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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LBC/2014/0046**
Property	:	**Flat 1B, Lauderdale Road London W9 1LT**
Applicant	:	**1 Lauderdale Road Limited**
Representative	:	**Mr E Denehan – Counsel instructed by W H Lawrence Solicitors**
Respondent	:	**Ms R Kianouri**
Representative	:	**Ms Zietler - Counsel**
Type of application	:	**Determination of an alleged breach of covenant under S.168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal member(s)	:	**Judge -Ms N Haria LLB (Hons) Professional member –Ms S Coughlin**
Date and venue of hearing	:	**29 & 30 September 2014 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	

DECISION

Decisions of the tribunal

1. The Tribunal is satisfied that the Lease is a long lease within the meaning of Section 169(5) of the Commonhold and Leasehold Reform Act 2002 ("the Act"). The Lease contains covenants that are binding and may be enforced by the Applicant.

2. The Tribunal finds the Respondent has not breached the provisions of the covenant under the Fifth Schedule paragraph 10 as detailed in the decision below.

3. The Tribunal finds the Respondent has breached the provisions of the covenant in the Sixth Schedule paragraph 1 of the Lease as detailed in the decision below.

The application

1. The Applicant seeks a determination pursuant to subsection 168(4) of the Act that the Respondent is in breach of the nuisance covenant under paragraph 10 of the Fifth Scheduleand the user covenant under paragraph 1 of the Sixth Schedule of the Lease.

2. The alleged breaches are as detailed in the application dated 11 June 2014 and in the Applicant's skeleton argument and Closing submissions.

Background

3. The Applicant holds the freehold title to the building known as and situate at 1 Lauderdale Road London W9 1LT. The freehold title isregistered at the H M Land Registry under Title Number NGL648554. The building was constructed as a single semi- detached dwelling house in the 19th century, and was converted sometime during the mid 70's to four self-contained residential flats.

4. The Respondent holds the leasehold title to the Property known as Flat 1B Lauderdale Road pursuant to a lease dated 19 July 1984 ("The Lease") for a term of 125 Years commencing 24 June 1981. The leasehold title isregistered at the H M Land Registry under Title Number NGL505556. The Respondent acquired the leasehold interest in the property by assignment on the 25 September 1996. Flat 1B is a first floor flat.

5. The flats are all let on long leases as follows:

(i) Flat 1A – second floor flat – lessee Ms Laurel Green,

(ii) Flat 1B – first floor flat – lessee the Respondent,

(iii) Flat 1C – ground floor flat – lessee Dr Paul Giladi,

(iv) Flat 1D – garden flat – lessee Mr Alexander Gunz and Mrs Julie Gunz.

6. The flat is on the first floor of the building known as 1 Lauderdale Road. The building is circa 1830's and it was originally built as a single family home. It was converted in the 1970's into four flats, and comprises a garden flat (which has it's own front entrance), a ground floor flat, a first floor flat and a second floor flat. The building is on the corner of Lauderdale Avenue and Randolph Avenue and is next to a round-about where six roads converge. Opposite the building are the Warrington Hotel and Pub and a primary school. The building is located above an underground train tunnel.

7. In essence the Applicant alleges that the Respondent who is the leaseholder and occupier of the first floor flat is in breach of the Nuisance and User covenant under the Lease. The Applicant claims the breach is due to excessive noise over a number of years at all times of the day and night caused by the Respondent, her visitors or employees. In addition it is claimed that the Respondent uses her flat for a trade or business. The Respondent denies the allegations.

Directions and Hearing

8. Directionswere issued on the3 July 2014 and the case was set down for a hearing on the 29 and 30 September 2014. At the end of the first hearing day on the 30 September the tribunal had not concluded hearing all the evidence, the tribunal had yet to hear evidence from the Respondent and some of her witnesses. The tribunal reconvened on the 26 November with the parties. Mr Piarrouxthe tribunal member who had taken part in the first day of the hearing was unable to continue to hear the case due ill health and so he took no further part in the proceedings and the remainder of the tribunal continued to hear the evidence and made the determination.

9. At the end of the day on the 26 November 2014 although the tribunal had heard evidence from the parties and the witnesses, there was insufficient time to hear closing submissions from the representatives so further directions were issued for closing submissions to be submitted in writing. The tribunal reconvened on the 6 February 2015 without the parties to consider the closing submissions and make a determination.

10. The procedural points were addressed at the start of the hearing. An additional Tab 12 was added to the Applicant's bundle the Respondent agreed to the inclusion of the additional documents. The Respondent produced signed witness statements from WajidGulzar and MilankaDrenovak.

The Lease

11. Under Clause 3 of the Lease the Respondent as Lessee covenants with the Applicant as Lessor and with the lessees of the other flats in the Building (held on 125 year leases) as set out in the Fifth and Sixth Schedules.

