FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/18UC/LBC/2021/0021/AW
Property	:	74a East Wonford Hill, Exeter, Devon, EX1 3DD
Applicant	:	Exeter City Council
Representative	:	Mr Russell James of Counsel instructed by Legal Services, Exeter City Council
Respondent	:	Mr John Cummings
Representative	:	Mr Ranaldi (lay representative)
Type of Application	:	Alleged breach of covenant- Section 168(4) Commonhold and Leasehold Reform Act 2002
Tribunal Member(s)	:	Judge J Dobson Mr B Bourne MRICS Mr E Shaylor
Date of Decision	:	28th February 2022

Decision

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Summary of the Decision

1) **The Tribunal determined that the Respondent has breached the covenant contained in paragraph 19 of the Third Schedule to the Lease from approximately Spring 2006 and ongoing.**

2) **The Tribunal determined that the Respondent has not breached the covenant contained in paragraph 20 of the Third Schedule to the Lease.**

3) **The Respondent is ordered to pay the application and hearing fees incurred by the Applicants in the sum of £300 within 28 days.**

The Property

4) The Property is a one bedroom flat, also comprising a living room, a kitchen, a bathroom and a hallway.

5) The Property is situated in a block containing 5 other flats ("the Building"). The Building adjoins but is slightly offset from another block of six flats.

6) The freehold of the Building is owned by the Applicant, the local council and the lessor to the Respondent. The Respondent owns the leasehold interest in the Property pursuant to a 125- year lease dated 27th March 2006 ("the Lease").

Application and History of Case

7)The Applicant made an application dated 17th August 2021 for a determination by the Tribunal that the Respondent is in breach of the Lease. There are two provisions of the Lease relied on by the Applicant and asserted to have been breached, as set out above. Both were said to stem from the same steps taken by the Respondent. The Applicant asserted that the Respondent had made internal alterations to the Property, more particularly, the removal of an internal wall and door, without approval in writing of the Applicant being requested or given.

8) Directions given on 6th October 2021 set out the steps to be taken by the parties to prepare the case for determination and considered that the application was likely to be suitable for determination on the papers, to which the parties did not object. Further Directions were given on 4th November 2021 in response to two case management applications by the Respondent. The relevant one is the Respondent sought authorization to include as an exhibit to his witness statement, a voicemail recording audio file of a message which the Respondent said was left for him by an officer at the Applicant council, and which the Respondent said was relevant to the application. Permission was granted provided that, firstly, the recording was in a compatible format which may be readily accessed and openable by the Applicant and the Tribunal and, secondly, that the Respondent also provided a written transcript of the voicemail as an additional exhibit to his witness statement.

9) The Applicant subsequently provided a 237-page bundle for the determination.

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However, on review of the bundle on 21st January 2022 to consider whether the application remained suitable to be dealt with on the papers, it was considered that there were matters raised which required an oral hearing, including so that oral evidence could be received.

10) In particular, it was considered that the Respondent's case potentially amounted to an argument that the Applicant ought not to be entitled to rely on the relevant provisions of the Lease because of the asserted oral agreement and that whilst the Respondent did not express his case in specific terms of waiver, estoppel or similar, that was essentially the argument which it seemed he raised. Given the outcome of that appeared likely to turn on the detail and cogency of the Respondent's evidence, it was considered that an oral hearing was required.

11) The Respondent also raised a second argument about there having been a post-dispute arbitration agreement, which was not clear on the papers and which it was considered, could also best be dealt with at an oral hearing in the wider circumstances.

<u>The Law</u>

12) The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), most particularly section 168(4), which reads as follows:

> "A landlord under a long lease of a dwelling may make an application to [the appropriate tribunal] for determination that a breach of a covenant or condition in the lease has occurred."

13) The section continues in subsection (5) as follows:

> "But a landlord may not make an application under subsection (4) in respect of a matter which-
>
> (a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
>
> (b) has been the subject of determination by a court, or
>
> (c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement"

14) The Tribunal must assess whether there has been a breach of the Lease on the balance of probabilities.

15) A determination under Section 168(4) does not require the Tribunal to consider any issue other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to the question of whether or not there has been a breach. As explained in *Vine Housing Cooperative Ltd v Smith* (2015) UKUT 0501 (LC), the motivations behind the making of applications are of no concern to the Tribunal, although they may later be for a court.

