FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AR/LBC/2023/0039**
Property	**:**	**171A Station Lane, Hornchurch, Essex RM12 6LL**
Applicant	**:**	**Kilbey Ventures Limited**
Representative	**:**	**Mark Loveday instructed by Grayfield Solicitors**
Respondent	**:**	**Roger Philip Wigmore**
Representative	**:**	**In person**
Type of Application	**:**	**Determination of an alleged breach of covenant s168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Judge Hargreaves** **Alison Flynn MA MRICS**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR** **3rd and 4th October 2023**
Date of Decision	**:**	**18th October 2023**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

1.1 the Respondent has breached the covenants in clause 2(3) and 2(8) of the lease dated 31st March 1987

1.2 the Applicant's claims based on clauses 2(6) (paragraphs 11-13 of the Applicant's statement of case) and 2(7) of the lease (paragraph 9 of the Applicant's statement of case) are struck out.

2. Any claim for costs by the Applicant pursuant to Tribunal Rule 13(1) shall be made by 5pm 1st November 2023 with a brief statement in support and re-serving on the Respondent the Form N260 already provided dated 3rd October 2023.

3. The Respondent has until 5pm 15th November 2023 to file and serve a response on costs.

4. The Tribunal will deal with costs after 14th November 2023.

NB References in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

REASONS

1. Dealing with the background to this dispute first, the Applicant acquired the freehold of 171 Station Lane and was registered as proprietor of the title (EGL 153440) [173] on 5th May 2022. This was therefore a recent acquisition. The outline of 171 is depicted on the file plan at [177]. The Respondent acquired the leasehold interest in the first floor flat at 171, known as 171A, and was registered as proprietor of the leasehold interest (EGL 194460) on 1st September 2004 [179-183]. He told us that he had let the flat, which is a two-bedroom flat above shop/commercial premises, for about 18 years. Following the recent breakdown of his marriage and divorce, the tenants had moved out, and he and his son had moved in in around January 2022. The flat has been unoccupied since sometime in December 2022 when, as is discussed in more detail below, the electricity was cut off and has not been re-connected.

2. We had the benefit of a site visit on Tuesday 3rd October, in which we were accompanied by counsel for the Applicant, Mr Loveday, the Applicant's managing director John Kilbey, and the Respondent. The premises were largely as described by Lee Kyson of Lee Kyson Building Consultancy Ltd, as the result of his inspection on 24th April 2023 [19-103]. The photographs (of which there are many) speak for themselves. The Respondent indeed accepted Kyson's descriptions. We therefore do not intend to repeat them. The flat looks like a property undergoing renovation: ie, the kitchen and bathroom are unusable because are not fitted, connected, or plumbed, previous units have been removed, and redecoration is incomplete. To put it shortly, a person might comment

that it looks like the builders and decorators have walked off site at the end of a working day. One of the issues we wished to explore therefore was whether, if a property is in the process of being repaired and maintained and decorated, but the works have stopped for any reason, a breach of covenant can be proved. In this case, as we explain, we have concluded that the Applicant has proved that the property has been in a state of disrepair for a considerable period, before and after the Applicant acquired the freehold.

3. The Respondent had failed to abide by any of the directions issued on 26th July 2023 [104-108] and on Monday 2nd October had asked the Tribunal for a postponement on personal grounds. He was directed to make a proper application and copy it to the Applicant, but failed to do that and consequently the site visit and hearing proceeded as listed by the directions of 26th July 2023. As no procedural sanctions had been imposed on the Respondent, we permitted him to cross-examine so far as he was able to, and comment on the Applicant's case subject in return to a rigorous but fair cross-examination by Mr Loveday, who assisted the Tribunal in running the hearing with a Respondent who had, in lay terms, done little or nothing to prepare for the hearing or defend his position.

