FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AZ/LBC/2020/0014**
Property	**:**	**136 Boundfield Road, SE16 1PD**
Applicant	**:**	**Phoenix Community Housing Association (Bellingham and Downham) Limited**
Representative	**:**	**Tiernan Fitzgibbon instructed by Clarke Wilmott**
Respondent	**:**	**Oluwaseyi Modupeola Sogbesan**
Representative	**:**	**None**
Type of application	**:**	**Determination of an alleged breach of covenant s168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal member(s)	**:**	**Judge Hargreaves** **Evelyn Flint DMS FRICS IRRV**
Venue	**:**	**CVPREMOTE**
Date of hearing	**:**	**24th September 2020**

DECISION

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1. The Respondent is in breach of the covenants contained in Schedule 7 paragraphs 4, 16, 17, 21.1, 21.3 of the 125 year lease dated 16th August 2004 and made between the Mayor and Burgesses of the London Borough of Lewisham and the Respondent.

2. If the Applicant wishes to pursue an application for costs pursuant to Tribunal Rule 13(1)(b)(ii) then it must file and serve the schedule of costs dated 24th September 2020 on the Respondent by 5pm 12th October 2020 together with a brief summary of why it should obtain such an order.

3. The Respondent will then have until 5pm 27th October to file with the Tribunal and serve on the Applicant any response on the question of costs, after which date the Tribunal will deal with Rule 13 costs if notified that a Rule 13 decision is required by the Applicant.

REASONS

1. The Applicant landlord seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the Respondent tenant is in breach of various covenants contained in the lease. The Respondent is the registered proprietor of the 125 year lease which she entered into with the Mayor and Burgesses of the London Borough of Lewisham on 16th August 2004, the freehold reversion being assigned to the Applicant in 2008. The lease and office copy entries are at p41-86 of the bundle.

2. The hearing was conducted remotely using the CVP platform on the morning of 24th September 2020. There was no objection to the use of this format by the parties. The form of remote hearing was CVPREMOTE. A face to face hearing was not held because of the difficulties of arranging a Covid safe hearing at Alfred Place, so it was not practicable, no-one required a face to face hearing, and the application was ideal to be considered in a remote hearing. The documents to which we refer are contained in a bundle consisting of 174 pages supplied by the Applicant's solicitors Clarke Wilmott electronically. We have made the order set out above. Mr Fitzgibbon who represented the Applicant at the hearing said that he was content with the process and format at the end of the hearing.

3. The hearing was listed to take up to one day but due to the absence of the Respondent and the organisation of Mr Fitzgibbon who presented the well-prepared case with a great deal of efficiency, it took less time. We are indebted to him for his extremely useful skeleton argument dated as long ago as 12th June but clearly amended since then if that date was once accurate.

4. This brings us to a preliminary point. There was no attendance by or on behalf of the Respondent. In fact she has been absent from any

form of participation, written or oral in this application, though she would have received the first directions issued by Judge Hamilton-Farey on 13th March 2020 and later directions varied on 14th July (Judge Martynski) so must have been aware of what was involved and required of her, having also received all correspondence from the Applicant and the Tribunal. Having established that the Applicant has used her email throughout, that the Tribunal has done the same, that no last minute email or contact was received from the Respondent, that no emails were "bounced back" to the Tribunal, we have concluded for the purposes of Tribunal Rule 34(a), taking all the evidence of contact into account, that we are satisfied that the Respondent has been notified of the hearing or alternatively, that reasonable steps were taken to notify her of the same. Moving on to Rule 34(b) we are satisfied that it is also in the interests of justice to proceed with the hearing because the evidence produced by the Applicant is cogent, the case is well prepared, there has been no request for an adjournment and above all, not one single challenge to the Applicant's case from or on behalf of the Respondent has been received. In these circumstances we were entitled to proceed with the hearing and to determine the application in the absence of the Respondent. In effect she has put the Applicant to proof of its case and it has surmounted that hurdle.

5. The application originally sought a declaration in relation to the following breaches of covenant (Schedule 7 is applied through the general covenant to observe Schedule 7 as provided for in clause 4 of the lease):-

    (i) A breach of the covenant in paragraph 4 of Schedule 7 to keep the demised property and its fixtures and fittings in "good and substantial repair") (p52-3) in the usual terms;

    (ii) A breach of paragraph 17, Schedule 7 which provides that the property may only be used as "private residential premises for occupation by one household only" (p56);

    (iii) A breach of paragraph 21.2, Schedule 7 which provides that the Respondent is required to "keep all water, waste and soil pipes, drains, sinks, baths, lavatories and cisterns of the demised premises free from obstruction and properly cleansed" (the "blockage" covenant);

    (iv) A breach of the related covenant in paragraph 21.3, Schedule 7, which requires the Respondent to ensure that no "water or liquid soaks through the floors of the demised premises" (p57) (the "leakage" covenant).

