FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/12UD/LBC/2020/0004**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 6, St.Andrews Court, Badgeney Road, March, Cambs PE15 9GE**
Applicant	**:**	**Ground Rent Trading Limited**
Representative	**:**	**Mr Paul Simon 'in house' Counsel**
Respondent	**:**	**Ms Lorna Rose Larham**
Representative	**:**	**Mr L Varnam counsel - instructed by Bowsers solicitors**
Type of application	**:**	**Determination of an alleged breach of covenant**
Tribunal member	**:**	**Tribunal Judge Dutton**
Venue	**:**	**Remote video hearing**
Date of Decision	**:**	**1st December 2020**

DECISION

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 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 I was referred to are in two bundles of approximately 280 pages, the contents of which I have noted.

Decisions of the tribunal

(1) The tribunal determines that there has been no breach of the covenant or condition of the lease for the reasons set out below and dismisses the application.

(2) No request in these proceedings was made by the tenant for an order under s20C of the Landlord and Tenant Act 1985.

Background

1. This is an application by Ground Rent Trading Limited, the Landlord of the property, being Flat 6, St Andrews Court, Badgeny Road, March, Cambridgeshire PE15 9GE (the Flat) for an order that there has been a breach of covenant or condition of the lease pursuant to s168(4) Commonhold and Leasehold Reform Act 2002 (the Act).

2. The tenant is Ms Lorna Rose Larham, who has owned the lease of the Flat since November 2015.

3. The alleged breach is that Ms Larham has made alterations to the Flat that she occupies under the terms of a lease dated 7th June 2007 between McLeod Homes Limited (McLeod) (1), St Andrews Court (Badgeney Road) Limited (2) and M P O'Donovan (3) (the Lease). The Lease is for a term of 125 years from 7th June 2007.

4. The Applicant is the landlord and freehold owner of the property known as 3 – 6 St Andrews Court, Badgeney Road, March, which comprises four flats, two on the ground floor and two on the first floor and is contained in HM Land Registry Title number CB345547. The Applicant purchased the property on 3rd September 2008, although registration does not appear to have been concluded until June 2009.

5. The allegations are set out in the application and are to be found at clause 3.7 of the Lease. They are under the heading "Alterations" and set out the following:

   3.7.1 *not to make any structural or external alterations whatsoever and not to make any other alterations or additions to the Premises without the prior written consent of the Landlord and the Management Company*

   3.7.2 *not relevant*

3.7.3 *not to carry out or make any alteration or addition to the Premises until:*

3.7.3.1 *all necessary notices under the Planning Acts have been served and*

3.7.3.2 *all necessary permissions under the Planning Acts have been obtained*

3.7.3.3 *and until the prior written consent of the Landlord and the Management Company is obtained and subject to clause 3.7.1 above*

6. In addition to the alleged breaches concerning alterations the application also refers to breaches of planning and a requirement to obtain planning. Finally, there is an allegation concerning encroachment which is neither pursued in the statement of case, which accompanied the application, nor in the witness statement of Mr Laurence Freilich, the asset manager responsible for the property nor indeed by Mr Simon acting as advocate for the Applicant at the hearing on 26th November 2020.

7. It is appropriate to record the description of the Flat, which in the Definitions and Interpretation section of the Lease describes the "Premises" as *all that flat known as plot 6, more particularly described in the First Schedule*. One then turns to the First Schedule and finds the following description of the Premises, *ALL THOSE premises known as Plot 6 situate on the first floor of the Building and shown edged red on the Plan including: ….* Under the exclusion wording at 8 the Lease says this *"any part of the Building lying above the surface of the ceiling or below the floor surfaces save as otherwise provided in this lease"* The plan annexed to the lease shows the ground and first floor of the property, although it is to be noted that in respect of the Flat there appears to be a set of internal stairs rising upwards, both in the Flat of Ms Larham but also flat 5, the neighbouring property.

8. I was provided with bundles both on behalf of the Applicant and Ms Larham. The Applicant's bundle included the application, statement of case, the tribunal directions dated 15th September 2020, a copy of the Lease, Land Registry entries for the freehold and leasehold titles and a witness statement of Mr Freilich with a number of exhibits. Mr Freilich did not attend to give evidence. His reason for non-attendance is unknown. I will return to specific documents as necessary.

9. For Ms Larham I was provided with a Statement of Case, her witness statement and exhibits, legal submissions, a copy of a decision by the Eastern Tribunal in 2016 in respect of flat 4 at the property and a short video, which apparently the Applicant was not able to view. Ms Larham was represented by Mr Varnam, of Counsel.

