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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LBC/2014/0066**
Property	:	**Flat B, 13 Laurier Road, London NW5 1SD**
Applicant	:	**13 Laurier Road Limited**
Representative	:	**Mr Edward Hicks, Counsel**
Respondent	:	**Gergana Dragomirova Draganova**
Representative	:	**Mr Daniel Dovar, Counsel**
Type of application	:	**Determination of alleged breaches of covenant under section 168 of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	:	**Judge Timothy Cowen** **Mr Richard Shaw FRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**5 October 2015**

SUBSTANTIVE DECISION

Decision of the tribunal

The Applicant's application for a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 is dismissed.

The application

1. The Applicant seeks a determination under section 168 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent is in breach of various covenants contained in a lease dated 15 August 1986. Section 168 of the 2002 Act enables a landlord of residential premises to obtain such a declaration as a requisite prelude to the service of notice under section 146 of the Law of Property Act 1925 and subsequent forfeiture proceedings.

2. The application to the tribunal was dated 12 August 2014. The Tribunal heard evidence and submissions over the course of 4 days in March and April 2015.

Introduction

3. This is not an ordinary landlord and tenant scenario. 13 Laurier Road is a house which is converted into 4 flats. They are all held on long leases. The landlord company, which is the Applicant in this case, is owned and operated by two of the flat owners. The flat owner who effectively runs the landlord company (certainly for the purposes of this dispute) is Mr Rowe. The subject property in these proceedings is the Respondent's flat ("the Property"), which is the ground floor flat. Mr Rowe owns and occupies the basement flat, which is directly below the Property.

4. The nature of many of the alleged breaches mean that much of this dispute is more in the nature of a neighbour dispute than a traditional landlord and tenant dispute. This especially applies to the Applicant's allegations of noise nuisance and change of room use which would lead to noise nuisance.

5. The alleged breaches concern works to the Property which were carried out by the Respondent in June 2014. In particular, the works involved effectively knocking through two rooms into one continuous space by removing part of a wall and double-doors. Although there are 29 separate breaches alleged in the application, their alleged effects can be grouped in 4 categories:

    5.1. the effect on the structural fabric of the building.

    5.2. the effect on the use of rooms in the Property – "the Stacking Issue"

    5.3. the actual additional noise and other nuisance caused by and during the works.

    5.4. other miscellaneous effects such as the alleged failure to provide access to the Applicant's surveyor, floor coverings and other matters.

The Lease

6. The Property is the ground floor flat in a house converted into four flats. There is a lease of the Property dated 15 August 1986 ("the Lease") for a term of 125 years from 29 September 1985 at a ground rent. The Applicant is the current proprietor of the reversion expectant upon the Lease and the Respondent is the current proprietor of the leasehold estate having purchased it in June 2011.

7. The relevant covenants on the part of the Respondent lessee in the Lease are as follows:

   7.1. At clause 2(5), a covenant to observe the restrictions and regulations specified in the Fifth Schedule to the Lease, which we discuss in a separate section.

   7.2. At clause 2(8) a covenant to keep the Property in repair.

   7.3. At clause 2(10) a covenant to permit access to the lessor and its duly authorised surveyors and agents upon request and notice at all reasonable times for the purposes of inspection and repair.

   7.4. At clause 2(12)(a) a covenant not to do anything which would increase the risk of fire and have an adverse effect on the building insurance policy.

   7.5. At clause 2(13)(a) and (b) covenants not to make alterations except in certain circumstances. The whole of clause 13 is discussed in detail in a separate section.

   7.6. At clause 2(19) a covenant not to cause nuisance or annoyance.

   7.7. At clause 2(20) a covenant to keep the floors of the Property carpeted save for the kitchen and bathroom for which other provisions are made.

   7.8. At clause 2(24) a covenant to make good any damage caused by the lessee or her servants, agents or visitors.

8. The principal allegations of breaches concern the works carried out at the property commencing in June 2014. Some of the issues concerning those works and the question of consent revolved around 2 issues which the Applicant made the subject of further regulations. It will therefore be helpful to consider those issues before tackling the issue of the works themselves.

The Regulations: Stacking and the Guidelines

9. As noted above, clause 2(5) of the Lease requires the Respondent to comply with the restrictions and regulations specified in the Fifth Schedule. The Fifth Schedule contains a number of the usual sort of regulations of which the following are relevant to this application:

9.1. Paragraph 3: not to throw anything out of the window of the Property

9.2. Paragraph 10: not to allow people to loiter in the common parts

9.3. Paragraph 16: to keep all the floors covered with carpets and underlay other than the kitchen and bathroom which must be covered "suitably and properly".

10. Both the main body of the Lease and the Fifth Schedule provide for the possibility of the landlord making further regulations:

10.1. Clause 2(5) of the Lease provides that the landlord may make other restrictions and regulations "from time to time ... **in the interests of the good management of the Building** a copy of which shall be sent to the tenant at least seven days before they are due to take effect." (our emphasis added)

10.2. Paragraph 19 of the Fifth Schedule to the Lease provides as follows:

> "All further or other rules and regulations made at any time and from time to time by the Lessor in addition to or substitution for the foregoing rules and regulations or any of them which the lessor may deem **necessary or expedient for the safety care or cleanliness of the Building or any part thereof or for securing the comfort and convenience of all tenants in the Building** PROVIDED ALWAYS **that no such further or other rules or regulations may be made hereunder which shall subject the Tenant to any unusual or unreasonable burden** nor shall they take effect under the tenant has received seven days' prior written notice thereof."

