**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | CHI/ 21UD/LBC/2023/0022 |
| **Property** | : | Flat 4, 18 Warrior Gardens, St Leonard-on-Sea, East Sussex, TN37 6EB |
| **Applicant** | : | Braear Developments Limited |
| **Representative** | : | Diane Doliveux of counsel instructed by Wykeham- Hufford Sheppard and Son Limited solicitors |
| **Respondent** | | Lizzie Dzvuke |
| **Representative** | : | Kwabena Owusu of counsel instructed directly |
| **Type of Application** | | Breach of Covenant. Section 168(4) Commonhold and Leasehold Reform Act 2002 |
| **Tribunal Member(s)** | : | Judge J Dobson<br>Mr E Shaylor MCIEH |
| **Date of Hearing** | : | 18th June 2024 |
| **Date of Re- convene** | : | 9th July 2024 |
| **Date of Decision** | : | 30th September 2024 |
| **Date of Review Decision** | : | 18th December 2024 |

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**REVIEW DECISION**

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## Summary of the Decision

1. **The Tribunal determines that the Respondent breached the covenants contained in paragraph h. of Part I of the Third Schedule to the Lease and further the covenants contained in paragraphs 2., 4. and 10. of Part II of the Third Schedule to the Lease.**

2. **The Respondent is ordered to pay contribute to the application and hearing fees incurred by the Applicants in the sum of £300.00 within 28 days.**

## The Property

3. Flat 4, 18 Warrior Gardens, St Leonard-on-Sea, East Sussex, TN37 6EB, ("the Property") is a flat situated on the second- floor of the converted building known as 18 Warrior Gardens, St Leonard-on-Sea, East Sussex, TN37 6EB ("the Building") containing seven flats across five floors, all accessed from a communal entrance to the front of the Building.

4. The freehold of the Building is owned by the Applicant. The Applicant was registered as the proprietor on 2nd February 1995. The application was submitted by the Applicant's solicitors, Wykeham- Hufford Sheppard and Son Limited.

5. The Applicant's witness, Ms Mori, is a director of 18 Warrior Gardens RTM Company Limited. That is a right to manage ("RTM") company. It was not identified when the RTM company acquired the right to manage but nothing turns on that. Ms Mori is not a member or director of the Applicant company. The RTM company appointed managing agents, FPE Management.

6. The Respondent has owned the leasehold interest in the Property pursuant to a lease dated 2nd April 2013 since it was assigned to her on 22nd April 2021 [206- 210]. That date has some relevance as the Respondent was the tenant under a tenancy agreement prior to that date, but necessarily the Lease provisions did not apply.

## Application and History of Case

7. The Applicant made an application [3- 11] dated 23rd October 2023 for a determination under S168 (4) of the Commonhold and Leasehold Reform Act 2002 by the Tribunal and accompanied by a statement of case [13- 16]. They alleged various breaches of covenants by the Respondent. Specifically, those were the following:

    1) Placing personal objects/plant pots in the communal area;
    2) Failing to cover the floors with carpets;

3) Allowing noise, music and/or musical instrument sounds to be audible outside Flat 4 for long periods so as to cause nuisance;
4) Undertaking DIY causing nuisance including wastewater discharge on the external walls and rear building roof;
5) Placing a satellite dish on the outside of Flat 4;
6) Trespassing on the roof area above the front bay belonging to Flat 3, including by placing plants and other items there (and expanded upon in its "Response" [17- 18] to include uses related to drying personal items, maintaining plants and general leisure activities) and causing leaks and damage.

8. Prior to the application, correspondence had been sent by the Applicant's solicitors to the Respondent dated 19th December 2022, requiring that asserted breaches of covenant be remedied.

9. Directions were given on 19th March 2024 [211- 216] and 29th April 2024 [217- 220] for steps to be taken to prepare the case for hearing. The Directions given included directing a bundle to be provided for use at the final hearing. A PDF bundle was provided amounting to 220 pages. That included a number of colour photographs.

10. Whilst the Tribunal makes it clear that it has read the bundles, the Tribunal does not quite refer to all of the documents in this Decision, it being unnecessary to do so. It should not be mistakenly assumed that the Tribunal has ignored those pages or left them out of account. Where the Tribunal refers to specific pages from the bundle both above and below, it does so by numbers in square brackets [ ] and with reference to the PDF numbering.

11. The hearing finished only just before 6pm when the Court building closed There was no opportunity for the Tribunal to even start discussing their determinations, given a need to vacate. The Tribunal therefore needed to find a time at which the members could reconvene. That could not be achieved until 10th July 2024. That was the starting date for the target period for provision of the Decision.

12. Given hearing and other commitments and the holiday period, there regrettably has then been a delay in the ability to produce this Decision. The Tribunal is very much aware that the parties will have been awaiting the Decision and can only apologise to the parties for the delay and any inconvenience caused.

## **The Law**

13. 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."

14. Hence it is for the "landlord", in this instance the Applicant, to apply and not an RTM or other management company.

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

16. 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 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.

17. There are many other case authorities in respect of breaches of leases. However, none were referred to by the parties and the Tribunal does not regard there to be any which require specific reference here.

18. A lease is to be construed applying the basic principles of construction of such leases as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (paragraph 15):

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

15. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

> "the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

16. A breach may be committed by the lessee themselves or by alternatively there may be acts by others occupying or visiting the property which place the lessee in breach. It is usual for terms to include such other occupiers and visitors and to provide for matters permitted by the lessee which the lessee does not commit themselves. The Applicant's Counsel provided and extract from Aldridge on Leasehold Law in that regard, although the Tribunal does not find the proposition to be controversial in any event.

17. Nuisance has been held in *Walter v Selfe* (1851) 4 De G & Sm 315 QBD to mean using premises in such a manner as to unreasonably interfere with the use and enjoyment of a property and that was:

> "not merely according to elegant or dainty modes and habit of living but according to plain and sober and simple notions among the English people".

18. The Respondent's Counsel specifically referred to the judgment of the Court of Appeal in *Baxter v Camden LBC* (No2) (2001) QB 1, one of two case with regard to whether noise constituted nuisance where there had been normal day to day activity but lack of soundproofing meant the noise could be heard outside the particular property. He contended that use of a property had to be unusual or unreasonable, which the Tribunal accepts as a correct, if brief, summary of the outcome. It was also identified in *Southwark LBC v Tanner* (2001) 1 A.C. 1 HL that ordinary domestic use of residential premises does not amount to nuisance.

19. In earlier cases, it was identified that what may amount to nuisance in one location may not amount to nuisance in another, but the Tribunal does not consider it necessary to say any more than that about the particular point in this case.

20. The extract from Aldridge which the Tribunal was provided with also included a case of *Tod- Healy v Benham* (1889) 40 Ch. D 80 CA in which it was identified that nuisance on the one hand and annoyance on the other are not the same thing. In respect of annoyance, it was said:

> "'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure.... of the ordinary sensible English inhabitants of a house.... That seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort."

21. The language used both in *Walter v Selfe* and in *Tod- Healy v Benham* is somewhat archaic given the age of each authority, the nationality of the inhabitant, for example, having no relevance. Nevertheless, the principles are long- established.

## The Lease

22. The original lease of the Respondent's flat [116- 133] is dated 14th June 1985 and grants a lease for a 99- term from a commencement date of 25th 1985. A deed of surrender and regrant incorporating the terms of the original lease was entered into on 2 April 2013 [134- 140] for a 125- year

term. The Applicant is one of the contracting parties to the re-granted lease. Clause 8 of the re- granted lease provides that "the same covenants, conditions and revisions" apply. The Tribunal refers to the original and re-granted lease or either one of them individually as "the Lease".

23. The Property is described and defined in the re-granted version of the Lease as "Situated on the second floor and being No. 4 in the building known as 18 Warrior Gardens, St. Leonards on Sea TN37 6EB as shown edged red on the plans annexed to the (1985) lease". Helpfully, 18 Warrior Gardens as a whole is described as "the Building" (along with the other land in the freehold title) so the term does not clash with that used in this Decision.

24. The Applicant relied in its application on the "Covenants by the Tenant" and the "Restrictions" contained in the Third Schedule, the provision that the lessee covenants in those terms being stated in clause 6 of the original Lease as follows:

"The Tenant covenants with the Landlord as set out in the Third Schedule"

25. The Tribunal therefore refers to both the Covenants and the Restrictions as covenants.

26. In terms of the Covenants, specifically the following paragraphs in Part I of the schedule were said to apply:

"c. - To comply in every respect with the requirements of any competent authority in respect of the Flat or the user thereof

h. - Within two calendar months after being called upon by the Landlord by notice in writing so to do to remedy any breach of any of the Tenant's covenants specified in such notice

o. - To keep all floors in the flat covered with carpets except that in the kitchen and bathroom cork and/ or rubber covering or other suitable materials for avoiding the transmission of noise may be used instead of carpets"

27. In relation to the Restrictions, the Applicant relied in its application on the further provisions in Part II of the Schedule as follows:

"2. - Not to do or suffer to be done any act or thing causing nuisance or annoyance to the Landlord or the owners, lessees and occupiers of the other flats comprised in the Building, nor to use the Flat or suffer the use of the same for any illegal or immoral purposes

4. - Not to fix any aerial to the roof of the Building or the outside of the Flat

7. - No pianola musical instrument, gramophone, television wireless, loudspeaker or mechanical or other sound reproducing apparatus of any kind shall be placed or used nor shall any singing be practiced in the Flat so as to cause annoyance to the owners, lessees, or occupiers of the other flats in the Building or so as to be audible outside the Flat between the hours of 11 pm and 8 am

10. - No clothes or other articles shall be hung or exposed outside the Flat or inside the same so as to be visible from outside the Flat"

28. The covenant in clause 3 therefore required the Respondent to comply with those regulations in Part I of the Third Schedule and also the covenants in Part II of the Third Schedule.

29. In the First Schedule at paragraph 2., the lessee was granted "The right at all reasonable times and upon giving reasonable notice for the Tenant and person authorised by hm to enter upon any other part of the Building for the purpose of repairing or maintaining the Flat or any pipes sewers drains cables and wires or other installations exclusively serving the same making good all damage thereby occasioned".

