FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LBC/2015/0112**
Property	:	**Flat 5, 76-78 Upper Street, London N1 0NU**
Applicant	:	**Coffee Kingdom Limited**
Representative	:	**Mr M Feldman, Counsel (Day 1) and Ms N Muir, Counsel (Day 2)**
Respondents	:	**Mr I Williams and Ms D Keohane**
Representative	:	**Ms L Mattsson, Counsel**
Type of Application	:	**Application for determination under section 168(4) Commonhold and Leasehold Reform Act 2002 (breach of covenant in lease)**
Tribunal Members	:	**Judge P Korn** **Mr M Cartwright FRICS**
Date and venue of Hearing	:	**15th March and 25th April 2016 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16th May 2016**

DECISION

Decisions of the tribunal

(1) The Respondents are in breach of the second limb of clause 4(8) of the Lease, namely the covenant to "not place any flower box pot or any other object on such roof terrace so as to cause or which might cause drainage difficulties or problems or other damage to the structure of the Building or the surface of the roof terrace".

(2) The Respondents are not in breach of clause 3(7) or clause 4(7) of the Lease. They are also not in breach of the first limb of clause 4(8) of the Lease, namely the covenant to "keep any roof terrace situated within the Demised Premises in a clean neat and tidy condition".

(3) It is noted that the parties have reserved their position on costs pending receipt of this decision. Any cost applications must be made in writing within 14 days after the date of issue of this decision.

The application

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

2. The Applicant is the freehold owner of the Property and the Respondents are the current leasehold owners. The Lease is dated 14th August 2006 and was originally made between 76-78 Upper Street Management Company Limited (1) and Eirik Peter Robson (2).

3. In its application the Applicant alleges that the Respondents are in breach of covenants contained in clauses 3(7), 4(7) and 4(8) of the Lease. The wording of each of those covenants is set out below:-

   3(7) *"Not at any time during the said term to make any alterations in or additions to the Demised Premises plan lay out or any part thereof or to cut maim alter or injure any of the walls or timbers thereof or to alter the Landlord's fixtures therein without first having made a written application ... in respect thereof to the Lessors and Head Landlord and secondly having received the written consent of the Lessors and Head Landlord thereto provided that such the Lessors consent shall not be unreasonably withheld or delayed by the Lessor".*

   4(7) *"Not overload any of the floors ceilings roof terraces walls timbers beams or any part of the structure of the Building".*

4(8) *"Keep any roof terrace situated within the Demised Premises in a clean neat and tidy condition and not place any flower box pot or any other object on such roof terrace so as to cause or which might cause drainage difficulties or problems or other damage to the structure of the Building or the surface of the roof terrace".*

Applicant's case

4. The building of which the Property forms part consists of 8 flats above a commercial restaurant. The demise of the Property (Flat 5) includes a terrace to the rear and another terrace to the front. The front terrace forms the roof of the restaurant at street level. Rainwater discharges from both terraces largely via a concealed downpipe, the opening of which is located within the flat roof of the adjoining premises, Flat 1.

5. As a result of the presence of decking on the terrace of Flat 5 the terrace does not drain properly. Debris gathers below the decking and is trapped by the timber supports. When it rains heavily, that debris is washed out and blocks the drains. Although the Respondents state that they purchased the Property with decking in place they accept that the decking was replaced in 2010 and again in 2015.

6. In relation to clause 3(7) of the Lease (set out in paragraph 3 above) the Applicant accepts that the Respondents can only be in breach of this clause if the decking is a fixture. In the Applicant's submission, if it is a fixture then it is a landlord's fixture and the removal of the old decking and installation of new decking in April/May 2015 required landlord's consent which was not sought or obtained.

