**SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY AT DUMFRIES**

**[2020] SC DUM 19**

**A131/16**

JUDGMENT OF SHERIFF BRIAN A MOHAN

in the cause

STEPHEN REAY (Assisted Person)

Pursuer

against

DUMFRIES AND GALLOWAY HOUSING PARTNERSHIP

Defender

**Pursuer: Maxwell, Brazenall & Orr, Dumfries**
**Defender: Stalker, Fisher, Plexus Law, Edinburgh**

DUMFRIES, 11 October 2019

**Introduction**

[1] The pursuer in this action was a tenant of the defenders, a public sector landlord. The pursuer sought compensation from the defenders. He claimed that the defenders failed in their obligations to him as a tenant because the house which he rented in Stranraer had inadequate sound insulation. He claimed to have suffered stress and family disruption as a result.

[2] The defenders denied liability. They accepted that they owed obligations to their tenants, including the pursuer. But they disputed that these obligations required them to refurbish older properties – such as that rented by the pursuer – to modern standards of soundproofing.

[3] The Sheriff, having resumed consideration of the cause,

**Finds in fact**

***The parties***

1. The pursuer is Stephen Reay who [now resides at an address near Stranraer, Dumfries and Galloway]. The defenders are Dumfries and Galloway Housing Partnership Limited (also known as DGHP), a company incorporated under the Companies Acts and having a place of business at Grierson House, Bankend Road, Dumfries DG1 4ZS. The defenders are a public sector landlord.

2. The pursuer resided at 102 Mount Vernon Road, Stranraer, a property owned by the defenders, together with his wife JR, from 2003 until July 2015 when he moved to his current address. From 2003 until April 2006 the pursuer's wife was the sole tenant. From April 2006 until July 2015 the pursuer and his wife were joint tenants. The tenancy was a Scottish Secure Tenancy and the lease between the parties was a Scottish Secure Tenancy Agreement.

***The property at 102 Mount Vernon Road, Stranraer***

3. The property at 102 Mount Vernon Road, Stranraer, DG9 7PZ was an upper flat forming part of a four-in-a-block unit within a development of former council houses in Stranraer. The property was built in the mid-1930s and was of a 'Garden City' style commonly then used by local authorities engaged in the widespread construction of housing for rent.

4. The flat was accessed by a door at the side of the building leading to an internal stairway. The accommodation consisted of a hallway, living room, bathroom, kitchen and two bedrooms. Number 100 had a similar layout, with its rooms of similar dimensions immediately below those in number 102.

5. The flats were separated by a timber joisted floor with tongue and groove flooring above and a lath and plaster ceiling below. The property was constructed using ash deafening laid on top of deafening boards under the floorboards as a form of sound insulation. Ash deafening was the residue left by coal burning from steam locomotives and factories. It was easily available in the 1930s and was a light material in the shape of small stones which could be transported in bags and poured into the floor space between flatted properties built before 1939. Ash deafening was typically laid to a depth of 70mm. This provided airborne sound insulation between the dwellings which formed the blocks of flats.

***The pursuer's complaints***

6. In July 2009 the pursuer complained to the defenders of excessive noise and other behaviour by his neighbours immediately downstairs in 100 Mount Vernon Road. During the same month the defenders asked the pursuer's neighbours to moderate their behaviour. The pursuer made further complaints to the defenders regarding his neighbours' behaviour in early 2010. In March 2010, following further communication with the neighbouring tenants, the defenders considered that the complaint had been resolved.

7. In February 2011 the pursuer made further complaints to the defenders regarding his downstairs neighbours. On this occasion the complaint was initiated by the pursuer through his local councillor on Dumfries and Galloway Council. On 22 February 2011 a meeting took place between the pursuer and an officer of the defenders within the pursuer's home. The noise identified by the pursuer as nuisance was deemed by the defenders to be "domestic noise" from a family with young children and not excessive. The defenders gave certain advice to the said neighbours to ensure that noise levels would be minimised

because of the way in which sound travelled through buildings of the type of which numbers 100 and 102 Mount Vernon Road formed part.

8. In February 2012 a further complaint was made by the pursuer regarding noise from the same neighbours. A further meeting took place at the pursuer's home with employees of the defenders. Officers employed by the defenders identified the noise as normal and not excessive, given the design and layout of the properties.

