FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LBC/2018/0050**
Property	:	**Flat 3, 37 Platts Lane, London NW3 7NN**
Applicant	:	**Platts Lane Limited**
Representative	:	**Gary Pryce, Counsel**
Respondent	:	**Edward Randall**
Representative	:	**Simon Lane, Counsel (first day) and Sam Madge-Wyld, Counsel (second day)**
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** **Mrs A Flynn MRICS** **Mrs J Hawkins**
Date and venue of Hearing	:	**31st August and 1st November 2018 at 10 Alfred Place, London WC1E 7LR**
Reconvene for decision	:	**5th December 2018**
Date of Decision	:	**14th January 2019**

DECISION

Decisions of the tribunal

(1) One or more breaches of the following covenants/conditions have occurred:-

- Covenant contained in clause 2(10) – CCTV
- Condition contained in paragraph (7) of Second Schedule – use of garden and erection of shed
- Covenant contained in paragraph (4) of Fourth Schedule – use of garden and erection of shed
- Covenant contained in paragraph (10) of Fourth Schedule – use of garden and erection of shed.

(2) No other breach of covenant or condition to which this application relates has occurred.

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 have occurred under the lease of the Property ("**the Lease**").

2. The Applicant is the current freehold owner of the building ("**the Building**") of which the Property forms part and the Respondent is the current leasehold owner of the Property. The Lease is dated 14th December 1994 and was originally made between Glenwood Productions Limited (1) and Sarupa Ajmera (2).

3. The Building is a late Victorian house comprising four flats. The freehold interest in the Building was acquired by Victoria Barclay in or around 2001 and she then assigned it to the Applicant company on 14th June 2017. Ms Barclay had acquired the long leasehold interest in Flat 4 prior to acquiring the freehold interest in the Building, and she continues to be the leasehold owner of Flat 4. Lesley South is the leasehold owner of Flat 1 and Elaine Morris is the leasehold owner of Flat 2.

4. In its application, the Applicant alleges that the Respondent is in breach of covenants contained in clauses 2(4), 2(10) and 2(13(f) of the Lease, in breach of a condition contained in paragraph (7) of the Second Schedule and in breach of covenants contained in clause 2(11) in combination with paragraphs (4) and (10) of the Fourth Schedule to

the Lease. The wording of the relevant part of each of those covenants and the nature of the alleged breach is set out below:-

Clause 2(4)

"Keep the Flat and every part thereof in good and substantial repair and condition ... (other than the parts thereof referred to in the Fifth Schedule hereto) ...".

Alleged breach: failure to repair roof terrace, thereby causing water ingress into Flat 2 below.

Clause 2(10)

"Not to do or permit or suffer to be done in or upon the Flat anything which may be or become a nuisance annoyance or which may cause damage or inconvenience to the Lessor or the other lessees or tenants of the Lessor ...".

Alleged breach: causing nuisance or annoyance (see later for details).

Clause 2(13)(f)

"To comply with and observe all regulations orders requirements and all byelaws affecting the Flat made by the local authority or other duly constituted authority ...".

Alleged breach: failure to comply with regulations made by local authority in relation to erection of shed.

Paragraph (7) of Second Schedule

"The right in common with all other persons entitled to the like right to use the garden at the rear of the Building as a private pleasure garden".

Alleged breach: breach of condition only to use garden as a private pleasure garden.

Clause 2(11)

"During the said term to perform and observe all and singular the restrictions stipulations and conditions set out in the Fourth Schedule hereto".

Paragraph (4) of Fourth Schedule

"Will not (so as to cause annoyance or inconvenience to the Lessor the owners lessees and occupiers of the other flats) play or use or permit to be played or used any piano pianola gramophone television wireless loudspeaker or mechanical or other musical instrument of any kind or permit any singing to be practised in the Flat or so as to be audible outside the Flat between the hours of 11.30 p.m. and 8.00 a.m. and not at any time to cause a nuisance or annoyance to the Lessees or occupants of any of the other flats in the Building".

Alleged breach: causing nuisance or annoyance (see later for details).

Paragraph (10) of Fourth Schedule

"Will not remove damage or disturb any trees shrubs grass bushes or the layout of the rear garden and will not create any nuisance annoyance or disturbance in or about the use of the garden to other lessees of the Building or the Lessor ...".

Alleged breaches: removal, damage or disturbance of trees, shrubs, grass, bushes or the layout of the rear garden and creation of a nuisance or annoyance in or about the use of the garden.

Witness evidence

Ms Barclay's evidence

General

5. In her witness statements Ms Barclay states that for many years she tried to manage the Building on a co-operative and relatively informal basis but that since the Respondent purchased Flat 3 in 2015 this approach has worked less well. It was apparent from the outset that there were going to be tensions between the Respondent and the other leaseholders, and there have been a number of disputes. As a direct result of the tensions Ms Barclay decided in July 2017 to appoint a firm of managing agents, SP Property Group ("**SPP**"), to manage the Building so that she would not have the stress of trying to appease the Respondent and his partner, Saloomeh Mokhtari.

Garden

6. On or around 26th April 2018 the Respondent and Ms Mokhtari removed a number of plants and shrubs from a corner of the garden and arranged for a shed to be erected. These events were witnessed by both Ms South and Ms Morris (the leaseholders of Flats 1 and 2). SPP

were notified and they telephoned the Respondent demanding that he cease and desist, but to no avail. The Respondent did not have the Applicant's consent either to remove the plants and shrubs or to erect the shed. Ms South and Ms Morris both complained about the Respondent's actions and stated that they considered the shed to be an obstruction and nuisance to their enjoyment of the garden. The Respondent later continued to carry out works in the garden, for example on 30th June 2018 when he pulled up further plants, despite the Applicant's solicitors writing to him on 4th and 18th May 2018 asking him not to do so.