7. In relation to clause 4(7) of the Lease (also set out in paragraph 3 above) the Applicant states that the covenant contained therein specifically requires the terraces not to be overloaded. The front terrace has two sofas, chairs, a coffee table, a separate wooden table and the decking itself. There are also several planters exceeding 150mm in height and filled with earth, the weight of which increases following rainfall. As a result of the drainage problems there is the additional weight of pooled water. Aspect Property Services Ltd has advised the Applicant that the design maximum limit for structural integrity is a water level of 150mm, and the Applicant states that on occasions the standing water has reached 300 – 500mm as a result of drain blockage as evidenced by a watermark visible in images on the parapet wall. The Applicant submits that the overloading has been a continuous breach but that it has been worse since 2012 in relation to the pooling of water and since 2015 in relation to the weight of pots and furniture.

8. In relation to clause 4(8) of the Lease (also set out in paragraph 3 above) the Applicant states that according to its expert evidence the drainage problems are caused by dirt, debris and water falling between

the gaps in the decking and then being flushed out during heavy rainfall into the drain and blocking it. The problem is exacerbated by the timber joists which support the decking, as they obstruct the natural flow of rainwater which would dilute the debris. The presence of the decking means that the debris cannot be seen and it obstructs the cleaning of the roof terrace. In the Applicant's submission this is an ongoing general problem and it is not possible to be precise as to the dates on which the terrace is not clean, neat and tidy.

9. Also in relation to clause 4(8) and on the basis that the decking is a chattel, the Applicant submits that the Respondents placed decking on the roof terrace in April 2015 in breach of the covenant contained in this clause. It has caused damage to the building and might do so again and might also cause damage to the roof terrace itself. It also might cause drainage difficulties or problems or other damage, the evidence for this being that the previous decking did so and that there has been further flooding since the new decking was installed. Again, this problem has been ongoing since April/May 2015.

Respondents' case

10. The Respondents note the Applicant's claim that the decking has caused drainage problems, which in turn results in water ingress to the restaurant below and the common parts, but the Respondents deny that this is the case and submit that no credible evidence has been put forward to support the Applicant's case. The Respondents maintain that the water ingress has been caused by faulty drains and the Applicant's failure to maintain the same.

11. The decking was installed long before the date of grant of the Lease, the Respondents relying in this regard on the witness evidence of Ms Paver and on an email dated 25th January 2015 from Mr Robson, the previous owner. Mr Robson and his fellow leaseholders together purchased the headlease and granted themselves new leases, including the Lease, and therefore they knew of the decking and permitted its existence at the time the Lease was granted.

12. The old decking was replaced in April 2015, and the Applicant was informed of the planned replacement in advance and invited to inspect the flat roof, but an inspection did not take place until after the decking had been installed. In the Respondents' submission the decking formed part of the Property as originally demised in 2006 and as later purchased by the Respondents, and Counsel for the Respondents has referred the tribunal to the case of *Taylor v Hamer (2002) EWCA Civ 1130* on this point.

13. The Respondents also argue that by virtue of section 62 of the Law of Property Act 1925 and in circumstances where decking was installed

prior to the grant of the Lease, the Respondents now have a legal right to retain the decking.

14. The Respondents further argue that in view of the length of time for which the decking has been in place with the direct or tacit consent of the original landlord the covenants in the Lease will have been waived to the extent that they prohibit the placing of decking on the roof terrace.

15. Specifically as regards clause 3(7) of the Lease, the carrying out of unauthorised alterations is a one-off breach and would have been waived many times over. In any event, it is not accepted that the existence of the decking could constitute a breach of clause 3(7) as the decking is not fixed to the roof.

16. As regards clause 4(7) of the Lease, overloading is again a one-off breach in the Respondents' submission and again would have been waived many times over. In addition, no evidence has been provided to demonstrate that the decking overloads the roof terrace. On the contrary, the Respondents have submitted evidence from a structural engineer on 15th November 2015 who concluded that the load of the decking was within permissible allowance.

