FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BH/LBC/2019/0093**
Property	**:**	**52C Bulwer Road, London E11 1BX**
Applicant	**:**	**Mr Paresh Patel**
Representative	**:**	**Ms Nicola Cleightonhills (solicitor) of Meaby & Co., Solicitors**
Respondent	**:**	**Dr Barbara Lond**
Representative	**:**	**None**
Type of application	**:**	**Application for a determination under s.168 Commonhold and Leasehold Reform Act 2002, of breach of covenant**
Tribunal member(s)	**:**	**Judge N Rushton QC BA (Law), LLM; Mr PMJ Casey MRICS**
Date and venue of hearing	**:**	**20 January 2020 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**20 January 2020**

DECISION

Decisions of the tribunal

(1) The Tribunal determines pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that there was no breach by the Respondent of her obligation under the lease to repair the roof.

(2) The Tribunal records the admission of the Respondent at the hearing that she owes £6,608.66 to the Applicant by way of service charges in respect of the roof repairs effected by the Applicant landlord.

The application

1. The Applicant seeks a determination pursuant to section 168 of the 2002 Act that the Respondent has breached her lease of the property 52C Bulwer Road, London E11 1BX ("the Flat") by failing to repair the roof.

2. The Application is dated 30 October 2019.

3. Directions were issued by the Tribunal on 20 November 2019 and subsequently varied on 23 December 2019 by a letter from the Tribunal.

4. Following receipt of the Tribunal's letter of 23 December 2019, the Applicant has also issued an application under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for determination of the payability and reasonableness of service charges which have been charged to the Respondent in relation to repairs of the roof. However, given the lateness of that application the Tribunal stated at the start of the hearing that it could not be determined on 20 January 2020 but would have to be pursued separately (if appropriate).

5. An oral hearing of the Application took place on 20 January 2019. The Applicant did not attend in person but was represented by his solicitor, Ms Cleightonhills. The Respondent attended in person.

6. At the conclusion of the hearing and with the concurrence of the parties, the Tribunal decided that an inspection was not necessary, there being no dispute that the roof had now been repaired on the instruction of the Applicant landlord.

The parties and the property

7. The Applicant is the freehold owner of the house known as 52 and 52a Bulwer Road, Leytonstone E11, registered at HM Land Registry with

title number EGL 108889 ("the House"). It is a semi-detached three storey Victorian house which has been converted into three flats, each held on a long lease under which the Applicant is now the landlord.

8. The Respondent is the registered owner of the long leasehold interest of the Flat, which is on the second (top) floor of the House, and is registered with title number EGL 135379. The term of the lease is 99 years from 25 December 1980. The Respondent was registered as proprietor on 8 March 1999.

9. The Flat is sub-let by the Respondent to sub-tenants. Her home is elsewhere in London.

The lease

10. Clause 1 of the lease provides that the Lessor demises to the Tenant "*all the property described in the First Schedule hereto…"*. The First Schedule describes the demise as:

"*All that Second Floor Flat known as Second Floor Flat 52 Bulwer Road Leytonstone E.11 in the London Borough of Waltham Forest (the property) including the roof, floor finish and floor joists and boardings and [illegible word] ceilings and ceiling joists the plaster on the inside of all exterior and party walls and the windows and doors of the flat…"* [emphasis added]

11. Clause 2 of the lease provides that the Tenant will perform all of the covenants in the Lease for the benefit of the owners from time to time and the lessees of the other flats in the House.

12. Clause 3 provides (so far as relevant):

"*3. The Tenant HEREBY FURTHER COVENANTS with the Lessor:-*

(3)…

(b) In accordance with the Tenant's covenants in that behalf to repair decorate and make good all defects in the repair decoration and condition of the demised premises of which notice has been given by the Lessor to the Tenant within three calendar months after the giving of such notice.