7. There is also a planning issue as Nick Bell of Camden Council confirmed in emails dated 26th April and 2nd May 2018 that planning permission was required for the erection of the shed, and SPP has confirmed to Ms Barclay based on a search of planning permissions that no planning permission has been obtained for the shed.

CCTV

8. On 21st March 2018 Ms Barclay received an email from Ms South stating that the Respondent had erected two surveillance cameras at the front and rear of the Building. The cameras had been positioned so as to capture all persons entering the Building and the communal garden, and the rear camera appeared to capture Ms South and Ms Morris on their private terraces. SPP wrote to the Respondent on 5th April 2018 asking him to remove the cameras but as at the date of her first witness statement (2nd August 2018) he had not replied to this request. The Applicant's solicitors also wrote to the Respondent on 4th and 18th May 2018 asking him to remove the cameras but they remain in situ.

Water ingress

9. Ms Morris has suffered a number of incidents of water ingress into her flat (Flat 2). SPP asked the Respondent on 13th July 2017 to give access to enable them to investigate the leaks from the interior but he refused. As a result, C&K Services (London) Limited ("**C&K**") were instead instructed to inspect the Respondent's flat roof from the outside in August 2017, and they advised the Applicant that it was in bad condition. C&K recommended a specific course of action but the Respondent then refused to co-operate.

Refuse

10. Problems with refuse bags started after the Council changed its policy in or around April 2017. Residents were given the option of using wheelie bins or orange bags, but the bags were not to be used for food. Food waste was to be placed in separate small brown bins.

11. On 13th April 2017 Ms Barclay noticed an orange bag containing food waste which had been dumped on the communal path near the bin area. She then noticed more orange bags containing food waste being persistently dumped, and this created mess. Ms Barclay emailed all leaseholders to remind them of the approved refuse disposal system. The dumping continued and she suspected that it was being done by Ms Mokhtari, partly as Ms Barclay was receiving complaints about the dumping from both Ms South and Ms Morris.

12. SPP wrote to the Respondent on 13th October 2017 asking him to ensure that his refuse was placed in the black wheelie bins and he replied by essentially stating that he would put his rubbish where he wanted. On 30th January 2018 Ms South told Ms Barclay that she had seen Ms Mokhtari dumping an orange bag containing food waste. There was also further correspondence on the issue, including from Veolia – who collected the refuse – and from the Council.

Cross-examination of Ms Barclay

13. Regarding the water leaks, Ms Barclay was unable to state what the Respondent had done which was in breach of the Lease. She also accepted that the initial leak had not been the Respondent's fault as he had at that point just moved in. She also seemed to accept that the flat roofs were the freeholder's responsibility to maintain, although she suggested that the section of roof from which the leak appeared to have emanated could be seen both as a roof and as a floor. As regards the Respondent's refusal on 13th July 2017 to give access, she accepted that this was not a complete refusal.

14. As for the garden shed, on being asked whether it was agreed that the Respondent could erect the shed she accepted that there had been a general conversation on the subject. However, objections had been raised about cost and about the proposed use and the Respondent had promised to keep her informed before doing anything. In fact, he had not kept her informed and had suddenly erected the shed many months later. The shed was also bigger than she had expected. Counsel for the Respondent pointed to exchanges of email showing an attempt on the Respondent's part to find a compromise in relation to the shed, but Ms Barclay said that none of this demonstrated that the freeholder's formal consent had been obtained or even sought.

15. In response to another question Ms Barclay said that the Respondent had not paid any service charges for 3 years, although it was put to her that the Respondent had paid for certain things and she did not disagree with this.

16. Regarding the CCTV, Ms Barclay accepted that she had not seen it until it had been drawn to her attention. She further accepted that Ms South also had CCTV, but this had been installed following a break-in after

consultation with Ms Barclay and after putting up warning signs. In addition, Ms South's flat was very separate from the rest of the Building. Ms Barclay was unable to say for certain whether the Respondent's CCTV actually worked.

17. Regarding the refuse collection, she said that her main concern was about bags being put out too early and being attacked by vermin.

Ms South's evidence

18. In her witness statements Ms South states that the leaseholders were able to reach agreement on most matters concerning the Building until the Respondent and Ms Mokhtari moved in, and she agrees with Ms Barclay that it was apparent from the first residents' meeting attended by the Respondent that things were going to become difficult.

19. In relation to the shed, at a residents' meeting on 7th December 2015 the Respondent said that he had obtained a quotation for a garden shed in the region of £5,000. Neither Ms South nor Ms Morris could afford to contribute their proportionate share of this cost and so they voted against it. The discussion rapidly turned acrimonious with Ms Mokhtari shouting at Ms Morris and saying that everyone hated her.

20. In relation to the garden generally, Ms Barclay emailed all leaseholders to tell them that a gardening consultant was visiting and that they were all welcome to come and meet her. Ms South and Ms Morris both did so and contributed their ideas for the garden. As far as she was aware, the Respondent did not take the opportunity to contribute his own ideas. Agreement was subsequently reached as to what should be removed from the garden and what new items should be planted. She considered the agreed garden works, once carried out, to be a great improvement. Then on 26th April 2018 she noticed the Respondent and Ms Mokhtari going into the garden and starting to dig up some large shrubs towards the back of the garden and moving a couple of trees. They then proceeded to lay concrete paving slabs over the cleared area and then a couple of contractors erected a shed on top. The Respondent then attached a large padlock to the shed and, as far as she is aware, he is the only leaseholder who has access.

