FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/00HP/LBC/2020/0030
Property:	168a Rossmore Road, Poole, Dorset BH12 2HL
Applicant:	Sita Henry-Pierre
Representative:	In Person
Respondent:	Mr Jonathan & Mrs Jacqueline Cole
Representative:	In Person
Type of Application:	Section 168 Commonhold and Leasehold Reform Act 2002 (Breach of Covenant)
Tribunal Members:	Judge A Cresswell (Chairman) Mr K Ridgeway MRICS Mr E Shaylor MCIEH
Date and venue of Hearing:	17 March 2021 by Video
Date of Decision:	23 March 2021

DECISION

The Application

1. On 20 November 2020, the Applicant, the owner of the freehold interest in 168A Rossmore Road, Poole, Dorset BH12 2HL, made an application to the Tribunal claiming breach by the Respondents of various covenants in Lease.

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 not to do or permit or suffer to be done in or upon the Demised Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor under clause 4(i) and to allow access to the landlord under clauses 3(j) and 3(i) of the lease. Details follow.

Inspection and Description of Property

3. The Tribunal did not inspect the property but saw it on Street View and was supplied with photographs and plans.
4. The property in question appears to comprise a garage and first floor of a semi-detached house with a garden. The ground floor is retained and lived in by the Applicant lessor.

Directions

5. Directions were issued on various dates. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
6. This determination is made in the light of the documentation submitted in response to those directions and the evidence and oral representations received at the hearing. Evidence was given at the hearing by the Applicant and by Mr and Mrs Cole.
7. At the conclusion of the hearing, the parties confirmed to the Tribunal that they had been able to say all that they wished to say.

The Law

8. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.

9. 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.

10. The Tribunal assesses whether there has been a breach on the balance of probabilities (**Vanezis and another v Ozkoc and others** [2018] All ER(D) 52).

11. 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. 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.*

12. 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.

13. **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.

14. 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)). See further below.

15. **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."

16. **Southwark London Borough Council v Mills and others; Baxter v Camden London Borough Council** [1999] 4 All ER 449 Lord Hoffman:

I turn next to the law of private nuisance. I can deal with this quite shortly because it seems to me that the appellants face an insuperable difficulty. Nuisance involves doing something on adjoining or nearby land which constitutes an unreasonable interference with the utility of the plaintiff's land. The primary defendant is the person who causes the nuisance by doing the acts in question. As Pennycuick V-C said in Smith v Scott [1972] 3 All ER 645 at 648, [1973] Ch 314 at 321:

'It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance ...'

But I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other. As Lord Goff of Chieveley said in Cambridge Water Co Ltd v Eastern Counties Leather plc [1994] 1 All ER 53 at 70–71, [1994] 2 AC 264 at 299:

'... liability [for nuisance] has been kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action": see Bamford v Turnley (1862) 3 B & S 62 at 83, [1861–73] All ER Rep 706 at 712 per Bramwell B.'

Of course I accept that a user which might be perfectly reasonable if there was no one else around may be unreasonable as regards a neighbour. As Bramwell B remarked in Bamford v Turnley (1862) 3 B & S 62 at 84, [1861–73] All ER Rep 706 at 713 it may in one sense be quite reasonable to burn bricks in the vicinity of convenient deposits of clay but unreasonable to inflict the consequences upon the occupants of nearby houses. Likewise, it may be reasonable to have appliances such as a television or washing machine in one's flat but unreasonable to put them hard up against a party wall so that noise and vibrations are unnecessarily transmitted to the neighbour's premises. But I do not understand how the fact that the appellants' neighbours are living in their flats can in itself be said to be unreasonable. If it is, the same, as I have said, must be true of the appellants themselves.

On this part of the case the appellants again rely on Sampson v Hodson-Pressinger [1981] 3 All ER 710, to which I have already referred. In that case the Court of Appeal held that the use of the terrace over the plaintiff's roof was not only a breach of the covenant for quiet enjoyment by the landlord but also a nuisance committed by the upstairs tenant for which she and the landlord were both liable. My Lords, in my opinion this decision can be justified only on the basis that having regard to the construction of the premises, walking on the roof over the plaintiff's flat was not a use of the flat above which showed reasonable consideration for the occupant of the flat beneath. It was not, in Bramwell B's phrase, 'conveniently done'. If the upstairs tenant was going to use the roof in that way, it had to be suitably adapted to protect the plaintiff from noise. I do not regard it as authority for the proposition that normal and ordinary user, in a way which shows as much consideration for the neighbours as can reasonably be expected, can be an actionable nuisance.