30. That right is permissive. There is no express reference in the Lease to the lessee not being able to enter upon any other part of the Building otherwise, although it is implicit. No Covenant or Restriction in the Lease relates to that.

31. The Tribunal has considered the Lease as a whole but does not consider it necessary to set out any more of the provisions of the Lease in this Decision than those quoted above.

32. The Tribunal does note and bearing in mind the case authorities mentioned above about nuisance, that both 2. of Part II refers to "annoyance", as well as nuisance and 7 refers to annoyance solely. In principle, it would be possible to breach paragraph 7. of Part II by way of causing annoyance without also causing nuisance.

## The Inspection

33. The Tribunal inspected the Property and the Building on the morning of the hearing and prior to commencement of the hearing. In addition to the members of the Tribunal, Ms Doliveux of Counsel as legal representative of the Applicant; Ms Miharu Mori, the Applicant's witness; Mr Owusa of Counsel, as legal representative for the Respondent; Ms Lizzie Dzvuke, the Respondent and Mr Sean McLaughlin, the Respondent's partner, were present at the inspection. It should be emphasised that the Tribunal did not undertake a survey of the Property, either in respect of specific areas or generally.

34. The Tribunal saw the outside of the front of the Building. The front door led into what the Tribunal will term the entrance hall. There was a staircase to the upper floors with a landing area at the top of the first flight on the first floor. A door led to an are which former part of Ms Mori's flat (Flat 3) but the Tribunal did not see that. A separate door led into the main part of her flat. The Tribunal ascended the next flight of stairs, which again led to a landing, passing a window to the rear of the Building.

35. The Tribunal was taken inside the Respondent's flat. That has a bedroom and a living room to the front elevation of the Building and a kitchen, a bathroom, and a small area in effect forming a lobby between the last two of those to the rear elevation. The Tribunal describes the area as a lobby below. However, that is very much for ease of reference and in the absence of an obvious better term, rather than the term being one of art. The use of the term nnshould not be taken to mean anything in itself or to indicate a conclusion of the nature of the area. The relevance of that will become apparent below.

36. The hallway runs between the rooms to the front and those to the rear. The bedroom was above the room used by Ms Mori's son: the living room is above Ms Mori's living room. There was no washbasin in the bedroom. There were radiator pipes.

37. The Respondent's living room was fronted by a large window. Outside that was a wide stone windowsill and then a flat area above the very front of the bay below (the roof areas mentioned below), bounded by metal railings. There were a number of plant pots containing plants placed on the stone windowsill, so outside of the window and the Respondent's flat. In addition, there was a tall weed growing out of the masonry.

38. The living room and the bedroom were carpeted. The kitchen had wooden flooring. The bathroom had vinyl flooring.

39. There was musical equipment in the living room and in the kitchen. In the living room, that was a stereo system: in the kitchen, a radio tuner and speakers.

40. Along one side of the lobby was a range of storage cupboards. It was said that the water cylinder used to be housed in one of those cupboards, although that amounted to evidence from the Respondent's side and where the Tribunal had been clear it would not take evidence at the inspection. There was nothing shown to the Tribunal which confirmed the matter.

41. It was said that the overflow pipe from which water was alleged to have discharged could be seen through the bathroom window. However, that was a top window and seeing through it required clambering over the bath and to by the window and then seeking to twist to be able to look out at the relevant angle. The Tribunal declined to do that.

42. The Tribunal also saw that there was a staircase which ascended to the entrance door of another flat but did not inspect that flat. The Tribunal did not see the rear elevation from outside. Access to do so could only have been obtained through another flat.

43. On the communal landing was a cover, which it was said was loose, and behind that 2 water valves. It was common ground that one valve served Flat 4, the Respondent's Property, and the other Flat 5 on the top residential floor. In fact, the Tribunal identified that it was not actually the

case that the cover was loose, rather it was not secured at all and was designed to be slid on and off.

44. The Tribunal next inspected Ms Mori's flat.

45. The principal room in the flat was a living room in which a run of kitchen units had been installed. There was a full height box bay to the front elevation incorporating a window, which accounted for the roof area above the bay to Ms Mori's flat and outside the Respondent's Property. The ceiling of the room was affected by water staining a few feet from the bay window area.

46. To the side of that room and essentially above the hallway and staircase was a room which it was said was used by Ms Mori's son. That lead to a sunroom/ conservatory room to the front elevation with glazed sloping roof panels. Neither of those revealed obvious staining or other visible matters of note. However, from the sunroom, the external wall of the living room could be seen where that extended forward from the brick wall of the front elevation of the son's bedroom.

47. There was a drainpipe running down by the outside of the wall just in from the front elevation from which the bay window extends and there was a hopper. The pipe was thicker above the hopper than below. There was evidence that water had leaked from the pipe and/or the hopper and onto the wall.

48. There was a further room to the rear elevation of the flat which the Tribunal glanced into (and a bathroom which the Tribunal did not see).

49. To the communal landing/ stairs outside Flat 3 and appearing to the Tribunal to be below the store cupboards to the lobby in the Respondent's Property, there was water staining and plaster damage.

**The hearing and thereafter**

50. The hearing was conducted in person at Hastings Law Courts.

51. Ms Doliveux of counsel represented the Applicant. The Respondent was represented by Mr Owusu of counsel. Ms Mori, Ms Dzvuke and Mr McLaughlin were in attendance.

52. The Respondent and Mr McLaughlin were significantly delayed in arriving at the Court following the inspection. The Tribunal was ready to commence at 11.30am. Mr Owusu arrived somewhat before his clients did and the Tribunal asked for Counsel to enter at 12noon to explain the position. The Tribunal was informed that the Respondent and Mr McLaughlin had, essentially, got lost. In those circumstances and on balance, the Tribunal considered that it was not appropriate to start without them. The Tribunal set time limits on questioning and submissions in light of the finite available hearing time in order to ensure that the case could be concluded within the day, notwithstanding that the Tribunal said that it would sit as

late as occupation of the hearing room made possible. The remainder of the hearing commenced at 12.20pm when the Respondent had arrived.

53. The Tribunal heard oral evidence from Ms Mori on behalf of the Applicant, from the Respondent herself and from Mr McLaughlin. The Tribunal also heard twelve recordings made by the Applicant's witness, Ms Mori, of noise which she said could be heard.

54. The bundle included three written witness statements of Ms Mori including exhibits [19- 29, 147- 151, and 153- 158]- the third of which was effectively the Applicant's reply to the Respondent's case (the Response document being very brief). There was a written witness statement from Ms Dzvuke [169-176] and one from Mr, McLaughlin [187-190].

55. Further, the bundle included a witness statement from Mr Joseph Legge, the lessee of Flat 5, the second floor flat [199]; a statement from Mr Barry Poole, the lessee of Flat 1, a ground floor flat [197-198]; and statements from Ms Alexandra Lampani [191- 192, Mr James Whitear [193- 194] and Ms Michelle Somura [195- 196].

56. None of the witnesses mentioned in the immediately above paragraph attended at the hearing. Hence, they could not be questioned. No explanation was given for their non- attendance which was a good reason and might have had any potential for the written statements alone to be given any more weight than is usual. The Tribunal gave those witness statements very little weight in the absence of the authors attending to be questioned and so enabling their evidence to be tested. None of the findings made by the Tribunal rest on evidence contained in those witness statements. The Tribunal adds that one witness addresses only one specific date and another is not a resident, presents as a long- term friend of the Respondent and makes unnecessary comments about Ms Mori. Hence those in particular offered no real assistance.

57. The Tribunal found that the evidence Ms Mori gave was what she believed to be true-although as explained below that did not mean that the Tribunal accepted her belief to always be correct or that her evidence and other evidence was always sufficient to prove the particular part of the Applicant's case. In addition, she ascribed some matters to the Respondent to the exclusion of other sources where that was not supported by other evidence and her view appeared to be coloured by other matters: that said it will be seen below that the Tribunal accepted other matters were correctly ascribed to the Respondent and for certain breaches not made out that was not for lack of the Tribunal finding the Respondent had as a fact done as alleged.

58. The Tribunal found that some of the Respondent's evidence, in particular in writing and especially initially, was simply untrue and some was maintained until other evidence demonstrated it to be untrue and then changed. The same applied to an extent to Mr McLaughlin given their effectively shared positions. That was disappointing. The Respondent in her statement contended in her witness statement Ms Mori to be "vindictive

and petty" and to be lying. The Tribunal did not agree with any of that and is unimpressed by that use of language and by other criticism of Ms Mori for her efforts to demonstrate noise. Neither was the Tribunal much impressed by the otherwise somewhat aggressive and critical tenor of the Respondent's witness statement, or in some instances that of Mr McLaughlin.

59. One effect, as set out where relevant below, was that where there was a direct dispute between the witness evidence given on each side and Ms Mori had actual evidence of the matter in question- and in the event those were very little- the Tribunal preferred the evidence of Ms Mori.

60. Both Counsel provided what the Tribunal will term Skeleton Arguments- although Mr Owusu headed his "Respondent's submissions and so the Tribunal is using the same term for both principally for consistency- and made oral closing submissions. As might be surmised, the Tribunal rejected the submission of Mr Owusu that the Respondent had been truthful.

61. The Tribunal was grateful to all of the above for their assistance.

Application to strike out

62. The Respondent sought to strike out the application, or at least elements of it. Rule 9(3)(d) and (3) of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, provides that the Tribunal may strike out pleadings or part of them if they are frivolous, vexatious or an abuse of process.

63. The Applicant's position in a nutshell was that each of the matters alleged required findings of fact to be made by the Tribunal and the outcome was dependent upon those, the plumbing work by the Respondent/ Mr McLaughlin being a plausible cause of the banging pipes. It was also submitted that the application to strike out appeared to be at least in part based on a mistaken belief that Ms Mori is a director of the Applicant company.

64. Mr Owusu correctly identified that any breach of covenant application could only be based on incidents after the Respondent became the lessee. He accepted that some of the case was fact sensitive. However, he submitted that other elements could only succeed if supported by expert evidence, for example the banging pipes and the leaking of water from the roof area outside the Respondent's bay window. Ms Doliveux responded referring to the evidence for some breaches, referring to other factual matters and noting the application as made is not how the Respondent's case had previously been framed.