(4) If the Tenant shall at any time make default in the performance of any of the covenants herein contained for or as relating to the repair decoration or maintenance of the demised premises then to permit the Lessor and all persons authorised by the

Lessor to enter upon the demised premises and repair decorate or maintain the same at the expense of the Tenant (but so that no such entry repair decoration or maintenance shall prejudice the right of re-entry under the provision hereinafter contained) and to repay to the Lessor the costs of such repair decoration or maintenance on demand (including any Solicitors' Counsels' and Surveyors' costs and fees reasonably incurred by the Lessor in respect thereof…."

13. Clause 4 provides (so far as relevant):

> *"4. The Tenant HEREBY COVENANTS with the Lessor and as a separate covenant with each Tenant of a flat at the property as follows:*
>
> *(1) From time to time and at all times during the term well and substantially to repair cleanse maintain amend and keep in repair the demised premises and the Landlord's fixtures therein…"*

14. Clause 5 provides (so far as relevant):

> "*5. The Lessor hereby covenants with the Tenant:-*
>
> …
>
> *(2) If reasonably required by the Tenant to enforce the covenants and regulations similar to those mentioned or set out in Clauses 2 3 and 4 hereof entered into or to be entered into by the lessees of the other flats comprised in the property on the Tenant indemnifying the Lessor against all costs and expenses in respect of such enforcement…*
>
> *(3) PROVIDED ALWAYS that the Lessor's performance of this covenant is conditional on the Lessor receiving from the Tenant on demand a full contribution towards the Lessor's costs and expenses incurred in such performance (such contribution to be the same proportion of the total costs and expenses including Architects' Surveyors and legal fees as the gross rateable value of the demised premises is of the sum of the combined gross rateable value of all the flats at the property). At all times during the said term to keep the external walls and the load bearing walls and foundation… the timbers and roof and chimney stacks and exterior of the property (including drains gutters and external pipes)… in good and substantial repair and in proper order and condition…"*

(4) That every lease or tenancy agreement of a flat in the property hereinafter granted by the Lessor shall contain covenants and regulations to be observed and performed by the Tenant similar to those contained in Clauses 2 3 and 4 hereof…"

15. The Tribunal is told that the leases of the First and Ground floor flats contain mirror provisions, although it has not seen these other leases.

The issue

16. This lease therefore contains both an obligation on the Respondent tenant to repair and maintain the roof (as part of her demise) and also a landlord's covenant on the Applicant to keep the roof in good and substantial repair, subject to him receiving a full contribution to the costs from each of the tenants of the House.

17. The issue for determination by the Tribunal is whether there has also been a breach by the Respondent of her obligations under the lease to repair the roof, in circumstances where all of the steps which have been taken on behalf of the Applicant have been by reference to his repair covenants as landlord.

The facts

18. The Applicant says that by October/November 2018 the Respondent had allowed the roof to fall into disrepair and that following a series of leaks, this had been brought to his attention by the tenants of the other two flats.

19. On 9 November 2018 the Applicant's solicitors wrote to the Respondent stating it had come to his attention that the structure and roof of the building might be in need of repair. The letter enclosed a copy of the lease, highlighting the Applicant landlord's covenants and the Respondent's obligations to pay service charges in that regard. The letter referred to initiating a consultation process under s.20 of the 1985 Act as amended. It proposed instructing a surveyor to inspect and report and requested payment by the Respondent of a third of that cost.

20. Dr Lond was in New Zealand for most of the time over the period from October 2018 to April 2019, as her brother, who resided there, was being treated for terminal cancer. He passed away on 11 December 2018. There is no dispute that she was having to spend this time dealing with his affairs, acting as executor and that she also had medical problems herself, all of which made it difficult for her to deal with issues concerning the Flat or repairs to its roof. Correspondence was sent by the Applicant's solicitors to her by email as well as by post since she was known to be in New Zealand.

21. Ms Cleightonhills told the Tribunal that she had invited all the tenants to a meeting at the end of 2018 about how to address the problem with the roof repairs. Dr Lond was unable to attend. The other tenants told Ms Cleightonhills that they would prefer the Applicant to deal with the disrepair of the roof through the landlord's covenants, with them paying a third of the cost each, rather than by the Applicant taking steps to enforce the Respondent's covenant as tenant to repair the roof.

