FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AE/LBC/2020/0036** **LON/00AE/LSC/2021/0050**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**114a Brondesbury Villas London NW6 6AE**
Applicant	**:**	**Ms Susan Roche**
Representative	**:**	**In person**
Respondent	**:**	**Nick Davies and Gemma Elwin Harris**
Representative	**:**	**In person**
Type of application	**:**	**For the determination of alleged breaches of covenants and conditions of a lease and for the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Tribunal Judge Dutton** **Mrs S F Redmond BSc MRICS**
Venue	**:**	**Video Hearing 27 April 2021**
Date of decision	**:**	**30 April 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPEREMOTE. A face-to-face hearing was not held because. it was not practicable and no-one requested the same and all issues could be determined in a remote hearing. The documents that we were referred to are in bundles of some 360 pages, the contents of which we have noted.

Decisions of the tribunal

1. The tribunal dismisses the application of the Applicant seeking a determination that the Respondents had been in breach of their lease under the provisions of s168(4) Commonhold and Leasehold Reform Act 2002 (The Act).

2. The tribunal records the agreement reached between the parties in respect of the application under s27A of the Landlord and Tenant Act 1985, in case reference - LON/00AE/LSC/2021/0050 - which is as follows: *The Applicant will accept the sum of £30 in full and final settlement of all service charges payable by the Respondents for the period up to and including 31 December 2020. Such sum to be paid within 28 days, or sooner*.

Background

1. On 29 July 2020 the Applicant Ms Susan Roche applied to the tribunal for an Order that the Respondents, Mr Nick Davies and Ms Gemma Harris had breached a covenant and or condition in their lease in respect of 114a Brondesbury Villas, London NW6 6AE (the flat).

2. Directions were issued on 8 February 2021 by Judge S J Walker. These helpfully set out the multiple allegations and drew to the attention of the Applicant that a number of matters related to issues which fell to be determined under s27A Landlord and Tenant Act 1985 (the 1985 Act). As a result of this direction on 16 February 2021 the Applicant issued an application under s27A of the 1985 Act.

3. We initially indicated to the parties that we did not consider we could deal with the service charge dispute. No directions had been issued and the evidence we had was somewhat jumbled. However, as a result of discussions between us and the parties we were able to establish that the only issue in dispute for the period to 31 December 2020 was a balancing charge for insurance of under £60. The parties, rightly we consider, and helpfully, agreed that this matter could be compromised on the terms of the agreement that appears above at 2. In those circumstances there is nothing further for us to consider on that case, which will be closed. Of course, there may be further service charges for the period from 1 January 2021, but we do hope that any issue in respect therefore can be resolved by agreement.

4. Accordingly, we confine the remainder of this decision to the allegations of breach of covenant and or condition of the Respondents lease.

5. The application lists no, less than 14 allegations of breaches. Of these 6, or maybe 7 related to service charge issues. The remainder allege as follows:
    - A failure to maintain the structure of the Respondents' flat
    - Structural alteration without approval
    - Use of premises for commercial purposes
    - Removal of a garage and use as a rental property
    - Issues arising from a burglary but in truth these turned on an allegation that the insurance premium had increased as a result of the Respondents' alleged negligence in not securing the flat. This fell into the s27A territory and we did not consider this point further.

6. The lease under which the Respondents hold the Property has been extended and is now for a term of 189 years from 1 January 1977. The terms of the lease require the Landlord, in this case the Applicant, to carry out certain services and for the Respondents to pay a service charge. The lessees covenants are set out in the Sixth Schedule and the landlords covenants in the Seventh Schedule.

7. The Demise of the flat is set out in the Third Schedule and includes the garden and the window frames and glass therein.

8. The repairing obligation on the lessee are to be found at clause 3(1) of the Sixth Schedule and require that the lessee shall keep the flat in good and substantial repair to the satisfaction of the Lessor's surveyor but imposes no obligation on the lessee to decorate the exterior of the flat. At paragraph 3.2 there is an obligation on the lessee to keep in good and substantial repair the boundary fences and hedges. Paragraph 8 provides that the lessor may have access to the flat to inspect the state of repair and at paragraph 9 a prohibition on alterations of a structural nature without the lessor's consent, such consent not to be unreasonably withheld.

9. Although the Applicant had listed a number of issues we were referred to only two at the hearing. The first was a complaint that the rebuilding of the boundary wall had not resulted in an exact match of that which had previously been in situ. Photographs were provided and the Applicant accepted that there appeared, on her view, to be an extra layer of brickwork, although the wall was, on the face of it no higher. After some discussion on this issue the Applicant, in our view appropriately, agreed not to pursue any argument that this constituted a breach of the lease.

