FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/00HN/LBC/2023/0018**
Property	**:**	**Flat 5, Keythorpe, 27 Manor Road, Bournemouth BH1 3ER**
Applicant	**:**	**Keythorpe (Bournemouth) Management Limited**
Representative	**:**	**Ms Antonietta Grasso, Counsel, instructed by Coles Miller Solicitors**
Respondent	**:**	**Mr Henry Victor Last (1)** **Mrs Sarah Cherie Last (2)**
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**
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 (b) relocation of an internal door perpendicular to the flat entrance and (c) removal of the floor threshold between the lounge and balcony at Flat 5 Keythorpe;

(2) The Tribunal finds that an allegation of cutting into bathroom walls has not been proved.

(3) The Tribunal has no jurisdiction (outside of rule 13) to make a general costs order.

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

(5) 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.

(6) The respondent shall pay to the applicant its application fee to 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 5, 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) Henry Victor Last and Sara Cherie Last. 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.

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.

6. On 13 March 2024, the Tribunal issued a direction that the case would be determined at a hearing and heard together with an application in relation to flat 2 Keythorpe, also being an application under section 168 (4), CHI/00HN/LBC/2023/0017.

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. Part way through the inspection Mr and Mrs Last attended.

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 5 is on the first 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 Lease

10. On 21 September 1998 a new lease of flat 5 was granted for 199 years from 25 March 1978. A copy of the lease was not available, but counsel submitted that it was likely to be on the same terms as that for flat 2 (CHI/00HN/LBC/2023/0017).

The Hearing

Procedural Matters

11. Prior to the start of the hearing the Tribunal received an application to allow in a late second witness statement from Mr Last , dated 7 May 2024. The Tribunal decided to admit this as it was very short.

The Applicant's case

12. 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. The first respondent had not produced a statement of case but had served a witness statement. The respondents had obtained a structural engineer's report ("the Report") . [However, the engineer was not acting as an expert in the proceedings and did not give evidence].

13. Counsel submitted that the alleged breaches were (i) levelling up the balcony floor with the flat [i.e. removal of the threshold on the floor between lounge and balcony] (ii) creating recesses in the walls for shower pipes or conduits (iii) kitchen refurbishment works [this was not proceeded with] (iv) mechanical electrical and plumbing work in the airing cupboard [this was not proceeded with] (v) removal of arches around existing openings in internal walls (vi) relocation of a door adjacent to the flat entrance with the old door being stopped up (vii) creation of a door in a different location. [In the statement of case ((iii) and (iv) were not included and (v) was limited to the arch in the hallway].

14. 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.

15. 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.

16. The respondent's case was contradictory. At para 4 of his witness statement the respondent apologises and admits to a mistake, but then asserts that the works are minor and non-structural. The respondents rely on the report which describes the works as being of "very low structural impact". Ms Grasso submitted that on any reading the report indicates that some level of structural work was carried out. Further the prohibition against alterations in the lease is absolute.

17. In the statement of case, reference was made to the Report which stated:

"The works carried out in Flat 5 are of mixed nature. Some are cosmetic with no structural effects and others have structural significance but with very low impact.

Non-structural are:

1. Levelling of the balcony floor with the flat;

2. Recesses in the walls for shower pipes or conduits;

3. Kitchen refurbishment ongoing works; and

4. MEP work in the airing cupboard

Work With Structural Relevance

1. Removal of arches around existing opening in internal walls; the arches are

cosmetic with no structural impact;

2. Relocation of a door adjacent to the flat entrance; This has been compensated with an adequate precast concrete lintel…and the old opening bricked up;

3. Another door was relocated and this was protected with a standard lintel"

18. Following *Duval v 11-13 Randolph Crescent Ltd* [2020] UKSC 18 the applicant has no right to consent to the alterations.

