FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UH/LBC/2018/0033
Property	**:**	Flat 3, 17 Winchester Road, Worthing, BN11 4DJ
Applicant	**:**	DK Majo Estates Limited
Representative	**:**	Ben Maltz (counsel)
Respondents	**:**	Kevin Leake
Representative	**:**	Not represented
Type of Application	**:**	Determination of alleged breach of covenant
Tribunal Members	**:**	Judge N P Jutton and Mr M J F Donaldson FRICS
Date	**:**	26 March 2019 Havant Justice Centre, Elmleigh Road, Havant, PO9 2AL
Date of Decision	**:**	8th April 2019

DECISION

---

1 **Introduction**

2 The Applicant, DK Majo Estates Limited, makes an application to the Tribunal pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that the Respondent Kevin Leake has breached a covenant or condition contained in the lease of Flat 3, 17 Winchester Road, Worthing, BN11 4DJ (the Property). In particular the Applicant contends that the Respondent has committed a breach by reason of the use to which the Property has been put and by carrying out certain unauthorised alterations.

3 **Documents before the Tribunal**

4 The documents before the Tribunal comprise a bundle of some 193 pages which include the Applicant's application, the Respondent's Lease (including a Deed of Variation), Statements of Case, correspondence and legal authorities. References to page numbers in this Decision are references to page numbers in the bundle of documents.

5 **The Statutory Provisions**

6 Section 168 of the Commonhold and Leasehold Reform Act 2002 provides:

> *"(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 (c20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless sub-section (2) is satisfied.*
>
> *(2) This sub-section 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.*
> *…*
>
> *(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".*

7 **The Lease**

8 The Respondent's Lease is dated 26 July 2017. It is in the form of a Deed of Surrender and Grant of New Lease made between the Applicant and Respondent (12-17) (the Lease). It provides for the surrender of a Lease dated 30 September 1988 made between Double 9 International Limited

(1) and Rosario Antonio Cocchiara and Wendy Bradbury (2) (14-17) (the Old Lease) and the grant of a new lease. Clause 5 of the (new) Lease incorporated into the Lease the covenants provisions regulations conditions and other matters contained in the Old Lease as if they were set out in full in the Lease as varied by it. The variations related to the term and the ground rent payable. Accordingly references to the provisions of the Lease in this Decision are by reference to those provisions as set out in the Old Lease

9 The Lease contains the following provisions (as set out in the Old Lease):

10 Paragraph 9 of the recitals states:

"The Lessor has previously sold or granted or proposes to sell or grant long leases of the flats in the property and intends to impose restrictions similar to those set forth in the First Schedule hereto to the intent that the owner or lessee for the time being of any part of the property or any flat therein will be able to enforce the observance of the restrictions by the owners or occupiers for the time being".

11 By clause 2 the lessee covenants with the lessor and with the owners and lessees of the other flats in the property to observe the restrictions set out in the First Schedule. The First Schedule includes the following provision at clause 1/15 of that Schedule:

"The demised premises shall not be used or permitted to be used for any purpose whatsoever other than as a private residential flat in one family occupation nor for any purpose from which a nuisance annoyance or disturbance can arise to the owners lessees or occupiers of the other parts of the property nor for any illegal or immoral purpose nor shall any auction be held therein at any time".

12 Paragraph 1/16 of the same Schedule states:

"No act or thing shall be done or permitted which may render void or voidable any policy of insurance or cause an increased premium to be payable".

13 Clause 3 contains further covenants on the part of the lessee, in particular:

"3(C) Not to make any structural alterations or structural additions to the flat nor to erect any new buildings thereon or remove any of the Lessor's fixtures or in any way to alter the exterior appearance of the Flat without the previous consent in writing of the Lessor such consent not to be unreasonably withheld".

14 At clause 4 the lessee covenants with the lessor and with the owner and lessees of other flats comprised in the Property as follows:

"4(A)(i) Remedy all defects in and keep the interior of the Flat in good and substantial repair and condition....
(ii) Without prejudice to the generality of Clause 4(A)(i) above the interior of the Flat includes (a) the internal partition walls (b)the glass

and all the moveable and opening part of the windows the internal window catches and sash cords the door to the balcony (if there be one) doors of the Flat (c) the ceilings below the level of the joists (d) the floors above the level of the joists (e) the interior faces of all the walls enclosing the Flat (f) all cisterns tanks sewers drains sanitary and water apparatus pipes and cables wires and appurtenances thereto belonging to and used exclusively by the occupants of the Flat and within the boundaries thereof."

