FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AH/LBC/2022/0024**
Property	**:**	**252B London Road, Croydon, London CR0 2TH**
Applicant	**:**	**Ms Joy Elizabeth Bowling**
Representative	**:**	**Mr Ross Patterson, Solicitor, of Benchmark Solicitors LLP**
Respondent	**:**	**Ms Carlene Nicola Kamaka**
Representative	**:**	**Mr Douglas Maxwell of Counsel, instructed by Harding Mitchell Solicitors**
Type of application	**:**	**Determination of an alleged breach of covenant**
Tribunal members	**:**	**Judge N Hawkes** **K Ridgeway MRICS** **John Francis QPM**
Date and venue of hearing	**:**	**11 October 2022 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**26 October 2022**

DECISION

Decisions of the Tribunal

For the reasons set out below, the Tribunal finds that the Respondent has breached clauses 3(g), 4(a), 4(b) and clause 1 of the First Schedule to the Lease of the Property.

The background

1. The Applicant is the freehold owner of 252 London Road, Croydon CR0 2TH ("the Building"). The Building comprises a block containing three flats situated above ground floor commercial premises.

2. The Applicant holds the first floor flat at the Building and, also, the ground floor premises from where she operates a business.

3. The Respondent is the leasehold owner of the property known as 252B London Road, Croydon CR0 2TH ("the Property"). The Property comprises a second floor flat at the Building.

4. The Applicant and the Respondent are the original parties to the lease of the Property. By a lease dated 9 March 2007 made between (1) Joy Elizabeth Bowling and (2) Carlene Nicola Kamaka ("the Lease"), the Property was let by the Applicant to the Respondent for a term of 125 years from 1 January 2006.

5. The Applicant seeks determinations pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent is in breach of various covenants in the Lease which are referred to below.

6. On 5 July 2022, Directions were given by the Tribunal leading to a final hearing which took place on 11 October 2022.

The hearing and inspection

7. The Tribunal inspected the Property at 10.30 am on 11 October 2022, in the presence of the Applicant and both parties' representatives. The final hearing then took place at 10 Alfred Place, London WC1E 7LR at 1.30 pm on 11 October 2022.

8. At both the inspection and the hearing, the Applicant was represented by Mr Patterson, Solicitor, and the Respondent was represented by Mr Maxwell of Counsel, accompanied by Mr Kutty, a Legal Assistant.

9. The Tribunal heard oral evidence of fact from the Applicant. In a witness statement dated 10 October 2022, that is the day immediately before the

hearing, the Respondent informed the Tribunal that she would be unable to attend the hearing due to work commitments.

10. The Respondent made no application for an adjournment and the hearing proceeded in her absence. Accordingly, although the Respondent had prepared a witness statement, she did not give oral evidence.

11. The Tribunal has read and taken into account the Respondent's witness statement but has given it limited weight because, due to her absence, the Respondent's evidence could not be tested through cross-examination.

The issues

12. Section 168 of the 2002 Act includes provision that:

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 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…

13. This application solely concerns alleged breaches of covenant on the part of the Respondent. At the commencement of the hearing, the Tribunal noted that the application does not concern whether or not the Applicant is in breach of covenant or whether the Respondent should be granted relief from forfeiture.

The terms of the Lease

14. By clause 1 of the Lease, the Property is the flat shown on the plan annexed to the Lease and edged in red and includes "the floor and ceilings" "but not the floor of the flat above it if any or the ceiling of the flat below if any and the internal and external walls between those levels on the plan".

15. By clause 3(c) of the Lease, the tenant covenants, "Not to make any alterations or additions to the Demised Premises not to remove any of the Landlord's fixtures and fittings without the previous consent in writing of the Lessor". The Tribunal notes that, by contrast with some of the other tenant's covenants, the word "permit" does not appear at clause 3(c) of the Lease.

16. By clause 3(d) of the Lease, the tenant covenants, "To pay all costs charges and expenses (including solicitor's costs and surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court".

17. By clause 3(g) of the Lease, the tenant covenants, "During the term not to assign underlet or part with possession of the Demised Premises or any part thereof or the Landlord's fixtures and fittings (if any) without the previous consent in writing of the Lessor such consent not to be unreasonably withheld".