10. The Applicant confirmed that the primary cause of her concern related to the windows to the front of the flat. It would seem that a Notice of Disrepair was served on the Respondents in July 2020. A carpenter was retained and checks made with the local authority, as the property falls within a Conservation Area. It is not, we believe contested, that the Respondents liaised with the Council and obtained Planning Permission to paint the windows following repair. Copies of the relevant paperwork were included in the Respondents' bundle.

11. In response it would seem that the Applicant sought permission for the repairs and required a Schedule of Work. Subsequently, she sought replacement of the

windows based, it would seem on a report from London Sash Window Company dated 7 November 2020. The report speaks of a concrete sill, replaced it, would seem, before the Respondents purchased the flat. It goes on to speak of areas rotten beyond repair. In the conclusion it is said that *"with the condition, age and structural compromise in place, with regret for such beautiful windows, it is my strong recommendation they are changed in full for complete new windows."* The report goes to price the windows at around £20,000.. In an addendum, also dated 7 November 202, the author Matthew Dixon visited the Property after the works were completed. We have noted all that is said.

12. In response the Respondents relied on guidance from the local authority and a report from True Associates, chartered surveyors written by H J True BSc MRICS FBEng and dated 18 November 2020. The local authority appears to recommend that there should be repair rather than replacement to retain the character of the locality, which is a conservation area. Permission was sought from the Council for the repainting and permission was granted on 20 October 2020. The planning documents are within the Respondents' bundle and we have noted the contents. The planning related only to repainting as permission was not required for the repairs.

13. The report of Mr True is to advise on the condition of the window frames in the Respondents' property. He states that the window frames are architectural features and in keeping with designs protected under the Kilburn Conservation area where we are told replacement should only occur if the original frames are beyond repair. He considers that the windows were not beyond repair. He is critical of the London Sash Window report, suggesting that there is some conflict with their desire to win instructions to replace. The recommended course of action confirms that the windows were suffering from rot but have now been repaired and are in good decorative order and that there is nothing to support the Applicant's request for replacement.

14. We asked Ms Roche, the Applicant, to confirm that she did not wish to pursue any of the other allegations contained in the application and referred to in her papers. She confirmed that her main concern was with the window works and that the repairs did not comply with the terms of the lease. She had wanted the Respondents to retain a qualified person to oversee the works and that replacement was the correct way forward, as stated by the London Sash Window representative.

Findings

15. The original application listed a number of issues, including matters for which an application under s27A of the 1985 Act was made. We have, thanks to the compromise of the parties, been able to resolve that issue.

16. The allegations of breaches of the lease raised in the application are numerous. They include some made after the application was issued, for example not acknowledging Notices served for the wall and windows and not allowing access. There is an allegation concerning lack of security, resulting in burglaries

at the Applicant's and Respondents' flats. However, correctly we consider, the Applicant only proceeded with the wall, although conceded that she would not pursue that issue at the hearing, and the windows.

17. We accept the evidence of the Respondents that the requirement of the local authority is to repair wherever possible, rather than replace. In this case the lease would seem to make the Respondents responsible for the window frames and glass, but not the decoration, presumably to ensure that the exterior of the Property is maintained in a common colour. It could be argued therefore, that the decoration of the windows was the responsibility of the Applicant and the Respondents would contribute the due proportion of the decorative works under the service charge regime. The wording of the lease at paragraph 3.1. of the sixth Schedule is somewhat ambiguous as it refers to not placing any 'obligation' on the lessee to decorate the exterior.

18. This has not been raised as an issue and we see no need to explore that further. The concern of the Applicant was that the works undertaken were not sufficient to ensure the structural integrity of the windows. What evidence do we have on this point?

19. The Applicant relies on the report from London Sash Window Company, Mr Dixon, who does not, so far as we or the Applicant are aware, have any particular professional qualifications. Further there is a concern that this report leans towards replacement because of the potential for expensive work to be placed with them. We bear in mind that the local authority is not in favour of replacement because as is said in the Conservation Guide the replacement of windows has been a primary cause of "character decline".

20. For the Respondents we have the report of a qualified chartered surveyor, Mr True, who expresses support of the work done.

21. We do not consider that the lease permits the Applicant to dictate as she has, the works that are carried out. The repairs as required under paragraph 3.1 of the sixth schedule that works are done to the satisfaction of the Lessors surveyor. No surveyor has been retained by the Applicant. The Respondents' surveyor is content with the works, although, we accept, he does not present his report as an independent expert witness would do.

22. The burden of proof in this case rest with the Applicant. We do not consider that she has discharged that burden. We prefer the evidence of Mr True and accordingly find that the Respondents have complied with their obligations under the lease to keep the flat in a good and substantial state of repair and thus dismiss the claims by the Applicant that there has been a breach of covenant.

23. After the hearing concluded Mr Davies wrote to the tribunal raising two issues. The first was costs, which we deal with in a moment, and the other was the Applicant's offer to complete a fresh LPE1 form, at no cost to the Respondents. We do recall the Applicant offering to do so but this is not within the jurisdiction

of this tribunal and the parties will have to resolve that issue between themselves.

