Case Reference	**:**	**LON/OOBK/MNR/2020/0006 CVPREMOTE**
Property	**:**	**Flat 8 Clifton House 131 Cleveland Street London W1T 6QE**
Applicant	**:**	**Mr Joe Daly**
Representative	**:**	**Mr Tim Samuel**
Respondent	**:**	**Wallshire Limited**
Representative	**:**	**Mr Alan Tunkel**
Type of Application	**:**	**Determination of the market rent under Section 14 Housing Act 1988**
Tribunal	**:**	**Mrs E Flint DMS FRICS**
Date of hearing	**:**	**18 December 2020**

DECISION

The rent payable from 23 December 2020 is £300 per week.

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice Cloud Video Platform with all participants joining from outside the court. A face to face hearing was not held because it was not possible due to the Covid 19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to are in a bundle of 245 pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions.

Background

1. Pursuant to section 13(4) of the Housing Act 1988 ("the 1988 Act") the applicant referred to the tribunal multiple notices received from the Respondent proposing a new rent in respect of the property.

2. A preliminary hearing on the papers was held on 18 March 2020 when it was determined that the correct notice was dated 9 January 2020 and specified a weekly rental of £484.62 per week with effect from 9 February 2020.

3. It is agreed that the Applicant's father, Mr Brendan Daly, who was granted a tenancy in 1962, died on 8 February 2017. The applicant succeeded to his father's tenancy following his father's death.

4. The property is an unfurnished flat comprising three rooms, kitchen and shower/wc on the second floor of a purpose built block of flats. The tenant's father installed a shower and wc in the flat. The electrical system is old with round pin sockets allowing limited use of electrical appliances. The Applicant uses a small electric hot plate with which to cook, he stated that the circuit is not able to take a more powerful appliance.

5. Following an inspection of the flat on 10 September 2018, Westminster City Council ("the Council") served a Hazard Awareness Notice on the Respondent on 28 September 2018. The hazards found at the premises were listed in a Schedule to the Notice as being:

    A. Excess cold as there is no fixed heating;
    B. Fire: the bedroom is entered off the living room and it does not have an alternative means of escape, there are no fire detection or alarms within the flat;
    C. Electrical hazards: old dated electrical installation
    D. Food safety: No hot water to kitchen sink and no tiled splash back to work top and sink.

6. The recommended course of action was to install a gas fired central heating system; provide the flat with an automatic fire detection system; provide a satisfactory supply of hot water to the kitchen sink and a splashback to the sink and work surface area; provide a copy of the electrical test report relating to the installations within the five

years issued by a competent person and if no such report is available commission a competent person to inspect and produce the report and provide a copy of the report/certificate to the council.

7. Directions in respect of this application were issued on 21 October 2020 and amended on 24 November.

The Hearing

8. At the beginning of the hearing Mr Samuels, counsel for the Applicant, made a partial concession that for the purposes of this hearing, any improvements carried out during Mr Brendan Daly's tenancy accrue to the landlord.

9. In addition, Mr Samuels said that he would address the tribunal on hardship under S14(7) and would call Mr Daly to give evidence.

10. Initially, Mr Tunkel, counsel for the Respondent, sought to object however after a short adjournment later in the hearing he confirmed that his instructions were to accept that backdating the increase to February 2020 would cause the Applicant undue hardship and said that the Tribunal could exercise its discretion to set an effective date as late as the date of the hearing.

11. During the hearing Mr Samuels conceded that the starting point for assessing the open market rent of the property was £500 per week based on the rent paid for flat 10 which has an identical footprint but which he said had been modernised to a high standard as is usual for an open market letting.

12. Mr Samuels confirmed that there is no written tenancy agreement and that as at 27 November 2020 the Applicant has made clear that he does not want the proposed works to be carried out.

13. Mr Samuels said that he would deal with the legal issues which have arisen in this case relating to sections 14(2)(c) and 16 of the Landlord and Tenant Act 1985, the new section 9A of the Landlord and Tenant Act 1985 and the interpretation of *Yeoman's Row Management Limited v Bodentien-Meyrick* [2002] EWCA Civ 860 ("Yeoman's Row").

14. He said that section 16 of the Housing Act 1988 is implied into the contract between the parties as is the covenant for quiet enjoyment and sections 11 and 9A of the Landlord and tenant Act 1985 (LTA1985).

15. He accepted that section 14(2) c HA1988 requires the Tribunal to disregard "*any reduction in value …attributable to a failure by the tenant to comply with any terms of the tenancy*" when determining the rent at which the flat might be let.