.....

"4(D) Not to do or permit to be done any act or thing which may cause any increase to extra premium to be payable for insurance of the Flat or the property or any part thereof or which may render void or voidable any policy or policies of such insurance ...

4(G) Use the Flat for the purpose of a private residence of one family only.

4(H) Keep the floors (except the kitchen and bathroom) close carpeted and under-felted and take every precaution for ensuring quietness in the property including the placing of rubber insulators under any piano forte gramophone wireless or television set or any sewing machine washing machine spin dryer refrigerator or other machine kept in the Flat or take other effective means to deaden sound".

15 **The Issues**

16 The issue before the Tribunal is whether or not there has been a breach by the Respondent of a covenant or condition in the Lease, in particular:

i has the Respondent allowed the Property to be used for a purpose other than as a private residence of one family in breach of clause 4(G) and paragraph 1/15 of the First Schedule to the Lease. If so, has that had the effect of causing an increase in the property insurance premium for the Property in breach of clause 4(D) and paragraph 1/16 of the First Schedule (The First Issue);

ii has the Respondent carried out structural alterations or structural additions to the Property without the previous consent in writing of the Applicant in breach of clause 3(C) of the Lease (The Second Issue);

iii has the Respondent by installing laminate wood effect flooring throughout the Property committed a breach of clause 4(H) of the Lease (The Third Issue).

17. **The First Issue**

18. **The Applicant's case**

19. Mr Maltz confirmed that the Applicant no longer seeks to rely for the purposes of this application on the allegation that there has been a breach

on the Respondent's part of paragraph 1/16 of The First Schedule to the Lease or clause 4(D).

20. Mr Maltz took the Tribunal through the provisions of the Lease. He referred to the a form of undertaking (126) dated 1 November 2018 signed by the Respondent whereby the Respondent undertook not to use the Property for short term lettings or "*accommodation for transient/temporary occupiers*" but which undertaking contained a proviso (added by the Respondent) that in giving the undertaking the Respondent did not accept that such use constituted a breach of the terms of the Lease. Prior to that undertaking Mr Maltz said there had been a breach on the part of the Respondent. He referred to a printout from the 'Airbnb' website (58/61) which showed seven postings from guests who had stayed at the Property during the summer of 2018. The issue he said was whether the type of lettings which had taken place constituted a breach of the terms of the Lease.

21. Mr Maltz referred to the Tribunal to *Iveta Nemcova v. Fairfield Rents Limited (2016) UKUT 303(LC)* and to *Bermondsey Exchange Freeholders Limited v. Ninos Koumetto* a decision of the County Court of Central London dated 1 May 2018. The relevant clause in Nemcova was said Mr Maltz in very similar terms to that contained in the Lease. The clause in Nemcova was:

"*not to use the Demised Premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence*"

The provision in Koumetto was:

"*not to use or permit the use of the Demised Premises or any part thereof otherwise than as a residential flat with the occupation of one family only…*".

The latter was Mr Maltz submitted on "*all fours*" with the provision at clause 4(G) and paragraph 1/15 of The First Schedule to the Lease. The only material difference was the use of the word "*private*" in the Lease. If anything Mr Maltz contended the use of the word "*private*" in the Lease strengthened the Applicant's case.

22. There was Mr Maltz said no distinguishing feature in this case and accordingly the Tribunal was bound to follow the decisions in Nemcova and Koumetto and to find there was a breach. The key factor Mr Maltz submitted was the question of the degree of permanence. As the Upper Tribunal put it at paragraph 53 in Nemcova:

"*I have reached the view, consistent with the decision of the FtT, that the duration of the occupier's occupation is material. It does seem to me that in order for a property to be used as the occupier's private residence, there must be a degree of permanence going beyond being there for a weekend or a few nights in the week. In my judgement, I do not consider that where a person occupies for a matter of days and then leaves it can be said that during the period of occupation he or she is using the*

property as his or her private residence. The problem in such circumstances is that the occupation is transient, so transient that the occupier would not consider the property he or she is staying in as being his or her private residence even for the time being".

23. Further at paragraph 65 in Koumetto the County Court stated:

"*….The covenant relates to the use of the flat as a "residential flat" only. What the Judge found was a series of arrangements for short term, transitory, occupation by strangers (to the Defendant) by way of what she described as "commercial hire". She considered that the meaning of clause 2.4 was "clear" and it prohibited use of the flat for any "commercial" purpose "such as hotels or bed and breakfast style letting, for example through Airbnb or such letting as the Defendant had done*".

