FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/45UH/LBC/2023/0014
Property:	Flat 2, 4 Wallace Avenue, Worthing, West Sussex BN11 5RA
Applicant:	Rachel Marie O'Driscoll
Representative:	Paul Oakley (Counsel) instructed by Carpenters Solicitors
Respondent:	Lynda Jayne Paine
Representative:	Paul Ashwell (Counsel) instructed by GWCA Solicitors
Type of Application:	Application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002
Tribunal Members:	Mr D Jagger MRICS Mr C Davies. FRICS Mr E Shaylor MCIEH
Date and venue of Hearing:	11 and 12 January 2024 Havant Justice Centre
Date of Decision:	7th February 2024

DECISION

Description of hearing

This has been a face-to-face hearing. The documents that the Tribunal was referred to were contained in a large bundle comprising 981 pages which included 5 short videos prepared by the Applicant in connection with water damage to the ground floor bathroom. A witness statement was provided from each party together with response statement provided by the Applicant. There was a very helpful Limited Defect Inspection Report prepared by Ian Wieck Surveying Ltd dated 15th June 2022 which we will refer to in this decision as "the Wieck Report". In addition, Mr Ashwell produced a Skeleton Argument and we are grateful for the assistance that he has provided in this difficult case. In addition, he provided a List of Authorities. For his part, Mr Oakley submitted two cases which we will refer to. Finally, at the beginning of the second day Mr Oakley presented the Tribunal with four documents namely an email from Castleview Homes, an email from Ollie Whiting of Jacobs Steel letting agents, an email from the applicant to the respondent dated 7th May 2023 and a schedule of photographs from Bruce Reynolds of Adur and Worthing Councils showing the replacement shower tray works undertaken by Richard Bhatt Plumbing on the 11th September 2023.

The order made is described below.

Decisions of the Tribunal

1. The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002 no breaches have occurred.

2. The Tribunal makes an order preventing the Applicant from recovering the costs it has incurred in these proceedings though a Service Charge.

The reasons for the decision are set out below.

The background to the application

1. The Applicant seeks an order that a breach of covenant or a condition in the lease has occurred pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002. The application concerns four alleged breaches at **Flat 2, 4 Wallace Avenue, Worthing, West Sussex BN11 5RA**

2. This follows an action in the County Court between the parties for various matters not the same as matters covered in this application which resulted in a Tomlin Order dated 26th January 2023.

3. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-section (4) shown in bold:

> *(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 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.

4. The Applicant is the freehold owner of Flat 1 (ground floor) 4 Wallace Avenue, Worthing, West Sussex BN11 5RA which was acquired on the 22nd June 2020.

5. The Respondent is the registered proprietor of the leasehold Flat 2 (first floor) at 4 Wallace Avenue, Worthing, West Sussex BN11 5RA ("the Property"). She acquired the leasehold interest on 3rd July 2017. Prior to this, the Respondent rented the ground floor flat from the 19th January 2015. The lease under which the Respondent hold the property is dated 16th March 1979 as corrected by a deed of variation and extended by a lease dated 31 July 2019. The extended lease encompasses the covenants set out in the 1979 lease. Upon acquiring the flat, the Respondent undertook significant refurbishment works which involved removing internal walls, and replacement of the kitchen and rearrangement of the bathroom which we will consider at length in this decision.

6. The premises which are the subject of this application is a converted flat on the first floor of 4 Wallace Avenue Worthing West Sussex BN11 5RA. This flat forms part of a 1930s detached property with pebbledash render elevations under the original pitched and tiled roof covering. The property is located in an established road close to the sea front.

The Application and hearing

7. The Applicant was represented by Mr Oakley and the Respondent represented by Mr Ashwell and we are grateful for the assistance that they provided in this difficult case. On the 15th May 2023 the Applicant made an application and directions were originally issued on the 19th September 2023 setting out a timetable for exchange of documents for a hearing to take place on the 23rd November 2023. By a case management application (CMA) dated 28th September 2023 the Respondent requested amended Directions in order to postpone the hearing date to allow expert surveying evidence. This was granted by the Tribunal and subsequent Directions were prepared on the 6th November 2023 prior to this two day hearing.

The issues

8. The first issue the for the Tribunal to decide was whether the application should be struck out. This case was put forward by Mr Ashwell in his Skeleton Argument and is summarised here rather than repeated in full.

9. Mr Ashwell put forward the argument that the Applicant's conduct of her case is an abuse of process, with numerous flagrant breaches of the Tribunal Guidance on Electronic Hearing Bundles and of the Tribunal Rules.

10. It is asserted that the application should be struck out under Rules 8(2) (c) and 9(3)(d). Due to a failure to comply with rules, practice directions or Tribunal directions. This states the Tribunal may strike out the whole or part of the proceedings or case if *the Tribunal considers the proceedings or case (or part of them) or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal.*

11. Mr Ashwell asserted that the alleged breach of the lease clause 4(1) (failure to keep in repair) was not particularised so the Respondent did not know what they had to respond to and he criticised the Applicant's response statement as not being a proper statement, rather a series of questions. He also commented that there were originally three separate bundles which were quite impossible to navigate. The updated and paginated bundle was only produced over two weeks after being requested and is unwieldly and comprises some 980 pages much of which is irrelevant and unnecessary, particularly inconsequential inter-solicitor correspondence in the 148-page section G of the Documents bundle, contrary to Guideline 4. Mr Ashwell produces several such breaches of the Guidelines.

12. All in all, Mr Ashwell asserts that the application was completely incompetent, prepared with a lack of co-operation and a breach of the Tribunal rules.

13. Turning to Mr Oakley, he firstly felt somewhat "ambushed" by this application which he claimed to receive 9.20pm Wednesday 10th January, being the evening before the hearing and in his words an "11th hour tactic". Mr Ashwell, for his part replied that his offer to exchange skeleton arguments which he regarded as standard practice had not been responded to and he did not want to show his hand too early.

14. Firstly, Mr Oakley referred the Tribunal to Rule 9 (4) *The Tribunal may not strike out the whole or part of the proceedings or case under paragraph (2) or paragraph 3(b) to (c) without first giving the parties an opportunity to make representations in relation to the proposed striking out*. Therefore, in essence the parties must have advance warning in the matter.

15. Next, Mr Oakley drew the Tribunals attention to two Upper Tribunal cases. The first of which is *Jalay Enterprises Limited v Harrison Ramsdale* and others. In the introduction of this case Martin Rodger KC states "*For a court or tribunal to debar a party from participating in the final hearing of a claim brought against them is a draconian step"* This case set out the "*Denton Principles "* whereby the Court of Appeal gave guidance recommending a three stage approach to applications for relief against sanctions. In paragraph 35 in *Denton v White,* the Court of Appeal warned against an unduly draconian approach to relief and emphasised that compliance was not to be regarded as an end in itself ; rules and rule compliance were the handmaids not the mistresses of justice and could never be allowed to assume a greater importance than doing justice in any case.

16. Mr Oakley then referred the Tribunal to the second case, *Astor Bristol Ltd and Bristol School of Performing Arts Ltd*. In this case the Tribunal were asked to pay particular attention to paragraph's 26 and 27.

17. Mr Oakley then went on to confirm that the bundle of documents was accepted by the Tribunal and agreed with the Respondents solicitors, Carpenters.

18. The Tribunal retired to consider the matter and concluded that the application should not be struck out and should proceed. The Tribunal's power to bar a Respondent from participating in proceedings is contained in Rules 8 and 9. If we then look to Rule 3(1) the overriding objective is for a Tribunal "*to deal with cases fairly and justly"* What it means to deal with a case fairly and justly is amplified by Rule 3(2)

19. In this Tribunal's opinion, this is a relatively high bar to establish. At no time, did the Respondents complain or request a withdrawal of the application before this late in the day request. A great deal of time and effort has been undertaken by the Applicant, however misguided in places.

20. The Tribunal found the Applicant's bundle to have been clumsily assembled containing extraneous material not relevant to this hearing and not consecutively page numbered. However, the Tribunal is experienced and is well versed at dealing with a large bundle of documents, however irrelevant. The Tribunal had also quickly settled on the Wieck Report (referred to above in paragraph 1) as providing a clear articulation of the repair matters involved and the same report was available to the Respondent. It is for these reasons the Tribunal finds these matters not to be seriously detrimental and the striking out of the application is rejected.

21. The second issue for the Tribunal to decide is whether or not a breach or breaches of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002.The Applicant made four substantive allegations of breach of covenant against the Respondent in the application which are dealt with in turn below.

