FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**CHI/43UK/LBC/2024/0005/AW**
Property	:	**12 Stack House, West Hill, Oxted, Surrey RH8 9JA**
Applicant	:	**Stack House Residents (Oxted) Limited**
Representative	:	**Ms Elizabeth Fisher, Counsel**
Respondent	:	**Mr Peter Calnan**
Representative	:	**Mr Tim Calnan (son)**
Type of application	:	**Application for an Order under section 168 (4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal member(s)	:	**Mr C Norman FRICS Valuer Chairman** **Mr M J F Donaldson FRICS** **Ms P Gravell**
Date of Hearing	:	**25 September 2024**
Venue	:	**Sevenoaks Magistrates' Court**
Date of Decision	:	**25 September 2024**
Date of Reasons	:	**16 December 2024**

DECISION

Decision

(1) At the conclusion of the hearing the Tribunal announced its decision as follows:

The respondent is in breach of Paragraph[1] 9 of the First Schedule of the lease.

The Tribunal finds that Paragraph 9 of the First Schedule of the lease requires underfelt and carpet to be installed in all parts of the flat except kitchen and bathroom. This must be installed so as to cover the entire surface area of the rooms. The Tribunal finds that the lease does not require the underfelt and carpet to be installed using gripper rods or glue, but the installation must be maintained at all times.

The applicant has indicated that it will not require such installation in the dining room area beyond the floor line of the existing kitchen cupboards.

(2) The Tribunal also now records the admission made on behalf of the respondent during the hearing that the boiler had been relocated to an unauthorised position in the kitchen and a hole made in the outside wall for the flue, without the lessor/applicant's permission.

Reasons

Background

1. The applicant seeks an Order under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that breaches of covenant or condition in the lease of have occurred at **12 Stack House, West Hill, Oxted, Surrey RH8 9JA** ("the Flat"). The allegations were:

   (i) that the lessee breached Paragraph 9 of the First Schedule of the lease by failing to supply and fit underlay and carpet in all rooms of the Property except the kitchen and bathroom

   (ii) that the lessee installed a new boiler in the cupboard at the far southwest of the plan to the Licence, whereby the flue exit was installed straight back through the wall of the Landlord/applicant's property and was cut and installed without

[1] The parties have referred to the provision as a "clause" whereas, being included in a Schedule it should be referred to conventionally as a "Paragraph" and that is the notation which the Tribunal will adopt.

the permission of the Landlord and has caused damage to the Landlord/applicant's property.

2. During the hearing, the lessee/respondent (via his representative) conceded (ii) (see above).

Directions

3. Directions were issued on 17 July 2024, setting the matter down for determination via a face-to-face hearing.

Inspection

4. The Tribunal inspected the property on 25th September 2024 immediately prior to the hearing. Mr Peter Calnan, Mr Tim Calnan, Mr Cook, and Ms Fisher were present at the inspection together with other members of the respondent's family.

5. The property is a block of flats dating from the 1970s. The main structural floors are concrete. Flat 12 is situated on the first floor. As originally designed it comprised three bedrooms, together with living room, kitchen and bathroom. The Tribunal noted the laminate floor to the kitchen, dining room and hallway. It also noted that removable carpeting without underlay had been laid on parts of the hallway and dining room. The position of the boiler had been moved from its original location.

The Law

6. Section 168 of the Act provides:

> (1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
>
> (2) This subsection is satisfied if: - '(a) 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.
>
> (3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

The Lease

7. The subject lease is dated 11 May 1976 ("the Lease"). This has been subject to two Deeds of Variation, one dated 11 May 1979 and a second dated 8 November 2019 by which the Lease term was varied to 999 years from 29 September 2019.

