FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/43UH/ LBC/2019/0009
Property:	26 Hale Street, Staines, Surrey TW18 4UW
Applicant:	Si Pan Long
Respondent:	John Salter
Representative:	Rowberry Morris, Solicitors
Type of Application:	Section 168 Commonhold and Leasehold Reform Act 2002 (Breach of Covenant)
Tribunal Members:	Judge A Cresswell (Chairman)
Date of Decision:	8 July 2019 on the Papers

DECISION

The Application

1. The Applicant, the owner of the freehold interest in 26 Hale Street, Staines, Surrey TW18 4UW, has made an application to the Tribunal claiming breach by the Respondent of various covenants in the Lease. The Tribunal has considered only the breaches claimed by the Applicant to have occurred.

Summary Decision

2. The Tribunal has determined that the landlord has demonstrated that there has been a breach of covenant. The breaches found are in respect of the covenants relating to the tenant's duty to use the Property only as a private dwelling occupied by a single household (Clause 3.14) and not, unless the Landlord gives consent in writing, to alter or add to the Property or allow anyone else to do so (Clause 3.9). Details follow.

Inspection and Description of Property

3. The Tribunal did not inspect the property. The property in question appears to comprise a house and garden, connected to 24 Hale Street, which is occupied by the Applicant. Part of 24 Hale Street faces on to the garden of the property.

Directions

4. Directions were issued on various dates. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
5. This determination is made in the light of the documentation submitted in response to those directions.

The Law

6. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.
7. A covenant is usually regarded as being a promise that something shall or shall not be done or that a certain state of facts exists. Section 168(1) and (2) Commonhold and Leasehold Reform Act 2002 provide that a landlord may not serve a notice under Section 146 Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Tribunal under Section 168(4) of the 2002 Act that the breach has occurred.
8. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to that question and cannot encompass claims outside that question, nor can it encompass a counterclaim by the Respondent; an application under Section 168(4) can be made only by a landlord.
   The issue of whether there is a breach of a covenant in a lease does not require personal fault unless the lease says so: **Kensington & Chelsea v Simmonds** (1997) 29 HLR 507. The extent of the tenant's personal blame, however, is a relevant consideration in determining whether or not it is reasonable to make an order for possession: **Portsmouth City Council v Bryant** (2000) 32 H.L.R. 906 CA, but that would be a matter for the Court.
9. **Teign Housing v Lane** [2018] EWHC 40 (QB): Although a tenant did not consider that he had breached the terms of his tenancy, he had. His genuine belief that he had permission did not mean that there had not been a breach. The trial judge had wrongly approached the issue of breach and therefore the matter was remitted for retrial. The judge had been entitled to find that the

tenant believed he had been given permission to install CCTV cameras, but believing that his actions were authorised was not a defence to a claim for a breach of the tenancy agreement clause preventing alterations without written permission, *Kensington and Chelsea RLBC v Simmonds [1996] 3 F.C.R. 246* followed.

10. **Tod-Heatly v. Benham** (1888) 40 Ch. D. 80: Per Lord Justice Cotton, can the Tribunal be satisfied by the evidence before it that reasonable people, having regard to the ordinary use of Mr Long's house for pleasurable enjoyment, would be annoyed and aggrieved by what has been done by the Respondent? Would it be an annoyance or grievance to reasonable, sensible people? Is it an act which is an interference with the pleasurable enjoyment of the house? Per Lord Justice Lindley, does it raise an objection in the minds of reasonable men, and is it an annoyance within the meaning of the covenant? Per Lord Justice Bowen, " 'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house – if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort."

11. In **Tod-Heatly v. Benham,** the Court considered the meaning of "annoyance":

Cotton LJ:

> *'Now "annoyance or grievance" are words which have no definite legal meaning. It has been pressed upon us that we cannot say that it was that which was an annoyance or grievance to reasonable people, because the Judges, in speaking of what would be an annoyance to reasonable people, are only speaking of what they themselves really think would be an annoyance or grievance. That is the difficulty that Judges very often have to deal with; they must not take that to be an annoyance or grievance which would only be so to some sensitive persons. They must decide not upon what their own individual thoughts are, but on what, in their opinions and upon the evidence before them, would be an annoyance or grievance to reasonable, sensible people; and, in my opinion, an act which is an interference with the pleasurable enjoyment of a house is an annoyance or grievance, and within the definition given by V-C Knight-Bruce in Walter v. Selfe 4 De G. & Sm. 322. It is not sufficient in order to bring the case within the words of the covenant, for the Plaintiffs to show that a particular man objects to what is done, but we must be satisfied by argument and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done.'*

Lindley LJ:

> *'The question which arises is, what is the meaning of the expression "shall or may be or grow to the annoyance, nuisance, or damage' [sic: he omitted 'grievance'] of the persons named. Certainly that string of words is introduced in order to give the covenantee a greater protection than he would have had without any such words at all, or if only one of those words were used. ... I cannot at all agree with the contention that these words "annoyance or grievance to the inhabitants" mean that which would be according to law a nuisance, or that the covenant is only against such acts as would produce pecuniary damage. ... Now what is the meaning of annoyance? The meaning is that which annoys, that*

which raises objections and unpleasant feelings. Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant.'

