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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LBC/2017/0028**
Property	:	**34a Halliford Street, London N1 3EL**
Applicants	:	**Mr S McLusky & Ms K Tomashevski**
Representative	:	**Ms H. Matthews; Ellington Estates**
Respondent	:	**Mrs A. Greer**
Representative	:	**Mr Thomas Talbot-Ponsonby of Counsel**
Type of Application	:	**Determination of Breach of Covenant; Section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Judge Lancelot Robson** **Mr J F Barlow JP FRICS** **Mrs R Turner JP BA**
Date and venue of Hearing	:	**25th May 2017** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**6th July 2017**

DECISION

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DECISION SUMMARY

(1) The Tribunal determined that no breach of a covenant or condition in the Lease had been proved, and refused the application made by the Applicants pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002.

Preliminary:

1. By an application dated 24th February 2017 the Applicants applied for a determination under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the Act) that breaches of the lease of the property dated 21st April 2008 (the Lease) had occurred, prior to the issue of a notice under Section 146 of the Law of Property Act 1925. The Respondent is the current Lessee. An extract from Section 168 is attached as Appendix 1.

2. Directions for a hearing were given on 3rd March 2017 (subsequently amended on 9th and 20th March, and on 4th April 2017). The Applicants made written submissions in their application and on 19th April 2017, supported by the second Applicant's witness statement dated 22nd April 2017. The Applicants made a further submission dated 19th May 2017 outwith the Directions. The Respondent made written submissions in her statement of case dated 9th May 2017 and her witness statement of the same date. All these submissions were supplemented by oral submissions at the hearing.

Inspection

3. The Tribunal inspected the common parts of the Building and the subject flat in the company of the parties and their legal advisers on the morning of the hearing. The Respondent's husband and son were also present. 34 Halliford Street is a basement, two storey and attic Victorian terraced house divided into two maisonettes at some time in the past. The Applicants occupy the basement and ground floor property, and the Respondent and her family occupy the upper maisonette. There is a portico at ground floor level which gives exclusive access to the upper property, but was agreed to be a common part. The front garden, where bins etc are kept, is also part of the common parts. The rear garden is divided into two parts, the part nearest the house is demised to the lower maisonette, and the other part is demised to upper maisonette. An external staircase at the rear allows access from the first floor of the upper property to the part of the garden demised to it. The paintwork on the stucco at the front of the Building was old, but generally in fair condition

4. Internally, the Tribunal saw an attic bathroom with a tiled floor at 3rd

floor level. The steep stairs and door at that level had restricted headroom. On the 2nd floor was a large double bedroom and a large kitchen/diner. At first floor level was a bedroom at the rear with a living room and a further bathroom at the front. The Tribunal could see no sign of occupation other than by the Respondent's family. The flat and fittings were finished to a very high standard. The state of decoration was also of a high standard. The Respondent confirmed at the inspection that she had arranged for the portico and the small wall in front of it to be repainted. The new paintwork concerned appeared in good condition, and was of a very similar colour to the rest of the building. The Respondent's rear garden had paved paths and artificial grass. The fences appeared to be new and in good condition. The Respondent stated that this was to facilitate access for the contractors who were treating the Japanese Knotweed. There was no sign of any Japanese Knotweed anywhere on the demised premises or elsewhere at no 34, although the Tribunal noted a small plant on the opposite side of the garden of the adjoining property (on the right hand side as viewed from the road), which may have been Knotweed, it was too far away for a positive identification. There was no sign of a bamboo screen on the external staircase or of any damage to it, although the Respondent admitted she had erected one to protect her very young grandson, and showed us the remains of the screen in her garden. The Tribunal also saw two jasmine plants under the railings of the front garden, both of which appeared to be growing well. The front garden itself was tidy with no sign of rubbish outside the bins at the time of its visit.

Hearing

Relevant Agreed Facts

5. The following chronology was common ground between the parties. The Respondent has lived in the upper maisonette since 15th March 1991. The Applicants have lived in the lower maisonette since 9th December 1998. On 9th September 2002 the Applicants purchased their long leasehold interest in the lower maisonette from the London Borough of Islington. On 21st April 2008 the Respondent purchased her long leasehold interest in the upper maisonette. On 31st March 2015 the Applicants purchased the freehold interest in 34 Halliford Street from the London Borough of Islington. Prior to that purchase, the whole of No 34 was managed by Partners for Improvement ("Partners") on behalf of the London Borough of Islington.

