



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case reference** : **LON/00BJ/LBC/2020/0051**

**HMCTS code  
(paper, video,  
audio)** : **V: CVPREMOTE**

**Property** : **Flat C, 145 Tooting Bec Road, London,  
SW17 8BW**

**Applicants** : **Mr Shakil Ismail (1)  
Mr Sajid Daud Ismail (2)**

**Representative** : **Mr David Giles**

**Respondent** : **Mr Siddique Osman**

**Representative** : **Mr David Fleming  
Of William Heath & Co**

**Type of application** : **Determination of an alleged breach of  
covenant**

**Tribunal members** : **Judge Brandler  
Mr M Cairns**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of hearing** : **30<sup>th</sup> November 2020**

**Date of decision** : **10<sup>th</sup> December 2020**

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**DECISION**

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## **Covid-19 pandemic: description of hearing**

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V:CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in two bundles. The applicants' bundle of 100 pages, referred to in this decision by way of [page number followed by A] and the Respondent's bundle of 168 pages, referred to in this decision by way of [page number followed by R], the contents of which we have noted. The order made is described at the end of these reasons. The parties confirmed at the end of the hearing that they had been able to tell the Tribunal everything they wanted to say.

## **Decisions of the tribunal**

- (1) The Respondent is in breach of clauses 2(3) and 2(4) of the lease dated 30<sup>th</sup> April 1986
- (2) The Applicants did not unreasonably withhold consent and there has been no waiver.
- (3) The Limitation Act 1980 is not relevant to this application.
- (4) The Tribunal makes no order for costs

## **The application**

1. By an application dated 07/09/2020, Mr Shakil Ismail and Mr Sajid Daud Ismail ("The Applicants") seek a determination pursuant to s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("The Act") that Mr Siddique Osman ("The Respondent") is in breach of clauses 2(3) and 2(4) of his lease dated 30<sup>th</sup> April 1986. In particular, the applicant asserts that the respondent has cut injured and maimed the walls and ceiling without consent contrary to clause 2(3) and made structural additions and erected a new building contrary to clause 2(4) of the lease of the property known as Flat C, 145 Tooting Bec Road, London SW17 8BW ("The property").
2. The terms of the lease of the property relied upon in this application are:
  - (i) Clause "2(3) *Not to injure or maim any of the walls ceilings or partitions of the flat without the lessors consent in writing first obtained such consent not to be unreasonably withheld or delayed*"
  - (ii) Clause "2(4) *Not to make any structure alterations or structural additions to the flat or the internal arrangements thereof nor to erect any new*

*buildings thereon or remove any of the Lessor's fixtures without the previous consent in writing of the Lessor such consent not to be unreasonably withheld or delayed"*

3. The Respondent does not deny that he has carried out an upgrade of the property, but opposes the application on the basis that he attempted to obtain consent from the Applicants, that they ignored the request to carry out alterations, and they therefore unreasonably withheld consent and have therefore waived their right to obtain a determination of a breach. The Respondent further seeks to rely upon the Limitation Act 1980 because he says the alterations were carried out some 15 years ago.
4. Both parties seek costs should they be successful.
5. The history of the proceedings is that directions were issued on 09/10/2020. Those directions have been complied with.

### **The background**

6. The Applicants acquired the freehold interest of 145 Tooting Bec Road, London SW17 8BW ("The building") on 28.04.2004, having already acquired a long lease of flat A on the ground floor of the building on 08.05.2003. They have never lived in this flat. It forms part of their property portfolio.
7. The property which is the subject of this application is Flat C on the 1<sup>st</sup> and second floors of a converted house. The flat has sole access to a loft area which is demised to this flat as set out in the First Schedule of the lease [37R). The Respondent holds a long lease of the property. His interest in the property having been registered at the Land Registry on 07.02.2005 [25R]. The Respondent has never lived in the property, it forms part of his property portfolio.
8. There was very limited photographic evidence of the building provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

### **The hearing**

9. This was a remote video hearing, each of the parties and the tribunal members joining the proceedings separately, other than the two applicants who joined from the same video device. The start of the hearing was delayed due to connectivity problems. Everyone was connected and the hearing commenced at 10.50 a.m.

