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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LBC/2017/0046**
Property	:	**24a Halliford Street, London N1 3HB**
Applicant	:	**London Borough of Islington**
Representative	:	**Mr B Maltz of counsel**
Respondent	:	**Mr James Brown**
Representative	:	**In person**
Type of Application	:	**Determination that a breach of covenant has occurred (Commonhold and Leasehold Reform Act 2002, s 168(4))**
Tribunal Members	:	**Tribunal Judge Richard Percival** **Mr John Barlow JP FRICS**
Date and venue of Hearing	:	**13 November 2017** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 December 2017**

DECISION

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The application

1. The applicant landlord seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the respondent tenant has breached covenants in the lease.

The property

2. The property is a ground, first and second floor maisonette forming part of a converted period mid-terrace house. The property is located in the East Canonbury Conservation Area in the London Borough of Islington.

3. The Tribunal inspected the property on the morning of the hearing, accompanied by the respondent in person and Mr Maltz of counsel and Mr Pope, the head of housing at Partners for Improvement in Islington, which manages the freehold on behalf of Islington.

The lease

4. The lease, which was granted in 2004 under the right to buy legislation, is for 125 years commencing in 1987.

5. In clause 1(1) of the lease, the following is (amongst other things) excepted from the demise:

   > "main structural parts of the Building (including the roof and foundations and external parts thereof the frames of the windows but not the interior faces of such parts of the external walls as bound the demised premises or the rooms therein)"

6. The applicant contends that the respondent has breached two provisions. The first is clause 3(18), by which the tenant covenants:

   > "At all times during the said term at the Tenant's expense to comply in all respects with the provisions and requirements of any relevant legislation for the time being in force and in particular the Town and Country Planning Act 1990 and all orders or regulations made under such legislation and all licences consents and conditions granted or imposed thereunder ... "

7. The second is clause 3(20), by which the tenant covenants:

   > "Not to make any structural alterations or additions to the Building or to the demised premises whatsoever unless

authorised by any relevant legislation for the time being in force in particular the Town and Country Planning 1990 and first having obtained the Council's prior written consent."

8. The respondent acquired the leasehold interest in 2013. He is resident abroad, and lets the property.

The hearing and the issues

Representation and witnesses

9. The applicant was represented by Mr Ben Maltz of counsel. Mr Salah Kettani, a Senior Planning Officer (Enforcement) at the London Borough of Islington, and Mr Pope gave evidence.

10. Mr James represented himself, and gave evidence.

Brief factual outline

11. The lease plan shows a single bedroom, in addition to the hall, on the ground floor. On the first floor, it shows a kitchen at the rear of the property and a living room and bathroom at the front. The second floor is described as storage space. By the time the maisonette was acquired by Mr James, the second floor was used as a bedroom, consent for which had been granted at some time.

12. After he acquired the leasehold in 2013, the respondent re-ordered the first and second floors. Both rooms on the first floor became bedrooms, and the second floor became a kitchen/living room. A velux roof light was installed in the front slope of the roof, facing the street.

13. The application relates to this re-ordering and associated works.

The issues

14. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) Whether the respondent has breached clauses 3(18) and 3(20) by installation of the velux window in the kitchen;

    (ii) Whether the respondent has breached clauses 3(18) and 3(20) by virtue of not obtaining building regulations approval for the installation of a new kitchen on the second floor and in respect of the work to install the kitchen;

    (iii) Whether the respondent has breached clauses 3(18) and 3(20) by virtue of not obtaining building regulations approval for the

re-ordering of the maisonette to constitute a three bedroom dwelling.

15. In relation to the issues relation to building regulations, the application insufficiently particularised the alleged breach. The Tribunal accordingly gave directions to allow for both parties to make written representations in relation to the matter, the applicant by 28 November and the respondent by 5 December 2017. The applicant provided such submissions timeously. The respondent's submissions were received after the deadline. In what follows, we have accordingly taken into account the former and discounted the latter.

The velux window

16. Section 55 of the Town Planning Act 1990 defines "development" for the purposes of the requirement for planning permission. By section 55(1), the term means the carrying out of, amongst other things, building operations. That term is defined in section 55(1A)(c) as including structural alterations to buildings.

17. Under the Town and Country Planning (General Permitted Development) Order 1995, the instrument in force at the time of the alterations to the property, certain developments which would otherwise require planning permission are permitted to be undertaken without such permission.

