FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	BIR/OOCT/LBC/2022/0018
Property	:	Apartment 9, The Exchange, 20a Poplar Road, Solihull B91 3AB
Applicant	:	City Living (Midlands) Limited
Representative	:	Realty Law
Respondent	:	Mr Thomas Martin Maguire
Type of Application	:	An Application for a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant or a condition in a lease has occurred
Tribunal Members	:	Judge David R. Salter (Chairman) Mrs J. Rossiter FRICS
Date of Hearing	**:**	None. Decision determined on written submissions.
Date of Decision	**:**	**8 November 2023**

DECISION

Background

1 The Applicant landlord is the freeholder of the building known as The Exchange, 20a Poplar Road, Solihull B91 3AB which comprises ground floor commercial units and ten residential flats on the other floors of which Apartment 9 is one. Apartment 9 ('the Property') is a long leasehold apartment forming part of the second floor of The Exchange.

2 The Respondent is the long leaseholder of the Property.

3 The lease under which the Respondent holds the Property is dated 9 August 2019 and made between the Applicant and Dean Kershaw. It is granted for a term of 999 years (less 14 days) from 1 June 2017 up to and including 17 May 3016 ('the lease').

4 By an application dated 14 December 2022, the Applicant seeks an order from the Tribunal that the Respondent is in breach of several covenants in the lease of the Property, namely through his failure, first, to maintain and repair the Property (clause 3.5.1 – Covenant to repair) and, second, by not allowing the Applicant access to inspect the Property (clause 3.10.1 – Covenant to permit the landlord to inspect the premises and its right to repair) and, thirdly, by allowing water to leak from the Property to the apartment below, Apartment 5, (clause 3.18.1 – Covenant not to cause a legal nuisance).

5 In the application, the Applicant indicated that, prior to the submission of the application, its managing agents, KWB Property Management, had sought on several occasions to elicit a response from the Respondent in relation to the alleged breaches of covenant. In this respect and following the Respondent's failure to acknowledge the need to take action in relation to the afore-mentioned leak and to allow KWB Property Management, notwithstanding the service of a notice of inspection, access to the Property to inspect, Realty Law sent a letter before action to the Respondent dated 14 November 2022 in which the alleged breaches of covenant were highlighted. The Respondent did not reply to this letter before action.

6 Directions were issued by a Deputy Regional Judge on 9 January 2023. Those Directions stated that the burden of proof in relation to the alleged breaches rests with the Applicant and that the Tribunal must be satisfied that (a) the lease includes the covenants relied on by the Applicant and (b) that, if proved, the alleged facts constitute a breach of those covenants. The Directions also recorded that the Respondent and any mortgagee or occupier of the Property should seek independent legal advice as these proceedings may be a preliminary to court proceedings to forfeit the lease.

7 Thereafter, the Directions were concerned, principally, with matters pertaining to the preparation and submission by the parties of their respective bundles of documents. The Directions specified that these should be indexed with numbered pages and with the documents, as far as possible, presented in date order, with primacy given to the submission of the Applicant's bundle. In relation to the Respondent's bundle, the Directions directed that Respondent should include, *inter alia*, 'a full statement in response to the Applicant's case setting out in full the grounds for opposing the application'. Following the anticipated receipt of the Respondent's bundle of documents, the Directions afforded the Applicant the opportunity to submit a brief supplementary reply.

8 In addition, the Directions alerted the parties to the prospect of an inspection of the Property followed by a hearing.

9 A bundle of documents prepared by the Applicant in the manner prescribed by the Directions was received by the Tribunal on 25 January 2023. The bundle included copies of the following documents - the application, the Directions, the lease of the Property, up-to-date official copies of the entries on the registers of the both the freehold and leasehold titles, relevant communications by the Applicant (through KWB Management or Realty Law) to the Respondent, a signed witness statement (made by Mr Mark Eskins, Property Manager, KWB Property Management), legal submissions (presented by Realty Law as a statement of case), other documents upon which the Applicant relied, and photographs.

10 The Respondent did not respond to or comply with the Directions.

11 Accordingly, further Directions in the form of a barring warning were issued by the Regional Judge on 3 March 2023. The barring warning applied to the Respondent who was advised that, unless he provided a bundle of documents in accordance with the Directions issued on 9 January 2023 by 15 March 2023, he would be automatically barred from taking further part in these proceedings with the consequence that the Tribunal need not consider any response or other submission made by him and may determine, summarily, any or all issues against him.

