FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LBC/2022/0001**
Property	**:**	**Flat 2, Frances Court, Maida Vale London W9 1PN**
Applicant	**:**	**Frances Court Limited**
Representative	**:**	**Mr Edward Blakeney -Counsel**
Respondent	**:**	**Mr Eaman Semmakie**
Representative	**:**	**In person**
Type of application	**:**	**Determination of a breach of Covenant under Section 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge Daley** **Ms S Phillips MRICS-Professional Member**
Venue	**:**	**Heard at 10 Alfred Place, London WC1, on 6 May 2022 at 10AM and reconvened on 24 June 2022 for a decision in the absence of the parties**
Date of decision	**:**	**4 August 2022**

DECISION

The Decision

I. **The Tribunal determines that the Respondent has breached clauses 3 (m), Schedule 2 clause 16, and 19, of the lease.**
II. **The Tribunal is not satisfied on a balance of probabilities that a breach of covenant occurred in respect of clause 3 (c), 3 (p) and Schedule 2 clauses 4, and 6 in respect of the other breaches.**
III. **The Tribunal makes no order under Section 20 C of the Landlord and Tenant Act 1985 limiting the landlord's costs.**
IV. **The Tribunal makes an order that the Respondent reimburse the hearing and application fee in the sum of £300.00.**

The Application

1. On 5 January 2022, the Applicants applied for a determination of whether the Respondent had committed a breach of clauses in the lease**.**

2. The premises which are subject to the application is a 2-bedroom flat in a block of 6 flats, on a raised ground floor.

3. The Applicant is the freeholder of the block of flats in which the premises is situated, and also the owner of two leasehold flats within the premises. The respondent is the leaseholder of the premises known as flat 2 Frances Court ("the Premises") pursuant to a lease dated 25 March 1977 subsequently varied on 9 March 1978 and varied by a further deed, 27 April 2007 made between 64 Frances Court, Maida Vale Freehold Limited the Applicant and Eaman Semmekie the leaseholder. (The lease contains the following covenants-:

   At Clause 2 – "THE Tenant HEREBY COVENANTS with the Lessor and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flats comprised in the building that the Tenant and the persons deriving title under him will at all times hereafter observe the restrictions set forth in the Second Schedule hereto.

4. At Clause 3 – "THE Tenant HEREBY COVENANTS with the Lessor that the Tenant and all persons deriving title under him throughout the said term hereby granted will:- … (c) Maintain uphold and keep the demised premises … and all walls sewers drains pipes cables wires and appurtenances thereto exclusively belonging in good and substantial repair and condition … (m) At all reasonable times during the said term permit the Lessor and … his lessees with workmen and others upon giving three days' previous notice in writing (or in the case of emergency without notice) to enter into and upon the demised premises or any part thereof for the purpose of repairing any part of the Building or any other adjoining or contiguous premises and for the

purpose of making repairing maintain supporting rebuilding cleansing lighting and keeping in order and good condition all roofs foundations damp courses sewers drains pipes cables watercourses belonging to or serving the Building or any part thereof and also for the purpose of laying-down maintaining repairing and testing drainage gas and water pipes and electric wires and cables for similar purposes… (p) Not do or permit or suffer to be done in or upon the demised premises or any part thereof any act or thing which shall or may be or become a nuisance damage annoyance disturbance or inconvenience to the Lessor or the tenants or the occupiers of any of the adjoining houses of the neighbourhood or which may prejudice the respectability thereof … 15.3.

