FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UD/LBC/2021/0027
Property	**:**	Basement Flat 1A, 39-40 Cornwallis Gardens, Hastings, East Sussex, TN34 1LX
Applicant	**:**	39-40 Cornwallis Residents Association Ltd 39/40 Cornwallis Gardens Residents Association
Representative	**:**	George Okines of Arko Property Management
Respondent	**:**	Julie Kenna
Representative	**:**	Miss Dwomoh of Counsel Gardner Leader LLP
Type of Application	**:**	Breach of covenant S168 (4) of the Commonhold and Leasehold Reform Act 2002
Tribunal Member(s)	**:**	Regional Surveyor W H Gater FRICS (Chairman) Regional Judge M W Tildesley OBE Mr D Ashby FRICS
Date of Hearing	**:**	23 March 2022 Havant Justice Centre Hybrid hearing
Date of Decision	**:**	24 May 2022

DECISION

The Tribunal determines that the Respondent is in breach of tenant covenants contained in the lease of the Property dated 3 July 1978, made between Lyndale Developments Co and Arthur Turnbull Edwards and Annette Edwards. Those breaches are as follows: -

- **Clause 2. (6) (Lessee Covenant to redecorate)**
- **Clause 2. (7) (Lessee Covenant to maintain and repair the flat and landlord's fixtures and fitting)**
- **Clause 2. (15) (i) (Lessee Covenant not to cut or maim the walls floor timbers stanchions or girders)**

1. The reasons for its decision are set out below.

2. References to documents in the bundle are shown [*] and relate to the electronic numbering of the pdf.

Background

3. The Applicant seeks an Order under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 that the Respondent has breached covenants in the lease. The application was made on 18 October 2021.

4. The Applicant is the Freeholder Company of the property which comprises 10 flats. Nine of the ten lessees are shareholders.

5. The Respondent is a leaseholder of the lower ground floor flat.

6. From information on the web the property is a five storey semidetached building built around 100-125 years ago. It stands on the corner of Cornwallis Road and Linton Gardens.

7. Flat 1A is a basement flat set below road level approached down steps with a garden area retained by a roadside wall.

8. Directions were issued on 8 December 2021 setting out procedures and timescale for the determination of the matter.

9. The Applicant stated that the Respondent has done extensive alterations to the subject property breaching various clauses in the lease and resulting in the flat being uninhabitable for many years. The issues are set out in detail in sections 5 and 13 of the application form.

10. On 5 January 2022 the Respondent applied to stay these proceedings to enable the Respondent to pursue a related claim for breach of lease against the Applicant.

11. A Legal Officer considered the application for stay premature because there was no Claim yet before the County Court. Also, the proceedings before the Tribunal are exclusive to the Tribunal's jurisdiction.

12. A Legal Officer directed that the application for stay would be re-considered by the Tribunal hearing the case on 8 February 2022 upon receipt of the Applicant's reply and bundle on 26 January 2022. The Applicant was expected to include in its reply, a response to the stay application. The Applicant opposed the application for stay.

13. On 28 January 2022, after reviewing the bundle and the application Judge Tildesley OBE refused the application for a stay on the grounds that the jurisdiction of the Tribunal is limited to deciding whether a breach has occurred, that the Tribunal had not been hitherto notified of the proceedings, and that such County Court proceedings would not be relevant to the issue that the Tribunal has to determine.

14. A hearing took place on 8 February 2022 at Havant Justice Centre, with the parties' representatives joining by video conferencing.

15. The Applicants were represented by Mr Okines of Arko Property Management and the Respondent was represented by Miss Laithwaite of Counsel. The Tribunal is grateful to both representatives for their submissions and assistance.

16. In addition to the bundle, each had submitted a skeleton argument which assisted the Tribunal.

17. Miss Laithwaite also provided a bundle of authorities for reference.

18. Before proceeding to the substantive application, the Tribunal heard from the Applicants and Respondents as follows:-

<u>Applicant's Amendment Application</u>

19. By an application dated 26 January 2022 the Applicant sought the Tribunal's permission to vary the application to:

- Add an allegation of breach of the Lease through failure by the Respondent to pay service charges according to the terms of the Lease for a period of 16 years; and

- Expand the alleged breach of clause 2(15)(i) to include alterations to the layout of the flat without the Applicant's consent.

