FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/19UJ/LBC/2019/0042
Property:	29 Quayside Court, 48 Commercial Road, Weymouth, Dorset, DT4 8AQ
Applicant:	Quayside (Weymouth) Management Company Limited
Representative:	Ms K Hill
Respondent:	Ken and Jan Stephens
Representative:	Mr Stephens
Type of Application:	Section 168 Commonhold and Leasehold Reform Act 2002 (Breach of Covenant)
Tribunal Members:	Judge A Cresswell (Chairman) Mr M J F Donaldson FRICS MCIArb MAE Judge J Dobson
Date and venue of Hearing:	12 February 2020 in Weymouth
Date of Decision:	18 February 2020

DECISION

© CROWN COPYRIGHT 2020

The Application

1. On 23 September 2019, the Applicant, the owner of the freehold interest in 29 Quayside Court, 48 Commercial Road, Weymouth, Dorset DT4 8AQ, made an application to the Tribunal claiming breach by the Respondent of a covenant in the Lease. The Tribunal has considered only the breach claimed by the Applicant to have occurred.

Summary Decision

2. The Tribunal has determined that the landlord has demonstrated that there has been a breach of covenant.
3. The Tribunal makes no order under Section 20C Landlord and Tenant Act 1985 or Commonhold and Leasehold Reform Act 2002 Schedule 11, Paragraph 5A.

Inspection and Description of Property

4. The Tribunal inspected the property on 12 February 2020 at 1000. Present at that time were the Respondents, Mr and Mrs Stephens. The property in question comprises a third-floor flat with an entrance hall leading to 2 bedrooms, 2 bathrooms, a kitchen and a lounge diner, with a staircase from the lounge diner leading up to a mezzanine study and a small external balcony beyond the kitchen. The Tribunal noted that the bedrooms, stairs and mezzanine study were all carpeted, the bathrooms had tiled floors and the hall, lounge diner and kitchen all had maple wooden flooring. There were 2 rugs in the hall, covering much of the floor surface and 3 rugs in the lounge diner covering a good part of the flooring, but there was no rug cover near the door to the hall. The Tribunal also inspected the flat below the property, which was flat 27, when Mr and Mrs Costello were present.

Directions

5. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
6. This determination is made in the light of the documentation submitted in response to those directions and the evidence and oral representations received at the hearing. The Tribunal heard evidence from Ms Katherine Hill, a director of Temple Hill Property Management Limited (the property's managing agent), from Mr Martin Figg, a director of the Applicant company, and from Mr and Mrs Stephens, the Respondents. At the conclusion of the hearing, the parties confirmed to the Tribunal that they had been able to say all that they wished to say.

The Law

7. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.
8. A covenant is usually regarded as being a promise that something shall or shall not be done or that a certain state of facts exists. Section 168(1) and (2) Commonhold and Leasehold Reform Act 2002 provide that a landlord may not serve a notice under Section 146 Law of Property Act 1925 in respect of a breach by a

© CROWN COPYRIGHT 2020

tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Tribunal under Section 168(4) of the 2002 Act that the breach has occurred.

9. The Tribunal assesses whether there has been a breach on the balance of probabilities (**Vanezis and another v Ozkoc and others** [2018] All ER(D) 52).

10. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to that question and cannot encompass claims outside that question, nor can it encompass a counterclaim by the Respondent; an application under Section 168(4) can be made only by a landlord.

11. The issue of whether there is a breach of a covenant in a lease does not require personal fault unless the lease says so: **Kensington & Chelsea v Simmonds** (1997) 29 HLR 507. The extent of the tenant's personal blame, however, is a relevant consideration in determining whether or not it is reasonable to make an order for possession: **Portsmouth City Council v Bryant** (2000) 32 H.L.R. 906 CA, but that would be a matter for the Court.