5. In Schedule 2 – "4. Not to use or permit of suffer to be used in the demised premises … any washing machine spin dryer refrigerator or other machine of any kind in such manner as to cause nuisance or annoyance to the lessees or occupiers of other flats in the Building … and in particular – (a) not to use or permit to be used in the demised premises at any time such instrument or machine which stands on the floors of the demised premises unless the same be stood upon insulators made of rubber or other suitable sound deadening material; (b) not to use or permit to be used any such instrument or machine as aforesaid … between the hours of eleven p.m. and seven a.m. … 5 6. … nor do or permit to be done any act or thing whatsoever which may become or be dangerous or a nuisance of cause scandal or annoyance to the Lessor or the neighbourhood … 16. Not to permit or suffer any wastage or overflow of water at the demised premises nor permit or suffer any water or other liquid to soak through the floors… 19. To keep the floors of the demised premises (except the kitchen bathroom and water closet) covered with carpet and underfelt or with such other effective sound deadening floor covering materials."
6. Directions were given on 17 January 2022. the following directions were given-: "(2) The tribunal will reach its decision on the basis of the evidence produced to it. The burden of proof rests with the applicant. The tribunal will need to be satisfied: (a) that the lease includes the covenants relied on by the Applicant; and (b) that, if proved, the alleged facts constitute a breach of those covenants. (4) The respondent and any mortgagee or occupier of the property should seek independent legal advice, as these proceedings may be a preliminary to court proceedings to forfeit the lease."
7. This matter was listed for an in person hearing on 6 May 2022, the hearing was adjourned for a determination to be made by the Tribunal in the absence of the parties.

The Hearing

8. The hearing was attended by Mr Edward Blakeney- Counsel on behalf of the Applicant. Mr Jonathan Malka –Director of the Applicant Company attended to represent the applicant company. Also, in attendance on behalf of the Applicant as witnesses were Ms Krieger

leaseholder of flat 4, Mr Jorge Maytorena, former tenant of flat 1, and Mr Liam Dewhurst, of Cubit Consulting the property manager.

9. Mr Eaman Semmakie, the Respondent attended and represented himself. Also, in attendance on behalf of the Respondent as witnesses were Dr Haidan Hassan and Mrs Dayla Al-Obidi of flat 3, and Mr Owusu tenant of flat 2. All parties and witnesses attended in person at 10 Alfred Place.

The Hearing

10. Prior to the hearing the Tribunal had been provided with the following documents; an applicant's hearing bundle comprising 89 pages, together with an applicant's reply bundle. A witness statement from Mr Jorge Maytorena dated 25 April 2022 and video evidence of an incident which occurred on 21 December 2021. Mr Blakeney had also prepared a detailed Skeleton argument dated 6 May 2022.
11. The Tribunal had also been provided with a Respondent's bundle comprising 578 pages and closing submissions from the respondent dated 24 May 2022.
12. At the hearing the Tribunal accepted the witness statement of Mr Maytorena which had been filed late, the Tribunal also heard opening submissions from Mr Blakeney which dealt with the issue of whether the Tribunal had the jurisdiction to consider the questions of remedy and waiver.
13. The Tribunal heard detailed evidence from Mr Malka, Mr Maytorena, Ms Krieger, Mr Dewhurst on behalf of the Applicant.
14. The Tribunal heard submissions and evidence from Mr Semmekie, and also Dr and Mrs Hassan and Mr Joseph Owusu.
15. There were also statements in both the applicant's and respondent's bundles. Although the Tribunal considered all of the statements from witnesses, it reminded itself that the witness statements were not tested by cross-examination and therefore it was appropriate to consider the weight to be attached to the statements.
16. It was also clear that the relationship between the director of the Applicant company Mr Malka and Mr Semmekie had a considerable history, details of which were referred to in the various documents within the bundles. The Tribunal reminded itself of its jurisdiction, and noted that there were issues which existed which were not within the scope of this application.
17. At the end of the hearing the Tribunal had run out of time to hear detailed closing submissions and reach its determination. It therefore directed the parties to provide closing submissions. The Tribunal received submissions from the respondent dated 24 May 2022 and an emailed reply from Counsel Mr Blakeney on 10 June 2022.
18. The Tribunal considered these submissions at its reconvened hearing on 24 June 2022.

The Law

Section 168 (4) of the Commonhold and Leasehold Reform Act 2002

19. 1)A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied. (2) This subsection is satisfied if— (a)it has been finally determined on an application under subsection (4) that the breach has occurred, (b)the tenant has admitted the breach, or (c)a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
20. The Tribunal considered each of the breaches in turn and the evidence it had heard in coming to its decision.
21. The evidence and the reason for the decision is set out below on each of the alleged breaches.