9. At the said meeting in February 2012 the pursuer requested that the defenders should carry out soundproofing measures to the flat at 102 Mount Vernon Road because he regarded the noise from his neighbours as excessive. The defenders refused that request as it was not their policy to carry out soundproofing improvements to properties of the age and type occupied by the pursuer.

10. On 3 October 2013 the pursuer made further complaints to the defenders about anti-social noise disturbance coming from his downstairs neighbours. At this time the pursuer indicated that the sound problem was inherent in the property. As part of their investigations into this complaint officers from the defenders spoke to the pursuer and visited him within his home during October and November 2013. The pursuer behaved in a threatening and intimidating manner in dealing with the defenders on these occasions. He became obstructive to suggestions made by the defenders about the installation of sound recording equipment to test the level of daily noise. He complained that the defenders' equipment was likely to be inadequate and made demands to the defenders about the type of sound equipment which he wanted them to use.

11. As a result of the pursuer's manner in dealing with officers of the defenders in October and November 2013 the defenders were unable to complete the investigation of his complaint. Ms G, the neighbour who resided downstairs from the pursuer, made a counter-

complaint about the pursuer's manner towards her. She vacated her tenancy at 100 Mount Vernon Road in December 2013. Another tenant took up occupation of the flat at number 100 and the pursuer did not make any further complaints to the defenders about anti-social behaviour.

12. In 2014 the pursuer sought further assistance from his local councillor on Dumfries and Galloway Council (DGC), the local authority for Stranraer, about the sound insulation within his home. DGC retained a statutory responsibility for local authority services in the areas in which the defenders were the social housing provider. There was some overlap in the responsibilities of the two agencies in matters such as anti-social behaviour or neighbourhood management. As a result of the approach made to DGC by the pursuer, sound insulation testing of the pursuer's home at 102 Mount Vernon Road took place.

***Sound insulation at 102 Mount Vernon Road***

13. Sound is measured in decibels (dB), expressed as a number. The term "DnT,w" is the Weighted Standardized Level Difference in dB, and is used to provide a rating value that expresses the degree of airborne sound insulation provided by a separating floor. The higher the DnT,w value, the better the sound insulation. In a domestic situation, airborne sound is generated typically by speech, television, radio or a music system. Normal sound in a domestic setting can also be generated by other appliances or equipment, such as washing machines, or impact noise, such as a door closing.

14. The living rooms and bedrooms of 100 and 102 Mount Vernon Road were tested by both dB Acoustics and RMP. The tests were carried out by each of these companies in appropriate conditions and using appropriate industry methods and standards.

(a) When tested, the living rooms of both properties were found to have Airborne Ratings of 49dB DnT,w (by dB Acoustics) and 50dB DnT,w (by RMP).

(b) The back bedrooms of the two properties were found to have Airborne Ratings of 46dB DnT,w (by dB Acoustics) and 47dB DnT,w (by RMP).

(c) The front bedrooms of the properties were not tested by dB Acoustics. They were tested by RMP and found to have an Airborne Rating of 51 dB DnT,w.

15. The differentials in the measurements between the two testing companies were accounted for by slight differences in their testing methods. When dB Acoustics carried out testing of the rear bedroom at the pursuer's home in August 2014 there was no furniture and no floor covering within the room. The addition of a carpet and furniture generally increases the level of insulation within a room against sound coming from outside that room.

16. Sound insulation within the property at 102 Mount Vernon Road was provided by ash deafening under the floorboards. In 2014 the ash deafening in the underfloor area beneath the back bedroom at 102 Mount Vernon Road was not at the normal depth of approximately 70mm. It had been displaced during electrical rewiring carried out in the 1980s, leaving it at a reduced depth at some points. Said displacement or removal in part of ash deafening occurred prior to the commencement of the pursuer's tenancy.

17. At the time of the building's construction, less was known in the housebuilding industry about how to create sound separation through design than became prevalent in later years. At the time the property was built there were no standardised building regulations in Scotland under which houses were to be constructed. Noise created in

current domestic conditions is typically greater in volume and frequency range than was created in domestic conditions in the 1930s.

18. The sound insulation for the property fell below the standards set by building regulations in place at the time the testing was carried out. The primary reason for the sound insulation for the property being at the levels identified was the type and form of the building's design and construction. The displaced ash deafening contributed to the level of sound insulation.

