FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LBC/2023/0033**
Property	**:**	**Flat 2, 70 Holland Park, London W11 3SL**
Applicant	**:**	**69/70/71 Holland Park Limited**
Representative	**:**	**Mr Howard Lederman – Counsel instructed by Pearlmans Solicitors**
Respondent	**:**	**Ms Alison Smith**
Representative	**:**	**none**
Type of application	**:**	**Determination of alleged breaches of covenant: s. 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge Mark Jones** **Ms Jane Mann MCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**04 March 2024**
Date of decision	**:**	**11 April 2024**

DECISION

Decisions of the tribunal

(1) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, the following breaches have occurred:

(i) The Respondent has failed to decorate the Flat, in breach of clause 3(4) of the Lease.

(ii) The Respondent has failed to repair, maintain, renew, uphold and/or keep the Flat in good and substantial repair and condition, in breach of clauses 3(3) of the Lease.

(iii) The Respondent is in breach of clause 2 and regulation 3 of the First Schedule to the Lease, by permitting dirt and refuse to accumulate in sinks, the bath and lavatories within the Flat.

(iv) The Respondent is in breach of clause 2 and regulation 11 of the First Schedule to the Lease, by failing to ensure that the floors of the bathroom and kitchen are properly and suitably covered.

(v) The Respondent is in breach of clause 2 and regulation 16 of the First Schedule to the Lease, by failing to ensure that the windows of the Flat are cleaned at least monthly.

(2) The Respondent has not committed further breaches of the Lease alleged:

(i) The Respondent is not in breach of clause 4(1).

(ii) The Respondent is not in breach of clause 2 and regulation 2 of the First Schedule to the Lease, as has been alleged.

(iii) The Respondent is not in further breach of clause 2 and regulation 16 of the First Schedule to the Lease, by failing to ensure that the windows of the Flat are properly curtained in the style appropriate to a private residence.

(iv) The Respondent is not in breach of clause 2 and regulation 1 of the First Schedule to the Lease, by using it for a purpose from which a nuisance annoyance or disturbance to owners, lessees and occupiers of other parts of the building can arise, as alleged.

(v) The Respondent is not in breach of clause 3(6) of the Lease, by having made alterations to the Flat, as alleged.

(vi) The Respondent is not in breach of clause 3(5) of the Lease, by failing to permit access to the Flat, as alleged.

Introduction

1. The Applicant landlord seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("***the 2002 Act***") that one or more breaches of covenant have occurred.

2. The application relates to Flat 2, 70 Holland Park, London W11 3SL (*"**the Flat***"), a one-bedroom ground-floor flat with small mezzanine, accessed by ladder, in a row of 3 houses divided into flats, 69, 70 and 71 Holland Park. 70 Holland Park is a Grade 2 listed building of 3 storeys and an attic and basement, containing some 9 flats, including the Flat.

3. The Flat has masonry walls with timber suspended floors and lath and plaster ceilings with decorative covings.

4. Neither party requested an inspection, and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

5. The Applicant is the freehold proprietor of 69, 70 and 71 Holland Park. Its title to 70 Holland Park registered under title no. 230143.

6. The Respondent holds a long lease of the Property dated 12 October 1972, for a term expiring on 24 June 2070 (*"**Lease**"*). The Respondent became the registered proprietor of her leasehold interest on 27 October 1994, registered under title no.NGL215531.

7. Quadrant Property Management Limited (*"**Quadrant**"*) were the managing agents of the lessor from about 2010 until Safe Property Management were appointed property managers on 1 January 2024 .

The Hearing

8. The Applicant was represented by Mr Howard Lederman of counsel at the hearing. We are grateful to him for his helpful skeleton argument and oral submissions.

9. The Respondent did not attend the hearing, while her acquaintance Ms Cheryl Prax was present as an observer.

Preliminary Matters

10. The Tribunal is satisfied that the Respondent was aware of the proceedings and the hearing, against the background summarised below.

11. Following correspondence received from acquaintances of the Respondent, including Ms Cheryl Prax and Mr Jake Gibilaro, the hearing listed for 12 September 2023 was postponed by the order of Regional Judge Powell dated 11 September 2023 which directed that the Respondent *"…must by 18 December 2023 obtain and file a medical report from a suitable psychiatric or psychological expert as to her mental capacity to conduct the proceedings…"* The Tribunal is satisfied that that order was hand-delivered to the porter at what appears to be the Respondent's home address, at Apartment 5, Highgrove Point, Frognal Rise, Hampstead London NW3 6PZ (*"**Highgrove**"*).

