FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00KF/LBC/2023/0010**
Property	**:**	**25 and 25A Ronald Park Avenue, Westcliff-On-Sea, Essex SS0 9QS**
Applicant	**:**	**Barry Maquire and Kelly Allen**
Representative	**:**	**Unrepresented**
Respondents	**:**	**Sathita Phanphet and Liam Phelan**
Representative	**:**	**Unrepresented**
Type of application	**:**	**Determination of an alleged breach of covenant under section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal	**:**	**Judge A. Arul** **Gerard F. Smith MRICS FAAV**
Date of hearing	**:**	**18 February 2025**
Date of decision	**:**	**5 May 2025**

DECISION AND REASONS

Decisions of the Tribunal

(1) The Tribunal determines that, for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, the Respondents have breached clause 2(c) of their Lease (more particularly described below) by removing a non-structural wall without the written consent of the Applicants.

(2) The Applicants have not demonstrated that the Respondents have committed a breach of any other provisions of the Lease as alleged in the application including, for the avoidance of doubt, clause 4(c) relating to insurance or paragraph 1 of the Fourth Schedule relating to nuisance.

REASONS

The Application

1. By an application dated 30 August 2023, the Applicant freeholders seek a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ('**the 2002 Act**') that the Respondent leaseholders are in breach of their lease of flat 25A Ronald Park Avenue, Westcliff-On-Sea, Essex SS0 9QS (together with flat 25, "the Property"). It is alleged in the application form that the Respondents undertook various works, in breach of clauses 2(c), 4(c) and paragraph 1 of the Fourth Schedule to the Lease.

2. On 12 August 2024 the Tribunal gave Directions, which the parties had complied with.

The Inspection and the Hearing

3. The Tribunal inspected the Property, comprising both flats 25 and 25A, on the morning of the hearing day. The hearing then took place at a nearby venue.

4. The parties all attended and were not formally represented, but each had a family member assisting them. Mrs Ann Allen made an opening statement for the Applicants and Ms Matthew made some submissions for the Respondents.

5. The parties had submitted written statements and it was confirmed that they adopted those statements as their evidence. Live evidence was heard from each of the parties. The Tribunal had the benefit of bundles of documents from the Applicants and the Respondents, and a supplemental bundle from the Applicants. These included statements

from the Applicants and from Mrs Ann Allen. There was also a statement from the Respondents, and from Mr Frank Halfyard and Ms Matthew.

6. The Tribunal also had before it an application made on 14 December 2024 by the Applicants to admit images showing CCTV signage. These were images taken after the material events and the Tribunal expressed the view that they may have limited probative value. On this basis the parties were invited to deal with the relevance, if any, in submissions.

Agreed Facts

7. The Property comprises a Victorian era house in the middle of a terrace, which has historically been converted into two flats – ground floor and first floor.

8. The Applicants are the proprietors of a long lease of the ground floor, flat 25. Ms Allen's mother appears to have owned the freehold and during this dispute, on 30 November 2022, transferred this to the Applicants.

9. The Respondents are the proprietors of a long lease of the first floor, flat 25A. It has a ground floor entrance which immediately proceeds into a stairwell leading to first floor accommodation.

10. The Respondents purchased flat 25A on 29 September 2022. They did not immediately take occupation, instead engaging contractors to undertake some internal refurbishment works. It is those works which are subject to dispute and more fully addressed below.

11. It is common ground between the parties that a fairly comprehensive refurbishment of flat 25A had occurred during late 2022 and early 2023. This, broadly speaking, comprised plumbing, heating, wiring, lighting, flooring, cupboards and fittings, and general decoration. The radiators were all replaced and the bathroom and kitchen furniture were all replaced.

12. It is also common ground between the parties that the works started around early October 2022 and there was an intense period of activity for at least the first three weeks when stripping out works were undertaken. On or around 24 October 2022, one of the contractor's foot came through the ceiling of flat 25 from flat 25A above. Further, that the works were not as intense but continued until around December 2022 or early into 2023. There are, however, differing accounts as to exactly what works were carried out and the level of interruption, if any, to the Applicants.

