FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/12UB/LBC/2020/0001**
HMCTS code (audio, video, paper)	**:**	**A:BTMMREMOTE**
Property	**:**	**24 Hanover Court Cambridge CB2 1JH**
Applicant	**:**	**Cambridge City Council**
Representative	**:**	**Ash Vyas, 3C Shared Services - Legal Practice**
Respondent	**:**	**Hernan Dario Ferraro Cordoba**
Type of application	**:**	**Application for determination of alleged breaches of covenant**
Tribunal members	**:**	**Judge David Wyatt** **Judge Wayte**
Date of decision	**:**	**2 October 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote audio hearing. The form of remote hearing was A:BTMMREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents we were referred to are in a bundle of 174 pages, together with the Respondent's statement of case filed on 26 June 2020 and the further documents filed and served shortly before the hearing (as described in paragraph 11 below), the contents of which we have noted.

Decision of the tribunal

The tribunal is not satisfied that any of the alleged breaches have occurred.

Application

1. The Applicant is a local housing authority and the registered proprietor of the freehold land registered under title number CB287000, which includes Hanover Court and other land and buildings in Cambridge. Hanover Court is a purpose-built block of 78 flats, of which 28 flats are held by leaseholders and 50 flats are occupied by people housed by the Applicant.

2. The Respondent leaseholder exercised the right to buy the Property. On 15 August 2005, he took from the Applicant a lease which currently has about 95 years left to run, expiring on 17 June 2115 (the "**Lease**"). The leasehold title is registered under title number CB300084. The Property is described as a two-bedroom flat on the fourth floor of Hanover Court, with a store on the third floor.

3. Section 146 of the Law of Property Act 1925 (the "**1925 Act**") restricts forfeiture of leases. Subsection 146(1) provides that a right of re-entry or forfeiture shall not be enforceable until the landlord serves on the tenant a notice specifying certain matters, including the particular breach complained of, and the tenant fails within a reasonable time thereafter to remedy the breach (if capable of remedy) and make reasonable compensation.

4. By section 168 of the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**"), a landlord under a long lease of a dwelling may not serve such a notice under subsection 146(1) of the 1925 Act in respect of a breach by a tenant of a covenant in the lease unless it has been finally determined on an application under subsection 168(4) that the breach has occurred (or one of the other conditions set out in subsection 168(2) is satisfied).

5. On 26 February 2020, the Applicant made an application for a determination, under subsection 168(4) of the 2002 Act, that breaches of various covenants in the Lease had occurred.

6. Given the context, we are required to make our determination with the particularity that would be required for a notice under subsection 146(1) of the 1925 Act.

Procedural history

7. On 16 April 2020, the tribunal gave case management directions. Those directions struck out the part of the application which alleged breach of the covenant in the Lease to pay service charges. As explained in the directions, the tribunal did so because subsection 169(7) of the 2002 Act confirms that section 168 does not affect service of a notice under subsection 146(1) of the 1925 Act in respect of any failure to pay service charges. Such notices in respect of service charges are subject to different restrictions, which are normally addressed by making an application to the tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 that service charges are payable, but the Applicant made no such application. The directions identified the remaining issues for the purposes of the application under subsection 168(4) of the 2002 Act, as summarised below.

8. Pursuant to the directions, the Applicant provided official copy entries for the freehold and leasehold titles. The tribunal wrote to the two mortgagees with registered charges against the Property (Lloyds Bank PLC and The Mortgage Business PLC), the holder of an equitable charge noted on the leasehold title as having been created by an interim charging order (Hillesden Securities Limited) and to "the occupiers" of the Property to ensure that they were all aware of this application, with copies of the application form and the directions. None of these potentially interested persons responded to ask to join the proceedings or participate in the hearing.

9. The directions said that the tribunal considered an inspection was not required, but good quality photographic or video evidence would be considered. The directions gave the Respondent until 11 June 2020 to produce a bundle of the documents he relied upon, including a statement in response to the applicant's case setting out in full the grounds for opposing the application, any signed witness statements of fact, any legal submissions and any other documents on which the Respondent wished to rely. This was extended to 25 June 2020 because the Applicant was given more time, until 28 May 2020, to produce the bundle of documents on which it relied. On 26 June 2020, the Respondent produced a statement in response to the application, but nothing further.