Applicants' case

5. At the hearing, the Applicants outlined the relevant provisions in the Lease as follows;

Clause 3(13):
"to be responsible for and to indemnify the [landlord] against all damage occasioned to the demised premises or any other part of the Building or any adjacent or neighbouring premises or to any person caused by the act or default or negligence of the Tenant or the servants agents licensees or invitees of the Tenant.

Clause 3(16):
Not to do or suffer or permit to be done or allow to be done or to bring or allow to be brought on to the demised premises or the Building or any part thereof any act matter or thing of a noisy dangerous noxious offensive inflammable or combustible nature or which may cause damage or be or grow to be a danger nuisance annoyance or disturbance to the [landlord] or to the occupiers for the time being of any of the other dwellings in the Building or to adjoining or neighbouring premises or to the public including for the avoidance of doubt any such matter or thing which would or might in the reasonable opinion of the [landlord] amount to racial harassment to such occupiers or the public or whereby any insurance of the demised premises or the Building may become void or voidable or be vitiated or lessened in value and on receiving notice from the [landlord] or its duly authorised officer of anything done or brought on to the demised premises or the Building or any part thereof which in the opinion of the [landlord] shall be inconsistent with this covenant forthwith to discontinue or remove the same and to take to the satisfaction of the [landlord]or its duly authorised officer as aforesaid all steps necessary to prevent any recurrence of the matter or matters mentioned in such notice.

Clause 3([18]):
At all times during the said term at the Tenant's expense to comply in all respects with the provisions and requirements of any relevant legislation for the time being in force and in particular the Town and Country Planning Act 1990 all orders or regulations made under such legislation and all licences consents and conditions granted or imposed thereunder and to produce to the [landlord] on receipt of notice thereof any notice order or proposal therefor made given or issued to the Tenant under or by virtue of such legislation affecting or relating to the demised premises and at the request of the [landlord] to make or join with the [landlord] in making every such objection or representation against the same that the[landlord] shall deem expedient and to indemnify (as well after the expiration of the said term by efflux (sic) of time or otherwise as during is continuance) and keep indemnified the [landlord] against all liability whatsoever in respect of such matters

Clause 3(20)
Not to make any structural alterations or additions to the Building or to the demised premises whatsoever unless authorised by any relevant legislation for the time being in force in particular the Town and Country Planning Act 1990 and first having obtained the [landlord's] written consent

Clause 3(9)
"Not to use or permit or suffer to be used the demised premises or any part thereof other than for residential purposes

(a) Subject to the provisions of Clauses 3(11) 3(14) and 3(15) hereof not to sublet or otherwise part with possession of any part as opposed to the whole of the demised premises"

6. The Applicant submitted that the Respondent had committed the following breaches of the Lease by:

a) allowing Japanese Knotweed to grow in the garden in the demised premises contrary to Clauses 3(13) and 3(16)

b) left rubbish on part of the building, which the previous freeholder had informed the Applicants contained Japanese Knotweed JKW) contrary to Clauses 3(13) and 3(16).

c) caused serious damage to a jasmine plant growing over the front fence belonging to the Applicant contrary to Clauses 3(13) and 3(16) of the Lease.

d) damaged the common parts of the Building by painting them without the Applicant's permission contrary to Clauses 3(13) and 3(16)

e) altered the layout of the demised premises to change it from a 3 bedroom property to a 2 bedroom property without complying with the Building Regulations contrary to Clauses 3(18) and 3(20)

f) installed a shower room on the first floor in June 2016 without complying with the Building Regulations contrary to Clauses 3(18) and 3(20)

g) altered the layout of the demised premises to change it from a 3 bedroom property to a 2 bedroom property without the Applicants' consent contrary to Clause 3(20)

h) erected a bamboo screen on an external staircase forming part of the Building without first obtaining the Applicants' consent contrary to Clause 3(20)

i) sublet a room in the Flat thus parting with possession of part as opposed to the whole of the demised premises contrary to Clause 3(9)(a)

7. On behalf of the Applicants it was submitted that;

a) Japanese Knotweed ("JKW")
is a plant dangerous to both the environment and to the integrity of buildings. It is an offence pursuant to Schedule 9 of the Wildlife and Countryside Act