Bowen LJ:

'What is the meaning of the term "annoyance"? It implies more, as it seems to me, than "nuisance." The language of the covenant is, that nothing is to be done, "which shall or may be or grow to the annoyance, nuisance, grievance or damage of the lessor or the inhabitants of the neighbouring or adjoining houses." Now, if "annoyance" meant the same thing as "nuisance" it would not have been put in. It means something different from nuisance. … "Annoyance" is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house – if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort.'

12. The Tribunal does have jurisdiction to determine whether the landlord has waived the right to assert, or is estopped from asserting, that a breach has occurred, but does not have jurisdiction to consider the question of waiver necessary when deciding whether a landlord has waived the right to forfeit a lease (HH Judge Huskinson in **Swanston Grange Management Limited v Langley- Essex** (LRX/12/2007)).

13. In **Vine Housing Cooperative Ltd v Smith** (2015) UKUT 0501 (LC), HH Judge Gerald said this: *The question before the F-tT …… was the straightforward question of whether or not there had been a breach of covenant. What happens subsequent to that determination is partly in the gift of the landlord, namely, whether or not a section 146 notice should be issued and then whether or not possession proceedings should be issued before the county court. It is also partly in the gift of the county court namely whether or not, if and when the application for possession comes before the judge, possession should be granted or the forfeiture relieved. These events are of no concern to, and indeed are pure conjection and speculation by, the F-tT. Indeed the motivations behind the making of applications, provided properly made in the sense that they raise the question of whether or not there had been a breach of covenant of a lease, are of no concern to the F-tT. The whole purpose of an application under section 168, however, is leave those matters to the landlord and then the county court, sure in the knowledge that the F-tT has determined that there has been breach.*

GHM (Trustees) Limited v Glass (LRX/153/2007) the President (Mr George Bartlett QC) said:

"*in my judgement the LVT was in error in refusing to make a determination that a breach had occurred on the ground that the breach had been remedied by the acquisition of the landlords of knowledge on the tenants' identity. The jurisdiction to determine whether a breach of covenant has occurred is that of the LVT. The question whether the breach has been remedied, so that the landlord has been occasioned no loss, is a question for the Court in an action for breach of covenant*"

Forest House Estates Ltd v Al-Harthi (2013) UKUT (LC):

The question of whether a breach had been remedied by the time of the LVT's inspection was not an issue for determination by the LVT. Questions relating to remedy, damages for breach and forfeiture are matters for the Court. The

LVT was entitled to record the fact that the breach had been remedied by the time of its inspection, but that finding was peripheral to its main task under section 168(4) of the 2002 Act.

14. Where a party does bear the burden of proof:
"*It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law… It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out…: the burden of proof is a last, not a first, resort."* (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

Ownership

15. The Applicant is the owner of the freehold of the property, as shown by a copy of the Register of Title. The Respondent is the owner of the leasehold interest in the property.

The Lease

16. The lease before the Tribunal is a lease dated 13 July 2001, which was made between Latchmere Properties Limited as lessor and the Respondent as lessee.
17. Clause 1.6.1.2 defines "*The Building*" as "*the buildings and other structures comprising the dwelling houses …"*
18. Clause 1.6.2 says *"the property" is shown edged red on Plan 2 ("Plan 2") annexed to this Lease and shall include:*
1.6.2.1 includes details of parts of the structure of the building and pipes, wires, cables, conduits etc.
19. Clause 3.14 of the lease is a covenant by the Respondent *"To use the Property only as a private dwelling occupied by a single household …* "
20. Clause 3.9 of the lease is a covenant by the Respondent *Not, unless the Landlord gives consent in writing, to alter or add to the Property or allow anyone else to do so except that no consent shall be required for internal non-structural alterations. This obligation does not restrict any duty to comply with other terms of this lease or with statutory requirements.*
21. Paragraph 3 of Fourth Schedule to the lease is a covenant by the Respondent *Not to do anything or permit to be done anything which shall be a nuisance or annoyance to the Landlord or the Owner or occupier of other parts of the Building.*
22. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
23. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:

> 15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract

to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

Consideration and Determination of Breach of Covenant
Clause 3.14: Other Residents
The Applicant

24. The Applicant states that in September and October 2018, the Respondent listed 2 rooms to let via Rightmove leading to 2 tenants in residence at the property from the beginning of November 2018; the Respondent also was living at the property.

