London Borough of Southwark v. Mills ; Baxter v. Mayor London Borough of Camden [1999] APP.L.R. 10/21

House of Lords before Lords Slynn of Hadley ; Steyn ; Hoffmann ; Clyde ; Millett 21st October 1999

LORD SLYNN OF HADLEY : My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hoffmann and Lord Millett. Although I have great sympathy with the tenants who have to endure a very disagreeable level of noise, it seems to me impossible to hold that the landlord can be liable in nuisance for conduct which is not a nuisance on the part of the tenant. I agree that a breach of a covenant of quiet enjoyment is not limited to direct and physical injury to land and that excessive noise in principle may constitute a substantial interference with the possession or ordinary enjoyment of the demised premises. But it seems to me that on well established authority it cannot be held in the present cases that the landlord was in breach of any covenant of quiet enjoyment.

2. Accordingly for the reasons given by my noble and learned friends, I too would dismiss both appeals.

LORD STEYN : My Lords,

3. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hoffmann and Lord Millett. For the reasons they have given, I would also dismiss both appeals.

LORD HOFFMANN : My Lords,

4. The appellants in these two appeals, Mrs. Tracey Tanner and Miss Yvonne Baxter, are respectively tenants of the London Boroughs of Southwark and Camden. Mrs. Tanner lives in a block of flats on Herne Hill. Miss Baxter occupies the first floor flat in a converted Victorian house in Kentish Town. They both complain of being able to hear all the sounds made by their neighbours. It is not that the neighbours are unreasonably noisy. For the most part, they are behaving quite normally. But the flats have no sound insulation. The tenants can hear not only the neighbours' televisions and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making. The lack of privacy causes tension and distress.

5. Each of appellants has brought proceedings against her council, as landlord, seeking an order that it do something to remedy the situation. But the Court of Appeal has decided in both cases that the tenant has no legal remedy. Mrs. Tanner and some other tenants in her block of flats commenced arbitration proceedings against Southwark Council in accordance with the terms of her tenancy agreement. The Arbitration Tribunal made an award ordering the Council to install soundproofing. The award was upheld on an appeal to Laddie J. [1998] 3 W.L.R. 49 under section 1(2) of the Arbitration Act 1979. But his judgment was reversed by the Court of Appeal (Schiemann and Mantell L.JJ.; Peter Gibson L.J. dissenting) [1999] 2 W.L.R. 409 and the award set aside. Miss Baxter brought proceedings in the Central London County Court. His Honour Judge Green Q.C. dismissed her action and his judgment was affirmed by the Court of Appeal (Stuart-Smith, Otton and Tuckey L.JJ.) Both tenants appeal to your Lordships' House.

6. Neither tenancy agreement contains any warranty on the part of the landlord that the flat has sound insulation or is in any other way fit to live in. Nor does the law imply any such warranty. This is a fundamental principle of the English law of landlord and tenant. In ***Hart v. Windsor*** (1844) 12 M. & W. 68, 87 Parke B. said: *"There is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let."* And in ***Edler v. Auerbach*** [1950] 1 K.B. 359, 374, Devlin J. said: *"It is the business of the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he wants to use them, whether that fitness depends upon the state of their structure, the state of the law, or any other relevant circumstances."*

7. It is true that in each tenancy agreement the Council agreed to keep the structure in repair. Such an obligation would in any case be implied by section 11 of the Landlord and Tenant Act 1985. But the appellants do not rely upon this covenant and cannot do so. Keeping in repair means remedying disrepair. The landlord is obliged only to restore the house to its previous good condition. He does not have to make it a better house than it originally was: see ***Quick v. Taff Ely Borough Council*** [1986] Q.B. 809.

8. In many cases, of course, the tenant does not have the bargaining power to exact an express warranty as to the condition of the premises or the freedom of choice to reject property which may not meet his needs. This is often the case with local authority housing. For this reason, Parliament has in various ways intervened to protect certain tenants from the bleak laissez-faire of the common law. A number of techniques have been used. One has been to provide that statutory warranties as to the fitness of the premises for human habitation should be implied in tenancy agreements of certain dwellings. Such a term was implied by section 12 of the Housing of the Working Classes Act 1885 into lettings of houses and flats at annual rents (in London) of less than £20. For some years the limit was periodically increased to keep pace with inflation until section 6(1) of the Housing Act 1957 fixed it at £80 a year. But since then it has remained at that figure. The legislation remains upon the statute book as section 8 of the Landlord and Tenant Act 1985 but there can now be very few lettings in London to which it can apply. The existence of the limited statutory implied warranty has, however, inhibited the courts from developing the common law in this area. In ***McNerny v. London Borough of Lambeth*** (1988) 21 H.L.R. 188, 194 Dillon L.J. said that the legislature had "*conspicuously refrained*" from updating the statutory rent limit and it was therefore not for the courts to create liabilities which Parliament had not thought fit to enact. Taylor L.J. spoke to the same effect. This seems to me to show a proper sensitivity to the limits of permissible judicial creativity and to be no more than constitutional propriety requires. In 1996 the Law Commission, in its report Landlord and Tenant: Responsibility for State and Condition of Property (Law Com No 238) recommended (in paragraph 11.16) that a statutory warranty that a dwelling-house is fit for human habitation should be implied into any lease for less than seven

years. The Commission also recommended (in paragraphs 11.28-29) that the criteria for determining whether a dwelling-house was fit for human habitation should be those listed in section 604 of the Housing Act 1985 (as amended). These include such matters as dampness, adequate provision for lighting, heating and ventilation, facilities for cooking and effective drains. But they contain no mention of sound insulation. The Commission recorded (at paragraph 4.44) that sound insulation was a factor which had been suggested for inclusion in the fitness standard but made no recommendation.

9. A second statutory technique has been to confer powers upon local authorities to make closing orders which prohibit the occupation of dwellings unfit for human habitation or demolition orders which require them to be demolished. Such powers are now contained in Part IX of the Housing Act 1985. They are an incentive to landlords to ensure that their properties comply with the fitness standards specified in the Act. There are also less drastic powers contained in section 189 of the Housing Act 1985 which empowers local authorities to serve notices requiring work to be done in order to make the house fit for habitation. None of these powers are directly relevant because they do not apply to local authority housing. The authority cannot make orders against or serve notices upon itself. But the significant point is that the standard of fitness is that to which I have already referred in section 604 of the Housing Act 1985. It makes no reference to sound insulation.

