

**SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL**

**CASE No: CHI/00ML/LBC/2007/0006**

**IN THE MATTER OF 9 AMBER COURT, 100-106 HOLLAND ROAD, HOVE, EAST SUSSEX AND  
IN THE MATTER OF SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT  
2002**

**B E T W E E N :-**

**FAIRHOLD HOMES**

**Applicant**

**AND**

**MR AND MRS J OSIECKI**

**Respondents**

Premises: 9 Amber Court  
100-106 Holland Road  
Hove  
East Sussex  
BN3 1LU ("the Premises")

Hearing : 13<sup>th</sup> June 2007

Tribunal: Mr D Agnew LLB LLM (Chairman)  
Mr R A Wilkey FRICS FICPD  
Ms J K Morris

**Determination:**

The Tribunal determines that there has been a Breach of covenant by the Respondents in respect of their lease of the Premises.

**Reasons:**

**1. The Application**

- 1.1 On 27<sup>th</sup> March 2007 the Applicant submitted an application to the Tribunal for a determination as to whether there had been a breach of the covenants in the lease of the Premises by the Respondents.
- 1.2 Directions were issued by the Tribunal on 30<sup>th</sup> March 2007 which provided, amongst other things, for the Applicant to file and serve its witness statement and supporting documents by

27<sup>th</sup> April 2007 and for the Respondents to reply within 21 days of receipt of the Applicant's documentation saying why they contested the application.

1.3 The Applicant filed two witness statements when submitting the application on 27<sup>th</sup> March 2007. Although no further witness statements were filed by the Applicant, its representative applied at the hearing to adduce the evidence of extracts from the diary of one of the witnesses which had not hitherto been disclosed to the Respondents or the Tribunal. The Tribunal decided to allow reference to be made to the diary extracts insofar as they related to the incidents already contained in the witness statement but not otherwise as the Respondents had no prior notice of this evidence and had not had the opportunity of preparing their response to it. The Respondent Mrs Osiecki who was present at the hearing agreed that these entries could be adduced in evidence.

1.4 There was no written evidence filed by the Respondents.

## **2. Inspection**

2.1 The Tribunal inspected the Premises immediately prior to the hearing on 13<sup>th</sup> June. They comprise one of 51 retirement flats constructed by McCarthy & Stone. There is a residents' lounge and House Manager's office on the ground floor. Flat 9, the Premises, is on the same floor at the end of a corridor leading to one other flat whose front door faces that of the Respondents. The lift to the upper floors is accessed from this corridor not far from the Respondents' front door but this door is recessed back so that it is not easily visible from the area outside the lift.

2.2 On the lower ground floor, below the Respondents' flat and at right angles to it, there is a laundry room. This houses, amongst other equipment, three tumble driers and there is a vent in the wall beneath the window to the laundry room which ducts the warm air from the driers out into the atmosphere. Windows belonging to the Respondents' flat look out onto this area.

2.3 To the rear of the block there is an area for residents' and visitors' parking.

2.4 On the day of the inspection there was a strong smell of garlic in the Premises but not in the hallway or the communal areas. The front door to the Premises was not propped open on that occasion and the windows in the flat were open.

### **3. The lease**

3.1 The lease of apartment 9 is dated 31<sup>st</sup> August 1995 and is made between McCarthy & Stone (Developments) Ltd and Freda Winifred Harriet Snell. It is for a term of 125 years from 1<sup>st</sup> June 1995. Residents of the property are restricted to those of 60 years of age or over or, in the case of joint owners, the younger partner must be 55 years of age or above.

3.2 By clause 3.2 of the lease the demise is expressed to be subject to "the performance by the Tenant of the covenants in this lease."

3.3 The Tenant's covenants (described as "regulations") are set out in the Seventh Schedule to the lease. Those relevant to this case are:-

"4. Not to do or suffer to be done on the Premises or the Estate anything which may be or become a nuisance or annoyance or cause damage or danger to the Landlord or the occupiers of any other apartment in the building or any nearby or adjacent property or which may injure or tend to injure the character or reputation of the Estate.

5. Without prejudice to the generality of Regulation 4: 5.1 Not to use or permit to be used in the Premises any radio television set record player tape recorder or any musical or other instrument or machine of any kind or to practice or permit singing in the Premises between the hours of 11pm and 7am such that the same is audible outside the Premises."

### **4. The law**

4.1 Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (hereinafter referred to as CLARA) provides as follows:

"A Landlord under a long lease of a dwelling may make an application to a Leasehold Valuation Tribunal for a determination that a breach of covenant or condition in the lease has occurred."

### **5. The Landlord's case**

5.1 When submitting the application to the Tribunal the Applicant contended that the Respondents had been in breach of both paragraphs 4 and 5.1 of the Seventh Schedule to the lease but the Landlord's representative at the hearing conceded that there was little or no evidence to the effect that electrical equipment, musical instruments or singing had been

audible outside the flat between the hours of 11pm and 7am and so he did not rely on a breach of paragraph 5.1 but he did rely on breaches of paragraph 4.

