

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

CHI/24UF/LBC/2009/0007

Decision of the Leasehold Valuation Tribunal on application made under
Section 168 of the Commonhold and Leasehold Reform Act 2002

Applicant:	Rodney Court (Gosport) Management Company Limited
Respondent:	Mr Sam Oparah
Re:	76 Mantle Close, Rowner, Gosport
Date of Application	23 rd April 2009
Date of Inspection	6 th August 2009
Date of Hearing	6 th August & 14 th October 2009
Venue	Portsmouth Central Library, Guildhall Square, Portsmouth
Appearances for Applicant	Ms J Cole, Now Professional, Managing Agents
Appearances for Respondent	Mr Oparah in person
Also attending 6 th August	Mrs C Terry, Technical Officer & Mr P Jawolek, Senior Environmental Health Officer, Gosport Borough Council; Mrs L Phipps, tenant & Ms K Lewis, lodger
Also attending 14 th October	Mr G House, neighbour

Members of the Leasehold Valuation Tribunal

M J Greenleaves	Lawyer Chairman
P D Turner-Powell FRICS	Valuer Member

Date of Tribunal's Decision:	2nd November	2009
---------------------------------	--------------	------

Decision

1. The Tribunal determined that for the purposes of Section 168 of the Commonhold and Leasehold Reform Act 2002 (the Act) breaches of covenants or conditions on the part of Mr Sam Oparah (the Respondent), have occurred in respect of the flat known as 76 Mantle Close, Rowner, Gosport ("the premises")
2. The covenants and conditions in respect of which breaches have occurred are contained in a Lease ("the lease") dated 30 August, 1984 made between Wimpey Homes Holdings Limited (1) Rodney Court (Gosport) Management Company Limited (2) and S E Clutterbuck (3) being a lease of the premises for a term of 999 years from 1 January, 1980
3. The breaches found to have occurred within the meaning of Section 168 of the Act are as follows, namely: Frequent emission of noise from the premises largely by use of electrical equipment or appliances, or broadcasting receiving or reproductive equipment within the property so as to cause a continuing nuisance to a neighbour for periods from in or about September 2007 until April 2008 and from about September 2008 until August 2009
4. The breaches are in respect of either or both of the following provisions of the lease:
 - a. Clause 3: "The Purchaser severally covenants with the Company and the Management Company and also as a separate covenant with every other person who is the registered proprietor of any part of the Development (for the benefit of the Development and each and every part thereof with the intention of binding the Property) in the terms specified in the 3rd Schedule".
 - b. 3rd Schedule, paragraph 5: "not to do or permit to be done on the property or the development any act matter or thing: -- (a) which may be or become a nuisance annoyance or disturbance or inconvenience to the Company the Management Company or the registered proprietors of the titles to the leases".
 - c. Clause 7: "The Company the Management Company and the Purchaser agree and declare: -- (a) in the terms specified in the 7th Schedule".
 - d. 7th Schedule paragraph 1: "no unsuppressed electrical equipment or appliance shall at any time be used in or upon the Property or any part of the Development and no broadcasting receiving or reproductive equipment shall be used on the Property or the Development so as to be audible outside the Flat comprised in the Property".

Reasons

Preliminary.

5. This was an application by the Applicant under Section 168 of the Act for a determination that breaches of covenants or conditions of the lease had occurred in respect of the premises.
6. The lease of the premises was at all material times assigned to the Respondent who, at all material times, has sublet it to Mrs Phipps.
7. The application was made to the Tribunal on 23 April, 2009. The Hearing commenced on 6 August, 2009 and was adjourned until 14th October to enable the offices of Gosport Borough Council to provide clarification of certain evidence and documentary evidence of events relevant to the issues in the case. In the event, the Council officers declined to return to the hearing on the 14th October and did not provide the clarification or documentary evidence anticipated. On the first day of the hearing, Mrs Phipps said she wished to give evidence, indicating she could do so on any subsequent date fixed. In the event she did not attend the second day of the hearing so the Tribunal heard no evidence from her.

Inspection.

8. The Tribunal inspected the premises in the presence of the Miss Cole, and Mrs Phipps.
9. The premises are situated in a residential area and comprise a maisonette on the first and 2nd floors of a block of 12 maisonettes on 4 floors. The access to the flat is by means of an external stairwell and walkway. The flat comprises a living room and kitchen, 2 bedrooms and bathroom.
10. The block is one of several blocks originally built for service personnel.

