FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UD/LBC/2023/0029
Property	**:**	Ground Floor Flat, 29 Southwater Road, St Leonards on Sea TN37 6JR
Applicant	**:**	St Peters Mews Ltd
Representative	**:**	Barretts Law
Respondent	**:**	Ms Teresa Ford
Representatives	**:**	No appearance
Type of Application	**:**	Breach of covenant (s.168 Commonhold and Leasehold Reform Act 2002)
Tribunal Members	**:**	Judge MA Loveday
Date and venue of hearing	**:**	8 July 2024 (determination on the papers without a hearing)
Date of Decision	**:**	9 July 2024

DETERMINATION

Introduction

1. This is an application under s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for a determination of breaches of covenant in a lease of a flat in St Leonards on Sea. Directions were given on 22 April 2024 when it was indicated that the matter was suitable for a determination on the papers without a hearing.

Background

2. The application relates to the Ground Floor Flat, 29 Southwater Road, St Leonards on Sea TN37 6JR ("the Flat"). The building comprises a period mid-terrace house on three floors plus basement, with a 2-storey bay to the front. The building has been converted into 3 flats. There is a rear garden accessed from the Flat.

3. By a lease dated 26 September 1988, the Flat and the rear garden were demised for a term of 99 years from 25 December 1987 (the Lease"). The material terms of the Lease appear in Appx.A.

4. The respondent is the registered proprietor of the Lease, and the applicant is the freehold owner of the building.

5. The material provisions of the 2002 Act are as follows:

> **"168 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 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 the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

The applicant's case

6. The application is dated 31 October 2023. The application form states that:

> "The Leaseholder is in breach of clause 4(1)(b) to keep the garden in a tidy and kept condition and cultivated and free from weeds and rubbish.
> The garden is an appalling state and condition. The Leaseholder has been written to but has not done anything about it.

The Leaseholder is in breach of clause 1 of the Lease as she has failed to pay additional rent relating to the cost of maintaining and insuring the building.
The Tenant is in breach of clause 4(6) of the Lease. She has left the property unoccupied. Internally, she has left the property in an appalling condition with possessions stored in a dangerous way.
Rats have entered her property and have previously chewed through wires. This is in breach of clause 4(6) of the Lease".

Mr Charles Packe, a Director of the applicant, gave a statement which confirmed the above.

7. The respondent has not filed a statement of case or responded to the application.

The tribunal's determination

8. The tribunal is required to determine the question of whether there has been a breach of covenant on the civil standard of proof.

9. Given no statement of case or other material has been submitted to rebut the evidence given by Mr Packe, the tribunal accepts his evidence of fact. The tribunal's findings of fact are as follows:
    a. The respondent has failed to keep the garden in a "tidy and kempt condition". There are several photographs of the garden which show years of weed growth, self-seeding plants and rubbish. On this evidence, the tribunal finds the garden is not tidy, is not "kempt", that it is not "cultivated" and that it is not free of weeds and rubbish.
    b. A tree has been allowed to grow in such a way that it has caused damage to the structure of the building.
    c. The garden has been cleared by the applicant.
    d. There are current arrears of service charge of £9,350.55.
    e. Mr Packe states that the respondent has vacated the Flat. In addition, there are further photographs showing the Flat has books and other possessions piled against the walls and over the floor, that there is a great deal of loose clothing strewn over the floor mixed with household goods and what appears to be rubbish.
    f. Rats have entered the flat and eaten through electrical cables. There are several photographs showing mains wiring stripped of insulation in places.
    g. The applicant has paid to clear the flat of rubbish and rectification of damage to wiring.
    h. The respondent has vacated the flat for a considerable period of time.

10. The tribunal is satisfied the respondent is in breach of clause 4(1) of the Lease: the damaged wires are a breach of clause 4(1)(a) and the condition of the garden is a breach of clause 4(1)(b). However, there is no evidence of any breach of the covenant to repair on notice in clause 4(5) or any specific evidence to show that the premises were in a condition which rendered insurance policies void or voidable, etc. in breach of clause 4(6). These breaches need to be dis-

tinctly proved, and the tribunal has not seen any demand for remediation or any insurance details.

11. As to the allegation of breach of clauses 1 and 4(2) of the Lease (failure to pay insurance rent and service charges), the evidence presented consists of a statement of service charges/demand dated 8 January 2024, seeking payment of £9,300 (ref: GFF 29 South). The tribunal does not have jurisdiction to make a finding of breach under s.168(4) of the 2002 Act because forfeiture for non-payment of service charges is covered by s.81(1) Housing Act 1980 rather than by s.168 of the 2002 Act. The condition in s.81(1) of the 1980 Act would be met if the tribunal had been asked to determine liability to pay service charges under s.27A Landlord and Tenant Act 1985, but there is no s.27A application. Given the significance of the present proceedings, and the fact the respondent has not appeared, the tribunal is not prepared to treat this application as being made under s.27A of the 1985 Act.

