FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	CHI/00HY/LBC/2024/0002
Property	**:**	Flat 9, 54 Avenue Road, Trowbridge, Bath, BA14 0AQ
Applicant	**:**	City Freeholds Ltd
Representative	**:**	Ben Harwood of Counsel
Respondent	**:**	Peter Ross
Representative	**:**	None
Type of application	**:**	Breach of Covenant. Section 168(4) Commonhold and Leasehold Reform Act 2002
Tribunal members	**:**	Regional Surveyor J Coupe FRICS Mr J Reichel MRICS Mr M Jenkinson
Date Hearing and venue	**:**	24 January 2025 Bath Law Courts, North Parade Road, Bath, BA1 5AF
Date of decision	**:**	16 May 2025

DECISION

Decision of the Tribunal

i. The Tribunal determines that, on the basis of the evidence provided, no breach of covenant under the Respondent's lease has occurred.

The Application

1. The Applicant seeks a determination pursuant to section 168(4) Commonhold and Leasehold Reform Act 2002 ("the Act") as to whether the Respondent is in breach of clause 3(d) of the lease, in which the lessee agrees to the following terms with the lessor:

> 3(d) "During the said term to keep the demised premises and every part thereof (except those parts included in the Lessor's covenants for repair hereinafter contained) and all the fixtures and fittings therein (if any) and the internal walls (including the internal parts of the external walls) thereof and all glass in the windows and doors thereof and the sewers drains pipes cables wires and appurtenances thereto belonging in substantial repair throughout the term hereby granted and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the remaining parts of the Building."

2. The demised premises are defined in the first schedule of the lease as:

> "ALL THAT flat and premises being THE SECOND FLOOR FLAT, Flat 9, 54 Avenue Road, Trowbridge including the ceilings of the said flat the joists above such ceilings (but excluding the floors of the flat above) and the floors of the said flat and the joists supporting such floors ALL WHICH said property is for the purpose of identification only shown edged red on the plan annexed hereto."

3. The application was received on 7 February 2024.

Background

4. The Applicant is the freehold owner of the two buildings known as 54 Avenue Road, Trowbridge, Wiltshire, BA14 0AQ registered at HM Land Registry under title number WT104568 and 65 Wingfield Road, Trowbridge, BA14 9EG registered at HM Land Registry under title number WT253063. Together the buildings are referred to as "the building".

5. The building is situated at the junction of Avenue Road and Wingfield Road and is said to comprise a converted Victorian building with ten flats across three floors, with 54 Avenue Road overlapping 65 Wingfield Road.

6. The Respondent is the registered owner of Flat 9, 54 Avenue Road, Trowbridge, Wiltshire, BA14 0AQ ("the property") registered under title number WT269596.

7. The lease ("the lease") is dated 22 February 2008 and is made between Country Estates (GB) Limited and David Campbell.

8. The property is a one-bedroom flat on the top floor, situated above Flat 4, 65 Wingfield Road, which is owned and occupied by Mr Crook.

9. The Tribunal did not deem a property inspection necessary for determining the application, and neither party requested one.

10. The Directions issued on 10 July 2024 established a timetable for the exchange of the parties' cases and documentation, as well as for the submission of a hearing bundle in preparation for the hearing and determination.

11. These reasons address in summary form the key issues raised by the parties. They do not recite each point referred to in submissions but concentrate on those issues which, in the Tribunal's view, are critical to this decision. In writing this decision the Chairman had regard to the Senior President of Tribunals Practice Direction – Reasons for Decisions, dated 4 June 2024.

12. The Tribunal apologises for the delay in issuing this decision beyond the timeframe indicated at the hearing. The Tribunal appreciates the parties' patience in this matter.

The Hearing

13. The hearing took place on 24 January 2025 at Bath Law Courts. The Applicant was represented by Mr Harwood of Counsel, with Mrs Trueman, director and shareholder of City Freeholders, in attendance. The Respondent represented himself.

14. The documents that the Tribunal were referred to were contained within an electronic bundle extending to 237 pages, the contents of which have been noted by the Tribunal. References to page numbers in the bundle are indicated as [ ].

