FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/00HN/LBC/2019/0040**
Property	**:**	**First Floor Flat, 89 St Luke's Road, Bournemouth BH3 7LS**
Applicant	**:**	**Mr Min Y Park**
Representative	**:**	
Respondent	**:**	**Mr F Morgan and Mrs C Morgan**
Representative	**:**	**Preston Redman, solicitors and Miss L Worton, counsel**
Type of application	**:**	**Breach of covenant**
Tribunal member(s)	**:**	**Judge D. Agnew** **Mr D. Banfield FRICS**
Date of hearing	**:**	**22 October 2020**
Date of decision	**:**	**4 November 2020**

DETERMINATION

Background

1. On 29 August 2019 the Applicant applied to the Tribunal for a determination under section 168 of the Commonhold and Leasehold Reform Act 2002 ("the Act") that a breach or breaches of covenant have occurred in a long lease of a dwelling of which he is landlord. The dwelling in question is the First Floor Flat, 89 St Luke's Road, Bournemouth BH3 7LS ("the Flat"). The Applicant is the freehold owner of the land and buildings at 89 St Luke's Road ("the Property"). The Respondents were the lessees of the Flat under a lease dated 27 April 1983 for 99 years from that date until they entered into a new lease of the Flat on 17 September 2019.

2. The Respondents had initiated statutory proceedings for an extended lease. There was a dispute as to the terms of the new lease. This dispute was settled by a determination of the Upper Tribunal on 17 December 2018. The new lease was eventually executed on 17 September 2019 only a few days after this Application was made. The allegations of breach of lease therefore concern alleged breaches of the old lease.

3. At the time that execution of the new lease was due certain monies that the Applicant claimed to be owing to him were outstanding and although the Respondents offered to pay them the Applicant refused to accept the payment tendered by the Respondents for fear of prejudicing his right to forfeit the Respondents' lease due to the alleged breaches of covenant that are the subject of the current proceedings. The terms of the former lease with regard to covenants with which this Application is concerned were incorporated into the new lease.

4. The Applicant has raised 19 allegations of breach of covenant (or "issues" as he terms them). Issues 1 and 2 relate to alleged breaches by the Respondents' immediate predecessor. This was UCB Home Loans Limited ("UCB") who were mortgagees in possession of the Flat at a time when the Applicant says a) that a boundary fence between the gardens of the Ground Floor Flat and the Flat was removed by UCB and b) when one half of the buildings insurance premium was unpaid.

5. Unfortunately, on his application form the Applicant named an individual, Mr Martin O'Reilly as a Respondent rather than UCB. It seems that he was an employee of UCB. Whether by accident or design, Mr O'Reilly was never brought into the proceedings from the time that initial directions were made onwards. I say by design because it could never have been the case that Mr O'Reilly personally could have been liable for any breach of covenant by his employer. In the event, neither he nor UCB have been involved in these proceedings and the Applicant has not at any time sought to amend the proceedings to name UCB as a Respondent. Consequently, the Tribunal dismisses the claim against Mr O'Reilly.

6. It should be noted, however, that the Respondents have offered to pay the sum in question as part of the monies payable on completion of the

lease extension, but, as has already been noted, the Applicant has refused to accept payment. The Tribunal does not find the Respondents in breach of covenant in those circumstances.

7. Directions were first issued in this case in September 2019. Originally they provided for a paper determination of the case but, after receipt of the hearing bundle a Procedural Judge decided that an oral hearing would be required. A date for the hearing had to be postponed twice due to the Covid-19 pandemic. Arrangements were then made for the hearing to take place by video on 22 October 2020. As the Applicant was uncomfortable with the use of technology in this way, he attended Havant Justice Centre for the hearing and was provided with the necessary facilities. However, he did not wish to be seen by the Respondents and so switched off his video camera. Mr and Mrs Morgan had problems in connecting to the video and so dialled in to the hearing on their mobile phone. Consequently, none of the parties were visible on the screen, although the Respondents legal representatives and the Tribunal were visible to all parties.

8. At the hearing the Respondents were represented by Miss Louise Worton of counsel. Mr McCarthy of Preston Redman, the Respondents' solicitor also attended.

The hearing

9. The Applicant had provided the Tribunal with a very comprehensive hearing bundle. Additionally, a few days before the hearing and in response to further directions the Respondents had submitted a bundle of photographs. The Applicant said that he had not seen them, so arrangements were made for photocopies to be taken by the Tribunal staff and supplied to Mr Park during the hearing.

10. The Respondents wanted to forward some additional photographs during the course of the hearing but the Tribunal decided that it was too late for them to do so. After the hearing, Mr Park sought by email to adduce further evidence but again the Tribunal refused to look at this as it was inappropriate to try to introduce further evidence and argument after the hearing.