12. The Fifth Schedule to the Lease contains what are described as the general covenants by the Lessee. Paragraph 10 of the Fifth Schedule to the Lease sets out a "Nuisance covenant". The Respondent as Lessee covenants under paragraph 10 of the Fifth Schedule of the Lease as follows:

"(10) Nuisance

Not carry on or permit or suffer in or upon the demised premises or any part thereof any sale by auction Nor the hanging or putting out or placing so as to be visible from outside the demised premises of clothes or other articles to air dry or bleach or of food or drink or of any articles for containing food or drink Nor piano playing singing or music of any kind or the use of wireless or television loudspeakers gramophones radiograms record players or tape recorders or other musical instruments or appliances for the production or reproduction of sound so as to be audible from the outside of the demised premises nor (but without prejudice to the foregoing) between the hours of Eleven p.m. and Seven a.m. on weekdays and Eight a.m. on Sundays Nor (except in the case of emergency) the execution of any works of renovation maintenance or repair to the demised premises so as to be audible from the outside of the demised premises so between the hours of Eight p.m. and Eight a.m. Nor the exhibiting of any bill notice placard nameplate or painting or any advertisements whatsoever (including Agents' Sale or Letting Boards) Nor the setting up of any stove other than one gas electric or other cooking stove Nor any act matter or thing whatsoever whether in the demised premises which shall or may be or become or cause a nuisance damage annoyance or disturbance to the Lessors or any of their lessees or tenants or to the owners or occupiers of any property in the neighbourhood"

13. Paragraph 1 of the Sixth Schedule sets out the "User covenant" under which the Respondent as Lessee covenants as follows:

"That the Lessee shall:-

1. User

NOT use or permit or suffer to be used the demised premises or any part thereof for any illegal immoral or improper purpose or for the teaching of singing or music of any kind or for any trade business or manufacturer or profession whatsoever or for gaming or as a betting office BUT shall keep and use the demised premises as a single self contained flat in one private family residential occupation only"

The Statutory Provisions

14. The relevant provisions are set out under the Commonhold and Leasehold Reform act 2002 (the 2002 Act). These provide as follows:

Section168: No forfeiture notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral Tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation Tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a)has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b)has been the subject of determination by a court, or

(c)has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement

Section169: Section 168: supplementary

.....

(5) In section 168

"long lease" has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.

Section 76: Long leases

(1) This section and section 77 specify what is a long lease for the purposes of this Chapter.

(2) Subject to section 77, a lease is a long lease if—

(a) it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise"

The Applicant's Case

15. The Applicant's case is fully articulated in the Applicant's application, skeleton argument, closing submissions and submissions in reply. It is therefore not necessary to repeat the submissions made on behalf of the Applicant. The Applicant relies on copies of various correspondence and the witness statements of:

(i) Mrs Mona Giladi the occupier of the ground floor Flat 1C,

(ii) Dr Paul Giladi the lessee of the ground floor Flat 1C,

(iii) Ms Laurel Green the lessee and occupier of the second floor Flat 1A,

(iv) Ms Caron Sandhuthe lessee of Flat 1C between 12 August 2005 and end of May 2012, and

(v) Mr William Lawrence, Director of WH Lawrence Solicitors.

16. It is the Applicant's case that the Respondent has breached covenants underparagraph 10 of the Fifth Schedule of the Lease("the Nuisance covenant") and paragraph 1 of the SixthSchedule of the Lease ("the User covenant").

17. It is submitted that the Nuisance covenant contains seven discrete elements as detailed in the Applicant's skeleton argument[1] and the Applicant relies on the seventh element which provides as follows:

".....Nor any act matter or thing whatsoever whether in the demised premises which shall or may be or become or cause a nuisance damage annoyance or disturbance to the Lessors or any of their lessees or tenants or to the owners or occupiers of any property in the neighbourhood"

18. The Applicant submitted that there are probably words missing from this element of the Nuisance covenant (the words *"or not"* after the words *"the demised premises"*perhaps), or possibly an unnecessary word has been included, namely "whether". The Applicant submitted that the Nuisance covenant is so widely drawn that it catches everything and all circumstances that shall, may be or become a nuisance, damage, annoyance or disturbance. It is also submitted that there is a presumption against redundant drafting[2] in construing the Nuisance covenant meaning must be given to each specific prohibition against "*...nuisance, damage annoyance or disturbance...* to the Lessors or any of their lessees or tenants or to the owners or occupiers of any property in the neighbourhood.

19. The Applicant contends that the following five categories of persons are protected by the Nuisance covenant:

(i) The lessors,

(ii) The lessors' lessees,

(iii) The lessors' tenants,

(iv) The owners of any property in the neighbourhood, and

(v) The occupiers of property in the neighbourhood.

[1] Paragraph 5.2 of the applicants Skeleton Argument
[2]Bindra v Chopra [2009] EWCA civ203

20. In the Lease "*the Lessor*" is stated to be the Church Commissioners For England but the Applicant submitted that the title "*Lessor*" applies to any person in whom the reversion immediately expectant upon the determination of the term created by the Lease is vested.[3] It is admitted that the Applicant has the benefit of both the Nuisance and user covenants.

21. The Applicant submitted that both Dr Giladi and Ms Green as the lessors' lessees or in the alternative as the lessors' tenants have the benefit of the Nuisance covenant and that nuisance, damage, annoyance and disturbance has been caused to both of them.