The Decision of the Tribunal and reasons for the decision

Clause c) Maintain uphold and keep the demised premises … and all walls sewers drains pipes cables wires and appurtenances thereto exclusively belonging in good and substantial repair and condition …

22. The tribunal considered the terms of the lease, and the submissions of the Mr Blakeney.
23. The Tribunal heard from Mr Semmakie that there had been water leaking from his flat into flat 1 below which had been repaired once they were reported, in his closing submissions he referred to problems which had occurred due to the water tank being disconnected.
24. In his Skeleton Argument Mr Blakeney stated that -: "Although the Respondent makes reference to the fact that he saw to the leaks once the problem had been brought to his attention …], that is no answer to the question of whether the covenant has been breached. In Dilapidations: The Modern Law and Practice, 7 th ed. at 14-03 it is confirmed that "it is settled law that a covenant to keep in repair obliges the covenanting party to keep them in repair at all times, and so is broken the moment a defect occurs."

The Tribunal's decision and reason for the decision

25. The Tribunal noted that the clause contained the words "keep". The Tribunal noted that the evidence concerning the condition of the property was given by Mr Dewhurst in his capacity of property manager.
26. Given the wording of the lease, we find that there is a requirement that the premises should be in good repair at all times.
27. However, the Tribunal in considering the clause noted that the requirement to keep in repair applies to "walls sewers drains pipes cables wires and appurtenances."
28. The Tribunal heard from Mr Jorge Maytorena and Mr Dewhurst and Mr. Malka who all dealt with the issues of leaking of water from flat 2 which is dealt with below.
29. The Tribunal heard that Mr Maytorena, who told the Tribunal that he had experienced two major leaks from the flat above one of which had occurred in March 2019 and which had caused damage to his laptop.
30. The Tribunal also heard from Mr Dewhurst of Cubit Consulting, who was responsible for managing the property. His is the only direct evidence on the issue of the state of repair within the premises, other than the evidence of the Respondent.
31. In his evidence he told us that he had inspected the flat on two occasions the last one being on 18 February 2019. He referred the Tribunal to paragraph 3 of his witness statement. He stated that he had walked through the flat and had noted that there were defective mastic sealants and a defective swinging shower screen. He also referred to leaking and rusting old valves and thermostatic valves with "oxidising radiators". The Tribunal heard from the respondent that he had sent photographs of the repairs and that no inspection of the repairs which had been carried out at that time was requested.
32. The Tribunal considered the wording of the lease and the evidence of Liam Dewhurst, it accepted the definition cited in the Law of Dilapidation's; it also considered that the interpretation of the lease cited by Mr Blakeney is correct, that the wording "keep in repair has a stricter interpretation than the wording used in Section 11 of the Landlord and Tenant Act 1985.
33. However, it considers that it is for the Applicant to prove that the Respondent is in breach of the terms of the lease.
34. The Tribunal noted that there was no evidence such as a schedule of repairs which had been produced by the Applicant. It also heard no evidence, that the water leaking, which forms the basis of the complaint of the breach of clause 3 related to the "sewers, drains and pipes etc", as covered by clause 3 C.
35. Accordingly, the Tribunal is not satisfied on the evidence before it that the water leaking which occurred is covered by the items which must be kept in repair in accordance with clause 3 C of the lease.
36. There was no expert evidence on the cause of the leaks such as a surveyor's report. Given this, the Tribunal are not satisfied on a balance

of probabilities that a breach occurred as a result of "*walls sewers drains pipes cables wires and appurtenances* in relation to clause 3 of the lease being in disrepair. As set out by the Applicant in the application,

