FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	CHI/00HE/LBC/2022/0014
Property	**:**	Drake Cottage, 15 Teetotal Street, St Ives, Cornwall, TR26 1PH
Applicant	**:**	Rosamund Tamsen Wright
Representative	**:**	Mr Samuel Hodge of Counsel, instructed by Nalders Solicitors
Respondent	**:**	Martin Green and Helen Louise Green
Representative	**:**	Mr Charles Irvine of Counsel, instructed by Peacock Law
Type of application	**:**	Breach of Covenant. Section 168(4) Commonhold and Leasehold Reform Act 2002
Tribunal member(s)	**:**	Mrs J Coupe FRICS Mr C Davies FRICS ACIArb Mr E Shaylor MCIEH
Hearing Date and venue	**:**	26 September 2022 Havant Justice Centre, Elmleigh Road, Havant, PO9 2AL
Date of decision	**:**	19 November 2022

DECISION

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Summary of the Decision of the Tribunal

The Tribunal determines that the Applicant has demonstrated that there has been a breach of clause 3.16 of the lease pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002 in regard to the following: (i) demolition of a wall between the lounge and kitchen; (ii) installation of steel section I beam; (iii) the removal of a timber beam.

The Respondents shall reimburse the Applicant the application and hearing fee totalling £300.00 within 14 days of the date of this decision.

The reasons for our decision are set out below.

Background to the Application

1. By way of an application dated 29 April 2022 and received on 4 May 2022, the Applicant seeks an order that a breach of covenant has occurred pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act").

2. The application concerns alleged breaches at Drake Cottage, 15 Teetotal Street, St Ives, Cornwall, TR26 1PH ("the Property"), the grounds of which were set out in sections 5 and 13 of the application form.

3. The Applicant is the registered freeholder proprietor of 15 Teetotal Street, St Ives, TR26 1PH ("the freeholder"). The freehold contains two leasehold properties: (i) a basement flat known as Duckdown; and (ii) a property comprising the upper floors, known as Drake Cottage (the subject property).

4. The Respondents are the registered proprietors of the leasehold interest in the property under a lease dated 3 March 2003 for a term of 999 years ("the lease"). An assignment of this lease in favour of the Respondents was registered on 5 May 2015. It is this lease that is before the Tribunal.

5. The property is a Grade II Listed house located in the centre of St Ives, a popular tourist destination.

6. Neither of the parties sought to persuade the Tribunal that an inspection of the property was necessary or appropriate. The Tribunal concluded that the issues could be determined fairly, justly and efficiently on the material available without such an inspection, consistent with the overriding objective of the Tribunal. However, the property and locality were viewed online by the Tribunal via publicly available platforms.

7. The Applicant relies on the following provisions in the lease and a purported admission by Mr Green of the breach in an email dated 20 February 2022:

    (i) Alleged breach of clause 3.25(c)
    (ii) Alleged breach of clause 3.16

8. The Tribunal was supplied with an electronic bundle of 190 pages. Both parties provided a skeleton argument in advance of the hearing for which the Tribunal was grateful. References in this determination to page numbers

in the paginated bundle are indicated as [ ].

9. These reasons address in summary form the key issues raised by the application. They do not recite each and every point raised or debated. The Tribunal concentrates on those issues which, in its view, go to the heart of the application.

10. Where the Tribunal finds a particular matter as a fact, it does so on the basis that it is confident that on the available evidence that fact is established or proven on the balance of probabilities.

The Hearing

11. The hearing was a hybrid hearing, with the chairman Mrs Coupe and the parties and their representatives joining via the online platform CVP. Mr Davies and Mr Shaylor of the Tribunal were sitting at Havant Justice Centre.

12. The Applicant, Ms Wright, attended the hearing and was represented by Mr Hodge of counsel. The Respondents, Mr and Mrs Green, attended and were represented by Mr Irvine of counsel. Instructing solicitors also joined.

13. At the outset of the hearing, three preliminary matters were raised by the Respondent:

    i. Whether the Applicant could rely on the report provided by Desmonde Associates ("Desmonde report") given that the Applicant had not sought the Tribunal's permission as per Rule 19(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, nor did the report meet the requirements of an expert report as per Rule 19(5).

    ii. Whether the application ought to be struck out under Rule 9(3)(e) as, on the basis on which it was brought, it disclosed no reasonable prospect of succeeding.

    iii. Whether the application lacked sufficient clarity or particularity. Referring to the Upper Tribunal's decision in *Marchitelli v 15 Westgate Terrace Ltd* [2020] UKUT 192 (LC) the Respondent asserted that the application failed in its drafting to provide the same degree of transparency as a section 146 notice, i.e., in such a way that *"no lessee could have any reasonable doubt as to the particular breaches which are specified"*.

