LON/00AC/LSC/2006/0049

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 168 OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002 AND SECTION 20(C) LANDLORD & TENANT ACT 1985

Applicant:	**ERNLE ESTATES LIMITED**
Respondent:	**MS L McILROY**
Premises:	**FIRST FLOOR FLAT, 8 STOWE ROAD, LONDON W12**

Date of hearing:	20 SEPTEMBER 2006
Date of decision:	28 SEPTEMBER 2006
Tribunal:	Mr M Martynski Mrs H Bowers BSc(Econ) MRICS MSc Mr D Wilson
Appearances:	Mr M Paine (Applicant's managing agent) Ms L McIlroy (Respondent) Mrs J Stainsby (Spokesperson for Respondent) Mr R Paing (Ground Floor Tenant) Ms R Ribeiro (Ground Floor Tenant)

Background and main issue

1. This is an application made by Ernle Estates Limited which is the freehold owner of the building at 8 Stowe Road, London W12.

2. The Respondent, Ms L McIroy, is the long lessee of the First Floor Flat, 8 Stowe Road, London W12 ('the Premises') pursuant to a lease ('the Lease') for a term of one hundred and twenty five years commencing 24 June 1981.

3. The Applicant applied for a determination by the Tribunal that there is a breach on the part of the Respondent of the covenant in the Lease concerned the carpeting and/or other covering of the floors in the Premises. The substance of the alleged breach was that the flooring in the Premises was not covered as stipulated by the lease. The Applicant alleged that as a result of the breach of covenant, the occupiers of the Ground Floor Flat situated underneath the Premises are caused a noise nuisance.

The written and oral evidence

4. The Applicant's case was set out in two statements of case dated 06.09.06 & 19.09.06 from its managing agent, Mr Martin Paine of Circle Residential Management Limited.

5. The Respondent's case was set out in a statement of case dated 16.09.06.

6. The parties produced copies of two significant documents as follows;

(a) the Lease;

(b) a letter ('the Licence') signed by Mr Paine on the headed note paper of the Applicant's then managing agents, Webber Steinbeck & Company dated 13 October 2006.

7. The Tribunal did not hear evidence from either Mr Paing or Ms Ribeiro as to the noise nuisance that was alleged from the Premises. The Tribunal was not concerned with the issue of whether there was, or was not a noise nuisance from the Premises or as to the extent of any such nuisance. The only question

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for the Tribunal was the question of whether or not there is a breach of covenant on the part of the Respondent.

The Lease

8. The lease contained the following relevant terms;

"THE Lessee HEREBY COVENANTS with the Lessor and with and for the benefit of the owners and Lessee from time to time during the currency of the term hereby granted of the other flats comprised in the Building that the Lessee and the person deriving title under him will at all times hereafter observe the restrictions set forth in the Second Schedule hereto" [clause 2]

"The Lessee shall keep the demised premises substantially carpeted or all covered with cork or rubber covering except that in the kitchen and bathroom cork or rubber covering or other suitable material for avoiding the transmission of noise may be used instead of carpets and shall at least once monthly clean all the windows in the demised premises"
[Second Schedule – paragraph 10] ('the Covenant')

The Licence

9. The Licence was addressed to the Respondent's predecessors in title (a Mr Simmonds and a Ms Lamb) and was headed;

"*Consent for Works to First Floor Flat 8 Stowe Road London W12*".

The relevant parts of the body of the Licence read as follows;

"*You may accept this letter as a Licence to Undertake Alterations (Retrospective) in relation to the above property.*"

"The agreed works comprise ..... the replacement of the floor coverings in the bathroom, kitchen, living room and corridor with 10mm solid wood T&G on 3mm insulation".

The inspection

10. This took place on the morning of the hearing. Present at the inspection were;

Mr M Paine (Applicant's managing agent)

Ms L McIlroy (Respondent)
Mrs J Stainsby (Spokesperson for Respondent)
Mr R Paing (Ground Floor Tenant)
Ms R Ribeiro (Ground Floor Tenant)

11. The Tribunal noted on the inspection that the flooring in the Premises was (so far as it could be seen) plywood, rather than solid wood and that it was probably not tongue and groove.

12. Apart from the bedroom which was carpeted with a fitted carpet, the Premises were covered as follows;

Living room: A large thick rug and a smaller thinner rug covering the depth of the living room with approximately one and half feet either side not covered.

Kitchen: A thin rug covering approximately just over 50% of the floor area.