12. That order was made following correspondence received from acquaintances of the Respondent, including Ms Cheryl Prax and Mr Jake Gibilaro.

13. No report was filed, leading to Deputy Regional Judge Carr's further directions on 12 January 2024, listing the matter for hearing on 4 March 2024. Those directions were emailed to Ms Prax and Mr Gibilaro and, as noted above, Ms Prax attended the hearing.

14. Thereafter, the evidence of Mr Pomeranc, solicitor for the Applicant, which the Tribunal accepts, shows that his firm wrote to the Respondent both at the Property and by recorded delivery to the Highgrove address on 25 January 2024 advising her of the 4 March 2024 hearing date. A further letter dated 16 February 2024 informing the Respondent of that hearing date was sent to the Property and hand-delivered to the Highgrove porters lodge on 16 February 2024.

15. Insofar as correspondence from the Respondent's acquaintances raised a potential issue of the Respondent's incapacity, the Tribunal has no evidence before it in relation to such matters. The obligation to demonstrate any want of capacity to conduct proceedings falls upon the party alleging it, against the presumption of capacity arising from s.1 of the Mental Capacity Act 2005. Absent the report directed by Judge Powell, or any other evidence, the legal presumption is that the Respondent possesses capacity to conduct proceedings and, if she wishes, to provide instructions.

16. The Tribunal, accordingly, considered it appropriate to proceed with the hearing in the absence of the Respondent.

Procedural background

17. The landlord's application was dated and filed with the Tribunal on 14 March 2023.

18. The Tribunal gave directions on 16 May 2023, which were circulated to the parties. Those directions identified the issues to be determined as including the Applicant's allegations that the Respondent had failed to decorate, repair, keep clean, failed to reside at the Flat, had failed to lay floor coverings, had permitted dry rot to infest it, had made unauthorised alterations to the Flat and had refused access to it. The directions specified that the Tribunal will need to be satisfied that:

    (a) The Lease includes the covenants relied on by the Applicant, and

    (b) that, if proved, the alleged facts constitute a breach of those covenants.

19. The directions provided for various procedural steps to be taken by the parties in preparation for the hearing, including for the Respondent to send to the Applicant by 21 July 2023 various documents, including a statement setting out grounds for opposing the application and any witness statements of fact relied upon and alternative quotations, if available, for the provision of services. The Respondent did not do so, and indeed served and/or filed nothing prior to the hearing date to indicate whether she did, or did not agree with the various allegations made.

20. The Applicant relied upon Grounds in the form of a witness statement dated 14 March 2023 of Ms Deseley West, a former senior property manager employed by Quadrant. By the date of the adjourned hearing, Ms West had left Quadrant's employment and was believed to be travelling overseas. In anticipation of these matters, a copy of her Grounds was re-signed by her and witnessed on 30th October 2023. Her evidence was admitted as hearsay, pursuant to a Hearsay Notice dated 27 February 2024. Exhibited to that statement of grounds was a substantial bundle of contemporaneous documents.

21. The Applicant also relied upon statements of grounds from Mr Pomeranc, dated 14 March 2023 and 7 July 2023, augmented by his further statement dated 28 February 2024, each bearing a statement of truth.

22. The Tribunal heard evidence from Mr Pomeranc at the hearing. The Tribunal also gave permission to the Applicant to call Mr Glen Hardingham MRICS, the author of a report upon the condition of the Property, dated 31 October 2022, based upon a visual inspection that

took place on 21 September 2022. We are grateful to both witnesses for their evidence.

23. The Tribunal has considered the various documents which formed the hearing bundle of some 456 pages, which includes a series of more recent internal photographs taken on various dates in February 2024 upon attendance by Joanna Roznowska, Director, Safe Property Management and Steven Charalambides, surveyor Advanced Property Preservations Ltd instructed by the Applicant. We have also considered further documents provided by Mr Lederman by email on 5 April 2024, which we directed to be served upon the Respondent, with permission for her to respond. No such response was received.

Relevant Provisions in the Lease

24. The Lease defines the demise of the Flat thus:

> *"ALL THAT the flat details whereof are set out in Part 3 of the said Second Schedule and including the ceilings and floors thereof and the joists and beams on which the floors are laid and together with all cisterns tanks sewers drains pipes wires and ducts and conduits used solely for the purpose of the flat but no others including also the windows and window frames and the interior faces of such of the external walls as bound the flat (hereinafter called 'the demised premises')..."*

25. The Tribunal will consider the relevant terms of the Lease allegedly breached when it comes to consider the alleged breaches, sequentially.