**Finds in fact and law**

1. The sound insulation within 102 Mount Vernon Road, Stranraer was not a defect in the property.

2. At the time the pursuer was in occupation at 102 Mount Vernon Road, Stranraer, the property was fit for human habitation.

**Finds in law**

1. The Building (Scotland) Regulations 2005 and 2011 included standards in relation to sound insulation. Said regulations applied only to properties built or converted after the regulations came into force.

2. The defenders were not required by statute to meet the Technical Standards contained in the Building (Scotland) Regulations 2005 or 2011 in relation to standards of sound insulation for the property at 102 Mount Vernon Road, Stranraer.

3. The defenders were not in breach of the obligations owed to the pursuer as their tenant under Schedule 4 of the Housing (Scotland) Act 2001.

4. The defenders were not in breach of their tenancy agreement with the pursuer in relation to the levels of sound insulation within the property at 102 Mount Vernon Road Stranraer.

**THEREFORE:**

REPELS pleas-in-law Numbers 1 and 2 for the pursuer, and plea-in-law Number 1 for the defenders;

SUSTAINS pleas-in-law Numbers 2 and 3 for the defenders and, in terms thereof,

ASSOILZIES the defenders;

REPELS plea-in-law Number 4 for the defenders as no longer necessary

ASSIGNS a hearing on expenses at Dumfries Sheriff Court, Buccleuch Street, Dumfries on 30 November 2019.

**Note:**

[4] Evidence and submissions in this proof before answer were heard over four days.

**Pursuer's submissions**

[5] The pursuer occupied the property at 102 Mount Vernon Road Stranraer from 2003 together with his wife who was the tenant. From March 2006 the pursuer became a joint tenant and remained there until July 2015 when the couple moved to another DGHP property. The pursuer's case was that the defenders had failed in their duties and obligations as his public sector landlords. It was accepted that modern buildings and homes had more advanced levels of sound insulation than building from the 1930s, such as the property under consideration here. It was not until many years after the 1930s that uniform

building standards came into force. The current regulations were from 2005 and 2011 and set standards, among other things, of sound insulation.

[6] The pursuer's case was that, once the difficulties which he had experienced were brought to the attention of the defenders, this triggered an obligation under both the relevant statute and the tenancy agreement to take corrective action. The lease, which was a standard Scottish secure tenancy agreement, established duties on a landlord to keep the house "habitable, wind and water tight and in all other respects reasonably fit for human habitation". The duty to repair extended to any defect which "will significantly affect" the tenant's use of the property or its common parts. The reason these terms were relevant was that the tenancy's conditions stated explicitly at clause 5.7 that the "duty to repair includes a duty to take into account the extent to which the house falls short of the current building regulations by reason of disrepair." Schedule 4 of the Housing (Scotland) Act 2001imposed the same obligation by statute, irrespective of the explicit term in the tenancy.

[7] The pursuer's case, therefore, was that once he had brought to the defenders' notice the difficulties which the poor sound insulation was causing, they had to resolve this defect in the property. In so doing, the defenders were under both a contractual and statutory obligation to take account of the up to date building regulations. So the pursuer submitted that, in his case, they were obliged to provide an improved level of sound insulation to address the difficulties which he had repeatedly reported about sound transmission between the two flats. The pursuer had raised complaints since 2009, as confirmed by the various letters and file notes which were not in dispute. It was not until 2014, when Dumfries and Galloway Council – not the defenders – commissioned a sound engineer's report from dB Acoustics that the true extent of the problem was revealed.

[8] The inspection by Mr Barbour of dB Acoustics showed the relevant readings at very low levels. His readings of 46 and 49 were far below the minimum standards required in the up to date building regulations. Further to this, Mr Barbour's physical inspection under the floor of one of the rooms showed the displacement of ash deafening. Such a reduced depth at different points had occurred many years before, was not something which the tenant could have had any control over, and the defenders were obliged to address it once they were made aware of the difficulty.

[9] Mr Barbour had recommended the use of a modern material to supplement the existing ash deafening. This product – known as Quietex – was made from limestone chips and could provide a relatively cheap remedy to the problem. Mr Barbour's assessment was that this would cost about £180 excluding labour to install in the home. The alternative solution was a new ceiling in the flat below, though this would be significantly more disruptive and expensive (costing around £8,500).