17. **Coventry and Others v Lawrence** (2014) UKSC 13:

As Lord Goff of Chieveley explained in Hunter v Canary Wharf Ltd [1997] AC 655, 688, "[t]he term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land", quoting from Newark, The Boundaries of Nuisance (1949) 65 LQR 480. See also per Lord Hoffmann at pp 705-707, where he explained that this

principle may serve to limit the extent to which a nuisance claim could be based on activities which offended the senses of occupiers of property as opposed to physically detrimental to the property.

3. A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in Sedleigh-Denfield v O'Callaghan [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".

4. In Sturges v Bridgman (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.

5. As Lord Goff said in Cambridge Water Company v Eastern Counties Leather plc [1994] 2 AC 264, 299, liability for nuisance is "kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which '… those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action': see Bamford v Turnley (1862) 3 B & S 62, 83, per Bramwell B". I agree with Lord Carnwath in para 179 below that reasonableness in this context is to be assessed objectively.

18. 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).

Estoppel and Waiver

19. The Tribunal has jurisdiction to determine whether the landlord has waived the right to assert, or is estopped from asserting, that a breach has occurred (**Swanston Grange Management Limited v Langley- Essex** (LRX/12/2007) HHJ Huskinson: *"The LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of waiver or estoppel (in which case a breach will not have occurred)."*).

20. The Tribunal must consider whether the breach occurred, not whether there has been a waiver of any breach subsequently, as the latter is not a matter for the Tribunal, but is for a court.

Ownership

21. The Applicant is the owner of the freehold of the property. The Respondents are the owner of the leasehold interest in the flat.

The Lease

22. The lease before the Tribunal is a lease dated 16 August 1988, which was made between John Richard Jones and Andrew Nicholas Ellis as lessor and Jonathan David Jones as lessee.

23. The preamble to the lease contains definitions:

"The Demised Premises" means all that first and second floor flat ("the Flat") known as the First Floor Flat 168a Rossmore Road Parkstone Poole in the County of Dorset and the entrance and stairway leading from the ground floor of the Building shown for the purposes of identification edged red on the plan marked "A" annexed hereto and the roof and roof space of the Building and all parts of the Building both structural and otherwise above the level of one half the distance between the top and bottom of the joists supporting the floors of

the Demised Premises and all structural parts of such entranceway and stairway and the joists thereof TOGETHER WITH the garden shown edged green on plan "B" annexed hereto and 'TOGETHER ALSO with the garage and out building shown edged blue on the plan marked "B" annexed hereto and all structural parts of such garage and out building including the foundations and roofs thereof and TOGETHER ALSO with the forecourt or driveway shown edged brown on the plan marked "B" annexed hereto

"The Building" means the land and premises situate and known as 168 Rossmore Road Parkstone aforesaid shown edged in red on plan "B" annexed hereto of which the Demised Premises form a part being the land comprised in the title above mentioned

24. Clause 3 of the lease

3. THE Lessee HEREBY COVENANTS with the Lessor as follows:-

(i) To permit the Lessor and the Lessor's Surveyor Agents or Workmen on first receiving prior notice from the Lessor at all reasonable times in the daytime to enter into and upon the Demised Premises to view the state and condition thereof and thereupon the Lessor may serve upon the Lessee notice in writing specifying any repairs necessary to be done for which the Lessee is liable and request the Lessee forthwith to execute the same and if the Lessee shall not within three months after the service of such notice commence and thereafter proceed diligently with and complete the execution of such repairs then to permit the Lessor to enter upon the Demised Premises and execute such repairs and the cost thereof shall be a debt due to the Lessor from the Lessee and be forthwith recoverable by action

