Ref: LON/00AG/LBC/2005/0024

LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DETERMINATION

RE APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Premises: Flat 24 Alban House, Sumpter Close, London NW3 5JR

Applicant:	Alban House Hampstead Limited
Respondents:	Mr P B Leon and Mrs S R Leon
Hearing:	7 December 2005 (morning)
Inspection	7 December 2005 (afternoon)
Attendances:	Mr M Palfrey of Counsel, instructed by Messrs Portner & Jaskel Solicitors, with Mr D McMillan (Chairman and Director) and Mr F K K & Mrs G P F Ching (lessees of Flat 20) *for Applicant* Mr A Tilsiter, of Messrs Harold Benjamin Solicitors, with Mr P B Leon and his son, Mr G. Leon. *for Respondents*
Tribunal:	Professor J T Farrand QC LLD FCIArb Solicitor Miss M Krisko BSc(EstMan) BA FRICS Mrs S E Baum JP

1. The originating Application, dated 15 November 2005, pursuant to s.168(4) of the 2002 Act sought a declaration that breaches of covenants in the Respondents' lease had occurred.

2. The Applicant is named as the registered proprietor of the freehold title to the Premises subject to leases listed in the Charges Register (including the lease of Flats 20 and 24). The freehold was, evidently, acquired by collective enfranchisement in 2000 under the Leasehold Reform and Urban Development Act 1993 so that all lessees are shareholders of the Applicant.

3. The Respondents (together with Mr Leon's father, Mr Gary Leon, now deceased) are named as the registered proprietors of the leasehold title to Flat 24 at the Premises. The current lease had been (re)granted as varied on 27 November 2000 and is for a term of 999 years from 25 March 2000 at a peppercorn rent. Since 2002, when Mr Gary Leon died, Flat 24 has been occupied by sub-tenants.

4. Clause 2 of the Respondents' original lease contains a Lessee's covenant with the Lessor and other lessees to observe and perform Regulations in the First Schedule to that lease. These Regulations include the following:

> 20 — Not to use any part of the Buildings in such manner as to cause annoyance nuisance injury damage or disturbance to the Lessor or the lessees or occupiers of other parts of the Buildings or the owners or occupiers of any nearby or adjacent property nor to damage any trees plants or shrubs in the gardens or grounds of the Buildings but to use the same subject to such reasonable Rules and Regulations for the common enjoyment thereof as the Lessor may from time to time prescribe.
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> 22 - To keep the floors of the Flat covered with close-fitted carpet with a foam backed underfelt or underlay or with such other effective sound-deadening floor covering material as shall previously be approved by the Lessor's [...] Managing Agents

Regulation 22 is printed as amended in 2000 on (re)grant of the lease. The employment by the Lessor of an Agent in connection

with management is expressly envisaged in Clause 4(v)(f). It is understood that the first named Respondent is a director of Fulleasy Ltd which was employed as Managing Agent for the Premises until August 2005.

5. The declaration sought in the Application was that the Respondents were in breach of Regulations 20 and 22. Reference was also made to Regulation 1 under which Lessees covenanted, in effect, not to do or allow in the Flat "any act or thing which may annoy or tend to cause annoyance nuisance damage or danger to the Lessor ... or any other lessees or occupiers of any part of the [Premises]". However, this Regulation was not relied upon at the Hearing as adding anything to Regulation 20.

6. The Application contained the following Statement of Facts:

> "The Respondents have laid laminate/wooden flooring in the reception room and hallway of Flat 24 Alban House without the approval of the Lessor. As a result of the laminate/wooden flooring now laid the Lessor has received complaints of noise nuisance from the Lessee of Flat 20 Alban House."

7. In a Statement in Response to the Application, dated 8 November 2005, Mr P Leon described the Premises as a purpose built block consisting of 24 flats built out of brick with concrete floors. He stated that, in April 2005, new sub-tenants had requested the removal of some of the carpet at Flat 24 and the installation of laminate flooring, apparently for decorative and health reasons.

8. So far as remaining material at the Hearing, Mr Leon relied upon two contentions in repudiation of the Applicant's charges of breaches of covenants. First, in accordance with Regulation 22, he had obtained approval from the Managing Agent. He enclosed a copy letter, dated 4 April 2005, from his company Fulleasy Ltd which gave him "permission to lay a laminate floor providing that there is suitable sound-deadening underlay to the laminate". Second, the laminate flooring laid used Technics 5 underlay throughout so that "effective sound-deadening floor covering material" had been installed as required by Regulation 22 as well as by the approval. He enclosed copy product information in support.

9. At the Hearing, as to the first point, Mr Palfrey submitted that the approval given by Fulleasy Ltd was ineffective as being, in substance,

given by Mr Leon to himself and, in any event, outside the authority of Fulleasy Ltd. He drew attention to the restricted terms of the Residential Management Agreement entered into between the Applicant and Fulleasy Ltd as from 1 December 2002.

10. As to the second point, Mr Palfrey disputed whether the underlay used was in fact Technics 5.

11. He also emphasised that the Applicant's case was not confined to breach of Regulation 22 but included causing 'noise nuisance' and annoyance in breach of Regulation 20. In this connection, reference was made to extracts from *Woodfall (Landlord and Tenant)* and *Halsbury's Laws* concerning the construction of similar covenants. Although passages were read from 19th century cases, a 20th century case was cited in *Woodfall* (footnote 2) as indicating an appropriately modern approach. In *Hampstead & Suburban Properties Ltd. v. Diomedous* [1969] 1 Ch. 248 at p.258, Megarry J stated: "I have no doubt that what is a nuisance or annoyance will continue to be determined by the courts according to robust and common-sense standards." He also, incidentally but relevantly, stated: "In the context I feel little doubt that "effective soundproofing" is soundproofing which is effective in preventing a nuisance or annoyance to neighbours."