65. The Tribunal took time to consider the application. The Tribunal was content that the application did not meet the requirements for being struck out save in relation to the element of the breach alleged about access to the

roof area above Ms Mori's bay window resulting in water leaking into Ms Mori's flat.

66. The Applicant's case relied largely upon photographs of the effects of leaks within Ms Mori's flat. The Tribunal saw those. The photographs included with the third witness statement showing water staining to the side wall of the living room by the external hopper. The Tribunal saw both the water staining inside and the pipe and hopper during the inspection. The Applicant did not rely on any survey report or other investigations in respect of any leaks and from where the water emanated. There was evidence given by Ms Mori of previous work to the roof area above her bay window and an assertion of that being required to address previous leaks but it was not clear whether the roof area had been shown to be the cause, what work had been undertaken and whether that had been the solution. In any event, that was historic and insufficient to demonstrate the cause of current leaks. The Tribunal therefore applied its expertise to the evidence available insofar as required. The Tribunal was very much mindful that the place at which water becomes apparent inside a property may be quite different from where the water penetrates into a building. Water may track across until there is a weak spot, such as a join or a gap. The places where water staining was visible inside Ms Mori's flat was not therefore an accurate guide to where water had leaked in.

67. It was not impossible that water had penetrated the roof area above the bay and tracked to where staining was visible. The second witness statement of Ms Mori expressed her view that it was likely that the trespass onto the roof area had contributed to the leaks experienced, so the Applicant's case apparently accepted there being another cause of the leaks and was vague. There was no specific evidence that water had so leaked or which specifically supported Ms Mori's view being correct. Even assuming that the water penetration, or some of it, had been caused by an issue with the roof above, as to what that issue was and how it related to any trespass by the Respondent or others at or visiting the Property was not identifiable. There was the external evidence identified at the inspection. Taking matters together, whilst it was possible that there had been damage caused to the roof above the front bay to Ms Mori's flat by trespass by the Respondents, there was no realistic prospect of the argument succeeding on the evidence presented.

68. The Tribunal very much summarised the above reasoning in the hearing but so that the hearing could then move on. Therefore, the case as identified in the second part of the 1st sentence containing the allegations [15] was struck out but only that. The Tribunal also strikes out any of the Applicant's case in respect of alleged breaches prior to commencement of the Lease, if indeed the Applicant sought to mention such matters on the basis of them being breaches.

<u>The substantive case</u>

69. The Tribunal then turned to the substance of the hearing, at which point it heard the evidence of the witnesses and Counsel's submissions. The

matters heard in relation to those, and the determinations made are set out below.

70. The Decision seeks to focus solely on the key issues. The omission to therefore refer to or make findings about every matter stated is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Various matters mentioned in the bundle or at the hearing do not require any finding to be made for the purpose of deciding the relevant issues in the cases and the Tribunal accepts there to be matters which it does not therefore address in what is a lengthy Decision despite that.

71. In addition, it is not practical to make findings about every single incident alleged by Ms Mori. Mr Owusu in his Skeleton Argument referred to there being 866 complaints in total. It is right to say that the Tribunal has not checked that figure, but Ms Doliveux did not suggest it to be wrong and if it is modestly wrong, such modest inaccuracy is of no significance in the context of the case. It was not practicable to hear from the parties about every instance. The hearing would have been required to be markedly longer for there to have been any prospect of that and it would have been necessary to identify that as a proportionate approach to take. There was nothing to suggest that it would have been, even accepting that the time for the hearing had to be limited beyond that originally anticipated. The Tribunal was content that it had enough to understand the parties' cases and consider the different types of allegations made. It does necessarily follow that in the main the Tribunal addresses types of allegations as opposed to precise instances.

**Consideration- were there breaches of the Lease by the Respondents? Including evidence received and findings of fact**

72. The Tribunal takes each limb of breach alleged in turn below. The Tribunal starts with noise, given that instances of noise comprise the over-whelming majority of the allegations. As it appears convenient to do so, the Tribunal then turns to elements which have a degree of connection with the noise allegations, before dealing with the remaining types of allegations.

**Allowing noise, music and/or musical instrument sounds to be audible outside Flat 4 for long periods so as to cause nuisance**

73. The Tribunal determines that the Respondent has breached the covenant in paragraph 2. of Part II of the Third Schedule of the Lease.

74. This was the most involved element of the case. The Applicant raised a number of specific instances of alleged breaches and the Tribunal takes those in turn but within this over- arching section.

75. Before doing so, Ms Mori, the Applicant's witness, said in her written statement that the noise was so loud that it has caused her to suffer from tinnitus. However, there was no other evidence of that- that is to say firstly,

whether Ms Mori does suffer from tinnitus and secondly, linking it with the noise said to emanate from the Respondent's Property. The Tribunal members' understanding from previous experience- with personal injury cases and noise nuisance as an environmental health officer respectively- is that noise causing tinnitus in the normal course requires either prolonged exposure to over 70 decibels or short exposure to very loud noise, perhaps 120 decibels, which could be music but extremely loud music. The noise experienced by Ms Mori was heard in her flat where the noise was said to be caused in another flat and so, even allowing for the age and nature of the Building and likely limited sound proofing, the noise is likely to have needed to be even greater at source.

76. The Tribunal is not determining whether Ms Mori was caused tinnitus by noise from the Property and must be cautious about whether such a condition is relevant to her experience of noise, although given Ms Mori asserts suffering from the condition, its potential relevance could not simply be dismissed. The Tribunal members' understanding from previous experience, for examples injury claims about tinnitus, is that it is a recognised effect of the condition that sufferers can suffer from perceived noises such as ringing, buzzing, humming and potentially banging or similar and such perceived noise can seem akin to hearing music. On the footing of Ms Mori suffering from tinnitus it would be possible that sounds she perceived that she heard were not a consequence of any outside source. It may also be possible that noise affected her more than the average. However, there is no evidence before the Tribunal about any of that.

77. Mr Owusu specifically raised the point that Ms Mori stated firmly that the noises she heard emanated from the Respondent's Property whereas she refers to suffering from tinnitus. He did not go so far as to raise the specific matters mentioned above by the Tribunal but alluded to the general effect. Mr Owusu argued that impacted on the credibility of Ms Mori.

78. The Tribunal placed no reliance on the particular allegation that noise from the Property had reached a level which caused tinnitus and made nothing of the evidence which might have been adduced about that but was not one way or the other- and for the avoidance of doubt drew no inferences from any lack of specific further evidence of tinnitus. The Tribunal was also careful not to ascribe any given instance of noise alleged or any wider type of noise to tinnitus as opposed to there having been actual sounds where there was no evidence on which it could properly even start to do so. The Tribunal did look, as it ought, to whether there was sufficient evidence received that noise did emanate from the Respondent or her Property and the Tribunal determined the case on the basis of whether that had been demonstrated.

79. The Tribunal merely flags up its understanding as to tinnitus because the point was mentioned in the Tribunal's discussions before the Tribunal put those matters out of its mind when considering matters based on whether there was sufficient evidence of it being caused by the Respondent, others her Property or her Property itself. In those premises, no additional submissions were needed. The Tribunal considers below the evidence from

the parties as to whether it is demonstrated that there was noise in breach of 2. and/ or 7. of Part II of the Third Schedule emanating from the Respondent's Property.

80. This element of the case was clearly of particular concern to Ms Mori. She had gone to considerable efforts to demonstrate the times at which she said that had been affected by noise and the nature of noise and has taken audio recordings of examples of the noise- which it should be made clear is not only said to be music noise, but it convenient to address the evidence here. The criticism of Mr Mori by the Respondent for that was unfounded. The Tribunal noted the triangulation of audio recordings [32, 50, 163-168], diary entries [71- 105] and decibel measurements [51- 70]. The Tribunal noted the information about the recording equipment, including the oral evidence about placing the equipment in her bathroom and the reference in the second statement of Ms Mori about that pointing up to the ceiling of her flat- so in the direction of the Respondent's Property- and the details of devices used [145- 146].

Music –

81. The Tribunal determines that the Respondent has not on the evidence breached clause 2 because of the playing of music.

82. The Applicant relied in relation to this element of the asserted breach on the provisions in both paragraphs 2 and 7 of Part II of the Third Schedule, between the hours of 11pm to 8am being audible and causing annoyance. The Tribunal noted that there were two separate, if to an extent overlapping, provisions. The first, paragraph 2., is that there should not be noise at any time which is such as to constitute nuisance or annoyance: the second is there should not be any noise from music (to summarise) which, at any time causes annoyance and also not any noise from music between the hours of 11pm and 8am which can be heard outside of the Property- so irrespective of whether the level of noise would constitute annoyance at other hours.

83. Mr Owusu noted in this Skeleton Argument that of the 866 complaints made by Ms Mori, 158 relate to music.

84. The Respondent did not deny ever playing music. However, it was her case that music was played principally when cooking or at the weekends and that the music was not an excessive level. In effect, her case was that the playing of music was nothing beyond usual use of the Property and was not within the hours where any noise from music being audible outside the Property was not permitted. The sort of playing of music accepted by the Respondent was fundamentally different to the allegations advanced on behalf of the Applicant.

85. It was also suggested by the Respondent that music noise may have been caused by a musician said to live in the building next door and adjoining. That was repeated by Mr McLaughlin. Ms Mori very firmly rejected the

noises to which she referred, not only music, arising elsewhere than from the Respondent/ the Respondent's Property.

86. As identified at the inspection, there was some music equipment in the Respondent's Property and the Tribunal formed the impression that the Respondents enjoyed music. On the other hand, there was not an unusually large amount of music equipment or any of which was obviously specialist- accepting the limits of the Tribunal's ability to assess that from the limited inspection.

87. The recordings played to the Tribunal in the hearing did not assist the Applicant's case. It was said that Ms Mori was in her flat when some of those were made but not for others.

88. There was a recording one second long of music in September 2023 but not notable. There were two barely audible sets of music in Autumn 2021, together with three sounds which may have been drums which were more audible. There was also what may have been deep vibration but was barely audible.

89. Plainly, the recordings were just that and not the original noise. On the other hand, they were evidence presented and all that the Tribunal experienced first-hand. The recordings demonstrated some noise but at a very low level.

90. The Tribunal does not by those determinations also go on to find positively that any music experienced was at a low level. Simply, on the evidence provided and including from the recordings, the Applicant did not sufficiently demonstrate the sort of level of noise asserted or otherwise noise which would objectively cause nuisance or annoyance on the evidence presented.

