

## AnthonyJ Peach

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**From:** Jenna Peck  
**Sent:** 04 March 2009 11:57  
**To:** AnthonyJ Peach  
**Subject:** The Van Alen Building

**Attachments:** CAM\_00ML\_LBC\_2008\_0012\_CASE\_PAPERS.doc

Dear Tony

Please see the attached final reasoned decision from the Tribunal in the matters of 20/22 & 34 The Van Alen Building, Brighton, East Sussex, BN2 1WP.

Our Ref: CAM/00ML/LBC/2008/0012 & 0013  
Your Ref: CHI/00ML/LBC/2008/0023 & 24

Regards

Jen



CAM\_00ML\_LBC\_20  
08\_0012\_CASE\_PA..

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE**

**LEASEHOLD VALUATION TRIBUNAL**

**Case number : CAM/00ML/LBC/2008/0012 & 0013**

**(formerly CHI/00ML/LBC/2008/0023)**

**Property: App 0012 Flat 20/22, The Van Alen Building, Marine Parade, Brighton BN2 1WP**

**App 0013 Flat 34, The Van Alen Building, Marine Parade, Brighton BN2 1WP**

**Application :** For determination that the Respondent is in breach of a covenant or condition in a lease between the parties [Commonhold and Leasehold Reform Act 2002, s.168(4)]

**Applicant :** The Van Alen Freehold Ltd, (reg office) 37 The Van Alen Building, 24-30 Marine Parade, Brighton BN2 1WP

**represented by** Osler Donegan Taylor, solicitors, of Pavilion View, 19 New Road, Brighton BN1 1UF [ref : PB/AK/VanAlen/676/20]

**Respondents 0012** Nicola Jane Webb, Flat 20/22, The Van Alen Building, above

**0013** James Robert Webb, Flat 34, The Van Alen Building, above

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**DECISION**

Handed down 3<sup>rd</sup> March 2009

**Tribunal :** G K Sinclair, G J Dinwiddy FRICS, and D S Reeve

**Hearing date :** Tuesday 17<sup>th</sup> February 2009 at Hove Town Hall

**Representation :** For the Applicant — Paul Barnes, solicitor, Osler Donegan Taylor  
For the Respondents — Robert Webb (their father), with his wife Olivia Webb

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## Summary

1. These two applications concern the same Applicant, the same building and the same facts said to constitute the alleged breach. The two Respondents are members of the same family and share representation. The tribunal therefore considered it appropriate to deal with both matters together, and directions were issued to that effect.
2. Each application, under section 168(4) of the Commonhold and Leasehold Reform Act 2002, seeks a determination by the tribunal that the relevant Respondent is in breach of covenant. The short description given of each alleged breach of covenant is as follows :

The original boiler in [the relevant flat] was replaced with a condensing boiler. When replacing the boiler the replacement flue installed was larger than the original and differs markedly in appearance and stands out against the background of the building and rhythm of the remaining flues. This alteration to the exterior of the building is a breach of clause 2(12), clause 2(13) and clause 2(23)

3. Having inspected the premises externally and given due consideration to the relevant provisions of each lease, the evidence presented, and the parties' respective submissions the tribunal determines – for the reasons which follow – that the installation by the Respondents of replacement boilers and flues do not constitute breaches of covenant as alleged.

## Relevant lease provisions

4. Each application alleges that the Respondent is in breach of a number of covenants in his or her respective lease (which in all material particulars are similar). The covenants relied upon are as follows; with those excerpts quoted by the Applicant appearing in **bold** :

### Clause 2(12)

Not at any time during the said term without the licence in writing of the lessor first obtained and upon payment of any fee required by the lessor therefor to erect or place any additional wall building or erection on any part of the demised premises and **not without such licence as aforesaid to make any alteration in the plan or elevation of the demised premises or any part thereof or in any party walls or the principal or bearing walls or timbers thereof** and without prejudice to the generality of the foregoing not to alter any of the windows in the flat or the positioning thereof