1981 to plant or otherwise cause JKW to plan or otherwise cause JKW to grow in the wild. While the Environment Agency Code of Practice states that it is not an offence to have JKW on land, nor is it a notifiable weed, it is a cause of concern to neighbouring properties where it could spread if not controlled. Under Sections 33(1)(a) and(b) of the Environmental Protection Act 1990 all JKW material and soil containing it is "controlled waste". The movement of controlled waste must be carried out by licenced operators.The Respondent had allowed JKW to grow in her garden since (at least) 2010. Rubbish bags containing JKW had been left by the Respondent on the freehold part of the property in 2012. The Respondent was responsible for any JKW growing in the garden. JKW had damaged the garden and was a threat to the Applicant's garden and property. Mortgage lenders were reluctant to lend on properties with JKW, as noted in an RICS information paper published in 2015 (in the bundle). It might affect the valuation of a property. The Respondent did not deny the presence of JKW in her garden. The Respondent alleged that the freeholder was responsible for dealing with JKW, and that there was a contract (arranged by the previous freeholder) in place to treat the JKW, but no details had been provided by the previous freeholder when the Applicants purchased the property in 2015. If the Respondent had the benefit of any such contract, it was for her to take the benefit of it, and it remained her responsibility under clauses 3(13) and 3(16) of the Lease not to allow the JKW to cause damage.

b) **Rubbish**

It was submitted that in her witness statement, the Respondent admitted having JKW in her garden in July 2012. The Respondent also admitted that she had (on the instruction of Partners) left sealed bags in the freehold part of the property [front garden] containing JKW. She had also admitted taking the bags to the Council's recycling centre in Hornsey Street. Thus the Respondent was in breach of the Environmental Protection Act 1990. In 2016 the Applicants requested information from the Respondent about the JKW and its removal. It was the Respondent's responsibility to provide this information, not the Applicants' responsibility to obtain it from the previous freeholder.

c) **Jasmine plant**

The Applicants submitted that they had planted (inter alia) the jasmine plant in the [front garden] in 1995 and had maintained the front garden since moving in in 1998. At a previous hearing in another case, the Respondent had admitted that the Applicants had maintained the [front garden] since 1998, and so it was contradictory to now deny that the Applicants planted and maintained it.

d) **Painting**

The Respondent had caused damage to the common parts by painting them very poorly in a slapdash fashion without the Applicant's permission. The Applicants refuted the Respondent's claim that she had been given permission verbally to paint the front door and the porch.

e) **Failure to comply with the Building Regulations when changing it from a 3 bedroom property to a 2 bedroom property** and

f) **Failing to get the Applicant's consent to changing the layout as noted above**
The Respondent had altered the layout of her demised premises. The Respondent had provided no evidence of compliance with the Building Regulations, or a Regularisation Certificate. The Respondent, at the hearing of the previous case, (LON/00AU/LSC/2016/0495 (still undecided at the date of this hearing)) contended that she did not require the Applicants' consent as no structural alterations were involved. In their subsequent submission dated 19th May 2017 after learning of a retrospective application to regularise the installation of a bathroom by the Respondent, the Applicants submitted that they believed that the Respondent had misled the Building Control Surveyor. The bathroom was not being refitted in their view, it was installed after a period of 14 years during which time it had been used as a bedroom. Furthermore, the Respondent had admitted (again in the case noted above) that the removal of the original bathroom and other alterations in the attic had been done without the landlord's permission or Building Regulations consent. The Applicant only wished to regularise the position with the three bathrooms in accordance with the Lease by the Respondent complying with the Building Regulations.

g) installing a shower room on the first floor in June 2016
The Respondent had also admitted that she had recently installed a bathroom/shower room in the property. She should remedy this by applying for a Regularisation Certificate for any unauthorised work.

h) erecting a bamboo screen
The Applicants noted that the Respondent had remedied this breach, and made no further submission.

i) subletting a room in the Flat
The Applicants submitted that they had seen persons who were not members of the Respondent's family coming and going, and appeared to be living in the flat. In their subsequent submission, they noted that the Respondent (in compliance with Directions in this case) had requested the Tribunal not to disclose the names of the persons living there to the Applicants. The Tribunal was invited to draw its own inference from this request.

