FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AC/LBC/2021/0023**
Property	**:**	**Flat 17 Solar Court, Etchingham Park Road, N3 2DZ**
Applicant	**:**	**Solar Court (Finchley) Management Limited**
Representative	**:**	**Ms Mattison**
Respondent	**:**	**(1)Isabel Hannah Kiddy (as executor of the estate of the late Stephen John Lewis)** **(2)Cubhill Limited**
Representative22	**:**	**Mr Bryden**
Type of application	**:**	**Application for a determination as to breach**
Tribunal members	**:**	**Judge Shepherd** **Mr S Johnson FRICS**
Date and venue of paper determination	**:**	**22 November 2021**
Date of decision	**:**	**26 November 2021**

DECISION

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1. In this case the Applicant, Solar court (Finchley) Management Ltd ("The Applicant") is seeking a determination of breach pursuant to Section 168 of the Commonhold and Leasehold Reform Act 2002 ("the Act"). The First Respondent is Isabel Hannah Kiddy (as Executor of the Estate of the Late Stephen John Lewis) and the Second Respondent is Cubhill Limited. In actual fact the only relevant Respondent is Cubhill because they carried out the alleged unauthorised works at the premises. They will be referred to as the Respondent for the remainder of this decision.

2. The property concerned is Flat 17, Solar Court, Etchingham Park Road, London N3 2DZ ("The premises"). This is a one-bedroom top floor flat situated within a development consisting of two purpose-built blocks of flats comprising 40 self-contained units.

3. In the application dated 9 March 2021 the First Respondent is the current registered leasehold owner of the flat pursuant to a deed of variation dated 20 May 2020 made between the Applicant and the First Respondent. The deed operated as a surrender of an earlier lease of the flat dated 4 February 1971. The Second Respondent took an assignment of the lease of the flat from the First Respondent on 15 July 2020 but at the date of the application was not yet registered as legal owner of the flat. This was why both Respondents were named although at the date of the hearing as far as the Tribunal understood registration had taken place.

4. The covenants relied upon by the Applicant in the lease are the following:

5. Clause 2 (3) of the lease where the tenant covenanted with the landlord :

not to injure cut or maim any of the walls ceilings floor or partition of the demised premises.

6. Clause 2(4) of the lease where the tenant covenanted with the landlord:

not to make any structural alterations or structural additions to the demised premises or the internal arrangements thereof nor remove any of the landlord's fixtures without first having obtained the vendors written consent provided that the purchaser may from time to time (but only with the prior written consent of the bendable and subject to any conditions thereby imposed) substitute for any of the landlord's fixtures such fixtures of at least as good kind and quality and in any such case that covenant hereinbefore contained shall attach to and apply to the things so substituted.

7. Clause 3(12) of the lease where the tenant tenant covenanted with the landlord:

at the purchaser's own expense obtain all necessary permissions and approvals under the Town & Country planning Acts or otherwise for any additions and alterations to the demised premises that may be made from time to time during the said term and to produce to the vendors or its surveyors all such permissions and approvals. And not to do or omit or suffered to be done or omitted any act matter or thing in all respecting the demised premises required to be omitted or done (as the case may be) by the Town & Country planning Acts or any bylaw or which shall contravene the provisions of the said acts or bylaws or any of them.

8. It is the Applicant's case that extensive alterations have been carried out to the flat without their consent. They arranged for Anthony Harrison FRICS of Finlay Harrison Chartered Building Surveyors to

produce a report after an inspection on 7 December 2020. The report identified a number of alterations to the flat which the Applicants say are in breach of the covenants set out above. In summary the report states the following:

- The original kitchen has been repositioned from a self-contained room into the living room to create a kitchen/reception room and a new second bedroom created where the original kitchen was positioned;

- A fire resistant timber glazed screen which enclosed the entrance hall has been removed and replaced with a timber stud partition. The removal of this screen has removed the fire protection from the entrance door lobby which is a breach of building regulations;

- The original kitchen has been removed including the stripping out of all the feed and waste pipes and the infilling of partitions and levelling of the floor;

- The bathroom has been completely stripped out and refitted with alterations to the corner cupboard which has been fitted with a new water tank with tumble dryer underneath;

- In order to install the new kitchen new feed pipes and a waste pipe it would have been necessary to cut into the cement and sand screed across the bathroom and hallway to the new kitchen/lounge;

- The new arrangement of the rooms in the flat has resulted in non-compliance with the building regulations with regards to drainage and fire regulations;

- The original panelled radiators and associated feed pipes have been removed and replaced with electric radiators. The removal of the radiators and their feed pipes would have involved cutting out of wall finishes and also the cement and sand screed;

- The original timber parquet flooring has been stripped out to gain access to the screed. It appears that this has been done to enable it to be cut back in order to introduce new pipes and to remove the original pipes;

- A new plasterboard ceiling has been formed secured to battens fixed in the soffit of the structural floor slab above the flat;

- New electric wiring has been run through chases cut into the walls and/or the floor screed.

