FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**HAV/00HG/LBC/2024/0603**
Property	**:**	**First Floor Flat 198 North Road West, Plymouth, Devon, PL1 5BY**
Applicant	**:**	**Peter Buchan**
Representative	**:**	**Thomas Dawson (Counsel) instructed by Brady Solicitors**
Respondents	**:**	**Alexander Nelson**
Representative	**:**	**No appearance**
Type of application	**:**	**Determination of alleged breach of covenant (s168 Commonhold and Leasehold Reform Act 2002)**
Tribunal Members	**:**	**Judge R Cooper** **Mr D Jagger FRICS** **Mr M J F Donaldson FRICS**
Date and Venue	**:**	**15 May 2025** **Havant Justice Centre. Parties attending by video**
Date of decision	**:**	**4 June 2025**

DECISION

Summary decision

1. The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, the following breaches have occurred (full particulars of which are set out below):

(i) Failure to keep in repair the bathroom of the Property resulting in water egress into the flat below from 14

August 2023, in breach of clause 5(a) of the lease dated 15 December 1988, and

(ii) Failure to make good damage to the ceiling of the flat below in breach of clause 5(b) of the lease.

2. The Respondent shall pay to the Applicant within 28 days of this Decision the tribunal fees paid by the Applicant in the sum of £330.

Background to the Application

1. Peter Buchan ('the Applicant') is the freeholder of 198 North Road West, Plymouth, Devon, PL1 5BY ('the Building'). He is also the leasehold owner of the ground floor flat in 198 North Road West ('the Ground Floor Flat') which is tenanted.

2. Alexander Nelson ('the Respondent) is the leasehold owner of First Floor Flat 198 North Road West, Plymouth, Devon, PL1 5BY ('the Property') which is also tenanted.

3. On 8 November 2024 the Tribunal received an application from the Applicant seeking a determination under s168(4) of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') that the Respondent has breached the terms of his lease.

4. Directions were issued to the parties on 5 March 2025. The Applicant has complied with the directions, but the Respondent failed to provide a response or any documents.

5. No inspection of the Property took place. Neither party requested it, and it was not considered necessary for a fair decision to be made by the Tribunal.

The issues for the Tribunal

6. The Applicant seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent is in breach of the covenants in his lease.

7. A determination by the Tribunal under section 168(4) of the 2002 Act is one of the requirements before a notice under section 146 of the Law of Property Act 1925 ('a section 146 notice') can be served. A section 146 notice is the first step in the process of forfeiting the Respondent's lease (s168(1)). As such, a finding of the Tribunal that a breach has occurred is a matter of some significance.

8. In summary, the Applicant alleges the Respondent is in breach of the terms of his lease by:

(a) Failing to repair the cause of the leak in the bathroom of the Property, allowing water to leak into the Ground Floor Flat,

(b) Failing to repair the damage caused to the Ground Floor Flat as a consequence of the leaking water (including the joists between the flats and the ceiling of the Ground Floor Flat),

(c) Breaching the requirement not to allow anything to be done that might vitiate the insurance for the Building,

(d) Failing to provide evidence that he is complying with regulations required for the letting of the Property – namely Gas Safe and EPC certification, and evidence the tenant's deposit was protected,

(e) Failing to pay ground rent and service charge when due, and

(f) Making alterations to the Property without consent.

9. It is for the Applicant to demonstrate on the balance of probabilities that the Respondent has breached the terms of his lease in this way.

The Documents

10. The Tribunal considered the documents in a PDF bundle prepared by the Applicant comprising 194 pages. The documents themselves, however, are numbered to page 191. Where documents are referred to they are referenced by the page number on the document '[ ]'.

11. In addition, the Tribunal received photographic evidence by email on 14 May 2025. The Tribunal had not seen the Applicant's letter of 2 May 2025, but Mr Dawson read this to the panel.