21. In relation to the CCTV issue, Ms South states that she considers the installation of two cameras to be an invasion of her privacy and "decidedly creepy". There are no signs warning people that they are being monitored, and the location of the cameras means that the Respondent is monitoring all people entering the Building, the garden and, possibly, her terrace. As a result of the cameras she spends less time sitting on her terrace than she would otherwise do and feels that she is unable to enjoy her own home.

22. On the refuse disposal issue, she already had a strong suspicion that orange bags were being dumped by the Respondent and/or Ms Mokhtari, and then on 30th January 2018 she was sweeping her front yard and saw Ms Mokhtari dump an orange bag by the bin area. She regularly finds food waste strewn across the bin area.

23. On a separate point not covered by the application, in the summer of 2016 the Building underwent external redecoration including the re-painting of the front door from black to grey. Then on 12th August 2016 she saw the Respondent sanding the newly painted front door and then re-painting it black. When she spoke to Ms Barclay, she was told that the Respondent had not been given consent to re-paint the door. In addition to not having consent, he carried out the re-painting in a substandard manner and Ms Barclay needed to have it re-painted again at her own expense.

Ms Morris' evidence

24. In her witness statements Ms Morris echoes Ms South's comments regarding the shed, the removal of plants and trees, the CCTV and refuse disposal. She also refers to an incident on 11th August 2017 when she was sitting on her terrace and Ms Mokhtari shouted at her to tell her to stop looking at her home, which she denies having been doing, and then Ms Mokhtari suddenly threw three jugs of water over her. She reported the matter to the police.

25. Regarding the water ingress issue, she states that since the Respondent purchased Flat 3 her own flat has suffered from three separate water leaks as a result of water coming in from the Respondent's flat above. In her witness statement she describes her dealings with the Respondent in connection with these leaks and his refusal to allow her plumber to enter his flat to investigate.

The Respondent's evidence

General

26. In his witness statement, the Respondent states that the Applicant has brought these proceedings as a result of an unfortunate breakdown in relations between neighbours.

Water ingress

27. When informed about the first leak on 24th July 2015 he spoke to Ms Morris and, believing that the leak originated from the flat roof to the rear of his flat, he erected a tarpaulin cover to try to stop rain coming on to the roof and he repainted the roof with a waterproof paint. He received no complaints from the freeholder about any work carried out

at that point. He suggested to Ms Morris that they work together with the insurance company to find a solution, and Ms Morris gave him the necessary details.

28. On 13th August 2015 Ms Morris reported that the leak was recurring and, on concluding that the problem was a defective gutter, the Respondent arranged for a roofer to examine the leak and repair the damage. Ms Morris wrote to him to thank him. Then on 26th August 2015 Ms Morris wrote to him stating that the roof (meaning the roof area which is the subject of these proceedings) was his responsibility, and he was astonished at this abrupt suggestion of responsibility on his part.

29. The issue was discussed at a leaseholder meeting on 16th September 2015, but the minutes of that meeting do not fully reflect his understanding as to what was agreed regarding responsibility for the relevant part of the roof. There was then subsequent correspondence between him and Ms Barclay on the issue. On 14th December 2015 a formal inspection of all of the flat roofs at the Building took place and they were considered to be *"in good condition for their age with no noticeable leaks happening at this time"*.

30. Another leak was reported in July 2017, and the Respondent consented to a contractor having access to his flat roof. He tried to find out from SPP what the contractor had discovered but SPP were evasive and unhelpful. On 6th October 2017 SPP circulated a section 20 notice of intention to carry out works to the rear flat roof and he responded by letter stating that there was no leak from the flat roof and therefore no need to carry out any works. He added that as the relevant area was within his demise it would constitute trespass to access it without his consent. SPP then circulated a statement of estimates on 5th March 2018 and then he heard nothing further until these proceedings commenced.

Garden

31. The minutes of the first leaseholder meeting on 16th September 2015 refer to a suggestion on the part of the Respondent and Ms Mokhtari that a shed be bought for storing communal items. On 27th September Ms South came for tea at his flat and said *"I will back you on a shed"*. On 8th November he and Ms Mokhtari walked around the garden with Ms South and discussed things that could be done to improve the garden. On 10th November he wrote to Ms Barclay about improvements to the garden and received an encouraging reply.

32. At the second leaseholder meeting on 7th December 2015 the atmosphere was jolly. The other leaseholders did not want to contribute towards the cost of the shed but were happy for the Respondent to continue to look for a shed for his own use. There was,

though, an angry exchange when Ms Mokhtari asked Ms Morris if she could move two storage boxes which had been left in the communal pathway.

33. The Respondent also refers in his witness statement to certain email exchanges on the subject of the shed, culminating in an email on 13th January 2016 in which he stated that everyone had agreed that he could construct a shed at the end of the garden for his own use.

34. As regards the proposed improvements to the garden, he felt that after her earlier encouragement Ms Barclay was then dragging her heels, and so he wrote to her on 22nd January 2016 to remind her of her responsibilities as freeholder to maintain the garden. Then on 7th April 2017 certain trees were cut down without his having been consulted. The removal of those trees deprived his flat of significant screening. He complained about this to the Council. He was also not consulted in relation to the planting of new trees and shrubs.

35. As regards the construction of the shed, following the agreement that he understood to have been reached he installed a shed at the bottom of the garden on 26th April 2018. He considered that the new trees and shrubs had been planted either to frustrate that agreement or simply to ignore it. He did relocate certain trees in order to construct the shed and accepts that it would have been better not to have done so but states that he would have done if his relationship with the freeholder had been better. As regards any planning issue, he does not consider that planning permission is required for a shed in a communal garden.

Refuse disposal

36. In his witness statement he summarises the new refuse collection arrangements as notified to all residents by the Council. He had opted to use orange bags, which he understood to be one of the options, and he started leaving these in the bin area. However, Ms Barclay then requested that all waste be left in black wheelie bins and said that orange bags could go in wheelie bins as long as they were encased in a black bag. This seemed absurd to him.