12. In reply, Mr Tilsiter asserted that the approval given by Fulleasy Ltd should be regarded as effective: the company was a separate legal entity and, although he accepted that it lacked express authority to give the approval, the contractual position between the Applicant and its Managing Agent was not a matter for the Tribunal to consider. He further, submitted that, if approval were not given by the Applicant, it would have been unreasonably withheld in contravention of s.19(2) of the Landlord and Tenant Act 1927.

13. As to the efficacy of the laminate and its underlay, he complained that his client had never been told by the Applicant or its complainant what would be suitable. He described Mr Ching's witness statement as "sensational", asserted that Technics 5 had been used and was not unsuitable and submitted that, in judging whether nuisance and annoyance arose from day to day living in blocks of flats, a degree of tolerance should be expected from the occupants.

14. Mr Tilsiter added that Mr Leon was upset that meetings to discuss the complaints and possible alternatives had not occurred instead of

these proceedings. He additionally said that there were at least four other flats in the premises with laminate floors but that the only complainant was Mr Ching.

15. Although concerned that the approval given by Fulleasy Ltd might not be real but a mere formality, the Tribunal was prepared to accept, in effect, Mr Tilsiter's submission that it should be regarded as effective. Regulation 22 as amended only requires approval, not from the Lessor, but from the Lessor's Managing Agents. So far as lessees are concerned, the Managing Agent from time to time must be regarded as having ostensible or apparent authority to give the requisite approval. However, the approval given here was conditional: it expressly depended upon there being a suitable sound-deadening underlay to the laminate. Since suitable can only be taken as meaning effective, the nub of the case plainly becomes an assessment of the sound-deadening efficacy of the laminate flooring laid and its actual underlay. Whether or not that underlay is, in fact, Technics 5 appeared immaterial to the Tribunal.

16. The Tribunal considered that Mr Tilsiter's submission about s.27(2) of the 1927 Act rendering any withholding of consent unreasonable was misconceived. That subsection relates to covenants against making improvements and, whilst the laminate flooring laid here might well be regarded as an improvement, Regulation 22 is not directed at restricting improvements. More importantly, Regulation 22 requires previous approval and s.19(2) cannot apply unless and until approval or consent has been sought and refused.

17. In the Tribunal's view, the facts that discussion meetings had not been arranged and that, despite there being laminate floors in other flats, Mr Ching was the only complainant, although to be regretted perhaps, were not material for present purposes. The Applicant was entitled to address alleged breaches of covenants by the Respondents without dealing similarly with other lessees and might have good reasons for not so doing, particularly in the absence of complaints.

18. Mr Ching's witness statement included his evidence that the laminate floor covering was not effective to deaden sound, particularly sound occasioned by the sub-tenants' child, and that he and his wife found this a nuisance and were annoyed, to the extent that his health had been adversely affected. His evidence had been described by Mr Tilsiter as "sensational" but not otherwise

challenged. Accordingly, it appeared to the Tribunal that the issue was whether Mr Ching's evidence and complaints should be rejected as lacking commonsense or accepted as reasonable in the circumstances. It was considered that this should be decided, so far as practicable, on a basis of objectively established facts.

19. In the light of this, the Tribunal decided to make an appropriate Inspection of the Premises following the Hearing. The method of undertaking such an inspection appeared not to be dictated by any procedural precedent and would, the Chairman ruled, have to be 'played by ear'. Accordingly, arrangements were made for the Tribunal to visit three flats in the Premises – No.24 itself, No.20 which was immediately below it and No.16 which was immediately below No.20. During the visit the Tribunal was able to undertake listenings, in the presence of the parties and from flats beneath, of footsteps as well as of tennis balls, a rubber ball and glass marbles being dropped and bounced on the laminate flooring of flats above and compare this with the same sounds in relation to carpets (as throughout in Flat 20, except for the kitchen and bathroom, and partially in Flat 24).

20. This exercise enabled the Tribunal to find as a fact that the laminate flooring, with its underlay, did not constitute an effective sound-deadening floor covering material. The impact noise from hard objects, such as the marbles and heels, was significantly more audible on the laminate flooring. Normal footsteps on the laminate floor in the hallway were clearly audible in the flat below, while normal footsteps in the carpeted hallway were not audible in the flat below. Further, the 'clack' sounds produced were such that, in the judgment of the Tribunal, Mr and Mrs Ching were, on a balance of probabilities, wholly justified in complaining of 'noise nuisance' and annoyance.

21. In the light of the above findings, therefore, the Tribunal now determines, for the purposes of s.168 of the 2002 Act, that breaches of the covenants contained in Regulations 20 and 22 in the First Schedule to the Lease now vested in the Respondents have occurred as claimed by the Applicant.

22. Finally, it should be noted that Mr Leon in his Statement in Response had applied for an order under s.20C of the 1985 Act limiting the inclusion of the Applicant's costs in future service charges. However, during the Hearing Mr Palfrey gave an assurance

on behalf of the Applicant that such costs would not be included as service charges. Consequently, it was unnecessary for the Tribunal to consider whether or not the order sought would be just and equitable in the circumstances and no order is made.

CHAIRMAN Julian Faulks

DATE 16th December 2005