The hearing

12. This was a remote hearing by video. The Tribunal were in attendance at the Havant Justice Centre. Mr Buchan attended the hearing remotely by video. Mr Dawson (Counsel for the Applicant) also attended separately by video. Mr Nelson did not attend, and no reasons were given for his absence.

Preliminary issues

13. As Mr Nelson was not in attendance, the Tribunal considered whether it should proceed in his absence. It considered rules 3 and 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

14. The Tribunal was satisfied that Mr Nelson had been notified of the date of the hearing, and that notification had not been returned undelivered. The Tribunal decided it was in the interests of justice to proceed in his absence. If the hearing was adjourned there was no guarantee Mr Nelson would attend on the next occasion, given his failure to comply with the

directions. He had had the opportunity to provide information for the Tribunal to consider but had not done so. The issues were of some considerable importance to him, given they had the potential to allow his lease to be forfeit. However, even if the Tribunal were to find a breach, he would have an opportunity to apply for relief from forfeiture in the event of such proceedings.

15. Mr Dawson confirmed to the Tribunal that Mr Buchan was attending the hearing remotely from Germany and wished to give oral evidence. In his letter of 2 May 2025 he asked the Tribunal for permission to do so. Having confirmed that Mr Buchan had not made an application for permission to the Foreign Commonwealth and Development Office (FCDO), the Tribunal informed him that evidence could not be given. This is because Germany is not on the FCDO's Taking of Overseas Evidence unit's list of countries that have given consent. Having taken instructions, Mr Dawson confirmed that Mr Buchan was happy to proceed without giving evidence from Germany. Mr Buchan remained on mute throughout the hearing to ensure no inadvertent breach. The hearing proceeded by way of submissions from Mr Dawson.

Discussion and conclusions

16. The purpose of bringing proceedings under section 168(4) of the 2002 Act is to enable a landlord of a long lease of a dwelling to serve a section 146 notice to forfeit the lease for breaches of covenant by the tenant. In other words, it is the first step towards the freeholder taking possession of and depriving the Respondent of his flat. The provisions of section 168 are set out in full in the Appendix to this decision.

17. If proceedings are brought under s168 of the 2002 Act, the Tribunal is required to determine whether the tenant has committed an actionable breach of covenant. The Tribunal's jurisdiction under section 168(4) is limited to making a finding of fact on whether or not a breach has occurred. The Tribunal's jurisdiction does not extend to deciding whether the breach had been remedied. That is a question for the Court in any subsequent action for forfeiture of the lease (*Swanston Grange (Luton) Management Limited v Eileen Langley-Essen* (LRX 12/2007)). However, Judge Hutchinson in that case confirmed that the Tribunal can decide whether the landlord is estopped from asserting the facts on which the breach of covenant is based.

18. The Applicant's case is set out in the Application and his witness statements of 31 October 2024 and 3 April 2025 [1 to 12 and 128 to 133] together with the supporting documentary evidence. In the original application and witness statement, the breach alleged by the Applicant solely relates to the issue of water leaking from the bathroom of the Property which had caused damage to the Ground Floor Flat. The Applicant alleges breaches of covenant in respect of Clauses 5(a) and 5(b) of the lease [4] in this respect.

19. In his second witness statement, however, the Applicant broadens the scope of his application, and Mr Dawson when pressed confirmed the Applicant wished to proceed on all grounds. The Applicant alleges the Respondent's actions (or inaction) had resulted in serious structural safety risks, put the insurance at risk, and had caused him financial loss. He alleges that the Respondent had carried out unauthorised alterations to the Property by adding a third bedroom, failed to pay his service charges on time, and had failed to provide documentation that was legally required regarding the sub-letting of his flat. The Applicant in his second statement alleged breaches of Clause 5(e), 5(f), and 6 of the lease in addition to 5(a) and 5(b) [132].

20. In reaching its decision the Tribunal considered the totality of the evidence in the round and the submissions made by Mr Dawson.