8. The central provision in the lease in issue is Paragraph 9 of the First Schedule ("Paragraph 9") which provides:

> "***The Tenant shall furnish all floors of the premises with sufficient underfelt and carpets (except those in any bathroom or kitchen) to minimise the induction of sound from the premises to any other parts of the Estate.***"

9. In relation to the boiler and flue works, this is an admitted breach of Clause 3(e) of the Lease which provides ***"not [to] make any structural alterations or structural additions to the demised premises or any part thereof or remove any of the Landlord's fixtures without the previous consent in writing of the Lessors."***

The Licence

10. A licence was granted on 30 September 2020 from the applicant to respondent. The licence granted consent to carry out defined works ("Works") subject to conditions. By clause 2.2, the consent ceased if the works had not been started within six months of the date of the licence and completed within three months of their commencement. By clause 5.2 the tenant covenanted that the lease would extend to the works and apply to the property as altered by the works. By clause 8, the right of re-entry in the lease would be exercisable if any covenant or condition of the licence was breached as well as if any of the events stated in the provision for re-entry in the lease occurred. The licenced works included installation of a new kitchen, boiler, appliances and supplying and fitting underlay and carpet to the dining area.

The Hearing

11. Ms Fisher of Counsel represented the applicant and Mr Tim Calnan the respondent.

Procedural Matters

12. Prior to the start of the hearing the Tribunal received a skeleton argument from Ms Fisher. The respondent objected on the basis that it was served late. The Tribunal noted that the directions did not provide for any advance provision of a skeleton argument prior to the hearing. Furthermore, the purpose of a skeleton argument is to summarise that which Counsel would be entitled to state orally at the hearing. The skeleton argument did not amount to new evidence but was confined to legal argument and was entirely proper. The respondent's objection was therefore dismissed.

13. The Tribunal drew the attention of both parties to section 143 of the Law of Property Act 1925, appended below in the Legal Annex. It also drew the parties' attention to *Arnold v Britton* [2015] UKSC 36 in relation to the date upon which the lease covenants fall to be interpreted. In relation to the interpretation of legal documents, the Supreme Court held at Paragraph 15 that "[The] 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." (emphasis added).

14. Unfortunately, relations between the parties are strained. In dealing with the submissions and evidence the Tribunal will only make such findings as are necessary to resolve the issues before it and will not make findings on other matters between the parties.

The Applicant's case

15. This may be summarised as follows. Paragraph 9 was not amended by virtue of the Deeds of Variation or the Licence. In breach of Paragraph 9, the Tenant failed to lay underfelt (or underlay) and carpets. The Tenant has installed "Pro-Sound SoundMat3 Plus" ("SoundMat") which they consider to be better. The Tenant invites the Tribunal to focus on the second part of Paragraph 9: *"to minimise the induction of sound from the premises…"*

16. Such an approach is wrong and disregards Paragraph 9. Paragraph 9 was clear and specifically requires the installation of "underfelt and carpet." The wording of Paragraph 9 is mandatory and does not provide the Tenant with an option. The Lease does not enable a tenant to choose what type of flooring they can install.

17. There is no expert evidence that the SoundMat is superior to carpet with underlay. The specification of the SoundMat does not identify whether, within the Property, it actually minimises the induction of sound. The Tribunal cannot rely on the specification to determine that the

SoundMat is as effective as underlay and carpet. Furthermore, again, this is outside the scope of Paragraph 9. Paragraph 9 does not permit the installation of any flooring so long as it minimises the induction of sound; it specifically identifies the type of flooring that is required. By the Tenant installing a hard flooring, they have breached Paragraph 9.

18. The Tenant confirmed the terms of the Lease by the 2019 Deed of Variation. Further, it seeks to widen the issues before the Tribunal, and it is submitted that such a proposition is not relevant for the Tribunal's determination of whether there has been a breach of Paragraph 9.

19. In the lobby area of the Property, a carpet type rug has been placed on top of the hard flooring. This is insufficient to satisfy Paragraph 9. There is no underlay/underfelt and it is not a fitted carpet. From the photographs it is clear that the "rug" is thin in nature and easily lifted up. The Landlord has a real concern that it presents as hazard in a fire.

20. The Landlord has not consented to the "Soundmat" flooring by virtue of the Licence. The Licence does not permit such flooring and reaffirms that the covenants of the Lease must be upheld (paragraph 5.2). The Landlord also relies upon *Duval v 11-13 Randolph Crescent Limited* [2018] UKSC 18 where the Supreme Court confirmed that where a lease contains an absolute covenant, a requirement for all tenant leases to be granted in substantially the same form, and a mutual enforceability covenant obligating the landlord to enforce such covenants upon request, then the landlord would be in breach if they give consent to another tenant to carry out works in breach of an absolute covenant.