10. The Applicant's statement of case sets out the alleged clauses said to be breached, with reasons for such allegations. It is firstly said that a staircase has been constructed and a new habitable space has been made within the roof space resulting in an additional bedroom and that there had been maiming the roof to add a Velux window. It is further alleged in this statement that no consent was granted for the alterations, nor planning granted.

11. In support of the Applicant's case I was provided with a witness statement of Mr Freilich. This is dated 29th September 2020 and the same day the Applicant wrote to the Tribunal indicating that either Mr Freilich or Mr Simon would be attending. Mr Simon had not made a witness statement. Mr Freilich confirmed he was the asset manager responsible for the property. As a result of Ms Larham wishing to dispose of the Flat, correspondence was entered into in the Summer of 2020. This correspondence indicated that a second bedroom existed at the Flat, which it appears was not known to the Applicant. The Lease provides for a Consent to the sale as there is a Restriction on the Title requiring a consent to show that clause 3.12 has been complied with. This clause relates to Alienation. In his statement Mr Freilich said that such a consent would not be provided unless the Flat had been inspected to ensure no breaches of the lease.

12. In an attempt to speed matters up, as Ms Larham had found somewhere to buy, she sent a copy of the buyer's bank valuation and the Estate Agents particulars. These described the Flat as a two storey maisonette with two bedrooms, one on the first floor and one on the second floor. Mr Freilich also referred to earlier correspondence with Shoosmiths Solicitors in 2015. This was on behalf of an earlier purchaser. The first letter appears to be from those solicitors dated 6th March 2015. It says at the second paragraph *"It is understood that there is loft access in the flat, however it is not included in the demise, nor does our client have the right to use same. Please can you provide your consent to our client using the loft space for storage"*.

13. This elicits a response from the Applicant stating that a Deed of Variation would be required, that the area is valuable space and puts a price of £5,500 plus an increase in the ground rent to enable the prospective purchaser to acquire same. This offer was in essence repeated to Ms Larham.

14. The statement then goes on to set out the clauses Mr Feilich considers Ms Larham has breached.

15. Notwithstanding that Mr Simon had not provided a witness statement of his own, he did seek to rely on Mr Feilich's statement. He added that the Flat did not go beyond the ceiling joists to the first floor and that the lease and the plan referred only relates to the first floor. He said that although

planning may have been granted for an additional floor this did not mean that the planning permission had actually been implemented.

16. He was asked questions by Mr Varnam. Mr Simon maintained that the staircase and the velux window were not present when the lease was granted. He did admit that he had not been to the property and nor did it seem had Mr Freilich. Reference was made to the decision of our colleagues in August 2016 (case CAM/12UD/LSC/2015/0039) when the block is described. Included in the description is a statement that there were two one-bedroomed flats on the ground floor and two two-bedroomed flats on the first floor, each with an attic bedroom. This prompted Mr Simon to say that there would seem to be evidence of another breach by the owner of flat 5. He was not prepared to accept that the lease when granted was for anything other than a single floored property.

17. Mr Simon was then taken to a copy of the planning permission for the development. This was contained in the respondent's bundle at page 70 onwards. It is dated 30th June 2005, the applicant is McLeod, the original developer and landlord of the Property. This describes the property as 2 x 2 – bed flats and 2 x 1 – 1 bed flats. At item 8 the permission refers to roof lights on the second floor. With the planning are copies of drawings submitted by McLeod in May 2005. At page 77 of the Respondent's bundle is a drawing clearly showing the existence of a bedroom in the attic area. Indeed, it shows two figures looking out of the velux window. Further support for the existence of the second bedroom in the attic, was it was suggested by Mr Varnam to be found in the additional drawing at page 111 of the bundle showing the attic floor as a bedroom, with stairs rising to it.

18. Mr Simon did not accept this as evidence that the flat, when constructed had two bedrooms, one on the attic floor level. He said it was not unusual for developers to deviate from the plan, although he had no evidence to support such an assertion.