16. Section 16A HA 1988 provides that "*the tenant shall afford to the landlord access ….and all reasonable facilities for executing therein any repairs which the landlord is entitled to execute*". He submitted that the section does not give the landlord an express right to gain access for works if they are not repairs. The question here is are the proposed works repairs or improvements?

17. The case of Yeoman's Row was concerned with a contractual clause which provided for the tenant to allow the landlord and agent "*to execute any repairs or works to the inside or outside of the flat*". It was held that the word "work" moderated the extent of the repairs and the word was given a narrow meaning given the potential invasion of the covenant for quiet enjoyment. The Act uses the word "repairs" without any modification. Nor is there a common law right of entry for improvements.

18. Mr Samuels referred to the guidance on the meaning of repairs given by Lord Denning in Morcom v Campbell-Johnson [1956] 1QB 106:

    "*If the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking, an improvement; but if it is only the replacement of something already there, which has become dilapidated or worn out, then, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs and not improvements*"

19. Therefore, if the works the Respondent is proposing to carry out are improvements and not repairs, section 16 HA 1988 does not apply and the tenant has not failed to comply with the terms of the tenancy.

20. He said that the works are works of improvement: there is no fixed heating in the flat therefore the installation of central heating is an improvement; there is no hot water in the kitchen, its installation is an improvement; there is a working shower and wc, to strip out and replace is an improvement, all the proposed works are improvements.

21. It is not disputed that until August Mr Daly had been happy to allow the respondent to do the works which had been scheduled to commence in September and would take 4 – 6 weeks to complete. Mr and Mrs Daly were ready to move into alternative temporary accommodation during the period when the flat would be uninhabitable. However, it seems that there were problems with one or more of the contractors and the works were postponed.

22. Subsequently Mr Daly said that he did not want the works done, he was entitled to change his mind. The Respondent was aware that Mr Daly suffered from ill health and both he and his wife were elderly and they were concerned about the level of Covid19.

23. Mr Samuels said that Section 9A LTA 1985 is a red herring because the section imposes a liability on the lessor, the lessee is only required to give access "*for the purpose of viewing its condition and state of repair*". The section does not insert an implied term that the lessee will permit the landlord to undertake

improvements therefore no implied term has been broken and section 14(2)(c) does not bite.

24. The Housing Act 2004 does not provide for a right of entry. In the case of an improvement order or prohibition order the remedy is in the magistrate's court to get an order to make the occupier comply.

25. Mr Samuels said that the market rent should be assessed on the basis of the current condition of the flat, evidence of which is supplied by the Hazard Awareness Notice. The determination should not assume that any improvements have been carried out.

26. On behalf of the respondent, Mr Tunkel, provided the background to the case commencing with the Respondent seeking to increase the rent by service a notice under Section 13 HA 1988. The initial notice was held to be invalid in the County Court. Subsequently a number of notices were served and possession proceedings commenced based on the new notices which were joined to the existing proceedings. Mr Daly complained to the council about the condition of the flat and subsequently the Hazard Awareness Notice was served on the Respondent. Mr Daly served a Defence and Counter claim dated 22 October 2018 alleging that the Respondent was in breach of its repairing obligations and had failed to comply with the Hazard Awareness Notice.

27. The validity of the S.13 notices was dealt with at a preliminary hearing. The Respondent has sought access to carry out the works but Mr Daly has refused access.

28. He said that the question for the Tribunal is should the market rent be assessed based on the current state of the flat, as proposed by Mr Samuels, or with the works having been carried out?

29. He submitted that if the landlord is under a statutory duty to carry out the works in the Hazard Awareness Notice then the tenant must be under a similar obligation to allow the landlord access to carry out the works. Furthermore, by refusing access Mr Daly is in breach and S.14(2)(c) requires any reduction in the value of the property attributable to such a breach to be disregarded therefore the property should be valued as if the works had been carried out.

30. Mr Tunkel accepted that the landlord had objected to some of the works in the Notice, but it was Mr Daly who had generated the Respondent's obligations to carry out the works by going to the council. The County Court proceedings had been paused to allow the Tribunal to assess the rent.

31. A quotation for the works from Tectum Limited was in the bundle in the sum of £26,112.84 plus contingencies. The works were for decoration of all walls, ceilings and woodwork; replace the kitchen sink, supply sink unit, sink, tap and splashback; supply gas fired boiler central heating system; strip out existing shower cubicle and replace, new taps to wash basin; supply and install new electrical distribution board and rewire property, including providing a

total of 19 double sockets; remove all carpet and vinyl and replace throughout property; replace a broken window glass and sash cords to one window.