24. Further at paragraph 66

"*…The user covenant is clear. Clause 2.4 is breached when the flat is not being used as a residential flat but as short term temporary accommodation for transient visitors paying for such use by way of commercial hire.*"

25. The nub of the decisions in Nemcova and Koumetto Mr Maltz submitted is the degree of permanence of lettings. That Airbnb lettings are not Assured Shorthold Tenancies. The occupiers are not committing themselves to occupying as residents. That the arrangement with Airbnb occupiers is purely one of expediency, a transient accommodation arrangement. That the only evidence before the Tribunal said Mr Maltz was the printout out from the Airbnb website in the bundle which shows in July and August 2018 seven reviews of the accommodation in quick succession. It was understood Mr Maltz said that the Respondent only started advertising the accommodation at the Property in June 2018. The Property was located in a seaside town and no doubt he suggested in the summer some of the lettings at the Property would have been holiday lettings or other temporary accommodation.

26. **The Respondent's case**

27. Mr Leake said that the undertakings signed by him (126) dated 1 November 2018 was not an admission of breach on his part nor he said was he asked to make an admission. The Applicant he said had produced no evidence of a letting pattern. That the lettings at the Property had been typically up to a month in length. The shortest perhaps 3 to 4 days. He had, he said many repeat guests. He mentioned a family who had needed temporary accommodation, a Chinese family who had just arrived in the country. The Lease Mr Leake said did not require him to obtain consent to sublet the whole of the Property.

28. Mr Leake sought to distinguish Nemcova and Koumetto on the following grounds:

    1. That as far as he was aware there had been no complaints from other residents in the building.

2. That he had not let the Property out on a bed and breakfast basis or as an hotel.

3. That he did not offer accommodation for hen or stag parties.

4. That he received repeat bookings from the same family.

5. That the average period of lettings had been for a much longer period than that referred to in Nemcova and Koumetto.

6. That he had not offered to cook food or provide meals for occupants.

7. He did not believe that all of the Leases at Winchester Road were on common terms as was the case Nemcova (see paragraph 63 of that Decision).

8. That Mr Leake's flat had its own separate private entrance. Occupiers did not use a common entrance and were not therefore occupying "*cheek by jowl*" with other residents.

9. That the provisions in the Lease relating to subletting and alienation differed from that referred to in the authorities relied on by the Applicant.

29. That the term *"private residence*" as in Koumetto was not Mr Leake said interchangeable with the terms in the Lease.

30. Mr Leake made reference to a decision of the Leasehold Valuation Tribunal (as it then was) *Keverstone Court Freehold Limited v. Becker and Baig (2012)*. That he said was a decision which supported his contention that the use of the property for short term lettings was not a breach of the covenant to use the property as a private residence of one family only.

31. In response Mr Maltz said that there were 6 flats at Winchester Road (a building converted into flats) which were all held on long Leases on common terms.

32. **The Tribunal's Decision**

33. Each case is fact specific. It is for the Tribunal to consider closely the terms of the Lease and in particular the covenant at clause 4(G) and paragraph 1/15 of The First Schedule. It is assisted by the authorities referred to by the Applicant and to the extent that the terms of the Lease may be "*on all fours*" with those decisions the Tribunal is bound by them. The Tribunal is not bound by the Keverstone Court Decision of the Leasehold Valuation Tribunal relied upon by Mr Leake which predates the Decisions in Nemkova and Koumetto.

34. The covenant in this case requires the Lessee not to use the Property otherwise than as "*a private residence of one family only*" (clause 4(G) or

for any purpose whatsoever "*other than as a private residential flat in one family occupation*" (paragraph 1/15 of The First Schedule).

35. It is noteworthy in the view of the Tribunal that paragraph 9 of the Recitals to the Lease makes it clear that the Lessor has or intends to grant Leases of other flats to contain Restrictions similar to those set out in The First Schedule to the Lease, no doubt including that at paragraph 1/15. As in Koumetto the context in this case is that of residents of flats living with and only with other residents. The Tribunal agrees with the Applicant that in considering the words "*private residence for one family only*" and similarly "*private residential flat in one family occupation*" that the duration and degree of permanence of residency is a key factor. In the view of the Tribunal the occupation of the Property pursuant to Airbnb arrangements during the summer of 2018 was not of a nature that could reasonably be said to have any degree of permanence. The occupancies seemingly could be measured in days or at most as Mr Leake said one month. Such occupiers could not have understood or believed that they were occupying the Property during their limited period of occupation as their private residence. Their occupation was of a temporary or transient nature. There was no degree of permanence such that an occupier could consider the Property as his or her private residence.