### Clause 2(13)

**Not to do or permit any waste spoil injury damage or destruction to or upon the demised premises or any part or parts of the estate nor to do or permit thereon any act or thing which shall or may be or become illegal or immoral or a nuisance damage annoyance detriment or inconvenience to the lessor or the tenants or occupiers of the premises adjoining the demised premises or to the neighbourhood or which may reduce the value of any other premises on the estate**

### Clause 2(17)

**To pay the lessors all expenses (including solicitors' counsel's and**

**surveyors' fees) incurred by the lessor incidental to the preparation and service of a notice under sections 146 and 147 of the Law of Property Act 1925 and notwithstanding forfeiture is avoided otherwise than by relief granted by the court save where in any such proceedings the lessor is ordered to pay the lessee's costs or no order for costs is made**

*Clause 2(23)*

**To make good any damage to any part of the estate maintained property or the building maintained property caused by any act or omission or negligence of any occupant of or a person using the demised premises and (without prejudice to the generality of the foregoing) not to damage or interfere with the aerals and services of the building maintained property (whether or not attached to or included in the demised premises) or the fire-fighting /detecting appliances and equipment (if any)**

5. By clause 2(4) each lessee also covenants that s/he shall :

**From time to time and at all times during the said term well and substantially repair reinstate uphold support cleanse maintain drain amend and keep the demised premises and the fixtures therein and to clean both sides of all glass in all doors and windows in the external walls of the flat once each month and all walls and service installations cisterns mains water tanks and appurtenances thereof in good and substantial repair condition and appearance with all necessary reparations cleansing and amendments whatsoever all party walls shall be repairable as party walls (sic)**

6. By paragraph 35 of the Particulars to the Lease the expression "service installations" :

**means sewers drains channels pipes watercourses gutters mains wires cables conduits aerals tanks and apparatus for the supply of water electricity gas telephone and television signals and for the disposal of foul and surface water or any one of them**

#### **The law**

7. 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 (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 a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.
- (5) ...

- 8. Section 169 contains supplementary provisions which this decision need not record.
- 9. The question whether a lease is forfeit therefore remains one for the court, as is the exercise of its discretion to grant relief against forfeiture; an issue which in the context of a long lease is likely to be of considerable concern to any mortgagee of the tenant's leasehold interest.
- 10. Where the lessee is bound by a covenant restricting alterations the principle is that an alteration is effected only when the construction or fabric<sup>1</sup> of the building is altered,<sup>2</sup> and the mere installation of something new, such as a telephone or additional electric wiring would not ordinarily be a breach of a covenant not to alter the demised premises. It has also been held that the replacement of permitted air conditioning plant by new items to perform exactly the same functions was not an alteration or addition to the demised premises.<sup>3</sup>
- 11. Where the covenant is qualified by the need to obtain the landlord's licence or consent then by statute such consent is not to be unreasonably withheld in the case of alterations which are improvements.<sup>4</sup>

#### **Inspection and evidence**

- 12. As the Applicant's expressed concern was as to the visual effect of the replacement flues the tribunal inspected the exterior of the building only, and from ground level at both the front and rear. Mr & Mrs Webb, Mr Barnes and his assistant, and Mr T W Howard BSc MRICS were also present at the inspection.
- 13. Flat 34 is on the fourth floor, with the flue extracting to the street frontage. Flat 20/22, formerly a flat on the fourth floor (next to 34) and a narrower duplex situate to its rear and on the fifth floor, running from front to back, has a flue discharging to the rear.
- 14. The tribunal was informed that the Van Alen Building<sup>5</sup> had been built in about 1999, in

<sup>1</sup> Woodfall refers, at para 11.258, to the "form or structure", citing *Bickmore v Dimmer* [1903] 1 Ch 158