16) The Lease is to be construed applying the basic principles of construction of such leases as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in

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the judgment of Lord Neuberger (paragraph 15):

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

17) Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

> "the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

18) Various other decisions of courts and tribunals have considered matters relevant to breaches of covenant on the facts of those specific cases. More significant is the question of whether breaches of the wording of the given covenants are actionable breaches, that is to say ones which the Applicant is able to rely on for the purpose of an application such as this. There are also decisions as to whether breaches can be relied on for the purpose of a claim for forfeiture but those are not directly relevant to the question for this Tribunal.

19) Rather the relevant question for this Tribunal is explained in the judgment of the Upper Tribunal in *Swanston Grange (Luton) Management Limited v Eileen Langley Essen* [2008] L and TR 20 (LC) That is binding if the same point as arose there arises here. Whilst the specific type of breach was different, the same point as to reliance on such breach does arise.

20) It was held in *Swanston Grange* that if there was a waiver of breach of covenant or otherwise the Applicant is estopped from asserting its rights, then the obligation imposed on the lessee by the covenant in the given lease is suspended and hence there was not an actionable breach. Consequently, no proceedings could be founded on any such asserted breach.

21) In determining whether there was such a waiver or there is an estoppel, the words of HHJ Huskinson in *Swanston Grange* below apply:

> "23. For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show an

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unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants regarding underlettings either at all or for the time being. The Respondent would need to establish that she had altered her position to her detriment on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenants would be unconscionable"

The Lease

22) The Property is stated in clause (1)(c) of the Lease to include, amongst other things:

(iii) the internal walls of the said flat between the levels of floor and ceiling included in the demise as aforesaid (save such walls as are next hereinafter mentioned)
(iv) a moiety (co-extensive and contiguous to the said flat) in each case and severed vertically of internal division walls which serve to enclose the said flat and any other flat in the Block

23) The Property is leased to the Respondent together with various rights set out in the first two schedules to the Lease but subject to covenant and obligations set out in the Third, Fourth and Sixth Schedules.

24) The principal relevant covenants by the Lessee are contained in the Third Schedule to the Lease. The Applicant relied in its application on the following provisions of that Schedule:

19. NOT to make any alterations to the layout of the Premises as shown on Plan No. 3 without the approval in writing of the Council to the plans and specifications thereof and to make such alterations only in accordance with such plans and specifications when approved and at the Lessee's expense to obtain all licences planning permissions and other things necessary for the lawful carrying out of such alterations and to comply with all byelaws regulations and conditions applicable generally or to the specific works undertaken.

20. NOT to do or permit or suffer to be done in or upon the property or any part thereof anything which may be or become a nuisance annoyance obstruction inconvenience danger or disturbance to the Council (whose opinion in this matter shall be conclusive) or the Owner or occupier of any other Flat or whereby any insurance for the time being effected on the Property or any part thereof may be rendered void voidable or whereby the rate of premium may be increased and to pay all costs charges and expenses incurred by the Council in abating a nuisance in obedience to a Notice served by a competent authority or by the Council.

The hearing

25) The hearing was conducted as a remote hearing on Thursday 10th February 2022. Judge Dobson sat at Havant Justice Centre, but all other participants attended remotely by video.

26) Mr James of Counsel represented the Applicant. Mr Ranaldi, a lay representative, represented the Respondent. Mr Ian Miles gave oral evidence in support of the Applicant's case. Mr Cummings gave evidence in support of his case. The Tribunal is grateful to all of those for their assistance with this case.

27) Prior to the hearing, the Tribunal case officer wrote to the parties at the request

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of Judge Dobson, identifying the potential relevance of *Swanston Grange* and also making reference to a case from this Tribunal, *Darwen v Piasecki (*CHI/00HE/LBC/2019/0020), a decision of a tribunal chaired by Regional Tribunal Judge Tildesley OBE, where the question of waiver or estoppel was dealt with in a breach of covenant application involving holiday lets. The decision of this Tribunal in *Darwen* applied that judgment to the facts of the particular case and the decision demands appropriate respect, albeit that it is not binding on this Tribunal. It was noted that the facts were rather different and *Darwen* was mentioned as simply an example of how *Swanston Grange* had been applied.

28) No written submissions were made as to the law or otherwise in response.

29) Mr Ranaldi applied at the outset of the hearing and on behalf of the Respondent for the application to be dismissed on the ground that the Limitation Act 1980 applied such that the application was out of time. Mr James briefly referred to the fact that the issue had only been identified last year but more generally said that time would be required to prepare a proper response to the point, which was one which had not been raised in the Respondent's case and was an eleventh hour change. Mr Ranaldi accepted that was correct.

