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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LBC/2016/0019**
Property	:	**15 St Matthews Lodge, 50 Oakley Square, London NW1 1NB**
Applicant	:	**All Land Limited**
Representative	:	**Mr Brown of Counsel**
Respondent	:	**Mr Luke Latham Moorhouse Heaton and Ms Min Miao**
Representative	:	**In person**
Type of Application	:	**Determination of an alleged breach of covenant**
Tribunal Members	:	**Judge W Hansen (chairman)** **Mrs R Turner JP**
Date and venue of Hearing	:	**8th June at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16th June 2016**

DECISION

Decision of the Tribunal

(1) The Tribunal determines that the Respondents have breached the following covenants contained in a lease dated 29 September 1982: firstly, paragraph 27 of the Third Schedule taken together with paragraph 11 of the Regulations contained in the Seventh Schedule by residing in the Flat without carpet on the floors in the hallway, reception/dining room and the 3 bedrooms; secondly, paragraph 28(a) of the Third Schedule by using parking space 8 otherwise than for parking a private motor vehicle; thirdly, paragraph 27 of the Third Schedule taken together with paragraph 5 of the Regulations contained in the Seventh Schedule by permitting noisy works to the Flat on Sunday 6 March 2016 and outside the permitted hours of 9am-2pm on Saturday 5 March 2016; fourthly, paragraph 27 of the Third Schedule taken together with paragraph 7 of the Regulations contained in the Seventh Schedule by keeping two cats in the Flat without consent.

(2) The Tribunal determines that there has been no breach of the covenant contained in paragraph 8 of the Third Schedule.

The Application

1. By an application dated 4 April 2016 the Applicant seeks an order under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002" Act") that a breach of covenant has occurred. In fact, the Applicant alleges five separate breaches of covenant, albeit two of the alleged breaches arise out of the same facts.

2. The particular breaches alleged are as follows:

   (i) *Breach 1*: It is alleged that by taking up the carpet and laying a wooden floor in the hallway, reception/dining room and three bedrooms the Respondents have breached the covenant contained in paragraph 8 of

the Third Schedule *"not to alter the internal planning or the height elevation or appearance of the Flat nor at any time to make any alterations or additions thereto ... without the previous formal license of the Lessor..."*

(ii) *Breach 2*: Based on the same facts, it is alleged that the Respondents have breached the covenant contained in paragraph 27 of the Third Schedule (*"to observe the Regulations"*), taken together with paragraph 11 of those Regulations (as set out in the Seventh Schedule) which contains an obligation *"Not to reside ... in ... the Flat unless the floors (including the passages) are close covered with carpet and underfelt or (in the bathroom lavatory and kitchen only) linoleum or sound absorbing tiles"*.

(iii) *Breach 3:* It is alleged that by storing material, including the carpet, in parking space 8, the Respondents have breached the covenant contained in Clause 28 (a) of the Third Schedule *"not to use the parking space except for parking a private motor vehicle"*.

(iv) *Breach 4:* It is alleged that by permitting noisy works to the Flat on Sunday and outside the permitted hours of 9am-2pm on Saturday the Respondents have breached the covenant contained in paragraph 27 of the Third Schedule (*"to observe the Regulations"*), taken together with paragraph 5 of those Regulations, which contains an obligation *"Not to permit any noisy works of repair to the Flat or any noisy works in connection with any alterations and improvements to the Flat ... except between the hours of 9am and 2pm and between the hours of 4pm and 6pm Mondays to Fridays and between the hours of 9am and 2pm on Saturdays"*.

(v) *Breach 5:* It is alleged that by keeping two cats in the Flat the Respondents have breached the covenant contained in paragraph 27 of the Third Schedule (*"to observe the Regulations"*), taken together with paragraph 7 of those Regulations, which contains an obligation *"Not*

without the written consent of the Lessor to keep any animal in the Flat".

Background

3. The Applicant is the freehold proprietor and landlord of 50 Oakley Square, London NW1 ("the Building"). Its title is registered at HM Land Registry under title number NGL733417. The Building is a 4-storey modern block of flats built in about 1980. The Respondents are the registered leasehold proprietors of a 3 bedroom flat in the Building on the second floor ("the Flat") which they hold on the terms of a lease dated 29 September 1982 ("the Lease") whereby the Flat was let for a term of 125 years from 25 December 1980 at an annual rent of £100.00. The Flat comes with two allocated parking spaces in the basement, being spaces 8 and 16. The Respondents' title is registered at HM Land Registry under title number NGL443712. The Respondents completed their purchase on 4 March 2016.

