FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	CHI/21UF/LAC/2023/0017 and CHI/21UF/LBC/2024/0010
Property	:	33 Balcombe Court, Balcombe Road, BN10 7QW
Applicant	:	Balcombe Court Peacehaven Limited
Representative	:	In Person
Respondent	:	Elaine Iris Cardy and Stephen George Licence
Representative	:	In Person
Type of application	:	An allegation of breach of covenant: Section 168(4) Commonhold and Leasehold Reform Act 2002 And Application for liability to pay administration charges
Tribunal members	:	Mr R Waterhouse MA LLM FRICS Ms C Barton MRICS Ms T Wong
Date and Venue of hearing	:	Interim Decision- 15 January 2025 Full Decision 3 March 2025 FTT(Property Chamber) Residential Property, Havant Justice Centre, Elmleigh Road, Havant, Portsmouth PO9 2AL

Full DECISION

The Directions had noted that the "breach of lease issue has been addressed by the Respondent". At the hearing however the Respondent maintained that no breach of covenant had occurred. Without both parties agreeing on a common position on the breach, the issue remained for the Tribunal to determine. The Landlord had chosen not to attend the hearing, but had done so on the basis that the breach issue had been resolved.

The Tribunal made the Interim Decision that no breach of covenant was proven. With the absence of the Landlord the Tribunal directed that the parties could make submissions if they wished on the basis of the Interim Decision by the 24 February 2025.

No such submissions were received; therefore, the Tribunal confirms the Interim Decision.

Decisions of the Tribunal

1. For the reasons set out below, the Tribunal finds that the Applicant Landlord's allegation that the Respondent leaseholder has breached the Lease not proven.

2. The Tribunal determines that no administration charges are payable by the Respondent leaseholder.

The background

3. The Respondent made an application for a determination as to whether certain variable administration charges sought from them by the Applicant were payable by them under the terms of their lease and if so, were reasonable in amount. The administration charges claimed arose, the Applicant says, following an alleged breach of a covenant in the Respondent's lease not to carry out any alterations to their property without first obtaining the consent of the Applicant. The case reference is CHI/21UF/LAC/2023/0017.

4. By a separate application the Applicant seeks a determination that the Respondent is in breach of a covenant in their lease not to carry out alterations to their property without first obtaining the consent of the Applicant. The case reference is CHI/21UF/LBC/2024/0010. The Respondent denies carrying out unauthorised alterations and disputes that the administration charges can be recovered from them under the terms of the lease. For the purposes of this decision there being two applications submitted one by each party, the Landlord will be known as the Applicant and the Leaseholder known as the Respondent.

5. The Respondent also seeks an order pursuant to section 20C of the Landlord and Tenant Act 1985 that any costs incurred by the Applicant Landlord in

connection with the proceedings should not be included in any service charge payable.

6. Additionally, it seeks further an order pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 reducing or extinguishing any administration costs that the Applicant might incur in respect of these proceedings and seek to recover from them under the terms of their lease.

7. Directions were issued on 17 July 2024 listing the application for a case management and dispute resolution hearing on 13 September 2024.

8. The hearing took place at Havant Justice Centre as directed and was attended by Alison Moore, Solicitor for the Respondent and Christine Murray, Director the Applicant company.

9. By an order dated 13 September 2024, Judge N Jutton made Directions in respect of the Application. The Application was later listed for a final hearing on 15 January 2025.

10. The Tribunal ordered that the two applications be consolidated and dealt with together. It was agreed that for the purposes of the proceedings going forward, Balcombe Court Peacehaven Limited would be the Applicant and Ms Cardy and Mr Licence would be the Respondent.

The Lease

11. The following provisions of the lease are relevant to this application.

12. By prescribed clause 1 of the lease, *"the property"* or Flat 33 is described as follows:

ALL THAT the flat numbered 33 on the ground floor of the Building and more particularly described in the First Schedule hereto Together with the easements rights and privileges mentioned in the Second Schedule hereto EXCEPT AND RESERVING as mentioned in the Third Schedule.