30) The Tribunal adjourned the case to consider that issue, following which the decision on the point was stated. Judge Dobson explained to the parties that the point was a wholly new line of argument, accepting that the Applicant may well need time to prepare to deal with it and with a consequent need to adjourn the final hearing; that the point would not have been dealt with if a decision had been issued based on the parties' paper cases and was not an issue which had been identified as requiring an oral hearing; and that it could have been raised between the direction listing the application for an oral hearing and the day of the hearing, in which event it could have been dealt with at the hearing. The Tribunal did not therefore allow the Respondent to pursue that argument. No determination was made as to the merits of it.

Background facts agreed or not disputed

31) A number of facts were agreed between the parties in their cases and so were treated as accepted for the purpose of this application:

i) The Respondent made certain changes to the Property, including removing the wall previously separating the kitchen to the Property from the hallway and erecting a partial wall and opening.

ii) No written approval as provided for by paragraph 19 of the Third Schedule to the Lease was sought by the Respondent or consequently obtained and, necessarily, there was not an undertaking of alterations in accordance with plans and specifications which the Applicant had approved.

iii) There was an attendance at the Respondent's property by Jo Medley and Marc Drury-Rose of the Applicant on 29th January 2021 in relation to an unrelated matter of obtaining information related to a complaint of noise made by an occupier of the Building in relation to another occupier.

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iv) A letter was written by Ms Medley on behalf of the Applicant dated 18th February 2021 setting out that the Applicant required the Respondent to re-instate the wall in question, and to attach a door, and requiring that work to be undertaken within 2 months, although not specifically referring to the terms of the Lease. The letter noted that the Respondent asserted that he was given verbal permission.

v) The Respondent replied to that by a letter dated 27th February 2021. The Respondent said that Building Regulations and similar were not required for the works undertaken and so no written permission was required, raising other arguments about fire safety. No mention was made in that letter of receipt of verbal permission.

vi) A further letter was written by Mr Miles on behalf of the Applicant dated 29th April 2021 in response to the Respondent's reply disputing the Respondent's assertion that permission was not required and suggesting the Respondent's belief was the reason why no permission was sought. The letter quoted provisions of the Lease.

vii) The Respondent replied to that by letter dated 16th May 2021, which included a paragraph about the contact he said was made with the Applicant in 2006 and a subsequent attendance at his Property.

viii) The Respondent made a complaint about the Applicant's decision to pursue matters, both through the Applicant's complaint process and to the Housing Ombudsman.

32) Other facts were found by the Tribunal following the hearing, as set out below.

Summary of the parties' cases

33) The Applicant's paper case was simple, and the essence is set out above. The Applicant asserted that the Respondent was not entitled to undertake the work and so by removing the wall, he made an unapproved alteration. In addition, that he had thereby created a potential fire hazard and so did something which created a danger and caused a nuisance. Additionally, the Applicant contended that the determination of whether a danger or nuisance had been caused was for the Applicant according to the Lease provisions.

34) The Applicant offered no direct alternative witness evidence in relation to the alleged conversation with its officer but denied both that a conversation had taken place, or that the Respondent was entitled to rely on it. The Applicant's case was that there was no written confirmation of the conversation having taken place or of any permission having been given and that there would have been, demonstrating that neither of those occurred.

35) In closing submissions, Mr James argued that arbitration was a very distinct form of dispute resolution and that there had been no post-dispute arbitration agreement. Further, that the fact that the Housing Ombudsman could deal with a complaint does not engage section 168(5) of the 2002 Act. He argued that there had been no representation meeting the requirement set out in

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Swanston Grange and quoted paragraph 23 of that judgment, as set out above. Mr James further submitted that there was a requirement for knowledge on the part of the lessor of the breach of covenant in question.

36) Mr James argued that breaches of both provisions, that in paragraph 19 and paragraph 20, were made out, arguing in relation to that in paragraph 19 that the Applicant's opinion was the key and that even if there had been permission to undertake the works, such that there was no breach of paragraph 19, there was still a danger created pursuant to paragraph 20 and that the relative position before and after the works was not relevant. In relation to paragraph 19, the case he advanced was that there had been no conversation with an officer of the Applicant. He submitted that if there had been a significant conversation, there would be a record of it: he conceded the Tribunal may find there had been some type of conversation. Mr James disputed the Respondent's assertion that the event had been significant to him.