- Miss Laithwaite for the Respondent was not in principle opposed to the Amendment Application, subject to having an opportunity to respond in evidence to the additional allegations levied pursuant to the Tribunal's further directions.

20. The Tribunal determined at the hearing that:

- In relation to the application to add the allegation of non-payment of service charges, a determination of a breach on these grounds is not appropriate under section 168, having regard to section 169(7) of the Act. Any determination under this heading would first require an application and determination under section 27 A of the Landlord and Tenant Act 1985. The application to amend on that ground is therefore refused.

- In relation to the application to expand the alleged breach of clause 2(15)(ii) to include alterations to the layout of the flat without the Applicant's consent, the Tribunal notes that the Respondent is not opposed to the application. Accordingly, and in the interests of justice, that part of the application is confirmed.

Respondent's Adjournment Application.

21. The Respondent made an application within the skeleton argument to adjourn for 10 weeks on the grounds that they had not had full sight of the breaches alleged in submissions by the Applicant. On hearing representations, the Tribunal determined at the hearing that:

- The Respondent now had sufficient detail of the allegations to respond fully.

- The Tribunal reaffirmed its earlier decision to reject the application for a stay pending the related claim in the County Court.

- In the interests of justice an adjournment would be granted but that in order to dispose of the matter expeditiously the matter was set down for hearing on 23 March 2022.

The Applicants application to admit further evidence.

22. Prior to the hearing the Applicant made an application to admit additional documentation, namely a Schedule of Dilapidations dated 20 April 2015 by M Atkinson Chartered Surveyor of Standen Associates and an A3 sketch plan of the flat.

23. The Respondent stated that she did not oppose this application provided the covering letter which went with the Schedule of Dilapidations was included.

The Respondents application to Strike Out

24. The Respondent's counsel submitted a skeleton argument immediately before the hearing. This included, in effect, an application to have the case struck out.

25. The grounds were that the Applicant shown on the original Application, 39-40 Cornwallis Residents Association, is not the Landlord, and that 39/40 Cornwallis Gardens Residents' Association Limited (Co. Regn. No. 5611491) is the Freeholder stated in evidence and therefore the Landlord for the purposes of the Act.

26. Both applications were dealt with as preliminary matters at the hearing.

Issues

27. The Tribunal finds that the following substantive issues need to be determined.

28. Have the covenants referred to below been breached?

- Clause 2 (6) (Lessee covenant to redecorate)

- Clause 2(7) (Lessee covenant to repair and maintain)

- Clause 2. (15) (i) (Lessee Covenant not to cut or maim the walls floor timbers stanchions or girders).

- Clause 2. (15) (ii) (Lessee covenant not to commit or permit any waste or damage to the flat or make any alterations to the elevation).

- Clause 3. of the Third Schedule: Restriction not to do or permit to be done any act which may render void the insurance.

29. Specific allegations made in the application state that the Respondent has:

    1. failed to keep the flat in good repair for a period of approximately 10 years.

    2. removed the landlords' fixtures and fitting and not reinstated them.

    3. cut and maimed the floors and walls without landlords' consent.

    4. made alterations to the drainage without authority to do so.

    5. caused the insurance to be voided for the subject property.

The Law

30. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002, most particularly section 168(4), which reads as follows: -

"A landlord under a long lease of a dwelling may make an application to [the appropriate Tribunal] for determination that a breach of a covenant or condition in the lease has occurred."

31. The Tribunal must assess whether there has been a breach of the Lease on the balance of probabilities.

32. An application under Section 168(4) can be made only by a lessor in relation to an asserted breach by a lessee. It cannot be made by a lessee in respect of an alleged breach on the part of a lessor.

33. A determination under Section 168(4) does not require the Tribunal to consider any issue other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to the question of whether or not there has been a breach. As explained in Vine Housing Cooperative Ltd v Smith (2015) UKUT 0501 (LC), the motivations behind the making of applications, are of no concern to the Tribunal, although they may later be for a court.

34. The Lease is to be construed applying the basic principles of construction of such lease as set out by the Supreme Court in Arnold v Britton [2015] UKSC. Hence the Tribunal must identify the intention of the parties by reference to what a reasonable person, having all of the background knowledge which would have been available to the parties, would have understood the language in the contract to mean, in their documentary, factual and commercial context, disregarding subjective evidence of any party's intentions.

The Lease

35. The flat is shown edged red on the lease plan and defined [29] as "… including all walls floors and ceilings from the level of the underside of the floor joists of the flat up to the level of the underside of the floor joists of the ceilings of the flat provided that all walls vertically dividing the flat from any other flat shall be party walls and together with the easements rights and privileged".

36. The specific covenants alleged to have been breached are: -

37. Clause (2)

(2)(6) Once in every seven years of the said term to paint with two coats of good oil colour the internal parts usually painted of the Flat and at the same time with such inside painting to varnish whitewash and colour those parts of the inside of the Flat as are usually varnished whitewashed or coloured.

(2)(7) From time to time and at all times well and substantially to repair cleanse maintain and keep the Flat (other than the parts comprised in and referred to in paragraphs (1) and (2) of clause 5 hereof) and the fixtures

thereon and the walls pipes cables wires and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever (damage by fire or other insurable risk not due to any neglect or default of the Lessee causing the insurance policy to be vitiated or payment of the insurance monies to be refused only accepted).

(2)(15) Not during the said term:

(i) without the consent in writing of the Lessor (and where applicable Superior Lessors) to cut or maim any of the wells floors timbers stanchions or girders of the Flat.

(ii) commit or permit any waste or damage whatsoever to the flat or make or permit to be made any alterations in the elevation or in the external decoration thereof or in the means of access thereto.

Third Schedule Paragraph 3

3. Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance on any flat in or part of the said Building or may cause an increased premium to be payable in respect thereof.

The Hearing

38. The preliminary issues were dealt with as follows: -

- Application to admit further evidence. On the grounds that there was no objection from the Respondents, provided the covering letter was included with the Schedule of Dilapidations, the Tribunal found that it was in the interests of justice and of assistance to the proceedings to admit all of these documents as requested.

- Application to Strike out. On hearing submissions by the parties, the Tribunal found that the Applicant was not prejudiced by the incorrect identity of the Landlord on the application form and that the intent of the application was clear and not fatal to the application. The Tribunal exercised its power under Rule 10 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to substitute 39/40 Cornwallis Gardens Residents' Association Limited (Co. Reg. No. 5611491) as the Applicant in these proceedings.

Evidence

39. The Applicant submitted a bundle in accordance with Directions which contained statements and evidence from both parties. References to pages in the bundle are shown as [*].

40. The Tribunal will not recite all the evidence considered but will refer to the evidence at the Hearing and in the Bundle in considering each allegation.

The Applicants evidence

41. In summary the applicants allege that the lessee vacated the flat around 2011-2012 and shortly thereafter commenced extensive alterations to the flat, which involved stripping out the landlords' fixtures and fittings, creating a second bedroom and changing the position of the kitchen and bathroom. The floor of the demised property suffered dry rot and was not properly treated allowing the rot to spread to other parts of the structure. The flat has to date not been reinstated and remains uninhabitable.

42. In addition, although not related to this application, the Applicants pointed out that the Respondent has not paid service charges due since 2013.

The Respondents evidence

43. In summary the Respondent states that she has been involved with various disputes with the Applicant for a number of years. There have been numerous issues with her Property which are the responsibility of the Applicant, which she raised with the Applicant, via its managing agent, Arko Property Management ("Arko"). However, the Applicant either did not take her concerns seriously, or failed to undertake the necessary investigations and repairs to deal with the issues that arose.

44. It has not been possible to undertake remedial works whilst repairs for which the Respondents are responsible are not dealt with.

Determination

45. The Tribunal considered each issue allegation of breach in relation to the relevant lease covenant to determine whether, on balance of probabilities there has been a breach.

46. The case is intermixed with counterclaims by the Respondent regarding Landlords alleged failures. The Tribunal must only determine whether the Respondent was in breach of the lease on the matters alleged at the date of the application.

47. The Respondent has claimed that the allegations are unspecific and does not know what is claimed. Having allowed the adjournment and admission of further statements and documents, the Tribunal is satisfied that the case made out is sufficiently clear for the Respondent to answer.

48. The Respondent instructed solicitors in March 2021 to send a Pre-action Conduct and Protocol letter to the Applicant for alleged breaches of landlords covenants. The Applicant has strongly denied the allegations and sent a solicitors' letter in reply. The Respondent has not followed up

on the letter of claim and made a claim before the Court. The Tribunal has no jurisdiction under section 168 (4) to consider a counter claim by a tenant for breach of landlord's covenants.