11. In our judgment, these two provisions concerning alterations to the regulations should be read together. In order for the Applicant to introduce a new regulation, all the criteria highlighted above in bold therefore must be met and the Applicant must give seven days' notice after which the regulations take effect.

12. This is important in this case because two of the complaints against the Respondent concern new regulations which the Applicant purported to impose on the lessees:

12.1. The rule against stacking

12.2. Regulations concerning requests for consent to carry out alterations.

13. We now consider each of those issues in turn.

Stacking

14. A stacking arrangement is one whereby the use of specified rooms in a multi-dwelling building is stipulated and regulated so as to reduce the amount of disturbing noise between dwellings. Such an arrangement is designed to keep similar rooms above each other. For example, all the bedrooms would be vertically aligned through the building so that the residents would not be disturbed at night by the noise of a busier type of room.

15. In the Respondent's Property, it is common ground that the main front room was originally used as a bedroom and the large rear room was used as a living room. It is also common ground that the Respondent has changed that arrangement and that she did so soon after moving into her Property in mid 2011. The parties disagree on the question whether the use of rooms in the property is designated by the terms of the Lease.

16. On its face, the Lease does not contain a covenant requiring the tenant to use rooms only for specified purposes and not to change them. The Applicant relies on a 2010 licence for alterations which contained a plan which labelled the proposed new front room as a bedroom. In our judgment, that does not amount to a covenant not to change the use. In the context of a lease which did not previously expressly regulate the use of rooms, any document by which the parties agree to introduce such regulation should be explicit about the issue. Such a new covenant cannot and should not be implied from the labels on a plan or the descriptions of rooms in the body of the text which, in the context, are clearly intended to be a useful shorthand to identify rooms and nothing more. The Applicant also relies on the natural layout of the Respondent's flat which makes it more convenient to use the front as a bedroom because of the location of the access from the hallway. Otherwise, guests have to walk through part of the bedroom to gain access to the living room. That may be right, but the natural and convenient use of a room is not the same as saying that its use is mandated as a covenant in the lease.

17. There is a major flaw in the Applicant's objection to the Respondent's change of use of the rooms on the grounds of stacking. The use of the rooms in the flats in the Building is not vertically uniform in any event. If the Respondent were to comply with Mr Rowe's wishes as to the use of her rooms, then there would be stacking conformity between his flat and hers, but there would be a mismatch between the Respondent's flat and the flat above her. In other words, Mr Rowe's concern about stacking does not relate to his position as director of the Applicant

landlord company, but rather is a matter which solely benefits him as fellow occupier of the Building.

18. So in our judgment, at the time when the Respondent purchased her Lease, there was no covenant regulating the use of rooms within her Property.

19. Thereafter, the Applicant tried to impose a rule on stacking by invoking the clause (quoted above) which allows for further regulations to be made.

20. On 5 October 2012, Mr Rowe for the Applicant hand-delivered a letter to the Respondent stating that a rule had been made under paragraph 19 of the Fifth Schedule to the Lease "to secure the comfort, convenience and quite enjoyment for all residents". The rule was as follows:

> "Changing in the use of a room
>
> Not to change the use of a room, for example using a bedroom as a living room this is because most flats have a similar layout; bedrooms are above bedrooms and living rooms are above living rooms, which helps minimise noise nuisance. Having a living room above a bedroom may create a noise nuisance for neighbours."

The rule went on to describe two exceptions, namely (i) where there is a similar layout in the flat below and (ii) if it is a change in the upper level of a maisonette.

21. The day on which this new rule was delivered to the Respondent happened to be the day after the Respondent made her first request for consent to alterations.

22. The proviso to paragraph 19 of Schedule 5 to the Lease states that the landlord's power to make regulations may not be exercised so as to impose "unusual or unreasonable burdens" on the tenant. In our judgment, this purported regulation did seek to impose an unreasonable burden on the Respondent and was not therefore a valid exercise of the Applicant's power, for the following reasons:

22.1. it is a very intrusive regulation on the long leaseholders' freedom to use their space as they wish and there had apparently been no previous need for any such regulation when the lease was created in 1986 or since then. The Applicant was unable to demonstrate anything which had changed so as to make this regulation necessary, when it had not previously been necessary.

22.2. there is already a covenant against noise nuisance and there is no reasonable need for further restricting the tenant's freedoms for the same stated purpose.

22.3. as noted above, there was no vertical alignment in the whole building in any event.

22.4. there is no rational basis within the rule itself for allowing a tenant to change the use of a room if it would become aligned with a room immediately below, but preventing a tenant from changing the use of a room to align it with the use of a room above.

23. All of this demonstrates that the rule was designed for the personal convenience of Mr Rowe, who lives in the basement, and was directed towards restricting the Respondent's use of her rooms for Mr Rowe's own perceived comfort rather than for the Building as a whole. The rule was therefore not made as part of the landlord and tenant relationship.

24. The timing of the alleged new regulation showed that it was targeted at raising obstacles to the Respondent's proposals for alterations.

25. In any event, the stacking rule is of little use or application in this case, because it is common ground that the Respondent had already switched the use of the two large front and rear rooms before the attempt to impose this rule. She has not changed the use of the rooms after 5 October 2012 and the works she carried out did not, of themselves, effect any change in use of the rooms.