12. **Teign Housing v Lane** [2018] EWHC 40 (QB): Although a tenant did not consider that he had breached the terms of his tenancy, he had. His genuine belief that he had permission did not mean that there had not been a breach. The trial judge had wrongly approached the issue of breach and therefore the matter was remitted for retrial. The judge had been entitled to find that the tenant believed he had been given permission to install CCTV cameras, but believing that his actions were authorised was not a defence to a claim for a breach of the tenancy agreement clause preventing alterations without written permission, *Kensington and Chelsea RLBC v Simmonds [1996] 3 F.C.R. 246* followed.

13. The Tribunal does have jurisdiction to determine whether the landlord has waived the right to assert, or is estopped from asserting, that a breach has occurred, but does not have jurisdiction to consider the question of waiver necessary when deciding whether a landlord has waived the right to forfeit a lease (HH Judge Huskinson in **Swanston Grange Management Limited v Langley- Essex** (LRX/12/2007)). See further below.

14. In **Vine Housing Cooperative Ltd v Smith** (2015) UKUT 0501 (LC), HH Judge Gerald said this: *The question before the F-tT .... was the straightforward question of whether or not there had been a breach of covenant. What happens subsequent to that determination is partly in the gift of the landlord, namely, whether or not a section 146 notice should be issued and then whether or not possession proceedings should be issued before the county court. It is also partly in the gift of the county court namely whether or not, if and when the application for possession comes before the judge, possession should be granted or the forfeiture relieved. These events are of no concern to, and indeed are pure conjection and speculation by, the F-tT. Indeed the motivations behind the making of applications, provided properly made in the sense that they raise the question of whether or not there had been a breach of covenant of a lease, are of no concern to the F-tT. The whole purpose of an application under section 168, however, is leave those matters to the landlord and then the county court, sure in the knowledge that the F-tT has determined that there has been breach.*

15. By consenting to the addition of wooden floors in contravention of a covenant in the lease, a landlord precluded itself from insisting on carpeting once the work had been carried out: **Faidi v Elliot Corporation (**2012) EWCA Civ

© CROWN COPYRIGHT 2020

287. Where a landlord does give a licence to a tenant to act in breach of an absolute covenant, the landlord may be liable to other tenants in damages: ***Duval v 11-13 Randolph Crescent Limited*** *(2018) EWCA Civ 2298.*

16. Where a party does bear the burden of proof:
"*It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law… It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out…: the burden of proof is a last, not a first, resort.*" (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

Ownership

17. The Applicant is the owner of the freehold of the property. The Respondents are the owner of the leasehold interest in the flat.

The Lease

18. The lease before the tribunal is a lease dated 31 March 1999, which was made between Trencherwood Homes Limited as lessor, the Applicant as Management Company and Malcolm Larkin and Mary Elizabeth Larkin as lessees.

19. The Third Schedule of the lease contains covenants by the lessee. Paragraph 1 says "*The floors of all rooms of the Flat (except bathroom kitchen and W.C.) shall be suitably carpeted and all reasonable precaution taken (including the placing of rubber or cork insulators) to deaden the sound of sewing machines dishwashers washing machines or other household machines radios record players television sets pianos or other musical instruments.*"

20. Ms Hill confirmed to the Tribunal that this was the sole covenant said by the Applicant to have been breached by the Respondents.

21. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).

22. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:

> 15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line

© CROWN COPYRIGHT 2020

Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

Consideration and Determination of Breach of Covenant
The Third Schedule Paragraph 1
The Applicant

23. The Applicant considers that the floor should be fully covered with a fitted carpet and underlay. Ms Hill indicated that it was less easy to monitor compliance if rugs were used as these could be easily removed.
24. Whilst the lease does not forbid any particular sub-flooring materials, it does require that all areas (except bathroom, kitchen and WC) shall be suitably carpeted. The word “carpeted” as opposed to “carpeting” amplifies the contention that the entire specified area should be carpeted, not just partial carpeting with loose rugs.
25. Other flats in the development where there had been hard floors had now had carpeting fitted.