22. In approaching this application, we have regard to guidance provided by Martin Rodger KC, the Deputy President, in *Marchitelli and 15 Westgate Terrace Ltd* [2020] UKUT 192 (LC); [2021] 1 P&CR 9 (at [49]):

> "The purpose of proceedings under s.168(4) of the 2002 Act, is to establish the facts on which steps to forfeit an extremely valuable lease will then be founded. Before forfeiture proceedings may be commenced the landlord is required by s.146(1) of the 1925 Act, to serve a notice "specifying the particular breach complained of" and if that breach is remedied and compensation is paid no forfeiture will occur. Before a s.146 notice may be served the FTT must determine that "the breach" has occurred (s.186(2)(a) of the 2002 Act). It follows, therefore, that the determination required of the FTT must be sufficiently specific to provide the basis of a s.146 notice."

The Lease

23. The lease for the flat is at page 50-58 of the bundle. It is dated 16th March 1979. The lease contains a number of covenants which we will discuss when we consider the alleged breaches. By clause 4(7) the lessee covenants to "contribute and pay one-half of the costs expenses outgoings and matters mentioned in the Third Schedule hereto. Unusually, this clause draws an imaginary line in the centre of the building whereby the ground floor flat is responsible for the lower part of the fabric of the building and assumed foundations and the lessee of the first floor flat is responsible for the upper part of the structure including the roof covering and its timber framework. The ownership of the loft space is somewhat disputed, but that is not a matter for this Tribunal.

The determination

24. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal summarises the arguments and makes determinations on the 4 various issues as follows:

25. **Allegation 1:** that the Respondent is in breach of clause 4(1) of the lease.

26. *Clause 4(1) From time to time and at all times hereafter during the said term well and substantially repair cleanse and maintain amend and keep in good tenantable repair and condition (a) the interior of the demised premises and all windows doors cisterns and sanitary fittings of and used in connection with the demised premises properly cleansed repaired and renewed and maintained and (b) (subject to the right of contribution hereinafter contained) the roof structure and the exterior of the demised premises and to decorate the same every third year of the said term in a colour to be approved by the Lessor.*

27. The Tribunal were informed that the Applicant has instructed Castleview Homes in March 2023 to manage the building on her behalf. She confirmed Managing Agents are preparing a schedule of works for the maintenance of the external fabric of the property and The Wieck Report will form the basis of the schedule. The Applicant said she had done this due to a lack of co-operation from the Respondent over external maintenance.

28. Mr Oakley took the Tribunal to the introduction of the "Wieck Report" and sought to consider the five bullet points. The first of these was "the external render to all elevations" The report highlights evidence of vertical and horizontal cracking to each elevation and the helpful photograph's confirmed this matter. In the Conclusions and Recommendations the report states "*Although there is evidence of past/historic cracking and some current cracking, the render generally appeared to be sound with a few hollow areas noted around the areas of cracking from our tap test.'* Further reports, go on to identify that the wall ties holding the two leaves of the building together have failed in places and require replacement. In the Tribunals opinion, this is not unusual given the coastal location and the age of the building. In any case, this is a latent defect which would not have been apparent to the parties. When the Respondent replaced the first- floor windows it is agreed that that there are gaps to the render around the window openings. The Respondent states that she has tried to have these works carried out to no avail due to restricted access and the Applicant denying access to rear of the property, scaffolding being required due to a conservatory and a large shed being in the way. The Tribunal found the Respondent to be a convincing witness and has no reason to reject this evidence. Once again, it was confirmed such works will form part of the forthcoming major works programme.

29. The next matter is the external roof coverings. The report confirms the concrete tiled covering is original and states "*Although the sand facing to the tiles is beginning to erode, much of the roof is generally in satisfactory condition*. The report identifies some areas of localised damage to the tiles with damaged/slipped tiles noted to all

elevations. The number of tiles slipped is relatively few and these should be replaced on an ad hoc basis. The report identified a stepped front valley gutter between the main roof and the side addition (see photos) The original lead has been recovered with a bituminous roofing membrane which has possibly caused the water staining to the ceiling of Flat 2 immediately below this area. In the Tribunals opinion such valleys do have a tendency to become defective and require regular maintenance. The report however, noted no obvious cause of such damage.

30. The third matter under consideration were the mechanical extracts to flat 2. The photographic evidence confirms these are flexible hoses in the loft space which terminate at a thru-tile vent. The report states the lack of insulation around these hoses could cause a condensation problem in the future and the leaseholder *may* wish to consider insulating the ductwork to avoid this risk. In the Tribunals opinion this a relatively minor matter and a recommendation only. The parties discussed the timber boarding and stored possessions in the loft space and the Respondent confirmed each of these matters have been resolved. The staked timber having been simply the previous loft boarding which has now been replaced into position and boxes have been removed from the loft, despite the uncertainty as to the demise of the loft space mentioned in paragraph 24.