THE FIRST SCHEDULE

ALL THAT the Flat numbered 33 on the ground floor of Balcombe Court Balcombe Road Peacehaven in the County of East Sussex as the same is drawn on Plan No 1. annexed hereto and hatched black on Plan No 2 annexed hereto including;

(a) the internal plastered coverings and plaster work of the walls bounding the demised premises and the doors and door frames and the window frames in such walls and the glass fitted in the windows; and

(b) the plastered coverings and plaster work of the walls and partitions lying within the demised premises and the doors and door frames fitted in such walls and partitions; and

(c) The plastered coverings and plaster work of the ceilings and surfaces of the floors including the whole of the floorboards skirting boards and supporting joists (if any) and

(d) All conduits which are laid in any part of the Building and serve exclusively the demised premises; and

(e) All fixtures and fittings in or about the demised premises and not hereafter expressly excluded from this demise but not including: -

(i) Any part or parts of the Building (other than conduits and joists expressly included in this demise) lying above the said surfaces of the ceilings or below the said floor surfaces; or

(ii) Any of the main timbers and other joists of the Building or any of the walls or partitions therein (whether internal or external) except such of the plastered surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise; or

(iii) Any conduits in the Building which do not serve the demised premises exclusively

13. Clause (9) (a) and (b) refers to alterations.

(9) (a) Not without the prior written consent of the Lessors (which consent shall not be unreasonably withheld) to make any non-structural alterations to the interior of the Flat.

(b) Not to make any alteration or addition whatsoever in or to the Flat , either externally or internally save as permitted by the immediately preceding sub-clause (a) or to make any alteration or aperture in the plan external construction or elevation thereof AND without prejudice to the generality of the foregoing not to alter cut or injure any of the principal timbers iron or steel work or walls of the Flat or place on or affix to the outside of the flat any pipe wire or other apparatus or cover up or disfigure any architectural feature of such Flat or do or suffer in or upon the Flat any wilful or voluntary waste or spoil.

Procedural Background

14. The parties had been involved in various other proceedings, in respect of the property as set out below.

15. The Respondent made an Application, to determine costs in respect of a lease extension, under section 60(1) of the Leasehold Reform Housing and Urban Development Act 1993. The case number CHI/21UF/OC9/2023/0019 was determined by Tribunal on 18 April 2024.

16. The Applicant Landlord made an Application and Request for Case Management or other Interim Orders, dated 19 December 2024 submitted by C Murray for a postponement because ; " The Freeholder a leaseholder collective , has no funds with which to appoint a representative and there is no one available to attend on an unpaid basis until May 2025 due to prior work commitments."

17. The Respondent opposed the postponement application.

18. Procedural Judge Whitney determined on the 9 January 2025 that the Tribunal has an obligation to deal with all obligations in accordance with its over-riding objective. That includes reaching a final determination within a reasonable period of time, and in a proportionate manner.

19. Judge Whitney on the 20 December 2024, in response to an Application and Request for Case Management or Other Interim Orders dated 19 December 2024 was not satisfied that the hearing should be postponed and in the absence of further representations the hearing took place on 15 January 2025.

20. The Applicant Landlord made an Application and Request for Case Management, or other Interim Orders dated 22 December 2024 submitted by C Murray requesting "Determination on papers alone now, that the breach of lease issue has been addressed by the Respondent or postponement to May 2025."

21. Procedural Judge Whitney determined that if the Applicant Landlord did not attend, then the Tribunal should have regard to their documents filed.

22. By email dated the 12 January 2025, the Applicant Landlord, represented by C Murray noted that they were in an overseas country which did not have arrangements in place which permitted evidence to be given remotely. The Applicant Landlord asked, that "legal fees" and "administrative charges" should be considered by the Tribunal.

23. As stated, the hearing was listed for 15 January 2025, and it took place at Havant Justice Centre.

The Hearing

24. At the hearing the Applicant landlord did not attend. The Respondent Ms Cardy and Mr Licence attended in person. The Tribunal was provided with the following documentation for the hearing: (i) 257-page hearing bundle, (ii) an Application and request for case management or other interim orders made by C Murray of the Freeholder dated 19 December 2024, with (iii) a subsequent Tribunal order by Judge Whitney dated 20 December 2024 (iv) an Application and request for case management or other interim orders made by C Murray of the Freeholder dated 22 December 2024 with (v) subsequent Tribunal order by Judge Whitney dated 9 January 2025 and (vi) email of 12 January from C Murray of the Freeholder.

