FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LBC/2024/0013**
Property	**:**	**Flat 10, 30 Harley Street, London W1G 9PW**
Applicant	**:**	**Harleyqueen Properties Ltd**
Representative	**:**	**Mr Stephen Woolf instructed by Infields & Co. Solicitors**
Respondent	**:**	**Mr Royston Kenneth Graham**
Representative		**Mr Lorenzo Leoni**
Type of application	**:**	**Determination of an alleged breach of covenant**
Tribunal members	**:**	**Tribunal Judge Niamh O'Brien** **Tribunal Member A Flynn FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Hearing	**:**	**30 September 2024**
Date of Decision	**:**	**1 October 2024**

DECISION

Decisions of the Tribunal

(1) The Respondent has breached clauses 5(6) and 5(20)a(ii) of his lease as detailed below.

(2) The Tribunal does not make an order under s20C of the Landlord and Tenant Act 1985 or under paragraph 5A of the Commonhold and Leasehold Reform Act 2002

The Application

1. The Applicant is the Respondent's landlord. By an application dated 14 March 2023 the Applicant seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that the Respondent has breached various terms of his lease.

The Proceedings

2. Directions were issued to the parties on 16 April 2024. The Applicant was ordered to serve its statement of case, and any witness statements and documents it wished to rely on, by 30 April 2024. The Respondent was directed to file his response, any statement and any further documents by 3 June 2024. The Applicant was to file any supplemental reply by 17 June 2024 however this date was varied to 30 August 2024. The tribunal did not consider that it was necessary to carry out an inspection of the subject premises and neither party requested that an inspection be carried out

The Hearing

3. The Applicant was represented by Mr Woolf and the Respondent was represented by Mr Leoni. We thank both counsel for their helpful submissions. At the start of the hearing the Tribunal had to decide whether to admit in evidence two documents; the witness statement of Ms Woollacott, a director of the Applicant company, and a report dated 25 September 2024 prepared Quotehedge Ltd, the Applicant's heating and plumbing contractor. The Respondent objected to the admission of a witness statement of Ms Susan Woollacott which had been served as the Applicant's supplementary reply. The Respondent's point initially was that the directions provided for a supplementary reply rather than a witness statement. Mr Leoni clarified that the main objection was that the document was not supplemental and went beyond merely responding to the Respondent's statement of case. He submitted that the nature of the case which the Respondent had to meet was not set out with any great clarity prior to service of this statement. He accepted that his client had had the statement for over a month and he confirmed that Mr Graham had not made an application to the tribunal for more time to consider it.

4. Mr Woolf on behalf of the Applicant resisted the application to exclude Ms Woollacott's statement. He submitted that the Applicant had no way of knowing what Mr Graham's response would be when the Applicant filed their initial statement of case and documents in support. He submitted that the Respondent's case as set out in his Response consisted of wholesale denials which had to be addressed. He confirmed that there were no new allegations of breach in Ms Woollacott's statement and submitted that much of the documentation attached

to it consisted of correspondence which the Respondent had already seen. He noted that the Respondent had been sent the statement a month before the hearing and had ample time to consider its contents.

5. We considered that we should permit the Applicant to rely on the statement. It does go further that one would normally expect of a supplemental reply and it is correct that much of the exhibited documents could and perhaps should have been attached to the earlier witness statement of Mr Newell, the Applicant's solicitor. However in our view it responds to the denials contained in Mr Graham's statement and does not seek to go outside the allegations of breach contained in the application. We considered that would be in keeping with the overriding objective of dealing with cases justly and in a proportionate manner to admit it.

6. We then considered the admissibility of the report prepared by the Applicant's heating and plumbing contractor regarding the condition of the central heating pipes located in the Respondent's flat. This document had not been seen by the Respondent prior to the hearing. We were told that this document was prepared following a joint inspection of the premises which took place on 24 September 2024. We were told that the Applicant had tried to obtain the Respondent's agreement to the inspection on 16 September 2024. The inspection was carried out in the presence of the Respondent and his contractor.

7. Mr Graham did not agree to the admission of this document essentially on the grounds that he had not seen it before the hearing and had insufficient time to consider it. Mr Woolf on behalf of the Applicant submitted that this was in effect a jointly prepared document and that he was very surprised by the Respondent's objection to its admission. Normally the tribunal would be reluctant to permit a party to rely on a document that had been prepared and disclosed so close to a hearing date. However it seems to us that both parties had previously agreed that it would be sensible to have an updated report on the condition of the premises and both parties had co-operated in its production, although we would not characterise the document as a joint expert report. Furthermore Mr Graham informed us that having read it, he did not dispute its contents. In the circumstances we considered it sensible to admit it.

8. The Tribunal had the following documents:

   a) A 198-page bundle prepared by the Applicant for this hearing
   b) The Respondent's application for an order under s20C of the 1985 Act and/or for an order under paragraph 5A of the 2002 Act, and
   c) A skeleton argument prepared by Mr Woolf.

9. We considered the contents of the bundle and heard oral evidence from both Ms Woollacott and Mr Graham. We heard further submissions from Mr Leoni and Mr Woolf at the conclusion of the evidence.