17. As regards clause 4(8) of the Lease, the Respondents submit that, apart from the obligation to keep the roof terrace clear and neat and tidy, the obligations in this clause are one-off obligations and again they would have been waived many times over. The Respondents also deny that any of these obligations have been breached. There is no evidence that the roof terrace has not been kept in a clear, neat and tidy condition, and the Applicant has come nowhere close to establishing that the flower box pots and decking may cause drainage problems. Finally, there is no evidence to support the allegation that the decking, any flower boxes or pots or any other object have caused damage to the structure of the building or the surface of the roof terrace.

Mr Miller

18. Mr Miller is a director of the Applicant's managing agents. Counsel for the Applicant sought to call him as a witness despite the fact that he had not given a witness statement. The tribunal gave permission for him to be asked a very limited series of questions on the basis that he could then be cross-examined by Counsel for the Respondents. He confirmed that a site inspection had taken place but was not sure of the exact date. He also confirmed that it remained his view that the decking needs to be removed.

19. In cross-examination by Ms Mattsson, he accepted that a photograph from June 2013 showed evidence of flooding despite the fact that the

decking had been removed from this area at that time. As to specific dates on which the rear terrace had not been kept clear, Mr Miller said that he was aware of it not being clear on 12th March 2016. Mr Miller also accepted that it was possible that debris from Flat 4 may have contributed to the cause of a blockage reported on 30th April 2012, although his view was that the decking on the Property's roof terrace was the main cause.

20. Ms Mattsson also put it to Mr Miller that the Applicant had provided no evidence of regular maintenance of the drains. Mr Miller said that there were regular maintenance checks of the drains and that the drains were periodically cleared but there was a limited budget. In response to a question about the flower pots on the flat roof of Flat 1, Mr Miller said that he did not think that those pots constituted a breach of the Flat 1 lease as they were not heavy and no soil was spilling out of them. In his view, the main problem in relation to Flat 5 (as distinct from Flat 1) was the decking, but the pots and the furniture were also part of the problem. He accepted that he had not weighed any of the pots.

Ms Paver

21. Ms Paver has been the leaseholder of Flat 1 since 2004. Counsel for the Applicant sought to call her as a witness despite the fact that she had not given a formal witness statement. The tribunal gave permission for her to be asked questions limited to the contents of her letter to the Applicant's managing agents dated 24th February 2016 which formed part of the hearing bundle. In that letter she states that the current leasehold owners of the Property knew when they purchased the Property that there were roof drainage issues that needed to be resolved but that nevertheless they built decking and a fence and have not allowed for any drainage on their side of the fence. This has caused real problems with debris being washed from their decking into the drain gully and there have been many blockages. At the hearing Ms Paver accepted that there had been decking in place previously but said that it had been in very poor condition.

Mr Rellis' evidence

22. Mr Rellis is a partner in charge of the building consultancy department at Keningtons LLP, a firm of chartered surveyors, and has over 20 years' experience as a building surveyor. The hearing bundle contains an expert witness report by him on the instructions of the Applicant. His report recommends, among other things, the removal of the decking to allow a thorough survey and inspection of the flat roof and protective measures being considered to prevent vegetation and/or debris from entering the concealed rainwater downpipe.

23. His firm's limited inspection revealed rainwater pooling between joists which was likely to be due to the joists being laid as a floating system

and obstructing the natural flow of rainwater. His report expresses the view that the current arrangement and construction of the timber-decked terrace could be causing drainage difficulties in discharging rainwater from the roof and also prevents the landlord from inspecting the roof surface.

24. At the hearing he said that in his view the decking was exacerbating the ponding by creating a water barrier and that the decking did not conform to good practice.

25. In cross-examination he accepted that there was some ponding where there was no decking but his view was that decking exacerbated the problem. He also accepted that it was possible that the ponding on the roof of Flat 1 was caused by sagging, but even if there was also some sagging on the roof of Flat 5 in his view the main issue was the decking preventing the water from draining away. Ms Mattsson put it to Mr Rellis that the Respondents had tested the drainage by flooding the roof terrace, but Mr Rellis' view was that this was an inadequate test unless the water remained in situ for a long period.