91. In addition, and notwithstanding the information Ms Mori provided, the Tribunal received insufficient evidence about the type of equipment used, particularly demonstrating whether or not it was calibrated correctly or otherwise confirming the decibel levels. That was particularly relevant where the sounds played to the Tribunal were much quieter than it was suggested they ought to be. The noting down alone of those levels by Ms Mori was not considered by the Tribunal to be sufficient without more support. Even if the noise as played in the hearing had been heard rather louder by the Tribunal, sufficient evidence of the accuracy of its reflection of the noise experienced in Ms Mori's flat may have been lacking.

92. Whilst the Tribunal noted Ms Mori's oral evidence that her work involved dealing with technical detail, that was in a different field and more significantly, and as asserted on behalf of the Respondent, there had been no independent verification of the noise, the decibel level or the process followed. Ms Mori was not, as Mr Owusu submitted, a sound engineer or otherwise relevantly trained. Whilst he accepted that Ms Mori could give evidence of what she perceived, he asserted that when Ms Mori moved into matters about the recording equipment and recordings, she sought to give

effectively expert evidence, which she could not do, such that her evidence was effectively inadmissible hearsay. Mr Owusu highlighted that Ms Mori extracted information and presented that with her own reports.

93. The Tribunal accepted that there was validity in those submissions, save in relation to that as to inadmissible hearsay, the Tribunal position on evidence being different to that of the Courts even assuming that the categorisation as inadmissible hearsay was correct, which the Tribunal did not need to specifically dwell on. Rather the relevant question for the Tribunal was the weight which could be given to Ms Mori's evidence about those matters and whether there was sufficient for the Applicant's case on the matter to be proved to the required standard. There was not.

94. The evidence of Ms Mori about the level of noise- and about nuisance and/ or annoyance being caused- was also affected by the fact that she said that she had left the recording running and it had picked up noise. Her statement said that she was not in the room at the time, but the Tribunal understood from her evidence that at least on many occasions, Ms Mori was not in her flat at all.

95. Hence, Ms Mori had not been present on a lot of the occasions according to her evidence such as to hear the noise recorded herself and so she could add nothing to the recordings as played and to the logs she had created, at least on those occasions. Indeed, in the hearing, little was said about other instances. That did not assist with the Tribunal understanding the level of noise and certainly determining that it was such as to constitute a nuisance or annoyance.

96. In addition, where Ms Mori was not present in the flat, the Tribunal does not accept that she can have been caused any nuisance or annoyance in any event. Mr McLaughlin made that point well in his statement. Ms Mori was not there to be annoyed or suffer nuisance. Quite how many instances the removal of such occasions would have left was unclear. The Respondent referred in her statement to Ms Mori having moved out, without dwelling on why Ms Mori might have done that, but does not specify the period and there was no other evidence of the period involved.

97. The Tribunal additionally noted that if there had been noise at the level asserted by Ms Mori, irrespective of the recordings not assisting in the event, it would logically have been able to be heard by the occupier of the flat above the Respondent's flat in addition to being audible in Ms Mori's flat. Further, on balance it was more likely that at least some noise would also have been audible elsewhere in the Building and quite possibly an adjoining building. However, there was no supportive evidence from anyone else, that is to say neither any witness statements, or even any other written evidence by way of complaints made.

98. Given the Tribunal's view of some of the evidence on the Respondent's side and her lack of credibility in general, the Tribunal did not set great store by the specifics of the position as asserted by the Respondent. However, the fact that allegations were denied did require the Applicant to provide

sufficient proof of its case. For the avoidance of doubt, the Tribunal considers that there was no merit in the Respondent's complaint about recordings being made.

99. The evidence of Ms Mori, even with the care that she had undoubtedly taken, was not strong enough to demonstrate that there had been music played by the Respondent at a sufficient level to objectively constitute nuisance or annoyance under the provisions of the Lease. That determination should not be interpreted as amounting to the Tribunal disbelieving the evidence of Ms Mori about her perception of noise- and as explained above, the Tribunal believed that the evidence Ms Mori gave about this allegation and the other allegations was what she believed to be true- but rather that there was insufficient evidence of a breach.

100. However, the Tribunal, notwithstanding having found below most of the allegations against the Respondent to be made out at least factually, notes that where some difficulties emanate from a source it is possible to perceive all difficulties to stem from that source and be reluctant to accept other source. Whilst Ms Mori was firm in her view about the source of music noise and whilst accepting Ms Mori's beliefs were genuine, some caution is required in excluding other sources in the absence of cogent supporting evidence.

101. The Tribunal does not in the circumstances make a specific finding as to whether any of the music noise emanated from the next building and was made by the musician said to live there- there was far from sufficient evidence to enable the Tribunal to determine. Ms Mori did not dispute there being a musician there, much as she was firm that was not the cause of the noise experienced or recorded. The Tribunal did not need to make a finding in the event.

102. The Tribunal has construed the provision about causing nuisance or annoyance as requiring an objective assessment, that is to say consideration of what a reasonable hypothetical lessee in the Building would regard as causing nuisance and annoyance, rather than the subjective view of any particular lessee. Nuisance and annoyance would normally be considered in that manner. The Tribunal identifies nothing nearly sufficiently particular in the wording of the Lease to indicate that the contracting parties intended a different approach to be taken.

103. The Tribunal accepts that Ms Mori, sensitised to the situation, may have been caused nuisance and/ or annoyance when others would not have been. However, the evidence does not support the hypothetical tenant being caused either of those.

104. Given that even low- level noise audible between the hours of 11.00 pm and 8.00 am irrespective of being enough to amount to annoyance would have been a breach, the Tribunal also needed to consider that question separately. The Tribunal was mindful of the distinction identified above between the two particular provisions in the Lease and indeed the two elements of paragraph 7. such that music which may be heard between

11pm and 8am constitutes a breach irrespective of whether the level of it would constitute a breach (by way of nuisance and/or annoyance) if the Lease had not contained the last element of paragraph 7. of Part II of the Third Schedule.

105. However, viewed against the background of all of the above, the Tribunal found that there was no sufficient of noise heard by Ms Mori between the hours of 11.00pm and 8.00amand emanating from the Respondent's Property during the period since the Respondent became a lessee. The Tribunal therefore concluded that no breach occurred in that manner.

106. On a much more specific level, Ms Doliveux referred in her Skeleton Argument, as had the solicitor's letter, to an incident in which the Respondent was asked to turn her music down during a birthday party in June 2020. However, as the Respondent rightly pointed out in her written case, she was not the lessee at the time and so could not be in breach of the Lease.

107. Mr Owusu referred to further allegations of parties in July and August and then September 2020 but did so in order to assert that there was no evidence that they were noisy and that they breached the terms of the Lease (although as noted above if there was music which could be heard outside of the Respondent's Property that constituted a breach whether the level was "noisy" as that word would ordinarily be understood or otherwise).

108. The Tribunal did note the asserted pattern of parties in Summer 2020, which followed the relaxing of lockdown, although with the considerable restriction to 6 persons who could be inside a given dwelling at a time. The Tribunal is content from the evidence of such parties that the parties occurred, notwithstanding that the Respondent is said to have denied that. It is common ground that the police attended and the Tribunal finds it unlikely that would have happened, especially at that point in time, unless the impact had been significant. The Respondent was still not a lessee at those dates.

109. The Tribunal did not find the incidents of much assistance in relation to the likelihood of the Respondent having breached the provisions of her Lease by playing music more generally. None of the alleged incidents since the Respondent became a lessee was identified as related to a party and the Tribunal could not find any real help from loud noise at a particular birthday party and other parties when considering the question of music causing a nuisance or annoyance in very different circumstances. Whilst Ms Doliveux invited the Tribunal to draw inferences about other alleged instances of music noise from the loud noise at the birthday party, in the circumstances the Tribunal declined to do so.

110. It will be appreciate from the above that if there had been better evidence, including as to recordings and the level of noise, the outcome of

the above may have been different and may be different on another occasion were that relevant.

Banging –

111. The Tribunal determines that the Respondent has on the evidence breached the provisions because of the banging noise arising from the Respondent's water pipes and in failing to remedy the breach within two months of being required to do so.

112. Instances of alleged banging pipes are by far the most numerous of the complaint made. Some 654 instances were noted by Mr Owusu to relate to this- and that figure was not challenged. The records kept by Ms Mori set out dates on which she states that she suffered banging noise and the Tribunal notes that recordings were taken.

113. In relation to banging noises specifically, the Applicant referred to paragraph 2 of the Fourth Schedule identifying that the Applicant is responsible for repair of pipes serving the Property in common with other parts of the Building. However, it is the Respondent who is responsible for pipes solely serving the Respondent's Property.

114. The Applicant's case was imperfect. The Applicant primarily again relied on the evidence of Ms Mori, Ms Mori contended that there was banging from pipes which she gave evidence she believed emanated from the Respondent's Property- and again the Tribunal accepted that was her belief- but she could not state definitively that is where the noise came from.

115. It was common ground that the Respondent, or more specifically Mr McLaughlin, had undertaken refitting of the bathroom in the Respondent's Property. The Applicant surmised, in effect, that the Respondent or Mr McLaughlin must have done something to cause that, more particularly surmising that it related to the bathroom re-fit. The Applicant's case was that Mr McLaughlin in the cause of undertaking plumbing work in relation to the bathroom, or otherwise, appeared to have modified the water flow in the bathroom and thereby caused the issue with banging pipes (as well as an issue with wastewater- see below). It was said that occurred in or around March 2022. Mr Legge had not been a lessee before that and so the Tribunal perceives could not have commented on any earlier period even if he had wished to.

116. Aside from allegations about instances of banging, the Applicant also asserted that the water valve serving the Property and situated on the communal landing outside the Property had been accessed and interfered with. The Applicant produced a photograph showing that the cover had been removed [36].

117. Ms Mori also referred to a wash basin in the Respondent's bedroom however, and as identified above, there was no basin at the time of the inspection. There was at least no identified evidence that there had been a

wash basin in the bedroom until fairly recently before the inspections which had been removed. That did not assist the Applicant's case, although it was not the most significant feature overall. The noise mentioned in relation to that perceived wash basin was not banging in any event.

