FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00KF/LBC/2023/0010**
HMCTS code	**:**	**P:PAPERREMOTE**
Property	**:**	**25A Ronald Park Avenue, Westcliff-on-Sea, Essex SS0 9QS**
Applicant	**:**	**Barry Maguire and Kelly Allen**
Respondent	**:**	**Sathita Phanphet and Liam Phelan**
Type of application	**:**	**Application for permission to appeal**
Tribunal members	**:**	**Judge A. Arul** **Gerard F. Smith MRICS FAAV**
Date of Decision	**:**	**2 June 2025**

DECISION

Decision

1. The Tribunal has considered the Applicants' request for permission to appeal to the Upper Tribunal (Lands Chamber) dated 21 May 2025 and determines that:

    a. It will not review its Decision; and

    b. Permission be refused for appeal to the Upper Tribunal (Lands Chamber).

2. The Applicants may make a further application for permission to appeal directly to the Upper Tribunal (Lands Chamber). Any such application must be made no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission to appeal.

3. Where possible, the Applicants should make any further application for permission to appeal online using the Upper Tribunal's online document filing system, called CE-File. This will enable the Upper Tribunal to deal with it more efficiently and will enable the parties to follow the progress of the application and submit any additional documents quickly and easily.

4. Information about how to register to use CE-File can be found by going to the following web address:

    https://www.judiciary.uk/guidance-and-resources/practice-direction-for-the-lands-chamber-of-the-upper-tribunal-electronic-filing-ce-file/ jU

5. Alternatively, it is possible to submit an application for permission to appeal by email to: Lands@justice.gov.uk.

6. The Upper Tribunal can also be contacted by post or by telephone at: Upper Tribunal (Lands Chamber), 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL (Tel: 020 7612 9710).

Reasons

7. The relevant provisions in respect of appeals are set out in the Practice Directions of the Upper Tribunal (Lands Chamber) dated 2 January 2024 ("the Practice Directions").

8. Paragraph 11.14 of the Practice Directions provides that permission to appeal will be granted if the Tribunal considers that the proposed appeal has a realistic prospect of success, unless the sum or issue involved is so modest or unimportant that an appeal would be disproportionate. Permission to appeal may also be granted if the Tribunal considers there is some other good reason for an appeal.

9. The Applicants have filed extensive grounds, comprising 38 pages along with a case list and several enclosures within a bundle totalling 121 pages. There are three core challenges in relation to the Tribunal's findings on clauses 2(c)

(fixtures), 4(c) (insurance) and paragraph 1 to the Fourth Schedule (nuisance) to the Lease. There are additional challenges based on alleged procedural impropriety and application of the relevant legal tests across a range of factual findings. This comprises a wholesale challenge to the majority of the Tribunal's findings of fact.

10. This decision addresses the pertinent arguments with a view to identifying whether any have a realistic prospect of success or otherwise justify permission to appeal being granted. This decision cannot proportionately deal with every argument which is raised in the appeal document. It is necessary to consider whether, even if an argument has a realistic prospect of being 'correct', it would have made a difference to the overall outcome.

11. In relation to clause 2(c) of the Lease, the Tribunal determined that the Respondent leaseholders were in breach for removing a non-structural wall without consent but found that removal of other fixtures was not a breach; because they were replaced.

    a. The Applicants say that the Tribunal erred because removal of a fixture is a breach even if new items are installed thereafter. They say that contractual obligations must be interpreted strictly, not diluted by convenience. In *Arnold v. Britton* [2015] UKSC 36, the Supreme Court highlighted that contractual interpretation must be by reference to the parties' intentions as a reasonable person with the background knowledge available to the parties would have understood them to be. This requires focusing on the meaning of the relevant words in their documentary, factual and commercial context, but disregarding subjective evidence of any party's intentions. To the extent that there is ambiguity, the Lease is ostensibly the freeholder's document, therefore the doctrine of *contra proferentem* would favour the Respondents. The Tribunal's interpretation that removal means <u>permanent</u> removal in the context of freeholder's non-structural fixtures in a long residential lease was open to the Tribunal on the facts.