10. A third statutory technique is to prevent the creation of sub-standard housing in the first place. This is achieved by the requirement that new buildings and conversions should conform to standards laid down in building regulations. Local authorities have had power to make such regulations or bye-laws since the middle of the last century. Mrs. Tanner's block of flats on Herne Hill was constructed in about 1919. Ms. Baxter's terrace house was converted in 1975. Both the construction and the conversion would have had to comply with bye-laws made under powers contained in the London Building Acts. But these contained no requirements concerning sound insulation. Ms. Baxter's conversion included the replacement of some brick interior walls with plasterboard on stud partitions and the replacement of the old plaster-on-lath ceilings with skimmed plasterboard. These changes made the sound insulation rather worse. But they did not contravene the bye-laws in force at the time. The Building Act 1984 replaced the previous system of local bye-laws with nationally applicable regulations made by the Secretary of State for the Environment. The Building Regulations 1985 (SI 1985/1065) contained for the first time a requirement that walls and floors which separate one dwelling from another should resist the transmission of airborne and impact sound: see Part E of Schedule 1 to the Regulations. Similar provisions are now contained in the Building Regulations 1991 (SI 1991/2768). But the regulations apply only to buildings erected or converted after they came into force. They are of no assistance to the appellants.

11. In the absence of any modern statutory remedy which covers their complaint, the appellants have attempted to fill the gap by pressing into service two ancient common law actions. They are the action on the covenant for quiet enjoyment and the action of nuisance. My Lords, I naturally accept that if the present case falls squarely within the scope of either of these actions, the appellants must succeed. But if the question is whether the common law should be developed or extended to cover them, your Lordships must in my opinion have regard to the fact that Parliament has dealt extensively with the problem of substandard housing over many years but so far declined to impose an obligation to install soundproofing in existing dwellings. No doubt Parliament had regard to the financial burden which this would impose upon local authority and private landlords. Like the Court of Appeal in ***McNerny v. London Borough of Lambeth*** (1988) 21 H.L.R. 188, 194, I think that in a field such as housing law, which is very much a matter for the allocation of resources in accordance with democratically determined priorities, the development of the common law should not get out of step with legislative policy.

12. I shall consider first the covenant for quiet enjoyment. This is contained in clause 1 of Mrs. Tanner's tenancy agreement. It says: "*The tenant's right to remain in and to enjoy the quiet occupation of the dwelling house shall not be interfered with by the Council. . .* " Clause B4 of Ms. Baxter's agreement says *"The Council shall not interfere with the tenants' rights to quiet enjoyment of the premises during the continuance of the tenancy."* Read literally, these words would seem very apt. The flat is not quiet and the tenant is not enjoying it. But the words cannot be read literally. The covenant has a very long history. It has been expressed or implied in conveyances and leases of English land for centuries. It comes from a time when, in a conveyancing context, the words "*quiet enjoyment*" had a technical meaning different from what they would today signify to a non-lawyer who was unacquainted with their history. So in ***Jenkins v Jackson*** (1888) 40 Ch.D. 71, 74, Kekewich J. felt obliged to point out that the word *"quietly"* in the covenant *"does not mean undisturbed by noise. When a man is quietly in possession it has nothing whatever to do with noise... 'Peaceably and quietly' means without interference - without interruption of the possession."* Likewise in ***Kenny v. Preen*** [1963] 1 Q.B. 499, 511 Pearson L.J. explained that *"the word 'enjoy' used in this connection is a translation of the Latin word 'fruor' and refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it."*

13. The covenant for quiet enjoyment is therefore a covenant that the tenant's lawful possession of the land will not be substantially interfered with by the acts of the lessor or those lawfully claiming under him. For present purposes, two points about the covenant should be noticed. First, there must be a substantial interference with the tenant's possession. This means his ability to use it in an ordinary lawful way. The covenant cannot be elevated into a warranty that the land is fit to be used for some special purpose: see ***Dennett v. Atherton*** (1872) L.R. 7 Q.B. 316. On the other hand, it is a question of fact and degree whether the tenant's ordinary use of the premises has been substantially interfered with. In ***Sanderson v. Berwick-upon-Tweed Corporation*** (1884) 13 Q.B.D. 547 the flooding of a substantial area of agricultural land by water discharged from neighbouring land occupied by another tenant of the same landlord was held to be a breach of the covenant. In ***Kenny v. Preen*** [1963] 1 Q.B. 499 a

landlord's threats to evict the tenant, accompanied by repeated shouting and knocking on her door, was held to be a breach. It is true that in ***Browne v. Flower*** [1911] 1 Ch. 219, 228 Parker J. said that: *"to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough"* and in ***Phelps v. City of London Corporation*** [1916] 2 Ch. 255, 267, Peterson J. said it was *"at least doubtful"* whether a nuisance by noise was a breach of the covenant. For my part, however, I do not see why, in principle, regular excessive noise cannot constitute a substantial interference with the ordinary enjoyment of the premises. The distinction between physical interference with the demised premises and mere interference with the comfort of persons using the demised premises recalls a similar distinction made by Lord Westbury L.C. for the purposes of the law of nuisance in ***St. Helen's Smelting Co. v. Tipping*** (1865) 11 H.L.Cas. 642. That distinction was no doubt justifiable in that context on pragmatic grounds, but I see no reason why it should be introduced into the construction of the covenant for quiet enjoyment. I would not be willing to say that ***Kenny v. Preen*** [1963] 1 Q.B. 499 was wrongly decided. The fact that the appellants complain of noise is therefore not in itself a reason why their actions should fail.

14. There is however another feature of the covenant which presents the appellants with a much greater difficulty. It is prospective in its nature: see Norton on Deeds (2nd ed. 1928) pp. 612-613. It is a covenant that the tenant's lawful possession will not be interfered with by the landlord or anyone claiming under him. The covenant does not apply to things done before the grant of the tenancy, even though they may have continuing consequences for the tenant. Thus in ***Anderson v. Oppenheimer*** (1880) 5 Q.B.D. 602 a pipe in an office building in the City of London burst and water from a cistern installed by the landlord in the roof flooded the premises of the tenant of the ground floor. The Court of Appeal held that although the escape of water was a consequence of the maintenance of the cistern and water supply by the landlord, it was not a breach of the covenant for quiet enjoyment. It did not constitute an act or omission by the landlord or anyone lawfully claiming through him after the lease had been granted. The water system was there when the tenant took his lease and he had to take the building as he found it. Similarly in ***Spoor v. Green*** (1874) L.R. 9 Ex. 99 the plaintiff bought land and built houses upon it. The houses were damaged by subsidence caused by underground mining which had taken place before the sale. The Court of Exchequer held that there was no breach of the covenant for quiet enjoyment which had been given by the vendor. Cleasby B. said (at p. 108): *"It seems to me impossible to say that there is a breach of covenant for quiet enjoyment by reason of the subsidence of the house in consequence of the previous removal of the coal. This subsidence of the house was a necessary consequence of the condition of the property bought by the plaintiff . . ."*