18. By clause 4(a) of the Lease, the tenant covenants to, "Keep the Demised Premises (other than the parts therefrom comprised and referred to in paragraphs (c) of Clause 5 and the Fourth Schedule hereof) and all walls part walls sewers drainpipes cables wires appurtenances thereto belonging in good and tenantable repair and condition in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the parts of the Building other than the Demised Premises and when the Demised Premises include a garden to keep the garden in a neat and tidy condition and not to use the same or permit the same to be used for the dumping of rubbish".

19. By clause 4(b) of the Lease, the tenant covenants, "To paint twice over with good and appropriate oil colour and varnish paper whiten and colour all inside wood and iron work of the Flat where usually painted varnished papered whitened and coloured in the year Two Thousand and twelve AND in every subsequent fifth year and during the last year of the said term in a good and workmanlike manner".

20. By clause 4(d) of the Lease, the tenant covenants, "Not to do or permit to be done any act or thing which may render void or voidable the policy or policies of insurance of the Building and other parts of the Building or any policy or policies of insurance in respect of the contents of any of the flats comprised in the Building or which may cause any increased premium to be payable in respect of any such policy".

21. By clause 1 of the First Schedule to the Lease, the tenant covenants, "Not to use the Demised Premises nor permit the same to be used for any purpose whatsoever other than as a private dwelling house in the occupation of one family only or for any purpose from which a nuisance can arise to the owners and occupiers of the other flats comprised in the Building or in the neighbourhood or for any illegal or immoral purpose".

22. By clause 2 of the First Schedule to the Lease, the tenant covenants, "Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance on any flat or garage in or part of the Building or may cause an increased premium to be payable in respect thereof".

23. By clause 5(c)(i) of the Lease, the landlord covenants, "to paint the whole of the outside wood iron and other work of the Building heretofore or usually painted and grain and varnish such external parts as have been heretofore or are usually grained and varnished".

24. By clause 5(c)(ii) of the Lease, the landlord covenants, "to paint varnish colour grain and whitewash such of the common parts of the Building as have been or usually painted papered coloured grained and whitewashed (other than those parts which are included in this demise or in the demise of the other flats in the Building)".

25. By clause 5(e) of the Lease, the landlord covenants, "That subject to contribution and payments as hereinbefore provided the Lessor will carry out the works referred to in the Fourth Schedule hereof".

26. The works referred to in the Fourth Schedule include: "The expenses of maintaining repairing decorating and renewing (a) the main structure and in particular the roof chimney stacks gutters and rainwater pipes of the Building (b) the gas and water pipes drains and electric cables and wires in under or upon the Building and serving more than one flat herein (c) the main entrances passages landings and staircases of the Building leading to the flats in the Building and (d) the lift shaft cables winding apparatus and all other equipment appurtenant to the lift (e) the boundary walls and fences of the Building (f) the Entryphone system in the Building".

The Tribunal's determinations

27. The Respondent contends that, in breach of clause 3(c) of the Lease, "the Respondent has altered the Property by removing the copper pipes, boiler and internal doors from the Property. The kitchen and bathroom appliances have been removed. The electrical and plumbing installations have been disconnected."

28. The Tribunal observed these defects during the course of the inspection save that the boiler, whilst disconnected, was visible. At paragraph 28 of her witness statement, the Respondent denies altering the Property by removing items. The Applicant gave evidence that the Property has been squatted. She stated that she became aware of the current state of the Property when she gained emergency access in order to remedy a water leak. She was therefore not in a position to give direct evidence concerning how the Property came to be in its current defective state.

29. In all the circumstances, the Tribunal is not satisfied on the balance of probabilities that the Respondent, whether by herself, by an agent, or by instructing or encouraging anyone else, removed the items referred from the Property and/or disconnected the electrical and plumbing installations. The Tribunal finds that it is more probable that these actions, which have caused substantial damage to the Property, were undertaken by the squatters who were not acting on the Applicant's behalf.

30. The Applicant contends that, in breach of clause 3(g) of the Lease, the Respondent parted with possession of the Property when squatters moved into the Property. She states that the squatters were removed by the police following a drugs raid.