19. He was then taken back to the lease plan which shows stairs leading to the attic floor, which was consistent with the developers plans. He denied this, relying on the lease. He was referred to copies of estate agents particulars, from the time of Ms Larham's intended sale and including earlier ones in 2012 and 2014 referring to a two bedroomed flat. He was asked to review the original sale prices for the ground floor and the upper floor flats which showed in 2007 the ground floor sold for circa £95 – 100,00 yet the sale price for Ms Larham's property was circa £115,000. Mr Simon was not persuaded and indeed thought the lower prices for the ground floor properties may have been because the developer wished to sell quickly. He did, however, accept that the flat had been converted into two bedrooms by 2012. He confirmed that the applicant had owned the building since 2008.

20. We were told by Mr Simon that he had introduced a policy of inspecting properties before a consent to sale was given to ensure that there had been no breaches. This was, he said, as a result of a Supreme Court decision, details of which were not provided to us. It seems however, that at no time has the applicant inspected the subject property.

21. He was asked why the decision in 2016 had not resulted in action at that time. Somewhat surprisingly he suggested that the applicant, who had not attended that hearing, would, although accepting that the decision had been received, not have read beyond the front page, which contained the tribunal's findings.

22. Returning to the correspondence in 2015 between Shoosmiths and the applicant he said that the offer was made without inspection of the property. If the matter had proceeded, then the property would have been inspected. He maintained throughout that the lease was the document which mattered. There was no reference to a second floor being part of the demise, nor did the plan show the additional floor. He did not accept that there may have been a fault in the drafting of the lease. Relying on his stated experience in drafting leases he felt that the wording of the demise would be carefully considered by the client, in this case the developer and such an omission picked up.

23. Mr Simon was asked about replies given by Mr Freilich to pre contract enquiries at the time of Ms Larham's purchase. Again, in the respondent's bundle, there is a copy of the letter sent by Mr Freilich to the vendor's solicitors Jeffrey Mills, sent by email and dated 9th August 2015. In answer to the question *"Are there any matters relating to the property that a prudent buyer should be aware of including a known breach"* to which he answers NO. Later the question is in part repeated asking whether the tenant was in breach of any covenants/stipulations in the lease and again the answer is NO. Mr Simon's response was that the application to the tribunal was started promptly after it is said the applicant became aware of the breach. Further, that the answers by Mr Freilich in August 2015 reflected that which was known by the applicant at the time, although he did accept that he considered Ms Larham would have relied on these responses.

24. Before Ms Larham gave evidence Mr Varnam said that there were certain headline points to be made: -

- The burden of proof rests with the applicant
- There has been no inspection of the property since the applicant bought in 2008
- The lease definition of the demise and the plan is the only evidence adduced by the applicant

- There is overwhelming evidence that there have not been alterations made to the Flat since the lease was granted. This evidence was to be found in the planning papers, the original sale price, the estate agents particulars going back to 2012 showing the Flat was two bedroomed, over two floors. The lease plan shows stairs to upper floor.

- The lease is in error

25. Thereafter we heard from Ms Larham. There was a statement of case and a witness statement. I have noted both. She describes the property she purchased at paragraph 2 of her statement, which is a two bedroomed flat over two floors. Throughout her period of occupancy she has paid the ground rent and service charges and has made no changes to the Flat other than replacing the cooker and some decoration. She believes that the applicant has misunderstood the extent of the property, an example being that a charge for a lock to the basement door was included, notwithstanding there is no basement. She said that because of this action she has now lost the property she and her partner were hoping to buy.

26. Ms Larham told me that she had paid her ground rent until October this year, the action having been started in September 2020.

27. Asked about Mr Freilich's replies to questions raised in 2015, she told me she had relied on them in deciding to purchase the Flat.

28. She was asked by Mr Simon about the correspondence between Shoosmiths and the applicant in 2015. She said that this was on behalf of a previous prospective purchaser. She was asked why the offer made in 2015 was the same made to her this year, which it was suggested showed that the applicant was talking about the upper floor and not the small loft space. She could not answer. She did say that the other flat at this floor level, flat 5, had the same layout as hers and that flat 5 had not, during her period of occupancy, been altered.

29. She was asked why she had not accepted the offer by the applicant and replied that she did not see why she should pay for an error in her lease. She repeated that the loft space referred to in the correspondence could only be accessed from the first floor.

30. Mr Varnam summed the case up as there being a key question to answer. Not what was demised but have there been alterations to create a stair case and a second bedroom on the upper floor? The evidence was that planning permission was granted for a two bedroomed flat with a velux window, which is what exists. The lease plan shows stairs. Also, the difference in the first selling price for this Flat and the downstair flats is consistent with the differing accommodation. The applicant had

produced no positive evidence. The applicant has owned since 2008 but it is only in 2020 that the issue is raised.

