FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LBC/2020/0035**
HMCTS code (paper, video, audio)	**:**	**V - Video**
Property	**:**	**Flat 10, 21 Hyde Park Square, London W2 2JR**
Applicant	**:**	**21, Hyde Park Square Freehold Ltd.**
Representative	**:**	**Mr. David Moore of Rodgers & Burton Solicitors**
Respondent	**:**	**(1) Mr. Sachin Gangadhar Kerur** **(2) Ms. Michelle Elizabeth Kerur**
Representative	**:**	**Unrepresented**
Type of Application	**:**	**For the determination of alleged breaches of covenant**
Tribunal Members	**:**	**Tribunal Judge Stuart Walker (Chairman)** **Mr. Stephen Mason BSc FRICS**
Date and venue of Hearing	**:**	**7 December 2020 – video hearing**
Date of Decision	**:**	**30 December 2020**

DECISION

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. A face-to-face hearing was not

held because it was not practicable and all issues could be determined in a remote hearing. The Tribunal's determination is set out below.

Mr. Moore commented that he was not entirely happy with the full video hearing system as some of the controls were not clear. He considered that the CVP system was easier to use. However, once he got going things were fine he said. Ms. Kerur was content with the process.

The Tribunal makes the following determinations.

(1) The Respondents have not breached any of the terms of their lease by constructing a trellis and a platform in the parapet gutter to the property and placing artificial plants on it.

(2) The Respondents have not breached the requirements of regulation 3 of the third schedule of the lease by laying wooden flooring in the bedrooms of the property as this does not amount to an act or thing which in itself is a nuisance or annoyance to any other tenant or occupier.

(3) The Respondents have breached regulation 10 of the third schedule of the lease by removing the carpets from the bedrooms of the property and replacing them with wooden flooring without the approval of the Applicant or of the Company as defined in the lease.

Reasons

The Application

1. The Applicant seeks a number of determinations pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that breaches of covenant have occurred.

2. The application was made at some time before 22 September 2020 (the application form is not itself dated). Breaches of five different clauses in the lease were identified. The particulars of those breaches which were pursued at the hearing are set out in what follows. In summary, they concern allegations of erecting platforms and trellising on which artificial plants have been placed and the installation of wooden flooring in the bedrooms.

3. Directions were issued on 22 September 2020. They provided for a remote video hearing. Under the directions both parties were required to provide a digital indexed and paginated bundle of documents. Bundles from both parties were before the Tribunal. As is often the case, the numbering of the electronic bundles and that of the hard copies do not align. The Applicant's electronic bundle was in two parts, the hard copy was a single bundle numbering 129 pages, together with 5 photographs, taking the total number of pages to 134.

References to page numbers in what follows are to the hard copy of this bundle unless otherwise stated. The Respondent produced an indexed bundle of 116 pages together with written submissions of 11 pages. References to documents in the Respondent's bundle will again be to the hard copy page number and will have the prefix "R".

4. The relevant legal provisions are set out in the Appendix to this decision. The Tribunal bore in mind throughout its deliberations that the burden was on the Applicant to show that breaches of covenant had occurred on the balance of probabilities.

The Hearing

5. The Applicant was represented by Mr. Moore of Rodgers & Burton Solicitors. Ms. Kerur, the Second Respondent, appeared in person. Also present were Mr. T. Pearce, the Applicant's surveyor, and Ms. D. Laren one of the Applicant's directors.

6. Neither party requested an inspection, and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The Background

7. The property which is the subject of this application is a fourth-floor three-bedroomed flat in a purpose-built block which comprises about 20 flats.

The Lease

8. By a lease dated 8 January 2007 made between the Applicant on the one part and Bryval Properties Ltd. on the other part the property was demised for a term of 999 years from 25 December 2004 (pages 19 – 58). The Respondents became the registered proprietors of the lease on 2 October 2019 (page 65).

9. Other than the specific clauses which the Applicant alleged had been breached, there were no issues as to the substance or contents of the lease. The specific clauses in issue are set out in what follows.