9. The Applicant's solicitor wrote to the Respondents on 26 January 2021 alleging that they were in breach of the lease. Neither Respondents admitted being in breach.

10. A witness statement of Jaclyn Dylan a director and shareholder of the Applicant was provided to the Tribunal. It states that no application for consent had been made prior to the works being carried out. It states that the flat had been neglected by the previous owner and had not been occupied for some time. The Applicant had received complaints from neighbours on the top floor of the building who were affected by the constant drilling and building work from the flat. There followed an

exchange of emails between the Applicant's agent and the Respondent. On 13 August 2020 the Applicant's agent went to the premises and was told by the contractor that the premises were been turned into a two-bedroom flat with the living room being turned into a kitchen diner. The Applicant's agent wrote to the Respondent on 17 August 2020. In response the Respondent stated in an email on 18 August 2021 that had been no breach of lease and no building control certificates were required.

11. The agent instructed the Respondent to stop all future works until they had been provided with the plans and an inspection of been carried out. However the works continued and were causing a nuisance to other residents during the covid 19 lockdown.

12. In an email dated 23 September 2020 from the Applicant's agent the Respondents were asked to reinstate the flat. Their solicitors replied on 5 August 2020 denying that their client was in breach of lease and saying that the works had caused no loss to the Applicant.

13. The premises were placed on the market by the Respondents as a two bedroom flat through Martin Gerard estate agents. There followed the inspection on 7 December 2020 by Anthony Harrison which has already been detailed above.

14. In legal submissions on behalf of the Applicant the case of *Grand v Gill* [2011] 27 EG 78 was relied upon. In that case the Court of Appeal held that plaster is an essential part of the creation and shaping of ceilings and partition walls and is part of the structure of a building. In relation to fixtures it is stated that they are those things which attach to the land or building in a permanent manner thus becoming part of the property rather than an easily removable fitting : see *Dilapidations The modern law and practice* sixth edition 25 – 06 to 25 - 20. The Applicant also

relied on the case of *TSB Bank plc v Botham* (1997) P and CR D1 in drawing the distinction between a fixture and a chattel.

15. In relation to breaches based on *cutting and maiming* the Applicant relied on *Trimnell-Richard v Tuffley* [2018] UKUT 0150 (LC) where HHJ Behrens held that the starting point in determining whether there was a breach was the wording of the covenant, namely, not to "alter cut or maim any of the walls of the maisonette". The first question was whether the tenant had "altered cut or maimed" any of the walls in the first floor flat and, secondly, if she did so, did she have the landlord's written consent? In the circumstances of that case it was clear that the hole in the wall made by the tenant's plumber to connect the new toilet was not in the same place as the hole for the fixings for the old toilet so that the tenant had altered cut or maimed the exterior side of the wall and it was equally clear that there was no written consent from the landlord. It followed that the tenant was in breach of covenant.

16. The Applicant's legal submissions went on to state that as well as there being breaches of the lease as evidenced in the report of Anthony Harrison the work was not carried out to a reasonable standard. The new waste pipe did not have an effective fall and was therefore prone to blocking. Also, the alterations to the internal arrangements and the removal of the fire resistant timber glazed screen meant that the flat did not conform with the stacking within the building or fire regulations. The photographs showed an opening between the new kitchen and the escape route from the bedrooms to the front door of the apartment, although the respondent stated a door has now been installed in this opening.

17. In response the Respondent's representative Yosef Zekaria stated that Cubhill Ltd is a property development company which acquires and develops residential property which the company then manages. When

the property was being advertised for sale it was stated in the property particulars that only purchasers with an additional budget for a full refurbishment should view the property. Therefore, he said it was inevitable that whoever purchased the property would be required to undertake substantial works. He stated that the property was in a dilapidated condition and was uninhabitable. The walls and ceilings and the pipework were in need of significant upgrading to comply with current building regs. Also all electrics and plumbing needed to be reinstated and a pest control company had to be employed to rid the property of rodents.

