FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UB/LBC/2013/0042** **CHI/29UB/LAC/2014/0002**
Property	:	**103 Beaver Road, Ashford, Kent TN23 7SF**
Applicant	:	**SE Powerbase Ltd**
Representative	:	**Ms Madjirska-Mossop of Mayfield Law, solicitors**
Respondent	:	**Fred Shellock**
Representative	:	**In person**
Type of Application	:	**In the matter of applications under the Commonhold & Leasehold Reform Act 2002 s.168(4) (Breach of Covenant) and Sch 11 para 5 (Determination of liability to pay administration change)**
Tribunal Members	:	**Judge M Loveday (Chairman)** **R Athow FRICS MIRPM**
Date and venue of Hearing	:	**17 June 2014** **Ashford Tribunal Centre**
Date of Decision	:	**1st August 2014**

DECISION

INTRODUCTION

1. These are combined applications (1) under Commonhold & Leasehold Reform Act 2002 s.168 for a determination that a breach of a covenant or a condition in the Lease has occurred and (2) under Sch 11 para 5 for a determination as to liability for an administration charge. The applications relate to 103 Beaver Road, Ashford, Kent TN23 7SF. In each case, the Applicant is the freehold owner of the property and the Respondent is the lessee.

2. The s.168 application is dated 2 December 2013. On 13 December 2013, the Tribunal directed that the matter should be listed for hearing. The Sch 11 application is dated 17 January 2014. On 24 January 2014, directions were given that the two matters should be heard together.

3. Both parties submitted Statements of Case and supporting documents and the matters were listed for hearing on 17 June 2014. On that date, the Tribunal carried out an accompanied inspection of the premises. The Applicant was represented by Ms Madjirska-Mossop of Mayfield Law, solicitors. The Respondent appeared in person.

THE LEASE

4. The premises comprise a maisonette on two floors of a former mixed use building on the corner of Beaver Road and Whitfeld Road in Ashford. By a lease dated 12 October 1979, the premises were demised by Tyresales Southern Ltd to Derek Perry and Janet Mears for a term of 99 years from 25 December 1978. The material covenants on the part of the lessee are as follows:

> "4. The Lessee hereby covenants with the Lessor as follows;-
> ...
> (4) At all times during the said term and as occasion shall require and without being thereunto required to repair maintain and keep the demised premises in good and every part both external and all Landlord's fixtures and fittings therein and additions thereto in good and substantial repair order and condition and properly painted papered and decorated and but without prejudice to the generality of the foregoing so as to support shelter and protect the parts of the building and other than the demised premises
> AND IT IS HEREBY EXPRESSLY AGREED (but without prejudice as aforesaid) that there is included in this covenant as repairable and maintainable by the Lessee all walls ceilings and floors and also all cisterns pipes sewers drains gutters watercourses cables wire ducts and apparatus chimneys flues and other things exclusively belonging to or provided or used solely for the service of the demised premises but subject to the provisions hereinafter contained as to party structures.

(5) To paint all external wood and iron work with two coats at least of good quality paint in a workmanlike manner in every third year of the term and so that the existing colour scheme shall not be varied without the consent in writing of the Lessor.
(6) To repair and maintain jointly or to pay a fair and proper proportion of the expense of repairing and maintaining all party walls and other party structures and all pipes sewers drains gutters watercourses cables wires ducts apparatus chimneys flues or other things or any parts thereof belonging to or used by or provided for the demised premises jointly or in common other maisonettes and in particular IT IS HEREBY DECLARED
(a) All joists between the ceilings of the shop and the floor of the flats are hereby declared to be party structures and the expense of repairing and maintaining them shall be borne in equal shares by the Lessor and Lessee.

...
(17) To pay all costs charges and expenses (including solicitors costs and surveyors fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act, 1925 notwithstanding forfeiture shall be avoided otherwise than by relief granted by the Court.

...
(21) To keep the garden properly maintained planted and tidied"

STATUTORY PROVISIONS

5. The Commonhold and Leasehold Reform Act 2002 restricts forfeiture of residential leases as follows:

> "**168. No forfeiture notice before determination of breach**
> 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 (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 a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the Lease has occurred."

Sch 11 provides:

"2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

...

5(1) An application may be made to an appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable."

INSPECTION

6. The Tribunal inspected the property externally from ground level, and internally, prior to the hearing taking place. Since the inspection is material to the decisions reached in respect of the alleged breaches of covenant, it is necessary to go into the details of what was observed by the Tribunal in the course of the inspection.

7. The building appears to have originally been a semi-detached house built about 110 – 125 years ago close to Ashford Town centre. It is of solid wall construction on 2 floors, L-shaped, with rendered and colour washed elevations and a concrete tiled roof. There are modern single storey bays to the ground floor front elevation. Most windows and doors have been replaced with uPVC units. The front ground floor of this building and the neighbouring attached property appears to have formerly been used as a tyre fitting garage. However it has more recently been converted in to residential flats.

8. The front elevation has been the subject of considerable renovation in recent times and is now in good decorative condition, although there is a small area of broken rendering. It has a small front garden which has a palisade fence and lawns (outside the demise of the subject flat). There has been settlement to the first floor level and some windows were noted to have subsided; it is accepted by both parties that this is old and there is no current movement taking place.

