HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/22UB/LBC/2012/0007

Property	:	**8 Czarina Rise, Laindon, Basildon, Essex SS15 5SS**
Applicant	:	**Cottesmore Gardens Management Co. Ltd.**
Respondent	:	**Steven Price**
Date of Application	:	**22nd May 2012**
Type of Application	:	**For a determination that the Respondent is in breach of a covenant or condition in a lease between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair) Marina Krisko BSc (Est Man) FRICS David W Cox**
Date and venue for hearing	:	**25th July 2012 at The Holiday Inn, Waterfront Walk, Festival Leisure Park, Basildon SS14 3DG**

DECISION

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1. The Tribunal's decision is that there is insufficient evidence to determine that the Respondent is in breach of covenants in his lease dated 21st September 2001 ("the lease") wherein the property was let to the Respondent for 999 years from 24th June 2000.

Reasons

Introduction

2. The Tribunal was told that the Applicant management company is now the freehold owner of the building in which the property is situated and the Respondent is the long leaseholder of the property itself.

3. Michelle Cox is the long leaseholder of 27 Basildon Road, Laindon which, despite the difference in address, is the flat immediately below the property and she has complained that she suffers excessive noise which emanates from the property which is occupied by either a subtenant or licensee of the Respondent.

4. The application seeks a determination that the Respondent is or has been in breach of the terms of the lease so that the forfeiture process can be commenced.

The Law

5. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the **Law of Property Act 1925** ("the 1925 Act") he must first make "*...an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred*".

6. The managing agents were somewhat ambivalent about whether it is the Applicant's intention to forfeit the Respondent's lease with one representative saying that it wasn't and one saying that it might be.

7. The Section does not state whether it refers to a past or present breach. However, as it must be a step towards a notice under Section 146(1) of the 1925 Act, it must relate to a present breach because a notice under Section 146 is simply a notice specifying the breach and then leaving sufficient time for the breach to be remedied. Thus it would not be possible to serve such a notice if the breach no longer existed.

The Alleged Breaches

8. Clause 3(4) of the lease provides that all floors except the kitchen must be covered with carpets and underlay. Fittings must be secured with adhesive rather than nails etc. The first allegation is that there is a breach of this provision although there does not appear to be any evidence of continuing breach after a carpet was laid in the bathroom.

9. Clause 3(6) says that the lessee must not "*cut maim or injure any structural part*" of the property. It is alleged that screws and/or nails have been used by the Respondent to compress the floor structure in an attempt to reduce noise.

10. The Second Schedule to the lease contains the restrictions on the use of the property which includes not causing or permitting a nuisance to any other lessee and "*not to make any noise audible outside the demised premises whether by wireless television musical instruments or otherwise at any time*". It is alleged that the noise nuisance allegedly being caused by the Respondent's subtenant or licensee breaches this provision.

The Position of the Parties Prior to the Hearing

11. The parties agree the background facts up to the end of 2009. The Respondent has been the long lessee of the property since it was built. The complainant, Michelle Cox, formerly rented 10 Czarina Rise which is on the same level as and opposite the property. The two of them had a relationship between 2005 and October 2009.

12. Ms. Cox says that she had no problems with noise nuisance at 10 Czarina Rise and decided to buy 27 Basildon Road which she did on 13th June 2008. The Respondent had in fact moved out of the property in August 2007 when he moved back with his parents and decided to sublet the property.

13. Both the Respondent and Ms. Cox agree that the Respondent spent time at 27 Basildon Road and they both experienced noise emanating from the property. Ms. Cox refers to creaking floor boards which would wake them up. Indeed, she says that on one occasion the Respondent retaliated by banging on the ceiling and 'also' calling his tenant at approximately 6.00 am after the noise woke him up again.

14. The Respondent says, in his statement that "there was a high level of noise coming from my flat". The only specific noise he refers to is footsteps being heard but he was clearly so concerned about this that he approached the builder, the NHBC and Norwich Union, none of whom was, apparently, prepared to assist. In an e-mail of the 2nd March 2010 he refers to the creaking and noise from his flat in 2009 as being "horrendous".

15. In January 2009, the property became vacant and Ms. Cox and the Respondent, who were still in a relationship, decided to try to do something about the noise themselves. They agree that various enquiries were made of people who may be able to help and eventually, in about April 2009, a friend of Ms. Cox's family who was a builder screwed what has been referred to as the 'floating' floor to the joists below in an attempt to at least stop the creaking floorboards.

16. In September 2009, Ms. Cox gave birth to her son and stayed with her parents. On 10th October 2009, the Respondent found another tenant for the property. At this stage it seems that both Ms. Cox and the Respondent thought that they had cured the noise problem. Ms. Cox says that she moved back into her flat in November 2009 when it became evident that substantial noise was coming from the property. She says that the Respondent's tenant had a young child and she refers to excessive banging noises, thumping and running backwards and forwards.