22. The witness statement of Mrs Giladi is supported by extensive diary entries spanning the period from 18/08/2012 to 30/06/2014 and running from pages 53 to 365. Dr Giladi's evidence supports Mrs Giladi's evidence and confirms noise disturbances during the night that cause him to wake and in particular disturbances that occur when the Respondent's daughter resides at Flat 1B. Ms Green confirmed that her own experience of the disturbances and problems with noise emanating from the Respondent's flat is less severe than that experienced by Mrs Giladi and Dr Giladi, primarily because she lives above the Respondent's flat (as opposed to under the Respondent's flat) and also because she is often away from her flat for significant periods. Ms Sandhu was the lessee of Flat 1C between 12 August 2005 and the end of May 2012 when she sold her flat to Dr Paul Giladi. Ms Sandhu's evidence relates primarily to issues with the Respondent's daughter in 2011. Ms Sandhu stated that she would hear a significant amount of banging, screaming, shouting and door slamming from Flat 1B at least once a week but that once the Respondent's daughter left Flat 1B to live at a special school, the noise issues subsided considerably.

23. In relation to the alleged breach of the User covenant the Applicant relied on the witness statements of William Lawrence, Mrs Giladi and Dr Giladi.

24. **The Respondent's case:** The Respondent relied on her statement of case, the skeleton argument, the closing submissions, her witness statement and the witness statements of:

(i) NikrousKianouri – the Respondent's uncle,

(ii) MylenSanglay – the Respondent's cleaner,

(iii) SomayyeMandizadeh – the Respondent's friend,

(iv) WajidGulzar - the Respondent's friend, and

[3] Section 78(1) Law of Property Act 1925

(v) MilankaDrenovak - the Respondent's friend.

25. The Respondent had originally sought to rely on the witness statement of John Charlesworth, however, as the Respondent had been unable to produce a signed copy of his witness statement by the end of the day on the 30 September 2014, Ms Zeitler confirmed that the Respondent would no longer rely on his witness statement.

26. The Respondent averred that her activities and the activities of those visiting the property, are incapable of amounting to either a nuisance, annoyance or disturbance to the occupants of the other flats in the building. The Respondent denied the allegations of nuisance with the exception of occasional noise caused by her severely disabled daughter.

27. The Respondent produced a schedule with her comments on the diary entries made by Mrs Giladi. The Respondent averred that her comments showed that on numerous occasions when she or her visitors were said to have caused noise nuisance, either no-one was staying at Flat 1Bor any noise that occurred was the ordinary noise occurring at reasonable times of the day eg: the Respondent's cleaner working between 2pm or 2:30pm and 6pm to 6:30pm two days per week. In addition the Respondent pointed out that Mrs Giladi alleged noise nuisance on the part of her cleaner on days when the cleaner was not at the property.

28. The Respondent accepted that noise occurs at her property but contended that the noise (other than the noise caused by isolated and sporadic incidents relating to her daughter) was that of everyday living. The Respondent submitted that the noise was the result of everyday, ordinary and reasonable use of her flat occurring at reasonable times of the day and included noise caused by walking around the flat, using sanitary facilities at the flat, opening and closing doors and cupboards, as well as reasonable household cleaning activities such as vacuuming.

29. The Respondent denied that any other person resides at Flat 1B but admitted that her uncle visits approximately three times per year and on some occasions stays in the Respondent's spare bedroom for periods ranging from one day to two weeks. The other visitors to the flat include her mother who visits approximately once a year, occasional visits from two friends and her daughter.

30. The Respondent asserted that the complaints relied upon only amount to a nuisance, annoyance or disturbance if judged by reference to the evidence of a witness who is more sensitive or less tolerant than the hypothetical reasonable neighbour. The Respondent stated that she has installed additional sound insulation over the floors of her flat and has re- carpeted the whole flat (apart from the kitchen and bathroom). Further, the Respondent removed a pump serving her hot water and heating system and replaced her (perfectly functional) boiler at a cost of

£7,000 because of complaints by Mrs Giladi. The Respondent stated that she voluntarily took steps to reduce noise transference from her flat to Flat C and that she cannot be blamed for any noise transference issues resulting from a conversion carried out in the 1970's.

31. The Respondent accepted that when her daughter was still residing at the property (during a period which predates thepurchase of Flat 1C by Dr Giladi) and during sporadic visits since that time, her daughter has on occasions made noise that arguably exceeded the noise of everyday living, and due to her behavioural problems has caused a disturbance. However the Respondent contends that as her daughter is disabled within the meaning of Section 6 and Schedule 1 of the Equality Act 2010 and as such the Applicant would be in breach of its obligations pursuant to Section 35(1) of the Equality Act 2010 if it sought to rely on the conduct of the Respondent's daughter as amounting to a breach of the Nuisance covenant.

32. The Respondent admitted that she trades on eBay through a limited company and her goods are stored in a storage facility in North London. The Respondent denied using her flat for the purposes of a trade or business and relied on a letter dated 17 June 2014 from the City of Westminster Strategic Director Built Environment following a planning enforcement investigation regarding the use of the flat for business purposes. The letter confirms that the flat is in use for residential purposes and the that the Respondent confirmed she does run a business but that all stock is held in a warehouse and posted directly from the warehouse.