[10] The defenders had dragged their feet in this matter. Although the pursuer had originally reported his neighbours for anti-social noise, it should have been apparent to the defenders that something more was wrong. Their own inspectors had diagnosed much of the complaint as "normal living noise" coming from downstairs. That being the case, their approach should not have been to encourage more tolerance from the pursuer towards his neighbour and her children. Instead they should have accepted that, if normal living noise caused such interference, there was a possible problem with the property itself, and should have taken appropriate steps to investigate for a defect and remedy that. At the very latest, the defender's breach of duty arose by November 2014, when their own investigation and sound testing by RMP was completed.

[11] The pursuer's final submission was that the defect caused by the poor sound insulation had significantly affected his use of the property. He had been under significant strain. His daughter, who normally had occupied the back bedroom (the room which tests revealed to have the worst level of sound insulation) had had to move out. Accordingly, the defenders were liable to the pursuer for compensation for damages. The appropriate approach to valuation was detailed in the English Court of Appeal decision of *Wallace* v *Manchester City Council* (1998) 30 HLR 111.

**Defenders' submissions**

[12] The defenders accepted that they owed a "repairing obligation" to the pursuer. That arose from both the contractual arrangements in the tenancy agreement, and by operation of the Housing (Scotland) Act 2001. However, the way the case was pled required the pursuer to prove that the property fell below the relevant standard at some point during his tenancy. In other words, he had to show that the defect of which he complained (the failure in sound insulation) *arose* during his tenancy. He had failed to do that.

[13] There were a number of other reasons why, according to the defenders, the pursuer's case should fail. The pursuer's own expert witness, David Barbour, had only tested the rear bedroom and the living room of the property. He had only inspected under the floor of the rear bedroom. That room had no flooring and no furniture in it at the time. Even if the testing had demonstrated a defect in the insulation between the rear bedroom and the equivalent room in the flat downstairs, that would only be relevant if the pursuer had proved that the noise disturbance was coming from that downstairs room. His assessment could not be said to have taken account of all of the ways in which sound may have travelled to the rear bedroom of number 102, such as through windows or walls.

[14] The noise which principally formed the basis of the pursuer's historical complaints was doors slamming and loud music, examples of anti-social behaviour. According to one of the defenders' expert witnesses, Mr Gibb, slamming doors was 'impact noise' which would not be prevented by the condition of the underfloor sound insulation, because of the ways in which 'flanking transmission' carried sound. A review of the case workers' notes produced in evidence demonstrated that it was a full six years after the pursuer began to live in the house that he brought any noise problem to the attention of the defenders. That all supported the conclusion that the difficulties he experienced came from the habits and excessive noise created by a particular neighbour, not from the sound insulation within the property.

[15] Taking the evidence of the pursuer's expert witness Mr Barbour at its highest, the pursuer had failed to prove that any perceived defect in the underfloor sound insulation had a significant effect on the perception of sound within the rooms of the flat. The lowest reading found by Mr Barbour was 46 dB in the rear bedroom. He had accepted that the addition of a carpet could raise the reading by 1 dB. Furthermore, even though he recommended the use of Quietex to fill part of the underfloor void he was unable to state with certainty what difference that was likely to make.

[16] By contrast, the defenders' expert witness Mr MacKenzie had said that the addition of furniture in the back bedroom could raise the insulation level by 2 dB. Mr Mackenzie's overall conclusion – as someone who helped to write the standards contained within the current building regulations – was that a range of 47 – 51 dB was adequate, typical of houses of that construction, and in line with similar housing throughout Scotland.

**Relevant Law**

[17] The pursuer was a tenant and the defenders were landlords under a Scottish Secure Tenancy Agreement. This agreement (the terms of which were produced at 5/1 of process) set out a number of repair obligations or duties owed by the defenders:

1) Clause 5.3 of the Agreement stated:

> "During the course of your tenancy, we will carry out repairs to keep the house in a condition which is habitable, wind and water tight and in all other respects reasonably fit for human habitation. We will carry out all such repairs within a reasonable period of becoming aware, or being notified by you, that the repairs need to be done…",

2) Clause 5.4 stated:

> "We will carry out a reasonably diligent inspection of the common parts before the tenancy begins…..We will repair any other defect we find which will significantly affect your use of the common parts, or the house, within a reasonable period", and

3) Clause 5.7 stated:

> "Our duty to repair includes a duty to take into account the extent to which the house falls short of the current building regulations by reason of disrepair or sanitary defects".