- 5.2 The evidence as to the breaches of paragraph 4 came from two sources, namely the House Manager, Ms Carol Lavelle and from a letter written to the Landlord's Estates Manager by the lessee of Flat 16 Amber Court, situated directly above the Respondents' flat. This letter is dated 18<sup>th</sup> August 2006 and was exhibited to the witness statement of the Applicant's Estates Manager, Mr J Coleman . This letter stated as follows:-

"It is with regret that I have to write to you with a complaint.

I live in flat no 16, directly above flat no 9. The occupants of this flat are making such a noise, banging and slamming their windows and doors that it is becoming intolerable.

I find it impossible to understand why this man should run from room to room slamming all of his windows at the slightest noise from outside.....

This man refuses to close his front door (it is barricaded with a set of steps and a broom) and with all his windows open at all times the cigarette smoke permeates through the whole building. The cooking smells, particularly garlic, are so strong at times that it is overpowering in our communal lounge.

I do not know what steps you can take in this matter but I beg you to treat it very seriously and act as soon as possible."

The letter is signed by the tenant of flat 16, Mr M J McCormick and it is countersigned by 19 other tenants. Mr Coleman was not present at the hearing as he was on leave but the Landlord's legal representative, Mr Henning, asked the Tribunal to accept his evidence as hearsay evidence and give it the appropriate weight.

- 5.3 The House Manager, Ms Lavelle, lives in flat 6 Amber Court. She described how she herself had experienced in her office overpowering smells of cooking, garlic in particular, emanating from the Respondent's flat through the propped open front door of the Premises. She described how it was sometimes possible to smell it as soon as you enter the front door of the block and how it pervades the lounge and the lift. She also said that other residents often complained to her about the smell.

- 5.4 As for noise, she described an incident on 10<sup>th</sup> January 2007 at 6.30pm when she heard loud music coming from flat 9. It was so loud that it was "horrific". She was returning from

shopping and the music could be heard in the car park. Other residents complained to her that this had been going on for an hour and a half. On 21<sup>st</sup> November 2006 other residents reported to the House Manger that doors had been slammed shut 14 times in a row at about 6.45pm and then there was further banging at 10pm but Ms Lavelle had not heard the door banging for herself.

5.5 Ms Lavelle summed up her evidence by saying that there were incidents of noise or smells from flat 9 almost every day and that matters have reached such a stage that they are "beyond endurance" and that it is a "nightmare" living there. She has never encountered anything like it before.

5.6 The reason given to the Estates Manager and the House Manager for the Respondents having their front door open is that they complain of vapours or fumes being experienced by them in their flat from the extractor venting to the tumble driers in the communal laundry. Ms Lavelle was able to endorse Mr Coleman's witness statement to the effect that they had tried to investigate the Respondents' complaints but neither they nor the Environmental Health Officer of the Council had been able to detect any toxic or harmful smells or fumes emanating from this source. The Environmental Health Officer, Mr Powell, had visited the site and had attended at the laundry with Mr Osiecki. Ms Lavelle had provided some wet towels impregnated with Comfort conditioner which were placed in the tumble drier and the machine operated for about 10 minutes. No fumes or significant smells had been detected from the vent. The Landlord's agents were at a loss what to do without any evidence of a problem with the laundry vent. The Environmental Health Officer had reported that he had researched the matter and had found no evidence of any problem with harmful fumes or vapours being given off by Comfort conditioner. Ms Lavelle stated that the Respondents were at liberty to carry out investigations through their own experts and if anyone could establish a problem and the cause of that problem the Landlord would pay to rectify the problem and pay the expert's cost. They would not pay for the cost of an expert, however, if he or she reported that there was no problem with the laundry exhaust.