The Tribunal's decision

33. A determination under Section 168(4) of the Act does not require the Tribunal to consider any issue relating to forfeiture other than the question of whether or not a breach has occurred. The Tribunal does not have jurisdiction to consider whether the landlord has waived the right to forfeit the lease, this is a matter for the court to determine when considering an application for forfeiture. Accordingly, the tribunal limits this decision to the narrow issue of whether or not the Respondent is in breach of the covenants in the Lease.

34. It is not uncommon for leases of residential properties to include covenants similar to the Nuisance covenant and the User covenant included in this Lease.

The Nuisance covenant:

35. This case relates to the following part of the Nuisance covenant:

"Nor any act matter or thing whatsoever whether in the demised premises which shall or may be or become or cause a nuisance damage annoyance or disturbance to the Lessors or any of their lessees or tenants or to the owners or occupiers of any property in the neighbourhood"

36. Mr Denehan submitted that there are probably words missing from this element of the Nuisance covenant (the words *"or not"* after the words *"the demised premises"* perhaps), or possibly an unnecessary word has been included, namely "whether" included.

37. The most important principle when interpreting a lease is to read the lease as a whole that the wording in the lease its ordinary common sense meaning, so far as possible.Lord Hoffman in **Investors Compensation Scheme v West Bromwich Building Society**[1989] 1 All ER 98 identified five broad principles for interpretation of contracts:

1. What would a reasonable person, having all the relevant background knowledge reasonably available to the parties to the lease, have understood the clause to mean?
2. Does the 'matrix of fact' affect the language's meaning? The 'matrix of fact' essentially involves ascertaining what the parties intended their rights and obligations to be, considering the background of the case.
3. Prior negotiations between the parties should be excluded.
4. Regard must be had to the context in which words are used, not just given their literal meaning.
5. Words should be given their natural and ordinary meaning, however if it can be concluded from the background that something must have gone wrong with the language, i.e. a spelling mistake, then a common sense approach should be taken.

38. The Nuisance covenant is imposed on the lessee of the demised premises, being a residential flat within a converted house. If the words *"or not"* are incorporated into the Lease as suggested it extends the scope of the Nuisance covenant to areas beyond the demised premises. Considering the clause in context and considering the factual matrix, that the covenant is in a lease of a residential flat in a converted house with the other flats within the building being let on similar terms, it seems unlikely that it was intended that a lessee should or could be heldliable for a nuisance outside the demised premises extending to areas outside the demised premise and even outside the building itself. The Tribunal is of the view that it is much more likely that the covenant includes an unnecessary word, the word *"whether"*. The Tribunal is of the view that the covenant should be read as follows:

> *""Nor any act matter or thing whatsoever in the demised premises which shall or may be or become or cause a nuisance damage annoyance or disturbance to the Lessors or any of their lessees or tenants or to the owners or occupiers of any property in the neighbourhood"*

39. The Tribunal is of the view that the Nuisance covenant applies to prohibit nuisance in the demised premises and so the noise caused due to the manner in which the front door of the building is closed falls outside the area covered by the Nuisance covenant. In the alternative, if the Tribunal is wrong in its interpretation of the Lease in this respect, the Tribunal finds that there is no breach of the Nuisance covenant as it was admitted at the hearing that the self-closing mechanism of the front door was not working and the door required pulling closed. A claim for a breach of the Nuisance covenant cannot be made out, if the noise and vibration complained of is as a result of a fault with the door,which is out of the control of the Respondent.

40. In relation to the alleged slamming of the door to Flat 1B, the Tribunal noted that none of the Applicant's witnesses had witnessed how the door is in fact shut by the Respondent and her guests, in addition the Tribunal noted that there was no evidence as to the construction of the door or its closing mechanism. It was admitted that each flat has its own individual front door of various designs and construction. It is possible therefore that in order to shut the front door of Flat 1B it is necessary to pull the front door. Ms Green suggested that the noise on shutting the door could be reduced by using the key inserted into the lock to pull the door shut as opposed to pulling it shut without a key. This may be a solution and may result in less noise but the noise resulting from shutting the door without a key cannot possibly constitute a breach of the Nuisance covenant. Using a door to go in and out of the flat when there is no evidence that it is being deliberately slammed shut cannot be a breach of the Nuisance covenant no matter what time of day or night the door is closed. The Appellant would need to show the door was slammed on purpose and that it was ordinarily possible to shut the door without slamming it. None of the witnesses had seen the door being shut so they could not say whether the door slams shut no matter how it is closed. There was no evidence as to whether the door is set in a stud wall or a solid wall as this would make a difference to the level of sound transmitted.

41. It is accepted that both covenants bind the Respondent and benefit the Applicant, Dr Giladi, Ms Green as well as the owners and occupiers of any property in the neighbourhood. Although the Respondent has not taken any point on the matter, it is as well to clarify that the covenant is so widely drawn that it also benefits Mrs Giladi as an occupier of a property in the neighbourhood.

42. The Tribunal accepts that the Nuisance covenant is widely drawn and contains a number of specific prohibitions, the most relevant in this case being "*nuisance, damage, annoyance and disturbance*". The Tribunal accepts that meaning must be given to each of the prohibitions mentioned in the covenant and striving to give meaning and effect to all the provisions of the Lease construed as a whole with a presumption against redundant drafting[4].