36. For those these reasons the Tribunal determines that the occupation of the Property by third parties during the summer of 2018 pursuant to the Airbnb scheme did amount to a breach of both clause 4(G) and paragraph 1/15 of the First Schedule of the Lease. The Tribunal notes that and understands that that breach is no longer continuing.

37. **The Second Issue**

38. **The Applicant's Case**

39. The works of alteration which the Applicant says the Respondent has carried out at the Property without consent as required by clause 3(C) of the Lease as set out in the Applicant's Reply (129 – 135). They are as follows:-

40. **Electrical works**

41. Those works included the Applicant says the installation of a new consumer unit and full rewiring throughout the Property. The need for the Respondent to obtain written consent for those works has been the Applicant says admitted by the Respondent. Mr Maltz referred to an email from the Respondent's Solicitor to the Applicant's Managing Agents dated 5 June 2018 (105). Under the heading of "*rewiring of whole flat involving new circuits*" the email states "*Our client acknowledges that he should have obtained consent*".

42. Mr Maltz also referred to a response to that email (85) dated 16 June 2018 in which the Managing Agent states "*had your client have applied for prior written consent, as he should have done, the consent would have been granted subject to the person carrying out the work to be a competent person i.e. a qualified electrician. Whilst Building Control*

may accept a competent person being called in after the event to check everything over and correct any problems that is not the point. No doubt your client is using the modified electrical installation now without holding a valid electrical safety certificate".

43. The Applicant understood Mr Maltz said that as such the consent referred to by the Respondent's Solicitor in the email of 5 June 2018 was the need to obtain consent to carry out the electrical works in accordance with the terms of the Lease. As such he submitted there was admission of breach on the Respondent's part.

44. In any event Mr Maltz said the works were of a nature which did require permission pursuant to clause 3(C) of the Lease being works amounting to structural alterations. That works constituting structural alterations were not limited to works carried out for example to external walls or supporting structures. They were works which interfered with the fabric of the building. That it mattered not whether or not the fabric in question was load bearing. He referred the Tribunal to the Court of Appeal Decision in *Pearlman v. The Keepers and Governors of Harrow School (1978) EWCA Civ 5.*

45. Rewiring Mr Maltz contended involved carrying out work behind the surface of the faces of the walls of the demise. That it involved breaking through walls. That it was invasive. That accordingly such work was of a structural nature and accordingly consent was required pursuant to clause 3(C). Mr Maltz submitted that where such internal works were carried out of alteration or renewal that the Applicant had an acute interest in those works to ensure that they are done properly and did not have an adverse impact on the freehold reversion. That the works were of such an invasive nature that they must amount to a structural alternation. That for example the installation a new modern consumer board could not be considered a like for like replacement.

46. **Partition Wall**

47. The Lease Plan (24) shows a form of partition wall between the kitchen at the Property and the lounge and hallway. The wall (and door within the wall) had at some time in the past been removed. That the Respondent has since constructed a new partition wall and installed a new door without consent. The Applicant did not Mr Maltz said have any direct knowledge as to whether the original configuration had been removed by a predecessor in title of the Respondents. However during a meeting at the Property between Mr Winter of the Management Company and the Respondent, Mr Winter had said that the wall should be replaced. That the Respondent had accepted that the wall and door had to be replaced. That conversation did not Mr Maltz submit amount to consent pursuant to the terms of the Lease. That is because clause 3(C) requires prior written consent. That to enable the Lessor to be satisfied that the works were carried out properly and compliant with Building Regulations and Fire Safety Rules. There was Mr Maltz said, if it were contended by the Respondent, no waiver on the Applicant's part to reply upon clause 3(C). That the nature of the works carried out fell within the definition of structural alterations or additions. That it mattered not whether the wall

was load bearing. Its construction amounted to work to the fabric of the Property (as per Pearlman) and as such consent was required pursuant to clause 3(C) which consent had not been granted.

48. **Kitchen Refurbishment**

49. Mr Maltz confirmed that the Applicant was not pursuing this matter. That on the basis that the Applicant understood that the works carried out were essentially just the replacement of kitchen units and cupboards and the installation of a new cooker and hob. On that basis and that basis only the Applicant accepted that the works did not amount to a structural alternation.