Mr DeFreitas' evidence

26. Mr DeFreitas is a chartered civil engineer with Aspect Property Services Ltd and has produced a two stage report in relation to the roof terrace on the instructions of the Applicant which is included in the hearing bundle.

27. In his view the overlaying of the asphalt deck with the particular timber decking chosen had led to dirt, debris and water falling between the gaps in the decking. The dirt and debris would have collected under the decking until such time as the rain was sufficient to wash them out and block the drains. In addition, the decking and furniture prevent easy inspection and therefore one is not alerted to the need for cleaning. Also, when the drains become blocked it can be without warning and during periods of heavy rain, so the water can build up and in the most adverse cases can breach the damp course of the front wall, leading to damp in the external wall and leakage through that wall. He also comments in his report that the regular cleaning of the drains appears not to be adequate to anticipate and prevent their being blocked, due to the steady build-up of debris under the decking. It is therefore pointless to inspect and clear the drains without also inspecting and cleaning the underside of the decking.

28. At the hearing Mr DeFreitas said that there was also a risk of the furniture on the roof terrace causing damage in the absence of a method of spreading the load.

29. In cross-examination Mr DeFreitas accepted that he had no first-hand knowledge of the factual position, save for that which was apparent from an inspection of the roof terrace. He also accepted that some of the items brought up by an unblocking of the drains were not items that one would expect to have been found under the decking of Flat 5. However, in his view the main problems were dirt and silt, albeit that silt was not specifically referred to in his report.

30. Ms Mattsson also referred Mr DeFreitas to the relevant rainfall records and put it to him that the problems have not always coincided with heavy rainfall and therefore it is not the case that the problems are triggered by heavy rainfall washing out debris from under the decking. Mr DeFreitas did not accept this point, arguing that many of the problems did coincide with there having been heavy rainfall.

Mr Quinton's evidence

31. Mr Quinton is a roofing specialist and has produced a report on the use of timber decking on flat roofs with particular reference to the Property. The report is included in the hearing bundle. His firm advises customers never to use timber decking on their flat roof because of the problems caused by the timber bearers on which the boards sit. Where the roof is asphalt it is affected by temperature. If pressure is placed on it then it can easily crack when cold and can easily be dented when warm. The placing of heavy objects on the decking such as large planters containing soil can lead to damage occurring much faster.

32. In cross-examination Mr Quinton said that decking is always potentially problematic and that the particular problem here was the combination of decking and asphalt. Ms Mattsson put it to him that sometimes decking did not cause damage, to which he responded that it was highly unlikely that no damage had been caused based on his 44 years of experience in this area. He added that any chair or table will damage asphalt, especially in the summer.

Mr Williams' evidence

33. Mr Williams is one of the Respondents and has provided three separate witness statements. In his witness statements he refers to the fact that he is a chartered member of the Royal Institute of British Architects and summarises his professional experience, but in this case he appears as a witness of fact and not as an expert witness.

34. Mr Williams' written witness statements are lengthy, taken in aggregate, and it is not considered practical to summarise their contents in detail. However, the contents are noted and a few points can usefully be referred to here. He states that he believes the decking originally to have been installed prior to the date of the Lease. The roof

deck has been kept clean and regularly swept, and he states that the assertions that the decking has caused drainage difficulties and that the roof terrace is overloaded are unsupported by evidence. In his view the Applicant has not focused on investigating or eliminating other possible causes of water ingress. The Respondents have sought meetings with the Applicant and/or its managing agents but the managing agents have on occasions not felt authorised to act on the issue. Mr Williams also summarises his understanding of the factual background to the replacement of the front decking and the question of access to inspect the roof membrane as well as his views on the Applicant's case in respect of each alleged breach. He further states that when the Respondents replaced the decking in April 2015 their contractors removed four bags of silt from under the decking, the majority of which was located at the low point of the terrace.

35. In cross-examination Mr Williams accepted that he has not lived at the Property since 2013 and that he has no day to day control over what happens at the Property. Ms Muir for the Applicant put it to Mr Williams that there were now sofas, armchairs, a Rattan table and 20 large pots and that therefore the weight on the decking was considerably more than previously. Mr Williams replied that all of the large pots have been in situ since the date of the Lease but he accepted that there had been some changes.