[18] The defenders owed statutory duties to the pursuer under Schedule 4 of the Housing (Scotland) Act 2001. Schedule 4 of the Act provides:

> "1.The landlord in a Scottish secure tenancy must –
>
> (a) ensure that the house is, at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation, and
> (b) keep the house in such condition throughout the tenancy…
>
> 5.(1) in determining for the purposes of paragraph 1 whether a house is fit for human habitation, regard is to be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any building regulations in force in the area…
>
> 6. In paragraph 5, "sanitary defects" includes lack of air space or of ventilation, lack of lighting, dampness, absence of adequate and readily accessible water supply or of sanitary arrangements or of other conveniences, and inadequate paving or drainage of courts, yards or passages."

**Analysis of the evidence**

***The pursuer's complaints***

[19] Although the pursuer made a number of reports to his landlords about noise from neighbours in the flat underneath, they began as complaints of anti-social behaviour and were treated as such by the defenders. The condition of the property and its soundproofing did not become the focus of his complaint until 2013. Two of the defenders' witnesses – Mr Martin Brown, a Tenancy Services Manager, and Ms Suzanne Gibson, Anti-Social Behaviour Officer, both employed by the defenders – spoke to the sequence of complaints and the documents which listed these between 2009 and 2012.

[20] In October 2013 a further complaint was made by the pursuer. The meetings regarding that and the procedures which it invoked were detailed in the notes prepared by the defenders' officers and produced at 6/9 of process; these were spoken to by Ms Gibson in her evidence. It was clear that, at an interview on 8 October 2013, the pursuer raised the matter of sound insulation. He asked the defenders to consider installing improved soundproofing. Although he had mentioned this previously (in 2012) that was when he maintained that this was necessary because of the excessive noise from his neighbours. In October 2013 his complaint was about the building itself.

[21] However, the pursuer was not entirely co-operative with the defenders in their subsequent efforts to address this complaint. His frustration at the situation was apparent. He took the view that the defenders were not advancing his complaints properly. He insisted that he did not want "antiquated" sound monitoring equipment used to test the sound levels. When Ms Gibson spoke to the downstairs neighbour (a single mother with young children), that individual complained of being "picked on" by the pursuer, and she herself moved house shortly afterwards. At a further meeting with officers of the defenders

on 31 October 2013 the pursuer again complained about the type of equipment which may be used to test soundproofing. He hinted that he may commit acts of violence towards his neighbours to force a reaction. He threw paperwork around the room. His comments and behaviour towards employees of the defenders began to cause alarm. At a further meeting in the pursuer's home on 6 November 2013 to discuss noise monitoring equipment he adopted an aggressive and threatening manner towards Ms Gibson and her colleague. As a result of this the defenders' attempts to install sound monitoring equipment did not progress.

*The sound insulation experts*

[22] The above is a summary of the evidence surrounding the pursuer's complaints. Further to that background, much of the evidence in this proof came from the technical experts on sound insulation. The pursuer complained to his local councillor on Dumfries and Galloway Council. As a result, the local authority instructed David Barbour, principal of dB Acoustics and Environmental Services to conduct sound insulation testing of the pursuer's then home at 102 Mount Vernon Road, Stranraer in August 2014. Mr Barbour provided a report (5/15 of process) dated 10 August 2014.

[23] On receipt of this report the defenders instructed their own sound insulation testing of the pursuer's home in October 2014. That resulted in a report from RMP Acoustics Energy Vibration (RMP) dated 4 November 2014 (5/5 of process). These two reports followed the only inspections carried out with the use of sound testing equipment. There were three other technical reports referred to at the proof. Gordon Gibb, principal of Gibb Architects Ltd and a member of the Royal Institute of Architects of Scotland (RIAS) expert witness panel, conducted a further survey of the property at 102 Mount Vernon Road and

produced a report dated 26 July 2018 which reviewed the earlier tests (6/1 of process). In response to this, Mr Barbour produced another report (5/16 of process), after which Mr Gibb produced his own 'addendum report' (6/3 of process).

[24] Fortunately, despite there being five expert reports in process and evidence being led from the three authors of these, much of the technical evidence was agreed in a joint minute. A further 'joint statement in relation to expert reports' was lodged by the parties at the beginning of the proof; this set out further areas of agreement and disagreement between the experts. There are two main areas where it is appropriate for me to make comment on the experts' evidence. These are (1) their sound insulation findings, and (2) their comments on the remedial work which could have been carried out to the property.

