FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	CHI/43UJ/LBC/2023/0030
Property	:	9 Stack House, West Hill, Oxted, Surrey RH8 9JA
Applicant	:	Stack House Residents (Oxted) Limited
Representative	:	Mr Will Beetson, Counsel
Respondent	:	Theresa Mary O'Carroll (1) Michael James Curran (2)
Representative	:	Mr Ben Leb, Counsel
Type of application	:	Application for an Order under section 168 (4) of the Commonhold and Leasehold Reform Act 2002
Tribunal member(s)	:	Mr C Norman FRICS Valuer Chairman Mr C Davies FRICS
Date of Hearing	:	26 October 2024
Venue	:	Civil Justice Centre, Havant
Date of Decision	:	6 February 2025

DECISION

Decision

(1) The respondent is in breach of Clause 3(i)(c) of the lease which requires the lessee to keep the demised premises in good and tenantable repair and condition. The breach occurred on 1 March 2019.

(2) The respondent is in breach of Paragraph 9 of the First Schedule of the lease, being a duty to furnish all floors of the premises with sufficient under felt and carpets except those in any bathroom or kitchen to minimise the induction of sound from the premises to any other parts of the estate. The breach occurred on 1 March 2019.

Reasons

Background

1. The applicant seeks an Order under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that breaches of covenant or condition in the lease of have occurred at 9 Stack House, West Hill, Oxted, Surrey RH8 9JA ("the Flat"). The allegations as set out in the application form were:

   (i) That the tenant had breached Paragraph 1 of the First Schedule which stated "not use the flat nor permit the same to be used for any purpose whatsoever other than as a private flat in the occupation of one family only nor for any purpose from which a nuisance can arise to the owners lessees or occupiers of other flats on the estate or in the neighbourhood [...]

   (ii) That the tenant had breached Paragraph 2 of the First Schedule where the lessee covenants "not to do or permit to be done any act or thing which may render void or voidable any policy of insurance of any flat garage or store on the estate or may cause an increased premium payable in respect thereof."

   (iii) That the lessee had breached Paragraph 9 of the First Schedule by which the lessee covenants to " furnish all floors of the premises with sufficient under felt and carpets (except those in any bathroom or kitchen) to minimise the induction of sound from the premises to any other parts of the estate."

   (iv) That the tenant had breached clause 3 (i) of the lease which states "the tenant hereby covenants with the lessors that the tenant and the persons deriving title under him will throughout the said term hereby granted ...

(v) (c) “maintain uphold and keep the demised premises other than the parts thereof comprised in and referred to in the lessors covenants for repair hereinafter contained and subject as hereinafter provided all walls sewers drains pipes cables wires and appurtenances thereto belonging in good and tenantable repair and condition [...]” and

(vi) (e) “not make any structural alterations or structural additions to the demised premises or any part thereof or remove any of the landlord’s fixtures without the previous consent in writing of the lessors.”

2. At the hearing, counsel for the lessor stated the following in his skeleton argument:

The Applicant states that the Respondents have: failed to keep the Flat in repair; failed to install sufficient underfelt and carpets (except those in any bathroom or kitchen) to minimise the induction of sound from the premises to any other parts of the Estate.

The allegations in relation to increased insurance premiums and the use of the Flat for the occupation of a single family are not pursued.

Directions

3. Directions were issued on 9 July 2024, setting the matter down for determination on the papers. By amended directions dated 24 September 2024 the matter was set down for a face-to-face hearing.

Inspection

4. The Tribunal did not consider that an inspection was necessary as the bundle contained extensive photographs.

The Property

5. The property is a block of flats dating from the 1970s. The main structural floors are concrete. Flat 9 is situated on the top floor and is a large penthouse.

The Law

6. Section 168 of the Act provides:

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

The Lease

7. The subject lease is dated 29 September 1977 ("the Lease"). This has been subject to a Deed of Variation, dated 8 November 2019 which extends the term to 999 years but leaves unchanged other terms.

The Hearing and Preliminary Matter

8. Mr Beatson, Counsel represented the applicant and Mr Leb, Counsel, the respondent. Both counsel produced skeleton arguments for which the Tribunal is grateful. Mr Raymond George Cook, a director of the applicant gave evidence on its behalf. Mr Michael James Curran gave evidence on behalf of the respondents.