12 The Respondent did not provide a bundle of documents in accordance with the Directions issued on 9 January 2023.

13 The mortgagee of the Property, Nationwide Building Society, was made aware of these proceedings by Realty Law in a letter dated 13 March 2023. Nationwide Building Society has not applied to the Tribunal to be joined as a party to these proceedings.

14 In an e-mail to the Tribunal dated 3 June 2023, Realty Law requested that, in view of the barring of the Respondent, the matters raised in the application be resolved by the Tribunal in a determination based on the evidence presented on behalf of the Applicant and the accompanying written submissions.

Inspection

15 The Tribunal visited The Exchange on 19 July 2023 with a view to inspecting the Property. In the event, the Tribunal was unable to gain access to it. However, it was able to inspect Apartment 5 which is situated on the first floor and immediately below the Property. This inspection took place in the presence of Mr Eskins and Mr Adrian Bowron and Mrs Sarah Bowron, the long leaseholders of Apartment 5, who consented to the Tribunal's inspection of Apartment 5.

During the inspection, Mr and Mrs Bowron drew the Tribunal's attention to evidence of water ingress on the ceilings in the living area and the bedroom and to some discolouration of the flooring in the living area caused by permeation of water through the ceiling onto the floor which had occurred notwithstanding a protective covering on the living room floor. Mr and Mrs Bowron also informed the Tribunal that there is water underfloor heating throughout The Exchange.

Subsequently, the Tribunal requested that the Applicant supply copies of any 'as built' drawings and specifications of The Exchange, with particular reference to the central heating and water heating systems supplying the bathrooms and kitchens of the apartments and to the services and associated conduits for The Exchange and the apartments. Such copies were duly supplied by the Applicant.

Hearing

16 No hearing was held for the reason cited in paragraph 14 above.

The Lease – provisions pertinent to the application

17 The following extracts from the definitions in clause 1(1) of the lease are material to the application:

1. **DEFINITIONS AND INTERPRETATION**

1.1 The following expressions shall have the following meanings assigned to them where the context so admits:-

WORDS & EXPRESSIONS

"the Apartment" means the area edged red on the Lease Plan known as Apartment 9 comprising:-

(I) the premises on the second floor of the Building which includes:-

(a) the inside and outside of the windows and other lights and the frames, glass, equipment, and fitments relating to windows and lights of the Apartment;

(b) the doors, door frames, equipment, fitments and any glass relating to the doors of the Apartment;

(c) the internal plaster or other surfaces of the loadbearing walls and columns within the Apartment and of walls which form boundaries of the Apartment;

(d) non-loadbearing walls completely within the Apartment;

(e) floor surfaces, raised floors and floor screeds down to the joists or other structural parts supporting the flooring of the Apartment;

(f) the plaster or other surfaces of the ceilings and false ceilings within the Apartment and the voids between the ceilings and false ceilings;

(g) the Conduits within and exclusively serving the Apartment;

(h) appurtenances, fixtures, fittings (if any) and rights granted by this Lease;

(i) machinery and plant provided by the Landlord (if any) situated within and exclusively serving the Apartment;

but excluding the structural parts, loadbearing framework, roof, foundations, joists and external walls, and the Conduits… within (but not exclusively serving) the Apartment;

"the Conduits" means and includes all ducts shafts cisterns tanks water gas electricity and telephone supply pipes wires and cables sewers drains

soil pipes waste pipes waterpipes gutters soakaways meters and any other conducting media serving the Apartment and the Estate

"Retained Premises" means

(i) all structural parts of the Building…

…(ii) the conduits not exclusively serving the Apartment or exclusively serving any other demised premises or part of the Building intended for demise

18 Clause 3 of the lease sets out the Tenant's Covenants. The covenants pertinent to the application are as follows:

"3.5 **Repair**

3.5.1

At all times during the Term to repair (and renew where more economic than repair) and keep the Apartment and each and every part thereof in good and tenantable repair and condition in every respect (damage by any of the Insured Risks excepted save to the extent that the payment of any policy monies has been lawfully refused or withheld in whole or in part by reason of any act neglect omission or default of the Tenant any undertenant or its or their respective servants or agents) and to decorate the Apartment not less than every five (5) years

3.10 **Landlord's right of inspection and right of repair**

3.10.1

To permit the Landlord and its employees or agents at all reasonable and proper times and upon at least seven (7) days' written notice (and accompanied if required) to enter the Apartment (during the normal working day) and examine their condition (and also take a schedule of Landlord's fixtures and fittings in the Apartment (if any)

3.18 **Nuisance**

3.18.1

Not to do on or about the Apartment any act or thing which is a legal nuisance to the Landlord or its tenants or to the owners tenants or occupiers of any other part or parts of the Apartment or any adjoining or neighbouring premises or which causes injury or damage to any neighbouring or adjoining property or any fixture or fittings goods furniture or other thing in it including injury or damage attributable to neglect or default or carelessness of the Tenant or any undertenant or its or their respective servants agents contractors or licensees or to the bursting overflowing disrepair or leaking of any cistern tank basin pipes or other apparatus in the Apartment which the Tenant is liable to repair or renew"

Relevant Law

19 Section 168 of the Commonhold and Leasehold Reform Act 2002 ('the Act') provides as follows:

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 committed 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 2(c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which-
(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(b) has been the subject of determination by a court, or
(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement…

Submissions

Applicant

20 The Applicant submits that the Respondent has failed to comply with obligations imposed on him by the lease and, in so doing, is in breach of clauses 3.5.1, 3.10.1 and 3.18.1 of the lease.

21 In essence, the Applicant contends that, first, the Respondent failed to keep the Property in repair, internally, with the consequence that water has leaked and continues to leak from the Property into Apartment 5 (a breach of clause 3.5.1). Such leak emanates from conduits/internal pipes (including water pipes) that exclusively serve the Property for which the Respondent is responsible under the terms of the lease (see, definition of 'conduits' in clause 1(1)). Secondly, the leak constitutes a nuisance (a breach of clause 3.18.1). Finally, the Respondent, notwithstanding legitimate requests from the Applicant (including the issue of a Notice to Inspect), has refused access to the Property to the Applicant's representatives to carry out an inspection with a view to identifying the source of the leak (a breach of clause 3.10.1).

22 In its statement of case allied with supporting documents presented in evidence, the Applicant sets out the sequence of events leading up to the application to the Tribunal and the evidence in support of its submission that the Respondent is in breach of the aforementioned covenants in the lease.

23 In June 2022, KWB Property Management was notified that water was entering Apartment 5 through the ceiling. As a consequence, Mr Eskins drew this to the attention of the Respondent a number of times and asked him to address this problem. In his witness statement dated 23 January 2023, Mr Eskins says:

'7. I was notified on or around 14 June 2022 by the flat below flat 9, water is seeping into their flat via their ceiling from flat 9.

8. My initial concern was if there is a leak to the flat below, it is caused from an escape of water in the flat above.

9. It is very common in these circumstances; we use the Applicants inspections powers granted within the Lease, as agents of the Landlord to inspect the Property.

10. In most cases if there is a leak to the flat below, it is caused from an escape of water in the flat above.

11. I had initial amicable and positive conversations with the leaseholder of Apartment 9 explaining the issue and requesting their assistance in resolving it. As the leak continued, I subsequently again tried to reach the leasehold owner of Apartment 9 on numerous occasions via telephone and email and I received no further response…

12. I regularly inspect The Exchange so I even attempted to reach the leaseholder in person but there was no reply at the time.'

24 Mr Eskins also added in his witness statement that he had been informed by the owners of Apartment 5 that 'there are intervals in the day where the leak is heavier when the shower is turned on in the flat above'. He observes that this suggests the leak is from Apartment 9.

25 The Applicant adduced in evidence copies of the e-mails to which Mr Eskins refers (dated 14 September 2022 and 4 October 2022) together with a call log extracted from KWB Property Management's phone report showing eleven telephone calls made to the Respondent between 18 August 2022 and 15 September 2022 and two automated text replies from the Respondent dated 6 September 2022 and 13 September 2022 respectively which the Applicants suggest are indicative of the receipt by the Respondent of calls made on those dates.

26 In view of the lack of response from the Respondent, Realty Law issued a Notice to Inspect dated 21 October 2022 which requested that access to the Property be accorded to KWB Property Management by the Respondent on 31 October 2022 with a view to ascertaining the source of the leak. The Notice was also sent to the Respondent in an e-mail dated 26 October 2022. The Applicant adduced the Notice to Inspect (and the letter that accompanied it which was also dated 21 October 2022) and the e-mail in evidence.

27 Mr Eskins, who was accompanied by a contractor, sought to obtain access to the Property in accordance with the Notice to Inspect on 31 October 2022. This was denied by the Respondent.

