FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/00HN/LBC/2023/0017**
Property	**:**	**Flat 2, Keythorpe, 27 Manor Road, Bournemouth BH1 3ER**
Applicant	**:**	**Keythorpe (Bournemouth) Management Limited**
Representative	**:**	**Ms Antonietta Grasso, Counsel, instructed by Coles Miller Solicitors**
Respondent	**:**	**Finchley Properties Limited**
Representative	**:**	**Mr Adrian Carr, Counsel instructed by 360 Law Services Limited**
Type of application	**:**	**Application for an Order under section 168 (4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")**
Tribunal member(s)	**:**	**Mr Charles Norman FRICS Valuer Chairman** **Mr Michael Donaldson FRICS** **Mr Mike Jenkinson**
Date of Hearing	**:**	**8 and 9 May 2024**
Venue	**:**	**The Crown and County Courts at Bournemouth**
Date of decision	**:**	**12 July 2024**

DECISION

Decision

(1) The Tribunal finds that breaches of covenant by the respondent have occurred in carrying out (a) alterations to the arch between the hallway and lounge and (b) removal of the floor threshold between the lounge and balcony at Flat 2 Keythorpe;

(2) The Tribunal has no jurisdiction (outside of rule 13) to make a costs order;

(3) The application for a costs order against the respondent under rule 13(1)(b) is refused;

(4) The respondent's applications for orders under section 20C of the Landlord and Tenant Act and Para 5A of Schedule 11 of the 2002 Act are refused.

(5) The respondent shall pay to the applicant its application fee in the Tribunal and half the hearing fee within 28 days of this decision being sent.

Reasons

Background

1. The applicant seeks an Order under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that breaches of covenant or condition in the lease have occurred at Flat 2, Keythorpe, 27 Manor Road, Bournemouth BH1 3ER ("the Flat"). The allegation is that alterations have been carried out, contrary to the lease.

2. The subject lease, following a surrender and re-grant, dated 21 September 1998, grants a term of 199 years from 25 March 1978. It is now held by (1) Keythorpe (Bournemouth) Management Limited ("Keythorpe") and (2) Finchley Properties Limited. The freehold is vested in the management company of which all lessees hold a share. Mrs Mallika Neale is a resident director who gave evidence on behalf of the applicant. Mr Grosz is a director of the respondent.

3. The central provision in the lease in issue is clause 3(6) which states:

4. *"Not to alter THE FLAT either externally or internally nor to cut maim or injure any structural part thereof nor erect or suffer to be erected any further building or addition upon THE FLAT nor make or suffer to be made any external projection from THE FLAT"*

Directions

5. Directions were issued on 11 January 2024, setting the matter down for determination on the papers unless a party requested a hearing. In response to a case management application, Further Directions were issued on 22 February 2024.These directed that the matter be determined following a hearing, and that the respondent be permitted to call expert evidence.

6. On 13 March 2024, the Tribunal issued a direction in relation to flat 5 Keythorpe, also being an application under section 168 (4), CHI/00 HN/LBC/2023/0018, that both cases would be heard together.

Inspection

7. The Tribunal inspected the property on 8 May 2024 prior to the hearing. The Tribunal was accompanied by Mr Morris Grosz, his son, Ms Malika Neale, both Counsel and Mr Stannard of Coles Miller solicitors.

8. The property is a block of 25 flats, including a penthouse, in a prime location in Bournemouth facing the sea. It appears to date from the 1970s. Flat 2 is on the ground floor and is a large 3-bedroom flat with 2 bathrooms. The parties pointed out the disputed work.

The Law

9. Section 168 of the Act provides

> (1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
>
> (2) This subsection is satisfied if: - '(a) it has been finally determined on an application under subsection (4) that the breach has occurred; '(b) the tenant has admitted the breach; or (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
>
> (3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

The Hearing

Procedural Matters

10. Prior to the start of the hearing the Tribunal received an application to allow in a late second witness statement from Mr Grosz, dated 3 May 2024. The Tribunal decided to admit this as it was very short.

The Applicant's Case

11. The applicants had served a statement of case verified by a statement of truth by Mr Stannard of Coles Miller Solicitors. In addition, the Tribunal received a helpful skeleton argument from Ms Grasso, together with authorities.