118. The effects of banging were said to be ongoing. Ms Mori said in her second statement that the frequency of the banging- she described it as water hammer- had reduced but the noises had not entirely ceased. Ms Mori said in written evidence that the noise occurred when the bathroom in Flat4 was used. The third statement said that the pattern of banging had changed since the application to the Tribunal and had caused less of an impact- Ms Mori speculated that the water pressure had been reduced. It remained the Applicant's case that problems continued.

119. The Respondent queried why she should not access her water valve or undertake plumbing works. The Applicant did not allege that the Respondent should not be able to undertake plumbing works. The Tribunal has no difficulty in finding that she could. The Applicant did make allegations about the effect of those works.

120. The Respondent's case did accept that the stopcock to the water supply had been adjusted and Ms Dzvuke also accepted that in her oral evidence. She also said that the stopcock was adjusted to reduce knocking. Mr McLaughlin said it was necessary to close the stop cock during those works and then re-open it, it then requiring some adjustment. He said that he had, first, adjusted the stopcock to stop water coming out too fast.

121. More generally, the Respondent's case was that there was no evidence from the Applicant of the source of the banging and specifically whether it emanated from pipes solely serving the Respondent's Property or pipes elsewhere in the Building which were the responsibility of the Applicant and further suggested a problem with pipes in the Building generally. The Respondent highlighted the lack of any expert evidence in relation to pipes and the source of the noise. The Respondent contended that there had always been some knocking of pipes since she moved in back in 2017.

122. It was additionally asserted by Mr Owusu in his Skeleton Argument that the evidence of Mr Legge that he has heard loud banging of pipes supported there being a more general problem and not one related to the Respondent's Property specifically. The Tribunal notes that Mr Legge's report documented in the bundle [141] to the RTM company was in October 2023 and is said to be the third such report. Unfortunately, the report has not been expanded and so only the first sentence of his issue is displayed in full. The second sentence begins "The noise is" but as to what follows that is unknown to the Tribunal. Insofar as text was visible, Mr Legge referred to banging with loud pipes in the Building without commenting on where those came from, and on three occasions being December 2022, January 2023 and October 2023. The witness statement of Mr Legge added nothing of assistance.

123. The Respondent additionally asserted the banging or some of it to be "phantom sounds", although that phrase was not explained. The Tribunal perceives the Respondent to suggest that the banging noise was imagined by Ms Mori and not real, although it was unclear how that fitted with the Respondent's case that there had always been some noise.

124. Ms Mori was cross- examined as to whether she could really identify the banging as coming from the Respondent's flat as opposed to somewhere else within the Building. It was suggested that on behalf of the Respondent that she could not and that her suspicion of the Respondent had led her to perceive that any noise was caused by the Respondent, implicitly to the exclusion of other sources. She did not accept that.

125. - Mr Owusu referred to the suggestion of Mr McLaughlin having done something which caused the banging as mere supposition. That said, the provision in the Lease was "not to do or suffer to be done any act or thing causing nuisance or annoyance", so there was no need for specific act by the Respondent (or her partner) if another part of the provision applied.

126. The Applicant's case was that one attempt had been made to investigate the banging pipes by seeking access to the Respondent's flat, but no more than that. The Applicant did not even suggest that it had made a second effort. Mr Owusu highlighted- including in closing- the lack of effort by the Applicant to take action, including inspecting and repairing pipes, re-iterating the Respondent's assertion that it was pipes generally which were the most likely source of any banging and not the Respondent's Property's pipes specifically. The Applicant did not adduce any report from any plumber or relevant expert. Mr Owusu suggested that the Applicant's case amounted to guesswork and that the Applicant sought to pass on guesswork to the Tribunal. The Tribunal considers that goes too far but equally considers that the Applicant lacks evidence it could usefully have relied on and with no clear explanation for the lack of it.

127. Taking all of the evidence together and whilst the Applicant's case was far from perfectly supported by evidence, the Tribunal finds on balance that there was banging noise as alleged and that noise had emanated from the Respondent's Property.

128. The Tribunal determines that the DIY works undertaken to re-fit the bathroom in the Respondent's Property and steps taken in the course of that were the cause of the banging experienced by Ms Mori.

129. Whilst the fact of work and the fact of pipes banging may be described as circumstantial, in fact it is compelling. It would be a remarkable coincidence if the matters were not related. Given that there is no evidence of other changes, it is illogical that the banging would have ceased if it emanated elsewhere in the Building or say an adjoining one. Even accepting the lack of expert evidence, the Tribunal determined the evidence received to be sufficient. That is not to undertake guesswork but rather to weigh the evidence available and to determine that was, whilst some way from perfect, sufficient.

130. The Tribunal finds it likely that there was some degree of knocking of pipes prior to 2022, accepting that as likely from the nature of the Building, but with no evidence that was frequent, and that some limited instances from 2022 onwards did not relate to the Respondent's Property. However, the Tribunal does not find that earlier knocking to have been at the same level of frequency or volume. Any earlier level of problems is not at all inconsistent with the Respondent or her partner having made the problem appreciably worse.

131. The Tribunal does not go so far as to find that every single date on which banging was alleged was correct. The specific evidence about all specific dates was not sufficient for that, including given the issues with the recordings identified above. The Tribunal again notes that there are asserted instances when the Applicant was not present and so could not have been caused nuisance and annoyance in any event.

132. The Tribunal does not find it constructive to go through each of several hundred instances. The Tribunal does determine that there were a significant number of instances and that in at least by far the majority of instances identified by the Applicant's witness statement, the banging heard did emanate from the Respondent's Property.

133. Noise was a matter included in the letter dated 21st December 2022 by the Applicant's solicitors [47- 49] but that was noise from music and not banging pipes. There was no reference to banging from pipes being required to cease. Hence there was not a breach of paragraph h. of Part II demonstrated.

DIY noise-

134. The next type of noise on which the Applicant relied was noise from DIY. The Tribunal determines that the Respondent has on the evidence breached the provisions because of the noise arising from DIY. For the avoidance of doubt, the Tribunal deals with DIY- related noise here and any other effects of DIY separately below. There were rather fewer allegations in respect of this type of noise.

135. The allegations were of "late- night" activity on several dates, starting with May 2021 but in particular during October 2021, which was not identified as DIY- related specifically but at least could have been.

136. The Tribunal found that there was an extent to which noise from DIY could not properly be considered as nuisance. Work to one's property undertaken during normal working hours and a period either side of that was the equivalent of work being undertaken by a contractor. It could not be the case that the Respondent was unable to have work undertaken to her flat. Work such as replacing bathroom or kitchen, or the fitting of new flooring is not unusual. It is essentially normal usage of a property. It is stating the obvious to say that noise will be generated, and the Tribunal has little doubt that may be the source of annoyance or distraction for

others occupying the same or an adjacent building, perhaps sometimes other buildings around. That does not make such noise actionable nuisance under this Lease. In this instance, the Tribunal understands that the work undertaken to the Respondent's bathroom or at least the work of concern was later than the work to the kitchen and was not the Applicant's focus in terms of noise.

137. Neither does the Tribunal consider that in the normal course such activity is actionable annoyance under the terms of the Lease. Whilst there may be activity which does not amount to nuisance because of being normal use but which could still amount to annoyance, it may not be easy for activity to be objectively troublesome where it is normal usage.

138. The Tribunal noted that whereas in relation to music the Lease provided that there can be no music which can be heard outside of the Property between the hours of 11pm and 8am, there was no equivalent provision in respect of other noise. However, the Tribunal considered that in no way prevented breach of the Lease where other noise was at a sufficient level to amount to nuisance or annoyance.

139. However, a recording played at the hearing was of sawing and other apparent DIY at 7.33pm in September 2023 and Mrs Mori gave oral evidence of noise heard by her until approximately 9pm. It was accepted by Mr McLaughlin that he had undertaken works to the flooring to the kitchen and bathroom to replace the flooring in those rooms, in addition to the work to the bathroom more generally. He described in his statement using a sander, although said that to be a small detail one, at least at the time Ms Mori attended at the Respondent's Property to complain about the noise.

140. Mr McLaughlin also accepted that in the course of the work to the kitchen floor, he had undertaken activity which the Tribunal finds would be likely to have produced significant noise and of a nature which may well have been heard outside of the Respondent's Property and by Ms Mori in her flat. Significantly, he accepted that on occasion work had continued into the evening. Mr McLaughlin said in oral evidence that any DIY stopped by 8pm but the Tribunal prefers the evidence of Ms Mori that it did not always do so.

141. The Tribunal understands that people wish to complete given tasks and it is easy enough when in the midst of doing something to carry on with it, including beyond the time at which it was originally intended to stop. However, the fact that is understandable, does not prevent it producing a breach of the Lease. There is a difference between work between usual work hours and to an extent beyond that on the one hand and work into the later evening on the other. Whilst other residents of a building and others adjacent or nearby must accept that there may be noise from works sometimes during the day, they are entitled to expect that will not occur into the evening. Such works into the evening, whilst understandable on occasion, is not usual use of a property as ordinarily understood and it is objectively likely to trouble one's enjoyment of one's home during the

evening. Whether work ceases by 8pm or continues to 9pm and beyond makes no specific difference other than to the extent of the breach.

142. Construing the provisions of the Lease, both the particular provision and the Lease as a whole, in the context of the Building and intended occupation of it, the Tribunal determines that the meaning of the words used by the contracting parties is such as to make noise from DIY in the later evening noise which breaches the Respondent's covenant.

143. The evidence was less than fully clear as to the exact times of instances of noise in late evening, not that anything specific turns on that, and as to the exact number of instances. The Tribunal is unable to make a precise determination of the number of incidents of relevant DIY noise. The Tribunal is unable to determine whether the noise identified by Ms Mori in October 2021, for example, stemmed from equipment being used but does not discount any possibility of it.

144. However, taking the evidence as a whole, the Tribunal is content that there were instances of DIY producing noise which affected Ms Mori and/ or other residents to a sufficient extent to amount to nuisance and/ or to annoyance in or around October 2021 and which therefore were firmly breaches of the covenants in the Lease.

145. For the avoidance of doubt, this cause of noise was also not mentioned in the December 2022 letter from the Applicant's solicitors and so there could no breach of paragraph h. arising from it.