<sup>2</sup> In considering whether there has been an alteration the court is entitled to apply the *de minimis* rule : see *Taylor v Vectapike Ltd* [1990] 2 EGLR 12

<sup>3</sup> See *Hill & Redman* at para A[7380.160], citing *Hogee (London) Ltd v Co-operative Insurance Society Ltd* (1992) 63 P&CR 362

<sup>4</sup> See Landlord and Tenant Act 1927, s.19(2). If the alteration or addition sought to be made in fact effects an improvement, it comes within the sub-section : *Balls Bros v Sinclair* [1931] 2 Ch 325, and *Lambert v Woolworth & Co Ltd (No 2)* [1938] Ch. 883

<sup>5</sup> Named after William Van Alen, architect of the Art Deco-style Chrysler Building in New York

a 1930s Art Deco style. Although the render appears white in the photographs annexed to the Applicant's expert's reports the tribunal was informed that the building had been repainted in its current pale – almost battleship – grey since the contentious flues had been installed. For reasons which follow this was slightly surprising.

15. Each flat is heated by a gas boiler. As originally designed, each boiler is served by a separate inlet and outlet flue, 50mm in diameter, appearing as a horizontal pair of flues perhaps 200–300mm apart. Each flue projects perhaps 50–75mm, largely exposed at the sides, and with a solid baffle or end-cap of a pale colour. On the Marine Parade frontage the twin flues on the ground, first and second floors are sited just under the roof of each balcony. The pairs of flues are more or less vertically in line, giving the appearance of pairs of columns, but at first glance they would not be noticed from the street but for the long narrow stains below each outlet flue caused by dripping water. That such stains can have formed in the short period since the building was repainted is surprising.
16. On the fourth floor, however, the balconies are smaller, are inset within the face of the building, and occupy the location where the twin flues project on the floors below. On this floor a different solution is employed. The front of the building is stepped in design, with the flats on the fourth floor stretching the full width of each step. Those flats to the right of flat 34 (as viewed from the street) have a left-hand exterior wall. In each case the flues project from this otherwise blank wall (apart from the staining). Flat 34 has no such return wall, so its original twin flues project to the front, but in an entirely different location than those on the floors below. It did not form part of any pattern, or “rhythm” – as it has been described in the application.
17. The new, 100mm diameter concentric flue projects from the front wall at a lower point than the former twin flues. Due to the onset of this dispute Mr Webb has not completed the infilling and touching up of these flue holes, but he assured the tribunal that if he were not required to re-use them then the work would be completed immediately. His *bona fides* were not challenged. Although the new flue is twice the diameter of the former ones, and projects further from the wall (with no evidence of staining at all) it is also of a pale colour and, viewed from street level, does not thrust itself to the forefront of one's attention. Unless one knows what one is looking for, it is therefore inconsequential.
18. To the rear of the building the pairs of flues again ascend as dotted columns, save that on the ground floor the flues are offset appreciably to left or right. On the fourth floor there are recessed balconies, so the wall from which the flues project is set back from those below. The flues themselves project immediately below a slatted roof structure above each balcony, thus making them even less conspicuous. The new concentric flue to flat 20/22 is 125mm in diameter, but it occupies the position of the left-hand twin flue, just below the central bracket for the roof structure, which is of similar colour. The other flue hole has been filled in, although not yet repainted.
19. The evidence presented on behalf of the Applicant comprised a Report on Alterations dated 17<sup>th</sup> June 2008 by T W Howard BSc MRICS of Graves Son & Pilcher, a letter dated 18<sup>th</sup> April 2008 and a report of a site survey conducted on 8<sup>th</sup> May 2008 by David Beattie Associates, building services consultants, and some photographs. On the morning of the hearing a further fax was presented, confirming (to no-one's surprise) that the boilers

installed by the Respondents and those recommended by the Applicant each comply with current Building Regulations.

