary steps to deal with the problem but has been prevented from doing so by being denied access to the ground floor flat. The Tribunal does not accept that this is the case. The evidence shows that the Applicant's solicitors wrote to the Respondent on several occasions to complain about the state of the Property but received no written response whatsoever. Indeed, the Applicant's solicitors wrote to the Respondent's solicitors on 28<sup>th</sup> January 2013 referring to the Applicant's surveyor's report, commenting in some detail on the poor state of the Property and putting them on notice that the Applicant was minded to exercise its right to enter the Property to carry out emergency works, and seemingly it did not receive a response even to this letter.
34. In addition, plausible evidence was given that the owners of the Applicant company attend the building frequently and that the Respondent has had the Applicant's solicitors' contact details for a considerable period of time, and so it is not considered credible that the Respondent has simply been unable to gain access to the ground floor flat over a period of several months, even assuming that access to the ground floor flat is necessary in order to carry out remedial works properly. Indeed, even if the Respondent genuinely has had problems gaining access to the ground floor flat this does not explain why it has failed properly to fix the shower unit itself.

35. The Tribunal considers that it is arguable that condensation and poor ventilation are not themselves a breach of the repairing covenants, but the disrepair in relation to the shower pipework, the floor tiling, the timber framework and the bedroom floor are considered to constitute breaches of the repairing covenant in clause 3(c) and the disrepair leading to water ingress in the ground floor flat is considered to constitute a breach of the repairing covenant in clause 4.
36. In conclusion, the Tribunal considers that breaches of covenant in the Lease have occurred.



## Appendix of relevant legislation

### Commonhold and Leasehold Reform Act 2002

#### Section 168

- (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 (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 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.