ALARUMS, EXCURSIONS AND NOISES OFF NUISANCE, QUIET ENJOYMENT AND INJUNCTIONS

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by

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Recent cases of interest include *Ingram v Church Commissioners* [2015] (VAT on service charges), *Royal Mail v Pridebank* [2015] (user provisions in restrictive covenants), *Snowball Assets v Huntsmore* [2015] (rights of retention of property in a collective enfranchisement) *Merie Bin Mahfouz v Barrie House* [2014] (rights to leasebacks in collective enfranchisements)

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CASE STUDY NOTES

Tranquil House

1. Tranquil House comprises a large London townhouse, converted some years ago into flats. There are twelve flats in the conversion, two on each of the six floors of the building. There is a basement floor, a ground floor and four upper floors. The flats are all let on long leases, granted by the original developer of the building.

1.1 The freehold owner of the building is a company called Inactive Limited. Inactive acquired the reversionary freehold interest in the building, after its conversion into flats, from the original developer and landlord. There is no headlease of the building.

Enter the Intolerants

2. In 2014 Mr. and Mrs Intolerant purchase the long leasehold interest in Flat 10, on the third floor of the building. The vendor is Mr. Indifferent, who had been tenant of Flat 10 for the previous ten years. Mr. Indifferent had underlet Flat 10 to a series of short term undertenants.

2.1 The layout of Flat 10 is poor. With the consent of Inactive, which is required under their lease, the Intolerants carry out works to re-arrange the internal space in Flat 10. One effect of these works is to move the living room of Flat 10, where the Intolerants have their wide screen television, from the front of Flat 10 to the rear, where previously the kitchen and bathroom were located.

2.2 This, in turn, has the effect of bringing the living room of Flat 10 into a location directly below the living room of Flat 12, which is on the fourth (top) floor of the building.

2.3 The Intolerants are devoted fans of Game of Thrones. They have the entire boxed set of the five series so far made. On Tuesday evenings the Intolerants have their Game of Thrones evening, when they sit down and watch their favourite episodes.

Alarums, excursions and noises off

3. Unfortunately for the Intolerants they are not the only ones who like to spend their Tuesday evenings in cultural pursuits. Every Tuesday evening, Flat 12 is the location for the weekly meetings of the Tranquil House Amateur Shakespeare group, also known, by its initials, as Trash.

3.1 Large numbers of people attend Trash's weekly meetings, where scenes from the Bard's works are acted out, with appropriate sound effects, by enthusiastic amateur thespians.

3.2 The noise from these activities penetrates straight into the Intolerants' living room. Depending upon which Shakespeare play is being performed, the sounds of battles, duels, arguments, and noisy deaths fill the Intolerants' living room, largely drowning out the battles, duels, arguments and noisy deaths from Game of Thrones being played out on their wide screen television.

3.3 The noise transmission is made significantly worse by the fact that the living room of Flat 12 has bare polished wood flooring.

3.4 The persons who occupy Flat 12, and run Trash are Mr. and Mrs Ham. The Intolerants make a number of complaints to the Hams, but the weekly meetings of Trash continue, and there is no reduction in the noise. The Intolerants also complain to Inactive, but Inactive says that the matter is not the responsibility of Inactive.

The Intolerants take action

4. By the time Trash have reached Henry V, and have devoted an entire evening to perfecting Henry V's speech before Agincourt, ably supported by cheering extras, the Intolerants have had enough. They instruct Philistine & Co., a firm of solicitors experienced in dealing with noise nuisance cases, to put a stop to what they regard as the noise nuisance created by Trash's activities.

4.1 Philistine & Co. carry out various investigations, with the following results.

4.2 It turns out that the Hams are not the persons who hold the long lease of Flat 12. The registered proprietor of the lease is a Mr. Absentee, the brother of Mrs Ham. Mr. Absentee is rarely at Flat 12. There is no evidence that the Hams have any underleasehold interest in Flat 12.

