



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

**Case Reference** : **LON/00AP/LBC/2022/0010**

**Property** : **Flat 14 Herons Lea, Sheldon Avenue, London N6 4NB**

**Applicant** : **Herons Lea Residents Association Limited**

**Representative** : **Mr M Palfrey of Counsel**

**Respondent** : **Ms Masako Mori**

**Representative** : **Not present and not represented**

**Type of Application** : **Application for determination as to breach of covenant in lease under section 168(4) Commonhold and Leasehold Reform Act 2002**

**Tribunal Members** : **Judge P Korn  
Ms S Phillips MRICS**

**Date of hearing** : **7 June 2022**

**Date of decision** : **15 June 2022**

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**DECISION**

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## **Description of hearing**

The hearing was a face-to-face hearing.

## **Decision of the tribunal**

A breach of covenant has occurred, namely a breach of the covenant contained in clause 2(9) of the original lease as incorporated into the Lease.

## **The application**

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (“**the 2002 Act**”) that a breach of covenant has occurred under the lease of the Property (“**the Lease**”).
2. The Applicant is the freehold owner of the building of which the Property forms part and the Respondent is the current leasehold owner of the Property. The lease (“**the Lease**”) is dated 30<sup>th</sup> January 2001 and was made between the Applicant (1) and the Respondent (2). The Lease is an extension to the original lease dated 2<sup>nd</sup> April 1959 and incorporates by reference most of the terms of the original lease.
3. In its application, the Applicant alleged that the Respondent was in breach of the covenants contained in clauses 2(8) and 2(9) of the original lease as incorporated into the Lease. At the hearing the Applicant’s representative conceded that a breach of clause 2(8) could not be proved and confirmed that the Applicant was now only relying on clause 2(9).
4. The relevant part of clause 2(9) (including the preamble at the beginning of clause 2) reads as follows:-

*The Lessee hereby covenants with the Lessor that the Lessee will ...*

*from time to time and at all times during the said term well and substantially to repair cleanse paper paint polish varnish distemper whiten maintain amend and keep the interior of the demised premises and the fixtures and fittings therein and the walls pipes drains cables conduits and appurtenances thereof with all necessary reparations cleansings paperings paintings polishing varnishing distemperings and whitenings and amendment whatsoever ... .*

5. Relevant to the interpretation of clause 2(9) is clause 5 of the original lease as incorporated into the Lease, the pertinent part of which reads as follows:-

*For the purpose and with the object of removing doubts IT IS HEREBY DECLARED that there is included in this demise the confining walls of the demised premises to a thickness of one moiety of the thickness of such walls from the underside surface of the floor joists of the superior flat to the underside surface of the ceiling in the demised premises ... .*

### **Applicant's case**

6. In his witness statement, Geoffrey Paradise – Chair of the Herons Lea Residents Association Management Committee – states that the Respondent left the Property in November 2016 and was believed to be returning to her home country of Japan.
7. In July 2020 the Applicant received a complaint from the owner of a basement storeroom of the existence of a leak which appeared to have come from the Property. Dr Paradise accessed the Property and discovered that the source of the leak was the flat above (Flat 16). As a result of the leak, the bathroom ceiling of the Property had fallen in. Copy photographs are attached to his witness statement. He found the Property to be in a very poor state, and again has provided copy photographs in support.
8. In September 2020 there was a further leak into the storeroom and Dr Paradise again accessed the Property, this time with a plumber. Again the source of the leak was Flat 16, and this time a beam had fallen in from the bathroom ceiling. A copy photograph of the bathroom is attached to his witness statement. The plumber capped off the gas as he considered that it could be a danger.
9. At the hearing, the tribunal noted that the witness statement was unsigned and undated, but Dr Paradise assured the tribunal that he had supplied the original dated version to the Applicant's solicitors and he showed the tribunal a photocopy of the signed and dated version.
10. Dr Paradise said that he was not aware of anyone else having entered the Property since he had gone in to check the condition. As regards the attempts made to contact the Respondent, he said that he had tried to contact her several times and had eventually found contact details for her brother through the Japanese Embassy. After much delay he finally received an email response from her brother's son, who told him that the Respondent had been listed as a missing person by the Japanese police. The brother's son later told Dr Paradise that the brother had died and that he – the son – could not help Dr Paradise any further.
11. In response to a question from the tribunal, Dr Paradise said that he had seen the same damage in September 2020 as he had seen in July 2020 and that the only difference was that the damage had deteriorated and/or spread.

12. Mr Palfrey said that the damage relied on was the damaged ceiling surface, damage to the bathroom sink, and disrepair to the bathroom floor and walls.

### **Respondent's case**

13. The Respondent has made no written submissions and was not present or represented at the hearing.

### **The statutory provisions**

14. The relevant parts of section 168 of the 2002 Act provide as follows:-

*“(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 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.*

*(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.”*

### **Tribunal's analysis**

15. Under clause 2(9) of the original lease as incorporated into the Lease, the tenant covenants amongst other things *“well and substantially to repair ... the interior of the demised premises ... and the walls ...”*. Clause 5 of the original lease as incorporated into the Lease states that the demise includes *“the confining walls of the demised premises to a thickness of one moiety of the thickness of such walls from the underside surface of the floor joists of the superior flat to the underside surface of the ceiling in the demised premises”*.
16. Based on the above, we are satisfied that the ‘demise’ of the Property includes the internal half of all walls dividing the Property from any adjoining flats and the underside surface of the ceiling. We are also satisfied that the Respondent was under an obligation pursuant to clause 2(9) to keep the Property in repair, i.e. in good condition.

17. It does not follow that any disrepair is necessarily a breach of covenant. If, for example, there was evidence that disrepair had occurred but that it had all been remedied immediately then there would be no breach of covenant. However, the Applicant's position in this case is that there was damage to the ceiling surface, the bathroom sink, and disrepair to the bathroom floor and walls in July 2020 and that this damage/disrepair still remained in September 2020 and had worsened.
18. Having considered the copy photographs, read Dr Paradise's witness statement and listened to the Applicant's oral submissions, we are satisfied that at the very least there was disrepair to the ceiling surface and to the bathroom floor. We also accept the Applicant's uncontested evidence that this disrepair existed in both July 2020 and September 2020, and we are satisfied that the failure to remedy the disrepair between July and September 2020 constitutes a breach of covenant under the Lease.
19. In conclusion, therefore, we are satisfied that a breach of covenant has occurred.

### **Cost applications**

20. There were no cost applications.

**Name:** Judge P Korn

**Date:** 15 June 2022

### **RIGHTS OF APPEAL**

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.