37. In response to criticisms of his having left orange bags out he asked SPP to arrange for him to receive a replacement bin as his original one had been removed but no such bin was provided.

CCTV

38. The Respondent went with Ms Mokhtari to the police station on 28th August 2017 to report an exchange that he understood to have taken place on 11th August between Ms Mokhtari and Ms Morris. The incident was recorded by the duty officer as one of racial harassment

against Ms Mokhtari and the duty officer suggested that they could install CCTV cameras as a deterrent against further mischief.

39. He was aware that Ms South had installed a camera at the entrance to her own flat and was aware of burglaries having taken place in other flats and in the locality, and after some consideration he and Ms Mokhtari decided to install two cameras.

Cross-examination of Respondent

40. The Respondent accepted that he made a unilateral decision to repaint the front door.

41. In relation to the water ingress issue, the Respondent said that it was not his responsibility under the Lease to carry out repairs to the roof but he acknowledged that the relevant area was demised to him.

42. Regarding the CCTV, he agreed that he had not consulted anyone else before installing the cameras and did not put up any signs to warn people of their existence. He conceded that it might be reasonable for other residents to be distressed by the existence of the cameras but felt that they had served their purpose by deterring bad behaviour. On being asked how the cameras could have acted as a deterrent if the other residents did not know that they had been installed, the Respondent said that the other residents did know even though they had all claimed not to know.

43. In relation to the garden shed, the Respondent said that he had put down about 24 concrete slabs on which the shed was then placed, and he accepted that he had not told the freeholder, the other leaseholders or the managing agents in advance. He accepted that he had been asked by the managing agents to desist from removing plants and shrubs from the garden and from erecting the shed. He also accepted that he had not apologised to Ms Barclay or to anyone else for any distress that he had caused them. He added that he had had no idea how Ms Barclay had felt, although he struggled to explain why he thought the managing agents had asked him to desist. Part of his argument was that an agreement had been reached in 2016 regarding the erection of a shed, but he conceded that his removal of trees planted in 2017 could not have formed part of that agreement. He also conceded that he should have spoken to Ms Barclay before removing those trees and added that relations were not good at this point.

44. As regards the planning permission issue, he now accepted that it was clear that planning permission was needed (and was not obtained by him) for the erection of the shed. He conceded that he has still not submitted a planning application but said that this was because the

local planning authority had told him that he could do so whenever he chose.

45. Counsel for the Applicant also referred the Respondent to certain letters from the Applicant's solicitors addressed to him dealing with various issues, including the limited nature of his rights over the garden. The Respondent said that the solicitors' letter dated 25th July 2016 was merely a response to a particular proposal for tree-trimming, although Counsel for the Applicant put it to him that the letter did not refer to tree-trimming. He also took the Respondent through the email correspondence with Ms Barclay and others which the Respondent had claimed constituted agreement that he could erect a shed, and he put it to the Respondent that it did not constitute any such agreement. In addition, Counsel for the Applicant asked the Respondent about a sign that had been put up stating that carrying out works in the garden constituted trespass, but the Respondent said that he had not seen it.

46. Regarding refuse disposal, the Respondent had claimed that orange bags could not be placed in wheelie bins, but what was the basis for this claim? The Respondent struggled to explain the basis. As regards specific examples of him and Ms Mokhtari allegedly dumping food waste in orange bags, the Respondent did not accept that the bags contained food waste.

Ms Mokhtari's evidence

47. In her witness statement she states that Ms Morris was constantly asking her to do something about the water leak. One particular roofer decided not to take on the job of repairing the roof because of Ms Morris "being too hysterical". In the end, it turned out that the leak was from the guttering and wall next to Ms Morris' bedroom.

48. The residents' meeting on 15th September 2015 was not as described by the other residents. Ms Barclay abruptly asked the Respondent what his plans were for the roof terrace. There was a general discussion as to the installation of a communal shed and the need to trim the garden. At the second meeting on 7th December 2015 it became apparent that the other residents did not need a shed for their own use, and an agreement was reached that the Respondent could erect a shed for his own use. Ms Mokhtari also asked Ms Morris to relocate her brown boxes which were blocking the path to the garden and Ms Morris reacted very aggressively. According to Ms Mokhtari, Ms Morris then left the meeting, Ms Barclay apologised for Ms Morris' behaviour and Ms South said that such behaviour was typical of Ms Morris.

49. On the question of what relations were like between residents before the Respondent and Ms Mokhtari arrived, Ms South had told her that there had been huge tension between certain people. In addition, the former owner had disclosed that there had been some arguments. Ms

Mokhtari also refers to an incident on 6th June 2016 which made her realise that Ms Barclay did things in relation to the Building when asked to do so by Ms Morris. She also describes Ms Barclay and Ms Morris working closely together in relation to the leak which occurred in November 2016 and states that she and the Respondent felt harassed and bothered by the two of them.

50. Ms Mokhtari states that Ms Morris would sometimes sit on her patio staring into Flat 3's bedroom and bathroom and that on one occasion she made a xenophobic remark. She also accuses Ms Morris of having made up certain allegations. She adds that since the installation of CCTV cameras Ms Morris' nuisance behaviour has reduced.

51. Regarding refuse disposal, she is unable to say whether the contents of the torn orange bin bags belong to her and the Respondent.

Cross-examination of Ms Mokhtari

52. In cross-examination she denied throwing water at Ms Morris. Counsel for the Applicant put it to her that a builder had seen her doing so but she replied that she had not seen any builder. Counsel also referred her to an email from a police officer stating that after the incident had been reported Ms Mokhtari refused to speak to him, but Ms Mokhtari denied that this was the case and suggested that the email in question might have been altered by Ms Morris. On being pressed on this point she then withdrew the allegation.