18. Mr Zekaria provided a schedule of works for the work that was carried out at the premises. These works included removing the entrance and hallway ceiling and removing a collapsed ceiling in the lounge. He says that the works represented a substantial upgrade of the property but did not constitute structural alterations or structural additions because all the structural walls have remained intact, He said that the works cost around £28,000 and greatly improve the property both for the inhabitants and the neighbours.

19. Mr Zekaria said that on 26 August 2021 a building control sign off was received from Barnet Council in relation to the refurbishment and reconfiguration of the property. This document is at page 8 of the exhibits to Mr Zekaria's statement and is a certificate of completion signed by M Keown on 27 August 2021. Mr Keown was the building control manager of the London Borough of Barnet.

20. A witness statement by Andrew Male of the Bowen partnership confirmed that the works were carried out in accordance with building regulations in his opinion. Significantly Mr Male conceded that there may have been a breach of clause 2(3) of the lease but this would have been minimal and would have occurred as part of the ordinary course of renovation works. He also stated that the new location of the kitchen

required the running of a new feed and waste pipes within the sand and cement screed. This would have required the sand and cement screed to be cut into. Again, he agreed that this was a breach of clause 2(3). However, he stated that the work was non structural and would not therefore be a breach of clause 2 (4). He does not agree with Mr Harrison's opinion that the parquet flooring was a landlords fitting. He said that the parquet flooring is a floor finish. He also stated that anything above the floor screed would be considered to be a fixture and not a fitting and thus would be the property of the Respondent.

21. Mr Male stated that the original panel radiators and associated feed pipes had been removed and replaced with electric radiators he understood that the feed pipes were not excavated from the screed and that they were cut in and capped just below screed level before the screed was repaired. He was therefore of the opinion that clause 2(3) has been breached but that these works were carried out as part of the renovation works. He did not consider the heating system to be a landlord fitting and the change from a panelled radiator system fed via a boiler to electric radiators was not structural work. Therefore there was no breach of clause 2(4).

22. Mr Male stated that the new plasterboard ceiling had been installed but this work was not structural and did not contravene clause 2(4). The work would not have involved cutting injuring or maiming the walls ceiling or floor and therefore would not be a breach of clause 2(3).

23. Mr Male stated the electrical system has been rewired with the certificate for the works included in the bundle. He accepted that these works would have involved chases being cut into the walls and that this work would therefore be a breach of clause 2(3) however he stated that it is not a breach of clause 2(4) because the works were non-structural. He stated that the works to cut into the walls etc would have formed part of the general refurbishment works and he would assume that

many of the other flats within Solar Court would also have had additional sockets installed.

24. The Respondents also produced legal submissions in response to the Applicant's submissions. They relied in particular on the case of *Duval v 11 to 13 Randolph Crescent Ltd* [2020] UKSC 18. They said that this case had to be considered when interpreting clause 2(3). They stated that whilst the ratio of that case related to obligations to 3rd party leaseholders when giving consent it was necessary for the Supreme Court to construe the meaning and interpretation of the relevant terms and the leases. In doing so the Supreme Court considered the ambit of a clause that involved the cutting maiming or injuring of any roof, wall or ceiling or pipes under the utilities. In the context of that particular case those words did not extend to cutting which was not itself destructive and is no more than incidental to works of normal alteration or improvement. They say that in interpreting the present.

25. The Respondents stated that clause 2(3) cannot be an absolute prohibition as structural alterations and additions which can be consented to in clause 2(4) would require this; they stated that clause 2(4) does not require consent for works of normal alteration or addition

26. The Respondents accepted that the property had been converted into two bedrooms and the kitchen has been repositioned. However, they stated that this is not a breach because those works were non - structural works and related to fitting out rather than the fabric of the property. Clause 2(4) requires consent only for structural alterations. They accept that the feed and waste pipes were stripped out but this was work incidental to those permitted by clause 2(4). They accepted that the screen was removed and replaced but this was not structural work. They accepted that there had been cutting into the cement and sand screed but again they denied that this was a breach of clause 2(3).

They accepted that the bathroom has been stripped out and refitted but they said this was not structural. They accepted that the paneled radiators and pipes have been stripped out but again they said this was not structural. They said that the parquet flooring was non structural. They also stated that the plasterboard ceiling was not structural and did not involve anything which could be said to be a breach of clause 2(3) and even if it did the Duval interpretation would apply. A similar submission was made in relation to the electrical installation.