Hallway: A thin rug covering approximately less than 50% of the floor area.

Bathroom: There were three bath mats covering the majority of the main floor area. There were steps leading from the bathroom door down to the bathroom floor area which were not covered.

Application to adjourn

13. At the outset of the hearing, the Respondent made an application to adjourn the hearing. The reason for this application was that the Applicant's second statement of case was only handed to the Respondent during the inspection of the property earlier in the day. The Respondent required time to consider some references to statutory provisions [s.2 Law of Property (Miscellaneous Provisions) Act 1989 & s's.78 & 79 Law of Property Act 1925] made by Mr Paine in the second statement of case and an assertion made by him in that

second statement that he had no authority to grant the Licence to alter the Premises.

14. The application to adjourn was refused. The grounds for the refusal were that; (a) neither party were legally represented; the Tribunal was in a position to consider and explain the statutory provisions to the Respondent; (b) the statutory provisions referred to by Mr Paine were photocopied in full by the Tribunal's clerk and given to all parties who were then given time to consider them prior to the main hearing commencing; (c) the statutory provisions had no real relevance in any event in the proceedings; (d) Mr Paine's assertion that he had no authority to issue the Licence to alter could be considered by the Respondent without the need for an adjournment.

The Respondent's case

15. The Respondent had two main arguments; First, the Licence amounted to a waiver of the requirements of the Covenant, or alternatively that by issuing the Licence (which she submitted gave permission for an alternative floor covering other than that set out in the Covenant), the Applicant was estopped from now alleging that there had been a breach of the requirements of the Covenant.

16. Second, she argued that in any event the Premises were substantially carpeted and so if the Applicant were entitled to insist on compliance with the Covenant, it had been complied with.

17. The Applicant contended that the Licence which had been given to the Respondent's predecessor in title was personal to that predecessor and accordingly the Respondent could not rely on the Licence. He further contended that he had no authority to issue a licence to alter the Premises and he had no authority to waive the requirements of the Covenant.

The decision

18. The Tribunal found that the Respondent was in breach of the Covenant as alleged by the Applicant for the following reasons.

19. The Licence, although not entirely clearly worded, was on its own wording plainly given as a licence to retrospectively allow the works as described in it which had by that time been undertaken and accordingly the Licence was for the benefit of the then tenant and any successor in title. The Licence was not, as suggested by Mr Paine, a licence personal to the Respondent's predecessor in title or, in Mr Paine's words a 'side letter'. The Licence was clearly made by the Applicant's agent who held himself out to be authorised to grant a Licence and accordingly the Applicant is bound by that Licence.

20. As to the Respondent's argument that the Licence could be taken by her to be a waiver of the requirements of the Covenant, it is the view of the Tribunal that the Licence did not and could not act as such a waiver. It was limited to giving permission to the carrying out of the works described in it. There was no question of an estopple arising. The letter containing the Licence was addressed to the Respondent's predecessor in title, not the Respondent, and did not in any event amount to a representation that the Covenant would not be

enforced or that the Covenant did not have to be complied with. Accordingly there is an existing obligation upon the Respondent as per the terms of the Covenant.

21. Even if the reasoning set out in the preceding paragraph were not correct and the Licence was capable of acting as a waiver of the requirements of the Covenant, the Respondent would still not be able to rely on the Licence in any event. The Licence could only be relied upon if the terms of that Licence were complied with. They were not. The Licence gave permission for a solid wood floor of tongue and grove construction. The flooring that actually exists in the Premises is a plywood floor (probably not of tongue and grove construction).

22. The Tribunal went on to consider if there was in fact compliance with the requirements of the Covenant. It was common ground that there was no cork or rubber flooring in either the kitchen or bathroom, therefore the question was whether the Premises, in the words of the Covenant, were substantially carpeted. The Tribunal considered whether the carpeting was substantial in both size and/or in respect of substance.

23. Following the inspection of the Premises the Tribunal found that whilst there were some rugs covering the floor, these were not, taken as a whole, substantial in size or substance and accordingly were not sufficient to satisfy any reasonable interpretation of the words "substantially carpeted".

24. The Tribunal did not take exact measurements of the floor area covered by rugs and mats but the inspection allowed it to come to a clear view on the question of "substantially carpeted". In particular (but the decision on the question of "substantially carpeted" does not rest on this fact alone) the Tribunal noted that the covering in the bathroom was by way of thin bath mats rather than rugs or carpets.

25. