FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00MD/LBC/2018/0008**
Property	:	**38 Laburnham Grove, Slough, Berkshire SL3 8QU**
Applicant	:	**Judeglen Limited**
Representative	:	**Mr S Gallagher - Counsel**
Respondents	:	**Ms A K Awusu** **Mr A K Oyinka**
Representative	:	**In Person**
Type of Application	:	**Application under section 168 of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Tribunal Judge Dutton** **Mr N Martindale FRICS**
Date and venue of Hearing	:	**Meeting room 6, Holiday Inn Express, London on21st June 2018**
Date of Decision	:	**27th July 2018**

DECISION

DECISION

The Tribunal finds that the Applicant has not proved its case and therefore dismisses the application for the reasons set out below.

BACKGROUND

1. This was an application made by Judeglen Limited seeking an order that there had been a breach of covenant or condition of the lease by the Respondents Ms Awusu and Mr Oyinka.

2. The application included within the bundle is undated and unsigned. It does, however, contain what appeared to be the Applicant's statement of case alleging that the Respondents had made alterations to the property in breach of clause 11(13) of the lease without the landlord's consent.

3. In a bundle provided for the hearing we had copies of the directions issued which are dated 10th April 2018, confirmation that Marlborough Holdings were representing the Applicant, the copy application and copies of the Land Registry entries, the lease and variation and statements from the Respondents. In addition, there was some correspondence relied upon by the Respondents which we will refer to in due course.

4. We were also provided with a copy of a reply that the Respondents had apparently served dated 14th May 2018. We also received before the hearing written submissions prepared by Mr Gallagher of Counsel.

INSPECTION

5. Before the hearing we inspected the subject property. It is a ground floor maisonette in a block of four having a garage to the right hand side when looking at the property from the road. We noted that the windows were UPVC double glazed and that to the flank wall by the footpath leading to the rear garden a porch had been constructed of brick and an aluminium sliding door. The roof above was plastic on wooden rafters. Inside the porch area was a double glazed front door. In total there were five windows although one window needs to be considered separately.

HEARING

6. The hearing took place at the Holiday Inn Express in London and the Applicant was represented by Mr Gallagher of Counsel. Nobody from the applicant company attended and there were no witness statements. The only evidence we had from the Applicant was the application itself which, as we have indicated above, was unsigned and undated.

7. Mr Gallagher told us that Judeglen and Marlborough were not arms-length companies, Marlborough appearing to be a trading name. Asked why this application had arisen, we were told by Mr Gallagher that he thought that this had been prompted by an application by the Respondents to extend the lease.

8. Mr Gallagher had produced a helpful document headed 'Submissions', the contents of which we have noted and which are known to the Respondents, they having been provided with a copy on the morning of the hearing. They confirmed that they would take no point on the document being delivered so late and that they had had the chance to read same.

9. Arising from the submission and from the papers generally, the following appears to be common ground. The original lease was granted in 1962 and was subject to a deed of variation on 19th February 1999 which was in effect a surrender and re-grant. The deed of variation was essentially on the same terms as the 1962 lease, although there were some alterations to the ground rent and insuring provisions.

10. It is said by Mr Gallagher that there was no lease plan for the 1999 lease and that accordingly the extent of the property must have been by reference to the 1962 lease which was he said incorporated by reference.

11. Mr Oyinka had purchased his interest in the flat in 2005 and Ms Awusu had become a co-owner some ten years later.

12. The breaches complained of by the Applicant are as follows:

    a. The replacement of the windows in the maisonette
    b. The replacement of the external front door
    c. The construction of a brick porch/enclosure to the side of the premises. It was accepted by Mr Gallagher that reference to the replacement of external doors in the plural was incorrect and the porch to the front of the premises had no bearing as this related to the upper maisonette.

13. Mr Gallagher submitted the fact that the alterations may have been made before the Respondents owned the property did not prevent them from being liable to the proprietary remedy of forfeiture and he referred us to an extract from Woodfall seeking to support that contention.

14. The submission went on to say that the Respondents' case was based on the predecessor in title's answer to the pre-contact enquiries but no first hand evidence could be given as to what may have happened between August of 2002 and 1999. The best evidence with regard to the side porch was that the lease plan had not been amended on the 1999 grant but instead had been incorporated into the new lease. This plan did not show a porch. Indeed it appeared to show an indent in the footpath being the access to the front door of the property. There was no evidence of any licence of having been granted, which was not a point argued for by the Respondent.

15. It is Applicant's case that the erection of the porch was an additional building and an alteration to the plan and elevation, that the replacement of the windows were alterations to the principle walls and an alteration to the elevation. The same applied to the new front door.

16. We were reminded of the restrictions of our jurisdiction under section 168(1) and referred to the Upper Tribunal case of Swanston Grange (Luton) Management Limited v Langley-Essen.

