FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BH/LBC/2019/0101**
HMCTS code (paper, video, audio)	**:**	**V - Video**
Property	**:**	**284A, High Road, Leytonstone, London E11 3HS**
Applicant	**:**	**Goldstreet Properties Ltd.**
Representative	**:**	**Ms. Isabel Petrie of counsel instructed by Portner Law Ltd.**
Respondent	**:**	**Mr. Muhammad Afzal Khan**
Representative	**:**	**Mr. Azim Khan (Respondent's brother)**
Type of Application	**:**	**For the determination of alleged breaches of covenant**
Tribunal Members	**:**	**Tribunal Judge Stuart Walker (Chairman)** **Mr. Stephen Mason BSc FRICS**
Date and venue of Hearing	**:**	**11 August 2020 – video hearing**
Date of Decision	**:**	**3 September 2020**

DECISION

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. A face-to-face hearing was not held because it was not practicable and all issues could be

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determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 269 pages, the contents of which were noted. The Tribunal's determination is set out below.

The parties said that they were generally happy with the process. Although counsel for the Applicant Ms. Petrie has some technical difficulties and had to rely solely on her audio connection for the second half of the hearing she considered that the hearing had been fine and the Respondent said that he was happy with the process.

The Tribunal determines that the following breaches of covenant have occurred.

(1) The Respondent has breached clause 2(h) of the lease by underletting and parting with possession of part of the property. The property has been let on two separate tenancies.;

(2) The Respondent has breached clause 2(k) of the lease by failing to permit the Applicant (or its agents or surveyors) to examine the condition of the demised premises or otherwise to enter upon the demised premises for any other reasonable purposes between 1 November 2018 and 27 March 2019 and from 6 June 2019 to 21 June 2019.;

(3) The Respondent has at some time between 2005 and 2007 breached clause 2(o)(i) of the lease by carrying out a development within the meaning of the Town and Country Planning Act 1990, namely a material change of use of the property from use as a single dwelling house to use as two separate dwelling houses.;

(4) The Respondent has breached clause 2(o)(i) of the lease by building a rear extension to the property at some time between 2005 and 2007, thus carrying out a development within the meaning of the Town and Country Planning Act 1990.;

(5) The Respondent has breached the user covenant in clause 10 of the second part of the 6th schedule of the lease by using the property for the purpose of accommodating more than one family. The property has been let on two separate tenancies in relation to two separate tenants and/or families.;

(6) The Respondent has breached clause 14 of the second part of the 6th schedule of the lease at some time between 2005 and 2007 by subdividing the property into two separate flats, by installing a second bathroom and second kitchen, by cutting through walls and timber and by altering the layout of the premises, without the prior written consent of the Applicant.;

(7) **The Respondent has breached clause 14 of the second part of the 6th schedule of the lease by building a rear extension to the property at some time between 2005 and 2007, without the prior written consent of the Applicant.**

Reasons

The Application

1. The Applicant seeks a number of determinations pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that breaches of covenant have occurred.

2. The application was made on 6 December 2019. Seven beaches of five clauses of the lease were identified. The particulars of each alleged breach are set out in what follows, and they are considered in the order in which they appear in the application. In summary, they mainly concern allegations of unauthorised use and alteration of the premises.

3. Directions were issued on 16 December 2019. They provided for a hearing on 23 March 2020. However, in view of the Covid-19 pandemic a decision was taken on 18 March 2020 to postpone the hearing. Further directions were issued on 23 June 2020. These provided for a remote video hearing. Under the revised directions the Applicant was required to provide a digital indexed and paginated bundle of documents. This was before the Tribunal and consisted of 269 pages. Page references in what follows are to that bundle. The Tribunal also had a bundle of authorities produced on behalf of the Applicant together with a skeleton argument from Ms. Petrie. In addition, the Tribunal received a document from Ms. Petrie after the hearing which set out in writing the findings of fact which she had orally invited the Tribunal to make during the course of her submissions.

4. The relevant legal provisions are set out in the Appendix to this decision. The Tribunal bore in mind throughout its deliberations that the burden was on the Applicant to show that breaches of covenant had occurred on the balance of probabilities.

The Hearing

5. The Applicant was represented by Ms. Petrie of counsel. The Respondent appeared in person and was represented by his brother, Mr. Azim Khan.