Factual Background

26. As stated above, the Respondent acquired title to her leasehold interest in the Flat in 1994.

27. As explained by Ms West in her statement, which in this regard we accept, Quadrant's records are to the effect that the Flat was unoccupied by 2010, and has remained unoccupied ever since.

28. In February 2012 Quadrant forced entry into the Flat in the course of investigating the source of a leak within the building at 70 Holland Park. 7 photographs were taken at the time, showing the Flat to be in a state of internal disrepair, and appearing to be unoccupied as a dwelling. The Tribunal has considered these pictures and finds them to show unoccupied premises.

29. Although not the subject of this discrete application, the Tribunal notes that the available records disclose a sporadic history of response to

demands for payment of ground rent and service charges, leading to a series of County Court judgments in the Applicant's favour against the Respondent, and in turn to orders for possession and forfeiture of the Flat between 2011 and 2013, albeit that in due course forfeiture was avoided upon payment of the sums awarded.

30. In October 2021 a leak occurred, whereby water emanated from the premises above the Flat, and on 30 October 2021 a plumber attended and gained access to the Flat along with representatives of the fire brigade. We have seen a video that was filmed on that date showing the poor internal state of repair: it appears to the Tribunal that no decoration, repair or maintenance had occurred in the almost 10-year period following the February 2012 photographs.

31. The utilities of gas, water and electricity formerly serving the Flat have each been disconnected on an unknown date or dates.

32. The insurers of the building have been advised of the unoccupied status of the Flat. No additional premium is payable by the Applicant, but cover for the Flat has been restricted to Fire, Lightning, Aircraft and Explosion only.

33. On 22 July 2022 Pearlmans solicitors, acting for the Applicant, wrote to the Respondent providing notice of the Applicant's wish to inspect the interior of the Flat, and requesting that she contact Quadrant to arrange a convenient time to allow access. The letter was addressed to the Flat, together with copies sent and hand-delivered to Highgrove and to the Respondent's brother. No response was received to that letter.

34. On 21 September 2022, Quadrant arranged for the locks to the Flat to be changed by a locksmith, and on that date Mr Hardingham carried out his inspection. The Flat was unoccupied. As summarised above, Mr Hardingham's report following that inspection was dated 31 October 2022. A copy was sent to the Respondent under cover of a detailed letter of claim from Pearlmans dated 11 January 2023, which formally offered the Respondent a set of the keys to the changed locks. No response was forthcoming to that letter (or, indeed, any of the relevant correspondence) and the offer of a set of keys has not been taken up.

35. In the absence of any response, the Applicant made application to the Tribunal on 14 March 2023. This was accompanied by an application seeking the determination of the reasonableness and payability of service charges, which is the subject of a separate Decision of this Tribunal, dated 04 April 2024.

The Respondent's Position

36. As summarised above, the Respondent provided no grounds to dispute any of the allegations made against her.

37. The Tribunal has, nevertheless, carefully considered the matters alleged, in order to determine the issues on the application. They will be addressed sequentially, below.

The statutory provisions

38. The relevant parts of section 168 of the 2002 Act provide as follows:-

> *"(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 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.*
>
> *(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred."*

39. This Tribunal, now, has the jurisdiction originally conferred on the leasehold valuation Tribunal.

Allegation 1: Failing to Decorate

40. By clause 3(4) of the Lease and part 6 of the Second Schedule thereto, the tenant covenanted to redecorate the Flat in 1979 and in every succeeding seventh year, in a proper and workmanlike manner employing two coats of quality paint, and/or employing wallpaper, varnish and similar decorative substances. Counting in 7s from 1979 would, for the period with which the Application is concerned, have required redecoration in or around 2014 and 2021.

41. From:

41.1 the evidence contained in the photographs taken in 2012,

41.2 the video filmed in 2021,

41.3 the evidence contained in Mr Hardingham's report confirmed by him in his oral evidence to the Tribunal, which we accept,

41.4 photographs taken by Mr Hardingham upon inspection on 21 September 2022, and

41.5 further photographs taken in February 2024 upon attendance by Ms Roznowska and then Mr Charalambides,

it is readily apparent - and the Tribunal finds as a fact - that the Flat has not been redecorated at any time between 2012 and September 2022. While from the presence of tins of paint in the earlier photographs it appears that there may have been either ongoing or anticipated works of redecoration prior to the date on which those were taken, the Tribunal accepts Mr Harding's evidence, contained in §4.1.12 of his report that:

"From comparison of the photos taken in 2012 and my own photos taken in 2022 it is clear that the flat has remained vacant and no repair and redecoration works been carried out."

