FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference: LON/00BK/LBC/2021/0009

Property	**7/8 Floor Penthouse Flat, 31 Price Albert Road**
Applicant	**Frogour Limited**
Respondent	**1. Zaki Farsi and 2. Samya Lenjawi**
Type of Hearing	**Alleged breach of covenant. S.168(2) CLRA 2002**
Tribunal Members	**Judge Jim Shepherd** **:** **Sarah Phillips MCIEH**

The matter was heard at a virtual hearing on 22nd April 2021 . The tribunal had not had the benefit of an inspection of the premises due to the lockdown currently in force . We did however have the benefit of photographs and plans relevant to the leases.

DETERMINATION

1. This application relates to a block of 18 flats at Kings Court, 31 Prince Albert Rd, London NW8 7LT ("the building"). The application is brought pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002 ("The Act") for a determination that the Respondents are in breach of their lease. A determination is a necessary precursor to forfeiture action under section 146 of the Law of Property act 1925.

2. The background to the application is as follows:

3. The Applicant is the freeholder owner of the building. The Respondents are the leaseholders of the roof space at the top of the building ("the roof space") and the penthouse flat below it ("the premises") There are two leases which bind the Respondents. The original lease which was dated 12 March 1982 in relation to the premises and a lease of the roof space dated 31st of May 1984. The latter came into existence because there was at one time a plan to develop the roof space so in effect this was a lease of airspace with a view to development.

4. The Tribunal did not inspect the premises but we had the benefit of very clear photographs and descriptions by the parties as well as plans. The roof of the building is physically separated into three sections. Only part of the roof is finished such that it might be enjoyed for use, and that part is separated from the rest of the roof by railings and is the only part which is currently tiled. The remainder of the roof has no tiles just chippings above the asphalt/felt but does have various satellite dishes supported by paving slabs and other items which the Applicant has permitted.

5. The Respondents acquired the lease through a company called Amarone Investments Incorporated. It would appear that between 1983 and 2018 the Applicant undertook responsibility for the roof and carried out repairs of it without question. This was with the exception of some urgent repairs carried out by the Respondents in 2009. Since around 2014 the Applicant has had plans for a remodelling of the exterior of the building including replacing the roof. Prior to these plans the Applicant had carried out patchwork repairs on the roof. There had been a repeated problem of roof leaks into the premises. In 2018 the Applicant carried out inspections of the roof through various surveyors including Salouen, Malcolm Hollis, Calford Seadon and Langley. These surveys reports were contained in the hearing bundle between pages A189 and A127 inclusive. During these surveys there was a destructive inspection of the roof. The Respondents say this is significant because the Applicant did not seek permission from them to carry out these investigations even though they now sought to argue that the roof was demised.

6. On 20th February 2018, the Applicant sent an email suggesting that responsibility for the roof repairs lay with the Respondents. This ran contrary to the previously accepted position that they were responsible for the roof repairs because they doing them. The Applicants do not deny that they were doing the roof repairs. They say that their managing agents misunderstood the lease and when they took advice from solicitors they had a "Eureka moment" and realized that the Respondents were in fact responsible.

7. The unexpired terms of the leases were assigned from the Respondent's company to the Respondents themselves in 2019. It is alleged that the Applicant initially sought to obstruct

that assignment by contending that the Respondents were responsible for dilapidations to the roof but that objection was later withdrawn.

8. The Respondents' counsel in his skeleton argument helpfully 3ecognized the reports carried out by the Applicant's surveyors and listed the various materials encountered on the roof. The list is as follows:

a) tiles of cementitious composition;

b) two layers of felt or asphalt;

c) a layer of insulation;

d) a bituminous vapour control layer;

e) a plywood deck;

f) a slab assumed to be of concrete composition;

9. This description is very similar to that given by the Applicant's counsel in his skeleton argument at paragraph 8 where he states that the roof of the building is understood to be comprised the following:

a) A surface finish (either spa chippings or cementitious promenade tiles);
b) two layers of felt as waterproofing;
c) insulation;
d) bituminous vapour control layer;
e) plywood deck
f) a slab which is suspected to be of concrete construction.

The leases

10. The flat lease demises to the leaseholder "the area known as the roof space but shall not include any part or parts of the building .... Below the said floor surfaces" (clause 1).

11. Under the flat lease the landlord covenanted "at all times during the said term to keep the interior and exterior walls and ceilings and floors of the building (other than those in this or any other demise) and the roof structure including any new roof structure as a result of the works contemplated herein.....In good and substantial repair and condition".

12. The roof space lease demised to the tenant "all that on top of the building including the surface of the roof whether it is paving stones tiling or any other material thereupon but not including any of the main timbers roof structures (other than the surface) and joists of the building (clause 1)".