10. The Applicants were represented by Mr David Giles of counsel. The Respondent was represented by Mr David Fleming, solicitor of William Heath & Co. Mr Rizwan Osman, the Respondent's son, who had prepared a witness statement, was not present.
11. During the course of the hearing both parties asked the Tribunal to consider caselaw which had been submitted to the Tribunal by email and were considered and referred to in submissions. The Tribunal had the opportunity to consider the caselaw during a break.
12. The tribunal heard first from the first applicant, Mr Shakil Ismail. He confirmed the contents of his two witness statements, the first dated 28.10.2020 [17-A] and the second dated 19.11.2020 [68-A].
13. In oral evidence Mr Ismail confirmed that he owns a number of properties, is a professional landlord and has been in the business for some time. By profession he is an accountant and believes that his property agency is a member of ARLA. In relation to best practice he is reliant on professional advice.
14. He and his brother originally bought the long lease of flat A in the building, and later purchased the freehold of the building. There were no photographs of the building available to the tribunal to indicate whether there were Velux windows at the time of purchase. Mr Ismail states that there was no evidence of planning permission or building regulations for any alterations to the building since the plans dated 1985 which appear to be for the original conversion of the building to 3 flats.
15. Mr Ismail told the tribunal that he had first noticed Velux windows in the building in the early part of 2020. At the time he was visiting his tenant in flat A to inspect penetrating dampness from a neighbouring property. During his inspection, he went into the garden and noticed a window in the rear of the property in the roof space. There is no photograph of that rear window and none of the plans in the bundle indicate a window [59R]. He sought advice from his solicitors, and instructed Trevor Mullineaux, from KLF Structural Design Ltd, Consulting Engineers to inspect the property to establish if the building was sound and whether the flat had been extended or was in its original form. He was also asked to note as much as possible without being able to look at beam sizes.
16. On 23.10.2020 Mr Mullineaux inspected the property in the company of Mr Ismail and found that the roof space at the front of the building had been converted into a living space. Access was by way of a staircase from the second floor and three Velux windows to the front were noted. Mr Mullineaux's one page letter is the extent of the report [66A]. In that letter Mr Mullineaux states inter alia that "The timber and materials visible in the void at the rear of the room indicated that the construction was relatively recent".

17. It was put to Mr Ismail that this is a Victorian building and “relatively recent works” as set out in Mr Mullineaux’s letter, may mean a period of 10-15 years prior to the inspection. Mr Ismail did not dispute this.
18. Mr Ismail disputes that the Respondent sought permission for the works carried out at the property.
19. Mr Ismail relies very much on the respondent’s own documentary evidence submitted for this hearing to establish the breaches asserted in his application. He says this is because he has no way of knowing otherwise what works had been carried out at the property. He denies having been approached for permission to carry out such works, but confirms that had he been approached, he would not have unreasonably withheld consent.
20. Mr Ismail was cross examined at length about the letters in 2004 [43R] and it was put to him that he just ignored any letters from the Respondent. Mr Ismail denied this, stating that had he received such a letter he would have dealt with it.
21. It was also put to Mr Ismail that he is only bringing this current action against the Respondent because the Respondent had complained about service charges and delayed paying them. This was denied by Mr Ismail. He is concerned that the works in the loft have not been done correctly, and had permission been sought from him, he would not have unreasonably withheld that permission.
22. The Tribunal then briefly heard from Mr Sajid Daud Ismail. He confirmed his statement dated 19.11.2020 [99A]. He confirmed he had probably not visited the property since the time they purchased it. He stated that he had not received correspondence from the Respondent in 2004. When asked how he could be so sure, and that he may have forgotten receiving these letters, Mr Ismail stated that he would have alerted Shakil (Ismail) to the letters.
23. In the afternoon, the tribunal heard from the Respondent, Mr Osman. He confirmed his witness statement dated 10.11.2020 [13R]. Although he was in receipt of the electronic bundle, he was not confident in opening that during the hearing in case he got cut off. He had some pages printed, others were read to him where necessary.
24. Mr Osman is an accountant with 40 years of property experience. He has a portfolio of properties and is a professional landlord. In 2011 he acquired an estate agency which is situated in Tooting Bec Road.