50. **Bathroom Refurbishment**

51. The Applicant says that the works carried out amounted to a full refurbishment of the bathroom including the creation of an airing cupboard, the installation of a new hot water cylinder and the fitting of a new shower cubicle and fittings. That it was understood that the works included relocating the hot water cylinder from the kitchen to the bathroom. That such works must have involved the installation of new pipework. That the works included the routing of an overflow pipe from the hot water cylinder through an external wall which Mr Maltz said on any analysis given that involved cutting through the structure of the Property must be works of a structural nature. Similarly that the construction of a new cupboard around the boiler that would be tied into the walls of the demise amounted to an interruption with the structure i.e. the fabric of the Property. As such the Applicant says consent to the works was required. It was not Mr Maltz said satisfactory for the Respondent to argue that the Applicant had to prove what works had been carried out when the Respondent had access to that evidence and had chosen not to produce it.

52. **Two Storage Heaters**

53. The issue here the Applicant says is similar to that in relation to the installation of hot water cylinder. That the installation of new storage heaters involves integration into the existing services at the Property. That it was legitimate for the Lessor to have some control over such works. That their installation amounted to works to the fabric of the Property.

54. **Windows**

55. The Respondent had, the Applicant says, replaced certain wooden windows at the Property with UPVC windows. That the Respondent had sought consent. Mr Maltz referred to a draft Form of Consent (127) prepared by the Applicant. That was he said an undated and unsigned document clearly marked "*draft*". That the granting of consent, as was clear from the face of the document, was conditional upon a number of matters being complied with by the Respondent. That included the production of a Registration Certificate from the "*Assure*" Scheme. The production from the window manufacturer of a product brochure and user manual. That it was clear the Applicant says that the Respondent

understood the need to obtain consent hence the production of the draft Licence. That in the event consent had not been granted because the conditions had not been complied with but nonetheless the works had been carried out. That the Respondent having asked for consent simply lost patience and got on with the works before consent was granted. That there was accordingly a breach of clause 3(C) of the Lease.

56. **The Respondent's Case**

57. **Electrical Works**

58. Mr Leake said that the email at page 105 had been taken by the Applicant out of context. That reference to obtaining consent did not necessarily mean reference to obtaining consent under the terms of the Lease. In fact the email was referring to the need to obtain Building Control Consent to the works. There had been no admission.

59 Mr Leake said that none of the works carried out amounted to an alteration. That the need for the works had been caused by the ingress of water into the Property because of the Applicant's failure to carry out repairs. Mr Leake referred to the Lessee's covenants at clause 4 of the Lease (30 and 31). Clause 4(A)(i) he said required the Lessee to remedy all defects to the interior of the Property. That further at clause 4(ii)(f) the interior of the Property was defined to include cisterns tanks etc. That definition Mr Leake said covered electrical works. That what he has done was to simply carry out work to replace faulty items with ones that worked. That there were no works of alteration. That as such permission for the works was not required under the terms of the Lease. All he had done was to comply with his repairing obligations.

60. **Partition Wall**

61. Mr Leake said that the partition wall had been removed before he purchased the Property. He did not feel that he was obliged to replace the partition wall but nonetheless had agreed to do so. That simply replacing or reinstating an internal wall did not amount to works of alteration.

62. **Bathroom Refurbishment**

63. Mr Leake said that when he purchased the flat it was in a poor state. That had been caused by the ingress of water due to a failure on the Applicants part to repair. That the works were not he said structural works. That the overflow pipe routed through the external wall could have been in place for many years. That the old cylinder must have had some form of pressure vent or overflow pipe. That the cylinder had been faulty and that he had simply instructed workmen to replace it.

64. The works carried out by him Mr Leake said were not comparable with the works carried out in Pearlman. That in Pearlman the work had been to change a coal fired heating system for a gas system. That the works carried out in Pearlman were major works which included works effecting load bearing walls. They were Mr Leake said "*major works*". That the works

that he carried out were not comparable. That he had only changed faulty components of the existing hot water system.

65. **Storage Heaters**

66. There were Mr Leeke said two storage heaters at the Property both of which required replacing. One had been damaged by flooding and the other was faulty. All he had done was replace the faulty storage heaters. They were not works of alteration that required consent.