31. The fourth matter is reported damp problems to Flat 2. The report confirms these are localised damp issues which appear to be caused by the valley gutter (see above) and possible defective flashings to the chimney stack. A recommendation was also made to provide vents to the redundant chimney breasts which the Respondent confirmed she would undertake within 28 days.

32. The final matter is the roof void access from Flat 2. The parties discussed the timber boarding and stored possessions in the loft space and the Respondent confirmed each of these matters have been resolved.

33. In his closing submissions Mr Ashwell states that the Applicant has waived compliance and/or the modern doctrine of promissory estoppel prevents her from denying the oral agreement to vary the terms of the lease covenants. In simple terms, the current lease arrangements are unworkable and the parties have agreed to split all the maintenance costs on a 50/50 basis collectively and the Applicant should not organize joint repairs on a practical basis and at the same time insist on the Respondent complying with the strict terms of the lease. Mr Oakley responded that the oral agreement did not constitute a lease variation and did not provide a basis for estoppel, nor did the Tomlin Order as it is not a court order or matter of record. The applicant's position is that by neglecting maintenance issues the Respondent has caused further disrepair.

34. The Tribunal determines that the Respondent is not in breach of Clause 4(1) as the Applicant has failed to provide any substantive evidence of a breach. The Wieck

Report is a concise and informative document and it does not identify and elements of disrepair significant enough to place the Respondent in breach of covenant.

35. **Allegation 2 and 3**: that the respondents are in breach of clause 4 (4) In the application, the application states the Respondent is in breach of clause 4(ii) but the parties agree that the correct clause is 4(4)

Clause 4(4) Not throughout the said term use or occupy or permit to be used or occupied the demised premises otherwise than a single private residence and not to do or permit or suffer to be done on the demised premises any act or thing which may become a nuisance annoyance or inconvenience to the Lessor or its tenants or the owners lessees or occupiers of the ground floor flat.

36. The first of these matters is that the Respondent and her partner caused a nuisance in terms of unacceptable noise levels. In the Applicants witness statement (pages 80-88) it is asserted that that on several occasions the Respondent caused excessive noise which commenced in December 2020. The various incidents involved police involvement although no parties were cautioned. The Applicant collected video evidence and photographs. Further, following a visit from Mr Rochford, an Environmental Health Officer listening devices were installed and a comprehensive diary prepared for the week 17/11/2021 – 24/11/2021. Further recordings were obtain on a mobile phone app. In conclusion, the matter was not taken any further by the EHO and it is confirmed that since Ms Paine and her partner vacated the property there have been no further police incidents.

37. Mr Oakley did not wish to amplify these points and regarded the noise from the bathroom above due to the ceiling and associated insulation material in the ground floor flat having been removed following water leaks from above to be more of an issue. The matter is therefore connected to the other alleged breach of 4(4) considered below at paragraph 39.

38. The burden of proof lies with the Applicant to produce evidence to establish the true facts needed to satisfy the elements of the dispute. " The subject property comprises a former detached house which has been converted to form two dwellings. It was not designed for multiple occupation nor was it constructed subject to modern building regulations or with modern sound proofing materials. The noise of which the Applicant complains appears to be general living noises consistent with two adults who are living in the upper flat. Although the Tribunal is sympathetic to this situation the evidence produced by the Applicant is not sufficient to persuade it to find a breach of Clause 4(4) in this case. On the balance of the evidence submitted it can find no historic breach of covenant. The bathroom ceiling is a temporary matter and it would appear the Applicant is living harmoniously with the Respondent's tenants.

39. The next matter is the major concern. This is the ongoing leak/leaks from the Respondents bathroom causing water damage to Applicants bathroom which lies directly below. This is evidenced by photographs and videos. In 2017 the Respondent undertook significant refurbishment works to her flat which involved the removal of all existing sanitary fittings and the installation of a walk- in shower. In and around November 2022 the Applicant commenced refurbishment works on her own bathroom and it is in this month that the first indication of water ingress was revealed in the Applicants bathroom. Both parties now agree this was somewhat of a coincidence and nothing more.