Clause 3 (*m) **At all reasonable times during the said term permit the Lessor and … his lessees with workmen and others upon giving three days' previous notice in writing (or in the case of emergency without notice) to enter into and upon the demised premises or any part thereof for the purpose of repairing any part of the Building or any other adjoining or contiguous premises and for the purpose of making repairing maintain supporting rebuilding cleansing lighting and keeping in order and good condition all roofs foundations damp courses sewers drains pipes cables watercourses belonging to or serving the Building or any part thereof and also for the purpose of laying-down maintaining repairing and testing drainage gas and water pipes and electric wires and cables for similar purposes…"***

37. The Tribunal was referred to a letter written by Mr Dewhurst of Cubit Consulting dated 21 November 2021. In this letter Mr Dewhurst refers to a number of matters which form the basis of the application brought by the Applicant. In the second paragraph of the letter, Mr Dewhurst makes reference to the report of a number of leaks into flat 1. He then stated "…I therefore write to request access on behalf of the landlord, Frances Court Limited so I may inspect the premises and advise on any necessary repairs."

38. In his closing submissions Mr Semmakie stated-: "T*here are a number of problems with this request. i. The clause does not state access for inspections. ii. Testing is allowed for the purposes of communal pipes, gas, wiring. i.e., "similar purpose" iii. The clause does not state inspections for the purposes to advise on repairs. iv. The letter is not from the Lessor. v. Not a valid notice. Sent to intimidate the tenants and invade their privacy. 80.However, to keep the peace I have allowed Cubit's, Mr Liam Dewhurst access many times in the past and even shared a Schedule of Condition Report of Flat 2 regarding a party wall agreement Cubit's were doing on behalf of the applicant. … 81. Also, Mr Dewhurst stated in oral evidence, he had access on a number of occasions in the past, 2014 and 2019. Cubit Consulting had seen Flat 2 many more* times*… The access request on the 18th Nov 2021 was not reasonable and justified. Given the Applicant's track record, I didn't want my tenants to be intimidated under the guise of Lessor's right to access"*

The decision of the Tribunal and the reasons for the decision

39. The Tribunal finds that it is implied within this clause, that in order for testing *of drainage gas and water pipes and electric wires and cables*

for similar purposes" which is a prerequisite to carrying out repairs access must be provided.

40. *The Tribunal noted however that the request did not comply with the* requirements of the three days' notice, however given that the access required was urgent and according to the terms of the lease an inspection could be carried out without notice for the purpose of inspecting the cause of the leaks. The Tribunal considered the reason for refusing the request, which was that the Respondent did not consider that the Landlord wished to carry out work and that the request for access was a means of intimidating his tenant.
41. The Tribunal however finds that access was requested, and that it heard from Mr Dewhurst, Mr Malka and the former tenant of flat 1 that there was an issue at the premises.
42. Accordingly, the Tribunal is satisfied on a balance of probabilities that access was required for testing drainage gas and water pipes and that the refusal to provide access is in breach of clause 3 (m) of the lease.

Not do or permit or suffer to be done in or upon the demised premises or any part thereof any act or thing which shall or may be or become a nuisance damage annoyance disturbance* or *inconvenience to the Lessor or the tenants or the occupiers of any of the adjoining houses of the neighbourhood or which may prejudice the respectability thereof.

43. *A*t paragraph 17.1.6 of his Skeleton Argument Mr Blakeney set out the Applicants position *"… For the avoidance of doubt, it does not matter that these concerns relate to the Respondent's tenants – Clauses 2 and 3 of the Lease are covenants by the Respondent that he "and the persons deriving title under him" will comply with the relevant obligations. Clause 3(p) also specifically includes acts that the Respondent "permit[s]" to be done.*"
44. The Tribunal heard detailed evidence from Mr Malka about the numerous complaints that he had received from both his tenant and Ms Krieger concerning noise nuisance from flat 2. He stated that as a result of Mr Owusu (the respondent's tenant) he had lost his tenant who had left as a result of intimidation and noise.
45. The Tribunal also heard from Mr Jorge Maytorena (former tenant of flat 1) and Ms Krieger on behalf of the Applicant, and evidence from Mr Owusu, and Dr and Mrs Hassan on behalf of the Respondent.
46. The Tribunal also heard evidence from Mr Semmakie, who as Respondent in these proceedings also gave evidence. He does not live at the premises, but rents it out on a shorthold assured tenancy. There is nothing in the lease which prevents him from sub-letting the premises in this way.
47. Although Mr Semmakie is not a direct witness to the allegations of "nuisance damage annoyance disturbance or inconvenience. He gave evidence of complaints which had been made to him which pre-dated Mr Owusu's occupation of the premises and steps that he had taken in order to comply with requests made by Mr Malka and Ms Krieger in the letting of his property. It was his evidence that unreasonable