The Respondents

26. The Respondents contend that the top floor flats of the development are of a significantly different design to the 26 flats on the lower floors. The area in question is an open-plan kitchen/diner, which the Applicant wrongly refers to as a lounge/dining area with a separate kitchen. The plan used by the Applicant is a crudely adapted plan of the flats below.
27. The underlying flooring complained of has been in situ for 20 years. There was wood flooring in the show home and details of contractors displayed in the show apartment. They used the same contractor to install maple flooring in 1999 when they purchased the property.
28. There has been a complaint only from Flat 27. They are 72 and 71-years old and consider they live quietly and unobtrusively, there being no issues of complaint in the previous 17 years.
29. In August 2017, the occupant of Flat 27 complained when their 3-year old grandson had a “meltdown” and banged his heels against the newel post at the bottom of the stairs.
30. Subsequently the occupant of Flat 27 complained once about a loud banging noise, but had to accept that the noise was coming from the next block.
31. The Respondents accept that moving furniture on their roof terrace will cause noise.
32. Their lounge is on a mezzanine, is fully carpeted and is approached by fully carpeted stairs from the kitchen/diner.
33. The kitchen or kitchen/diner has a very small galley, so that many activities such as food preparation are carried out at the kitchen table and other parts of the room.
34. Late in 2018, the Respondents added more loose-laid carpet in the kitchen/diner, but Mr Clive Clifford of the Applicant company insisted that only fitted carpet with underlay was acceptable. There have been no complaints since the addition of the loose-laid carpet. The Respondents believe that this carpeting is “suitable”. It achieves their objectives of harmonising the whole room whilst also allaying the fear that a spillage might ruin a large carpet. It

© CROWN COPYRIGHT 2020

deadens their footsteps and other surface contact. In combination with the expanded-polystyrene sound-insulating layer under the whole floor, it is effective in absorbing reflected sound.

35. The attitude of the Applicant has changed over time. At an owners' meeting on 10 September 2001 after the Applicant became freeholder, it was noted in respect of wooden floors "*... enforce the removal or carpeting of them*", which suggested that the wooden floors did not require removal. Although not minuted, it was explicitly stated by the Secretary in answer to a question from the floor, that rugs and loose-laid carpets could be placed on top of hard floors to cut the noise down to acceptable levels.

36. In its letter of 4 December 2018, the Applicant said "*as an alternative it might be acceptable (to residents living below) to fit soft-surfaced covering with sound insulation underneath*". In its letter of 19 March 2019, the Applicant said "*no alternative covering is acceptable*".

37. If the lease was meant to require "fitted carpets" then it would have said so. "Suitably carpeted" is clearly intended not to be overly prescriptive and to allow more than one approach to achieve the desired affect.

The Tribunal

38. The Tribunal notes that the Respondents regard the mezzanine floor as their lounge and the lounge diner as their kitchen diner. The Tribunal has, however, to look at the Lease to see what is meant by the relevant descriptions of the rooms. The Tribunal was able to examine the plan attached to the Lease. From that plan, it could see that letters were printed within the various rooms. Of the rooms in question here, there were 2 separate sets of letters. Where the kitchen could be found in both flats 29 and 27 was the letter "k" and where the lounge area in flat 27 and the lounge diner area in flat 29 could be found were the letters "l/d". Both parties accepted that "k" meant kitchen and "l/d" meant lounge diner. Mr Stephens accepted that "k" meant kitchen and that "l/d" did not mean kitchen; it was the first time he had spotted that the letters were "l/d".

39. It was common sense, in any event, that whilst the kitchen and bathroom areas would be allowed hard floors to cope with the presence of water, all other areas could be differentiated. The Tribunal was told by Mr Figg and noted that the hard area floors were built above each other as part of the planning of the development.

40. The Tribunal has followed the guidance of the Supreme Court in **Arnold v Britton** and others when considering the words of the lease in this case.