10. The hearing of this matter was listed for 14 August 2020. On 10 August 2020, the Respondent applied for an adjournment to give his legal advisers (referring to Lyons Davidson) more time to prepare. The tribunal granted the adjournment until 4 September 2020, warning that no further extension of time was likely to be granted and the parties must prepare as a matter of urgency for the new hearing. The tribunal also gave the Respondent the opportunity to file and serve any further statement of case by 27 August 2020.

11. On 26 August 2020, the Respondent applied for more time, referring to a different firm of representatives (C P Law Associates) and the service charge issues which had already been struck out. His application for another adjournment was refused, but the Respondent was given a further final extension of time, until 4pm on 3 September 2020, to produce any further statement of case in respect of the outstanding issues before the hearing on 4 September 2020. The Respondent's further statement of case was then produced on the afternoon of 3 September 2020. On the morning before the hearing, the Applicant sent by e-mail the second witness statement of Carol Amos, producing two exterior photographs showing the balcony of the Property, a decision of the Planning Inspector dated 3 July 2020 (dismissing an appeal by the Respondent against a decision to refuse a retrospective application for planning permission for installation of a window in the balcony) and a skeleton argument.

Hearing

12. At the hearing on 4 September 2020, Mr Vyas represented the Applicant. Carol Amos, the home ownership services manager employed by the Applicant, gave evidence for the Applicant.

13. The Applicant had produced a witness statement from Police Constable Sean Feline, a file note from Megan Cooke (a colleague of Ms Amos) and e-mails apparently from a complainant leaseholder in Hanover Court, but no witness statement from that colleague or that complainant. None of these individuals attended the hearing to give evidence.

14. The Respondent did not attend. We were satisfied that he had been notified of the hearing and that it was in the interests of justice to proceed with the hearing from 10:35am. The Respondent telephoned tribunal staff that afternoon, and then sent an e-mail at 5:15pm, claiming that he had understood the tribunal would call him, so had waited rather than dialling in, referring to a previous hearing. The tribunal gave the parties until 17 September 2020 to make any submissions about this, observing that:

    a) the parties had been given clear instructions to dial into the hearing using the number and code provided; when the hearing listed for August was adjourned, at the Respondent's request, the parties were told to use the same dial-in details on 4 September; there was no previous hearing and the Respondent had not explained how he understood that he would be called by the tribunal when the instructions told him to join the hearing by dialling in; the Respondent knew that the hearing would start at 10:30am on 4 September but did not appear to have made any contact with the tribunal until the afternoon, when the hearing had already been concluded; but

b) it might be useful for the Applicant to have the opportunity to cross-examine the Respondent about his evidence.

15. Both parties responded, but the Respondent did not give any explanation to answer the observations which had been put to him (as summarised above) and the Applicant did not ask for the opportunity to cross-examine the Respondent. Accordingly, the tribunal informed the parties that we would proceed to make our decision based on the evidence provided.

Issues

16. The case management directions identified the remaining alleged breaches as follows, confirming that the tribunal would reach its decision based on the evidence produced to it, where the burden of proof is on the Applicant.

a) Breach of the user covenant in clause 10 of the Lease (to use the Property only as a self-contained residential flat in one family occupation);

b) That alterations have been made in breach of clause 6.4 of the Lease; and

c) Breach of clause 11.2 of the Lease in respect of annual gas safety checks and provision of certificates.

17. Each of these allegations is examined in turn below. In respect of each, the tribunal is only required to determine whether a breach of covenant has occurred. It does not have jurisdiction to decide whether the landlord may have waived the right to forfeit. It may in some cases be concerned with whether the landlord has waived the covenant itself or is estopped from asserting the covenant, because if the landlord has waived the covenant itself there is nothing for the tenant to breach, but no such waiver was argued by the Respondent or indicated by the evidence provided.