(j) To permit the Lessor and the lessees tenants or occupiers of the remainder of the Building or any neighbouring building and their respective servants agents or workmen at any time or times during the Term on first receiving prior notice from the Lessor at reasonable hours in the daylight (excepting in any emergency) to enter upon the Demised Premises for the purpose of cleansing and for executing repairs or alterations to the Building the Lessor or such adjoining owners or lessees as the case may be making good forthwith to the Lessee's reasonable satisfaction all damage thereby occasioned

(q) To comply in all respects at the Lessee's own cost with the provisions of any statute statutory instrument rule order or regulation made or given by any authority or the appropriate Minister or Court so far as the same affect the Demised Premises (whether the same are to be complied with by the Lessor the Lessee or the occupier) and forthwith to give notice in writing to the Lessor of the giving of such order direction or requirements as aforesaid and to keep the Lessor indemnified against all claims demands and liabilities in respect thereof

25. Clause 4. THE LESSEE HEREBY COVENANTS with the Lessor and with and for the benefit of the owners and tenants from time to time during the currency of the Term of the remainder of the Building:

(i) Not to do or permit or suffer to be done in or upon the Demised Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor or the occupiers of the remainder of the Building or whereby any insurance for the time being effected on the Building or any part thereof or the Demised Premises or any of them may be rendered void or voidable or whereby the rate of premium may be increased and to repay to the Lessor all expenses incurred by the Lessor rendered necessary by breach of this covenant

(ii) Not at any time to do or permit to be done anything in or upon the Demised Premises which might lessen or diminish the support and protection now given or afforded by the Demised Premises to the remainder of the Building nor to make any structural alterations modifications or additions to the Demised Premises nor to carry out any building works which might lessen the protection or support now enjoyed by the remainder of the Building

26. 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)).

27. 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 4(i) and 4(ii)

The Applicant

28. The Applicant asserted that the Respondents had breached this covenant by building in July 2015 a half block wall to replace a boundary wall that had fallen down in December 2014 and May 2019.

29. The Applicant states in her application as follows: *The demise of the flat includes a garden. The demise does not include the boundary wall of the garden which forms part of 'the Building' within the meaning of the lease. The boundary wall was a retaining wall with the neighbouring property, 166 Rossmore Road occupying the lower ground level position.*

30. The Applicant argued that because the work was conducted from the demised premises, the rebuilding was done in or upon the demised premises in the knowledge of a dispute between the Applicant and the owner of number 166 as to the rebuilding and was or became a nuisance or annoyance or caused damage or inconvenience to the Lessor by reason of the wall being built on her land.
31. She pointed to a photograph of Mr Cole constructing the wall from the demised garden.

The Respondents

32. The Respondents agree that the boundary wall is not part of the demise.
33. There is an implied term of the lease that the Applicant would keep the house in a proper state of repair, such that it would not cause a nuisance to the Respondents by virtue of its defective condition. The Applicant was in breach of that covenant. Her behaviour in failing to repair the wall was a nuisance as its dangerous nature led to a substantial interference with the enjoyment by the Respondents of their property.
34. The Applicant is estopped and/or it would be inequitable to permit her to insist on compliance with clause 4(ii).
35. The Applicant acquiesced in the Respondents' building works.
36. They suffered substantial detriment in terms of doing works in 2015 and 2019 and their costs.
37. They had an implied licence to enter her land to effect the repairs or were entitled to enter the land to abate a nuisance.
38. They did stop construction in 2015 when instructed by the Applicant to do so and had only stopped up a gap with the few remaining blocks in 2019.

The Tribunal

39. 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 and the other clauses in issue.
40. Clause 4(i) and (ii) relates to acts in or upon the demised premises. Both parties plead that the wall is not a part of the demised premises, a statement with which the Tribunal agrees. It follows that any removal of or rebuilding of the wall cannot, of itself, be in breach of this covenant. However, it is not

disputed that the works to remove the fallen wall and rebuild it as a breeze block wall were effected in good part from the demised premises. On that basis, the Tribunal has concluded that the rebuilding was or became a nuisance or annoyance or caused damage or inconvenience to the Lessor by reason of the wall being built on her land. Whilst the wall has withstood the elements for some time, it is not the wall that the Applicant desires and she is now involved in costs to obtain its removal.

41. The Respondents said that they saw the breeze block wall as a temporary solution and yet they have sought to impose conditions upon the Applicant for its removal.

