



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

Case Reference : **BIR/37UC/LBC/2020/0001**

**HMCTS code
(paper, video, audio)** : **P:PAPERREMOTE**

Property : **The leasehold property 106a Kilton Hill,
Worksop, S81 0AZ**

Applicant : **Steven Glyn Jones and Rachel Catherine
Jones**

Respondent : **John Vernon Sharp**

Application : **Application for an Order that a breach
of covenant or a condition in the lease
has occurred**

Tribunal members : **Tribunal Judge D. Barlow
Regional Surveyor V Ward BSc Hons FRICS**

Date of Decision : **4 June 2020**

DECISION

COVID-19 PANDEMIC: DESCRIPTION OF HEARING

This has been a hearing on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE, V: A face-to-face hearing was not held because it was not practicable, no-one requested it and all issues could be determined in a hearing on paper. No physical property inspection was undertaken, although photographic evidence of the property was included in the Applicant's statement of case.

DECISION

- I. The Tribunal determines that the Respondent is liable under clause 2(e) of the lease of the Property to keep in good repair and condition the right hand (south) flank wall of the Property.
- II. The Tribunal finds that the Respondent is not in breach of that covenant.

REASONS

Background

1. The Applicant landlord sought a declaration from the Tribunal under s168(4) of the Commonhold and Leasehold Reform Act 2002, that the Respondent tenant was and remained in breach of the covenants of his lease. Directions were issued by the Tribunal on 19 March 2020.
2. The matter has been determined on the papers by the Tribunal considering the following:
 - a. The application dated 13 March 2020 with supporting documents (together the Applicants statement of case).
 - b. The Respondents statement of case dated 8 April 2020.
 - c. The Applicants reply dated 27 April 2020.
3. The Applicant landlord is the freeholder of the building known as 106-108 Kilton Hill Worksop, which comprises ground floor commercial units and first floor residential accommodation (the building). 106A Kilton, is a long leasehold flat forming part of the first floor of the building (the property) and sits directly under an expanse of timber flat roof with felt covering.
4. The Respondent is the long leaseholder of the property.
5. The lease under which the Respondent holds the property is dated 24 October 1980 (the lease) and was made between (1) Andrew George Buchanan and (2) Ian Moore.
6. The Applicant alleges that the Respondent's failure to keep the right-hand (south) flank wall of the property in repair, contrary to the duty said to be imposed on him by the repairing covenants in the lease, has caused it to collapse leading to enforcement proceedings being taken by Bassetlaw District Council under s78 of the Building Act 1984. The Applicant has incurred expense shoring up the wall and removing debris to avoid further loss or damage and is threatened with prosecution by the council if progress is not made.

7. The Respondent denies that he is liable for keeping the structural walls of the building in repair and asserts that the landlord is responsible. His liability being limited to paying a contribution to the cost of repairs to the roof and communal areas. He also states that he has been unable to sell his flat due to the condition of the roof.

Evidence and the parties submissions

The Applicant's submissions

8. The grounds of the application are set out in the application, supported by a copy of the lease and an inspection survey report carried out on 21 August 2019, by BS Watts BSc CEng MICE MStructE, Principle Associate for Thomasons Limited (“the Report”).
9. The Applicant argues that clause 2(e) of the lease obliges the tenant to keep the structural walls bounding the flat in repair.

The relevant part of clause 2(e) reads as follows:

“to keep in good repair and condition the structure main walls floors and timbers of the demised premises other than the roof and the area coloured blue and the entrance and stairway coloured brown on the said plan and to.....”