42. We are, therefore, satisfied on a balance of probabilities that there has been a breach of clause 3(4) of the Lease.

Allegation 2: Failing to Repair

43. By clause 3(3) of the Lease, the tenant covenanted to keep the Flat, including all windows, sanitary, water, gas, electrical and central heating apparatus, walls, ceilings, floors and all fixtures and additions thereto in good and substantial repair and condition.

44. This is mirrored in clause 4(1), requiring the state of repair to be such as to afford all necessary support, shelter and protection to the remaining parts of the building.

45. From the evidence, it is apparent that no repairs or maintenance have been effected in or to the Flat since 2012, save (perhaps) any emergency works to terminate water flow or ingress during the entries that were made in 2012 and on 30 October 2021.

46. Were the Flat nevertheless in good repair, the fact that repairs and maintenance had not been carried out might not of itself constitute a

breach. The Tribunal however finds that the Flat is in a state of substantial disrepair due to a neglect of any maintenance over (now) more than a decade at a minimum.

47. The Flat is not, however, in good repair. The various defects found by Mr Hardingham, each of which we accept, include:

47.1 The kitchen flooring is missing sections of vinyl floor covering.

47.2 Bathroom floor tiles are missing.

47.3 The carpet throughout the flat is heavily stained, threadbare and beyond its useful life.

47.4 The timber windows are in a state of decay, and have areas of rot.

47.5 The paintwork to the windows is peeling and heavily soiled with mould and grime from years of neglect.

47.6 The timber windows are splitting from excessive moisture.

47.7 The glazing is filthy with grime.

47.8 The timber window shutters are also suffering from decay with flaking and peeling paintwork.

47.9 The windows were not operable in September 2022.

47.10 Many kitchen units are either broken or missing drawer or cabinet faces. The units are unusable and require full replacement.

47.11 The walls, ceilings, cornicing and covings throughout the flat are heavily stained with water stains and grime.

47.12 There is also cracking to plaster surfaces which is usually addressed as part of cyclical redecoration works.

47.13 As summarised above, there is no running water or power supply to the Flat.

47.14 The lath and plaster ceiling above the mezzanine has partly collapsed in consequence of a water leak from premises above the Flat.

47.15 The timber ladder and fascia to the mezzanine area have partly rotted from damp ingress.

48. It is Mr Hardingham's evidence, which this Tribunal accepts, that from comparison of the photos taken in 2012 and his own photos taken in 2022 it is clear that the flat has remained vacant and no repair and redecoration works have been carried out. He opines, and we again accept, that the lack of heating and ventilation for many years has contributed to the decay of the windows, walls, ceilings and floors, and the lack of regular maintenance and cyclical decorations has contributed to the overall decay and state of disrepair within the Flat. The February 2024 pictures confirm that no, or no substantial remedial works appear to have been undertaken in the approximately 18 months after Mr Hardingham's inspection.

49. While in his report Mr Hardingham stated in several places that he found the Flat to be *"inhabitable"*, in response to questions from the Tribunal he clarified that this word was, on each occasion it appeared, intended to be *'uninhabitable'*, which the Tribunal accepts, not least in that it makes substantially more sense in the wider context of his evidence, and accords with the Tribunal's view of the photographic and video evidence. Mr Hardingham expanded upon this, explaining that there was no water or power supply to the Flat, sanitaryware was broken, the bathroom was unusable, the kitchen unusable and the entire interior was dilapidated.

50. The internal areas of the Flat are the lessee's liability to repair. It is apparent that the Respondent has not done so for a considerable period, leaving the Flat in an uninhabitable condition as matters stand. The Tribunal, accordingly, finds on a balance of probabilities that the Respondent has breached clause 3(3) of the Lease.

51. As to clause 4(1) of the Lease, the Tribunal finds that while there is plainly considerable disrepair within the Flat, the available evidence fails to demonstrate that the nature and extent of that disrepair is such as to breach the covenant to keep in repair *"…so as to afford all necessary support shelter and protection to the parts of the building other than the demised premises …"* While there is evidence of damage in the form of the roof above the mezzanine having partly collapsed, that appears to be a consequence of a leak from premises above the Flat, not of any want of repair of the Flat itself.

52. The Tribunal therefore finds on a balance of probabilities that no breach of clause 4(1) has been established.

Allegation 3: Blocking of Sinks, Baths and Lavatories

53. Clause 2 of the Lease obliges the lessee to observe the regulations set out in the First Schedule.

54. Regulation 3 of the First Schedule provides:

"Not to throw dirt rubbish rags or other refuse or permit the same to be thrown into the sinks baths lavatories cisterns or water or soil pipes in the demised premises"

55. On inspection, Mr Hardingham found debris and rubbish scattered around the kitchen, including in the kitchen sink. He also states that he found rubbish in the bath tub, assertions borne out by the photographic evidence.