6. By letter to the Tribunal dated 22nd June the Applicant asked for permission to amend the application by including additional breaches:-

(v) A breach of the other part of paragraph 17, Schedule 7, to allege the Respondent also breached the prohibition against using the property "for any trade profession or business whatsoever", which is the obvious flip side to the other part of this covenant set out above (p56);

(vi) A breach of paragraph 16.1 of Schedule 7 which prohibits the Respondent from "permitting or suffering to be done" in the property anything which may become a nuisance or annoyance to adjoining occupiers.

7. Since the relevant facts relied upon for the additional breaches are clearly contained in the original application and arise out of the same sequence of events, these were additional breaches which we agreed to consider. Given the evidential and factual basis we could see no prejudice to the Respondent in doing so and she chose not to challenge the application which was served on her on 22nd June 2020. If we are wrong about allowing the additional breaches to be considered pursuant to Rule 6(3)(c), it makes little difference to the outcome of the application overall.

8. The Applicant relied on three witness statements. First, Rob Augustine (p117, 2nd June) describes how the Applicant was notified of water ingress to the flat below by the tenant of 138 Boundfield Road on 17th January (see also p144), his attempts to arrange repairs consensually and finally arranging for forced access, which prompted a response from an occupier called Mr Kolawole Taiwo who provided access to Mr Augustine, his colleague Suzanne Russell and an "operative" employed by the Applicant on 6th February who carried out temporary plumbing repairs to prevent further water ingress to the flat below. Two factors emerge from his account: the state of the plumbing disrepair in the bathroom (paragraphs 7-8) and the evidence that the Respondent herself did not live in the property, but that four separate people (including Mr Taiwo who described himself as a tenant of the Respondent) did, each with access to a room via an individual lock. Mr Augustine's account ends with a description of a combative phone call with the Respondent who was angry about the repairs being undertaken to her property and her denial that its occupants were anything other than family and friends as to which she has produced no supporting evidence. (She reminded the Applicant that her property had been subject to the effects of disrepair in respect of other flats, see eg the orders of HHJ Luba QC in CLCC in 2016 in respect of 134 Boundfield Road, p125-134.) She has not filed any evidence to support that and the photographic evidence relating to the locks would require an explanation for a property supposed to be used as a residence for members of one household, as does what Mr Taiwo said. The email at p144 dated 10th February sent on behalf of the occupier of 138 Boundfield Road about water leakage from the property also refers to "private lets" of the property. It is clear from the correspondence and attendance notes at p87-100 of the bundle

that the Applicant sought to engage the Respondent about the problems in the property in a structured and informative way between 17th January and issuing the application, but to little practical avail (which is also relevant to the paragraph 16 allegation).

9. Mr Augustine has left the employ of the Applicant and did not give oral evidence. But as his evidence has not been challenged, we admitted it and accept what he says as it is a credible account and supported by other evidence.

10. Suzanne Russell also provided a statement dated 2nd June (p121). She attended the property on 6th February with Mr Augustine and again in paragraphs 6-11 describes in some detail the findings of the "operative" with regards to plumbing disrepair in both the kitchen and the bathroom of the property (blockage and leakages), and the causes and consequences. She too explains why her observation of the flat and conversation with Mr Taiwo led her to the conclusion that the Respondent had sub-let the property to four individuals who were not members of the same household. The fact that Mr Augustine and Ms Russell concluded the property was being used as an unlicensed HMO adds nothing to the alleged breach of paragraph 17. A household means people living together and the evidence suggests the individual occupiers were not friends or members of a household, had their own rooms and only shared the bathroom and kitchen. Mr Taiwo was also recorded as saying a "new" tenant had moved in, suggesting a letting on a rooms only basis.

11. Ms Russell was unable to attend the remote hearing for various practical reasons, but again, we have read her evidence and accept the contents as truthful and reliable, like Mr Augustine's. Again, the Respondent has made no challenge to her evidence either.