Guidelines for Applying for Permission

26. In July 2011, the Applicant issued to the Respondent a document headed "Guidelines for Works and/or Alterations to Leaseholder's Flat". It contained a long list of requirements and steps to be taken by a tenant seeking permission for alterations and then carrying out works. The list is described in this document as "a schedule of procedures which must be followed". The Applicant in this case argues that this document was also incorporated into the lease under its powers to add rules and regulations and that the Respondent's failure to comply with its terms is a further breach of the lease.

27. We disagree. Although the document is couched in mandatory terms, it does not say expressly on its face (or in any covering letter) that it is a new rule/regulation under the lease. In fact, it contains the following statement "The Schedule of requirements provides is to act merely as a guideline checklist and does not replace the conditions and covenants contained in your lease". In our judgment, this indicates clearly that the document is not intended to be incorporated into the lease. In

addition, the document specifies "corrective action" which may be taken for breach of the guidelines. The corrective action specified does not include any remedies under the lease, such as forfeiture.

28. For all those reasons, we hold that the Guidelines for Works etc document is not part of the Lease.

The Key Issues – the Alterations Works

29. The starting point when defining this dispute is to note that it is common ground that the Respondent carried out alterations works to the Property without the express consent of the Applicant.

30. The issues for determination on the question of alterations therefore amount to the following questions:

    30.1. Were any of those works prohibited by the absolute covenant contained in clause 2(13)(a) of the Lease?

    30.2. In respect of any works not prohibited by the absolute covenant, were they prohibited by the qualified covenant contained in clause 2(13)(b) of the Lease?

    30.3. In respect of the any works covered by the qualified prohibition, was consent unreasonably refused?

31. It would be helpful, before attempting to answer those questions, to set out what works were done and the events leading up to them.

The Key Events – the Alterations Works

32. There is a great deal of common ground between the parties about the dates and substance of the key events which can be summarised by way of the following chronology:

    (the key events, namely the requests for consent, the refusals and the commencement of work are highlighted in bold for ease of reading.)

    31.07.11 The Applicant sent to the Respondent guidelines for applying to the Applicant for permission for alterations

    04.10.12 **Proposal 1A:** The Respondent notified the Applicant of her intention to carry out alterations by sending plans and specifications to Mr Rowe.
    This involved:
    (a) removing the doors and part of the internal partition to create a new aperture of 2,800mm.

(b) relocation of the kitchen and bathroom to the rear of the existing middle room
(c) creating a new small room in place of the existing kitchen and bathroom.

08.10.12 The Applicant sent to the Respondent new rules to prevent stacking (see below) and an invoice for £1,000 costs of the application for permission for alterations.

14.01.13 The Respondent applied for licence to alter based on Proposal 1A.

08.03.13 **Refusal of Proposal 1A**: The Applicant replied saying that it is "not required to consider the proposal" because the proposed alterations are in breach of the absolute covenant against structural alterations in clause 2(13)(a) of the Lease. That refusal also cited service charge arrears and an allegation that there was an existing breach of covenant relating to use of rooms (namely, the Stacking Issue)

14.03.13 **Proposal 1B:** The Respondent submitted revised proposals. The revisions related only to the location of access to the proposed new bathroom.

22.03.13 **Refusal of Proposal 1B**: The Applicant replied on the same terms as the previous refusal, this time citing "recent legal advice".

27.03.13 The Respondent asked for clarification of the refusal, in particular which of her proposed works were in breach of the absolute prohibition in clause 2(13)(a).

04.06.13 The Respondent refused access to Mr Rowe to enter and inspect the Property following a leak into Mr Rowe's flat.

03.03.14 **Proposal 2A:** The Respondent submitted new proposals for alteration works and sought consent from the Applicant. This involved:
(a) removal of the doors between the rooms and the creation of an opening of unspecified size.
(b) realigning the wall between the existing bathroom and kitchen
(c) extending the kitchen
(d) installing a sliding partition in the large back room.

25.03.14 **Refusal of proposal 2A:** The Applicant refused consent on the grounds that the proposals were "contrary to the absolute covenant" in clause 2(13)(a)

28.03.14 The Respondent requested clarification of the refusal, in particular as to the specific proposal which contravened the

absolute prohibition against alterations. (No clarification was ever given).

07.06.14 **Proposal 2B:** In the absence of any response to the request for clarification, the Respondent submitted revised plans and schedules of works.

13.06.14 **Refusal of Proposal 2B:** The Applicant referred back to its letter of 25.03.14 refusing consent.

20.06.14 The Applicant again refused consent for alterations

23.06.14 **The Respondent commenced works.**

12.08.14 The Applicant made this application to the Tribunal.

The Nature of the Work Carried out by the Respondent.

33. The Respondent commenced work on 23 June 2014. The work has now been completed as the Tribunal saw when inspecting the Building. The only significant item which has not been carried out is the installation of a sliding partition in the large rear room.

34. The works carried out are broadly as follows:

34.1. The doors in the partition were removed and the aperture was widened from 1,500mm to 1,930mm. Its height was increased from 2,000mm to 2,373mm.

34.2. The wall between the existing kitchen and bathroom was realigned by removing it and rebuilding it along a slightly different line.

34.3. A new door was installed between the kitchen and the hallway thereby extending the kitchen.

34.4. a new shower stall was installed in the bathroom in place of the bath with accompanying plumbing alterations.

34.5. ceramic floor tiles were laid in the bathroom.

34.6. an engineered timber floor has been laid in the kitchen and hallway.

34.7. a new front door has been installed which is taller than the previous front door.