The Property

11. 89 St Luke's Road is a substantial detached house originally built in the mid 1920's but converted into two flats in or about April 1983 when the lease under which the Respondents hold th Flat was granted. The Applicant purchased the freehold of the Property in 1992 and retains the Ground Floor Flat which has never been the subject of a long lease. The Respondents purchased the Flat in 2015 from the mortgagees in possession (UCB) of the previous long leaseholders. As noted above, they extended their lease under the statutory procedure in 2019.

12. The Flat occupies the whole of the first floor of the building. A plan attached to the lease of the Flat dated 27 April 1983 shows an area

hatched black over which the lessees of the Flat have a right of way on foot only. This right of way extends from the roadway at the front of the Property, along the side of the building to two adjoining garages and what is shown as an entry to the Respondents' garden, which lies directly behind the freeholder's garden, at the rear. One garage, to the right as one looks at them from the road, is demised to the Respondents. That to the left is retained by the Applicant as part of the freehold.

13. Immediately to the rear of the Property is a garden area which is part of the freeholder's retained land and behind that again, further away from the building, is a garden area demised with the Flat. There is an area of garden to the front of the building which is part of the freeholder's retained land but the black hatching on the lease plan referred to in paragraph 12 above extends over this area. This will be referred to later in this decision.

14. The two rear garden areas and the garages and right of way have been the subject of much dispute between the parties almost since the Respondents moved in. Part of the problem stems from the fact that the garages do not appear to have been built in exactly the same position as would appear to be the case on the plan incorporated in the 1983 lease plan. The positioning of the garages has a knock-on effect on the exact position of the boundary line between the two garages, and the position and extent of the gate and right of way exercisable by the Respondents to reach their garden. These are serious and legally complicated matters which, unless the parties can exercise some common sense and compromise are likely to involve very costly County Court proceedings to determine the line of the boundary and the extent of the Respondents' right of way to access their garden and whether, in accessing their gate in its present position they are trespassing on the Applicant's land. It will involve expensive expert evidence from surveyors and arguments as to prescriptive rights and, perhaps, easements of necessity. What is clear is that these issues cannot be resolved or determined by the decision of this Tribunal in these proceedings. This Tribunal's jurisdiction under the Act is simply to determine whether a breach of covenant has occurred.

The Applicant's case

15. Issue 3. The Applicant says that the Respondents are in breach of covenant by removing the existing boundary fence and erecting their own fence forming a physical boundary between their garden and that of the Ground Floor Flat. He says that this is a violation of his right to "quiet enjoyment" of his land. He also says that the Respondents refused access to his surveyor which he says was to report on overgrown trees on the rear boundary of the plot on which the property stands, which is his responsibility to maintain. He says that these actions are a breach of Schedule 2 and Schedule 6 paragraphs 10, 14 and 15. The wording of these parts of the Schedules referred to are set out hereafter.

Issue 4. The Applicant alleges that the Respondents have erected a garden shed in their garden in breach of Schedule 2, Paragraph 10 and 14 of the Sixth Schedule .

Issue 5. The allegation is that the Respondents have erected a picket fence in their garden in breach of the Second Schedule, and paragraphs 10 and 14 of the Sixth Schedule

Issue 6. The Applicant alleges that the Respondents have removed a parking bollard from the reserved property in breach of the regulations contained in paragraph 3 of the Eighth schedule to the lease.

Issue 7. This is a repeat of the allegation in Issue 3 concerning the access of the Applicant's surveyor to the Respondents' garden.

Issue 8. It is alleged that the Respondents have a CCTV camera pointing towards the Applicant's front land/common driveway which is an annoyance to him and therefore a breach of regulation 3 in Schedule 8 of the lease.

Issue 9. The allegation is that the Respondents have breached paragraph 6 of the 8th Schedule by not carpeting the floors of the Flat.

Issue 10. The Applicant alleges that Mr Morgan has ridden his motorcycle over the access roadway to reach his garage at least 20 times and has parked a vehicle on the accessway. This, he says, is in breach of Schedule 4, clause 4 and paragraph 14 of the Sixth Schedule and paragraph 3 of the Eighth Schedule.

Issue 11. It is alleged that the Applicant's supplier of gas to the Ground Floor Flat was changed by the Respondents. He does not specify the covenant that he alleges the Respondents breached.

Issue 12. The Applicant alleges harassment by the Respondents in removing his dustbins from the front of the building and depositing them on the rear garden of the Ground Floor Flat in breach of Schedule 4 paragraph 6 and Schedules 6 and 8 at paragraphs 14 and 3 respectively.