6. The directions also provided for an inspection of the property on 23 March 2020. However, in the light of the Covid-19 pandemic, no inspection took place. In any event, given the many concessions made

by the Respondent the Tribunal did not consider that an inspection was either necessary or proportionate.

The Background

7. The property which is the subject of this application is a ground floor one bedroom flat in a terraced property which was previously a private house. There is a first floor flat above the property.

The Lease

8. By a lease dated 10 September 1984 made between W&M Joint Ventures Ltd. on the one part and Llewellyn Anthony Rose and Patricia Bernadette Nelson on the other part the property was demised for a term of 125 years from 1 January 1984 (pages 16 – 48). The Applicant acquired the freehold interest on 3 March 1988 (page 50) and the Respondent became the registered proprietor of the lease on 7 November 2003 (page 55).

9. Other than the specific clauses which the Applicant alleged had been breached, there were no issues as to the substance or contents of the lease. The specific clauses in issue are set out in what follows.

The Issues

10. In his legal submissions (pages 211 to 213) the Respondent raised a jurisdictional issue on the basis of section 168(5) of the Act. This was considered first. The only other issues were the specific alleged breaches. These were considered in turn. As will be seen, many of these were admitted.

The Jurisdiction Issue

11. Section 168(5) of the Act provides that a landlord may not make an application under section 168(4) in respect of a matter which has been or will be referred to arbitration, which has been the subject of determination by a court, or which has been the subject of determination by an arbitral tribunal. The Respondent argued that the alleged breaches of the lease had already been considered by a court.

The Applicant's Case

12. On behalf of the Applicant Ms. Petrie argued that there was no evidence of any determination by any court on the question of whether there had been breaches of the covenants in the lease. There was, she accepted, some evidence that the Respondent had been a party to proceedings in the magistrates' court in relation to planning issues, and the evidence certainly showed that the Respondent had made a number of

applications for certificates of lawful development (pages 154 to 166 and 170 to 199). However, the Applicant was not a party to the proceedings in the magistrates' court and they were not aware of the outcome. Those proceedings were not, she argued, in any way a determination of the issues between the parties in these proceedings.

The Respondent's Case

13. Mr. Azim Khan explained to the Tribunal that there had been a dispute between the Respondent and Waltham Forest Borough Council in respect of alleged breaches of planning control at the property. An enforcement notice had been served and the Council had then commenced criminal proceedings in the magistrates' court for breach of that notice. These had been withdrawn when the Council finally granted a certificate of lawful development.

14. Reference is also made to these proceedings in a letter from the Respondent to the Applicant's solicitors dated 20 November 2018, where they are referred to as an appeal against an enforcement notice (page 59).

15. Mr. Khan accepted that the terms of the lease had not been before the magistrates' court, but nevertheless argued that as the magistrates' court case concerned the changes made to the property the alleged breaches which related to these changes had already been adjudicated on.

The Tribunal's Decision

16. The Tribunal was satisfied that it had jurisdiction to determine whether or not the alleged breaches of covenant had occurred. It was satisfied that these matters had not been the subject of a previous determination by any court. Although the property was itself the subject matter of the allegation of a criminal failure to comply with a planning enforcement notice, the terms of the lease were clearly irrelevant to those proceedings. The Applicant was not a party to the proceedings and the court was not being invited to consider whether what the Respondent had or had not done was permitted or not under the terms of the lease. The questions for the magistrates' court concerned issues of planning enforcement, which are completely different in nature to the private law dispute between the parties in this case.

The Breaches - Breach No. 1

17. By clause 2(h) of the lease the Respondent covenanted as follows;

> "*The Lessee will not assign transfer underlet or part with possession of part only of the demised premises*" (page 22)

18. The Applicant's case was that the Respondent had granted two separate tenancies of two separate parts of the property in breach of this provision.

19. This breach was admitted by the Respondent at the hearing. In paragraph 5 of his witness statement the Respondent stated as follows;

> "*In 2005 I stripped the interior of the Premises, reconfigured the accommodation space, and formed two flats for living accommodation*" (page 215)

It was accepted by the Respondent that the property had been let on two separate tenancies. Their names had been provided to the Applicant and copies of the directions of 23 June 2020 had been sent to the tenants (page 266).

20. On this basis the Tribunal was satisfied that a breach of clause 2(h) had occurred. It was satisfied that by creating two tenancies of different parts of the property the Respondent had underlet or parted with part only of the demised premises.

