FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AJ/LBC/2020/0026 (P)**
Property	**:**	**Flat 6 Elton Lodge, Florence Road, London W5 3TX**
Applicant	**:**	**Elton Lodge (Ealing) Management Company**
Representatives	**:**	**Mr Maury Horwich**
Respondent	**:**	**Ms Jeanne Spinks**
Representative	**:**	**In person**
Type of Application	**:**	**Application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Judge Professor Robert M Abbey**
Venue of paper based decision	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**2nd October 2020**

DECISION

Decisions of the Tribunal

(1) The Tribunal refuses to grant the application for an order that a breach of covenant or condition in the lease has occurred pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002.

(2) The reasons for our decisions are set out below.

The background to the application

1. The Applicant seeks an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. The application concerns an alleged breach ("the alleged breach") or breaches affecting **Flat 6 Elton Lodge, Florence Road, London W5 3TX** ("the property.").

2. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-section (4) shown in bold:

> *(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.

3. The property is a two-bedroom second floor purpose built flat in 4 storey block of 8 flats built around 1970. The building has a flat roof with falls to the centre of the building. There are four drainage points, two in the centre at the low point, two at the perimeter at the high point. This dispute concerns one of the high point drains.

4. The application before the Tribunal was issued by the Applicant on 18th June 2020. The Applicant alleges in its application a breach of the lease covenants and or conditions. In particular and in detail, Clause 1i of the lease reserves to the lessor (which is the applicant) the sewers, drains etc. which run through the property excepting those noted in clause 1 of the lease which are used or intended to be used solely for the property demised under the lease. The four communal roof drains run vertically and uninterrupted through the building. One is in the corner of the kitchen. They are mechanically protected by a casing which originally ran uninterrupted from floor to ceiling. The sole purpose of these drains is to conduct rainwater away from the roof. They do not provide a drainage function for individual flats; this is provided by other pipes.

5. Some years ago, and in order to renovate the kitchen, the casing was removed without the lessor's permission or knowledge. There cannot be any exact idea of when this happened, ut was simply sometime in the past. A rainwater leak into the kitchen was notified to the lessor. As the pipe was physically inaccessible from within the building a CCTV survey was made from the roof which did not show a breakage but gave rise to concerns about the pipe joints. The applicant says that the lessee, who had not been resident in the flat for many years claimed it was a leaking roof however the flat above showed no signs of water ingress. It was some months later that the cupboard and tiling in the corner of the kitchen were removed so that the downpipe could be inspected.

6. It was when the cupboard was removed that the interference with the downpipe was discovered. A section of the downpipe had been removed and replaced. However, the applicant says the repair was not fit for purpose and was clearly putting lateral stress on the section of pipe above it. The applicant asserts that while it is accepted that the leak emanates from a different location to the repair the disturbance to the downpipe that was caused both before and during the repair, along with degradation of the repair materials used are believed to be responsible for the leak.

7. The applicant therefore says that the nature of the breach is that the protective casing around the downpipe has been removed and that the downpipe has been detrimentally interfered with without the lessor's consent (and that the existing repair is not fit for purpose).

8. Clause 1.1 of the lease reserves to the lessor-

> *"The free and uninterrupted passage and running of water … through and to the other buildings and land comprised in the said Estate through the sewers drains watercourses pipes cisterns gutters cables and wires which are now or may hereafter during the term hereby granted be in or under the demised premises."*

The purpose of this condition is clear, it is to allow the free flow of water through pipes within the property. As the freehold is held communally the applicant says this dispute becomes a question of whether the cost of putting matters right is borne by an individual or shared.

9. With regard to the ownership of the downpipe and casing clause 1, to be found at the bottom of page 1 of the lease states:

> *"The Lessor hereby demises unto the Lessee first all that flat known or intended to be known as Number 6 Elton Lodge aforesaid being the second floor flat forming part of the building as particularly shown on the said plan annexed hereto and thereon edged blue including the non-structural finishings or coverings to the ceilings floors and walls thereof the internal non-structural walls dividing the rooms comprised in the flat hereby demised and one-half (severed vertically) of any non-structural walls dividing the flat from any other flat or common parts of the said building and all windows and window frames cisterns tanks drains pipes wires ducts and conduits used or intended to be used solely for the purposes of the flat hereby demised but excluding the roof foundations structural floors main walls columns and beams which are loadbearing or structural and the external and main structural parts of the building and secondly all that garage numbered 6 on the said plan and thereupon edged green…"*

10. The applicant says that the downpipe in question serves to drain the roof of rainwater. That is its sole purpose. It is not demised to the lessee and therefore by default retained by the lessor. The purpose of the casing is to prevent fire spreading between flats through the penetrations in the concrete floors. Thus, neither are demised to the lessee and as they represent common parts of the building, they are by default retained by the lessor who carries the responsibility to maintain them.

11. Notwithstanding the terms of the original application the statement of case made by the applicant cites other breaches rather than the breach of clause 1.1. outlined above. The applicant now says the contention

that the lessee is liable can be based partly on paragraph 9 of the Schedule of Stipulations and Restrictions to the lease which states the lessee is:

> *"Not to do any waste spoil or destruction to or upon the demised premises nor to do or permit any act or thing which shall or may become a nuisance damage annoyance or inconvenience to the Lessor or its tenants or the tenants or occupiers of the adjoining premises or to the neighbourhood."*

12. The applicant goes on to assert that "Paragraph 9 only states "the demised premises" in its injunction. It does not qualify this and therefore as would be logical it includes both that demised to the lessee and also that demised to the lessor. Damage to the downpipe would be a "nuisance annoyance and inconvenience to the Lessor or its tenants or the tenants or occupiers of the adjoining premises" because rainwater could enter the flats below. Removal of the fire-resistant casing around the downpipe in the process removing the means to prevent fire spreading is a particularly egregious breach not only of the lease but also the lessee's responsibility under common law."

