FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LBC/2019/0025**
Property	**:**	**Flats at 66, 32 & 61 Marlborough, 61 Walton Street, London SW3 2JU**
Applicant	**:**	**Marlborough Knightsbridge Management Ltd**
Representative	**:**	**Mr J Fieldsend, Counsel instructed by Bolt Burdon Solicitors**
Respondent	**:**	**Celia Willis, owner of flat 66 and Court-appointed Deputy for Shirley Alice Price, leasehold owner of Flats 32 and 61**
Representative	**:**	**Miss M Proferes, Counsel instructed by Withers LLP Solicitors**
Type of application	**:**	**Application under s168(4) of the Commonhold and Leasehold Reform act 2002**
Tribunal members	**:**	**Tribunal Judge Dutton** **Mr S Mason FRICS**
Date and venue of paper determination	**:**	**10 Alfred Place, London, WC1E 7LR on 22 May 2019**
Date of decision	**:**	**26 June 2019**

DECISION

DECISION

The Tribunal determines that there has been a breach of covenant or condition of the Respondent's lease under the provisions of section 168(4) of the Commonhold & Leasehold Reform Act 2002 (the Act)

BACKGROUND

1. On the 27th March 2019 solicitors for the Applicant issued an application in the Tribunal seeking a determination that there has been a breach of condition or covenant of the lease under provisions of section 168(4) of the Act. The application alleges that the Respondent has replaced the external doors to the three flats in breach of clause 3(4) of the lease. It is further alleged that in breach of clause 4(5) of the lease, certain regulations have not been complied with and reference is made to new regulations notified to the leaseholders of the building in July of 2018, but those new regulations do not form part of these proceedings. Subsequent to the issue of the application, directions were issued foreshadowing a paper determination. However, that did not happen and the matter came before us for hearing on 22nd May 2019.

2. This case was heard in conjunction with a case bearing reference LON/00AW/LBC/2019/0024 with the same Applicant but the Respondent being a Mr Thierry Gill Fivaz, the leaseholder of Flats 120 and 121 at Marlborough. The facts associated with that case and with the one are very similar hence the matter being dealt with at one hearing. However it is felt appropriate to issue two decisions the more so as the Respondent in this case Celia Willis also relies on a failure by the Applicant to proceed with her application for consent in a timely manner.

3. Prior to the commencement of the hearing we were provided with a substantial bundle of papers which included amongst other things an extract from Woodfall, photographs, copies of the register of title, the three leases which we were told were in similar form, correspondence passing between the parties and others as well as the application and the Tribunal directions. In addition to this, we had a copy of the Respondent's response statement and grounds of opposition, a reply thereto and skeleton arguments from both Counsel. In the Respondent's response statement under the heading Conclusion, we are asked to make an order that the Respondent has not been in breach of the covenants but also that the Applicant is not permitted to replace the lessees' doors nor to use service charge or company funds for that purpose. We can say at the outset that that is not a matter that we intend to deal with. Indeed, it would appear to be the case that the Respondent does not pursue that because in the skeleton argument prepared by Miss Proferes the issues we are asked to determine are as follows:

    a. Was the Respondent required to obtain written consent prior to replacing the doors?
    b. Are the doors landlord's fixtures for the purposes of clause 3(4)? If so, has the Respondent (i) removed them within the meaning of clause 3(5), (ii) is such removal an act of damage contrary to clause 4(5) regulation 17 and

(iii) is such removal an interference with the external decorations or painting of the demised premises contrary to 4(5) regulation 20?

4. The skeleton argument went on to set out some of the history relating to fire risk assessments, section 20 notices and steps intended to be taken by the board of the Applicant, which is a company owned by the majority of the lessees in the building. We have noted all that was said in so far as it is relevant to the issue we must determine. Reference is also made to the imposition of new regulations, but again those are not proceeded with by the Applicant.

5. The Applicant's position appears to be from the papers before us, that the doors were fixtures, replacing them was removing them for the purposes of clause 3(4) and therefore clause 4(1) is relevant in that the repair involving removal requires written consent. The Respondent's position is that the doors are not fixtures, the replacement was not a removal but a renewal and part of the Respondent's obligations under clause 4(1) and therefore no consent was required. We were referred to a number of authorities as well as extracts from Woodfall, from Dowding and Reynolds and what appeared to be an extract from Aldridge Leasehold Law. The various statements and responses are common to the parties and it does not seem to us to be necessary to repeat matters set out therein in any detail. The same applies to the skeleton arguments which were exchanged between the parties and presented to us on the day of the hearing, for which we are grateful.