42. A Party Wall decision makes clear that, although the buttress to the wall is a party wall, the breeze block wall is not and was constructed on the land owned by the Applicant, i.e. her half of the buttress wall.

43. On the basis of the evidence available to it, the Tribunal was unable to say that the Applicant ever acquiesced in the building as that runs counter to the documentation and oral evidence available to it. Nor is there evidence to support a view that there can be any form of estoppel as the Applicant has been consistent in her efforts to secure a solution via her case against 166, whilst making it clear to the Respondents that wall construction must cease.

44. The Respondents did not further explain how they had an implied licence to enter the Applicant's land to effect the repairs or were entitled to enter the land to abate a nuisance. There was no evidence before the Tribunal, for instance, of any application for an order under the Access to Neighbouring Land Act 1992.

45. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has been a breach of Clause 4(i).

46. The Tribunal wishes to make it clear, however, that it had some sympathy with the Respondents, who were caught in a situation not of their making, the wall having collapsed before their purchase of the flat was completed. Whilst the dispute between the Applicant and the owners of 166 continued and continues to run on, they wanted to use their land safely. There was a steep drop into 166 unguarded by a wall, which presented health and safety issues for them and their family and animals. The Tribunal does not endorse all of their behaviour, particularly when recourse to the Access to Neighbouring Land Act 1992 might have assisted them to proceed on a sure footing, but can

see that they may have felt driven to taking the matter into their own hands. The reasons for their actions are a matter, however, for the Court. The Tribunal's task was to determine if there had been a breach of the covenant.

Clause 3(q)

The Applicant

47. The Applicant asserted that the Respondents had breached this covenant by failing to serve appropriate notices under the Party Wall Act 1996 before commencing the above wall works.

The Respondents

48. The Respondents argue that because the wall is not categorised by the lease as being a party wall, it cannot be a party wall.
49. Further, an award under Section 12 of the Party Wall Act 1996 determined it not to be a party wall.

The Tribunal

50. Clause 3(q) is concerned *with the provisions of any statute statutory instrument rule order or regulation made or given by any authority or the appropriate Minister or Court so far as the same affect* ***the Demised Premises.*** The Party Wall Act affects the wall; the wall is not, as the parties both accept and the Tribunal has found, a part of the demised premises. As such any breach of the requirements of the Act in respect of the wall cannot meet the terms of the covenant because the Act does not affect the demised premises.
51. 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(q).

Clause 3(j)

The Applicant

52. The Applicant asserted that the Respondents had breached this covenant by refusing the Applicant access to remove the half block wall.
53. In her application, the Applicant states: *By way of letters dated 4 and 17 June 2019 via BLM Solicitors the Applicant required access to the garden of the flat to remove the half block wall. Access was expressly refused by the*

Respondents by way of an e-mail to BLM Solicitors dated 18 June 2019 and from Laceys Solicitors dated 24 June 2019.

The Respondents

54. The Respondents say that when the Applicant's solicitors wrote on 4 June 2019 seeking access for her to the garden for the purpose of demolishing the half block wall on 11 June 2019, the Respondents' solicitor replied to the effect that they were away on holiday from 7 to 21 June 2019 so that access would not be possible on the intended date.
55. The Applicant's solicitors sought access for the Applicant on 25 June 2019 by their letter of 17 June 2019.
56. No mention was made of reinstatement, nor was any scope of works provided or any detail given of what was to be done. Accordingly, the Respondents' solicitor responded that no access would be given until a structural survey had been carried out.
57. It is denied that there was a breach of covenant.

The Tribunal

58. Clause 3(j) provides the Applicant with a right to enter the garden, providing reasonable notice of a reasonable time is given, to execute repairs or alterations to the wall with a proviso that she make good forthwith to the Respondents' reasonable satisfaction all damage thereby occasioned to the demised premises.
59. It cannot be to make good all damage occasioned to the wall as the Respondents have no proprietary rights in the land on which they had built the wall. The solicitor's letter of 4 June 2019 gave an undertaking that no damage would be caused and that a temporary barrier followed by temporary fencing would be installed.
60. The Applicant's solicitor's letter of 17 June 2019 sought access to the garden only for the Applicant's "agents".
61. By email of 18 June 2020, Mr Cole responded, amongst other comments:
Please take notice that I will be seeking legal council as to my position in this matter and have a structural surveyor give me a report on the safety of the wall construction.