restrictions had been placed on his tenants, in the past and that the Applicant and other occupiers were acting unreasonably.

48. Mr Maytorena had been called as a witness on behalf of the Applicant he had also produced a witness statement dated 25 April 2022. In his statement he set out his experience of living at flat 1 and the circumstances in which he stated he was caused a nuisance by the Respondent's tenants. He set out that he had lived in the premises from October 2018, until December 2021, when he and his wife had decided to move out of the premises, due to concerns about the safety of his family, and his inability to cope with the noise nuisance caused by Mr Owusu and his family (the respondent's tenants).
49. He set out that he had lived at the premises without issue until the summer of 2020, when he had first experienced problems with noise due to the then tenants of the premises exercising early in the morning. He stated that he had spoken with them concerning this and that they had agreed to exercise later in the day. He was away from the property between December 2020 until March 2021. When he returned to the property, he became aware that there were new tenants. He described being disturbed by, "stomping" especially in the corridor of flat 2 which was directly above his bedroom. He stated that he was also disturbed by crying, screaming and shouting and that this happened at various times throughout the day and night.
50. He stated that he had written a polite letter in October, and that this had been met with hostility from Mr Owusu. He stated that in response, Mr Owusu had knocked on his door and spoken to his wife and she had felt that his manner was aggressive and threatening.
51. The Tribunal were provided with a video of an event which had occurred on 21 December 2021. Mr Maytorena informed the Tribunal that he had been disturbed in the early hours of the morning, and had knocked on Mr Owusu door, to ask him to be quieter and that as a result he was subsequently verbally abused by Mr Owusu.
52. The Tribunal was provided with a copy of a video of the exchange between Mr Owusu and Mr Maytorena which had been filmed by Mrs Maytorena. Complaints were also made to the police by both men, although police report numbers were obtained and there was correspondence from the police no prosecutor action, or other follow-up action was taken by the police.
53. The Tribunal also heard from Ms Krieger, she set out that she had also experienced issues with previous tenants of the Respondent, she referred to previous tenants who were students who had caused problems by smoking and having parties in the garden.
54. She had also had problems with noise nuisance, and that this had been particularly concerning to her as her mother had been very ill, and had been at the premises at the time when the noise nuisance occurred.
55. She had also had experience with Mr Owusu and recounted an occasion when she stated that she had knocked on his door to inform him of a break in to one of the flats and had found his attitude and demeanour to be intimidating.
56. The Director of the Applicant company also set out that he had received numerous complaints concerning the occupants of flat 2. These complaints had centred on a young child constantly running around the

flat including the internal corridors. As well as, shouting, heavy walking, and noise coming from the use of the washing machine and the vacuum cleaning at 8am or earlier on Sunday mornings.