4. The original parties to the Lease were Carlians Developments Limited as Lessor, Stuart Harrington Cook and Karen Rachel Cook as Lessee and Holding & Management (Property Administration) Limited ("Holding") as Maintenance Trustee. The Applicant is now the Lessor and we were told by Mr Raybould, a director of the Applicant, that Holding have been replaced as the Maintenance Trustee by an RTM company. By Clause 3 of the Lease the Lessee covenants with the Lessor to observe and perform the obligations in the Third Schedule. We have set out above the terms of the relevant covenants.

Inspection

5. We inspected the Flat immediately before the hearing on 8 June 2016. It is a light and airy three bedroom flat on the second floor of the Building. For present purposes it is relevant to note that the hallway and 3 bedrooms that lead off the hallway together with the large reception/dining room have a floating wooden floor. We also noted the presence of two cats. We inspected

the parking spaces in the basement, in particular spaces 8 and 16 belonging to the Respondents. Both were completely empty. Mr Heaton pointed out that two other spaces belonging to other tenants were not and we noted the presence of a mobility scooter and some boxes.

The Evidence

6. We heard evidence from Mr Raybould, a director of the Applicant, who confirmed the truth of the evidence set out in his witness statement dated 11 May 2016. He was asked about the alleged noisy works on the weekend of 5/6 March and he confirmed that he was relying in this regard on what he had been told by his fellow directors, two of whom live in the Building, above and below the Respondents. Those directors did not give evidence but the Respondents in any event accepted that they had been carrying out noisy works, consisting principally of hammering, over that weekend outside the permitted hours. Mr Raybould was also asked whether other tenants in the Building had laid wooden floors and he confirmed that they had indeed done so but he described such breaches (if indeed they were breaches) as "historic", relating to an earlier and unsatisfactory management regime presided over by Holding who had since been replaced. He suggested that Flats 31 and 36 have wooden floors, as well as some of the flats on the ground floor. He was unable to provide any meaningful detail as to the precise position in relation to these other lessees but suggested that enforcement action might still be taken in the event of a complaint. He said: "*We're trying to tighten up on the enforcement of covenants*", following the change of management. Finally, he was asked about the other parking spaces in basement and he explained that some leeway was given to the tenant with the mobility scooter in the basement because he was disabled.

7. The Tribunal's directions dated 7 April 2016 had directed the Respondents to file and serve a statement in reply to the application, setting out their case and providing copies of any documents by 29 April 2016. They failed to do this. However, on the morning of the hearing, Mr Heaton produced a statement which he wished to read out and rely on as the Respondents' statement in

reply. We adjourned briefly for Mr Brown to consider his position but he did not object and we admitted the evidence and asked a number of questions of our own designed to clarify the position.

8. Mr Brown did not challenge any part of the evidence and that is because it accorded entirely with his case. Having completed their purchase on 4 March 2016, the Respondents began working on the Flat over the weekend of 5/6 March. They accepted that they had a workman there over the weekend who was working on both the Saturday (5 March) and Sunday (6 March) outside the permitted hours, undertaking noisy work consisting principally of hammering. The work to take up the carpet and replace it with a wooden floor also began that weekend and was completed during the course of the following week. Mr Heaton emphasised the fact that they had installed an underfloor soundproofing system which "*offers significantly better soundproofing qualities than carpet and underfelt*". As the work progressed, unwanted rubbish was left in parking space 8 pending its collection by the local authority. The photograph at page 67 of the bundle shows what it looked like. The unwanted carpet and various boxes are clearly visible. The one point of difference between the parties related to the cats. The Applicant' statement of case alleged that the Respondents had admitted by an email dated 23 March they were "*currently keeping two cats at the Flat*" whereas the Respondents told us (and we accept) that the cats did not move in until 2/3 April.

9. The Respondents told us that they had received a Report on Title prior to purchasing the Flat but had not read it "*line by line*" but had relied more on what they had been told by the estate agent who apparently told them that they could lay wooden floors and that other flats in the Building had wooden floors. Although they did not put it in terms of waiver, they suggested that they were being unfairly singled out for enforcement action. They made a similar point in relation to the basement parking space and pointed out that other tenants had apparently stored things there without facing enforcement action.

Determination

10. *Preliminary.* It came to the Tribunal's attention as a result of the evidence given by Mr Raybould that an RTM company has acquired the right to manage the premises comprising the Building. Consistent with his evidence, we note that the official copy of the register of the Applicant's title contains a note in the proprietorship register as follows: "*All Land 2014 RTM Company Limited ... has lodge evidence ... that it is a RTM company and has acquired the right to manage the land in this title pursuant to Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002*". Where the right to manage has been acquired, the key operative provisions of the 2002 Act effect a statutory substitution of the RTM company as the person responsible for "*management functions*" relating to the whole or part of the premises, and impose a prohibition on other parties exercising the same functions. Management functions are functions with respect to services, repairs, maintenance, improvements, insurance and management (s.96(5)); functions relating to the grant of approvals are also transferred (ss.98-99). Despite this erosion of the landlord's powers, certain management functions are excluded, including functions relating to re-entry or forfeiture which remain with the landlord (s.96(6)(b)) and the landlord retains its right to enforce tenant covenants: section 100.

