



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

**Case reference** : **LON/00AF/LBC/2021/0034**

**HMCTS Code** : **V: CVPREMOTE**

**Property** : **29A Windsor Drive, Orpington,  
Kent BR6 6EZ**

**Applicants** : **(1) Siamak BODBIN  
(2) Susan Elizabeth BODBIN**

**Representative** : **None**

**Respondents** : **(1) Philip TEVLIN  
(2) Sophie WARD**

**Representative** : **Mr Shephard, Counsel**

**Type of application** : **Section 168 Commonhold and  
Leasehold Reform Act 2002 -  
determination of an alleged breach  
of covenant**

**Tribunal members** : **Judge T Cowen  
Ms S CoughlinMCIEH**

**Date of hearing** : **29 July 2021**

**Date of decision** : **9 November 2021**

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**DECISION**

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### **Covid-19 pandemic: description of hearing**

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents before the tribunal at the hearing were in the form of electronic bundles supplied by the parties in advance of the hearing.

The Tribunal took account of the electronic documents submitted and all of the evidence and submissions made at the hearing in reaching its decision.

### **DECISION OF THE TRIBUNAL**

The Tribunal determines that the following breach has occurred. In breach of clause 4.3.1.3 of the Lease, the Respondents have failed to keep in repair the surface of the flat roof area outside the rear entrance to the Property.

### **REASONS FOR THE DECISION**

#### **The Property**

1. 29 Windsor Drive (“the Building”) is a middle terrace building with ground floor commercial premises and a 2-storey maisonette above. The Property is the upper maisonette. There is an access walkway which runs along the back of the entire terrace at first storey level. There is also a flat roof area at first floor level. Part of the walkway and the flat roof are immediately above the ground floor commercial premises of the Building.

#### **The Lease**

2. The Applicants are the freehold proprietors of the Building and have been since November 2013. The Respondents are, and have been since an assignment in January 2015, the registered leasehold proprietors of the Property under a 125 year lease dated 28 November 2005 (“the Lease”) at an annual ground rent of £100.

#### **The Application**

3. The Applicants’ application is under section 168 of the Commonhold and Leasehold Reform Act 2002 for a determination that breaches of covenant have occurred.
4. The Applicants were represented by the First Applicant. The Second Applicant played no part in the proceedings at all. For the sake of

convenience, for the rest of the decision, we will refer to the First Applicant as simply “the Applicant”.

### **The Applicant’s Case**

5. In essence, the Applicant claims that the Respondents have failed to comply with their repairing obligations in the Lease, despite the Applicants’ requests for them to do so. The Applicant claims that these breaches have resulted in water ingress into the commercial premises on the ground floor of the Building since 2018. The Applicant occupies those commercial premises himself for the purposes of his business. The consequence of any breaches committed by the Respondents and any loss suffered by the Applicant or others is not, of course, relevant in this application. Our only concern is whether a breach has been committed.
6. The Applicant wants to serve a section 146 notice in respect of the alleged breaches and seeks from this Tribunal a determination that the alleged breaches have occurred.
7. The application was made in May 2021 and was for a determination that the Respondents were in breach of the following covenants:
  - a. Clause 4.3.1.3 - the tenant’s repair covenant
  - b. Clause 4.3.1.9 - the tenant’s covenant to prevent the escape of water.
  - c. Clause 4.3.1.10 - the tenant’s covenant not to do anything which invalidates or increases the insurance premium.
  - d. Clause 11 of the 4<sup>th</sup> Schedule - the tenant’s covenant not to permit any water leakage through the floors.
8. The Applicant’s written submissions, served before the hearing, cited additional breaches of:
  - a. clause 13 of the Fourth Schedule regulations - the regulation against causing nuisance and annoyance
  - b. Clause 4.3.1.5 - the qualified alterations covenant.
  - c. Clause 4.3.3 - the covenant against alienation of part.
9. In the same written submissions, the Applicant withdrew the allegation that the Respondents had breached clause 4.3.1.9.