32. As regards the works redecoration is a repair; replacing the kitchen sink and shower cubicle is merely replacing old with new therefore repairs; rewiring is a repair, window repairs are repairs and replacing floor coverings is a repair. The installation of central heating and fire alarm are improvements but are a requirement of the Hazard Awareness Notice. Mr Tunkel did concede that the number of double sockets to be installed could be viewed as an improvement being greater in number than the existing round pin sockets.

33. Mr Tunkel submitted that how the works are labelled is not significant. It is necessary to look at the nature of the works and the condition of the property to determine whether the works are repairs or improvements. He said that most of the works are repairs and that Mr Daly is obliged to give access for these by S.16 HA 1988. In addition, where works are required by a Hazard Awareness Notice, even if the works are improvements, Mr Daly is under an implied statutory duty to afford access for these by ss28-37 HA 2004 and in particular ss.30 and 35.

34. Where works are required by s9A L&TA 1985 (inserted by the Homes Fitness for Human Habitation Act 2018) then he submitted Mr Daly is under an implied duty to afford access. He referred in particular to s.17(2)(b) which gives an extended meaning to "repairing covenant" to include "repair, maintain, renew, construct or replace any property". He said "construct" would cover improvements and therefore bring improvements within the ambit of s.16 HA 1988.

35. Mr Tunkel referred to the decision of the Upper tribunal in North Lincolnshire Homes Limited v Mrs Bentley 2015 UKUT 0451 (LC) where in granting permission to appeal the Deputy President had observed that "*If, [the Appellant] had been refused access to carry out repairs, it is arguable that the repairs should be assumed to have been carried out. It is therefore arguable that the F-tT erred in law in taking the actual state of repair into account and treating it as justifying a reduced rent*".

36. He referred to the landlord's statutory repairing obligations under S11 L&TA 1985 and suggested that to comply with the landlord's obligations under S.11 regarding space heating it may be necessary to install space heating where none is in situ. Moreover, it is an offence for the landlord not to comply with a Hazard Awareness Notice. He referred to the landlord's right to obtain possession under s33 HA 2004, however the Tribunal notes that the section refers to a property subject to a Prohibition Order.

37. Mr Tunkel asserted that the Yeomans Row case was easily distinguishable; it was a 2002 case concerned with a contractual matter. Here we are concerned with statutory obligations.

38. He was of the opinion that Mr Daly is estopped from refusing the Respondent access to carry out the works by his counterclaim which is current and requires Wallshire to carry out the works.

39. Mr Tunkel stated that for all these reasons Mr Daly is in breach of his express or implied statutory obligation to allow Wallshire to carry out the works with the consequence that the new rent should be assessed on the assumption that the Respondent has been able to carry them out.

40. In reply Mr Samuels said that internal decorations, the supply of carpets, curtains and white goods were the tenant's responsibility and that there was no duty on the landlord to undertake the tenant's responsibilities.

41. As regards estoppel, Mr Daly was entitled to change his mind. If the tenant does not inform the landlord of the disrepair or refuses access to carry out the repairs the landlord has a defence and his liability ends. The Respondent has not differentiated between repairs and improvements but has taken an all or nothing approach. There has been no offer to repair the window or sort out the damp. The tenant's changed position here does not set up estoppel.

42. There was no discussion in the North Lincolnshire case as to the meaning of repairs.

43. S17 states "*in this section repair means*"..., therefore the definition cannot be applied to S.11.

44. The proposition that the tenant has a correlative duty to the landlord's statutory duty under the 2004 Act cannot be correct: the 2004 act is a self-contained Act. The landlord can use "reasonable excuse" as a defence for not having complied with the notice. Enforcement is via the Magistrate's Court who ***may*** order access.

45. If the Tribunal does not accept that the tenant is not in breach then what is the market value assuming the repairs have been carried out? The proposed works are a mix of repairs and improvements. The landlord is not entitled to override the tenant's right to quiet enjoyment.

46. The first time Mr Daly refused access was 15 October 2020 when one of the team members had to isolate, which is why the revised schedule of works did not take place. If the works had commenced by the end of October then they would have been completed not long before today's hearing.

47. Mr Tunkel pointed out that the Yeoman's Row decision was in 2002, S.35 2004 Act came into force in 2006.

48. Mr Daly gave evidence regarding his joint income to assist the Tribunal regarding his claim for hardship relief.

The Tribunal's decision

49. In accordance with the terms of section 14 Housing Act 1988 the Tribunal proceeded to determine the rent at which it considered that the subject

property might reasonably be expected to be let on the open market by a willing landlord under an assured tenancy.