17. Ms. Cox then took it upon herself to contact the builder and NHBC but she did not succeed in getting them to do anything either. At about this time, the Respondent and Ms. Cox agree that they fell out for reasons which are not relevant to this dispute but which had created animosity between them. Ms. Cox asked a surveyor to look at the

property and he said that the screwing down of the floor increased the risk of direct impact noise. The screws, or at least those fixing the floating floor to the joists below were removed. Ms. Cox says that the noise problem was not cured by this action.

18. Various 'experts' were then instructed by Ms. Cox and the managing agent who concluded (a) that the standards pertaining when the property was built were less stringent than now on the issue of the transmission of noise between flats in a building (b) that the removal of the screws had put the structure back into its condition when constructed and (c) that upgrading the noise insulation would improve matters.

19. Ms. Cox then instructed Jason MacDonald, a specialist in noise control. He suggested some remedial works which she could do to her flat and she did eventually undertake some of these works. She says that there was a substantial improvement in the areas where work was done but she could not afford to do all the works. Mr. MacDonald has now prepared a full report which states that the screwing down of the floating floor did cause some worsening of the noise because what is described as a 'resilient' layer had been 'compressed' down from 25mm to 21mm which was bound to have affected the ability of the floor to reduce sound penetration.

20. Whilst all the experts and Mr. MacDonald in particular have undoubtedly tried to assist in this matter, the fact is that no-one can say with any certainty (a) whether the original construction of the property was adequate (b) what the actual transmission of sound was between the property and 27 Basildon Road prior to the floor being screwed down and (c) what the difference between the level of sound reaching 27 Basildon Road was then as compared to now.

21. It would certainly seem to be undisputed, on the face of the evidence from both Ms. Cox and the Respondent, that in 2008, the level of noise escaping from the property into 27 Basildon Road was unacceptable to both and caused them to make great efforts to try to resolve matters themselves by complaint and direct action. The evidence to suggest that the position is worse now is inconclusive at best and non-existent at worst.

The Inspection

22. The inspection was attending by Jeremy Brook and Abigail Teece from the managing agents, Michelle Cox, Jason MacDonald, the Respondent and his sister Gemma Price. The building in which the subject property is situated is a 3 storey property of brick under tile construction in a pleasant cul-de-sac in a residential area in the outlying area of Basildon known as Laindon.

23. The Tribunal looked in the subject property and there were carpets in all rooms save for the kitchen which seemed to comply with the terms

of the lease so far as could be seen. Indeed, some of the carpeting was very thick indeed which is to the Respondent's credit.

24. At the Tribunal's request, its members were able to see 27 Basildon Road and, as an experiment, the members of the Tribunal stayed in various parts of 27 Basildon Road whilst the Tribunal's case worker remained in the subject property with Mr. Brook from the managing agent and the Respondent where she proceeded to walk around and jump up and down.

25. This could not, obviously, be a scientific test and was very subjective. However, the two bedrooms where the additional sound deadening lowered ceiling had been installed, had very little noise penetration whereas in the lounge, kitchen and bathroom, the members of the Tribunal could clearly hear the floor creaking and noises of someone walking and jumping up and down. Having said that, the noise penetration was no more, in the Tribunal's considerable experience, than one would expect in an old flat with a wooden floor above.

The Hearing

26. The hearing was attended by those who attended the inspection. Mr. Brook produced an e-mail from NHBC which simply said what the materials and design of the floor of the subject property should have been. It did admit that such materials and design may not have been those which were actually installed. This evidence did not really take matters any further in determining what materials were actually used in the construction.

27. Miss. Price then said that one of her family had taken the floor of the bathroom up under the bath and this revealed that the thickness of the controversial resilient layer was 21mm. This is the one room where no work was undertaken by the Respondent to screw down the floor. This was immediately challenged and it was unfortunate that there was no evidence produced to support this statement because it would immediately have brought into question Mr. MacDonald's assertion that the original thickness of the layer was 25mm.

28. Mr. MacDonald gave evidence. He was pressed by both the Tribunal members and Miss. Price about his conclusions. The end result of this was that he could not give any direct evidence about noise levels either before the floor had been screwed down or after the screws had been removed as compared with the situation now.

29. The photographs were considered. It was pointed out to Mr. MacDonald that there was evidence of considerable penetration of the joists by electrical wiring which must also have an influence over sound penetration which he accepted.

30. As to the bathroom, it was Mr. MacDonald's evidence that the mere presence of a bath which would be filled with water is likely to have created a compression to the resilient layer down to 21mm. It was put

to him by the Tribunal that there would really be no difference between a bathroom such as he described and a lounge with a heavy bureau or display cabinet, or a bedroom with a heavy wardrobe. All of these would be heavy weights concentrated into 4 legs or supports. If his suggested result was considered to be a possible natural development over time, then whatever the Respondent may have done, the suppression of the resilient layer may have happened in any event.

Conclusions

31. It seems that everyone in this case, including the Tribunal, agrees that noise pollution can be a scourge which substantially reduces the ability of a flat owner from enjoying their home environment. Equally, the purchaser of a flat must anticipate that from time to time there will be occasions when noise will be transmitted from adjoining flats. Therefore, the lease conditions about the transmission of noise must be interpreted in the context that some noise is bound to be transmitted from one flat in a block to another. The question is whether the Respondent's subtenant or licensee is causing a nuisance. She probably is, as a matter of law, although at the time of the Tribunal's inspection, there was no nuisance.