Pigeon noise and other noise

146. Although not referenced by Ms Doliveux in her Skeleton Argument or other submissions, Ms Mori's statement had made an allegation that she could hear pigeon noises which she perceived were produced by the Respondent's audio equipment and similarly asserted engineered water flow noise. In effect the allegation as the Tribunal understood it was that there had been the recording or production of a pigeon noise and that was played back.

147. The Respondent denied that and Mr Owusu argued in his Skeleton Argument that the allegation was unsustainable without expert evidence. In closing, Mr Owusu said this was a key matter. It was also asserted rather more boldly that the allegation was more likely to arise from the Applicant's mental state than be objective proof of noise nuisance.

148. The Tribunal as not greatly impressed by the making of that last assertion. There was no evidence of the Applicant's mental health and no evidence that led to imagining pigeon noises if that is what was being suggested. The Tribunal also considered that Mr Owusu went further than could be sustained in suggested that the Applicant's whole case was undermined.

149. Ms Doliveux did not challenge the Respondent's evidence denying capturing or creating and playing back such noise. Ms Mori was not able to persuade the Tribunal of exactly what she had heard and still less that it came from the Respondent or her Property. This was an instance where Ms Mori had placed an issue at the door of the Respondent but objectively the evidence for that was lacking.

150. Notwithstanding Ms Mori's belief in there being such noise, and indeed her belief of involvement by the Respondent, there was by some distance insufficient to find that the pigeon noise did emanate from the Respondent's Property. It is not necessary for the Tribunal to make any other specific finding than that the particular allegation was not made out on the evidence presented.

151. Ms Mori did in her written evidence refer to other general noise such as furniture rattling, laundry and vacuum cleaning, amongst other sources. There was additional reference to noise of water flowing, which Ms Mori said in her first witness statement she perceived to be "modified or engineered". The difficulty with that was whilst Ms Mori said "it feels like" modified noise, that feeling did not demonstrate anything tangible on which the Tribunal could have properly determined there to be a breach. The evidence was far to unclear as to the facts, never mind how it might fit with the clauses in the Lease, with the inevitable result that the Tribunal did not determine a breach. There was also water noise indicated to be in part perceived by Ms Mori to relate to the washbasin she thought there was in the Respondent's bedroom. However, that was not even identified by the Applicant as amounting to a breach and so there is no need to say any more about it.

152. None of that was demonstrably noise arising from anything other than normal use of a dwelling, so there was no breach found by the Tribunal. Any other matters did not require any finding.

**Failing to cover the floors with carpets or other suitable material**

153. The Tribunal determines that the Respondent has <u>not</u> breached the covenants in paragraph 0. of Part I of the Third Schedule of the Lease.

154. It will be noted that this heading is longer than the quote of the allegation in the application form above. As clause 0. of Part I of the Schedule sets out, the obligation was not necessarily to cover with carpet but rather to cover with carpet or other suitable material. The Respondent was and is only in breach if she did neither of those.

155. The Applicant's case was that it perceived that all of the floors within Flat 4 were hard floors and that none were covered with carpet or other suitable material in respect of those areas where an alternative to carpet was permitted. The Applicant had not entered Flat 4 and so no-one from or on behalf of the Applicant had first- hand knowledge. It was submitted by Ms Doliveux that the Tribunal could draw inferences from the Respondent's failure to provide evidence of carpeting or other suitable

flooring. In addition, Ms Mori's evidence was essentially that she had heard noise which sounded like items being dropped on hard floor. Ms Dzvuke accepted in oral evidence dropping items, due she said to being partially sighted.

156. The Respondent's response in writing in her statement to the allegation being made was that the Property was carpeted at all times. Mr Owusu continued that position into his Skeleton Argument.

157. Ms Doliveux put to Ms Dzvuke that there was no carpet before May 2024. Ms Dzvuke denied that, stating that there was always carpeting and that the carpeting in May 2024 was new carpeting to replace the carpet already there.

158. Ms Dzvuke sought in response to that questioning from Ms Doliveux about the allegation to introduce a series of photographs not in the bundle and about which there had not apparently been any previous indication. Ms Doliveux looked and identified that the document appears to comprise particulars of Ms Dzvuke's flat prepared by an estate agent. She identified that the flat looked different from how it looked at the inspection, but the document was undated.

159. The Tribunal noted at that point that it had (aside from the evidence of Ms Mori as to noise) only the evidence of Ms Dzvuke, that it did not have a photograph showing the floors in the period relevant and before the carpeting said to have been fitted on 6th/7th May 2024 and that it may accept the evidence of Ms Dzvuke or it may not. The Tribunal accepted the carpet being fitted on those dates and that explained the presence of carpet at the time of the inspection but offered little as to the position before then.

160. The Respondent explained the delay in carpeting as because of a need to save up. The Tribunal accepts that the Respondent may have saved up to meet the costs rather than doing so another way but that would not assist the Respondent where the floors were required to be carpeted at all times and if they were found not to have been.

161. It is right to say that if the rooms had previously been carpeted, it would have been simple for the Respondent to have provided evidence of that. The Tribunal considered that particularly relevant where it had not accepted evidence of the Respondent about other allegations and in particular that she had maintained positions until otherwise shown not to be correct. Whilst the Applicant had no documentary or other evidence of the position prior to May 2024, the lack of credibility of the Respondent about other matters was still relevant to whether the evidence on this element should be accepted. It was noted by the Tribunal that carpeting was arranged to be fitted towards the end of a set of proceedings in which one of the allegations was that the living room and bedroom were not carpeted, and following Directions being issued which provided for an inspection of the Property and a final hearing.

162. Weighing the evidence overall, whilst there was doubt cast on the Respondent's evidence of carpeting from the timing of the new carpet and from the doubt about the Respondent's evidence and from the evidence in the case in general and hence the Tribunal was unconvinced that the rooms had previously been carpeted, it was for the Applicant to prove its case. The Applicant had been able to advance only the assertion of noise of items falling onto a hard surface, where the evidence of noises suffered from the difficulties identified above.

163. The net effect is that the evidence received at the hearing failed to prove a lack of carpet to the floors of the living room and bedroom from April 2021 and ongoing and hence there was no breach demonstrated.

164. The Respondent's case about the bathroom and kitchen was that underneath the floor covering was appropriate insulation- in oral evidence Mr McLaughlin said 3.8mm thick sound insulation- and so the flooring complied with the covenant which allowed for flooring other than carpet in those areas provided that suitable materials for avoiding the transmission of noise were fitted. The Applicant had no positive case to offer in respect of that. The Respondent said in her statement that was at significant cost and implied she had gone further than she should need to, although there was nothing to suggest that she went beyond that which the Lease obliged her to do as lessee.

165. Rather inevitably, it was impossible to see what was beneath the floor covering to the kitchen and the bathroom. In order to do so, the covering would have needed to be removed in part. Neither the Tribunal nor the Applicant had even asked the Respondent to do that and it was understandable that the Respondent had not it.

166. The Tribunal considered the evidence of Mr McLaughlin was detailed about the work undertaken by him and about the nature of the insultation and flooring fitted. Mr McLaughlin described the steps taken by him with clarity and cogently. The Tribunal accepted on the evidence that there was sound insulation and then MDF below the floor surfaces to the kitchen and bathroom (and area described as a lobby) and that it was compliant.

167. As identified above in relation to the areas inspected, there is an area, which the Tribunal describes as a lobby, although it is repeated that is for ease of reference rather than the term being one of art, between the kitchen of the Respondent's flat and the bathroom. It follows that no great weight should be attached to the particular term which the Tribunal has for ease used.

168. At the time of the inspection, the floor of that area was not carpeted. The visible floor is a small area, the far wall from the entrance to the kitchen being behind a run of full height cupboards and the visible area being just large enough to allow a door from the kitchen and the cupboard doors to open without collision. The plan to the original Lease identifies the cupboards as an airing cupboard and to contain the boiler serving the Respondent's flat. The Respondent said that her and her partner did not

walk on that area but that cannot be correct- the bathroom could not be accessed otherwise- although it may be that use of the area is largely limited to accessing the bathroom (although not relevant to the question of breach).

169. The Tribunal does not have a note of the nature of the flooring within the cupboards, which do form part of the lobby area, and received no evidence about that. In relation to the floor within the run of cupboards, the Applicant has failed to demonstrate what the flooring was and so whether or not it breached the requirements of the Lease, such that the application fails in relation to that small area for that reason.

170. Clause o. permits alternative floor covering to the kitchen and bathroom: it does not do so to the lobby in terms. It follows that if the lobby is treated as a separate room and not forming part of the kitchen or bathroom then the floor covering is such that the Respondent is in breach of the Lease. Ms Doliveux in closing relied on the fact that the lobby area was not carpeted, and the Applicant maintained there to be a breach accordingly. Whilst it is for the Tribunal to determine whether there has been a breach and that is the limit of the Tribunal's task, the Tribunal feels compelled to observe that if there were a breach by an insulated floor covering but not carpet to a small area between the kitchen and bathroom with no discernible effect on anything, that would be about as minor a breach as possible. This is almost too small a thing for the law to be concerned about at all.

171. The Tribunal determines that for practical purposes the area forms part of the kitchen to the Property. It contains further storage. The line is a fine one and the inspection was useful in forming a view as to which side of the line the area falls. The determination is therefore that the Respondent was not in breach of covenant in respect of the lobby area.

172. The Tribunal determines that the Respondent was <u>not</u> in breach of the provision of the Lease.

**Undertaking DIY causing nuisance including wastewater discharge on the external walls and rear building roof**

173. The Tribunal determines that the Respondent has not breached the covenant in 2. of Part I of the Third Schedule of the Lease, leaving aside the noise determined above.

174. The allegation in the statement of case refers to nuisance on a number of occasions including wastewater discharge. However, leaving aside noise nuisance alleged and former part of the allegation above, it was not identified what nuisance was being asserted other than discharge of wastewater. Therefore, the Tribunal limits it consideration to that in the absence of being able to do anything else.

175. It was common ground that the Respondent's partner, Mr McLaughlin, had undertaken the re-fitting of the bathroom, so that was DIY as termed,

and as discussed above. The Respondent's case as advanced by Mr Owusu was that there was again no expert evidence and that there needed to be, therefore as to the Respondent's Property being the source of the discharge.