The Issues

10. The issues in this case centre on two items of work which it is not disputed that the Respondents carried out at the property. Firstly, they attached some wooden trellising to the inward facing side of a parapet wall and also placed timber bearers over a gutter between this parapet wall and the window ledges of the property on which they had placed a number of artificial plants in pots. This can be seen at pages 130 to 134. No evidence was given to the Tribunal to explain which parts of the building drained into and through this parapet gutter.

11. The second dispute concerned the placing of wooden flooring in the front bedrooms of the property.

12. The Tribunal considered the alleged breaches of the lease in turn as follows.

The Trellising

13. There was no dispute that these works had been done. The Respondent's primary contention, and the one first considered by the Tribunal, was that what had been done was not in breach of the terms of the lease.

The Applicant's case

14. Although reference was made in the application to other terms in the lease, at the hearing Mr. Moore made it clear that the Applicant only relied on one aspect of the lease which, it was alleged, had been breached.

15. By clause 5.21 of the lease (page 31) the Respondents covenanted to observe and perform the regulations set out in the Third Schedule of the lease. The Applicant's case was that there was a breach of regulation 5. This states as follows;

> "*Not to place or leave any edible material nor to place any flower box or pot or other articles on any balcony window ledge or outside any window or door on or in the Common Parts*"(page 48).

16. Mr. Moore made it clear that the Applicant's primary case depended on the parapet gutter and wall forming part of the Common Parts as defined in the lease. In the alternative he argued that this regulation should be read so that the term "*on or in the Common Parts"* did not qualify the prohibition on placing articles on any balcony or window ledge. In other words, the regulation placed an absolute prohibition on placing articles on any balcony or window ledge whether within the demise or not.

17. Mr. Moore referred us to the definitions in the lease. The demise is defined in clause 2.8 of the lease by reference to Part 1 of the First Schedule (page 22). This Schedule provides that the demised premises do not include the external or structural walls other than plastered surfaces expressly included in the demise (para 2.2) nor do they include the structural parts and the railings of any balconies (para 2.3) nor the windows or window frames (para 2.5) – see page 39. Mr. Moore argued that the demise ended at the windows of the flat and that the gutter which lay beyond those windows was not part of the demise. The parapet gutter, he contended, formed part of the retained property as defined in clause 2.10 of the lease (page 22). This defines the retained property as all parts of the Building not let or intended to be let and includes the Common Parts, "*such parts of the building including …… those parts of the walls … not within the flats in the Building*" and the windows and window frames.

18. Mr. Moore referred the Tribunal to clause 2.9 of the lease which defines the Common Parts as follows;

> "*the footpaths forecourts halls passageways staircases lifts landings and any other areas in the Building which are from time to time during the Term provided by the Lessor for use in common by the lessees and occupiers of the Building and all persons expressly or by implication authorised by them*" (page 22).

He contended that the parapet gutter to the Respondents' flat fell within this definition.

The Respondents' Case

19. The Respondents' case was a simple one, namely that regulation 5 applied only to the Common Parts and that the parapet gutter was not within the Common Parts. In the alternative, it was also argued that the erection of the trellis had been consented to by the Applicant.

The Tribunal's Decision

20. The Tribunal concluded that the natural meaning of the words in regulation 5 was that it only prohibited placing articles on or in the Common Parts. It clearly qualifies the references to placing articles "*outside any window or door*" as the phrase is immediately followed by "*on or in the Common Parts*". In the Tribunal's judgment, the placing of the word "or" between "*any balcony window ledge*" and what follows is not to distinguish between those parts which must be in the Common Parts – ie windows and doors – and those which do not – ie balconies and window ledges. Rather it is there to distinguish between placing items **on** balconies and ledges and placing items **outside** windows and doors. The Tribunal concluded that the qualification applied to the whole of the regulation.

21. This interpretation also avoids what would otherwise be the rather surprising conclusion that the lease created an absolute prohibition on placing anything on any window ledge or balcony in the property.

22. Having reached this conclusion, it followed that the Applicant could only succeed if they could show on the balance of probabilities that the parapet gutter was indeed part of the Common Parts.