Until I have the results from both these avenues of enquiry no access to work on the wall will be granted, once my enquires are complete and I have further conversed with yourself regarding the results then at that time we will agree a time and date for access to my garden.

As you're client has waited four years before demanding this type of resolve I'm sure she can wait a little longer until I have all the facts in place.

I have exceeded to her untimely demands in the past when she has quoted the terms of the lease to me in the street, I will not be bullied into rushing this along when all this time has past until I am aware of my position and the intended works detail.

62. A letter from the Respondents' solicitor of 24 June 209 said: *Our clients propose to have a Structural Surveyor examine the wall and provide a report as to whether it is safe or not. In the meantime your client is forbidden to enter on our client's garden to carry out any demolition.*

63. The Respondents, having no proprietary rights in the land on which they had built the wall, have no right to dictate to the Applicant how she deals with her property or to deny her access to her property via an agent under the terms of the lease. By signing the lease, they have agreed that the Applicant can have access to her property via her agents by giving prior notice of a reasonable time.

64. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has been a breach of Clause 3(j).

Clause 4(i) Antisocial Behaviour

The Applicant

65. The Applicant asserted that the Respondents had breached this covenant by reason of their behaviour on 2 days in June 2020.

66. *On 9, or 10 and 18 June 2020 Mrs Cole engaged in behaviour occasioning a nuisance to the Applicant. In summary on 9 and 10 June 2020 Mrs Cole was heard shouting from the Flat 'I'm going downstairs to that woman'. On 18 June 2020 at 21:16 The Applicant returned home to the building with a friend to be met by Mrs Cole shouting from her window 'fucking horrible' and 'nasty people' Mrs Cole further threatened to throw something at the Applicant. Once the Applicant had entered her flat Mrs Cole continued to shout 'I hate that cunt downstairs' with the word 'cunt' repeated thereafter.*

One or both of the Respondents then proceeded to bang on the floor of the Flat with such force that the floor/ceiling creaked and continues to creak (which it did not do before) causing the Applicant to fear structural damage. At 21:28 Mrs Cole shouted, so as to be clearly audible within the Applicants flat, 'I'm going to that cunt downstairs' to which Mr Cole replied 'no, no, don't do that'. The Respondents then continued to argue audibly until approximately midnight.

67. She has also suffered abuse from a resident of a neighbouring property. She denies changing her WIFI network name.

The Respondents

68. The Respondents say that in early June 2020, the Applicant changed her WIFI network name to "170 Flat 1 Benefits Cheats!" and later to "170 Ross Flat 1 Benefits Cheats!" This upset the Respondents as their son is disabled and suffers from extreme anxiety.
69. As a consequence, about 9 or 10 June, they would have raised their voices in the flat and spoken of the Applicant in a derogatory manner. It was not intended to be heard by the Applicant or directed at her.
70. On 18 June 2020, their son had asked to move away from 170 due to the extreme anxiety he was suffering as a result of the Applicant's harassment. Mrs Cole became extremely upset; from her flat, she saw the Applicant and told her that she and her partner were "fucking horrible people". Her husband told her to come away from the window and she did, with nothing further being said.
71. At the hearing, Mr and Mrs Cole had a different recollection of the events to the Applicant. Mrs Cole could recall calling the Applicant and her partner nasty people and skanks and that they would have heard her say so.
72. On the second occasion, the Coles related a loud argument between themselves about the WiFi issue, when the vulgar speech recorded might have been used. They were surprised that this had been heard by the Applicant as it was not directed at her.
73. It is denied that what is admitted amounted to a breach of covenant.

The Tribunal

74. The Tribunal is guided by **Southwark London Borough Council v Mills and others; Baxter v Camden London Borough Council** and **Coventry and Others v Lawrence** and **Tod-Heatly v Benham** above.

75. Taking the allegations at their highest, the behaviour complained of is clearly not a nuisance in the terms meant by the lease, as explained in **Coventry and Others v Lawrence**. The behaviour could not be described as *"interferes with the enjoyment by the plaintiff of rights in land"*.