15. During the hearing, it became apparent that the parties were referring to document extracts without providing full copy. The Respondent was directed to provide the Tribunal with complete documentation. The Applicant was given a right to reply. Both parties complied by 7 February 2025. The contents of both submissions have been noted by the Tribunal. The Tribunal is satisfied that although the full reports were not included within the hearing bundle, the pertinent parts of those reports were provided.

16. The hearing was recorded and such stands as the official record of these proceedings.

The Law

17. The relevant law relating to the Tribunal's jurisdiction 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."

18. The Tribunal is required to assess whether there has been a breach of the Lease on the balance of probabilities *(Vanezis and another v Ozkoc and others (2018) All ER(D) 52).*

19. 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. Whether any breach has been remedied, or the right to forfeit for that breach has been waived, are not questions which arises under this jurisdiction. Neither can the Tribunal consider a counterclaim by the Respondent as an application under Section 168(4) can only be made by a landlord. The motivations behind the making of an application are also not relevant to the determination of whether a breach has occurred.

20. In *Vine Housing Cooperative Ltd v* Smith (2015) UKUT 0501 (LC), Judge Gerald said this:

> *"The question before the F-tT ..... was the straightforward question of whether or not there had been a breach of covenant. What happens subsequent to that determination is partly in the gift of the landlord, namely, whether or not a section 146 notice should be issued and then whether or not possession proceedings should be issued before the county court. It is also partly in the gift of the county court namely whether or not, if and when the application for possession comes before the judge, possession should be granted or the forfeiture relieved. These events are of no concern to, and indeed are pure conjecture and speculation by, the F-tT. Indeed the motivations behind the making of applications, provided properly made in the sense that they raise the question of whether or not there had been a breach of covenant of a lease, are of no concern to the F-tT. The whole purpose of an application under section 168, however, is to leave those matters to the landlord and then the county court, sure in the knowledge that the F-tT has determined that there has been breach."*

21. The 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 where, at paragraph 15, Lord Neuberger said:

> *"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 Hoffman in Chartbrook Ltd v Persimmon Homes Ltd (2009) UKHL 38, (2009) 1 AC 1101, para 14. And it does so by focusing 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."*

22. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise at 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."

The Applicant's case

23. The Applicant alleges that the Respondent has breached clause 3(d) of the lease by failing to maintain the floor and its supporting joists in substantial repair. Specifically, the claim concerns a water leak in the Respondent's property in January 2021, which, they say, caused damage to Flat 4 beneath and which led to the discovery of rotten floor joists requiring replacement. The registered owner of Flat 4 is Mr Crook.

24. The chronology of events, in so far as relevant to this determination, are set out in brief below.

25. In February 2021, under Mr Crook's instructions, SBM Ltd conducted an initial damage assessment of Flat 4 following an escape of water incident within Flat 9 above.

26. In March 2021, Mr Crook invited M2 Structural Engineers ("M2") to provide a fee quote for conducting a site visit and preparing a report with remedial recommendations. A quote of £420 [74] was forwarded to the Applicant.

27. On 21 April 2021, M2 reported to Mr Crook with structural drawings and calculations detailing their recommendations for work to the existing timber floor joists, coupled with the installation of additional timber floor joists to provide adequate structural support. [78]

28. On 28 June 2021, SBM Ltd provided a fee quote of £5,141.25 + VAT in regard to the recommended work.

29. Despite ongoing communication between the Applicant and Respondent, no agreement in regard to liability was reached. On 3 May 2022, the Applicant instructed Awdry Law LLP to handle the dispute.

30. On 1 June 2022, Awdry Law LLP wrote to the Respondent, issuing a Notice requiring him to repair the damaged joists and remedy the alleged breach of the lease. Further written communication between the Applicant's legal representative and the Respondent ensued.

31. The Applicant states that the Respondent repeatedly denied liability for the works but eventually, on 1 August 2022, agreed to undertake the repairs without an admission of liability [154]. Contractors commenced work on 21 September 2022.

32. On 26 September 2022, Mr Crook raised concerns with the Applicant regarding the works undertaken, which he believed did not comply with

the specifications provided by M2. Subsequently, Awdry Law LLP contacted the Respondent requiring him to address the concerns.