The Alterations Covenant

35. The alterations covenant is in the following terms:

> "(a) Not make or permit or suffer to be made any structural alteration in the plan elevation or appearance of the Flat nor make any structural addition thereto.
>
> (b) Not (without prejudice to the generality of the foregoing sub-clause) at any time during the said term make any alterations in or additions to the Flat or any part thereof nor cut maim alter or injure any of the walls beams or timbers thereof nor erect or remove (save with the consent in writing of the Landlord not to be unreasonably withheld) any internal partition or dividing rooms nor tamper with or make any alterations to the installation for the supply of heat for space heating or for supplying domestic hot water to the Flat … nor alter the Landlord's fixtures or fittings therein without first having made a written application (accompanied by all relevant plans and specifications in respect thereof) to the Lessor and secondly having received the written consent of the Lessor thereto and in any event expressly in accordance with the requirements of any local public statutory or other authority and of the insurance office or offices with which the Building may for the time being be insured."

36. The principal features of the alterations covenant appear to be:

36.1. It comprises two separate types of covenant, an absolute covenant contained in (a) and a qualified covenant contained in (b).

36.2. There may be some apparent overlap between works covered by each of these two parts. For example, cutting walls is covered in (b) and could also amount to a structural alteration of the plan or elevation in (a). That ambiguity is dispelled by the words in brackets near the beginning of (b) "without prejudice to the generality of the foregoing sub-clause". That means that anything which is capable of coming within both (a) and (b) is covered by (a) and not (b).

37. It is common ground that the Applicant in this case has not given consent for any of the works in question in this dispute, nor has it waived any covenants as a whole, nor has it agreed to vary the alterations covenant. It follows that the legal consequences of the two types of covenant contained in clause 2(13) are that:

37.1. If the Respondent has carried out works covered by (a), then those works are a breach of covenant and we must make a determination to that effect under section 168 of the 2002 Act.

37.2. If the Respondent has carried out works covered exclusively by (b), then there are two possible outcomes:

37.2.1. If the Applicant has unreasonably refused consent for those works, then the Respondent is entitled to carry out the works as if consent had been given. See *F W Woolworth v Lambert* [1937] Ch 37, CA

37.2.2. If the Applicant's refusal of consent for those works is reasonable, then the works are a breach of covenant and we must make the requisite section 168 determination.

38. The absolute prohibition in sub-clause (a) forbids:

38.1. "any structural alteration in the plan elevation or appearance of the Flat" and

38.2. "any structural addition thereto".

39. Because of the nature of the work carried out by the Respondent, the definition of the phrase "structural addition" is not as relevant as the definition of the phrase "structural alteration".

40. The definition of what is absolutely prohibited by sub-clause (a) can be broken down into the following questions:

40.1. is the work in question an alteration?

40.2. does it alter the plan, elevation or appearance of the Property?

40.3. is it structural?

41. It follows that an alteration in the plan, elevation or appearance of the Property which is not "structural" is not prohibited by sub-clause (a).

42. It is notable that the word structural only appears in sub-clause (a). It does not appear at all in sub-clause (b).

43. However sub-clause (b) contains a qualified prohibition on altering a number of items which are (or can be) structural, such as walls, timbers, beams and internal partitions. Since sub-clause (a) takes precedence over sub-clause (b), as described above, the interpreter would be entitled to assume that all structural alterations are covered by the absolute prohibition in sub-clause (a). In that case, what meaning can be given to the apparent prohibition on altering structural-type items in sub-clause (b)?

44. In our judgment, although sub-clause (a) takes absolute precedence over sub-clause (b), the words of sub-clause (b) are part of the overall context from which any uncertainty in the meaning of the words in sub-clause (a) can be interpreted.

45. So, do the words in sub-clause (b) assist with the meaning of the phrase "structural alterations" in clause (a)? In our judgment, the inclusion of a number of structural-type items in sub-clause (b) and generally the wide range of items included in sub-clause (b) tends to indicate that the intention of the draftsman, and the parties to the Lease, was that the range of items covered by sub-clause (a) should be narrower than it might otherwise be capable of being. In other words, if there was no sub-clause (b) at all, then the meaning of the phrase "structural alterations" in sub-clause (a) could be capable of bearing a very wide meaning, especially because it could be said that it was, in that hypothetical scenario, the only protection the landlord would have in relation to alterations. But where, as here, the Lease includes another clause which protects the landlord in relation to alterations, namely sub-clause (b), then the categories of items listed in that other clause demonstrate an intention for the meaning of the phrase in the first clause to have a narrower meaning, otherwise much of the second clause would be devoid of practical meaning.

46. To assist with working out the true meaning of "structural alteration" in the present lease, the parties' counsel cited a number of authorities. As one would expect, there is no conclusive definition of the phrase "structural alteration" in legislation or in authorities – each case depends upon its own wording and context – but some of the judicial commentary on the issue is helpful.