25. At the start of the hearing the Tribunal noted that the Applicant Landlord made an Application and Request for Case Management, or other Interim Orders dated 22 December 2024 submitted by C Murray requesting "Determination on papers alone now, that the breach of lease issue has been addressed by the Respondent or postponement to May 2025. Tribunal's bold highlighting.

26. The Respondent said that works had been carried out to infill an area between the living room and the kitchen and that a door had been fitted subject to the landlord's requirements. However, the Respondent did not accept that a breach of the lease had occurred.

27. The Tribunal took an adjournment to consider the respective positions and determine the procedural way forward.

28. In the absence of either specific agreement by both parties on the alleged breach or specific withdrawal by both parties of the action for the alleged breach, then the application alleging a breach is still outstanding and requires to be determined by the Tribunal.

29. The Tribunal determined that the outstanding question of the alleged breach should be addressed first, using the submissions in the bundle and oral evidence by the Respondent who were present. The lease plan showed a solid division between the living room and the kitchen and a door opening with a door fitted. The Applicant's Valuer and later jointly appointed building surveyor had made a visual inspection of the interior of the property and recorded the part open plan nature of the area between the living room and the kitchen, and that no door was fitted. Given the Applicant Landlords were not present the Tribunal determined that it would issue a preliminary decision from which the Applicant landlords could make written representations later if they wished. Such written representations as made would be reviewed on paper before the final decision was issued. Appeal rights would run from the issue of the final decision.

The Legislation

30. Section 168 of the 2002 Act provides that:

> *(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.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), "appropriate tribunal" means —

(a) in relation to a dwelling in England, the First-tier Tribunal...

31. Rule 13(1)(b) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides that the Tribunal may make an order in respect of costs only if a person has acted unreasonably in bringing, defending or conducting proceedings.

<u>The Alleged Breach of undertaking non-structural alterations without prior written consent – Clause 9 (a) and (b)</u>

Respondent (Leaseholders) submission

32. The Respondent gave an overview of the issues. The Respondent had sought to have their lease extended, the premium for which had been agreed with the landlords. A previous application was made to the Tribunal for determination of costs payable to the landlord for the lease extension. This Application was determined by Judge Lumby on 18 April 2024.

33. The Respondent noted that a Valuer acting for the landlord had inspected the property at the time of the application for a lease extension and recorded the open plan nature of the access to the kitchen. The Landlord's Valuer noted the access to the kitchen was different in form from that described on the lease plan.

34. The lease plan from page 123 of the bundle showed an enclosed kitchen accessible via a doorway and a door. The physical construction found by the

Landlord's Valuer was that no door had been fitted and the dividing area between the kitchen and the living room comprised a half height solid wall.

35. The Landlord considered that this difference between the physical reality within the flat and as represented in the lease plan demonstrated that alterations had taken place without authorisation and therefore the Respondent was in breach of the lease namely Clause 9(a) and (b).

36. The Respondent did not concede that a breach of the lease had occurred, however. Nonetheless they agreed to extend the half height brick wall up to the ceiling and fit a door.

37. The Tribunal was referred to a recent photograph of the area between the living room and the kitchen which was contained within the bundle. This confirmed the half height dividing wall and no door fitted to the doorway.

38. The Respondent decided to appoint a builder to carry out opening up work to the subject area in order to ascertain the true position concerning alleged alterations. This was done without tacit acceptance of the Respondent, that unauthorised alterations had been made or that there had been a breach of lease. The works were intended to make the finalised wall match the layout of the flat contained in the lease plan.

39. During the works the Respondent observed that following the removal of timber finishing and plaster, the brickwork contained only undamaged bricks. The Respondent submitted this indicated that wall was as originally built in that if there had been a later alteration it would be expected that severed bricks would be observed.