27. In a letter dated 28 September 2021 Mr Harrison the surveyor for the Applicant stated that the certificate of completion issued by Barnet Council referred to above was not conclusive evidence that the works described in the certificate were in compliance with the requirements of the building regulations indeed this was stated on the certificate itself.

28. He stated that it was apparent from an email received from the London Borough of Barnet by the Applicants that the Building Regulations application for approval was accompanied by a sketch showing the route of the waste pipe serving the kitchen, installed in conjunction with the general renovations. He said he was previously provided with a sketch and a drawing on which the waste runs had been superimposed to show how this relates to the new layout. In his report he'd referred to the root of the waste pipe found at paragraph 5.12 which was he assumed a straight line from the sink to the soil pipe in the region of 4.5 m long. He stated this would not comply with building regulations as it exceeded the limit of 3 m as set out in part H1. In addition, the fall to the pipe would have been virtually level and certainly not within the tolerances required by the regulations of 18 mm to 44 mm per metre. Indeed, he stated the route as indicated was worse as not only are there now bends within the pipe run but also the length of it exceeds the 4.5 m. He stated that the pipe has to firstly drop vertically beneath the sink to the floor level to enable a 90° bend to be formed so that the pipe could enter into the screed. He assumed this was a soil pipe. In

summary he stated that the pipe cannot comply with the building regulations due to the fact it's too long, laid with inappropriate falls, and will not function as it would readily block due to the flat runs and the number of bends along its length.

The hearing

29. Ms Mattison of Counsel appeared on behalf of the Applicant and Mr Bryden of Counsel on behalf of the Respondent.

30. In evidence Mr Male accepted that the pipe work did not have a sufficient fall to meet Building Regulations. He accepted that the partition had been removed and a new partition constructed between the kitchen and living room. He did not know whether a new door and frame had been fitted. He accepted that to put the pipe in screed would need a channel cut into the screed. He said that the flooring removed was probably the original flooring and may have been a fixture not a fitting. He said when the floor was removed it would not be needed to cut into the screed because a self levelling compound was used. He said that the water tank was the original water tank. All of the radiators had been removed and replaced by electric ones He did not know if they'd have had to cut the screed to do this. He accepted that the ceiling was a new ceiling which had spotlights and it was a suspended ceiling. For the water tank he accepted that it was necessary to cut into the pipes. He accepted that the kitchen had been moved and the pipes removed and re-plumbed but he said that there was no need to cut into the screed for this purpose.

31. Miss Mattison said that she relied on the summary of Mr Harrison's report. The kitchen had been relocated, pipes had been relocated there had been cutting into the structure of the building without consent and the relocation and conversion from one to 2 bedrooms had also been carried out without consent as had the stripping out of all radiators.

32. Mr Bryden cross-examined Mr Harrison. The latter accepted that he was called in when the works were complete and he largely confirmed his written evidence. He said that the screed had been cut into when removing the radiators and putting cables into it. He said that the parquet flooring was a fitting and it was indeed an original fitting. Parquet is in a bitumen -type compound which was put in by the landlord. He considered that the suspended ceiling although screw fixed was structural.

33. Mr Zekaria gave evidence and said in his experience the works did not need building regulation approval. He accepted that the premises have been let to tenants without a fire compliant door.

Determination

34. It is patently clear that considerable works were carried in the premises and that no prior permission was sought from the Respondents. In relation to the allegations of breach the Respondents accepted that there had been breaches but argued that because those breaches had taken place during the course of other works they were excused. They relied for this proposition on *Duval* in interpreting clause 2(3).

35. *Duval* concerned a different issue than that before this Tribunal. It concerned the tension between two clauses one of which was an absolute prohibition and the other a clause requiring the landlord to enforce provisions of the lease where there had been breaches. The landlord in the *Duval* case had given permission to a leaseholder to carry out works which on their face breached the absolute prohibition. The Supreme Court held that the landlord was prevented from licensing work which absent a license from the landlord would amount to a breach of clause of a particular clause. This is a quite different

situation than the present situation which simply concerns a breach of lease application.

36. The two clauses in *Duval* were the following:

> Clause 2.6 : *Not without the previous written consent of the landlord to erect any structure pipe partition wire or post upon the demised premises nor make or suffer to be made any alteration or improvement in or addition to the demised premises.*
>
> Clause 2.7: Not to commit or permit or suffer any waste spoil or destruction in or upon the demised premises nor cut maim or injure or suffer to be cut maimed or injured any roof wall or ceiling within or enclosing the demised premises or any sewers drains pipes radiators ventilators wires and cables therein and not to obstruct but leave accessible at all times all casings or coverings of conduits serving the demised premises and other parts of the building.