10. In its application the Applicant initially alleged that the Respondent had breached his lease by;

    (i) Failing to keep the flat, and particularly the installations for sanitation and for central heating, in a good state of repair

such that the properties below the flat had on numerous occasions been affected by water leaks;

(ii) Subletting the flat without seeking the Applicant's prior consent;

(iii) Failing to pay service charges and ground rent when they became lawfully due;

(iv) Failing to comply with various statutory obligations relating to short term lettings; and

(v) Failing to grant access to the Applicant as required by the terms of his lease.

11. We considered that it was not appropriate for the tribunal to consider matters relating to the payability of service charges in the context of an application made under s.168 of the 2002 Act. Mr Woolf indicated that the arrears had been cleared and that consequently the Applicant did not pursue its application insofar as it related to service charges or ground rent. He also indicated that the Applicant was not seeking declarations that the Respondent had failed to grant access or failed to comply with statutory obligations relating to short term residential lettings. He indicated that the Applicant sought determinations relating to the allegations of disrepair and subletting.

The Lease

12. The Applicant holds a leasehold interest in the premises known as 14 Queen Anne Street and 30 Harley Street in London. Flat 10 was initially let by the Applicant to the Respondent pursuant to a sublease of 75 years commencing on 1 October 1981. The property demised is described in the Second Schedule to the lease as;

> *ALL that Flat shown for the purposes of identification only on plan number 2 and therein edged red on the third floor of the building including [without prejudice to the generality of the foregoing] the landlords fixtures and fittings [including the radiators and circulating pipes comprising part of the general heating system if any] serving the entire building sanitary apparatus and appurtenances the surfaces of the ceiling and floors [including any floorboard screeds and plaster on the internal walls] the glass in the windows the window frames the doors [including the door by which access to the said flat is gained] the door frames an internal non-structural walls or partitions of the said flat and the interior faces of such parts of the external and internal walls as bound the said flat and all conduits wires pipes and cables exclusively serving the said flat.*

13. The Tenant's obligations are set out in Clause 5 of the lease. Clause 5(6) obliges the Tenant

> *"to repair and keep in good repair the interior of the flat [damage by any of the insured risks excepted save for the insurance affected*

by the landlord shall have been vitiated in whole or in part for any act or omission of the tenant or any of the tenant's servants agents or licensees]

14. Clause 5(8) obliges the Tenant;

"*to keep all the water and waste pipes ducts and sanitary and water fittings in the flat protected from frost and free from obstruction…*

15. Clause 5(12) obliges the tenant;

"*within three months after service on the tenant of notice of any disrepair for which the tenant is liable [or immediately in case of need] to make good the disrepair and in default to permit the landlord execute the necessary works the cost of which shall be paid by the tenant to the landlord on demand and in default be recoverable as rent in arrear"*

16. Clause 5(20)a(ii) of the lease obliges the tenant to seek the prior written consent of the landlord prior to parting with possession with the whole or sub-letting the whole for a period of more than six months. It also obliges the tenant to supply the landlord with a copy of the proposed sublease 30 days before its commencement. That clause also contains an absolute prohibition on subletting for a period of less than six months.

17. In her witness statement and in her oral evidence Ms Woollacott alleges that the Respondent has committed multiple breaches of the lease, specifically that he;

(i) Failed to keep the installations for sanitation in good repair and condition such that mains water leaked into the properties below. Her evidence is that there was a leak from the toilet in June 2021, a leak from the stopcock in the kitchen in December 2022 and a further leak from the bathroom caused by defective sealant in June 2023.
(ii) Failed to keep the central heating pipework in good repair and condition leading to an uncontainable leak in October 2021 which was only stopped when the Landlord instructed its contractor to attend and completely isolate the central heating pipes serving the flat.
(iii) Has sublet the flat without seeking permission, had persistently let out the flat to Air B and B guests in the latter part of the 2010s and subsequently had sublet the flat to students who had not always behaved well.

18. The Applicant relies on the content of the report of Hedgequote dated 25 September 2024. This indicates that a pressure test of the heating system was carried out in the presence of Ms Woollacott, the Respondent and the Respondent's plumber. This involved reconnecting the central heating pipes serving the flat to the general central heating system. Within a very short time of Flat 10 being reconnected to the system there was a leak into the flat below.

This leak stopped when the central heating pipes serving the flat were again isolated.

19. For his part the Respondent said that he had never lived in the property but that he had attended to any item of disrepair as soon as he had been given notice of it. It is common ground that he undertook a significant amount of work to the kitchen and the bathroom in the summer of 2023 and that there have been no further episodes of mains water leaking from the Flat since then. It is also agreed that, save for a leak in February 2023, which we consider in more detail below, there was no incidence of water leaking from the central heating system into the flat below until the pressure test was undertaken in September 2024. He agreed that the central heating pipes serving his flat are in need of repair but it is his case essentially that he had not been made aware of the need for repairs until the he observed the outcome of the recent pressure test. His evidence was that he believed that the central heating pipes had already been repaired by the Applicant.