Use covenant (clause 10)

18. Clause 10.1 of the Lease states that:

> "*The Tenant may use the flat only as a self-contained residential Flat in one family occupation*."

19. The Applicant alleged breach of this covenant from the time of their first inspection on 21 November 2019 but could not say how long they were alleging the breach had continued after that or whether they

alleged it was continuing. They suspected breach before 21 November 2019 but confirmed they had no real evidence of this.

20. Ms Amos said that the flat originally comprised two bedrooms, a living room, a bathroom and a kitchen. She arranged to inspect the Property because, on 13 November 2019, she had been notified that the Fire and Rescue Service had attended the Property and had informed the Applicant that the Property was being sublet to several people. Ms Amos inspected the Property on 21 November 2019 with her colleague, Ms Cooke. Ms Amos said that, at the inspection, the Respondent confirmed he had moved out of the Property and claimed there had been no fire, only a false alarm from cooking.

21. Ms Amos told us that on 21 November 2019 there were five "other" people at the Property (two women and three men), besides the Respondent and the Applicant's officers. Ms Amos had not asked for their names but, based on the passport photograph provided later, she believed that one of them was the individual named in her passport (explained below) as Daniela Stoleru. Ms Amos said that the Respondent had claimed two of the men were gas fitters, but was suspicious about that because she had the impression that all five people were Romanian. She acknowledged it was possible that one or two of these people had genuinely been there to inspect or service the gas appliances/installations, since a letter in the bundle from Cadent Gas Limited confirmed that their engineer had attended and fixed a faulty gas supply regulator between 1pm and 1:34pm on 21 November 2019, which would have been shortly after the Applicant's inspection from 11am that day.

22. Ms Amos said that she saw two double bedrooms and a single bedroom, all with key-coded locks. The nature of the locks is not clear from the single poor-quality photograph provided, but something does seem to have been fitted to a door shown in the photograph. She said that the single bedroom had been installed as part of the original living room. She said in her statement only that the Respondent was not able to access the locked single bedroom, but told us at the hearing that they did obtain access to this bedroom after someone phoned the man staying in that room. She said that the remaining living room appeared to be used as a bedroom, with an L-shaped sofa bed. She said that the external balcony had been "*enclosed with PVCu glazing*" and arranged as a dining room, with the window into it from the kitchen blocked (as indicated by a photograph she had provided), but said that marks in the carpet in the living room (which she accepted could not be seen from the photograph she had provided) suggested that the table was normally there and the enclosed balcony was in fact used as a bedroom. She said there were eight tooth brushes in the bathroom (although this is not clear from her photograph, there do appear to be seven or eight). Ms Amos said that at the time of the inspection the Respondent had completed a sublet registration form, naming Marian Pavel as his sub-tenant and not naming any others.

23. The Applicant requested removal of the bedroom locks for safety reasons. Ms Amos confirmed that, on re-inspection by Ms Cooke and another colleague on 11 December 2019, the locks had been removed. Ms Amos did not attend that inspection, because the Respondent had asked that other officers inspect instead of Ms Amos. Ms Cooke did not attend the hearing to give evidence, or produce a witness statement. Her file note indicates that on 11 December 2019 there were two women at the Property who spoke through the Respondent and informed her that one bedroom was used by "*Marian*" and "*Pulmer Dana*", the other double bedroom was used by "*Rascol Teo*", said to be Marian's brother, and the single bedroom in the living room was used by "*Rosana Pavel*", said to be the partner of Teo, but there were male and female belongings in both double bedrooms. Ms Cooke's note indicates that again there were eight toothbrushes in the bathroom, but we can only see about six in the photograph provided. Ms Cooke does not say in her note, and was not available at the hearing to explain, whether any of these individuals were the same or different people from those at the Property at the inspection in November 2019.

