FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LBC/2022/0028**
HMCTS code (paper, video, audio)	:	**In person hearing**
Property	:	**Flat 5, 49 Maresfield Gardens, NW3 STE**
Applicant	:	**49 Maresfield Gardens London (Frcehold) Limited**
Representative	:	**Mr Gabriel Fadipe of Counsel**
Respondent	:	**Andrea Petrelli & Paola Cartolano**
Representative	:	**Mr Matondo Mukulu of Counsel**
Type of application	:	**Application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	:	**Judge H. Carr** **Judge Sarah McKeown** **Mr N. Miller**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**24th October 2022**

DECISION

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Covid-19 pandemic: description of hearing

This has been a face-to-face hearing. The documents that the Tribunal was referred to were contained in a bundle comprising 96 pages prepared by the Applicant a bundle comprising 219 pages prepared by the Respondent and a reply comprising 2 pages prepared by the Applicant.

The order made is described below.

Decisions of the Tribunal

(1) The Tribunal determines that there has not been a breach of clause 3 j of the lease pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002.

(2) The reasons for the decision are set out below.

The background to the application

1. The Applicant seeks an order that a breach of covenant or a condition in the lease has occurred pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002. The application concerns alleged breaches at **Flat 5, 49 Maresfield Gardens, NW3 STE** ("the property").

2. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-section (4) shown in bold:

> *(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 a leasehold valuation tribunal***

for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—
(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.

3. The Applicant, a freehold company owned by most of the leaseholders including the Respondents is the registered proprietor of the freehold of 49 Maresfield Gardens, NW3 5TE.

4. The Applicant employs a managing agent, Red Carpet Estates, to manage the property.

5. The Respondents are the registered proprietors of the leasehold property at Flat 5,49 Maresfield Gardens, NW3 STE. They acquired their leasehold interest on 15th February 2013 . The lease is for a term of 189 years (less last ten days) from 29th September 1933.

6. The property which is the subject of this application is a 3 bedroom flat in a converted Victorian house comprising 9 flats in total

The hearing

7. The Applicant was represented by Mr Gabriel Fadipe of Counsel. Mrs Carr of the Applicant's managing agent attended and gave evidence. Mrs Kortel the leaseholder of Flat 3 also attended and gave evidence. The Resp0ondents were represented by Mr Matondo Mukulu of Counsel. Ms Paola Cartolano of the Respondents attended and gave evidence.

The issue

8. The only issue for the Tribunal to decide is whether or not a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. At the CMH the primary allegation of breach by the Respondent was identified as follows:

   (i) that the Respondent has breached clause 3 (j) of the lease by-

      (a) Removing or failing to cover or keep covered the floor in the demised premises with underfelt

and carpet or other suitable sound proofing materials.

And/or

(b) failing to take all reasonable measures to avoid the transmission of noise to any other part of the Building

9. Clause 3 (j) provides that the lessee is obliged -:

To cover and keep covered the floor or the firstly Demised Premises with underfelt and carpet or other suitable sound-deadening materials and to take all reasonable measures to avoid the transmission of noise to any other part of the Building.

Chronology

10. The Respondents acquired the lease on 15th February 2013. They carried out works prior to moving in, including laying a laminate floor.

11. The majority of the leaseholders extended their leases to 999 years and the terms of their leases were changed (a) to allow wooden floors and (b) to make leaseholders responsible for their windows, but the revised terms also provided that painting the windows was a common expense

12. The Respondents did not extend their lease and therefore the original terms in relation to noise continue to apply.

13. Mrs Basak Kotler moved into Flat 3 in 2017. Flat 3 is directly below Flat 5. The configuration of the property means that the living room of Flat 5 is directly above Flat 3 living room.

14. Mrs Kotler made a number of complaints of noise nuisance by text and email from 2018. There is evidence that she spoke to prospective tenants about her complaints.

15. A formal complaint was made by Mrs Kotler to the managing agents in January 2021. That complaint led directly to the proceedings before the tribunal.

The determination

16. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal summarises the arguments and makes determinations on the various issues as follows:

Has the Respondent removed or failed to cover or keep covered the floor in the demised premises with underfelt and carpet or other suitable sound proofing materials?

The Applicant's arguments

17. The Applicant argues that at a date unknown to the Freeholder but subsequent to moving into Flat 5 in 2013 the Respondents carried out extensive works to the flat and laid laminate to the floor.

18. Despite earlier allegations, both parties are agreed that the Respondents did not remove carpet from the flat before fitting the laminate flooring.

19. The Applicant says that laying the laminate means that the Respondents have not kept covered the floor at Flat 5 with underfelt and carpet or other suitable sound-deadening materials;

20. The Applicants say there has been extensive text and or email correspondence going back a number of years between the Respondents and the leaseholder at Flat 3, whose flat is directly below Flat 5, in which she has complained of the noise emanating from flat 5, much of which results directly from the absence of underfelt or carpet or other suitable floor covering.