Respondent's case

8. The Respondent's submissions are summarised as follows;

a) Japanese Knotweed

b) rubbish

The Respondent submitted that the previous landlord's contractors and staff

had inspected her garden on numerous occasions between 2004 and 2007 in response to her request for repairs and maintenance to the fencing, garden wall and the tree. During that period she had noticed a plant which reminded her of bamboo. In early May 2012 she had started clearing her garden. The waste was put out each week in the communal [front] garden next to the waste bins for collection. She also used Islington's Bulky Collection Service to take away a further 20 bags of garden waste on 19th and 21st May 2012. By 22nd May she had cleared the garden and put down weed mats in anticipation of fence repairs, for which she had permission from the landlord's agent. She also reported that the tree required attention to the landlord, who sent a tree specialist on 26th June 2012. He reported to her that there were small amounts of JKW in her garden, and two adjacent gardens. He said that he would notify Islington so that they could arrange for its removal. A JKW specialist came on 10th July 2012. He advised that the weed mats be taken up so that he could identify the area requiring treatment. On 26th July 2012 the landlord's agent advised her to seal up the remaining bags in the front [communal] garden, which she did. They were subsequently removed. After some delay resulting in a complaint by the Respondent, she learned that the landlord had made a contract on 6th September 2012 for a professional company to treat the JKW. The contract included an (extendable) treatment programme initially from 2102 -2016, and a warranty for further treatment (a copy was in the Respondent's bundle). This had been provided to the Applicants, but despite the correspondence on the subject, they appeared still to doubt that the treatment programme was in existence. At the request of the Respondent, the contractors had returned in 2016 to deal with a small further outbreak, and at that time they had carried out a full further inspection of the garden, including the areas between the fences to ensure there was no other JKW. The contract had been extended to the end of 2017 under the warranty.

The Applicants had raised this issue in March 2016, but appeared to ignore what she had said in her correspondence on the subject, when returning to the issue. The Respondent was particularly concerned by the terms of a letter written by the Applicant's adviser dated 17th May 2016 in response to the Respondent's Section 22 Notice, [Tribunal's note; a necessary preliminary to an application for the appointment of a manager] which amongst other threats of legal action included a statement that the Applicants were encouraging neighbours to bring a claim for diminution in the value of their properties and the costs of any JKW treatment. In fact this threat had already been carried out by 17th May 2016, as an employee of Partners came on 13th May 2016 to investigate a complaint from the the occupier of 35A Halliford Road about the JKW, and the state of the fence. She had referred the employee to the JKW contract taken out by his own office. The Applicants had spent a great deal of time investigating her property sale, and the previous property file, but had not taken the obvious course of telephoning Partners to verify what the Respondent had told them. The Respondent submitted she was being harassed by this application, and that the Applicants had not demonstrated any damage. She had not brought the JKW onto the property, thus she was not in breach of the covenants.

c) Jasmine

The Respondent submitted that her father had planted the jasmine plant many years ago. The Applicants had never objected to her pruning the jasmine until 14th November 2016 after she had served the Section 22 notice. She disputed that the plant formed part of the Building or the demised premises. She did not bring the jasmine onto the Building. Thus there was no breach of Clauses 3(13) or 3(16).

d) Painting

The Respondent agreed that she had repainted the area around the portico, and the exterior of her front door. She had received verbal permission to do so from the previous landlord some time ago, as long as she repainted in the same colours. The Respondent submitted that the painting had been done properly, there was no damage to the Building, and that she was not in breach of covenant.

e) Building Regulations Consent for alterations

f) Landlord's Consent to alterations

The Respondent submitted that the Applicants were fully aware that there was no prohibition on changing the use of rooms. They had carried out a number of alterations to their property during the currency of their lease, including removal of a structural wall, making an open plan living room, and opening a new door within the communal area. The previous landlord had taken no action against them for breach of their lease. The Respondent had only changed the use of her rooms, and the layout remained the same, as was clear from their own evidence.

The Respondent submitted that the work to the third bedroom and other alterations complained of was completed prior to the grant of the Lease dated 21st April 2008. The previous landlord was aware of the work. Its Right to Buy report dated 11th July 2002 (in the bundle) listed improvements to be disregarded in the valuation as; conversion of bathroom to bedroom and storeroom to bathroom, fully fitted kitchen, tiling to walls in kitchen, ensuite shower to bedroom. The floor plan in the RTB report was identical to the one used by Foxtons (referred to by the Applicants) in 2015. These showed 5 rooms and an attic. No walls had been removed or added, and no additional rooms had been created. All she had done was to change the use of her rooms, which was not prohibited by the Lease. The Senior Building Control Surveyor from Islington inspected on 20th July 2016 when work had started [on the first floor bathroom] and stated that refitting the bathroom in the same position and redecorating were not notifiable works. This had been reaffirmed by Islington in its email dated 21st April 2017. The Respondent contended that she did not need permission from the Applicants because she had not made any structural alterations or additions. Thus there was no breach of clauses 3(18) or 3(20) of the Lease.