12. Counsel submitted that the alleged breaches were (i) removal of the threshold floor level in the lounge area (ii) removal of an arch in the hallway (iii) kitchen refurbishment works. [The Tribunal pointed out that the application itself referenced only allegations (i) and (ii) which alone were therefore before the Tribunal; Ms Grasso confirmed that position in her closing.] Although Mr Morris Grosz, a director of the respondent, had served a witness statement there was no statement of case.

13. Clause 3(6) imposes an absolute prohibition. There is no provision for consent. Further, the lessee is prohibited from cutting any external part. No consent has been sought from the respondent.

14. In *Trimnell-Richard v Tuffley* [2018] UKUT 0150 (LC) the Upper Tribunal held that the approach was to decide the question of fact whether the tenant had breached the covenant, on the facts not to alter cut or maim any of the walls and if so whether the tenant had the landlord's written consent. In *Solar Court (Finchley) Management Limited v (1) Isabel Hannah Kiddy (as executor of the estate of the late Stephen John Lewis) (2) Cubhill Limited*, LON/00AC/LBC/2021/0023 The FTT held, with reference to the lease clause, "*not to injure cut or maim any of the walls ceilings floor or partition of the demised premises*", that works to the bathroom and kitchen, the fitting of a new plasterboard ceiling, fitting new radiators and wiring and cutting into the screed, amounted to a breach of the covenant in the lease. In *53 Ashley Hill Management Company v Walker CHI/00HB/LBC/2023/0011*, the FTT found that the removal of internal partitions and removal of doors were alterations in breach of the lease.

15. The respondent's case was contradictory. The respondent contends that although it carried out the works, they were non-structural and did not

contravene the lease. Mr Grosz listed some of the works carried out: removal of decorative arches, and the floor post [threshold] together with the patio door connected to the floor post. The respondent seeks to rely on a structural engineer's report prepared in relation to flat 5 Keythorpe. The applicants object.

16. The applicant also sought costs relying on clauses 3 (13) and 3 (14) of the lease. [Those clauses confer on the landlord the right to bring an administration charge in connection with litigation costs against the lessee].

17. In addition, the applicant sought an order under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"). There was also an application for reimbursement of the application fee.

The Applicant's Witness Evidence

18. Counsel called Mrs Mallika Neale who had given a witness statement verified by a statement of truth. It was made in her capacity as a director of the applicant and as a resident within the building. The matter arose following complaints received on 26 April 2023 about noise, mess and the unsightly appearance of the block from the outside. There was also a skip taking up limited parking spaces and loose ironmongery causing tyre punctures. On her return to the property Mrs Neale spoke to the workmen who said that they were fitting a new kitchen and that they would not allow her access. Other residents informed Mrs Neale that the workmen were also removing the step [threshold] between the lounge area and balcony. From the outside Mrs Neale observed that walls had been altered in the hallway.

19. Owing to allegations that the application had been motivated by anti-Semitism or other victimisation, Ms Grasso put questions in chief to Mrs Neale . Mrs Neale told the Tribunal that approximately 75% of the residents were Jewish, and that half of the current four directors were Jewish. Mrs Neale denied any form of religious discrimination against the respondent. There were 25 flats of which 8 were permanently occupied the remainder being holiday homes. Mrs Neale was a permanent resident.

20. In cross examination, Mrs Neale stated that she had bought her flat number 23 in December 2019. Her flat was similar in layout to no 2. An arch in her flat had been squared off when bought but she was not aware of that at the time. She was not qualified to say whether or not the works were structural. She did not know what proportion of flats had squared off arches. She did not know whether lessees are allowed to change kitchens. No action had been taken in relation to flat 8, which was altered in 2006. This has been discussed but there was no appetite to do so. The managing agents were aware. Action was taken again flat

2 because the lessee had refused to stop work when asked. There is no new policy.

21. In re-examination, Mrs Neale stated that if a person wanted to install broadband, they should write to the managing agents and the directors would decide.

The Respondent's Case

22. The Tribunal received a skeleton argument from Mr Carr in relation to this case, together with an authorities' bundle.

23. The respondent admitted that the applicant is their landlord, that the relevant lease was a long lease, and the flat is a dwelling within the meaning of section 169 (5) of the Act.

24. The respondent further admitted that it had raised a non-structural arch in the flat[1], removed a non-structural threshold between the living room and the outside, installed new kitchens and bathroom suites with associated rewiring and re-plumbing. None of the works are structural nor visible from outside the property. There is no structural report in relation to flat 2.

25. Mr Carr submitted that the case turned on the proper interpretation of clause 3(6) of the original lease. He relied on *Arnold v Britton* [2015] UKSC 36. Mr Carr submitted that on a true and proper interpretation of the original lease the covenant on clause 3 (6) is an absolute covenant against structural alterations to the flats and alterations to the flats which would be visible from the exterior of the building.

26. Further, he relied on *Bickmore v Dimmer* [1903] 1 Ch 158 where the Court of Appeal held that in a lease of business premises, a covenant against making "alterations to the premises" the world "alteration" must be limited to alterations which affected the form or structure of the building. Vaughan Williams LJ stated (at pp.166-7):

> We have to construe the word "alteration" in this covenant. I feel very strongly that it would be really impossible to hold that every addition to the premises, whether it does or does not alter the form or structure of the premises, is within the meaning of the word "alteration" in the covenant. The result of so holding would be that this tenant carrying on the business of a watchmaker and jeweller would not be able to put up a fixed blind on the outside of the window of his shop, or to put a lamp outside in front of his main door, or even to place a knocker upon the door. That would really be an impossible construction … In my opinion, the words "alteration to the said premises" apply only to alterations which would affect the form or structure of the premises.

[1] The arch was squared off by removal of curved masonry, by which means its height was increased.

27. On a literal interpretation of clause 3 (6) no alterations whatsoever could ever be carried out over the entire term of the original leases. This would apply to the entire unexpired residue of the term of 179 years from grant. This would preclude replacing kitchens, replacing bathrooms, rewiring, re-plumbing, installing broadband, drilling into walls and attaching shelves to walls.

28. The purpose of clause 3(6) is to prevent the respondent from making alterations to the flats which will affect the structure of the building and/or be visible from outside the flat. The mischief which the clause seeks to prohibit is damage to the landlord's reversion, damage to other flats in the building and diminution in the value of the other flats in the building. Non-structural works carried out internally not visible from the outside will not cause these effects. This interpretation is consistent with paragraph 6 of the third schedule where the respondent covenants not to make any alteration or change in the external appearance save as regards internal curtains or blinds.

29. In addition, the background circumstances were that the flat has always been a very valuable asset, most recently selling at £500,000 in 2023. The parties knew that over the lifetime of the leases the lessees might wish to modernise their flats. Alterations of this nature would be unlikely to affect other leaseholders apart from noise when defecting such works.

30. Mr Carr then submitted that the respondent had been discriminated against. Flat 8 had been subject to similar works in the past, without requiring reinstatement of the alterations. Alteration works had also been carried out in Mrs Neale's flat. At least four other flats have had the same alterations carried out without enforcement action having been taken. At paragraph 42 and 43 Mr Carr submitted

> "42. Mr Grosz and Mr & Mrs last [in relation to CHI/00HN/LBC/2023/0018 (Flat 5)], are the only leaseholders who are Jewish. [The bringing of the proceedings] against them alone is driven by anti-Semitic discrimination.[…].

31. Paragraphs 42 and 43 were withdrawn by Mr Carr late on the second day of the hearing.

32. The respondent made applications for orders under section 20C of the Landlord and Tenant Act 1985 and Para 5A of Sch 11 of the 2002 Act.

The Respondent's Witness

33. Mr Grosz was called. He had given witness statements dated 15 March and 3 May 2024, verified by statements of truth. His evidence may be summarised as follows. His statements were drafted by his solicitor. The management at Keythorpe had been uncooperative. The

modifications to flat 2 were non-structural and did not contravene the lease. Clause 3 (6) does prohibit alterations to the flat both internal and external which may impact the structural integrity of the property, but the alterations made were purely cosmetic. Work undertaken was primarily due to health and safety issues. The decorative arches reduced the internal height of the property [between rooms] thereby interfering with his ability to enjoy the property. These were also old-fashioned, and removal was required to modernise the aesthetics. Removal of the floor post [threshold] was prompted by safety concerns for his elderly parents and in-laws who are infirm. Over the last 25 years similar modifications were made to multiple properties in the building without consent, but the management did not take enforcement action. This included the lessee of flat 18 who is on the Keythorpe committee. Flat 8 when sold eight years ago had had similar modifications made. Although an enforcement letter was sent to the lessee of flat 8, 25 years ago, proceedings were not issued. He is being discriminated against. In cross examination, Mr Grose accepted that his religion was not the reason he was being pursued.