Hearing.

11. In the course of the proceedings the Tribunal received written statements from Mr House and Mr Oparah, both of whom also gave oral evidence. A witness statement was also received from PC Nicola Burton who, in the event, was unable to attend the hearing to give evidence in person.
12. Ms Cole, for the Applicant, stated that the complaint related to alleged breaches of 2 covenants in the lease affecting 76 Mantle Close. She alleged there had been breach of covenant for the last 18 to 24 months since Mrs Phipps moved into the flat.

13. We heard evidence in support of the application given by Mrs C Terry, technical officer of the Gosport Borough Council who had been involved in the case since 12th September 2007.

- a. Her involvement arose because of notice served on Mrs Phipps in relation to her occupancy of 90 Cornwell Close Gosport.
- b. On 5th July 2007 the Council had written to the occupier of 90 Cornwell Close referring to a complaint of alleged noise nuisance arising from that property as a result of loud music, stating that the Council had no evidence one way or the other about the allegation, pointing out the Council's powers and asking the occupier to take steps to avoid causing any further annoyance or disturbance to neighbours. Despite that letter the noise continued at that address. The occupier at that address at the material time was Mrs Phipps.
- c. So when Mrs Phipps moved to 76 Mantle Close the Council served notice on her dated 12 September, 2007 on the basis of "being satisfied of the likely occurrence of noise amounting to a statutory nuisance emanating from 76 Mantle Close arising from the playing of amplified music". The notice required Mrs Phipps as the occupier of the premises from which the noise would be emitted immediately from the service of the notice to abate the same and prohibit the occurrence and recurrence of the same.
- d. In October 2007 complaints were received but we were not provided with any written evidence, save for an outline list of dates of complaints of noise from 76 Mantle Close on 8 occasions from 12 September, 2007 until 4 October, 2007 which refers to complaints by unidentified residents, some direct and some on the Police 101 telephone line. They referred generally to noise from loud music, some of the notes specifically referring to the noise coming from 76 Mantle Close.
- e. On 16 October, 2007 Mrs Terry had written to Mrs Phipps stating that she had been contacted regarding alleged noise nuisance from 76 Mantle Close as a result of loud music, referring to the notice of 12 September, 2007 which remained in force, but that the Council at that stage had no evidence one way or the other about the allegations. That letter had been copied to Ms Cole and to Mr Oparah, the landlord. She said that the Council had at that stage however received evidence from the Police on 12th October. We have seen a record from the Hampshire Constabulary of various reports received by them from 12 October, 2007 until 15 May, 2009, that on 12 October, 2007 referring to very loud music from 76 Mantle Close. The report was made at 22:40 that day and the neighbour had said it had been continuing since 17:00 hours.
- f. On 14th January 2009 the Council had installed in a flat (which they did not wish to identify) in the block of flats sound recording equipment known as "Matron" and that remained in place until it was removed by the Council on 27th January 2009.

- g. The Council produced a condensed graph showing the result of that recording. We were told that the Matron equipment is recording the entire time of its installation; that it has a facility for the complainant to mark any particular instances of noise so that the Council could listen to what the complainant was particularly concerned about.

14. Mr Jawolek, Senior Environmental Health Officer of the Council also gave evidence, particularly to explain what the graph showed.

- a. He said that a noise level of approaching 80 dB would be unreasonable; that there were many instances of the recording approaching at that level and some exceeding it. The Tribunal queried why there appeared to be within the same graph two distinct traces, the lower of which appeared not to exceed 40 dB. Mr Jawolek said that in fact the 2 traces were linked and would be shown up if the graph were produced in an extended form laterally. He said that could be done and produced at a further hearing. Mr Jawolek could recall the recording consisting of amplified music and lyrics. He could only remember an instance of Justin Timberlake.
- b. Mr Jawolek also said that the Council had file records of meetings with the complainant but they were not available at the hearing. He said that the records showed the names of parties to meetings, amplified music, noise and dates and times; that these cover the period November 2008 to February 2009 and recorded instances about every 2 weeks.
- c. The Council officers were satisfied from the recording that the level of noise recorded constituted a statutory nuisance.
- d. As a result of the recording, Mrs Terry had written to Mrs Phipps on 4 February, 2009 stating that despite the notice of 12 September, 2007 she had again played amplified music, it had been monitored and the Council is satisfied that a statutory nuisance exists. With that letter was enclosed a noise abatement notice.