10. The Applicant's case centres around events in 2018 when he suffered a leak of water into his ground floor premises at the Building. He says that, upon inspection, he noticed cracks in the asphalt of the flat roof and walkway above the ground floor. He engaged a builder to apply resin onto the cracks, which stopped the leaks temporarily. The Respondents then failed to effect any further repairs to the area, which led to further leaks in October 2019. The Applicant again engaged a builder to apply resin. This time the builder also applied a specialised paint over the resin. The Respondents objected to the paint and hosed it off, which the Applicant says caused further leakage into the ground floor.
11. The Applicant also alleges that the Respondents have sublet part of the Property in breach of an absolute covenant. In particular, the allegation is that the Respondents are subletting the Property to three separate households as an unlicensed HMO. This allegation is based on a letter addressed to the Respondents from their mortgage lender Halifax dated 17 May 2021.
12. The Applicant also gave evidence of parcels being delivered to the Property addressed to the people other than the Respondents and invites the Tribunal to find on the balance of probabilities that the Respondents have breached the covenant against alienation of part of the Property.
13. The Applicant alleges that the Respondents have carried out structural alterations to the Property without consent. This is based on a letter from the Respondents' solicitors which states that the Respondents have "paid thousands of pounds for repairs to the structure of the roof and to the outer part of the building".
14. The Applicant alleges that the alleged actions of the Respondent adversely affect the building insurance policy.
15. The Applicant alleges that the Respondents have caused nuisance and annoyance to neighbouring occupiers by lighting bonfires on the Property.

### **The Respondents' Case**

16. The Respondents deny all breaches. In particular:
  - a. They assert that any leaks into the ground floor of the Building were coming from a blocked and overflowing drain hopper which serves the adjacent building, a café called "Bread and Butter". In support of that assertion, they rely on a "survey report" dated 28 June 2021.

- b. They admit that they washed off the paint, but they deny that this caused any leakage. They assert that the paint used was solar reflective paint which was unsuitable and unsafe to be used on walking surfaces. As a result of the unsafe use of this paint, the First Respondent slipped on the paint and banged his head.
- c. They deny that they have sublet the premises, but they admit that they have approached their lender for permission to take in a lodger.
- d. As well as denying that they had done anything which prejudices the Applicant's insurance, they also assert that the Applicant refuses to make any insurance claims so as to avoid any increase premium. They argue therefore that nothing they have done could have affected the insurance, if the Applicant fails to report it to the insurer.

### **The Tribunal's Decision**

- 17. The Tribunal heard evidence from the Applicant himself and from the First Respondent. The Tribunal also considered all of the papers submitted in the hearing bundles and took account of the submissions made by the parties and their representatives.
- 18. The reasons for our decision on each of the alleged breaches will be considered separately as follows.

### **Clause 4.3.1.3 - Alleged breach of repair covenant**

- 19. It is alleged that the area of flat roof outside the entrance to the Property was out of repair and that the Respondents failed in their obligation to keep or put it into repair.
- 20. In order to determine whether that allegation is made out, it is necessary to answer a series of questions:
  - A. Does the flat roof area in question fall within the subject matter of the covenant?
  - B. Was the flat roof area in question out of repair?
  - C. Did the Respondents comply with their duty, if any, to repair it?
- 21. We would answer those questions as follows:

A. Does the flat roof area in question fall within the subject matter of the covenant?

22. It is clear from the terms of the Lease that it does.
23. The demised premises are defined in the particulars of the Lease as: “the flat situated on the upper floors of the Building [defined in clause 1.1.6 as “the building of which the Premises shall form part”] shown edged red on the plan attached more particularly described in the First Schedule.”
24. The material parts of the First Schedule define the Premises so as to include:
- “1. All walls enclosing the Premises (but in the case of any external wall of the Building only the interior face of such wall and in the case of any dividing wall between the Premises and any other part of the Building only one half of such wall severed vertically
- ...
4. The ceilings and floors (including the floor joists of the Premises other than any main beams or girders supporting such floor joists).
- ...
6. All conduits pipes wires and cables ... carried in the floors screeds ceilings walls or ducts incorporated within the Premises and which are not used by or for any other part of the Building (whether in common with the Premises or otherwise).”
25. Clause 4.3.1.3 contains the tenant’s covenant to repair. The relevant parts of that clause are as follows:
- “From time to time as often as occasion shall require during the Term at the Tenant’s expense well and substantially to renew repair uphold support maintain cleanse amend and keep in good and substantial repair and condition the Premises ... and all conduits pipes wires cables and ducts and any other things installed for the purpose of supplying water...or for the purpose of draining away water and soil or for allowing the escape of steam or other deleterious matter from the Premises insofar as such conduits pipes wires cables and ducts or other things are installed or used only for the Premises and not also for any other parts of the Building...” (emphasis added)
26. In summary, we are satisfied that the demised premises includes the flat roof and that the Respondents are required to keep in repair the

demised premises. The Respondents are therefore required to repair the flat roof.

27. By way of further support, clause 6.1.1 states the repairing obligation of the occupier of the ground floor premises (which also happens to be the Applicant at the moment). That clause specifically excludes “the flat roof over the shop on the ground floor of the building”, thereby implying that the flat roof falls within the Respondents’ repairing obligations.