<u>Breach No. 2</u>

21. By clause 2(k) of the lease the Respondent covenanted as follows;

> "*The Lessee will permit the Lessor and its agents or surveyors with or without workmen and others at reasonable times during the term hereby granted to enter upon and view and examine the condition of the demised premises and take a schedule of all landlord's fixtures and fittings thereon and for other reasonable purposes and of all defects and wants of repair on any such view* ......" (page 23)

<u>The Applicant's Case</u>

22. The Applicant's case was that the Respondent had failed to permit the Applicant or its agents and surveyors to enter the premises between 1 November 2018 and June 2019. In support of the Applicant's case Ms. Petrie relied on the correspondence between the parties as follows;

    (i) On 1 November 2018 the Applicant's solicitors wrote to the Respondent by recorded delivery at the address of the property stating that they were concerned that alterations had been made to the property, drawing attention to clause 2(k) and requesting confirmation by 9 November 2018 that access would be given to the Applicant's surveyor and the provision of dates and times between 12 and 23 November 2018 when access could not be given (page 57). There was no reply to this letter.

    (ii) On 12 November 2018 the Applicant's solicitors again wrote to the Respondent drawing attention to the previous letter and asking for dates and times between 19 and 30 November 2018 when access could not be given (page 58).

    (iii) On 20 November 2018 the Respondent wrote back to the Applicant's solicitors. This letter stated that the Respondent was

bemused by the request for access, set out information about the magistrates' court proceedings already referred to and concluded with the following – "*I trust the above information resolves your client's concerns of any alterations to the property or breach of the terms of the lease*". No dates were provided either for access or when access could not be given (page 59).

(iv) On 23 November 2018 the Applicant's solicitors wrote again to the Respondent again drawing attention to the Applicant's rights under clause 2(k). This letter requested dates to be provided by 27 November 2018 when access could not be given for the period from 3 to 14 December 2018 (page 60). There was no reply to this letter.

(v) On 7 December 2018 the Applicant's solicitors wrote once more to the Respondent. This invited the Respondent to agree by 7 December 2018 that a breach of clause 2(k) had occurred and warned of an application to this Tribunal (pages 61-62).

(vi) On 17 December 2018 the Respondent replied to the letter of 7 December. This letter stated as follows;

> "*Unfortunately we do not currently have access to the property because the current occupier of the address travelled abroad until the end of January.*
> *Please contact me in February, when I hopefully will be able to grant you access with the permission of the occupier.*" (page 63)

(vii) The Applicant's solicitors wrote again to the Respondent on 11 February 2019. This letter stated that it was believed that the property was occupied by multiple individuals. The letter stated that the Applicant required immediate access to the property to conduct an inspection and that it was intended to inspect on 21 February 2019. The Respondent was invited to state by 19 February 2019 if he was unable to give access on that date and to provide alternative dates (page 65).

(viii) On 18 February 2019 the Respondent replied to this letter stating that the current occupier was away and would not return until the end of February and suggesting that the Applicant awaited their return. He stated that it was possible that a date for inspection could be arranged in mid March (page 68).

(ix) Then, on 27 March 2019 the Respondent wrote to the Applicant's solicitors suggesting an inspection on 16 April 2019 (page 69).

(x) This date was accepted by the Applicant's solicitors in a lengthy letter dated 11 April 2019 which also set out a number of the other alleged breaches of covenant (pages 70-73).

(xi) The Applicant's surveyor did not, in fact, attend on the date arranged. This was later explained as being due to a confusion over the dates. In an e-mail sent by the Applicant's solicitors to the Respondent on 31 May 2019 a further inspection date of 6 June 2019 was proposed, and the Respondent was invited to provide alternative dates if this was not convenient (page 76).

(xii) There was no reply to this e-mail and a further e-mail was sent on 7 June 2019 requesting dates over the next 14 days (page 77).

23. In her skeleton argument Ms. Petrie argued that clause 2(k) is an absolute covenant requiring access at reasonable times. No notice is required though such notice was given (para 23).

24. Ms. Petrie drew the Tribunal's attention to paragraph 8 of the Respondent's witness statement (page 215) in which he stated that the Applicant had had access at all times to the property, in particular the common areas, and that access could have been requested from the Respondent's tenants. She argued that clause 2(k) placed the onus on the Respondent to provide access and that entry to the common parts only did not amount to entry to the demised premises.