12. In any event, the tribunal is concerned about the limited evidence of the service charges shown in the statement:
    a. There is no explanation of the charges of £2,643.59 shown in the statement as a "balance brought forward".
    b. The various different apportionments which appear in the statement are unexplained. An apportionment of 33.30% is applied to building insurance and some other costs, whilst an apportionment of 100% is applied to the two largest costs items, namely "Works Major S20" and "S20 Fees". This is despite the clear provision for a single apportionment in clauses 1 and 4(2) of the Lease.
    c. It is unclear whether there is an overlap between the charges of £9,300 claimed and the default judgment obtained on 30 May 2024 for £4,635.27 (Claim no.K91YX723).

    Had the tribunal been minded to consider these items, it would (at the very least) given directions for the applicant to provide further evidence about the service charges.

Conclusions

13. The Tribunal determines that the respondent has breached clauses 4(1)(a) and (b) of the Lease of the Flat dated 26 September 1988.

Judge Mark Loveday
9 July 2024

APPENDIX A: LESSEE'S COVENANTS

1 ... YIELDING AND PAYING THEREFOR ... AND ALSO PAYING by way of additional rent from time to time a sum of money equal to then propionate part of the amount by which the Lessor may expend in effecting or maintaining the insurance of the Building and such other risks as the Lessor may think fit as hereinafter mentioonmed such proportionate amount to be the proportion which the rateable value of the demised premises bears to the aggregate rateable values of all the flats in the Building as a whole such last mentioned rent be paid without any deduction on the half yearly day for the payment of rent next ensuing after the expenditure thereof

....

4(1) (a) Keep the demised premises (other than the parts thereof comprised and referred to in paragraph (d) and (f) of clause 5 hereof) and all walls, sewers, drains, pipes, cables, wires and appurtenances thereto belonging in good and tenantable condition and repair and in particular (but with prejudice to the generality of the aforegoing) so as to support, shelter and protect parts of the building other than the flats.
(b) Keep the garden in a tidy and kept condition and cultivated and free from weeds and rubbish.

(2) Contribute and pay from time to time as and when required (by the presentation by the Lessor with an account prepared by her or on her behalf) a sum of money equal to the proportionate part of the amount which the Lessor may expend towards the cost expense and matters mentioned in the Fourth Schedule hereto such proportionate amount to be the proportion which the rateable value of the demised premises bears to the aggregate rateable values of all the Flats in the Building as a whole and also to pay to the lessor to provide a reserve fund to cover accruing and anticipated expenditure in respect of the compliance by the Lessor with her said covenants.

....

(5) Make good all defects decays and wants of repair of which notice in writing shall be given by the Lessor to the Lessees and for which the Lessees may be liable hereunder within three months after the giving of such notice.

(6) Not to do or permit to be done any act or thing which may render void or voidable the policy or policies of insurance of the Building hereinbefore referred to or any policy or policies of insurance in respect of the contents of any of the flats comprised in the Building or which may cause any increased premium to be payable in respect of such."

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application 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.

APPENDIX: SCHEDULE 1 TO THE LEASE

THE FIRST SCHEDULE
THE DEMISED PREMISES

1. The premises specified in the Particulars as shown for identification purposes edged red on the Plan A annexed hereto and forming part of the Building including:
(a) The internal plastered or plaster board coverings and plasterwork of the walls bounding the premises and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such doors door frames and window frames) and any glass fitted in such doors and window frames and
(b) The plastered or plaster board coverings and plaster work of the walls and partitions lying within the premises and the entirety of any non- supporting walls and partitions and the doors and door frames fitted in such walls and partitions and
(c) The plastered or plaster board coverings and plaster work of the ceilings and the surfaces of the floors including the whole of the floorboards (if any) and
(d) All conducting media which are laid in any part of the Building and serve exclusively the premises (excluding any such deemed to be property of the relevant statutory undertaker)
(c) All fixtures and fittings in or about the Demised Premises and not hereafter expressly excluded from this demise

But not including:
(i) any part or parts of the Building (other than any conducting media expressly included in this demise) lying above the said ceilings or below the said floor surfaces
(ii) any of the main walls roofs foundations timbers beams and joists of the Building or any of the supporting walls or partitions therein (whether internal or external) except such of the plastered and plaster board surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise
(iii) any conducting media in the Building which do not serve the Demised Premises exclusively