40. The Respondent noted that their contractor believed that the age of the plaster indicated it was contemporary with the original construction of the property, further that the lintel above the opening was of an age that again indicated the opening was as built and finally the lack of severed bricks was indicative of there not being a subsequent opening of the area. However, the Respondent's contractor did not submit a witness statement nor was in attendance in the Tribunal.

41. The Respondent submitted that a flat is currently for sale in the block, and that they had observed from the marketing details that the kitchen in the property for sale had a similar part open plan access.

42. Finally, the Respondent noted that previously the flat had been subject to water penetration from above. During the rectification of this the Respondent's flat was visited a number of times by the Landlord. At no time did this result in the Landlord indicating concern over potential alterations.

43. Bundle page 201 Respondent's exhibit EIC4 comprises sales particulars dated 2013 for the subject property showing no fire door fitted to the kitchen. Additionally, within the bundle there is a plan of proposed flats in Peacehaven dated 1972. The plan shows the kitchens in the units having no doors. How this relates to the subject premises is not known.

44. The Respondent includes a letter from the leaseholder's Valuer to the landlord's Valuer noting;

" I have taken a look at my photographs of the wall and the kitchen units etc and I do believe it to be original. The kitchen units adjoin the kitchen return, and this matches the wood ledge and carpentry detail around the opening. I am confident that the kitchen is original, and the overall style is in keeping with the age of the lease. The majority of the wall is there and may have led the draughts person drawing in the wall on the lease plan, or adopting the architects plan, (as we know happens all too often.) Do you or your client have any proof that this feature is not original?"

45. The Respondent claimed that neither they nor their predecessor had undertaken any alterations in this area. The Respondent had undertaken the works to infill and fit a door in order to comply with the landlords' requests notwithstanding the Respondent did not accept a breach had occurred.

Applicant's Submissions

46. The Applicants were not in attendance being abroad at the date of the hearing and being unable to give evidence from the country which they were in.

47. The Applicant's Application form contends that "alterations have been made to the interior structure of the flat without prior written consent, of the lessor as required by section 9 (a) and (b) of the lease".

48. During an inspection for the purposes of a new lease, pursuant to the provisions of the Leasehold Reform Housing and Urban Development Act 1993, the Lessor's Valuer/Surveyor noted the existence of only a half height wall in situ between the living room and the kitchen of the property (such door and wall being shown on the lease plan).

49. The Application notes that "after protracted correspondence KMS Surveyors Ltd, (Chartered Building Surveyors) were appointed on a mutually agreed basis, to report on whether alterations had been made and what impact such alterations had particularly in relation to the structural integrity of the building and compliance with relevant building control and fire regulations . KMS confirmed that alterations had been made, and retrospective building control is required to answer structural and fire safety issues. They also took the view that such retrospective Building Control Approval is required for insurers to accept there is no additional fire risk to the building.

50. The Respondents claimed there was no alteration but then agreed to alter the property to concur with the Applicants demand to settle the matter.

51. The Applicant submitted a position statement. Within the position statement at paragraph 14, it was noted "KMS surveyors inspected the property on 20 April 2024 and reported the property had been altered and concluded that

the certain way to answer the structural and fire safety issue would be through a retrospective application for building control approval. "

52. The bundle at [73] has a copy of the report of Mark Sztyber of KMS (Building Surveyors) Ltd carried out on the 20 April 2023.

53. At 1.3.2 the report states "The original configuration of the flats includes a fire resisting door between the kitchen and the sitting room".

54. Under 2.2.1 "Methodology" the report states that "no intrusive or destructive investigations were undertaken. The inspection was "visual".

55. The analysis comprised comparing Flat 27 which was said to be in an original condition with that of Flat 33. Flat 27 having a closing fire door to the kitchen.

The Determination

56. The Tribunal reached its decision after considering the Respondent's oral evidence and the written evidence of the parties, including documents referred to in that evidence, and taking into account its assessment of the evidence. The Tribunal also took into account the parties' submissions and arguments when reaching its decision. The Tribunal has applied the relevant law to the issues that require determination and our decisions are below.

57. Before the Tribunal concerns itself with the question of the breach of the lease, it needs to ascertain if any alterations actually took place.