57. The Tribunal heard from Mr Semmakie, although Mr Semmakie was not a first-hand witness to the events that had occurred. He provided some contextual evidence of the background leading up to these events. He stated that he had been letting the premises, for some time. He stated that he had tried to be accommodating to Ms Krieger as a leaseholder, and Mr Malka by allowing them to vet his tenants.
58. He set out that in his view his tenants were being harassed by Ms Krieger and Mr Malka and his tenant, he cited what he saw as malicious anonymous complaints that had been made to social services.
59. He also invited the Tribunal to hear from Mr Owusu the tenant of flat 2 and Dr and Mrs Hassan. The Tribunal heard from Mr Owusu. In his statement he set out that he moved into the property in January 2021, he was a financial director of a cross boarder financial company, and his wife was an accountant at a private school. He set out that they both worked full-time. He stated that their son who had been 2 years old at the time and attended nursery from 9am to 4pm 5 days a week.
60. In his statement he set out that two days after he moved in Ms Krieger knocked on his door to complain about the noise caused by his unpacking. He stated that after that she complained on a frequent basis, and that her complaint usually took the form of banging on the floor. He had also had an unsigned complaint from a neighbour. He informed us that he had become concerned that her complaints amounted to harassment, as some of her objections occurred when in his view, his son was engaged in normal developmental activities that a two-year-old would engage in. He cited as one example that his son would be exuberant when he returned from work and would greet him with enthusiasm, and that he would at times delay his return from work so that their son was sleeping to avoid complaints about the noise.
61. He informed the Tribunal that he, himself had complained to Mr Malka on one occasion, about the banging on his ceiling and floor, after Mr Malka had informed him about a burglary, which had occurred at the premises He had also told him that he felt , that he was being harassed by Ms Krieger.
62. He stated that Mr Malka had expressed the view that it was odd for her to complain about the noise caused by his son, as he, Mr Malka could at times hear Ms Krieger's mother crying out at different times during the night, due to the fact that she was very ill.
63. Mr Owusu took this to mean that Mr Malka understood that there was a level of noise, which all of the occupants experienced, which they had to be prepared to overlook given the issues with sound transference within the building. Mr Owusu did not accept that he had hoovered or that the washing machine had been used before 8am on a Sunday morning.
64. He told the tribunal that he recalled on one occasion that the vacuum cleaner had been used as flour had been spilt on the floor and that the alternative was to allow his son to walk into it and take it over the premises. He also did not accept that his son was up at all hours of the night. He stated that his son normally slept through the night and woke

at between 7-8 am in the morning. However, as a young child if he did wake up it was normal for him to cry and need comforting.

65. Mr Owusu accepted that on 21 December 2021, that in hindsight he could have responded differently to what he viewed to be provocation from Mr Maytorena. He informed us that in the early hours of 21 December his son had become very unwell and a decision was made that he had to be taken to Accident and Emergency of the local hospital. He stated that whilst he and his wife were getting things together to take their son to the hospital. Mr Maytorena had knocked on the door. Mr Owusu found Mr Maytorena manner to be aggressive, and he was annoyed that Mr Maytorena, did not appear to accept that the noise was caused by an urgent situation.
66. He accepted that a heated argument had ensued and that he had sworn at Mr Maytorena. He stated that unfortunately he had become heated, as his child was sick and he was stressed and concerned.
67. He felt that Mr Maytorena was being unfair, he accepted that he had sworn and shouted at Mr Maytorena, however he considered that the video which had been taken by Mrs Maytorena was only partially accurate in that it did not record the events that led up to the incident. He felt that in order to reduce the noise to a level that would be acceptable to Ms Krieger it would adversely impact on the normal development of his son.
68. The Tribunal also heard from Dr Haidan
69. In his evidence he was very philosophical about the noise within the building, He stated that he could regularly hear noise from flat 5 such as the sound coming from the TV. He stated that "… this is London" and you adapt to a degree of noise. He found Mr Owusu and his family to be good neighbours and in general he did not find that the noise made was abnormal or excessive after 8pm. His flat was immediately below flat 5, and he too had experienced problems with water leaking from flat 5 so he considered that there might be a problem unrelated to the occupancy of flat 2.
70. Mrs Dayla Al-Obidi (Dr Haidan wife) joint leaseholder of flat 3. Also gave evidence to the Tribunal, she stated that at times Ms Krieger could be unreasonable and that the building was not always a family friendly or easy environment to live in.
71. She referred to the fact that although all of the occupants had a right of access to the garden. Someone had complained about her children leaving their bikes within the garden. The Garden had been locked and she stated that "… only Caroline [Ms Krieger] and her visitors had access to the garden" and she had refused the leaseholders a key to the back garden, even though she had a right to access under the terms of her lease.
72. The Tribunal was also given copies of the reports which had been made to the police as a result of the incident which had occurred on 21 December 2021.
73. The Tribunal noted that they were helpful although they only repeated what the occupants had told them.

