Noise / Nuisance

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Most leases contain a covenant on the part of the lessee not to cause a "nuisance" or an "annoyance" or something to that effect.

A "nuisance" will generally occur where there is direct, physical interference with the reasonable enjoyment of the claimant's property *(Hampstead & Suburban Properties v Diomedous [1969] 1 Ch. 248; Walter v Selfe (1851) 4 De G. & Sm. 315).* A common example is water ingress; or excessive noise, dust or fumes (for example, caused by works to the building), which make the flat inhabitable, or otherwise significantly impair the lessee's physical enjoyment or their flat.
The term "annoyance" is broader.

Both terms fall to be construed objectively. The question is whether a reasonable person would consider the actions to amount to a "nuisance" or an "annoyance"; not "a fanciful person or a skilled person ... but the ordinary sensible English inhabitant of a house" *(Tod-Heatly v Benham (1888) 40 Ch. D. 80, applied in National Schizophrenia Fellowship v Ribble Estates [1994] 1 E.G.L.R. 181; Chorley Borough Council v Ribble Motor Services (1996) 74 P. & C.R. 182, CA; and Dennis v Davies [2010] 03 E.G. 104).*

Previous examples of actions which have been held to amount to an "annoyance" have included the erection of a substantial structure which obstructed the passage of light to a flat, and the construction of a hospital within the vicinity of a flat, which would have significantly increased the risk of infection for the occupants of properties in the vicinity. The use of 12 flats for the purpose of housing individuals with severe mental illnesses was held not to amount to an "annoyance" (National Schizophrenia, above).

In *Fouladi v Darout [2018] EWHC 3501 (Ch),* the High Court (Justice Morgan) had to consider whether a lessee of a flat had a claim against the landlord and a neighbouring lessee for noise disturbances.

Fouladi, a leaseholder of a valuable apartment in the affluent area of Kensington ("the Claimant"), filed a claim for noise nuisance against: 1) Darout Ltd, the leaseholder of the apartment above ("the First Defendant"); 2) Ahmed El Kerrami, resident of that apartment ("the Second Defendant"); 3) Sarah El Kerrami, another resident of that apartment ("the Third Defendant"); and 4) St Mary Abbots Court Ltd, the landlord of the block ("the Fourth Defendant").

The lease was clear and required the leaseholders to obtain the landlords consent prior to conducting any alterations. Furthermore, the lease contained two regulations requiring the leaseholder to "...cover and keep covered the floors of the Premises with carpet and an underlay other than the floors of the kitchen and bathroom which shall be properly and suitably covered with suitable material to avoid the transmission of noise"; and "the laying of non-carpet or tiled floors within a flat must be adequately insulted and sound proofed before it is approved...".

The First Defendant conducted alterations (which were held to be without consent). The works included the removal of carpet and the installation of flooring, which, on evidence caused an increase in noise levels. The claim against the First, Second and Third Defendants was for the reinstatement of the alterations and appropriate measures to reduce the noise. The claim against the Fourth Defendant was on two grounds; firstly, on the basis that it was aware of the works and failed to inspect them or act in a way that would have highlighted the installation of the new flooring; and secondly, that the Claimant's quiet enjoyment clause had been breached.

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The Claimant was successful against the First, Second and Third Defendant, however the claim against the Fourth Defendant was dismissed. All, except for the Fourth Defendant, appealed.

The Second and Third Defendant claimed that they could not be liable as firstly, it was the First Defendant who carried out the alterations; and secondly, they were not subject to the lease terms. In respect of the claim against the Fourth Defendant, it was held that its failure to act to prevent the works to the flooring was not participation in the nuisance (also it was insufficient to amount to a breach of quiet enjoyment). All appeals were dismissed.

Points to note from this case:

1. An action for noise disturbance against a neighbouring leaseholder can be successful, depending, of course, upon the facts of the case.

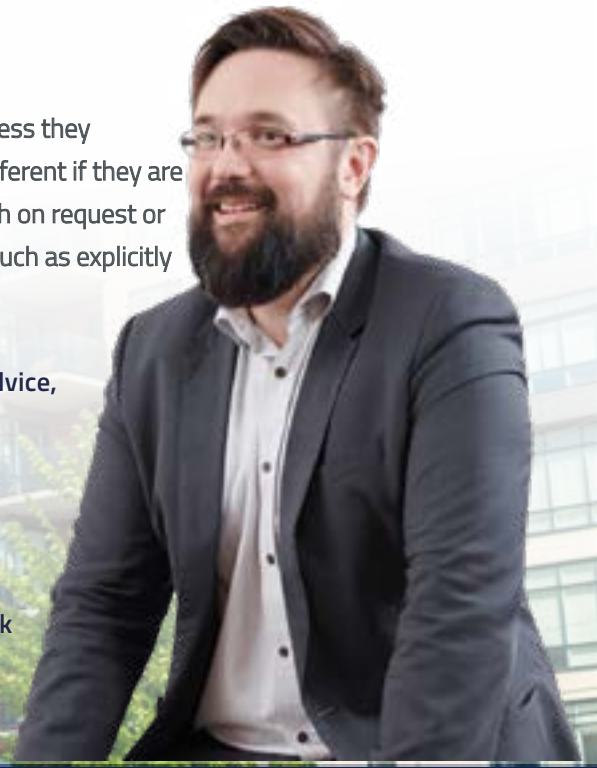
2. It was not entirely clear on how this claim was brought and whether or not there was the existence of a mutual enforceability clause.

3. There was confusion in the definition of nuisance, at first instance; the noise was described as coming from "ordinary" use; however, it was also described as substantial and a serious interference with the claimant's occupation of their flat. In *Southwark LBC v Mills (2001) 1 AC 1,* it was held that the ordinary use of a flat cannot give rise to an actionable nuisance even if the noise constitutes a considerable interference. However, in this case it was held that the alterations were the nuisance and the noise caused was a consequence of that nuisance.

4. This case established a sliding scale of connection between the landlord and the nuisance carried out by a tenant:

a. A landlord failing to take steps to prevent a nuisance when he does not know that a nuisance is being carried out;
b. A landlord failing to take steps to prevent a nuisance when he does know that a nuisance is being carried out;
c. A landlord authorising a nuisance; and
d. A landlord participating in a nuisance.

"The threshold for landlords is high. They are unlikely to be liable in nuisance unless they participated in or (in some cases) authorised the breach. The position may be different if they are under an obligation to enforce the breach and they either fail to enforce a breach on request or do something which would make it impossible for them to enforce the breach (such as explicitly waiving the breach)."



If any of the cases have raised any questions or issues and you need legal advice, Brethertons can assist.

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