4. It was clear to us that the parties had numerous discussions and encounters which were not adequately described in any pleadings or in Mr Kilbey's witness statement which deals with many irrelevant factors [109-113]. We therefore spent quite some time at the face-to-face hearing on the 4th October trying to establish a timeline, particularly in relation to the vexed issue of how and when the electrical supply to the flat was terminated as we were concerned to establish whether this would have an impact on the Applicant's case on the general breach of repairing covenants as provided for in clause 2(3) of the lease, or any defence. It was also clear to us from the site visit that what was demised pursuant to the lease dated 31st March 1987 [156-171] has been impacted, to put it neutrally, by the residential development undertaken by the Applicant since acquiring the freehold (not dealt with by Mr Kyson). This has basically involved building two ground floor flats to the rear of 171, and a new first floor flat to rear of 171A which abuts the rear bathroom flank wall [see plan at 171]. At the site visit we asked for copies of the planning application and any party wall agreements. By the end of the day Mr Loveday had supplied a party wall agreement which relates on to the ground floor commercial premises and does not therefore affect the Respondent's interest, and plans relating to the planning application and permissions granted. It should be added that the Applicant has itself carried out certain works to the property and these are listed in paragraph 14 of Mr Kilbey's statement [111-112].

5. We were surprised by the absence of a party wall agreement as between the Applicant and Respondent, particularly since, as Mr Loveday described it, the lease is a 'layer-cake' lease which demises the *'internal and external walls of the flat above [the ground floor shop level] and*

the roof of the building together with the structure so far as the same constitutes the roof of the flat and also including the entrance hall and staircase and joists and supports thereof leading from the ground floor to the flat': First Schedule to the lease [166-7]. As to the planning application and permission, it appears that on some plans 171A is treated as part of the proposed development site. This seems to have had at least two significant results which we need to clear up in the course of this decision. First, the new first floor flat built backing onto 171A has been built in accordance with plans which permit building right up to the rear bathroom window of the Respondent's flat (which raises questions as to the layer-cake demise as the Respondent cannot access the rear wall any longer). The bathroom window was boarded up on the outside by the Applicant's workmen and so the bathroom windows do not open and the window is supposed to be properly bricked up. A new window is supposed to be installed on the remaining flank wall to compensate. Second, the planning permission plans also indicate a revised opening in the wall between the WC and the rest of the bathroom. The precise details are unclear because the parties could not agree on site with any clarity where this change was supposed to occur or explain to us who was responsible for the evidently part-completed changes in the opening to the wall between the WC and the rest of the bathroom. Thirdly, the other main physical change we noted is that whereas the ground floor entrance door for 171A used to open onto a side yard, that area has now been enclosed to provide a newly built entrance hall for four flats, and the Applicant appears to believe that it can charge the Respondent certain costs associated with the provision of new doors etc under the service charge provisions of the existing lease (see paragraph 15 of Mr Kilbey's witness statement at [112]). These changes had some impact on the electricity issues which needed untangling. As Mr Loveday correctly submitted, whilst acknowledging that his client might have muddled planning permissions with landlord/tenant contractual rights and obligations, it is not our job to comment on the impact of these physical changes either as to the Applicant's breach of any covenant for quiet enjoyment or whether the Respondent's lease requires to be varied, or what issues of acquiescence/estoppel arise.

6. While Mr Loveday also submitted that the planning permissions were irrelevant to the application, he was not entirely correct about that. The application [1-11] specifically relies on two alleged breaches of covenant, ie clause 2(3) (general repairing) and clause 2(8) (decorating). The Applicant's pleadings [12-17] then included alleged breaches of two further covenants ie clause 2(7) (against unauthorised alterations) and clause 2(6) (allowing the landlord to inspect on notice).[1]

7. Mr Loveday expanded his case on the alleged breach of clause 2(7) at paragraphs 18-20 of his skeleton argument to refer specifically to the boarding up of the bathroom window and to alterations in the