<u>The Respondent's Case</u>

25. Mr. Khan argued that there had been no deliberate refusal of access, but he accepted that the Applicant had not, in fact, been given access to the premises. He said that the Respondent had been trying to arrange access with his tenants but this had proved to be a "nightmare" and it just took longer and longer to arrange. Mr. Khan argued that the Respondent had not refused access and was happy to provide it but that it was not practicable because of his tenants. The Respondent was cautious about doing things which might cause problems with his tenants.

<u>The Tribunal's Decision</u>

26. The Tribunal was satisfied that breaches of clause 2(k) had occurred. The wording of the clause is clear and requires the Respondent (not his tenants) to provide access to the landlord at reasonable times to enter and view the condition of the premises. There is no requirement for the Applicant to show that there is a reason why they should be permitted to inspect, though in this case the correspondence makes it clear that they were concerned about what the Respondent had done to the premises and about which there is no dispute.

27. The Tribunal was satisfied that the correspondence showed that the Applicant was seeking access at reasonable times – the Respondent was repeatedly asked to provide dates when access could not be given. The Tribunal was also satisfied from the correspondence that the Applicant sought access for the purpose of inspecting the premises - a purpose permitted by the lease.

28. There was no suggestion that the Respondent did not receive the requests for access. In any event, the letters written by the Respondent himself show that several of the letters containing requests were received by him. Also, in the solicitor's letter of 11 April 2019 it is stated that the first letter (that of 1 November 2018) was sent by recorded delivery and signed for by M.F. Khan on 2 November 2018 (page 70). This was not challenged by the Respondent.

29. The Tribunal did not accept the argument that the Respondent was absolved from his obligations under the lease because of difficulties he himself had in obtaining access from his own tenants. The fact that he had chosen to divide the premises and sublet them – in breach of the terms of the lease – did not alter his obligations to his landlord.

30. The Tribunal accepted that the Respondent did indeed offer access on 16 April 2019. It is unfortunate that this offer was not taken up. The Tribunal also noted that after the missed appointment the Applicant did not seek access again until 31 May 2019 when an e-mail was sent requesting access on 6 June 2019. Whilst clause 2(k) does not provide a notice requirement, it is difficult to see how the Respondent can be regarded as being in breach of it if no request for or attempt to obtain access is made. Whilst a request for access may be regarded as ongoing if it is made and then not acted on, it is more difficult to see how a request can be regarded as continuous when the Respondent has agreed to provide access but the Applicant has missed the appointment, especially as well over a month passed after the appointment was missed before a further request for access was made. The burden is on the Applicant to show that there has been a breach and the Tribunal was not satisfied that there was a breach between 27 March 2019, when a date for access was proposed by the Respondent, and 6 June 2019 which is the next date proposed by the Applicant.

31. However, it is also clear that the request for access on 6 June 2019 was not granted and there was a continuing failure to grant access as a result of the failure to provide alternative dates after 7 June 2019.

32. The Tribunal therefore concluded that the Respondent has breached clause 2(k) of the lease by failing to permit the Applicant (or its agents or surveyors) to examine the condition of the demised premises or otherwise to enter upon the demised premises for any other reasonable purposes between 1 November 2018 and 27 March 2019 and from 6 June 2019 to 21 June 2019.

Breaches Nos. 3 and 4

33. Clause 2(o)(i) of the lease is in the following terms;

> "*The Lessee will not carry on or permit to be carried on upon in or over or under the demised premises any development within the meaning of the Town and Country Planning Act 1971 (hereinafter called 'the Act') which expression shall include any Act amending or re-enacting the same any order regulation or direction made under the Act or any Act amending or re-enacting the same nor apply for or permit any application for permission under the Act to carry out any such development*".

34. In their application the Applicant alleged two distinct breaches of this clause. In both cases it was alleged that the Respondent had carried out development within the meaning of the Town and Country Planning Act 1990. The first development was a material change of use brought about

by the subdivision of the premises into two flats and the second was the erection of an extension. These were considered separately.

Breach 3 – Subdivision

35. Ms. Petrie referred the Tribunal to the Town and Country Planning Acts 1971 and 1990. She submitted that it was only necessary to consider the latter as this was a re-enactment of the 1971 Act and clause 2(o)(i) was drafted so as to include references to re-enactments of the 1971 Act.