21. The Tribunal is satisfied that the Official Copies of the Register of Title demonstrate that the Applicant is the freehold owner of 198 North Road West under Title DN20177 [118], and Alexander Nelson is the leasehold owner of the Property under Title DN266321 [121]. The Official Copies show that the Respondent's leasehold title is unencumbered by any mortgage or charge.

22. The Property comprises the upper floor of a mid-terrace two-storey Victorian house which on an unknown date was converted into two flats. The plan attached to the lease shows the Property to be a two-bedroom flat with a kitchen at the rear, living room to the front, and a combined toilet & bathroom between the two bedrooms in the middle [37].

23. The lease of the Property is dated 15 December 1988 and was made between David Allan Tall and Alexander Nelson. The term is for 99 years from 25 March 1983.

24. The Lease, in summary, contains the following provisions. By Clause 3 the lessee covenants *inter alia* to pay the rents reserved, allow the Lessor to enter to inspect upon giving four days notice and to make good within one month (or forthwith in the case of an emergency) all defects and wants of repair for which the Lessee is liable.

25. By Clause 4 the Lessee covenants to observe the restrictions in the Second Schedule to the lease for the benefit and protection of the ground floor flat. The restrictions in the Second Schedule include the usual prohibitions on noise and anti-social behaviour, but also include:

    (a) a prohibition on any action that would result in vitiation of any insurance policy, refusal of payment of insurance monies or increase in premium (paragraph 2) [34] and

    (b) a prohibition on making structural or external alterations or additions to the demised premises without prior written consent of the lessor (paragraph 14) [35].

26. Clause 5 contains the Lessee's repairing covenants with the Lessor and the Lessee of the Ground floor flat. The Respondent covenants:

    (a) To keep the demised premises in good and tenantable repair condition and decorative state and in particular (but without prejudice to the generality of the foregoing) so as to give shelter and protection to the lower flat

    (b) To keep clean and in good and tenantable repair and condition the floor and ceiling of the demised premises and all doors and the inside and outside of the windows and window frames and all sewers drains watercourses cables pipes and wires which serve the demised premises and to make good at the Lessees expense any damage to the lower flat caused by the Lessees' failure to comply with this sub-clause

    (c) ..

    (d) ..

    (e) To clean the windows of the demised premises as often as necessary

    (f) As a joint obligation with the Lessees of the lower flat to keep the entrance hall and the porch and entrance steps of the main building in food repair condition and decorated properly swept and cleaned [29] to [30]

27. Clause 6 of the lease as it has been copied in the documents appears incomplete [30] to [31].

28. In relation to each of the breaches alleged the Tribunal made its determination for the following reasons.

    <u>Failure to repair – leakage of water from First Floor Flat to Ground Floor Flat in Breach of Clause 5(a)</u>

29. The Tribunal determines that the Respondent has breached Clause 5(a) of the lease as he has failed to repair defects to the bathroom in the Property since at least 14 August 2023 thereby allowing water to leak into the Ground Floor Flat causing the ceiling of the Ground Floor Flat to partially collapse. The Tribunal made its determination for the following reasons.

30. The Tribunal is satisfied that on 14 August 2023 the Applicant gave the Respondent notice that the ceiling of the lobby by the backdoor of the ground floor flat had collapsed, most likely due to water leaking from the bathroom above [40]. In response to the Tribunal's questions Mr Dawson confirmed that the collapsed portion of the ceiling shown in the photographs received by the Tribunal on 14 May 2025 were of the damage referred to in the email of 14 August 2023, and that on the plan to the lease this was the area of lobby between the 'toilet & bathroom' and the 'bedroom' leading from the 'Ground Floor Court' [37]. The Tribunal was

satisfied that the 'toilet & bathroom' and an area labelled 'store' in the first floor flat was above this lobby.

31. The Tribunal is satisfied from the email correspondence between the Applicant and Respondent that works had previously been undertaken in the bathroom of the Property and there had been earlier problems with water leakage although the date is unknown [45].