13. The roof space lease included a covenant by the tenant to well and substantively maintain and keep clean and in good repair and condition the surface of the roof (clause 2 (III)).

Determination.

14. The Tribunal is grateful for the written arguments and submissions produced by Counsel on both sides. A hearing took place on 22nd April 2021 where evidence was taken and full submissions were made. The tribunal reserved its judgement and this is the determination being made.

15. The central issue before the tribunal was the extent of the demise to the Respondents. The extent of this demise will dictate the degree to which the Respondents are responsible for the repair of the roof. If they are responsible for the repair of the roof they are in breach because it was common ground that the roof was in disrepair.

16. The background facts which are uncontentious are as follows: Parkgate Aspen were appointed managing agents by the Applicant in 2004. In 2017 the premises began suffering from quite serious water ingress. This was reported to Parkgate Aspen who arranged for the roof to be repaired. After taking legal advice however Parkgate Aston became aware of the terms of the roof space lease which it is alleged imposed on the Respondents an obligation to maintain the roof surface. In fact it was the Respondent's case that the Applicant through their managing agents had arranging repairs of the roof for some time. Although of interest the conflict of evidence on this point was not really relevant to the Tribunal's decision. There was insufficient evidence that the Applicants had waived the covenant in the lease which the Respondents said placed the responsibility on them.

17. The Tribunal considers that the Applicant and their agents genuinely believed they were responsible for the roof and acted accordingly. Indeed, the responsibility for the roof repairs had been given no real conscious thought because it would be normal for the freeholder to keep responsibility for repair of the roof. To do otherwise would be unwise and not in the interests of preserving their investment. It's difficult to see how in these circumstances there was a waiver. Prior to the "eureka moment" the Applicant and their managing agents were acting as any responsible freeholder would act. The complicating factor in this case was the lease of the roof space and the fact that the Respondents were given the responsibility of repairing the surface of the roof. Accordingly, the real nub of the issue in the present case was what is the surface of the roof?.

18. The Applicant's contention was that the roof space lease was clear and the roof surface was specifically carved out of the roof demised to the Respondents and accompanied by a repairing obligation. The *roof surface* was either construed as everything above the concrete

slab or was only the felt layer upwards. In either event the Applicants contended that the Respondents have a positive obligation to repair and maintain a specific part of the roof.

19. The Respondents on the other hand submitted that the Applicant was seeking to pass off full responsibility for the replacement of the roof at a cost of £150,000 plus VAT. This was contrary to the normally accepted position of the landlord being responsible for repairing the roof and was described as *astonishing* because until the Eureka moment the applicants had been treating the roof as their own.

20. The Respondents argued that the *roof structure* was not demised to them and that this remained the responsibility of the Applicant. This at least appeared to be common ground. The Respondents further argued that the parts of the roof which had said to have fallen into poor condition and needed replacement comprise several of the component layers as described above none of which are at the surface of the roof in any event. The two layers of felt which need replacement are not at the surface because the uppermost felt layer lies beneath various other materials including chippings, tiles and paving slabs placed on the roof by the Applicant. Neither can it be said that the lower layer of felt or the insulation were on the surface. The Respondents counsel relied on the five stage test identified in *Dowding and Reynolds Dilapidations the modern law and practice* (sixth edition). With respect to him the Tribunal considered this of limited help because it appears to overcomplicate the situation before us. It was common ground that the roof was in disrepair and required replacement. Therefore, much of the criteria of in the *Dowding* test did not need to be applied. The only real question in this case was the extent of the demise and on this the parties appear to have polar opposite positions.

21. As identified by the Applicant the general principles of construction are well-known and will not be rehearsed here. In any event it has been said repeatedly in higher court decisions that each case depends on its facts. This case is relatively unusual because of the roof space lease. The Respondents relied on several cases to support their arguments including, *Hallisey v Petmoor Developments* (2000) EGCS 124 a decision of Paton J, where it was said that the main structure of the building ought properly to be construed so as to include not only the bare concrete shell but also whatever additional surfaces created in order to make that shell a complete and effective structure for the purpose of maintaining the physical integrity of the flats within the development. This is of limited help because the issue here is not what the roof structure is but what the roof surface is.