49. The Tribunal finds that a chronology of events adduced from the evidence provided will assist in this determination.

Chronology

2004 Respondent purchases the flat and alters the property internally.

2012 Respondent reports cracked wall and defective roof over kitchen.

2012 Respondent vacates flat.

December 2013 Respondent's Mortgage lender pays arrears of service charges following Section 146 proceedings.

July 2014 Kitchen roof repaired following s 146 action by Applicant for service charge payment.

2014 Dry rot discovered in floor of lounge.(The Applicant alleges this was found as early as 2012 but no evidence has been produced).

April 2015 Schedule of Dilapidations in respect of disrepair in the Respondent's property prepared by Standen Associates Limited, Chartered Building Surveyors, and served on the Respondent requiring her to complete the repairs

September 2015 repairs said by Respondent to be completed following Rentokil report of July 2015.

2016/17 Further work carried out by the Respondent including toilet plumbed in to main drain

2018 Respondent obtains report from 7 H surveyors which finds front floor sub void affected by damp and rot.

June 2020 Repairs to drains carried out. Blockbusters confirm leakages ceased July 2020.

February 2022 Local Authority Building Control Department issue certificate of completion in respect of work to the drains.

50. **Consideration: The Tribunal considers the evidence against each allegation for breach of covenant**

51. **Clause 2. (6) (Lessee Covenant to redecorate)**

Clause 2. (7) (Lessee Covenant to maintain and repair the flat and landlord's fixtures and fitting)

52. The Applicant referred the Tribunal to the photographic evidence which shows the condition of the flat at various dates between 2011 and 2022.

53. The Applicant states that the Respondent has admitted this allegation in stating that "the flat is basically a shell at present" [62]. Whilst the Applicant has responded to allegations over the years the Respondent has taken no steps to reinstate the flat for 10 years.

54. The Applicant served a Schedule of Dilapidations on the Respondent, prepared by Standen Associates Ltd and dated 29 April 2015. The required works included fully expose and trace dry rot outbreak, remove all affected timber and joinery past the last sign of fungal growth and reinstate including sterilising brickwork and all affected surfaces. Reinstatements to be like for like with the exception of wall linings. That Schedule was replied to by the Respondent stating that repairs were carried out in response.

55. The Applicants state that a claim made in 2020 by the Respondent that a minor damp issue was the reason she had not maintained the property did not explain why she had failed to maintain the flat for the previous 8 years.

56. At the hearing, the Applicant said that the kitchen ceiling had not collapsed, the walls cupboards were not damaged and there was no need to take them down. It was accepted that it was reasonable to remove fixtures whilst treatment/repairs were carried out, but it was unreasonable to strip out units in 2015 and not reinstate over the next 7 years.

57. The Respondent states that the fact that the inside of her property is basically a shell at present is solely because of breaches by the Landlord. There is no point in carrying out repairs until issues with the drains were fixed. She disputes that her flat has not been in good repair.

58. The Respondent cites ongoing problems with drains, a leaking flat roof over the kitchen and an apparent leaking pipe from the floor above into the rear bedroom.

59. The Respondent sets out a timeline of events at [107-9.] In September 2015 she points out that repairs were carried out as specified by the Landlord's surveyor. Further works were carried out in 2016/7, again, as instructed by the Landlord and their surveyor. In 2018 after commissioning a survey from 7 H surveyors she found that problems were ongoing.

60. With regard to the issue of Landlord's fixtures and fittings, the Applicant points to the removal of kitchen and bathroom fittings with the earliest photographs showing this in 2019.

61. In submissions the Respondent states that any fixtures or fittings, unless serving other flats in common with the Flat, are the Respondent's fixtures or fittings and the Lease does not prevent or restrict their removal or replacement by the Respondent, subject to the Flat being (within a reasonable period of time) put into repair.

62. The Respondent at [190] states that ongoing issues with the external walls and roof of the kitchen have prevented her installing a new kitchen.

63. The Respondent's 2nd statement points out at 9 [190] that there is currently no bathroom suite installed. The tiles and flooring were removed with a view to redecorate and upgrade at the same time as the rest of the flat. The bathroom has not been refitted for economic reasons.

Discussion

64. The Standen Schedule of Dilapidations was accepted by the Respondent, who confirms that the repairs were carried out as specified, in September 2015.