50. In so doing the Tribunal, as required by section 14(1), ignored the effect on the rental value of the property of any relevant tenant's improvements as defined in section 14(2) of that Act or any reduction in value due to a failure by the tenant to comply with any terms of his tenancy.

51. The Tribunal finds that the tenant, in the absence of clear words in any relevant statute, does not have a statutory implied covenant requiring him to give the landlord access to carry out works to the property. S30 HA 2004 relates to Improvement Notices and S.35 relates to premises where an improvement notice or prohibition order have been served: neither applies in this case. However, the council specifically stated that both of these courses of action were inappropriate when considering the hazards at the subject property.

52. The Tribunal does not accept that S11 HA 1985 requires the landlord to install heating appliances where none are installed and does not accept that "maintain" can be so interpreted. The Tribunal has taken into account that the landlord has been aware since at least since September 2020 that there are outstanding window repairs because they were referred to in the estimate from Tectum Limited dated 17 September 2020. It is noted that the landlord has not offered to carry out these repairs, except as part of the major works.

53. The works in the Hazard Awareness Notice comprise the following improvements: installation of central heating, replacement of existing shower cubicle and provision of altered plumbing, tiled splashback and hot water in kitchen, fire/smoke alarms and rewiring with a higher number of sockets than is currently installed in the flat. The rewiring however also included an element of repair. The proposed works relating to redecoration and replacement of floor coverings were consequential to the rewiring and installation of central heating: they were a means of making good.

Valuation

54. The tenancy is one to which Section 11 of the Landlord and Tenant Act 1985 applies. The Tribunal accepts that the flat was in very poor condition, unheated, with no hot water in the dated kitchen, a dated shower/wc and a window frame and sash cord requiring attention.

55. In addition, the Tribunal accepts that Mr Daly has more onerous internal decorating and repair covenants than an assured shorthold tenant.

56. In coming to its decision, I have used as the starting point the rent of £500 per week which the parties had agreed was the open market rental value for the flat if let in the usual condition for lettings on an Assured Shorthold basis.

57. However, the tenancy is an assured periodic tenancy and Mr Daly is required to carry out minor internal repairs and decorate the interior. The flat was let without the floor and window coverings, modernised kitchen with white goods

and bathroom with modern fittings usually found in an assured shorthold letting. In addition, the landlord of an assured shorthold usually redecorates unless the existing decorations are in very good condition.

58. I have adjusted the open market rent to reflect these matters, there are no tenant's improvements because Mr Daly accepts that the improvements were made during his father's tenancy and accrue to the landlord. Using my expert knowledge of the level of deductions appropriate the I have valued the flat as follows:

	Open market rent		£500 per week
Less	Unmodernised, no hot water to kitchen, no central heating, white goods, floor coverings, curtains or blinds.	£175	
	Terms and conditions of tenancy	£ 25	
	Adjusted market rent		**£300 per week**

The decision

59. The Tribunal determines the rent at £300 per week.

60. The rent proposed in the Notice of Increase could not have included the works proposed under the Hazard Awareness Notice because at the date of the Notice of Increase the landlord had not engaged contractors to carry out the work or arranged alternative accommodation for the tenant whilst the works were being undertaken. Indeed at that time the tenant was anxious for the landlord to do the work specified under the Hazard Awareness Notice. The tenant did not refuse access until October 2020 and therefore it could not be asserted that he was in breach at the date of the Notice, 9 January 2020.

61. The rent takes effect from 23 December 2020 being the date of my determination. The tenant is on a low income but not eligible for Housing Benefit. If the new rent was backdated to 9 February 2020 arrears amounting to approximately £10,000 would result in undue hardship.

Chairman: Evelyn Flint

Dated: 23 December 2020

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.

Appendix

Landlord and Tenant Act 1985

11 Repairing obligations in short leases

(1) In a lease to which this section applies (as to which, see sections 13 and 14) there is implied a covenant by the lessor—
(a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),
(b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and
(c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.

[(1A) If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant implied by subsection (1) shall have effect as if—
(a) the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest; and
(b) any reference in paragraphs (b) and (c) of that subsection to an installation in the dwelling-house included a reference to an installation which, directly or indirectly, serves the dwelling-house and which either—

(i) forms part of any part of a building in which the lessor has an estate or interest; or
(ii) is owned by the lessor or under his control.

(1B) Nothing in subsection (1A) shall be construed as requiring the lessor to carry out any works or repairs unless the disrepair (or failure to maintain in working order) is such as to affect the lessee's enjoyment of the dwelling-house or of any common parts, as defined in section 60(1) of the Landlord and Tenant Act 1987, which the lessee, as such, is entitled to use.]