18. The property is located within the East Canonbury Conservation Area. By a direction under article 4 of the 1995 Order, the London Borough of Islington notified that that Order should not apply within the Conservation Area in respect of (among other things) "the ... alteration of a dwelling house where any part of the ... alteration would front the highway" and "any alteration to the roof of a dwelling house where the relevant roof slope fronts the highway."

19. Mr Maltz submitted that accordingly planning permission was required for the velux window for two reasons. First, the article 4 directive took the relevant work out of the permitted development framework. Secondly, being a leasehold maisonette, the property did not fall within that framework in the first place ("dwelling house" does not include a flat, and see definition of flat: article 1(2)).

20. Mr Brown initially contested that planning permission was necessary for the installation of the velux window, but following Mr Maltz's submissions, conceded that it was required. Mr Brown had not applied for planning permission.

21. Mr Brown similarly initially resisted the submission that the installation of the velux window amounted to a structural alteration, such that permission from the applicant was required under clause

3(18) of the lease. However, during argument he conceded that, if the roof was part of the structure for the purposes of the lease, then the velux window was an alteration to the structure, and he was in breach of the covenant.

22. It is clear from clause 1 of the lease that "the main structure" includes the roof.

23. *Decision*: The respondent has breached clause 3(18) by installing the velux window without planning permission, and has breached clause 3(20) both for the same reason and because he did not seek or receive the written consent of the applicant to do so.

The installation of the kitchen

24. Mr Maltz argued that the installation of the kitchen involved breaches of the lease in two ways.

25. First, he submitted that the installation required building regulations consent, which had not been secured, thus breaching both clause 3(18) and the compliance with legislation limb of clause 3(20).

26. The Building Regulations 2010 ("the Regulations") require, under regulation 12(2), a person who intends to carry out building work (as broadly defined in regulation 3) or to replace or renovate a thermal element in a building, to either provide a notice to the local authority (under regulation 13) or deposit full plans (under regulation 14). A "thermal element" is (relevantly) a wall, floor or roof which separates a "thermally conditioned" part of a building from the outside. There is no definition of "thermally conditioned" in the Regulations. We take it to mean a part of the building the temperature of which is artificially regulated.

27. It is not contested that the respondent has neither served a notice nor submitted full plans under regulation 13 or 14. The applicant asserts that one of these two requirements subsists, without specifying which. Similarly, it is not contested that the respondent has not sought to secure a regularisation certificate in respect of unauthorised work under regulation 18(2).

28. The applicant's case is that the relocation of the kitchen "consisted of notifiable works requiring building control approval" under the Regulations. The applicant sets out the "relevant requirements" set out in schedule 1 to the Regulations as F1 – adequate ventilation and H1 – an adequate system of drainage.

29. The applicant does not set out why it considers that the work undertaken to provide the kitchen on the third floor requires notification.

30. The requirement to notify (or submit plans) under regulation 12 applies to those who intend (among other things) to "carry out building work". Under Regulation 3(1)(b), "building work" includes (among other things) "the provision ... of a controlled service or fitting".

31. A "controlled service or fitting" is a service or fitting to which parts G (sanitation, hot water safety and water efficiency), H (drainage and waste disposal), J (combustion appliances and fuel storage systems), L (conservation of fuel and power) or P (electrical safety) of Schedule 1 to the Regulations apply.

32. It is clear that, in intending to install a kitchen, the respondent was intending to provide services or fittings to which those parts apply. At this stage, it is irrelevant whether the installation did, in fact, comply with the substantive requirements. The fact that the services/fittings are ones to which those parts of the Schedule apply means that the fitting out of the kitchen amounted to building work within the requirements of regulation 12; and accordingly were subject to the notification/plan provision requirements of that regulation.

33. In the light of this finding, it is not necessary to consider whether the installation of the velux window amounted to the replacement or renovation of a thermal element (ie the roof).

34. Secondly, Mr Maltz argued that the installation of the kitchen involved structural alterations, and thus was in breach of the consent requirement in clause 3(20). This submission was put on two bases. First, over the kitchen hob is an extractor fan. Mr Maltz argued that the fan must discharge to the rear of the building. Secondly, the provision of other services - water, gas and waste water – must have involved structural alteration.

35. Mr Brown conceded that the extractor fan discharged through ducting going through an external wall at the rear of the building. He accepted that if the external wall was part of the structure, then the installation of the fan amounted to a breach of the clause.