g) 2016 Shower Room
See submissions above

h) bamboo screen
The bamboo screen was connected with plastic clips to the railings of the external stairs leading from her property to her rear garden to protect her young grandson. The screen had subsequently been removed. The railings were not altered in any way. There was no structural alteration or addition, and thus no breach.

i) subletting
The Respondent submitted that she only discovered this allegation of a breach in the Application. She considered this approach unreasonable, as she had not been given the opportunity to answer the Applicants' concerns. The Respondent had family staying with her as guests in her home. They had their own home. She was not subletting. There was thus no breach of clause 3(9)(a).

Decision

9. The Tribunal considered the submissions and evidence. It was surprised that this application had been made. The Tribunal considered that the Applicants (who appeared to have been legally advised from the beginning of 2016 at least) seemed unaware of the effect of the law relating to Privity of Estate, which briefly stated, requires the parties taking an assignment of a lease to stand in the shoes of the original lessor/lessee. Also, the terms of a lease cannot have effect prior to the date of a lease without a specific agreement to the contrary. One of the effects of these basic legal principles on this case is that the Applicant landlords are bound by the actions (and inactions) of their previous landlord, and cannot seek to reopen matters occurring prior to their ownership of the freehold interest. At the hearing it was suggested to the Tribunal that breaches complained of beginning prior to the Applicant's ownership were "continuing breaches" and thus actionable. Whilst this might be correct in certain circumstances, if the previous landlord is deemed to have waived or accepted a breach, then the current landlords are bound by the previous landlord's actions. The Tribunal noted that the Applicants stated in answer to a question from the Tribunal that they had made no preliminary enquiries prior to the purchase of the freehold.

10. The Tribunal also noted that the Applicants apparently did not understand that the burden of proving an allegation of a breach of covenant has occurred on the balance of probabilities lay with them, and not the Respondent. Thus phrases like "the Respondent is put to strict proof" are unhelpful. It is always for the party making an allegation of breach to bring sufficient evidence to prove it, not for the party defending an inadequately evidenced allegation to prove that s/he is not in breach.

11. Following the headings above it found as follows:

a) allowing Japanese Knotweed (JKW) to grow in the garden in the demised premises contrary to Clauses 3(13) and 3(16) -

It seemed to be common ground that the JKW had been growing in the Respondent's garden since at least 2004, although it had escaped the notice of several of the previous landlord's staff during that period, some of whom might have been expected to have recognised it. There was no evidence, nor was it suggested, that the Respondent had brought JKW onto the property, or should have recognised it as such. The previous landlord's contractor identified it on 26th June 2012 and noted that it was also growing in several neighbouring gardens but not, it should be noted, on any other part of No 34, particularly the Applicants' garden. The previous landlord (which had been pressed to take action by the Respondent) had entered into a contract to eradicate the JKW on 6th September 2012. The contract set out a programme of treatment until 2016, with an extendable warranty. The last treatment had been carried out in April 2016. There was evidence in the bundle that the period of cover had been extended under the warranty until December 2017. The terms of the relevant clauses in the lease are set out above. The Tribunal found that there was no breach of Clause 3(13) of the Lease, as no actual damage was pleaded, and also the Applicants had specifically stated that no charge had been made to them by the previous landlord for the cost of the eradication measures in the period 2012 - 2015, while it was the landlord.

Relating to Clause 3(16) the Tribunal noted that there was no evidence before it as to the source or cause of the JKW infestation. It had infested several adjacent gardens by the time it was identified by the previous landlord's contractor in June 2012. There was also no evidence before the Tribunal that the infestation had started in the Respondent's garden. The previous landlord had not issued a notice to the Respondent under Clause 3(16) but had decided to arrange for the treatment of the JKW itself. The Applicants submitted that it was in fact the Respondent's responsibility under the Lease to treat the JKW, and not the landlord's responsibility. However the Applicants, as its successors, are obliged to abide by the previous landlord's decision. For its own reasons, the previous landlord had accepted responsibility for treating the JKW, and it is now too late to reopen that decision. The Applicants also stated at the hearing that the treatment was taking too long, and that the Respondent should have employed another more efficient contractor. However that suggestion was made without any evidence, and showed lack of experience in dealing with JKW. The information set out in the preamble to the JKW eradication contract in the bundle explains the standard method of successfully dealing with JKW, and is worth reading.