9. The left-hand side of the building is partially in the demise of the subject flat and partially the liability of the freeholder Applicants. There are two chimney stacks on this elevation and both were inspected from ground level. The front stack had what appeared to be some loose bricks over 3 or 4 courses and one chimney pot was leaning. This was only visible when viewed through binoculars. The stack appeared to be reasonable straight for its age. The rear stack on this elevation could not be clearly seen. There was a stop-end missing to the front end of the side gutter. The decorative condition was worn and there was an area of defective rendering on this elevation. There were some stains to the area adjacent to the chimneys, but the cause could not be ascertained. It may well be staining from soot in the flues. Decorations to this side are old and need renewing.

10. Along the side of this wall was a concrete footpath from the main road. This is the main pedestrian access to the subject flat. It was noted that some repairs had been undertaken, especially to the front area.

11. The rear part of the main house is in similar form and it was noted that there has been a lintel replaced in recent times over the lounge door. The gutter soffits and barge boards are in poor decorative condition and the timber has started to rot in some parts. Walls are in need of redecoration.

12. The rear extension part of the building is over two floors and of similar construction. The decorative state is poor and some rendering has failed. Upon a detailed inspection by the Tribunal there is what appeared to be some form of damp proof course ("DPC") at ground level, probably of a bituminous type typical of the era. If this is the case, it has a limited life span and appears to have failed, although this cannot be confirmed from the limited inspection carried out. What could be seen was defective rendering externally at low level, and similarly the internal plasterwork has failed at low level. The Applicants' surveyor showed the Tribunal high readings on his moisture meter. The Tribunal noted that the rear concrete yard immediately outside this area was at, or above the internal floor level and, significantly, substantially above the original damp proof course in some areas.

13. Timber to the soffits and barge boards are in poor condition with areas of timber failure. External decorations are poor and peeling. There is an old timber shed adjoining the rear of the rear extension.

14. The rear garden is within the demise of the flat and has a new close boarded timber fence to the left-hand boundary. There are similar older fences to the rear and right boundary, but the Applicants have attached a new fence to the other side of the side fence, thus making it difficult for the Respondent to maintain the original fence. The garden is rough cut lawn which is poorly maintained. There are 3 conifers and 1 laurel almost on the rear boundary. The conifers are about 30ft but appear to have had the crowns removed at some time in the past in an effort to stop them growing taller.

15. Drains were inspected. One inspection chamber was clear whilst two others had small amounts of standing water in them. This did not indicate any defect to the drains, merely that they had been used in recent times. No tests of the drain runs were undertaken.

16. The internal inspection of the property showed the Respondent to be in the process of redecoration to some rooms. On the ground floor the kitchen was in poor decorative condition with high readings from the Applicants' surveyor's damp meter indication dampness to the outside wall close to the defective areas externally. The utility/dining room was in a similar condition. The bathroom was in a good state of repair and decorations had recently been carried out. The living room was in good decorative condition with new decorations. The staircase and landing had worn decorations. On the first floor the rear bedroom (bedroom 3 on the Lease plan) was in poor decorative condition. Bedroom 2 decorations were old and damp was noted on the chimney breast; the Respondent stated this had occurred in the recent storms and heavy rain. Bedroom 3 decorations were old. Bedroom 4/study is in the process of being decorated.

17. The Applicants directed the Tribunal to the electric meters which are situated in the under-stairs cupboard; there has been a recent replacement of the electric meter and suppliers' main fuse. The fuse board is of the old wire fuse type, but there are no notes from the electricity supply company requiring its update. Generally around the flat the electric switches and power points appear to be of the modern style. The flat has gas fired central heating, and gas services appear to be in serviceable condition.

REPAIRS: SUBMISSIONS AND EVIDENCE

18. The Applicant's case. The Applicant referred to its Statement of Case and supporting documents. At the hearing, Ms Madjirska-Mossop supplemented these with oral submissions and a skeleton argument.

She also called Mr Julian Belcher and Mr Graham Ford FRICS to give evidence.

19. The Applicant submitted that the Respondent had failed to carry out works or contribute to the cost of works in breach of clauses 4(4), 4(5), 4(6) and 4(21) of the Lease. Ms Madjirska-Mossop referred to a report by Ashford BC dated 2 September 2011 and a report of Mr Graham Ford FRICS produced on 15 April 2013[1]. In her skeleton argument, Ms Madjirska-Mossop set out in some detail the covenants the Applicant was relying on and the alleged breaches of those covenants, helpfully cross referenced to paragraphs in the above two reports. These arguments are summarised in Schedule 1 to this decision. It is important to note that a number of alleged defects that were originally set out in the Ashford BC and by Mr Ford's reports were not eventually relied on by Ms Madjirska-Mossop at the hearing. For example, Mr Ford's report refers to structural alterations in the living room, to the potential long-term need to carry out works to the front chimney stack and to possible problems with drainage in the garden. In the event, the Applicant did not rely on these matters at the hearing.

20. Mr Belcher is a Director of the Applicant Company. In his evidence he referred to witness statements dated 17 January and 28 February 2014. Mr Belcher also referred to the Ashford BC report and Mr Ford's report and confirmed their contents. He then dealt with the history of the dispute over defects to the shared chimney in some detail. The Tribunal need only refer to one aspect of this evidence, namely the shared chimney.