*The sound insulation findings*

[25] All of the sound testing carried out on the pursuer's home was conducted according to appropriate standards. There were some comments back and forth in the various reports about differences in the methods used by dB Acoustics and RMP, but I was satisfied that – by the time of the proof – each of the testers acknowledged the validity of the other's methodology.

[26] The testing was carried out in order to establish the degree of airborne sound insulation provided by the separating floor between the pursuer's home at number 102 and the flat below, number 100. The term "DnT,w" is the Weighted Standardized Level Difference in dB, and is used to provide the relevant rating value. The higher the DnT,w value, the better the sound insulation. The relevant results were as follows:

1) the living rooms of both properties were found to have Airborne Ratings of 49dB DnT,w (by dB Acoustics) and 50dB DnT,w (by RMP),

2) the back bedrooms of the two properties were found to have Airborne Ratings of 46dB DnT,w (by dB Acoustics) and 47dB DnT,w (by RMP),

3) the front bedrooms of the properties were not tested by dB Acoustics. They were tested by RMP and found to have an Airborne Rating of 51 dB DnT,w.

[27] It was agreed by all experts in their evidence that – by modern building standards – a rating of 47 was poor, 50 was satisfactory, and 53 was good.

[28] The only significant difference between conditions at the time of the tests was in the back bedroom of the pursuer's home, the room with the lowest rating in both reports. When dB Acoustics carried out the test in August 2014 (with a score of 46 dB) there was no furniture and no carpet on the floor. From the evidence before me I was satisfied that this could have accounted for the difference between the results found there, RMP's reading having measured at 47.

[29] The other significant finding from dB Acoustics' test was revealed when the sub-floor was inspected. As could be seen in the photographs within the report produced by Mr Barbour (at 5/15), the ash deafening material was at a low level at some points. It appeared to have been displaced at some time previously. The balance of the evidence was that this occurred during electrical re-wiring of the property, probably carried out in the 1980s, when workers needed to move this material aside to drill holes into the floor timbers to provide an access route for cables. It appeared that, on completion of the work, the loose insulation material was not pushed back into place. This left the ash deafening at a shallower depth at certain points under the floorboards of the back bedroom of the home.

[30] It was a matter of agreement among all of the expert witnesses in the case – Mr David Barbour, Mr Richard Mackenzie and Mr Gordon Gibb – that the ratings in the rear bedroom and living room of the property when tested in 2014 fell below the Building Standards Regulations of 2005 or 2011. While these regulations were not produced in

process they were referred to by all of the experts in their reports and there was no dispute between them about their content in regard to sound insulation. The evidence was that, at the time of the testing, new-build properties in Scotland had to meet a reading of 56 DnT,w. Building conversions of older properties carried out after the regulations came into force had to reach a rating of 53.

[31] However, all three experts agreed that there was no obligation on the defenders to upgrade their housing stock to meet these standards of sound insulation as a matter of course: see RMP report (5/5) at page 2, dB Acoustics' second report (5/16) at page 5, and the Gibb report (6/1) at pages 5, 7 and 12. In that last-noted report from Gordon Gibb he commented on page 12 at para 3.1.9:

> "The Scottish Housing Quality Standard (SQHS) was introduced by the Scottish Government in February 2004 with the target that all homes rented from social landlords should meet this standard by April 2015. This requires the retrospective upgrading of rented premises in certain situations. However, consideration of sound transmission between adjacent properties through party walls or floors is not covered by this legislation."

[32] The pursuer accepted that there was no obligation on the defenders to meet general updated standards of soundproofing. His proposition was that the condition of the property's sound insulation shown in the testing still amounted to a defect which required remedial action.

*What remedial action was available?*

[33] The evidence pointed to a number of features of this property which made it less able to resist the passage of sound between the flats. These were features inherent in the design and materials used in the property's construction, and were detailed in Mr Gibb's report (6/1) at page 13. These included (a) the level of ash deafening between the floor and ceiling

below, but they also included (b) the use of floor boards – with gaps between – rather than ply sheets with an unbroken membrane, (c) the internal walls which did not allow acoustic separation through the mid-floor because they were "contiguous without baffle passing through party floors", and (d) the common wall in the stairwell, which was only half a brick in thickness. Mr Gibb spoke in evidence of how these features were common in houses of the type being tested. These aspects caused 'flanking transmission', the process whereby sound travels by an indirect path, not merely on a direct route from point A to point B. These features all challenged the pursuer's assertion that the sound problem arose from the level of ash deafening. In other words, the soundproofing underneath the floorboards was only one part of the picture when it came to the causes of sound transmission from one flat to another.