47. In *Irvine v Moran* [1991] 1 EGLR 261, Rimer J was discussing the meaning of the word "structure" in the implied repairing covenant in section 11 of the Landlord and Tenant Act 1985. He said:

> "I have come to the view that the structure of the dwelling house consists of **those elements of the overall dwelling-house which give it its essential appearance, stability and shape.** The expression does not extend to the many and various ways in which the dwelling house will be fitted out, equipped, decorated and generally made to be habitable.
>
> **I am not persuaded … that one should limit the expression 'the structure of the dwelling house' to those aspects of the dwelling house which are load-bearing in the sense that that sort of expression is used by professional consulting engineers and the like;** but what I do feel is, as with regard to the words 'structure of the dwelling house', that in order to be part of the structure of the dwelling house a particular element must be a material of significant element in the overall construction. To some extent, in every case there will be a degree of fact to

> be gone into to decide whether something is or is not part of the structure of the dwelling house."
>
> (our emphasis added)

48. That passage was described by Neuberger LJ in *Marlborough Park Services Ltd v Rowe* [2006] EWCA Civ 436, [2006] H.L.R. 30 at para 17 as "a good working definition to bear in mind, albeit not one to apply slavishly."

49. That therefore provides a very wide definition of "structure" as a starting point. Virtually every wall dividing rooms within a flat could be said to give the dwelling its "essential appearance". That illustrates well the point we make above about the need to read sub-clause (a) in the light of (b). If sub-clause (a) is construed as widely as the definition suggested in *Irvine v Moran*, then there is little, if any meaning which can be attributed to the parts of sub-clause (b) which relate to walls, timbers etc.

50. It seems to this Tribunal that some meaning must be given to the word "structural" in this lease which is more limited and relates more particularly to structural elements, in the sense of those which specifically provide the dwelling with stability. Another important reason to take that approach is the fact that the phrase "structural alterations" in sub-clause (a) is qualified by reference to "the plan elevation or appearance of the Flat". In other words, the alteration has to be both (i) to the plan elevation or appearance and also (ii) structural. Essentially the *Irvine v Moran* definition is covered by (i), the first of those two requirements, which means that the word "structural" in this clause must mean something additional and a further qualification. The only thing which it can mean in this context, therefore, is something which involves the stability of the structure.

51. So, by our interpretation of clause 13(2)(a) in its context, an alteration in a wall (such as happened in this case) is not structural unless it interferes with a structural element of the Flat, namely something which provides the Flat with its stability.

The Expert Evidence

52. We heard evidence from two experts on this issue, Mr Bell for the Applicant and Mr Hucks for the Respondent. We prefer the evidence of Mr Hucks, the Respondent's expert. We agree with his conclusion that the diagonal truss and the two studs are load-bearing and therefore (in the context of the construction of this Lease) are structural elements in the wall.

53. There is no evidence that the lintel which was removed above the doors , was an original feature nor that it served a structural function nor that it was intended to do so. Mr Bell, the Applicant's expert, speculated that the thickness of that lintel showed that it was intended to be structural, because builders would not tend to use any material which is more substantial (and therefore more expensive) than necessary. But we do not think that amounts to good enough evidence for us to draw the conclusion that the lintel was ever a structural element in the wall. Mr Bell did not see the lintel in situ and was not able to test it in any way. The lintel and the studs which ran down from it look like the frame for a doorway. There is no evidence that they served any other purpose. Mr Hucks' clear opinion, which we accept, was that the studs which ran down from the lintel were insufficient to provide any measure of significant support.

54. The diagonal truss identified by Mr Hucks as the structural element of the wall, on the other hand, appears to have no purpose other than to provide and contribute stability to the Property. Mr Bell did not suggest that it had any other intended purpose. We therefore conclude, on the basis of the evidence available to us, that the truss and the studs running down from it are the structural element in the wall in question. It is common ground between the parties and their experts that the Respondent's contractors did not cut into that part of the wall.

55. The Applicant sought to challenge the evidence of Mr Hucks on the further ground that his independence and integrity as an expert had been compromised, because the Respondent had consulted him before she carried out the works by sending him photographs of the exposed area for his comment. The Respondent acted upon the advice given by Mr Hucks in response to those photographs. Mr Hucks did not inspect the Property at that point. The Applicant argued that Mr Hucks' evidence was tainted by the fact that he was essentially defending his own advice (for which he may be liable in negligence to the Respondent) and was not therefore giving impartial expert evidence. We disagree. To some extent all expert witness, who are instructed by only one party, are defending their position and are at risk from their own clients if their opinion is negligently given. It is not unusual for parties to call as an expert a professional who has been involved in the dispute at a relatively early stage. We do not regard Mr Hucks' expert evidence as tainted by his involvement in this matter prior to the works. In any event, we have formed our own view of the evidence given by the experts and have reached the conclusion that Mr Hucks' opinion is correct and Mr Bell's opinion is not – for the reasons set out above.

56. We therefore conclude that the Respondent's alterations to the wall in question were alterations to the plan, elevation and appearance of the Property, but they were not structural alterations within the meaning of sub-clause (a).

57. It also follows that the other alterations which are alleged by the Applicant to be breaches of sub-clause (a) are also not structural within the meaning of the clause as we have interpreted it. This includes the realignment of the wall separating the kitchen and the bathroom, the new door between the kitchen and the hallway, and the new main entrance door and infill panel. None of these items are structural alterations in that they do not concern the stability of the structure.

58. It follows that the alterations did come within sub-clause (b) as it is common ground that they involved cutting into walls of the Property. It is also common ground that the Applicant did not grant consent to the Respondent to do those works. We now, therefore, turn to the question whether the Respondent unreasonably withheld consent which, if so, would entitle the Applicant to have carried out the works as if she had consent.