21. Mrs Carr of Red Carpet Estates, the managing agents for the property, gave evidence on behalf of the Applicant. She has managed the process throughout.

22. Mrs Carr gave evidence of the type of acoustic works that the leaseholders of flat 1 and flat 2 had carried out to their property . It seems that they have taken advice from architects and have laid 35 mm Monarfloor, together with 100mm Rockwool RWA45 between existing floor joists with minimum 50 mm airgap above and a layer of Sounblock plasterboard fitted between joists below acoustic insulation. Mrs Carr indicated that in her opinion that provision is the standard required of flats at 49 Maresfield Gardens.

23. Mrs Carr pointed out that she had only been told of the quality of the underlay used by the Respondents late in these proceedings. She notes that the specification is 3.6 mm and that it should be at least 35 mm.

24. Mrs Carr referred to the current Building Regulations. When asked by the tribunal if she considered that leaseholders had to comply with current Building Regulations, she said that the current regulations gave

some indication of what was required in order to reduce noise transmission.

25. Counsel for the Respondent questioned the expertise of Mrs Carr in connection with the appropriate requirements for fulfilling the conditions of the covenant.

26. Mrs Carr explained why the Applicant had not carried out an acoustic test to establish the extent to which sound was transmitted from the property. She said it was because the Respondents' agreement to acoustic testing was dependent upon acoustic testing being carried out on all the flats and she considered that to be too expensive and unnecessary to do so. From her perspective the test only needed to be done in flat 5 because there was only one complaint about continuous noise impact and that related to flat 5.

27. Mrs Carr said that she asked the tribunal to order an acoustic test. The tribunal looked at the correspondence and pointed out that the request was for the tribunal to inspect and not for an acoustic test.

28. The tribunal asked why Mrs Carr had not used the powers in the lease to carry out the test. There was no clear answer to this.

29. Mrs Basak Kotler gave evidence to say that everyday noise such as walking or talking loudly is transmitted from flat 5 to her flat. She hears footsteps loudly and clearly. In addition, heavy movement in flat 5 causes vibration to the ceiling causing the chandelier to jingle.

The Respondent's arguments

30. The Respondents argue that they put laminate and underlay down as soon as they bought the flat in 2013 and before moving in. The said that the underlay was that recommended by the installer and that it was top quality underlay, specifically the quality was Duralay Timbermate Excel. This was recommended by the provider of the laminate flooring. This underlay provides impact sound reduction of 23dB.

31. In the opinion of the Respondents, this underlay is sufficient to comply with the clause in the lease. They say that the lease of flat 5 does not specify any technical requirements on the carpet and underfelt and therefore no technical requirements can be specified for the sound deadening material either.

32. They argue that 'or other suitable sound deadening material' where there are no technical requirements must mean 'fit for purpose' in substitution for underfelt and carpet. As they followed the advice of the provider of the laminate what they installed was fit for purpose. Indeed, they argue

that laying the laminate floor with this specific underlay improved the sound insulation from what was in the flat previously.

33. The Respondents argue that noise transmission is normal when living in a converted Victorian building.

34. The Respondents say that Mrs Carr failed in her obligations to properly inspect so as to prove the allegations on sound deadening material as she did not carry out an acoustic test.

The Applicant's response

35. The Applicant says that it was not until the bundle was received that the Respondents provided information about sound deadening material.

36. Mrs Carr has checked the quality of the underlay installed. The technical specification for Duralay Timbermate Excel states that it has an impact sound reduction of 23dB in contrast with the requirements of the Building Regulations Part E which are that 64dB should be the sound reduction in converted flats. The Applicant says that therefore this is insufficient.

37. The Applicant also argues that the specification make no reference at all to sound proofing and that the thickness of the underlay is 3.6mm, whereas the Monarfloor soundproofing system is 35mm. The Duralay Timbermate Excel would, in Mrs Carr's opinion, satisfy the requirement in accordance with the lease to keep the floor covered with underfelt and carpet but it would not satisfy the other sound deadening material requirement.

Have the Respondents failed to take all reasonable measures to avoid the transmission of noise to any other part of the Building

38. The Applicant says that the Respondents have not taken any reasonable measures to avoid the transmission of noise to other parts of the Building.

39. The Applicant says that the proper way to do this was to comply with the building regulations current in 2016 and carry out sound deadening improvements as carried out by all of the other flats in 2016.

40. The Respondents say that they have taken all reasonable measure to avoid the transmission of noise to other parts of the building, indeed they

assert that they sincerely believe that they have taken all possible measures over and beyond to avoid the transmission of any noise.

41. In particular they

(i) Covered the original flooring made of Victorian floor board with sound deadening material that has significantly improved the reduction of noise transmission from almost 0 to at least 23dB.