The Respondent

25. The Respondent admits he has breached Clause 3.4 through ignorance, having let 2 rooms to 2 tenants. As at 28 May 2019, one tenant had left and the other was under notice to leave.

The Tribunal

26. The Tribunal has followed the guidance of the Supreme Court in **Arnold v Britton** and others when considering the words of the lease in this case.
27. The Respondent admits he has breached Clause 3.4, having let 2 rooms to 2 tenants.
28. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has been a breach of Clause 3.4.

Clause 3.9: The Tree
The Applicant

29. The Applicant states that the Respondent, without his permission, planted a tree next to a wall in his front garden. The Applicant did not complain when it was small, but now it is large and he has concern for the structural integrity of the adjoining wall as the tree matures.
30. In response to the Respondent's statement, the Applicant says that nothing was planted in the relevant position when he moved into the neighbouring property in 2011; only in the last 3 to 4 years has he seen it grow from a bush into a tree. It is difficult to believe that the Respondent, the leaseholder since 2001, was not responsible for planting the tree and it is noted that it provides cover against onlookers from the nearby bridge.

The Respondent

31. The Respondent denies planting the tree. He has cut it back from time to time. It was in place before his lease.

The Tribunal

32. The Property is defined in Clause 1.6.2. A study of Plan 2 shows it clearly to include the building and garden. The Respondent argues that references to the structure somehow limit the wider definition of building and garden delineated on the plan, but the further detail is clearly included so as to differentiate those parts of the building demised from those comprised in 24 Hale Street.
33. The Tribunal has considered the competing arguments and can see no cogent evidence to support a contention that the Respondent planted the tree in question. There is no evidence as to the type of tree or its growing cycle. It is within the everyday experience of any gardener, including this Tribunal, that saplings appear in gardens on a very regular basis, their presence caused by windborne seeds or the digestive systems of birds. If left, those saplings can relatively quickly grow into trees. There is no evidence, therefore, as to when the tree first appeared or who or what was responsible for its presence in the garden.
34. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has not been a breach of Clause 3.9 in relation to the tree.

Clause 3.9: The Security Light

The Applicant

35. The Applicant states that the Respondent has installed a passive infrared-triggered floodlight on the building to light the driveway. No permission was sought or granted for this alteration. The light shines down and into his living room window below.
36. The new light is larger than the old light and has an infrared sensor attached.
37. Had the Respondent replied to initial letters, an agreement could have been reached about the size, location and angle of the lighting.

The Respondent

38. The Respondent states that he replaced an existing floodlight that was faulty and which had been there when he took on the lease.

The Tribunal

39. The Tribunal has had regard to the guidance in **Teign Housing v Lane.**
40. It appears to be common ground that an old, inoperative, light was taken down by the Respondent and replaced with a new PIR light.
41. The Property is defined in Clause 1.6.2. A study of Plan 2 shows it clearly to include the building and garden. The Respondent argues that references to the structure somehow limit the wider definition, but the further detail is clearly included so as to differentiate those parts of the building demised from those comprised in 24 Hale Street.
42. The Respondent's argument that Clause 3.9 is concerned only with structural alterations is not tenable for the reason detailed above, i.e. that the Property has a wider meaning than the building; because the Respondent appears to have read parts of the clause and considered them outside their context; because the clause itself, by excepting internal non-structural alterations, does not except external non-structural alterations.
43. Although the Respondent argues that there was simply a replacement of a faulty light by a working light, that activity was without the written consent of the Applicant.
44. It is suggested that the Applicant could not unreasonably withhold consent, but this ignores the concern posed by the light to the Applicant and the fact that any consent may well have been conditional upon how the new light was

directed. When the positioning/size of the light is agreed and the living room is brought back into use as such, the parties can ensure that there will be no future possibility of concern as to its use.

45. This Tribunal cannot see how it can be argued that a new working light installed by the Respondent in place of an old inoperative light without the consent of the lessor can be described as having been affirmed by the lessor.
46. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has been a breach of Clause 3.9 in relation to the new security light.

Paragraph 3 of the Fourth Schedule: The Bins

The Applicant

47. The Applicant states that the Respondent stores Local Authority refuse bins against the wall and directly below and/or near the living room window of his home, 24 Hale Street. They pose a health risk and are a nuisance. There are other, out of sight, areas that the bins can be stored.
48. The Applicant plans soon to put back the living room from a storage space to be the main family living space and his primary concern is about the health risks arising from the proximity of the bins to the window.