176. The Tribunal does not accept that as necessary or realistic. In respect of the latter of those, the Tribunal considered that any expert would probably have wished to see the situation at the time of the discharge, that is to say the specific circumstances then, and even so it is unclear what additional assistance would have been provided. The contemporaneous attendance of the videos confirmed the fact of discharge from a wastewater pipe on the occasions shown. Mr McLaughlin contended in his witness statement that the leaking overflow was from Flat 5, although the videos did not immediately appear to the Tribunal to support that.

177. However, there were two such videos and wastewater discharge from a wastewater pipe was not greatly compelling in itself where the allegation was one of nuisance. There was no witness evidence from a witness contending that there had been discharge on numerous occasions or occasions of a severe nature and even more significantly, there was no witness who stated that nuisance to have been caused to them as a result of wastewater discharge. Indeed, this matter was scarcely touched upon before the Tribunal. The Tribunal did not receive any evidence of there being nuisance. A specific finding that the relevant pipe was or was not that to the Respondent's Property is therefore irrelevant.

178. The Applicant failed to make out its case on this element on the evidence presented to the Tribunal. Hence the determination made.

**Trespassing on the roof area above the front bay belonging to Flat 3, including by placing plants and other items there and causing leaks and damage**

179. The Tribunal determines that the Respondent has breached the covenants in 10. of Part I and h. in Part II of the Third Schedule of the Lease.

180. The Applicant's case was that the Respondent breached provisions to the extent of trespass onto the roof area outside the bay window to the Respondent's living room. It was asserted that the roof falls outside of the demise to the Respondent, which was not challenged. It was said that the Respondent (and the Tribunal infer other occupiers or visitors) have sole access to the area. That is plainly correct from the Tribunal's inspection- the area can be accessed via the Respondent's bay window but not from any other part of the Building.

181. The Applicant particularly relied on a series of photographs [39, 41- 44, 107-109, 111, 113, 115]. In the photographs, there are variously evidence of a sunflower and other plants having been placed (the Tribunal infers in pots) on the roof area, various ones of Mr McLaughlin both standing and sitting on the roof area and of a mat hung on a line to dry, which would

have to have been placed there. Ms Mori also referred in her first statement to visible plants and the position of those changing.

182. The Tribunal notes that the Respondent's case was that she had not accessed the area [179], later varied to her having accessed it where necessary to make good something about the Property, for example cleaning her windows and maintenance. Mr Owusu had adopted the argument that the Respondent could access the roof area for the purposes to which the Respondent referred. Ms Dzvuke maintained that position in oral evidence in the hearing and in spite of the photographs produced. The argument relies on paragraph 2. of the First Schedule, as identified in the Respondent's witness statement. That permits access for repairing and maintaining.

183. However, that is upon giving reasonable notice. There is not suggestion in the Respondent's case that notice was ever given and the bundle contains no document in which notice was given.

184. On the narrow point, the Tribunal identifies nothing in the Lease which provides for access for the Respondent for window cleaning. The Tribunal is unable to identify any proper construction which can be put on the paragraph which enables it to encompass window cleaning. That does not in the normal course fall with either repair or maintenance and there is no hint that the wording of the paragraph intended that it would do so on this occasion.The Tribunal does not consider that a term can be implied into the Lease permitting access for that purpose.

185. The Tribunal determines that there is no basis for a conclusion that the requirement to give notice for matters which did amount to repairs or maintenance could be dispensed with, save that the Tribunal considers that a provision that notice could be dispensed with in the event of a demonstrable emergency ought to be implied. The Respondent did not argue any of that and so the Tribunal would be taking a point neither represented party made. Whilst the Tribunal as an expert one can do that, care is needed in doing so and this is the not the time for it by some margin. In any event, at first blush the Lease operates satisfactorily without implying such term, save arguably in any emergency, and so it is at least not immediately apparent that one properly could be implied.

186. Hence, even the admitted access by the Respondent and by Mr McLaughlin did, as the Applicant argued, amounted to trespass onto an area demised to the Applicant and not to her and which was not a communal area to which access by her was permitted.

187. On a wider level, the Tribunal finds on the basis of the photographs and the other evidence received that the Respondent did by accessing the roof area herself and by Mr McLaughlin doing so, trespass onto an area demised to the Applicant and not to her and which was not a communal area to which access by her was permitted more generally than the Respondent has admitted to. Indeed, the Tribunal finds that in none of the

instances identified by the Applicant was access by the Respondent or by Mr McLaughlin for either of window cleaning or maintenance.

188. The Tribunal found the Respondent's case to be an attempt to concoct a good reason for access which was simply not correct and quite plainly so in light of the photographic evidence. The Respondent's case was firmly contradicted by the other and more compelling evidence. The Respondent's position was not helped by her shifting case when presented with evidence. That is both in respect of access for the limited purposes the Respondent asserts and in respect of more general access.

189. This was therefore another instance where the Tribunal found the Respondent's evidence to be untrue and which necessarily impacted on her wider credibility.

190. The Tribunal is satisfied that the Respondent by herself or by Mr McLaughlin used the area as if it were a balcony and by placing plants on the roof area (and the Tribunal is satisfied that the Respondent and/ or Mr McLaughlin accessed the area in order to water the plants amongst the other reasons).

191. The Tribunal notes that the Respondent objected to being photographed but the Tribunal was not asked to exclude the photographs as evidence and can identify no likelihood that it would have done so. Even if a zoom lens was used in order to provide a clearer photograph that the eye could have seen at street level, that does not detract from what was shown.

192. However, whilst there may- although the Tribunal in no way seeks to reach any determination on the point- have been actionable trespass, that is a different matter to breach of covenant. The fact that the Respondent only has the right to access the roof area in particular circumstances does not render it a breach of covenant specifically if she does so. The Applicant's remedy would stem from the tort (civil wrong) of trespass more widely and not from contract. The Respondent did not specifically covenant that she would not access the roof area.

193. The breach of paragraph h. in Part I of the Third Schedule is said to arise from the Applicant requesting that the Respondent cease to trespass on the roof area in correspondence dated 21st December 2022 and the Respondent failing to do so. However, breach of paragraph h. relates to the remedy of a breach of covenant. Necessarily, there has to be a breach of covenant for the Respondent to remedy within the two- month period.

194. Hence, despite the Respondent doing things which the Lease does not permit, thus far the Tribunal finds the Respondent not to be in breach of covenant.

195. The Tribunal is, however, also satisfied that the area was used by in order to hang a mat to dry and so that the mat was visible outside the Flat. The Applicant produced a photograph of the mat hanging apparently to

dry. The Respondent admits doing that [180], hence no finding is needed, and says in her written case that was on a one- off occasion. The Applicant appeared to accept that, presenting no contrary evidence.

196. The Tribunal determines that the hanging of a mat was breach of clause 10 of Part I of the Third Schedule, although on a one- off occasion only.

197. For the avoidance of doubt, the Tribunal determines that there was no breach identifiable after December 2022 in respect of the mat for the Respondent to remedy or any similar contraventions and so no breach of paragraph h. of Part II for that reason.

198. Whilst not part of any specific determination, the Tribunal makes a further observation. That is that it is easy to see attraction for the Respondent in using the roof area. There is space for small chairs, there are railings providing some safety, the area is south facing and there is, just about, a view of the sea. There is no external other drying area and no doubt the placing of plants would be aesthetically pleasing when an occupier is inside the living room. However, that is of no matter in relation to the Lease and the Respondent's rights under it.

**Placing personal objects/plant pots in the communal area**

199. The Tribunal determines that the Respondent has not breached the covenant in clause c. of Part I of the Third Schedule of the Lease.

200. The allegation made in the statement of case is that by way of placing personal objects/ plant pots in the communal areas, the Respondent has acted in a way which is non- compliant with fire safety regulations and so in breach of paragraph c. of Part 1. Plants in pots are shown in photographs [45, 106 (although fewer), 110, 112, 114, 144].

201. The Tribunal saw the internal windowsill in question on its way up the stairs between the flats of Ms Mori and the Respondent. There were no plant pots or other items on the sill at that time. The Applicant accepted the plant pots were removed from the area in or around May 2024.

202. The Applicant's case is that the plant pots which had previously been in situ belonged to the Respondent: the Respondent denied that. It was her case that there was no evidence of any plants and related being hers. The Applicant did not adduce any direct evidence that they were.

203. The Applicant's case was further that the communal areas should be kept clear to avoid obstructions of a communal fire escape route. The Applicant provided photographs showing plants in small pots on the windowsill of the window in the rear wall of the Building partway up the stairs from the first floor to the second floor. It was apparent from the photographs provided by the Applicant that the pots did not in situ obviously obstruct the stairs. The windowsill edge is just over the edge of the stairs and the remainder of the sill is into the window recess as might be expected. The photographs as at 18th March 2024, showed plant pots in

situ and as photographed [144] comprised two or small plants, of which one or more trailed down from the windowsill towards the stair below but stopped somewhat short and the trailing growth appeared thin. However, the Tribunal accepts that someone passing up or down the stairs in the event of a fire or otherwise could potentially knock one or more of the pots onto the stairs and they could then potentially amount to an obstruction to the next person or persons seeking to use the stairs as a matter of fact.

204. The Applicant says that the Respondent was asked to remove the pots but failed to and is thereby in breach of clause 8 of part of the Third Schedule. Correspondence was sent dated 19th December 2022 as noted above.

205. The Applicant's case, including the evidence of Ms Mori does not therefore identify that the Respondent, or indeed Mr McLaughlin, had been seen placing the plant pots and objects on the windowsill. It also does not identify that either of them had been seen watering the plants or doing anything else with them.

206. The Applicant's case, via the evidence of Ms Mori is that the plants and plant pots, or other plants and plant pots, had been present long before lessees of the ground floor or top floor flats became lessees. With her third statement, Ms Mori provided evidence that the lessee of Flat 5 in particular had become such in June 2022, so somewhat after the plants and pots were first identified. The only others with access to the areas were Ms Mori and people attending her flat on the one hand and the Respondent and people attending the Respondent's Property on the other.

