FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UK/LBC/2016/0017**
Property	:	**8 Sackville Place, Sevenoaks, Kent, TN13 3FE**
Applicant	:	**Sackville Place Sevenoaks Management Company Limited**
Representative	:	**Mr Colley**
Respondent	:	**Mr and Mrs Miles**
Representative	:	**Carl Fain (Counsel instructed by Thomson Snell & Passmore)**
Type of Application	:	**s.168 CLRA '02**
Tribunal Members	:	**Judge D Dovar** **Mr Brandon Sims FRICS** **Ms Jayam Dalal**
Date and venue of Hearing	:	**27th October 2016** **Sevenoaks Magistrates' Court**
Date of Decision	:	**8th November 2016**

DECISION

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1. This is an application under s.168 of the Commonhold and Leasehold Reform Act 2002 ('the Act') in relation to the floor coverings of the Property which is held by the Respondents under a lease dated 24th May 2012.

2. Section 168 of the Act provides that a landlord cannot takes steps to forfeit a residential long lease for breach of covenant without first obtaining either an admission of breach from the tenant or getting a determination of breach from a tribunal.

Inspection

3. The Tribunal carried out an inspection of the Property and the flat below (owned by Mr Colley, who represented the Respondent at the hearing) on the morning of the hearing.

4. Sackville Place is a modern purpose built block of apartments fronting the A225 just North of Sevenoaks. The building is 3 storey with underground parking. A common entrance hall and staircase serves the block. There are 7 apartments and 3 penthouse flats.

Covenant

5. The material clause of the Respondents' lease is clause 4.22 which provides that

"The Tenant must cover the floors of the Apartment (except in the Kitchen and the bathroom) with carpets throughout or such other

appropriate floor coverings as may be required to deaden sound in the Apartment"

6. The Applicant alleges that this clause is breached in that the floor covering of much of the Property is wooden which causes noise to transmit to the flat below and causes a nuisance and annoyance to Mr Colley.

Installation of wooden floors

7. The Property is part of a relatively recent development. Both Mr Colley and the Respondents bought their flats prior to their completion. They were given a number of options before completion in relation to layout and finishes by the landlord developer (who it is understood then held the freehold to the whole site). This included the option of whether to install wooden flooring. The wooden flooring to both the Property and Mr Colley's flat were installed by the landlord developer. The Respondents paid extra for this finish.

8. Mr Colley said that when he opted for wooden floors the landlord developer pointed out that he would be in breach of the terms of his lease. Mr Colley candidly admitted that he was also in breach of this covenant as he has wooden flooring, as well. He said that if the owner beneath him complained he would have his flat carpeted.

9. The Respondents say they never received such any such warning from the developer and that if they had been told this, they would not have installed, or paid extra for, the flooring.

Noise problems

10. Mr Colley expressed clearly the difficulties he had with the noise transmission; he classified it as impact noise.

11. Mr Colley says he has had problems with noise from the Property for a number of years. He first complained to the landlord developer about noises to his flat from the flat above, in August 2013, but didn't get anywhere. He first emailed Mr Miles in July 2014 and asked to have a meeting, but this also did not get anywhere. The Respondents do not live in the Property, they let it out and it is their various tenants who have caused the noise nuisance.

12. The first tenant could be heard walking and running for long periods during the day. The next tenant moved in with two young sons and Mr Colley said the noise levels increased dramatically; to the extent that on one occasion he had to get out of bed at 10.30pm and bang on ceiling with broom handle. The next tenant had a son and the noise intrusion continued, albeit at a lower level. The Property is currently vacant and so there is presently no noise intrusion.

Breach?

13. The Respondents deny they are in breach for a number of reasons, which are dealt with in turn below.

14. Firstly, they say that given that they were granted the lease with the wooden floors laid, to seek to enforce that covenant would amount to a derogation from grant. They rely on an extract from Woodfall on

Landlord and Tenant (para 11.-083) in that regard. The Tribunal does not consider that this is a derogation from grant. As the extract relied upon sets out, that will arise where the Landlord's conduct is such as to frustrate the purpose of the grant. In this case, the Tribunal does not view an attempt to force compliance with clause 4.22 as sufficient conduct to amount to the frustration of the purpose of the grant. The Respondents can still use the flat as a residential flat without wooden floors.

15. Secondly, they say that the act of the landlord in laying the wooden floor prior to the grant is a waiver of clause 4.22 in respect of the floor as currently laid. The Tribunal agrees with this contention. The Tribunal considers that by not only granting the lease with the wooden floors in situ, but charging more for the floors, the landlord is not able to subsequently complain about their installation. The landlord's conduct was sufficient to act as a representation that if the Respondents agreed to having the wooden floor installed and paid for, they would not later have to recover the floor.

16. The Respondent referred to *Faidi v. Elliot Corporation* [2013] L&TR 25, CA in support. In that case the landlord had given written consent to alterations, which included wooden flooring. They then sought to enforce provisions in the lease (similar to those in this case) requiring floor coverings to deaden sound. The Court of Appeal found that the consent to alterations acted to prevent reliance on the lease terms.

17. Mr Colley sought to distinguish that case on the basis that there was no written consent to the installation of floors. The Tribunal does not consider that the absence of written consent makes a material difference in this case. The conduct of the landlord in installing and charging for the flooring is sufficient conduct to give rise to a waiver of the covenant.

18. Had there been any direct evidence that the Respondents had been told (as Mr Colley said he had) that it would be installed at their risk, then the situation may have been different. The Respondents were clear that they had been given no warning. They had always intended the flat as an investment and would have not spent more than needed. They simply didn't think this was an issue as the landlord developer had put the floor down.

19. For that reason, despite the Tribunal sympathising with Mr Colley because of the obvious distress he suffers from the noise, this is not a matter which can be enforced through clause 4.22 because reliance on that covenant has been waived.

20. That deals with the issue of breach; there is no breach as alleged. In respect of the other arguments put before the Tribunal by the Respondents, they would have been rejected for the following reasons:

    a. it was said that there was no breach as there was no evidence that the floor covering was not appropriate to deaden the sound. Whilst the flooring may have passed building regulations, planning control and the environmental health, the Tribunal had no doubt that the noise is very real to Mr Colley. He can hear

the day to day activities from the flat above. Had the clause been adhered to, he should not be hearing them. Had it not been for the fact that the landlord had waived the covenant, the Tribunal would have found a breach;

b. it was said that the breach had been waived after installation as this was a 'once and for all breach' and with full knowledge of the breach, the landlord had demanded and accepted service charges. This is not a matter for the Tribunal to determine in this application. Whilst a waiver of the *covenant* prior to breach is relevant, a waiver of the *right to forfeit* after breach is outside the Tribunal's jurisdiction as confirmed in *Swanston Grange (Luton) Management Ltd v. Langley-Essen* [2008] L&TR 20 (Lands Tribunal);

c. Finally it was suggested that Mr Colley had contributed to the breach by altering his layout. This was not pursued with any vigour at the hearing and the Tribunal did not consider that there was sufficient evidence to establish that this was the case.

Conclusion

21. The application is therefore dismissed in that the Tribunal does not make any determination of breach.

Judge D Dovar

Appeals

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.

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.

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.

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.