24. The Respondent maintains that the residents were all from the same family. Ms Amos said that, on about 27 December 2019, the Respondent provided a copy tenancy agreement for the Property. This document is typed in the names of "*Dario Ferraro*" as landlord and "*Marian Pavel Rascol*" as tenant. The names of three other tenants have been added in manuscript and appear to correspond with the copy passports provided in the names of Marina-Roxana Olteanu, Teofil Rascol and Daniela-Elena-Florentina Stoleru. The document specifies a rent of £1,000 per month for a term of six months from 1 November 2019. It has a covenant (at clause 3.15) not to assign, underlet, charge or part with or share possession of the Property or any part or take in paying guests or lodgers. It appears to have been signed by Marian Pavel Rascol alone. On the evidence provided, it is more likely than not that Marian Rascol and Teofil Rascol are brothers, and Marina Olteanu and Daniela Stoleru are their girlfriends/partners.

25. In December 2019, the Respondent claimed that he was in the process of moving back to the Property and Ms Amos said that on 9 April 2020 she had received an e-mail from the Respondent about a change of residents. This e-mail was not produced and Ms Amos could not recall the contents, but Mr Vyas said he believed it was probably to say, or claim, that the subtenants had left and the Respondent had moved back into the Property. Mr Vyas accepted that on the face of it this was broadly consistent with the tenancy agreement, since the basic contractual term would have expired at the end of April 2020, and the assertion by the Respondent in his statement in June 2020 that he and his daughter, "*Ximena Ferraro*", had moved into the Property and the previous tenants had left. Mr Vyas confirmed that the Applicant had not asked to reinspect the Property or for any other evidence of the current occupation of the Property. He submitted that the Respondent

had not engaged with the litigation correspondence from Mr Vyas and was unlikely to have co-operated.

26. Ms Amos had produced a credit reference search with 191 entries for residents of the Property, which seemed at first glance to be significant. However, this search had been generated by someone else and she could not say what period it covered. The names in the search result were in alphabetical order, with no indication of the date(s) of any of the entries. Further, there appear to be many entries for each individual (more than 20 seem to be for the Respondent, with last names of Cordoba or Ferraro, and more than 10 seem to be for Marian Rascol alone). Since the Respondent has owned the Property for some 15 years and presumably occupied it before that, and given the number of duplicates, this may or may not indicate a high number or turnover of residents at the relevant time(s), depending on the dates to which the entries relate. Ms Amos told us at the hearing that the Applicant had used a different search which had produced the same names and the relevant dates, differently ordered, to notify the tribunal earlier (for the purpose of giving notice of this application to potentially interested persons) that the most recent "*possible*" residents were Alexandru Dascalu, two individuals with the last name Munteanu and two others. However, no dates were given in relation to any of these people and no actual evidence of this had been provided.

27. The Applicant produced a witness statement from Police Constable Sean Feline, who said that he had attended the Property on 3 April 2020 after the residents had called the emergency services to say that their landlord was seeking to make an eviction, had brought a baseball bat and was being very threatening. PC Feline's statement has several obvious mistakes (saying for example that the Respondent was 80 years old but born in 1962) and he did not attend the hearing. His statement says that the Property was a three-bedroomed flat with a sofa made up as a bed and a tent on the balcony, but when he visited the only people at the Property were "Darao Farrard" (apparently, the Respondent), "*Marina Dascalu*" (whose date of birth was, he said, 5 March 1997) and her young daughter, and two unidentified men on the balcony. PC Feline says in his statement that Ms Dascalu told him that until recently the Property had been rented to eight people, but four of them had returned to Romania. The "*Dascalu*" last name does appear in the credit search results mentioned above, but those search results also confirm that the date of birth of Marina Olteanu (one of those named in the tenancy agreement mentioned above) was 5 March 1997. We observed at the hearing that it was more likely than not that Marina Dascalu was Marina Olteanu, using a different name, and the Applicant did not dispute this.

28. Ms Amos said that the Applicant had received noise nuisance complaints from neighbours on 27 April 2020 and 5 May 2020. Both complaint e-mails seem to be from the same individual, who complains in their e-mails about banging, drilling and screaming matches, loud

radio noise, and slamming doors and windows all night (their e-mail of 27 April) and asserts that there were many different people at the Property in 2018, then a group of young people and a noise abatement order served in February 2019, then in the last year a person or people who had found the Property using "Air B&B", with a high turnover of residents, at least four different combinations of groups, in the last couple of months (their e-mail of 5 May). Ms Amos said that all of this was having a devastating impact on the quality of life of residents at Hanover Court.