Issue 13. The Applicant says that the Respondents have altered the lower section of one of the rear windows to the Flat so that it now opens, whereas originally it was sealed shut. He says that this is in breach of paragraph 10 of the Sixth Schedule.

Issue 14. The Applicant alleges that the Respondents have trespassed onto the front garden of the property and have mowed a section of the Ground Floor Flat's rear garden. The Applicant says that he does not "appreciate" this and it invades the privacy of his tenants.

Issue 15. The Applicant alleges that the Respondents have disconnected his CCTV camera. This has caused him annoyance and is therefore a breach of paragraph 3 of the Eighth Schedule.

Issue 16. The allegation here is of a breach of the landlord's and his tenants' right to privacy involving the use by the Respondents of CCTV and trespass onto the Applicant's reserved land, already contained in other "Issues".

Issue 17. The allegation here is of an incident where it is alleged Mr Morgan "verbally assaulted" the Applicant's wife when she was at a supermarket. It was pointed out to the Applicant that this was not an incident on the premises and so could not constitute a breach of the lease. The Applicant accepted this and that allegation was therefore summarily dismissed.

Issue 18. The allegation here is that the Respondents refused to accept three quotations for replacement of the boundary fence between the two gardens. The Applicant says that this has caused him annoyance and is therefore a breach of Schedule 6 paragraph 15 and the Eighth Schedule paragraph 3.

Issue 19. The Applicant alleges that the Respondents were "laughing cynically" at the Applicant whilst he was repairing the front wall with a neighbour, that on another occasion they were heard to say "smashing face" which the Applicant took to be an "indecent assault" that he has suffered harassment by having a mobile phone camera pointed at him whilst Mr Morgan was wandering around the common driveway "with his top naked". The Applicant says that these encounters have affected his mental health. The Applicant does not specify which covenant it is alleged that the Respondents have breached but the Tribunal assumes that, as with several other "issues" it is paragraph 15 of the Sixth Schedule and paragraph 3 of the Eighth Schedule.

The lease

16. The following lease terms are relevant to this case.

(a) The Second Schedule is headed The Reserved Property. It states:

"FIRST ALL THOSE the common driveway paths gates boundary walls and fences forming part of the property and not included in the premises hereby demised AND SECONDLY ALL THOSE the main structural parts of the building forming part of the property including the roof main walls foundations chimney stacks gutters and rainwater pipes and all external parts thereof including the downpipes (but not the glass in the windows of the flats nor the interior faces of such external walls as bound the flats) and all cisterns tanks sewers…"

(b) The Fourth Schedule provides that the rights included in the demise are as follows:

" 1. The right in common with the Lessor and the owners and occupiers of the other flat in the property and all others having the like right to pass and repass at all times (on foot only) and for all reasonable purposes in connection with the use and enjoyment of the premises

over and along the common driveway hatched black on the plan annexed hereto"

(c) The Sixth Schedule provides that:

"10. That the Lessee will not at any time during the said term cut maim alter or injure any of the principal timbers roofs or walls of the premises nor erect or suffer to be erected any new buildings thereon or make any structural alteration or addition whatsoever in or in the premises externally or internally or make any alterations to any boundary or party wall or make any alteration in the plan external construction height roof walls timbers elevation architectural appearance or external decorations of the said premises or any buildings which may be erected on the said premises without the consent of the lessor first obtained."

(d) Paragraph 15 of the Sixth Schedule states:

" The Lessee shall not do or permit or suffer to be done in or upon the premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor or to the owner or occupier of the other flat or of any property adjoining the property or the neighbourhood or whereby……"

(e) Paragraph 20 of the Sixth Schedule provides that:

"The Lessee shall upon reasonable notice (and except in case of extreme urgency at least forty-eight hours notice) in writing permit the Lessor and the owners of the other flat to have access to enter upon the premises as often as it may reasonably be necessary for them to do so in fulfilment of their rights or obligations hereunder or under covenants relating to the other flat and similar to those herein contained the person or persons so entering making good any damage caused thereby."

(f) By paragraph 24 of the Sixth Schedule:

"The Lessee further covenants with the Lessor that the Lessee will at all times during the term hereby created observe such regulations as may from time to time be made by the Lessor and also the regulations made and specified in the Eighth Schedule hereto".

(g) By paragraph 3 of the Eighth Schedule it is provided that the lessee:

"Will not do any act to the damage and annoyance of the Lessor or the Lessor's tenants or the occupiers of any of the adjoining or neighbouring houses".

The hearing

17. The Tribunal indicated that it had read the hearing bundle and in particular the statements of case of the parties and the witness

statement of the Respondents and that it would treat them as the parties' evidence in chief. Miss Worton cross examined the Applicant on his case at length.