20. Mr Graham accepted the flat had been let to tenants ever since he purchased it. He agreed that that he had not sought the Applicant's consent prior to subletting the flat in accordance with the lease. It is his case that at some point in the 1980s the Applicant's then managing agent had told him that he did not need to seek consent to sublet or furnish the Applicant with a copy of any tenancy agreement. He accepted that he had received an email dated 9 October 2023 from the Applicant's managing agent which stated that going forward the Applicant would be enforcing the terms of the lease relating to subletting and would require in particular a copy of the tenancy agreement before permission to sublet would be granted. He also accepted that in or about August 2024 he granted a new sub tenancy to two law students for a term of 2 years, and that he did not either seek the Applicant's consent or supply the Applicant with the new tenants' details or a copy of the tenancy agreement.

21. It is important to note that the Tribunal's role under the Act is to determine simply whether there has been a breach of covenant on the evidence before it. Whether there are extenuating circumstances which would allow relief from forfeiture or whether the landlord has an alternative remedy is irrelevant at this stage.

22. The Tribunal is satisfied that the Respondent has committed multiple breaches of the lease. Our findings and our reasons for them are set out in the following paragraphs.

Determinations of Breach: Disrepair

23. In breach of clause 5(6) of the Lease, the Respondent failed to keep the flat in repair in that there was a leak of mains water from the bathroom in June 2021 due to a defective toilet and a further leak in June 2023 due to defective sealant around the bath. Additionally there was a leak of water from the water supply to the kitchen in December 2022. We accept, and it is common ground, that the refurbishment works undertaken by the Respondent were sufficient to prevent the escape of mains water from the Flat into the properties below, and there is no evidence of a continuing breach in this regard.

24. In breach of Clause 5(6) the Respondent has failed to repair and keep in repair the central heating pipes serving his property. We are satisfied that these pipes fall under his repairing obligations as they form part of the demise as defined by Schedule 2 to the lease. Mr Leoni submitted that the obligation to repair and keep in repair does not arise until the landlord has notified the tenant of the need for repair by virtue of Clause 5(12) of the lease. The tenant is in breach of the covenant to keep the flat in repair from the moment any disrepair manifests. Consequently we do not have to consider whether or not the Respondent had been notified of the leak from the central heating pipes serving his flat. However we are satisfied that he was well aware for some considerable time that the central heating pipes serving his property were in a defective condition. We do not accept his evidence that he believed that the Applicant had repaired the pipes. The engineer reports at pages 114 and 143 of the bundle (the latter is attached to the Respondent's own statement) show clearly that the only works which were carried out by the Applicant were to isolate the pipes in October 2021 and to attend to a leaking valve in 2023.

25. Mr Leoni sought to argue that insured risks are excluded from the tenant's repairing obligations. Insured risks are defined by the preamble to the lease as including burst pipes and damage caused by the heating apparatus. This argument was not raised before closing submissions. It seems to us that while Clause 5(6) may operate to exclude damage to the interior of the Flat caused by burst pipes, it does not exclude the pipes exclusively serving the flat from the tenant's obligation to keep whole of the demised premises in repair.

Determinations of Breach: Subletting

26. In breach of Clause 5(20)(a)(ii) of his lease the Respondent has sublet without consent and without furnishing the Applicant with the information required by that clause. Mr Graham asserts that the Applicant has waived compliance with that clause for a number of years. The Applicant does not challenge the assertion that compliance with Clause 5(20)a(ii) was waived at some point in the distant past. However it submits that any such waiver without doubt ceased on 9 October 2023 when the applicant's then managing agent informed all lessees by email that from that date forward the Applicant would insist in strict compliance with the subletting provisions in the lease. Mr Graham accepts that he received this email and accepts that he did not comply with it when he granted a new tenancy to 2 new tenants which commenced on 1 September 2024.

27. Mr Woolf submits that the waiver was withdrawn by an earlier letter dated 17 May 2017 which is at page 131 of the bundle whereby the Applicant's then managing agent wrote to all leaseholders advising them that Air BnB lets were not permitted under the terms of the lease. However as the Tribunal has found that the Respondent has breached the covenant by subletting without consent in September 2024, the point is otiose – it is not necessary to establish that any breach of covenant is a breach twice over.

Final Matters

28. The Respondent has made applications under s20C of the 1985 Act and Paragraph 5A of Schedule 11 to the 2002 Act. These provisions permit the tribunal to prevent a landlord from recouping its legal costs of proceedings from the leaseholder as either a service charge or an administration charge. We do not consider that such an order would be appropriate in this case. The Respondent has lost on the main issues in the proceedings which were the allegations of subletting without consent and disrepair. The application was entirely justified. We have considered whether we should make a partial order under those provisions in light of the inclusion of service charge matters in the application, however it seems to us that this would not have increased the costs to any significant degree. We have not been asked to consider an application for unreasonable conduct costs under Rule 13(2) of the First Tier Tribunal Rules 2013 and any party may make such an application following receipt of this determination should they wish to do so.

Name : Judge O'Brien Date 1 October 2024

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).