9. Mr Beatson objected to what was termed a new defence not previously pleaded. This was set out in Mr Leb's skeleton argument as follows:

> *20.a) the programme of renovation works commenced by Rs is not a breach of clause 3(i)(c) because Rs are not undertaking works to restore the flat to a former condition from which it has deteriorated and nor do Rs seek to preserve a former functional condition of the flat. Instead, the flat is in the state it is in because Rs have sought to improve the flat.*

10. Mr Leb cited *Assethold Limited v Watts* [2014] UKUT 0537 (LC) as authority for this proposition. There, the Deputy President of the Upper Tribunal (Lands Chamber) said: "To my mind "to maintain" and "to repair" each connote the doing of something to the subject matter of the covenant. To repair involves undertaking work to restore the subject to a former condition from which it has deteriorated. To maintain involves preserving a functional condition by acts of maintenance on to the thing to be maintained."

11. Mr Beatson submitted that that argument was raised for the first time as a new defence, which the respondents should not be permitted to do. Mr Beatson cited as authorities *Jacobs v Chalcot Cresent (Management Company) Limited* (2024) EWHC 259 and *Enterprise Homes v Adams* 2020 UKUT 151.

Decision on the Preliminary Matter

12. *Assethold* was concerned with whether legal costs for a dispute over a party wall were recoverable under a repairing covenant. It was held that they were not (but recoverable under other covenants). Therefore, the Tribunal rejects the argument that this is authority for Mr Leb's submission. In *Jacobs*, Mr Justice Fancourt said at Paragraph 57 "For the reasons given by Dyson LJ in Al-Medenni v Mars , a party is entitled to rely on the pleaded case as defining the ambit of the issues to be decided at trial." In *Enterprise Home Developments LLP v Adam*, the Tribunal was concerned with procedural unfairness in a paper determination by the FTT and the way in which the FTT, not a party, raised a new point. It is therefore not directly relevant.

13. Applying *Jacobs* the Tribunal finds that Mr Leb's submission is a new point, and that the Tribunal should not allow it. If the Tribunal is wrong about that, it rejects the respondent's submission as unarguable and totally without merit.

The Applicant's case

14. Mr Beatson's submissions may be summarised as follows. The respondent purchased the flat in 2012. In or around 2012 or 2013 the respondent stripped out the flat with the intention of renovating it. The respondents rely on alleged issues with communal pipes which they say were resolved in 2016, roof disrepair completed in 2019 and Covid restrictions [2020] as a defence to putting the flat in repair. The extant allegations were that the respondents had failed to keep the flat in good and tenantable repair and condition and failed to install sufficient underfelt and carpets (except those in any bathroom or kitchen) to minimise the induction of sound from the premises to any other parts of the estate.

15. Counsel referred to photographs as to the current state of the flat in the bundle, which showed the flat in a completely stripped out condition. He submitted that the flat is not in good repair and condition and the same is not contended for by the respondent. The respondent's position is that there is no valid requirement on them to obtain a licence from the applicant.

16. Mr Beatson called Mr Raymond Cook, director of the applicant who gave evidence, having served two witness statements verified by statements of truth. His evidence may be summarised as follows, in relation to the

extant claim. The respondent purchased the property in 2012. Subsequently in 2012/2013 the respondent stripped out the property with the intention of substantial renovation. Subsequently there had been numerous requests from the applicant, the applicant's managing agents Rayners Property Managers and the applicant's solicitors, Compton Solicitors LLP requiring the respondent to repair the property. Mr Cook referred to inter partes correspondence from December 2022. This alleged that a leak occurred from flat 9 into flat 7.

17. On 4 January 2023, the respondents contended that the flat was undergoing renovation and was not in disrepair. They contended that they could not progress their works owing to disrepair of communal water pipes and leaking from the roof of the building. The respondent had previously accepted that remedial works to the communal water pipes were completed in 2016 and roof replacement completed in February 2019.

18. The respondents complained that their intention to proceed in 2020 was abruptly terminated by Rayners. Mr Cook's evidence was that this was a consequence of the Covid pandemic regulations and the risk to elderly residents if works had been carried out at that time.