15. The tenant takes the property not only in the physical condition in which he finds it but also subject to the uses which the parties must have contemplated would be made of the parts retained by the landlord. ***Anderson v. Oppenheimer*** (1880) 5 Q.B.D. 602, in which it was contemplated that the cistern would be used to contain water, demonstrates this proposition. An even more pertinent case is ***Lyttelton Times Co. Ltd. v. Warners Ltd*** [1907] A.C. 476. The plaintiffs owned a hotel in Christchurch, New Zealand, next to the premises in which the defendants operated a printing press. They made an agreement under which the defendants would rebuild their premises and grant a lease of the upper floors to the plaintiffs for use an additional hotel bedrooms. Unfortunately the noise and vibrations of the press beneath caused substantial inconvenience to the occupants of the bedrooms. The plaintiffs claimed an injunction to restrain the defendants from working their press. They said that the defendants knew that they intended to use the premises as bedrooms and were under an implied obligation not to interfere with their convenient use. But Lord Loreburn L.C., giving the advice of the Privy Council, said that the plaintiffs also knew that the defendants intended to use their premises for printing. He went on (at p. 481): *"When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and having found that, both should be held to all that was implied in this common intention...[If] it be true that neither has done or asks to do anything which was not contemplated by both, neither can have any right against the other."*

16. If one stands back from the technicalities of the law of landlord and tenant and construes the tenancy agreement in accordance with ordinary contractual principles, I think that one reaches the same conclusion. In the grant of a tenancy it is fundamental to the common understanding of the parties, objectively determined, that the landlord gives no implied warranty as to the condition or fitness of the premises. Caveat lessee. It would be entirely inconsistent with this common understanding if the covenant for quiet enjoyment were interpreted to create liability for disturbance or inconvenience or any other damage attributable to the condition of the premises. Secondly, the lease must be construed against the background facts which would reasonably have been known to the parties at the time it was granted. The tenant in ***Anderson v. Oppenheimer*** (1880) 5 Q.B.D. 602 must be taken to have known that the building had a water system and that the landlord would therefore keep the cistern supplied with water. The hotel owners in ***Lyttelton Times Co. Ltd. v. Warners Ltd.*** [1907] A.C. 476 must be taken to have known that the lessor of their bedrooms would be operating a printing press downstairs. They did not realise that the noise and vibrations would be a problem, but that was because of the way in which the premises had been constructed. On that point the landlord gave no warranty. Against this background, the lease could not be construed as entitling the tenant to close down the landlord's business.

17. In the Court of Appeal in Mrs. Tanner's case (***Southwark London Borough Council v. Mills*** [1999] 2 W.L.R. 409) Peter Gibson L.J. delivered a dissenting judgment. He said that if the noise made by neighbouring tenants in the course of their ordinary use of their flats amounted to an interference with Mrs. Tanner's reasonable use of her flat, she could be estopped from complaining only if she had expressly or impliedly consented to the noise. In the

present case, there was no evidence about what the tenants had known about the lack of soundproofing before they took their tenancies. But in my opinion a requirement of consent to the noise goes too far. It is sufficient that the tenants must reasonably have contemplated that there would be other tenants in neighbouring flats. If they cannot complain of the presence of other tenants as such, then their complaint is solely as to the lack of soundproofing. And that is an inherent structural defect for which the landlord assumed no responsibility. The Council granted and the tenant took a tenancy of that flat. She cannot by virtue of the terms of that tenancy require the Council to give her a different flat.

18. It remains only, on this part of the case, for me to comment on two authorities upon which the appellants strongly relied. The first is ***Sanderson v. Berwick-upon-Tweed Corporation*** (1884) 13 Q.B.D. 547, to which I have already referred in another context. The Corporation let a farm to Sanderson. It reserved in favour of Cairns, another tenant farmer, the rights to use a drain across one of Sanderson's fields and to enter and repair it. Water discharged by Cairns leaked through the drain and flooded Sanderson's land. He sued the landlord on the covenant for quiet enjoyment. Fry L.J., giving the judgment of the Court of Appeal, said, at p. 551: *"...[T]he damage here has resulted to the plaintiff from the proper user by Cairns of the drains passing through the plaintiff's land which were improperly constructed. In respect of this proper user Cairns appears to us to claim lawfully under the defendants by virtue of his lease, and to have acted under the authority conferred on him by the defendants. The injury caused to the field appears to us to have been, within the meaning of the covenant in that behalf contained in the lease to the plaintiff, a substantial interruption by Cairns, who is a person lawfully claiming through the defendants, of the plaintiff's enjoyment of the land, and so to constitute a breach of the covenant for quiet enjoyment for which the defendants are liable in damages."*

19. The appellants argue that their neighbouring tenants are likewise making *"proper use"* of their flats but the improper construction of the building, like the improper construction of the drain, results in an interference with the appellants' lawful use and possession of their own premises. In my opinion, however, these parallels are misleading. Fry L.J., in the passage which I have cited, is not saying that Cairns, in flooding the plaintiff's land, was making a *"proper use"* of the drain as against the plaintiff. He makes it quite clear that it was not. The reference to *"proper use"* is for the purpose of deciding whether the landlord is liable for what Cairns had done. This depended upon whether Cairns was *"lawfully claiming under"* the landlord and that in turn depended upon whether he was using the drains in a manner authorised by his lease. It is in this sense that he describes his use of the drains as *"proper."*

20. The present case is not concerned with whether the neighbouring tenants, in using their flats in the ordinary way, are lawfully claiming under the landlord. They obviously are. The question is rather whether their conduct amounts to a breach of the covenant for quiet enjoyment at all. In ***Sanderson's*** case the flooding of the land by Cairns was improper and a breach because he had a very limited right to discharge water onto the plaintiff's land. He could do so only through the drains. If the drains were badly made so that they would not hold the water, it was his or his landlord's responsibility to ensure that they did. A right to entry had been reserved to enable him to do so. But in the present cases, the rights of the tenants of neighbouring flats to use them in a normal way are not qualified in any way. As against the appellants, there is nothing improper about their neighbours' use of their flats.

