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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/18UE/LBC /2017/0014
Property:	11 Croftside, Victoria Road, Ilfracombe, Devon EX34 9LT
Applicant:	Croftside Management Company (Ilfracombe) Limited
Respondent:	Mr and Mrs David Wilson
Type of Application:	Section 168 Commonhold and Leasehold Reform Act 2002 (Breach of Covenant)
Tribunal Member:	Judge A Cresswell
The Hearing:	Decision on the Papers
Date of Decision:	25 May 2017

DECISION

The Application

1. On 15 March 2017, the Applicant, the owner of the freehold interest in 11 Croftside, Victoria Road, Ilfracombe, Devon EX34 9LT, made an application to the Tribunal claiming breach by the Respondent Lessees of various covenants in their Lease.

Summary Decision

2. The Tribunal has determined that the Applicant landlord has not demonstrated that there has been a breach of covenant.

Directions

3. Directions were issued on 27 March 2017. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
4. This determination is made in the light of the documentation submitted in response to those directions.

The Law

5. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.
6. 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.
7. 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.
8. 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 conjecture 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."*
9. *"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*

task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law... It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out...: the burden of proof is a last, not a first, resort." (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

Ownership and Management

10. The Applicant is the owner of the freehold of the building, Croftside, which comprises 12 flats. The Respondents are the owners of the leasehold interest in Flat 11.

The Lease

11. The lease before the Tribunal is a lease of 12 Croftside dated 17 February 1987, which was made between the Applicant as lessor and Paul Victor Denham as lessee. It has not been suggested that this lease is not in the same terms as the lease for Flat 11.
12. The Applicant claims a breach of 3 covenants within the lease.
13. Clause 4 of the lease is a covenant by the lessor (on conditions) for quiet enjoyment by the lessee.
14. The Third Schedule details covenants on the part of the lessee.
15. Paragraph 2 of that Schedule says that: *"No radio television or musical instrument shall be played in such a manner as to cause annoyance or nuisance to the occupants of neighbouring premises or property or so as to be audible outside the Flat between the hours of 11pm and 7.30 am".*
16. Paragraph 13 of that Schedule says: *"Not to do or suffer to be done in or upon the building or any part thereof any act or thing which may be a nuisance damage or annoyance to the Landlord or the Tenant or occupier of any adjoining property."*
17. Clause 4 of the lease is a covenant by the Landlord to provide the Tenant Lessee with quiet enjoyment, so that there can be no breach of that covenant by a Lessee. Breach of another covenant by a Lessee could affect how the clause operates, but could not itself be a breach of the specific clause.
18. Paragraph 2 of the Third Schedule refers specifically to radio, television and musical instrument and there has been no specific allegation of noise from any of those discrete sources. Sometimes a lease has a "catch-all" element referring to any source of noise, but that is not the case here.
19. Paragraph 13 of the Third Schedule is, however, more general in scope and would certainly cover noise nuisance of the nature complained of here. The Tribunal will, accordingly, consider in detail only whether there has been a breach of Paragraph 13 of the Third Schedule, having determined that the other two covenants are, respectively, not relevant and not supported by the evidence.
20. 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,

Consideration and Determination of Breach of Covenant, Paragraph 13 of the Third Schedule