21. After the Ashford BC report, which identified problems with the chimney, Mr Belcher said the Respondent had viewed the condition of the chimney. After the viewing, he suggested to the Respondent that the Applicant's workforce should carry out remedial works, and the Respondent had agreed to this. He asked the Respondent to sign a letter to confirm the agreement. At the hearing Mr Belcher produced a copy of the letter which was dated 25 February 2012, and the Respondent consented to it being produced in evidence. The letter stated that the Respondent was happy for the Applicant to carry out the repairs. It agreed to apportion the cost of repairs to both chimneys on a 75%:25% basis between the Respondent and the Applicant. This was because one chimney was wholly the Respondent's responsibility and the other was shared. The Respondent countersigned the letter and dated it 12 March 2012.

22. At about this time, negotiations were also taking place about the grant of a new lease to the Respondent. On 29 March 2012, Kingsfords LLP (the Applicant's then solicitors) wrote to Orchid Law (the Respondent's then solicitors). The letter stated that their client would agree to a new lease but that he wanted the Applicant to carry out the repairs to the chimney and decorate the external parts. Mr Belcher was not prepared

[1] In fact, the report is misdated 15 April "2010".

to accept this. On 13 April 2012, Orchid Law therefore asked for the Applicant's proposals for repairs to the chimney, and asserting the right to carry out the work and recover the cost from the Respondent. On 3 May 2012, Kingsfords wrote stating that their client "was not prepared to allow the works [to the shared chimney] to be carried out by the Respondent's workforce". The letter also stated that the Respondent had employed a roofer to look at the chimneys, and he had agreed that the shared chimney needed repointing and that there was a dislodged brick.

23. When cross examined by the Respondent, Mr Belcher stated that the shared chimney could not easily be viewed from the ground. However, he did not accept that the reason the Applicant wanted to replace the shared chimney was to match it with the others stacks on the roof. The Applicant had also offered to obtain three quotes for the work to the chimney stack, but the Respondent had refused. When questioned by the Tribunal, Mr Belcher stated that the Respondent had expressly refused permission for the Applicant's workforce to start work on the chimney.

24. Mr Ford gave detailed evidence about the matters set out in his report. He had inspected from ground floor level without going onto the roof. He accepted that since his report, a number of matters had changed. The garden fence (para 3.28) had been replaced with a new one. The garden had been tidied to a greater extent (para 3.28). He believed the drains had been flushed through (para 3.26). Some repairs had been carried out internally (para 3.17) including some plastering (para 3.17(i)). There was also a new electrical meter (para 3.21). However, there had also been some new defects, principally damp at high level in the second bedroom, and he wished to add this to his schedule of works. Mr Ford was particularly concerned about the roots to the Leylandii trees, since there were very fast growing and were now out of control. Mr Ford pointed out that this was clay soil. He considered the trees were close to the property behind and could affect the foundations.

25. As far as the DPC was concerned, the inspection before the hearing had revealed an original DPC – which Mr Ford would have expected from a property of that age – although it was in places only slightly above the external concrete surface of the path. In his view, the DPC had failed. Two actions were now required. First, the removal of the rendering (which was in any event defective). Then a chemical DPC should be injected at low level. Despite what the Respondent had suggested, there was no evidence of a chemical DPC. In Mr Ford's view, the internal damp was caused by (1) failure of the DPC and (2) penetrating damp because of the poor condition of the external rendering.

26. Mr Ford also referred to the high level damp in the second bedroom. The damp was not apparent in March 2013 when he had inspected for his report. Now there were high readings with a Protimeter. This was caused by water penetrating through the chimney. The possible causes

were (1) Defective pointing – although in March 2013 he had not seen any defective pointing (2) defective flashings (3) water entering the flue (4) the stacks becoming saturated. However, he re-iterated that it would be necessary to have a closer inspection of the chimney.

27. Mr Ford was cross-examined by the Respondent and questioned by the Tribunal. He accepted in cross-examination that the damp to the bedroom was consistent with storm damage. He volunteered the opinion that an insurance claim would probably succeed in paying for the internal damage, although it would not pay for the cause of the problem. As far as the trees were concerned, he had seen no sign that they had been trimmed. When pressed by the Tribunal, he stated that he thought the most likely cause of the damp now evident in the second bedroom was a cracked flaunching and cement fillet. He accepted that one of the potential causes was not a breach of covenant, namely the exception wet weather during the previous winter. The rainwater could have built up in the stack and stayed there long enough for evaporation not to take place.

28. Ms Madjirska-Mossop submitted that the repairing obligation at clause 4(4) was to be interpreted in the light of well-known case law, in particular *Luxmore v Robson* (1818) 1 B. & Ald. 584 KB, *Post Office v Aquarius Properties Ltd* [1987] 1 All E.R. 1055 *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69. The only possible issue with the main repairing covenant related to whether there was an obligation to install a new chemical DPC. However, the evidence showed that the DPC had failed, and the expert evidence of Mr Ford was that the most convenient way of remedying the defect was by installing a fresh chemical DPC.