24. This tribunal is not a general cost jurisdiction. Costs can be awarded against a party whose conduct has been unreasonable in bringing, defending, or in the conduct of the proceedings before this tribunal. The email to us of 28 April 2021 does not appear to have been copied to the Applicant, it should have been and we direct Mr Davies to do so immediately. We will however, deal with the email as an application for an order for costs under the provisions of rule 13 Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, which are set out below.

25. We have therefore set out directions for the parties to follow if the Respondents intend to take this route. They should think carefully and take into account the decision of the Upper Tribunal in the Willow Court case which is referred to below. Having considered the directions, the Respondents shall let the tribunal and the Applicant know within 14 days whether they intend to continue with the application.

Directions for an application under Rule 13

1. The tribunal considers that this application may be determined by summary assessment, pursuant to rule 13(7)(a).

2. The application is to be determined without a hearing and on the basis of the written submissions from the parties. However, any party may make a request to the tribunal that a hearing should be held or the tribunal may decide that a hearing is necessary for a fair determination of the application. Any such **request for a hearing should be made by 28 May 2021** giving an indication of any dates to avoid. The tribunal will then notify the parties of the hearing date. The hearing will have a time estimate of two hours.

The respondent's case

3. By **28 May 2021** the respondent shall send to the applicant a statement of case setting out:

   (a) The reasons why it is said that the applicant has acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule, dealing with the issues identified in the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC), with particular reference to the three stages that the tribunal will need to go through, before making an order under rule 13;

   (b) Any further legal submissions;

   (c) Full details of the costs being sought, which we understand is limited to the surveyors, including invoices, details of the work undertaken and the

time spent, with his/her hourly rate and a copy of the engagement letter setting out the basis of the fees claimed.

The applicant's case

4. By **25 June 2021** the applicant shall send to the respondent a statement in response setting out:

   (a) The reasons for opposing the application, with any legal submissions;

   (b) Any challenge to the amount of the costs being claimed, with full reasons for such challenge and any alternative costs;

   (c) Details of any relevant documentation relied on with copies attached.

The respondent's reply

5. By **9 July 2021** the respondent may send to the applicant a statement in reply to the points raised by the applicant.

Documents for the hearing/determination

6. The respondent shall be responsible for preparing the bundle of documents (in a file, with index and page numbers) and shall by **19 July 2021** email to applicant and to the tribunal at London.Rap@justice.gov.uk, a digital indexed and paginated Adobe PDF bundle of all relevant documents for use in the determination of the application. If this is not possible, they should email the documents in Microsoft Word format, in numbered order (i.e. using a prefix of 01, 02, 03, etc). The subject line of the email must read:" "BUNDLE FOR DETERMINATION IN [insert case details]"

7. The bundle shall contain copies of:

   - The tribunal's determination in the substantive case to which this application relates;
   - These directions and any subsequent directions;
   - The respondent's statements with all supporting documents;
   - The applicant's statement with all supporting documents.

8. As the tribunal is working electronically during the current pandemic, the tribunal determining this application will not have access to a physical file, nor electronic access to documents sent to the tribunal. It is therefore essential that the parties include any relevant correspondence to the tribunal within the digital bundle.

Determination/hearing arrangements

9. The tribunal will determine the matter on the basis of the written representations received in accordance with these directions in the week commencing **2 August 2021.**

10. If a hearing is requested, the Tribunal will notify the parties the details of the hearing.

11. Any letters or emails sent to the tribunal must be copied to the other party and the letter or email must be endorsed accordingly. Failure to comply with this direction may cause a delay in the determination of this case, as the letter may be returned without any action being taken.

Andrew Dutton

Tribunal Judge Dutton 30 April 2021

NOTES

(a) The parties are referred to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for guidance on how the application will be dealt with, subject to these directions.

(b) Documents prepared for the tribunal should be easy to read. If possible, they should be typed and use a font-size of not less than 12.

(c) Whenever you send a letter or email to the tribunal you must also send a copy to the other parties and note this on the letter or email.

(d) If the respondent fails to comply with these directions the tribunal may strike out all or part of their case pursuant to rule 9(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

(e) If the applicant fails to comply with these directions the tribunal may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.

ANNEX – RIGHTS OF APPEAL

1. 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 at the Regional Office which has been dealing with the case.
2. 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.
3. If the application is not made within the 28-day time limit, such application must include a request to 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.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie 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.

Rule 13

Orders for costs, reimbursement of fees 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, or

(iii)a leasehold case; or

(c)in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a)must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b)may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a)a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b)notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a)summary assessment by the Tribunal;

(b)agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c)detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(**1**), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(**2**) and the County Court (Interest on Judgment Debts) Order 1991(**3**) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.