53. On the issue of refuse disposal, Ms Mokhtari denied putting out orange bags containing food waste but accepted, when pressed, that the bags may have contained sanitary towels.

Respondent's submissions

Clause 2(4) of Lease

54. Clause 2(4) requires the tenant to keep the Flat in good condition but the covenant excludes the parts specified in the Fifth Schedule, namely (inter alia) the structure and the roofs. The lease plan refers to 'Terrace Flat 3', part of which contains a flat roof. In the Respondent's submission, the fact that the area in question could be used as a terrace did not stop it being a roof and/or forming part of the structure and therefore it was still the case that it was not included in the Respondent's repairing responsibilities. Presumably the Applicant itself believed this area to be the landlord's responsibility as it sent out section 20 consultation documentation in anticipation of works being carried out.

55. The Respondent has also referred the Tribunal to paragraphs 7-34 to 7-36 of *"Dilapidations: The Modern Law and Practice"* which contains an analysis as to what is included in the structure of a building.

Clause 2(10) of Lease

56. Clause 2(10) contains a covenant against doing anything "in or upon the Flat" which may cause nuisance, annoyance or damage. It follows that it does not apply to anything done outside the Flat and therefore cannot apply to anything done in the garden. The Respondent accepts that the covenant is capable of applying to the CCTV.

57. However, Ms South had been allowed to have CCTV and therefore arguably there had been a general waiver of that covenant: see *Woodfall 11.044.2*. In the alternative, the Respondent does not accept that the installation of CCTV constituted a nuisance or annoyance. The front camera is no longer operational and anyway just covered the shared accessway, whilst the rear camera is just focused on the garden and cannot objectively be categorised as a nuisance because there is no true privacy in the garden.

Clause 2(13)(f) of Lease

58. Clause 2(13)(f) contains a covenant to comply with regulations etc but again only insofar as they affect the Flat and so again it cannot apply to anything done in the garden, including failure to obtain planning permission for the erection of the shed.

Paragraph (7) of Second Schedule to Lease

59. Paragraph (7) to the Second Schedule contains a right to use the garden as a pleasure garden. As it is merely a right, if the Respondent strays outside the ambit of the right then the Applicant's remedy is to sue for trespass. This paragraph does not contain a covenant or condition and therefore the erection of the shed cannot constitute a breach of this provision for the purposes of section 168 of the 2002 Act.

Paragraph (4) of Fourth Schedule to Lease

60. The starting point for paragraph (4) of the Fourth Schedule is that it relates to music, television, etc, and therefore the reference to 'nuisance' later in the same paragraph has to be interpreted in this light. In other words, the paragraph does not contain a general prohibition on causing nuisance.

Paragraph (10) of Fourth Schedule to Lease

61. Paragraph (10) of the Fourth Schedule relates to the removal of trees, shrubs etc and the use of the garden, and the Respondent accepts that it is also capable of applying to the erection of the shed.

62. However, the Respondent does not accept that the erection of the shed constitutes a "nuisance, annoyance or disturbance" for the purposes of this provision. An ordinary person would not find the existence of the shed to be an annoyance, and in any event the erection of the shed was agreed to. It does not matter that the agreement was relatively informal and it is immaterial that not all of the details were discussed. As regards the letters referred to by the Applicant, these do not mention the shed as they merely refer to unauthorised works, and therefore those letters cannot have revoked the agreement between the parties. The telephone call by the managing agents was too late in the process.

63. In partial summary of his position, the Respondent argues that the Applicant has through its conduct waived the covenant and/or is estopped from relying on it, and on this point he has referred the Tribunal to the Upper Tribunal decision in *Swanston Grange (Luton) Management Ltd v Langley-Essen (2008) L. & T.R. 20* and also to a passage in the textbook *Woodfall (paragraph 11.044).*

Refuse disposal

64. This did not take place "in or upon the Flat" nor in the garden, and therefore none of the covenants has been engaged. In the alternative, the Respondent had no wheelie bin and therefore no choice but to leave orange bags out.

General points

65. The Respondent submits in the context of the shed and garden that even if there have been breaches of covenant these have been minor, and therefore following the decision of the Upper Tribunal in *Beaufort Park Residents Management Limited and Mr Abdolreza Sabahipour (2011) UKUT 436 (LC)* it would be draconian to determine that there have been breaches of covenant.

66. In written submissions the Respondent argues that the Applicant's use of the procedure under section 168(4) of the 2002 Act is vexatious and an unjustified attempt to put undue pressure on the Respondent.

Applicant's submissions

General point

67. Counsel for the Applicant characterised it as 'unreal' to suggest that reasonable people would not have been disturbed by the activities of the Respondent and Ms Mokhtari. There was evidence of police warnings, of other leaseholders being afraid to approach the Respondent, unauthorised uprooting of plants, and CCTV being used to monitor the private space of others.

Clause 2(4) of Lease

68. The terrace is part of the Respondent's demise and has been described as a terrace, not as a roof, on the lease plan. In addition, based on the information available it is the felt and bitumen that are in disrepair and causing water ingress, and these do not form part of the structure. The Respondent is therefore responsible for repairing this area and failed to do so in breach of the covenant contained in clause 2(4).

Clause 2(10) of Lease

69. This covenant does not just refer to causing a nuisance but also extends to annoyance, damage and inconvenience which makes it wider. Annoyance is easier to show than nuisance, and the Applicant has referred the Tribunal to the case of *Tod-Heatly v Benham (1888) 40 CH D 80* and to a passage in *Woodfall* on this point (paragraph 11.197).

