FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BJ/LBC/2015/0038**
Property	:	**Flat 26, Elm Quay Court, 30 Nine Elms Lane, Vauxhall, London, SW8 5DE**
Applicant	:	**Elm Quay Freehold Ltd & Elm Quay Management Ltd**
Representative	:	**Ms Tkaczynska of Counsel**
Respondent	:	**Mr & Mrs Trifonov**
Representative	:	**Mr Trifonov in person**
Type of Application	:	**Determination of an alleged breach of covenant**
Tribunal Members	:	**Judge I Mohabir** **Mr S A Manson FRICS**
Date and venue of Hearing	:	**17 June 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**28 July 2015**

DECISION

Introduction

1. This is an application made by the Applicants under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") for a determination that the Respondents have breached various covenants and/or conditions in their lease.

2. The Respondent are the leaseholders of the property known as Flat 26, Elm Quay Court, 30 Nine Elms Lane, Vauxhall, London, SW8 5DE pursuant to a lease dated 11 September 1991 ("the lease") made between (1) Regalian Properties (Northern) Ltd ("the landlord") and (2) Elm Quay Management Ltd ("the management company") and (3) Michael Joseph Anslem O'Connor ("the tenant"). The Respondent took an assignment of the lease on an assignment of the lease on 23 May 2014.

3. By clause 4(6) of the lease, the tenant covenanted with the landlord:

> *"Not at any time during the said term to make an 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 landlord's fixtures therein without first having made a written application (accompanied by all relevant plans and specifications) in respect thereof to the Management Company shall not unreasonably withhold such consent in the case of non-structural internal alterations."*

4. Schedule 4, paragraph 13 of the lease also provides as a regulation that the tenant shall:

> *"At all times to cover and keep covered with carpet and underlay the floors of the Flat comprised in the Demised Premises other than those of the kitchen and bathrooms and at all times suitably and properly to cover and keep covered the floors of the kitchen and bathroom in the Demised Premises."*

5. The tenant's covenant to perform and observe the regulations is found in clause 5(6) of the lease.

6. It is common ground that between 23 May and 13 June 2014 the Respondents commenced various works at the property, which included the installation of wooden flooring.

7. By an application dated 13 April 2015, the Applicants applied to the Tribunal seeking a determination that the Respondents had breached clause 4(6) and Schedule 4, paragraph 13 above by replacing the carpets with wooden flooring. At the hearing the Applicants sought a further determination that the Respondents had not obtained consent for the alterations to the kitchen, the bathrooms and the removal of a wardrobe in the master bedroom and replacing it with a fitted one, even though this was not pleaded in the application.

Decision

8. The hearing in this case took place on 17 June 2015. The Applicants were represented by Ms Tkaczynska of Counsel. Mr Trifonov appeared in person on behalf of both Respondents.

9. The Tribunal heard witness evidence from Mr Bryce Robinson on behalf of the managing agent, Canbury Management Ltd, and Ms Muriel Bankhead, a Director of the management company, as to the works carried out by the Respondents to the flat and in particular the installation of the wooden flooring. Given that the works *per se* are not factually disputed by the Respondents it is not necessary to set out their evidence here.

10. The Tribunal also heard evidence from Mr Trifonov. Put simply, his defence to the application was that he received an e-mail dated 13 June 2014 from the caretaker of the building asking him to let Mr Robinson know the extent of the proposed works and on the same day sent the reply to which he did not receive a reply until 24 July 2014. Mr Trifonov submitted, in terms that, as no objection had been received in the interim, he reasonably assumed that implied consent had been granted. Therefore, he was not in breach of the lease as alleged.

11. The express terms of clause 4(6) are that the tenant is, firstly, required to make a written application to the management company and, secondly, to obtain consent if they propose to either carry out any structural alterations to the premises and/or to alter the landlord's fixtures. It follows that it proposed works do not amount to structural alterations or alteration to the landlord's fixtures within the meaning of clause 4(6) then no application or consent is required. The issue, therefore, in the first instance for the Tribunal to decide was whether the works carried out by the Respondents amounted to structural alterations and/or alterations of the landlord's fixtures under clause 4(6) for which consent was required under the lease.

12. The use of the words "cut maim alter or injure" in clause 4(6) of the lease would appear to envisage significant structural alterations greater in scope than the refurbishment works carried out by the Respondents. Indeed, in relation to the installation of the wooden flooring, Mr Robinson's evidence was that the flooring *"was being laid on top of concrete"* and, arguably, as such did not amount to a structural alteration within the meaning of clause 4(6). Of course, this is always a question of fact and degree in each instance. The Applicants called no evidence and made no submissions that the works carried out by the Respondent were in fact structural alterations or alterations to the landlord's fixtures caught by clause 4(6). The mere execution of the works does not establish these facts. The Tribunal, therefore, concluded that the Applicants had not discharged the burden of proof in this regard and, consequently, found that the Respondents had not breached clause 4(6) of the lease by carrying out the works and failing to obtain consent to do so.

13. As to schedule 4, paragraph 13 of the lease, the Tribunal had little difficulty in finding that the Respondents were in breach of this regulation by installing wooden flooring. It did not accept Mr

Trifonov's submission that consent could be implied by Mr Robinson's failure to reply in a timely manner to his e-mail dated 13 June 2014.

14. There is no term in the lease or any statutory provision that implies such consent on the facts of this case. Moreover, it is quite clear from the correspondence that at no stage did Mr Robinson indicate that he either consented to the installation of the wooden flooring or had authority to do so nor had the landlord or management company expressly waived this regulation under the discretion afforded by clause 5(6) of the lease. In any event, the Tribunal does not have jurisdiction to hear and decide any arguments relating to issues about waiver and/or possibly any estoppel that might arise.

15. Accordingly, the Tribunal determined that the Respondents had breached the terms of schedule 4, paragraph 13 of the lease but not clause 4(6).

Judge I Mohabir
28 July 2015