10. The Applicant states that on or around 21 August 2019 they became aware that part of the right hand (south) flank wall of the building had collapsed exposing the property to the elements. They obtained the Report which indicated longstanding disrepair leading to a gradual deterioration of the timber wall plate that partially supported the wall leading to its failure. This, they say was caused by the failure of the Respondent to keep the structure, walls and/or timbers in good repair.
11. The Report confirms that the survey was visual only, no opening up or sampling was undertaken. All observations were taken as if facing the front of the building. It begins with a description of the building which is detached, age unknown but thought to be about 50 years old. The roof is a timber flat roof with felt covering supported on timber joists which are supported by the left and right flank walls and assumed to also rest on internal loadbearing walls. The roof is surrounded by a 215mm brick parapet 300mm high. There are recessed gutters at the base of the parapet wall leading to two corner outlets.

The external walls are cavity construction up to the parapet wall, which is solid brick. The cavity is not insulated, the construction of the ground and first floor are unknown.

Following heavy rain the week before the owner confirmed the parapet wall to the right hand (south) flank wall collapsed onto the roof and access below. Small sections remained. The vertical extent was generally down to the top of the first floor windows for the outer wall and just above for the inner wall. The exposed timber joists were fixed to a timber wall plate. Wall ties were apparent up to the base of the of the roof joists but there were no ties above leaving a height of 1200mm to the top of the parapet untied to the structure. The flank wall below was bowing in places.

The parapet wall leans in and sits partly on the timber wall plate supporting the roof joists and is partly unsupported over the cavity below. There has been past water

penetration through the felt covering at the recessed gutter causing dry rot in the timber wall plate to the extent that some parts were essentially destroyed removing support to the inner section of the parapet causing instability.

The surveyor cannot ascribe a single cause for the collapse of the parapet. He discusses and discounts high wind and heavy rainfall as being inadequate of themselves, to cause the collapse. He finds that the problems are of long standing and that there is clear evidence of water ingress into the cavity which has caused the timber wall plate to decay and cause corrosion of the cavity wall ties. Whilst not able to be categorical the surveyor states that the most likely scenario is a gradual deterioration of the timber wall plate due to ingress of water through the roof covering, the lack of ties between the parapet wall and the upper part of the outer cavity wall; and the corrosion of the wall ties due to water ingress through the felt roof covering.

The report goes on to make recommendations for further inspections to determine the extent of the remedial works necessary to make good and observes that the south flank wall would not now be constructed without expansion joints; and may therefore be more prone to thermal movement and possible cracking.

The Respondent's submissions

12. The Respondent made a short submission stating that he bought the flat in 2004 but was unable to sell it when he needed to move for work due to the condition of the roof. He denies being responsible for the structural parts of the building and refers to an ambiguity in the lease that he says the Applicant is seeking to exploit. He points to clause 3(a) and (c) of the lease in support.
13. Clause 3 of the lease contains the landlord's covenants.

Clause 3(a) provides:

“(a) to keep in good repair and condition (subject to the lessee paying one half of the cost of repair) the roof of the demised premises and the areas coloured blue and the entrance and stairway coloured brown on the said plan”

Clause 3(c) provides:

“(c) To maintain in good repair and condition the foundations of the building containing the demised premises and the load bearing walls thereof supporting the demised premises”

14. The Respondent also states that his liability to contribute to repairs is limited to the roof and communal parts and that as this is a structural issue that affects the whole building and he only owns one part, it makes no sense for his responsibility to go beyond paying for his share of the work.

The Applicant's reply

15. The Applicant denies that there is any ambiguity. They rely on paragraph 2(e) read in conjunction with the description of the demised premises at clause 1 of the lease, which is as follows:

“1. THE landlord hereby demises unto the Lessee ALL THAT first floor flat numbered 106a Kilton Hill.....as the same is more particularly delineated on the plan annexed hereto and thereon coloured red and blue the same being divided from the ground floor property of the Landlord so that the floor boards and underlying rafters of the demised premises shall be included in this lease.”

16. The Applicant states that this clause makes clear that the entirety of the first floor was intended to be demised including floor boards and rafters. Clause 2(e) specifically refers to the structure and main walls of the demised premises.
17. The Applicant also states that clause 3(c) when considered in its entirety, is intended to ensure that only the structure below the demised premises is maintained by the landlord.