The Applicant's Witness Evidence

21. Counsel called Mr Raymond Cook who is a director of the applicant. Mr Cook gave two witness statements each verified by statements of truth.

22. In his first statement Mr Cook referred to the lease and the licence. He asserted that although the respondent carried out works pursuant to the licence, he had failed to comply with its terms thereby breaching the terms of the licence and the lease. In particular, the respondent failed to supply and fit carpet and underlay in all rooms (except kitchen and bathroom) and the dining area. The respondent removed underlay and carpet previously laid in the lobby and hall and failed to furnish those floors with sufficient underlay and carpets. The works carried out were not to the reasonable satisfaction of the landlord [as required under the licence].

23. Mr Cook inspected flat 12 on 5 April 2022 with Mr Robert Sawyer, the applicant's surveyor of Rayners Property Management. Mr Cook saw that the new dining area (former bedroom) had not been supplied and fitted with underlay and carpet and had a hard floor of wood and vinyl. The floor covering of the lobby and hall area had been removed and replaced by a wood and vinyl floor and did not have underfelt or carpet.

Mr Cook also summarised inter partes correspondence to which it is unnecessary to refer.

24. In his second witness statement, Mr Cook's position was that the respondent had signed a licence which included an obligation to supply and fit underlay and carpet to the dining area. Other leaseholders knew and complied with the terms of their lease and relied on others to do so.

25. The terms of the licence were negotiated between the parties. Comparison with events in other flats in the past was irrelevant. In 2015 Rayners, professional managing agents were appointed and ensured compliance with all relevant covenants and regulations. Compliance with Paragraph 9 is mandatory and not dependent on noise complaints having been received. By signing the deed of variation on 8 November 2019 the respondent affirmed the tenant's covenants in the lease. As constructed, the dining room was bedroom three. The new boiler was not put in the position shown on the licence plan and the respondent did not obtain previous consent in writing of the lessor before making a structural alteration by cutting a hole through the wall and installing an external flue through it. None of the respondent's photographs show felt or underlay and carpet as required by the lease and licence. There is no use of gripper rods or glue to secure the carpet. The loose carpet is a trip hazard.

The Respondent's Case

26. Mr Tim Calnan set out a detailed statement of case verified by a statement of truth. This may be summarised as follows. Mr Peter Calnan had proposed modest works to improve the value of his home. This included improvement of the acoustic performance of the previous floor coverings. There is inconsistency in enforcement in relation to other flats in the block, whilst other lessees have also relocated their boiler flues.

27. Paragraph 9 of the lease was a qualified covenant with the qualification being that there must be sufficient underfelt and carpets to minimise the induction of sound from the premises to any other parts of the estate. The SoundMat acoustic underlay was more than sufficient as it exceeded building regulation requirements and consent should not have been unreasonably withheld. There have been no complaints about noise nuisance during the three years following the installation of this floor. The floor cannot be referred to as a hard floor, wooden floor, or wood/vinyl but is an expensive purpose made acoustic underlay on top of flooring grade board. This is laid above the structural concrete floor. The finish is vinyl.

28. Mr Peter Calnan did not change the use of the bedroom to a dining room because the room in question was already a separate dining room when the flat was purchased on 29 July 2019.

29. The proposal was to remove the existing laminate flooring in the kitchen. A high-performance acoustic underlay Sound Matt3 Plus would be laid upon which would be added a vinyl flooring. This was superior to that previously installed which was laid on bare concrete. Paragraph 9 states "the tenant shall furnish all floors of the premises with sufficient underfelt and carpets (except in any bathroom or kitchen) to minimise the induction of sound from the premises to any other parts of the estate." However, the phrase "must be fitted with sufficient carpet and underlay" does not guarantee the requirement of minimising noise transmission to other parts of the Estate and takes no account of the attenuation properties of either the underlay and/or the carpet. The applicant has not provided evidence that the respondent failed to meet the sound attenuation requirements specified. Mr Tim Calman exhibited a technical data sheet for the Sound Matt3 Plus product together with extensive photographs of the flooring within the flat.