(ii) The original huge rug/carpet that covered the whole living room area was kept on top of the sound deadening material to additionally improve the sound deadening of the heavily trafficked area.

(iii) They added a clause to the tenancy agreement that they granted to their tenants, to prevent the transmission of noise by the tenants; 'the tenant agrees to cover and keep covered the living room floor with a rug/carpet and to take all reasonable measure to avoid the transmission to any other part of the building'.

(iv) Tenants with small families were carefully selected, at times compromising the potential rental income, in order to reduce the traffic in the flat. The first tenants were a couple with an 18 month daughter and the second a young couple with no children.

42. No complaints of noise were made by the previous owner of Flat 3 after the Respondents moved in and improved the sound deadening provision in the flat.

43. The owner of Flat 3 moved in in December 2017 after an extensive renovation where the ceiling was stripped off and the original fittings removed. The Respondents say it was a result of these works that the noise from Flat 3 became more evident.

44. The Respondents argue that the burden of proof rests with the Applicant. The flat has not been inspected to prove the allegations. An inspection would have resolved the case years ago and saved time and stress.

45. They also point out that if they had refused to allow the inspection, they would have been in breach of clause 3 (g)

46. The Respondents were asked by the tribunal whether, as they were aware of the problems of noise, they did not feel that they should do something

more to ameliorate it? Ms Cartolano said that she thought that noise transmission was inevitable in a converted Victorian property and that she had a 'gentleman's agreement' about noise transmission. She provided evidence of the 'gentleman's agreement' in various text messages. The Applicant says that there was no such gentleman's agreement, and the texts are simply demonstrative of normal neighbourly interactions.

47. Mrs Kotler has responded to the Respondents' arguments as follows:

(i) There was extensive traffic in rooms that were not covered by the rug, in particular the bedrooms in the mornings,

(ii) The tenants selected were not quiet. The toddler child of the first tenants ran around the flat particularly in the morning and the second tenants played loud music and watched TV as well as walking around the flat with their shoes on. '

(iii) The previous tenant was very elderly and reported to be hard of hearing.

(iv) The architect, who carried out the works to Flat 3, provided confirmation that the renovations added extensive sound proofing to the flat.

The Tribunal's decision

48. The Tribunal determines that there has been no breach of clause 3 j of the lease.

49. **Reasons for the Tribunal's decisi**The tribunal determines that there is insufficient evidence before it to determine that the underlay to the laminate was not suitable sound proofing material.

50. The tribunal considers there is insufficient evidence for it to make a determination that the Respondents had failed to take all reasonable measures to avoid the transmission of noise to any other part of the Building

51. The tribunal has sympathy with Mrs Kotler. It is clear that she has found the noise transmission in the property very trying. However, the tribunal has to determine the question of whether there has been a breach of a covenant in the lease, and not whether Mrs Kotler is experiencing distress as a result of noise transmission. The burden of proof is on the

Applicant to demonstrate breach of the lease. This requires objective evidence of the breach.

52. The tribunal does not accept the argument of Counsel for the Applicant that the installation of laminate flooring albeit with underlay constitutes, in itself, a breach of the term of the lease.

53. The tribunal pressed the Applicant to clarify where and when it had been communicated to the Respondents exactly what was required for the Respondents to comply with the clause in the lease. There was no answer to this other than to refer to what other leaseholders had done in the course of extending their leases. The Applicant agreed with the tribunal that the Respondents were not required to comply with the current Building Regulations, but she indicated that in her opinion these were indicative of what would be required in order to comply.

54. The tribunal agreed with Counsel for the Respondent that it appeared that, for the Applicant, there was only one acceptable approach to ensure compliance with the covenant, which was to carry out the extensive work that other residents had carried out and comply with current Building Regulations. However, this is not what was required by the lease. The Applicant's belief that this was what was required appears to have prevented it from collating objective evidence of a breach and articulating clearly what, other than complying with current Building Regulations, would constitute reasonable measures to avoid the transmission of noise.

55. The tribunal were concerned, in particular, that no acoustic test had been carried out. This meant that the tribunal had no objective evidence about the level of sound transmission from the property. The tribunal would also have expected some expert evidence about reasonable measures to avoid sound transmission and about what would be suitable sound proofing materials.

56. The tribunal makes two further points. First disputes of this nature almost inevitably increase tension between occupiers of property. The tribunal suggests that arguments about vexatious behaviour and false statements are not productive to a sensible settlement of this dispute.

57. Second, the Respondents should note that the lease gives the applicant a right to obtain an acoustic test and that the results of that test may well provide the evidence required to demonstrate that the covenant has been breached. It would suggest that to avoid further litigation it may well be in the best interests of everyone concerned to carry out the test, and to agree action if that test demonstrates a breach of covenant. Such action may involve the laying of carpet and suitable underlay.

Name: Judge H Carr **Date:** 24th October 2022

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).