36. Ms Muir noted that Mr Williams had included in evidence an opinion from Mr Martin Brazier, an engineer at Clarke Nicholls Marcel. In cross-examination Mr Williams accepted that Mr Brazier did not actually inspect the Property and that he was reliant on information provided by Mr Williams himself. Ms Muir put it to him that this rendered Mr Brazier's opinion meaningless.

37. As regards his offer to allow the Applicant and/or its agents to inspect the membrane, Mr Williams conceded that this offer was conditional on the Applicant putting the decking back at its own cost following inspection. He also accepted that the Respondents had decided to replace the decking regardless of the views of the Applicant because the existing decking was rotten.

38. In relation to the leaks complained about by the owners of the restaurant, Mr Williams said that they had "made up" some of these.

39. On being re-examined by Ms Mattsson Mr Williams said that the decking was up for 15 days and that he gave the Applicant several options for inspecting during this period.

Respondents' further comments

40. Ms Mattsson referred the tribunal to extracts from Chitty on Contracts (32nd Edition) in arguing that the Applicant has either waived the relevant covenants or is estopped from relying on them. In her submission, granting the Lease with the decking in place was a representation by conduct and it would be unconscionable for the Applicant to be allowed to go back on this.

41. In Ms Mattsson's view the decking was a tenant's fixture, and in this regard she referred the tribunal to the detailed definition of "Demised Premises" in the Lease. As regards the distinction between fixtures and chattels, Ms Mattsson referred the tribunal to extracts from Woodfall: Landlord and Tenant (Westlaw UK) and again to the case of *Taylor v Hamer* (referred to earlier). Alternatively, in her submission, the Respondents have acquired an easement to use the decking under section 62 of the Law of Property Act 1925. In any event, the Applicant had failed to prove breach.

42. There was no evidence that any of the instances of flooding were caused by the decking, and part of the Respondents' evidence was that their roof only represents 6% of the total surface area capable of carrying water and other items into the drains.

Applicant's further comments

43. As regards the definition of Demised Premises in the Lease, paragraph (f) sets out certain elements which are excluded from the demise, and the structure of the terrace and any part of the premises above the ceiling are both excluded.

44. As regards the issue of waiver, in Ms Muir submission it is not for this tribunal to determine whether the Applicant had waived its right to forfeit the Lease. As regards possible waiver of the covenants themselves, Ms Muir referred the tribunal to paragraph 11.044.3 and submitted that passive acquiescence in a breach is insufficient and that in any event waiver of a breach was not relevant to a continuing breach.

45. Ms Muir said that it was not realistic to suggest that a breach can only be demonstrated by the Applicant accessing the roof and weighing everything and then obtaining a structural surveyor's report, especially given that the Applicant would have needed to obtain an injunction to gain access as the Respondents were only prepared to allow access subject to unreasonable pre-conditions. In relation to clause 4(8), by definition the roof terrace could not be kept clean with the decking on top. As regards the prohibition on placing flower pots and other items on the roof terrace, this covenant had been carefully drafted and the evidence indicated that placing such items on the roof terrace might

cause drainage difficulties. There was also the evidence of multiple call-outs to deal with drainage problems.

The statutory provisions

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

"(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if –
(a) it has been finally determined on an application under subsection (4) that the breach has occurred,
(b) the tenant has admitted the breach, or
(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

Tribunal's analysis

Clause 3(7) of the Lease

47. The evidence indicates that the decking is not annexed to the Property. It appears that the decking is not fixed to the roof terrace but effectively floats on timber spreaders and does not cut into the asphalt. Woodfall (paragraph 13.133), in distinguishing between fixtures and chattels, states that it depends on all the circumstances of the case and in particular on the degree of annexation and the object of the annexation. In this case the decking is not annexed to the Property at all, and so there is no purpose in analysing the object of the (non-existent) annexation. Prima facie, therefore, the decking must be a chattel.