4.3 Mr. Sensitive, an acoustic expert instructed by Philistine & Co., attends Flat 10 on several Tuesday evenings, and provides a report stating his view that the noise transmission from Flat 12 from Trash's activities is excessive and unreasonable. Mr. Sensitive does also say that the unreasonable sound transmission from Flat 12 is confined to the living room of Flat 10.

4.4 Mr. Sensitive says that there are two reasons why the noise transmission is at an unreasonable level.

(1) The presence of large numbers of people in the living room of Flat 12, engaging in amateur dramatics.

(2) The wooden flooring of Flat 12, which exacerbates the impact noise transmission from Trash's activities.

4.5 So far as the leases of Flat 10 and Flat 12 are concerned, the salient points are as follows.

(1) The Intolerants' lease contains a landlord's covenant for quiet enjoyment.

(2) The lease of Flat 12 contains a tenant's covenant not to cause nuisance and annoyance to any adjoining occupiers.

(3) The lease of Flat 12 contains a tenant's covenant restricting the covering of the floors of Flat 12 to underlay and carpeting, save for the kitchen and bathroom, which may be covered with other sound deadening material. Bare wooden flooring is expressly prohibited.

(4) Under the lease of Flat 10 the tenant can make a formal request to the landlord to take action against another tenant, on condition that an indemnity is provided to the landlord against the costs of such action. The landlord is not however obliged to take action, but has an unfettered discretion as to whether to do so.

(5) The leases of Flat 10 and Flat 12 both contain provisions stating that there is no letting scheme in respect of the building.

4.6 The wooden flooring was laid in Flat 12 pursuant to a licence granted to Mr. Absentee by Inactive for alterations to be made to Flat 12. The licence was granted shortly before the Intolerants purchased Flat 10. The licence specifically permitted the wooden flooring. The wooden flooring was installed by Mr. Absentee. It would also have been clear to Inactive, when the licence was granted, that the wooden flooring would not be covered by underlay and carpeting.

4.7 Philistine & Co. send letters of claim to the Hams, Mr. Absentee and Inactive.

(1) As against the Hams Philistine & Co. seek an injunction to prevent meetings of Trash in Flat 12, and damages for nuisance.

(2) As against Mr. Absentee Philistine & Co. seek an injunction to prevent meetings of Trash in Flat 12, and damages for nuisance.

(3) As against Inactive Philistine & Co. seek damages for nuisance and for breach of the covenant for quiet enjoyment and for breach of the implied covenant not to derogate from grant.

The Hams reply

5. The Hams instruct Arty & Co. as their solicitors, who respond to the letter of claim as follows (italics have been added to all quotations in this Case Study).

> *"We are very surprised by the allegation that Trash's activities amount to a nuisance. The noise generated by Trash's activities is no more than the noise generated by normal domestic activities. It occurs once a week, and is, by no stretch of the imagination, unreasonable.*
>
> *We also point out that Mr. and Mrs Ham are important figures in the local artistic community, and Trash's activities help to satisfy an important local need for cultural activities. Trash's meetings in Flat 12 have been held regularly for a period of some ten years. Prior to the Intolerants' arrival in Flat 10 there had been no previous complaints from Mr. Indifferent or any other occupier of Flat 10.*
>
> *We also note that your clients have changed the internal layout of Flat 10, so as to relocate the living room of Flat 10 to a position immediately below the living room of Flat 12. If, which is denied, there is a nuisance, your clients have come to, and created that nuisance by their relocation of their living room.*

It also seems to us that an injunction is a wholly disproportionate remedy in this case if, which is denied, there is a nuisance. Trash meets once a week, and always on a Tuesday. There is a public interest in Trash's activities being allowed to continue. In all the circumstances it is not unreasonable to expect your clients to tolerate one evening a week of such noise as there is.