*B. Was the flat roof area in question out of repair?*

28. This issue is not really in dispute. The Respondents admit that the surface of the flat roof was cracked. It is a flat roof with no drainage and is therefore likely to hold water after rainfall. Cracks in the surface are defects which would trigger the tenants’ repair obligation, whether or not the cracks were actually causing water ingress to the premises below at any one time.
29. The Tribunal was satisfied that the part of the flat roof which was included in the demise was out of repair. The same surface continues outside the demise of the Respondents’ lease to form a walkway between various properties. There was no specific evidence that any parts of the surface outside the Respondents’ demise was out of repair, but the Applicant may want to have that surface checked to avoid future disputes.

*C. Did the Respondents comply with their obligation to repair the flat roof?*

30. It is clear to the Tribunal that the Respondents have not complied with their obligation to repair the flat roof. They have done nothing other than jet spray the paint which had been applied on behalf of the Applicant. The Respondents may have had good safety reasons for cleaning off that paint. There is no evidence for the Applicant’s allegation that the Respondents deliberately jet sprayed the weakest areas of the surface with the intention of causing water ingress to the ground floor premises.
31. The question whether the Applicant should have applied the paint in the way it was applied is not an issue for us to decide. Our only jurisdiction is to determine whether the Respondents breached the terms of the Lease in the way alleged.
32. The Respondents accept that they have done no work to repair the cracks in the flat roof surface. We find that they had a continuing obligation to keep the flat roof in repair and they have not done so. We determine that this amounts to a breach of covenant.

**Clause 4.3.1.5 - Alleged unlawful alterations**

33. Clause 4.3.1.5 contains a tenant's covenant in the following terms:

“Not without the previous written consent of the Landlord and the Other Occupier to make or allow to be made any structural alterations in the plan elevation or appearance of the Premises nor make any addition thereto nor cut maim alter or injure any of the walls or timbers thereof nor erect or remove any internal partition for dividing rooms.”

34. The Applicant relied on a letter from the Respondents' solicitors which referred to the Respondents carrying out “repairs to the structure of the roof” of the Building. The Applicant submitted that these works were structural alterations for which consent would have been necessary under the terms of the Lease.

35. The Respondents admitted that they had repaired a leak in the roof and that they not sought consent for these works (although they did ask for permission to erect scaffolding to aid the works), but they denied that the roof works involved any structural (or other) alterations for which consent would have been necessary.

36. In our judgment, repair works to a roof do not necessarily involve any of the types of alterations which are covered by clause 4.3.1.5. If anything, the word “repairs” is more likely to imply that the works did not involve alterations. It may be that the Applicant made assumptions based on the solicitors' use of the phrase “**structure** of the roof” (emphasis added), but that does not mean that there were alterations to the structure. The solicitor was talking about **repairs** to the structure.

37. In any event, the Applicant was unable to identify any specific alteration of any kind. In our judgment, this allegation must fail for lack of any evidence to support it.

**Clause 4.3.1.10 - Alleged effect on insurance premium and policy**

38. Clause 4.3.1.10 contains a tenant's covenant in the following terms:

“Not to do or permit or suffer anything which may render any increased or extra premium payable for the insurance of the Premises or the Building or which may render void or voidable any policy for such insurance...”

39. There is no evidence of any effect on the insurance premium or on the validity of the policy. The Applicant's evidence was that he had been advised by a mortgage broker that his claim for water ingress might be



denied, so he decided not to make a claim at all. There is no evidence whether that fear was founded and there is no evidence that anything done by the Respondents would have caused such an outcome.

40. His allegation that the Respondents' breach of repair covenant (or other alleged breaches) had an impact on his insurance premium or policy is purely speculative. The Applicant could not provide any evidence for that assertion. It was no more than simply his assertion.
41. We were not provided with copies of the full terms and conditions of the relevant insurance policies, so we could not even draw inferences as to what might be likely to affect the premium or the validity of the policy.

**Clause 4.3.3 - Unlawful subletting**

42. Clause 4.3.3 contains an alienation covenant in the following terms:

“Not at any time during the Term to assign or underlet or attempt to assign or underlet part only of the Premises”

43. In our judgment, there is no evidence of unlawful subletting. In order for there to be a breach of clause 4.3.3, the Applicant would have to have proved that the Respondents either assigned or sublet a part of the Property to a third party or attempted to do so.
44. The Applicant relied on the letter from Halifax dated 17 May 2021, which says:

“Thank you for getting in touch about taking in lodgers. We agree to let you share your house with a lodger as long as:

1. The lodger does not have the legal right to live in the property on their own, now or in the future.
2. The lodger does not have diplomatic immunity
3. You do not change the property to give the lodger separate facilities such as their own kitchen or bathroom.”