29. As far as clause 4(6) was concerned, the rear chimney stack was a "party structure". The Respondent had two options. He could repair and maintain the chimney stack by taking some positive action: *Lurcott v Wakely & Wheeler* [1911] 1 K.B. 905. Alternatively, he could make a payment representing the fair proportion of the cost of doing so. The doctrine of election applied, and the parties had elected not to pursue the second option: see the letters dated 13 April and 3 May 2012. That left the first option, namely repairing the chimney himself, which the Respondent had not done.

30. The Respondent's case. The Respondent referred to his Statement of Case dated 13 February 2014, and in particular paragraph 14 which gave a detailed response to the alleged breaches. These responses are summarised at Schedule 2 to this determination. At the hearing, the Respondent gave evidence (in particular updating the information given in his Statement of Case) and made submissions. He also called evidence from Ms Katherine Bricknell, who was a friend of the Respondent.

31. Ms Bricknell referred to a witness statement dated 3 February 2014. In December 2010 she had carried out work for the Respondent while he

was away. This included decorating the lounge, kitchen dining room, bathroom stairs and bedrooms. She also gave details of the building works carried out by the Applicant to the neighbouring property and their serious effect on the Respondent.

32. In his own evidence, the Respondent referred to his statement dated 4 February 2014. He accepted that repairs were needed to the property but gave details of works previously carried out. In about 1993 he had a chemical DPC installed as a result of damp in the interior of the kitchen and utility/dining room. In about 1994-5 he had a new timber floor installed in the front room. In 1996-7 he had a lintel installed above the kitchen door and window as a result of a crack in to the exterior kitchen wall. In 1995, he demolished the internal wall between the living room and hall to make it open plan. In 2000, he removed the water heater from the third bedroom and installed a boiler in the kitchen. The boiler was replaced in 2010, when he also renewed the bath, shower, kitchen sink, WC and bathroom flooring. Ms Bricknell had redecorated most of the interior in 2010. He gave details of the work in the garden and removal of some of the Leylandii trees. He considered he now had a very nice garden. The Respondent accepted the allegation by Mr Ford that the interior of the property could benefit from a complete redecoration, apart from the parts dealt with by Ms Bricknell. Three bedrooms were generally in good repair, but he had put the decoration of the fourth bedroom on hold, pending the result of the insurance claims. He considered the kitchen and living room in good repair, although the dining/utility area needed redecorating. He did not accept the repairs to the exterior. In particular, the property never had a DPC, the only one being the chemical DPC he had installed. In September 2011, the Applicants had carried out work to remove the render along the north wall of the building at low level and they had extended this around the flank wall by about 1.5m. As far as the shared chimney was concerned, the Respondent had signed the letter dated 25 February 2012 while he was unwell. Subsequently, it was "correct ... that I did not honour that agreement and reneged upon the same". The gutter stop end was missing, but that had been knocked off by the Applicant's workmen.

33. At the hearing, the Respondent also updated the Tribunal with works which had taken place since the Statement of Case. He stated that he was "in the throes" of carrying out external works. He had obtained three estimates to re-point and repair both chimneys, make good the render, fascias, soffits and external walls. He would deal with the gutter stop end and any gutter blockages when he did this work. The Respondent had already repaired the garden fence. The works would start within the next 4 months, and he was cashing in a pension policy to pay for the works. As to the chimney repairs, he had no difficulty dealing with them once he had estimates. Similarly, he was happy to repaint the property. The Applicant was also cross-examined about the details of the works in Mr Ford's report. In particular, he was asked about the DPC. He stated that the area affected by damp had originally been a shed which was not designed to be lived in. It had no DPC

originally and "I can't be expected to rebuild the property". He also stated he would not replace the fuse box. This work was not "compulsory" and he had been told it was unnecessary. In response to questions from the Tribunal, the Respondent stated that although the property had a new meter, he had checked online and it was unnecessary to have a new fuse box. This would only be required if he had the whole place re-wired. As far as the trees were concerned, 3 years ago he had had them trimmed by a qualified contractor who also removed one tree. He agreed the tallest remaining trees were about 36ft tall. As to the concrete path outside the lounge and kitchen, this had always been there since he moved in. The same applied to the render at low level outside the kitchen.

REPAIRS: TRIBUNAL'S FINDINGS

34. Before turning to the Tribunal's findings on each individual alleged breach of the repairing covenants, two preliminary points should be made. Firstly, under s.168 of the Commonhold & Leasehold Reform Act 2002 the Tribunal's function is limited to determining whether a breach of covenant has occurred. Where, as in this case, the alleged breaches relate to tenant's repairing covenants, the Tribunal is not required (or indeed permitted) to deal with the consequence of any breaches, such as the extent of works that might be required to remedy any breach. For example, in the case of the DPC, the Tribunal is only dealing with the question of whether there is a failure of any existing DPC, not with the question of whether a new chemical DPC is needed. Secondly, it is clear that the allegations have in some respects changed during the course of the application. On the Applicant's side, Mr Ford added concerns about damp in a bedroom as a result of the inspection which took place on the date of the hearing, while it is clear that Ms Madjirska-Mossop no longer relies on some matters raised by Mr Ford in his expert report (such as the drainage and electrics). On the Respondent's side, since preparing his Statement of Case, the Respondent has plainly carried out some work - principally by repairing the fence. Although the Tribunal accepts that in many cases the wording of s.168 would enable it to decide whether breaches of covenant 'have occurred" in the past, neither party suggested that such an exercise should be carried out here. The Tribunal therefore confines itself to considering whether any breaches of covenant existed on the date of the hearing.

35. The Tribunal will deal with each alleged breach in turn.

36. <u>The Chimneys.</u> There are three chimneys on the roof of the demised premises. Although a great deal of time was spent by the parties and the expert on the two chimneys that were exclusively within the demise of the flat, Ms Madjirska-Mossop's skeleton argument eventually relied

only on alleged defects to the shared chimney stack. This chimney stack is a "party structure"; hence the relevant provision is clause 4.6 of the Lease.

37. In determining whether a breach of clause 4(6) of the Lease has occurred, the first issue is whether the chimney stack is no longer in "repair". This does not involve any complex issues of law. Mr Ford mentions that the chimney is out of true, and that the condition of the pointing to the stack should be ascertained. However, his main assertion is that the stack has loose bricks and that the chimney pots are leaning. Both he assesses as potentially hazardous. The Respondent does not challenge these findings, and they were confirmed by the Tribunal on inspection. Both parties have had notice of the defects for some time, and they have not been remedied. The Tribunal therefore finds that the requirement to "repair" in clause 4(6) of the Lease has not been met in relation to the loose bricks and chimney pots of the shared chimney. It does not find that the leaning of the chimney stack itself or the possible need for re-pointing amounts to any want of repair. The former is no more serious than other chimneys in the area (the Tribunal observed next door's chimneys as an example) and the latter is speculative.

38. The central dispute in relation to the shared chimney relates to the form of the clause itself, and the two options made available by the draftsman for dealing with any want of repair to party structures.

39. In her oral submissions, Ms Madjirska-Mossop contended that the provision should be construed so that there were two options. Either (i) the Respondent was required to "repair" the chimney or (ii) the Applicant could do so. In the event that the second course was taken, the tenant's obligation in clause 4(6) then became an obligation to pay the Applicant "a fair and proper proportion of the expense of" the repairs. By rejecting option (ii), the Respondent had elected that (i) applied. In effect, clause 4(6) became a standard obligation for the tenant to repair, and the tenant was in breach of that covenant.

40. The Tribunal does not agree with Ms Madjirska-Mossop's interpretation of clause 4(6) and her characterisation of the two options. The first limb is not expressed to be an obligation to repair imposed on the Respondent alone. It is expressed as a joint obligation ("To repair and maintain jointly"), rather than a several obligation. Indeed, another difficulty for the tenant in meeting its obligations under the first limb is that the other parties with the joint obligation to repair party structures are not entirely clear. They may include other lessees rather than the landlord: see clauses 4(6)(a) and (b).

41. As far as the second limb of clause 4(6) is concerned, there is no obligation imposed on the tenant to undertake any works or to agree or permit the landlord to carry out works. The second limb is framed purely in terms of an obligation to "pay" a sum of money. This limb is not broken unless and until a demand for payment is made.

42. Applying the above construction to the facts of this case, the Respondent has at no stage proposed to carry out works "jointly" with the Applicant. Indeed, its initial proposal was to carry out the chimney repairs itself and then recover the costs under the second limb of clause 4(6): see letter dated 25 February 2012. The Respondent is not therefore in breach of the first limb of clause 4(6). As to the second limb, Ms Madjirska-Mossop referred at the hearing to equitable election, and did not therefore rely on any alleged breach of that part of the covenant. However, the Applicant has plainly not repaired the chimney or (more significantly) demanded payment of a "fair and reasonable proportion of the expense of" such repairs.

43. In short, the Tribunal is satisfied there is no breach of Clause 4(6).

44. Rainwater Goods. The Applicant asserted that these were breaches of clause 4(4) of the Lease, but it appears the gutters served more than one flat and therefore more properly fall within clause 4(6) of the Lease ("...gutters ... provided for the demised premises jointly ort in common with other maisonettes..."). The first issue is the allegation that the gutter runs have become clogged, and there is pure dispute of fact on the point. The Tribunal prefers the evidence of the Respondent on this since (i) he has lived in the premises for some time and would have expected to see evidence of such blockages in times of heavy rainfall and (ii) Mr Ford has simply inferred the clogging from a ground level inspection only. The second issue is the missing stop end. The Tribunal accepts the uncontested evidence of the Respondent that this was damaged by the Applicant's contractors and that it will be attended to when the fascias and soffits are repaired. For the same reasons as given above, there is no breach of clause 4(6). The Tribunal therefore finds the Applicant is not in breach of the terms of his lease in relation to the rainwater goods.

45. External Walls. The Tribunal observed that the rendering to the side wall is in poor condition. This is a separate issue to the strip of rendering at ground level which has been exposed by the Applicant. The Respondent states he intends to carry out render repairs as part of his proposed works. However, there is no dispute that at present (i) the render falls within the Respondent's obligations in clause 4(4) of the Lease (ii) damaged or deteriorated condition (iii) it is in a state below that required by the covenant (iv) it is not an inherent defect or other matter not contemplated by the parties as being within the covenant. It follows there is a breach of clause 4(4) of the Lease.

46. Damp. The parties agree there is evidence of damp internally within the kitchen and dining room. The issue is whether there is any breach of covenant in this respect.

