FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AC/LBC/2022/0077**
Property	**:**	**5 Read House, East Crescent, London N11 3AX**
Applicant	**:**	**The Mayor & Burgesses of the London Borough of Barnet**
Representative	**:**	**Mr Hugh Rowan (Counsel)**
Respondent	**:**	**Mrs Eva Gabay**
Representative	**:**	**Mr Stan Gallagher (Counsel)**
Type of application	**:**	**Declaration as to a breach of covenant – Section 168(4) Commonhold & Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge Rosanna Foskett** **Mrs Alison Flynn MA MRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**20 April 2023**

DECISION

Determination

1 For the reasons set out below, the Tribunal determines that for the purposes of Section 168(4) of the Commonhold & Leasehold Reform Act 2002, the Respondent has breached clause 3(xiii) of her lease (more particularly described below) by altering the internal planning and/or the height, elevation or appearance of her flat and/or making alterations or additions thereto without the written consent of the freeholder.

The Application and the hearing on 19 April 2023

2 By an application issued on 16 November 2022, the Applicant freeholder seeks a determination under Section 168(4) of the Commonhold & Leasehold Reform Act 2002 (**'the Act'**) that the Respondent leaseholder is in breach of her lease of 5 Read House, East Crescent, East Finchley, London N11 3AX (**'the Property'**), specifically clause 3(xiii).[1]

3 On 18 January 2023 the Tribunal gave Directions. The Applicant's solicitors filed a bundle and the Applicant's counsel filed a Skeleton Argument prior to the hearing. The bundle had been sent by email to the Respondent's email address which the Tribunal had on file and the Applicant's solicitors had sent a hard copy to the Respondent's home address last Friday, which she had received.

4 At the hearing on 19 April 2023, the Applicant was represented by Mr Hugh Rowan (Counsel) instructed by Judge & Priestley Solicitors; Ms Firdous Abdullah of The Barnet Group attended and gave oral evidence (as well as her witness statement dated 22 February 2023) on behalf of the Applicant. The Respondent was represented by Mr Stan Gallagher (Counsel) and was assisted at the hearing by her son, Mr Asif Gabay, who gave oral evidence on behalf of the Respondent.

5 At the outset of the hearing, the Respondent applied for permission to adduce 3 pages of evidence, having failed to engage with the proceedings at all and having failed to file any evidence prior to the hearing. The Tribunal heard submissions from both parties on this application and determined that it was just persuaded that there was a good reason (the Respondent's health) for the failure to file evidence on time and that it would be in accordance with the overriding objective to allow the evidence to be adduced and it would not cause prejudice to the Applicant to have to deal with it. The Respondent was also permitted by the Tribunal to adduce some limited oral evidence from Mr Asif Gabay in relation to those 3 pages of documentary evidence.

6 Both parties indicated that they did not consider an inspection necessary. The Tribunal agrees and had detailed photographs and descriptions from a surveyor who visited the property in October 2019 and had produced a report, which was adduced in the Applicant's evidence.

7 Mr Gallagher cross-examined Ms Firdous.

8 Mr Rowan cross-examined Mr Gabay.

[1] The Application Notice dated 16 November 2022 also sought a determination of breach of clause 3(xix), but it was made clear in the Applicant's Skeleton Argument and at the oral hearing on 19 April 2023 that this allegation was not pursued in these proceedings.

The Law

9 Section 168 of the Act provides as follows:

> *'(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.'*

The Lease

10 The property which is the subject of this dispute is a ground floor flat and storage unit in a purpose-built block of flats on an estate in Barnet.

11 The lease is dated 16 July 2001 for a term of 125 years from 1 April 1988 and is between the Mayor and Burgesses of the London Borough of Barnet ("**the Freeholder**") and Eva Gabay ("**the Leaseholder**"). The lease relates to "the Flat" which is defined as the flat numbered 5 being on the ground floor of the

Block as shown tinted pink on plan "B" annexed hereto together with the storeroom shown tinted blue on plan "B"). The Leaseholder acquired the lease in 2001 on exercise of her right to buy rights under the Housing Act 1985.

12 The Leaseholder covenants with the Freeholder by clause 3(xiii) of the lease "*Not without [the Freeholder]'s written consent to alter the internal planning or the height elevation or appearance of the Flat nor at any time make any alterations or additions thereto nor cut maim or remove any of the party or other walls or the principal concrete elements or bearing timbers or iron steel or other supports thereof nor carry out any development thereto nor change the user thereof (with the meaning of any legislation for the time being in force relating to town and country planning)*".

The parties' positions

13 It was accepted by the Leaseholder's representative that works have been done to convert the flat from a three-bedroom single flat to a property containing 4 separate units (3 bedsits and one apartment) and that there was no written consent from the Freeholder for these works. The same is also supported by: (i) the report of James Roche dated October 2019 (which was not challenged on behalf of the Leaseholder); (ii) the fact that the right to buy legislation (which resulted in the Leaseholder being granted her lease) was exercisable only in respect of a single dwelling; and (iii) the wording of the demise in the lease referred to a flat (not several flats).

14 The Freeholder's position was that these unauthorized works were a simple breach of the lease. The Leaseholder had been notified of them on several occasions (as could be seen from copies of letters dated 3 August 2018, 4 April 2019 and 27 June 2022[2] in the bundle) and had entirely failed to engage with that correspondence. The flat was put up for sale by auction in February 2022 (with the particulars including the floorplan, showing the division of the flat into 3 bedsits and one apartment) but has since been withdrawn.