67. **Windows**

68. Mr Leake said that the old windows had been inspected by him with the Applicant and that they had agreed that they needed replacing. That he has been told by Mr Winter that he would need to get retrospective written consent. With reference to the unsigned draft Form of Consent (127) the window manufacturer did not provide a product manual or user manual (a user manual was not needed Mr Leake said to try and understand how to open a window). That the window company were not able to obtain an "*Assure*" Registration Certificate. Upon being questioned by the Tribunal Mr Leake very reasonably said that he nonetheless accepted that he was required under the terms of the Lease to obtain written consent for these works. He had he said acted in good faith in the belief that he had consent and had provided all that the Applicant had asked for.

69. **The Tribunal's Decision**

70. Clause 3(C) of the Lease it will be recalled provides as follows:

"*Not to make any structural alterations or structural additions to the flat nor to erect any new buildings thereon or remove any of the Lessors' fixtures or in any way to alter the exterior appearance of the Flat without the previous consent in writing of the Lessor such consent not to be unreasonably withheld*".

71. The Tribunal is concerned solely with the issue as to whether or not there has been a breach of this clause by the Respondent. In particular whether the Respondent has carried out structural alterations or structural additions to the Property without obtaining the previous consent in writing of the Applicant.

72. The Applicant says that the works carried out by the Respondent are of a structural nature because they involve of the fabric of the Property. That it matters not whether the fabric in question is load bearing (Pearlman).

73. Save where he has made admissions, the Respondent says that he is not required to obtain consent because the works carried out by him are not in the nature of alterations or additions. That they are works that he was required to carry out in order to comply with the covenant at clause 4(A) of the Lease being works to remedy defects to the interior of the Property and to keep it in good and substantive repair and condition. In particular the Respondent says that the term "*interior of the flat*" includes by reference to clause 4(A)(ii)(f) cisterns, tanks, sewers etc.

74. Although the Tribunal may be assisted by authorities cited to it such as Pearlman it must primarily consider the natural and ordinary meaning of the wording of clause 3(C) in the context of the whole of the Lease having regard as far as it can to all of the relevant circumstances that would have been known to the original parties to the Lease.

75. Clause 3(C) requires consent in writing to be obtained by the Lessee prior to carrying out works which amount to "*structural alterations*" or "*structural additions*". Consent is also required if the Lessee wishes to remove any of the Lessor's fixtures or alter the exterior appearance of the flat.

76. In considering whether the works carried out by the Respondent are structural alterations or structural additions the Tribunal is of the view that it has to look at both whether the works are of a structural nature and whether they amount to alterations or additions. Pearlman says that "*structural*" means works that involve the fabric of the building as it was put by Lord Justice Lane:

" "*Structural" in this context means, I believe, something which involves the fabric of the house as opposed to the provision merely of a piece of equipment. It matters not whether the fabric in question is load bearing or otherwise, if there is any substantial alteration, extension or addition to the fabric of the house the words of the schedule are satisfied*".

77. The works in Pearlman were substantial works. They were substantial works of alteration and addition to the structure of the house. They were works to install a modern gas fired full central heating system to include 18 radiators and towel rails. They were works to supply hot water to baths and sinks. They were works to replace a coal fired boiler in the kitchen supplying hot water for sinks and baths and 2 radiators. The rooms in the house previously having been heated by ordinary coal fires. They were substantial works in the sense that they were adding something new to the structure of the house amounting to alterations and additions to the structure.

78. The Tribunal has considered clause 3(C) in the context of the Lease as a whole and in particular has had regard to the Lessee's covenants at clause 4. As set out above clause 4(A)(i) requires the Lessee to "*Remedy all defects in and keep the interior of the Flat in good and substantial repair and condition……*". Clause 4(A)(ii) goes on to state that "*the interior of the flat*" includes internal partition walls and at sub clause (f) "*all cisterns tanks sewers drains sanitary and water apparatus pipes and cables wires and appurtenances thereto belonging to and used exclusively by the occupants of the Flat and within the boundaries thereof*".

79. In the view of the Tribunal having regard to the terms of the Lease as a whole it could not have been the intention of the original parties nor of the draftsman that the Lessee was on the one hand required to remedy all defects etc. in accordance with clause 4(A) but at the same time would be required to seek the previous written consent from the Lessor to carry out such works. That arguably could give rise to an absurd situation whereby

consent was refused by the Lessor thereby preventing the Lessee from complying with his repairing obligations. There is a difference between works of alteration and addition (whether structural, as in Pearlman, or otherwise) and works to remedy defects or works to keep the Property in good and substantial repair and condition. To the extent therefore that the works carried out by the Respondent do not amount to works of alteration or addition (whether structural or otherwise) then consent pursuant to clause 3(C) for such works is not in the view of the Tribunal required.