15. We did not receive any evidence from the Council officers to identify that any of the noise complained of actually emitted from 76 Mantle Close.

16. Evidence from Mr House:

- a. He is a co-director of the management company which is the Applicant in this case.
- b. He and his wife have at all material times owned the lease of and lived at 69 Mantle Close which, on the first floor, lies partially beneath 76 Mantle Close.
- c. His evidence maybe summarised: the loud music commenced the day Mrs Phipps moved in September 2007. Within a few days he spoke to her about it, explaining that he worked nights and therefore slept in the day, she had given him her phone number and over the period in question he sent her text

messages on various occasions of noise and he had also likewise contacted Mr Oparah. Within a week or 2 of Mrs Phipps moving in she had a party and the noise was so loud that their windows were vibrating. Initially the music was after 5 pm, sometimes until 7 or 9 pm. At weekends the loud music would commence at 11 am and continue until 11 pm or later. He used earplugs and turned up the television but the noise was still loud. On various occasions he complained to the Police and the Council. In April 2008 the Council offered him noise monitoring equipment but he declined as Mrs Phipps was then going away for 3 months; she did not actually return until September 2008 when the problems resumed. He said that Mr Oparah asked him not to complain for 2 months so he did not do so. However he finally asked the Council to install monitoring equipment which they did for 2 weeks in January 2009. Despite the Council then issuing a notice to Mrs Phipps, the volume and frequency of noise from 76 Mantle Close continued until the Tribunal hearing on 6th August since when there had been no significant noise.

- d. He said that in about September 2008 a neighbour moved out because of the music; that she wouldn't complain because she had an issue with Mrs Phipps before she moved in.
- e. On an occasion at the end of September 2008 Mr House had alleged that Mrs Phipps was trashing her flat. In reply to Mr Oparah, who did not accept she had, Mr House said that she had broken the door.

17. Mr Oparah's evidence.

- a. Mr Oparah had prepared a written statement for the first hearing day and subsequently prepared a written statement in response to Mr House's written statement. He summarised these in oral evidence.
- b. Prior to Mrs Phipps taking the tenancy on 10 September, 2007, he had been unaware of any untoward history concerning her. Since then he had received a number of complaints about noise but only from Mr House. On an occasion in November 2008 he had received a text message from Mr House complaining about loud music. At the time he had been standing beside the front door of 76 Mantle Close and said the complaint was a complete lie. He did not accept that he or his company, Community Housing Services, had failed to address complaints received. One of his staff lived nearby and "usually conducts stake out surveillance, without the knowledge of the complainant or Mrs Phipps, in our attempt to witness and obtain evidence of noise by loud music". When they had received a noise complaint, this individual would rush to the scene without informing anyone and in most cases no music at all was being played and she was playing music, the level of the sound is usually reasonable.

- c. Overall he did not accept any complaints made by Mr House were valid. He refuted Mr House's claim that on one occasion when Mr Oparah had been standing outside the property, he had actually taken 35 minutes to get there.
- d. Finally he emphasised that nobody had previously questioned his company's conduct concerning housing; nobody else had made complaints about Mrs Phipps; that he had demonstrated a seriousness with which he dealt with complaints; when he had receive text messages he had rushed there and never found any noise

Consideration.