6. We first heard from Mr Fieldsend on behalf of the Applicant. It was, he told us, accepted that the fronts doors to all flats were included within the demise and that there were 168 flats in the building. The difference between the Respondent in this case and Mr Fivaz was that Miss Willis had made an application to the Applicant for the change of the doors to the flats that she and her mother owned. From her point of view there was an allegation that there was an unreasonable withholding of consent in that the production of same was unreasonably delayed. It was said on behalf of the Applicant that insofar as the consent was concerned, time did not start to run until the request for information and other matters had been properly dealt with by the Respondent. The question of the reasonable time for dealing with the consent was discussed but it was the Applicant's view that the Respondent had "jumped the gun" and proceeded to have the doors replaced without obtaining the consent.

7. We were told that the terms of the lease relevant to this case are the same for each property and it is perhaps appropriate to set those out now. Clause 3(4) of the lease says as follows:

"3(4) Not at any time during the said term to make any alterations in or additions to the demised premises or any part thereof or to cut maim alter or injure any of the walls or timbers thereof or to alter the internal arrangements thereof or to remove any of the landlord's fixtures therefrom without first having made a written application (accompanied by all relevant plans and specification) in respect thereof to the lessors and secondly having received the written consent of the lessors thereto and

paying the fees of the lessor and any mortgagee and their respective advisors."

The other clause of the lease we were required to consider is 4(1) which says as follows:

" Throughout the said term to repair maintain renew uphold and keep the demised premises and all parts thereof (other than such parts as are comprised and referred to in paragraphs (a) and (b) of sub-clause (5) of clause 5 hereof) including so far as the same form part of or are within the demised premises all windows glass and doors (including the entrance door to the demised premises) locks fastening and hinges sanitary water gas electrical apparatus and walls and ceilings drainpipe wires and cables and all fixtures and additions in good and substantial repair and condition …."

Reference is also made to the regulations under the first schedule and we were asked to consider regulation 17 which says as follows:

"Not at any time to do or permit the doing of any damage whatsoever to Marlborough the fixtures fittings or chattels therein the curtilage thereof or the path adjoining thereto and forthwith on demand by the lessors to pay to the lessors the cost of making good any damage resulting from a breach of this regulation."

In addition to this regulation we were referred to regulation 20 which says as follows:

"Not at any time to interfere with the external decorations or painting of the demised premises or any other part of Marlborough."

8. It is accepted that the front doors to the three flats have been removed and replaced and it is the Applicant's case that the doors removed are a fixture and thus caught by clause 3(4) and regulation 17. It is the Respondent's case that they are a chattel and thus outside those clauses. The question, therefore, that we need to decide is whether the front door to the flats is a fixture or a chattel and a number of cases were put to us in this regard.

9. It is accepted, however, that the door is not a structure and therefore is not caught by the alterations or additions clause. It is, however, in the Applicant's view a fixture and the preceding word 'landlord' adds nothing to the definition. It was said also that the word 'renew' adds nothing to the word 'repair'. In any event, there is no evidence that the removal and replacement was to remedy disrepair and accordingly the removal of the door as a fixture required the consent of the Applicant. Reference was made, as we have indicated above to Dowding & Reynolds chapter 25 under the heading 'Fixtures' and we will deal with that in the findings section of the decision. We were referred to a number of cases, these included the cases of Botham and others v TSB Bank, Holland v Hodgeson, Bishop v Elliott, Lambourn v McLellan and as we have indicated various extracts from text books.

10. On the question of consent, we referred to the cases of Wilson v Flyn and Bewick v Bailey Casinos. The Applicant's case is simply put that the front door to the flat was not a chattel and was a fixture and it had been removed without consent. Removal and replacement and with a different door constitutes a permanent removal It must therefore been within the contemplation of the parties that control over the door would be retained by the Applicant because, if not, the tenant could remove and replace with something different. Mr Fieldsend suggested that the Respondent says the consent was only needed if there was a material change and because a better door was installed no consent was required. However, there was no evidence before us to show that the door was better quality. There was no witness statement from the Respondent to confirm this fact.

11. Mr Fieldsend's submission was that the prohibition contained within the lease worked well in requiring consent because quality could then be assessed, which would be important. He was satisfied that there was a close relationship between clause 3(4) and clause 4(1). It was not, he considered, unreasonable to consider that works under clause 3(4) may well require consent under clause 4(1). The landlord was concerned about getting back what was included in the demise and the wording gave control to the landlord to ensure that that is what happened.

12. Insofar as the regulations are concerned, Mr Fieldsend submitted that regulation 17 was there to deal with permanent removal, which constituted damage and this was consistent with the repairing obligations and consent required. Under regulation 20 external decoration is not limited to the exterior of Marlborough but includes the interior and in particular the front door.

13. Further on the question of consent, the prohibition against removal of fixtures under clause 3(4) is permissible with the Applicant's prior consent. It is the Respondent's assertion that the requirement for consent is that it should not be unreasonably withheld. The provisions of section 19(2) of the Landlord and Tenant Act 1927 is relied upon. It is said by the Applicant that that section applies to covenants against making improvements and not a covenant concerning the removal of a fixture. Even if section 19(2) applies then the Applicant is entitled to a reasonable time to consider the application.