21. In the Court of Appeal in Mrs. Tanner's case (***Southwark London Borough Council v. Mills*** [1999] 2 W.L.R. 409) Mantell L.J. said that he regarded ***Sanderson v. Berwick-upon-Tweed Corporation*** (1884) 13 Q.B.D. 547 as indistinguishable from the case before him. But he said that it was in conflict with the decision of the Court of Appeal in ***Duke of Westminster v. Guild*** [1985] Q.B. 688. In that case, the question was whether a landlord was obliged to repair a drain serving the demised premises which passed under the landlord's retained land. The Court of Appeal held that no such obligation could be implied and that it did not fall within the scope of the covenant for quiet enjoyment. Slade L.J. said (at p. 703): *"The express covenant for quiet enjoyment and implied covenant against derogation from grant cannot in our opinion be invoked so as to impose on [the plaintiffs] positive obligations to perform acts of repair which they would not otherwise be under any obligation to perform."*

22. Mantell L.J. said that he preferred the latter case and applied the principle stated by Slade L.J. But I do not regard the two cases as being in conflict. The landlord in Sanderson was obliged to repair the drain on **Sanderson's** land only if he or his other tenant wanted to use it. Otherwise they ran the risk of exceeding their right to discharge water onto the tenant's land. But the drain in ***Duke of Westminster v. Guild*** [1985] Q.B. 688 was on the landlord's land and he was not using it. Nor was anyone claiming under him. The tenant wanted it repaired for his own benefit. This the landlord was not obliged to do. It is a general principle that the grantor of an easement of way or drainage is not obliged to keep the way or drain in repair. In my opinion, therefore, Mantell L.J. was quite right to apply the principle stated by Slade L.J. in ***Duke of Westminster v. Guild*** and need not have been troubled by ***Sanderson.*** That principle seems to me to apply a fortiori to the present appeals. The appellants are attempting to use the covenant for quiet enjoyment to create not an obligation to repair but a more onerous obligation to improve the demised premises.

23. The second authority relied upon by the appellants is ***Sampson v. Hodson-Pressinger*** [1981] 3 All E.R. 710. The plaintiff was statutory tenant of a flat (flat 6) in a converted house in Belgravia. On 31 March 1978 the landlord granted him a lease for 99 years with the usual covenant for quiet enjoyment. The landlord made alterations to the flat above (flat 7) which included the construction of a tiled terrace on the roof over the plaintiff's living room. On a date which does not appear in the report, the landlord granted a 99 year lease of the upper flat to a tenant who took possession on 11 August 1978. The tiles had not been properly laid and as a result the plaintiff

was seriously disturbed in his living room by the impact noise of people walking about on the terrace. The Court of Appeal held that the landlord was liable in nuisance. It does not appear that the pleadings placed reliance on the covenant for quiet enjoyment, but Eveleigh L.J. mentioned it in passing: *"The contemplated use for which the original landlord let flat 7 to the first defendant was one which interfered with the reasonable enjoyment of the plaintiff's flat. Consequently that landlord was, in my opinion, in breach of the covenant for quiet enjoyment."*

24. I think with respect that this reasoning, while possibly correct on the facts, omits some essential steps. At the time when the plaintiff was granted his lease, it must have been contemplated by the parties that the flat upstairs would be used for ordinary residential occupation in accordance with the way it was constructed. It could not therefore have been intended that such use would be a breach of the covenant for quiet enjoyment. It could have amounted to a breach only if the cause of the noise was some act of the landlord or the tenant of No. 7 claiming under him which could not fairly have been within the contemplation of the parties when the plaintiff took his lease. If the terrace had not then been in existence, I can see the argument for saying that the parties could not have contemplated that the plaintiff would have people walking about on his roof. As the building then stood, that may have been an unreasonable use to make of the roof. If people did so regularly, with the authority of the landlord, in such a way as to cause substantial interference with his enjoyment of the premises, it could have been a breach of the covenant for quiet enjoyment. And if the landlord adapted the roof to enable his tenant and her guests to walk upon it, he would be obliged to do so in a way which protected the tenant beneath from unreasonable noise. But this argument depends entirely upon the adaptation of the terrace taking place after the grant of the plaintiff's lease. It has no application to the present case in which the premises were in their present condition when the appellants took their tenancies.

25. I turn next to the law of private nuisance. I can deal with this quite shortly because it seems to me that the appellants face an insuperable difficulty. Nuisance involves doing something on adjoining or nearby land which constitutes an unreasonable interference with the utility of the plaintiff's land. The primary defendant is the person who causes the nuisance by doing the acts in question. As Pennycuick V.-C. said in ***Smith v. Scott*** [1973] Ch. 314, 321: *"It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance."*

26. What is the nuisance of which the appellant's complain ? The sounds emanating from their neighbours' flats. But they do not allege the making of these sounds to be a nuisance committed by the other tenants. Mr. Goudie Q.C., who appeared for Miss Baxter, said that if necessary he would contend that it was. But I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other. As Lord Goff of Chieveley said in ***Cambridge Water Co. v. Eastern Counties Leather Plc***. [1994] 2 A.C. 264, 299: *"Liability [for nuisance] has been 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."*

27. Of course I accept that a user which might be perfectly reasonable if there was no one else around may be unreasonable as regards a neighbour. As Bramwell B. remarked in ***Bamford v. Turnley*** (1862) 3 B. & S. 62, 83, it may in one sense be quite reasonable to burn bricks in the vicinity of convenient deposits of clay but unreasonable to inflict the consequences upon the occupants of nearby houses. Likewise, it may be reasonable to have appliances such as a television or washing machine in one's flat but unreasonable to put them hard up against a party wall so that noise and vibrations are unnecessarily transitted to the neighbour's premises. But I do not understand how the fact that the appellants' neighbours are living in their flats can in itself be said to be unreasonable. If it is, the same, as I have said, must be true of the appellants themselves.

28. On this part of the case the appellants again relied upon ***Sampson v. Hodson-Pressinger*** [1981] 3 All E.R. 710, to which I have already referred. In that case the Court of Appeal held that the use of the terrace over the plaintiff's roof was not only a breach of the covenant for quiet enjoyment by the landlord but also a nuisance committed by the upstairs tenant for which she and the landlord were both liable. My Lords, in my opinion this decision can be justified only on the basis that having regard to the construction of the premises, walking on the roof over the plaintiff's flat was not a use of the flat above which showed reasonable consideration for the occupant of the flat beneath. It was not, in Baron Bramwell's phrase, *"conveniently done."* If the upstairs tenant was going to use the roof in that way, it had to be suitably adapted to protect the plaintiff from noise. I do not regard it as authority for the proposition that normal and ordinary user, in a way which shows as much consideration for the neighbours as can reasonably be expected, can be an actionable nuisance.

29. If the neighbours are not committing a nuisance, the Councils cannot be liable for authorising them to commit one. And there is no other basis for holding the landlords liable. They are not themselves doing anything which interferes with the appellants' use of their flats. Once again, it all comes down to a complaint about the inherent defects in the construction of the building. The appellants say that the ordinary use of the flats by their neighbours would not have caused them inconvenience if they had been differently built. But that, as I have said more than once, is a matter of which a tenant cannot complain.

