



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

Case reference : **LON/00BH/LBC/2019/0100**

Property : **Flat 26, Chessington Mansions,
Colworth Road, London E11 1HZ**

Applicant : **Chessington Mansions Management Ltd**

Representative : **Ms R Murray of counsel**

Respondent : **Hyfield Estates Ltd**

Representative : **Ms I Kerkvliet (director)**

Type of application : **Determination as to whether there has
been a breach of covenant**

**Tribunal
member(s)** : **Judge S Brilliant
Mr A Harris LLM FRICS FCI Arb**

**Date and venue of
hearing** : **02 May 2019, 10 Alfred Place, London
WC1E 7LR**

Date of decision : **07 May 2018**

DECISION

Decision of the tribunal

The tribunal determines that the respondent is not in breach of clause 2(8) of its lease requiring it to repair flat 26.

The application

1. The applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 that breaches of covenant in the lease have occurred.
2. The relevant legal provisions are set out in the Appendix to this decision.

The background

3. Chessington Mansions, Colworth Road, London E11 1HZ (“the block”) comprises a 1930s three-storey concrete framed block of flats with solid brickwork clad walls incorporating a combination of UPVC and powder coated aluminium framed windows beneath a timber suspended flat roof covered with mineralised surface felt. Cantilevered external concrete walkways are constructed to the east, west and south elevations accessed via three external stairwells

4. The respondent is now the long lessee of flat 26 under an underlease dated 29 June 1978 (“the lease”). The head lessee is the applicant. The lease was for a term of 139 years from 29 September 1935, but this term has now been varied by deed dated 9 May 1996. The specific provisions of the lease will be referred to below, where appropriate.

5. Flat 26 is situated on the top story of the block. The flat immediately below is flat 15. The kitchen of flat 26 is immediately above the kitchen of flat 15.

6. According to Companies House, the objects of the respondent are *other letting and operating of owned or leased real estate*.

7. The respondent does not occupy flat 26. It is leased out by way of an AST. The lessee at all material times has been an elderly gentleman, Mr O’Halloran.

8. The occupier of flat 15 at all material times has been Ms Sollerova.

The issues

9. In panel 5 of the application notice the applicant is required to specify the particular covenant in the lease that is alleged to have been breached, and to give details as to the nature of the alleged breach.

10. In panel 5 the applicant makes reference to two separate covenants in the lease. First, clause 2(8) which is the repairing covenant. Secondly, clause 2(9) which permits the applicant to enter flat 26 on notice, in order to view its condition, and to give notice of any want of repair which must be carried out within two months.

11. Panel 5 concludes with the following:

Damp penetration has been occurring in the flat¹ over the last 16 months, and the applicant has obtained a surveyor's report in relation to the damp issues.

Despite the applicant's attempts to resolve the water ingress issues that have arisen, the respondent has failed to carry out the necessary repairs, in breach of its repairing obligations under the terms of the lease.

12. Ms Murray fairly accepted that no details as to the alleged breach of clause 2(9) had been given. We ruled that the only issue before us was whether or not there had been a breach of the repairing covenant contained in clause 2(8) of the lease.

The lease

13. The respondent covenanted in clause 2(8) of the lease:

From time to time and at all times well and substantially to repair cleanse maintain and keep the Flat ... and the fixtures thereon and the walls pipes cables wires and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever ...

The hearing

14. At the hearing the applicant was represented by Ms Murray of counsel. The respondent was represented by Ms Kerkvliet, one of its directors. We are grateful to both for their submissions.

15. Neither side requested a site inspection, nor did we consider it proportionate to conduct one.

16. The applicant called Mr Harvey, the managing director of the applicant's managing agents, Red Brick Management Ltd ("the managing agents"). He had made two witness statements, although the latter one was mainly argument rather than evidence.

¹ This is confusing as the damp is in flat 15, not flat 16.