[34] David Barbour, the sound expert instructed by DGC and called by the pursuer, said in evidence that a modern insulating material call Quietex could be used to fill the gaps in the space under the floorboards. Ash deafening was no longer available, but Quietex was made from limestone chips and, according to Mr Barbour, could be bought reasonably cheaply and used to support the existing ash deafening. He thought that this would cost about one hundred and eighty pounds (£180) being eighteen bags at approximately ten pounds per bag, excluding labour. He asserted that this could improve the readings by about 2 dB. Another option – though more expensive – would be the installation of a further ceiling in the flat below. This would lower the height in the rooms underneath but Mr Barbour was confident that such a system would produce a significant and noticeable difference in the sound insulation, from anything between 7 and 14 dB. The installation of such a system would cost about eight thousand five hundred pounds (£8,500). He offered the caveat that such a system would not prevent flanking transmission.

[35] Mr Mackenzie and Mr Gibb did not share the confidence of David Barbour that the use of Quietex would improve the soundproofing to a significant extent. Mr Mackenzie noted that installation of a new ceiling would be less disruptive than opening floorboards to fill the spaces. He also made the observation that a new ceiling would reduce the height of the rooms in the flat downstairs and would not eliminate flanking transmission. Mr Gibb opined that the remedial works required to bring both flats (100 and 102) up to modern standards would be extensive. As well as a new ceiling system, various other openings (such as fireplaces) would have to be sealed, and new stud partition walls would be needed. He detailed the works involved in his report (6/1) at pages 17 and 18, and put the cost for both flats at sixty thousand pounds (£60,000).

**Decision**

***Did the defenders' duties and obligations require them to improve the soundproofing?***

[36] The fundamental questions I have had to decide in this case were (1) whether the report by the pursuer of his specific difficulties with noise from his neighbours amounted to notification of a 'defect', (2) whether the defenders consequently required to take action which included the type of remedial soundproofing described above, and (3) whether the defenders' failure to take such steps while the pursuer was their tenant entitled him to an award of damages.

[37] It was apparent from the evidence that the ratings found within the house at 102 Mount Vernon Road were typical of that found in many similar types of properties. And it was clear that those levels of soundproofing within the home in 2014 were lower than the standards required in new-build properties, or in new conversions of older dwellings.

[38] For the pursuer to succeed in this claim he had to prove that the defenders had breached their contractual or statutory obligations and duties to him as a tenant. I was satisfied that the pursuer sought to give notice of a problem with the building in October 2013 when his regular complaints about neighbour noise focussed for the first time on the condition of the existing soundproofing within the home. The subsequent un-co-operative and hostile manner which he adopted when the defenders tried to investigate this further did not eliminate the existence of a defect, but it delayed the point at which there was an obligation on the defenders to take any necessary remedial action. This much was conceded by the pursuer's solicitor, who did not argue that the obligation arose in October 2013. He contended that some action should reasonably have been taken by the defenders once they were in receipt of the dB Acoustics report. It was accepted that the defenders responded appropriately to that in the first instance by instructing their own sound testing report within a reasonable period of time. The pursuer's argument was that, by November 2014 (when the report form RMP was received), the repair obligation was triggered, and the failure to carry out remedial works from that point gave rise to the claim for damages.

[39] I should observe that this starting point for the repair obligation was supported by the authorities cited. *O'Brien* v *Robinson* [1973] AC (HL) 912 was a House of Lords decision dealing with a claim by a tenant for compensation from the landlord of a flat because of a ceiling which collapsed. The court unanimously dismissed the tenant's appeal, and took the opportunity to review a century of common law decisions regarding a landlord's repair obligation. After considering a long line of authorities Lord Diplock concluded as follows (at page 930):

> "[This] appeal must fail unless the tenant can show that before the ceiling fell the landlord had information about the existence of a defect in the ceiling such as would put him on inquiry as to whether works of repair to it were needed."