28 In view of the Respondent's lack of response throughout, a letter before action dated 14 November 2022 was sent by Realty Law to the Respondent. The Respondent failed to respond to this letter. Accordingly, the Applicant made its application to the Tribunal.

29 The Applicant's also presented in evidence photographs showing marks on the ceilings in the living room and bedroom that were indicative of water ingress and a photograph of water stains on a covering laid to protect the floor in the living room.

30 In light of these circumstances, the Applicant requests that the Tribunal makes an order that the Respondent has breached each of clauses 3.5.1, 3.10.1 and 3.18.1 in the lease.

Respondent

31 The Respondent did not make any submissions.

Costs

32 Costs were sought by Realty Law, on behalf of the Applicant, on two grounds. First, in furtherance of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the Tribunal Rules'), wasted costs from the Respondent's failure to comply with provisions in the lease, and, secondly, contractual costs referable to clauses 3.4.2 (any reasonable and proper action taken by the landlord in connection with any material breach of the tenant's obligations in the lease), 3.4.3 (any steps taken in proper contemplation of proceedings relating to Apartment 9 under 146 and/or 147 of the Law of Property Act 1925), 3.44 (any reasonable and proper action taken by the landlord in abating a legal nuisance caused by the tenant), and 3.22.6 (any liability arising from any breach by the tenant of any covenant or any condition in the lease) in the lease.

33 Further, Realty Law submitted, on behalf of the Applicant, an itemised statement of costs dated 16 March 2023. This showed total costs of £2,859.40 (including VAT of £458.40).

Decision

34 In light of the evidence presented by the Applicant and the evidence gleaned from its visit to The Exchange and inspection of Apartment 5, the Tribunal is required to consider the Applicant's contention that the Respondent is in breach of clauses 3.5.1, 3.10.1 and 3.18.1 of the lease in view of water ingress into Apartment 5 through the ceilings of its living area and bedroom from Apartment 9.

35 The Tribunal's jurisdiction under 168(4) of the Act extends only to the making of a determination of whether or not the alleged breaches of covenant have occurred. Inevitably, this necessitates the construction or interpretation of pertinent wording in the lease. In this respect, the Tribunal is mindful of Lord Neuberger's observations in *Arnold v Britton* [2015] UKSC 36 to the effect that the following matters are material to the assessment of the meaning of relevant words, namely the natural and ordinary meaning of the clauses under consideration, any other provisions in the lease, the overall purpose of the clause(s) and the lease, the facts and circumstances known or assumed by parties at the time the lease was executed, and commercial common sense. Subjective evidence of any party's intentions is to be disregarded.

36 The pivotal issue is to what extent, if any, responsibility for the water ingress (leakage) and its consequences may be attributed to the Respondent.

37 In essence, clause 3.5.1 of the lease imposes an obligation on the Respondent 'to repair…and keep the Apartment and each and every part thereof in good and tenantable repair and condition in every respect'. Clause 1.1 of the lease defines the meaning of 'the Apartment' for the purposes of the lease.

When considered in the context of the application and the afore-mentioned pivotal issue, this definition states, explicitly, that 'the Apartment' includes those conduits 'within and exclusively serving' the Apartment. Hence, the responsibility for what broadly may be described as the maintenance and repair of such conduits falls on the Respondent under clause 3.5.1.

Clause 1.1 also provides that conduits 'not exclusively serving the Apartment or exclusively serving any other demised premises or part of the Building intended for

demise' fall within the meaning of 'retained premises' from which it may be inferred responsibility for their maintenance and repair lies with the Applicant.

Further, the generic definition of 'the Conduits' in Clause 1.1 includes, specifically, water supply pipes and water pipes.

38 The evidence suggests that there is an abundance of 'conduits' situate within the likely vicinity of the source of the leak. Some of those conduits or pipes are in place to 'exclusively serve' the Property, for example, the pipes that facilitate the inflow and outflow of water to and from the Apartment whilst others have a remit that goes beyond serving the Apartment (and for that matter any other individual demised apartment within The Exchange), for example, the pipes utilised in the central heating and water heating systems.

39 The Applicant asserts, strongly, that the source of the leak is pipes that 'exclusively serve' the Property and that responsibility for the leak, therefore, lies with the Respondent; an assertion made manifest by Mr Eskins in his witness statement when he recounts the occurrence and recurrence of the leak and, also, relates the observation of the leaseholders of Apartment 5 that water ingress into that apartment is 'heavier' when the shower is in use in the Property.

