



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00AH/LBC/2023/0049**

Property : **68a Parchmore Road, Thornton Heath,
Croydon CR7 8LW**

Applicant : **Hanbury Commercial Properties
Limited**

Representative : **Streeter Marshall LLP**

Respondent : **Mark St Louis**

Representative : **Denham International Letting Agent**

Type of application : **Determination of an alleged breach of
covenant Section 168(4) Commonhold
and leasehold Reform Act 2002**

Tribunal members : **Judge J Pittaway
Ms A Flynn MA MRICS**

**Date and Venue of
hearing** : **2 November 2023
10 Alfred Place, London WC1E 7LR**

Date of decision : **23 November 2023**

DECISION

Decisions of the tribunal

1. For the reasons set out below, the Tribunal finds that the Respondent has breached clauses 2(4) and/or clause 2(5) and 2(9) of the Lease of the Property.
2. The Tribunal issues Directions in respect of the Application for costs under Rule 13(b) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The background

3. The Applicant is the freehold owner of 68 Parchmore Road (“**the Building**”). The Building is a mid terrace Victorian house comprising two flats in total. Mr Turner and his wife Susan Turner are directors of the Applicant. Mr and Mrs Turner are also the leaseholders of the ground floor flat at the Building.
4. The Respondent is the leasehold owner of 68A Parchmore Road, Thornton Heath Croydon CR7 8LW (“**the Property**”), which is the first floor flat at the Building.
5. The Respondent is the tenant of the Property and the Applicant the Landlord under a lease dated 17 October 1972 made between Richard Stanley Whittingham (1) and Robert Ian Harcourt (2) as varied by a Deed of Variation dated 19 March 2003 made between Henry John Humphreys (1) and Donald Anthony Bailey (2) (“**the Lease**”), the term of which is 129 years from 29 September 1972.
6. The Applicant seeks a determination 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.
7. On 28 July 2023, Directions were given by the Tribunal which stated that the Property would be inspected at 10.30 am on 2 November 2023 and the hearing would be held at 1.30 pm on 2 November 2023.
8. At the end of the Hearing Mr Skjott applied for costs under Rule 13(b) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The inspection

9. The Tribunal inspected the ground floor flat at 68 Parchmore Road and the exterior of the Building at 10.30 am on 2 November 2023, in the presence of Mr Turner, Mr Skjott, counsel for the Applicants and Mr Lartey, the tenant of the ground floor flat. The Tribunal, on its own, inspected the upper flat with the consent of the occupant. Neither the Respondent nor his representative was in attendance.
10. The Tribunal inspected the ground floor flat and the exterior walls of the Building. It noted that the damp stains in the ground floor living room even though the room had been recently decorated. It found staining at ceiling height on both the flank wall and the wall between the flank wall and the adjacent bedroom. It noted vents and triple vents had been installed in the windows for the purpose of reducing the damp.

11. There was also evidence of staining at ceiling height on the external wall of the rear bedroom. The Tribunal also noted damp stains around the kitchen window and in the bathroom located under the asphalt roof of extension.
12. The Property smelt damp.
13. The bathroom in the rear extension showed slippage from the original extension, to the extent that some cover panels recently installed by Mr Turner had moved from the wall.
14. During the Tribunal's inspection of the exterior Mr Turner drew its attention to the guttering and downpipe that he had installed in an effort to minimise damp penetration. It noted the new window to the upper maisonette bathroom. The other two rooms on the upper floor had not been replaced and appeared to have the original sills.
15. The Tribunal noted the crack between the single storey extension and the main building.
16. The Tribunal inspected the rear garden. That demised to the Respondent is not separated by any dividing feature from the rear garden that is demised to the lessee of the ground floor flat and the Respondent has no means of access to the rear garden, the stairs which previously gave such access having rotted and been removed. The Tribunal noted the two sycamore trees at the end of the garden, which by their location are in the area of garden demised to the Respondent.
17. The Tribunal inspected the bathroom and kitchen of the upper maisonette without the other parties being present. The inspection was cursory due to the occupant not having been aware previously of the intention to inspect.
18. The bathroom of the upper maisonette smelt damp, the floor was damp and the walls damp. The cause of the damp was not clear to the Tribunal. The bathroom had modern fittings and was in reasonable condition.
19. There was no apparent evidence of damp in the kitchen of the upper flat.