29. We asked the Applicant for their submissions about the interpretation of the relevant covenant, to use the Property only as a "*self-contained residential Flat in one family occupation*", since the evidence indicated that the tenants from November 2019 until at least April 2020 were two brothers, Marian and Teo Rascol, and their girlfriends/partners Marina Olteanu and Daniela Stoleru, particularly in view of the reference by PC Feline to one of them (Marina Olteanu using a different last name) having a young daughter, and a family might be expected to have occasional guests staying temporarily. The Applicant confirmed at the hearing that these four adults would have been "*fine*" for the purposes of the covenant, but they suspected other people had also been residing at the Property. Ms Amos referred again to the way the Property had been set up, with two double bedrooms, one single bedroom, a sofa bed and the enclosed balcony which appeared to be intended for sleeping accommodation, asking us to take a "*holistic*" view.

30. Mr Vyas accepted that the Applicant had not attempted to reinspect the Property, or seek any other evidence of current occupation, despite the suggestions from the Respondent in April and June 2020 that the former tenants had left and he had moved back. He said this matter was not serious enough for a dawn raid or something of that nature, particularly during the Coronavirus pandemic when the Applicant's resources were so stretched.

The tribunal's decision

31. We are not satisfied on the balance of probabilities that a breach of the user covenant has occurred. There is a real possibility of breach, in the past or as alleged, and the evidence appeared at first glance to be more persuasive but it does not stand up to scrutiny. The Applicant has not provided sufficient evidence for its allegations of residence by more than one family.

32. As mentioned above, we are required to make our determination with the particularity that would be required for a notice under subsection 146(1) of the 1925 Act, but we have been left to guess about what might have been done in the past, what the position was on 21 November 2019 (the only date in respect of which the Applicant felt able to make a firm allegation) and what has happened since then.

33. The way that the Property had been set up, with the additional single bedroom locked in November and the door locks which were removed in December, is significant, but the question we must determine depends on how the relevant parts of the Property were used at the relevant time(s). These matters do suggest a breach at some point in the past and/or as alleged, but they are not enough to show that unrelated persons were residing at the Property in addition to the two brothers, their two partners and their young child, on or after 21 November 2019. We have no information about how old the locks were, how they functioned (locking automatically if the door was not wedged open, or needing to be locked each time) and who was said to be living in each room on 21 November 2019. One of the brothers or their partners may or may not have been using the single room, particularly if a baby or young child had been sleeping in the double bedroom. They may or may not have had friends staying temporarily as guests, or paying lodgers with or without the involvement of the Respondent. Ms Amos did not give evidence about belongings in the bedrooms. Ms Cooke had mentioned male and female belongings in the double bedrooms (not the single bedroom) in her note from December 2019, but had not attended the hearing. The numbers of toothbrushes in November and December 2019 does not make any real difference, since any person may have more than one and at least five occupants were within the accepted family.

34. We cannot put any significant weight on the hearsay evidence in the statement made by PC Feline about what Marina Olteanu/Dascalu is said to have said in April 2020 about more people having stayed earlier, additional lettings cash in hand and the like, or the file note from Ms Cooke, or the allegations in the e-mails from the complainant. On careful examination, the credit reference search report produced by the Applicant does not give any real assistance and indicates that the person who spoke to PC Feline at the Property and seemed to be unrelated was in fact one of the accepted family, Marina Olteanu, with her young child. Similarly, the people said to have been named to Ms Cooke at her reinspection in December 2019 may or may not be the people who were there in November or even the young child; neither Ms Cooke nor Ms Amos can tell us.