48. In paragraph 13.134 Woodfall develops the above point further and gives examples of items which are generally considered to be chattels because they rest on the ground by their own weight, for example a greenhouse bolted to its own structure, a statue resting on a plinth or a wooden barn resting on stone caps. Whilst Woodfall does go on in paragraph 13.135 to state that a dry stone wall can be a fixture, this would seem to be very much the exception to the general rule, and in the absence of any annexation to the land (or in this case to the roof terrace) the decking is in our view a chattel.

49. The Respondents have referred us to the Court of Appeal decision in *Taylor v Hamer*. That case related to the question of whether certain flagstones within a landscaped garden were included in the sale of a property. In that case a large part of the focus was on the extent to which the seller had misled the buyer and on whether the flagstones were included in the sale regardless of whether they were fixtures or chattels. Whilst the case does contain some reference to fixtures, there is no specific focus on the distinction between fixtures and chattels, and in any event one could easily make a distinction between (a) flagstones embedded in – and forming an integral part of – a landscaped garden in the context of a sale of a property and (b) decking sitting on top of a roof terrace. Therefore, we are not persuaded that *Taylor v Hamer* is authority for the proposition that the decking is a fixture.

50. As regards the parties' respective submissions on the definition of Demised Premises, these are only relevant to the distinction between landlord's fixtures and tenant's fixtures and are not relevant to the distinction between fixtures and chattels.

51. It follows that the removal of any previous decking and the installation of new decking is not an alteration to the Property itself and nor in our view is it an addition to the Property within the meaning of clause 3(7). Furthermore, the evidence indicates that neither the removal of any previous decking nor the installation of new decking involved cutting, maiming, altering or injuring any of the walls or timbers of the Property or altering the landlord's fixtures.

52. Accordingly, in our view the Respondents are not in breach of clause 3(7) of the Lease.

Clause 4(7)

53. The alleged breach of clause 4(7) is one of overloading of the roof terrace. The Applicant has referred us to the number and weight of sofas, chairs, tables and planters and of the decking itself. It has also referred to the additional weight of pooled water as a result of the drainage problems.

54. Aspect Property Services Ltd has advised that the design maximum limit for structural integrity is a water level of 150mm, and the Applicant has stated in written submissions that on occasions the standing water has reached 300 – 500mm as a result of drain blockage. At the hearing, though, Mr DeFreitas of Aspect Property Services Ltd accepted that he had no first-hand knowledge of the factual position.

55. Mr Miller has given evidence regarding the presence of heavy pots but he accepted at the hearing that he had not weighed any of them. Mr Quinton has given evidence that the placing of heavy objects on decking

can cause problems, but he has also not weighed any of the actual items on the roof terrace and in any event the main focus of his evidence was on problems arising out of decking being placed on an asphalt roof.

56. There is some evidence that there has been an increase in the number, and possibly the weight, of items on the decking, but in our view the evidence that this has actually led to the roof terrace becoming overloaded is quite thin. The Applicant has argued that in order to obtain better evidence it would have had to obtain an injunction so as to obtain access to the roof terrace on acceptable terms. Whilst it might be arguable that this is the case, it does not follow that the tribunal should determine that there has been a breach of covenant on the basis of insufficient evidence. In our view, not enough evidence has been brought to show even in approximate terms what the weight of the items on top of the decking has been during the period of the alleged overloading nor to demonstrate that the roof terrace has in fact been overloaded.

57. Accordingly, in our view there is insufficient evidence to show that the Respondents are in breach of clause 4(7) of the Lease.

Clause 4(8)

58. Clause 4(8) of the Lease has two elements. There is a requirement to keep any roof terrace in a clean, neat and tidy condition. There is also a requirement not to place any flower box, pot or any other object on the roof terrace so as to cause or which might cause drainage difficulties or problems or other damage to the structure of the building or the surface of the roof terrace.