36. Ms. Petrie then referred the Tribunal to sections 336 and 55 of the Town and Country Planning Act 1990 ("the Planning Act"). She argued that by virtue of section 336 "development" has the meaning given in section 55. By section 55(1) development includes the making of any material change in the use of any building. Section 55(3)(a) then expressly provides that the use as two or more separate dwelling houses of any building previously used as a single dwelling house involves a material change in the use of the building. In addition, section 336 of the Act defines "building" so as to include any part of a building.

37. The Applicant's case was that by subdividing the property into two flats the Respondent had materially changed the use of the property and that this amounted to development within the meaning of the Planning Act.

38. This breach was admitted by the Respondent at the hearing. As explained in connection with breach no. 1 the Respondent accepted in his witness statement that he had subdivided the property into two flats and that this process had started in about 2005.

39. The Tribunal accepted Ms. Petrie's analysis of the legislation. Given the Respondent's acceptance that he had subdivided the property it therefore concluded that a breach of clause 2(o)(i) had occurred in that the Respondent has at some time between 2005 and 2007 carried out a development within the meaning of the Town and Country Planning Act 1990, namely a material change of use of the property from use as a single dwelling house to use as two separate dwelling houses.

Breach 4 – Erection of an Extension

<u>The Applicant's Case</u>

40. The Applicant's case was that the Respondent had erected a rear extension to the building. Ms. Petrie again referred to the Planning Act and pointed out that the meaning of "development" in section 55 included the carrying out of building operations, and that by section 55(1A) this included structural alterations of or additions to buildings. There was no doubt that an extension had been built and the Applicant's case was that this had been done by the Respondent at some time between 2005 and 2007.

41. Ms. Petrie also argued in the alternative that even if the Respondent had not himself built the extension but had acquired it in 2003 from his

predecessor in title, the Respondent was still liable to make good this breach and he had failed to do so despite requests from the Applicant.

The Respondent's Case

42. The Respondent's case was that the extension had been built before he acquired the property in 2003. It was not argued that the construction of the extension did not amount to development.

The Tribunal's Decision

43. The Tribunal accepted the Applicant's legal analysis and that the construction of the extension was development as defined by the Planning Act. Its construction therefore amounted to a breach of clause 2(o)(i) of the lease whenever this happened. The principal issue for the Tribunal was the factual question of when the extension was built.

44. Having considered the evidence carefully and having regard to the burden and standard of proof that applies, the Tribunal was satisfied that it was the Respondent who built the extension and that he did so at some time between 2005 and 2007. Whilst no single piece of evidence showed this conclusively, taking the evidence as a whole this was clearly established on the following basis;

(i) The Applicant relied on a letter written to them by the occupier of the upper floor flat, Dr. Ruth Wheeler, on 17 March 2010. This stated as follows;

> "*As you know Mr. Khan added an extension and converted the downstairs property into 2 flats in summer 2007. .... I am particularly concerned about potential damage that the extension may have done to the structure of the entire building; it is now possible for me to hear every noise made by the downstairs tenants.*" (page 116)

There was no reason for the Tribunal not to regard this letter as reliable and it was written by a person who was living directly above the property. The Tribunal considered it unlikely that Dr. Wheeler would be mistaken about who added the extension or when.

(ii) The Respondent made three applications to Waltham Forest Borough Council seeking a certificate of lawful development for an existing use or operation. The applications were dated 23 February 2012, 13 August 2012, and 20 February 2014. In each case the application was made in respect of use as two flats with a single storey extension. In each case the application included the question "*When was the use or activity begun, or the building works substantially completed?*" The answer given to this question on each occasion was 2005 (pages 186, 165 and 158). The Tribunal considered it unlikely that the Respondent would have stated a later date of completion of the building works than was in fact the case, especially as it was in the Respondent's interests to show the passage of time since the works were completed.

It was also argued by the Applicant that the fact that on each occasion the Respondent had ticked the box stating that the building works were completed more than 4 years before the application rather than that which stated that they were completed more than 10 years previously also showed that the extension could not have been completed before November 2003. However, the Tribunal rejected this argument because two of the applications were in fact made less than 10 years after the Respondent acquired the property and it also accepted the Respondent's argument that the relevant box was that which referred to 4 years as this application concerned domestic premises for which the relevant period is 4 years rather than 10 years for other premises.

The Respondent argued that the use of the date 2005 was not indicative of the date the extension was completed but was the date that the use as two flats began. He pointed to the fact that the question that was answered referred to both the beginning of the new use and the completion of the building and that the applications were made in respect of both user and construction. The Tribunal bore this in mind but noted that on none of the applications was any qualification provided about the difference between the date of construction and the date of the change of use. In any event, the applications did not show that the extension had been built before the property was acquired by the Respondent.