14. We were told that the application for consent was made by the Respondent on 12th November 2018 but that relevant documentation was not provided until 19th November 2018. A final undertaking as to professional costs was not given until 29th November 2018 and works commenced on 5th December before the matter had been fully concluded. We were taken to the various emails evidencing these dates.

15. It appeared that the Respondent had, according to the Applicant, created the urgency by fixing a date for the contractors to attend on the 5th December 2018. This appears to because if they could not fit the doors then, it would not be until Easter of 2019 that the works could be undertaken. It is said that no evidence of this deadline was produced to the Applicant.

16. For the Respondent Miss Proferes, confirmed that the factual matters in the outline given by Mr Fieldsend was correct. The question of fixtures was again discussed which she considered was a more nuanced question. Did the parties intend the landlord's fixtures would include the doors? Her view was that these were not chattels but neither were they landlord's fixtures and we were referred to the extract from Dowding and Reynolds where a chattel was defined as neither an integral part of the demised premises nor a fixture. Under the definition of fixtures, it is said that it is anything affixed to the demised land or building in such way as it has lost its chattel nature but does not become an integral part of the land or building. For the purposes of analysis fixtures are conventionally subdivided into landlord's fixtures and tenant's fixtures. However, the article went on to say that the use of the expression 'landlord's fixtures' has no particular significance in the law relating to fixtures save as to denote those which are not tenants. It is generally used to refer to fixtures which a tenant is not entitled to remove either because they are annexed to the premises by the landlord (and were therefore part of the demised premises from the outset) or because they were annexed by the tenant after the grant of the lease but the circumstances are such for whatever reason he has no right to remove them.

17. It was accepted by Miss Proferes that the front door to the flat is an integral part of the building but is not structural and it is different from the internal doors to the flats. Replacing the door did not change the structure and she reminded us that the doors in question are part of the demised premises. She asserted that the doors were not in repair because they did not provide adequate fire protection. Age can make an item out of repair requiring renewal. She also referred us to an extract from Aldridge Leasehold Law in which it is suggested that an example of class of chattels may be found in doors or windows and that perhaps it was better to regard such items as not fixtures at all.

18. We were asked to consider the purpose of 'annexation' of the doors. An example was given of cinema seats which were fixed to the floor and held to be fixtures as they were intended to be permanently fixed but remained chattels when they were hired out for a shorter period. It was also suggested to us that the lease should not require a tenant to undertake certain steps and then require that to take those steps permission should also be obtained. It was suggested by Miss Proferes that clauses 3(4) and 4(1) were mutually exclusive. On the question of the removal of the doors, it is said that they were renewed by way of replacement rather than removal. The natural meaning of the lease, it was suggested, was that the tenant must obtain consent before removing a fixture such that after that action the fixture no longer exists. Replacing a fixture is not the same as removing. It was suggested that there had been no material change had the fixture been replaced by one of better quality.

19. Alternatively, if consent was required under the lease, the consent was unreasonably withheld under the provisions of section 19(2) of the Landlord and Tenant Act 1927 and no retrospective licence has been offered. As to the breach of regulations, it is denied that any damage has been caused to Marlborough. The removal of the doors from the Respondent's point of view was not damage, they had been renewed in keeping with the obligation placed

on the Respondent by the lease. Insofar as the external decoration and painting was concerned, the doors are not decorations and no interference had taken place to any painting. Accordingly, the Respondent's case was that there had been no breach and further that the Applicant failed to provide the consent within a reasonable period of time.

20. Mr Fieldsend responded briefly to this indicating that there was no witness statement from the Respondent and he sought to justify the period time it had taken for the Applicant to deal with the request for consent. He was of the view that the door was not part of the structure as it was internal and he relied on the various authorities that had been put to us.

FINDINGS

21. We consider that our responsibility in this case is to make a determination as to whether or not there has been a breach of covenant or condition of the lease. We will not deal with the wider questions raised by the Respondent, in particular the ability of the Applicant to carry out the works to the other doors of flats in the building and to fund the cost of same from service charges or from company funds. That is for another time. Our task is to merely decide whether there has been a breach by the Respondent. In the extract from Dowding and Reynolds at chapter 25 a definition of fixtures is as follows:

"A fixture is anything which has been affixed to the demised land or building in such a way that it has lost its chattel nature but it has not become an integral part of the land or building. For the purpose of analysis fixtures are conveniently sub-divided into landlord's fixtures and tenant's fixtures.

The expression landlord's fixtures has been criticised it has no particular significance in the law relating to fixtures, save to denote fixtures which are not tenant's fixtures."