18. We have considered the evidence presented to us in writing and at the hearing. There is a direct conflict between the parties on the substance of the evidence. Mr House on the one hand gives evidence of frequent continuing unreasonable noise over significant periods of time since September 2007. Conversely Mr Oparah says that there has been no significant noise during that time.
19. While there are some direct discrepancies between the evidence given by each of them, such as whether Mr Oparah was on site when a complaint was made by Mr House, the discrepancies are few and we are satisfied that each of them has given their evidence in good faith to the best of their recollection. In our experience discrepancies are not unusual.
20. However, Mr Oparah has found himself in a difficult position in as much as, in the nature of things, he has not been in the locality of 76 Mantle Close for much of the time. We have not had the benefit of hearing Mrs Phipps evidence, nor have we heard directly from Mr Oparah's surveillance person. We do not blame Mr Oparah that we have not heard from Mrs Phipps but he could have helped us by calling the surveillance person to give evidence. As it is, we do not have corroboration of Mr Oparah's evidence.
21. Conversely, we do have some corroboration of the evidence from Mr House.
 - a. First, we note that on the 5th July 2007 the Council wrote to "the occupier", (it is not disputed that Mrs Phipps was that occupier), at 90 Cornwell Close, Gosport, in July 2007 concerning noise at that address. Then as soon as she moves to 76 Mantle Close, the Council serve on her another notice the terms of which are to warn her against causing noise.
 - b. Then in January 2009 we have some evidence from the monitoring equipment, albeit unclear, from which the Council determined, in the terms of its notice of 4 February, 2009 to Mrs Phipps, that it was satisfied of the existence of noise amounting to a statutory nuisance emanating from 76 Mantle Close.
 - c. We cannot be completely certain that the monitoring equipment was recording noise emanating from 76 Mantle Close but taken with all the other evidence, we are satisfied

that that is the high probability. We accept the Council's evidence that a noise level approaching 80 dB would be unreasonable and we note that the trace from the monitoring equipment does on occasions exceed that level; that was over a period of 2 weeks.

- d. We also take into account various messages received by the Police and the Council over the period in question. That is not direct evidence of noise but it does indicate that a near neighbour, we presume Mr House, has been driven to make complaints. One cannot exclude the possibility that they could have been logged by a complainant without justification but we think it unlikely.
- e. In coming to that conclusion and weighing up all the evidence referred to above for the Applicant, we also had a written statement from PC Nicola Burton. We would have preferred to have her oral evidence in person but that was not possible for Police operational reasons. The substance of her statement related to an incident around 20:25 hours on Friday 15th of May 2009 when PC Burton, riding past 76 Mantle Close on her bicycle, heard amplified music from 76 Mantle Close from the street. She stood close to the front door of 76 Mantle Close and could hear song lyrics clearly, even though she was at the time plugged into the Police radio directly into her ear. While she did not enter the address, a second Police unit did. Mrs Phipps was instructed to turn the music down, but even so it could still be heard from where PC Burton was originally standing.
- f. We have noted above that we are satisfied that the oral evidence from two witnesses has been given in good faith to the best of those witnesses' recollections. In coming to our decision, we have also considered whether it was reasonably likely that Mr House might be unduly sensitive and be exaggerating the noise level. We accept that there is apparently no complaint from anyone else who might be affected by the noise. We accept that there may be reasons, such as possible recrimination, which might deter other people from complaining. We also note that Mr Oparah has not called evidence from other neighbours to the effect that there has been no significant noise. We also take account of the fact, as stated to us by Mr House, that there has been no noise problem since the first day of the hearing in early August. We feel that if he had been involved in an unwarranted campaign against Mrs Phipps, it would be likely that he would have continued to complain about noise since that first hearing day. He has not done so and that, together with the other evidence for the Applicant, leads us to the conclusion that it is much more likely than not, that the evidence for the application is substantially true and that there has been a sustained nuisance by reason of amplified noise from 76 Mantle Close.

- g. Is that finding contrary to the terms of the lease of 76 Mantle Close? We have set out above the two relevant provisions of the lease. The provision in the 3rd schedule is a covenant by the lessee, in this case Mr Oparah and not Mrs Phipps, not to do or permit to be done in the flat any act matter or thing which may be or become a nuisance annoyance or disturbance ...
- h. It may be arguable that the lessee, Mr Oparah, has not himself done or omitted something to be done in the terms of that clause, so there is no breach. Whatever the position about that, the 7th schedule provision is more clear. We are satisfied on the evidence that the noise about which complaint has been made has been caused by broadcasting receiving or reproductive equipment being used in 76 Mantle Close at such a level as to be audible outside that flat. To that extent anyway we found that there had been a breach by the lessee of that condition in the lease and so determined under section 168 of the Act.