Mr. Absentee replies

6. Mr. Absentee also instructs Arty & Co., who reply separately on his behalf, as follows.

"We refer to our separate letter of response written on behalf of the Hams. What we have said in that letter applies equally to Mr. Absentee. So far as Mr. Absentee is concerned however, he rarely visits Flat 12. Mr. Absentee has licensed Mr. and Mrs Ham to occupy Flat 12, for which they pay a licence fee. The licence can only be terminated on one month's notice. As a licensor Mr. Absentee is therefore in the same position as a landlord, and can only be liable for a nuisance created by his licensees if he has either participated in that nuisance, or authorized that nuisance by licensing Flat 12. The Hams' licence does not contain any term which prevents or restricts Trash's activities

Mr. Absentee has always been aware of the use made of Flat 12 by Trash, and the Hams have communicated your clients' previous complaints to Mr. Absentee. If however, which is denied, Trash's use of Flat 12 has constituted a nuisance, Mr. Absentee has neither participated in, nor authorized that nuisance.

So far as the wooden flooring is concerned, this was installed with the consent of the landlord, Inactive. As such, it cannot be the subject of complaint by your clients."

Inactive replies

7. Inactive instructs Detached & Co. as its solicitors. The material part of their reply to the letter of claim is as follows.

"We refer you to the decision of the Supreme Court in Coventry v Lawrence (No. 2). As that decision confirms, a landlord can only be liable for a tenant's nuisance where the landlord has participated directly in the commission of the nuisance, or where the landlord must be taken to have authorized the nuisance by letting the relevant property.

In the present case and if, which is denied, the activities of Trash have amounted to a nuisance, there can be no question of our client having either authorized or participated in the nuisance. Our client can therefore have no liability to your clients in nuisance.

The same reasoning applies to the claims for breach of the covenant of quiet enjoyment and for breach of the implied covenant not to derogate from grant. There can be no breach of these covenants where the landlord has neither authorized, nor participated in the relevant interference with the tenant's property.

For the avoidance of doubt, our client is not minded to take action itself as landlord of Flat 12. While our client has always been aware of Trash's activities, our client is not satisfied that Trash's activities constitute any breach of any covenant in the lease of Flat 12, and is not prepared to embark on time consuming and expensive legal proceedings to try to establish such breach of covenant, even with the benefit of a full indemnity from your client."

The Questions

1. Is the noise from Trash's activities a nuisance?

2. If there is a claim in nuisance, is Inactive liable to the Intolerants?

3. If there is a claim in nuisance, is Mr. Absentee liable to the Intolerants?

4. If there is a claim in nuisance, should an injunction be granted to prevent meetings of Trash in Flat 12?

Points to think about

1. Is the noise from Trash's activities a nuisance?
   (1) Are the activities of Trash an interference with the Intolerants' reasonable use of Flat 10?
   (2) Is the wooden flooring in Flat 12 relevant in answering this question?
   (3) Does it matter that the noise transmission occurs only one evening a week?
   (4) Can it be said that the Intolerants have created the nuisance, by re-arranging the layout of Flat 10 so that the living room is now located directly under the living room of Flat 12?
   (5) Does it matter that Trash's activities have been carried on for the past ten years, and that Mr. Indifferent and his undertenants never complained?

2. If there is a claim in nuisance, is Inactive liable to the Intolerants?
   (1) Can it be said that Inactive has participated in the nuisance?
   (2) Can it be said that Inactive has authorized the nuisance?
   (3) What is the significance, if any, of the facts that (i) Inactive authorized the installation of the wooden flooring, although wooden flooring was prohibited by the terms of the lease of Flat 12, and (ii) that Inactive would have been aware that the wooden flooring was not going to be covered?
   (4) What is required to demonstrate a breach of the covenant for quiet enjoyment?
   (5) Is there a claim for breach of the implied covenant not to derogate from grant?
   (6) What is the significance, if any, of Inactive having been aware of Trash's activities?
   (7) What is the significance, if any, of Inactive having received direct complaints from the Intolerants?