32. Whether the landlord in this case really wants to forfeit the Respondent's lease is doubtful. It was Ms. Teece's opinion that all the landlord wanted was for the noise penetration to stop. Possibly a cynic may suggest that all it would want is for Ms. Cox's complaints to stop. It seems to this Tribunal that the proper action to have taken was to bring proceedings in the county court for breach of contract so that consideration could have been given to remedies which are simply unavailable to this Tribunal such as a declaration of breach, an injunction and/or damages.

33. As to whether the structure has been 'injured', it is the Tribunal's view that although the original screwing down of the floor probable did amount to 'injury', the subsequent removal of the screws corrected that. The resilient layer is, on the balance of probabilities, considered to be part of the structure and therefore any permanent compression which was not consistent with normal wear and tear would be a breach. However, there was no conclusive evidence that the thickness of this resilient layer was 25mm when fitted and Mr. MacDonald's evidence was that the thickness of the resilient layer could have been depressed down to 21mm in places, even with normal use.

34. There was some evidence of screws or nails poking through the floor when it was exposed for the noise suppression works to be undertaken on Ms. Cox's property. However, the evidence was that the screws which actually compressed the floor had been removed which suggests that these were just rogue screws or nails which did not 'injure' the structure.

35. The Tribunal did not consider that Ms. Cox was just complaining because of the breakdown in her relationship with Mr. Price. She has

not just sat back and expected everyone else to stop the noise. She has actually spent a considerable amount of money in at least giving her and her child some peace at night by having the bedrooms insulated against excessive noise. It may be that she is particularly sensitive to noise. That does not necessarily mean that she is being unreasonable.

36. The fact is that people who live in older flats with old standards of sound insulation must understand that there is bound to be noise penetration despite what is said in leases such as this one. It is simply impossible in everyday life to completely avoid noise penetration because the person making the noise is not 'on the receiving end' unless there is co-operation and good sense, which there appears to have been a lack of in this case.

37. There is therefore a high level of responsibility on flat occupiers to be sensitive to this issue. This is particularly relevant when there are children in the upper flat because children do like to jump off things and run around. That is what children tend to do but they have to be controlled. In this case, there is at least some evidence that the occupier of the property has not kept her child from running and jumping around at will.

38. It is this Tribunal's view, based on its considerable experience in dealing with flats over many years, that this problem exists for 3 main reasons. Firstly the floor is of an old design and the apparent lack of problems in the remainder of the building indicates that the installation of the floor to the subject property could well have been below standard. Secondly, wooden floors do deteriorate over time which is why they can start to 'creak' and shudder over time and why concrete floors are now the norm. Thirdly, the occupier of the subject property is not acting sensitively. The noise levels noted by the Tribunal on its inspection were acceptable which leads the Tribunal to the view that, on balance, the occupier is not exercising appropriate levels of consideration for her neighbour.

39. The Tribunal was told that the approximate cost of providing sound insulation to the remainder of Ms. Cox's flat would be around £5,000 i.e. to the lounge, kitchen and bathroom. Just insulating the lounge would be around £3,000. The choices for the parties are stark i.e.

- Mr. Price acknowledges that his tenant/licensee is being unreasonable and tackles this problem or risks county court proceedings for nuisance. On the evidence of Ms. Cox and, in particular, the considerable efforts she has made to help herself, the court is likely to be sympathetic, particularly if there is clear evidence of the noise created. This could involve damages or an injunction.
- The landlord acknowledges that this floor has a basic flaw which can only be resolved by spending money. There is no obligation on the Respondent to pay to upgrade the floor. Ms.

Cox's assertion that she just wants the floor back to its previous state is illogical because even she accepts, in her evidence, that the floor in 2008 was unacceptable.

40. Neither party should feel complacent. If any county court action goes against the Respondent, this may involve him being responsible for the costs of the work undertaken by Ms. Cox so far, the cost of further insulation work and legal costs and expenses which could be more than those two sums.

41. Equally, if the court should accept that the main fault lies with inadequate soundproofing in the structure due to poor workmanship or design, then the landlord could face similar penalties.

42. Whatever the situation, this Tribunal cannot be satisfied to the requisite standard of proof that the Respondent is in breach of the terms of the lease as at the date of the hearing.

43. The landlord may well feel – as does this Tribunal – that the most sensible and commercially viable compromise is to pay for the further insulation to Ms. Cox's lounge whilst, at the same time, Mr. Price should accept responsibility for a proportion of the cost e.g. 50% and make sure that he makes it clear to his tenant/licensee that unless they are more reasonable, eviction must follow. As it is not necessary for Ms. Cox to spend much time in the kitchen or bathroom, there would be no absolute necessity to soundproof the whole of the remainder of her flat although she may choose to do this.

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Bruce Edgington
Chair
27th July 2012