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

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| **Case reference** | **:** | **LON/00BK/LBC/2022/0020 V:CVP** |
| **Property** | **:** | **Flat C, 33 Clifton Gardens, London, W9 1AR** |
| **Applicant** | **:** | **33 Clifton Gardens Ltd** |
| **Representative** | **:** | **RLS Law** |
| **Respondents** | **:** | **Pietro Lamberti & Carmen Maria Lamberti** |
| **Representative** | **:** | **SCS Law** |
| **Type of application** | **:** | **Commonhold & Leasehold Reform Act 2002 - Section 168(4)** |
| **Tribunal member(s)** | **:** | **Judge Sheftel**<br>**Mr Leslie Packer** |
| **Date of decision** | **:** | **11 October 2022** |

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**DECISION**

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## Summary of Decision

The tribunal determines that the Respondents are in breach of the Lease as more particularly set out at paragraph 23 below.

## Introduction

1. By application dated 15 March 2022, the Applicant seeks a determination that the Respondents have breached the terms of their lease, pursuant to section 168 of the Commonhold and Leasehold

Reform Act 2002 (the "2002 Act"). In particular, it is said that the Respondents have laid flooring in their flat contrary to the requirements of clause 2.12.2 of the Lease as further set out below.

## Background

2. The application concerns the property known as Flat C, 33 Clifton Gardens London W9 1AR ("the Property"). 33 Clifton Gardens is a stucco fronted building, which has been converted to 5 flats. The Property is on the first floor comprising two bedrooms, two bathrooms, living room, kitchen, hall and two balconies. There is no lift.

3. The Property is demised by lease dated 9 January 1995 for a term of 125 years from 24 June 1991 (the "Lease"). The Respondents acquired the leasehold title to the Property in 2004. The flat is sub-let, and the Respondents have never lived there.

4. The Applicant, freeholder, is a lessee-owned company. According to the First Respondent, prior to the appointment of Carlton Grove Chartered Surveyors to manage the building in 2017 there were no managing agents as there had been no real need for them; the management had been carried out by the various leaseholders.

## The hearing

5. The hearing of the application took place on 12 September 2022 by remote video. The Applicant was represented by Mr Toby Boncey (counsel) and the Respondents by Mr Luke Gibson (counsel). In advance of the hearing, the tribunal had been provided with a bundle totalling 329 pages.

6. On behalf of the Applicant, the tribunal heard evidence from Joshua Adler, director of the managing agent. In addition, Gregory Bruh, the leaseholder of Flat E, 33 Clifton Gardens and Stefano Ruggiero, the leaseholder of Flat D, 33 Clifton Gardens both provided written witness statements on behalf of the Applicant, although neither was called to give oral evidence as they were each based out of the jurisdiction. On the behalf of the Respondents, Mr Pietro Lamberti, the First Respondent, gave oral evidence. The tribunal was also provided with an expert report

of Mr Steven Day MRICS dated 9 August 2022, who had been jointly instructed by the parties. In addition, it is also noted that the bundles contained various (undated) photographs of the Property.

7. There is clearly a long running dispute between the parties extending to matters beyond the scope of the present application. Nevertheless, the tribunal is grateful to all parties for their assistance and the way in which the hearing was conducted.

## The law

8. Section 168 of the 2002 Act provides as follows:

(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

9. Accordingly, the sole question for the tribunal is whether there has been a breach of the lease. It is not within the tribunal's jurisdiction to determine as to whether any right to forfeiture has been waived and the tribunal makes no finding in this regard. Similarly, it is not for the tribunal to comment as to the reasons or motives as to why the application has now been brought, notwithstanding that this was raised during the hearing.

**The Lease**

10. The key provision of the Lease is clause 2.12.2. This imposes an obligation on the lessee:

> "*To lay and maintain at all times in all parts of the Demised Premises good quality carpeting and underlay except that in the kitchen and bathroom all over cork or rubber covering or other suitable sound-deadening and insulating floor covering may be used instead of carpets*"

11. It is the Applicant's case that the Property is not laid with good quality carpeting and underlay throughout or, in the case of the kitchen and bathrooms, all over cork or rubber flooring or other suitable sound-deadening and insulating floor covering.

12. The Respondents oppose the application, essentially on two grounds:

    (1) that the flooring does not breach the provisions of clause 2.12.2; and/or

    (2) that, in any event, the Respondents had obtained consent for the flooring (as well as other works) following their purchase of the Property and therefore they are not in breach of the terms of the Lease.

13. The two issues are addressed in turn.

**Is the flooring contrary to the requirements of the Lease?**

14. It is the Applicant's case that the Property has marble-effect tiles on the kitchen floor and wood flooring in the rest of the flat so that the flat is

not laid with good quality carpeting and underlay throughout or, in the case of the kitchen and bathroom, all over cork or rubber flooring or other suitable sound-deadening and insulating floor covering.

15. In the Respondents' submission, that materials used throughout the Property are 'suitable' and comply with the requirements of clause 2.12.2. It is also said that the Applicant's interpretation of the clause 2.12.2 - that carpeting is required throughout the Property save for the kitchen and bathrooms - is incorrect. In the Respondents' submission, alternative flooring is not limited to the kitchen and bathrooms.

16. Dealing first with the question of interpretation of the Lease, the tribunal determines that the Respondents' submission is not correct. As set out above, the obligation is

"*To lay and maintain at all times and in all parts of the Demised Premises good quality carpeting and underlay except that in the kitchen and bathroom all over cork or rubber flooring or other suitable sound-deadening and insulating floor covering may be used instead of carpets*".

In our view, the phrase '*other suitable sound-deadening and* insulating *floor covering may be used instead of carpeting*' must relate to the kitchen and bathrooms only. Were the reference to 'other suitable' material' to apply to the entirety the flat, further words would need to be inserted after words 'rubber flooring'. As drafted, the syntax simply does not work on the Respondents' interpretation. Accordingly, as a matter of interpretation, the clause requires carpeting and underlay throughout, save that cork or rubber or other suitable sound deadening and insulating floor covering may be used in the kitchen and bathroom.

17. Further, on the question of interpretation, the issue was raised as to how to determine whether alternative materials for the bathroom and kitchen are 'suitable' for the purposes of the clause. On this point, we agree with the submission of the Applicant that 'suitability' must be determined by reference to 'sound-deadening and insulating' qualities, having regard to the wording of the clause. We also note that Mr Lamberti submitted in his evidence that 'suitability' must be determined by reference to

materials available at the time the Lease was entered into. However, even if the Respondents were correct (and no evidence was presented as to what might have been available at the time), the key point is that the suitability of alternative coverings must always be measured by reference to 'sound-deadening and insulating' qualities as compared to 'good quality carpet and underlay', as we discuss further below.

18. Turning to the actual condition of the Property, the Respondents did not deny that the Property was not carpeted. As set out at para.5.2 of Mr Day's report, which was not contested, the floor coverings within the Property at the time of his inspection (2 August 2022) were as follows:

- "*Living room hall and the two bedrooms - floating timber plank floor covering laid over an acoustic foam underlay.*
- *kitchen - marble stone tiling laid on a tile mat boarding.*
- *En-suite bathroom – ceramic/porcelain tiling laid on an assumed tiling mat board.*"

19. It had been suggested that rugs had been placed throughout the Property at various times, although at the date of Mr Day's inspection it was said that "*the various rugs/loose carpets evident within the Respondents photographs supplied in June 2021 were not observed as being present at the time of my inspection*".

20. In relation to the timber flooring, Mr Day concluded that:

"*In my opinion the installed floor is not likely to provide the same sound deadening qualities of a good quality carpet and underlay particularly in relation to impact sound. However, I cannot ascertain whether the installed timber flooring has suitable sound deadening and insulation qualities instead of carpets as the least does not contain measurable performance criteria as to what would be deemed suitable and no benchmark testing of a carpet covering and underlay has been undertaken as part of this report.*" (para.5.5)

21. He also noted that the:

"*acoustic underlay appears to be missing to the timber covered steps between the Living Room and Kitchen, which would further prejudice its sound deadening and insulating quality.*" (para.5.6)

22. In relation to the kitchen and bathrooms, he stated:

"*Tiled and stone floor coverings within the kitchen and the two bathrooms are not cork or rubber cover rings and do not appear to include any sound deadening or insulating treatments over and above their inherent material properties.*

*In my opinion, the tiled and stone floor coverings would not provide equivalent sound deadening qualities to a cork or rubber floor covering,*

*particularly in relation to impact sound. However, similar to the timber flooring referred above, the lease does not contain any measurable performance criteria and no benchmark testing has been undertaken as part of this report.*"

23. Having regard to the evidence provided and particular the expert report of Mr Day, we determine that the flooring is not in accordance with the provisions of clause 2.12.2 of the Lease. In this regard, we find that:

    (1) The living room, hall, bedroom and steps are not carpeted as required by the terms of clause 2.12.2;

    (2) In the kitchen and bathrooms, the coverings are neither cork or rubber, nor a suitable alternative. This is on the basis of Mr Day's conclusion that they would not provide equivalent sound deadening qualities to a cork or rubber floor covering, particularly in relation to impact sound;

    (3) In the kitchen, bathrooms and steps, the coverings do not appear to include any sound deadening or insulating treatments.

24. If we are wrong on the question of interpretation of clause 2.12.2 of the Lease, and alternatives to carpeting are permitted for the entirety of the flat, we nevertheless consider that the flooring as installed is contrary to the requirements of the Lease, given Mr Day's expert evidence that, "*the installed floor is not likely to provide the same sound deadening qualities of a good quality carpet and underlay particularly in relation to impact sound*". We therefore consider that the flooring to the living room, hall and the two bedrooms is not a 'suitable' alternative in any event.

25. Accordingly, on any view, we consider that the flooring is not in accordance with the requirements of clause 2.12.2 for the reasons set out above.

**Did the Applicant consent to the flooring?**

26. This leads on to the second issue: namely, did the Respondents obtain consent to the flooring in early 2005 as they contend?

27. The evidence of the Applicant on this issue was extremely limited. The witness statements of both Mr Bruh and Mr Ruggiero each stated that "*So far as I am aware, the Applicant never entered into any such licence or approved the works formally or informally at any time*". However, Mr Lamberti's position was that neither was involved in the negotiations in 2004 and 2005 which, on the Respondents' case, led to consent being granted. Indeed, Mr Bruh has only owned Flat E since 2011. Rather, Mr Lamberti's evidence was that he had dealt with a Mr Brian Levene, who has since sold his flat and left 33 Clifton Gardens.

28. Similarly, Mr Adler stated that he had no knowledge of any licence being granted to the Respondents. However, as noted above, Carlton Grove Chartered Surveyors did not take over management of 33 Clifton Gardens until 2017. On handover, they were given copies of leases and service charge accounts for the previous three years. However, they were given no documentation relating to an alleged licence for alterations granted in respect of the Property.

29. Turning to the Respondents' evidence, it was acknowledged that there were gaps in the documentary record. Mr Lamberti's position was that the Respondents had entered into a licence in March 2005 which authorised the flooring, although no executed and final version of the alleged licence could be found.

30. While it was accepted that the documents provided did not present a complete picture, Mr Gibson submitted that the gaps could be filled by Mr Lamberti's oral evidence. In this regard, Mr Boncey, on behalf of the Applicant, sought to cast doubt on Mr Lamberti's credibility. This included submissions: that Mr Lamberti had sought to present the decision of the FTT in previous proceedings between the parties in a more favourable light than had been the reality; there had been inconsistencies between his description of the condition of the flooring when the Respondents purchased the flat and the Minehill Specification (which is referred to in more detail below); and the fact that notwithstanding that the parties had agreed joint instructions to the

expert, Mr Lamberti provided additional materials that the Applicant had not agreed should be included.

31. In the tribunal's view, we do not find that there was an attempt to mislead or establish a false narrative. However, we are also conscious that the events relating to the granting of an alleged licence occurred 17 years ago and so recollections will inevitably be less precise than in respect of events more recently. Accordingly, we place greatest weight on the contemporary documentary evidence provided.

32. The documentary evidence clearly showed that negotiations had taken place in late 2004 and early 2005 for the grant of a licence to carry out various works to the Property. Mr Lamberti produced correspondence from his then solicitors, Strain Keville which were indicative of such negotiations. It was not possible to determine the precise date of most of the letters, but it was accepted that they would have been from late 2004 to early 2005. They include a letter from Strain Keville to the Respondents dated 17 January 2005, purportedly enclosing, among other things, a Deed of Variation for signature and Licence for Alterations for signature. Unfortunately, we do not have copies of the enclosures and as noted above there is also no copy of any signed agreement. But Mr Lamberti also produced in evidence a bank statement which showed that he paid the invoiced premium for the licence (and Deed of Variation). Whilst it was suggested in the hearing on behalf of the Applicant that the money might subsequently have been returned, no evidence was offered that this had happened.

33. In the circumstances, the tribunal finds that the parties did enter into a licence for alterations in or around March 2005. However, the fact of a licence being granted, and the terms of such licence are different things. In our determination there is not sufficient evidence to establish on the balance of probabilities that the Respondents obtained consent to the floor works as they now appear. The reasons for this decision are as follows:

    (1) As noted above, no copy of the signed licence was produced, nor any other document confirming the final, agreed terms. The

unsigned draft licence contained in the bundle is undated, although does specify the year as 2004. There was no dispute that the agreement was not entered into until 2005 and it was not disputed that there continued to be negotiations in relation to the proposed works in the final months of 2004 and at the start of 2005. Indeed, one of the letters from Strain Keville refers to an 'amended plan'.

(2) Even if the unsigned version of the licence contained in the bundle represented the final agreement, it did not show *what* works were consented to. In particular:

(a) Clause 1.10 of the draft licence defined "The Permitted Works" as follows:

> "The Permitted Works mean the alterations made to the interior of the Premises, the nature and extent of which are detailed in the Plans ("the Internal Works"), or any different works and, subject to Clause 5.4 [excluding liabilities and warranties], any additional words the execution of which is required under any approved consent or the Landlord's approval of any other matter relating to the works. For the avoidance of doubt the Tenant is only permitted to carry out work referred to in the Licence and the Tenant shall carry out no other work whatsoever."

(b) Clause 1.8 defines 'The Plans' as meaning *"the drawing numbered 07-170-04 "D" dated 13.10.04 annexed and any additional drawing(s) and/or specification that the Landlord may from time to time approve*". However, the only version of the drawing numbered 07-170-04 0 which we were referred was a simple plan which contained no details of floor coverings.

(c) There was no attachment to the draft agreement showing what works were to be authorised.

(d) The only document referencing works was a 'Description of Works' dated 31 August 2004, produced by a company called Minehill Limited (the "Minehill Specification"). This describes extensive proposed works to the flat, going well beyond flooring. However, there was no clear evidence that this was incorporated into the agreement or set out the agreed schedule of works.