47. The starting point here is the expert evidence of Mr Ford given at the hearing. His opinion was that the ground floor damp had two causes, namely (1) failure of the DPC and (2) penetrating damp because of the

poor condition of the external rendering. The Tribunal accepts this opinion and finds as a fact that these are the two causes of the internal dampness. The latter factor is dealt with above. The question is therefore solely whether the failure of the DPC is attributable to any breach of clause 4(4) of the Lease.

48. The Tribunal has inspected the premises and heard evidence from both Mr Ford and the Respondent as to whether the premises were originally built with a DPC, and whether it has failed. The Tribunal finds as follows. Firstly, there is a horizontal DPC in the flank wall of the rear addition of the house. The DPC comprises a bituminous strip laid horizontally between two courses of brick at low level. Secondly, although the DPC is visible outside the utility/dining room, on balance the Tribunal finds that it also extends along the rear addition flank wall as far as the doorway. There is no reason for it to have been constructed in any other way. Thirdly, the DPC is original (i.e. dating to Victorian times). It certainly pre-dates the Lease. Fourthly, the effectiveness of the impermeable barrier has been compromised, allowing groundwater to rise above the level of the DPC. There are three physical defects which cause or contribute to this:
    (i) The bituminous layer has perished in places.
    (ii) In the area outside the utility room the exterior has been rendered so as to bridge the DPC. This is clear from the area where the rendering has been removed.
    (iii) In the yard outside the lounge, the concrete surface has been laid in such a way as bridge the DPC. It is clear that as one moves towards the front of the building along the yard, the concrete surface level rises somewhat (no doubt to allow surface water to drain off to the rear). However, by the time one arrives at the doorway, the level of the yard is above the level where the DPC is assumed to be.

    Fifthly, the Tribunal finds that both the rendering and the concrete surface of the yard were in these positions prior to the grant of the Lease. Finally, the Tribunal finds that the damage to plasterwork internally has at least in part been caused by rising damp that evades the DPC.

49. Applying the above facts to clause 4(4). The Tribunal is satisfied that Respondent is in breach of clause 4(4) of the Lease. It concludes that (i) the concrete surface of the yard, rendering, DPC and internal plasterwork all fall within the Respondent's obligations to repair set out in the covenant. (ii) The DPC itself is damaged or defective, as is the plasterwork in the kitchen (iii) the DPC and plasterwork in the kitchen are in a state below that required by the covenant and (iv) the bitumen DPC has perished since the date of the Lease. Moreover, even though the bridging of the DPC may well have been present at the start of the Lease, that is no defence: per Ralph Gibson LJ in Post Office v Aquarius Properties (1987) 54 P&CR 61 at p.70 (citing Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] QB 12 and Elmcroft v Tankersley-Sawyer (1984) 15 HLR 63). It follows that clause 4(4) obliged the lessee

to remedy the perishing of the DPC and the bringing. He is in breach of covenant for failing to do so.

50. As explained above, it is not for this Tribunal to find whether the covenant should be met by inserting a new chemical DPC, by removing the bridging or otherwise.

51. Eaves/fascias/bargeboards. Mr Ford asserts there is rot to the eaves timbers and bargeboards and this was confirmed on inspection. The Respondent does not really deny this, and accepts he is to carry out this work shortly. The damage was evident on inspection. The Tribunal finds that (i) the eaves timbers fall within the Respondent's obligations to repair in clause 4(4) (ii) the timbers are in a damaged or defective condition (iii) the soffits and fascias are in a state below that required by the covenant and (iv) they were in the contemplation of the parties as part of the obligation to repair. There is a breach of covenant by the Respondent.

52. External decoration. There are two external redecoration provisions in the Lease. Clause 4(4) requires the lessee to keep the external parts "properly painted papered and decorated", while clause 4(5) requires it to "paint all external wood and iron work with two coats of best quality paint in a workmanlike manner in every Third year of the term ...". There is some overlap between the two provisions, as observed by Mr Ford.

53. As far as clause 4(4) is concerned, this specifically deals with painting papering and decoration of all parts of the exterior, and the obligation is a conventional repairing one to deal with repairs as they fall due. The Tribunal finds that (i) the exterior decoration falls within the Respondent's obligations to repair in clause 4(4) (ii) the decorations were at the date of the hearing in a damaged or defective condition. The Tribunal's inspection confirmed the evidence of Mr Ford, and the Respondent did not really dispute the point (iii) they were in a state below that required by the covenant (iv) The decoration obligation was in the contemplation of the parties as part of the obligation to repair. There is therefore a breach of clause 4(4) of the Lease.

54. As to clause 4(5), Ms Madjirska-Mossop limited her submissions to the decorations consequential on the repairs to the eaves timbers and bargeboards (see above). There does not seem to be any dispute that these have not been decorated for many years. The only argument made by the Respondent was that the 3 year period ran from the date of the Applicant's works to next door. The Tribunal does not accept this. Clause 4(5) is clear enough, and provides for a 3 year painting cycle irrespective of whether decoration is necessary, desirable or even pointless. The Tribunal finds there has been a breach of clause 4(5) of the Lease in this limited respect.