14. For the Applicant, Mr Hodge acknowledged that the Tribunal's permission had not been sought for the Applicant to rely on the Desmonde report, nor did the report meet the requirements of expert evidence laid out in Rule 19(5). Mr Hodge proposed that the report either be considered as general

background information or, in the alternative, that as the Respondent also sought to rely on an expert report for which permission had not been obtained, that a pragmatic solution would be for both reports to be relied upon. On behalf of the Respondents Mr Irvine objected to such a proposal, citing his need to challenge the evidence of the Desmonde report and to cross examine the author.

15. Mr Hodge stated that the Respondents were clearly aware of the particulars of the alleged breaches as they had engaged in correspondence with the Applicants in such regard and, further, that the alleged breaches were listed in part 5 of the application form [5] as follows:

(a) Demolition of a wall between the lounge and kitchen;

(b) Relocation of pipework and cables, including cutting through primary structures (including timber joists, masonry and rafters) and interference with soundproofing features;

(c) Installation of a steel section "I" beam;

(d) Installation of a timber stud;

(e) Woodburning stove has been installed or is in the process of being installed;

(f) Demolition and removal of wall surfaces, walls and virtually all original fixtures and fittings;

(g) Removal of an oak beam.

16. Having heard counsel's submissions', the Tribunal adjourned to consider the application and, on reconvening, handed down its decision as follows.

17. Permission to rely on expert evidence had neither been sought from the Tribunal nor granted. The Desmonde report fell considerably short of the requirements of expert evidence in accordance with Rule 19(5) and the author was not in attendance to be questioned by the Tribunal or cross examined by counsel. The contents of the report were contradicted by the Respondent's own expert report. The Tribunal therefore denied the Applicant permission to rely on the Desmonde report. Likewise, the Respondent was denied permission to rely on the Respondents' expert report as the author was also not present for judicial questioning or cross examination.

18. In denying the Applicant permission to rely on the Desmonde report the Tribunal made it clear to the Respondent that sufficient evidence remained within the Applicant's submissions, including that the Applicant had been in attendance during her surveyor's inspection and had observed the alleged breaches, that the application to strike out failed.

19. Further, the Tribunal determined that the alleged breaches had been adequately particularised within the application form and that the Respondents were aware of the issues complained of. The hearing proceeded.

20. As a consequence of the Tribunal's ruling at paragraph 17, and with the Tribunal's permission, the Applicant withdrew ground (b) *'Relocation of pipework and cables, including cutting through primary structures (including timber joists, masonry and rafters) and interference with soundproofing features* and any reference or reliance upon an allegation of

breach in relation to a foyer frame and foyer frame glass, neither of which had been included in the application.

The Law

21. The relevant law relating to the Tribunal's jurisdiction in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002, most particularly section 168(4), which reads as follows:

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

22. The Tribunal is required to assess whether there has been a breach of the Lease on the balance of probabilities *(Vanezis and another v Ozkoc and others* (2018) All ER(D) 52).

23. A determination under Section 168(4) does not require the Tribunal to consider any issue other than the question of whether a breach has occurred.
Whether any breach has been remedied, or the right to forfeit for that breach has been waived, are not questions which arise under this jurisdiction. Neither can the Tribunal consider a counterclaim by the Respondent as an application under Section 168(4) can only be made by a landlord. The motivations behind the making of an application are also not relevant to the determination of whether a breach has occurred.

24. In *Kyriacou v Linden* (2022) UKUT 288 LC the Upper Tribunal held that the Tribunal's only task is to determine whether a breach of covenant has occurred. Whether that breach has been remedied, or whether the right to forfeit for that breach has been waived, is irrelevant to the First Tier Tribunal's ("FTT") determination. Furthermore, the FTT is not restricted to considering whether a breach existed at the date of application.