22. The Respondents also relied on the case of *Ibrahim v Dovercorn Reversions Ltd* (2001) 82 P&CR 28. In that case Rimer J held that the demise included at least the surface of the roof terrace within the demise. As such the question arose as to the extent of the repair

required by the tenant of the roof garden given the tenant's obligation to keep the demised premises in repair. Rymer J using the reasoning of Patton J in Hallisey which he described as compelling found that the main structure extended to the roof save only for the surface area of the roof tiles which were the responsibility of the tenant. Again, that was a case with a different lease and different facts and circumstances. The Respondents also relied on the passage from Woodfall on landlord and tenant (at paragraph 13.037.10) where reference is made to the two decisions just mentioned and where it is stated:

> *Where a part of a building is both the roof of a lower part and a terrace for benefits of an upper part it is a question of construction whether layers of the composite structure are demised. A landlord will not lightly cede control and responsibility for the repair of the part of the exterior fabric to the tenants.*

23. This of course is trite law. Again, however it takes the matter no further forward. It merely recites the fact that each case must be decided on its own facts using the well accepted rules of construction. The respondents also relied on the case of *Daya v London and Surrey* (unreported, 1st March 2018), a decision of His Honour Judge Parfitt sitting in Central London County Court which involved the lease of a roof garden with tiles and railings where there was an express obligation upon the tenants to keep the surface of the said roof garden in good and substantial repair. Whilst helpful the case is not on all fours with the present case because it is not alleged that the Respondents had use of a roof garden. In any event the principal point to come out of the *Daya* case was that it would be unlikely for the landlord to intend to cede control of the fabric of the building.

24. The Respondents' case in simple terms was that whatever the surface is to mean it lies above the layers referred to above in the description of the roof. They strengthened this submission with the argument that the layers of felt, insulation etc are by their nature aspects of the roof structure relying on the case of *Hallisey* referred to above. They give integrity to that structure and are an indispensable part of it. The Tribunal endorses this position. It would be very surprising if a landlord ceded responsibility for components of the structure of the building which the felt (often nailed down), asphalt and the insulation undoubtedly constitute. The Tribunal also accepts the Respondent's contention that if it were to find somewhat artificially that the demise went lower than the absolute surface of the roof then you would have in effect a patchwork of responsibilities which would simply not be satisfactory. Indeed, it would be detrimental to both the landlord and other leaseholders. The landlord could not ensure that the building was kept in proper condition and the other leaseholders would suffer because although they would avoid any financial responsibility for the parts of the roof demised to the tenant on the upper floor, they would themselves suffer from being in a building which may not be properly repaired.

25. However, the Tribunal derived no benefit whatsoever from the evidence of the conduct of the parties prior to the Eureka moment. The facts simply do not satisfy the requirement of a complete waiver i.e. a waiver of the covenant itself neither does the fact that the parties had been operating in one way automatically mean that the Tribunal should interpret the lease in that way.

26. The real issue here is the meaning of roof surface. Is it the very top surface of the roof or is it a particular point within the roof make up where the demise lies?. As already indicated, it would be unattractive to decide it is the latter because there would be the unavoidable situation of shared responsibilities. It is 7ecognized however, that if that is our construction it does not matter whether it is practical for the parties per *Arnold v Britton* [2015] UKSC 36.

27. In practical terms what happened here was that the Respondents were planning to construct another layer on top of the building and for that reason they would need to have demised to them the roof space. They didn't need to have demised to them the felt or any of the roof coverings but they needed to have the roof space so that they could carry out the necessary work to construct another layer. If the parties had genuinely considered that the Respondents were to be demised parts of the actual roof then the term *roof surface* would have been carefully defined identifying those parts defined. It isn't defined like this and the reason for that is that there was no real intention to cede responsibility for the maintenance of the roof to the Respondents. Indeed, this this would be an unusual and unwise thing to do.

28. The Tribunal had difficulty with the Applicant's argument that responsibility lay with the Respondents because it is difficult to identify why that is a prudent stance to adopt. Surely it is in the interests of the freeholder and indeed the leaseholders that the freeholder maintains responsibility of the roof? They can then decide when the roof needs repairing what repairs are carried out and protect their asset. They can also recover the cost of this by the service charge. In that respect they are not out of pocket. To argue that in fact the Respondents are responsible for the lease roof potentially presents considerable hurdles for the Applicants. Each time the roof needed to be repaired if the Respondents failed to carry out the repair the Applicant would have to take action against them.

29. In summary therefore, the Tribunal finds that the lease is to be read on the basis that the Respondents are not responsible for the repair of any elements of the roof other than the absolute surface of that roof. In practice this will mean probably no more than the Respondents being responsible for the shingle on the surface of the roof or the surface of any covering put down. It is artificial to seek to designate precisely where the Respondents' responsibility lies and indeed in the Tribunal's view it would be unfavourable to do so. In practice it is sufficient to say that all of the ordinary accepted elements of the roof are the

responsibility of the Applicant to repair. There was insufficient evidence to confirm that the Respondent had failed to repair the surface of the roof as defined and therefore the application is dismissed.

Judge Shepherd

14th June 2021

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).