## **6. The Respondents' case**

- 6.1 Mr Osiecki was housebound and so could not attend the hearing but Mrs Osiecki attended together with her son.
- 6.2 Mrs Osiecki said that these allegations against her and her husband only started after they had complained about the harmful fumes or vapour emanating from the tumble driers in the communal laundry and escaping into the atmosphere through a vent situated below their sitting room window. They experience this problem when all the machines are loaded and working but not at other times. The smell of the vapour was described by them as "most unpleasant and so strong it can be tasted". There was a written complaint about this from the Respondents to the Landlord's Estates Manager in June 2006, just a few months after they moved in. In another letter from the Respondents they described the smell from the laundry exhaust as a "stench". Mrs Osiecki and her son at the hearing described how it made their eyes smart and caused severe headaches behind their eyes. The reason why they kept the front door of their flat open during the day was to blow this smell out of the apartment and Mrs Osiecki stated very firmly that until this problem of theirs was sorted out she would continue to keep the front door open.
- 6.3 She described the Landlord's Estates Manager as useless in his attempts to detect and solve the problem with the laundry exhaust as was the Environmental Health Officer who, Mrs Osiecki said, did not even have an instrument to test the exhaust. Ms Lavelle had only loaded a flannel into the drier when the Environmental Health Officer was present, and so this was not an adequate test. She was prepared to get her own builders to come in and establish what the problem was and what needed to be done to rectify it but she had no intention of paying for this. It was the Landlord's responsibility and they paid enough in service charges as it was.
- 6.4 As for the complaints from Ms Lavelle and the other residents as to the noise and smell of cooking and cigarette smoke emanating from her flat throughout the communal areas, she said these were grossly exaggerated. Other residents had been coerced by Ms Lavelle into complaining about her and her husband because they did not want to cross her. Her husband liked to play his native Polish music, particularly military marches, in the afternoons but this was not particularly loud and if it could be heard in the car park this was not affecting

other residents in their flats. She admitted that she was out at work during the day on most days so she could not say what her husband did in her absence. She and her husband liked to cook with garlic and cook traditional Polish food but she denied that the smell was overpowering. She did not like the smell of cabbage being cooked which often came from "downstairs" but she did not complain. She accused Ms Lavelle of lying in her evidence and of exaggerating the noise and smells coming from her flat. She denied that she or her husband slam doors. Mrs Osiecki's son thought that it would not be possible for anyone in a flat situated above his parents to hear banging and music. He thought this would only be experienced by people living in a flat below. He confirmed the affects of the laundry exhaust which he said he had experienced himself. Mrs Osiecki sad that visitors to her flat had commented on it, thinking that it was the smell of gas.

## **7. The Tribunal's decision**

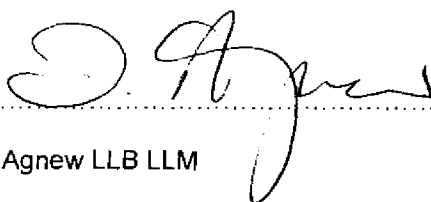
- 7.1 Having heard and read the evidence, the Tribunal decided that there was sufficient evidence on a balance of probabilities to satisfy them that the Respondents had breached paragraph 4 of the Seventh Schedule to their lease and that a nuisance or annoyance had been caused to Ms Lavelle and other residents of Amber Court. This nuisance or annoyance consisted of the playing of loud music and the very strong cooking or garlic smell.
- 7.2 The Tribunal considered that the smells and noises might well be containable if the front door to the Respondents' apartment were kept shut, although no one could be certain of this unless or until the situation was tested.
- 7.3 The Tribunal accepted the evidence of Ms Lavelle where it consisted of first hand evidence as to noise and smells. She had no reason to be untruthful and her evidence was backed up by the letter from the resident of flat 16. The Tribunal did not consider that it was likely that there had been a conspiracy between Ms Lavelle and the 19 other residents who had signed the letter from the resident of flat 16, as the Respondent suggested.
- 7.4 Mrs Osiecki confirmed that her front door was kept propped open during the day, confirmed that she and her husband liked cooking with garlic and that her husband in particular liked listening to Polish military music. The question was whether these activities, innocent in themselves, were of such a level, in the case of noise, and strength, in the case of smell, to

cause a nuisance or annoyance to neighbouring tenants. The fact that the front door was left open was an indication that the noise and smells were likely to emanate into the common parts more readily than if the door was kept shut.

7.5 The Tribunal was mindful of the fact that reactions to the smell of garlic can be subjective and that to a certain extent there must be an element of "live and let live" in a community such as that at Amber Court. It is, however, unreasonable for anyone living there to have to withstand continuous behaviour which is inconsiderate of the feelings of others.

7.6 It is no defence in law to the breaches of covenant complained of for the Respondents to say that the reason that their behaviour is a nuisance or annoyance to their neighbours is because they have to keep their front door open to evacuate "fumes or vapours" emanating from the laundry exhaust. The covenants in the lease are to be strictly complied with. There is no clause which says the tenants must not without reasonable excuse (emphasis added) cause a nuisance or annoyance. The prohibition on causing a nuisance or annoyance is absolute. In any event the Respondents had not proved to the Tribunal's satisfaction that they were being affected by the laundry exhaust. It is not proof for them simply to assert the problem. There was no independent evidence that such a problem exists. If the Respondents wish to establish that there is a problem with the laundry exhaust they will need to have an expert investigate the matter and suggest a solution. If there is found to be a problem the Applicants have stated they will pay to remedy the situation. As stated above, however, this does not affect whether or not the Respondents have breached the covenants contained in their lease. Upon the evidence presented and on a balance of probabilities the Tribunal finds that there have been such breaches.

Dated this 20th day of June 2007



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D Agnew LLB LLM  
Chairman