25. The Lease is to be construed applying the basic principles of construction of such leases as set out by the Supreme Court in *Arnold v Britton* (2015) UKSC 36 where, at paragraph 15, Lord Neuberger said:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd (2009) UKHL 38, (2009) 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the*

lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

26. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise at paragraph 17:

"the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g., in Chartbrook (2009) AC 1101, paras 16-26) *should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."*

Chronology

27. For context: The parties were in preliminary discussions concerning a potential sale of the freehold of the property, initially jointly to the Respondents and the proprietor of the leasehold interest in Duckdown, and later, when the lessee of Duckdown withdrew his interest, solely to the Respondents. Negotiations ensued but no sale progressed.

28. The following list of events is taken from the parties' written submissions, the witness statements of the Applicant and the Respondents and from oral evidence at the hearing. It is a summary only.

29. On 13 October 2020, Mr Green texted the Applicant advising her that the Respondents were intending to undertake internal refurbishment to the property and requesting an update on the building insurance.

30. The Applicant responded the same day stating that she was awaiting resolution of the freehold sale before demanding the insurance contribution. The Applicant wrote "*We really need to have the freehold sorted before you start alterations as that is tied to the lease of the building. Basically, once you both own the building you can't* (sic) *do what you please with it between yourselves …"*

31. On 1 January 2021, the Applicant emailed Mr Green stating, inter alia, "*I am writing just to remind you that we have one month left to sort out the freehold of 15 Teetotal Street and that I have asked you not to do any form of alterations on Drake until the freehold has been settled. This is very important, I don't want anything done now and did place that in a text to you on October 13th 2020. I am not giving my permission for any works, in accordance with the lease."*

32. Between January and March 2021, the Respondents undertook no works at the property.

33. On 24 December 2021, the Respondents submitted a planning application to Cornwall Council under reference PA21/12782 certifying that no one except Mr Green was the owner of any part of the land or building to which the application related. The application stated as follows:

i. *"**External**: Replace the east boarded side of the back dormer with a window to gain a sea view.*

Internal: Ground Floor:

ii. *Demolish foyer frame and replace with a half glass door and screen.*

iii. *Install oak beam by Structural Engineer to support timber, floor joists.*

***Internal: First Floor**:*

iv. *Complete make-over of family bathroom.*

v. *Demolish dry wall forming store room. Form new dry wall store room for washing machine and tumble dryer. New drain to run parallel with floor joists to back of building into existing drains.*

vi. *Loft – complete make-over of ensuite."*

34. Around mid-January 2022, works commenced at the property. No planning permission had been granted at such time. The Applicant submitted that her written consent had neither been sought nor granted.

35. On 10 March 2022, conditional planning permission was granted.

The alleged breach

36. The only issue for the Tribunal to determine is whether or not a breach of covenant or a condition of the lease has occurred pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002. The two clauses the Applicant alleged to have been breached were clause 3.16 and clause 3.25(c).

The relevant clauses of the Lease

Clause 3.16 provides that the tenant covenants:

"NOT to alter or add to the property nor to allow anyone else to do so other than such alterations and additions carried out in accordance with Planning Permission NO 99/P/0328/F dated 27th May 1999 and Building Regulation Approval No. 99/R/0307 dated 29th June 1999 and other than the amendments agreed in advance by the Landlord which are strictly only as follows

(a) To remove the wall between the kitchen and dining room.
(b) To block up the doorway from the lounge to the kitchen.
(c) To open up the area under the stairs to increase the lounge.
(d) To create a bathroom or shower room in the new loft conversion.

PROVIDED that the Tenant may make internal non-structural alterations to the property with the Landlord's consent in writing."

By clause 3.25(c) the tenant covenants:

"*Not to carry out any developments on the property which requires permission other than in accordance with the Planning Permission and Building Regulation Approval referred to in clause 3.16 with such amendments as may be approved by the Landlord or such other developments as may be approved by the Landlord.*"

37. The Tribunal finds it convenient to take each alleged breach in turn.

Demolition of a wall between the lounge and kitchen

38. The Applicant alleged that the partition wall between the kitchen and lounge had been removed upon the instructions of the Respondents. The parties disputed whether the wall was structural and original, or non-structural.

39. The alleged removal of the wall was considered a prohibited internal structural alteration by the Applicant. Beyond that, the Applicant contended that even if the alteration were to be deemed non-structural, which she disputed, the Respondents still failed to seek her consent in writing as required under clause 3.16.

40. The Applicant, in oral evidence, stated that during her inspection of the property and whilst accompanying her surveyor, she witnessed that the wall had been removed.