19. On 4 January 2023, the respondents stated that in order to progress the works they needed to have a builder fully on board. To do so they had to establish that they had sole ownership and control of the project. Allegations of harassment were groundless.

20. In their letter dated 9 January 2023, Compton stated to the respondents that it was their responsibility to take the necessary and reasonable steps to ensure that they are not in breach of their covenant. By 28 February 2023 they required the respondents to send Rayners full start and finish dates for the works. On 18 January 2023, the respondents replied that they accepted that a seven-week period should be sufficient time to identify and contact a builder to establish a possible start date. They alleged that the most serious impediment was the absence of an equitable working relationship with the landlord and that the relationship with the applicant was so fractured that the respondent could not see a way forward at that time.

21. On 21 February 2023 Compton's advised the respondents that the previous draft agreement submitted by the respondents under which they would carry out works was rejected and that there was no need for any separate agreement between the tenant and landlord on the terms claimed. The failure of the respondents to put the premises into good and tenantable repair and condition was implicit in their acceptance that extensive renovation was required.

22. Previously, on 14 November 2019 the applicant's solicitors had served a section 146 notice on the basis that the respondent's acceptance of the need for renovation and refurbishment was an admission of breaches of covenant. At that time, the respondent was represented by Taylor

Walton solicitors, who challenged the validity of the section 146 notice. The applicant's case was that the breach was a continuing breach, as evidenced by the respondents' acknowledgement that the property was not in a good and tenantable repair and condition therefore requiring refurbishment. The respondent's position was that the refurbishment works could not be contracted as a "project" without a separate agreement being in place with the applicant. The Respondents' position was that they would have to act as project manager themselves and employ individual trades directly.

23. Following a letter from Rayners on 11 April 2024, in which the applicants asserted that they believed that the respondents were intending to shortly commence work, the respondent's responded that they wished to use a long reach crane [oversailing the building] and a significant proportion of the car parking area for storage and delivery of bulky materials. Rayners responded that a licence for such use would be required, and this would be conditional on a licence for alterations, ensuring protective insurance cover, compliance with health and safety regulations and to minimise disruption, noise, and nuisance to residents. On 13 May 2024, the respondents disagreed with this position and stated that they would not be in any position to proceed further with the project at that juncture. Rayners repeated the request for details of the proposed works from a surveyor, architect, or engineer, with details about structural alterations. They repeated that the applicant a required the respondents to enter a licence governing use of the crane, contractors' insurance and indemnity insurance for any damage caused.

The Respondent's Case

24. The respondents' submitted a statement of case. This was verified by statements of truth. The tribunal treated this as a witness statement and Mr Curran BSc CEng MIET, gave evidence which may be summarised as follows in paragraphs 26-29.

25. When bought in 2012 the respondents were aware that the property had not been updated for 40 years. Subsequently they discovered that there was a serious problem with leaking central heating pipes embedded in the concrete floor screed. This had caused issues in the flats below. The respondent considered that it would be necessary to carry out an across-the-board programme of works to take 18 months. This would include removal of the floor screed, installation of a new heating system, removal of the ceilings to allow updated electrics, new plasterwork, new plumbing, new bathrooms, cloakroom, kitchen, and utility room. It was clear that the flat would not be in a habitable state until the works had been completed. These would need to be done in their entirety before the property could be occupied. Mr Curran stated in his witness statement that the renovation work started with the approval of the landlord in 2012.

26. Since 2012, the respondent's plans had been seriously impacted by the landlord's behaviour and actions. Between July 2012 and May 2016, the landlord failed to repair communal pipes. Between July 2012 and February 2019, the main roof was failing which was a breach of the landlord's repairing obligations. Between February 2018 and December 2019, the respondents received hostile and intimidating solicitors' letters threatening legal action. On 27 May 2020, the respondents were directed to stop work, and that directive had never been rescinded. From 2022 to 29 August 2024 there were further hostile solicitors' letters. From 30 April 2024, Rayners effectively issued a stop demand by way of an email. The tribunal should consider the reasons why the renovation work has become so protracted. This was caused by the landlords' decisions and actions.