32. The Tribunal finds that the Respondent was aware by 30 August 2023 following a report from his plumber that the water leak from the bathroom of the Property was due to the shower door and/or frame that had been incorrectly assembled and/or sealed [29].

33. The Tribunal finds it more likely than not that the Respondent had arranged for a repair to be carried out on or before 27 September 2023 [47]. However, notwithstanding that repair the water leaks continued, as the Applicant's tenant reported on 4 October 2023 that water was still leaking.

34. The Tribunal finds that any repairs by the Respondent were not effective and has given particular weight in this regard to the Applicant's emails sent to the Respondent of 4 October 2023 [48], 12 October 2023 [50], 5 May 2024 [64], 16 May 2024 [66], 8 June 2024 [68], and 16 June 2024 [70] regarding the ongoing leak. Brady Solicitors also sent a letter before action dated 31 January 2024 [52] making clear to the Respondent that water was continuing to leak, that the damaged ceiling in the Ground Floor Flat could not be repaired until the cause of the leak was found and repaired to a proper standard. The Tribunal is satisfied that the Respondent was notified he was in breach of the terms of the lease. However, it appears he failed to respond.

35. The Tribunal finds it was only by September 2024 that the Respondent began to take action in respect of the leak, reporting on 12 September 2024 that he had been unwell and was *'seeking a contractor to repair the water leak & flooring in the top flat'* [73].

36. On 16 October 2024 the Respondent confirmed he had received a quotation regarding the bathroom repairs [74]. The Plumbing Doctor who had quoted on 26 September 2024 confirmed the following:

    (a) the shower door had not been installed properly, was leaking and needed to be removed, resealed and reinstalled, and

    (b) the flooring to the bathroom was unstable and crumbling under the bath allowing it to move and leak water. The tiled splashback was also loose as a result serving no useful purpose [86]

37. The Tribunal was satisfied that although Plumbing Doctor had quoted for the repair works in September 2024, by 2 January 2025 the Respondent had failed to contract the company to arrange a starting date for the works and by then they were only available in mid February 2025 [91].

38. However, as the Applicant insisted works were carried out by Heritage Preservation to replace the joists beneath before the bathroom repairs were carried out [94] it would appear that matters stalled further at this point. Mr Dawson confirmed that as at the date of the hearing, the works to repair the bathroom had still not been carried out. Even if the bathroom works had been carried out, the Tribunal still finds that the Respondent had breached the repairing covenant in clause 5(a) of the lease.

39. Although the Applicant alleges that the water leakage had caused damage to the joists, the top half of which the Tribunal finds fall within the Property demised to the Respondent [34], no finding is made in this regard. Mr Dawson accepted that the Applicant has not produced the Heritage Preservation survey in evidence. The Tribunal notes this was apparently obtained by the Applicant on 20 June 2024 and no reasons were given for the failure to disclose. There is no other evidence before the Tribunal supporting the Applicant's allegations.

40. Whilst the photographs show water staining to the joists, they do not show any obvious signs of rot or structural damage.

41. Although Mr Dawson submits the Respondent accepted responsibility for the joists, the Tribunal finds Mr Nelson's emails of 6 January 2025, for example, only authorise inspection of the joists [90]. This is not an admission of liability or disrepair.

42. However, whilst no breach has been proved, the Tribunal is satisfied that prolonged exposure to water has the potential to affect the structural integrity of the joists and potentially, therefore, they may be in need of repair (although the Tribunal makes no finding in this regard).

43. In his second witness statement, the Applicant also alleges there is a *'serious structural safety risk'*, namely a risk of collapse of the ceiling of the first floor flat following a roof leak in 2016 [128]. The Tribunal makes no finding of breach in this regard because the Applicant has provided no other supporting documentation. Although the Applicant says this was discovered in an inspection on 19 March 2025, no copy of the inspection report has been provided [131]. Mere assertions of breach are not sufficient.