18. With regard to issue 9 (the floor covering of the Flat) the Respondents accepted that prior to the inspection by the Tribunal (accompanied by the Applicant) for the purpose of the lease extension application, the floors were not carpeted. The Applicant evidently spotted this at the inspection and as soon as this had been brought to their attention they said that they immediately put in hand the carpeting of the Flat. They produced photographs of the carpeting. The Applicant said that it was the first time that he had seen this at the hearing but accepted that the breach had been remedied and he would not pursue this issue further. The Tribunal notes, however, the Respondents' acceptance that at the time of the Inspection there was a breach of covenant which has since been remedied.

19. The Respondents' counsel put it to the Applicant that with regard to Issues 11,12,13,15 and 19 there was no evidence to back up the Applicant's allegations. He said that some of the allegations had been made to him by his tenants and others he had witnessed himself.

20. With regard to Issue 3 the Applicant accepted under cross examination that by the time the Respondents bought their Flat there was just one fence post standing on the boundary line between the two gardens. He maintained that the Respondents had no right to erect a fence themselves. He asserted that their fence was on the retained land but even if it was on their land this breached the covenant against making any structural alteration or addition whatsoever to the premises without his consent. The Respondents had denied his second surveyor access to their garden. He maintained that part of the reason for requiring access was to report on the state of trees on the rear boundary which was his responsibility to maintain and not just for the purpose of taking measurements for the position of the boundary.

21. With regard to issue 4 the Applicant maintained that the garden shed in the Respondent's garden is a "building". He claimed that the wheels under the shed are removable and the shed rests on the ground. The wheels are put back on the shed when its legitimacy in the garden is under scrutiny from the local planning authorities.

22. Issue 5 concerns the alleged picket fence. It was put to the Applicant that this is in fact a number of moveable wooden pallets on their side. The Applicant insisted that it is a structure for which his consent was required.

23. Issue 6 concerns the removal by the Respondents of a parking bollard that the Applicant had placed on the communal driveway. He maintains this was to prevent unauthorised access to the driveway from the road. He denied that no damage was done on its removal: he said that concrete had been damaged in the process. He denied that it was

impeding the exercise of the Respondents' right of way over the driveway. When put to him that the bollard had been a trip hazard he responded that it was up to visitors to watch out. He said that he had not replaced the bollard in the five years since its removal but this had upset him.

24. Issue 7 is included within Issue 3 at paragraph 20 above.

25. Issue 8 concerning the Respondents' CCTV camera, the Applicant accepted that he could not say whether the camera was simply a deterrent and not connected up to a recording system but he said he could see a red light on the machine indicating that it was operating.

26. Issue 9 with regard to carpeting has been covered in paragraph 19 above.

27. Issue 10. With regard to the parking of a vehicle on the driveway the Applicant denied that this had ceased after the Upper Tribunal decision which confirmed that the restriction to the right of way was for access on foot only. He asserted that the photograph of the Respondent's car parked on the driveway had been taken in September 2018, after the Upper Tribunal's decision had been issued. Although not contained in his statement of case, the Applicant in evidence at the hearing asserted that his tenants had been disturbed by Mr Morgan taking his motorbike along the driveway to his garage and tuning it up, creating a noise nuisance. He was unable to produce any evidence of complaints from his tenants of such disturbance. When referred to the evidence that the motorbike had covered only 47 miles in a year he replied that this could have meant 47 separate journeys of 1 mile.

28. Issues 11,12,13,15 and 19 have already been referred to in paragraph 18 above.

29. Issue 14 concerns trespass to the front garden and the rear garden of the Ground Floor Flat. As already stated the Tribunal's jurisdiction does not extend to making any determination as to trespass. That is a matter for the County Court. Also, trespass in itself cannot be a breach of any of the lessee's covenants save insofar as it might constitute a nuisance or annoyance to the lessor or an owner or occupier of the Ground Floor Flat. The Applicant says this does cause him annoyance. It was put to the Applicant that the Respondents' right of way as shown hatched black on the lease plan extends over the front garden. The Applicant disagreed saying that the right of way extends only up to the end of the turning bay in the drive and does not extend over the front garden.

30. With regard to Issue 16 the Applicant said he was told by the Council that it was "the people upstairs" who had reported the number of tenants was such that an HMO licence was required. The Council were satisfied this was not an HMO but it had occurred on four occasions and this he maintained constituted a form of harassment.

31. Issue 17 was summarily dismissed (see paragraph15 above).

32. Issue 18 relates to the refusal by the Respondents to accept the Applicant's estimates for repairing the fence. When asked how this was a breach of covenant he replied that this was an interference with his right and obligation to maintain the property. He said he was going to implement the section 20 consultation procedure but in view of all the "issues" he has raised he has taken no further step in this regard nor has he levied any service charges for fear of jeapordising his right to forfeit the Respondents' lease.