Unreasonably withholding consent

59. The criteria for deciding whether consent has been unreasonably withheld were set out by the Court of Appeal in *International Drilling Fluids v Louisville Investments* [1986] Ch 513 and adapted for cases of consent for alterations in *Iqbal v Thakrar [2004] EWCA Civ 592*. They may be summarised as follows:

59.1. A reasonable refusal should be connected to the landlord and tenant relationship, because the purpose of the covenant is to protect the landlord from damage occurring to its property interests. Put another way, it is unreasonable if the refusal of consent is designed to achieve some collateral purpose wholly unconnected with the terms of the lease.

59.2. The burden of proof is on the tenant to show that the refusal is unreasonable.

59.3. It is necessary for the tenant to make sufficiently clear what her proposals are, so that the landlord knows whether to refuse or give consent to the alterations or additions.

59.4. The landlord does not need to prove that the reason for refusal is objectively justifiable, only that a reasonable man might have reached the same conclusion in the circumstances.

59.5. The reason for refusal need not be something prohibited by the lease.

59.6. The landlord's protection of its own interests must be proportionate, when considering the detriment to the tenant which would result from refusal.

59.7. The refusal may not be made on the grounds only of pecuniary loss.

59.8. The issue is a question of fact in each case.

60. The reasons for refusal to be considered by the Tribunal are those which actually influenced the landlord at the time of the refusal, even if the landlord did not communicate those reasons to the tenant. See *Bromley Park Estates v Moss* [1982] 1 WLR 1019 in which Slade LJ made the important point that the need to show that any reason relied upon actually influenced the landlords mind at the time of the refusal is especially important where (as here), the tenant purports to rely on an apparently unreasonable refusal and commences work before the matter has come before a tribunal or court. It would, of course, be most unjust to allow the landlord to rely in court on an afterthought in those circumstances.

61. There were four occasions on which the Respondent refused consent, before the work commenced. They are set out in the chronology above, but are extracted here for ease of reading:

61.1. The refusal of proposal 1A on 8 March 2013

61.2. The refusal of proposal 1B on 22 March 2013

61.3. The refusal of proposal 2A on 25 March 2014

61.4. The refusal of proposal 2B on 13 June 2014

62. On each occasion, the Applicant stated in its written refusal that the reason for refusing consent was because the proposed works included structural alterations which were prohibited by clause 2(13)(a) of the Lease.

63. In the light of the authorities cited above, we must go beyond what was stated at the time and consider what was influencing the mind of the landlord when refusing. Mr Rowe gave evidence about the refusal of proposal 1A. He gave three reasons in his witness statement and in his oral evidence:

63.1. It contravened clause 2(13)(a) because it was a structural alteration.

63.2. Its effect was inconsistent with the existing stacking arrangements.

63.3. The Respondent had failed to pay £1,000 requested by the Applicant to enable detailed consideration to take place.

64. He said that proposal 1B was rejected for the same reasons because it did not address any of the concerns of the Applicant.

65. Proposals 2A and 2B were rejected, according to Mr Rowe in his evidence, for the following reasons:

65.1. the substance of the proposal contravened clause 2(13)(a).

65.2. the proposal was ambiguous because it was not apparent precisely how big the aperture would be.

65.3. an alteration in stacking arrangements was objectionable.

65.4. the drawings were incomplete – various details were missing, there were no large scale details of "critical areas".

65.5. the Applicant could not pay for a surveyor to advise, because the Respondent had failed to pay costs and fees on account.

65.6. flooring materials were unsuitable.

65.7. the proposed full height glazed sliding door was ill-suited for a domestic conversion.

66. We make the following observations on those reasons for refusal:

66.1. We accept that refusal on the on the grounds of clause 2(13)(a) influenced the mind of the Applicant at the time of the refusal. But it is (i) wrong for the reasons stated above and (ii) not a valid reason for refusing consent under clause 2(13)(b) anyway on the obvious grounds that it is covered exclusively by sub-clause (a). Nevertheless, this appears to be the primary reason for refusal which influenced the mind of Mr Rowe on behalf of the Applicant at the time of the refusal. In effect, he was not really refusing consent at all. He was simply stating that the proposed works were not permissible because of an absolute prohibition against structural alterations. He was, as we have already concluded, wrong about that. We must therefore conclude that this was not a reasonable reason for refusal of consent.

66.2. We accept that the refusal on the grounds of stacking also influenced the mind of the Applicant at the time of the refusal. It is however also unreasonable in our judgment. This is because (i) the works of themselves did not dictate any

particular room use and would not prevent future change of use (without further alteration works) by this Respondent or a future tenant and (ii) the change of use of rooms had already taken place before the application for permission to carry out alterations. In any event, we do not think that the stacking issue is a reasonable ground for refusal for the reasons stated above in connection with stacking – in particular because there is no uniformity of stacking in the Building to begin with. Also, as noted above, the stacking concerns relate only to the connection between the ground floor flat and the basement flat, which belongs to Mr Rowe. This reason for refusal was not therefore made on grounds connected to the landlord and tenant relationship, but were solely motivated by Mr Rowe's concerns for his own comfort as tenant – concerns which do not apply equally to other tenants because of the absence of stacking higher up the Building.

66.3. We accept that some measurements and specifications were missing from the plans and schedules in Proposals 2A and 2B. We accept that Mr Rowe for the Applicant may have noticed these omissions and commented on them. We do not, however, think that this was a genuine influence on his mind when refusing on the Applicant's behalf. We have reached that conclusion because the fact of the cutting of the main dividing wall and the stacking issue was so prominent in Mr Rowe's mind, that the precise measurement of the size of the aperture in that wall would have made no difference to his decision to refuse, given that it was clear from the plan that the aperture wold be sizeable, but slightly smaller than the measured aperture he had already rejected in proposals 1A and 1B.

