FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LBC/2020/0052**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Third floor flat, 116 Kings Road London SW3 4TX**
Applicant	**:**	**Cadogan Estates Ltd**
Representative	**:**	**James Castle of Counsel**
Respondent	**:**	**Thomas Charles Gooknik**
Representative	**:**	**In person**
Type of application	**:**	**Application for the determination of alleged breaches of covenant under section 168(4) Commonhold and Leasehold Reform Act 2002 (the "Act")**
Tribunal member	**:**	**Judge F J Silverman MA LLM** **Mr A Parkinson MIRPM MRICS**
Date of hearing	**:**	**01 March 2021**
Date of decision	**:**	**5 March 2021**

DECISION

The Tribunal determines that the Respondent Tenant is in breach of covenant in relation to Clauses 4.10, 4.11, 4.15.4 and 4.15.7 of his lease.

REASONS

1. By an application dated 02 September 2020 (Page 2) the Applicant landlord sought a determination pursuant to s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent was in breach of various covenants contained in his lease dated 22 May 2014 (page A17) of the third floor flat 116 Kings Road, London SW3 4TX (the property). The Tribunal notes that the lease under which the Respondent currently holds the property was granted under the provisions of the Leasehold Reform Housing and Urban Development Act 1993 and is a statutory extension of an earlier lease of the premises containing identical covenants to the earlier lease save for the length of term and ground rent.

2. Directions were issued by the Tribunal on 02 and 12 November 2020.

3. The breaches which were considered by the Tribunal at the hearing which is the subject of this decision relate to clauses 4.10, 4.11, 4.15.4 and 4.15.7. of the Respondent's lease the relevant wording of which is set out in context in the discussion below.

4. The hearing took place by way of a remote video hearing which was not objected 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.

5. Restrictions in place on account of the Covid pandemic prevented the Tribunal from making a physical inspection of the property. The Tribunal considered that the issues before them did not require a physical inspection and were assisted by photographs of the property supplied by the parties and views of the property on Google maps.

6. At the hearing the Applicant was represented by Mr Castle of Counsel, and the Respondent appeared in person.

7. The Tribunal considered the documents in the hearing bundles the relevant parts of which are referred to below.

8. At the commencement of the hearing the Applicant made an application to include further documents which they said related to the issue of whether the Respondent had remedied one of the alleged breaches. Although the Tribunal understood that the Applicant had felt it necessary to adduce this evidence because of the Respondent's own recent activities at the property, the evidence had only reached the Tribunal late on the evening before the hearing and the Tribunal considered that it was too late for inclusion in the bundle because it gave the Respondent no time to respond to it.

9. The property which is the subject of this application comprises a one bedroom flat on the top (third) floor of premises in Kings Road Chelsea. A flat with an identical footprint to the subject property occupies the second floor, the lower floors, including basement, comprise commercial premises. The loft space and

roof area are not included in the demise. Access to the residential flats is by a shared door at street level and a staircase.

10. It is undisputed that as demised, the property had an 'L' shaped living area with the kitchen part, including electrics and plumbing, all contained within the short arm of the 'L'.

11. It is also undisputed that the Respondent has recently altered the interior of the property by re-siting the kitchen, including all electrics and plumbing and fitting a new macerator, within the main rectangle of the living area and extending a partition wall behind the 'new' kitchen area to create a separate study (described by the Respondent as a dining area) in the space previously occupied by the kitchen.

12. Clause 4.10 of the Respondent's lease provides as follows:

'Not at any time during the said term to make any alteration to the premises or any part thereof or to any services serving the demised premises nor to erect thereon any partitioning or walls or other structures without in every case obtaining the prior approval in writing of the Lessor'

13. The Respondent accepts that he did not apply to the Applicant for the relevant consent before undertaking the works. The fact that he has applied to the Applicant for retrospective consent suggests that he acknowledges that the works he carried out do indeed require the landlord's prior consent. The fact that the works have received building control consent from the local authority is accepted (page 212) but not relevant to the question in hand.

14. The Respondent suggested that the works he had done had not created a separate study/dining room because there was no actual door between that area and the main kitchen/living room. The photographs supplied to the Tribunal do however show that a fully finished door frame has been constructed in the entrance way to the former kitchen area suggesting that it may be intended to hang a door in that space in future (page 170). The presence of a door closing the area off, would have prevented the works from satisfying building regulation requirements.

15. Irrespective of the Respondent's argument about the non-creation of a separate room, which is not accepted by the Applicant and does not convince the Tribunal, there is no doubt that the Respondent has breached this covenant by altering the electric wiring and the plumbing (referred to in the lease as 'services') and by extending a partition wall to further enclose the short arm of the 'L' ('not to erect any partitioning walls'). This is irrefutable.

16. The unauthorised work to the electrics and plumbing as described above is also clearly in breach of clause 4.11 of the lease which states:

'Not during the said term to make or permit to be made any alteration in or addition to the gas electrical or other service installations serving the demised premises without the previous written consent of the Lessor'.

17. The alterations to the plumbing works involved the installation of new pipework which required an exit route through the loft area above the demised premises and over the roof itself. Neither of these areas are included in the demise and the Respondent did not seek prior consent before his builder accessed them to effect the works. The Applicant alleges that damage was caused to the loft and roof areas during the course of these works and suggests that the works themselves were not of an acceptable standard since there had recently been a leak, thought but not proved to have emanated from these works, which had caused damage to the second floor flat and to the commercial premises beneath. The Respondent said that he had not known that the loft and roof area were not within his demise and that any damage caused had recently been remedied.