70. The facts indicate that the Respondent continued with the erection of the shed even when telephoned by the managing agent requiring him to desist. Similarly, the position in relation to the orange bags was indefensible and the Respondent's arguments are very weak.

71. As regards the CCTV, the Respondent must have closed his eyes to what the other residents thought, and his failure to tell them about the cameras constituted a complete lack of neighbourliness. His CCTV cannot be compared to Ms South's which was focused on a smaller area and had the freeholder's permission.

Clause 2(13)(f) of Lease

72. The Respondent argues that this covenant does not cover the erection of the shed because it refers to regulations etc "affecting the Flat", but in the Applicant's submission the phrase "affecting the Flat" is wider than, say, the phrase "concerning the interior of the Flat" and therefore it can apply to the erection of the shed.

Paragraph (7) of Second Schedule to Lease

73. The right to use the garden is clearly a right which is conferred subject to a condition, namely that it only be used as a pleasure garden. It follows that doing something in breach of this condition is a breach of condition for the purposes of section 168 of the 2002 Act.

Paragraph (4) of Fourth Schedule to Lease

74. Contrary to the Respondent's interpretation of this paragraph it simply deals with two separate issues. They are separated by the word "and", and the word "annoyance" is repeated. It is clear, therefore, that it contains a stand-alone covenant against causing nuisance or annoyance to others which is not limited to the specific issues listed in the first part of that paragraph.

Paragraph (10) of Fourth Schedule to Lease

75. The erection of the shed was a clear breach of this covenant. The facts show that there was no agreement on the part of the Applicant to allow the Respondent to erect a shed. It is true that there was some discussion with Ms Barclay when she was the freehold owner, but the Respondent has not specified precisely what he is relying on to demonstrate that a legally binding agreement was reached. In addition, certain fundamental details were never discussed, for example the size of the shed. In any event, there are letters in the hearing bundle from the Applicant's solicitors to the Respondent clearly stating that he did not have authority to carry out any works.

The statutory provisions

76. 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 2(4) of the Lease

77. This clause contains the tenant's repairing obligations, and the alleged breach is a failure to repair the roof terrace, thereby causing water ingress into Flat 2 below.

78. There is specifically excluded from clause 2(4) any obligation on the tenant's part to repair and maintain the parts of Flat 3 referred to in the Fifth Schedule. The Fifth Schedule expressly requires the landlord to repair the structure of the Building, and this includes "in particular the roofs". The Fifth Schedule could have limited the landlord's repairing responsibilities to the main roof but it does not do so. It includes all of the roofs, and we see no basis for interpreting the word "roofs" as excluding flat roofs.

79. Furthermore, the tenant's repairing covenant in clause 2(4) expressly acknowledges that the landlord is responsible for the repair of certain parts of the Flat which have been demised to the tenant (if referred to in the Fifth Schedule), and so the issue is not whether the flat roof in question forms part of the Respondent's demise. The relevant part of clause 2(4) obliges the tenant to *"keep the Flat ... in good ... condition ... (other than the parts thereof referred to in the Fifth Schedule hereto) ...".* Whilst it is true that part of the flat roof is labelled "Terrace Flat 3" on the lease plan, this does not prevent it being a roof for the purposes of the Fifth Schedule to the Lease.

80. The Applicant argues, possibly in the alternative, that the part of the flat roof in disrepair is not a structural part of the roof, but we do not accept this argument. First of all, there is in our view insufficient evidence before us to conclude that the failure was specifically in causing a non-structural part of the flat roof to fall into disrepair and that the structural elements of the roof themselves were in good condition. Secondly, the exclusion from the tenant's repairing covenant is simply of the roofs rather than merely of particular parts of those roofs, and the Applicant has not shown that responsibility for the roof was intended to be divided in this way.

81. In conclusion, on the evidence before us there has been no breach of the covenant contained in clause 2(4).

Clause 2(10)

82. This clause contains a covenant not to do or permit or suffer to be done in or upon the Flat anything which may be or become a nuisance or annoyance or which may cause damage or inconvenience.

CCTV

83. Dealing first with the CCTV, it is accepted by the Respondent – rightly in our view – that the phrase "in or upon the Flat" is wide enough to cover the affixing of the CCTV. As regards the argument that Ms South was allowed to have CCTV and that this caused the equivalent clause in the Respondent's lease to be waived or led to some form of estoppel, we do not accept this argument. Ms South sought and obtained permission for her CCTV whereas the Respondent did not do so. The two situations are also not comparable in that Ms South's CCTV was focused on a smaller area. There was also no real evidence to indicate that her CCTV was causing anyone else any distress, whereas in our view the Respondent's CCTV was much more intrusive.

84. As to whether the installation and use of the CCTV cameras constitutes a breach of the covenant contained in clause 2(10), in our view it does. The Applicant has referred us to the case of *Tod-Heatly v Benham (1888) 40 CH D 80* and paragraph 11.197 in Woodfall, both of which distinguish between the words 'nuisance' and 'annoyance' on the basis that the latter has a wider meaning than the latter. Whilst the Respondent's behaviour in this case might not be serious enough to constitute 'nuisance', in our view it does constitute 'annoyance' as well as 'inconvenience', and therefore it is a breach of the prohibition against doing anything which *"may be or become [an] ... annoyance or ... may cause ... inconvenience"*. The Respondent did not seek the Applicant's consent, and nor did he even discuss the issue with the Applicant's managing agents or with Ms Barclay. His alleged justification was to prevent Ms Morris from behaving in a particular way, and yet he did not tell her or anyone else about the existence of the cameras. The evidence indicates to us that the view from the rear camera in particular was highly intrusive, and in our view a reasonable person would feel very uncomfortable on discovering that one of their neighbours was using a camera to watch them in the garden and on their private terraces.