76. If true, and some of it is admitted by the Respondents, the behaviour was clearly reprehensible. It was clearly upsetting. Was it, however, an annoyance within the terms of the covenant?

77. The Applicant said that she can hear much of what the Respondents say as they are a loud couple and the acoustics add to this. The Tribunal also notes that this occurred in June, when windows may well have been open.

78. The Respondents say that they were having an argument and there is support for this in the timing of the WiFi issue, which is likely to have upset them. On balance, the Tribunal accepts that what was said was about the Applicant, but not specifically addressed to her.

79. The Tribunal notes that the behaviour was limited to 2 days only and limited also in duration.

80. In **Tod-Heatly v Benham**, Bowen LJ said this: *"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.'*

81. Over the space of 2 separated days, Mrs Cole is said to have raised her voice. On the second of those days, she is said to have used foul language and she and/or her husband is said to have banged on their floor.

82. Applying the required tests, the Tribunal is not satisfied by the evidence before it that reasonable people, having regard to the ordinary use of the Applicant's house for pleasurable enjoyment, would be annoyed to the extent required by the covenant. Or that it would it be an annoyance to reasonable, sensible people to the extent required. 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.

83. The Tribunal would find otherwise were this to have been a pattern of repeated behaviour rather than the 2 isolated incidents during nearly 6 years of residence.

84. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has not been a breach of Clause 4(i).

Clause 3(i)

The Applicant

85. The Applicant asserted that the Respondents had breached this covenant by refusing the Applicant access for inspection of the demised premises. In her application, the Applicant stated: *By way of a letter dated 3 August 2020 the Applicant requested access to the flat to inspect its condition with a structural engineer. By way of a letter in reply dated 10 August 2020 the Respondents refused access to the Applicant stating that only the Structural Engineer would be granted access.*

86. *The Respondents' letter dated 10.08.2020 did not consent to the Applicant having access to the premises. Only allowing access to the Structural Engineer, stating "I hereby consent to your Structural Engineer having access to my property on the 12.8.2020 at 9.00am alone as per third schedule para 2 of my lease".*

The Respondents

87. The Respondents say that the Applicant had requested access to the flat for herself and her surveyor in her letter of 3 August 2020 on 12 August 2020. On the same day as receiving the Respondents' response, she responded that she was seeking legal advice and that the structural engineer's appointment was cancelled and would be rescheduled.

88. At the hearing, for the first time, Mr Cole said that he had refused the Applicant entry because he was concerned about the risk of Covid transmission if too many people entered the flat.

89. It is denied that there was a breach of covenant.

The Tribunal

90. Clause 3(i) provides the Applicant with a right of entry to the demised premises

to view the state and condition thereof by giving reasonable notice of a reasonable time. Her letter of 3 August 2020, seeking entry for herself, gave details of 3 aspects of the demised premises she wished to inspect as well as the wall.

91. Mr Cole's response of 10 August 2020 stated: *I hereby consent to your structural engineer having access to my property on the 12th August 2020 at 9:00am alone as per the third schedule para 2 of my lease.*

92. Paragraph 2 of the Third Schedule of the lease is an easement. It is an easement allowing the Applicant entry for the purposes she requested, so cannot be a reason for the Respondent to refuse entry.

93. The Respondents clearly had no valid legal reason to refuse the Applicant entry to inspect the demised premises.

94. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has been a breach of Clause 3(i).

95. The Tribunal would, however, wish to detail that there was much dispute between the parties as to the need for the Applicant to enter the property, but that the Tribunal remained satisfied as to the right of entry by the Applicant on this occasion notwithstanding her having entered the premises on earlier occasions.

96. The Tribunal did have sympathy with Mr Cole's expressed concerns as to Covid transmission. For a reader of this Decision at another time, the Tribunal notes that there has for the last year been a general reluctance to let people into the home (here a small flat) and the fewer the better is the choice where entry has to be allowed. Notwithstanding that sympathy, government guidance does not forbid entry by landlords for the purpose of inspection, but does call for a reasoned approach by both parties; in that context, the Tribunal repeats that the first mention of Covid came in Mr Cole's oral evidence.

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. Where possible you should send your application for permission to appeal by email to rpsouthern@justice.gov.uk as this will enable the First-tier Tribunal Regional Office to deal with it more efficiently.

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.