59. As regards the first element, in our view the requirement to keep an area clean, neat and tidy would seem to relate primarily to appearance and hygienic. The Applicant's evidence on this element of the covenant is quite weak in our view. No evidence has been offered to indicate that any of the chairs, tables or planters have been laid out in a manner which breaches this part of this covenant, nor has any evidence been brought to indicate that litter is left to accumulate on top of the decking, nor that soil or other debris is allowed to accumulate on top of the decking. There is an assumption on the part of the Applicant that soil, plant leaves and other debris get periodically trapped under the decking but even if this is the case it does not follow that this constitutes a breach of the obligation to keep the roof terrace in a clean, neat and tidy condition. We would have to be persuaded that the roof terrace underneath the decking is not in a clean, neat and tidy position, that this is a potential breach even though the debris concerned might well be invisible to anyone not specifically looking for it, and that the Respondents know that the roof terrace underneath the decking is not clean, neat and tidy and yet have failed to take reasonable steps to remedy the problem. We are not so persuaded.

60. As regards the second element, it is worth repeating this in full. This part of the covenant contains an obligation to *"not place any flower box pot or any other object on such roof terrace so as to cause or which might cause drainage difficulties or problems or other damage to the structure of the Building or the surface of the roof terrace".*

61. Although the evidence on this point is not overwhelming, having considering the parties' written and oral submissions and the clarifications obtained in cross-examination our view is that the Respondents have significantly increased the weight and size of the objects on the roof terrace. It is also common ground between the parties that, whatever the position in relation to any previous decking, the current decking has been placed there by the Respondents themselves.

62. By Mr Williams' own admission there had been a build-up of four bags of silt under the decking, which is indicative – albeit not conclusive – of drainage problems, as is the Applicant's evidence that on occasions the standing water has reached 300 – 500mm.

63. Mr Quinton has given expert evidence that timber decking of this nature always causes problems when placed on top of an asphalt roof, and he is a very experienced roofing specialist.

64. Mr Rellis, who is a very experienced building surveyor, has given expert evidence that his firm's limited inspection revealed rainwater pooling between joists which was likely to be due to the joists being laid as a floating system and obstructing the natural flow of rainwater. His report expresses the view that the current arrangement and construction of the timber-decked terrace could be causing drainage difficulties in discharging rainwater from the roof.

65. Mr DeFreitas, a chartered civil engineer, has given expert evidence that the overlaying of the asphalt deck with the particular timber decking chosen has led to dirt, debris and water falling between the gaps in the decking. In his view the dirt and debris would have collected under the decking until such time as the rain is sufficient to wash them out and block the drains. In addition, the decking and furniture would have prevented easy inspection and therefore one would not have been alerted to the need for cleaning.

66. The Applicant has also argued persuasively that soil and other debris will have fallen – and will still be falling – between the gaps in the decking and that the mere presence of the decking on the roof terrace makes it difficult to gain access to the roof terrace to clear away any build-up of debris, which can lead to a greater risk of drainage difficulties.

67. We also note the evidence of emergency call-outs in the hearing bundles. None of the specific call-out reports constitutes conclusive proof of problems emanating from the Property as a result of items placed on the roof terrace, but in our view the call-out evidence adds to the Applicant's case in relation to the second limb of clause 4(8). It supports the proposition that there has been a periodic build-up of water on the roof terrace and that debris from that roof terrace has blocked up the drains in sufficient quantities to indicate that the decking and other items on the roof may be causing drainage problems.

68. Following on from the above point, it should be noted that the second limb of clause 4(8) is very widely drafted, perhaps to reflect specific concerns about the roof terrace. It covers the placing of items on the roof terrace which "might cause" drainage difficulties or problems or other damage to the structure of the building or the surface of the roof terrace.

69. Mr Williams disputed the findings of the Applicant's various expert witnesses but he was not himself giving evidence as an expert witness. It was conceded at the hearing that the only expert witness relied upon by the Respondents, Mr Brazier, did not actually inspect the Property and that his opinion was reliant on information provided by Mr Williams himself.