[1] Not pleaded by Mr Loveday but by the Applicant's solicitor

bathroom wall opening. He submitted when we asked him to justify the expansion of two alleged breaches to four alleged breaches via the pleadings, that in accordance with the Tribunal directions he was entitled to plead his case as expanded. We disagree. In the particular case of the alleged breach of clause 2(7), not only was the allegation not included in the application and only referred to at paragraph 9 of the pleadings without particulars [14], but in the circumstances it was an abuse and an unreasonable allegation which should never have been pleaded by anyone with a remote understanding of the relevant facts. Although Mr Loveday defended the right to plead and rely on breaches not set out in the application form, he did recognise the difficulty of his situation and withdraw the particular allegation as to the breach of clause 2(7) at the start of the hearing. For our part we consider it an appropriate use of our case management powers to strike out the pleading at paragraph 9 of the Applicant's statement of case, partly because it was unparticularised, not in the original application and when it was particularised in Mr Loveday's skeleton argument, attributed fault to the Respondent for which the planning permissions showed he could not be responsible (or at the very least the Applicant would be estopped from relying on any such alleged breach).[2] The result is the same either way. The Applicant cannot rely on any proven breach of clause 2(7) of the lease.

8. For the same reason, ie non-inclusion in the original application, we strike out paragraphs 11-13 in the Applicant's statement of case [15] which allege a breach of clause 2(6) ie the covenant *'to permit the Landlord and its duly authorised agents with or without workmen and others upon giving previous notice in writing (except in cases of emergency) at all reasonable times to enter upon and examine the condition of the demised premises ...[etc]'*. Again, no particulars were pleaded except a vague reference in paragraph 12 to *'the Respondent for several months refused to grant access to the Applicant to inspect'* the flat, acknowledging however in paragraph 13 that access was granted on 24th April 2023 to the Applicant's surveyor. Mr Loveday expanded the allegations in paragraphs 24 and 25 of his skeleton argument (though did not pursue the allegations in paragraph 24) and limited the allegation to a request for access made on 12th April for 25th which was refused by the Respondent's then solicitors on 20th April [206 and 212]. This allegation was dealt with in very general terms by Mr Kilbey in his witness statement (paragraphs 9-11, [111]). Apart from the fact that we consider it appropriate to strike out the allegation on the same grounds as apply to the allegation in respect of clause 2(7), it is hard to see how a refusal for a request for access on 25th but which is provided on 24th is a breach of the covenant to provide access. Mr Loveday's submissions emphasised that he relied on the written refusal in Moss and Coleman's letter of 20th April 2023 to provide access on 25th for various practical reasons (no electricity and works obstructing access to the entrance to 171A and more significantly see [213-4] for photographs taken on 18th April 2023 by the Respondent). Since the

[2] See Tribunal Rule 9(3)(d): Mr Loveday was given notice of our intention at the start of the hearing.

point of the covenant is to provide access, that is what the Respondent did, just not on 25th. In other words, had we allowed the Applicant to proceed with the clause 2(7) allegation, we would refuse it as a matter of construction and on the facts, particularly since at the time it was refused, the entrance to the flat was blocked by the Applicant's own works.

9. These procedural issues dealt with, we move on to deal with the primary allegations in relation to clauses 2(3) and (8) set out in the application. Apart from the interior of the property, Mr Kilbey's witness statement alleged (paragraph 12 at [111]) that there was water damage to the commercial shop premises on the ground floor below due to ingress of water from 171A. It was hard to extricate a firm timeline from him, but we accept that there was damage on 14th and 16th September 2022 which most certainly aggravated relationships between Mr Kilbey and the Respondent and more importantly, showed the property to be in a poor state of repair before the 171A renovations were halted before December 2022 when the electricity was disconnected and not reconnected. Mr Kilbey's own photographs at [114-155], said (on instructions) to have been taken between July-October 2022 demonstrate both the state of 171A and the extent of damage caused by water ingress to the ground floor commercial premises. Mr Kilbey said it was like 'rain' whenever the bath/shower was used upstairs.