30. I would therefore dismiss both appeals.

LORD CLYDE My Lords,

31. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hoffmann and Lord Millett. For the reasons they have given, I would also dismiss both appeals.

LORD MILLETT My Lords,

32. Most people in England today live in cities. Many of them live cheek by jowl with their neighbours. They live in terraced houses, purpose-built blocks of flats, or flatlets created by the conversion of houses into separate residential units. Modern building regulations require proper sound insulation to be installed, but this is often lacking in older buildings or conversions. In its absence each occupier is likely from time to time to be disturbed in the enjoyment of his property by noise caused by the activities of his neighbours, as they are by his. Where the disturbance is intermittent and relatively slight the parties usually accept the need to put up with the annoyance they cause each other. But what if it is continuous and intolerable?

33. Where the offending noise is occasioned by the ordinary use of residential premises, so that it cannot be brought to an end except by leaving them vacant, the only practical solution is to install proper sound insulation; but that is expensive. Where the sufferer is an owner-occupier, he must either bear the cost himself or persuade his neighbour, who is likely to be suffering similar disturbance by noise emanating from his premises, to share the cost with him. Where the sufferer is a tenant, he would obviously like his landlord to carry out the work, but there is normally no legal obligation on him to do so. The law has long been settled that there is no implied covenant on the part of the landlord of a dwelling house that the premises are fit for human habitation, let alone that they are soundproof. Parliament has intervened in the case of furnished tenancies and tenancies at a low rent, but subsequent inflation has deprived the legislation of any practical application to unfurnished tenancies. In its Report Landlord and Tenant: Responsibility for State and Condition of Property (1996) (Law Com No. 238) the Law Commission recommended that a covenant that the premises are fit for human habitation should be implied in leases of dwelling houses of less than seven years, but rejected a proposal that this should cover sound insulation.

34. The question in these appeals is whether the position is different where the tenant and his neighbour share a common landlord. Can the tenant, who cannot sue his landlord because his own property admits noise, have an action against him because his neighbour's emits it? Can the tenant, who cannot compel his landlord to install sound insulation in his own property, oblige him to install it in his neighbour's? And since each tenant is both the victim of the disturbance caused by his neighbour and the cause of similar disturbance to his neighbour, can they join forces to compel their common landlord to install sound insulation to make both their properties soundproof?

35. The answer is to be found in the words of Martin B. in ***Carstairs v. Taylor*** (1871) L.R. 6 Exch. 217 at p. 222: *"Now, I think that one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently."*

36. Lord Goddard C.J. spoke to the same effect ***Kiddle v. City Business Properties Ltd.*** [1942] 1 K.B. 269, at pp. 274-5: *"[The Plaintiff] takes the property as he finds it and must put up with the consequences. It is not to be supposed that the landlord is going to alter the construction, unless he consents to do so. He would say to his intending tenant: 'You must take it as it is or not at all'."*

37. The doctrine does not depend on fictions, such as the ability of the tenant to inspect the property before taking the lease. It is simply a consequence of the general rule of English law which accords autonomy to contracting parties. In the absence of statutory intervention, the parties are free to let and take a lease of poorly constructed premises and to allocate the cost of putting them in order between themselves as they see fit. The principle applies whether the complaint relates to the state and condition of the demised premises themselves or, as in the cases cited, of other parts of the building in which the demised premises are located. Of course, the tenants of local authority housing do not negotiate the terms of their tenancy agreements. They take what they are offered on terms set by the local authority. But the meaning and effect of contractual arrangements cannot be made to depend on the parties' relative bargaining power. If it is thought right to redress any imbalance by importing terms in favour of the weaker party, this is a matter for Parliament.

38. The tenants accordingly accept that, in the absence of a statutory or contractual obligation to such effect, they cannot compel their landlords to install sound insulation. They invoke the tort of nuisance and the covenant for quiet enjoyment to obtain indirectly that which they cannot obtain directly. They complain of the sound emanating from the adjoining property, allege that it constitutes a legal wrong for which the landlord is responsible, and seek orders to restrain its continuance. In theory the landlord could avoid the cost of installing sound installation by obtaining possession of the flat where the sound originates and leaving it vacant; though he might equally well choose to obtain possession of the flat belonging to the complainant. This solution is not, however, available in practice, since all the flats are subject to secure tenancies.

The facts.

39. In each of the cases under appeal the landlord is a local authority. In the first of the two cases it is the London Borough of Southwark. It owns a number of blocks of flats in Herne Hill, built shortly after the end of the First World War. The individual flats are let to tenants. The terms of each tenancy are in standard form and include a covenant in the following terms: *"The tenant's right to remain in and to enjoy the quiet occupation of the dwelling house shall not be interfered with by the Council. . . ."*

40. This is an abbreviated version of the conventional covenant for quiet enjoyment, but it is common ground that it has similar effect.

41. Some of the tenants complained of the absence of adequate soundproofing in their homes. They stated that they wished the matter to go to arbitration. Between 1994 and 1996 they made applications to the Arbitration Tribunal maintained by the Council in accordance with provisions in that behalf contained in the Council's standard form of tenancy agreement. The tenants' evidence was striking. It showed that the ordinary day to day activities of each household were plainly audible to its neighbours. One of the tenants testified: *"I can hear all the private and most intimate moments of [my neighbours'] lives - conversations, what TV station they are viewing, when they go to the toilet, when they make love. Every light switched on, every door opened or closed, every pot or pan placed on the cooker, all these I hear."*

42. Her neighbour could presumably have given evidence to the like effect in relation to the noise emitted from her flat. Life in these conditions must be intolerable. Unless one or other of adjoining flats is to be left permanently empty, the only practical solution is to install soundproofing between them.

43. The Arbitration Tribunal's jurisdiction is limited to the resolution of disputes arising out of an alleged breach of a tenancy agreement. It found that the Council was in breach of the covenant for quiet enjoyment and ordered it to carry out effective soundproofing of the flats. The Council appealed to the High Court. Its appeal was dismissed by Laddie J., but its further appeal to the Court of Appeal was allowed by a majority. On the tenants' appeal to your Lordships' House, the parties formulated the question to be decided as follows: *"Where A is the tenant of a landlord ('L') of residential premises ('Flat 1') and L lets neighbouring residential premises in the same building ('Flat 2') to B, and the construction of the building is such that A and B are disturbed by the noise of normal residential use (in the manner contemplated by each letting) to an extent which substantially interferes with the reasonable enjoyment of each flat (in the manner contemplated by each letting), is L, by reason thereof only, liable for breach of covenant for quiet enjoyment:*

(a) to A;
(b) to B;
(c) to both;
(d) to neither?"

