FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HH/LSC/2017/0035
Property	:	12, Tordale, 33 Thurlow Road, Torquay, Devon TQ1 3EF
Applicant	:	Tordale (Torquay) Management Company Limited
Representative	:	Mr M Kay
Respondent	:	Mrs Betty Taylor
Representative	:	
Type of Application	:	Breach of covenant
Tribunal Member(s)	:	Judge D Agnew Mr T. Dickinson FRICS Mr M. Woodrow MRICS
Date and venue of hearing	:	27th July 2017 at Newton Abbot Magistrates Court
Date of Decision	:	16th August 2017

DETERMINATION

Background

1. The Applicant is the Management Company of the property known as Tordale situated at 33 Thurlow Road, Torquay, Devon TQ1 3EF ("the Property") and is party to a tri-partite lease of maisonette numbered 12 at the Property dated 22nd September 1995 and made between Tenby (London) Limited (1), Tordale (Torquay) Management Company Limited (2) and Claire Dawn White and Martin James Best (3), the original lessee. The Respondent, Mrs Betty Taylor is the current lessee of flat number 12 at the Property.

2. On 31st May 2016 the Applicant issued proceedings in the County Court Money Claims Centre under Claim Number C14YM851 claiming damages alleging that the Respondent was in breach of certain covenants in her lease by failing to maintain properly her balcony (it was not specified which balcony) and by refusing to allow a roofer instructed by the Applicant to inspect her balcony. As a result the Applicant claimed that it had to carry out works to the structure of the Property which had been damaged by water seeping through the tiles on the Respondent's balcony floor. The Applicant claimed one third of the cost of that work (£2433) from the Respondent, it being alleged that balconies of two other flats at the property contributed to the damage.

3. The Respondent filed a Defence to the claim and the case was allocated to the Small Claims track and transferred to Torquay and Newton Abbot County Court. On 18th January 2017 District Judge P. Taylor noting that there appeared to be a gap in the evidence linking the repairs to being solely the responsibility of the Defendant rather than all the leaseholders ordered that the case be transferred to this Tribunal "to consider, but not exclusively, whether a) the Claimant complied with the Landlord and Tenant Act 1985 b) did the Defendant maintain the balcony and c) is the work undertaken the sole responsibility of the Defendant or all the leaseholders".

4. The Tribunal held a Case Management Hearing by telephone on 17th May 2017 at which the Tribunal pointed out to the parties that whilst it had jurisdiction to determine whether a breach of covenant had occurred under section 168 of the Commonhold and Leasehold Reform Act 2002 it generally has no jurisdiction to award damages for breach of covenant. However, under a pilot scheme currently being conducted, the County Court may ask the Tribunal to determine matters within its area of expertise due to the fact that First-tier Tribunal judges are constituted judges of the County Court by amendments to the County Courts Act 1984 by the Crime and Courts Act 2013. The Tribunal identified this case as being suitable for this scheme as it has Chartered Surveyors on its panel who are well qualified to assess evidence as to damage to buildings. Both parties agreed that the Tribunal should have jurisdiction to determine the whole case and District Judge Taylor duly made an order that the Tribunal should deal with the claim in its entirety.

5. Statements of case were filed and served by both parties and the matter came before the Tribunal sitting in Newton Abbot Magistrates Court for hearing on 27th July 2017. Tribunal Judge Agnew presided over the proceedings as a County Court Judge and he appointed Mr T. Dickinson FRICS and Mr M Woodrow MRICS, both Chartered Surveyors and Members of the First-tier Tribunal (Property Chamber) to sit with him as Assessors.

Inspection

6. The Tribunal Inspected the Property immediately before the hearing. Present at the Inspection were Mr Kay, the Applicant's representative and Mr Doherty who has carried out maintenance work at the Property for the Applicant including the work giving rise to the invoice that the Applicant seeks to recover part of from the Respondent. Also present were Mrs Taylor, her son and granddaughter.

7. The Property is a purpose-built three storey block of 15 residential units and garages constructed in or about 1958 and situated in an elevated and exposed position facing west at the rear overlooking the moors. It is of cavity brick and block construction with brick faced and rendered elevations under a pitched and tiled roof. Flat 12 has two balconies accessed off the living room and kitchen respectively. The original floor tiles of these balconies were replaced by the Respondent in 2016 with Porcelain Stoneware tiles. The Tribunal noted that this work seemed to have been very well executed. The living room balcony has a single drainage gulley which it shares with the next door unit (Number 11). The other balcony drains to a gulley which also services a waste pipe from the kitchen. These gullies pass down through the balcony floors. The Tribunal noticed some rust staining to the render under the balconies of the Respondent's flat but also of some of the other units. Decorative metal railings are set into the top of the balcony walls and these show signs of rusting.