10. On the balance of probabilities we accept, and it was not seriously challenged by the Respondent, that the damage to the ground floor was caused on at least 2 occasions by water ingress from the Respondent's bathroom, as evidenced by the rotten floorboards underneath the bath, the state of which, even if unknown to the Respondent, must have been longstanding. He said the floorboards had been covered up until the Applicant investigated the leak, and that he (the Respondent) and the previous ground floor tenant had always attributed any water damage below to his tenants being careless when showering. Whether it was the bath or shower is irrelevant: the uncontested fact of repeat water ingress to the ground floor shop premises (notably after refurbishment by the Applicant) is enough to establish a breach of clause 2(3) of the lease. See also Kyson's report at [42-43, 86-91] for more photographs of the bathroom flooring and evidence of historic staining. The Respondent accepted that there were complaints about water ingress to the ground floor prior to 2022 but that he could never establish where the water was coming from.

11. Mr Kilbey was generally critical of the state of 171A as he described the point of the photographs he had taken (the Respondent seemingly happy to let him do so on those occasions). For example, in relation to the photograph at [117] which shows the kitchen with units prior to subsequent removal, he pointed out that they had no backing panels and were 'semi-functional'. The main issue we thought was not the lack of backing panels but the fact that their absence showed the presence of black mould. Putting how that occurred to one side (no explanations were proffered and the Respondent gave evidence that it had been dealt

with by a proprietary application as one might expect) the other obvious long standing evidence of disrepair relates to the front door of 171A as it was and still remains despite the Applicant's evident desire to replace it (at some cost to the Respondent it appears) as part of the new ground floor internal hallway renovation works. Good pictures of the front door are at [19, 145-146]. It is badly in need of a repaint and the sill is rotten. One consequence of that is that rain water appears to have seeped under the sill, caused the flooring to rot under the hallway linoleum, with the result that there is a hole in the floor when you step through the door. The Respondent has filled it with polystyrene as what can only be described as an unacceptable temporary measure which we saw for ourselves: see [100]. That is also evident disrepair pursuant to clause 2(3). As the Applicant contends, some of the works carried out by the Respondent demonstrate a lack of expertise which has exacerbated the state of disrepair, a good example of this being plasterboard installed against the external kitchen wall (see [32-36 Kyson report, letter from Applicant's solicitors at the top of [203]).

12. For these two reasons at the very least the Applicant has proved a breach of clause 2(3) of the lease. But we have to deal with the issue of the electricity supply to 171A because the Respondent argued that without electricity he cannot rectify any defects or continue with his programme of refurbishment, and that this was not his fault but the Applicant's. In respect of the breaches we have addressed, he is wrong about this as those breaches occurred well before December 2022.

13. The Applicant's case on the electricity was put by Mr Loveday in his skeleton argument as a failure to repair and maintain 'wires' as required by clause 2(3). He relied on the 28th October 2022 report at [221-236] and the quote from HS Electrical Contractors (who produced the report) dated 9th November [204-205] for over £4500 worth of wiring works. Mr Kilbey has some electrical qualifications and he tended to lecture both the Respondent and to some extent the Tribunal in his effort to explain his case: it could have been done in a much simpler way in a well-prepared witness statement (which his was not). However, we finally discerned the following from his and the Respondent's oral evidence. As the result of a supply issue to the flat before 28th October (we think non-electricians might say the supply 'blew' and terminated), a report was commissioned by the Respondent from HS Electrical ('Ben'). The Applicant's account of the background to the loss of supply is at [199]; the Respondent's initial position was that the fault was between the flat and the ground floor ([199]). The Applicant blamed the Respondent ([202]). Ben clearly had a working relationship with Mr Kilbey. There was an 'incoming supply cable fault' and Ben had been refused access to the 'intake' by the Applicant's office manager [223]. However the report shows substantial issues with the wiring in the flat [222] which was assessed as 'unsatisfactory' [221]. This assessment was provided without access to the main intake supply box [147-150]. There was no clear evidence to suggest that the Respondent made a direct request for access to this to be provided subsequently in any specific way which can be discerned on the