22. On 4 February 2019 a survey of the property was produced by Robert Hopps MRICS on the condition in particular of the roof. This confirmed that the roof, the flashing and the guttering were all in a poor state of repair. A copy of that report was seen by the Tribunal. The report also stated (at 3.2.1) that while there was evidence of multiple previous leaks and there had been patch repairs, these areas were currently dry. At 4.2 Mr Hopp said that while the initial cause of the water ingress was felt to be the poor condition of the main roof, the patch repairs were currently sound, but would be likely to fail in the near future. His conclusion was that extensive repair and refurbishment was required, especially of the flat roofs and slate cladding of the dormers, and the guttering.

23. There is no dispute that all the steps which were thereafter taken by the Applicant and his solicitors were by reference to the Applicant's repairing covenant under clause 5(3) of the lease. On 17 April 2019 they sent a notice to intention to carry out the remedial works, as qualifying works under s.20 of the 1985 Act. This was emailed to Dr Lond and she acknowledged receipt on 17 April 2019. On 21 May 2019 a Notice of Estimates was sent by email to Dr Lond, who acknowledged it on the same day (and said it was the latest in a number of repairs which had been required to the roof). On 2 July 2019 Dr Lond was sent a copy of the contract the Applicant intended to sign and was asked to pay £6,386 (being one third of the total contract price). The Tribunal was told that the other two tenants paid their one third shares in advance.

24. The roof repair works were carried out between July and August 2019. The contractors' final invoice is dated 22 August 2019.

25. On 16 September 2019 the Applicant's solicitors sent what was described as a service charge demand of £6,608.66, for one third of the total price paid. This included copies of the contractors' invoices. A further service charge demand was sent on 3 October, this one clearly including a summary of the tenant's rights and obligations, also for £6,608.66. On 30 October 2019 Dr Lond responded asking if there was any flexibility in payment and asking for confirmation of the exact sum due. Thereafter the present Application was issued.

The law

26. The relevant statutory provisions are set out in a schedule to this decision.

The hearing

27. The Tribunal heard evidence and submissions from both Ms Cleightonhills (for the Applicant) and the Respondent, Dr Lond.

28. Ms Cleightonhills accepted that the Respondent had not been given notice under clause 3(3)(b) to carry out repairs under her covenant in clause 4 to repair. Similarly, although workmen had carried out repairs on the instruction of the Applicant (and had been permitted by the Respondent to do this), the Applicant had not made a demand of the Respondent to pay the full amount of the cost of those works, pursuant to clause 3(4).

29. Ms Cleightonhills accepted that there were therefore no grounds on which the Tribunal could determine that there had been a breach of clauses 3(3)(b) or 3(4) of the lease. However she submitted that the Respondent had a free-standing obligation to repair under clause 4(1) of the lease and that the Tribunal should determine the Respondent had breached that obligation.

30. Since the roof had been repaired by the end of August 2019, there was also no dispute that any breach by the Respondent of her obligation as a tenant to repair the roof had come to an end once the repairs were completed.

31. The Respondent disputed that she should be held in breach of her covenant as tenant in relation to repairing the roof. She said she had already arranged for repairs to the roof to be carried out twice in 2019, in February and July, and had no reason to think the roof was still in a state of disrepair.

32. The Respondent also said in evidence, and the Tribunal records, that she admits she owes £6,608.66 to the Applicant for the roof repairs.

Determination

33. The Tribunal determines that so far as the Respondent's repairing obligation as tenant is concerned, clause 4(1) of the lease must be read together with clauses 3(3)(b) and 3(4). Clause 4(1) cannot simply be read as a free-standing obligation. If the Respondent tenant is to be held in breach of her repairing obligations under the lease, a notice needs to have been served on her under clause 3(3)(b) and she must have been given the requisite 3 month period to comply. The Tribunal reaches this view because clause 3(3)(b) cross refers to the Tenant's covenants to repair and so that these clauses are read in a way which is consistent and workable.

34. No written notice of disrepair was given by the Applicant under clause 3(3)(b), since the only correspondence with the Respondent concerning the disrepair referred to compliance with the landlord's covenants to repair. Therefore the Tribunal determines that there has not been a breach by the Respondent of her repairing obligations as tenant under the lease.