The relevant lease provisions

8. By clause 3(a) of the lease the lessee covenants to "Keep the said flat throughout the term hereby granted (other than the parts thereof to be maintained by the Company pursuant to the Fifth Schedule hereto) and all walls party walls sewers drains pipes cables wires timbers floors and ceilings windows glass doors locks fastenings hinges sanitary water gas electrical and heating apparatus and the external balcony (if any) and any appurtenances thereto belonging in good substantial and tenantable repair and condition and in particular so as to support shelter and protect the parts of the Building other than the said flat".

9. By paragraph 2 of the Third Schedule Part 1, power is reserved "for the Lessors and the Company and their respective Surveyors and Agents with or without workmen and others at all reasonable times on notice (except in the case of emergency) to enter the said Flat for the

purposes mentioned in or of performing and observing their respective covenants and obligations under this lease".

10. By paragraph 1(10) of the Fifth Schedule to the lease, the Company covenants to "without prejudice to the foregoing do or cause to be done all such works installations acts matters and things as in the discretion of the company shall be deemed necessary or advisable for the proper maintenance safety and administration of the building".

The hearing

11. In addition to Mr Kay and Mr Doherty, Mrs J Selley, a Director of the Applicant Company was also in attendance at the hearing. Mr Kay presented the Applicant's case at length going through the documentation contained in the hearing bundle. This comprised a copy of the Respondent's lease, correspondence from Mr Brian Foster, the lessee of the flat below the Respondent's flat, a report from Austin Associates, Chartered Surveyors dated 27th September 2006, various invoices for repairs to the Property, various minutes of AGM's and Committee meetings of the Applicant Company, photographs of fallen render, correspondence with the Respondent and a statement from a Mr Derek Woodard, the lessee of Flat 3.

12. It is the Applicant's case that since at least 2004 there has been a problem with the Respondent's balcony. It is alleged that water was seeping through the tiles and grouting on the living room balcony causing the beam above Mr Foster's bedroom balcony to begin to "break up". A report from Austin Associates, Chartered Surveyors, dated 27th September 2006 was relied on by the Applicant as showing that this was indeed the cause of the problem. Walls on either side of the Respondent's balcony were re-pointed in 2006 The Property was redecorated in 2009 but water staining to the render became gradually much worse. The Respondent continually asked the Respondent to attend to her balcony to stop the leakage but nothing was done. The Applicant arranged for 2 roofers to attend at the Respondent's flat to advise what work needed to be done and supply the Respondent with an estimate. One roofing company was allowed access by the Respondent: the other was refused access. It was alleged that Mr Foster promised on behalf of himself and the Respondent to arrange for the work to be done but this did not happen.

13. Eventually in 2015 Mr Doherty was instructed to attend to all "blown render on all balconies to Flats 11 and 12 to be repaired and painted". He was also asked to inspect and report on the condition of the RSJ's under Flats 9, 11 and 12. He started with Flat 11 and as he was inspecting this a large section of concrete came away in his hands. Mr Kay said that Mr Doherty had reported that when carrying out a small repair to the render of the Respondent's balcony he noticed that the water he was spilling was running between the joints of the tiles and disappearing. He sealed the joints with waterproof cement free of charge. Although there was a photograph of some broken away

concrete in the hearing bundle there was no statement from Mr Doherty setting out precisely what he did, or what he found where on the building and when. Mr Kay stated that the Applicant then asked Mr Doherty to estimate for the cost of repairing the three RSJ sections (presumably for Flats 9, 11 and 12). His invoice came to £7300. The Applicant's management committee decided that the three leaseholders whose balconies were involved should be responsible for the cost. The invoice was therefore divided by three and each lessee was asked to pay their one-third share. It was decided to do this, said Mr Kay, because it could not be established which flat was responsible for the seepage in the first place. The Respondent was informed of the cost of repair and that "the Committee had decided that" she was responsible for 1/3 of the total costs. Mr Kay said that the response was for the Respondent to raise a number of questions about irrelevant matters and did not address the actual request for payment or the reason therefor.

14. Mr Kay referred to the Respondent's lease and maintained that the Respondent was in breach of clause 3a by failing to maintain her balcony and paragraph 2 of the Third Schedule Part 1 by refusing entry to Torbay Roofing. He says that the Applicant was obliged to carry out the repairs by virtue of paragraph 1(10) of the Fifth Schedule. (The full text of all three clauses is set out in paragraphs 8, 9 and 10 above).