There is no means of differentiating between (A) and (B), and the answer must be either (c) or (d).

44. In the second case the landlord is the London Borough of Camden. It is the owner of a Victorian terraced house on three floors. The house was divided into two flats at some time prior to 1975. In that year the Council converted it into three flats, one on each floor. The conversion had the effect of reducing the sound insulation between the floors of the house. At that time there was no applicable building regulation requiring sound insulation between dwelling houses. Such requirements were not extended to inner London until 1986.

45. In 1992 the Council let the first floor flat to Miss Baxter on a weekly tenancy. The other two flats on the ground and second floor were already let to the present tenants. Miss Baxter's tenancy is in the Council's standard form. This includes two clauses in the following terms:

"The Council shall not interfere with the tenants' rights to quiet enjoyment of the premises during the continuance of the tenancy (Clause B4)

"The Council shall take such steps as are reasonably practicable to prevent the continuation of any nuisance caused to the tenant, having regard to all the circumstances of the case." (Clause B5).

46. Miss Baxter brought proceedings in the County Court against the Council alleging that, because of the inadequate sound insulation in the house, the ordinary day to day activities of her neighbours in the flats above and below her were clearly audible to her and seriously interfered with her enjoyment of her flat. She testified: *"I can hear . . . normal conversation, singing, arguments, the television, snoring, coughing, bringing up of phlegm, sneezing, bedsprings, footfalls and creaking floorboards, the pull-cord light switch in the bathroom, taps running in the bathroom and kitchen, the toilet being used . . . the vacuum is clearly audible as is any music played on the stereo."*

47. She alleged that this amounted to a nuisance at common law for which the Council was responsible, and that it was also a breach of the covenant for quiet enjoyment in Clause B4. After some earlier misadventures the case was heard by H.H. Judge Green Q.C. He found that the noise suffered by Miss Baxter as a result of the ordinary use of their flats by the tenants above and below her constituted an unreasonable interference with Miss Baxter's enjoyment of her flat. He attributed this to the combination of two factors, the conversion of the house in 1975 and the continuing occupation of the flats above and below after she had moved into her flat. He also found that the sound insulation between Miss Baxter's living room and the room immediately above fell below the standards now required by the relevant Building Regulations and was *"unacceptable."* Despite these favourable findings of fact, the Judge dismissed the Action, and Miss Baxter's appeal was unanimously dismissed by the Court of Appeal.

48. I shall deal first with Miss Baxter's claim in nuisance, and then with the claims by the tenants in both cases that their landlord is in breach of the covenant for quiet enjoyment.

Nuisance

49. The law of nuisance is concerned with balancing the conflicting interests of adjoining owners. It is often said to be encapsulated in the Latin maxim sic utere tuo ut alienum non laedas. This suggests a strict liability, but in practice the law seeks to protect the competing interests of both parties so far it can. For this purpose it employs the control mechanism described by Lord Goff of Chieveley in ***Cambridge Water Co. v. Eastern Counties Leather Plc.*** [1994] 2 A.C. 264 at p. 299 as *"the principle of reasonable user - the principle of give and take"*.

50. The use of the word *"reasonable"* in this context is apt to be misunderstood. It is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land. As Sir George Jessel M.R. insisted in ***Broder v. Saillard*** (1876) 2 Ch. D. 692, at pp. 701-702 that is not the question. What is reasonable from the point of view of one party may be completely unreasonable from the point of view of the other. It is not enough for a landowner to act reasonably in his own interest. He must also be considerate of the interest of his neighbour. The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him. The principle which limits the liability of a landowner who causes a sensible interference with his neighbour's enjoyment of his property is that stated in by Bramwell B. in ***Bamford v. Turnley*** (1860) 3 B. & S. 62, at pp. 83-84: *"There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz: that 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 . . . There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."*

51. It is true that Bramwell B. appears to justify his conclusion by the fact that the resulting nuisances are normally of a comparatively trifling character, and that is not the present case. But he cannot have intended the defence to be confined to such cases. Trifling nuisances have never been actionable, and Bramwell B. was searching for the principle which exempts from liability activities which would otherwise be actionable. His conclusion was that two conditions must be satisfied: the acts complained of must (i) *"be necessary for the common and ordinary use and occupation of land and houses"* and (ii) must be *"conveniently done*", that is to say done with proper consideration for the interests of neighbouring occupiers. Where these two conditions are satisfied, no action will lie for that substantial interference with the use and enjoyment of his neighbour's land that would otherwise have been an actionable nuisance.

52. In ***Ball v. Ray*** (1873) L.R. 8 Ch. D. 467 the occupier of a house in a street in Mayfair had many years previously converted the ground floor into a stable. A new occupier altered the location of the stable so that the noise of the horses became an annoyance to the next-door neighbour and prevented him from letting his house as lodgings. Lord Selborne L.C. said at pp. 469-470: "*In making out a case of nuisance of this character, there are always two things to be considered, the right of the Plaintiff and the right of the Defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection. I do not regard it as a reasonable or as a usual manner of using the front portion of a dwelling house in such a street as Green Street, that it should be turned into stables for horses; and, if it is so used, then the proprietor is bound to take care that it is so used as not to be a substantial annoyance, detrimental to the comfort and to the value of the neighbours' property.*"

53. The stabling of horses may have been necessary for the common and ordinary use and occupation of a dwelling house in 1873, but the layout of the premises was so altered that it was no longer "*conveniently done*".

54. In my opinion Tuckey L.J. [1999] 2 W.L.R. 566, at p. 574, was correct in stating that the ordinary use of residential premises without more is not capable of amounting to a nuisance. As he rightly explained, this is why adjoining owner-occupiers are not liable to one another if the party wall between their flats is not an adequate sound barrier so that the sounds of every day activities in one flat substantially interfere with the use and enjoyment of the other.

55. Counsel for Miss Baxter is prepared to argue if necessary that the tenants of the other flats could be held liable to her in nuisance. In this he would be wrong; their activities are not merely reasonable, they are the necessary and inevitable incidents of the ordinary occupation of residential property. They are unavoidable if those tenants are to continue in occupation of their flats. But his primary submission is that the Council is liable in nuisance as the common landlord. In this he is, in my opinion, plainly wrong.