The Applicant

21. The Applicant claims a breach by the Respondents of three covenants within the lease. (The Tribunal has already recorded its Decision in relation to two of those claims above.)
22. Both parties refer to matters which are not relevant to the issues in this application; the Tribunal does not discuss those other matters and is not swayed by the counter-allegations made.
23. The third breach claimed by the Applicant is based upon a claim that Mr and Mrs Taylor, tenants of the Respondent lessees of Flat 11, have been subjecting the lessee of Flat 6, Mrs Ann Eccles, to a concerted campaign of harassment by deliberately making a variety of noises during the late evening and early morning.
24. Mr and Mrs Taylor have been tenants of the Respondents in Flat 11 from July 2016. Flat 11 sits between Flat 12 (Mr Paul Denham) and Flat 6 (Mrs Ann Eccles) on the building's First Floor. Mr Denham says that the kitchen of Flat 11 is contiguous with the kitchen of Flat 12 and its lounge and main bedroom are contiguous with the lounge and main bedroom of Flat 6. Mrs Eccles says that the bedrooms of Flats 11 and 6 are separated by a party wall.
25. Mrs Eccles, lessee of Flat 6, complains that from her return to the property on 8 August 2016, she was disturbed by various noises during the night. She wrote to the occupiers of Flat 11 on 24 August 2016 referring to several disturbances by various sounds such as buzzers during the night and early hours of the morning. She received no response save for a loud buzzer at 5pm that day when the male occupant returned.
26. She informed the Managing Agent, Mr Stephen Brown, about the problem. She began to keep a log.
27. The log (enclosed with the Applicant's case) runs from 5 September 2016 to 28 April 2017 and records times and, from 10 December, types of noise, including loud alarm, hooter, squeaky noise, buzzer, telephone noise, noisy drawers and doors, slashing, knocking on wood/metal and whistle.
28. Mr Denham lives mainly in Gloucestershire, but spends a great deal of time at Croftside. He has heard no noise at night from Flat 11. He doubts that subtle noise at night transmitted to Flat 6 would be transmitted to his flat or anywhere else in the property. He has no reason to doubt the version of events given by Mrs Eccles and was concerned for her health.
29. Mr Denham wrote to the Respondents on 23 June 2016 about a previous tenant's claimed actions, but received no response.
30. Mr Stephen Brown, the Managing Agent, records in his statement the reported disturbances and their perceived effect on Mrs Eccles.
31. He details the position of the flats at the property, with Flat 11 being on the First Floor, between Flats 12 and 6 and above Flats 9 (Ground Floor) and 7 (Lower Ground Floor).
32. Mr Brown believed that any airborne or impact sound from Flat 11 was only likely to be heard in Flats 6 and 9 and possibly to a lesser extent in Flat 12
33. Mr Brown emailed the Respondents on 21 November 2016, saying "*Your tenants seem to have settled in well, however, there is one incident which is*

causing great distress to the elderly neighbours and that is an alarm which goes off repeatedly around 3.00 a.m." On 30 November 2016, he again emailed, referring to the difficulty caused by the "*alarm*" from Flat 11.

34. By letter of 12 January 2017, Mr Brown wrote to the Respondents saying that noise from Flat 11 could also be heard in Flat 12 and that Mr Denham too had observed strange "bumpings" emanating from Flat 11 often during the evening and deliberate noise from alarms being set off in the middle of every night and that Mrs Eccles' health was suffering and she and Mr Denham reported that their patience had been completely exhausted.

The Respondents

35. The Respondents say that Mr and Mrs Taylor came with excellent references (produced) before becoming tenants in Flat 11.

36. Once aware of the concerns of Mrs Eccles about noise, the Respondents visited Mr and Mrs Taylor and were assured by them that they were making no noise. They made enquiries of the flat below, Flat 9 and were assured that no noises were heard.

37. After receiving Mr Brown's email of 30 November 2016, the Respondents replied by email of 2 December 2016 saying that there were no alarms from his tenants, but there was a suspicion that history was repeating itself in that Mrs Eccles had previously complained about banging by Mrs Wilson's mother, the previous lessee of Flat 11.

38. The Respondents made further enquiries at the property following Mr Brown's letter of 12 January 2017, the negative result of which was reported to Mr Brown by telephone and they believed the matter was concluded satisfactorily.

39. Mrs Taylor went to Mrs Eccles' address following her letter, but she was not in when calls were made and she tried too to see Mr Denham, but he did not seem to be home very often.

40. Noises logged by Mrs Eccles could have come from the High Street and its parking area under the flats say the Respondents.

41. Miss A Cunningham refers to Mrs Eccles accusing her nan, Doreen Battershill, of repeatedly banging on the wall of Mrs Eccles' flat.

42. There are letters from a number of the flats' occupiers. Mr and Mrs Taylor deny the allegations. The occupiers of Flat 9, Karen Payne and Adam Swanson, twice said no noises were heard by them; similar denials were made by Flats 8, 7, 1 and 2.

The Tribunal

43. The Tribunal has followed the guidance of the Supreme Court in **Arnold v Britton** and others when considering the words of the lease in this case.

44. The Tribunal regards behaviour of the nature complained of to be very serious. Deliberately and regularly to make noise during the late and early hours with the intention of annoying a neighbour and with the direct result of disturbing that neighbour's sleep with the recognised health consequences is clearly despicable and reprehensible conduct. If such behaviour was the case and was perpetuated by the tenants, Mr and/or Mrs Taylor, and if the lessee Respondents were aware of that behaviour having been informed of it and having made their own reasonable enquiries and they failed to take reasonable action to cause that behaviour to end, the Respondents would *suffer to be done in or upon the building or any part thereof any act or thing which may be a nuisance damage or annoyance to the Landlord or the Tenant or occupier of any adjoining* property in accordance with paragraph 13 of the Third Schedule.

45. The real issue, therefore, is first whether the Tribunal can be satisfied on the basis of the evidence available to it, that behaviour of the nature complained of has actually occurred because the other questions arise from that initial circumstance.

46. The evidence of there being night-time noise comes solely from the statement of Mrs Eccles. The evidence of there not being such noise comes from a number of sources; the Taylors deny making noise; Mr Denham, their next door neighbour, hears no noise when present at his flat; no other tenant of those approached and reported upon by the Respondents is aware of any noise emanating from Flat 11 at night.

47. The Taylors posit other possible causes for the noise Mrs Eccles records on her log.

48. When there is a complaint of residential noise, local authorities will often advise a log is kept and that sound recording equipment is used. The former provides a record and the latter an independent source of evidence. The latter was not used here. The former was used, but there is some concern about the records presented to the Tribunal.

49. It is clear that the original record has not been produced to the Tribunal; clear because two typed versions are submitted, both of which contain typing at the start which appears to post-date and introduce the recorded events that follow. One typed version was submitted with the application and a second with the Applicant's case in response to the Directions. The second version differs from the first; not only is the typewritten preamble different, and there has been tidying of some of the typing (removal of some brackets and of some elision), but also there has been some alteration of the description of some of the sounds said to have been heard ("*Telephone effect bell*" changed to "*Telephone bell*" and "*Simulated telephone*" changed to "*Telephone bell*" and "*Something thrown against wall*" changed to "*Something thrown against the party wall*" and "*Simulated telephone bell (rings once)*" changed to "*Telephone bell*").

50. A further discrepancy is that, in her witness statement of 28 April 2017 submitted as part of the Applicant's case, Mrs Eccles says that the night-time noises continued after her letter of 24 August 2016, whereas the first typed version of the record of noises records on its face that for several days after the letter there was no problem at all until it recurred in early September.

51. Mr Brown's November 2016 emails to the Respondents present a different picture to that painted by the record kept by Mrs Eccles. He referred to the tenants as seeming to have settled well and there being only one incident (likely to be one per night) being an alarm going off repeatedly around 3.00 a.m. This does not fit with the record of noise since September, differing times each night and varied in nature ("*various sounds such as buzzers/alarms*").

52. The Tribunal cannot be satisfied, for the reasons given, that either of the two typed versions of the nuisance record accurately reflects the original record or accurately reflects what Mrs Eccles actually experienced.

53. Mr Denham doubted the transmission of subtle noises to flats other than Flat 6, but Mrs Eccles does not describe subtle noises. Mr Brown believed that any airborne or impact sound from Flat 11 was only likely to be heard in Flats 6 and 9 and possibly to a lesser extent in Flat 12; he does not say why there would be a lesser extent in Flat 12 to Flat 6, which, unless the noise was restricted to a contiguous bedroom (or lounge), would not be logical. Certainly Mr Denham heard no noise and Karen Payne in Flat 9 had never

experienced loud or awakening noises from Flat 11, whilst noting external noises from cars and people outside the building.

54. By letter of 12 January 2017, Mr Brown said that noise from Flat 11 could also be heard in Flat 12 and that Mr Denham too had observed strange "bumpings" emanating from Flat 11 often during the evening and deliberate noise from alarms being set off in the middle of every night and that Mrs Eccles' health was suffering and she and Mr Denham reported that their patience had been completely exhausted. This is not supported by Mr Denham's own evidence.

55. The Tribunal identified the real issue here as being first whether the Tribunal can be satisfied, on the basis of the evidence available to it, that behaviour of the nature complained of has actually occurred because the other questions arise from that initial circumstance. The Tribunal finds that it cannot be so satisfied.

56. On the basis of the evidence available to the Tribunal, the Tribunal cannot conclude that there has been noise of the nature complained of or that there has been a breach of covenant by the Respondents. The quality of the evidence presented by the Applicant has been examined above; the Tribunal does not repeat its findings, but notes numerous inconsistencies in the evidence set against a refutation by the Respondents supported by other tenants, notably the occupiers of Flat 9 below and Mr Denham of Flat 12.

Judge A Cresswell

APPEAL

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

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

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

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