Findings

Witnesses

34. The Tribunal found Mrs Neale to be a credible and measured witness and accepts her evidence. In particular, the Tribunal accepts her evidence that the proceedings were not in any way motivated by antisemitism, but because the respondent's works caused a nuisance, and that the lessee would not desist when asked.

35. The Tribunal found that Mr Grosz was inclined to blame others for his predicament. He considered that he had been victimised because similar alterations had been carried out to other flats in the block.

36. With reference to the engineer's report prepared for flat 5, the Tribunal does not consider it right to place weight on a report which relates to a different flat in the block. Further, the engineer was not called to give evidence by any party.

The breaches

37. The Tribunal finds that the alleged breaches are (i) removal of the floor threshold between the lounge and the balcony and (ii) raising the level of the archway between the hall and the lounge. It should be noted that there is a larger second archway between the lounge and dining area. Although that too had been raised, it was outside the scope of this application.

38. The Tribunal finds that both alleged breaches have occurred.

Reasons

39. There was no dispute about the facts. The respondent admitted that the works in question had been undertaken. The Tribunal also witnessed them during the inspection.

40. The Tribunal finds that the wording of clause 3(6) is clear, being an absolute prohibition against carrying out any alterations. It finds that the wording includes both structural and non-structural alterations.

41. In *Bickmore v Dimmer*, (1902), the facts concerned the erection of a large exterior clock without consent, to advertise a jeweller's shop. The clock was secured with six bolts to an exterior wall. The covenant was not to make any alterations without lessor's consent. The court held that alteration meant something that would affect the form or structure of the building and things required to carry on the business of a tradesman in a reasonable ordinary and proper way. It was held that erection of the clock was not a breach of covenant.

42. The Tribunal distinguishes *Bickmore v Dimmer* for the following reasons. There, the covenant was qualified, because works were permitted with landlord's consent. It concerned business and not residential premises. The case was decided before the enactment of s. 19(2) of the Landlord and Tenant Act 1927. This provides that in the case of improvements, landlord's consent cannot be unreasonably withheld. In *Lambert and Another v F. W. Woolworth and Company Limited* 1938 Ch.883 (C.A.) it was held that whether alterations are "improvements" must be viewed from the tenant's viewpoint. In alteration covenants which are qualified, where works are an "improvement" landlord's consent cannot be unreasonably withheld. These developments represent a substantial change in the legal landscape between 1902 and 1938. Accordingly, the Tribunal cannot be satisfied that *Bickmore v Dimmer* would have been decided in the same way after *Woolworth v Lambert* as it is likely that affixing the bolts would be a benefit to the tenant and therefore an "improvement" within section 19(2). If so, landlords' consent could not be unreasonably withheld. Further, the Tribunal does not consider that any of the alleged breaches in the present case are de minimis in nature.

43. The Tribunal is unable to accept Mr Carr's purposive construction of clause 3(6) with regard to diminution of the landlord's reversion or whether the alterations are externally visible or not. It finds the wording very clear, without any such qualifications.

44. In terms of other alterations to other flats, these appear to be historic and are anyway irrelevant to the present matter. The proceedings are brought by Keythorpe (Bournemouth) Management Limited, a residents' owned management company in which the freehold vested. The action is not brought by individual directors, or any natural person.

Application for Costs

45. The Tribunal has no power to make a general costs order in leasehold management cases.

46. In the event that an administrative charge for litigation costs is levied by the applicant against the respondent, under clause 3(13) of the lease, the Tribunal has power to assess its reasonableness and payability under Para 5A Schedule 11 of the Act. That would require a separate application.

Costs Under Rule 13 (1)(b)

47. The applicant seeks a costs order under rule 13(1)(b), based on the respondent's unreasonable conduct. It does not seek an order for wasted costs under Rule 13(1)(a).

48. Rule 13(1)(b) is engaged where a party has acted "*…unreasonably in bringing, defending or conducting proceedings…".* The Tribunal's power to award costs is derived from section 29(1) of the Tribunals, Courts and Enforcement Act 2007, which provides:

> "*(1) The costs of and incidental to –*
> *(a) all proceedings in the First-tier Tribunal, and*
> *(b) all proceedings in the Upper Tribunal,*
> *shall be in the discretion of the Tribunal in which the proceedings take place."*

It follows that any Rule 13(1)(b) order must be limited to the costs of and incidental to the proceedings before this Tribunal, namely the section 168(4) Application.

49. Counsel referred in her skeleton argument referred to *Ridehalgh v Horsefield*. The Tribunal pointed out that that had been superseded by the Upper Tribunal's decision *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), which outlined a three-stage test for deciding Rule 13 costs applications. Counsel indicated that she intended to rely on *Willow Court*. The Tribunal must first decide if there has been unreasonable conduct. If this is made out, it must then decide whether to exercise its discretion and make an order for costs in the light of that conduct. The third and final stage is to decide the terms of the order.

50. At paragraph 24 of *Willow Court* the UT said *"We see no reason to depart from the guidance in Ridehalgh v Horsefield at 232E, despite*

the slightly different context. "Unreasonable" conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"

51. At paragraph 43, the UT emphasised that Rule 13(1)(b) applications *"…should not be regarded as routine…"* and *"…should not be allowed to become major disputes in their own right."*

Decision on Costs Under Rule 13 (1)(b)

52. The application for a Rule 13(1)(b) costs order is refused, for the following reasons.

53. The threshold for making a Rule 13(1)(b) costs order is a high one. As stated at paragraph 24 of *Willow Court "…the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level*."

54. The Tribunal first looked at whether the respondent had acted unreasonably in defending or conducting the Application. When doing so, it only considered the period from 5 July 2023 (the date the application was received by the Tribunal) until 9 May 2024. The respondents' conduct outside this window is not relevant, as the Tribunal is only concerned with the conduct of the proceedings.

55. Counsel submitted that the respondent had behaved in a manner which could amount to harassment to the applicant. There had been serial non-compliance with directions, with witness statements served very late. An oral hearing had been requested, which was unnecessary as the issue was clear cut. The respondent had also not called an expert despite obtaining permission to do so. The Tribunal also notes that an allegation of antisemitism had been made against the applicant, as the motivation for bringing proceedings, although that allegation had been withdrawn late on day 2.

56. The Tribunal rejects the submission that requesting an oral hearing or deciding not to call an expert is unreasonable conduct.

57. The Tribunal finds that the making of antisemitism allegations, without any evidence, does amount to unreasonable conduct. Far less seriously, it also finds that the service of supplemental witness statements on the first day of the hearing is also unreasonable.

58. However, in exercising its discretion, the Tribunal takes into account that (i) by the start of the hearing there was no witness statement

alleging antisemitism before the Tribunal (ii) Mr Carr withdrew those allegations from his clients' case during the hearing (iii) the Tribunal does not consider that the length of the hearing was materially prolonged (iv) the related allegation of victimisation, although misconceived, had some evidential basis as it was accepted by the applicant that a number of other flats had been subject to alterations in previous years.

59. The Tribunal does not consider that the late service of a very short supplemental witness statement reaches the threshold for a rule 13 order.

60. Having regard to these factors and taking an overall view, the Tribunal has concluded that this is not a case where the unreasonable conduct should result in a costs order against the respondent. It is unnecessary for the Tribunal to go onto the third stage.

Applications under section 20C of the Landlord and Tenant Act 1985 and Para 5A Schedule 11 of the 2002 Act

61. The applicants have succeeded on both alleged breaches of covenant and having regard to that and the conduct of the parties, there is no basis on which the Tribunal could property make such orders. Both applications are refused.

Application for reimbursement of Tribunal Fees

62. For the same reasons above, the Tribunal orders that the respondent re-imburse the applicant for its application fee and half its hearing fee within 28 days of the date upon which this decision is sent to the parties.

Mr Charles Norman FRICS 12 July 2024

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).