FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAU/LBC/2015/0128**
Property	:	**Flat C, 388 Caledonian Road, London, N1 1DN**
Applicants	:	**Mr & Mrs Lear**
Representative	:	**Mr Jamal Demachkie (Counsel)**
Respondents	:	**Mr Malcolm Donald Allen & Ms Paula Elizabeth Barkay**
Representative	:	**Ms Lucy Barry (Solicitor)**
Type of Application	:	**Declaration as to a breach of covenant – section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Judge Robert Latham** **Mr Ian Holdsworth BSc MSc FRICS**
Date and venue of Paper Determination	:	**10 February 2016 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 March 2016**

DECISION

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1. The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, a breach of the lease has occurred in that the Respondents have:

(i) repartitioned some internal stud walls without obtaining the consent of their landlord;

(ii) replaced internal pipes without the consent of their landlord.

2. The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The Application

1. By an application issued on 19 November 2015, the Applicants seek a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent tenants are in breach of their lease in respect of Flat C, 388 Caledonian Road, London N1 1DN ("the property") in that they have (i) repartitioned some internal stud walls without obtaining the consent of their landlord; and (ii) replaced internal pipes without the consent of their landlord.

2. On 26 November, the Tribunal gave Directions:

(i) The Respondents' Statement of C is at p.43 of the Bundle.

(ii) The Applicants' Supplementary Case in Reply is at p.61.

3. At the hearing, the Applicants were represented by Mr Jamal Demachkie, Counsel instructed by Seddons, Solicitors. The Respondents were represented by Ms Lucy Barry, a Solicitor with Shoosmiths LLP. We are grateful to the assistance that they provided.

The Law

4. Section 168 of the Act provides as follows:

> (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.
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> (2) This subsection is satisfied if—
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> (a) it has been finally determined on an application under subsection (4) that the breach has occurred,
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> (b) the tenant has admitted the breach, or
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> (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. Strictly, all this Tribunal is asked to determine is whether the Respondents have breached a term of their lease. It is not for this Tribunal to consider whether another Court might grant relief from forfeiture.

The Lease

6. The lease is dated 30 April 2002 (at p.9). The tenant covenants:

"3.7 not to make any structural or external alterations or any additions to the Premises without the prior written consent of the Landlord, such consent not to be unreasonably withheld or delayed."

"3.8 not to make any connection with the Pipes serving the Premises otherwise than in accordance with plans and specification approved by the Landlord (such approval not to be unreasonably withheld or delayed subject to consent to make such connection having previously been obtained from the competent authority or undertaker)."

Our Determination

7. It is common ground that the Respondents carried out works at the property between November 2014 and May 2015. Those works included:

(i) The repartitioning of some non-load-bearing stud walls;

(ii) reconfiguration of the kitchen, living room, bedrooms and shower room which necessitated the replacement of internal pipes. The Respondents state that they merely replaced internal pipes, attaching the new pipes to the original connection where existing pipes enter into and within the property.

8. The works are described in the Respondents' letter dated 5 October 2015 (at p.49). This contains a sketch plan of the new layout of the flat (at p.51). Some indication of the existing layout of the property can be seen from the lease plan (at p.11).

(i) The Replacement of the Stud Walls

9. The Respondents contend that Clause 3.7 only relates to works that affect load bearing walls. Ms Barry refers to the definition of "the Main Structure" in Clause 1.4 which "means the roof and foundations of the Building and the external half of the main load bearing walls of the Building severed medially". She also refers to the definition of "the Premises" in Clause 1.2 which specifically includes (at 1.2.3) "the internal load bearing walls. She therefore suggests that the lease distinguishes load-bearing and non-load-bearing walls and Clause 3.7 is only intended to relate to the former.

10. Mr Demachkie contends that a conflation of the word "structural" with "load bearing" or "related to structural stability" is impermissible. The very fact that the lease differentiates between "Main Structure" (which is normally restricted to parts of the building which affects its stability) and "structural alterations" (which is wider in meaning) shows that the parties intended the two references to mean something different from one another. He suggests that it is telling that in the definition section the lease differentiates between load-bearing and non-load bearing walls, whilst Clause 3.7 makes no such distinction.