The Lease

13. The lease to flat 25A was granted on 1 March 2021 for a term of 125 years ('the Lease'). The terms of an earlier lease dated 2 May 1986 are adopted therein. The Tribunal noted that the original lease was defective in that it referred to a term of 90 years from 25 March 1905; which was presumably intended to be refer to 1985. Read strictly, the original term expired on 24 March 1995 and was not capable of being extended on 1 March 2021. The parties were not aware of this defect. The Tribunal proceeded on the basis that the Lease adopted the terms of the original lease even if it did not correctly extend them.

14. The relevant parts of the Lease are as follows:

14.1 Recital (5) defines the first floor flat (flat 25A) as: *"The Flat" means the interior faces of such exterior walls which bound the flat the floor structure (but excluding the ceiling plaster [if any] of the flat below) the ceiling plaster includes all cisterns tanks sewers drains pipes wires ducts and conduits within the same limitations serving the flat exclusively".*

14.2 Clause 1 states: *"…The Lessor HEREBY DEMISES unto the Lessee ALL THAT the flat situate on the First floor of the Building show for the purposes of identification only on the plan annexed hereto and thereon edged red (hereinafter called "the Demised Premises") …"*

14.3 Clause 2 states: *"THE LESSEE HEREBY COVENANTS with the Lessor as follows: …*

(c) not to make any structural alterations or structural additions to the Demised Premises nor to erect any new buildings thereon or remove any of the Lessor's fixtures without the previous consent in writing of the Lessor."

14.4 Clause 4 states: *"THE LESSEE HEREBY COVENANTS with the Lessor and with the owners and lessees of the other flat comprised in the Building that the Lessee will at all times hereafter:*

(a) keep the flat (other than the parts thereof comprised and referred to in sub-clauses (d) and (e) of Clause 6 hereof) and all walls party walls and sewers drains cables wires and pipes insofar as the same exclusively serve the flat in good and tenantable repair and condition and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the part of the Building other than the Demised Premises

(b) contribute and pay one half of the costs expenses outgoings and matters mentioned in the Third Schedule hereto and to pay the Lessor on demand such reasonable sum or sums as the Lessor shall require on account of anticipated expenditure

(c) not to do or permit to be done any act or thing which may render void or voidable the policy or policies of Insurance on the Building or any policy or policies of Insurance in respect of the contents of the other flat comprised in the said Building or which may cause any increased premium to be payable in respect of any such policy

(d) permit the lessors and others authorised by him with or without workmen and others at all reasonable times on notice (except in the case of emergency) to enter into and upon the Demised Premises or any part thereof for the following purposes:

[1] to repair any part of the building and to make repair maintain rebuild cleanse and keep in order and good condition all sewers drains pipes cables water courses gutters wires party structure or other conveniences belonging to or serving or used for the same and to lay down maintain repair and test drainage gas and water pipes electric wires and cables and for similar purposes the lessor or other person exercising such right (as the case may be) doing no unnecessary damage and making good all damages occasioned thereby to the Demised Premises

[2] to view and examine the state and condition of the Demised Premises

(e) make good all defects decays and wants of repair of which notice in writing shall be given by the Lessor to the Lessee and for which the Lessee may be liable hereunder within three months after the giving of such notice

(f) observe and procure that any person deriving title under him observes the restrictions set forth in the Fourth Schedule

14.5 The Fourth Schedule states:

1 not to use the Demised Premises nor permit the same to be used for any other purpose whatsoever then as a private dwelling house in the occupation of one family only or for any purpose from which a nuisance can arise to the owner's lessees or occupiers of the flats comprised in the building or in the neighbourhood or for any illegal or immoral. The provided clause in the lease agreement restricts the use of the premises for purposes that could cause a nuisance to other residents or the neighbourhood.

2 not to do or permit to be done any act or thing which may render void or voidable the policy or policies of insurance on any flat in the Building which may cause any increased premium to be payable in respect thereof

3 The Lessee shall not:

(a) make or suffer to be made any unreasonable noise in the premises by way of piano gramophone instrument vacuum cleaner singing or otherwise at any time whatsoever nor

(b) play or permit to be played nor use or permit to be used the said things or any of them in any manner whatsoever nor sing or allow any singing nor make any noise of any kind whatsoever between the hours of midnight and 7a.m. on all days.

15. The application specifically relies upon alleged breaches of clauses 2(c), 4(c) and paragraph 1 of the Fourth Schedule.

The Issues

16. The issue to be determined in this case is whether there has been a breach of covenant of clause/s contained within the Lease. That requires consideration of:

(1) Are the clauses relied upon by the Applicants within the Lease?