17. In the course of the hearing, Mr Gallagher expanded upon these points. It was put to him that the porch appeared to have been built on the common parts by reference to the lease plan but he was not sure that the Respondents would wish to argue that point.

18. Asked whether or not the limitation period applied to this case he said his view was that that may be a defence but that is not something for us to consider. He reaffirmed that in his view the windows form part of the principal walls. He accepted that the Applicants could not say what the original windows were constructed of although it would be unlikely that they were UPVC but more importantly perhaps could not say what the windows were made of in 1999, at the grant of the new lease. He accepted that the burden of proof rested with the Applicant. Asked whether the fact that there appeared to be concrete lintels above each of the windows meant that the windows could not themselves be structural, he accepted that but said they were still part of the principal wall. He was also invited to indicate whether one clause of the lease should have more power than another. His suggestion was that the requirement for consent by the landlord meant that such consent should also have been obtained if the tenant was considering changing matters by way of repair. He did, however, accept that the replacement/improvement could be the same as a repair.

19. For the Respondents Mr Oyinka confirmed that they had, by reference to the sales documentation when he purchased, evidence to show that at least in 2002 when the predecessors in title purchased there had been no changes made to the property before he bought in 2005. He referred us to the Sale of Property Information form which was in the bundle. He also told us that he had paid the ground rent in August of 2017. In additional also, one window to the rear, being the bedroom window, had been replaced by the landlord through its insurers following a burglary in 2011. He told us that the front door had been changed in January of 2012 on the advice of the Police following the burglary. We were told that this merely replaced a previous white UPVC door. There had been no structural changes made to fit the new door.

20. Mr Gallagher in brief response submitted that there was an evidential gap between 1999 and 2002. We had to decide the matter on the balance of probabilities. His view was that the best evidence was that the terms of the lease plan in 1999 were not varied from that in 1962 and that if there had been a change to the extent of the property in 1999 that should have been reflected in the new lease and the plan annexed.

THE LAW

21. The law applicable to this matter is set out at the foot of this decision.

FINDINGS

22. The Applicants have owned the freehold of this property since the 1980s. A new lease was entered into on 19th February 1999. It is correct to say that the property demised is dealt with by reference to the original lease which is dated 9th January

1962 and contains a plan which has suitable colouring showing the extent of the demise, the common footways and the garden.

23. The relevant terms of the lease apart from the general description of the property contained in clause 1 is to be found at clauses II(4) which contains an obligation on the part of the lessee to decorate the exterior of the property although at a colour to be approved by the surveyor for the lessor.

24. At clause II(5) it says as follows:
"From time to time and at all times during the said term well and to substantially repair uphold support cleanse maintain drain amend and keep the premises hereby demised and in particular the rafters or other the support of the floor of the upper maisonette and all new buildings which may at any time during the said term be erected on and all additions made to the demised premises and the fixtures therein and the walls and the fences marked with an inward "T" on the said plan and all sewers drains pathways passageways easements and appurtenances thereof with all necessary repairs cleansing and amendments whatsoever."

25. At II(7) it says as follows:
"All the demised premises painted repaired upheld cleansed maintained drained amended and kept as aforesaid at the expiration or sooner determination of the said term quietly to yield up unto the lessor together with additions and improvements made thereto in the meantime and all fixtures of every kind in or upon the demised premises in which during the said term may be a fixed or fastened to or upon the same except tenants or trade fixtures."

26. The terms of the lease which the Respondents are said to have breached is at paragraph II(13) and says as follows:
"Not at any time during the said term without the licence in writing of the lessor first obtained (such licence not to be unreasonably withheld) to erect or place any additional building or erection on any part of the demised premises and in particular but without prejudice to the generality of the a foregoing not to erect any fences or plant any hedges in front or at the rear of the demised premises and not without such licence as aforesaid to make any alteration in the plan or elevation of the premises hereby demised or in any of the party walls or the principal or bearing walls or timbers thereof nor construct any gateway or opening in any of the fences bounding the demised premises."

27. In this case Mr Gallagher representing the Applicants conceded from the outset that it would be necessary for us to be satisfied that any of the alterations which are said to be in breach of the lease occurred after the date of the Deed of Variation, which was the 19th February 1999.

28. It is the Respondent's case that these changes were made before 2002. In support of that, they rely both on Mr Oyinka's ownership since August of 2005, the matters set out in their witness statements and certain documentation produced. The first is a copy of the estate agent's particulars issued prior to the Respondents buying, which clearly refers to an enclosed porch and double glazing. Further in the replies to enquiries raised of the seller before Mr Oyinka purchased in 2005, the sellers having carefully noted the importance of these

answers and has confirmed at paragraph 9 that there were no changes to the property including building works and the replacement of windows or glazed doors.

29. There appear to be perhaps four issues that we need to consider. The first is the replacement of the window to the rear following the burglary. The second is the replacement of the main door on the advice of the Police. Both have happened during the occupancy of the Respondents. The next question is the replacement of the remaining windows in the maisonette and finally the construction of the porch to the side of the property.