41. Mrs Green, in oral submissions, admitted the removal of said wall, which she described as a *"modern partition"*. In cross examination, Mrs Green acknowledged that the Respondents had not advised the Applicant in advance of these works but suggested that the Respondents would be open to reinstating the structure if so required. Mrs Green explained that there was only a short window of opportunity during the holiday off-season to undertake any works and, further, that the limited availability of their builder was a consideration in the timing of the works.

Installation of a steel section "I" beam and removal of oak beam

42. The Applicant alleged that an oak beam, of historical and listed importance, had been removed upon the instructions of the Respondents and replaced with a steel section I beam. In oral submissions, the Applicant said that she had witnessed this alteration during her, aforementioned, inspection and, further, that the Respondents had neither sought nor been granted permission for such work.

43. In cross examination, Mrs Green accepted that the timber beam had been replaced with a steel section I beam, although she disputed that the beam was either oak or original. Mrs Green agreed with the claim that the Applicant's consent had not been sought.

Installation of a timber stud

44. The Applicant considered the installation of a timber stud to constitute an alteration affecting the form of structure of the building or, in the alternative, an internal non-structural alteration effected without the

Applicant's consent in writing.

45. Mrs Green, in oral evidence, explained that the Respondents had temporarily removed a wall and erected a timber stud in its place. Mrs Green agreed that the Applicant's explicit permission in writing had not been sought.

Woodburning stove

46. The Applicant contended that the installation of a woodburning stove was considered either a structural alteration which affected the chimney or, in the alternative, an internal non-structural alteration for which consent was neither sought nor provided.

47. Mrs Green, in oral evidence, admitted that the Respondents had installed a woodburning stove. However, Mrs Green contended that such an installation was neither a prohibited structural alteration nor a non-structural alteration requiring the Applicant's consent, consent she agreed was never sought.

Demolition and removal of wall surfaces etc.

48. The Applicant alleged that various wall surfaces had been altered and some original fixtures and fittings removed, all of which constituted internal non-structural alterations for which consent was neither sought nor granted.

49. Mrs Green, in her oral evidence, accepted that during a cosmetic update covered granite surfaces had been exposed. Mrs Green refuted that such refurbishment constituted internal non-structural alterations for which consent was required. Mrs Green further refuted that any original fixtures or fittings had been removed, although some had been upgraded during the refurbishment.

The Issues

50. The Applicant contended that the works undertaken, some admitted by the Respondents, amounted to extensive development of the property as prohibited under Clause 3.25(c), such works not falling within the express provisos of the clause. In the alternative, the Applicant alleged that the works were non-structural alterations that had been undertaken without the Applicant's consent in writing as required by Clause 3.16.

51. The Respondent contended that without the Desmonde report the Applicant had adduced no evidence to support the purported breaches as set out. To this end, the Applicant relied on the witness statement and oral evidence of Ms Wright who had observed the alleged alterations to the property during her inspection. Further, the Applicant relied on the written admissions of the Respondents, including a purported admission of breach by Mr Green, and the oral admissions by Mrs Green during the hearing.

52. To the extent that the Tribunal were to find that sufficient evidence had been adduced to support the proposed breaches, the Respondent denied that the matters complained of amount to a breach of the lease as to

alterations or additions or development requiring planning permission and, further, contended that the Applicant had failed to provide sufficient evidence in this regard. By way of example the Respondent asserted that the installation of a wood burning stove was neither an alteration affecting the structure of the

property, nor was it an addition or development requiring planning permission.

53. In response, the Applicant directed the Tribunal to the planning application submitted by the Respondents to Cornwall Council dated 24 December 2021 under reference PA21/12783 [53] whereby the Respondents sought planning consent for the following:

a. Replace the east boarded side of the back dormer window with a window to gain a sea view;
b. Demolish foyer frame and replace with a half glass door and screen;
c. Demolish dry wall between lounge and kitchen;
d. Install oak beam by Structural Engineer to support timber floor joists;
e. Complete make-over of family bathroom;
f. Demolish dry wall forming store room. Form new dry wall store room for washing machine and tumble dryer;
g. New drain to run parallel with floor joists to back of building into existing drains;
h. Loft – complete make-over of ensuite.

54. The Applicant contended that this planning application provided evidence that not only were the Respondents intending to carry out development to the property as prohibited by Clause 3.25(c) but that they were aware of their requirement to seek planning consent. Further, the Applicant stated that should the alterations fail to meet the definition of 'development' they were, in the alternative, non-structural alterations requiring the Applicant's written consent under Clause 3.16, consent that was neither sought nor granted.