evidence before us. Whilst it is true that his then instructed solicitors repeatedly referred to the disconnected electricity supply in their correspondence, we have decided that they were proceeding on the basis that the fault lay with the Applicant, that access was refused and that they did not have full knowledge of the situation as we now understand it to be.

14. In the end, the oral evidence backed up by limited documentary evidence, including evidence that an appointment had been made by the Respondent with UKPN to quote for a new electrical supply straight to the flat proves that (i) there were and are substantial issues with wiring to the flat which on the facts have not been rectified (see the quote at [204-205] as well as the October 2022 report) but which could be rectified by internal re-wiring works to the flat before being reconnected to the main building supply (what the Applicant called option 1) (ii) the problems existed before the end of October 2022 (iii) the Applicant explained its position on option 1 in an email dated 25th November 2022 at [249] (iv) an alternative direct supply was being considered by the Respondent via an appointment made with UKPN for 1st December 2022 [243-245] (option 2) but (v) the evidence is that no progress was made in this respect and there is no evidence as to whether the Respondent followed up with UKPN. In his evidence the Respondent blames the Applicant but failed to produce any evidence which supported this conclusion, any other refusal of access for repairs and any evidence of progress made with UKPN. In short, the Respondent has not progressed either option 1 or option 2. Given that there is no evidence that the Applicant was responsible for the blow out before 28th October, the defective state of the wiring to the flat was and remains the Respondent's responsibility on the evidence we have. His evidence as to trying to remedy the situation was unsatisfactory and can be summed up as having in effect walked away from the issue, possibly pending the outcome of these proceedings and being diverted by personal problems. Therefore, this is also a breach of the covenant in clause 2(3). We should add that while we reject Mr Loveday's submission that the Respondent should busy himself repairing and redecorating the flat with battery operated tools and no power supply is required, because we consider that impractical, the fact is that the Respondent's own failure to sort out the electrics is what is holding him up, so that the state of disrepair which plainly existed before the end of October 2022 continues and is exacerbated by his current failure to remedy this issue.

15. In our judgment these are the primary issues on which the Applicant succeeds in relation to the alleged breaches of clause 2(3). A full list is itemised at paragraph 12 of Mr Loveday's skeleton argument. What the other allegations amount to is that the Respondent has simply stopped the works he was carrying out: most of the allegations would be remedied by a good repair and redecoration job carried out by a good tradesman. Otherwise, the property will continue to look like a long-tenanted property in need of repair and redecoration and maintenance, the works having started, the workmen having walked off site. We do

not consider that it is necessary for us to go through the detail of the Kyson report: where it describes any defect, it is generally accurate if somewhat hyper critical (eg living room missing trims [24]). What has really underpinned the Applicant's case is the Respondent's failure to complete the jobs he started, a matter he acknowledged before proceedings were issued ([212]).

16. For what it is worth, and Mr Loveday described this as adding little, the Respondent's failure to start or complete what were evidently required redecorations (eg the mould on the bathroom ceiling needed attention), having accepted that the property required attention after 18 years of tenant occupation is evidently a further breach of the general decorating covenant in clause 2(8) to paint (etc) the interior every seventh year and then '*to carry out all other works of a decorative nature to the interior of the flat in a good and workmanlike manner* ..'. Nothing is finished, even the rooms which could be, such as the sitting room.

17. It follows that for these reasons the Applicant has established that the Respondent is in breach of the covenants in clauses 2(3) and (8) of the lease.

18. Directions for costs are included.

Judge Hargreaves
Alison Flynn MA MRICS
18th October 2023

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).