The Respondents' case

33. Apart from the absence of carpeting to the floors of the Flat prior to 2019 it is the Respondents' case that all allegations of breach of covenant are denied.

34. To supplement the evidence contained in the Respondents' statements of case and witness statements Mrs Morgan was asked by her counsel to describe the shed. She confirmed that it is on caster wheels which raise the shed off the ground. She says that the wheels remain on the shed and are not removed. They are hidden behind a wooden skirt at the base of the shed.

35. Mrs Morgan was offered up for cross examination. It was put to her that she had refused access to the Applicant's second surveyor. She replied that the Applicant had telephoned her at 8pm one evening and she had responded at 6am the following morning to say they had had insufficient notice of the proposed visit. When asked why she had insisted on the survey being carried out by a Council officer she replied that she and her husband had misunderstood the situation and that subsequently their solicitor had suggested a joint expert be appointed but the Applicant rejected this.

36. When put to Mrs Morgan that the fence they had erected was on his land she replied that she did not believe that to be the case. She referred to the photographs which she said indicted that their fence was placed several inches within their boundary and that the position of the original post which marked the position of the start of the fence after the gap to the garage affording access to their garden could also clearly be seen in front of their fence.

37. When put to her that in order to enter their garden through the gate in the fence they have erected they have to trespass over the Ground Floor Flat garden, again Mrs Morgan did not accept this. She said they access their garden from the driveway hatched black over which they have a right of way on foot and they keep close to the garage wall as they enter the gate.

38. After a ten minute break in proceedings to allow the Applicant to consider whether he wanted to ask the Respondents any further questions he said that he did not and that all the representations he

wished to make were contained in his statement of case and supporting documents.

39. Miss Worton made a few points in summing up but being aware of the lateness of the hour (it was approaching 5.30p.m.) she was very brief.

40. The Applicant applied for an order for the payment by the Respondents of his fees for making the application and hearing fee totalling £300. Miss Worton made an application for an order under section 20C of the Act. This gives the Tribunal the power to make an order that the landlord's costs of the proceedings should not be recoverable in any future service charge. Such an order is in the discretion of the Tribunal if it considers it just and equitable to do so in the circumstances. Miss Worton also asked the Tribunal to consider granting an order under Rule 13 of the Tribunal Procedure (First-tierTribunal)(Property Chamber) Rules 2013. This gives the Tribunal jurisdiction to award costs against a party who has acted unreasonably in bringing, defending or conducting a case before the Tribunal.

The Tribunal's determination

41. Before making specific findings the Tribunal wishes to make some general observations. First, the Tribunal emphasises, as it has already stated above, that its sole jurisdiction under section 168 of the Act is to determine whether a breach or breaches of covenant have occurred. It has no jurisdiction to determine a boundary dispute, disputes over the extent of rights of way, trespass, damage to property, harassment or any other matter that does not come within the ambit of any of the covenants contained in Schedule 6 to the lease. Nor does it have any jurisdiction to award compensation or issue injunctions to compel a party to do certain things, as asked for by the Applicant. These are all matters for the County Court. Consequently, many of the issues raised by the Applicant cannot be resolved in these current proceedings. The Tribunal does not encourage the parties to engage in further litigation which will be costly, protracted and stressful for little gain. The outstanding issues are capable of being resolved without the need for litigation if a reasonable approach can be adopted. If it is not possible for the parties to engage in direct discussions on the outstanding matters the Tribunal urges them to consider mediation.

42. The Applicant says that most of the allegations with regard to the Respondents' conduct come within paragraph 15 or 24 of the Sixth Schedule to the lease. Paragraph 15 is not to do, permit or suffer to be done on the premises anything that may be or become a nuisance or annoyance to the lessor. Paragraph 24 provides that the lessee must comply with the regulations set out in Schedule 8 which, at paragraph 3 prevents the lessee from doing any act to the damage or annoyance of the lessor. "Nuisance" has a particular meaning in law. The Applicant does not allege that the Respondents have committed nuisance in this sense of the word but he does claim that some of the allegations have been an annoyance to him or his tenants of the Ground Floor Flat. The

Tribunal, therefore, must consider what is meant by an annoyance to the lessor or his tenants. Is it a totally subjective test, that is if something happens to annoy the lessee or the tenants, no matter how trivial, does that constitute a breach of covenant, or is it an objective test whereby whether an act is annoying is judged against what the ordinary reasonable person would find annoying?