207. The Tribunal identified that there were only two lessees who would need to walk up the staircase which leads from the first- floor landing outside Ms Mori's flat to access flats at the upper levels. One of those is the Respondent and the other is the lessee of the flat above the Respondent's flat. There is no discernible reason why any lessee who does not need to use that staircase would place plant pots or other objects there. The Tribunal finds that leaves two lessees who are likely to have had an interest in placing objects on that windowsill to, as the Tribunal perceives they might see it, make the area more homely and/ or attractive.

208. The lessee of the top floor flat did not give a statement about the point and might have given cogent evidence stating that either they had placed the items and since removed them or that they had not done so. It is not for the Tribunal to speculate about what that evidence might have been, simply it was not received and so the answer cannot be known.

209. The question is whether on the evidence which is available and subject to any inferences which should be drawn, it is more likely that the objects had been placed there by the Respondent. In terms of inferences, the obvious one relevant if it were felt that the Tribunal could properly draw it, would be that there was a reason for the Applicant not obtaining a witness statement from the lessee of the top floor flat and that the reason was that

the statement would not assist the Applicant's case. However, the Tribunal does not consider in this instance that inference could safely be drawn.

210. As set out in this Decision, the Applicant's witness, Ms Mori, had other issues with Respondent- in respect of noise in particular- and the Tribunal was mindful that her evidence could be affected by that and the Applicant's position accordingly. However, as noted above, Ms Mori made no specific assertions of having seen the Applicant place pots, water them or do anything else and so there was no evidence from Ms Mori which could be affected on this particular issue.

211. The credibility of the Respondent was less than full, given her denial of matters which the Tribunal found to be correct- and indeed which she later accepted as correct. That supported a conclusion that the Respondent would deny matters unless forced to admit them and not that her position was an honest one from the outset. The Respondent's denial because of an asserted lack of evidence proving the Applicant's case was consistent with that. Mr McLaughlin also denied that the plants belonged to the Respondent but he also suggested a complaint about them to be "wrong and petty", using similar language to that used in the Respondent's statement about matters in the case, and suggesting they brighten up the stairwell. The Tribunal found those other phrases more significant than the denial itself.

212. The Tribunal did not believe the Respondent or Mr MacLaughlin. The Tribunal considered it unlikely the plants had been placed on the windowsill by the previous lessee of Flat 5 and not removed on them leaving and further that the plants had then been watered by the new lessee such that they did not die. The Tribunal could identify no reason why the lessee of Flat 5 would have removed the plants between March 2024 and May 2024, there having been nothing identifiably sent to that lessee to prompt such removal**.** In contrast, there was an allegation in proceedings against the Respondent that the presence of plants constituted a breach of covenant and a hearing and inspection pending. The removal of the plants in or about May 2024 was at least consistent with that.

213. The Tribunal finds on the balance of probabilities on the evidence presented and having weighed the features of the cases presented- not exclusively the limited credibility of the Respondent but weighing heavily- that the Respondent did place the plants and plant pots in the communal area.

214. The Tribunal was unimpressed by the description of the complaint as "petty" and notes that in many other properties in its experience a similar approach has been taken by landlords and management companies to ensure communal areas, particularly escape routes, are kept clear and that fire risk assessments have required that.

215. At the time of the inspections, there were plants and plant pots to the exterior wide stone windowsill outside of the Respondent's living room window. Ms Doliveux made reference to that. However, the Tribunal

identifies that no assertion of breach by way of that was advanced in the Applicant's case and no application has been made to amend the Applicant's case to include such an allegation. The Tribunal does not therefore seek to determine whether there is any ongoing breach of any provision to that extent.

216. In terms of the facts as found amounting to a breach of the Lease by the Respondent, the question is whether those involve a lack of compliance with the requirements of any competent authority in respect of fire safety.

217. The Tribunal considers that is what is intended where the issue identified is trip or trap hazards which risk the resident's safety in the event of a fire. Hence the compliance is perceived by the Tribunal to mean with either provisions in a statute or set of regulations or alternatively a more local requirement of the Fire and Rescue Service, local authority or similar body in respect of the Building in particular.

218. The Applicant did not identify the requirements which it sought the Tribunal to determine had been breached by plants and pots on the windowsill. Whilst the Tribunal encounters matter relevant to fire safety regularly and is aware about safe exits routes, as indicated above, that does mean that it has precise requirements at its fingertips and in any event, the Tribunal does not consider it appropriate to guess which requirement the Applicant might have sought to refer to and then analyse whether that has been breached. The Tribunal does not therefore know which requirement of which competent authority the breach is said to be of.

219. In those circumstances, and in spite of the factual finding, the Tribunal cannot determine that the requirements of relevant competent authorities have been breached in the absence of identification of what those requirements are.

**Satellite dish**

220. In relation to the satellite dish, the Tribunal determined that the Respondent had been in breach of clause 4. of Part I of the Third Schedule and paragraph h. of Part II of that Schedule.

221. There were photographs of that dish in situ but in any event, its presence, until removed, was not in dispute. It was said by Ms Mori that was placed on the Building in September 2020, when the Respondent was a tenant. Plainly she had no legal entitlement to place the dish there as a tenant. That said, she was not subject to the Lease covenants at the time.

222. The Respondent' case was that permission was granted in 2017 by the managing agent but no evidence of that was provided. The Tribunal was not prepared to accept the Respondent's evidence about permission.

223. In any event, the Respondent would at the time have been a tenant and not subject to the covenants in the Lease. Upon becoming the lessee, she became subject to them. There is no suggestion that she obtained any

dispensation or waiver from the covenant in 4. of Part 1 of the Third Schedule, variation of the Lease or anything else permitting the satellite dish. The Tribunal determines that the covenant applied. Whilst the Respondent had subsequently removed the dish, the case was that she did so in June 2023 (which was not challenged). It necessarily follows that the dish was in situ for a period in which the Respondent was the lessee and subject to the covenants in the Lease.

224. Clause 4 of Part II of the Third Schedule is quite clear that no aerial may be fixed. The Tribunal determines that the satellite dish was an aerial within the meaning of that provision. Leaving to one side any previous case decisions, the dish was plainly intended to pick up the signal for television channels and convey that to the television set, as an aerial. The continued presence of the satellite dish until removed, breached that provision.

225. The consequence was therefore that the Tribunal determined that there had been a breach in respect of the satellite dish. That breach was referred to in the solicitor's letter of December 2022 and not remedied within the required timescale. There was not an ongoing breach at the time of the application to the Tribunal.

**Other allegations**

226. Within the evidence of Ms Mori, there were also certain other specific, one- off, allegations. For example, it was said that the police attended about an allegation of assault but took no further action and separately that the Respondent in her Property followed Ms Mori moving around her flat. However, nothing was said about those in the hearing on either side, with no witness being asked about them.

227. That is understandable to a fair extent given the limited time and the natural concentration on the repeated instances of various natures. Nevertheless, it gave the Tribunal only unchallenged but contradictory written evidence to work from.

228. Despite the impact on the credibility of the Respondent identified above, there was insufficient to prefer the Applicant's case solely on the written evidence of those further allegations. The fact that the police took no action about the alleged assault did not take that matter anywhere given that there was no information as to what had informed the police in taking that approach and where the Tribunal identified that there could be a number of reasons. So that did not aid the Respondent but on the other hand it did not aid the Applicant either.

229. Any additional "other allegations", as termed, were not made out.

230. Although some other matters were mentioned in the witness statement of Ms Mori, the Tribunal did not understand them to be matters on which the Applicant sought a determination, and they did not fall within the types of items listed in the application. Hence, the Tribunal reaches no determination about them.

## Decision

231. **The Tribunal determines that there was a breach of the Covenants in Part I contained in paragraph h. and the Restriction in Part II contained in paragraphs 2., 4., and 10., in both instances those being of the Third Schedule to the Lease which the Respondent had covenanted to comply with.**

## Note

232. The Tribunal adds a brief note to this Decision in terms perhaps so obvious that they scarcely ought to need stating.

233. That is that the parties live in the same Building, which is a converted house on a number of levels. The residents are literally on top of one another. It is highly regrettable if the Respondent suffers from medical conditions and no doubt any other proceedings will do nothing to help those. It must be hoped that by the residents being mindful of the other residents, including the Respondent doing so sufficiently, any other proceedings can be avoided.

234. The Building will not have modern levels of sound- proofing and elements will be old. Some level of sound carrying is likely to be unavoidable whatever efforts are made and the residents cannot be expected to walk on eggshells. Insofar as Ms Mori has been sensitised to noise, it is to be hoped that she can overcome that and can more generally take a realistic view about noise which is likely to be experienced in a Building of this nature. However, the residents ought to be alive to the effects of others on how they live in the Building, not just because of the terms of their leases, which in being lessees they have agreed to comply with and must comply with whether they like it or not, but also common courtesy.

## Fees

235. The Applicant has incurred the usual fees in order to bring this application to the Tribunal, namely £100 to make the application and £200 for the hearing.

236. The Applicant has plainly been successful in obtaining a determination that there have been breaches of covenant by the Respondent, although that in itself is not the end of the matter.

237. The Tribunal notes that the Applicant had not made out all allegations, and one less following this Review Decision. There were instances, especially in relation to noise where the evidence was not sufficient. Mr Owusu's argument that the evidence of Ms Mori was unsatisfactory is accepted in part- she ascribed matters to the Respondent where there was insufficient evidence- but the Tribunal has explained that it does not consider that there was any dishonesty on the part of Ms Mori, rather it

considers she believed what she said, much as not always demonstrated to be correct on the evidence available.

238. However, the Tribunal does consider that Mr Mori's perception of some matters had been coloured by others. Her belief that matters emanated from the Respondent, such as the leaks to her flat and some noise reflected other maters doing so. To that extent it is possible to understand Ms Mori's perception, but the Tribunal considers that there was an element of assumption by her.

239. The Tribunal also notes that in no instance did it prefer the evidence of the Respondent or otherwise her case that there had not been a breach where there would have been sufficient evidence for a breach unless the given evidence of the Respondent was preferred. Indeed, the Tribunal disbelieved the Respondent on a number of matters and found her to adopt positions which were not true unless or until compelled to change those or until the Tribunal made contrary findings, as it has done. Insofar as it was suggested that there had been harassment of the Respondent, the Tribunal does not accept that.

240. The Tribunal has no doubt that taking those matters together, the appropriate order is that the Respondent should pay the fees incurred by the Applicant of £300.00.

**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