58. The physical layout of the flat as shown, in the lease plan, [123] of the bundle, and the physical layout, are not consistent. The lease plan was indicative of what was meant to, or assumed to have been built at the time of the grant of the lease but is not on its own conclusive evidence.

59. The Tribunal heard from the Respondent that they had made investigations with Brighton & Hove City Council Planning Department which provided plans contained in the original application for planning permission to construct the development. These showed a part open plan kitchen area consistent with what exists currently. The Respondents did not show the tribunal any copies of the application to substantiate this statement. As such the tribunal cannot place any weight on the information provided.

60. The Tribunal has heard accounts of direct observations from the Respondent, of the material and condition of masonry revealed when the works were being undertaken in December 2024 to install a door. Again, we have not seen photographic or witness evidence of this by way of a report from the Respondent's contractor. However, no other surveyor, valuer or contractor had yet opened up the structure of the property. The Tribunal considers this to be potentially good evidence as it is direct observational evidence of the nature and formation of the subject wall.

61. The Tribunal heard evidence from the Respondent that their contractor believed the nature of the lintel, type of plaster and state of the brick work to be indicative as being in the same condition as built. Without a witness statement from the contractor nor the opportunity to test their evidence, the Tribunal cannot place much weight on this.

62. The Tribunal has evidence from KMS (Building Surveyors) Ltd that "Flat 33 has been altered by a previous lessee". In the original course of events great weight would be placed on this report, given the author is a building surveyor. However, the statement by KMS above, at paragraph 48 is problematic for the Tribunal because in the report KMS appears to assume a point of reference that the original flat contained a fire door, when in fact this was the very thing, the inspection was aimed at identifying. Any comparison with a stated position of there being a fire door originally present and the physical state at inspection must conclude there was an alteration. However, we do not know that Flat 33 had such a fire door when originally constructed.

63. The report by KMS is also caveated by the fact that no intrusive work was undertaken to investigate. This means the evidence cannot be as incisive as if the subject area had been opened up.

64. There are copies of lease plans from 1972 for a development in Peacehaven which show the units to have no doors in the kitchen. This is problematic for the Tribunal as it does not specially connect the plans with this development either by notation or oral evidence on where these plans have originated from layout to be original.

65. There is also the statement made by the Respondent's Valuer where they indicated they believed the layout was original. The analysis provided was detailed and the Tribunal places reasonable weight on this.

66. In the circumstances, given the various inconsistencies and uncertainties in the evidence submitted, and the lack of a proper examination of the brickwork covered by plaster and timber detailing, the Tribunal places greatest weight on the first-hand observations. In particular the observation of opening up of the half height brick wall, between the living room and the kitchen, showed unbroken brickwork. The Tribunal considers this a strong indication that the wall, as exposed, was as built with no evidence of subsequent alterations. Additionally, again with first hand observations by the Respondent that the surface of the bricks of the half height wall was clean of mortar. This indicates strongly to the Tribunal that these bricks were not the remainder of a taller wall but had been laid and finished without further mortar being added.

67. The Tribunal determines on balance of the evidence that an alleged breach of the lease caused by removal of a fire door and part of a wall is not proven. There cannot be a breach when it was shown there was no alteration in the first place.

Administration Costs

68. As a consequence of finding that there is no breach of covenant proven, the costs that stem from this are not claimable under the lease.

Other matters

69. The Respondent in their application challenging the Administration Charge, [Ref CHI/21UF/LAC/2023/0017] also applied for an Order under section 20C Landlord and Tenant Act 1985 and Para 5 A Schedule 11 of the Commonhold Leasehold Reform Act 2002, that service charges and administrative charges that the Applicant Landlord incurred on the pursuance of the alleged breach of covenant are not chargeable. The Tribunal determines that given that the breach is not proven, the Tribunal makes an Order under Section 20C Landlord and Tenant Act 1985 and Para 5A Schedule 11 of the Commonhold Leasehold Reform Act 2002 that costs incurred by the Landlord in the proceedings of this Tribunal cannot be passed to the Tenant by way of service charge or administration charge in respect of litigation costs.

70. Finally given the determination that the alleged breach was not proven, the Tribunal makes an Order for the reimbursement of the Respondent's application fee and the hearing fees.

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).