20. On behalf of the Respondents Mr Webb explained that when his daughter was living in flat 34 her ceiling needed to be repaired because of a problem with the flue concealed within it. The managing agents dealt with the insurance claim and repairs, but within two years it was happening again. British Gas came in and condemned both the boiler and the flue because water was draining back into the boiler and causing rust. His daughter was pregnant at the time, needed heating in the flat, and they had to replace the boiler and flue. Three quotes were obtained – none recommending the models proposed by the Applicant.
21. In the case of flats 20 and 22 Mr Webb said that he had obtained the freeholder's licence to convert both flats into one and believed that the change of boiler was included within that. However, upon the licence being produced, inspection of the attached architect's plans showed that all that was then being considered was the re-positioning of the existing boiler. It would appear that the decision to upgrade to a larger single heating system serving the previously separate flats came later.

#### **Discussion**

22. Gas-fired boilers installed after 1<sup>st</sup> April 2005, and oil-fired boilers installed after 1<sup>st</sup> April 2007, must be condensing boilers, whether they are replacements or new installations.<sup>6</sup> In these two cases replacement was due in one case to the failure of the original boiler and flue and in the other to the need for a larger and more efficient system to cope with the heating needs of what previously had been two separate flats. Replacement was therefore a necessity in one case and a desirable improvement in the other. The same is likely to be true for other flats within the block, as and when their central heating systems require updating, either due to inefficiency or unreliability. With a variety of manufacturers and many models on the market, each being periodically updated or replaced by later models, it cannot be assumed that the flue arrangements for some or all will remain unchanged. It is also questionable whether the need efficiently to expel moisture from condensing boilers is best served by the small diameter high-level outlet flues installed when the building was constructed.
23. In each of these cases the double flue arrangement has been replaced by a single larger, concentric flue. The Applicant objects that these disrupt the pattern of all the other flues, and that – unless prevented – an unfortunate precedent will have been established and the frontage of the building will be spoiled by an uncontrolled mix of differing flues; some concentric and others twin, and of differing diameters. The fact remains that the present flues are inappropriate for the discharge from condensing boilers. Even if twin flues of the same diameter can be employed they will not look the same as now, and may project further from the face of the wall. Of the models proposed in the Applicant's evidence one employs twin flues of 80mm diameter. If this is regarded as acceptable then the concern expressed by the Applicant would appear to focus on the number of flues rather than their size.<sup>7</sup>

<sup>6</sup> See Approved Document L1 to the Building Regulations 2000 (as amended)

<sup>7</sup> See para 4.1.1 in each of Mr Howard's reports dated 17<sup>th</sup> June 2008, referring back to para 3.0

24. While the tribunal sympathises with the freeholder's desire to preserve the appearance of the building, and agrees that the way forward should perhaps be discussed amongst the lessees, upon its analysis of the covenants relied upon the tribunal does not accept that the professional replacement of the existing heating system and flues falls within the definition of "injury damage or destruction" in clause 2(13) or "damage" in clause 2(23). The application stands or falls on whether the work done constitutes an "alteration" to the elevation of the premises, or to the principal or bearing walls thereof, in clause 2(12).
25. The tribunal considers that the replacement of one heating system with another, which necessarily must now be of a different type (a condensing boiler), does not affect the "form or structure" or "construction or fabric" of the building; alternatively the work is *de minimis*. Furthermore, the lessee is bound by the poorly drafted clause 2(4) to :

...well and substantially repair reinstate uphold support cleanse maintain drain amend and keep the demised premises and the fixtures therein and... all walls and service installations cisterns mains water tanks and appurtenances thereof in good and substantial repair condition and appearance

The tribunal regards this as including repairs to or replacement of the heating system in the demised premises.

26. The tribunal therefore determines that the Respondents are not in breach of covenant and the applications shall stand dismissed.

Dated 3<sup>rd</sup> March 2009



Graham Sinclair – Chairman  
for the Leasehold Valuation Tribunal