35. We recognise that it has been difficult for the Applicant to gain better evidence of residence by inspection, but that was not the only way to attempt to gather adequate evidence. We do not understand why it did not produce a credit reference search with dates for the relevant entries, produce better quality photographs, ask PC Feline to attend the telephone hearing, produce a statement from Ms Cooke and ask her to attend the hearing, take a witness statement from any complainant(s) and ask them to attend the hearing, produce the noise abatement order which was said by the complainant to have been made early last year and give any relevant evidence about that, follow up with the Respondent to inspect or request current evidence of occupation, or provide any other evidence for the alleged breach. Even if we draw

what reasonable adverse inferences we can from the evidence produced and what may well have been a choice by the Respondent to avoid exposing himself to cross-examination at a hearing, this is not enough to tip the scales.

Alterations (clause 6.4)

36. Clause 6.4(a) of the Lease states (with our emphasis added) that:

> "*The Tenant must not make any alterations or additions to the structure of the Flat or Building without first obtaining:*
>
> - *the consent of the Landlord … and*
> - *any planning permission or building consent which may be required."*

37. The Applicant referred to two alterations: (a) installation of partitions (with a small window/vent) to create the single bedroom in the original living room; and (b) enclosure of the external balcony with PVCu glazing.

38. As to the partitions, Mr Vyas argued that these could be alterations or additions to the structure because without evidence from a structural engineer it was not possible to say that the alterations had not affected the structure; a structural wall might have been removed. Ms Amos added that the Respondent might have altered the kitchen, since it was now very small for the size of the flat, but she said nothing of the kind in her witness statement, which said simply that the third bedroom had been installed as part of the original living room.

39. The photographs produced on the morning of the hearing indicate that the balcony does not project outside the main exterior walls of the building. It is covered by the floor of the balcony above, with brick walls at each end and a large rectangular aperture facing out. The alteration to the balcony was to put a window into the aperture. Ms Amos said that the interior of the balcony had then been plastered and carpeted. Mr Vyas said that this was an "*alteration or addition to the structure*" because: (a) that expression means anything which interfered with the structure; and (b) it may well, he said, have been necessary to break into the structure to affix the window frame and/or install a lintel or other supports.

40. Mr Vyas said he was dubious about the landlord's consent which appeared from the Applicant's file to have been given in a copy letter apparently from 8 January 2004 (there is an obvious typographical error in the year), consenting to an application "*to install window to block of [sic] balcony*" as landlord only. This consent letter from 2004 made it clear that it was not giving approval for planning or building

regulations purposes, and it imposed further conditions. Mr Vyas sought to argue that this letter was not sufficient, since it was given before the Lease was granted, but it is not expressed to be subject to any time limits. He accepted that it was possible that the application for consent was made before or during the Respondent's application to exercise the right to buy the Property before the Lease was ultimately granted in 2005.

41. The Applicant did not know when the window had been installed in the balcony, and had not asked. No general planning history records had been produced (apart from the Planning Inspector's decision, dismissing the Respondent's appeal, produced on the morning of the hearing, as described above) and no building control history had been produced, only an e-mail from a surveyor employed by the Applicant seeking to give his general opinions. Ms Amos talked about the potential risks of the enclosed balcony for fire rescue purposes and the lack of building regulation consent, stating that she had checked with her colleagues at the Applicant and they had confirmed that no application had been made for building regulations consent. The appeal decision from the Planning Inspector confirmed that planning permission had not been obtained before the window was installed, or retrospectively.

The tribunal's determination

42. We are not satisfied on the balance of probabilities that a breach of the alterations covenant has occurred, because there is no real evidence to show that the internal partitions or the balcony window involved alterations or additions to the structure of the flat or the building.

43. We refer to Mr Vyas' submission that to constitute such an alteration or addition some kind of interference with the structure would have to be involved. While that may not be a comprehensive definition (for example, erection of whole new buildings near existing buildings can be treated as structural additions in different contexts (In Re Insole's Settled Estate [1938] Ch.812)), for the purposes of the alterations in this case we adopt his definition. The authorities indicate that (while of course this depends on the wording of the covenant in each case) even general covenants against alterations are normally confined to alterations which affect the structure (Bickmore v Dimmer [1903] 1 Ch. 158), and do not extend to alterations in appearance if installation and removal does not damage the fabric of the building (Joseph v London County Council (1914) 111 L.T. 276).