37) Mr James further invited the Tribunal to consider the level of detail likely to be remembered from a conversation fifteen years earlier and argued there were contradictions and lack of clarity in the Respondent's case, which case was inherently improbable. He submitted that the Respondent's case fell well short of showing unambiguous representations that the work undertaken was permitted. Whilst it will be seen below that the Tribunal did not accept the arguments advanced in the previous paragraph, it will also be seen below that the Tribunal did agree with Mr James in the immediately preceding regard.

38) The Respondent's case was that irrespective of the lack of written approval, he was orally authorised to undertake the work by one of the Applicant's officers and that he proceeded on that basis. It is asserted by the Respondent that an officer attended at the Property in 2006. The Respondent asserted that the officer who attended gave permission for the Respondent to make the alterations made to the Property and that he made those alterations in reliance on that.

39) Mr Ranaldi asserted in closing submissions that anyone else in the same circumstances would think the oral permission could be followed. He rejected the relevance of a lack of records and asserted that a decision to attend was consistent with the need to remove asbestos. He reminded the Tribunal that Mr Miles could not speak to the representations made by another officer of the Applicant a number of years earlier. He submitted that there was a lot of new information in oral evidence because that had not formed part of the complaint process.

40) The Respondent did not accept that doing something that the Applicant considers a fire safety risk amounted to doing something which constituted a danger or a nuisance pursuant to the Lease. Mr Ranaldi also observed that the Applicant's initial correspondence had related not to breach of covenant but rather to Building Regulations and fire safety, which had continued to be the Applicant's focus in subsequent communications up to and including August 2021.

41) The Respondent also contended in his written case that the parties had entered into a post-dispute arbitration agreement by way of Applicant providing guidance about the Respondent pursuing his dissatisfaction with the

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Applicant's complaint process with the Housing Ombudsman and the Respondent submitting a complaint to the Housing Ombudsman. Mr Ranaldi expanded on that in oral submissions. It was said that at the end of stage 2 of the Applicant's four-part complaint process, the Respondent was given guidance on an application to the Ombudsman and made that application. Mr Ranaldi submitted that the Ombudsman was able to use a number of tools to resolve a complaint, including mediation and including arbitration. He argued that pursuing this application violates the Housing Ombudsman scheme. Hence it was asserted that the Applicant is precluded from making its application.

42) The matters raised by the both the Applicant and the Respondent about Building Regulations and other matters and about breaches or lack of breaches of such, which fall outside of the jurisdiction of the Tribunal, did not assist in respect of the matter about which determination was required.

Findings of Fact

43)The Tribunal made the following findings of fact:

i) An internal door between the kitchen and hallway would have provided some fire resistance, where the estimate of fifteen minutes by Mr Miles was accepted as thereabouts correct for a door of the type likely to have been fitted prior to the Lease, applying the Tribunal's experience.

ii) There was no door in the doorway between the hallway and the kitchen at the commencement of the Respondent's tenancy or at the time of purchase of the Property on the long Lease by him, and further that the door had already been removed and was leant against a wall in the storage cupboard- the Tribunal accepted the Respondent's oral evidence. Also, that the Respondent had moved it further back into the cupboard by picking it up, which could easily be done because the door was light. The Tribunal found that to an indicate that the door was of insubstantial construction with limited fire- retardant qualities

iii) That the original wall between the kitchen and the hallway was constructed of thin plasterboard around a honeycombed centre, which applying its expertise the Tribunal found consistent with the likely age and original construction of the property and so accepted the Respondent's oral evidence. It was, the Respondent stated and the Tribunal accepted, roughly an inch to an inch and a half thick. The wall was situated in or about the place of the white markings superimposed on the photograph of the hallway in the bundle.

iv) There was a distinct lack of protection from a fire in the kitchen spreading at the time of the Respondent's occupation of the Property and at the time of the Lease.

v) The original condition of the Property, with no door present in the doorway between the hallway and the kitchen and with a very thin partition wall constructed as found, would have constituted a level of risk to the occupier of the Property and potentially the other properties in the Building differing little from the asserted current level of risk

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following removal of that thin partition wall

vi) The plan in the Lease was an accurate plan of how the Property was at the time of construction and the Property should have been at the time of purchase, including a door in the doorway. However, there is no evidence that the plan was prepared having inspected the Property and so was accurate as to the presence of a door at the time of the Lease or that the presence or absence of the door itself had any significance at the time of the Lease to cause the Tribunal to attach weight to the door being shown on the plan.