23. It was clear from the terms of the lease that the retained parts of the building were more extensive than the Common Parts alone. Therefore, whilst it may well be that the parapet gutter forms part of the retained property (a matter which it was not necessary for the Tribunal to determine) it does not follow that it forms part of the Common Parts. To do so it must be an area of the building which has been provided by the lessor for use in common by lessees of the building.

24. The Tribunal was not satisfied that the Applicant had established that that was the case. The photographs (pages 130 to 134) clearly show a gutter which is only accessible through the windows of the property and the Tribunal accepted the Respondents' contention to that effect. It was not suggested by the Applicant that any other lessees in fact had access to this gutter nor was it explained just how it was provided for the common use of the various tenants in the property.

25. In the absence of any such explanation the Tribunal concluded that the parapet gutter was not part of the Common Parts. It followed that what the Respondents had done was not a breach of the terms of the lease.

26. Having reached that conclusion, it was not necessary for the Tribunal to determine whether or not the Applicant had consented to the erection of the

trellis and thereby waived the covenant relied on. However, had it been required to do so it would have concluded that the covenant had not been waived.

The Bedroom Floors

The Applicant's case

27. There was no doubt that the Respondents had replaced previously existing carpet in the bedrooms in the property with wooden flooring. On behalf of the Applicant Mr. Moore argued that this was in breach of two of the regulations contained in the third schedule of the lease. The first, regulation 3, provided as follows;

> "*Not to do in the Premises any act or thing which shall be a nuisance or annoyance to the Lessor or to any tenant or occupier of the Building or any premises in the neighbourhood*"

The second, regulation 10, provided as follows;

> "*To cover all the floors of the Flat with carpet and underfelt or other material approved by the Company in its absolute discretion provided that the Lessee shall not be obliged to cover the floors of the hall bathrooms and kitchen in the Flat so long as they remain covered with any tiles laid by the Lessor (or its predecessor in title) prior to the grant of the Lease and provided that this clause shall not apply to any floor where there is no other flat or part of any other flat directly below the floor concerned*" (page 49)

28. The Applicant's case was that the placing of a wooden floor in the bedrooms had caused a nuisance to the occupiers of the flat below, from whom complaints had been received. Reliance was placed on an e-mail from the tenant of flat 7 (page 125). In addition, their case was that the flooring was no longer carpet as required by regulation 10 and that no approval had been given for any other material.

29. With regard to regulation 2 the Tribunal asked Mr. Moore what he considered was the act or thing which the Respondents had done which had caused a nuisance. He accepted that the initial failure to cover the floor was not itself an act of nuisance, but that continuing to leave the wooden flooring in place did amount to an act of nuisance as it resulted in noise being transmitted to the flat below. He also made it clear that he relied more heavily on regulation 10 than on regulation 2. He accepted that there was no witness statement from the downstairs tenant.

30. With regard to the question of consent, Mr. Moore argued that this simply had not been given and he relied on an e-mail from Mr. McKeith the property manager that he was not made aware that the carpets were being removed and wooden flooring fitted (page 121)

The Respondents' Case

31. This is set out in paragraphs 3.23 to 3.35 of the Respondents' statement of case. It can be summarised as follows. Firstly, consent had been obtained for wooden flooring in the living room which was already present (page R5). Secondly, wooden flooring is present in bedrooms in other flats throughout the building. Thirdly, the new flooring was installed to address the problem of noise being

caused by loose floorboards and an absence of insulation under the original carpet and that the new flooring was better insulated than that which was there before. They also argued that the new flooring was undertaken with the full knowledge of the Applicant's representative who did not suggest that further consent was required. They argued that there had only been one complaint of noise caused by lack of carpets and that following this the Applicant had agreed to allow the wooden flooring to be retained so long as it was covered with rugs (page R47). This amounted to ongoing consent and there was no basis for withdrawing it. In the course of oral argument Ms. Kerur argued that the placing of the wooden floor in the bedroom did not amount to an action which caused a nuisance. However, she accepted that in respect of regulation 10 there would be a breach apart from the fact, as she claimed, that the Applicant had given consent for the flooring to be put down.

