FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/29UD/ LBC/2019/0049
Property:	14 Milton Road, Swanscombe, Kent, DA10 0LY
Applicant:	Naka Estates Limited
Representative:	Mr Rosenberg
Respondent:	Christopher Thomas Alexander Dods
Representative:	None
Type of Application:	Section 168 Commonhold and Leasehold Reform Act 2002 (Breach of Covenant)
Tribunal Members:	Judge A Cresswell (Chairman)
Venue of Hearing:	On the Papers
Date of Decision:	10 February 2020

DECISION

The Application

1. On 18 November 2019, the Applicant, the owner of the freehold interest in 14 Milton Road, Swanscombe, Kent DA10 0LY, made an application to the Tribunal claiming breach by the Respondent of various covenants in the Lease. The Tribunal has considered only the breaches claimed by the Applicant to have occurred.

Summary Decision

2. The Tribunal has determined that the landlord has demonstrated that there has been a breach of covenant. The breaches found are in respect of the covenants relating to the tenant's duties under Clauses 2(3) and 2(11)(a) of the lease. Details follow.

Inspection and Description of Property

3. The Tribunal did not inspect the property. The property is stated to be a ground-floor flat and can be seen on photographs submitted for the hearing. It appears to be in a very poor state of repair, with 3 of the front windows being boarded over.

Directions

4. Directions were issued on 25 November 2019. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
5. This determination is made in the light of the documentation submitted in response to those directions. The Respondent has taken no part in the proceedings.

The Law

6. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.
7. A covenant is usually regarded as being a promise that something shall or shall not be done or that a certain state of facts exists. Section 168(1) and (2) Commonhold and Leasehold Reform Act 2002 provide that a landlord may not serve a notice under Section 146 Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Tribunal under Section 168(4) of the 2002 Act that the breach has occurred.
8. The Tribunal assesses whether there has been a breach on the balance of probabilities (**Vanezis and another v Ozkoc and others** [2018] All ER(D) 52).
9. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to that question and cannot encompass claims outside that question, nor can it encompass a counterclaim by the Respondent; an application under Section 168(4) can be made only by a landlord.
10. The issue of whether there is a breach of a covenant in a lease does not require personal fault unless the lease says so: **Kensington & Chelsea v Simmonds** (1997) 29 HLR 507. The extent of the tenant's personal blame, however, is a relevant consideration in determining whether or not it is

reasonable to make an order for possession: **Portsmouth City Council v Bryant** (2000) 32 H.L.R. 906 CA, but that would be a matter for the Court.

11. In **Credit Suisse v Beegas Nominees Ltd** [1994] 4 All ER 803, Lindsay J. considered a landlord's covenant to keep a building in good and tenantable condition. He said the necessary condition was such "*…as having regard to the age, character and locality of the property, would make it reasonably fit for the occupation of a reasonably minded tenant of the class likely to take it…*".

12. Where a party does bear the burden of proof:
"*It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law… It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out…: the burden of proof is a last, not a first, resort.*" (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

Ownership

13. The Applicant is the owner of the freehold of the property. The Respondent is the owner of the leasehold interest in the flat.

The Lease

14. The lease before the Tribunal is a lease dated 30 June 1993, which was made between Glen Nigel Durbidge as lessor and Simon Keith Graham Robertson and Andrea Louise Paine as lessees.

15. Clause 1(a)(ii) defines the demised ground floor flat to include "*all windows and window frames doors and door frames and all internal non load bearing walls*"

16. Clause 2(3) is a covenant by the tenant "*At all times during the said term to keep the Flat and additions thereto in good tenantable repair and decorative condition (but not to decorate any part of the exterior of the Flat) and forthwith to replace all broken glass*".

17. Clause 2(11)(a) is a covenant by the tenant "*not to do or suffer anything which may render any increased or extra premium payable for the insurance of the Building or which may make void or voidable any policy for such insurance*".

18. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).

19. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:

> 15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning

has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

Consideration and Determination of Breach of Covenant
Clause 2(3)
The Applicant

20. The Applicant complains that the property was in a very poor condition still on 11 December 2019 as shown by a photograph of the outside despite notice having been given to the Respondent by the Applicant on 11 October 2019 as to the state of the property and the requirement under the lease for the Respondent to effect repairs within 2 calendar months.
21. The property has boards over broken glass, is visibly in disrepair and is affecting the insurance of the building.
22. The Applicant indicated in its application that it had spoken to the Respondent in person "*but he is not cooperative in any matter*".

The Respondent

23. The Respondent has made no response.

The Tribunal

24. The Tribunal has followed the guidance of the Supreme Court in **Arnold v Britton** and others when considering the words of the lease in this case.
25. Clause 2(3) requires the tenant to keep the flat in good tenantable repair and forthwith to replace all broken glass. Clearly the tenant has failed to comply with that covenant. It is apparent from the evidence presented by the Applicant and the photograph in particular that the disrepair to the windows has been a long-standing issue.
26. For the above reasons, on the basis of the evidence before it and the failure by the Respondent to engage with the Tribunal proceedings and offer any counter position, the Tribunal finds that there has been a breach of Clause 2(3). The Tribunal has had regard to the guidance in **Credit Suisse v Beegas Nominees Ltd,** detailed above, in so concluding.

Clause 2(11)(a)
The Applicant

27. The Applicant complains that it is unable to obtain insurance on the property because of the state of disrepair detailed above.
28. AXA Insurance Company was unwilling to quote on the risk on 10 October 2019 and would only add the risk to the Applicant's policy upon confirmation of its intention to have the works completed within 6 months of purchase.
29. The Applicant states in its application, which contains a statement of truth, that AXA had indicated to it that the premiums would be increased or the insurance cancelled if the repairs required are not carried out.

The Respondent

30. The Respondent has made no response.

The Tribunal

31. Clause 2(11)(a) requires the Respondent *"not to do or suffer anything which may render any increased or extra premium payable for the insurance of the Building or which may make void or voidable any policy for such insurance".* Here there is evidence of the refusal by an insurance company to quote on the specific risk posed by the Respondent's failure to keep the flat in good tenantable repair. It is inevitable in such circumstances that the landlord would have to pay a higher sum to persuade an insurance company to accept the risk posed by the disrepair.

32. For the above reasons, on the basis of the evidence before it and the failure by the Respondent to engage with the Tribunal proceedings and offer any counter position, the Tribunal finds that there has been a breach of Clause 2(11)(a).

Judge A Cresswell

APPEAL

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.