



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00HB/LBC/2018/007

Property : Flat 5, 8 Rodney Place, Clifton, Bristol, BS8 4HY

Type of Application : Determination as to alleged breach of covenant:
section 168(4) Commonhold and Leasehold Reform
Act 2002

Applicant : Rodney Mansions Limited

Representative : SLC solicitors

Respondent : Mr Westley Jones

Tribunal Member : Judge Martin Davey

Date of Decision : 11 May 2018

Decision

The Tribunal determines under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that there has been a breach of the covenant contained in Clause (5) of Part I of the Second Schedule to the Lease of Flat 5, 8 Rodney Place, Bristol BS8 4HY held by Mr. Westley Jones.

Reasons for decision

The Application

1. By an application (“the Application”), dated 12 February 2018, Rodney Mansions Limited (“the Applicant”), being the freeholder Landlord of Flat 5, 8 Rodney Place, Clifton, Bristol BS8 4HY (“the Flat”), applied to the First-tier Tribunal (Property Chamber) (“the Tribunal”), under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) for a determination as to breach of covenant by the Respondent leaseholder of Flat 5, Mr. Westley Jones, under his lease (“the Lease”) of the Flat. The terms of section 168 of the 2002 Act are set out in the annex to these reasons.
2. The Tribunal issued Directions to the parties on 16 February 2018. The Tribunal listed the Application as suitable for a determination on the basis of written submissions unless either party requested an oral hearing. No such request was made and the Tribunal accordingly considered the matter, on the basis of the written submissions, on 3 May 2018.

The Lease

3. The Lease, dated 20 June 2006, was made between the Applicant, Rodney Mansions Limited (the Lessor) and Robert Gordon Jones and Alison Sylvia Jones (the Lessee). The Lease was granted for a term of 999 years from 2 November 1984. The Respondent, who is the current Lessee, purchased the Lease on 10 May 2013.
4. By Clause 6 of the Lease the Lessee covenanted, with the Lessor and the owners and lessees of the other flats at 8 Rodney Place, to perform and observe the covenants set out in Part I of the Second Schedule to the Lease. Clause (5) of Part I of the Second Schedule to the Lease is a covenant “To lay and maintain carpet with suitable felt or other underlay on all indoor floors of the Flat except the bathroom and

kitchen floors which shall have vinyl cork or other suitable floor covering.”

The Flat

5. The Flat is a two-bedroom first floor flat in a building (8 Rodney Place) containing 8 flats. The remainder of the Flat comprises a hallway, a spacious kitchen/dining/living room and a bathroom.

The Applicant's Case

6. 8 Rodney Place is managed on behalf of the Landlord by its agents, Hillcrest Estate Management Limited (“Hillcrest”). In his witness statement, dated 23 February 2018, Hillcrest’s estate manager, Mr. Owain Wynne, explained that the previous (original) Lessees of the Flat had made alterations to the Flat converting it into a two bedroom flat (one of the bedrooms having an en-suite bathroom created by partitioning the existing bathroom) with an open plan living/dining room with kitchen area. Mr. Wynne said that the Landlord gave consent to the proposed alterations stipulating that the floor of the open plan area was to be carpeted save for a one metre strip of vinyl cork or other suitable floor covering around the kitchen units. Mr. Wynne says that to the best of his knowledge the then lessee complied with the terms of the consent regarding the flooring. Mr. Wynne says that unfortunately, copies of the original application, consents and correspondence are no longer in the Applicant’s possession, although Mr. Wynne produced a plan showing the area which he says had been stipulated in 2006 as being subject to the carpeting covenant following the alterations.
7. Mr. Wynne said that following the Respondent’s purchase of the Flat, on 10 May 2013, the Respondent wrote to John Seaman, a representative of the Landlord, on 19 July 2014, requesting, amongst other things, permission to fit hardwood/laminate flooring in the living/dining/kitchen room. On 23 July 2014 the Applicant Landlord denied the Respondent’s request for permission to fit new flooring.
8. Mr. Wynne says that in June 2015 the Applicant became aware that the Respondent had fitted laminate or hardwood flooring and on 23 June 2015 the Applicant wrote to the Respondent regarding the alleged breach of covenant. Mr. Wynne says that since then the Applicant, acting through its agent or its solicitors, has made every effort to resolve the matter with the Respondent.
9. Mr. Wynne says that on 30 December 2017 he met with the Respondent at the Flat, along with a fitter, Mr. Darren Taylor, of Tailored Flooring 88 Alma Road Bristol BS8 2DJ. He says that at this meeting he discussed the carpet requirements with the Respondent, who agreed that the flooring in the hallway should be replaced to meet the

requirements of the Lease. Mr. Wynne says that a discussion ensued with regard to the open plan nature of the kitchen/dining/living area and how the kitchen area of that room could be defined for the purposes of the carpeting covenant in the Lease. The option favoured by the Respondent, was to carpet the hallway and the left side of the open plan area, leaving the kitchen/dining room area to the right of the open plan space covered with vinyl/laminate. Mr. Wynne says that this was rejected by the Applicant on two grounds (1) because the matter of flooring materials had been agreed with the then Lessees at the time of the alterations to the Flat in 2006 and (2) that the terms of the Lease clearly restrict vinyl cork flooring to the bathroom and kitchen.