The Tribunal decided that the terms of clause 3(16) appeared not to

have been fulfilled. The Applicants did not specifically allege that they had served a specific notice under the clause, although it is clear that they have complained on many occasions that the Respondent is in breach of it. However, even if such a notice was deemed to have been served, The Tribunal decided that no more could reasonably have been done by the Respondent. By the time the Applicants became the landlord in 2015, all reasonable steps had already been taken at the behest of the previous landlord. The Applicant's complaint on this point is premature. The Tribunal decided that no breach of clause 3(16) had been proved in relation to the JKW found to be growing on the property.

b) rubbish left in bags on part of the building, which the previous freeholder had informed the Applicants contained Japanese Knotweed, contrary to Clause 3(13) and 3(16) -

this allegation appears to fail on the facts. All the events complained of occurred in 2012, at a time when the Applicants were not the landlords. There was no continuing breach of covenant when the Applicants became the landlords. The Respondent also appears from the evidence before the Tribunal to have been acting on the instructions of her then landlord. The current landlord cannot seek to reopen that matter in this application. The Applicants devoted considerable time and effort in trying to prove that the Respondent had committed one or more criminal offences in the handling and disposal of the JKW. However this Tribunal has no jurisdiction to decide such matters, nor are they relevant to the Applicant's claim that the Lease had been breached. The Applicants offered no evidence of damage or cost associated with the alleged breach, thus the Tribunal decided that no breach of clause 3(13) had occurred.

Relating to Clause 3(16), again, the events complained of occurred in 2012. The previous landlord had made no complaint, but had in fact directed that the bags be sealed to await disposal. There was no evidence before the Tribunal that the previous landlord had ceased to demand rent or take any other action suggesting that it considered the Respondent to be in breach of the Lease. The Applicants are bound by the actions of their predecessor. Thus the Tribunal found that no breach of clause 3(16) had occurred.

c) caused serious damage to a jasmine plant growing over the front fence belonging to the Applicant contrary to Clauses 3(13) and 3(16) of the Lease.

The evidence from the parties shed rather less light on the true factual situation than might be expected. Both referred to only one plant, and both claimed to have planted it. One claimed it was seriously damaged, and the other claimed that it had been pruned. The Tribunal saw two plants, and both appeared to be growing vigorously. The Applicants' evidence was internally contradictory. They claimed in a written statement of case to have planted it in 1995, but immediately afterwards claimed to have moved in 1998. The Respondent's account at least was consistent with other facts, apart from the

number of plants actually present on inspection. Whoever planted the plants, they legally became part of the land. The relevant photographs in the bundle date the planting to a date well before the Applicants' purchase of the freehold. Thus the planter, or planters, planted the plants on land belonging to the freehold, over which the lessees only had rights for restricted purposes. There was no evidence that the previous landlord had objected to the plants. The Respondent's evidence at the hearing was that she had pruned the jasmine from time to time, again, apparently without complaint from the previous landlord. The Tribunal considers that the new freeholders are entitled to change their view on the matter if they wish to take over maintenance of the jasmine, as the previous arrangement appeared to be a matter of concession, However they must give reasonable notice, and also abide by the rights given by the leases on the property.

The Tribunal decided that it could find no evidence of any damage caused to the Applicants' property. Thus there was no breach of Clause 3(13). Also the jasmine itself appeared not to fall within the items prohibited by Clause 3(16), assuming the Respondent planted one or both plants. The actions of the Respondent in pruning it had been condoned by the previous landlord. There was no evidence of a formal notice to the Respondent under the Lease to end the practice, only claims that the Respondent was in breach of the Lease by doing so. The Tribunal decided that no breach of Clause 3(16) had been proved.

d) damaged the common parts of the Building by painting them without the Applicant's permission contrary to Clauses 3(13) and 3(16)

The Tribunal decided, after inspection, that contrary to the Applicants' assertion in their application, the painting done by the Respondent was of a reasonable standard. The colour was substantially the same, and only on the closest inspection could it be differentiated from the previous colour. Indeed the chairman had to have the edge pointed out to him to observe the difference. The act of painting itself is not specifically prohibited by the Lease, and certainly not by Clauses 3(13) and 3(16). The Tribunal decided that no damage had been done, thus there was no breach of Clause 3(13). If anything, the paint is protecting the Building. The Tribunal also decided that there was no reasonable claim that the painting was an annoyance etc, within the terms of Clause 3(16), so there was no breach proved relating to that clause. For clarity, the landlord remains entitled to repaint the whole Building, and charge for it in accordance with the 2nd Schedule to the Lease, as the work was done without their permission.

e) altered the layout of the demised premises to change it from a 3 bedroom property to a 2 bedroom property without complying with the Building Regulations contrary to Clauses 3(18) and 3(20)

The facts relating to this matter have been set out above. The Applicants asserted that the Respondent had admitted to failing to obtain consent when

doing these works during the hearing of the previous case relating to the appointment of a manager. However the work complained of was carried out prior to the grant of the Lease in 2008, so there was no breach of the Lease. Perhaps more importantly for the current landlords, the work was carried out more than 10 years ago, so the relevant authority almost certainly has no further enforcement rights, but they should take their own legal advice on that matter.

f) installed a shower room on the first floor in June 2016 without complying with the Building Regulations contrary to Clauses 3(18) and 3(20)

The Tribunal decided that the Respondent's Regularisation Certificate dated 12th May 2017 and email dated 24th April 2017 from Islington effectively disposed of this matter. The Applicants voiced suspicions relating to what the Building Control Officer had been told, (without any supporting evidence), but this was insufficient evidence to prove a breach on the balance of probabilities.

g) altered the layout of the demised premises to change it from a 3 bedroom property to a 2 bedroom property without the Applicants' consent contrary to Clause 3(20).

The Tribunal noted that the terms of Clause 3(20) require consent for "structural" alterations. As the Respondent submitted, there has been no alteration to the physical layout of the premises, merely a change of the use of some individual rooms. In accordance with the general rules of construing leases, the word "structural" must be given its plain natural meaning. "Structural" in the context of this clause relates to those items giving the property stability, so that it does not fall down, such as the main supporting walls, floors, or roof. For example, plaster boards on a light timber frame are not a structural wall, but a wall built to bear heavy weight, such as a cavity brick wall, is usually a structural wall. The presence or absence of bathroom or kitchen fittings (as argued by the Applicants) would not normally be expected to affect the structural stability of a property. The Tribunal accepted the Respondent's submission that there was no breach of Clause 3(20)

h) erected a bamboo screen on an external staircase forming part of the Building without first obtaining the Applicants' consent contrary to Clause 3(20)

Following from the Tribunal's decision above, attaching a light bamboo screen to railings with clips is not a "structural alteration". The Tribunal decided that there was no breach of Clause 3(20).

i) sublet a room in the Flat thus parting with possession of part as opposed to the whole of the demised premises contrary to Clause 3(9)(a)

The Applicants' case on this point was based solely on the observation of two people seen leaving the Respondent's property early in the morning on a

number of occasions, whom they did not recognise. The Respondent stated in her witness statement that these people were relations of the family staying as guests. The Applicants submitted that the fact that the Respondent had requested that the names of these people should not be revealed to them, should be treated by the Tribunal as significant, and draw its own conclusions. In the absence of any other evidence, the Tribunal found no reason to do so, as it had no evidence to doubt the Respondent's explanation. The Tribunal decided there had been no breach of Clause 3(9)(a).

10. The Tribunal therefore determined that no breaches of covenants or conditions in the Lease had been proved and refused the application made by the Applicant landlords pursuant to Section 168(4) of the Act.

Tribunal Judge: Lancelot Robson Dated: 6th July 2017

<u>Appendix 1</u>

Section 168 Commonhold and Leasehold Reform Act 2002

(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 (c20) (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) 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.

(3) But a notice may not be served by virtue of subsection 2(a) or (c) until after the end of a period of 14 days beginning with the day after that on which the final determination is made.

(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.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which-
(a) has been, or is to be, referred to arbitration pursuant to a post-dispute resolution agreement to which the tenant is party,
(b) has been the subject of determination by a court, or
(c) has been the subject of a determination by an arbitral tribunal

pursuant to a post-dispute resolution arbitration agreement.

169 Section 168: supplementary

(1) – (6) ....

(7) Nothing in Section 168 affects the service of a notice under Section 146(1) of the Law of Property Act 1925 in respect of a failure to pay-
(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).