43. Mr Denehan submitted that when used in a private covenant the word "*nuisance*"does not refer to nuisance in the technical, common law sense[5] as if this were the case the covenant would be unnecessary. He submitted that actions withconsequences which fall short of a nuisance at common law would be caught by this element of the covenant. Although he acceptedHe submitted that the conduct complained of in this case is such that it constitutes a breach of the Nuisance covenant and also amounts to a common law nuisance. The Tribunal agrees that in this case such a distinction is academicbut not for the reason suggested by Mr Denehan.The Tribunal considers that the nuisance element of the covenant covers conduct that would fall short of amounting to a nuisance in common law as otherwise it would be otiose. The Tribunal agrees that the covenant is so widely drawn that it catches not only conduct which amounts to a nuisance but also conduct that causes damage, annoyance or disturbance.

44. Lord Millett in the House of Lords case**Southwark LBC v Mills**[6]when considering the law of nuisance agreed thatTuckey LJ [2001] QB 1, was correct in stating that the:

> "*.....ordinary use of residential premises without more is not capable of amounting to a nuisance.....this is why adjoining owner-occupiers are not liable to one another if the party wall between their flats is not an adequate sound barrier so that the sound of every day activities in one flat substantially interfere with the use and enjoyment of the other*".

45. In relation to the plight of the claimant Miss Baxter, Lord Millett stated:

> "*...I have the greatest sympathy for her. But the fact remains that she took a flat on the first floor of a house, knowing that the ground and second floors were also occupied as residential flats, and expecting their occupants to live normal lives. That is*

[4]Bindra v Chopra [2009] EWCA Civ 203
[5]Tod- Heatley v Benham (888) 40 Ch. D. 80 at pages 95 and 98
[6][2001] 1 AC

all that they are doing. She has no cause to complain of their activities which mirror her own;".

46. As regards the prohibition against causing *"damage"* in the Nuisance covenant this is not limited to financial loss[7] or to physical damage to property, but will include any activity that results in a deterioration in the use and enjoyment of the property by the persons within the protection of the covenant

47. Bowden LJ in relation to the meaning of the term "annoyance" stated[8]:

> *"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. If guided strictly by the Common Law, we know what nuisance is. Whether the term is employed in the covenant in the exact sense of the term at Common Law or not, is a matter that may be doubted, but I will assume as matter of argument only, that 'nuisance' in this covenant means only a nuisance at Common Law. '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. You must take sensible people, you must not take fanciful people on the one side or skilled people on the other; and that is the key as it seems to me of this case.'*

48. Mr Denehan submitted that the word *"disturbance"* has no technical meaning in the context of a private covenant and is an ordinary English word in common usage. He submitted that the question is simply whether the matters complained of disturb those within the ambit of the relevant covenant. Ms Zeitler made no submissions on the matter. The Tribunal agreed with Mr Denehan that there is no legal meaning to the word *"disturbance"* in the context of a private covenant.

49. The issue is whether the conduct of the Respondent and her guests is such as to amount to a breach of the Nuisance covenant.On a literal interpretation of the Nuisance covenant the activities of ordinary everyday living would amount to a breach of the Nuisance covenant. This

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[7]C&G Homes Limited v Secretary of Sttae for Health [1991] 1 Ch.365 at pages 386E and 387E
[8]Tod- Heatley v Benham (888) 40 Ch. D. 80

cannot have been in the contemplation of the parties when the Lease was drawn up as it would frustrate the use and occupation of the flat for residential purposes as it could not be occupied without there being a breach of the covenant.The ordinary use of a premises which has been lawfully constructed or converted for the purpose for which it was constructed or converted cannot without more amount to a breach of the Nuisance covenant.

50. The Tribunal finds that the Nuisance covenant although widely drawn is not breached by reasonable ordinary every day residential use of the flats. Reasonable ordinary every day residential use would include amongst other things, coming and going to and from the flat and the building, moving around within the flat, moving furniture and goods, opening and closing doors, using the facilities such as bathrooms, toilets, kitchen and appliances within them, cleaning including vacuuming as well as entertaining guests.

51. The details of the conduct complained of areset out in the diary entries made by Mrs Giladi and in the witness statements of Dr Giladi, Ms Green and Ms Sandhu.The Respondent accepts that the conduct of her daughter was at times such that it would be caught by the Nuisance covenant, and we shall deal with this aspect of the case separately. The other matters complained of are primarily issues with excessive noise at various times of the day and night emanating from the Respondent's flat and from the comings and goings from the Respondent's flat.

52. The Tribunal having considered the evidence in detail including the diary entries finds that the noises complained of are noises of everyday living. The noises complained of relate to matters such as walking around the flat, the use of the sanitary facilities, closing of doors, "vigorous" cleaning. This is not dissimilar to the sort of noises complained of by Mrs Tanner and Miss Baxter in the **Southwark LBC v Mills**where it is said that:

> *"They both complain of being able to hear all the sounds made by their neighbours. It is not that the neighbours are unreasonably noisy. For the most part, they are behaving quite normally. But the flats have no sound insulation. The tenants can hear not only the neighbours' television and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making".*

53. The Tribunal is guided by the comments of Lord Slynn of Hadley in **Southwark LBC v Mills** on the issue as to whether the noise caused by the normal residential use of a flat can amount to a 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 CambridgeWater Co. v. Eastern Countries Leather Plc *[1994] 2 A.C. 264, 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, 83, 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."