80. **Electrical Wiring**

81. The Applicant says that there has been admission on the part of the Respondent that consent is required for these works. The Respondent says the reference in the email from his Solicitor dated 5 June 2018 (105) was not an acknowledgement that he was required to obtain consent under the terms of the Lease to the works but acknowledgement that he was required to obtain consent from Building Control. That the Applicant may have understood, the Respondent says wrongly, that he was acknowledging that he required consent under the terms of the Lease but it was wrong to do so.

82. On balance the Tribunal is of the view that it has insufficient evidence before it to make a determination that there has been an admission on the part of the Respondent. It notes that the email of 5 June 2018 goes on to say "*However, having spoken to Building Control they indicate that our client would need to have a qualified electrical connecting up to the electricity and such confirmation provided to you*". If anything the reference to Building Control (which is in the following sentence to that in which the Respondent's solicitor acknowledges that consent is required) suggests on balance that the consent being referred to is that to be obtained from Building Control as opposed to that required under the terms of the Lease.

83. The definition of the interior of the flat which the Lessee is required to keep in substantial repair and condition and to remedy all defects in includes "*cables, wires and appurtenances thereto*". In the view of the Tribunal works of rewiring are not works of alteration or addition. They are works to remedy defects. They may involve some degree of modernisation to comply with current standards and practices but nonetheless that does not make them works of alteration or addition. They are not works for which consent is required to be obtained by the Respondent pursuant to clause 3(C) of the Lease and as such the Tribunal finds that there is no breach of that provision on the Respondent's part.

84. **Partition Wall**

85. Internal partition walls are defined at clause 4 of the Lease as being part of the interior of the flat for which the Respondent is responsible for keeping in good and substantial repair and condition. The Tribunal notes that the Applicant has not had an opportunity to inspect the internal wall erected by the Respondent. However in the view of the Tribunal to the extent that the erection of a new wall by the Respondent was simply to

replace a wall previously removed by a predecessor in title such works are not works of alteration or addition. They are works to remedy a defect or of repair consistent with the covenant on the Respondent's part at clause 4(A). As such they are not works in the view of the Tribunal which require consent pursuant to clause 3(C) and accordingly the Tribunal finds that there was no breach in that regard on the part of the Respondent.

86. **Bathroom Refurbishment**

87. For the same reasons the Tribunal is of the view that these are not works of alteration or addition. It is unclear whether or not the outflow pipe that passes through the external wall was already in place or was inserted as part of the works of refurbishment. Clearly there will be a degree, as in other works, of modernisation. In the view of the Tribunal simply modernising or updating elements of the interior of the flat are not works of alteration or addition. For those reasons the Tribunal determines that there has been no breach on the Respondent's part of clause 3(C) of the Lease.

88. **Storage Heaters**

89. The Tribunal determines that these were not works of alternation or addition. They were simply works to replace existing storage heaters that had failed. They were works to remedy a defect and/or works to repair part of the interior of the property. As such the Tribunal determines that there is no breach on the Respondent's part of clause 3(C) of the Lease.

90. **Windows**

91. The Respondent has admitted that he was required to obtain consent pursuant to clause 3(C) of the Lease before carrying out works to the windows. As such by reason of Section 168(2)(b) of the Commonhold and Leasehold Reform Act 2002 the Applicant does not need a determination by the Tribunal. The Tribunal merely records the admission on the Respondent's part.

92. **The Third Issue**

93. **Applicant's Case**

94. The Applicant says clause 4(H) of the Lease is clear. That the Tribunal simply has to determine whether or not there has been a breach of that clause. That the Respondent's case as set out in Mr Leake's Statement (99) appeared to be that there had been a failure on the Applicant's part to explain to him what was meant by the term "*close carpeted*" so that he couldn't know what he should do to replace damaged carpets. Further that the suggestion made by the Respondent's Solicitor in a letter dated 22 June 2018 (92) that there could not be problems with noise emanating from the Property because of underlay placed below the laminate flooring missed the point. This Mr Maltz said was not a case of his client being pedantic. That although the Property is a ground floor flat it enjoys a party wall with other flats through which sound can travel. That as such clause 4(H) does secure a benefit of other Lessees in the building.

95. **The Respondent's Case**

96. Mr Leake said that he had to remove the existing flooring because of water penetration. That he had asked the Applicant for guidance as to what constituted the term "*close carpeted*". That had not been forthcoming. That he had he said spoken to five carpet companies who either had not heard of the term or gave conflicting advice. That it was Mr Leake said unreasonable for the Applicant to demand compliance with a covenant which could not be explained and which arose because of damage occasioned by the Applicant's alleged failure to repair. The laminate flooring he said had been down for eighteen months and that he was not aware of any complaints received from other Lessees or occupiers of the building. He believed that other ground floor flats in the building had laminate floors. That the wall separating the Property from other flats was originally an exterior wall and was therefore thick with no potential for noise transference.

97. Mr Leake referred the Tribunal to a First Tier Tribunal case of *Pledrean Properties Limited v. Lakovidou (2014)*.

98. **The Tribunal's Decision**

99. In the view of the Tribunal of clause 4(H) is clear. It requires the Lessee to keep all floors at the Property except the kitchen and bathroom "*close carpeted and under felted*". That the words "*close carpeted*" mean laying carpets flush to the inner face of the walls of the Property. What might be referred to as fitted carpets. Even if that were wrong it requires at the very least for carpet and under felt to be laid. Whether or not there is noise transference from the flat by reason of the laminate floors instead of carpets and whether or not there have been complaints from other occupiers of the building is irrelevant. The mischief aimed at by the clause to prevent noise transference may or may not have been breached but the strict terms of the clause in the view of the Tribunal have. The Tribunal is not assisted by the Decision of the First Tier Tribunal in *Pledrean Properties Limited v. Lakovidou*. The Tribunal is not bound by that Decision nor in any event is the Tribunal persuaded that the Decision supports the Respondent's case.

100. The Tribunal accordingly determines that the Respondent is in breach of clause 4(H) of the Lease by failing to keep the floors at the Property (save for the kitchen and bathroom) close carpeted and under felted.

101 **Other Matters**

102. At the conclusion of the hearing on 26 March Mr Maltz made an application for reimbursement from the Respondent of the application fee and hearing fee paid by the Applicant to the Tribunal pursuant to Rule 13(2) of the Tribunal Procedure (Frist-Tier Tribunal) (Property Chamber) Rules 2013 (The Procedure Rules).

103. The Applicant has succeeded in respect of two of the issues identified in this Decision. It has not succeeded in relation to its contention that prior

written consent was required in respect of the various works carried out by the Respondent at the Property. In all the circumstances it is in the view of the Tribunal reasonable to order the Respondent to reimburse to the Applicant one half of the fees paid by the Applicant to the Tribunal.

104. At the conclusion of the hearing on 26 March Mr Leake indicated that he was minded to make an application for costs. Although he represented himself before the Tribunal he had he said incurred costs in seeking legal advice. Rule 13(5) of the Procedure Rules provides that a party to proceedings before the Tribunal may make an application for costs pursuant to Rule 13 at any time during the proceedings or within 28 days after the date on which the Tribunal sends the parties its Decision. That a party who wishes to make an application for costs after receipt of the Tribunal's Decision must send or deliver the application to the Tribunal and to the other party. The application may include a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal (Rule 13 (4)(b)).

105. In the circumstances if either party wishes to make an application for costs pursuant to Rule 13 it is open for them to do so pursuant to the Procedure Rules.

106. If either party is minded to make an application for costs they may find it helpful to first consider carefully the circumstances under Rule 13(1)(b) of the Procedure Rules in which the Tribunal may make an order for costs and the decision of the Upper Tribunal (Lands Chamber) in *Willow Court Management Company (1985) Limited and Others v. Mrs Ratna Alexander and Others (2016) UKUT 0290 (LC).*

107. **Summary of Decision**

108. The Tribunal determines as follows:

1. That by using the Property to provide short term lettings through the online portal Airbnb the Respondent committed a breach of the covenant in his Lease at clause 4(G) and at paragraph 15 to The First Schedule thereof.

2. That the works carried out to the Property by the Respondent do not amount to works of structural alteration or addition and as such do not require prior written consent from the Applicant pursuant to clause 3(C) of the Lease. Accordingly the Respondent is not in breach of clause 3(C) of the Lease. The Tribunal notes however that the Respondent admits that he was required to obtain consent to work to replace the windows pursuant to clause 3(C).

3. That by failing to keep the Property close carpeted (save for the floors to the bathroom and kitchen) the Respondent is in breach of clause 4(H) of the Lease.

4. The Respondent shall within 28 days of receipt by him of this decision reimburse the Applicant 50% of the Tribunal fees paid by the Applicant.

Dated this 8th day of April 2019

Judge N P Jutton

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.