85. As for the Respondent's alleged reasons for installing CCTV, we are not persuaded that the evidence demonstrates that Ms Morris' behaviour towards him and Ms Mokhtari was such as to provide justification for the Respondent's actions.

86. In conclusion, on the evidence before us the installation and use of the CCTV constitutes a breach of the covenant contained in clause 2(10) of the Lease *"Not to do or permit or suffer to be done in or upon the Flat*

anything which may be or become [an] ... annoyance or which may cause ... inconvenience to the Lessor or the other lessees or tenants of the Lessor ...".

Garden and refuse disposal

87. The Applicant submits that the Respondent's use of the garden and his disposal of refuse constitute a breach of (inter alia) clause 2(10). The covenant in clause 2(10) relates to doing things (or permitting or suffering them to be done) *"in or upon the Flat"*, and we do not accept that the erection of the shed, the removal of shrubs etc or the placing of orange bags in the refuse area are things that were done *"in or upon the Flat"*. The covenant is therefore not engaged in relation to any of these items and therefore the use of the garden and the disposal of refuse do not constitute breaches of clause 2(10) of the Lease.

Clause 2(13)(f)

88. This clause contains a covenant *"To comply with and observe all regulations orders requirements and all byelaws affecting the Flat made by the local authority or other duly constituted authority ...".* The Applicant argues that the Respondent's failure to obtain planning permission for the erection of the shed is a breach of this covenant.

89. It is now common ground between the parties that planning permission was needed for the erection of the shed and that the Respondent failed to obtain planning permission, notwithstanding the Respondent's original stance to the contrary. However, the covenant only relates to matters "affecting the Flat". The Applicant argues that this formulation is wider than, for example, the phrase "concerning the interior of the Flat". Whilst we accept that there might be circumstances in which the former phrase would apply and the latter would not, we do not accept that the phrase "affecting the Flat" is wide enough to cover the erection of a shed in the communal garden in breach of planning permission. Whilst it would be fair to say that the Respondent has only erected the shed because he occupies the Flat, in our view for a statutory requirement to "affect" the Flat it must relate to the Flat itself in some way.

90. In conclusion, there has been no breach of the covenant contained in clause 2(13)(f).

Paragraph (7) of Second Schedule

91. This paragraph contains a right to use the garden at the rear of the Building as a private pleasure garden, and the Applicant argues that the erection of the shed and the removal of shrubs etc constitute a breach of the condition to which this right is subject.

92. We will deal first with the question of whether this paragraph contains a condition which is capable of being engaged for the purposes of section 168 of the 2002 Act. Neither party has brought any legal authority on this point. The Respondent argues that this paragraph merely creates a right and that using the garden for any purpose not covered by this right would constitute trespass rather than a breach of a condition for the purposes of section 168.

93. In our view, this paragraph does contain a condition which is capable of being engaged for the purposes of section 168 of the 2002 Act. The right has clearly been granted on condition that the garden be used as a private pleasure garden, and therefore it will have been the intention of the parties that any use which goes beyond the permitted use would constitute a breach of the condition subject to which the right has been granted.

94. As to whether the Respondent has in fact committed one or more breaches of this condition, in our view he has. Having seen the relevant copy correspondence and written submissions and having heard the main protagonists being cross-examined on their witness evidence, we consider that the erection of the shed, the removal of shrubs and the moving of trees all constitute a breach of this condition.

95. We do not accept that an agreement was reached that the Respondent could erect the shed, either with Ms Barclay as former freeholder or with the Applicant. There was discussion and correspondence on the issue, but despite the pressure exerted by the Respondent and Ms Mokhtari to persuade the others to agree we do not accept that there ever was actual agreement. The Respondent has failed to produce anything which could plausibly be regarded as a binding legal agreement, and even if it can be argued that the Respondent persuaded Ms Barclay and/or the Applicant to give agreement in principle, the details – including, but not limited to, the size – were at no stage agreed. On the contrary, certain of the letters from the Applicant's solicitors are indicative of the Applicant being strongly opposed to the Respondent's proposed and actual activities in the garden, and they should at the very least have alerted him (if he did not already know) to the need to proceed with more caution and to seek permission before taking any further steps. In addition, Ms Barclay's and the other leaseholders' concerns about what the Respondent has done to the garden and about the size of the shed seem genuine. The Respondent's actions in the garden, without first giving details or even any notice to the Applicant, are indicative of a decision to press ahead regardless of what any of the other residents or the Applicant thought, and the Respondent did not dispel this impression in cross-examination.

96. In conclusion, therefore, on the evidence before us there has been a breach of the condition contained in paragraph (7) of the Second Schedule.

Paragraph (4) of the Fourth Schedule

97. This paragraph contains a covenant that the tenant *"Will not (so as to cause annoyance or inconvenience to the Lessor the owners lessees and occupiers of the other flats) play or use or permit to be played or used any piano pianola gramophone television wireless loudspeaker or mechanical or other musical instrument of any kind or permit any singing to be practised in the Flat or so as to be audible outside the Flat between the hours of 11.30 p.m. and 8.00 a.m. and not at any time to cause a nuisance or annoyance to the Lessees or occupants of any of the other flats in the Building".*

98. The Respondent argues that the paragraph should be read as a whole and only relates to the playing or use of musical instruments, televisions etc. The Applicant argues that the second part of the paragraph is a stand-alone covenant and needs to be read separately.

99. If the intention was indeed for the second part to be read as a separate, stand-alone covenant it would have been better for it to be housed in a separate paragraph. However, despite this objection, we consider that the better view is that it can and should be read as a separate, stand-alone covenant. The first part of the covenant is time-limited whereas the second part is not, and the second part repeats the restriction on causing annoyance (and the reference to lessees and occupiers/occupants), which it would not need to do if the paragraph was merely proscribing the playing or use of musical instruments, televisions etc between certain times.