(2) The covenant implied by subsection (1) ("the lessor's repairing covenant") shall not be construed as requiring the lessor—
(a) to carry out works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable but for an express covenant on his part,
(b) to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident, or
(c) to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling-house.

(3) In determining the standard of repair required by the lessor's repairing covenant, regard shall be had to the age, character and prospective life of the dwelling-house and the locality in which it is situated.

[(3A) In any case where—
(a) the lessor's repairing covenant has effect as mentioned in subsection (1A), and
(b) in order to comply with the covenant the lessor needs to carry out works or repairs otherwise than in, or to an installation in, the dwelling-house, and
(c) the lessor does not have a sufficient right in the part of the building or the installation concerned to enable him to carry out the required works or repairs,
then, in any proceedings relating to a failure to comply with the lessor's repairing covenant, so far as it requires the lessor to carry out the works or repairs in question, it shall be a defence for the lessor to prove that he used all reasonable endeavours to obtain, but was unable to obtain, such rights as would be adequate to enable him to carry out the works or repairs.]

(4) A covenant by the lessee for the repair of the premises is of no effect so far as it relates to the matters mentioned in subsection (1)(a) to (c), except so far as it imposes on the lessee any of the requirements mentioned in subsection (2)(a) or (c).

(5) The reference in subsection (4) to a covenant by the lessee for the repair of the premises includes a covenant—
(a) to put in repair or deliver up in repair,
(b) to paint, point or render,
(c) to pay money in lieu of repairs by the lessee, or
(d) to pay money on account of repairs by the lessor.

(6) In a case in which the lessor's repairing covenant is implied there is also implied a covenant by the lessee that the lessor, or any person authorised by him in writing, may at reasonable times of the day and on giving 24 hours' notice in writing

to the occupier, enter the premises comprised in the lease for the purpose of viewing their condition and state of repair.

Housing Act 1988

14 Determination of rent by rent assessment committee.
(1)Where, under subsection (4) (a) of section 13, a tenant refers to a rent assessment committee a notice under subsection (2) of that section, the committee shall determine the rent at which, subject to subsections (2) and (4) below, the committee consider that the dwelling-house concerned might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy—

(a) which is a periodic tenancy having the same periods as those of the tenancy to which the notice relates;

(b) which begins at the beginning of the new period specified in the notice;

(c) the terms of which (other than relating to the amount of the rent) are the same as those of the tenancy to which the notice relates; and

(d)in respect of which the same notices, if any, have been given under any of Grounds 1 to 5 of Schedule 2 to this Act, as have been given (or have effect as if given) in relation to the tenancy to which the notice relates.

(2) In making a determination under this section, there shall be disregarded—

(a) any effect on the rent attributable to the granting of a tenancy to a sitting tenant;

(b) any increase in the value of the dwelling-house attributable to a relevant improvement carried out by a person who at the time it was carried out was the tenant, if the improvement—

(i) was carried out otherwise than in pursuance of an obligation to his immediate landlord, or

(ii) was carried out pursuant to an obligation to his immediate landlord being an obligation which did not relate to the specific improvement concerned but arose by reference to consent given to the carrying out of that improvement; and

(c) any reduction in the value of the dwelling-house attributable to a failure by the tenant to comply with any terms of the tenancy.

(3)For the purposes of subsection (2)(b) above, in relation to a notice which is referred by a tenant as mentioned in subsection (1) above, an improvement is a relevant improvement if either it was carried out during the tenancy to which the notice relates or the following conditions are satisfied, namely—

(a) that it was carried out not more than twenty-one years before the date of service of the notice; and

(b) that, at all times during the period beginning when the improvement was carried out and ending on the date of service of the notice, the dwelling-house has been let under an assured tenancy; and

(c) that, on the coming to an end of an assured tenancy at any time during that period, the tenant (or, in the case of joint tenants, at least one of them) did not quit.

(4)In this section "rent" does not include any service charge, within the meaning of section 18 of the Landlord and Tenant Act 1985, but, subject to that, includes any sums payable by the tenant to the landlord on account of the use of furniture or for any of the matters referred to in subsection (1) (a) of that section, whether or not those sums are separate from the sums payable for the occupation of the dwelling-house concerned or are payable under separate agreements….

Housing Act 2004

s. 30 Offence of failing to comply with improvement notice

s. 30 Offence of failing to comply with improvement notice (1) Where an improvement notice has become operative, the person on whom the notice was served commits an offence if he fails to comply with it.

s. 35 Power of court to order occupier or owner to allow action to be taken on premises

(1) This section applies where an improvement notice or prohibition order has become operative.