27. Renovation works commenced in July 2012 with the approval of the landlord. Removal of the ceilings revealed serious issues relating to communal pipes running horizontally in the ceiling with a length of 140 metres. This forced a suspension of works and closing out the contract with the original builder. Subsequently, a failure of the roof in breach of the landlord's obligations caused further interruption. In the absence of a contracted builder, the respondents removed and disposed of the debris and rubble from within the apartment and the adjacent balconies. Further work including the removal of over 300 m^2 of defective plaster from the walls has also been carried out. The respondents exhibited photographs.

28. A great deal of building materials was required to be brought to the flat to repair it. There were practical difficulties of using the stairs or lifts. The respondent wished to use either scaffolding or a very large overreaching crane, requiring use of several car spaces outside of their demise. Mr Curran denied that any of the stripping out work was structural in nature. In particular, he stated that the floor screeds were non-structural.

29. Mr Leb submitted that the respondents had not breached the lease. He submitted that it was not possible nor practicable for the respondents to carry on with their programme of works until the roof had been remedied on 28 February 2019. On 26 May 2020, the respondents advised the applicants that the respondents' new contractors were ready to commence work. On 27 May 2020 Mr Battersby of Rayners Estates first responded demanding that the contractor be disinstructed.

30. Mr Leb referred to authorities concerned with the interpretation and construction of documents. He cited *Arnold v Britton*, [2015] AC 1619, *Marks & Spencer plc v BNP Paribas Securities Services Trust Co* [2015] 3 WLR 1843, *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 and *Investors Compensation Scheme v West Bromwich BS* [1988] 1 WLR 896.

31. Counsel submitted that the respondents had sought to complete their renovation works diligently but were prevented from doing so by the

conduct of the applicant and its agents. Until 2019 it was neither practicable for the respondents to complete the renovation works given the disrepair to the building. Between 2020 and 27 January 2023, the respondents could not proceed with those works due to various delays and impediments caused by the applicants and its alleged reliance on the Covid 19 health emergency. Since January 2024, the respondents have held various meetings with their builder and other contractors and sub-contractors which have been frustrated by the applicant's solicitors making various unacceptable demands.

Findings

32. The Tribunal found Mr Cook to be a credible witness. The Tribunal found Mr O'Carroll to be honest, but that his case was in part misconceived.

33. The Tribunal finds that in 2012 the interior of the subject flat was completely stripped out leaving bare brick walls and bare ceiling structures. The floor screed and wall plaster were removed. There were no floor coverings.

34. The Tribunal has to construe the whole lease when considering the meaning of the covenants in issue. It finds that the tenant's repairing covenant cannot be construed so as to impose a repairing obligation when such an obligation was incapable of being performed as a result of landlord's disrepair. The same applies to the obligation to carpet.

35. The Tribunal finds that there had been several failures by the landlord to put the roof and communal pipes in repair. These issues were finally resolved on 28 February 2019. From that point onwards being 1 March 2019, the tenant's repairing covenants could be performed. The tribunal finds that the direction to stop work in in 2020 was caused directly by the Covid pandemic. However, that does not provide a defence because the covenant had to be performed from 1 March 2019.

36. Further, the Tribunal finds that the tenant's covenant to repair is unconditional. It is not conditional on the ability of the tenant to obtain licences to alter under the lease, or other permissions required from third parties. Nor is it conditional on licences for scaffolding, craneage oversailing the building or the use of additional car spaces being obtained from the landlord.

37. The respondent decided to carry out a wholesale stripping of the flat in 2012. However, the respondents were not entitled to adopt a mode of repair outside of their power and control which exceeded rights conferred under the lease, unless they had negotiated such rights. They had no right to insist on a mode of repair which was dependent on use of a large oversailing crane, occupation of car spaces outside their demise, or scaffolding. Such permissions would have to be sought and negotiated

from the landlords. If no such licence was granted, the respondents were not relieved of the repairing covenant. No licence was negotiated.

38. For these reasons, the Tribunal finds that the respondents were in breach of covenant 3(c)(i) from 1 March 2019. For the same reasons, the tribunal finds the tenants were in breach of Paragraph 9 of the First Schedule of the lease (duty to carpet) from 1 March 2019.

6 February 2025

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).