13. The Tribunal needs to establish from the written evidence presented to it whether or not, on the balance of probabilities, the Respondent has acted in such a way that the Respondent is in breach of the covenant/condition in the lease.

14. There was no oral hearing as the parties agreed to the matter being dealt with by the tribunal on the papers before it. To assist in that regard the Tribunal was supplied with two bundles of evidence supplied by the parties.

15. This has been a remote hearing on the papers which has been consented to or not objected to by the parties. The form of remote hearing was classified as P (PaperRemote). A face to face hearing was not held because it was not practicable given the Covid-19 pandemic (and the need for social distancing) and no one requested the same or it was not practicable and all issues could be determined in a remote hearing on paper. The documents that the Tribunal was referred to are in an electronic bundle supplied by both parties. Similarly, no site inspection was considered appropriate given the constraints on social interaction arising from the pandemic restrictions.

The issues and the decision

16. The Tribunal had before it the two bundles of copy deeds copy correspondence and papers prepared by the Applicant and the Respondent. These were in the form of two electronic files containing

copies of e-mails, statements, documentation and registered title copies and a copy of the lease as well as copy correspondence.

17. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issue in dispute or indeed possible given the pandemic restrictions.

18. The only issue for the Tribunal to decide is whether or not a breach of covenant or a condition in the lease had occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. Having considered and read all the written evidence and other submissions including legal submissions from the Applicant and the Respondent and having considered all of the documents provided, the Tribunal determines the issue as follows.

19. The respondent says of the application "to the best of my knowledge and belief I am not in breach of my lease in any way at all. I have been unable to determine which covenant or condition of the lease I am accused of breaching. The Applicant says in the application that the downpipe in question is not part of the let property but is part of the remainder of the building, and I agree. It is not subject to any of the specific covenants or conditions contained in the lease and the Applicant does not seek to argue that it is.

20. The Applicant acknowledges in the application that I personally have never interfered with the downpipe, or with the boxing that I am told (and accept) was originally encasing it. Unauthorised interference with property belonging to the freeholder and not covered by the lease is, to my understanding, a tortious act rather than a breach of the lease, but I have not committed any such act - as is accepted by the Applicant. Any breach, if there has in fact been a breach, occurred prior to the start of my ownership of the lease, which is more than 15 years ago. "

21. In the light of the evidence before it, the Tribunal is of the view that there is a no alleged breach of either the condition set out in the lease of the property or the covenant set out in the lease of the property owned by the respondent.

22. Dealing first with the condition at 1.1. of the lease. This says the respondent must allow the free and uninterrupted passage and running of water … through and to the other buildings and land comprised in the building through the sewers drains watercourses pipes cisterns gutters cables and wires which are now or may hereafter during the term of the lease be in or under the demised premises. The Tribunal could not find any convincing evidence that this condition had been breached. Nothing that the respondent had done or indeed not done prevented the flow of water. The pipe casing might be missing and there maybe leaks from the faulty joint but the respondent has not

stopped up or prevented the uninterrupted passage and running of water. Accordingly, the Tribunal is satisfied that there is no breach of this condition.

23. Secondly the Tribunal considered if there was a breach of the covenant not to do any waste spoil or destruction to or upon the demised premises nor to do or permit any act or thing which shall or may become a nuisance damage annoyance or inconvenience to the Lessor or its tenants or the tenants or occupiers of the adjoining premises or to the neighbourhood. Again, the Tribunal could not find any convincing evidence to support a claim that this covenant had been breached. There was no clear evidence that the applicant had by reason of the nuisance been injuriously affected by it. There was no significant evidence that the applicant asserted that seemed sufficient to persuade the Tribunal that the respondent had breached this covenant.

24. It is appropriate for the Tribunal to go further and consider whose pipe this is. The applicant says that the downpipe in question serves to drain the roof of rainwater. That is its sole purpose. It is not demised to the lessee and therefore by default retained by the lessor. The Tribunal agrees with this interpretation. This being so it is a structure that the lessor should repair and can consider being the subject of a service charge payable by the tenants in the building, if that is what the block leases contemplates.

25. The Tribunal considered the case of *GHM (Trustees) Limited v Glass (2008) LRX/153/2007* which is a decision of the Lands Tribunal about the breach of a lease clause or covenant. The President George Bartlett QC wrote that "The jurisdiction to determine whether a breach of covenant has occurred is that of the LVT. The question whether the breach has been remedied….is a question for the court in an action for forfeiture or damages for breach of covenant…. "

26. The effect of the Lands Tribunal decision is clear. This Tribunal need only determine whether a breach has occurred. This Tribunal is satisfied that in the light of the evidence set out above that a breach has not occurred and as such this Tribunal refuses to grant the application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002

27. Rights of appeal are set out in appendix 1 of this decision.

Name: Judge Professor Robert M. Abbey **Date:** 2nd October 2020

Appendix 1

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).