(3) In the alternative, even if the Minehill Specification formed part of the agreement and represents the approved works, the tribunal does not accept the submission that the contents are sufficient to establish that the Respondents had consent to the flooring as it currently appears and as described in Mr Day's report. In relation to flooring, the relevant parts of the Minehill Specification provide as follows:

> "**Down takings and removal**
>
> …
>
> 3. Carefully uplift overlay floor coverings and strip back to expose existing floorboards and remove from site stripped material.
>
> …
>
> **New Works**
>
> …
>
> 5. Floors of new WC shower, new ensuite bathroom and new kitchen to be overlaid with 12.5mm W.B.P. plywood bonded and screwed @ 300mm centres to existing floorboards.
>
> Floors to be fully tanked by applying "WEDI" building board sealed at joints and taken up junction of walls 100mm (laid to manufacturers instructions) Full specification for "Wedi" board and guarantee can be found on www.wedi.co.uk.
>
> 6. Floors to Entrance lobby, Bedroom 2, Bedroom 1 and Lounge to be laid with new hardwood strip flooring (client supply) on approved sound insulation. NB Quality and level of floorboards to be checked once top covering has been removed. Allow provisional sum for overlying entire floor with 12.5mm plywood.
>
> …"

Mr Lamberti described the Minehill Specification as only a 'high level' document. However, with regard to the kitchen and bathrooms in particular, the description for flooring in the Minehill Specification does not match the current description contained in Mr Day's report. For example, the Minehill Specification makes no reference to the tiling referred to in Mr Day's report. Indeed, even in relation to the other rooms, the Minehill Specification refers to 12.5mm plywood, whereas according to Mr Day's report, there is in place timber of 18mm thickness. In other words, putting the Respondents' case at its highest, the current flooring is not in accordance with the Minehill Specification in any event.

(4) The Respondents also argued that the Applicant approved the works once completed. However,

(a) The relevant clause in the draft licence (clause 1.3 of the Schedule to the draft licence) provides that on completion of the works, the Tenant must

"*… notify the Landlord so that his surveyors may make their final inspection and certify that the works have been completed*".

In the tribunal's determination, this provides a right to approve the works rather than an obligation.

(b) Further, and in any event, there is no evidence that this was done; no sign off or other documentation has been produced.

34. In the circumstances and for the reasons set out above, we do not find that the works were consented to.

35. It should be noted that the Applicant also made reference to clause 5.7 of the draft licence which provides as follows:

> "Subject to any variation of them made by this licence, the covenants and other provisions in the Lease are to extend to all works permitted or required by this licence from time to time executed, and are to apply in full force and effect to the Premises as altered as they now apply to the Premises demised by the Lease."

It was submitted by the Applicant that whatever was otherwise said in the agreement, the flooring must still comply with clause 2.12.2 in any event.

36. While clause 5.7 would arguably be relevant to the kitchen and bathroom areas to the extent that alternative flooring should still be suitable in relation to its 'sound-deadening and insulating' qualities, the tribunal does not agree with the Applicant on this particular issue in relation to the areas which would otherwise have required carpeting. The Applicant referred to the case of *Faidi v Elliot Corporation* [2012] EWCA Civ 287. In that case, although there was an express licence to put down oak floors, the landlord sought to rely on a term in the licence preserving the tenant's covenant in the lease to keep the floors covered with carpets. The Court of Appeal upheld the court's decision that notwithstanding the

inconsistency in the agreement, the landlord could not rely on the general provision and insist on carpeting once the works had been carried out. The Applicant sought to distinguish the present case on the basis that the two provisions are not necessarily incompatible. However, in our view, such argument cannot be sustained. If the permitted works had specifically allowed for an alternative flooring, it would seem completely pointless if the Applicant could nevertheless point to clause 2.12.2 to say it still had to be carpet.

37. Nevertheless, in our determination the point does not arise because of our finding that there is not sufficient evidence to show that the Respondents obtained consent to the flooring as it currently.

## Conclusion

38. In the circumstances and for the reasons set out above, we determine that the Respondents are in breach of the Lease.

**Name:** Judge Sheftel **Date:** 11 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).