33. On 4 October 2022, M2 confirmed via email to the Applicant that a photograph of the works indicated non-compliance with the original specifications provided. [157]

34. Following this, the Applicant approached SBM Ltd once more to request a new fee quote for remedying the works undertaken by the Respondent. The quote was £9,197.75 + VAT.

35. The Applicant then instructed John E. Cousins, a partner of Cousins Thomas Rose Chartered Surveyors, to inspect and report on the defective timbers and workmanship related to the joists.

36. Mr Cousins' report, dated 9 February 2023, says that the Respondents' builder seemed not to understand what work was required and that there had been no attempt to comply or engage with the engineer's drawings. In paragraph 4.10 of his report, Mr Cousins comments that "the work that was attempted is not acceptable and never will be." The costs of the remedial works subsequently increased to an estimated £25,450.

37. On 9 February 2023, the Applicant's solicitors wrote to the Respondent, enclosing a copy of Mr Cousin's report. In response, EMG Solicitors, instructed on behalf of the Respondent, disputed the nature and extent of the water damage to Flat 4 and denied that the remedial work undertaken was inadequate. EMG Solicitors claimed that the joists were damaged in 2014 by a burst pipe and ongoing water ingress through the roof between 2014-2017. The Applicant disputes these assertions.

38. On 9 November 2023, Mr Cousins prepared an addendum report, stating that the Respondent had still not completed the works to the damaged joists in accordance with the original specifications. He noted that the joists were no longer able to perform their designed function and that the floor timberwork was likely to show signs of instability, posing a risk to the building. The addendum report also suggested that it was highly unlikely any water ingress from rainwater due to the roofing works contributed to the issue.

39. On 22 December 2023, the Applicant's solicitors notified the Respondent that if compliance was not achieved by 12 January 2024, the Applicant would file an application with the Tribunal. The Respondent replied, asserting that the works completed in September 2022 met the correct standard.

40. In conclusion, the Applicant asserts that the floor joists are part of the demised premises of Flat 9 and that the Respondent covenanted to keep them in good repair to support and protect the rest of the building, but has failed to do so.

41. The Applicant refutes the Respondent's suggestion that responsibility for repair of the floor joists falls to the Applicant under the landlord's repairing covenant.

42. The Applicant states that, in failing to meet the requirements of the repairing obligations, the Respondent was, and remains, in breach of clause 3(d) of his lease.

43. The Applicant alleges that the breach is ongoing.

44. In written submissions, the Applicant also raised, for the first time, an additional alleged breach, that being of clause 3(i):

> 3(i) "To make good all defects decays and wants of repair of which Notice in writing shall be given by the Lessor and for which the Lessee may be liable hereunder within two months after the giving of such Notice."

45. In oral submissions, the Applicant stated that the Respondent had failed to make good the defects and repairs as stated in the Notice in writing provided by the Applicant's solicitors on 1 June 2022 and repeated several times subsequently and such constituted a breach of clause 3(i).

The Respondent's case

46. The Respondent contends that the floor joists are part of the building's main structure and, therefore, responsibility for repairing the joists lies with the Applicant landlord, as stipulated in Clause 4(d) of the lease, whereby the Lessor covenants with the Lessee as follows:

> "… the Lessor will maintain repair redecorate and renew
> (i) The main structure and in particular the roof chimney stacks gutters and rain water pipes of the Building
> (ii) …

47. The Respondent asserts that the Applicant has accepted this responsibility in other parts of the building and has undertaken similar works at their own expense.

48. The Respondent states that the Applicant has not only breached their repairing obligations under the lease but has also breached Clause 4(a) of the landlord's covenants by harassing the Respondent over this matter, thereby infringing on his right to peaceful and quiet enjoyment of the demised premises. The Respondent requests the Tribunal makes a finding to this effect.

49. The Respondent disputes the Applicant's claim that the joist damage was caused by the leaking macerator incident in January 2021, which, he says, was identified, isolated and rectified on the same day. He argues that the extent of the damage is inconsistent with this explanation. Instead, he suggests that damage is more likely due to long-term water ingress through the roof, occurring over a prolonged period between 2014 and 2017.