The Tribunal decision and reason for the decision

74. The Tribunal carefully considered the wording of the lease and the evidence that it had heard from both parties. It noted that it was the applicant's case that the clause had been breached.

    The Tribunal accepted that an altercation had occurred at the premises on 21 December 2021; The Tribunal noted the wording of the lease in particular, *"which may prejudice the respectability thereof"* **.**The Tribunal had no evidence that there had been any reports, concerning this incident other than those made by Ms Krieger, Mr Maytorena and Mr Owusu.

75. However, the Tribunal accepted Mr Owusu's evidence that this was only a partial record of what had occurred. It noted that the video appeared to have been filmed part way through an argument which had already commenced. It noted that Mr Owusu appeared to be in the process of leaving the building when the incident occurred and that the incident occurred outside the building. Although the Tribunal makes no finding that this occurred, it cannot be satisfied that Mr Maytorena did not play the role of an agent provocateur.
76. The Tribunal noted the police reports, and the information from the police however it noted that no action had been taken by the police concerning this incident.
77. It noted that Mr Owusu's behaviour as shown on the video was of no credit to him, and was not acceptable. However given the Tribunal's concerns about the video, and the circumstances which led to the incident. It is not satisfied on a balance of probabilities is a breach of the clause.
78. The Tribunal noted the lack of detailed evidence concerning the use of the washing machine and vacuum cleaner prior to 8am, although it accepted that due to lockdown the level of noise and the pattern of everyday living had changed.
79. However, it was not satisfied that any use of the washing machine, and vacuum was in breach of the terms of the lease. For reasons which are set out below.
80. The Tribunal then went on to consider whether the respondent had breached the terms of the lease, on the basis of evidence before it. The Tribunal noted that on the evidence of Mr Dewhurst, there was an issue with the sound installation within the building. This was also clear from the evidence of Mr Owusu and Dr Haidan.
81. It asked itself whether on the evidence it had heard the level of noise within the building was such that it "*may be or become a nuisance damage annoyance disturbance* or *inconvenience to the Lessor."*
82. It also considered whether on the evidence of Mr Malka, the Tribunal could be satisfied that the alleged breach could be proved.
83. In reaching its decision, the Tribunal considered that the standard used should be an objective rather than subjective test. It asked itself what the hypothetical man on the Clapham omnibus would find to be a nuisance in these circumstances. In this regard the Tribunal took particular note of the evidence of Dr Haidan, and Mrs Dayla Al Obidi. It found their evidence to be balanced and fair.

84. It considered that most occupants would consider that the noise levels during the day which involved the ordinary sounds of daily living would be tolerated. There would also be a degree of tolerance to young children and the elderly.
85. It reminded itself that all of the occupants of the building had expressed that they were able to hear other occupants within the building going about normal every day activities. It noted in particular that Dr Haidan's evidence was that noise which occurred prior to 8pm was in his view normal every day sounds.
86. The Tribunal also accepted that Mr Owusu has a young child, and that save for the unusual period that presented itself when lockdown occurred, Mr Owusu child was at nursery for an extended period during the day.
87. Having taken normal usage of the building into account, it was not satisfied on the evidence before it that the noises that were complained about amounted to a breach of the terms of the lease.
88. It accepted that Ms Krieger had gone through a difficult period, in which her mother's illness had played heavily on her mind, however it reminded itself, that her subjective view, and the fact of her longevity as a leaseholder did not mean that her subjective view, outweighed the evidence given by others. The tribunal applied a balanced approach to the evidence, and in doing so it asked itself whether the evidence was sufficient to satisfy the Tribunal on a balance of probabilities that a breach had occurred.
89. The Tribunal also considered the evidence of Mr Maytorena however, it was clear that much of Mr Maytorena's complaint was about the normal activities of daily living. Including the occasional waking of a child during the night.
90. Given this the tribunal are not satisfied that the respondent has through the actions of his tenant, which amount to the noise caused by everyday living breached clause as 3 (p) of the lease.
91. The Tribunal also considered clause 4 Schedule 2 of the lease Schedule 2 – "4. *Not to use or permit of suffer to be used in the demised premises … any washing machine spin dryer refrigerator or other machine of any kind in such manner as to cause nuisance or annoyance to the lessees or occupiers of other flats in the Building … and in particular – (a) not to use or permit to be used in the demised premises at any time such instrument or machine which stands on the floors of the demised premises unless the same be stood upon insulators made of rubber or other suitable sound deadening material; (b) not to use or permit to be used any such instrument or machine as aforesaid … between the hours of eleven p.m. and seven a.m.*
92. It noted that no evidence had been provided to suggest that the machine was not standing on some form of insulation. It also noted that the use of the washing machine and vacuuming which occurred was reported to have happened after 7 am, and there was nothing in the lease which prohibited these activities after those hours. Accordingly, the Tribunal finds no breach of this clause.
93. *The Tribunal made the same finding, in respect of clause 6 of schedule 2 which states -: "*6. … nor do or permit to be done any act or thing