56. This appears to the Tribunal to be an allegation of a most trivial nature, particularly when measured against the more substantial breaches alleged and found to be established, where the rubbish in question appears to be small in volume, and readily capable of removal or clearing up. The purpose of the Regulation is self-evidently to seek to prevent flooding and leaks from blocked installations for sanitary purposes, and no risk of flooding emanating from the Flat can be discerned where it currently enjoys no water supply.

57. Section 168(4) of the 2002 Act requires this Tribunal to determine whether there has been any breach of covenant by the Respondent. We must determine this on the balance of probabilities. It is not our role to determine for any such breaches whether relief from forfeiture should be granted on the basis (for example) that a particular breach is readily remediable and/or *de minimis*. These may be matters for the County Court, in due course.

58. the Tribunal accordingly finds on the balance of probabilities that there has been a breach of Regulation 3 of the First Schedule.

Allegation 4: Occupancy and Insurance

59. Allegation 4 is phrased thus:

"Failing to comply with the occupancy condition in the building's insurance contrary to clause 2 and regulation 2 of the First Schedule to the Lease - failing to inspect regularly…"

60. As explained above, clause 2 requires the lessee to comply with the regulations in the First Schedule. Regulation 2 provides:

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

61. By email dated 4 July 2022 the Applicant's insurance brokers indicated that in consequence of the unoccupied state of the Flat, cover for that

unit is restricted to fire, lightning, aircraft and explosion only, and require unoccupancy conditions to be complied with.

62. The Tribunal has considered the relevant unoccupancy conditions, in the form of a substantial *'Premier Property Owners Policy Booklet'* provided by Qdime Group, which in relation to any building being unoccupied in its entirety imposes on *the insured* various obligations of inspection every 14 days, record keeping of such inspections and prompt rectification of discovered defects. This of course imposes no obligation upon the Respondent, where the insured in this context is the Applicant. Indeed, the insurance policy appears to be for the building as a whole, which the Tribunal understands not wholly to be unoccupied.

63. In response to this point being queried by the Tribunal, after the hearing Mr Lederman forwarded an email chain containing the 4 July 2022 email (which had been omitted from the bundle) and a helpful explanatory note. That email chain, however, merely confirmed that the unoccupancy conditions referred to above were a condition of the policy. In response to a direct question from Ms West as to any effect on the premium payable, the response from Leanne Philp of Qdime, the Applicant's broker, was *"The rating will not be adjusted…"* The Tribunal understands this to mean that the premium was not increased (or decreased) in consequence of the minimal cover afforded the Flat element of the building.

64. This last point is confirmed in Mr Hardingham's report, at §3.2.9.

65. As summarised above, the occupancy conditions in the Applicant's insurance policy appear to impose contractual obligations on the *Applicant* to inspect the Property. They do not impose obligations on the Respondent. Having changed the locks and having retained keys to the Property since September 2022 the Applicant or their Managing Agents are well able to enter and inspect: it is a matter for them whether they do so.

66. There is no evidence that the Applicant's insurance policy is or may be void or voidable in consequence of the Respondent leaving the Flat unoccupied: on the contrary, the Applicant's policy has clearly been renewed by underwriters cognisant of the state of occupation of the Flat, who have made special conditions in respect thereof.

67. Similarly, there is no evidence that the premium payable by the Applicant has or may be increased in consequence of these matters: the evidence demonstrates instead that it has not.

68. The Tribunal therefore determines on the balance of probabilities that there has been no breach of Regulation 2 of the First Schedule of the Lease.

Allegation 5: Floor Coverings

69. Allegation 5 asserts that the Respondent has failed to carpet and/or underlay the Flat contrary to Regulation 11 of the First Schedule, which requires the lessee to *"…cover and keep covered the floors of the demised premises with carpet and an underlay other than the floors of the kitchen and bathroom which shall be properly and suitably covered…"*

70. The alleged breach rests upon the asserted inadequacy of the carpets in the Flat, and the damage to flooring in the kitchen and bathroom noted in Mr Hardingham's report, as summarised in §§47.1 - 47.3 of this Decision.

71. The Tribunal finds that, albeit they may be worn and in poor condition, the areas within the Flat required to be carpeted are indeed so carpeted. There is no evidence that the carpets do not have underlay underneath, which the Tribunal finds would be customary. Regulation 11 imposes no condition as to quality, and the Tribunal accordingly finds no breach in this regard.