3. If there is a claim in nuisance, is Mr. Absentee liable to the Intolerants?
   (1) Is Mr. Absentee in the same position as the landlord of Flat 12, by virtue of the licence granted to the Hams?
   (2) If so, can it be said that Mr. Absentee has either participated in the nuisance or authorized the nuisance?

(3) If not, what is the position of Mr. Absentee, as licensor of the Hams?

(4) What is the significance, if any, of the fact that Mr. Absentee installed the wooden flooring, and did so with the consent of Inactive?

(5) What is the significance, if any, of Mr. Absentee having been aware of Trash's activities, and of the Intolerants' complaints?

(6) What steps, if any, could Mr. Absentee reasonably have been expected to take by way of abatement of the nuisance?

(7) If Mr. Absentee was required to take any steps to abate the nuisance, did those steps extend to terminating the Hams' licence.

4. If there is a claim in nuisance, should an injunction be granted to prevent meetings of Trash in Flat 12?

(1) How does the Shelfer test apply?

(i) Is the injury to the Intolerants' rights small?

(ii) Is the injury one capable of being estimated in money?

(iii) Is the injury one which can be compensated by a small money payment?

(iv) Is the case one where it would be oppressive to grant an injunction?

(2) Is it relevant that Trash meets only once a week, on a Tuesday evening?

(3) Is it relevant that the Intolerants could move their Game of Thrones evening to a different evening?

(4) Is it relevant that the noise transmission is confined to the living room of Flat 10?

(5) Is there any public interest at stake?

(6) Is there a problem with framing the terms of the injunction?

(7) Does it make a difference that Flat 10 is the home of the Intolerants?

The Answers

1. Is the noise from Trash's activities a nuisance?

   YES/NO

2. If there is a claim in nuisance, is Inactive liable to the Intolerants?

   YES/NO

3. If there is a claim in nuisance, is Mr. Absentee liable to the Intolerants?

   YES/NO

4. If there is a claim in nuisance, should an injunction be granted to prevent meetings of Trash in Flat 12?

   YES/NO

Advice for the future

1. In order to keep the problems raised by this Case Study within reasonable bounds, the possibility of a letting scheme has been ruled out. In reality, in cases where leases of flats in a development or conversion have all been sold off at the same time, it is often possible to find a letting scheme. In some cases the terms of the leases make it clear that a letting scheme was intended. Where there is a letting scheme, it becomes possible for a tenant suffering noise nuisance from another flat to sue the tenant of that other flat on the restrictive covenants in that tenant's lease. This can be immensely useful, particularly in a case where the lease contains restrictive covenants regarding floor covering.
2. In cases involving noise nuisance between flats, expert acoustic evidence is vital. There is no established test for what constitutes noise nuisance as between flats. Without acoustic evidence, a Court may be reluctant to accept that noise transmission amounts to a nuisance.
3. In relation to flat conversions, in particular, sound insulation between the flats is often poor. Often the noise transmission derives from ordinary domestic activities such as walking in the flat, or noise from domestic appliances, or simply loud conversation. Where such noise transmission does not occur at anti-social hours it may be difficult to persuade a Court that there is a common law nuisance. This is why it may be important to be able to sue on the covenants in the lease of the flat from which the noise transmission derives.
4. Formulation of the relief sought by injunction is very important. The more practical and effective the solution offered by the injunction, the better the chances of the Court being persuaded to grant an injunction.
5. Noise emanating from a flat can amount to a statutory nuisance, within the meaning of Section 79 of the Environmental Protection Act 1990, thereby engaging the power of the local authority to serve a notice on the person responsible for the nuisance, requiring the abatement of the nuisance, pursuant to Section 80 of the same Act. This can be something of a blunt instrument, given that the effectiveness of the procedures for controlling a statutory nuisance in the Environmental Protection Act 1990 depend upon the willingness and ability of the local authority to take action.

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APPENDIX ONE

1. Is the noise from Trash's activities a nuisance?

1.1 Lord Neuberger summarized the case law on the basic definition of a nuisance in Coventry v Lawrence [2014] UKSC 13

> *"2 As Lord Goff of Chieveley explained in Hunter v Canary Wharf Ltd [1997] AC 655 , 688, "[t]he term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land", quoting from Newark, The Boundaries of Nuisance (1949) 65 LQR 480. See also per Lord Hoffmann at pp 705–707, where he explained that this principle may serve to limit the extent to which a nuisance claim could be based on activities which offended the senses of occupiers of property as opposed to physically detrimental to the property.*
>
> *3 A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in Sedleigh-Denfield v O'Callaghan [1940] AC 880 , 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".*
>
> *4 In Sturges v Bridgman (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal , famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.*
>
> *5 As Lord Goff said in Cambridge Water Company v Eastern Counties Leather plc [1994] 2 AC 264 , 299, liability for nuisance is "kept under control by the principle of reasonable user – the principle of give*

and take as between neighbouring occupiers of land, under which ' … those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action': see Bamford v Turnley (1862) 3 B & S 62 , 83, per Bramwell B". I agree with Lord Carnwath in para 179 below that reasonableness in this context is to be assessed objectively."

1.2 The Court has to balance the claimant's right to undisturbed enjoyment of his property against the defendant's right to use his property for his own lawful enjoyment. A recent example of the application of this balancing exercise is provided by Peires v Bickerton Aerodromes Ltd [2016] EWHC 560 (Ch), a case involving noise affecting a detached house from helicopters carrying out training operations.

1.3 Lord Neuberger also confirmed in Coventry v Lawrence that, as a general rule, there is no defence of coming to the nuisance.

"51 In my view, the law is clear, at least in a case such as the present, where the claimant in nuisance uses her property for essentially the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started: in such a case, the defence of coming to the nuisance must fail. For over 180 years it has been assumed and authoritatively stated to be the law that it is no defence for a defendant to a nuisance claim to argue that the claimant came to the nuisance. With the dubious 16th century exception of Leeds Cro Eliz 751, there is no authority the other way, as the observations of Blackstone and Abbott CJ were concerned with cases where the defendant's activities had originally not been a nuisance, and had only become an arguable nuisance as a result of a change of use (due to construction works) on the claimant's property."

1.4 Lord Neuberger went on to identify that the situation would be different where the claimant alters the relevant property or changes its use in such a way that, as a result of the alteration or change of use, a pre-existing activity on a neighbouring property becomes a nuisance.

“53 There is much more room for argument that a claimant who builds on, or changes the use of, her property, after the defendant has started the activity alleged to cause a nuisance by noise, or any other emission offensive to the senses, should not have the same rights to complain about that activity as she would have had if her building work or change of use had occurred before the defendant's activity had started. That raises a rather different point from the issue of coming to the nuisance, namely whether an alteration in the claimant's property after the activity in question has started can give rise to a claim in nuisance if the activity would not have been a nuisance had the alteration not occurred.”

“56 On this basis, where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the claimant's land, (iii) it is and has been, a reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use. (This is not intended to imply that in any case where one or more of these requirements is not satisfied, a claim in nuisance would be bound to succeed.)”

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APPENDIX TWO

2. If there is a claim in nuisance, is Inactive liable to the Intolerants?

2.1 The position of a landlord in respect of a claim in nuisance made against his tenant was considered by the Supreme Court in Coventry v Lawrence (No. 2) [2014] UKSC 46 (the second part of the decision of the Supreme Court in Coventry v Lawrence).