15. The Respondent's case was simply that she did not accept that the cause of the damage to the RSJ's was as a result of any failure on her part to maintain her balcony. She said that there was no persuasive evidence to that effect. The report from Austin Associates in 2006 was inconclusive and said that "inspection of the balcony of Flat 12 which is generally in sound condition does not indicate any obvious source of water penetration to the balcony ceiling below". Her son-in-law, Mr Burridge, had carried out work to the balconies in 2011. He found that although the grouting was beginning to break up, it was not sufficient in his view to cause the seepage problem. He had ground) out the joints and resealed them with a waterproof epoxy resin. Mr Burridge is said to be a qualified plumbing, tiling and heating engineer with over 40 years experience. The hearing bundle contained a statement from Mr Burridge but he was not called to give evidence.

16. The Respondent says that the issue of water penetration to the ceiling of the balcony of Flat 12a has been ongoing for 13 years and in 2004 it was accepted that it was the Management Company's responsibility to deal with it, and, presumably, recover any costs from all the leaseholders via the service charge. She produced a copy of a letter from Cosy Lettings, who managed the Property at the time, to that effect. She considers that the work done to the steels and render is "external maintenance" for which the Management Company is responsible under the lease and the cost recoverable through the service charge.

17. In her statements of case the Respondent makes much of the fact that there was no consultation carried out as required under section 20 of the Landlord and Tenant Act 1985 prior to the works being carried out. However, as the Tribunal pointed out, this is not a service charge case and section 20 only applies to costs incurred by way of service charges payable by all the lessees.

The determination

18. At the outset of the hearing the parties agreed that the three questions posed by this case for the Tribunal to answer were as follows:-
    a) Was the Respondent is breach of her lease by having failed to maintain her balcony?
    b) If so, did that failure cause the damage to the steels supporting the balconies and the render?
    c) If so, is the cost of the work, divided by three the correct measure of damages that the Respondent should be ordered to pay?

19. Questions a) and b) need to be considered together because even if there was a breach of covenant to keep the balcony in repair, this would need to have caused the damage to the steels and render for the Respondent to be liable to pay the damages claimed in the proceedings. There is insufficient evidence for the Tribunal to find on a balance of probabilities that the Respondent failed to maintain her balcony "in good and substantial repair and in particular so as to support shelter and protect the parts of the building other than the said flat" as required by clause 3a of the lease. The only professional report on the condition of the balcony is that of Austin Associates of 27th September 2006. This states that the balcony is "generally in sound condition" and "does not indicate any obvious source of water penetration to the balcony ceiling beneath". Further, "the outer wall to floor joint has in its history been sealed in cement which generally appears sound". The surveyors do describe a "weathering out" of the grouting between the tiles and Mr Burridge, the Respondent's son-in-law, confirms that in 2011 the grouting was beginning to break up but it was not sufficiently bad to cause the water leakage. His evidence must be treated with some caution as he is related to the Respondent and he was not called to give evidence in person at the hearing. For these reasons the Tribunal does not place any weight on his evidence. Similarly, the evidence from Mr Doherty about the water he spilled when repairing some render to Flat 12 is unsatisfactory. It was not contained in any witness statement and was hearsay evidence supplied by Mr Kay. It would not have been difficult for a witness statement to have been obtained from Mr Doherty upon which he could have been cross-examined at the hearing, but this was not done. As a consequence, the Tribunal can place no weight on this evidence either. It is surprising that the Applicant should have placed so much reliance upon the Austin Associates' report of 2006 which, by 2015 when the repair work was done, was already 9 years old, without obtaining an up to date report from a professionally qualified source such as a Building

Surveyor. As it is, the only professional opinion the Tribunal has to go on is the Austin Associates report of 2006 which, although recognising that seepage through the joints in the Respondent's balcony tiles is a possible source of the water ingress to the ceiling of the flat below, is not conclusive and other possibilities are suggested.

20. The Tribunal would have to find that the breach of covenant had caused the damage to the steels and render for the Respondent to be liable to pay a contribution towards the cost of repair other than as a service charge payer together with all the other lessees of flats in the Property. The Tribunal finds, however, that there is insufficient evidence of a causal link between the condition of the Respondent's balcony and the damage to the steels and render. The criticism of the Applicant's reliance on an 11 year old inconclusive report holds good for this aspect of the claim (question b)) as for question a). The Austin Associates report of 2006 did not, as the Applicant seemed to suggest, say that the cause of the water ingress was the condition of the Respondent's balcony. It says that it is not an "obvious source" of the water penetration to the ceiling beneath and offers other possibilities. It states: "The outer wall surface is part faced brick, part rendered. Under storm conditions it is probable that the brickwork if not rendering does become saturated with moisture which would penetrate to the ceiling beneath. In addition, when facing out from the balcony to the left hand side there is a soil pipe to drainage, brickwork behind which is in places open pointed where again moisture could gain entry." The report recommends that the brickwork be re-pointed and the outer face of the balcony sealed under dry conditions with two applications. Mr Kay says that brickwork was re-pointed after this report was obtained but the problem persisted. It is not clear, however, where this re-pointing was done other than that it was "to the rear of the building each side of balconies to Flat 12". The cost was £80 so it cannot have been very extensive. The brickwork was not sealed until 2009, over two years later. There was no evidence before the Tribunal as to how long such sealing was intended to last or that any resealing had been carried out since 2009, six years before the work was carried out in 2015. The Respondent offered other possible causes of the problem. In wet weather the gutters and downspouts are insufficient to carry the water that runs down from the roof away efficiently. She produced photographs showing heavy rain pouring down from the roof and being blown into the balcony area and the balcony facings. She feels that this could be a cause of the water penetration to the steels and render. Mrs Selley accepted that the guttering needed to be replaced with wider rainwater goods to collect more of the water running off the roof.