100. Has the Respondent done anything *"to cause a nuisance or annoyance to the Lessees or occupants of any of the other flats in the Building"*? In our view he has. For the reasons already referred to above, even if they do not constitute 'nuisance' the Respondent's uprooting of shrubs and moving of trees and erecting a shed without consent have between them caused annoyance to the other leaseholders, and in our view this constitutes a breach of the second part of this paragraph.

101. As regards the refuse disposal, do the Respondent's actions constitute a breach of the above covenant? The facts are disputed, and the Respondent and Ms Mokhtari deny having left out orange bags containing food waste, although Ms Mokhtari concedes that the bags may have contained sanitary towels. It is clear that there has been friction between the parties on this issue as on many other issues and that the Respondent and Ms Mokhtari have done various things which have annoyed Ms Barclay and the other leaseholders. However, it is also the case, in our view, that Ms Barclay and Ms Morris have done some things which they will have known would annoy the Respondent and Ms Mokhtari. Given the context and given the lack of clear evidence on this point, coupled with the Respondent's evidence that his wheelie bin was removed and that SPP refused or failed to arrange a

replacement, on balance our view is that the Applicant has not done sufficient to demonstrate that a breach of the covenant contained in paragraph (4) of the Fourth Schedule has occurred in relation to the refuse disposal issue.

102. In conclusion, therefore, on the evidence before us there has been a breach of the covenant contained in paragraph (4) of the Fourth Schedule (in conjunction with clause 2(11)), but only in relation to the uprooting of shrubs and moving of trees and the erection of a shed without consent.

Paragraph (10) of the Fourth Schedule

103. This paragraph contains a covenant that the tenant *"Will not remove damage or disturb any trees shrubs grass bushes or the layout of the rear garden and will not create any nuisance annoyance or disturbance in or about the use of the garden to other lessees of the Building or the Lessor ..."*.

104. For the reasons already given, it is clear that the Respondent has indeed damaged/disturbed trees and shrubs and the layout of the rear garden and has done so without the Applicant having given its consent. In addition, through damaging/disturbing trees and shrubs and the layout of the rear garden and erecting a shed without landlord's consent, he has created an annoyance and/or a disturbance in or about the use of the garden to other 'lessees' and to the 'Lessor'.

105. In conclusion, therefore, on the evidence before us there has been a breach of the covenant contained in paragraph (10) of the Fourth Schedule (in conjunction with clause 2(11)).

Other points

106. The Respondent has argued that the Applicant's use of the procedure under section 168(4) of the 2002 Act is vexatious and an unjustified attempt to put undue pressure on the Respondent. We do not accept this. Whilst we do not take the view that the Respondent and Ms Mokhtari have been the only ones responsible for the breakdown in relations between the parties, the breaches of covenant and condition are significant ones and it is not for the Tribunal to ignore them simply on the basis of the Respondent's highly subjective analysis as to what the Applicant's true motives have been in bringing this application.

107. The Respondent has also argued that the Applicant has waived certain covenants, and he has referred the Tribunal to the Upper Tribunal decision in *Swanston Grange (Luton) Management Ltd v Langley-Essen (2008) L. & T.R. 20* and also to a passage in the textbook *Woodfall (paragraph 11.044)* in support. In *Swanston Grange*, Judge

Huskinson held that the LVT (as this Tribunal was then called) had jurisdiction to determine whether the landlord had waived or was estopped from claiming the right to assert a breach of covenant, and the relevant section of *Woodfall* contains an analysis of the different types of waiver. However, on the facts of this case we do not accept that the Applicant has waived any of the breaches or is estopped from asserting any of the breaches. In relation to the CCTV, for the reasons noted above the permission granted to Ms South is easily distinguishable from the lack of permission granted to the Respondent (permission not even having been sought by him), and we do not accept that by giving permission to Ms South the Applicant somehow waived the Respondent's breach in advance or is now estopped from relying on his breach of covenant. In relation to the garden and shed, the Respondent's argument seems to be that an agreement was reached between the Respondent and the former freeholder and that this served as a waiver of any breach. However, for the reasons referred to above we do not accept that any agreement was reached between the Respondent and the former freeholder, nor do we accept that it was reasonable for the Respondent to believe that an agreement had been reached and then to proceed with carrying out work to the garden and erecting the shed without first communicating with and generally engaging with Ms Barclay and/or the Applicant's managing agents.

108. The Respondent has also argued in the alternative that any breaches have been minor and that, following the decision of the Upper Tribunal in *Beaufort Park Residents Management Limited and Mr Abdolreza Sabahipour (2011) UKUT 436 (LC)*, it would be draconian to determine that there have been breaches of covenant. The *Beaufort Park* case concerned a single issue, namely the right of access for the purposes of inspection. On the particular facts of that case Her Honour Judge Karen Walden-Smith took the view that the problem was best resolved by giving the leaseholder another opportunity to provide access in circumstances where it seems there was some genuine confusion as to which categories of person were entitled to be granted access. Our case can clearly be distinguished from the *Beaufort Park* case, as the breaches of covenant and condition are significant ones and some of them have been ongoing for a long time and have caused significant annoyance and distress.

Cost applications

109. Any cost applications must be made in writing within **14 days** after the date of this decision and copied to the other party. Any party wishes to respond to another party's cost application must do so in writing within **28 days** after the date of this decision, copying the response to the other party. The parties should endeavour to ensure that the submissions and any responses are proportionate in length.

Name: Judge P Korn **Date:** 14th January 2019

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.