45. A request for permission for additional occupiers (in this case a lodger) is not evidence that the Respondents did actually introduce any further occupiers, nor that they attempted to do so. However, in this case, the Respondents explained in evidence that their request to the Halifax was because they intended to have a friend stay with them for a couple of weeks. It is notable that the first and third of the conditions imposed by the Halifax (quoted above) would have had the effect of ensuring that the Respondents did **not** breach the covenants of the Lease, because they are designed to avoid a subletting of part. It was, of course, in the

interests of the mortgage lender not to permit anything which would prejudice their security. So, if the Halifax letter is evidence of anything, it is evidence of the Respondents doing their best to do things properly and if they acted within the terms of the letter then they would not have breached the terms of the Lease.

46. The Applicant also relied on his observation that he received enquiries by parcel deliverers for people with names other than those of the Respondents. That is also not evidence that any distinctive part of the Property was sublet to a third party, nor even that the people named on the parcels did in fact live in the Property.
47. In addition to the Halifax letter and the names on parcels mentioned above, the Applicant relied on his own observation that the Respondents' small child was no longer living at the Property and used this evidence to invite the Tribunal to conclude that the Respondents had moved out and sublet the Property to others.
48. Even if the latter allegation were true, that would not be a breach of the lease, because subletting of the whole of the Property is not prohibited at all. In any event, the Respondents explained that their child did leave the Property for a while, because the Second Respondent moved out for a short time with the child to live with her parents.
49. None of this evidence came anywhere near establishing on the balance of probabilities that the Respondents had sublet or attempted to sublet part of the Premises in breach of the Lease.

**4th Schedule paragraph 11 - Allegedly causing water ingress**

50. Under the terms of the Lease, the tenant covenanted to comply with the regulations contained in the Fourth Schedule to the Lease. Paragraph 11 of that Schedule contains a regulation requiring the tenant "Not to permit or suffer any wastage or overflow of water at the Premises nor to permit or suffer any water or other liquid to soak through the floors".
51. It is common ground that there has been water ingress into the ground floor premises, which are occupied by the Applicant. Although we have decided that the flat roof was cracked and that this would compromise the watertight seal of the roof, that is not a finding that actual water ingress has resulted from any act or omission by the Respondents. The experts reports submitted by the parties are inconclusive.
52. Doing the best we can with the evidence available to us and using our specialist experience and expertise, it appears to be most likely that the water ingress which has occurred was caused by:

- (1) defective upstands on the external walls of the Premises (which are specifically excluded from the demise - see paragraph 1 of the First Schedule to the Lease, quoted above)
  - (2) defective parts of the walkway which extended across the back of a number of neighbouring buildings and which are also not included in the demise
  - (3) a defective hopper, belonging to adjacent café premises known as “Bread & Butter”, which overflowed.
53. There is therefore insufficient evidence to establish that the water which entered the ground floor of the Building resulted from wastage or overflow from the Respondents’ Property, nor that it soaked through the floor of the Respondents’ Property.

**4th Schedule paragraph 13 - Alleged nuisance and annoyance**

54. Paragraph 13 of the Fourth Schedule is a regulation requiring the tenant “not to use any part of the Building in such a manner as to cause annoyance nuisance injury damage or disturbance to the Landlord or the tenants or occupiers of other parts of the Building or the owners or occupiers of any nearby or adjacent property.”
55. The Applicant alleges that the Respondents have caused nuisance and annoyance to neighbouring occupiers by lighting outdoor fires, causing smoke and noxious fumes.
56. There is no allegation of fires inside the building. There is one allegation of a fire on 4 April 2020 in the garden of the Property. According to the Respondents, that fire was to dispose of refuse belonging to a friend called Jack Parker at a time when municipal dumps were closed because of the COVID-19 pandemic. The Respondents’ evidence was that, after an initial confrontation about the matter the Applicant consented to the lighting of the fire before it started. The Applicant admitted at the hearing that he had so consented.
57. Although the Lease does not specifically provide for previous consent to given for nuisance and annoyance (as it does for structural alterations for example), by granting prior consent to the fire the Applicant must be taken to have waived the breach or to be estopped from asserting that it is a breach of covenant.
58. The Applicant alleged that the Respondents had lit fires at the Property other than the one to which he had consented. The Respondents denied it. The Applicant’s only evidence of this was that some of the neighbours had told him. The Applicant did not or could not name

these neighbours and none of them came forward to give evidence. We cannot and do not give any weight to that evidence. Even if these fires did take place, there is no evidence that they caused any nuisance or annoyance to anyone.

59. We therefore find that there is no breach of the covenant against nuisance and annoyance as alleged.

**Conclusion**

60. For all the above reasons, the Tribunal made the order set out above.

**Name:** Judge T Cowen

**Date:** 9 November 2021

## **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).