65. Further works were undertaken in 2016/17 including the toilet being plumbed in to the main drain, again as instructed by the landlord and surveyor.

66. It was not until 2018 that the Respondent found through her surveyor 7H that the front subfloor void was still saturated and there were signs of renewed fungal infection. (That report has not been provided.)

67. That being the case, there was a period between 2015 and 2018 when the flat should have been fully repaired and habitable.

68. The photographic evidence shows that repairs were not carried out as specified and that many areas were incomplete before the re-emergence of issues. For example, 1.1 of the Schedule of Dilapidations requires full reinstatement of the floor to be like for like.

69. Photographs of the Lounge between July 2014 and April 2015 [116-119] show the effects of an outbreak of rot in the floor where boards have been lifted and fungal rot remains. At [117] the floor is seen to be very close to an earthen subfloor.

70. Further photos of the lounge [121-126] in November 2019 show new timbers and a damp course loosely placed on a brick sleeper wall. There are building materials, bathroom fittings, a fan, dehumidifier and a chair casually placed around the room.

71. In January 2022[127-130] the chipboard floor surface appears to be loosely placed on an uncut wall plate and a pile of floor joists is laid to one side.

72. The photograph of the lounge [130] in 2022 shows an incomplete floor without sufficient joists and fixings, rather than a floor that was completed and then reopened.

73. The kitchen is shown in December 2011 [131] with apparent damp staining to the ceiling and one cupboard door awry. In July 2012 the ceiling plasterboard has come down and debris lies on the kitchen worktop and floor. The ceiling joists appear to be in place but show mould/rot staining. The cupboard door is out of alignment as previously.

74. In April 2015 the kitchen is shown [134] with the ceiling apparently repaired but the wall cupboard has been removed. The photograph at [136] taken from the same angle shows the base units and tiling have been removed. The wall finishes are in poor condition.

75. Photographs at [138-141] dated January 2022 show the kitchen in the same, unfinished and undecorated state.

76. The Respondent asserts that issues with the drains have been the main cause of recurring dry rot. She cites reports by Rentokil and the covering letter attached to the Schedule of Dilapidations as evidence that this is the case. That being so it would be unreasonable to expect the flat to be repaired with ongoing issues such as this causing fungal rot.

77. The Applicants point out that this is a Basement flat with floors at the front at external ground level, an earth sub floor originally and no damp proof course on floor sleepers. As such there are a number of inherent factors which also contribute to the risk of an outbreak of rot.

78. The Tribunal accepts the Applicant's evidence that a number of factors are contributing to the possible cause of rot.

79. Whilst it is reasonable that repairs cannot always be complete when ongoing issues are being rectified, there were periods when it was thought that the issues had been solved and no attempt was made to complete the repair and renovation. At the date of the application that remained to be the case. The Applicants point out that other properties in the building affected by dry rot were treated and reinstated in 2018 and are fully occupied.

80. Counsel for the Respondent asserts that a flat in a state of renovation does not in itself demonstrate breach of the lessee repairing obligation otherwise any leaseholder renovating a property would automatically be in breach of their lease.

81. The Tribunal finds that where a flat is renovated within a reasonable time scale and in a diligent manner the tenant will not ordinarily be in breach, but in this instance the extraordinary length of time and the apparent lack of organised working means that this is not so.

82. The Tribunal finds that the photographs show the flat be f an extremely untidy disorganised building site with materials, domestic items and debris liberally scattered throughout. This has been the condition of the Flat for at least seven years if not longer.

83. The Schedule of Dilapidations requires redecoration after repair works. At [192] 16 the Respondent states that the property has recently been painted. The Tribunal does not accept the Respondent's evidence.. The photographs at 121-130 show bare plasterwork that has apparently never been painted as at 2019 and 2022. This is not consistent with the Respondents evidence that works were carried out in accordance with the Schedule of Dilapidations by 2017 at the latest.

84. The Respondent's claim that it is unreasonable to expect the areas affected by rot to be painted over. The Tribunal is satisfied that areas of the flat, which were in good order otherwise, remained unpainted. For example, the bathroom.

85. Accordingly, the Tribunal finds on the balance of probabilities that the Respondent has not applied two coats of paint and not whitewashed the flat for over seven years and is therefore in breach of Clause 2. (6) (Lessee Covenant to redecorate).