    b. The Applicants say that the Tribunal erred in finding that the absence of a 1986 inventory prevented a finding of breach because this failed to recognise that title to any fixtures present passed to them as freeholders upon each historical assignment. Further, that a fixture is defined by the degree and purpose of annexation, not the existence of an inventory. This misses the point that there was no evidence of what was present or not at any time prior to the material events. An inventory was one way of satisfying this. Exploring the degree of annexation was another. The Applicants provided neither. It was open to the Tribunal to find that the Applicants had not provided sufficient evidence as to what items were removed and whether they belonged to the Applicants.

    c. Even if the Applicants succeeded in demonstrating that the Tribunal erred on both (a) and (b) above, there is no realistic prospect of demonstrating that the overall outcome would have been different. It was open to the Tribunal to find as a fact that clause 4(a) comprised a covenant on the leaseholder to keep the premises in good and tenantable

repair and condition, that this included an obligation to renew items and that such renewal did not require the freeholder's consent. *Lister v Lane and Nesham* [1893] 2 QB 212 does not assist the Applicants. It supports the proposition that a covenant to repair is not a covenant to give a different thing from that which the leaseholder took when they entered into the covenant. However, to allow fixtures to deteriorate without replacement would be to give something less. That replacement gives something more does not negate the fact that it may be necessary or desirable to avoid giving something less.

12. In relation to Clause 4(c) of the Lease, the Applicants say that the Tribunal erred in requiring evidence of actual insurance voidance or premium increase rather than considering a lower threshold of whether any act or thing done by the Respondents may have had such effect.

    a. The Tribunal decision makes clear that the Applicants did not provide a copy of the terms of any policy. There was therefore no evidence before the Tribunal by which to say whether any of the works carried out by the Respondents, or activities of their contractors, or the contractors' qualifications or insurance (or absence of) could, hypothetically, constitute a breach of any policy. Likewise, without evidence of any claim or notification to the insurers, or application for renewal terms, there was no evidence before the Tribunal that anything the Respondents or their contractors did could, hypothetically, affect the premiums. It was open to the Tribunal to require evidence rather than suppose that it was more likely than not that an insurer had any right to void the policy or had taken account of the risk of historical unauthorised works in setting a marginally higher premium.

    b. The Tribunal was entitled to consider that 'may' was not an abstract concept and needed to be grounded in some specific obligation under the terms of a specific insurance policy and by reference to specific activities by the Respondents. The finding that the Applicants did not prove its case was open to the Tribunal. The burden was on the Applicants and the suggestion that the Respondents should have provided counter evidence that premium increases were not due to any act or omission by them has no prospect of success.

    c. The Applicants argue that no structural assessment was carried out before the non-load bearing wall was removed; thus, it is argued, placing the insurance policy at risk. Leaving aside the absence of the policy wording to verify this, the Respondents' evidence was that their builder assured them that he was confident that the wall was non-structural. This transpired to be correct. It was open to the Tribunal to find on the facts that there was no risk and therefore require more than assumption that an insurer would have exercised any avoidance rights based on potential risk.

    d. *Fargnoli v GA Bonus Plc* [1997] CLC 653 does not assist the Applicants. There were no facts to disclose to the insurers; there was no evidence to say that the mere loss of the opportunity to investigate whether the wall

was structural or not was a disclosable risk. Even if the Applicant succeeded in showing that deprivation of that opportunity 'may' have voided the policy, there was no policy wording available or evidence from the insurers to support any obligation to tell them anything at all at that early stage of the works.

e. The Tribunal decision refers to the Applicants' own written admission that the wall was non-structural. The Applicants cannot have reasonably believed that the policy was at risk of being void or voidable. There is no realistic prospect of a finding that the Tribunal erred in failing to accept on the balance of probabilities that an insurer would regard the policy at risk.