The hearing

20. The hearing took place at 10 Alfred Place, London WC1E 7LR at 1.30 pm on 2 November 2023, following the inspection of the Property.
21. At the hearing the Applicant was represented by Mr Skjott. The hearing was attended by Mr and Mrs Turner, Mr Dwiredi (pupil barrister) and Ms Lewis (trainee solicitor). Neither the Respondent nor his representative was in attendance.
22. At the start of the hearing Mr Skjott advised the Tribunal that on his way to the hearing he had received an e mail from Denham International Letting Agent (**'Denham'**) suggesting that the hearing be relisted and a joint inspection arranged of the Property. Mr Turner advised the Tribunal that he had received a call from Mr St Louis at about the same time stating that Denham had not informed him of the hearing.
23. Mr Skjott submitted that the papers in connection with the application had been sent in August to both the Property and to Denham, and that accordingly the Respondent was aware of the proceedings. He submitted that the hearing should proceed as the issue before the Tribunal was one of fact.
24. The Tribunal adjourned briefly. It was satisfied that the Respondent, through his agent, had known of the proposed inspection and hearing and had failed to engage with the application. It noted that the lease of the

Property provides that s196 Law of Property Act 1925 applies to notices served under the lease. It determined that given that it had inspected before there was any suggestion that the Respondent wanted to postpone the hearing, and in the interests of fairness to the Applicant the hearing should proceed.

25. The Tribunal did not consider that there was any reason to have a joint inspection of the Building which it had already inspected. As made clear to the attendees at the inspection the Tribunal does not hear evidence or take submissions at the inspection. It merely inspects.
26. Following the hearing the Tribunal were handed an e mail from Mr St Louis dated 3 November 2023 and timed at 11.35. It attached an e mail of 2 November from Issac Carter, in which Mr Carter stated that he was the owner of the Property and had been unaware of the hearing until 2 November. It in turn attached an e mail from Mr Rwehumbiza of Denhams, also dated 2 November 2023 requesting that further communications be sent to Mrmarkstlouis@gmail.com. The Tribunal was unable to act upon these e mails which were only received after the completion of the hearing.
27. The Tribunal finds that, from Denhams' conversation with Mr Skjott on 3 November and its e mail of 2 November naming Mr St Louis as the person to whom further communications should be sent that in the absence of any evidence to the contrary Mr St Louis remains the owner of the property and Denham his agent/representative.

The issues

28. The issues before the Tribunal to determine were

- Was the Respondent in breach of a covenant or covenants in the Lease?
- Was the Applicant entitled to its costs under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

29. Section 168 of the 2002 Act provides that:

(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...

30. 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.
31. Rule 13 (b) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides that the Tribunal may make an order in respect of costs only if a person has acted unreasonably in bringing, defending or conducting proceedings.

The Tribunal’s determination

32. Having inspected the Property, the Building and its garden, and considered the evidence in the bundle before it, and Mr Skjoll’s submissions the Tribunal determines that the Respondent is in breach of clauses 2(4) and/or clause 2(5) and 2(9) of the Lease.
33. The Tribunal issues Directins in respect of the application for costs under Rule 13(b) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Reasons for the Tribunal determination

34. In the absence of the Respondent at the Hearing the Tribunal heard no oral evidence but relied upon its inspection and the bundles before it.
35. Mr Skjott submitted that the s168 issue before the Tribunal was one of fact, and that there had been no suggestion from the Respondent that the contents of Mr Turner’s witness statements was untrue.

36. Clause 1 of the Lease demises the Property in the following terms,

'ALL THAT piece of land shown on the plan annexed hereto and thereon edged green and being the upper maisonette and attic (hereinafter called 'the upper maisonette') of the property known as 68 Parchmore Road Thornton Heath aforesaid and the garden the situation whereof is shown on the said plan and thereon edged red all of which premises are known as 68A Parchmore Road, Thornton Heath in the London Borough of Croydon..'

37. By clause 2(4) of the Lease, the tenant covenants,

'To keep the interior of the upper maisonette and every part thereof in tenantable repair and decoration throughout the said term and it is hereby declared and agreed that there is included in the demised premises and in this covenant as repairable by the tenants (including replacements whenever such shall be necessary) the floors of and in the upper maisonette and one half in depth of the structure and the joists or beams on which the said floors are laid. There are also included the windows of and the attic over the upper maisonette. PROVIDED ALWAYS that the Tenant shall not repair any joist or beam on which the said floors are laid without giving notice to the occupier of the lower maisonette of his intention so to do giving details of the work intended to be done so that the occupier of the lower maisonette may take such precautions as he may be advised for the protection of the ceilings thereof.'

38. By clause 2(5) of the Lease the tenant covenants,

'To repair and keep in tenantable repair the exterior and the roof (subject to the Landlord's contribution hereinafter set out) of the upper maisonette and all additions thereto and the walls and fences and in particular those with an inward 'T' and drains thereof all paint work to be painted at least once in every three years and the brickwork to be pointed as required. PROVIDED ALWAYS that the exterior of the upper maisonette and all additions thereto and the walls and fences and drains thereof shall not be painted otherwise than in a colour and manner agreed with the Landlord or (failing such agreement) in the colour and manner (as near may be) in which the same is now or was last previously painted.'