CONSIDERATION

18. The Tribunal needed to consider three main areas:
 - a. Whether the right hand (south) flank wall had been demised to the Respondent or remained within the ownership of the Applicant landlord.
 - b. Whether clause 2(e) of the lease imposed a repairing obligation on the Respondent in respect of that wall.
 - c. Whether the disrepair of the wall highlighted in the Report was caused by a breach of that covenant by the Respondent.
19. In construing the wording of the lease the Tribunal had regard to Lord Neuberger’s comments in *Arnold v Britton* [2015] UKSC 36 where he set out six matters pertinent to the assessment of the meaning of the relevant words:
 - The natural and ordinary meaning of the clause;
 - Any other relevant provisions of the lease;
 - The overall purpose of the clause and the lease;
 - The facts and circumstances known or assumed by the parties at the time the document was executed;
 - Commercial common sense;
 - But, disregarding subjective evidence of any party’s intentions.
20. Clause 1 of the lease describes the premises by reference to red colouring on the lease plan. The red colouring appears to include the walls of the building and does not (as is sometimes the case) sit inside the line of the external walls. The clause does not exclude structural parts of the building, other than the roof and specifically includes the floor boards and underlying rafters. As the landlord expressly excluded the roof and expressly demised the floor and rafters it is likely that he would have expressly excluded the structural walls had that been the intention of the parties.
21. For the above reasons the Tribunal finds the lease includes the right hand (south) flank wall of the property.
22. Clause 2(e) of the lease is quite specific about the tenants repairing obligations, which are to keep in good repair and condition the structure main walls floors and timbers of the property. This is entirely consistent with Clause 1 of the lease and

unless a clear contrary intention can be inferred from the other clauses in the lease, obliges the tenant to keep the structural walls bounding the property in good repair.

23. Do clauses 3(a) and (c) indicate a contrary intention? Clause 3(a) is a landlord's covenant to repair the roof and certain common areas subject to receiving a contribution to the costs, from the tenant. Clause 3(c) is an absolute covenant to keep the foundations of the building in repair and the load bearing walls supporting the demised premises in repair. The Applicant argues that this clearly means the load bearing walls below the demised premises. The Respondent argues that it means the entirety of the load bearing walls.

Having determined that the physical extent of demised premises includes the load bearing right hand (south) flank wall, the Tribunal can only construe clause 3(c) as including the part of the load bearing wall below the property because the covenant expressly restricts the obligation to the "load bearing walls supporting the demised premises"

24. For the above reasons the Tribunal finds that there is no contrary intention or ambiguity and clause 2(e) of the lease imposes a repairing obligation on the Respondent in respect of the right hand (south) flank wall.

25. Are the items of disrepair to the flank wall, as set out in the Report, caused by a breach of clause 2(e) of the lease?

The Tribunal gives weight to the findings of the Report which concludes that the most likely cause of the damage is the failure of the felt roof covering, leading to a gradual deterioration of the timber wall plate due to ingress of water, the lack of ties between the parapet wall and the upper part of the outer cavity wall; and the corrosion of the wall ties due to water ingress through the felt roof covering.

This combined to render parts of the parapet unstable leading to its failure. The surveyor indicates that the problem is of longstanding and (at paragraph 3.3) that the issues caused by ingress of water into the cavity between the walls may not have been visible inside the flat.

The landlord is liable under clause 3(a) of the lease to keep the roof in good repair and condition. This will extend to the felt covering. The landlord's failure to keep the roof in repair appears from the conclusions of the Report, to be the likely cause of the damage to the timber wall plate, the corrosion of wall ties and ultimately the collapse of parts of the parapet.

26. For the above reasons the Tribunal finds that there is an absence of any causal link between the damage outlined in the Report and any failure by the Respondent to comply with the covenant at 2(e) of the lease.

The Law

Commonhold and Leasehold Reform Act 2002 s 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 a leasehold valuation tribunal 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.

D Barlow
Deputy Regional Judge

Date: 4 June 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).