54. Mrs Giladi summarised the issues with the noise at paragraph 4.10 of her witness statement where she states:

> *"The noise is mainly generated by (1) the continuous shifting of either furniture or heavy boxes of goods and luggage; (2)startling sudden bangs;(3)frantic activities;(4)stomping feet;(5)frenzied marching;(6)slamming of doors(7) and the grating of sliding cupboard doors, very often late into the night. (These are all aggravated by the unusual interior conversion of the rooms in Flat 1B, which is completely different from the stacked structure of Flats C and D below). The nuisance is also exacerbated by the activities of one or two regular associates who like to leave the building furtively between 4am and 5am. However, the worst culprit is the nocturnal uncle, who without fail routinely violates my sleep in the early hours of the morning. He subjects me to a sustained barrage of drumming sounds effect of various thuds and stomping feet, alternating with the sound of creaky (sic) floorwhen he slows down his movements. I am left physically and emotionally shaken, nursing a raised blood pressure and unable to settle, virtually at his mercy.His relentless continued assault on my deep sleep and well being is most upsetting, especially he(sic) Has been aware of the shoddy floorboard insulation in Flat B and its effects on the on the occupiers of the flat below well before our arrival. This in addition to allhis daily activities to occupy himself indoors. Despite the earplugs I still hear him. He is the bane of my life. He has hijacked my days and nights with his seemingly OCD conduct and his relentless stomping movement between the living room /kitchen and his bedroom/office."*

55. Mrs Giladiat paragraph 5.6 of her witness statement rejects the claim thatshe is over- reacting to what are normal day to day household activities. She admits that everyday noise does not cause any disturbance whatsoever. She states that;*"(There was also, on several occasions a rather embarrassing strong smell of marijuana in the foyer of the building) We experience blissful peace when no one is upstairs...."*.This indicates that the flat 1B would have to be unoccupied in order to achieve the level of noise,which Mrs Gildaiwould find acceptable. This cannot be reasonable, Lord Millett in the Southwark Case considered such an issue and stated:

> *"My Lords, Most people in England today live in cities. Many of them live cheek by jowl with their neighbours. They live in terraced houses, purpose-built blocks of flats, or flatlets created by the conversion of houses into separate residential units. Modern building regulations require proper sound insulation to be installed, but this is often lacking in older buildings or conversions. In its absence each occupier is likely from time to time to be disturbed in the enjoyment of his property by noise caused by the activities of his neighbours, as they are by his. Where the disturbance is intermittent and relatively slight the parties usually accept the need to put up with the annoyance they cause each other. But what if it is continuous and intolerable?*
> *Where the offending noise is occasioned by the ordinary use of residential premises, so that it cannot be brought to an end except by leaving them vacant, the only practical solution is to install proper sound insulation; but that is expensive. Where the sufferer is an owner-occupier, he must either bear the cost himself or persuade his neighbour, who is likely to be suffering similar disturbance by noise emanating from his premises, to share the cost with him. Where the sufferer is a tenant, he would obviously like his landlord to carry out the work, but there is normally no legal obligation on him to do so".*

56. Although, it is acknowledged by all parties that the sound insulation in the building is inadequate,the appellant makes no allowance for this in relation to the conduct complained of. In fact the Respondent has at her own expense undertaken some sound insulation to her flat and has re-carpeted the whole flat (apart from the kitchen and bathroom). Further, the Respondent removed a pump serving her hot water and heating system and replaced her (perfectly functional) boiler at a cost of £7,000 because of complaints by Mrs Giladi. It is notable that the Respondentvoluntarily took steps to reduce noise transference from her flat to Flat C.

57. The matters complained of in Ms Green's witness statement do not amount to a breach of the Nuisance Covenant apart from the banging of the slamming which as stated above cannot be a breach of the covenant and music at odd hours which has a strong bass so transmits vibrations

(this was a regular issue a while back though not recently). Ms Green states that she has received texts from the Respondent *"....on 6 occasions in 2.5 years to complain about noise (well vibrations really). Of these – I think three were as a result of visitors walking around....Two or three other times I wasn't at home and the noise was coming from somewhere else.....I am happy to admit I have a few loose floorboards".*This shows that the issue of noise being transmitted through the ordinary use of the flat is an issue from Flat 1A, the flat above the Respondent's flat as well.

58. Dr Giladicomplains in his witness statement of scrapping, thudding sounds and sustained creaking. In his oral evidence he admitted that these sounds could be asa result of everyday use of the flat and that these everyday noises could become a nuisance due to inadequate sound insulation. It is admitted by the parties that this building has inadequate sound insulation.