11. We have been referred to [13.060.4] of Woodfall "Landlord and Tenant". We have found the following passage to be of particular assistance:

> ""*Structural alterations*" have been defined by the Court of Appeal as "permanent alterations which affect the structure of the premises"; those which "would affect the form and structure of the premises" and those which involve "any substantial alteration, extension or addition to the fabric of the house". A house is a complex unity. "Structure" implies concern with the constituent or material parts of that unity. The constituent or material parts involve more than simply the load bearing elements, for example the four walls, the roof and the foundations. The constituent parts are more complex than that. "Structural" is that which appertains to the basic fabric of the house as distinguished from its decorations and fittings. The installation of kitchen sinks and cookers with the necessary plumbing work does not amount to a structural alteration. It is submitted, therefore, that the expression "structural repairs" is intended to distinguish those which involve interference with the basic fabric of the house—its walls, roof, foundations floors and so forth— from those which do not. The structure of a dwelling-house consists of those elements which give it its essential appearance, stability and shape. Although this is a good working definition, it must not be applied slavishly; and the particular context may require a different meaning to be given.

12. We have also been referred to the following authorities:

> (i) *Pearlman v Keepers and Governors of Harrow School* [1979] 1 QB 56. At p.72G-H, Geoffrey Lane LJ suggests that it matters not whether the fabric is load bearing or otherwise. At p.79, Eveleigh LJ held that structural means "appertaining to the fabric of a building so as to be a part of the complex whole";

(ii) *John Michael Bent v High Cliff Developments Ltd* (a decision dated 6 August 1999 of Mr Nicholas Warren QC, sitting as a Deputy Judge of the High Court). At [30], he held that the phrase "structural alteration" must be construed in the context of the lease;

(iii) *Grand v Gill* [2011] 1 WLR 2253 and the judgment of Rimmer LJ at [20] to [26]. He held that wall and ceiling plaster in the subject flat were part of the structure of the subject flat. He was satisfied that plasterwork was in the nature of a smooth constructional finish to the walls and ceilings to which a decoration can then be applied, rather than a decorative finish in itself.

13. We are satisfied that the repartitioning of some of the internal stud walls constitute structural alterations for which the landlord's written consent was required. Clause 3.7 does not distinguish between load and non-load bearing walls, albeit that that distinction is made elsewhere in the lease. We are also satisfied that the internal non-load bearing walls appertain to the basic fabric of the property as distinguished from its decorations and fittings. The phrase "structural alterations" is intended to distinguish between works that involve interference with the basic fabric of the property, namely its walls, ceilings and floors, from those that do not.

(ii) The Replacement of Internal Pipes

14. Ms Barry referred us to the definition of the word "pipes" in Clause 1.20 which extends to all pipes, sewers, drains, wires and cables. No new connections have been made. She contends that Clause 3.8 should be construed as relating only to any new connection the pipes serving the property.

15. Mr Demachkie argued that it was impermissible to re-write the lease by adding the word "new" to Clause 3.7. Clause 3.8 rather extends to any connection to the pipes. If the tenant connects apparatus which requires too much of the external pipes, it could lead to pipes failing, for example the excessive use of a foul drain or overloading the electrical system entering the property. The pipes leading to the property belong to the landlord and remain his responsibility. Thus whether the connections are new, or mere replacements, any connection must be checked to ensure that it has no impact on the existing system.

16. We accept the Applicants' submission. Clause 3.8 relates to any connection. It is apparent from the plan at p.51 that significant works have been executed involving the reconfiguration of the kitchen, the bathroom and the shower room. The landlord has a legitimate interest in checking the impact of these works on the existing system. In reality, most of the replacement connections may entail no significant material change. However, the landlord had the right to check that this was the position, before the works were undertaken. The tenant is protected by the requirement that the landlord's consent is not to be unreasonably withheld.

(iii) Discretion

17. The Tribunal raised with the parties whether we have any discretion to make a determination that a breach of covenant has occurred. May a tribunal refuse a determination if satisfied that the breach has been remedied by the date of the hearing, or if it is trivial or is being pursued by the landlord for ulterior reasons? Neither party suggested that we had such a discretion, albeit that this is an important issue that is to be considered by the Upper Tribunal. If we have a discretion, we are satisfied that this is a case where we should make a determination. Both parties are looking to this Tribunal to vindicate the position that they have taken. The likely consequence of our finding is that the landlords will require the tenants to seek their retrospective consent for the works.

18. The Respondents have asked the Tribunal to make an order under section 20C of the 1985 Act. Having regard to our findings above, we are satisfied that it is not just and equitable in the circumstances for such an order to be made under.

Judge Robert Latham

18 March 2016

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.