41. The ordinary meaning of "*carpet*", when used as a verb, taken from the Oxford English Dictionary, is "*cover with a carpet*".

42. The word "*suitably*" must have a meaning. Here, the Tribunal looks, as guided by the Supreme Court, to the question of the overall purpose of the clause of the lease and sees that it is related to the reduction of noise. Indeed, Mr Stephens said in evidence that he accepted that the purpose of the covenant was to deaden noise and that he took it that floor covering would be suitable when it was not a nuisance to neighbours. The floors cannot be suitably carpeted where they are not completely carpeted because this would offend both the meaning of the word "*carpeted*" and the purpose of the covenant too.

43. The Tribunal finds, accordingly, that suitably carpeted has the meaning that the lounge diner and hall floors (the only 2 floors in issue here) should be covered by carpet. They are not covered by carpet, only partially covered, so that there is a breach of covenant.

44. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has been a breach of paragraph 1 of the Third Schedule of the Lease.

© CROWN COPYRIGHT 2020

45. The Tribunal can well understand the frustration of the Respondents as the attention to their flooring was only applied by the Applicant from 2000/01, when it became the freeholder, despite their having had the floors laid in 1999. The fact remains, however, that the covenant was there to protect other tenants from noise and was always to be met by the Respondents, never having been waived by the freeholder. The Tribunal also appreciated that the Applicant has not always been consistent in the message it has given about what would be acceptable floor covering, but that lack of consistency has not acted as any form of waiver.
46. The Tribunal would also like to recognise the obvious honesty of the case put forward by the Respondents and note too that the case for the Applicant was not wholly consistent, with Ms Hill varying her evidence in relation to a number of issues.

Section 20c and Paragraph 5A Application The Respondents have made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Applicant's costs incurred in these proceedings.

47. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a … … residential property tribunal, ….are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(3) The … tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002 Schedule 11

Paragraph 5A Limitation of administration charges: costs of proceedings

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

© CROWN COPYRIGHT 2020

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal

48. The Tribunal first examined the lease to determine whether the Applicant is able to recover its costs via the Service Charge in accordance with the lease. The Tribunal finds that the lease does permit the recovery of costs by way of Service Charge.

49. In considering an application under Section 20C, the Tribunal has a wide discretion, having regard to all relevant circumstances. It follows a similar course when considering administration charges. *"Its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them." "In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise."* (**Tenants of Langford Court v Doren Ltd** (LRX/37/2000).

50. *"An order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances." "The scope of the order which may be made under section 20C is constrained by the terms of the application seeking that order...; "The FTT does not have jurisdiction to make an order in favour of any person who has neither made an application of their own under section 20C or been specified in an application made by someone else". (**SCMLLA (Freehold) Limited** (2014) UKUT 0058 (LC)). "In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make."* (**Conway v Jam Factory Freehold Limited** (2013) UKUT 0592 (LC)).

51. The Respondents, in seeking an order under Section 20C, argued that negotiation had not been exhausted, the Applicant appeared to be relying upon regulations not shared with them and there had been no exploration of alternative dispute resolution. Ms Hill indicated her own view that she was not aware of any continuing dialogue

52. Because the Applicant appears to have been led to the Tribunal by the unwillingness of the Respondents to recognise the requirement for the carpeting of the floors in issue and having regard to the time spent already in dialogue, the Tribunal does not allow the Respondents' application under Section 20c of the Landlord and Tenant Act 1985. The Tribunal notes that the Applicant has successfully argued that the Respondents were acting in breach of covenant. The Tribunal refuses for that reason also the application under Paragraph 5A and makes no order extinguishing any liability of the Applicant's to pay litigation costs incurred by the Respondent. In making both findings, however, the Tribunal also notes the statement given to it by Mr Figg that the Applicant will not

© CROWN COPYRIGHT 2020

seek to recover its costs associated with these proceedings from the Respondents.

Judge A Cresswell

APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

© CROWN COPYRIGHT 2020