43. In order to answer that question we were not supplied with any authorities where this has been decided. However, the Tribunal considers that it must be an objective test; in other words, whether a reasonable person having the ordinary use of the house for pleasurable enjoyment or the reasonable landlord having the usual landlord's interest in a property, would be annoyed or aggrieved by the lessees' actions. Further the words "annoyed" and "aggrieved" connote something more serious than being irked or irritated. Consequently, although the Applicant may say that he is annoyed by certain conduct of the Respondents the Tribunal will judge that conduct against the test set out above in deciding whether a particular act on the part of the Respondents constitutes a breach of paragraph 15 or 24 of Schedule 6.

44. The next general point the Tribunal wishes to make is that it is the Applicant who has brought this case and it is for him to prove his case on a balance of probabilities.

45. This leads to the Tribunal's consideration of Issues, 11,12,15 and 19. The allegations comprising theses issues consist of nothing more than the Applicant's assertion that the Respondents are responsible for them. This is flatly denied by the Respondents and the Applicant has no additional evidence to support the allegation that the Respondents are responsible. Where he says that his tenants have seen things and reported to him he has produced no evidence from those tenants, he is unable to say who they are or when precisely the events occurred, nor has he produced any letter or email from the tenants complaining or reporting the alleged incidents. Consequently, the Tribunal finds that the Applicant has failed to discharge the burden of proof required in respect of those issues and dismisses them.

46. Issue 17 has already been dealt with at paragraph 15 above and is hereby dismissed.

47. That leaves issues 3-10, 13, 14, 16 and 18 for the Tribunal to determine.

48. With regard to Issue 3, the Applicant agreed that when the Respondents purchased their flat there was just one fence post standing. The Respondents say that some fence panels were lying on the ground. At this time, therefore, it cannot be said that there was any boundary fence separating the two gardens. The removal by the Respondents of the one remaining fence post may technically have been a trespass but that is not something for this Tribunal to be concerned with. The Respondents say that their fence is not on the boundary but within their boundary, so they have not altered the

boundary. The Applicant disagrees but until that issue has been determined by a court, if not agreed, then this Tribunal cannot say that the boundary has been altered such that there has been a breach of covenant at paragraph 10 of the Sixth Schedule. Further, the Tribunal finds that even if there had been an alteration to the boundary line, which it does not, this does not come within the meaning of alteration to the "architectural appearance" or "exterior decorations" of the property so as to come within that part of paragraph 10. Nor does it find that there has been a "structural alteration". The Tribunal does not construe a fence to be "structural" in the context of the said paragraph 10. The word "structural" in the Tribunal's judgment connotes something far more substantial than a boundary fence.

49. The other aspect of Issue 3 concerns the alleged refusal of the Respondents to allow the Applicant's surveyor access to the garden. The Respondents say they were not given 48 hours' notice as required by the lease and the visit was not to do with maintenance of trees on the rear boundary as now claimed by the Applicant, but was simply to undertake a second opinion on the plan of the actual features on the ground as compared with the lease plan as had previously been undertaken by Mr Mills. Thus, the Respondents say, it was not for the purpose specified in the lease. The Applicant says he did give notice but there was no evidence as to when this was given or whether this was in writing as required. There is no mention in the second surveyor's report to the Applicant that his instructions included reporting on the state of the rear boundary. Consequently, the Tribunal finds that the Applicant has failed to establish this ground on the balance of probabilities.

50. Issue 4 concerns the garden shed. The question here is not whether the shed complies with planning regulations but whether it is a structure requiring the landlord's consent. The Tribunal finds that this is not a "structure" within the context of paragraph 10 of the Sixth Schedule. Nor is it a "new building". Both the term "structure" and "building" connote something more substantial and permanent than a shed. The Tribunal accepts Mrs Morgan's evidence that the shed is on caster wheels so that it is easily moveable. Even if the shed simply rested on the ground without wheels it would be stretching the ordinary meaning of the words "structure" and "building" to describe this relatively small shed. Issue 4 is therefore dismissed.

51. Issue 5 concerns the so called "picket fence". Mrs Morgan says it is not a picket fence but some wooden pallets placed on their side. They are not attached to the land and are moveable. The Tribunal, has seen the photographs of them. For the same reasons as for the shed the Tribunal does not find that this is a structure which required the landlord's consent.