30. Insofar as the bedroom window was concerned, which was replaced in 2011 following a burglary, it seems to us that the Applicant has no entitlement to argue that this window was in breach of the lease. The window was replaced by their insurers following attendance by the insurer's loss adjusters. The Respondents appear to have little or no involvement, although they did say that the window was installed was the same design and construction as the one that had been damaged. In those circumstances, therefore, we are satisfied that there can be no breach for the replacement of that window.

31. Insofar as the door is concerned, we were told that this was a like for like replacement save only that it was more secure they being advised to do so by the Police following the burglary. This was apparently replaced in 2012.

32. Insofar as the remaining windows are concerned, it is the Respondent's case that these were in situ long before they purchased. Indeed, relying on the documentation produced, they were in existence before their predecessors acquired the maisonette in 2002. Accordingly, it appears for the Applicants to be able to successfully argue that there has been a breach, they need to show that these windows which are presently in situ were replaced after the new lease in 1999. We remind ourselves that the burden of proof rests with the Applicant. Although Mr Gallagher reminded us that it is on the balance of probabilities, it seems to us that there is still an obligation on the Applicants to put forward some evidence to show that the windows have been changed since the new lease was entered into. We have no evidence whatsoever from the Applicant. Their evidence is confined to submissions made by Mr Gallagher, which are on a point of law only. Accordingly, in so far as the windows are concerned, we find that the Applicants have not discharged the burden of proof and we therefore conclude that there is no evidence to show that these windows were installed after the date of the new lease of February of 1999 and that accordingly the Applicant cannot establish that there has been a breach. We have of course already indicated that insofar as the replacement bedroom window is concerned, they were the ones who in fact installed same.

33. Insofar as the new front door is concerned, again there is no evidence as to what the door may have been in 1999. The Respondents indicated that they replaced an existing door, the only upgrade being the improved security. There appears to be nothing in the lease that prevents such a step being taken given that this is a full repairing lease on the part of the Respondents. Mr Gallagher helpfully conceded that a replacement could equate to a repair and it seems to us that an improvement can also equate to a repair. Given that the obligation to repair rests

with the Respondents, and that they were advised to undertake the work by the Police, we find that there is no breach insofar as the new front door is concerned.

34. We turn then to the question of the porch which is more problematic. We note all that Mr Gallagher says about the lease plan and accept that there is some weight to that argument. However, we are an expert tribunal. Our view is that the materials used to construct the porch predate 1999. Although Mr Gallagher said at if he were trying to argue that the porch had been erected in 1970 then he may have a difficulty because the materials it could be argued were not in existence at that time. However, as he merely seeks to argue that the porch was erected after 1999, he does not have that problem. Whilst we hear what he says, as an expert tribunal we are entitled to consider the porch construction. We are satisfied that the aluminium singled-glazed sliding door, the plastic roof and the brickwork are indicative of works carried out before 1999. We also have the concern that the porch appears to have been erected over part of the common parts, albeit that affording access to the maisonette and therefore is not an extension of the demised premises as such, although we would have to accept that it is an amendment to the plan/elevation for which on the face of it consent would have to be required.

35. However, again it seems to us that the burden of proof rests with the Applicant. They have owned the freehold of this property since January of 1989. In that time, we would have thought that they would have inspected on a fairly regular basis and should have known before 2016, as that appears to be the time the breach came to their attention, that a porch had been constructed. Using our knowledge and experience we are of the view that the porch was on the balance of probability likely to have been constructed before the date of the new lease in 1999. In those circumstances, therefore, we are not satisfied that the construction of the porch constitutes a breach of the lease.

36. For the reasons set out above we conclude that the Applicants have not proved their case and we therefore dismiss the application.

37. As a matter of comment, we would perhaps add, although this is not strictly within our jurisdiction, that it seems to us the Applicants were aware of the breach in respect of the porch and the windows by November of 2016 as they wrote to the Respondents at that time. The letter is marked without prejudice but it was in the bundle and was not objected to by Mr Gallagher. We understand from Mr Oyinka that he has paid a ground rent it having been demanded from him in August of 2017. Again, a matter not challenged.

38. In addition also, it seems to us that the erection of the porch is more than 12 years ago which may give rise to adverse possession arguments. Further, the limitation period relating to forfeiture would seem to be 12 years from the date of such breach.

39. We are not wholly clear what advantage the Applicant hoped to achieve by brining this application. We should perhaps also add that we trust that the landlord applicant is not going to seek to endeavour to recover any costs in respect of these proceedings. No attempt was made to produce any evidence and a representative of the Applicant did not consider it necessary to attend the

hearing to assist. There is no application before us under section 20C and therefore we can make no order at this stage, but we can indicate that we would be sympathetic to such a application.

Judge: Andrew Dutton

A A Dutton

Date: 27th July 2018

ANNEX – 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 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 to 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.