31. The Applicant gave evidence that the Respondent has been absent for a number of years, that squatters were living at the Property for some time,

and that the squatters turned the Property into a "drugs house" before eventually being removed by the police. This account is also recorded in an email from the Applicant dated 7 October 2021.

32. The Tribunal found the Applicant to be a credible witness and we accept this evidence. On the basis of the Applicant's evidence, we are satisfied that the Respondent did not take reasonable steps to monitor and manage the Property with the result that, for a period of time, squatters were in occupation and the Respondent was no longer in possession of the Property. The Respondent then took no steps to regain possession of the Property from the squatters who had to be removed by the police.

33. Accordingly, the Tribunal finds as a fact on the balance of probabilities that the Respondent parted with possession of the Property to squatters in breach of clause 3(g) of the Lease.

34. The Applicant contends that, in breach of clause 4(a) of the Lease, the Respondent has failed to keep the Property in good and tenantable repair.

35. On inspecting the Property, the Tribunal found the flat to be in an extremely poor condition and wholly unfit for human habitation. There were holes in the floorboards and unplastered areas on the walls. Internal doors had been removed. Masonry, rubble, feathers, and areas of extensive pigeon guano littered the floor. The kitchen and bathroom appliances and sections of copper pipework been removed. A bath stood, disconnected, in a corner of one of the rooms and there were no taps or sinks at the Property. Broken glazing to windows had not been properly boarded up allowing birds to enter the Property. Several pigeons flew freely around the living room during the course of the Tribunal's inspection.

36. The Respondent does not dispute that the Property is out of repair but contends that the Applicant has waived the covenant at clause 4(a) of the Lease by delaying in taking action against the Respondent.

37. The Tribunal has jurisdiction to decide whether a landlord has waived a covenant but does not have jurisdiction to determine whether the right to forfeit has been waived. In *Swanston Grange (Luton) Management Limited v Langley-Essen* [2008] L. & T.R. 20, LT), at [16] and [23] the Land Tribunal stated (emphasis supplied):

16. …For the reasons set out below I agree with the LVT that it did have jurisdiction to consider this question of waiver of the covenant using this expression in the sense mentioned above. Nothing I say is intended to indicate any jurisdiction in the LVT to consider the separate question of waiver which arises when it is necessary to decide whether a landlord has waived the right to forfeit a lease on the basis of a breach

of covenant. The latter question is dealing with the remedies available to a landlord on the basis of a breach of covenant which has been determined to have occurred or has been admitted by the tenant. ***The question with which this case concerned is the question of whether the landlord is estopped from asserting against the tenant that there has been a breach of covenant at all****. This in my judgment is a wholly different question and I do not accept Mr Clargo's argument that, if the LVT does not have jurisdiction to consider questions of waiver of the right to forfeit, it necessarily cannot have jurisdiction to consider questions of waiver in the sense of being estopped from relying upon a covenant at all.*

...

23. For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show ***an unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants*** *regarding underlettings either at all or for the time being. The Respondent would need to establish that* ***she had altered her position to her detriment*** *on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenants would be* ***unconscionable****, see Halsbury's Laws 4th Ed Reissue Vol 16(2) paragraph 1082 and following.*

24. In the present case I cannot see how such a waiver or estoppel can be made out bearing in mind

(1) The absence of any evidence from the Respondent as to her understanding of the facts at any relevant time or as to any change of position by her in reliance upon such understanding. The very limited evidence contained in paragraph 4 and 5 of her statement of case are insufficient, nor can I see anything sufficient which has been identified by the LVT contained in any other material. At highest all that appears to have happened is that the Appellant has for a period in the past not actively enforced the covenants controlling subletting, but this of itself is insufficient to constitute a clear and unequivocal representation (capable of founding an estoppel) that it would not do so in the future.

38. The Applicant gave oral evidence that the Respondent had had tenants at the Property in 2018, and maybe up to 2019, so she had known that the Property was "OK" at around that time. The Applicant stated that, after that, "things became worse and worse especially after squatters came in". She said that she first became aware that the Property was in its current uninhabitable condition during the covid 19 pandemic when she had to gain emergency access to remedy a water leak. She explained that she had no general right to gain access to the Property.