15 The Leaseholder's position relied on the 3 pages of evidence adduced, which were:

(i) 2 pages of an incomplete and unsigned[3] "Supplemental Agreement" between the Freeholder and a third party commencing on 1 December 2022 who provided accommodation to homeless individuals and for which the Freeholder paid him. The third party had an agreement with the Leaseholder to pay the Leaseholder part of what the Freeholder paid him for certain bedsits within the Flat to be used for this purpose. There was (according to the evidence of Mr Gabay which is accepted) no direct contractual relationship between the Freeholder and the Leaseholder in

[2] The delay in enforcement action was due to the Covid pandemic. This evidence was given in writing and orally on behalf of the Freeholder by Ms Abdullah and the Tribunal accepts that explanation.
[3] Ms Abdullah gave evidence that she had not in the brief time available been able to find a signed copy of this document.

respect of the letting of any part of the Flat to homeless persons on a temporary basis.

(ii) A one-page service charge demand in respect of the Flat (which appeared also to be incomplete) dated in 2023.

16 The Leaseholder's position was that the fact that the Freeholder had entered into the "Supplemental Agreement" in relation to a bedsit within the Flat meant that the Freeholder had waived the instant breach of covenant committed by the Leaseholder when the unauthorized works were carried out.

17 The Freeholder's response to this argument is that this Supplemental Agreement, adduced late and only partially, was in no way sufficient evidence of a waiver of the instant breach of covenant.

The Tribunal's Determination

18 The Tribunal notes that there is a distinction between (i) a waiver of the right to forfeit a lease for breach of covenant; and (ii) a waiver of any covenant itself. This distinction was referred to recently by the Upper Tribunal in Bedford v Paragon Asra Housing Ltd [2022] L&TR 7 at paragraphs 24 to 32.

19 The Tribunal is not in these proceedings considering any waiver of the right to forfeit. However, the Tribunal does need to consider whether the covenant itself has been waived because if the covenant does not bind the Leaseholder (because the Freeholder has waived its right to rely on it and enforce it), then the Leaseholder cannot be in breach of it.

20 Mr Gallagher, on behalf of the Leaseholder, accepted that:

(i) the Tribunal was not considering whether there had been a waiver of the right to forfeit;

(ii) the Tribunal was bound by Bedford and Triplerose Ltd v Patel [2018] UKUT 374 (LC) (quoted in Bedford at paragraph 30) as decisions of the Upper Tribunal (although he reserved his rights to argue that Triplerose was incorrectly decided in a higher court); and

(iii) that he could not make out a waiver of the covenant in clause 3(xiii) on the evidence before the Tribunal.

21 However, he submitted that there was an "intermediate category", namely a waiver of the instant breach of covenant (as opposed to a waiver of the covenant itself) and that this was something the Tribunal could determine today. Mr Rowan, on behalf of the Freeholder, did not accept that there had been any waiver of the instant breach on the basis of the evidence adduced and that there would be severe public policy ramifications if one were found.

22 The Tribunal finds on the evidence before it that:

(i) There was no waiver of the covenant itself (and no party invited the Tribunal to decide that there had been);

(ii) There was no waiver of the instant breach (i.e. the unauthorized works completed by the Leaseholder at some point prior to their discovery by the Freeholder in mid-2018); the Leaseholder could not suggest that the entry into the Supplemental Agreement was a waiver of the instant breach because:

- the Supplemental Agreement did not cause the Freeholder and the Leaseholder to enter into any arrangement with each other in relation to the bedsit, such that it is not possible to say that the Supplemental Agreement somehow demonstrated the Freeholder's consent to the unauthorized works to create the bedsit and thereby waived the breach of covenant;[4] and
- the Freeholder had by the date of that agreement (1 December 2022) already issued several warnings to the Leaseholder of her breach of covenant and had in fact issued proceedings in the Tribunal (on 16 November 2022) to obtain a determination of breach on the basis of those unauthorized works, such that, again, it is not possible to say that the Freeholder had somehow consented to the unauthorized works and thereby waived the breach of covenant.

23 The Tribunal finds that the Leaseholder carried out the unauthorized works detailed in Mr Roche's report of October 2019 and that those works involved:

(i) The alteration of the internal planning of the Flat (as defined in the lease);

(ii) The alteration of the height of the Flat;

(iii) The alteration of the appearance of the Flat;

(iv) The making of alterations or additions to the Flat; and

(v) The carrying out of development to the Flat.

Those matters all fall within the prohibition set out in clause 3(xiii) of the lease. Accordingly, the Tribunal determines that there has been a breach of that clause by the Leaseholder.

Judge Rosanna Foskett

Mrs Alison Flynn

20 April 2023

[4] The Tribunal notes paragraph 26 of Bedford v Paragon in which a well-known passage of Woodfall is quoted: waiver of the right to forfeit (not in issue in these proceedings) is based on election, whereas waiver of a breach of covenant is based on an inference of consent by the landlord to the tenant's breach, thus barring the landlord's remedy.

RIGHTS OF APPEAL

1 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.

2 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.

3 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.

4 The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie 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.