86. The Tribunal finds that, whilst some works had been carried out, repairs and redecoration were never completed in accordance with the lease, and that this situation has continued for a period of years. The flat has been unoccupied for just under 9 years at the date of the application. The rediscovery of damp and rot problems may have involved opening up and dismantling some areas but the evidence shows that repair / remedial works were incomplete and non-compliant prior to that and continue to be so.

87. The Respondent admits to being in arrears of service charge payments and the given that Section 146 action was taken for non-payment in 2013 there is clearly a history of non-payment. The Respondent has paid no service charges since 2013. This undermines her defence that the Applicant is in breach of the landlord's repairing covenant which is subject to payment of service charges.

88. With regard to the landlords fixtures and fittings, these are part of the repairing clause at 2 (7) but not defined. The parties dispute the ownership, in particular, of the bathroom and kitchen fittings.

89. The Respondent refers the Tribunal to the definition of what is included in a conveyance in Section 62(2) of the Law of Property Act 1925. The Tribunal did not find this of assistance in determining landlord's fixture and fittings.

90. The Tribunal construes that in the ordinary meaning of the word, a fixture is something affixed to the property which is not part of the structure or building. It is something which in offering the property for sale or rent, a Landlord would need to affix to make the property lettable, indeed habitable. The fact that a Tenant may replace these during the course of a long lease does not detract from the fact that, at the end of the lease, they revert to the Landlord at the end of the demise.

91. The Tribunal finds that bathroom and kitchen fittings meet the definition of landlord's fitting. Thus, the Respondent has a responsibility to keep them under repair.

92. The Applicant states that the earliest photographic evidence bathroom and kitchen fittings were removed was in 2019. It may have been earlier. The Tribunal finds that whilst it is reasonable to remove them for the purpose of carrying out repairs, it is not so when they are not reinstated for a period of years.

93. The photo at [133] shows that kitchen wall cupboards were in place in 2012, but in 2015[134] they were missing, predating the 2019 estimate by the Applicant.

94. By 2019 [136] the kitchen base units had been removed. The photo at [139] in 2022 shows that all base units and wall cupboards are missing but the stainless steel sink remains.

95. The Respondent claims that the kitchen cupboard was broken when the ceiling under the concrete roof collapsed. This is not borne out by the photograph at [132] which shows the ceiling down and the cupboard in place, albeit with one door awry.

96. At the date of the application, it was not known that the roof was again leaking so there is no reason why the kitchen cupboards could not be installed.

97. Photographs [166] 2019 and [159] 2015 show that the WC has been relocated in that period. At [166] there is shown a relatively new floor and a WC with double power point beside it.

98. At [167] there is a wash basin and pedestal and bath lying unfitted. The Respondent's timeline indicates that alterations were carried out in 2016-17. Therefore, whilst the WC has been relocated on new flooring and new wiring installed, the remainder of the suite remains uninstalled after some 6 or 7 years.

99. The Respondent's statement [190] 9 that the bathroom is not in disrepair is at odds with the comment in the same paragraph that the bathroom suite is waiting to be installed. Having the component parts in place is not the

same as complying with the covenant to keep in repair. There is nothing in the lease which permits the Respondent to delay compliance "for economic reasons".

100. The Tribunal is satisfied on the evidence that the flat has been in a state of disrepair for a significant number of years. The picture painted by the evidence is that the Respondent has attempted to renovate the flat but has never completed the works. Her reason for not completing, namely, the landlords failure to carry out its repairing obligations is not supported by the evidence, The Tribunal, therefore, finds that the Applicant has not from time to time well and substantially repaired the flat and the landlord's fixtures.

101. **Accordingly, the Tribunal determines that the Respondent has breached Clause 2. (6) (Lessee Covenant to redecorate) and Clause 2. (7) (Lessee Covenant to maintain and repair the flat and landlord's fixtures and fitting)**

102. **Clause 2 (15) (i) not to cut or maim any of the wells floors timbers stanchions or girders of the Flat (ii)commit or permit any waste or damage whatsoever to the flat or make or permit to be made any alterations in the elevation or in the means of access thereto.**

103. The Applicant states that the Respondent altered the layout of the property by changing a one bedroom flat into a two bedroom flat. See [193] 18. The bathroom has been moved to a section partitioned off the bedroom. The Respondent has created a door way for access to the bedroom in breach of clause 2(15)(i) not to cut or maim the walls.