55. Internal decoration. Again, this is argued under clause 4(4) of the Lease. There was a great difference between the parties about the state

of decoration of the interior. In the end, the Tribunal relies on its own inspection set out above. To summarise:

(a) Kitchen - poor condition
(b) Utility/dining room – poor condition.
(c) Bathroom - good condition.
(d) Living room - good condition.
(e) Staircase and landing – poor condition.
(f) Rear bedroom (bedroom 3) - poor condition.
(g) Bedroom 2 – poor condition.
(h) Bedroom 3 – poor condition.
(i) Bedroom 4/study – poor condition.

56. There is no other dispute about liability. The Tribunal therefore finds that on the date of the hearing the tenant was in breach of clause 4(4) of the Lease in respect the decorative condition of the kitchen, utility/dining room, staircase/landing and the four bedrooms. It may of course be that some of these breaches have been remedied by the date of this decision.

57. Internal plaster. The internal plaster to the kitchen and utility room are dealt with above. The Tribunal finds there is a breach of clause 4(4) of the Lease.

58. At the inspection, and during the hearing, Mr Ford raised the issue of damp to the upper bedroom. This was not of course set out in the application itself, and the Respondent had limited time to consider the point. The evidence given by the Respondent was that the damp occurred during a period of heavy rain. Mr Ford gave a number of possible causes of the damp, some of which involved breaches of clause 4(4) of the Lease. However, in response to questions from the Tribunal he accepted that one potential cause was storm damage outside the repairing obligation. He also considered that at least in part the damage could be covered by insurance. The Tribunal accepts the Respondent's evidence and the expert evidence of Mr Ford, and finds that the damp was caused by exceptional rainfall entering the chimney stack and not evaporating rather than any damage to any part of the premises. There is no breach of the tenant's obligations under clause 4(4) in this respect.

59. Structural alterations. This is not a matter pursued by Ms Madjirska-Mossop at the hearing or in her skeleton argument. The Tribunal therefore does not find any breach of clause 4(8) of the Lease.

60. Service installations. Although some time was taken up with inspecting and addressing the issue of drainage, this was another matter not pursued by Ms Madjirska-Mossop at the hearing or in her skeleton argument. The Tribunal could not in any event see evidence of any blockage or other defect.

61. The only matter that was pursued was the allegation that the fuse box required replacement and that this was therefore a breach of clause 4(4) of the Lease. There was of course no factual issue here – on inspection the fuse box was of some vintage, with wired fuse units.

62. The Tribunal finds that (i) the fuse box falls within the Respondent's obligations to repair in clause 4(4) (ii) the fuse box however fulfils its original purpose and appears to function. Moreover, its continued use does not appear to breach any regulatory requirement. It may be that it could not lawfully be installed in a new installation, but that is another matter. The fuse box is therefore not in a damaged or defective condition. (iii) the fuse box is not in a state below that required by the covenant (iv) the obligation to replace a functioning and lawful fuse box was not in the contemplation of the parties when the Lease was granted. There is therefore no breach of clause 4(4) of the Lease.

63. Garden. The obligation at clause 4(21) of the Lease is simply to "keep the garden properly maintained planted and tidied". The broken fence has been dealt with, leaving only the question of general tidiness and the trees.

64. As far as tidiness is concerned, this is plainly a matter of impression. Mr Ford says the garden is poorly maintained, while the Respondent says it is in good condition. The Tribunal's inspection (see above) suggested that the grass is rough cut and has the appearance of being poorly maintained. The Tribunal is therefore satisfied that the garden is not being keep "tidied" in breach of clause 4(21) of the Lease.

65. There is no factual dispute about the Leylandii trees which are about 36ft tall and close to the rear boundary wall. The Applicant says the trees are not being "maintained" because they have grown too tall. It is suggested there may be a risk to the foundations of neighbouring properties. The Tribunal noted that there were other similar height trees in nearby gardens. Mr Ford, for all his expertise, does not profess to be an arboriculture specialist. There is also evidence given by the Respondent that the trees were crowned fairly recently – which appeared to be confirmed on inspection. The Tribunal does not therefore find that at present there is any failure to maintain the Leylandii trees – although plainly the Respondent must take great care with them in future.

ADMINISTRATION CHARGE

66. The Applicant's case. This can be dealt with fairly briefly. The Applicant seeks a determination under CALRA 2002 Sch 11 para 3. Slightly unusually, the application itself does not state the amount of the charge, although it does say that the charge is a variable charge payable under clause 4(19) of the Lease. The Applicant's Statement of Case gave more information. It stated that on 4 September 2013 the Applicant demanded payment of £3,750 for its legal costs in connection with the preparation of a s.146 notice. A copy of this demand was included in the hearing bundle, and it was given before any s.146 notice was served. At the hearing Ms Madjirska-Mossop confirmed no notice had as yet been given.

67. At the hearing, the Tribunal indicated that there appeared to be potential legal and actual practical problems in dealing with the Sch 11 application. Legally, CLARA 2002 s.168(1) provides that "a landlord may not serve a notice under s.146(1) of the Law of Property Act 1925 ... unless" a breach of covenant has first been established by (i) admission or (ii) a decision of a court, tribunal or arbitrator. It is hard to see how the Tribunal can therefore be asked to establish liability to pay the costs of something which the landlord may not (at present) lawfully do. This is why s.168(4) applications of this kind are usually made after service of a s.146 notice. However, there is also a practical problem. It is difficult for the Tribunal to assess the reasonableness of a charge under clause 4(17) of the Lease for costs "of and incidental to the preparation of a notice under s.146" until those costs are actually known. An estimate made ten months before the hearing, and over a year before the notice is given is a poor basis for determining what those costs should be.