21. The Tribunal as an expert Tribunal including two Chartered Surveyors considers that the following are possible causes of the damage to the steels and render:-

i) leaking gutters/rainwater goods

ii) leaks to the drainage gullies where they pass through the balcony floor

iii) defective or porous rendering or brick facing
iv) the bridging of the cavity by cavity wall insulation inserted in 2010
v) cracks or damage to the concrete floor surface under the tiles
vi) surface rusting of metalwork exacerbated by the salty sea air

22. The above list may not be exhaustive. What the Applicants really needed to do was to properly investigate the cause of the problem by engaging a Chartered Building Surveyor or Structural Engineer to expose all of the steelwork for examination. A modern alternative could be to utilise thermal imaging by experts to assist in detecting the possible source of the water penetration. As it is, it is merely conjecture that it was the condition of the tiles or grouting on the Respondent's balcony that was causing the problem and, even on his own case, Mr Kay could not be sure which of the three balconies of Flats 9, 11 or 12 was the cause of the damage. That being the case, the Applicant has failed to discharge the burden of proof that the Respondent's failure to maintain her balcony has caused the damage which was attended to by Mr Doherty at a cost of £7,300 and the claim must be dismissed. There is no need to proceed to answer question c) posed in paragraph 18 above.

23. With regard to the alleged breach of covenant in refusing entry to Torbay Roofers, the evidence suggests that this did happen. The Respondent says in her statement of case in answer to this allegation that, on advice, she does not let anyone enter her flat "unannounced" This implies that she did refuse entry, albeit that another contractor had been given access earlier in the day. On a balance of probabilities, therefore, the Tribunal finds that entry to Torbay Roofers was denied by the Respondent. Did this, however, amount to a breach of covenant? Mr Kay's evidence was that this visit had been arranged to assist the Respondent in obtaining quotes for work to be done on the tiles to the balcony. Thus, although at the Management Company's request, Torbay Roofing were not attending at the property as agent of the Lessor or the Company but to advise the Respondent what was needed to be done and provide an estimate. In order for the covenant to be breached, Torbay Roofers would have to have been seeking entry as the Applicant's Agent. As this was not the case the Tribunal does not find that this amounted to a breach of the covenant in paragraph 2 of Schedule 3 to the lease. Even if there had been a breach of covenant in that regard, this alone cannot have led to the necessity to carry out the repairs to the RSJ's and so, as far as the claim for damages is concerned, it is an irrelevance.

Summary and conclusion

24. The Applicant has failed to prove that the Respondent was in breach of the covenant in her lease requiring her to maintain her balcony causing damage to the Applicant's property costing £7300 to rectify. Consequently, the Applicant's claim for damages for one third of that sum is dismissed. The claim that the Respondent refused entry to her flat to an employee or agent of the Applicant and thus breached

paragraph 2 of the Third Schedule to the lease is also dismissed. As this case was allocated to the Small Claims track any claim for costs is generally limited to recovery of the court fee. As the Applicant has been unsuccessful in its claim the Tribunal makes no order for costs or return of the court fee.

Judge D. Agnew

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.

In the Torquay and Newton Abbot County Court

THE COUNTY COURT

Claim No: C14YM851

Between:

Tordale (Torquay) Management Company Limited

Claimant

Mrs Betty Taylor

Defendant

ORDER

BEFORE Judge D. Agnew sitting with Mr T Dickinson FRICS and Mr M. Woodrow MRICS as Assessors at Newton Abbot on 27th July 2017

UPON hearing the Applicant and the Respondent in person

IT IS ORDERED THAT

(1) The claim for damages for breach of covenant is and is hereby dismissed.

(2) There shall be no order as to costs.

(3) The reasons for the making of this Order are set out in the determination of the First-tier Tribunal (Property Chamber) dated 16th August 2017 under case reference CHI/00HH/LSC/2017/0035.

Dated the 16th day of August 2017