50. Furthermore, the Respondent claims that the repairs carried out in September 2022 were both instructed, and paid for, by the building's then managing agent, reinforcing his belief that the landlord accepted responsibility for the works. The Respondent argues that if the Applicant now considers those repairs inadequate, they should address the issue with

the current managing agent.

51. Irrespective of either the cause of the damage or the repairing liability, the Respondent contends that the repairs undertaken by the managing agent's appointed contractor restored the joists to their original standard. The Respondent argues that the Applicant now seeks an upgrade to modern building standards which exceed the original specifications, are inconsistent with the rest of the building and constitute an improvement.

52. The Respondent also asserts that the report prepared by Mr Cousins is factually incorrect and thus unreliable. He questions how Mr Cousins reached the conclusions of his addendum without conducting an inspection, which he assumes was not undertaken due to the challenging access for someone of advanced age.

53. The Respondent relies on a further report prepared by M2 which he commissioned, an extract of which was included in the hearing bundle. A full copy of the report was subsequently provided at the Tribunal's request.

54. M2's second report, addressed to Mr Ross and dated 27 March 2023, is titled 'Flat 4, 65 Wingfield Road – Splice Repair – Structural Calculations'. The report was prepared by Joe Newton (Project Engineer) and approved by Matthieu Crosnier (Director).

55. The report identifies its purpose as 'The following design calculations are for checking the suitability of the splice repairs that have been carried out to the existing decayed floor joists." It explains that M2 has not inspected the repairs and that the report relies upon information provided by third parties.

56. The report refers to various calculations undertaken by M2, including bending stress, shear stress, bearing stress and deflection tests. While some test results passed and others failed, the report concludes that 'Existing floor joists do not comply with current standards however the load capacity of the joists has not reduced from the original condition."

57. In a covering email, Joe Newton wrote to the Respondent "As promised please find attached our structural calculations package for the repaired joists. As I mentioned, we are comfortable that the existing joists have been restored to their original load capacity based on the information that was provided to us …" [215]. The same conclusion was repeated in the report "Existing floor joists do not comply with current standards however the load capacity of the joists has not reduced from the original condition." [216].

58. In conclusion, the Respondent asserts that the repair of the joists falls under the landlord's repairing covenants. Furthermore, the repair works were commissioned and paid for by the Applicant's former managing agent. The Applicant relies on a report by M2, commissioned by a third party, which they have no right to rely upon. This report has been superseded by a subsequent report from the same firm, confirming that the undertaken repairs have restored joists' load capacity to their original specification.

59. Accordingly, the Respondent has not breached any covenants. Instead, the Applicant landlord is in breach of their repairing obligations. Furthermore, by pursuing this matter to litigation, the Applicant has infringed upon the Respondent's right to peaceful and quiet enjoyment of the demised premises.

Consideration and Findings of fact

60. The burden of proof rests with the Applicant and it is for them to evidence sufficient facts to show that the covenants in question have been breached. The Tribunal considered the alleged breaches from this perspective.

61. The Tribunal finds that the floor joists form part of the premises demised to the Respondent, the definition of which is clear within the first schedule of the lease, that being "ALL THAT flat and premises being THE SECOND FLOOR FLAT, Flat 9, 54 Avenue Road, Trowbridge including the ceilings of the said flat the joists above such ceilings (but excluding the floors of the flat above) and the floors of the said flat and the joists supporting such floors…"

62. The Tribunal rejects the Respondent's argument that the joists constitute part of the building's structure, thereby making them the landlords' responsibility to repair.

63. The Tribunal finds that the works undertaken to the joists in September 2022 were instructed and paid for by the Applicant's former managing agent, despite this being the Respondent's responsibility.

64. Having found that the joists are the Respondent's responsibility, the Tribunal turns next to the question as to whether the Respondent has breached clause 3(d) of the lease by failing to keep the demised premises in "*substantial repair throughout the term hereby granted and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the remaining parts of the Building*."

65. The Tribunal was neither tasked with, nor finds sufficient evidence to determine the cause of the damage to the joists, whether it be a leaking macerator, water ingress via the roof or chimney, or another source. However, nothing turns on the point in this instance as, it is common ground between the parties, that once the joists were exposed they were found to be in disrepair. The Tribunal finds as such.