37. In interpreting these clauses the Supreme Court stated the following:

> *31 Against this background I come to clauses 2.6 and 2.7. As I have mentioned, it was the common approach of the parties (and the Court of Appeal apparently accepted) that clause 2.7 sets the boundaries of clause 2.6. To take an example, a routine rewiring of one room would necessarily involve cutting a wire and a wall. On the parties interpretation, an activity such as this would fall within the scope of clause 2.7 and so would necessarily be outside the scope of clause 2.6. Indeed, it is difficult to think of any alteration or improvement within the apparent scope of clause 2.6 which would not involve some cutting of a wall, pipe or wire. It seems to me to be most unlikely that the parties intended that routine works of this kind should fall within the scope of clause 2.7 and so outside the scope of clause 2.6 with the*

consequence that the landlord could, however unreasonably, withhold its consent. It is much more likely, in my opinion, that the parties intended the two provisions to be read together in the context of the lease and the leasehold scheme for the building as a whole. On that approach it becomes clear that the two clauses are directed at different kinds of activity. Clause 2.6 is concerned with routine improvements and alterations by a lessee to his or her at, these being activities that all lessees would expect to be able to carry out, subject to the approval of the landlord. By contrast, clause 2.7 is directed at activities in the nature of waste, spoil or destruction which go beyond routine alterations and improvements and are intrinsically such that they may be damaging to or destructive of the building. It seems to me that this concept of waste, spoil or destruction should also be treated as qualifying the covenants not to cut, maim or injure referred to in the rest of the clause. In my opinion and in the context of this clause these words do not extend to cutting which is not itself destructive and is no more than incidental to works of normal alteration or improvement, such as are contemplated under clause 2.6.

38. In the present case by way of reminder the relevant clauses are the following:

2.3
Not to injure cut or maim any of the walls ceilings floor or partitions of the demised premises
2.4
not to make any structural alterations structural additions to the demised premises or the internal arrangements thereof nor remove any of the landlords fixtures without having first obtained the vendors written consent…

39. It is clear that the *Duval* case is relevant but it does not assist the Respondent. Clause 2.3 is akin to the more serious clause (2.7) in the case. It is a non - qualified prohibition and should be read as such like

clause 2.7 in the *Duval* case. Even if one is to read the clauses in this case together they must require the permission provision in clause 2.4 to apply overall. The Respondent has sought to suggest that the clauses are permissive of any works that are of a non - structural nature. Putting aside the question of whether the works are of a structural nature which is addressed below if one were to read the clauses together the leaseholder would need to get permission for works of the type referred to in clause 2.3 or 2.4. They did not do that in the present case.

40. Taking each alleged breach in turn:

- Repositioning the kitchen and new second bedroom: This involved stripping out all of the feed and waste pipes, infilling of partitions and relevelling of the floor. This was structural work that breached clauses 2.3 and 2.4. No permission was sought for the works. Although the premises needed to be improved the clauses are clear in their meaning and effect. The waste pipe was installed in a manner which did not comply with building regulations.

- Bathroom stripped out and refitted with a new water tank: these works [CAN YOU ADD SOMETHING HERE SIMON?] required the repositioning of pipework and new connections to the common building services together with the replacement of the water tank without the consent of the applicant in breach of clause 2(4) of the lease..

- The removal of the fire resistant glazed screen and replacement with a timber and stud partition. This would have involved a breach of Building Regulations contrary to clause 3 (12) and the removal thereof is a breach of clause 2(3) of the lease .

- New feed pipes and a waste pipe fitted from the repositioned kichen. This involved cutting the screed and was a breach of clause 2.3 and 2.4. Screed is in the opinion of the Tribunal part of the structure, and cutting it is structural work.

- New arrangement of rooms. This constitutes a breach of Building Regulations contrary to clause 3(12).

- Fitting new radiators and feed pipes which involved cutting into the screed. This was a breach of clauses 2(3) and 2(4). Screed is part of the structure and cutting it is structural work.

- Removal of parquet flooring. This was a landlord's fixture and should not have been removed without permission. It was installed by the landlord and it was permanent fixture.

- New plasterboard ceiling. This was not a breach as it did not involve structural works neither was it a breach of clause 2(3).

- New wiring run through the chases cut into the walls and floor screed. This was structural work – see above.

Summary

41. The Respondents carried out substantial works in breach of the lease as outlined above.

ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.