13. In relation to paragraph 1 of the Fourth Schedule of the Lease, the Tribunal heard evidence of the interferences described by the Applicants but made a factual finding that they did not cross the threshold to become actionable nuisances.

a. There was no evidence of complaints from neighbouring properties. The Respondents did not deny that there had been noise and some altercations but did deny that work had commenced as early as contended for by the Applicants. The Respondents' evidence was that they did talk to their builder and were assured that care was being taken. The duration of the interferences was short and in keeping with the type of works undertaken.

b. *Hunter v Canary Wharf* [1997] UKHL 14 was relied upon for the general proposition that an interference must constitute an unreasonable user of land to comprise a nuisance. This is coupled with the give and take principle (*Bamford v. Turnley* (1862) 3 B & S 66). It is correct that this principle can be adapted for older buildings or flats. It was open to the Tribunal to find on the facts that the threshold of unreasonableness was not met where domestic works were carried out over a short period and the Applicants were the only ones who had complained. There is no realistic prospects of this finding of fact being an error of law.

c. Paragraph 1 of the Fourth Schedule of the Lease prohibits use *"from which a nuisance can arise."* The Applicants contend that this is broader than common law nuisance but cite no support for this proposition. There is no realistic prospect of a finding that the Tribunal erred in inferring a test of unreasonable user into the Lease wording; such is within its function of contractual interpretation.

d. It is correct that a leaseholder can be vicariously liable for the nuisance of a contractor if the nuisance was a foreseeable consequence of the contractor's activity, and the leaseholder took no steps to avoid the nuisance. This requires there to be a nuisance, which the Tribunal found was not the case. Even if the Applicants were to demonstrate that such finding was in error, the Tribunal was entitled to accept the Respondents' evidence that they spoke with their contractor and took steps to avoid the nuisance. Further, the correspondence referred to,

including from solicitors, occurred after the initial disruptive works when the Respondents' flat was being stripped out. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, is distinguished, it is not sufficient to merely be 'aware', the leaseholder must 'adopt' the nuisance, ostensibly or by continuing it themselves. There was no evidence before the Tribunal that this occurred and there was insufficient passage of time for the Tribunal to infer it (nor was it invited to).

14. In relation to procedural matters:

    a. Insofar as the Tribunal made factual errors over (i) the location of defective light fitting (hallway / bedroom), (ii) the CCTV (timing of installation) and (iii) the offer (offer not accepted / no agreement over quantum) none were material to the outcome. There is no realistic prospect of the Applicants demonstrating that the findings as to breaches or not of the Lease were contingent on any of these points of fact.

    b. The signed surveyors' report was considered by the Tribunal as shown on page 61 of the Applicants' hearing bundle. The observation from the Tribunal was merely that the report was signed by the surveyors' firm not the individual surveyor. There was no comment to say it would not be considered. The report was not mentioned in the decision because it deals with the extent of works carried out and this was not in issue.

    c. It is not accepted (according to the panel's notes) that, during the hearing, the Applicants were explicitly informed by the Tribunal that case law could not be used as part of their submissions. It is unlikely that such a comment would be made in such blanket terms. It is possible that the Applicants were told that a point of law was trite law, or mentioned in their papers, and did not need to be repeated. Even if the Applicants' account is accepted, they did in fact rely upon several authorities – see, for example, pages 70 to 72 of their hearing bundle. On page 71 therein, reference is made by the Applicants themselves to *Hunter v Canary Wharf* [1997] UKHL 14. The appeal is therefore misconceived in suggesting (i) that no authorities were permitted or considered, given that the Applicants' own authority was considered, and (ii) that the Tribunal deprived the Applicants of authorities yet relied upon authority itself, given that the case relied upon was cited by the Applicants themselves.

15. In the circumstances the Tribunal does not consider that there is any realistic prospect of a successful appeal in this case. The Tribunal also does not consider that there is any other good reason for an appeal and therefore permission to appeal is refused.

Name: Judge A. Arul **Date: 2 June 2025**