59. The Tribunal finds the diary entries of Mrs Giladi to be largely subjective, including some exaggeration as well as malicious comments about Iranians. Mrs Giladidescribed her diary entries as "musings". The Tribunal does not accept the diary entries to be objective, factual statements of incidents. The Tribunal finds Mrs Giladi to be *"a fanciful person"*who is prone to exaggeration and a person who makes scurrilous, racist and derogatory comments (as evidenced by the diary entries) about the Respondent and her guests. Her view of the nuisance, annoyance, damage and disturbance is coloured by her view of the Respondent and her guests.The Tribunal finds her evidence lacks reliability and credibility. Some of the entries in the diary are not contemporaneous and have no date or time. Some but by no means all of our concerns are in relation todiary entries such as the following from the Appellant's bundle:

(i) Page 75- *"the "uncle" violent and unstopping activities/movements from 11pm to 1.45am creaking boards/stomping feet no notion of boundaries or awareness of others – violating our peace and quiet from the day we moved! day(sic) and night infringing on our own enjoyment of our house also bad smell of food impregnates the insulated ceiling"*

(ii) Page 77 –*"1,2and 3 Feb 2013 the uncle fidgets all night up to the mornings then cooks and "smells"(sic) the bedroom"*

(iii) Page 79–*".....9/2/13: Saturday Cowboy workers (young + Plumber) working in the daughters room 11/2/13 – all night- (11-3AM) walking working &making disturbing noise above our heads maid*

dirtying the bins!!? 13/2/13: awoken shaking from the noise in daughters room at 4AM"

(iv) Page 83–*"I am accusing her of having lodgers, paying guests and non- stop flow of guess (including relatives) filling up the three bedrooms???? Non-stop activity and rubbish and mail On industrial scale!– Good neighbours with good boundaries– abusing my freedom and space mistaking my kindness and politeness and patience for idiocy/ walk over I am discreet and like peaceful neighbourhood"*

(v) Page 103 –*" ...his stomping feet shake the whole flat and startle us...."*

(vi) Page 135- *"the woman must be demented to be able to create this sort of noise? bipolar/on drug? The noise is still going on at 12 PM! She has a girlfriend (small car will come sometimes and spend the weekend with her to party & cook & go out late at night with male friends and they create havoc above our head in the living room until late at night kitchen nightmare! Need to be insulated!!"*

(vii) Page 137 – *"20/8/13 from 1:50 AM she started moving and having some action (cat?) every hour until 5 AM a.m. when I took gave up and took a pill to relax in order to sleep an ordeal/ nightmare– did not give me a chance to recover from the day before. She must be on some "upper"high on drugs to be so restless even after a"heavy day"! It is very distressing and unsustainable healthwise– 10 AM; Sleeping soundly without a single movement!? ???????? like a "baby" ha ha"*

(viii) Page 153 *"she continuously knocks shift furniture as if she was suffering from some sort of anxiety syndrome combined with noisy hyperactivity to soothe herself she is not fit(nor her flat) to be living in the community! This is an unreasonable insane behaviour needs treatment like her daughter?! Very strange creature!! &we are paying the price!????? ?!"*

(ix) Page 165 –*"it is 10:30 PM it is and she is still marching & banging &creaking the floor above my bedroom it is very upsetting and needing to scream on my own to be still suffering from her after 14*

months! It is unacceptable & a sign of weakness to hat to sustain her all these months. We are not in Iran here!! Paul is away in Oxford & I feel very very lonely & helpless. It is some sort of rape/violation of my peace & quiet life. THEY ARE SIMPLY WILD BEASTS!"

(x) Page 189 – *"....7.30AM: flat D ? 7 to 8 very loud bangs that shook the bedroom walls?....."*

(xi) Page 201 – *"..... 4.30 PM: the "bombardment" & savagery of the cleaner/slave is in full swing until 6:30 PM....."*

60. The Tribunal agrees with MissZeitler'sview that *"....thecontention that the Applicant should not be given the benefit of the doubt and a charitable interpretation of the diary is misplaced. The so-called "diary" is to use, MrsGiladi's own words, her "musings". Her "musings" are a tendentious stream of consciousness designed to throw unfounded and scurrilous accusations at the Respondent."*

61. Dr Giladi's evidence supports Mrs Giladi's evidence and confirms noise disturbances during the night that cause him to wake and in particular disturbances that occur when the Respondent's daughter resides at Flat 1B.DrGiladi states that he has never been disturbed by everyday noises such as the sound of building work and by way of example he states that over the past few months 1 Lauderdale Road has had its roof replaced andhe felt no disturbance or irritation in any way while the builders were putting up scaffolding and fixing the roof. He is frequently disturbed during the morning and early afternoon because he hears

"...Flat B inconsiderately slamming shut the main door of the building. Such is the impact of the noise that it causes the paintings in my room to actually shake....I am also disturbed by scraping, thudding and thumping sounds and sustained creaking noises from Flat B. ....The sudden thumping and banging sounds along with the savaging of the hoover by MsKianouri's cleaner are particularly shocking and alarming especially since they are sustained over a fairly long period of time.....This type of noise is not everyday noise by any stretch of the imagination and it would appear that something is wrong with Flat B's floor insulation...."

62. It is inevitable that the description of the noises would be subjective, however the extract above from Dr Giladi's witness statement in particular statements such as *"savaging of the hoover" and "sustained creaking"* indicates thatDr Giladiseems to have embellished his descriptions by attributing unsubstantiated motives to creators of the noise. This throws doubt on the reliability and credibility of the

descriptions. In fact, Dr Giladi admits that there is something wrong with the sound insulation.