> *"11 The law relating to the liability of a landlord for his tenant's nuisance is tolerably clear in terms of principle. Lord Millett explained in Southwark London Borough Council v Mills [2001] 1 AC 1 , 22A, that, where activities constitute a nuisance, the general principle is that "the … persons directly responsible for the activities in question are liable; but so too is anyone who authorised them". As he then said, when it comes to the specific issue of landlords' liability for their tenant's nuisance, "[i]t is not enough for them to be aware of the nuisance and take no steps to prevent it". In order to be liable for authorising a nuisance, the landlords "must either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property"."*
>
> *"13 When it comes to landlords being liable for their tenant's nuisance by participating in the nuisance, as a result of acts or omissions subsequent to the grant of the lease, the law was considered authoritatively in Malzy. Lord Cozens-Hardy at p 316 had no hesitation in rejecting as "an extraordinary proposition" the contention that landlords could be rendered liable by accepting rent and refraining from taking any proceedings against their tenant, once they knew that their tenant was creating a nuisance. As he put it at p 315, by reference to an earlier, unreported case, "there must be such circumstances as to found an inference that the landlord actively participated in the [relevant] use of the [property]", and he referred a little later to the need for "actual participation by [the landlord] or his agents".*

2.2 Lord Neuberger was at pains to confine the scope of two earlier decisions of the Court of Appeal, in which landlords had been held liable for nuisances created by their tenants.

> *14 It was suggested that two decisions of the Court of Appeal, Sampson v Hodson- Pressinger [1981] 3 All ER 710 and Chartered Trust Plc v Davies [1997] 2 EGLR 83, demonstrated that the law has developed since Malzy , so that it is now less easy for landlords to escape liability for their tenant's nuisance than it was 100 years ago. We were not referred to any social, economic, technological or moral developments over the past century in order to justify a change in the law on this topic; indeed, as already mentioned, Smith (where Sir John Pennycuick relied on 19th century cases) and Malzy (which was decided a century ago) were both cited with approval in the House of Lords less than 15 years ago. Sampson was discussed in Mills at p 16B-D by Lord Hoffmann, whose implied doubts about the decision I share. If, which I would leave open, the defendant landlords in Sampson were rightly held liable for nuisance in that case to the plaintiff tenant, it could only have been on the basis that the ordinary residential user of the neighbouring flat which they had let would inevitably have involved a nuisance as a result of the use of that flat's balcony. In Chartered, although the nuisance resulted from the tenant's use of the property, the actual nuisance was caused by people assembling in the common parts, impeding access to the plaintiff's property. Since the landlords were in possession and control of the common parts, where the nuisance was occurring, the decision may well have been justified on orthodox grounds, although, again, I would not want to be taken as approving (or indeed disapproving) the decision that there was a valid claim against the landlords in nuisance in that case."*

2.3 On the facts of Coventry v Lawrence the majority in the Supreme Court were of the view that the landlords had neither authorized nor participated in the noise nuisance. Lord Carnwath and Lord Mance disagreed. Lord Carnwath put the matter this way.

> *"64 Lord Neuberger (para 21) has summarised the factors on which the claimants rely in the present case. I do not understand there to be any*

material dispute about the factual allegations; the dispute is as to their significance in law. In my view they show clearly that the involvement of Terence and James Waters has gone far beyond the ordinary role of a landlord protecting and enforcing his interests under a lease. It has involved active encouragement of the tenants' use and direct participation in the measures and negotiations to enable it to be continued. That these measures were directed in part to mitigating the problem does not alter the fact of participation nor the consequences for the landlord when the measures proved ineffective. It may be, as Lord Neuberger suggests, that they were motivated at least in part by their concurrent interests as freeholders, or even, in Terence's case, as local councillor. But under the Malzy test, as I understand it, the issue is not why they participated, but whether they did so, and with what effect."

2.4 In the case of Inactive, there is also the covenant for quiet enjoyment. Physical interference with the tenant's enjoyment of the property demised is capable of constituting a breach of a covenant for quiet enjoyment. This goes beyond cases of direct and physical injury to land. The covenant is broken if the landlord or someone claiming under him does anything that substantially interferes with the tenant's title to or possession of the demised premises or with his ordinary and lawful enjoyment of them. The interference need not be direct or physical. A breach of covenant for quiet enjoyment may be committed by excessive noise; see Southwark LBC v Mills [2001] 1 AC 1, where the claim failed for other reasons.