39. By clause 2(9) of the Lease, the tenant covenants,

'Not to do or suffer to be done in or upon the upper maisonette anything which may be or become a nuisance annoyance or cause damage or inconvenience to the Landlord or to the occupier of the lower maisonette or neighbouring owners and occupiers or whereby any insurance for the time being effected on the upper or lower maisonette or either of them or any contents thereof may be rendered void or voidable or whereby the rate or rates of premium may be increased'

40. At the start of the Hearing the Tribunal had before it a bundle of 173 pages (the '**Original Bundle**'). Mr Skjott informed the Tribunal that there was a supplemental bundle (the '**Supplemental Bundle**') which had been sent to the Respondent at the Property, to his agent Denhams and to the Tribunal on 27 October 2023. This was not before the Tribunal at the start of the Hearing but was made available to it during the Hearing.
41. The Original Bundle contained a witness statement from Mr Turner, as a director of Hanbury Commercial Properties Limited, which set out a chronology of water ingress from the Property since 2018 during which period of time Mr St Louis had been its owner. In April 2021 the London Borough of Croydon threatened an enforcement notice on the Respondent for the condition of the ground floor flat and issued a Schedule of Works for immediate repairs that the Applicant undertook. Mr Turner stated that many of the problems were linked to dampness in the external walls in the lounge, kitchen and rear wall to the bathroom.
42. The Applicant had had a damp specialist attend the ground floor flat who had determined that the damp in the ground floor flat was not caused by rising damp. He believed that rainwater was penetrating the nine-inch solid external walls and recommended remedial work which was carried out, being stripping the paint off the external walls and applying a specialist gel coating to the external walls. Vents were also installed at high level in the lounge, bedrooms and kitchen. Within weeks the ground floor flat was again showing signs of water penetration.
43. The Supplemental Bundle contained a second witness statement from Mr Turner referring to a further incident of water ingress from the upper maisonette on 10 October 2023.
44. During its inspection the Tribunal observed the dampness in the bathroom of the Property. It is not clear from its inspection whether this damp is caused by want of repair of the exterior of the Property or the interior of the Property, but it exists.
45. Mr Turner visited the upper maisonette in January 2023 and prepared a schedule of remedial works which was sent to the Respondent and his agents on 10 March 2023. This referred to repair of the bathroom, remediation of water penetration through the external walls to the rear bedroom of the upper maisonette and the replacement of its window. It also referred to two sycamore trees in the rear garden causing structural damage to the Building. Neither the Applicant nor its solicitors have received a response to the schedule and Mr Turner states that he does not believe that any remedial work has been carried out to the Property.
46. In July 2022 it was brought to Mr Turner's attention that cracks had begun to appear where the ground floor extension of the Building joins the rear of the original house. The Applicant instructed T2G Partnership to carry out a structural survey which concluded that two sycamores in the rear garden owned by the Respondent were affecting the foundations. His witness statement stated that this had been confirmed by chartered building surveyors Collier Stevens.
47. In relation to the want of repair to prevent the water ingress to the ground floor flat the Tribunal finds that, either because of want of repair to the

exterior or to the interior of the Property, the Respondent is in breach of his repairing obligations under clauses 2(4) and/or 2(5) of the lease. The Tribunal finds on the evidence before it that the want of repair is causing nuisance annoyance or cause damage or inconvenience to the applicant landlord and to the occupier of the lower maisonette in breach of clause 2(9) of the Lease.

48. The evidence before the Tribunal as to the cause of the cracks which have appeared between the ground floor extension and the original building is not conclusive. The original bundle contains a letter from Collier Stevens of 17 February 2023 in which they referred to '*slight foundation settlement in the rear of the extension*' and noted the two sycamore trees, which they recommended be pollarded or removed, but it is not conclusive that the trees are the cause of the cracking.
49. Further, all of clauses 2(4), 2(5) and 2(5) are covenants in respect of the 'upper maisonette' which does not include the garden. This is demised separately and the Lease contains no obligations in respect of it. Mr Skjott submitted that the Lease must imply that the garden is included in the 'upper maisonette' but this is not what it says, and the Tribunal finds that it is not included in the obligations imposed in respect of the Property.
50. The Tribunal therefore finds that the Respondent's inaction in respect of the trees does not give rise to a breach of s168 of the Act.

51. Mr Skjott applied for an order for costs against the Respondent under Rule 13 on the basis of the Respondent's conduct, that he had failed to make contact with the Applicant, and had failed to engage in the proceedings before the Tribunal until a late stage. Mr Skjott also referred the Tribunal to the manner in which the Respondent had reduced the payment of his outstanding ground rent. A statement of the Applicant's costs had already been sent to the respondent.
52. The Tribunal has issued separate Directions in relation to the costs application.
53. The issue of ground rent is not within the Tribunal's jurisdiction under s168.

Name: Judge Pittaway

Date: 23 November 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).