66.4. We do not accept as a matter of fact and evidence that Mr Rowe was influenced by the floor material at the time of the refusal.

66.5. In our judgment, the Applicant was not entitled to demand £1,000 (or any other sum) as a prerequisite for the consideration of the proposal for works of alteration. Clause 2(13)(b) states only that the tenant must make a written application with plans and specifications. We have already decided above that the "guidelines" issued by the Applicant did not have the force of a covenant or regulation within the Lease. In any event, the Applicant could be said to have waived any requirement for the payment of surveyor's costs and fees in advance, because Mr Rowe formed his own view that the works were in breach of clause 2(13)(a) without the benefit of a surveyor. It was that which genuinely influenced his mind at the time of refusal, not the fact that the Applicant did not have enough money to engage a surveyor.

67. For all those reasons, we have decided that the Applicant's refusal was unreasonable and that the Respondent was therefore entitled to carry out the works as if the Applicant had given permission under clause 2(13)(b), as it should have done.

68. The execution of any works for which permission was required under that clause was therefore not a breach of covenant.

Evidence of Mr Rowe

69. There is another feature of this case which we considered while determining the issue of reasonableness. Mr Rowe of the Applicant gave evidence and was cross examined at considerable length before us. He came across generally as an most unreasonable man. It is worth bearing in mind the context. Mr Rowe is a director of the Applicant Landlord, but he is also the downstairs neighbour of the Respondent. It is not a normal commercial relationship of landlord and tenant. One might expect ordinarily the give and take of neighbourliness to enable the residents of the Building to get on. But from the moment the Respondent moved into her Property, Mr Rowe acted in a provocative and unreasonably high-handed manner. His correspondence was unfriendly and pedantic. His conduct seemed calculated to create an atmosphere of hostility in the Building.

70. One example will amply illustrate this point. When the Respondent (who was then a single woman) moved into the Property, she moved her bed to the large rear room and slept there. Outside the window of that room is the small flat roof of the rear extension to Mr Rowe's basement flat. The flat roof belongs to Mr Rowe's demise, but it is accessible only from a ladder. On one occasion, the Respondent made the mistake of hanging some washing on the flat roof outside her bedroom window on a rack. She was clearly not entitled to do so and it was, as a matter of law, a trespass onto Mr Rowe's land. At this point there had not been a cross word between the parties.

71. One might think that a reasonable neighbour in Mr Rowe's position would have a quiet word with the Respondent and ask her politely not to hang her washing on his flat roof. Mr Rowe did not do that. Instead he climbed up a ladder onto the flat roof in the early hours of the morning and took a photograph of the Respondent's underwear and her other clothing on the rack. The photograph also shows the window which is right next to the bed where the Respondent was sleeping at the time. Mr Rowe then emailed the photograph to the Respondent with a demand that she cease hanging her washing on his flat roof. The Respondent was understandably shocked and very upset by the thought of Mr Rowe standing on a ladder outside her bedroom window taking pictures of her underwear and the window while she slept and then sending one of them to her. The flat roof is only a few feet wide. Someone on a ladder is not far from being able

to reach out and touch the bedroom window in question. The photograph itself does not show through the window, but it is not impossible that the person taking the photograph might have been able to see through the window. We regard Mr Rowe's behaviour as invasive, intimidating and unnecessarily confrontational.

72. It was also notable that Mr Rowe, during cross examination, was apparently unable to see that this was objectionable behaviour on his part. He insisted on the fact that he was entitled to demand that she stop trespassing and that he was entitled to climb on his own ladder up to his own flat roof to collect evidence of her trespass. As a matter of law, he may have been right. He seemed unable to see that there might be other less aggressive and invasive ways of dealing with the issue in the first instance. Needless to say, the Respondent did not hang her washing on the flat roof again after that.

73. This really set the scene for the way in which Mr Rowe communicated (or refused to communicate) with the Respondent from that time onwards. He was fixated on the stacking issue and kept a diary for several months of the noise emanating from the Respondent's flat which consisted of ordinary activities such as having conversations, walking around and making coffee. Mr Rowe admitted in cross examination that he could hear activity in all of the flats in the Building, not just the Respondent's.

74. In our judgment, Mr Rowe's conduct as director and prime moving force of the Applicant company was unreasonable and intimidating. This general observation of ours supports and augments our conclusion (made for the detailed reasons above) that the refusals of consent by Mr Rowe on behalf of the Applicant landlord were unreasonable.

Requirements of Authorities etc

75. There is another aspect of clause 2(13)(b) on which the Applicant relies. Even if the Respondent has made a written application and received permission, there is a further condition to be fulfilled as follows: "in any event expressly in accordance with the requirements of any local public statutory or other authority and of the insurance office or offices with which the building may for the time being be insured".

76. The Applicant says that to give business efficacy to that part of the covenant, it is necessary to imply a term that the Respondent must consult all appropriate authorities to check whether they wish to impose requirements and that the Respondent in this case has failed to carry out that consultation.

77. We do not accept the Applicant's submission. In order to establish that the Respondent has breached this part of the covenant, it would be necessary to identify a specific requirement made by a specified authority and show that has not been complied with. The wording of the covenant, in its context, is clearly designed to relate to express conditions imposed on the works on question by some authority or insurer which has directed their minds to the proposed works in question. It is not intended to mean, and does not mean, that there is burden on the tenant to search out authorities and insurers and ask for requirements to be imposed – nor to show that they have done so. The burden is on the landlord to show that a requirement has been imposed on the tenant, which has not been complied with.