whatsoever which may become or be dangerous or a nuisance of cause scandal or annoyance to the Lessor or the neighbourhood …" on the basis of its findings set out above.

Not to permit or suffer any wastage or overflow of water at the demised premises nor permit or suffer any water or other liquid to soak through the floors…

94. It heard from the respondent, Mr Semmakie. He accepted that there had been water leaking through the floor on one or more occasion and that where it was caused by an issue with his premises, he had fixed it. The Tribunal also heard evidence from Mr Dewhurst and Mr Maytorena concerning this. The Tribunal was aware that information had been provided after the hearing that it was alleged that this issue was still on-going. However, as it was not before the Tribunal, and no directions were made for additional evidence this has not been considered by the Tribunal in reaching its decision.

The Tribunal's decision and reason for its decision

95. The Tribunal considered the wording of the clause and also Mr Blakeney's submissions concerning the law on this point which was referred to above in Dilapidations: The Modern Law and Practice
96. The Tribunal accepted that this covenant means that the respondent is "not to permit or suffer any… overflow of water." The Tribunal noted that this had occurred in breach of clause 2 (16) of the lease. Accordingly the Tribunal finds that the respondent was in breach of this clause.

To keep the floors of the demised premises (except the kitchen bathroom and water closet) covered with carpet and underfelt or with such other effective sound deadening floor covering materials."

97. The Tribunal heard direct evidence from Mr Semmakie and Mr Dewhurst that the flat is not carpeted. Mr Semmakie, in his evidence stated that it had laminate flooring and underlay, and that more than one flat within the building had similar flooring.
98. The Tribunal accepted his evidence.

The Tribunal's decision and reason for the decision

99. In reaching its decision the Tribunal considered the wording of clause 19 schedule 2. The Tribunal consider that the wording is clear and unambiguous given this as Mr Semmakie accepted that there was no carpeting within flat 2, it finds notwithstanding the aesthetic appeal of alternative flooring, the lack of carpeting is in breach of this clause.
100. Having considered all of the evidence. **the Tribunal finds that breaches of the lease occurred in respect of clauses 3 (m)Schedule 2 (16) and Schedule 2 (19).**

101. In respect of clause 3 (c) 3, (p) Schedule 2, clause 4 and 6. it is not satisfied on a balance of probabilities that a breach of the lease occurred.

Application under s.20C and refund of fees

102. The Tribunal having considered its determination in respect of the lease, and the findings, then went on to consider whether to make an order under Section 20 C which would limit the amount of legal costs payable by way of service charges. (The Tribunal did not separately consider whether the lease permitted such recovery). Given the findings it has made the Tribunal considers that as t it is not just and equitable to make an order under Section 20C.

103. Further the Tribunal makes an order for the repayment of the application and hearing fees.

Signed: Judge Daley Date: 4 August 2022

Rights of appeal

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

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

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

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

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

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