55. To the extent that the matters complained of could amount to a breach of the lease, the Respondent argued that the Applicant had in fact provided permission for those alterations, additions or developments, given that the Applicant's only requirement in withholding permission was that the sale of the freehold must be settled which, by the time works commenced, had been resolved by the Respondents withdrawing from negotiations.

56. The Applicant responded that the Respondents had adduced no evidence to substantiate a claim that the Applicant had provided consent in writing for the works under consideration. Nor had the Respondent adduced evidence that the Respondents sought such permission in advance of undertaking the works. The Applicant relied on the oral admissions of Mrs Green that the Applicant's consent had never been sought.

57. Further, that the Respondents had intentionally and falsely submitted a planning application declaration stating that nobody except Mr Green was the owner of the property, thereby denying the Applicant knowledge of the planning application [56]. In response to this point, Mr Green acknowledged that this had been an error on the Respondents' part but

considered it an innocent error, as the form had been completed and submitted by their agent, albeit in Mr Green's name.

58. Both parties relied on a number of text messages and correspondence between them in support of their respective positions as to whether permission has been granted. The Tribunal will not rehearse all such exchanges but will focus on those most pertinent to this decision.

59. To rewind. The Applicant had offered to sell the freehold of the building jointly to the Respondents and the proprietor of the leasehold interest in Duckdown, and negotiations ensued.

60. On 13 October 2020, Mr Green texted the Applicant stating *"… Just to let you know that we are planning internal work at Drake Jan-March 2021. This is much needs* [sic] *as Drake remain as it was when we bought in in* [sic] *2015. Have you got an update on building insurance? Best regards Martin"*. [156].

61. On 13 October 2020, the Applicant replied to Mr Green saying *"I have been waiting for you and Alan to sort out the freehold before billing you the house insurance this year. I will send you an email. My solicitor who is dealing with this has been in contact and I have given her instructions on this matter. We really need to have the freehold sorted before you start alterations as that is tied to the lease of the building. Basically, once you both own the building you can't* (sic) *do what you please with it between yourselves …"* [157].

62. On 18 October 2020, the Applicant wrote a letter to the Respondents and the lessees of Duckdown providing a deadline of 31 January 2021 for the freehold sale to complete. The letter contained no reference to any permission for works. Negotiations between the Applicant and the Respondents over the price of the freehold continued.

63. On 1 January 2021, the Applicant emailed the Respondents stating *" … I am writing just to remind you that we have one month left to sort out the freehold of 15 Teetotal Street and that I have asked you not to do any form of alterations on Drake until the freehold has been settled. This is very important, I don't want anything done now and did place that in a text to you on October 13th 2020. I am not giving my permission for any works, in accordance with the lease."* [164].

64. At paragraph 14 of Mrs Green's witness statement, she stated *"We next received correspondence from Ms Wright on the subject on 1 January 2021 [p.37]. This was to remind us that the deadline for purchase was 31 January 2021 and to remind us that she would not authorise any work on Drake Cottage until the freehold sale was resolved. We had by now stood down our builders and accepted that we would not begin the work as planned in January-March 2021…"*.

65. On 4 January 2021, the Respondents replied by email continuing the discussion over the sale of the freehold and stating *"… We would like to remind you that we are in a compromised position given that lockdown has limited bookings and you have also refused the opportunity for us to refurbish during this downtime. We ask that you review your position while we continue to take legal and expert advice."* [165].

66. On 19 April 2021, the Respondents emailed the Applicant declining the offer to purchase the freehold. It is at this point that the Respondents now state that the Applicant's permission to the works was deemed granted. The Applicant's previous emails referred to a refusal to grant permission *"until the freehold sale was resolved"*. The Respondents claimed that having concluded the freehold negotiations, albeit by withdrawing their interest, the Applicant's prior correspondence could now be taken as granting permission. An implication that the Applicant strongly refuted.

67. In summary, Mr Hodge reiterated that no permission was ever sought by the Respondents for the works now complained of, nor was permission ever granted by the Applicant. Further, it was inconceivable that the text and letter exchanges between the parties could be deemed "written consent" as required by the lease. Finally, that the Respondents were clearly aware of their obligation to obtain the Applicant's consent having complained that such consent had been withheld previously and that by submitting a planning application which, as an aside ignored the Applicant's interest thereby denying her an opportunity to comment, the Respondents acknowledged that the planned works were either development or non-structural, both of which required the Applicant's consent.