vii) There appeared to have been at the time of construction a number of electric night storage heaters. There was also a heating unit for the original warm air heating system situated in a cupboard between the living room and the kitchen, the door of which cupboard opened into the living room.

viii) Following purchase, the Respondent wished to change the heating system from night storage heaters to gas central heating and to remove the redundant heating unit and the ducting from that unit. The cost of works involved was relevant.

ix) The Respondent telephoned the Applicant explaining what he wished to do. He was put through by the switchboard/ similar to a specific department, speaking to a male officer there and asking what he could do. The Respondent explained about the night storage heaters and the large heating unit in a cupboard. No reference was made to the internal walls to the Property during that telephone call.

x) The officer to whom he spoke knew or had cause to believe that there was asbestos in and/ or around the heating unit, and as a consequence of this the officer informed the Respondent that he would need to attend at the Property, for which a time and date was arranged. It was the reference to removal of the heating unit and potential asbestos which prompted the need to visit, rather than the proposed installation of gas central heating.

xi) The officer did attend. The Respondent was able to give a very general description of him where the level of detail he could recall and the lack of greater detail was unsurprising and plausible. The officer was at the Property for in the region of twenty minutes.

xii) A discussion took place with regard to the removal of the heating unit. There was also some discussion with regard to removal of areas of wall to facilitate the removal of the heating unit. The removal of walls was first discussed when the officer attended and had not been discussed on the telephone. There was reference to there being no changes to structural walls (although it is unclear which they were).

xiii) The discussion which took place was primarily directed towards the removal of the heating unit and matters related to the heating system, albeit with some general reference to the Property and potential changes which could be made to it.

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xiv) Some ideas were discussed as to what might be done to the Property in general terms. The discussion about what might be done and any suggestions made by the officer did not amount to specific permission to do one or all of those things.

xv) The officer explained that a specialist asbestos contractor would need to be instructed in respect of asbestos in or around the heating unit and removal of it. The Respondent did engage such a contractor.

xvi) The Respondent referred to the cooker being placed close to the electric fuse box and the doorway and there was passing mention of the ability to move it. The Tribunal does not find there to have been any detailed discussion of that relatively small matter.

xvii) There was not a specific representation that the Respondent could move the kitchen wall from its existing location to a new location, a definite distance into the then kitchen and construct walls of a particular size and design with an opening to the hallway of a particular size and design in the precise manner that the Respondent did.

xviii) The Respondent did remove the original wall dividing the kitchen and the hallway. He also removed the cupboard areas between the kitchen and the living room, including but not limited to that which had contained the heating unit and ducting.

xix) The removal of the cupboards did produce a wider and so larger kitchen. The movement of the division between the hallway and the kitchen, insofar as there was one, made the kitchen smaller than it otherwise would have been but the hallway larger than it previously was.

xx) The wall had been an internal wall and so falls in terms of provisions in the Lease, it falls within clause (1) (c) (iii) above and not (1) (c) (iv) above.

xxi) The Respondent constructed a new partial wall a distance into the kitchen from the location of the original wall. The opening left was greater than the opening in the original doorway had been.

xxii) The opening from the kitchen to the hallway meant that there was, at least in the main, nothing separating the kitchen from the only exit door to the Property.

xxiii) The Property as altered by the Respondent also constituted a nuisance and/ or danger to the Respondent occupier as compared to a property with a fire-resistant door and a suitably constructed wall. However, the Tribunal was unable to identify any increased nuisance or danger by the alterations as compared to any nuisance or danger which existed prior to those alterations.

xxiv) The front door to the Property had either always been, or had been replaced since the Lease with, a self-closing fire-resistant door. The

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doors to the other flats in the Building had also been replaced. (The evidence for these matters was limited but the balance of probabilities was applied to the evidence was received.) The front door led to a communal landing area and stairwell.

xxv) The nuisance of danger to the Applicant and/ or other occupiers of the Building had reduced rather than increased because of the fire-resistant front door, albeit that was not fitted by the Respondent.

xxvi) The Respondent was unaware of any requirement for a protected entrance (and exit area) pursuant to fire regulations. The Respondent had measured, subsequent to the correspondence from the Applicant and/ or the proceedings, and the furthest distance from any point in the flat to the exit was less than nine metres. However, any relevance of that to Building Regulations does not alter the question of a breach of the covenant in the Lease.

xxvii) There are smoke detectors in the Property installed by the Applicant and hard-wired.

xxviii) The question of fire-related risk was of appreciably greater significance to the Applicant in 2021 than it was in 2006 and the lessons learnt from the Grenfell disaster inform the approach now but were of less prominence some years earlier.

xxix) The first time that the Respondent tried to think back to the conversation in 2006 was in 2021, as the Respondent said himself in evidence.

xxx) The Applicant's officers did not see the works undertaken by the Respondent until 2021 and the Applicant was unaware of the work undertaken by the Respondent, including the removal of the original kitchen wall and installation of a partial wall in a different location.