72. By contrast, the kitchen flooring is clearly missing large areas of the formerly installed vinyl floor covering: this is most clearly demonstrated by photograph 15 appended to Mr Hardingham's report, and a similar picture attached to Mr Charalambides' correspondence. The bathroom floor is missing a series of tiles. The Tribunal finds on a balance of probabilities that the state of the flooring in those 2 rooms amounts to a breach of Regulation 11.

Allegation 6: Alleged Failure to Clean and Curtain Windows

73. Regulation 16 of the First Schedule, requires the lessee to clean the windows of the Flat both internally and externally on a monthly basis, and to *"…keep the windows properly curtained in the style appropriate to a private residence."*

74. As to external cleaning of the windows, Mr Lederman submits (and the Tribunal accepts) that one would expect Quadrant as reputable managing agents to arrange regular cleaning of the external windows of the three adjoining buildings, at 69-71 Holland Park, including those of the Flat. The Tribunal notes that charges in respect of window cleaning appear in the service charge accounts to March 2019 and March 2020, albeit in surprisingly low sums, but not as a separate item thereafter.

75. It is, however, clear that the windows of the Flat have not been cleaned internally for over a decade. Mr Hardingham, in evidence we accept, describes them as *"filthy with grime"*.

76. The Tribunal accordingly finds on a balance of probabilities that there has been a breach of Regulation 16 in respect of the want of internal cleaning of the windows within the Flat.

77. The Tribunal does not find that there has been a breach of Regulation 16 in respect of external window cleaning, finding it substantially more likely than not that Quadrant, as the Applicant's managing agent, will have made appropriate arrangements for the entire building.

78. As to the alleged requirement of curtains, the Tribunal notes that the covenant permits a degree of latitude to the lessee as to what is required to *"…keep the windows properly curtained in the style appropriate to a private residence."*

79. *"Curtained"* is employed as a verb, not as a noun. In this context, given its natural and ordinary meaning, the term may mean both to provide a hanging, fabric screen that may be drawn back and forth, but also to veil or shut off as with a curtain.

80. Albeit that they are said to be suffering from decay, the internal faces of the windows are adjacent to large wooden shutters which were and are usable to block and/or admit light to the Flat, and provide appropriate degrees of privacy. Having considered neighbouring premises on Google Streetview, the Tribunal notes that other flats within 69-71 Holland Park appear to have identical or substantially similar shutters installed and employed for the same purposes, as an alternative to fabric curtains.

81. Mr Lederman conceded, entirely fairly, that the presence of shutters might fulfil the contractual obligation.

82. In the transitive sense of the verb 'to curtain', the Tribunal considers that these shutters are entirely adequate to comply with the covenant.

83. The Tribunal accordingly concludes that:

    82.1 There is a breach of Regulation 16 in consequence of a failure to clean the internal faces of the windows of the Flat.

    82.2 No concomitant breach is found in relation to the exterior faces of the windows.

    82.3 There is no breach arising from a failure to curtain.

Allegation 7: Alleged breach of user covenant and dry rot

84. Allegation 7 is phrased:

"Failing to comply with the requirement to use the flat as a private residential flat in occupation only and/or using the Flat for purpose which produces a nuisance namely dry rot, contrary to clause 2 and regulation 1 of the First Schedule to the Lease and the report…"

85. The *"report"* referred to is, of course, that of Mr Hardingham.

86. Regulation 1 provides, in part:

"Not to use (the Flat) for a purpose whatsoever other than as a private residential flat in one occupation only nor for any purpose from which a nuisance annoyance or disturbance <u>can</u> arise to the owners lessees or occupiers of the other parts of the Building…" (emphasis added)

87. The underlined word *"can"* was not apparent on the slightly laterally truncated copy of the Lease in the bundle, but became apparent on submission by Mr Lederman of a better/wider copy after the hearing.

88. The Applicant's case is predicated on the basis that by effectively abandoning the Flat and carrying out no repairs and maintenance (as we have already held), the Respondent has permitted a situation to arise that produces a nuisance, in the form of dry rot, or the substantial risk of dry rot, which would or may have serious implications for the building, and the interests of other lessees.

89. The Tribunal, firstly, does not hold that by failing to reside in the Flat or let it to residential tenants the Respondent is in breach of Regulation 1. The Respondent appears not to be using it for any purpose whatsoever, besides merely owning it. The meaning and nature of the clause is, for example, to prevent use as a house in multiple occupation, or as business premises, causing nuisance to neighbours. We reject the contention that by living elsewhere, and leaving the Flat empty, the Respondent is in breach of the Regulation.