31. Mr Simon relied solely on the description of the Flat in the lease and that there was no plan of the second floor. He requested a finding that there had been breach. Whether the Landlord and Tenant (Covenants) Act 2007 assist the respondent he would not say as my task, he told me, was only to determine whether a breach had occurred.

Findings

32. The application it is alleged that "*the leaseholder (Ms Larham) or their predecessor have carried out an act of trespass and have developed the loftspace which falls outside of the leaseholders demise to create a second bedroom within the premises"*. The statement of case does not seem to pursue the allegation of trespass, confining itself to the alleged breaches of the lease as set out under the heading 'Alterations' under clauses 3.7 of the lease, including planning issues under 3.17.1 and 3.17.2 of the lease.

33. I therefore have to decide whether Ms Larham, or a previous owner has created a second bedroom in the top floor of the Flat without containing the consent of the applicant, or its predecessor in title and without the relevant planning permission to undertake such work.

34. The evidence relied upon by the applicant is confined to the wording of the lease which describes the Flat as set out in paragraph 7 above and the accompanying lease plan which refers to the First Floor only, although does show a set of stairs purportedly giving access to the top floor. I do not consider that the question of 'ceilings' assists the applicant as this can refer to the timbers above the ceiling on the second floor as easily as the first floor. The only witness was Mr Freilich, but he did not attend to give oral evidence. Mr Simon purported to give evidence, but he was the advocate for the applicant, in house counsel as he described himself to me and had not made a witness statement. He answered questions put to him by Mr Varnam but his knowledge of the property was limited as, like Mr Freilich, he had not inspected. Such evidence as he gave was limited to is experience in drafting leases and the changes he had made to the applicant's procedures for considering alienation.

35. On behalf of the respondent I heard from Ms Larham and had the benefit of seeing a number of relevant documents. These included the planning permission granted in 2005 to the developer McLeod clearly showing permission for two 2 bed properties in a block of 4 flats. The permission also provides for the installation of rooflights to the second floor. The planning drawings included in the bundle clearly show a second floor with a bedroom and stairs rising to that level, as well as roof lights.

36. In addition to these details I was provided with copies of estate agents particulars in 2012 and 2014 showing the Flat as a two bedroomed property. The original sales details for flat 3 show a sale price of £99,995 (August 2007) and for flat 4 a sale price of £94,995 (July 2007). In contrast the sales details for the original sale of flat 6 shows a price of £114,995 (June 2007). I accept that this spread of prices does provide evidence of the difference between the value of the one bedroomed flats on the ground floor and the subject Property consistent with the flats according with the original planning.

37. Mr Simon suggested that developers do not necessarily adhere to the planning, which might be true. However, I cannot envisage a developer building a smaller flat than planning allowed for and the difference in the original sale price and that of the ground floor properties would support the contention that the Flat was as provided for in the planning.

38. I must also consider the position of the applicant. At the time of Ms Larham's purchase Mr Freilich answered that there had been no breaches of the lease, a response relied upon by Ms Larham when she purchased. I also find it strange that the applicant, who has owned the Property since 2008 has never inspected, or requested to do so, even before starting this application. It would seem that the applicant was at cross purposes with the enquiry made by solicitors about the roof space. I am satisfied that the space the solicitors were referring to was the small loft space accessible from the first floor and not the bedroom in the attic. An offer to grant a deed of variation for £5,500 was made without an inspection, although Mr Simon said an inspection would have taken place before the deed was finalised. It is fair to say that the applicant has shown only limited interest in the property since it acquired the freehold in 2008. The burden of proof rests with the applicant.

39. I do not consider that the applicant has discharged that burden of proof. The only witness did not attend the hearing. Mr Simon conceded that the second bedroom existed at a time before Ms Larham purchased. I am satisfied on the evidence before me that the development was on the basis that Ms Larham's flat was always a two bedroomed property. The lease would appear to be in error when I consider the contemporaneous evidence in the form of the planning documents existing at the time of the building of the development and the difference in the original sale prices for the one bedroomed and the two bedroomed flats. All the evidence supports that Ms Larham has made no alterations to the flat requiring either planning permission or the consent of the applicant and Mr Simon conceded that was the case.

40. Accordingly, for the reasons I have set out above, I find that the respondent, Ms Larham, has not breached a covenant or condition of the lease by creating a second bedroom in the Property and I dismiss the application.

Tribunal Judge Dutton 1st 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).