Discussion and Decision

68. By way of reminder the alleged breaches consist of:
- Demolition of a wall between the lounge and kitchen;
- Installation of a steel section I beam;
- Removal of an oak beam to install above steel beam;
- Installation of a timber stud;
- Installation of a woodburning stove;
- Demolition and removal of wall surfaces and original fixtures and fittings.

69. It was common ground that all of the above actions had been affected by the Respondents, albeit Mrs Green contested that the removed beam was of oak or that exposing the covered granite wall surfaces constituted 'demolition or removal', or that any features removed were original.

70. The two lease clauses relied on by the Applicant are:
- 3.16 – not to alter or add to the property with the exception of works authorised under previous planning consent, provided that the Tenant may make internal non-structural alterations to the property with the Landlord's consent in writing.

- 3.25(c) – not to carry out any development which requires permission (other than previous planning consent referenced above)

71. Following the preliminary decision of the Tribunal neither party's expert witness reports were relied upon. However, the Tribunal found the oral evidence of Ms Wright in relation to the works undertaken by the Respondents, credible. Ms Wright had accompanied her surveyor throughout

his inspection and had witnessed first-hand that the wall between the lounge and kitchen had been removed and that a steel beam now lay in place of the previous timber

Beam. Further, Ms Wright witnessed a timber stud had been erected and a woodburning stove installed, and that wall surfaces and previous features had been removed. To her credit, Mrs Green admitted that the Respondents had undertaken these works, albeit the extent remained disputed as above.

72. The Tribunal therefore finds that the works complained of had been carried out by the Respondents. However, Ms Wright is neither a Chartered Building Surveyor nor a Structural Engineer and the Tribunal therefore finds that the Applicant has not proven that the works complained of amount to development which requires permission. Accordingly, the Tribunal does not find the works to constitute a breach of clause 3.25(c).

73. Turning next to clause 3.16, the Tribunal considered whether the works listed above breached the covenant not to alter or add to the property, provided that the Tenant was permitted to make internal non-structural alterations to the property with the Landlord's consent in writing.

74. The Tribunal finds that the demolition of the wall between the lounge and the kitchen, the installation of a steel section I beam and the removal of a beam, whether oak or a different timber, were proven by the Applicant. Further, the Tribunal finds that such works amount to a material change in the property which can only reasonably be considered an alteration or addition, or, in the alternative, an internal non-structural alteration to the property which required the Landlord's consent in writing.

75. The Tribunal does not find the installation of a timber stud or a woodburning stove, or the demolition and removal of wall surfaces to constitute a breach of 3.16. The Tribunal accepts the Respondent's argument that the erection of the timber stud was temporary and that the installation of a woodburning stove is neither an alteration nor an addition to the property, such installation being capable of removal at short notice and utilising a chimney stack already in-situ. Further, irrespective of Mrs Green's admission concerning exposure of the granite wall surfaces, the Tribunal finds that the Applicant has adduced insufficient evidence to meet the balance of probabilities that wall surfaces or original fixtures and fittings had been removed.

76. Which brings us to the question as to whether the Applicant Landlord's consent was given in writing to those three areas identified in paragraph 74 above.

77. The Respondents relied on the various text exchanges and letters between the parties to prove that the Applicant had provided written consent to the works, albeit that that such consent was only effective from the date either their purchase of the freehold completed or the date they notified the Applicant that they no longer wished to proceed with the acquisition.

78. The Tribunal find this argument nonsensical. Had the Respondents acquired the freehold from the Applicant then they would have no need for her consent. Further, in withdrawing from the purchase it again makes no sense that the Applicant would agree to works she had previously strongly argued

against, albeit the Applicant still had no knowledge of what such works actually entailed. Finally, the Respondent, has adduced no evidence proving that, at any point, they informed the Applicant either by text, letter or verbally of the

substance of their proposals. The Applicant had no visibility of the Respondents proposed works; indeed, the Applicant was not even made a party to the planning application submitted by the Respondents. Without knowledge of the proposed works, it follows that the Applicant could not have provided written consent. Accordingly, the Tribunal finds that the text and letter exchanges did not constitute a blanket permission for the Respondents to undertake works to the property, nor do the Tribunal find that finality on the question of the freehold acquisition constituted the Applicant's written consent.