90. As to *nuisance*, we have considered Mr Hardingham's evidence, including the lack of ventilation and damp meter readings. We have also considered the fact that on 21 February 2024 Mr Charalambides attended to undertake a dry rot survey, but in the event did not do so. We accept that both Mr Hardingham and Mr Charalambides noted dampness and damage to the walls, the latter noting a range of readings from acceptable to damp with the walls with the worst staining.

91. At its highest, Mr Charalambides noted:

"Regarding … dry rot, our inspection was very limited … We did note some fungal growth on a damaged bit of the ceiling, which could be an indication of non-wood-rotting fungi, but it's hard to confirm at this point."

92. We are satisfied that there is no evidence of the *existence* of dry rot in the Property. There is no evidence, for example, of the existence of fungal spores or fruiting bodies within the Flat. The circumstances create entirely understandable *concern*, but concern is not a nuisance in law.

93. As to the word *"can"* in Regulation 1, while the circumstances may permit the theoretical possibility of dry rot, none can be discerned some 12 (or more) years after it appears all semblance of repair and maintenance of the Flat ceased and indeed after appears to have suffered at least 2 ingresses of water from its neighbouring properties.

94. We therefore find no breach of Regulation 1.

Allegation 8: Alleged alterations in breach of covenant

95. This issue alleges:

"Making alterations to the walls timbers or plumbing in the Flat contrary to clause 3(6) of the Lease - see the report;"

96. Clause 3(6) provides, insofar as is relevant:

"Not make any alterations in or additions to or cut maim alter or injure any of the walls or timbers or plumbing or alter the internal arrangement of the demised premises or any part thereof without the previous consent in writing of the Lessors to the plans and specifications thereof (which consent shall not be unreasonably withheld)..."

The clause prohibits alterations without consent.

97. The lease plan shows the extent of the demise of the Flat, outlined in red. It shows nothing of the internal configuration of the rooms.

98. Mr Hardingham's evidence, contained in his report, which we accept in this regard is to the effect that all internal masonry walls appear to be part of the original internal layout.

99. The allegation against the Respondent relates to what has been described as the mezzanine, which forms a wooden construction above the kitchen and bathroom, accessed by ladder from the bedroom area of the Flat. Its interior configuration would not permit an adult of normal stature to stand, albeit that it might be usable either as bunk bed-style sleeping accommodation, or perhaps for storage.

100. Mr Hardingham concludes that this construction is unlikely to have been part of the original design, and he opines that it is possible that the

mezzanine would have required a licence to alter from the Applicant, but there is no evidence that one has ever been sought by any owner of the Flat.

101. The Tribunal notes that the building was constructed in or around 1862. It, and as its internal configuration may have evolved, the flats within, had been in existence for 110 years prior to execution of the Lease. The Applicant acquired the freehold of the building in 1987, 15 years after commencement of the Lease. From Ms West's evidence, Quadrant has been engaged as manager of the building since around 2009, some 37 years after the commencement of the Lease.

102. In response to a question from the Tribunal, Mr Lederman confirmed that there was no evidence whatsoever as to when the mezzanine was constructed.

103. There is nothing from which the Tribunal might infer:

103.1 the date of construction of the mezzanine;

103.2 whether that was before or after the commencement of the Lease;

103.3 whether that was before or after the Applicant's acquisition of freehold title to the building;

103.4 whether that was before or after Quadrant's retention as managing agent; and/or

103.5 whether that was before or after the Respondent's acquisition of her demise.

104. It is for the Applicant to prove its case as to breach of covenant. In relation to this issue, there is no evidence from which the Tribunal could conclude on a balance of probabilities that the mezzanine was constructed on any particular date, or that permission was or was not required for its construction, whether from the Applicant, or its predecessor(s) in title. The only conclusion the Tribunal does feel possible to infer is that the mezzanine was not constructed at any time after 2010, from when the Flat has been unoccupied.

105. We therefore find no breach of clause 3(6).

Allegation 9: Alleged failure to permit access

106. This issue alleges:

"Failing to permit access to the Flat as requested in the letter of 22nd July 2022 from Pearlmans solicitors to the Landlord, contrary to clause 3(5) of the Lease."