44) It was established that the Property is situated on the first floor and that the block was probably constructed in or about the 1950s.

45)The Tribunal noted in finding that an attendance took place, the oral evidence of Mr Miles that he had checked all of the Applicant's electronic records for any record of the conversation in 2006 between the officer and the Respondent and that he had found no record referring to such a conversation. Mr Miles expressed the opinion that something important such as giving permission would be recorded and the record kept, although that was his opinion and not a statement of fact. All else aside, his employment had started some years later, in 2015, such that he had no first- hand knowledge of practices at the time.

46) The Tribunal found that simply indicated the lack of a written record available from the search undertaken and was not good evidence that the attendance of the officer and a conversation had not taken place. That will be apparent from the finding above. Whilst Mr Miles also stated that it was not usual to visit a leasehold property, the Tribunal also found that to reflect his experience from 2015 onward and to provide little assistance in respect of the approach in 2006. He conceded that reference to asbestos would be likely to merit a visit and the

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Tribunal agrees that the removal of heating appliances and reference to asbestos is likely to have been viewed as more significant than the usual.

47) The Tribunal accepted that the Respondent had contacted the Applicant about the proposed change to the heating system and removal of the heating unit and ducting. He did not simply proceed with that work with no communication to the Applicant.

48) The Tribunal accepted much of the general evidence of the Respondent but considered that the evidence was not satisfactory as to what had been said by the officer who had attended in 2006. The written evidence made no specific reference to it at all**.** Despite a 32- page witness statement, and so a very full and detailed document, the comments made by the officer were dealt with in brief terms, only in paragraph 5 of the statement, repeating in identical terms a paragraph from the Respondent's letter dated 16th May 2021. In addition, the new partial dividing wall was not mentioned at all. The impression created by the discussion of the heating unit and walls in the statement suggested the heating unit to be located by or near to the wall between the kitchen and hallway and a wider gap created in the original wall, such that the Tribunal was surprised by the explanation in oral evidence that the heating unit was located by the opposite end of the original kitchen.

49) The oral evidence of the Respondent expanded on matters considerably, the Respondent providing a good deal of detail in relation to changes to the kitchen which was not contained in his lengthy written evidence. The Tribunal did not find this convincing as to the accuracy of the Respondent's evidence on the following matters. The Tribunal rejected Mr Ranaldi's attempt to explain away the significant additional detail.

i) The Respondent's case progressed when pressed in cross-examination from a discussion with the officer of options as to work which might be undertaken, which the Tribunal found plausible, to being told what could be done and giving permission for it and only towards the end of cross- examination did he specifically state that he asked in terms whether the kitchen wall with the hallway could be moved further into the kitchen and that the officer agreed.

ii) The Tribunal also found it notable that whilst the Respondent's original position in response the allegation of a breach had been to assert oral permission to have been given, much of the weight of it involved denial of permission to remove or move the kitchen wall was required at all. The Tribunal found that less than perfectly consistent with the Respondent's case that he had been given permission.

iii) The Tribunal did not accept that the Respondent could recall matters to the extent his oral evidence stated as it developed or that such specific permission for the actual work later undertaken was given. The Tribunal additionally did not accept that the Respondent would not have included more of those matters in his written statement prepared specifically in response to the proceedings if he had been able to recall them clearly or that he would not have made at least some mention of them when the Applicant first raised the

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matter in early 2021. The Tribunal agreed it was inherently implausible that the Respondent could recall the very old conversation as clearly as his oral evidence indicated and unaffected by the later work and the circumstances of the application. The inherent implausibility was relevant to the Tribunal where the Respondent's evidence suffered from the other difficulties identified.

iv) The Tribunal noted the Respondent's evidence that not many people visited his Property and accepted in that regard that the visit of the officer may well have been a notable one for the Respondent and that officers of the Applicant had not attended at his Property on a regular basis such that this attendance stood out. However, the Tribunal did not accept the Respondent's case to the extent of it asserting that the Respondent remembered the detail of the conversation which took place, particularly the detail of that part of the conversation as related to the movement of the kitchen wall with the hallway. The Tribunal did not accept that the fact that the Respondent allowed Ms Medley and her colleague to enter his Property was evidence that permission for the specific works had been given, but rather that the Property had been in the same condition for a significant number of years such that the Respondent hadn't considered any potential issue.

v) The Tribunal found that in the intervening 16 years between the attendance of the officer from the Applicant and the final hearing of the Applicant's application, much of the actual conversation had been forgotten by the Respondent. Whilst the Respondent may well have quite genuinely believed for one reason or another that alterations could be made, the Tribunal finds that when pressed giving evidence, the Respondent either consciously or sub-consciously gave answers which fitted what he had later done by way of alterations and had perhaps come to think of as agreeable and not answers which accurately reflected such of a conversation about the kitchen wall as actually occurred at the time.

vi) In addition, evidence as to the conversation with the officer that the alterations which were later made by the Respondent that more space would be released in the kitchen, which the Respondent stated and repeated both in oral evidence were found by the Tribunal to make sense in relation to the removal of the cupboards between the kitchen and the living room but not the kitchen wall to the hallway being removed and the new divide, such as it was, being moved into the original kitchen. The Tribunal found confusion on the part of the Respondent as to references to the walls in the area of the heating unit and the wall to the hallway.

50) In any event, the Tribunal did not accept that the officer could have gone so far as to specifically state that the Respondent could do something which had not been properly formulated by the Respondent at that time and so where the specifics of the work and the outcome of the work were unknown. It was inherently implausible, and the Respondent failed to demonstrate otherwise, that the officer would have stated that the Respondent had permission do exactly

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that which he later came to do. The Tribunal does not accept that he actually did so.

51) The Tribunal accepted that there were discussions about how the heater may be removed which the Respondent contacted the Applicant about in the first place but the Tribunal was not satisfied on the evidence received that the wider discussion had been as clear as the Respondent stated. The Tribunal noted that the Respondent removed the cupboards between the living room and the kitchen in order to improve the shape and size of the kitchen and that it suited that plan for the heating unit to be removed through the kitchen, with space for access to it and movement of it where the walls to the cupboards by the kitchen were intended to be removed. The Tribunal accepted that the unit may well not have fitted through a doorway and that issue may have been mentioned, although no dimensions were provided by the Respondent to the Tribunal of the unit or any doorway which enabled the Tribunal to determine that specifically, nor how much of any wall may have required removal. The Tribunal considers that in the event nothing turns on that.

52)The Tribunal accepts that the Respondent saw the officer as representing the Applicant council and may well not have considered the extent or limit of any authority the officer may have been able to exercise. However, at best the Respondent assumed, the word he used, the officer's comments to amount to permission to take steps, where they did not and certainly not the exact steps which were later decided to be taken.

53)The Tribunal has carefully considered the evidence in the context of the time when the attendance occurred. The Tribunal has ignored how likely or unlikely the asserted approach of the officer would be post- Grenfell and if the conversation had instead taken place in 2021, noting the danger of viewing events several years ago through the lens of current perspectives.

Application of those findings to the lease covenants and the law and determination of the application

Covenant in paragraph 19 of the Third Schedule

54)The Tribunal determined that the removal of the original kitchen wall by the Respondent and the construction of a partial wall in a different location did constitute a change to the layout of the Property.

55)The Tribunal determined that there was not "an unambiguous promise or representation" on behalf of the Applicant that the Respondent could make the specific alterations that he did. The general discussion that the Tribunal found to have taken place did not, the Tribunal; determined, go nearly far enough to amount to such. The Applicant did not subsequently waive the need for permission, nor did estoppel arise, the Applicant being unaware of the work undertaken by the Respondent.

56)The Tribunal determined that the application to the Housing Ombudsman by the Respondent did not amount to a post- dispute arbitration agreement pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002and therefore also did not prevent the Applicant relying on the breaches of covenant.

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57) The Tribunal accepted that an application had been made by the Respondent following an attempt to follow the Applicant's complaint process and that one of the various ways in which the Housing Ombudsman could seek to deal with complaints was by use of arbitration. However, that related to dissatisfaction with how the Applicant had dealt with the complaint. The Tribunal that did not agree that the submission of a complaint and the consideration of the complaint by the Housing Ombudsman, which had not in the event involved arbitration in any event, amounted to arbitration, or that any decision of the Ombudsman amounted to a post-dispute arbitration agreement.

58) Accordingly, the Applicant was able to pursue the breaches, which remained actionable.

59) Given that it was accepted that there was no written permission given and that the provisions of the covenant as contained in the Lease had not been complied with because of the change to the layout without written approval, it necessarily follows that the Respondent was in breach and remains in breach and further that the breach is actionable.

60) The Tribunal was not invited to find that the Respondent had breached the covenant by changing the layout of the Property by removal of the original cupboards between the kitchen and the living room and does not make any determination one way or the other.

<u>Covenant in paragraph 20 of the Third Schedule</u>

61) The Tribunal determined that there had not been a breach of the covenant in paragraph 20 of the Third Schedule to the Lease.

62) Taking as a starting point the condition of the Property at the time of the Lease, the Tribunal was not persuaded that the Respondent had caused or permitted a nuisance or danger. Mr Miles expressed the opinion that the Property is demonstrably less safe, but the Tribunal found that opinion was expressed on the assumption of a door being in place, which the Tribunal has found incorrect.

63) The Applicant provided no evidence as to the danger from fire in relation to the actual condition of the Property at the time of the Lease and no evidence as to the relative danger from fire as at the present time. If in fact the risk is greater now than it was with the original wall in situ but no door in the doorway, nothing was provided to evidence that. The position was, insofar as the limited evidence indicated, sufficiently similar for there to be no identifiable effect. The Tribunal necessarily proceeds on the evidence chosen to be presented to it and does not speculate about other evidence which might have been available. The Tribunal rejects Mr James' submission that the relative risk is not relevant.

64) Paragraph 20 provides that it is for the Applicant to decide whether an act may be or become a nuisance annoyance obstruction inconvenience danger or disturbance. The paragraph refers to "the Council (whose opinion in this matter shall be conclusive)". The Respondent accepted in cross- examination that to be correct, albeit he did not consider that the alterations had produced a risk.

65) The Tribunal agrees that paragraph 20 provides that it is the opinion of the Applicant which is that relevant. However, the Tribunal does not consider that

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to be the end of the matters. The Tribunal rather also considers that such opinion has to be formed on the basis of all of the relevant facts and then in a reasonable manner.

66) In contrast, the Applicant had not accepted that the door originally dividing the kitchen from the hallway had been removed prior to the Lease and had not demonstrated that any consideration had been given to the nature of the original wall. Similarly, as noted there was no evidence of the relative risk from the original condition to the current one and so that could not have been weighed. There was no evidence that the Applicant had considered the correct matters and so could have properly formed its opinion.

67) The Tribunal determined that the Applicant had not formed any opinion properly and so was not entitled to rely on that. In any event, the Tribunal would have found difficulty in accepting that the provision in the Lease ousted the jurisdiction of a court or tribunal even if it had purported to do so, although in the event it made no explicit reference to so purporting.

68) The Tribunal considered that it was entitled to apply its own determination as to whether there was a breach by an act which may be or become a nuisance, a danger or other breach. Given that finding that the position was, insofar as the limited evidence indicated, the same or sufficiently similar for there to be no discernible effect and that no increase in the danger, nuisance (or other words used in the paragraph of the Lease) had been demonstrated, the Tribunal did not find the Respondent in breach of the covenant.

Decision

69) The Tribunal determined that the Respondent has been from in or about April 2006 and remains in breach of paragraph 19 of the Third Schedule to the Lease but the Tribunal determined that on the evidence, the Respondent has not been demonstrated to be in breach of paragraph 20 of the Third Schedule to the Lease.

Fees

70) The Applicant has incurred the usual fees in order to bring this application to the Tribunal, namely £100 to make the application and £200 for the hearing which the Tribunal determined to be required.

71) The Applicant has plainly been successful in obtaining a determination that there has been a breach of covenant by the Respondent, although not in full. The Tribunal considers that in those circumstances, it was reasonable for an application to be made by the Applicant. The Tribunal considered that there was no circumstance rendering it unjust to order the payment of the fees by the Respondent.

72) The Tribunal accordingly determines that the Applicant is entitled to an award of the Tribunal fees paid totalling £300.

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RIGHTS OF APPEAL

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 and is to be sent by email to rpsouthern@justice.gov.uk

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.

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