40. On page 437 of the bundle, the Respondent has prepared a very useful chronology which provides dates and details of the leaks, works undertaken and the action undertaken by the parties. It is not the Tribunals intention to run through each date in this lengthy list of events. As confirmed above leaks have been causing water ingress to the Applicants flat from November 2022 up until today.

41. On the second day, the Tribunal were shown a number of photographs submitted to Bruce Reynolds a Private Sector Housing Manager for Adur and Worthing Councils. These photographs show the various stages of the major works undertaken by the Respondents plumber on the 11/12th September 2023. The works involved tanking and a replacement shower tray which was sealed. Ms Paine confirmed these works cost £2000 and she hoped that this would be the end of the matter. On the 22nd September 2023 Mrs O'Driscoll emailed the Respondent stating that the leaks had stopped but on the 15th October Mrs O'Driscoll confirmed further leaks are apparent.

42. Following a succession of claims and counter claims the up-to-date situation is that Mr Reynolds has recommended that an independent plumber (Mr Rob Carter) inspect and carry investigations to establish the cause of this ongoing leak and provide a remedy. Mr Carter, is being asked to undertake a very difficult task where others have failed in the past.

43. A significant amount of time was spent discussing the "Les Russell Report" requested by the Respondents letting agents, Jacob Steel. The Respondent states this was not so much a report but in fact a series of photographs. At the end of the hearing, Mr Oakley requested the Tribunals consent to write to Jacob Steel requesting a copy of the said report in order to place before the Tribunal in subsequent evidence. The Tribunal and the Respondent accepted this request and the said report could be put before the Tribunal as subsequent evidence. However, at the time of this decision the Tribunal has not had sight of such report and it is therefore assumed it is not available.

44. The Tribunal is satisfied that if a tenant fails to keep the installations for the supply, and use of water in a proper state of repair, and as a consequence a leak arises, the tenant will be in breach of covenant. However, a leak may arise through no fault of the tenant. In such circumstance, the tenant would be expected to take reasonable action to abate the problem. She would only put herself at risk of forfeiture if she failed to do so.

45. It is evident to the Tribunal this has been an intractable problem lasting over a year. The Tribunal certainly has some sympathy for the Applicant However, as the schedule of events shows the Respondent has made significant attempts to resolve the problem and it certainly would not be in her interest to provide a remedy, although Mr Oakley pointed out that each recurrence is a fresh issue and attempting to fix a problem is not sufficient in itself to discharge liability if such attempts are unsuccessful.

46. The Tribunal finds that the Respondent is not in breach of the covenant of her lease. It must be the case that leaks occur in converted flats for various reasons, Just because leaks manifest themselves it is not necessarily a breach. It is how the Respondent deals with these complaints of water damage. The Tribunal is satisfied the Respondent took reasonable and necessary steps to remedy the leak and she remains co-operative with the Applicant to finally resolve the issue.

47. **Allegation 4** that the Respondent is in breach of clause 5 of the First Schedule.

The right to affix and maintain one wireless or television aerial to the exterior of the demised premises.

48. It is stated by the Applicant that the Respondent has a TV aerial fixed to the chimney stack, a Sky Dish fixed to the rear wall and two small Broadband boxes fixed to the main walls. The Respondent confirms she is happy for the TV aerial which is now redundant to be removed when the major works take place. Otherwise, it is the Tribunals opinion that the Broadband boxes do not constitute an aerial.

49. Mr Ashwell put forward an argument that the First Schedule includes Easements, rights, and privileges. These are not covenants and therefore cannot be enforced or breached. The Tribunal agrees with Mr Ashwell in this matter.

50. The Tribunal determines that the Respondent is not in breach of Clause 5 First Schedule. The Applicant has failed to provide any substantive evidence.

Costs-Section 20c & Fees

51. In her response the Respondent invited the Tribunal to make an order preventing the Applicant from recovering its costs incurred in these proceedings, as part of the service charge.

52. This matter was not examined at length during the hearing. However, considering the success achieved by the Respondent in this decision the Tribunal considers it just and equitable to make an order preventing the Applicant from recovering the costs it has incurred in these proceedings.

53. For the same reasons, the Tribunal determines that the Applicant is to bear the costs she has incurred to have this application heard.

54. Finally, it is evident that communication has clearly broken down between the parties. The Tribunal would give a firm recommendation to the parties that they should really try, whatever the Tribunals determination, to put matters behind them. This is now the second hearing at the County Court and this Tribunal in just over a year. The Tribunal would certainly urge the parties to reach a resolution and a mutually beneficial way forward.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person 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.

4. 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.