52. Issue 6 concerns the parking bollard. The Respondents do not deny that they moved it. Technically, this may be a trespass to goods but, as stated previously, that is not a matter for this Tribunal. The question for the Tribunal is whether this removal constituted a breach of

covenant. Is it a breach of the Sixth Schedule, paragraph 10 or 14 as the Applicant alleges. The Tribunal finds that the removal was not a "structural alteration", nor has it altered the "external construction" or "architectural appearance" or "exterior decorations" of the property. Paragraph 14 concerns permitting the landlord and/or his workman to enter onto the demised premises for certain purposes and has nothing to do with the removal of the Applicant's property by the lessees and has nothing to do with the removal of the bollard. Consequently, the Tribunal does not find that the Respondents have breached this paragraph of Schedule 6. Two questions remain about the bollard. First, did the Respondents cause damage to the concrete securing the bollard when it was removed? If so, this could constitute a breach of paragraph 15 of the Sixth Schedule. The Respondents deny that the bollard was secured or that they caused any damage. The Tribunal has looked at the photographs in the hearing bundle and can find no evidence of damage to concrete. Consequently, that allegation is not proved.

53. Still on the subject of the parking bollard, the Applicant says that this was removed in April 2015, in other words, almost immediately after the Respondents moved into their Flat. The Applicant says that this caused him annoyance and so is a breach of paragraph 15 of the Sixth Schedule. Whether the Applicant was entitled to be annoyed about the interference with the bollard would depend to some extent on whether the Respondents were entitled to remove it. They say they were because it was impeding their right of way on foot over the driveway, that it was a trip hazard and, in fact, Mr Morgan's mother had injured herself on it. Whether or not the bollard was impeding the Respondents' right of way is, again, not a matter within the Tribunal's jurisdiction to determine. There is a lot of case law on that subject. However, as the right of way is on foot only and as the driveway is wide enough for anyone to walk along it unimpeded by the bollard, the Respondents may have difficulty in maintaining their position on that point if it came to litigation. The Tribunal can say no more than that. It is not to be taken as a finding of any sort. If that is right then the Tribunal can understand that the interference with the Applicant's property on his own land, albeit relatively trivial, could cause annoyance. This would satisfy the test set out in paragraph 43 above. Consequently, albeit fairly trivial, the Tribunal does find that the removal of the bollard constitutes a breach of the covenant.

54. Issue 7 has already been dealt with in paragraph 49 above.

55. Issue 8 concerns the Respondents' CCTV. They say that the camera is a not connected and is merely there for deterrent purposes. The Applicant cannot gainsay that. In any event, the Tribunal does not see why the Respondents should not have functioning CCTV pointing towards the front driveway for security purposes, if they wish. The Applicant says he is annoyed by this. The Tribunal finds that this does not satisfy the test set out in paragraph 43 and so dismisses this ground.

56. Issue 9. On the Respondents' admission the floors of the Flat were not carpeted until after the matter was brought to their attention after the Tribunal's inspection in 2017. Notwithstanding that the breach has been remedied the Tribunal must find that there was a breach prior to 2017.

57. Issue 10 concerns the parking of the Respondents' car on the access driveway when there is no right to park. There is a photograph supporting this on one occasion. The Respondents say that this was taken before the Upper Tribunal decision when it was ruled that the Respondents enjoyed a right of way on foot only. The Applicant says the photograph was taken at a later date but there is no evidence of the date. Whether the photograph was taken before or after the Upper Tribunal decision makes no difference as to whether a breach of covenant has occurred because the Respondents never had a right to bring a car onto the driveway. However, there is no evidence of the frequency of such parking. If it was only once, this might provoke a mild irritation in a landlord. If it was happening regularly then there could well be annoyance on the part of a landlord. However, there is only evidence of the one occasion and so the Tribunal does not accept that there was a breach of the covenant not to cause the landlord annoyance when applying the test set out in paragraph 43.

58. Issue 10 also involves, however, the allegation that Mr Morgan has ridden his motorcycle along the driveway and noisily tuned it up to the annoyance of the Applicant's tenants. There is no evidence of the tenants having been annoyed by any such behaviour on the part of Mr Morgan and that aspect of the Issue will therefore be dismissed.

59. Issue 13 concerns alleged alteration of one rear window in the Flat from being sealed to one that is capable of being opened. The Applicant says that he knows that when the windows were replaced in 1995, for which he gave permission, the lower section of this window was sealed shut. It is now openable. There has therefore been an alteration in the structure of the building without his consent. The fact that this window is now openable is said, by the Applicant, to affect the enjoyment of the Ground Floor Flat's garden below due to noise and cigars that have been found in the garden. The Respondents deny that they have done anything to the window. They have produced a photograph from which a date can be seen in the architrave of the window. That date is 1993. It is more likely than not, therefore, that the window in question was installed in 1995 than at a later date. The allegation of noise and any other "annoyance" is not corroborated and the Tribunal does not find these allegations proved.