63. On a balance of probabilities the Tribunal finds the Appellant has not proved its case. The Tribunal is of the view that although the Giladi's find the noise to be a nuisance they are noises of everyday living, which have become a nuisance due to inadequate sound insulation in the building as opposed to the breach of the Nuisance Covenant by the Respondent or her guests.

The complaints about the Respondent's daughter

64. The Respondent has admitted that when her daughter was still residing at the property (during a period which predates the purchase of Flat 1C by Dr Giladi) and during sporadic visits since that time, her daughter has on occasions made noise that arguably exceeded the noise of everyday living, and due to her behavioural problems has caused a disturbance. However the Respondent contends that as her daughter is disabled within the meaning of Section 6 and Schedule 1 of the Equality Act 2010 and as such the Applicant would be in breach of its obligations pursuant to Section 35(1) of the Equality Act 2010 if it sought to rely on the conduct of the Respondent's daughter as amounting to a breach of the Nuisance covenant.

65. The flat is a three bedroom flat intended to be occupied by a family or persons from society which may well include people with special needs and disabilities such as someone who has mobility issues and uses a walking aid such as a frame on wheels or some motorised equipment to help with bodily functions. Although it is accepted that the Nuisance covenant is widely drawn it cannot possibly have been intended that the occupation of the flat by such a person with the consequent noise generated by the various aids and equipment required by such a person would amount to a breach of the Nuisance covenant. Mr Denehan contended that occupation of the flat by such a person would be a breach of the Nuisance covenant but the Tribunal rejects this proposition as if it were correct then the flat could only be occupied by able-bodied individuals without any specific needs or disabilities. If this was the intention there would have been specific provision to this effect in the Lease.

66. The Respondent has in her witness statement explained her daughter's circumstances. Her daughter is only able to see a distance of about a meter and she may bump into objects due to her visual impairment. The Respondent admits that on occasion she may raise her voice to alert her daughter to danger. Her daughter also has profound hearing loss and so the TV and music might have been loud. The Respondent has produced a letter from the City of Westminster Children's Services which confirms that her daughter has complex needs and is a child with sensory issues

coupled with issues of anger. The letter also confirms that since 20 June 2011 the Respondent's daughter no longer lives with the Respondent.

67. In relation to an incident that occurred in 2011 when the Police were called Mrs Sandhu clarified at the hearing that the Respondent had asked that for the Police to be called as she was having difficulty controlling her daughter as her daughter found the Respondent's presence provocative. This was a one off incident. In the period from 2005 to 2012 during which time the Respondent was away from her flat for a period of 2 years or so there is a record of only one incident involving the Respondent's daughter. Even if this incident amounted to a breach of the Nuisance covenant, it is not an on-going breach. The complaints about the Respondent's daughter are about infrequent outbursts such as banging, screaming and shouting. The Respondent has given a credible explanation for these outburstand in any event the Tribunal considers that they were not frequent enough severe enough or out of the ordinary enough for a person such as the Respondent's daughter and they cannot amount to a breach of the Nuisance covenant.

The User Covenant

68. It is alleged that the Respondent and or her uncle in breach of the User covenant uses the demised premises for a trade or business and as such is not using the demised premises as a single self- contained flat in one private family residential occupation only.Mr Denehansubmitted that the User covenant is to be given a wide meaning and any activity that is an occupation rather than a pleasure is a business[9]. The Applicant relies on the witness statement of William Lawrence.

69. It is admitted that on the 11 May 2011 the Respondent or someone on her behalf incorporated a trading company with a registered office address at Flat 1B and also the Company's addressfor service. It is accepted that the registered office address of the Company was subsequently changed to a different address, however the Applicant alleges that the business activities of the Company continued to be carried out in Flat 1B.The Tribunal is persuaded by the material exhibited to Mr Lawrence's witness statement that the Company traded from Flat 1B from February 2014 to July 2014. It is irrelevant that the Company's stock may be stored at a different location, this does not detract from the fact that the business activity of the Company was conducted from Flat 1B.The Respondent relies on letter from Westminster City Council dated 17 June 2014 in support of her denial that any business activity is undertaken from Flat 1B. The letter is from the strategic director built environment of the Development and Planning Department.The letter states:

> *"I can confirm that during a site inspection it was confirmed that the flat is in use for residential purposes. You have since*

[9]Rolls v Miller 918840 27 Ch.D. 71 at page 87

provided written confirmation that you do run a business but all stock is held ina warehouse and posted directly from the warehouse and indeed no evidence of stock was seen during the site inspection".

70. Although the Respondent denies running an eBay business from Flat 1B, it is submitted that if it were found that the flat has been used for a business, it is submitted that the nature of an eBay business which is essentially conducted in cyberspace cannot have been in the contemplation of the parties in 1984 when the Lease was drafted when virtual businesses were unheard of. The Tribunal was not persuaded by this submission as regardless of whether the business activity is over theinternet or not the fact that the address for service of the Company and registered office address is at Flat 1B, this is sufficient for a breach of the User covenant. Business conducted over the internet still requires management and data input from a computer and although the Respondent states the stock is housed in a warehouse she has not provided the details of an alternative address from which she manages her business.

71. The Tribunal finds the Respondent has breached the User covenant in the Lease although it is noted that the activity has ceased.

Name: N Haria

Date:5 May 2015