79. In regard to Mr Green's purported admission of breach, the Tribunal accepts Mr Green's oral evidence that at the time of making such comment he had received no legal advice on the matter, had no understanding of the significance of making such a comment and that, at that point in discussions with the Applicant, he was simply being conciliatory in an attempt to move matters forward in an amicable way. Accordingly, the Tribunal attributes no weight to the alleged admission.

Costs

80. The Applicant sought an order that the Respondents pay her the costs of these proceedings under Rule 13(1)(b)(ii) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in the amount of £26,310.00, inclusive of VAT, on the basis that the Respondents acted unreasonably in defending these proceedings.

81. Under Rule 13(1)(b)(ii), where a Tribunal finds that a person has acted "unreasonably in bringing, defending or conducting proceedings" the Tribunal may make an order in respect of costs.

82. It is argued by the Applicant that the Respondents acted unreasonably in this matter by failing to admit the works undertaken at the property at an earlier date; by failing to admit that such works constituted the breaches now alleged; by deliberately deciding not to seek the Applicant's permission in the knowledge that such consent was required; and that such actions demonstrated a high level of culpability. Mr Hodge asserted that such behaviour met the threshold of unreasonableness which, accordingly, justified an award of costs.

83. In addition to a costs order in the amount of £26,310 the Applicant seeks reimbursement of the application and hearing fee.

84. In response, Mr Irvine pointed to the "shifting sands" of the Applicant's case and how some allegations raised in the hearing had not been disclosed prior. He refuted that the Landlord was entitled to be informed of all works, advocating instead that the lease did not suggest the Landlord should know everything and how the Applicant was able to ask questions of the Respondents if she had been concerned. Mr Irvine stated that many of the arguments raised by counsel were irrelevant to these proceedings and that

there was much ambiguity within the text exchanges and correspondence between parties prior to these proceedings. Ultimately, Mr Irvine argued that, if the Applicant was successful in her application, a costs order was still not warranted as the threshold of unreasonableness had not been met.

85. The approach that the Tribunal should adopt when considering an application under Rule 13(1)(b) was set out by the Upper Tribunal in *Willow Court Management Co (1985) Ltd v Alexander* (2016) UKUT 290 (LC) ("Willow Court").

86. It is a requirement of Rule 13(1)(b) that the party against whom an order may be made must act "unreasonably" in defending the proceedings. The Tribunal must consider whether or not the behaviour complained of can be described as unreasonable.

87. At paragraph 24 of its decision in Willow Court the Upper Tribunal stated:
"An assessment of whether behaviour is unreasonable requires a value judgement on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in Ridehalgh at 232E, despite the slightly different context. "Unreasonable" Conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?".

88. The Tribunal is of the opinion that the threshold for an unreasonable costs award is a high one. Having considered the behaviour of the Respondents, the Tribunal finds that the threshold of unreasonable behaviour has not been met. The purported admission of breach by Mr Green was dismissed by the Tribunal for reasons explained earlier. Further, the Tribunal does not consider that the Respondents have acted in a vexatious manner. The Tribunal formed the opinion that the Respondents conducted themselves at the hearing in a professional and measured manner. Questions were answered, particularly by Mrs Green, with honesty and openness despite, at times, such responses potentially being to their detriment. Although the Tribunal considers the actions of the Respondents prior to the hearing to have been, on occasion, naïve and misconceived, the submitting of a planning application without reference to the Landlord by way of an example, the Tribunal did not consider such actions to be intentionally deceitful but more borne out of frustration at the situation they found themselves in. Further, the Tribunal concluded that the Respondents were entitled to challenge and test the Applicant's evidence in these proceedings, particularly having regard to the potential implications were the application to be successful.

89. As the first stage of the tests laid out in Willow Court has not been met the Tribunal need not consider the following two stages. Accordingly, the Tribunal does not find that the Respondents behaved unreasonably in defending this application and, accordingly, the Applicant's costs application is refused.

90. However, the Applicant has been successful in part of her application and the Tribunal therefore finds it just and equitable that the Respondents reimburse the Applicant the Tribunal application fee and hearing fee. Accordingly, the Tribunal orders the Respondents to reimburse the Applicant with the application fee and hearing fee totalling £300.00 within **14 days** of the date

of this decision.

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 rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

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.