56. Once the activities complained of have been found to constitute an actionable nuisance, more than one party may be held legally responsible. The person or persons directly responsible for the activities in question are liable; but so too is anyone who authorised them. Landlords have been held liable for nuisances committed by their tenants on this basis. It is not enough for them to be aware of the nuisance and take no steps to prevent it. They must either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property: see ***Malzy v. Eichholz*** [1916] 2 K.B. 308. But they cannot be held liable in tort for having authorised the commission of an actionable nuisance unless what they have authorised is an actionable nuisance. The logic of the proposition is obvious. A landlord cannot be liable to an action for authorising his tenant to do something that would not be actionable if he did it himself.

57. Counsel for Miss Baxter relies on the fact that the Council not only let the adjoining flats for residential occupation but did so without first installing adequate sound insulation. It thereby authorised the use of the flats for

residential occupation in circumstances which, the argument runs, inevitably caused a nuisance. But in my opinion this takes the matter no further. What Miss Baxter must show, but cannot show, is that they inevitably caused an actionable nuisance. The Council has no obligation to soundproof her property to keep noise out, whether it emanates from her neighbours or from traffic or aircraft. It is under no positive duty to her to soundproof the adjoining flats in order to keep the noise in; such a duty could only arise by statute or contract. It is under no duty to bring the nuisance to an end, whether by regaining possession of the flats or by soundproofing the premises, unless it is an actionable nuisance.

58. My Lords, I would not wish to be thought indifferent to Miss Baxter's plight. I have the greatest sympathy for her. But the fact remains that she took a flat on the first floor of a house, knowing that the ground and second floors were also occupied as residential flats, and expecting their occupants to live normal lives. That is all that they are doing. She has no cause to complain of their activities, which mirror her own; or of the Council for having permitted them by letting the adjoining flats. Her real complaint is, and always has been, of the absence of adequate sound insulation. Her complaint, however well founded, cannot be redressed by the law of tort; any remedy must lie in statute or contract.

Breach of the covenant for quiet enjoyment.

59. The covenant for quiet enjoyment is one of the covenants of title formerly found in a conveyance of land, and the only such covenant found in a lease of land. It has long been understood that the word *"quiet"* in such a covenant does not refer to the absence of noise. It means without interference. The covenant for quiet enjoyment was originally regarded as a covenant to secure title or possession. It warranted freedom from disturbance by adverse claimants to the property: see ***Dennett v. Atherton*** (1872) L.R. 7 Q.B. 316; ***Jenkins v. Jackson*** (1888) 40 Ch. D. 71; ***Hudson v. Cripps*** [1896] 1 Ch. 265. But its scope was extended to cover any substantial interference with the ordinary and lawful enjoyment of the land, although neither the title to the land nor possession of the land was affected: **Sanderson v. Berwick-upon-Tweed Corporation** (1884) 13 Q.B.D. 547, 551.

60. Despite this there has lingered a belief that, although there need not be physical irruption into or upon the demised premises, there must be "*a direct and physical*" interference with the tenant's use and enjoyment of the land. On this ground the Courts have dismissed complaints of the making of noise or the emanation of fumes, of interference with privacy or amenity, and other complaints of a kind commonly forming the subject matter of actions for nuisance. Little harm seems to have been done, since in cases where a remedy was appropriate the tenant has been able to have recourse to the landlord's implied obligation not to derogate from his grant. But the existence of the limitation has been questioned: (see ***Kenny v. Preen*** [1963] 1 Q.B. 499) or circumvented by the round assertion that it is satisfied in what might be thought somewhat doubtful circumstances: (see Owen v. Gadd [1956] 2 Q.B. 99), and I think that we should consider whether it is a proper one.

61. There is nothing in the wording of the conventional covenant that would justify the limitation. I do not know whether it owes its existence to a desire to maintain some connection with the original scope of the covenant as a covenant securing title or possession, or to the mistaken notion that actions for nuisance "*productive of sensible personal discomfort*" were actions for causing discomfort to the person rather than for causing injury to the land: see ***Hunter v. Canary Wharf Ltd***. [1997] AC 655, 706. Now that this fallacy has been exposed, however, I can see no sound reason for confining the covenant for quiet enjoyment to cases of direct and physical injury to land.

62. Accordingly, I agree with the tenants that the covenant for quiet enjoyment 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 the demised premises. The interference need not be direct or physical. Nor, in my opinion, is it a necessary precondition of liability on the covenant that the acts alleged to constitute the breach would support an action in nuisance. I do not doubt that this will usually be a sufficient condition of liability, but there is nothing in the language of the conventional form of the covenant that would justify holding it to be a necessary one.

63. Once these artificial restrictions on the operation of the covenant for quiet enjoyment are removed, there seems to be little if any difference between the scope of the covenant and that of the obligation which lies upon any grantor not to derogate from his grant. The principle is the same in each case: a man may not give with one hand and take away with the other. Whether a particular matter falls within the scope of the covenant for quiet enjoyment depends upon the proper construction of the covenant. As ordinarily drafted, however, the covenant shares two critical features in common with the implied obligation. The first is that they are both prospective in their operation. The obligation undertaken by the grantor and covenantor alike is not to do anything after the date of the grant which will derogate from the grant or substantially interfere with the grantee's enjoyment of the subject matter of the grant: see ***Anderson v. Oppenheimer*** (1880) 5 Q.B.D. 602. In the present case the tenancy agreement contained a covenant on the part of the Council that *"the tenant's right . . . shall not be interfered with . . ."* That form of words clearly looks to the future.

64. The second feature that the implied obligation and the covenant for quiet enjoyment have in common is that the grantor's obligations are confined to the subject matter of the grant. Where the covenant is contained in a lease, its subject matter is usually expressed to be the demised premises. In an oft quoted passage in ***Leech v. Schweder*** (1874) 9 Ch. App. 463 at p. 474 Mellish L.J. said: *"It is perfectly true that the lessee is 'to hold and enjoy without any suit, let or hindrance.' But what is he to hold and enjoy? 'The premises'. What are the premises? The things previously demised and granted. The covenant does not enlarge what is previously granted, but an additional remedy is given, namely, an action for damages if the lessee cannot get, or is deprived of that which has been previously*

professed to be granted. Nothing, I apprehend, can be plainer than that at law it would not, in the least degree, enlarge what was granted."

65. In ***Spoor v. Green*** (1874) L.R. 9 Ex. 99 buildings collapsed because of subsidence caused by mining operations which had taken place before the lease. There was held to be no breach of the covenant for quiet enjoyment. The subject matter of the lease, and therefore of the covenant, was land already liable to subsidence in consequence of the prior removal of the coal.

66. In the present cases the covenants guaranteed *"the tenant's right to remain in and to enjoy the quiet occupation of the dwelling house"*, that is to say the dwelling house comprised in the tenancy. This must be identified at the date when the tenancy was granted. In each case it consisted of a flat in a building constructed or adapted for multiple residential occupation and having inadequate sound insulation. An undesirable feature of the flat was its propensity to admit the sounds of the every day activities of the occupants of adjoining flats. The landlord covenanted not to interfere with the tenant's use and enjoyment of a flat having that feature. It has not done so. It has not derogated from its grant, nor has it interfered with any right of the tenant to make such use and enjoyment of the premises comprised in the tenancy as those premises are capable of providing. To import into the covenant an obligation on the part of the landlord to obtain possession of the adjoining premises and not relet them, or to install sound insulation, would extend the operation of the grant.

67. The subject matter of the grant extends, of course, not only to the demised premises but to everything that is appurtenant or incident to the grant to which it relates. If the demised premises enjoy a right to ancient lights over adjoining property, the landlord must not interfere with the tenant's enjoyment of the right. This would be a nuisance at common law, but it would also be a breach of the covenant for quiet enjoyment. If, however, the demised premises enjoy no such right over adjoining land, the landlord is free to build upon it without thereby committing an actionable nuisance or breach of the covenant: Leech v. Schweder (supra). This may have given rise to the notion that it is a necessary condition of liability on the covenant that the acts complained of would constitute an actionable nuisance. But this is not the reason for the distinction. The true reason is that the covenant must be construed by reference to its subject matter, and what amounts to an interference with land which enjoys an easement over adjoining property may not amount to an interference with the enjoyment of land which does not. Thus in ***Davis v. Town Properties Investment Corporation Ltd.*** [1903] 1 Ch. 797 the scope of the covenant was limited by the fact that the owner of land adjoining the demised premises (which did not belong to the lessor at the date of the lease) might build on it at any time so as to interfere with the draught from the lessee's chimneys.

68. In construing the covenant, therefore, the location of the demised premises and the use to which adjoining premises are put at the date of the tenancy agreement, or the use to which they may then reasonably be expected to be put in future, must always be a material consideration. In ***Lyttleton Times Co. Ltd. v. Warners Ltd.*** [1907] A.C. 476, the parties agreed that the appellants' printing-house should be rebuilt, that the respondents should take a lease of the upper floors as additional bedrooms for their hotel, and that the appellants should use the ground floor for an engine-house and printing machinery. Both parties believed that the noise and vibration caused by the operation of the machinery would be so slight that it might be disregarded. The Privy Council held that the respondents had no cause of action. In giving the opinion of the Board, Lord Loreburn L.C. said at p. 481: *"In this case their Lordships think that both parties agreed upon a building scheme with the intention that the building should be used for bedrooms and also for a printing house according to a design agreed upon. Both parties believed these two uses could co-exist without clashing, and that was why both of them accepted the scheme. Neither would have embarked upon it if he had not thought his intended enjoyment of the building would be permitted, and both intended that the other should enjoy the building in the way contemplated. They were mistaken in their anticipation. But if it be true that neither has done or asks to do anything which was not contemplated by both, neither can have any right against the other."*

69. The case was argued in nuisance and the implied obligation not to derogate from the grant, but the reasoning is equally applicable to the covenant for quiet enjoyment. This is why it is important to bear in mind that the subject matter of each of the tenancies in the present case was not merely a residential flat, but a flat in a building constructed or adapted for multiple occupation. The adjoining flats appear to have been already let at the date of each of the tenancy agreements in question; but it would make no difference if they were not. It must have been within the contemplation of the prospective tenants that the adjoining flats would be let to residential tenants, and that the occupiers would live normally in them. Neither landlord, and none of occupiers of adjoining properties, has done or asks to do anything since the tenancy agreements were entered into which was not contemplated by everyone concerned.

70. In the Court of Appeal Mantell L.J. found it impossible to distinguish the facts of ***Sanderson v. Berwick-upon-Tweed Corporation*** (where the action on the covenant succeeded) from those of the present case or to reconcile the decision with ***Duke of Westminster v. Guild*** [1985] Q.B. 688 (where the action failed). I think that the two cases are quite different. They are not only not irreconcilable, but are complementary.

71. In ***Sanderson v Berwick-upon-Tweed Corporation***, the action was brought by the lessee of the servient tenement, being land which was subject to an easement of drainage. The drain was defectively constructed and the plaintiff's land was flooded. He brought an action against his landlord who had retained the ownership of the dominant tenement. The key to an understanding of the case is that it is for the grantee of an easement, and not the grantor, to maintain and repair the subject matter of the easement, with a duty to do so if by his neglect the servient tenement suffers damage: see ***Robbins v. Jones*** (1863) 15 C.B. (N.S.) 221, 244. The occupier of the

dominant tenement was accordingly liable to an action, and his landlord was rightly held to be in breach of the covenant for quiet enjoyment contained in the lease of the servient tenement.

72. ***Duke of Westminster v. Guild*** was the converse case. There the claim was made by the lessee of the dominant tenement. His land was flooded because a drain which passed under adjoining land belonging to his landlord became blocked. He sought to use the covenant for quiet enjoyment in his lease to transfer to his landlord his own obligation as occupier of the dominant tenement to maintain the drain. This would enlarge the grant, and the claim rightly failed.

73. Any tenant who complains of the state and condition of his property is right to consider whether the tenancy agreement, possibly modified by statute, provides him with a remedy. Where the complaint cannot be remedied without expensive improvements to the premises, this will require a clear contractual obligation to be expressed in the agreement. The covenant for quiet enjoyment is an unsuitable vehicle for such an obligation.

Conclusion.

74. My Lords, these appeals illuminate a problem of considerable social importance. No one, least of all the two Councils concerned, would wish anyone to live in the conditions to which the tenants in these appeals are exposed. For the future, building regulations will ensure that new constructions and conversions have adequate sound insulation. But the huge stock of pre-war residential properties presents an intractable problem. Local authorities have limited resources, and have to decide on their priorities. Many of their older properties admit damp and are barely fit for human habitation. The London Borough of Southwark has estimated that it would cost £1.271 billion to bring its existing housing stock up to acceptable modern standards. Its budget for 1998-9 for major housing schemes was under £55 million. The average cost of installing sound installation in the flats in Casino Avenue is £8,000 per flat. There are 34 similar flats in the estate, so that the total cost would be about £272,000. The Borough wide cost could be of the order of £37 million. The relevant local residents' association has considered that the installation of sound insulation is not a priority need.

75. These cases raise issues of priority in the allocation of resources. Such issues must be resolved by the democratic process, national and local. The judges are not equipped to resolve them. All that we can do is to say that there is nothing in the relevant tenancy agreements or current legislation, or in the common law, which would enable the tenants to obtain redress through the Courts.

76. I would dismiss both appeals.