2.5 Where the relevant complaint against the landlord involves an omission to act, rather than positive action on the part of the landlord, there can still be a breach of the covenant for quiet enjoyment, but only in circumstances where the omission amounts to a breach of some duty owed to the tenant by the landlord. Thus there was no liability imposed upon a landlord, by a covenant for quiet enjoyment, in respect of a defective drain where the landlord was under no obligation to keep the drain in repair; see Duke of Westminster v Guild [1985] QB 688.

2.6 There is also the implied covenant on the part of Inactive not to derogate from grant. The principle of non-derogation from grant is that if a person agrees to confer a particular benefit on another person, he must not do anything which substantially deprives the other of the enjoyment of that benefit. More simply, what is given with one hand cannot be taken away with the other. The principle is essentially restrictive in nature, and does not normally give rise to positive obligations on the part of the grantor.

2.7 In the landlord and tenant context the implied covenant not to derogate from grant applies to the use made of land retained by the landlord. Thus, where a landlord let a unit in a shopping mall over which he retained control through rule making powers, and charged a service charge, the landlord was held liable to the tenant of that unit for nuisance caused to that tenant by the tenant of another unit in the shopping mall; see Chartered Trust v Davies [1997] 2 EGLR 83. The other unit was a pawnbroker, whose customers were required to queue outside the unit, in the common parts of the shopping mall. This had a detrimental effect upon the business of the first unit, and amounted to a nuisance. The landlord did nothing to control the nuisance, and the first unit eventually went out of business. The essential reasoning of the Court of Appeal was that because the landlord had control of the common parts of the shopping mall, the landlord could be held responsible for the nuisance created by the pawnbroker's customers.

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APPENDIX THREE

3. If there is a claim in nuisance, is Mr. Absentee liable to the Intolerants?

3.1 The position of a licensor, whose licensee causes a nuisance, was recently considered by the Court of Appeal in Cocking v Eacott [2016] ECA Civ 140.

3.2 In this case the Court of Appeal held that a property owner was liable in nuisance to her next door neighbours. The property owner in question did not reside at the relevant property but had granted her daughter a bare licence to live there. The daughter had created a nuisance by shouting and by letting her dog bark excessively. The judge at first instance found that the daughter and the property owner were both liable in nuisance. The property owner argued that her position as a licensor was akin to that of a landlord, who would not be liable for such nuisance committed by a tenant.

3.3 This argument was rejected by the Court of Appeal. As the Court of Appeal explained, there were two possible tests for liability for nuisance: one for landlords of property, and one for those in occupation of property. To be liable for nuisance, a landlord had to either participate directly in the commission of the nuisance, or be taken to have authorised the nuisance by letting the property. The fact that a landlord did nothing to stop a tenant from causing the nuisance could not amount to participating in it. The landlord had limited liability because the tort focused the blame on the person who caused the nuisance. The landlord had neither control over nor possession of the property from which the nuisance emanated.

3.4 An occupier, however, was in a different position. He would normally be responsible for a nuisance even if he did not directly cause it, because he was in control and possession of the property. An owner might be regarded as an occupier of property for those purposes even if he had allowed others to live or undertake activities on his land. An occupier was liable if he continued or adopted the nuisance by failing to abate it without undue delay after he became aware of it or with reasonable care should have become aware of it; see

Sedleigh-Denfield v O'Callagan [1940] A.C. 880.

3.5 In Cocking the property owner was held to be in control and possession of the property. As such, it was held that the property owner fell to be treated as an occupier of the property, and not as a landlord. The property owner was liable in nuisance because she had failed to take steps to abate the nuisance, once she became aware of it, by enforcing a possession order which she had obtained against her daughter.