(2) What are the facts giving rise to the claimed breach or breaches?

(3) If proven, do those facts constitute a breach of the lease

17. The Tribunal is not concerned on this application with the seriousness of any breach, whether it has been remedied or whether any right to forfeiture for any breach has arisen and/or has waived by the Applicants. These would all be matters for the County Court if the Applicant makes a separate application for forfeiture of the Lease following service of a notice under section 146 of the Law of Property Act 1925 in reliance on any breaches found by the Tribunal. These limits to the Tribunal's jurisdiction were emphasised to the parties at the start of the hearing.

18. The burden of proof is on the Applicants to establish the facts and that these constituted a breach of the leaseholder covenants under the Lease. The alleged breaches are in respect of the obligations on the part of the Respondents, as leaseholders of flat 25A.

The Law

19. The material provisions of section 168 of the 2002 Act state:

168 No forfeiture notice before determination of breach

(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.

20. As made plain by the Court of Appeal in *Eastpoint Block A RTM Company Limited v Otubaga* [2023] EWCA Civ 879, an application to the Tribunal under section 168(4) is not itself an application for forfeiture of a lease. A determination under section 168(4) of the 2002 Act is no more than a declaration of whether a breach has taken place. If a declaration of breach is made, any proceedings for forfeiture or any other remedy must be pursued, if at all, in the County Court. Furthermore, whilst section 168(4) may be a step towards forfeiture, that is not its sole function. The applicant is doing no more than seeking to obtain a determination by a specialist tribunal that may be used for a number of purposes, including (but not limited to) the service of a notice by the landlord under section 146.

The Applicants' case

21. In summary, the Applicants say that the Respondents carried out works without consent, there were some structural works which were not permissible, landlord fixtures or fittings were removed and other works which required consent. They further allege that there was damage to flat 25 and complain about the manner that the works to flat 25A were undertaken by the contractors, causing noise and disruption. Finally, they say that the carrying out of the aforementioned activities rendered void, or would render void the policy of insurance for the building, or would otherwise impact on future premiums.

22. In relation to the claim for damage to flat 25, there was an allegation that a hole had been created by a contractor's foot coming through the ceiling creating an opening in the Applicants' kitchen below. Plaster is said to have fallen. There were also cracks in the ground floor ceiling and walls. It was said that the back bedroom ceiling started bowing.

23. At the hearing, it was apparent that there were three main categories of complaint – (1) that structural work had been carried out and fixtures or fittings removed, (2) that there had been nuisance committed by the Respondents' contractors and, (3) that the insurance for the building had been compromised (it was put as being voided but we considered the issue in the round).

24. On the issue of structural works and removal of fixtures and fittings, the Applicants rely on clause 2(c) which prohibits structural alterations or additions, or removal of freeholder fixtures. They say that the internal wall removal in the kitchen/diner in flat 25A and the chasing in of walls constituted structural works. They further rely upon the repairing obligations under clause 4(a) of the Lease. They accepted in evidence that certain circumstances may negate these provisions, such as changes in law would override lease. They relied upon a surveyors report as to what fixtures had been removed (largely kitchen and bathroom furniture) although conceded that they had been replaced with new items. They conceded that there was no list of what fixtures were present in 1986.

25. On the issue of nuisance, the Applicants relied upon paragraph 1 of the Fourth Schedule to the Lease. They stated that the interference was over one year, with six months being just the contractors. They stated that contractors came as early 7.15am and would not leave when asked. Their statements and exhibited email complaints to the Respondents rehearsed some instances of confrontation between them and the contractors. They conceded that there was no evidence of the occupants of neighbouring properties complaining. It was put to them that the contractors say that they were not actually working in the early hours, that there was an initial 4-5 months period from 3 October 2022 where works were carried but then things calmed down. They clarified that the first two weeks were very intense. They described the effect of the noise and disruption on their four elderly husky dogs, some of whom had passed away during the relevant time. The dogs spent most of their time under the stairs and hence the Applicants believe the deaths or impact on ill health of the dogs was connected with the noise and disruption.