<u>Breach of Clause 5(b) – failure to make good the damage to the lower flat</u>

44. The Tribunal determines that the Respondent has breached Clause 5(b) of the lease as he has failed to make good the damage caused to the ceiling of the Ground Floor Flat. It makes this determination for the following reasons.

45. Clause 5(b) requires the Leaseholder to make good any damage caused by that particular sub-clause (see paragraph 26 above). There is no evidence that the damage to the Ground Floor Flat is the result of a failure to repair sewers, drains, watercourses or pipes serving the Property. However, the Tribunal is satisfied that the failure to keep the floor of the Property in a

proper state of repair has enabled water to leak from the bathroom of the Property and to penetrate the floor causing the ceiling below to partially collapse. The failure to make good the damage to the ceiling of the Ground Floor Flat does, therefore, fall within the provisions of sub-clause 5(b).

46. In making this determination, the Tribunal relies on the findings and reasons set out in paragraphs 29 to 38 above. Although the Applicant had notice on 14 August 2023 that the ceiling had partially collapsed due to water egress from the bathroom of the Property, no repairs were carried out to stop the water leaks or carry out repairs to the bathroom or the ceiling of the Ground Floor Flat. The ceiling to the Ground Floor Flat in the lobby area by the back door remains defective and in need of repair and redecoration once the causes of the leaks have been rectified. The evidence from Plumbing Doctor clearly indicates the floor of the Property was in a state of disrepair, with holes and crumbling beneath the bath, thereby allowing the bath to move and cause leaks.

47. For the reasons set out in paragraph 39 to 41 above, the Tribunal makes no finding as regards the state of repair of the joists, the bottom half of which fall within the demise of the Ground Floor Flat.

Breach of Clause 5(e) and 5(f)

48. The Applicant in his second witness statement alleges breaches of Clauses 5(e) and 5(f). However, the covenant terms he cites (namely failure to observe all regulations…laid down by the Local or competent authority and a prohibition on assignment, mortgaging, charging, underletting or parting with possession of part (respectively)) [132] do not appear in Clause 5 of the Respondent's lease which he relies on in evidence [30].

49. The Applicant has produced no evidence demonstrating that the Respondent has failed to clean the windows or has failed to keep the common hallway jointly in a state of cleanliness and repair with the Applicant. The Tribunal finds no breach of covenant in respect of Clauses 5(e) and 5(f).

50. The terms relied on by the Applicant do, however, appear in Clause 3 of the lease. However, the Tribunal finds the Applicant has not demonstrated an actionable breach. The Applicant fails to specify which regulations in relation to the demised premises which he says were laid down by the Local Authority or other competent authority and were breached. Any breach by the Respondent of his responsibilities relating to the letting of property (for example protection of the tenant's deposit), are not regulations in relation to the demised premises. In any event, there is no evidence of any breach of the Respondent's duties as a residential landlord. There is also no evidence the Respondent has let out only part of the premises. All the evidence points to there being a single tenant, Gracie, occupying the entire Property.

Insurance - Breach of Clause 4 by reference to paragraph 2 of the Second Schedule – putting at risk the insurance of the Building

51. In his application, the Applicant complains that the Respondent's actions have put the insurance of the Building at risk either of being fully vitiated or of increased premiums which could be a breach of Clause 4 by reference to paragraph 2 of the Second Schedule.

52. Paragraph 2 provides as follows:

'Not to do or allow to be done anything which would cause the Insurance Policy on the building and the site to be vitiated or the payment of the insurance monies refused in the whole or in part or would cause any increase premium to be payable in respect thereof'

53. In his email to the Respondent of 8 April 2024, the Applicant says the premium has doubled *'due to the open claim regarding the water leak……and there is a 500 pounds excess for water leak claims'* [60]

54. Having considered the totality of the evidence the Tribunal finds the Applicant has demonstrated on the balance of probabilities that in April 2025 the insurance premium demanded was £915 [138] and that additional terms had been added to the schedule that the clauses in the policy relating to escape of water (Peril 4) and escape of oil (Peril 5) were deleted, and that loss or damage as a result of accidental damage were to be excluded.