#### Works carried out at the property

25. A proposed schedule of works dated 27.06.2005 headed “top floor flat – refurbishment” is included in Mr Osman’s bundle [50-51R]. It shows extensive works proposed. In oral evidence Mr Osman confirmed that all the works described in that schedule had been carried out at the property. Mr Osman also confirmed in oral evidence that he had not at any point sent a copy of that schedule of works to the freeholder/applicants. He told the Tribunal on multiple occasions that he didn’t contact the applicants after 2004 as they had failed to respond to him at that time and he had assumed they were absent. He was of the opinion that because the applicants had not responded, that he had the right to carry out whatever works he wanted to carry out without seeking their consent.
26. As well as confirming that all the works on the schedule had been carried out, in oral evidence the following works were mentioned specifically by Mr Osman:
- (i) The installation of at least one, if not two, Velux windows at the front of the house for the purpose of additional light and a fire escape from the loft room. He could not remember if there had been one or two existing windows at the front of the house but certainly one.
  - (ii) Central heating was installed. Mr Osman could not remember whether there had been electric heaters in the loft prior to the alterations.
  - (iii) A new staircase was installed into the loft because Mr Osman says that the previous owner had carried out poor quality works and had installed a temporary staircase that was not stable and was very dangerous.
  - (iv) All the floors in the loft were strengthened. There had not been a proper floor in the loft when Mr Osman had bought it, and the floors were strengthened because the old floor was squeaking
  - (v) A steel beam to party walls was installed along with a steel support beam, new floor joists throughout the flat, partitioning was adjusted in the hallway, a new shower cubicle was installed, stud walls were moved to accommodate the desired effect on the flat,
  - (vi) Adjustment of structural walls was denied.
  - (vii) Alterations to rafters to install 2/3 Velux windows was carried out. The builders had to cut through the roof to fit those. Mr Osman could not comment on the extent of the alterations but confirmed there had been no scaffolding. All the works had been done from inside the loft, including attaching lead flashings onto the roof.
  - (viii) The existing ceiling level was raised in the bedroom area. Due to water ingress the ceiling had bowed.

New joists and plaster board were installed. The water ingress from the roof was not notified to the freeholders.

- (ix) Some work was carried out to create an eave storage area. Mr Osman was not able to give details as he said he had not been there for a long time. From recollection it may have been an area lending itself to a storage area.
27. It was put to Mr Osman that the schedule of works depicts more than alteration works and refers to actual building work in the loft. In particular reference was made to the steel beam installed to party walls. Mr Osman's response was that the loft was in a poor state and a steel beam was required otherwise the property would be in 'jeopardy'. When asked about a party wall agreement, he responded that an informal arrangement had been carried out by his engineer with the neighbours.
28. Mr Osman was asked about the new window in the rear of the property overlooking the garden. This is the window that Mr Ismail had noticed earlier this year. It does not appear on any plans in the bundle. Mr Osman could not remember if he had installed a window to the rear of the property but asserted that no structural works had been carried out for many years. All structural works had been carried out at the same time.
29. Mr Osman was asked whether he had been aware at the time of purchase that the loft was an illegal conversion and not compliant with building standards. He confirmed that he did know that. He was further asked about the financial accounting for the works in his bundle [54-56R] which did not appear to include provision for building control costs. For example, there would have been a charge for checking calculations of load bearing. Mr Osman in response stated that his engineer Mr Williams was qualified and he had been guided by him. His advice at the time was that this was an upgrade and that no permissions were required and that no building control involvement was required.
30. He was asked about putting in an RSJ, building into party walls, party wall agreement, putting in windows with no building regulations input. Mr Osman stated that he deferred to Mr Williams who had spoken to the neighbours and made informal arrangements. He did not think that Mr Williams had carried out a proper party wall agreement.
31. It was put to Mr Osman that his own conversion of the loft may be illegal. He should have at least, Fensa certification, electrical safety certification, as well as documentation about fire escape. He was asked specifically if he had any documentation in relation to these issues. Mr Osman's reply was merely that because Mr Williams was a professional, he took advice from him. The gas safety certification was carried out annually. Mr

Osman relies on the engineer who has carried out a lot of other work for him.

Respondent's request for permission to carry out alterations

32. Mr Osman confirmed that he had not sent the schedule of proposed works or any other documentation. The reason Mr Osman gives for not sending any further correspondence to freeholders was because they did not respond to his solicitor's letters in 2004. He therefore assumed they were absent and said he could not carry on sending letters as he would not get a response.
33. He was asked why he was sending letters to a freeholder a year prior to becoming the owner of the property. Various issues were mentioned by Mr Osman. These included, that it had taken a long time to complete the purchase, that the freeholders had held up the sale of the flat because they would not provide an insurance certificate of the building and that they were trying to hold up the sale so that they could buy the flat themselves. He was asked whether the seller of the property had completed the seller's information question sheet. Mr Osman could not say because he had been unable to retrieve any documentation about the sale of the flat.
34. Although he mentioned purchasing the flat with a mortgage from HSBC, he could not recall that a survey had been carried out.
35. Mr Osman was asked about the wording in the letter dated 2004 – in that letter his solicitors asked the freeholders to confirm “that you would not have any objection to our client effecting a loft conversion of the roof space...”, which was not consistent with his oral evidence during which he referred to “upgrading” of the flat. Mr Osman in response stated that maybe he had said the wrong thing to his solicitor, that it was an upgrade, and the engineer would have prepared plans to do the work.
36. In relation to the letting of the property, the letting agent confirms in an email dated 8.11.2006 [63R] that the “Tenants are moving in today”. In cross examination Mr Osman was asked about the marketing photograph of the property [64R] which stated that the property was “Available: 20/12/2006”. It was put to him that the date on the photograph was inconsistent with the fact that tenants had moved in on 8.11.2006. He was asked if the date on the photograph was accurate. Mr Osman replied that the date on the photograph was not an exact date, and further that maybe the tenants had delayed moving in.
37. In further photographic evidence by way of a link in Mr Riswan Osman's witness statement [104R] a very similar view of the loft room is indicated for the current period of letting. Mr Osman was referred to these



photographs looking very similar to the photograph dated 20.12.2006 with the same black leather sofa and same red sofa in the photographs, all in very good condition. Mr Osman in response stated that he always purchased the same sofas for the property.

