RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

CASE No: CHI/21UG/LBC/2005/0011

B E T W E E N :-

Mrs A Novak

Applicant

And

Mrs D Boswell

Respondent

Premises: **35 Woodville Road, Bexhill-on-Sea, East Sussex**
Tribunal: **Mr D Agnew LLB, LLM**

REASONS

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1. **Introduction:-**

1.1 This is an application by the Applicant, Mrs Novak, under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination as to whether there has been a breach of covenant of the lease under which she holds her flat at 35 Woodville Road, Bexhill-on-Sea, East Sussex ("the Premises").

2. **The Determination**

2.1 For the reasons set out below the Tribunal does determine that there has been a breach of covenant by the Respondent, but only to the extent set out hereafter.

3. Background

3.1 The Applicant is the freehold owner of the building known as the Mansion which is now divided into two flats: the ground floor is let on a long lease dated 21st December 1965 between Ruth Frake (1) and Jean Mary Tuck (2) and the Respondent is the current leaseholder. The Applicant owns the freehold and occupies the first floor flat.

3.2 The Tribunal has no evidence as to whether they were purpose-built flats or whether the building has been converted from one large house.

3.3 The Respondent bought her flat in September 2002 at about the time when the Applicant retired as a schoolteacher. She bought her flat and the freehold in 1979.

4. The Lease

4.1 Although the Applicant has not specifically identified in her statement of case the covenants she alleges have been breached by the Respondent, as she was required to do by the Directions which were issued on 18 November 2005, it is clear from the Applicant's complaints about the Respondent, as set out in her diary entries and her statements of case, that the relevant covenants are contained in clause 3(ii)(f) of the lease and paragraph 3 of the First Schedule to the lease.

4.2 Clause 3(ii)(f) states requires the Lessee:-

"To keep the garden properly cultivated and in a neat and tidy condition....."

4.3 Paragraph 3 of the First Schedule to the lease states:-

"No piano, pianola, gramophone, wireless, television loudspeaker or mechanical or other musical instrument of any kind shall be played or used nor shall any singing be practised on the demised premises so as to cause annoyance to any owner or occupier of the other flat or maisonette comprised in the Mansion or so as to be audible outside the flat between the hours of Eleven p.m. and Nine a.m".

5. The Alleged Breaches of Covenant

5.1 The Applicant's complaints about the Respondent were as follows:-

a). She allowed her part of the garden to become unkempt and weedy and to look "bare" where plants had been removed

b). Her loud snoring disturbed the Applicant at night.

c). Her television was audible outside the hours of 11 p.m. to 9 a.m.

d). She played music loudly on her radio in the flat and in the garden.

e). She could be heard talking loudly and laughing on her telephone during the day and night.

f). She had installed a water feature which was sometimes left working for hours on end causing a disturbance to the Applicant.

g). She parked her car in the driveway instead of in the area of a former car port.

h). She allowed doors to bang closed.

i). There had been arguments where the Respondent had angrily rung the Applicant's doorbell in response to the Applicant's complaints about noise wherein the Respondent had been abusive towards the Applicant.

j). The Respondent has a loud cough which can be heard in the Applicant's flat and this often disturbs her at night.

k). An electrical appliance was making an odd noise which required investigation.

l). The smoke alarm had gone off once.

There were other less frequent matters about which the Applicant complained but those listed above were the main issues for the Applicant.

6. The Evidence

6.1 This was provided in a statement of case from the Applicant dated 13 January 2006, a letter from the Applicant to her solicitor dated 19 January 2006 which the solicitor forwarded to the Tribunal and a further such letter of 2nd February 2006. The Respondent's evidence was contained in two statements, the first dated 22 December 2005 (made before the Applicant's

first Statement of Case) and the second dated 20 January 2006. Letters as to evidence of the character of both parties and as to the state of the garden were also tendered in evidence.

6.2 The Applicant relied to a large extent on the entries she had made in her diary as to the matters she complained about. She said that she had never had any trouble with previous lessees. Attempts to get the Respondent to take steps to alleviate the noise had not been successful and she had been met with defiance and abuse. Apart from her diary entries, however, she produced no evidence as to the decibel level of the noise she complained of or as to how intrusive it was. Evidence as to the state of the garden was provided by way of colour photographs.

6.3 It was the Respondent's case that she had not done anything other than to lead a normal life, showing consideration to the Applicant and doing her best to try to appease her. The Applicant had, however, made her life a misery by her constant complaints about noise where these were only the noises of normal everyday life. She was suffering from stress as a result. She maintained that the previous two lessees had had trouble from interference by the Applicant and that one moved away as a result, but she did not produce any confirmatory evidence from those lessees. (The Applicant maintained that the only trouble she had had was concerning her claim for a contribution towards the cost of some works to the building).

6.4 It was the Respondent's case also that there was inadequate sound insulation between the flats. It should not be possible for the sounds of everyday living to be heard to the extent that they could in this property. She can hear the Applicant moving around in her flat and running her bath and discharging the bath water down the drain. In any event, she said, there was evidence that the Applicant was deliberately listening out for any sound so that she could complain.

6.5 Specifically, the Respondent denied that she used her washing machine or any electrical appliance between 11 p.m. and 9 a.m. She works nights and has commitments elsewhere every other weekend, so she is only present in the flat four nights every fortnight. She rarely watches television past 11 p.m. and when she does she has an earpiece through which to listen to it which she has acquired to overcome the problem of the noise from the TV being heard in the Applicant's flat.

6.6 The Respondent denies all the complaints made by the Applicant, including those which would not constitute a breach of covenant. It is not necessary to itemise every denial in these reasons where the behaviour complained of does not constitute a breach of covenant. Certain allegations such as loud snoring or coughing may have been accepted but, it was said, were not breaches of covenant. If the TV was on or music played between 11 p.m. and 9 a.m. this was not at anything other than a normal volume and in such cases it was the inadequate insulation which was to blame. As far as the garden was concerned, it was her choice to make it more minimalist as far as plants were concerned than it had been hitherto and she was entitled to do what she liked in her own garden. She enjoyed gardening and did keep the garden neat and tidy, employing a gardener on occasions. Thus whether or not the Respondent had been "guilty" as alleged, the allegations with regard to these items cannot constitute a breach of covenant.

7. The Tribunal's Decision

7.1 The following is a list of Applicant's complaints which do not constitute breaches of covenant by the Respondent:-

a). Loud snoring.

b). Loud coughing.

c). Slamming of doors.

d). The sound of the water feature.

e). Where the Respondent chooses to put her car.

f). Playing her radio in the garden during the day.

g). Talking or laughing loudly.

h). Talking on the telephone whether during the day or at night.

i). Speaking abusively to the Applicant.

j). The smoke alarm being activated.

k). An electrical applicance (other than one coming within the type of musical instrument or entertainment equipment as specified in paragraph 3 of the First Schedule of the lease) making a noise.

7.2 This leaves the noise of the television and music being played between the hours of 11 p.m. and 9 a.m. and the alleged failure to comply with the covenant with regard to the maintenance of the garden.

7.3 The wording of the covenant with regard to the garden is "to keep the garden properly cultivated and in a neat and tidy condition". To some extent the wording is subjective. What one person may consider to be "properly cultivated" and "neat and tidy" in the context of a garden may differ from the next person. There comes a time however, where a garden is in such a neglected state that any ordinary reasonable person would consider it not to be "properly cultivated" or "neat and tidy". Furthermore, as the Applicant accepts, there are times of the year when a garden's appearance is less attractive than at other times. There may be good reasons why weeding is not done for a time: such as illness or the need to attend to ill or elderly relatives. The Tribunal finds that the Applicant has not sufficiently made out her case on this ground that the Respondent has been in breach of covenant.

7.4 The question concerning the TV and music being audible between the hours of 11 p.m. and 9 a.m. was a difficult matter to decide in the absence of the Tribunal having the opportunity of seeing the property for itself and hearing the parties give their evidence so that a view of the winesses could have been formed. The Tribunal suspects, but has no evidence to support this, that the Respondent is right when she says that there is inadequate sound insulation between the two flats. It should not be possible to hear coughing or snoring from one flat to the other, at least not to such an extent that it is intrusive. It does seem a considerable restriction on the Respondent's enjoyment of her own property if she cannot watch television even at a low volume which is just audible to her, after 11 p.m. at night. The covenant was imposed no doubt as a protection of the interests of the other flat owner to curtail loud or intrusive activities late at night and in the early hours of the morning such as might be expected to disturb neighbours. It would seem that in this property, however, even the most ordinary sound levels of, for example, people speaking on the telephone, can be heard in the upper flat. Unfortunately for the Respondent, the wording of the covenant is such that there is technically a breach if any noise whatsoever from a source which is set out in the covenant, including a television, is audible outside the flat between the hours of 11 p.m. and 9 a.m. The Respondent does not have to have been unreasonable in the volume emanating from her

television for there to be a breach, provided that the television or radio or music producing equipment can be heard outside the Flat. The upper flat occupied by the Applicant is outside "the Flat"

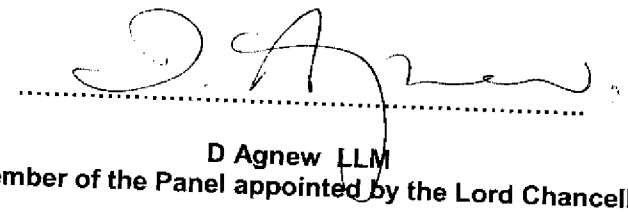
7.5 The Tribunal did consider whether the Applicant might be the sort of person who is unusually sensitive to noise or that perhaps she might have gone out of her way to listen for such noises. If this is the case there is no real evidence that this is so, and even If there had been this would have been relevant only as to whether the noise was of such a level that the ordinary reasonable person would not have found it an "annoyance". As already stated, however unreasonableness in the noise level is not necessary for the limb of the covenant relating to audibility outside the Flat between 11 p.m. and 9 a.m to be established.

7.6 The question for the Tribunal to decide is, therefore, whether on the evidence there have been occasions when the Respondent's television or played music has been audible in the Applicant's Flat between 11 p.m. and 9 a.m. The Applicant's diary entries give a number of instances where this has occurred. The Respondent says that she rarely has the television on after 11 p.m. and when she does, she uses the earpiece which cuts out the sound to the room. Which evidence, in the absence of seeing and hearing the parties in person does the Tribunal therefore accept? The burden of proof is on the Applicant, on a balance of probabilities. On balance, the Tribunal accepts the Applicant's evidence in this regard. The reason for this is as follows. The Respondent cannot know whether her television, radio or other music player can be heard in the Applicant's flat. The Tribunal had no reason to question the Applicant's honesty when she says she has heard the television on the occasions she has recorded after 11 p.m. at night. There are many other instances in her diary notes where she has honestly recorded that the noise stopped at an earlier time, or that there was no audible noise on a particular day. The Tribunal therefore accepts that there have been some occasions since 2003 when the Applicant has been able to hear the Respondent's television or recorded music between the hours of 11 p.m. and 9 a.m. The Tribunal finds, therefore, that there has, technically, been a breach of the covenant, even if this was not deliberate on the part of the Respondent (which the Tribunal accepts) and even if the fault lies in the fact that there may be inadequate sound insulation between the flats. Although this is no part of the Tribunal's jurisdiction, it suggests that the parties might

consider it to be in their interests if they were jointly to explore the possibility of installing extra sound insulation in the building.

7.7 The Applicant asks that the Tribunal rules that it would be reasonable to include the cost of her legal fees as a service charge in the next financial year. The Tribunal has no jurisdiction to make such a determination under Section 168(4) of the Act and therefore makes no such order. If the Applicant wishes to pursue such an application she will have to make a fresh application under the appropriate legislation.

Dated this 8th day of February 2006



D Agnew LLM
A member of the Panel appointed by the Lord Chancellor