11. *Breaches 1 & 2.* It is convenient to deal with these together arising as they do out of the same facts. There is no dispute that the Respondents have taken up the carpet and laid a wooden floor in the hallway, reception/dining room and 3 bedrooms. The Respondents have not sought or obtained the formal license of the Applicant or the RTM company for these works. Mr Brown put his case on the basis that the Respondents had thereby carried out unauthorised "*alterations or additions*" to the Flat in breach of paragraph 8 in the Third Schedule and/or were in breach of paragraph 11 of the Seventh Schedule which is a covenant not to reside in the Flat unless the floors are covered with carpet.

12. Having considered the terms of the Lease and the parties' submissions, we are not satisfied that the Respondents have breached the covenant in Clause 8 of

the Third Schedule. In general a covenant against alterations will be construed so as only to forbid alterations which would affect the form or structure of the building: see e.g. Halsbury's Laws, Volume 62, paragraph 616 and the cases cited there, in particular *Bickmore v Dimmer* [1903] 1 Ch 158, CA. There is no suggestion that the form or structure of the Flat has been affected. Nor are we persuaded that the replacement of a carpet with a wooden floor is an addition, certainly not in the context of this Lease and this clause. We therefore find that Breach 1 is not established.

13. However, we are satisfied that the same facts give rise to a breach of the covenant contained in paragraph 11 of the Seventh Schedule and we therefore find that Breach 2 is established. The result of the changes made has been to remove the carpet and replace it with a wooden floor. The Respondents are therefore residing in the Flat in circumstances where there is no longer any carpet covering the floors in the hallway, reception/dining room and 3 bedrooms. The soundproofing system is not a defence. The only other point that the Respondents raised by way of defence was a suggestion that the covenant may have been waived (see paragraph 9 above). In the light of this suggestion, Mr Brown drew our attention to the case of *Swanston Grange (Luton) Management Ltd v. Langley-Essen* [2008] L & TR 20, in particular paragraph 23 thereof, in which HH Judge Huskinson said this:

> *"For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show an unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants... The Respondent would need to establish that she had altered her position to her detriment on the strength of such promise or representation and that the assertion of the Appellant's strict legal rights under the relevant covenants would be unconscionable: see Halsbury's Laws, 4th edn, reissue Vol. 16(2) para 1082 and following."*

14. We are satisfied that there is no factual basis for a plea of waiver. We are talking here, of course, not about waiver of the right to forfeit, which is not a matter for this Tribunal, but waiver of a covenant in the sense that the party entitled to the benefit can lose the right to enforce it. Nothing was said to the Respondents by the Applicant or any authorised agent of the Applicant which

could found an estoppel or waiver. The estate agents were the vendor's agents, not the agent of the Applicant. The evidence about the other historic "breaches" was nowhere near clear enough to infer a prolonged course of usage inconsistent with the covenant.

15. *Breach 3*. The photograph at page 67 speaks for itself and demonstrates that this covenant was breached when the Respondents used parking space 8 to store carpets and other materials whilst they were awaiting disposal. For the same reasons as are set out in paragraph 13 above, the covenant has not been waived, notwithstanding that some other tenants may from time to time use the parking spaces for purposes other than parking a private motor vehicle. The breach has since been remedied but it was breached for a short period of time whilst the Respondents were undertaking work to the Flat. We are surprised that the Applicant has pursued this breach in the circumstances but we find that there was a breach of paragraph 28(a) of the Third Schedule.

16. *Breach 4*. The Respondents admitted that their workman had worked outside the permitted hours for one weekend whilst they were moving into the Flat. Again, we are surprised that the Applicant has pursued this breach in the circumstances but we find that there was a breach of paragraph 27 of the Third Schedule, taken together with paragraph 5 of the Seventh Schedule.

17. *Breach 5*. It is admitted that the Respondents are keeping cats without permission in breach of paragraph 7 of the Seventh Schedule. We find this breach proved, albeit there is no suggestion that the cats are disturbing anyone.

Conclusion

18. What happens hereafter is a matter for the Applicant and potentially the County Court. The time has certainly now come where the Respondents should seek legal advice as a matter of urgency. However, we are not going to leave this case without expressing the hope that recourse to the County Court is not necessary and that the parties are able to resolve their differences without further litigation. Clearly the Respondents should have read the Lease

and/or Report on Title more carefully but we are satisfied that they have acted in good faith throughout and that their breaches have not been wilful or deliberate. We therefore earnestly hope that the parties can resolve this matter without the need for court proceedings.

Name: Judge W Hansen **Date:** 16 June 2016