26. On the issue of insurance, the Applicants rely on clause 4(c) of the Lease. They stated that they had sent a message to the insurers but had received no response. They conceded that they had not produced any documentary evidence that the insurance policy was treated as void by the insurers, or might be. There was no policy wording available. They

stated that they believe that no insurer would allow unqualified persons to undertake works in the Property. As freeholders, they felt obliged to inform the insurers. They also noted that not residing in a flat for a year would void policy, although were not able to provide policy wording to this effect or give the exact dates that flat 25A was vacant. In relation to increased insurance premiums, there was no documentation produced however the Applicants gave evidence that they paid approximately £520 for the current year compared to £450 last year.

The Respondents' case

27. In summary, the Respondents' position is that they accept that refurbishment works were carried out (as summarised as agreed facts above) and that there was some disruption by their contractors (although they were not directly privy to it). They said that it was naivety which led them to carry out works without prior consent, they have not owned a flat before and did not believe consent was required. Upon the assertion that it was, they sought retrospective consent, and it was not forthcoming.

28. On the issue of structural alterations, the Respondents' deny that any works carried out constituted structural alteration or addition. They say that they checked with the contractor, Mr Halfyard, and he stated that this was not structural. Ms Matthew had known him a long time, so they trusted his judgement. In respect of fixtures, they believed that it was permissible to replace new for old, they were improving the value of the Property. They relied upon a homebuyers survey undertaken during the purchase process, which made recommendations for general modernisation of the bathroom and kitchen, and flat 25A generally. As for their repairing obligation, they said that they believed that they were entitled to improve the condition of their flat. The works were done competently and all gas and electrical works were certificated. There was only one issue with a light switch at the bottom of the stairs, this was traced to a faulty lamp which was replaced.

29. On the issue of nuisance, the Respondents accepted that there was some disruption to the Applicants, albeit they were not present at the Property so did not witness it themselves. They said it was likely to have been more of an issue only in the first few weeks of the works and that, to their knowledge, all works were carried out within permitted hours. They described these as 8:00 am to 18:00 pm on weekdays and 8:00 am to 13:00 pm on Saturdays. There was no work on Sundays except occasional tool collection, with advance notice to the Applicants. They said that it was notable that no other neighbours had complained. They spoke to Mr Halfyard and he wanted to resolve matters. They conceded that he probably was not present on site as much as he should have been. Following completion of the works, they offered around £6,000 to the Applicants but they refused to accept this. They

expressed unhappiness that relations had become strained. Miss Phanphet scared to stay in the flat so did not do so very often because of this. They are dog lovers so never intended any harm to the Applicants' dogs but denied that they had caused this and pointed to the lack of evidence connecting the refurbishment works with the death of any animal.

30. On the issue of the insurance, the Respondents said that they did not believe that the insurance was voided. They said that no insurance details had ever been given to them.

The Tribunal's determination

31. The Tribunal is required to determine the question of whether there has been a breach of covenant on the civil standard of proof, i.e., on the balance of probabilities.

32. The Tribunal determines as follows:

33. It is clear from the Lease that flat 25A comprises everything within its four walls including the previous internal wall, bathroom and kitchen furniture, cisterns, tanks, sewers, drains, pipes, wires, ducts and conduits exclusively serving it. Clause 2(c) of the Lease expressly prohibits the removal of the freeholders' fixtures in the absent of prior written consent. There is no inventory to identify what fixtures were existent in the flat when the original lease was incepted in 1986.

34. The Lease includes at clause 4(a) a repairing obligation to ensure that the flat is kept in good tenantable repair and condition.

35. It was apparent on inspection of flat 25A that extensive refurbishment had been carried out including: replacement of radiators and associated pipework; replacement of bathroom furniture (sink, faucet, toilet, and bathtub; replacement of kitchen cupboards, shelves and cabinetry; doors and skirting boards except the entrance door, hardwood flooring (we were told carpet existed originally); replacement electrical fuse board with consumer unit; replacement electrical rewiring and new outlets; replacement light fittings. It is likely in the Tribunal's view that some adjustments were made where replacements have been made, for example to plumbing fittings and electrical outlets.

36. The works undertaken involve removal of fixtures for the purposes of replacement, such as radiators, kitchen furniture and bathroom furniture. The Tribunal has insufficient evidence to determine whether the items present were present in 1986 or at some later date as replaced by the freeholders or their predecessors. The Tribunal accepted the evidence of both parties that prior consent was not obtained before removal of the items. In broad terms works appears to have been

carried out to a modern and reasonable standard, although a detailed condition was not carried out and is not the function of the Tribunal.

37. Clause 4(a) of the Lease requires the Respondents to keep their flat in good and tenantable repair and condition (our emphasis). It does not require the consent of the freeholder when undertaking works in fulfilment of this obligation. The Tribunal considers that they complied with this duty, which implicitly requires replacement and in some cases improvement or upgrading of items from time to time. To the extent that this might conflict with any duty not to remove fixtures, the Tribunal finds that a duty not to remove refers to a permanent removal and does not extend to mere replacement. There were no items which were removed and not replaced, hence the Tribunal determined that clause 2(c) of the Lease was not breached in respect of the obligation not to (permanently) remove the freeholders' fixtures. In any event, where there are conflicting provisions, the Tribunal finds that the Respondents are not in breach of the Lease to the extent that they were obliged to, and have, complied with clause 4(a).

38. On the issue of structural alterations, the Tribunal's view is that there were no structural alterations carried out by the Respondents. The chasing in of walls to accommodate pipework or wiring does not, in the Tribunal's view, constitute a structural alteration or addition. The internal wall was non-load bearing and was removed to create an open space between the kitchen and dining area. This appears to have been accepted by the Applicants themselves, for example in an email dated 2 November 2022. In that email they said: *"It was a solid brick wall that I don't believe was structural nor would anyone mind you taking it down, just in a bit more of a peaceful manner which would have been appreciated."* This email is indicative of the view that the Tribunal has formed that much of the objection by the Applicants in this case is to the manner that the Respondents undertook the works, rather than the works themselves. This email also suggests that the Applicants might well have approved the removal of the wall had they had advance notice as required by the Lease.

39. However, the internal wall was not replaced. The consent of the freeholder was therefore required. The Respondents did not obtain that consent so there was a breach of this requirement. It is not for the Tribunal to determine the consequences of such a breach. However, we makes the observation that, in our view, this is not a serious breach in the sense that there was no damage caused to the Property.

40. On the issue of nuisance, the Tribunal accepts the evidence from both parties that there was some disruption, including noise and some damage to flat 25, in particular parts of the ceiling. The Respondents admitted that there had been some damage but the scope and value were not agreed between the parties. There also appeared to have been some confrontations between the contractors and the Applicants. It is

not for the Tribunal to determine those issues (nor did it have the evidence to do so), only whether there has been a breach. To the extent that a breach has caused harm, or the works carried out lawfully but still caused harm, that is a matter outside our jurisdiction. The Tribunal considers that there has been no breach. The test for nuisance is whether there is a unreasonable use of land causing interference, as set out by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] UKHL 14. Internal flat refurbishment works are common place and, whilst errors were made, this does not itself cross the threshold to unreasonableness on the part of the Respondents. The works were not of an unusual type or duration and the Applicants did not satisfy the burden of proving that there was an unreasonable use of the flat by the Respondents or, as the case may be, that they should be liable for the behaviour of independent contractors. For the avoidance of doubt, paragraph 3 of Schedule 4 of the Lease does not apply. It covers the playing of instruments and the like and its wording or purpose does not extend to routine building works.

41. On the issue of insurance, the Tribunal was not presented with any evidence of a breach and cannot find one to have taken place. The Applicants had not presented the Respondents with any insurance documentation by which they could have known what would, or would not, have comprised a breach of the policy terms. There were no policy terms available for review. On the balance of probabilities, the modest increase in premium is likely attributable to natural market increases.

42. In summary, we do not find the majority of allegations of breaches of the Lease proven save that prior consent was required for the removal (and non-replacement) of the non-load bearing wall.

43. We also observe that the dispute between the parties became rather acrimonious and the communications we had seen demonstrated somewhat of a bunker mentality. There was evidence before is of the freeholders installing CCTV footage, and framing extracts from the Lease and hanging them in the common entrance area. There was some solicitors' correspondence and hostile communications between the parties. There were heated exchanges between the Applicants and the contractors. This is all unfortunate although largely did not assist the Tribunal in determining the central issues of alleged breach. It is hoped that this Judgment provides some certainty so that the parties can resolve their remaining disputes.

44. For the avoidance of doubt, this decision is not an order for forfeiture of the Lease or payment of any sum of money. It is a determination that limited aspects of works undertaken by the Respondents without the freeholders' written consent amounted to a breach of covenant within the Lease.

45. No application for a refund of fees was made and the Tribunal makes no order in respect of the same.

Name: Judge A. Arul **Date: 5 May 2025**

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).