44. There is no evidence to suggest that the installation of the interior partitions (to create the third bedroom) involved interference with the structure, and it seems unlikely that this did. Mr Vyas and Ms Amos did their best at the hearing to suggest why this may have done, but their suggestions seemed to be speculation and were not supported by

the documents. The Applicant had not challenged the Respondent's assertions in his statements that these were merely plasterboard partitions and Ms Amos' statement referred only to the third bedroom having been installed as part of the original living room, not to any other alterations (apart from the balcony window).

45. Similarly, there is no evidence to show that installation of the balcony window involved interference with the structure. Again, Mr Vyas and Ms Amos did their best at the hearing, but produced no evidence, let alone expert evidence, for their suggestions that there may well have been such interference (or to demonstrate that the window might be exerting any additional forces on the brick walls, for example). We accept that it may be difficult to assess this without expert evidence and possibly intrusive tests, but the Applicant has merely suggested possibilities, not produced evidence of probability. Further, the photographs of the exterior suggest if anything a window which may not have been well installed, possibly with adhesive or the like. The installation may or may not be safe or secure, but that is not the question we must decide. It might be a matter to be addressed by reference to other covenants in the Lease, or planning or other enforcement action depending on when the window was installed and other matters; we cannot comment on that. We bear in mind that the Respondent did in fact seek landlord's consent to the alteration - if he had sought consent after the Lease was entered into, that might indicate he was treating this as an alteration or addition to the structure because otherwise he would not have needed landlord's consent. However, as Mr Vyas pointed out, his application for consent would have been made in January 2004 or earlier, long before the Lease containing this covenant was entered into in August 2005.

Gas appliance testing/certificate

46. Clause 11.12 of the Lease states that:

> "*At least once a year, the Tenant must have all gas appliances in the Flat tested for safety by an approved gas inspector. The Tenant must make the inspection certificate available to the Landlord on request.*"

47. The case management directions given in April 2020 noted that it was said that a certificate had been provided and it was not clear precisely what the breach was said to be or whether the covenant is generally enforced, and that further details would be required.

48. Ms Amos produced a copy of her letter dated 13 November 2019, which asked the Respondent for a copy of the gas safety certificate for the Property, not for copies of any previous certificates. Ms Amos produced a copy gas safety certificate dated 16 December 2019 and said this was received from the Respondent on about 27 December 2019.

She said that the only previous gas certificate received was a warning/advice notice dated 18 September 2018, and produced a copy. This notice from 2018 said that the cooker was at risk because it had no stability chain or bracket and there was no earthing at the meter.

49. At the hearing, Ms Amos said that certificates were normally requested each year from leaseholders, but accepted that no evidence of any such requests had been provided to us. Mr Vyas submitted that the covenant in clause 11.12 was intended to require rectification of any defects identified by the annual tests, not just annual tests. He sought to refer to other covenants in the Lease, such as those for repair, but no allegation of breach of those other covenants had been made in these proceedings.

The tribunal's determination

50. We are not satisfied that a breach of this covenant has occurred. We have considered the submissions made by Mr Vyas, but this application was for determination of breach of clause 11.12 (and the other specific covenants examined above), not of other covenants in the Lease. As to clause 11.12, we are required (per Arnold v Britton [2015] UKSC 36) to focus on the meaning of the words used in the Lease and identify 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, disregarding subjective evidence of any party's intentions. The covenant refers only to "*testing*" for safety each year and making the "*inspection*" certificate available on request. It appears to be focussed on identifying problems. It is other clauses of the Lease which create obligations to fix them, which does not suggest room for a wider construction of, or implication of such obligations into, the covenant to test and provide inspection certificates.

51. The Applicant said that it asked for certificates each year, but produced no evidence of any such requests except the letter in November 2019 which simply requested a copy of the gas certificate. The documents produced show that the Applicant had the gas appliances tested in 2018 and 2019 and he produced copies of the inspection certificates following the request from Ms Amos. The Applicant did not say when the certificate for 2018 was provided; it suggested that the certificate for 2019 was provided late, but it appears to have been provided about 11 days after the test in 2019.

Name: Judge David Wyatt **Date:** 2 October 2020

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).