12. As a result of the visit on 6th February, the Applicant required access to carry out repair works in the absence of any confirmation from the Respondent that she would ensure they were done: it was put to the expense of obtaining injunctive relief in Bromley CC to enable it to do so: see pages 145-157 and p166 (again evidencing a lack of involvement by or representation of the Respondent). Having acquired the power to enter the property, the Applicant accessed it on 25th February and there is a surveyor's report listing what was found on that occasion at pages 159-164. Again, it evidences facts that justify findings of the breaches of paragraph 4, paragraph 21.1 and paragraph 21.3, as well as the nuisance breach in paragraph 16.1 given that it concludes that the flat below would require a dehumidifier and complete redecoration of bathroom and kitchen to deal with the problems caused by the leaks from the Respondent's property above. The state of the flat below is described briefly in the email of 10th February at p144, and it is a relatively understated description which gives it evidential credibility even though neither

the writer nor the occupant gave evidence. This is a case in which the plumbing and its condition in both the bathroom and kitchen were sub-standard to say the least, and it was unsurprising that damage has been caused to the property below.

13. Phil James provided a lengthy witness statement also dated 2nd June, on behalf of the Applicant, providing a comprehensive overview of his engagement with the subject of the application (from p109). We had the opportunity of asking Mr James questions about his evidence given that he has not attended the property, but we are satisfied that as an employee of the Applicant with day to day management responsibilities for the property, his evidence is also credible and provides a useful picture of what happened overall. For example his evidence adds to that of Augustine/Russell by describing access to the property on 30th January when a blockage in the u-bend in the bathroom sink causing stagnant water to stand in the basin was discovered (paragraph 9.5).

Breaches of covenant

14. As to the user covenant (paragraph 17), whilst the evidence is circumstantial and not admitted by the Respondent, we consider that on the balance of probabilities given the accounts of the main witnesses taken together, that the Respondent is not using the property as a private residence for occupation by one household only. That is certainly not the effect of what Mr Taiwo said to the Applicant's staff, nor do the four individual door locks suggest a one household user. The evidence is that the property is let to various individuals on an individual basis, and that the Respondent is letting to them for a financial reward: this is not the odd lodger in a spare room. Both parts of paragraph 17 are therefore made out.

15. There is clear evidence in the witness statements and the surveyor's report to prove blockage for the purpose of paragraph 21.1, and leaks for the purpose of paragraph 21.3. That a nuisance for the purposes of paragraph 16.1 has been caused to the owner and occupier of the flat below at 138 is proved by the email at p144, and the findings of the "operative" as well as the recommendations in the surveyor's report. The overall descriptions and photographs in the bundle demonstrate a failure to keep the property in good and substantial repair as required by paragraph 4 of Schedule 7. In fact, not only is the property in general disrepair in terms of its water and sanitary fittings as described, but it seems that there is little will on the part of the Respondent to do the works herself, provide access to others, or accept responsibility for paying for them, so she was suffering or permitting the disrepair and nuisance (to the extent the Applicant had to obtain injunctive relief to gain access to carry out repairs). As Mr Fitzgibbon emphasises in paragraph 38 of his skeleton argument, the Respondent knew by 3rd March when she finally contacted the Applicant, what the allegations were in respect of the property and had therefore knowingly failed to respond to the

Applicant's correspondence, much as she has done so in relation to this application.

16. This is not a complicated application which relies on arguments about the construction of covenants. The covenants relied upon (which are repeated in Phil James's statement for convenience) are straightforward, as is the evidence in support of the breaches as described by the Applicant's employees and agents. We are satisfied (i) that the facts set out by and on behalf of the Applicant by its witnesses and surveyor are made out comprehensively by the Applicant and that (ii) the facts justify findings that each covenant relied upon has been breached as alleged. This is a clear case in which the evidence points only one way in favour of the relief claimed by the Applicant.

17. As Rule 13 requires the Applicant to show that the Respondent has litigated unreasonably before any costs order can be made, the Applicant is given time to consider its position before pursuing such an application, the question being whether a failure to engage with the Tribunal at all is unreasonable litigation behaviour (when no unless orders were made, for example, and no steps appear to have been taken by the Applicant – perhaps due to experience with this litigant, we do not know – to enforce the Respondent's litigation obligations either). As it argues it has a contractual right to its costs, it may prefer to recoup its costs via the contractual route, but has yet to make a claim under the lease in respect of such costs, so any claim is premature and one in respect of which we have no jurisdiction in this application. So the question of costs is put to one side by us for the time being on the basis of the directions given.

Judge Hargreaves

Evelyn Flint DMS FRICS IRRV

25th September 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).