39. The Applicant said that she had initially hoped that the Respondent would carry out remedial work. She was aware that the Property, which is mortgaged, would be costing the Respondent money. She was also aware that the Respondent was attempting to sell the Property and she thought that the purchaser would be likely to put the Property into repair. However, the situation then "got on top of" the Applicant and so she decided to take legal action.

40. In her witness statement, the Respondent confirms that the Property was tenanted until the end of January 2019 and that, in or around March 2021, the Respondent decided to try and sell the Property.

41. Mr Maxwell referred the Tribunal to a letter dated 15 March 2021 from the Respondent to the Applicant stating (emphasis supplied):

"Please be advised that I visited the above property earlier on today. I found several dead birds in my living room and hallway which have got in as a result of holes in the roof.

I will be adding this to my claim against you as Freeholder for the property".

42. This appears to be an allegation that the freeholder is in breach of her repairing covenants rather than a request for the tenant's repairing covenant to be waived or an admission that the Applicant is breach of the tenant's repairing covenant. On 30 November 2021, less than nine months later, the Applicant's solicitor wrote a Letter of Claim to the Respondent contending that the Respondent was in breach of covenant. The Applicant gave clear oral evidence that she at no time waived the covenants in the Lease.

43. As stated above, the Tribunal found the Applicant to be a credible witness and we accept her evidence. We find as a fact on the balance of probabilities that the Applicant first became aware of the very significant deterioration in the condition of the Property during the covid 19 pandemic, so in 2020 at the earliest. The Applicant had, by 20 November 2021, formally instructed solicitors in respect of this matter.

44. Mr Maxwell said everything which could be said on the Respondent's behalf. However, we are not satisfied on the evidence on the balance of probabilities that, whether by action or inaction, the Applicant made an unequivocal promise or representation that she would not insist on her legal rights under the Lease.

45. We are also not satisfied on the balance of probabilities that the Respondent has changed her position to her detriment in the belief that a such representation has been made or that it would, in all the

circumstances of this case, be unconscionable for the Applicant to assert her legal rights insofar as they fall within this Tribunal's jurisdiction.

46. We therefore find that, in breach of clause 4(a) of the Lease, the Respondent has failed to keep the Property in good and tenantable repair.

47. The Applicant contends that in breach of clause 4(b) Lease, the Respondent has failed to decorate internally. Having inspected the Property, we find that it is highly likely that no internal decoration has been carried out for in excess of 5 years. Accordingly, we find as a fact on the balance of probabilities that the Respondent is in breach of clause 4(b) of the Lease.

48. The Applicant contends that, in breach of clause 4(d) of the Lease and clause 2 of the First Schedule, the buildings insurance policy may be voidable and the premium may increase as a result of the state and condition of the Property. The Tribunal was not referred to the terms of the any insurance policy or to any evidence from the insurer. We accept Mr Maxwell's submission that there is insufficient evidence before the Tribunal to establish that the Respondent is in breach of Clause 4(d) of the Lease.

49. The Applicant contends that, in breach of clause 1 of the First Schedule to the Lease, "the Respondent has allowed the Property to fall into disrepair, which is damaging the Applicant's flat below and the fabric of the block. The Property was also occupied by squatters and became a drugs den causing nuisance to the rest of the block and the neighbourhood."

50. The Tribunal accepts on the balance of probabilities the evidence of the Applicant that the Respondent, by failing to adequately maintain and manage the Property, has permitted the condition of the Property to deteriorate such that (i) water leaked from the Property into the first floor flat causing the Applicant loss and damage, (ii) squatters were able to reside at the Property and use it as a "drugs den" until they were eventually removed by the police rather than by the Respondent, and (iii) the use of the Property as a "drugs den" caused a nuisance and annoyance to the owners and occupiers of other flats in the Building.

51. Accordingly, the Tribunal finds on the balance of probabilities that, in breach of clause 1 of the First Schedule to the Lease, the Respondent has permitted the Property to be used other than "as a private dwelling house in the occupation of one family only"; that she has permitted the Property to be used for purposes "from which a nuisance can arise to the owners and occupiers of other flats in the building"; and that she has permitted the Property to be used "for illegal or immoral person", namely as a "drugs den".

Judge Hawkes

26 October 2022

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).