70. In conclusion, we are satisfied on the balance of probabilities that the Respondents are in breach of the second limb of clause 4(8) and have been in breach since April/May 2015 by placing the new decking on the roof terrace and placing a large number of items on the decking, some of them heavy. It will also have been apparent to the Respondents that the pots containing earth will have become heavier still after any rainfall. In our view the presence of the decking at the very least "might cause" damage to the surface of the roof terrace within the meaning of clause 4(8). In addition, the items placed on the decking might exacerbate the risk of such damage, and the debris from the pots and elsewhere combined with the presence of the decking at the very least "might cause" drainage difficulties. These are issues which have been raised repeatedly with the Respondents, and therefore they cannot argue – to the extent relevant – that they were unaware of these issues. The Respondents submit that they have tried to engage with the Applicant on these issues, but in our view the evidence indicates on balance that the Respondents set unreasonable pre-conditions for engagement and decided to place the decking on the roof terrace regardless of the views of the Applicant or its advisers.

71. We do not accept the Respondents' submission that even if they have done something in breach of the second limb of clause 4(8) the breach was a one-off breach. The second limb of clause 4(8) contains covenants which constitute continuing obligations and therefore the

breach is ongoing as is the potential for further drainage difficulties, damage or other problems.

72. We also do not accept that the Applicant has waived this covenant. As noted by the Applicant in its submissions a distinction needs to be drawn between a waiver of the right to forfeit for breach of covenant and a waiver of the covenant itself. Whether the Applicant has waived its right to forfeit the Lease is not within the jurisdiction of this tribunal to determine and accordingly we express no view on this point.

73. As regards waiver of the covenant itself, Ms Muir for the Applicant has referred us to paragraph 11.044.3 of Woodfall on this point. In Woodfall it is stated that mere passive acquiescence in a breach of covenant is not sufficient to constitute waiver. The question is whether the conduct or omissions of the covenantee have put it in such an altered relation to the covenantor as makes it manifestly unjust for the covenantee to be granted the relief it seeks. Woodfall goes on to refer to the case of *Attorney General of Hong Kong v Fairfax (1997) 1 WLR 149* in which a lease covenant prohibited the erection of buildings other than single storey villas but in practice high rise blocks had been erected on parts of the land concerned for 45 years. On those facts it was held that the covenant had been abandoned and therefore could not be enforced to prevent the erection of further high rise blocks. The Respondents have not offered any legal authority challenging this proposition, and it seems to us that for a covenant to have been waived for all time the circumstances need to indicate that it has effectively been abandoned by the covenantee. In our view there is no evidence in our case that the Applicant as landlord has abandoned the covenant not place any flower box pot or any other object on such roof terrace so as to cause or which might cause drainage difficulties or problems or other damage to the structure of the Building or the surface of the roof terrace.

74. As regards the Respondents' reference to section 62 of the Law of Property Act 1925, this point has not been argued in detail but it is not accepted that the existence of any previous decking in itself entitled the Respondents to install new decking regardless of the fact that to do so would constitute a breach of clause 4(8) of the Lease. Likewise, the Respondents' estoppel argument has not been argued in detail but it is not accepted that the Respondents have established that the Applicant is estopped by its own actions from relying on breaches of this clause.

75. Accordingly, we find that the Respondents are in breach of the covenant contained in the second limb of clause 4(8) of the Lease, namely the covenant to *"not place any flower box pot or any other object on such roof terrace so as to cause or which might cause drainage difficulties or problems or other damage to the structure of the Building or the surface of the roof terrace".*

Costs

76. No specific cost applications were made at the hearing itself, with both parties reserving their positions. As stated at the end of the hearing, if either party wishes to make any cost applications it/they must do so in writing, together with reasons of a reasonable length, within 14 days after the date of issue of this decision.

Name: Judge P Korn **Date:** 16th May 2016

RIGHTS OF APPEAL

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

B. 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.

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

D. 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.