55. However, the Tribunal had no evidence before it of the previous year's premium. Nor was there evidence that the Applicant had been unable to find an alternative insurer willing to insure those risks. The Applicant had also provided no evidence from the insurer that the claim for damage caused by the water leaks from the Respondent's bathroom had been refused.

56. In these circumstances, the Tribunal was not satisfied that the Applicant had proved on the balance of probabilities a breach of Clause 4 by reference to paragraph 2 of the Second Schedule.

<u>Breach of Clause 4 by reference to paragraph 14 of the Second Schedule – unauthorised alterations to the Property</u>

57. In his second witness statement the Applicant says that an inspection of the property on 19 March 2025 revealed that the Respondent had carried out unauthorised alterations to the layout of the Property by creating a third bedroom and converting the store into a shower room without written consent or planning/building control permission [131].

58. However, no copy of that inspection report was produced in evidence, nor was any other documentary evidence produced to support the allegations made. It is not sufficient for the Applicant to simply make assertions without more. The Tribunal finds the Applicant has not demonstrated a breach of the lease in respect of this allegation.

Failing to provide evidence that the Respondent is complying with regulations required for the letting of the Property

59. From around February 2025, it is clear the Applicant has been demanding the Respondent provide him with evidence that he is complying with regulatory requirements for the letting of property namely by providing Gas Safe, EPC and EICR certification, and evidence the tenant's deposit was protected [102]. The Applicant has also made a report/complaint to Plymouth City Council that the Respondent is in breach of these requirements [105] and [115].

60. Whilst the Respondent may or may not be in breach of his legal obligations in relation to his tenant (on which the Tribunal makes no findings), the Tribunal finds the Applicant has not demonstrated that a breach of those requirements would constitute a breach of the lease for the purposes of s168(4) of the 2002 Act.

61. The Applicant appears to submit this is a breach of Clause 5(e) of the lease [132], but as set out above, that is a requirement to keep the windows clean [28]. The Tribunal finds the Applicant has not demonstrated a breach of Clause 3(e).

Failure to pay ground rent and service charge demands on time

62. The Applicant alleges that the Respondent has breached the requirements of his lease regarding payment of ground rent and service charge. Whilst the Applicant confirms the Respondent has paid in full, he claims Mr Nelson did not make payments on time [129].

63. The Tribunal finds this allegation of breach is not made out on the evidence. This is because the only evidence of such demands being made are in the emails from the Applicant sent to the Respondent none of meet the legal requirements to be a valid demand for rent or service charge. Arguably, therefore, unless some other form of demand was made the Respondent was not required by law to make payment. As the Applicant accepts payment had been made and as there is no evidence that a valid rent or service charge demand had been made, the Tribunal finds there to be no breach of covenant.

Conclusions

64. Having made the findings of fact set out above, the Tribunal determines that the Respondent breached the covenants in his lease as follows:

(a) The Respondent failed to keep in repair the bathroom of the Property resulting in water egress into the flat below from 14 August 2023, in breach of clause 5(a) of the lease dated 15 December 1988, and

(b) The Respondent failed to make good damage to the flat below in breach of clause 5(b) of the lease.

65. Having made that determination, the Tribunal decided the Respondent is to pay to the Applicant within 28 days of this Decision the tribunal fees paid by the Applicant in the sum of £330. The Tribunal considers it reasonable for the Respondent to reimburse those fees as the Applicant has succeeded in the main limb of his application.

Signed: Judge R Cooper

4 June 2025

Note: 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 that 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, and should be sent by email to rpsouthern@justice.gov.uk.

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

The Law

Section 168 of the Commonhold and Leasehold Reform Act 2002 provides 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 (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.