The Respondent's case

10. The Respondent says that the floor covering in the Flat is Karndean Luxury Vinyl floor covering laid on 12 mm MDF board, which in turn is glued to a 12mm Sound Mat 3 fixed to the existing floorboards. He accepts that this floor covering in the hallway is not in conformity with the requirements of the Lease and says that he has agreed that it should be replaced with carpet and underlay. However, he says that the problem with regard to the floor covering of the open plan kitchen/dining/living space is that, as noted above, this space was created in 2006 by the previous lessee through alterations made to the Flat as originally configured. At the time when the Lease was granted there was a separate kitchen but when the Flat was altered the kitchen was converted to a bedroom and its location was moved to become part of the larger open space living/dining room. Thus Mr. Jones says that he has been trying to resolve how one might define "the kitchen" for the purposes of the covenant in clause (5) of the Second Schedule to the Lease in these changed circumstances. He says that this would identify which area of the living/dining/kitchen area should be carpeted and which could be covered with "vinyl cork or other suitable floor covering" as required by the Lease.

Discussion

11. At the heart of this Application is a dispute between neighbouring flat owners at 8 Rodney Mansions, a converted Georgian terraced property in the centre of Clifton Village, a mixed shopping and residential area, in Bristol. There are 8 flats at the property, the freehold of which is owned by the Applicant, Rodney Mansions Limited, which is a leaseholder controlled Management Company. The property is managed on behalf of the freeholder by its agents Hillcrest Estates ("Hillcrest"). The eight flats are each held on 999 year leases. The Respondent is the leaseholder of the first floor Flat 5, the Lease of which he purchased on 10 May 2013. The Lease was granted on 20 June 2006 to the Respondent's predecessors in title, Robert Jones and Alison Jones, for a term of 999 years from 2 November 1984.

12. Flat 5 comprises a hall, two bedrooms, a bathroom and an open plan living/dining room with a kitchen area. The flat was originally a one bedroom flat with a hall, separate kitchen, bathroom and a living/dining room. In 2006 the original Lessees, apparently with the permission of the Applicant (although evidence of the same is not available), created an en-suite bathroom by partitioning the original bathroom, changed the use of the kitchen to a second bedroom, with access to the en-suite, and relocated the kitchen facilities to that part of the living/dining room adjacent to the bathrooms. The changed layout is shown on plans submitted to the local planning authority (Bristol City council) with a planning application for listed building consent in 2006 (Ref: 06/02548/LA).
13. As is often the case in such circumstances, the leases of each flat contain identical, mutually enforceable, provisions designed to mitigate, if not eliminate, the effect on the occupier of a lower flat, of noise emanating from the flat above as a result of the ordinary daily living activities carried on by the leaseholder and or residents of that flat. A sample lease (relating to Flat 8) is contained in the trial bundle prepared by the Applicant but it is not disputed that the Lease for Flat 5 is in similar form.
14. To this end Clause (5) of the Second Schedule to the Lease contains a covenant by the Lessee with the Lessor and the lessees of the other 7 flats in the building "To lay and maintain carpet with suitable felt or other underlay on all indoor floors of the Flat except the bathroom and kitchen floors which shall have vinyl cork or other suitable floor covering." The burden of this covenant passed to the Respondent, on assignment of the Lease to him, by virtue of section 3 of the Landlord and Tenant (Covenants) Act 1995.
15. On 19 July 2014 the Respondent, sent an email to a Mr. John Seaman stating that he had moved into No 5 a few weeks previously. The email went on to state

"I have plans to make some improvements to the property in the near future – which will largely consist of repairs to the back bedroom following the water leak last year (which I believe has now been repaired?), reconfiguration of bathrooms from two back into one, painting throughout and new carpets/flooring. On the subject of flooring, I am interested in finding out whether or not I may lay hardwood/laminate in my front room (Drawing Room) with appropriate sound insulation underlay? I note when I purchased the property somewhere in the paper work it mentioned requiring approval of the management company – any guidance you can offer would be appreciated."
16. It is not clear precisely what role Mr. Seaman played, although the managing agent's estate manager, Mr. Wynne, describes him, in his witness statement, as a representative of the Landlord Company. In any

event Mr. Seaman replied to the Respondent by email of 23 July 2014 the relevant part of which states:

“The level of soundproofing at the moment is very poor since Alison and Rob changed things, perhaps you might improve it a bit. I hear your music, you probably hear mine!