(iii) The Tribunal also bore in mind the contents of the correspondence between the parties in respect of the extension and concluded that the Respondent's replies were inconsistent with his case that the extension had not been built by him.

On 17 February 2015 the Applicant's agents wrote to the Respondent. In this letter they stated that the Respondent was in breach of the terms of the lease in respect of the construction of the extension and he was required to demolish it (pages 246 to 248). However, when the Respondent replied to this letter on 2 March 2015 he said nothing about the extension (page 243). Had it been the case that he had purchased the property with the extension in place the Tribunal would have expected him to have said so in his reply and explained that he was not responsible for it, but he did not do so.

In a letter dated 12 November 2015 new agents instructed by the Applicant wrote to the Respondent and again referred to the unauthorised building of an extension (page 220). On this occasion also, rather than explaining that the extension was present when he bought the property, the Respondent replied by denying any breaches arising from the construction of an extension (page 219).

Also, in other letters sent by the Respondent in relation to claims that he had breached the terms of the lease by making alterations he at no point said that there was an extension at the premises when he acquired it, which again the Tribunal would have expected him to do if that had been the case (see pages 122, and 126).

In his submissions on behalf of the Respondent Mr. Khan said that he was not able to explain the contents of the correspondence but re-iterated the Respondent's case that the extension was already built by 2003.

(iv) On 13 July 2009 Waltham Forest Borough Council wrote to the Respondent in connection with possible enforcement action in respect of the construction of the extension (page 231). In due course an enforcement notice was issued. This was then withdrawn on 8 October 2013 when the local authority concluded on the balance of probabilities that the extension was built in 2006 (page 225). The Tribunal bore in mind that the local authority would have investigated the date of the construction of the extension in order to determine whether a certificate of lawful development could be issued. Having conducted their enquiries they concluded that the date of construction was 2006 and the Tribunal was satisfied that weight should be given to that conclusion.

(v) There is no mention in the Respondent's legal submissions that the extension had already been added when he bought the property and, indeed, no mention of an extension at all (pages 211 to 213). Although the Respondent denies constructing the extension in his witness statement (para 6 at page 215), the Tribunal noted inconsistencies in the Respondent's statements about changes to the property and concluded that his evidence was not reliable and little weight should be given to it. Thus, in a letter dated 15 April 2008 he stated that he did not accept that there had been a conversion of the property into two flats and stated that the property's original layout had stayed the same (page 232). This is entirely inconsistent with his own witness statement where, as already explained, he stated that in 2005 he reconfigured the accommodation space and formed two flats (para 5 at page 215).

(vi) In his witness statement the Respondent described the layout of the premises at the time he bought it. He stated that there were two bedrooms, a reception room, and a separate bathroom, separate WC and separate kitchen (para 3 at page 214). This was consistent with the mortgage valuation report prepared for his purchase of the property which shows that the property was on one floor and comprised 1 reception room, 2 bedrooms and a kitchen, bathroom and WC (page 234).

The Tribunal asked the Respondent to describe the layout of the property before he carried out any works to it. His evidence was that there was a bedroom at the front of the property with a second bedroom next door, there was then a large sitting room with a bathroom at the far end. He said that the extension was not being used as living accommodation at the time and that it was just a store room.

The Tribunal considered that this account was inconsistent with the mortgage valuation report. It is clear from the plans submitted with the planning applications that the extension is a substantial structure. It is as broad as the rear part of the original property and the side elevation shows that it is nearly as long as that part also (pages 182 and 183). It forms a significant addition to the property. Despite this, there was no mention of the existence of this room in the valuation report. Although the report allowed for the inclusion of both utility rooms and outbuildings, the totals for each of these was given as zero. The Tribunal found it unlikely that such a report would fail to mention a significant room within the property and considered it more likely that the reason for this room not being mentioned was that it was not yet built.

(vii) In his submissions Mr. Khan drew attention to the reference in the mortgage valuation report to conversion works including the removal of chimney breasts and covering of the roof (page 234). He argued that this showed that the extension was completed as part of these works. He also argued that the reference to the roof covering must have been a reference to the extension because the correspondence showed that substantial works were done to the roof after this (see for instance pages 247, 252 and 253).