30. Mr Tim Callan provided the Tribunal with a sample of the floor, which the Tribunal examined. In answering a question from the Tribunal Mr Tim Calnan said that this comprised two layers of heavy-duty hardboard with the Soundmat 3 plus in between and a vinyl finish.

Findings

Witnesses

31. The Tribunal found Mr Cook to be a credible witness. The Tribunal found Mr Tim Calman to be honest but that his submissions were misconceived.

The breaches

32. There was no dispute about the essential facts. The respondent admitted that a new floor had been installed which did not involve carpet with underlay being laid. Part of the relevant area had removable carpet only without underlay. The Tribunal also witnessed the floor during its inspection. The licence of 30 September 2020 specifically obliged the respondent [60][2] "to supply and fit underlay and carpet to the dining area, in accordance with section 3.2[a)] and section 3.2[c] of the Licence."

33. Furthermore, section 143 of the Law of Property Act 1925 (see Legal Annex) provides that the Licence extends only to permission actually given and does not prevent any proceedings for any subsequent breach unless otherwise specified in the licence. It further provides that the lessor's powers of re-entry in the lease remain in full force and effect as against any subsequent breach of covenant not specifically authorised. The Licence extends only to authorised works.

[2] Square brackets denote bundle page numbers

34. As stated above, Paragraph 9 states:

> ***The Tenant shall furnish all floors of the premises with sufficient underfelt and carpets (except those in any bathroom or kitchen) to minimise the induction of sound from the premises to any other parts of the Estate.***"

35. From *Arnold v Britton* (above) the meaning has to be ascertained at the date when the lease was granted, i.e. in 1976 and all the then surrounding circumstances. The Tribunal found that the obligation to carpet with underlay did not depend on whether a particular level of sound attenuation was achieved.

36. Secondly, there was no expert evidence to prove that the sound attenuation properties of the replacement floor equalled or exceeded carpet with underfelt. The Tribunal did not accept the specification sheet for SoundMat 3 plus as proving the point. It makes no comparison with the sound attenuation with carpet and underfelt. The specification also makes clear that the product is designed to work primarily with timber floors whereas the subject floor is concrete, undermining the relevance of the specification.

37. The Tribunal found that when the lease was granted, "carpet with underfelt" had a clear meaning being carpet laid contiguously with underfelt or underlay. It also found at that time, that any carpet and contiguous underlay would be expected to minimise noise transmission. It notes that the flooring installed was not available in 1976. The Tribunal also accepts Counsel's submission that "[Paragraph] 9 does not permit the installation of any flooring so long as it minimises the induction of sound; it specifically identifies the type of flooring that is required. By the Tenant installing a hard flooring, they have breached [Paragraph] 9."

38. The Tribunal, however, did not find that the covenant required the carpet and underlay to be installed in any particular way, such as via gripper strips or glue. Whether a mode of installation might cause a trip hazard is not relevant to the application before the Tribunal.

16 December 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal 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.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Legal Annex

143.— Effect of licences granted to lessees.

(1) Where a licence is granted to a lessee to do any act, the licence, unless otherwise expressed, extends only—

(a) to the permission actually given; or

(b) to the specific breach of any provision or covenant referred to; or

(c) to any other matter thereby specifically authorised to be done;

and the licence does not prevent any proceeding for any subsequent breach unless otherwise specified in the licence.

(2) Notwithstanding any such licence—

(a) All rights under covenants and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, condition or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and

(b) The condition or right of entry remains in force in all respects as if the licence had not been granted, save in respect of the particular matter authorised to be done.

(3) Where in any lease there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence, and a licence is granted—

(a) to any one of two or more lessees to do any act, or to deal with his equitable share or interest; or

(b) to any lessee, or to any one of two or more lessees to assign or underlet part only of the property, or to do any act in respect of part only of the property;

the licence does not operate to extinguish the right of entry in case of any breach of covenant or condition by the co-lessees of the other shares or interests in the property, or by the lessee or lessees of the rest of the property (as the case may be) in respect of such shares or interests or remaining property, but the right of entry remains in force in respect of the shares, interests or property not the subject of the licence. This subsection does not authorise the grant after the commencement of this Act of a licence to create an undivided share in a legal estate.

(4) This section applies to licences granted after the thirteenth day of August, eighteen hundred and fifty-nine.