17. The applicant also sought to rely upon a witness statement of Ms Sollerova dated 2 April 2019. This was not in the trial bundle and had not been disclosed by the postponed date for disclosure of signed witness statements of fact. There was no application for relief from sanctions, just a bald assertion that there had been difficulties in obtaining the witness statement because she was working in Ethiopia. We ruled against the admission of this witness statement.

18. The applicant principally relied upon a report by Mr Kelly MRICS of TCL Chartered Surveyors dated 10 May 2018, following an inspection of both flats on 4 April 2018.

19. It is doubtful to what extent, if at all, we should attach weight to this report. First, no application appears to have been made to rely upon expert evidence, as is required by r.19(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Secondly, the report is not compliant with the requirements of CPR/RICS. Thirdly, Mr Kelly did not attend the hearing to be cross examined or to answer questions of the tribunal, and no good reason could be given as to why he was not attending.

20. It was suggested that the tribunal is informal as far as evidence is concerned. It is true that by r.18(6)(i) of the 2013 Rules the tribunal may admit evidence whether or not it would be admissible in a civil trial in England and Wales. Nevertheless, where the surveyor's evidence is crucial to a case (be it a building surveyor or a valuer) the invariable practice is for that surveyor to be available for cross-examination. Simple justice requires that. Despite these concerns, we will proceed on the basis that Mr Kelly's report is part of the evidence of the case.

21. The respondent called Mr Dowling, one of its directors.

The applicant's case

22. On page 3 of his report [2/18], Mr Kelly refers to two quite separate areas of water penetration in flat 15. First, he refers to an isolated area of blistered decorations visible to the ceiling, approximately 400 mm in from the front wall for a length of about 400 mm and about 200 mm wide. This was not damp at the time of inspection. Prior to the decorations having been carried out there had been a previous damp patch. Mr Kelly made recommendations as to its redecoration.

23. Mr Kelly obtained access to flat 26. There was no evidence of leaks to the waste pipe serving the kitchen sink. There was a slight drip to the kitchen tap but this was not a direct cause of the damp to flat 15. The flexible waste pipe hose serving the washing machine was discharging directly into the kitchen sink over the top of the workshop. There is a picture of this on page 5 of the report [2/19].

24. The hose was only secured by a piece of string fastened off the kitchen tap. It was recommended that the hose should be plumbed directly into the waste pipe to prevent a risk of flooding. There was no evidence of leaks to the flexible and copper pipework.

25. Secondly, there was a more significant and concerning area of damp, not on the ceiling but on one of the walls of flat 15. As we understand it, Mr Kelly suggests this damp is penetrating not through the ceiling of flat 15 but from an external source which the applicant is liable to repair. The applicant is not relying upon this damage as evidence of a breach of covenant by the respondent.

26. It is common ground that since these proceedings commenced there has been a further incident of flooding from flat 26 through the ceiling of flat 15. This occurred on 29 March 2019. The applicant says that this is yet another example of the continuing want of repair.

27. In addition, on page 6 of his report [2/21], Mr Kelly says:

A subtle drip was noted emanating from the kitchen sink waste pipe indicative of a dripping tap (as noted internally) the less frequent drip from the condensate pipe suggesting that the boiler to flat 26, which is in excess of 10 years old, is defective. Whilst the drips are very slight, significant damp penetration and saturation will occur internally over time if the surface water disposal is defective.

The respondent's case

28. The managing agents wrote to the respondent in May 2018 reporting the complaint about water ingress into flat 15. A copy of Mr Kelly's report was provided. Mr Dowling spoke to Mr O'Halloran who confirmed that there had been a leak from his washing machine, which was no longer connected or in use.

29. In October 2018, Mr Dowling inspected flat 26. The washing machine had been left in the hall. Mr O'Halloran confirmed that there had been no further reports of water ingress since Mr Kelly's report. His intention was to remove the washing machine with a view to replacing it with a new machine in the future.