60. Issue 14 concerns the allegation of trespass onto the Applicant's front and rear gardens causing the Applicant "not to appreciate" this conduct. "Not appreciating" it does not amount to being "annoyed" by it. As previously stated, it is not within the Tribunal's jurisdiction to determine the extent of a right of way. However, the Tribunal does note that there is a contradiction between the wording of the Fourth

Schedule and the lease plan referred to in it. The wording states that the right of way is along the "common driveway" hatched black on the plan annexed. The plan shows the black hatching to extend over the front garden, well beyond what would normally be understood to be the "driveway". Normally speaking the "driveway" would be the tarmaced area. Unless the parties can agree what was intended and agree to a variation of the lease or plan to make the position clear (which, regrettably in this case seems unlikely) there is room for argument on both sides as to the extent of the right of way. There is no clear evidence before the Tribunal, however, of the Respondents having trespassed on the front or rear garden and so that issue will be dismissed.

61. Issue 16 concerned various unspecified acts of alleged invasion of privacy by the Respondents which were unsupported by any evidence. The evidence that it was the Respondents who contacted the Council as to the number of tenants occupying the property such that it constituted an HMO was hearsay evidence unsupported by any confirmation from the Council. The evidence of this "Issue" was therefore extremely weak and insufficient for the Applicant to discharge the onus of proving the allegation.

62. Issue 18 concerned the Respondents not accepting the Applicant's quotations for the repair of the fence. The Respondents say that the quotations they were given contained other work and that they wanted to see quotations restricted to the fence work. The copy estimates in the bundle do only refer to repairing the fence but they were obtained before the Respondents purchased the Flat and it is not clear if these were the estimates shown to the Respondents or whether they were later ones. In any event, there is no obligation on a lessee to accept the landlord's quotations or estimates. If they are not accepted the landlord must continue to have the work done and claim a proportion of the cost from the lessee who then has the right to challenge that cost if the lessee considers that the cost is unreasonable. In this case the Applicant did not proceed to have the work done.

Conclusion

63. Of the nineteen allegations of breach of covenant made by the Applicant the Tribunal finds only two to have been established: namely, the absence of carpet to the floors at one time and the removal of the parking bollard. The former has been remedied and the latter is trivial. All other allegations of breach are dismissed.

64. Finally, the Tribunal wishes to point out that its findings concern the alleged breaches to the covenants in the old lease. Although the wording of the lessees' covenants is the same as in that lease, a new lease was executed a fortnight or so after the application in this case was made. The Respondents now hold the Flat subject to the new lease. The whole point of section 168 is to provide a basis for forfeiture of the lease. However, the two findings of breach by the Tribunal do not relate to the new lease and so cannot form the basis of proceedings for

forfeiture of the new lease. Consequently, there seems little point in the application having been pursued once the new lease was entered into. This is something the Tribunal will need to consider when it comes to decide the question of costs.

Costs

65. The Applicant has asked for an order that the Respondents pay his application and hearing fees amounting to £300. The Tribunal does have power to do this under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. However, in view of the fact that the Applicant has almost wholly been unsuccessful in these proceedings the Tribunal does not make the order requested.

66. The Respondents applied for an order under section 20C of the Act. That gives the Tribunal power to order that any costs incurred by the landlord in the proceedings shall not be added to any future service charges. Such an order may be made if the Tribunal considers it just and equitable to do so. Again, for the reason that the Applicant has almost completely been unsuccessful in these proceedings the Tribunal does exercise its discretion to make an order under section 20C of the Act.

67. The Respondents counsel also asked the Tribunal to make an order for costs against the applicant under Rule 13(1)(b) of the aforesaid 2013 Rules. Usually, the Tribunal is a no costs forum. However, under Rule 13(1)(b) the Tribunal may order one party to proceedings to pay the costs of another party if a person "has acted unreasonably in bringing, defending or conducting proceedings". The Tribunal is conscious that at the end of the hearing there was little time for Miss Worton to make her application fully or for Mr Park to respond properly to it.

68. **The Tribunal therefore requires the parties to make their concise representations as to costs in writing. It wishes Miss Worton to go first and requires her to send her representations to Mr Park and to the Tribunal within 7 days of this decision being sent to the parties. Mr Park will then have 7 days from receipt of those representations for him to answer them succinctly. A statement of costs for Summary Assessment should, where appropriate, accompany the submissions. The Tribunal will then make its decision on costs without a further hearing and notify the parties by way of a short supplemental decision as soon as possible thereafter.**

69. The time for appealing this decision will not start to run until the decision on costs is sent to the parties.

70. For the benefit particularly of Mr Park, who is unrepresented, the Tribunal will be guided by the case of *Willow Court Management Company (1985) Limited v Alexander and others [2016] UKUT 0290 (LC)* when deciding the application with regard to costs.

Dated 4 November 2020

Judge D. Agnew (Chairman)