107. Clause 3(5) provides, insofar as relevant:

"Permit the Lessors and their duly authorised surveyors or agents with or without workmen and others upon giving previous notice in writing at all reasonable times (except in case of emergency) to enter into and upon the demised premises or any part thereof for the purpose of viewing and examining the state and condition thereof…"

108. As summarised in §33, above, on 22 July 2022 Pearlmans solicitors wrote to the Respondent at the Flat and at Highgrove providing notice of the Applicant's wish to inspect the interior of the Flat. This followed earlier requests to inspect, e.g. in April 2021. The request on 22 July 2022 was in the following terms:

*"**Notice to Inspect***

"Our client wishes to inspect the interior of the Flat to ensure the validity of the policy. Please treat this letter as giving you 14 days' notice of its intention to inspect. Please contact the managing agents (details below) to arrange a convenient time to arrange access.

…

"If we do not hear from you (or your authorised representative) with firm proposals for inspection of the interior of the Flat, in writing within 14 days, the Landlord will have no choice but to gain entry by breaking the locks and all locksmith charges will be for your account. Once inspected, the new keys will be retained by the managing agents and a set will be available for collection by you."

109. No response was received to that letter, and on 21 September 2022 the locksmith forced entry and changed the locks.

110. The 22 July letter proposed no date on which the Applicant or its agent sought access, instead inviting the Respondent to propose a convenient date and time, which she did not do. The question for this Tribunal is whether the failure to respond amounted to a refusal to permit inspection, thus breaching clause 3(5).

111. Prior to the hearing, the Tribunal provided Mr Lederman with a copy of the Upper Tribunal's decision in the case of *New Crane Wharf Freehold Ltd. v Jonathan Mark Dovener* [2019] UKUT 98 (LC).

112. The decision in *New Crane Wharf* concerns a clause in a lease that is very similar to clause 3(5) of the Lease in the present case, insofar as it related to the provision of access to a landlord. It stated as follows:

> "…to permit the Lessor and its agents and workmen at all reasonable times on giving not less than forty eight hours notice (except in case of emergency) to enter the Demised Premises"

113. The only substantive difference between that clause and clause 3(5) was that here simply notice had to be given in writing, whereas in *New Crane Wharf* there had to be 48 hours' notice.

114. In *New Crane Wharf* the First-tier Tribunal had concluded that there had been no breach on the part of a tenant who simply failed to respond to correspondence seeking entry. It observed as follows at para. 38 – as set out at para 12 of the judgment of the Upper Tribunal:

> *"The Applicant's case therefore seems to be that, through failing to respond positively to the Applicant's solicitors' statement that their client wished to gain access to the property, the Respondent was in breach of the obligation to permit entry. We do not accept this analysis."*

115. The Upper Tribunal accepted the First-tier Tribunal's assessment and observed – at paras 17 and 23– that a letter requiring access to be given by a certain time is not notice stating when access is required, but rather is merely an invitation to the tenant to propose a time. Simply asking the tenant to make arrangements proposing a suitable time for inspection engaged no contractual duty on his part, so that his failure to do so was not a breach of his lease.

116. In the present case, Mr Lederman sought to distinguish *New Crane Wharf* by contending that it was tantamount to a refusal to permit inspection where a tenant fails outright to respond to a request from her landlord. He also argued that while including a specific time and date in a request for access would be appropriate were someone in occupation, in the present case there was nobody in occupation of the Flat, so that the same was unnecessary. He contended that it would be artificial to conclude that where no time and date for inspection was specified in Pearlmans' letter, that the failure to respond was not a refusal to permit access, where the Flat was unoccupied.

117. We disagree. The letter of 22 July 2022 contained no appointed date. It was a general request for the Respondent to reply and make arrangements. There was no contractual obligation on her to do so.

118. In the absence of any reply, the question is whether the Respondent prevented or sought to prevent any lawful attempt by the Applicant to gain access to the Flat. We find she did not do so.

119. In the event, the Applicant's agents gained access on 21 September 2022. The Respondent did nothing to prevent them.

120. In conclusion, the letter from Pearlmans did not ask for access at a specific time on a specific date, and the Applicant was not prevented from gaining access at any such hypothetically nominated specific time or date. Instead, the letter asked the Respondent to make arrangements with Quadrant. There was no duty on the Respondent to make such arrangements and her failure to do so is not a breach of her lease, following the decision in *New Crane Wharf*.

121. On the basis of the material before the Tribunal, the Respondent has not breached clause 3(5) of the Lease.

Conclusion

122. In conclusion, therefore, we are satisfied that the Respondent has been in breach of clauses 3(3), 3(4), and Regulations 3, 11 and 16 of the First Schedule, in turn engaged by clause 2 of the Lease (but not in breach of clauses 3(5), 3(6), 4(1) and Regulations 1 and 2 of the First Schedule) and therefore that one or more breaches of covenant have occurred.

Cost applications

123. There were no cost applications.

Name: Judge Mark Jones **Date:** 11 April 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).