30. Mr Dowling explained that when Mr O'Halloran decided to install a new machine the latter decided to use the old rubber hose pipe to supply water from the copper water pipes to the machine. It was discovered that this hosepipe had a rubber seal missing, and this is what had caused the further leak on 29 March 2019. Mr Dowling's maintenance staff purchased a new hosepipe for £4.99, and this resolved the problem.

31. Mr Dowling has a background in construction, property management and development. Has been working in this area for over 35 years. He found no

evidence of leaks to the waste pipe serving the kitchen sink (which had been replaced two years prior) and the waste pipe was defect free. He did not note any drips from the kitchen tap and noted that the area underneath the sink was completely dry. Mr O'Halloran confirmed that he had not noticed any issues with leaks in the flat.

32. The boiler in flat 26 was not 10 years old and defective. It had been installed in 2012 and had been tested and repaired when necessary in the past two years. The condensate pipe for the boiler was discharging directly into the external gully.

Discussion

33. The applicant's case is summarised on page 3 of a notice given to the respondent on 25 September 2018 [1/91], but updated to include the incident of 29 March 2019.

34. The applicant's primary case is that the leakage from the washing machine constituted a breach of clause 2 (8) of the lease. Ms Murray argued that the washing machine was a "fixture" and that any flexible rubber hose pipe attached to it was a "pipe" or "cable" of such a fixture.

35. We are unable to accept this submission.

36. The flat's pipework is all the permanent pipework, including wastes and water supplies. The waste from the sink is part of the plumbing, but the waste pipe out of the washing machine hooked over the sink is part of the appliance itself. It is not part of the flat, and is therefore not covered by the repairing obligation. The surveyor's recommendation is not evidence of any breach of covenant. It may be good modern practice to plumb it in this way, but using a washing machine in the way the tenant did does not breach the repairing covenant.

37. The water supply to the washing machine is via a pipe terminating at a tap or valve. The pipe is repairable up to that point. The washing machine is connected to the tap by a flexible hose which is part of the appliance. The recent leak was caused by a missing washer on the machine side of the tap, and is therefore not a breach of the repairing covenant.

38. In summary, a flexible rubber hose pipe attached to a freestanding washing machine is not a "pipe" or "cable" within the meaning of clause 2 (8) of the lease. Mr O'Halloran may be liable to the owner or occupier of flat 15 in a civil claim based on nuisance or the rule in Rylands v Fletcher, but the respondent is not in breach of covenant. The damage may be covered by insurance.

39. The applicant's secondary case is that the boiler in flat 26 is defective and that the subtle drip emanating from the kitchen sink waste pipe could lead to significant damp penetration and saturation problems over time.

40. On this matter, we prefer the evidence of fact of Mr Dowling who attended the hearing to give oral evidence. His evidence (in paragraphs 13 and 14 of his witness statement dated 18 April 2019) is set out in paragraphs 31 and 32 above.

41. In any event, condensing boilers are meant to drip water. The boiler condenses water from the combustion process to extract the heat and discharges the condensate via a pipe. The boiler has been serviced, the gas certificate was supplied so there is no evidence the boiler was out of repair or of a breach of the repairing covenant.

42. An observation of a drip in a tap without more is not evidence of a breach of covenant. There are several reasons why a drip was seen including not turning it off properly. The surveyor was not investigating the flat 26 plumbing, but was directing his mind to the damp in flat 15 below. A recommendation to check the pipework is not evidence of disrepair unless it is a recommendation to investigate the source of a leak in for example buried pipework. There is no evidence of that here.

43. Accordingly, we find there has been no breach of the covenant contained in clause 2(8) of the lease.

Name: Simon Brilliant

Date: 07 May 2019

Appendix of relevant legislation

Section 168(4) of the Commonhold and Leasehold Reform Act 2002:

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.

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).

The surveyors report does not identify any leaks in pipework covered by the repairing covenant.

There was no expert evidence before us of any defect. A washing machine flood is unfortunate but not covered by the repairing covenant.