68. In the circumstances, Ms Madjirska-Mossop agreed that the best course was to adjourn the Sch 11 application generally pending the service of any s.146 notice and the clarification of the precise amount incurred by the landlord "for the purpose of or incidental to the preparation and service of" that notice. Directions accompany this determination.

CONCLUSIONS

69. The Tribunal determines under s.168(4) of the Commonhold and Leasehold Reform Act 2002 that breaches of clause 4(4) of the Lease dated 12 October 1979 have occurred as follows:
    a. Defective external rendering.
    b. Perished / bridging of the Damp Proof Course.
    c. Rot to timber fascias soffits and bargeboards.
    d. Internal plaster defects at ground floor level
    e. External decoration.
    f. Internal decorations in the majority of rooms.

70. The Tribunal also determines under s.168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of clause 4(5) of the Lease dated 12 October 1979 has occurred in that the timber fascias, soffits and bargeboards have not been decorated in every third year of the term.

71. The Tribunal further determines under s.168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of clause 4(21) of the Lease dated 12 October 1979 has occurred in that the garden of the premises has not been kept tidy.

72. The application for the determination of liability for an Administration Charge under Sch 11 to the Commonhold and Leasehold Reform Act 2002 is adjourned generally.

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Judge MA Loveday (Chairman)
1 August 2014

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 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.

SCHEDULE 1: APPLICANT'S CASE ON BREACHES OF COVENANT					
		G Ford report 15.04.13	**Ashford BC report 02.09.11**		**Alleged defect in lease**
External	Front (shared) chimney stack	Para 3.4-3.5		Stack leans, and may require demolishing and re-building "probably by the long-term". Bricks on top loose or dislodged and chimney pots at slight angle. Requires closer inspection. Remedial work urgent with scaffolding required. Pointing condition to be checked.	Clause 4(6)
	Rainwater goods	Para 3.6		Gutter runs clogged and should be cleared. Stop end missing	Clause 4(4)
	Render	Para 3.10	Sch D D4	Band of rendering at low level rear in poor condition. Requires hacking off and renewing	Clause 4(4)
	Damp	Para 3.11		The house would have been constructed with a DPC. However, significant damp to inner face of side elevation (kitchen and dining room) in part caused by defective rendering. Need to inject chemical DPC and make good	Clause 4(4)
	Rot to eaves	Para 3.14	Sch D D7	Some evidence of rot to eaves timbers	Clause 4(4), 4(5)
	External decoration	Para 3.16	Sch D D8	External painted wall surfaces need decoration. Rendering and eave timbers require decoration after repairs	Clause 4(4)
Internal	Internal decoration	Para 3.17		Complete redecoration with associated plaster and minor timber repairs	Clause 4(4)
	Plaster	Para 3.17(1) and (2)		Re-plastering of parts to make good after external repairs, together with some making good of cracks in ceilings and minor repairs to defective wall plaster	Clause 4(4)
Service installations	Electrics	Para 3.21-2		Mains distribution board fitted with wire fuses. Upgrading required so that it conforms with latest wiring regulations if test show any Condition One or Two defects	Clause 4(4)
Rear garden	Garden	Para 3.28		Garden untidy and requires clearing	Clause 4(21)
	Trees	Para 3.28 (i)		Line of Leylandii trees at the rear of the garden are up to 8m high. Grown beyond appropriate size and could have detrimental effect on adjoining property. Should be cut back or removed	Clause 4(21)

SCHEDULE 2: RESPONDENT'S CASE ON BREACHES OF COVENANT				
		Respondent's Statement of Case		**Alleged defect in lease**
External	Front (shared) chimney stack	Para 14(ii) and (iii)	1. No disrepair 2. Clause 4(6) not satisfied because A has failed to give estimate of cost	Clause 4(6)
	Rainwater goods	Para 14(iv)	1. No blockage of gutter runs 2. Stop end damaged by A's contractors	Clause 4(4)
	Render			Clause 4(4)
	Damp	Para 14(v)	No original DPC. New DPC an improvement	Clause 4(4)
	Rot to eaves			Clause 4(4), 4(5)
	External decoration	Para 14(x)	1. Agreed needs decoration 2. Awaiting reasonable time to elapse (3 years) since A's works next door	Clause 4(4)
Internal	Internal decoration	Para 14(vi)	1. No decoration required 2. Some damage caused by A's contractors in 2011	Clause 4(4)
	Plaster			Clause 4(4)
Service installations	Electrics	Para 3.21-2	Mains distribution board fitted with wire fuses. Upgrading required so that it conforms with latest wiring regulations if test show any Condition One or Two defects	Clause 4(4)
Rear garden	Garden	Para 14(ix)	1. Accepted that garden untidy 2. Largely caused by A's contractors	Clause 4(21)
	Trees	Para 14(viii)	Leylandii trees not grown beyond appropriate size	Clause 4(21)