The Tribunal's Decision

32. The Tribunal were not satisfied on the balance of probabilities that there had been a breach of regulation 3 of Schedule 3. This was because it was not satisfied that the placing of wooden floors in the bedrooms amounted to doing an act or a thing which itself caused a nuisance.

33. With regard to regulation 10, the Tribunal accepted that consent had been given in the past for other wooden floors in the property. That, however, was irrelevant, as was the nature of the flooring in other flats and also the issue of whether or not what was put down was better or worse than the carpets which it replaced.

34. There was no doubt that the Respondents had removed carpet which was previously in place, so the bedroom floors were no longer covered with carpet and underfelt as required by regulation 10. The only real question was one of consent. This was relevant in two ways. The first was whether the new flooring had been approved within the meaning of regulation 10. The second was whether the Applicant had waived the covenant itself. To establish the latter the Respondents would need to show that the Applicant had given a clear indication that the covenant was not enforceable against the Respondents.

35. For approval of a floor covering to have been given under the terms of the lease it must have been given by the Company. This is defined in the lease as being a different company from the Applicant – namely 21, Hyde Park Square Ltd. (page 20). There is no document originating from the Company which shows that the wooden flooring was approved before it was laid. On the contrary, an e-mail from Terry Pearce, the Applicant's surveyor, to the Respondents states that the installation of the floors had not been disclosed to him and if it had been, he would have approached the directors in relation to a written approval being given (page R24). Although the Respondents sought to rely on communications between themselves and their builder, these too suggested that no consent had been given. Thus, at page R28 there is a message sent by the First Respondent to their builder stating that if asked by the building manager about the flooring he is to say that it was done to fix a source of noise – notably it does not say anything about having already been granted consent to lay the new floor. Neither does the Respondent's written response to the Applicant's letter before action make any mention of consent having been

obtained for the new flooring (page R35). The Tribunal would have expected this response to have mentioned the granting of consent if it had in fact been given.

36. Bearing this in mind the Tribunal was satisfied that at the time the new flooring was put down in the property the Respondents had not obtained approval as required by regulation 10. For the same reasons it was also not satisfied that the Applicant had given any kind of indication that the covenant would not be enforceable. Even if, which the Tribunal did not accept, the Applicant had been aware that the flooring was being laid, the failure to act immediately did not amount to a waiver of this covenant.

37. The Tribunal was, therefore, satisfied that the Respondents breached regulation 10 of the third schedule the lease by laying wooden flooring in the bedrooms of the property. That is sufficient for the Applicant to succeed in this part of their application.

38. The Tribunal was not satisfied that what followed amounted to the grant of retrospective consent. On 23 January 2020 the Applicant's solicitor sent a letter before action to the Respondents warning of Tribunal and thereafter forfeiture proceedings and requiring the flooring to be removed (pages R31-32). Following the Respondents' reply, the Applicant replied on 31 January 2020 to the effect that the Respondents would not be asked to lay carpet at that stage, but if there were noise complaints then this would be required (page R37). The Respondents acknowledged this as a way forward in resolving their dispute with the Applicant (page R39). Then, following complaints of noise made by the tenant of flat 7 on 7 February 2020 the Applicant required carpeting to be installed by 21 February 2020 (page R41). Following further correspondence the Applicant then, on 18 February 2020 stated that permission would be given for the laying of extra thick full coverage rugs in both bedrooms but added that if this did not resolve the noise issues they would be required to reinstate fitted carpets (page R47).

39. It was clear to the Tribunal that what was happening was an attempt to settle the impending proceedings between the parties in a way which was as acceptable to both parties as possible. It certainly was not the case that the Applicant was relinquishing their rights under the terms of the lease. This did not, in the view of the Tribunal, alter its conclusion that the Respondents had acted in breach of the terms of the lease by laying wooden flooring in the bedrooms in the first place.

Name: Tribunal Judge S. J. Walker **Date:** 30 December 2020

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

- The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

- If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

- The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 168

(1)

it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

the appropriate tribunal

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), "appropriate tribunal" means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.