104. The plans at [44-5] show a surveyors sketch of the layout in 2002 and 2022. The Respondent purchased the property in 2004.

105. The Applicant also contends that clause 2(15)(ii) of the lease has been breached in that an elevation has been altered without consent. They make the point that an elevation could be both the internal or external elevation.

106. The Respondent confirms that the flat was altered after it was purchased in 2004. She states that her former partner obtained consent through the Landlords representative Christopher Collins.

107. The Applicants counter this stating that Mr Collins was not a representative of the then Landlord. They have spoken to Mr Collins who confirms that whilst he was involved in discussions on the sale of the flat, no such consent was granted. Other members of the Residents Association have the same recollection.

108. The Respondent points out that she wanted to add a second bedroom and that no doorways were knocked through.

109. The Respondent submits that if a landlord has waived or becomes estopped from relying as against a tenant, upon a covenant, then for so long as that waiver or estoppel operated the obligation to comply with the covenant is suspended. In the circumstances, it was wrong to conclude that a tenant who performed acts that strictly would be a breach of the suspended covenant had breached that covenant: they cite Swanston Grange (Luton) Management Ltd v Langley-Essen (2008) L & TR 20 and Stemp v Ladbroke Gardens Management Ltd (2018) UKUT 375 (LC).

110. Discussion

111. The Tribunal finds that alterations were carried out to the flat around 2004. The only plans provided are sketches in 2002 and 2022. Inter alia these show that the former bedroom now has a bathroom. The bathroom appears to use the former bedroom door and therefore the two doors to the bedroom have been created in what was previously the partition between the original bedroom and the hall.

112. The Respondents claim that consent was obtained is not supported by any witness statements or documented approval. There is doubt that the person alleged to have arranged the grant of consent was capable of acting. A Landlord's consent under a lease is a significant issue and it is surprising that no record has been kept or produced.

113. Turning to the issue of waiver, it is clear from the Standen report and covering letter that the Applicants were aware of the fact that the flat had been altered. Mr Standen refers to the fact that the bathroom has been altered in position from the rear of the property. There are a number of photographs from 2015 when the report was prepared which show the interior of the property.

114. In addition, the Applicants effectively consented to the bathroom drainage alteration by giving instructions to complete the drainage correctly in the Schedule of Dilapidations.

115. No evidence has been provided of any action or further investigation by the Applicants following Mr Standens report of alterations.

116. The Tribunal has the power to determine that that the Landlord suspended the covenant by waiver.

117. In Stemp v Ladbroke Gardens Management Ltd (2018) UKUT 375 (LC) the Upper Tribunal stated that a waiver may be implied from the landlords acts once he has knowledge of the breach.

118. Given the length of time since the Standen report and the lack of evidence of action or investigation by the Landlord the Tribunal finds that the covenant has been waived.

119. In addition,with regard to the alleged breach re alterations to the elevation, the allegation is in effect that this clause was simultaneously breached in altering the walls as noted above.

120. The Respondents cite Triplerose Ltd v Patel [2018] UKUT 374 (LC); [2019] H.L.R. 34 and others in submitting that its ordinary usage the word “elevation” denotes the external vertical surfaces of a building generally. The Applicants say that elevation includes internal elevation, a term commonly used by architects referring to wall rising from floor to ceiling level.

121. In Triplerose, the Deputy President Martin Roger considered “the natural and ordinary meaning of the word "elevation".”

122. “It is not a term of art, and unless it is being used in some special or technical sense it can be understood by anyone familiar with ordinary usage. The word has a number of meanings in different contexts. In architecture or surveying it means a drawing of a building on a vertical plane, as opposed to a ground plan; by extension it means not simply a drawing of the vertical plane but the vertical plane or exterior of the building itself. Unless it is qualified by reference to a specific plane even when used in the singular it denotes the external vertical surfaces of a building generally, [Tribunal emphasis] the front, the back and the sides, rather than referring only to the front of the building. building generally, the front, the back and the sides, rather than referring only to the front of the building.”

123. The Tribunal finds that the word Elevation, is more commonly used to refer to external areas and on balance the intention of the parties to the original lease did not include internal walls in this definition. Accordingly, and in addition to waiver, clause 2(15)(ii) has not been breached.