The Tribunal did not accept this argument. There was nothing to show that the conversion works referred to included the construction of the extension. Indeed, the purpose of the reference was to draw attention to the need to ensure that proper approvals were given for the works referred to. The Tribunal considered it highly likely that if there had been an extension present at the time this would have been expressly referred to in this context as the need to ensure that it had been built with appropriate consent would be obvious.

(viii) Although the Respondent produced the original mortgage valuation there was no other evidence relating to his purchase such as a copy of the original sale particulars, and there was no evidence that he had sought to obtain these.

45. The Tribunal weighed all this evidence and, putting it all together concluded that it was satisfied that the extension was built by the Respondent as alleged by the Applicant at some time between 2005 and 2007.

46. It followed that it was satisfied that the Respondent has breached clause 2(o)(i) of the lease at some time between 2005 and 2007 by carrying out a development within the meaning of the Town and Country Planning Act 1990, namely the construction of a single storey extension to the property. In the circumstances it was not necessary to consider the Applicant's alternative argument on this point.

Breach No. 5

47. By clause 10 of the second part of the 6th schedule of the lease the lessee covenanted as follows;

> "*Not to use the demised premises for any purpose whatsoever other than use as a private flat in occupation of one family only*" (pages 45 to 46).

48. The Applicant's case was that the Respondent had granted two separate tenancies of two separate parts of the property in breach of this provision.

49. This breach was admitted by the Respondent at the hearing. The factual basis is the same as that in respect of breach no. 1 above.

50. On this basis the Tribunal was satisfied that a breach of clause 10 of the second part of the 6th. schedule had occurred. It was satisfied that by creating two tenancies of different parts of the property the Respondent had used the property for purposes not permitted by the lease.

Breaches Nos. 6 and 7

51. By clause 14 of the second part of the 6th. schedule of the lease the lessee covenanted as follows;

> "*Not at any time hereafter to make or permit to be made any alterations in the construction height elevation or architectural appearance of the demised premises or any part thereof or other works thereon or to alter or cut any of the principal walls or timbers thereof or erect or build any additional or any substituted building whatsoever upon the demised premises or any part thereof ..... without the prior written consent of the Lessor....* " (page 46).

52. These two alleged breaches relied on the same factual basis as that relied on in respect of breaches nos. 3 and 4. In other words, the Applicant's case was that by reconfiguring the property and erecting an extension – both without prior consent – the Respondent was in breach of this clause.

53. As with breach No. 3, the subdivision and reconfiguring was admitted by the Respondent. There was no suggestion that prior consent had been obtained and the substantial correspondence in the bundle shows that to

be the case. Further, the Respondent at paragraph 7 of his witness statement (page 215) says that he did not realise that he needed consent. The plans show that in order to carry out this work the Respondent must have cut through walls and timber.

54. The Respondent's case as regards the construction of the extension was the same as that in respect of breach no. 4, namely that the extension was already there when the Respondent bought the property.

55. The evidence and arguments dealing with the question of when the extension was built are set out above together with the Tribunal's conclusion that the extension was built by the Respondent between 2005 and 2007. Again, there was nothing to suggest that consent had been given for this.

56. It follows that the Tribunal found that the Respondent had breached clause 14 of the second part of the 6th. schedule of the lease in two respects. Firstly, he had subdivided the property in or around 2005 to 2007 into two separate flats, by installing a second bathroom and second kitchen, by cutting through walls and timber and by altering the layout of the premises, without the prior written consent of the Applicant.

57. Secondly, he had, at some time between 2005 and 2007 erected a rear extension without prior written consent from the Applicant.

Waiver

58. There was some suggestion in the correspondence that the Respondent sought to argue that any breaches of covenant had been waived by the Applicant as reference is made in a number of places to their being aware of the breaches.

59. However, at the hearing Mr. Khan on behalf of the Respondent accepted that there was no issue as to waiver.

60. In any event the Tribunal was satisfied that there had been no waiver. The evidence clearly showed that the works were carried out without consent and that the Applicant had taken repeated steps to both ascertain what in fact had been done to the property and to take steps in relation to the breaches. It cannot be said that there has been any kind of representation by the Applicant that the covenants are no longer enforceable.

61. In all the circumstances, therefore, the Tribunal allowed the application and determined that the seven breaches of covenant set out at the beginning of this decision had occurred.

Name: Tribunal Judge S. J. Walker **Date:** 3 September 2020

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 168

(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.