Other Alleged Breaches

78. We have considered already the principal alleged breaches which took up most of the time at the hearings, but there are a number of other breaches alleged in the application as follows.

Refusal of access

79. It is alleged by the Applicant that the Respondent refused to provide access to the Applicant (and its duly authorised surveyors and agents with or without workmen and others) upon one week's notice in writing contrary to clause 2(10) of the Lease. The specific allegation is that the access was refused over a six month period from late 2013 until 3 May 2014.

80. The Respondent's defence to this allegation is that she was entitled to refuse access to Mr Rowe in the light of his inappropriate and aggressive behaviour towards the Respondent which we have noted above. There is no obligation upon the Respondent to permit access to Mr Rowe personally. On each occasion when the Applicant requested access, the Respondent asked for the reason for the inspection and was not provided with answers which accorded with the terms of the lease. The Respondent also alleges that the real purpose of the desired inspections was to thwart the Respondent's insurance claim, a purpose which was not a legitimate reason for access under the terms of the Lease. When the Applicant finally arranged for an inspection by Mr Tasker, a qualified surveyor, the Respondent permitted access (with the exception of one occasion which resulted from a misunderstanding on the part of the Respondent's husband).

81. The Tribunal accepts the Respondent's evidence on this issue. There was no breach of clause 2(10) by the Respondent.

Noise Nuisance

82. A reasonable person knows that there will be noise from living in an urban multi-dwelling building. One must take the building as one finds it. See *Tod-Heatly v Benham* (1888) 40 Ch. D. 80. We were not

persuaded by the Applicant's evidence that the effect of the works was to create more noise nuisance. Mr Rowe was complaining of noise from the Property before the works were carried out. He came across as being particularly sensitive to ambient noise in his environment. He gave evidence that he could hear noises from other flats in the Building as well. There was no convincing evidence that the Respondent had done anything significantly to increase the level of noise and therefore no evidence of a breach of the Lease in that regard.

Nuisance caused by Contractors

83. There are a number of allegations of inappropriate behaviour by the Respondent's contractors during the works which the Applicant claims to be a breach of the covenant at clause 2(19) against permitting to be done any nuisance. These include use of Mr Rowe's flat roof for rubbish disposal and as a toilet for the contractors and water ingress to Mr Rowe's basement flat during the works.

84. The Respondent's counsel relies on the case of *Hagee (London) Limited v Co-operative Insurance Society* (1992) 63 P. & C.R. 362 as authority for the proposition that the tenant is not responsible for the actions of independent contractors which were carried out without her knowledge and not according to her instructions. There was no evidence that any of the alleged nuisance was carried out with the Respondent's knowledge or on her instructions. We therefore make no finding as to whether the nuisance actually occurred, because we have decided that any such nuisance was not permitted to be done by the Respondent so as to amount to a breach of covenant as alleged.

Flooring

85. Clauses in the Lease relating to flooring are set out above. There is an allegation that carpets were removed from the large rear room and large front room and hard wooden floors installed. That is not the case. We saw on our inspection that those rooms are carpeted.

86. In the kitchen, the installation of hardwood flooring is alleged to be a breach of the Lease and in the bathroom, the installation of ceramic tiles is alleged to be a further breach. The Respondent claims to have laid acoustic insulation under these surfaces to alleviate any problem and as such claims that the flooring in these rooms is "suitable and proper" and is a "suitable material for avoiding the transmission of noise". We accept the Respondent's evidence on that issue and see no reason not to believe her.

87. The Applicant's submission is that there is no evidence that the flooring installed by the Respondent is a suitable material for avoiding transmission of noise. In our judgment, that states the burden of proof the wrong way round. In order to establish that a breach has occurred, the Applicant has to prove on the balance of probabilities that the new

flooring is not a suitable material and is therefore a breach. There is no such evidence and so the Applicant has not proved the alleged breach.

Piping

88. It was alleged that soil/waste piping was altered in a way different from that proposed in the application for consent, but the Applicant's Amended Statement of Case states that the Applicant does not actually know how the soil/waste pipe has been rerouted. It is therefore not possible for this Tribunal to be satisfied on the balance of probabilities that a breach of covenant has occurred.

Remedial Work

89. Finally, the Applicant alleges that the Respondent failed to carry out remedial work under clause 2(8) after a ceiling collapse. The Respondent denies that she had an obligation under the Lease to do so at all. We agree with the Respondent that there is no evidence that the work was covered by the subject-matter of the repair covenant in clause 298). In any event, it is common ground that the Respondent has now completed those works. The dispute concerned only the timing of the works. Even if the works were a tenant's obligation under the Lease, the Respondent explained in her evidence, which we accept, that the delays were caused by problems claiming on the relevant insurance policy. There is some evidence that the Applicant tried to thwart the claim by instructing the insurer not to pay out on the claim. The Applicant also tried to insist that the works in question required landlord's consent (which they did not), causing further delay. In any event, we hold that the Respondent carried out those works as soon as she was reasonably able to do so.

Conclusion

90. For all the above reasons, the Tribunal has reached the decision noted at the beginning of this judgment and has determined that none of the alleged breaches of the lease has occurred.

Name: Judge Timothy Cowen **Date:** 5 October 2015