3.6 Vos LJ summarized the position in the following terms, at paragraphs 27 and 28.

> *"27 On the judge's findings, Ms Eacott never had more than a bare licence. She had no right to exclude Mrs Waring from the property, and within 8 months of Mrs Waring's liability beginning, she had terminated any licence that Ms Eacott may have had. Mrs Waring was in possession of the property in the same sense as the Court of Appeal held the Council to be in occupation of the land in Page supra* [Page Motors Limited v Epsom and Ewell Borough Council 80 LGR 337]. *Moreover, there were other similarities on the facts. In Page, the Council took a policy decision to leave the travellers on their land, when they could have removed them. Mrs Waring did something very similar. The Council in Page obtained an order for possession against the travellers, but then chose not to enforce it, just as Mrs Waring did. Moreover, the Council provided the travellers with facilities on the site, just as Mrs Waring paid Ms Eacott's utility bills."*
>
> *"28. In my judgment, Mrs Waring was, in the requisite sense, both in possession and control of the property throughout her daughter's residence there, and the judge was therefore right to hold her liable for the nuisance as he did. The judge did indeed decide that Mrs Waring had been able to abate the nuisance but chose to do nothing "notwithstanding her daughter's unreliability". He found that the nuisance could easily have been abated "by removal of the dog or the occupier both of which were easily achievable" by Mrs Waring. The judge determined that an allowance of 9 months from the date of the letter before action was sufficient to allow Mrs Waring to abate the nuisance. I agree. The position is, as I have already said, analogous to that of the Council in Page supra."*

3.7 Vos LJ also admitted the possibility that there might be cases involving licensors where the licensor might not properly be regarded as an occupier of the property from which the nuisance emanated.

"29. I should not leave this topic without making it clear that the judge's decision was entirely based on the facts as he found them to be. It would perhaps, be possible to imagine cases where an arrangement called a licence was either held to be a tenancy, or found to be so much akin to a tenancy that the licensor could not properly be regarded as an occupier in the relevant sense. This was certainly not such a case. Accordingly, further examination of the position in such a situation can await a case in which such facts arise."

maitland CHAMBERS

APPENDIX FOUR

4. If there is a claim in nuisance, should an injunction be granted to prevent meetings of Trash in Flat 12?

4.1 As a result of the decision in Coventry v Lawrence [2014] UKSC 13 the law on when an injunction should be granted to restrain a nuisance has changed.

4.2 It is still relevant to have regard to what was said by AL Smith LJ in Shelfer v City of London Electric Lighting Co. [1895] 1 Ch 287, at pages 322-323.

> *"[A] person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.*
>
> *There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution … In my opinion, it may be stated as a good working rule that — (1) If the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction — then damages in substitution for an injunction may be given."*

4.3 The Shelfer test is not however to be applied in a mechanical fashion. The discretion to award damages in lieu of an injunction is to be exercised in a much more flexible fashion. The idea that damages should only be awarded in lieu of an injunction in exceptional circumstances has been disapproved. Lord Neuberger summarized the position in the following terms.

> *"120 The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of*

principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in Regan and Watson . And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in Jaggard [1995] 1 WLR 269 , 288, where he said:

> *"Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."*

4.4 The role of the Shelfer test was identified by Lord Neuberger in the following terms.

> *"123 Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in Fishenden 153 LT 128 , 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted."*

4.5 Lord Mance did suggest, in Coventry v Lawrence, that the right to enjoy one's home is a right of particular value, which most people would not measure in purely monetary terms.

> *"168 I would only add in relation to remedy that the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of*

money. With reference to Lord Sumption's concluding paragraph, I would not therefore presently be persuaded by a view that "damages are ordinarily an adequate remedy for nuisance" and that "an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests" – a suggested example of the latter being given as a case where a use of land has received planning permission. I would see this as putting the significance of planning permission and public benefit too high, in the context of the remedy to be afforded for a private nuisance. As already indicated, I agree with Lord Neuberger's nuanced approach."