36. As to the other services, Mr Brown's evidence was that, as the new kitchen was immediately above the old kitchen, provision of the service only involved drilling holes through the floorboards of the second floor (and, presumably, similarly penetrating the ceilings beneath). Although the pipes were hidden from view by cabinets or trunking, the installation had not involved breaking the external walls. To the very limited extent that our inspection permitted, it supported this view (the waste pipe from the washing machine, for instance, was visibly clear of the external wall).

37. Mr Maltz argued that even if the floorboards were not within the "main structural parts" (which was not conceded), clause 3(20) clearly contemplated the possibility that that there were elements of the structure, properly speaking, that did not fall within the definition of "main structural parts" in clause 1. The question was one of fact and degree, and the floorboards fell into this category of demised structural parts.

38. Mr Brown's submission was that the floorboards could not properly be described as structural.

39. We do not consider that the floorboards are within the un-demised "main structural parts". The matters set out in parentheses in clause 1(1) act to create an un-demised skin around the maisonette. The general expression "main structural parts" should be construed in the light of these specific terms, all of which delineate only the external borders of the property. We consider that if the drafter of the lease had wished to depart from that model by making some part or all of the internal floors of the flat the responsibility of the landlord, then that would have been expressly stated.

40. We agree with Mr Maltz that the lease encompasses the possibility of demised structural parts. But we agree with Mr Brown that, on any normal language understanding of the expression "structural alteration", it would not include moderate penetration of floor boards to accommodate pipes or wires.

41. *Decision*: (1) the fitting out of the kitchen amounted to building works requiring notification, or the submission of a plan, under the Building Regulations 2010, and no such notification or submission of a plan took place. The effect of this failure is as specified in paragraphs [47] and [48] below. (2) the penetration of the roof to accommodate the ducting of the hob extract fan constitutes a structural alternation and accordingly is a breach of clause 3(20). (3) The boring of holes in the floorboards to accommodate wires and pipes for the installation of the kitchen does not amount to structural alternations and does not breach clause 3(20).

The re-ordering of the property and Building Regulations

42. The applicant submits that the re-ordering of the maisonette so as to provide for a third bedroom required notification or submission of a plan under regulation 12(2) of the Regulations, and the failure to do so (or apply for a regularisation certificate) is a breach of clause 3(18).

43. As with the installation of the kitchen, the applicant does not specify how the duty to notify is said to arise. The applicant's submissions assert that it does, and refers to Part B1 and F1 of schedule 1, relating to means of escape and ventilation respectively.

44. In his submissions, the applicant makes separate submissions in relation to the installation of the kitchen and in relation to the re-ordering of the use of the rooms to provide an additional bedroom, a pattern we follow in this decision.

45. If the re-ordering were considered as completely separate from the installation of the kitchen, then it is not clear to us that such an operation would constitute "building work" for the purposes of the Regulations. It does not appear to fall within any of the categories set out in regulation 3(1) (including "material change of use" under regulation 6, as per regulation 3(1)(d)). The breaches relied on by the applicant are not substantive breaches of the requirements of schedule 1 (and if it were, then we would require expert evidence to establish such breaches). Rather, the applicant relies for breach on the failure to notify/submit a plan. If an operation does not qualify as "building work", then no such breach arises.

46. We have not been referred to any authority on the matter. However, we consider that it would be artificial to separate out the installation of the kitchen from the other works associated with the re-ordering of the flat. If an operation consisting of various distinct works includes some that count as "building work" within the definition in regulation 3, then it appears to us that the operation as a whole is the relevant category. If the respondent had complied with regulation 12, it would appear to us to defeat the intention of the Regulations if the local authority could only ensure that requirements relating to the kitchen, as the works which rendered the operation "building work", were satisfied, when it might otherwise also consider requirements pertaining to other elements of the operation, such as those mentioned by the applicant.

47. Accordingly, we prefer the conclusion that there has been a single breach of the requirements of the Regulations by the respondent by failing to adhere to regulation 12 in relation to the re-ordering of the flat, including both the installation of the new kitchen and the other associated changes to the flat.

48. *Decision*: In failing to notify, or submit a plan, under the Building Regulations 2010, regulation 12, in respect of the works to fit out of the kitchen and to undertake the other works to re-order the flat, the respondent has breached clause 3(18) of the lease and the compliance with legislation limb of clause 3(20).

Name: Tribunal Judge Richard Percival **Date:** 18 December 2017