19. The applicant sought costs relying on clauses 3 (13) and 3 (14) of the lease. [Clause 13(3) confers on the landlord the qualified right to demand an administration charge against the lessee in connection with litigation costs. Clause 13(4) concerns an indemnity from lessee to lessor.]

20. 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

21. 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. Her evidence may be summarised as follows. On 22 September 2022 she became aware of loud drilling emanating from flat 5. The builder showed her that they were moving a bedroom doorway adjacent to the front door. The builder said that they were removing a step [threshold] between lounge and balcony and an arch in the hallway. There were many complaints from other residents about the noise, dirt, disruption and unsightliness. This continued until April 2023.

22. Owing to allegations that the application had been motivated by anti-Semitism or other victimisation, (see below) Ms Grasso put questions in chief to Mrs Neale. Mrs Neale told the Tribunal that religion was not an issue that came up, and she had assisted members of the Jewish faith by, for example, ensuring that exterior lighting was kept on overnight on the Sabbath, as the use of switches is not then allowed.

The Respondents' Case

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

24. The respondents 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.

25. The respondents further admitted that they had raised a non-structural arch in the flat [by squaring off its curved sides thus increasing its height], 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 is structural nor visible from outside the property. They had also moved two doorways from the hallway into a bedroom and kitchen as shown on a surveyor's plan. The works had a "very low structural impact" according to the Report so cannot be regarded as structural works.

26. 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 the flats and alterations to the flats which would be visible from the exterior of the building.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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 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 [in relation to CHI/00HN/LBC/2023/0017 (Flat 2)]and Mr & Mrs last, are the only leaseholders who are Jewish. 43. [The bringing of the proceedings] against them alone is driven by antisemitic discrimination.[…].

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

33. 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 Respondents' Witness

34. Mr Last 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. His family had owned the property since 1981 as a holiday home. All works were undertaken under direction of a structural engineer. He believed that consent from the freeholder was not required, but Mr Last had not read the lease. During his family's ownership, he had observed similar work having been undertaken in other flats, in particular Flat 8. The works were minor and non-structural. The engineer's report states that the works have a very low structural impact. Only Mr Grosz (Flat 2) and he had been the subject of these proceedings for alterations. He considered himself discriminated against.

Findings

Witnesses

35. 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.

36. The Tribunal finds that Mr Last admitted that breaches of the lease had occurred.

The breaches

37. The Tribunal finds that the proven breaches which have occurred 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[1] (iii) moving the position of a doorway in the hall immediately perpendicular to the front door.

38. The Tribunal finds that that there was uncertainty as to what was done to the bathroom. As the refurbishment works were complete, the alleged breach was not visible during the Tribunal's inspection, nor in any photograph. There was no photograph in the engineer's report[2]. For these reasons this alleged breach is not proved.

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, except for the bathroom. The Tribunal places some weight on the report.

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. However, the Tribunal finds that the moving of the door opening which required a lintel, is a structural alteration.

41. In *Bickmore v Dimmer*, (see above) 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 the 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*

[1] It should be noted that there is a larger second archway between the lounge and dining area. That too had been raised but was outside the scope of this application.

[2] Only of the works once complete

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 of clause 3(6) clear and without any such qualifications.

44. In terms of other alterations to other flats, these appear to be historic and are irrelevant to the present matter. The proceedings are brought by Keythorpe (Bournemouth) Management Limited, a residents' owned management company in which the freehold is vested. The action is not brought by individual directors, or any natural person. Therefore, whether a current or former director owns a flat where similar alterations have been made is not relevant to the question before the Tribunal.

Application for Costs

45. The Tribunal has no power to make a general costs order in the cause[3], 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

[3] This excludes rule 13

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 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.

56. 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.

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. No request for an oral hearing was made by the respondent, but was directed by the Tribunal. In any event requesting an oral hearing does not amount to unreasonable conduct.

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 on 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 three alleged breaches of covenant and been unsuccessful on one claim. Having regard to that and the conduct of the parties, 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).