66. The Tribunal finds that the Applicant relies upon the contents of the report by M2, dated 21 April 2021, as commissioned by Mr Crook. That document, prepared and approved by Matthieu Crosnier, is confidential, addressed to and for the sole use and reliance of M2 Civil and Structural Ltd.'s client, such being Mr Crook. It is stated in the report that the author of the document accepts no liability for any use of the document other than by its client and only for the purposes, stated in the document, for which it was prepared and provided. No person other than the client may copy (in whole or in part) use or rely on the contents of the document, without the prior written permission of a Director of M2 Civil and Structural Ltd. The Tribunal finds no evidence that the Applicant is entitled to rely on the report. In contrast, the Respondent, having recompensed M2 accordingly,

acquired the right to rely on the initial report.

67. The Tribunal finds that the instructions issued to M2 by Mr Crook and subsequently by the Respondent were different. Mr Crook, who is not a party to these proceedings, instructed M2 to design the structure to modern standards. In contrast, the Respondent instructed M2 to assess whether the reparatory works directed by the Applicant's former managing agent had restored the joists to substantial repair.

68. The Tribunal finds that the two distinct questions posed to M2 resulted in two different responses, as confirmed by M2 in an email to the Applicant, in which they stated that their original appointment involved instructions to "design the structure so that it would comply with modern standards …". They concluded "… indeed, two different questions were asked."

69. As both parties rely on reports from M2, the Tribunal is satisfied that significant weight can be attributed to the opinions provided. In contrast, the Tribunal finds that the report and addendum report of Mr Cousins carries far less weight. There is no evidence before the Tribunal that Mr Cousins conducted any inspection of the repairs before condemning the works undertaken, instead relying on information provided by third parties in reaching his conclusions. Furthermore, the Respondent highlighted several alleged discrepancies and inaccuracies in Mr Cousin's report. Since the Applicant neither provided a witness statement from Mr Cousins nor sought permission for expert evidence from him, there was no opportunity to test the evidence from Mr Cousin's upon which the Applicant relied.

70. Neither party sought permission to call M2 to provide expert evidence to the Tribunal on this matter. Consequently, the Tribunal bases its findings on the conclusions in the reports provided. The Tribunal favours the Respondents' evidence from M2, which states that they are 'comfortable' that the existing joists have been restored to their original load capacity (based on information provided to M2 by the contractor). Although the joists do not comply with current standard, their load capacity has not diminished from the original condition.

71. The Tribunal finds that the repairs did not meet the specification provided by M2. However, the Tribunal concludes that the specification aimed to reinstate the joists to modern standards rather than restoring them to a state of substantial repair.

72. The Tribunal accepts M2 conclusions that the repairs undertaken restored the joists to substantial repair. Consequently, the Tribunal accepts the Respondent's argument that, being in substantial repair, the joists provide support, shelter and protect the remaining parts of the Building, as required by clause 3(d) of the lease.

73. Having considered the evidence and submissions carefully the Tribunal finds that the burden of proof, such being the balance of probabilities, has not been discharged by the Applicant.

74. Accordingly, the Tribunal finds no breach of clause 3(d) by the Respondent.

75. The Applicant's application dated 5 February 2024 did not seek a determination regarding whether the Respondent had breached clause 3(i) of the lease, instead introducing the claim within their statement of case. Based on the evidence provided, including the lack of clarity caused by the actions of the landlord's former managing agent in instructing the repairs and the complex circumstances surrounding the matter, the Tribunal is not satisfied that the claim is made out.

76. In regard to the Respondent's counter-claim that the Applicant is in breach of covenant, the Tribunal has no jurisdiction to consider such a claim. An application under Section 168(4) can only be made by a landlord.

DECISION

77. The Tribunal determines that, on the basis of the evidence provided, no breach of covenant under the Respondent's lease has occurred.

Costs

78. The Applicant sought Directions for a Rule 13 costs application. Should the Applicant still wish to pursue an application they must apply to the Tribunal within 28 days of the date of the decision for further Directions.

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 by email to rpsouthern@justice.gov.uk 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.