38. Mr Osman was questioned about his various addresses, and he confirmed that the address on the proprietorship register for the property is where he used to live until 2007. Although he is no longer connected to that property, post is forwarded to him by the new owners, and he has never advised the freeholders not to write to him at that address.

### **The decision**

39. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

### **The alleged breaches of clauses 2(3) and 2(4)**

40. The Respondent's documentary and oral evidence confirm the works carried out by him in converting the loft space in the property have breached clause 2(3) of the lease.
41. The schedule of works provided by Mr Osman in his bundle is extensive building work. He confirmed in oral evidence that all the works on the schedule had been carried out with no building control input. Party wall agreements were agreed informally between his engineer and the neighbours.
42. The works set out in the schedule of works require cutting and maiming of the walls and ceilings in breach of clause 2(3)
43. The installation of steel beams, a new staircase and a new bathroom are structural alterations to the flat in breach of clause 2(4).
44. The tribunal determines that there have therefore been breaches of both clauses 2(3) and 2(4).

### **The Limitation Act 1980**

45. The Respondent seeks to rely on this because he says the works were carried out in 2005. Legal submissions were made by both the representatives and cases were referred to.
46. The Respondent's argument is not accepted. The function of the Limitation Act is to stop stale claims. It acts to stop a cause of action

being effective. This tribunal is not hearing a cause of action. We are here to determine if there has been a breach and not to determine whether there is a subsisting right of the Applicant to forfeit the lease. The Tribunal does not have jurisdiction to determine any Limitation Act 1980 defence or indeed any ancillary matters such as when the clock starts for Limitation Act purposes.

47. It is entirely a matter for the Applicant to decide whether to act on the findings of the Tribunal that there have been breaches of the lease. Should forfeiture be sought, that is the cause of action to which the Respondent may wish to defend on the basis of the Limitation Act. That is prima facie a matter for the county court, not for the tribunal under section 168 of the Commonhold and Leasehold Reform Act 2002.

### **Waiver**

48. The Respondent argued that the delay in bringing the proceedings and the failure to respond to their letter of 2004 amounted to waiver.
49. The respondent's representative asked the Tribunal to find that waiver is analogous to limitation. Inasmuch as it is argued the declaration should not be made because of delay, these are matters for a case in equity and not in these proceedings so again the Tribunal does not have jurisdiction to determine that question
50. In respect of a claim that the Applicant has waived the right to forfeit, that again would not be part of the jurisdiction of a tribunal when making a determination as to whether or not there have been breaches of covenant.
51. Even if the Tribunal is wrong about this, the Tribunal find that there has been no waiver. The letter relied upon by the Respondent dated 29.1.2004 was a general enquiry one year before they completed the purchase of the flat. No schedule of works was sent to the Applicants, and indeed Mr Osman's oral evidence was that no letter was sent to the Applicants after that 2004 letter because, in his words, he could not carry on writing to them and not getting any response.
52. This did not in the Tribunal's consideration amount to an unequivocal act by the Applicant that considered objectively was consistent with the lease continuing. Again, this is a matter for the county court should forfeiture proceedings be begun and there may be further evidence that the parties would wish to adduce.
53. The Tribunal's role is to determine whether or not there have been breaches of the lease not what remedy the Applicant is entitled to seek on the basis of that declaration. There have been breaches and it is for the Applicant to decide what cause of action to take next.

## **Costs**

54. Both parties made an application for costs under Rule 13. In their submissions both parties referred the case of Willow Court Management (1985) Ltd v Alexander [2016] 0290 UKUK (LC)
55. The Tribunal made no order for costs.
56. We found that it was not unreasonable for this application to have been issued, the Applicants having discovered a potential breach of the terms of the Respondent's lease.
57. In relation to the Respondent, although we found that his defence had no merit, his conduct was not sufficient to meet the objective standard of conduct threshold as set out in the Willow Court case.

**Name:** D. Brandler

**Date:** 10<sup>th</sup> December 2020

## **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 Tribunal at the regional office which has been dealing with the case.

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.

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.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).