18. A very recent survey by the Applicant which was undertaken to verify the state of repair of the roof was not before the Tribunal having been sent to the Tribunal too late for inclusion in the hearing bundle. The Tribunal considers that there is sufficient evidence of the Respondent's breach of the alterations covenant (clause 4.11) to establish the breach without reference to the recent survey report. The Respondent clearly concedes that some damage must have been done to the roof because he sent his builder to the property to effect repairs.

19. The Applicant alleged that the Respondent was also in breach of clause 4.15.7 of the lease which provides:
'Not to erect nor permit any external wireless or television or other aerial nor to affix nor permit any blinds shutters window box or any other object whatsoever outside the demised premises'

20. In relation to clause 4.15.7 the main thrust of the clause is aimed at aerials window boxes etc which the Respondent has not erected. Not affixing 'any other ….object whatsoever' is broad enough to encompass the pipework and 'outside the demised premises' could include the loft area which is not included within the demise. On that basis the Tribunal finds that there has been a breach of this sub-clause by the installation of pipework/plumbing on the roof and in the loft area. The Tribunal recognises that the Respondent has made an attempt to remedy this breach but is not satisfied from the evidence it heard, that all offending pipe work has been re-sited to an area within the flat itself.

21. The Applicant also objected to the re-siting of the kitchen because it broke the stacking policy which they maintain in older residential premises. They demonstrated that the second floor flat had an identical footprint to the subject property ensuring that wet and dry areas were each vertically aligned. The Respondent's alteration had moved a wet area (kitchen) to a position above a dry area (living room) in the flat below thus increasing both noise pollution and the risk of water damage from leaks. The Respondent denied that the Applicant has such a policy and said it was outmoded and asserted that he had inserted a waterproof membrane beneath the new kitchen floor area. No proof of this was offered. Since these works were

effected a leak has occurred which has caused substantial damage to the second floor flat but the Applicant accepts that they have no definitive proof of causation.

22. Clause 4.15.4. of the lease provides:

'To cover and keep covered all floors of the demised premises (save for the Bathroom and Kitchen) with good quality sound deadening carpet and underfelt or other cover with similar qualities so as to minimise the induction of sound from the demised premises to any other parts of the Building'

23. It is undisputed that the subject property has uncovered hardwood floors throughout which is on the face of it a breach of clause 4.15.4. The Respondent maintained that the floors had been in that condition since before the Applicant acquired the freehold and he produced a copy invoice dated 2010 (page C84) for delivery of a quantity of wood flooring to the subject property. He also said that soundproofing had been installed beneath the wood but had no evidence to support this. The Applicant's surveyor reported that the flooring was in good condition and had appeared to have been laid recently (see pages 151/165 et seq). The Tribunal takes the view that the wood flooring to the new study/dining area may be new because the space had previously been used as a kitchen where the use of wood flooring is less common. In any event, the clause cited above requires the floors (except kitchen and bathroom) to be covered with carpet which is patently absent from the main living area and the Tribunal must therefore find that there has been a breach of this clause at least in relation to that area if not also to the remainder of the subject property. The Respondent said that the non-compliance with this covenant was because he had obtained consent from the previous freeholder but offered no proof of this. The fact that no complaints had been made by the tenant of Flat 2 is not relevant. Neither is there any sustainable evidence that the Applicant had waived this breach by long user.

24. The Applicant only became aware of the alterations to the property following an email from the Respondent (page 89) requesting reimbursement for a replacement lock on the street door which, in reply to a query from the Applicant he said had been broken by his builder. He also asserted that the works involved were 'decorations'(page 109) (with no mention of the main works) and had not cooperated with the Applicant in their request to enter the property to inspect (see page 156).

25. His attempts to ask the Applicant for their consent retrospectively have been both casual and half-hearted. Emails dated 10 June 2020 (page 178) 01 September 2020 (page 229) ask for 'consent' but do not say what for. When asked for a plan the Respondent submitted a single page hand drawn not to scale sketch without any details (page 191). He now suggests that the Applicant, who have not agreed to grant consent are wrongly and unreasonably withholding consent contrary to s19(2) Landlord and Tenant Act 1927.

26. The Applicant submitted that a retrospective application for consent was in effect a request that the Applicant landlord waived the breach which would

prevent them from taking further action in respect of it, even in a case where such action was required in order to enforce a covenant on behalf of another tenant.

27. In this respect the Tribunal accepts the Applicant's argument as above that the proviso attached to the various covenants by s19(2) only applies where a tenant has asked for consent prior to commencing work and not to a situation where the request for consent is made after the event.

28. It should also be noted that clauses 4.15.4 and 4.15.7 are absolute covenants to which s19 (2) has no application.

29. In summary, the Tribunal finds that the Respondent is in breach of covenant as alleged by the Applicant and as determined in the Decision above.

The Law

Commonhold and Leasehold Reform Act 2002

168 No forfeiture notice before determination of breach

(1)A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2)This subsection is satisfied if—

(a)it has been finally determined on an application under subsection (4) that the breach has occurred,

(b)the tenant has admitted the breach, or

(c)a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3)But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4)A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5)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.

(6)For the purposes of subsection (4), "appropriate tribunal" means—

(a)in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b)in relation to a dwelling in Wales, a leasehold valuation tribunal.

169 Section 168: supplementary

(7)Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—

(a)a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b)an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

Name: Judge F J Silverman **Date:** 5 March 2021

Note:
Appeals

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 by email to rplondon@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.