The Respondent

49. The Respondent states that he relies upon **Davies v Dennis & Others** (2009) EWCA Civ 1081 and **Wood v Cooper** (1894) 3 Ch 671, where Megarry J said that a nuisance or annoyance would continue to be judged by "*robust and common sense standards*". (In respect of the former, see **Tod-Heatly v Benham** above. In respect of the latter, Megarry J was not a Judge in **Woods v Cooper**; the quotation appears to come from HHJ Behrens at first instance in **Davies v Dennis and Others**.)
50. He attaches a photograph sent to him in 2012 by the Applicant showing the bins in the same location that the Applicant complains is a nuisance or annoyance, not having complained about this before. The bins have been kept in this location since at least 2001, when he took on the lease.
51. The bins are sealed with lids and do not pose a health risk.
52. Since the complaint, the Respondent has moved them along a little further; they cannot be kept on the public highway.
53. The Applicant was not annoyed or aggrieved until this year; no reasonable person would be annoyed or aggrieved.

The Tribunal

54. The Tribunal has considered the competing arguments.
55. Whilst not welcome to the Applicant, wheelie bins are a feature of modern life. There is no evidence before the Tribunal to show any health risk from their positioning and yet that is the sole concern of the Applicant.
56. The available evidence shows the bins to be occupying the same position over a period of some 7 years at least, i.e. adjacent to, but not directly beneath (save for a green bag in the image dated 13 April 2019) a window of 24 Hale Street, but within the demised property and close to the exit gates.
57. The Tribunal is guided by **Tod-Heatly v Benham** above.
58. On balance, it has concluded that there is no breach of Paragraph 3 of the Fourth Schedule in relation to the bins. There is no actual evidence of a health risk; the room in question is, apparently, not currently being used as a living room; the bins are not (save for the green bag) directly below the window; there is no evidence of unpleasant odour; there had been no complaint about the bins being in the same position over the previous 18 years or so.

59. Applying the required tests, the Tribunal is not satisfied by the evidence before it that reasonable people, having regard to the ordinary use of Mr Long's house for pleasurable enjoyment, would be annoyed and aggrieved by what has been done by the Respondent in his placing of his bins. Or that it would it be an annoyance or grievance to reasonable, sensible people. Or that it is an act which is an interference with the pleasurable enjoyment of the house. Or that it raises an objection in the minds of reasonable men, or it is an annoyance within the meaning of the covenant. Or that it is a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house or which disturbs his reasonable peace of mind.
60. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has not been a breach of Paragraph 3 of the Fourth Schedule.

Costs and Fees

61. The parties each have made an application for costs incurred in these proceedings, the Applicant's application relating solely to the Tribunal fees.
62. The Applicant argues that the Respondent has failed to respond to correspondence first sent on 7 November 2018; the tenants were in residence from November 2018 leading to a substantial sum for the Respondent in rent received as a result of his breach of covenant. The Respondent was found to be in breach of covenant by the Tribunal on 1 October 2014.
63. The Respondent argues that he has breached only one covenant (the Tribunal has found breaches of 2 covenants) and that the Applicant has acted through ignorance and been disingenuous. He argues that there should either be an order for three quarters of his costs or no order for either party.
64. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 read as follows:

> Rule 13.——(1) The Tribunal may make an order in respect of costs only——
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in——
>
> (ii) a residential property case,
>
> or (iii) a leasehold case; or
>
> (2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
>
> (3) The Tribunal may make an order under this rule on an application or on its own initiative.

65. The Tribunal reminds itself that this jurisdiction is generally a "no costs" jurisdiction. By contrast with the County Court, residential property Tribunals are designed to be "a largely costs-free environment": **(1) Union Pension**

Trustees Ltd, (2) Mr Paul Bliss v Mrs Maureen Slavin [2015] UKUT 0103 (LC).

66. The Tribunal has had regard to the word *"unreasonably."* The test is whether the behaviour permits of reasonable explanation: HH Judge Huskinson in **Halliard Property Company Limited and Belmont Hall and Elm Court RTM Company Limited LRX/130/2007 LRA/85/2008**.

67. The Tribunal followed a two-stage approach. First to find whether the Respondent acted unreasonably and then, if we so found, to exercise our discretion whether to order costs having regard to all of the circumstances.

68. **Ridehalgh v Horsfield** (1994) 3 All ER 848, Bingham LJ:
"'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable"
"'Improper' means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code."

69. The Tribunal finds that the Applicant has not acted unreasonably. He was entitled to pursue the breaches of covenant found by the Tribunal, one of which has led to the Respondent profiting from his breach and the Tribunal notes that the breach was not admitted to the Applicant until he brought the proceedings.

70. The Tribunal makes no order that the Respondent reimburse the Tribunal fees. The Applicant appears to have additionally taken weaker issues by relying on the issues of the tree and the bins.

Judge A Cresswell

APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