35. However, the Respondent has admitted that she owes the Applicant £6,608.66 as service charges in relation to the repair of the roof by the Applicant, pursuant to his obligations under clause 5 of the lease. This constitutes an admission for the purposes of section 81(1)(b) of the Housing Act 1996 and section 27A(4)(a) of the 1985 Act.

Name: Judge N Rushton QC Date: 20 January 2020

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).

Schedule of Statutory Provisions:

Commonhold and Leasehold Reform Act 2002

168 No forfeiture notice before determination of breach

(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 (c. 20) (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 [the appropriate tribunal]1 for a determination that a breach of a 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.

(6) For the purposes of subsection (4), "appropriate tribunal" means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

169 Section 168: supplementary

(1) An agreement by a tenant under a long lease of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under section 168(4).

(2) For the purposes of section 168 it is finally determined that a breach of a covenant or condition in a lease has occurred—

(a) if a decision that it has occurred is not appealed against or otherwise challenged, at the end of the period for bringing an appeal or other challenge, or

(b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in subsection (3).

(3) The time referred to in subsection (2)(b) is the time when the appeal or other challenge is disposed of—

(a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any), or

(b) by its being abandoned or otherwise ceasing to have effect.

(4) In section 168 and this section "long lease of a dwelling" does not include—

(a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies,

(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5) in relation to which that Act applies, or

(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).

(5) In section 168 and this section—

"arbitration agreement" and "arbitral tribunal" have the same meaning as in Part 1 of the Arbitration Act 1996 (c. 23) and "post-dispute arbitration agreement" , in relation to any breach (or alleged breach), means an arbitration agreement made after the breach has occurred (or is alleged to have occurred),

"dwelling" has the same meaning as in the 1985 Act,

"landlord" and "tenant" have the same meaning as in Chapter 1 of this Part, and

"long lease" has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.

(6) Section 146(7) of the Law of Property Act 1925 (c. 20) applies for the purposes of section 168 and this section.

(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

Housing Act 1996

81.— Restriction on termination of tenancy for failure to pay service charge.

(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure [by a tenant to pay a service charge or administration charge unless—]1[

(a) it is finally determined by (or on appeal from) [the appropriate tribunal]2 or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or

(b) the tenant has admitted that it is so payable.

(2) The landlord may not exercise a right of re-entry or forfeiture by virtue of subsection (1)(a) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(3) For the purposes of this section it is finally determined that the amount of a service charge or administration charge is payable—

(a) if a decision that it is payable is not appealed against or otherwise challenged, at the end of the time for bringing an appeal or other challenge, or

(b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in subsection (3A).

(3A) The time referred to in subsection (3)(b) is the time when the appeal or other challenge is disposed of—

(a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any), or

(b) by its being abandoned or otherwise ceasing to have effect.

(4) The reference in subsection (1) to premises let as a dwelling does not include premises let on—

(a) a tenancy to which Part II of the Landlord and Tenant Act 1954 applies (business tenancies),

(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies, or

(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995.

(4A) References in this section to the exercise of a right of re-entry or forfeiture include the service of a notice under section 146(1) of the Law of Property Act 1925 (restriction on re-entry or forfeiture).

(5) In this section

(a) "administration charge" has the meaning given by Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002,

(b) "arbitration agreement" and "arbitral tribunal" have the same meaning as in Part 1 of the Arbitration Act 1996 (c. 23) and "post-dispute arbitration agreement" , in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen,

(c) "dwelling" has the same meaning as in the Landlord and Tenant Act 1985 (c. 70), and

(d) "service charge" means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).

(5A) Any order of a court to give effect to a determination of the appropriate tribunal shall be treated as a determination by the court for the purposes of this section.

(6) Nothing in this section affects the exercise of a right of re-entry or forfeiture on other grounds.

(7) For the purposes of this section, "appropriate tribunal" means—

(a) in relation to premises in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to premises in Wales, a leasehold valuation tribunal.

Landlord and Tenant Act 1985

27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.