40 The difficulty is that the Applicant, notwithstanding the best endeavours of its representatives including the service of a written notice to inspect on the Respondent in accordance with clause 3.10.1 of the lease, has been unable to secure access to the Property with a view to establishing, definitively, that the source of the leak can be traced to pipes which the Respondent is obliged to keep in good and tenantable repair and condition under clause 3.5.1 of the lease.

41 The evidence shows that the Applicant's failure to gain access to the Property for the purpose of examining its condition is attributable to the conduct of Respondent who, after an initial responsiveness to the approaches of Mr Eskins, has been unwilling to co-operate and has denied access to the Property throughout. A position compounded by the absence of the Respondent when the Tribunal visited The Exchange with the principal purpose of inspecting the Property.

42 In these circumstances, the failure of the Applicant, through no fault of its own or of its representatives, to establish, in the absence of an inspection, a causal link between the leakage and pipes for which the Respondent is responsible means that the Tribunal is not in a position, as things stand, to find that the Respondent is in breach of clause 3.5.1. It follows that, presently, the Tribunal is, similarly, not in a position to find that the Respondent is accountable for what may be regarded on further examination as an unreasonable and substantial interference with the use and enjoyment of Apartment 5 caused by the leakage and, hence, in breach of clause 3.18.1 of the lease.

43 However, it is clear from the evidence that the Respondent is in breach of clause 3.10.1 of the lease for not allowing the Applicant and its representatives to inspect the Property for the purpose of examining its condition and the Tribunal so orders.

Costs

44 Rule 13 of the Tribunal Rules gives the Tribunal power to make an order for costs in limited circumstances. It provides:

Orders for costs, reimbursement of expenses and interest on costs

13 - (1) The Tribunal may make an order in respect of costs only -

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

(i) an agricultural land and drainage case,

(ii) a residential property case,

(iii) a leasehold case…

45 The Tribunal is required to exercise any power conferred by the Tribunal Rules with a view to giving effect to the overriding objective of those Rules, namely to deal with cases fairly and justly.

46 Section 29(4) of the Tribunal Courts and Enforcement Act 2007 ('the 2007 Act') provides:

(4) In any proceedings…the relevant Tribunal may –

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,
the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

Further, section 29(5) defines 'wasted costs' as follows –

(5) In sub-section (4) "wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay.

47 In respect of the Tribunal's power to award costs, the Upper Tribunal in *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC) stated:

"[12]…The general principle is laid down by section 29(1) *[of the 2007 Act]*: costs of all proceedings are in the discretion of the FTT, which has full power to determine by whom and to what extent the costs are to be paid, subject to the restrictions imposed by the 2013 Rules. Those restrictions prohibit the making of an order for costs except in the circumstances described in rule 13(1)."

48 More specifically in relation to 'wasted costs', the Upper Tribunal added:

"[17] The power to make an order for wasted costs under rule 13(1)(a) and section 29(4) of the 2007 Act is concerned with the conduct of a "legal or other representative" of a party, and not the conduct of the parties themselves. It is a distinct power which should not be confused with the power under rule 13(1)(b).

[18] The key characteristic of "wasted costs", as they are defined by section 29(5) is that they are costs incurred by a party "as a result of any improper, unreasonable or negligent act or omission" on the part of a representative…"

49 It follows that the Applicant's request to recoup what it regards as wasted costs that is costs incurred because of the Respondent's failure to comply with provisions in the lease, is misconceived, because such costs are not 'wasted costs' as envisaged by Rule 13(1)(a). It is also apparent from Rule 13(1) that the Tribunal does not have jurisdiction to contemplate an award of costs in relation to what the Applicant describes, generically, as 'contractual costs' that may be incurred in relation clauses 3.4.2, 3.4.3 3.4.4 and 3.22.6 of the lease.

Summary of Findings

50 In short, the Tribunal finds as follows:

(i) The Tribunal determines that a breach of the covenant in clause 3.10.1 of the lease has occurred;
(ii) The Tribunal determines that no breach of the covenants in clauses 3.5.1 and 3.18.1 of the lease has occurred; and
(iii) The application for costs under Rule 13 is refused.

Judge David R. Salter

Date: 8 November 2023

Appeal Provisions

51 If any party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such appeal must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

52 If the party wishing to appeal does not comply with the 28-day time limit, the party shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

53 The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.