124. **Accordingly, the Tribunal determines that clause 2(15)(1) and (ii) have not been breached.**

125. **Clause 3 Sch3. Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance on any flat in or part of the said Building or may cause an increased premium to be payable in respect thereof.[37]**

126. Allegation 5 caused the insurance to be voided for the subject property.

127. The Applicant states that buildings insurance will not cover premises left unoccupied for a prolonged period. The Respondent has left the property

unfurnished, untenanted and unoccupied for periods of more than 45 consecutive days and failed to inspect and record inspections. The Tribunal was referred to an extract of policy documents at [47&48].

128. The Applicant points out that a claim for dry rot cannot be made for unoccupied flats whereas in the past it was possible to prove that all were occupied.

129. The Respondent states that she does not know the terms of the policy for the building. The flat is unoccupied due to the Applicants breaches Regular checks have been made by the Applicant, her former partner and a friend living nearby. No record of these inspections has been provided.

130. Discussion

131. The Tribunal finds that policy document states the requirements of the policyholder as follows.

132. At "13: Unoccupied buildings" the policy specifies action where more than 30 % of the building become unoccupied. inter alia this includes thorough weekly inspections by a responsible person with a record kept of such inspections.

133. In addition, the Insured must notify the insurer as soon as they become aware of the Buildings or flats within being occupied by contractors for renovation, alteration or conversion purposes.

134. Unoccupied is defined as any Building or part of any Building or Flat which is unfurnished or untenanted or no longer in active use for a period exceeding 45 consecutive days.

135. The evidence of both of the parties is that the flat has been unoccupied for years.

136. There are 10 flats at the property. Accordingly, the flat constitutes a 10% of the flats for the purposes of the insurance policy.

137. Clause 13 of the policy would appear not to be engaged here as the flat comprises less than 30 % of the total of the 10 flats.

138. No evidence is produced as to whether the terms of the policy were given to the Respondent or that she was made aware of them. No further evidence of the policy or any notification made to insurers by the policyholder has been provided by the Applicants. There is no evidence produced to demonstrate that the premium has risen as a result of the flat being unoccupied.

139. Accordingly, and in view of the lack of evidence, the Tribunal finds that this clause has not been breached.

140. **Allegation 4: made alterations to the drainage without authority to do so.**

141. The Applicants do not state which clause of the lease this allegation of breach refers to.

142. The Tribunal has examined the lease and finds no express covenant which deals with this issue. The drains are however the responsibility of the Lessors and the Lessee has no reserved right to alter or repair them.

143. The Respondent states that clear instructions to alter the drains was given in the Schedule of Dilapidations which was complied with in September 2015. At 8.2 the Schedule requires the Respondent to "extend drainage pipe to below ground drainage in accordance with Building Regulation requirements".

144. The Respondent was not aware that the works had not been certified by the local authority but a completion certificate [238] was obtained dated 22 February 2022, after this application was made.

145. The Applicant questions whether the Building Control Department actually inspected the drains when certifying them, the evidence was produced only two weeks before the hearing and it has not been possible to confirm the facts with the council.

146. The photographs show that the pipe has not been cut into the benching and a drainage slipper to direct flow has not been installed.

147. As an experienced technical Tribunal, it does have similar concerns to the Applicants that the works in connecting to the main drain were non-compliant as the photos do appear to show that there is no slipper fitting (a curved pipe arrangement directing flow) at the drain connection point. Nevertheless, the must determine solely whether the Respondent has altered the drainage without authority.

148. The Tribunal finds that in relation to the connection of the new bathroom waste to the main drain, the Respondent was given authority to undertake the works by the Applicant when the Schedule of Dilaidations was served.

149. **In respect of the allegation that the Respondent has altered the drainage without authority, therefore, the Tribunal finds that the Respondent is not in breach.**

<u>Section 20c application</u>

150. The Respondent applied for an order under section 20C of the 1985 Act to prevent the landlord from recovering the costs of the proceedings through the service charge. Part 11 of Schedule V enables the Applicant to recover

the fees of any agent instructed by the landlord to manage the property. Although the Respondent has successfully resisted some of the allegations against her, the Tribunal on balance decides to make no order under section 20C. The Tribunal's reasons are the Applicant has been successful on the substantive allegation of failure to disrepair and the Applicant should not be denied its contractual right to recover costs.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.