[40] I did not accept the defenders' argument that only defects which were *caused* during the tenancy gave rise to the defenders' obligations and duties. It appeared to me that the 'repairing obligation' extended to matters which came to light during the tenancy, even if the likely cause pre-dated it. If it were otherwise, the landlords could escape responsibility merely by demonstrating that their own failures were longstanding, and that the particular problem occurred during occupation by a previous tenant, even if the symptoms only became apparent to the later tenant. The House of Lords *O'Brien* case cited above supported the view that such latent defects can give rise to a claim. The essential point in a case involving a reported fault is when the landlord was informed of the defect.

[41] Nor did I accept the defenders' submission that, because the ash deafening had been inspected in only one room (the rear bedroom), the pursuer had not proved that this applied throughout his home. Since I found that the ash deafening had been displaced by workers during the installation of electrical re-wiring, it appeared unlikely that their failure to re-spread that material on conclusion of the work was confined to only one room. It was the case that the back bedroom had the lowest readings when the testing was conducted, but the evidence was that the sound insulation readings were affected by a variety of features, of which the ash deafening was only one.

[42] However, the references to building regulation standards in the tenancy agreement between the parties and in Schedule 4 of the Housing (Scotland) Act 2001 (both cited above) did not impose a 'stand-alone' obligation on the defenders to meet such standards. The tenancy agreement required the defenders to "take into account" the current building standards, while the statutory obligation demanded that the defenders "have regard" to

them, but those requirements applied to the defenders only when repairing any defect of which they had been notified.

[43] The pursuer's contention in relation to such 'defect' was not that the level of sound insulation failed the test of being wind or water tight, or that it was a "sanitary defect" (as defined in Schedule 4.6 above). His submission was that the sound level readings identified in 2014 meant that the house was not "reasonably fit for human habitation" (a phrase which appears in both Schedule 4 and the tenancy agreement). His argument was, therefore, that the house had fallen below that threshold of fitness and that, accordingly, the defenders required to have regard to current building standards when correcting this. The alternative basis for his claim was the obligation in clause 5.4 of the lease, namely:

> "We will repair any other defect we find which will *significantly affect your use* of the common parts, or the house, within a reasonable period." [my emphasis]

[44] My conclusion from the evidence was that the levels of sound insulation in 102 Mount Vernon Road could not be regarded as such a defect. The pursuer lived in the property for six years (from 2003 until July 2009) without any complaint about noise. From July 2009 until 2013 his complaints were about the excessive noise and behaviour of a particular neighbour downstairs. Although employees of the defenders sometimes characterized this as "normal living noise" in their discussions with the pursuer, the matter at that stage was being treated by the defenders – quite properly – as a dispute between two of their tenants. Their approach at that time was to encourage each of the tenants to have tolerance and respect for their immediate neighbours. It was in October 2013 that the pursuer made the more specific complaint about the general levels of soundproofing in the building. This sparked the investigations and sound testing.

[45] While all the experts agreed that readings of 47 dB were "poor", this assessment was only in comparison to modern homes. As I have already noted, all those experts agreed that there was no obligation for older housing stock to be brought up to such levels of soundproofing. When assessing the overall standard of sound insulation in the property, the defenders' technical experts (Mr Mackenzie and Mr Gibb) described the levels respectively as "typical" and "actually rather good" for that type of property. Even the pursuer's expert Mr Barbour, while making various "recommendations" about the installation of a new ceiling below or the use of a modern material to fill the gap under the floorboards, did not express a concluded view that the levels of sound insulation experienced by the pursuer amounted to a defect, or made the house unfit for human habitation.

[46] The position was perhaps best summed up by Mr Mackenzie from RMP, the expert who advised many housebuilding companies and the Scottish Government on appropriate standards of sound insulation. He stated that, for public sector landlords with pre-war housing stock, the provision of up to date standards of sound insulation was "an aspiration, not an obligation".

[47] Accordingly, my conclusion is that the defenders were not in breach of their contractual or statutory obligations towards the pursuer. His action must therefore fail. Since I have decided that the pursuer's claim cannot be sustained on liability, it follows that no quantum has to be assessed.

[48] This was a proof before answer. I have repelled the preliminary plea of the defenders as I did not accept that the pursuer's case was lacking in relevancy or specification. However, I have sustained the defenders' pleas on the merits of the defence. The pursuer was legally aided, so I have assigned a hearing on expenses.