The extract then went on to consider the degree of annexation. At paragraph 25-7 it says *"Where an item has been attached or connected in some way to the land or building there is a rebuttable presumption that it has become a fixture."* It goes on to say *"A relatively slight degree of annexation may be required in order to raise the inference that an item has lost its chattel nature. In general, however, the more firmly the item has been fixed the more likely it is held to be a fixture. In addition, whilst the degree of annexation might be important the principle importance will be the purpose of annexation."*

In the case of Botham v TSB the question of what constituted fixtures was considered. The judgment of Sir Richard Scott VC is cited and he in turn refers to judgment of Scarman LJ who says as follows: *"As so often the difficulty is not the formulation but the application of law. I think there is now no need to enter into research into the case law prior to Leigh v Taylor [1902]AC1507. The answer today to the question whether objects which were originally chattels have become fixtures, that is to say part of the freehold, depends on the application of two tests, 1. method and degree of annexation 2. the object and purpose of the annexation. In the case of Bishop and Elliott*

comment is made albeit concerning a public tavern where it is suggested that whether properly called fixtures or not the tenant could not remove certain locks, keys, bolts and bars which were considered to be part of the house and go with as the doors or windows. The case of Lambourne and McClellan is also cited as indicating what was intended to be a fixture."

22. We remind ourselves of the terms of the lease and in particular clause 3(4) and 4(1). Clause 3(4) deals with alterations and additions and also a prohibition against removing landlord's fixtures without having the landlord's consent. Clause 4(1) contains the tenant's obligations to repair, maintain, renew, uphold and keep the demised premises and all parts in good repair, and includes the entrance door to the demised premises.

23. Whilst we can accept that replacement may constitute a repair, there is no evidence that the existing doors were in a state of disrepair. However, the renewing of the door does require the removal of same. Such removal requires the consent of the landlord under the provisions of clause 3(4) if it is held that the door is a fixture.

24. We have considered the various cases put to us and the arguments raised by Counsel. It seems to us that there is no doubt that the door is a fixture. It is connected to the Property and does not stand there by its own weight. It provides security and privacy to the owners of the flat and is also providing potential privacy and security to those people using the common parts. It is not in our findings a chattel. In those circumstances, although the provisions of clause 4(1) require the tenant to repair, maintain, renew and uphold the demised premises, the removal of the front door and the replacement with another does in our view require the consent of the landlord. This seems logical because one would expect a landlord to want to maintain some commonality of doors to the Property and in the light of the recent problems with regard to fires in flats certainly an intention to ensure that the doors provided sufficient fire safety. By requiring consent to change such an item, it enables the landlord to control whether the door meets the safety requirements as well as providing a suitable alternative to ensure that the ambience of the building is maintained.

25. In this case, of course, the Respondent did seek the consent of the landlord and it is suggested that the Applicant unnecessarily delayed such consent. The timescale appears to be somewhere around 12th November to 5th December. There was a short delay in the Respondent providing the Applicant with the information that they sought. It appears then that the Applicant's managing agent was away for a few days and unfortunately the matter was not progressed greatly in his absence. However, upon his return there were still questions that needed to be resolved not least of which some form of undertaking with regard to the costs of the consent. That it seems was not provided until the end of November and within five days or so the Respondent was arranging for contractors to fit the new doors.

26. It appears that there was some 'time imperative' largely because the contractors indicated if they were unable to fit the doors in December they would have to wait until the following Easter. It is in the background of the

Applicant indicating to tenants that it was going to proceed to change doors, that perhaps there was something of an urgency. However, we are not aware that the timescales of the contractors was imparted to the Applicant and accordingly it does not seem to us that that has any particular bearing on whether the consent was granted in a timely fashion. We do not consider that a delay of less than 28 days is unreasonable and bearing in mind the findings of the cases that were referred to us of Wilson and Fynn and Bewick and Baylis Casinos, particularly in the latter where Mr Justice McGary took the view that there must be a reasonable time allowed for the consideration of an application, it seems to us that the Applicant could not be accused of unnecessarily dragging their heels and in effect, therefore, failing to provide consent.

27. We therefore find that as the door is a fixture, the consent of the landlord was required before it was removed and replaced. Further we find that the timescales for the giving of consent are such that it was not unreasonably withheld and that the Respondent perhaps, as was suggested by Mr Fieldsend, 'jumped the gun' in getting the works undertaken before the consent had been finalised.

28. We therefore find there has been a breach of the condition of the lease.

29. It does not seem to us that the regulations are particularly helpful on determining this matter. And make no findings therefore that there has been any breaches of the regulations. The breach rests with clauses 3(4) and (4)(1) which we find are not mutually exclusive but should be read in conjunction with each other.

Judge: Andrew Dutton

A A Dutton

Date: 26th June 2019

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.

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

3. If the application is not made within the 28-day time limit, such application must include a request to 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 identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.