On the matter of laminate flooring Section 5 of the lease on page 9 states: To lay and maintain carpet with suitable felt or other underlay on all indoor floors of the flat except the bathroom and kitchen floors

We have just this month had to ask the owner of flat two to reinstate carpets as the owners of flat 1 (basement flat) were suffering excessive noise through the timber flooring above. This applied to living area as well as two bedrooms

I enclose a link to the building regulations view on laminate flooring which is not favourable even with underlay on a traditional suspended timber floor.....

Sorry not to be more helpful”

17. Whatever the precise nature of this exchange might be, it is clear that the Applicant Landlord has not at any stage waived the application of the Clause (5) covenant in the Second Schedule to the Lease in the case of Flat 5. Indeed since Mr. Wynne first wrote to the Respondent on 23 June 2015, having shortly before then discovered, from sale particulars for the Flat, that the Respondent appeared to have installed wood/laminate flooring within the Flat, it is clear that the Landlord has at all times requested compliance with that covenant by the Respondent. By a letter to the Respondent dated 12 January 2016 the Applicant’s solicitors (SLC solicitors) informed the Respondent that “It has been brought to our attention that there is frequent noise from the property at various times during the evening and night, with the laminate flooring exacerbating the noise nuisance to the neighbouring properties.” This was reiterated in an email from SLC to the Respondent on 24 November 2017. As noted above, the Respondent says that his floor covering is actually vinyl, but this does not alter the fact that it is not carpet with felt or underlay as required by the terms of the Lease.
18. The Tribunal considers that this dispute was, and probably still is, capable of resolution by some compromise agreement between the parties. Much of the evidence relates to failed attempts by the parties to come to such an agreement. The sticking point for the Respondent seems to be the extent of the living/dining/kitchen room that should be carpeted.
19. However, the sole issue for this Tribunal is whether there has been a breach of a covenant in the Lease. Subsections (4) and (6) of section 168 of the Commonhold and Leasehold Reform Act 2002 provide that

a landlord under a long lease of a dwelling may make an application to the Tribunal for a determination that a breach of covenant or condition in the lease has occurred. The present Application for such a determination has been made because section 168(1) of the 2002 Act provides that “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 (c20) (restriction on forfeiture) in respect of any breach by a tenant of a covenant or condition of the lease unless subsection (2) is satisfied.” In so far as relevant, section 168(2) provides that the 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.....”

20. In the present case the covenant is absolute in its terms. It requires the laying of carpet and underlay to the inner floors of all areas of the Flat save the kitchen and bathroom. It follows that the sound insulation qualities of other covering that has been laid by the Respondent is immaterial to the issue of whether there has been a breach of the covenant.
21. The Tribunal therefore has no hesitation in finding that in so far as the inner floors of the Flat (save for the bathroom and kitchen) are not laid with carpet and underlay there has been such a breach of covenant. Indeed the Respondent admits as much in the case of the hallway (thereby satisfying section 168(2)(b) of the 2002 Act). With regard to the open plan area, the difficulty is that since the lease was granted there is no separate kitchen. The “kitchen” is now part of the living/dining room, which raises the problem of to what extent that room is exempt from the carpeting obligation imposed by the covenant. There is no obvious answer to this question. It is a matter of degree and common sense. The Applicant says that the line was drawn at a one metre wide strip in front of the kitchen units by agreement with the original Lessee at the time of the 2006 alterations. However, that is not binding on the Respondent in the absence of a variation of the Lease. Nevertheless, the fact remains that the living/dining area constitutes a major part of the room, wherever one draws the line. At the present time it would appear that none of the room has been carpeted and therefore there is a breach of the covenant.
22. The Tribunal hopes that following this determination the parties will be able to resolve the matter without further potentially expensive litigation, which will in all likelihood benefit nobody.

RIGHTS OF APPEAL

1. 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.

2. 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.
3. If the person wishing to appeal does not comply with the 28 day time limit, that 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.
4. 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.

Martin Davey
11 May 2018

Annex: The Law

Commonhold and Leasehold Reform Act 2002

168 No forfeiture notice before determination of breach

(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.

(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

(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.