22. The Tribunal made its decisions accordingly.

(signed)

M J GREENLEAVES

Chairman
A member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

CHI/24UF/LBC/2009/0007

RE: Decision of the Leasehold Valuation Tribunal on application made under Section 168 of the Commonhold and Leasehold Reform Act 2002

Applicant: Rodney Court (Gosport) Management Company Limited

Respondent: Mr Sam Oparah

Re: 76 Mantle Close, Rowner, Gosport

Members of the Leasehold Valuation Tribunal

M J Greenleaves	Lawyer Chairman
P D Turner-Powell FRICS	Valuer Member

Date of Tribunal's Decision: 1st December 2009

Respondent's Application for Leave to Appeal dated 2 November, 2009

Decision

1. The Tribunal refuses leave to appeal.

Reasons

2. The Respondent's grounds for appeal may be summarised as follows:
 - a. The decision was not based on any actual evidence;
 - b. "Gosport Borough Council officers failed completely to give effect in any way, in accordance with the Council stated powers, that they are satisfied that the alleged evidence constituted statutory nuisance".
 - c. Noise level evidence was concealed by the Council so the Respondent was denied the opportunity to deal with it; and the Council failed to provide evidence relating to usage of the monitoring equipment
 - d. "To be given the opportunity to provide the required corroborative evidence of the surveillance which was conducted in respect of the alleged noise complaints".

- e. He is unable to prevent complaints and no evidence from other neighbours was provided.
- f. The evidence from Mr House was false.
- g. The noise recorded by the monitoring equipment may have been introduced and manipulated by Mr House.
- h. In view of Mr House's position as a director of the management company, he was driven by malice to make and pursue a complaint.
- i. To ensure justice.

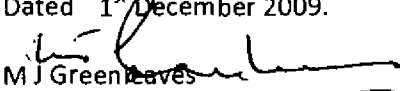
3. The Tribunal deals with the points as follows:

- i. 2a. The decision was based on the evidence set out in the reasons to the substantive decision at paragraphs 13, 14, 16 and 17. The conclusions reached by the Tribunal and the resulting decision were justified on that evidence.
- ii. 2b. The Tribunal is not entirely clear about the allegation that the Respondent makes about the Gosport Borough Council, but it may be a complaint by the Respondent that the Council did not act on the evidence they received. It is clear to the Tribunal that the Council did act by serving a Noise Abatement Notice (see paragraph 14d of the reasons). If it had then taken further action as a result of that notice, that could have added to the evidence before the Tribunal for consideration. The fact that the Council did not appear to act on noise evidence in terms of prosecution, might be taken as some indication that the evidence was insufficient but equally the Council might have decided not to pursue it in view of the proceedings commenced by the Applicant. We do not know about that, but it did not affect our decision which was based on all the other evidence before us.
- iii. 2c. If the Respondent was denied by the Council with the opportunity to deal with noise level evidence, that is not a matter for the Tribunal which had to decide whether, as a fact, there had been noise which constituted a breach of the terms of the lease. The Council did provide some evidence regarding usage of monitoring equipment. As referred to in paragraph 21c of our reasons, we could not be entirely certain that the noise recorded by the monitoring equipment emanated from 76 Mantle Close, but taking that monitoring evidence with all the other evidence, we found it to be a high probability.
- iv. 2d. If the Respondent is saying that he did not have an opportunity to call corroborative evidence in support of his case, the Tribunal did not prevent him from so doing and he did not indicate he wished to do so. As we noted in the reasons, it seems that it was intended that Mrs Phipps should give evidence, but she did not attend the 2nd hearing date.
- v. 2e. The Tribunal accepts what the Respondent says. The Tribunal received evidence not only from Mr House but the other corroborative evidence set out in the reasons.

- vi. 2f & 2h. As alluded to in paragraph 21f of the reasons, we considered whether we should rely on Mr House's evidence. We did not find it to be false, nor that he had any ulterior motives in making his complaints other than to try to deal with actual problems, and his evidence was generally supported by the other evidence before us.
- vii. 2g. The allegation that Mr House controlled the operation of the monitoring equipment is incorrect. We noted in our reasons "We were told that the Matron equipment is recording the entire time of its installation; that it has a facility for the complainant to mark any particular instances of noise so that the Council could listen to what the complainant was particularly concerned about". In relation to the allegation that Mr House may have in effect caused the noise is a matter which we bore in mind when considering all the evidence. However, bearing in mind not only Mr House's evidence but the other evidence before us as set out in our reasons, we were satisfied that the complaint made by the Applicant was proven.
- viii. 2i. We are satisfied that our decision is in accordance with the weight of the evidence before us and is justified on the reasons given; and that the parties have already received justice in the case.

We accordingly refuse leave to appeal.

Dated 1st December 2009.


M J Green

Chairman
A member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor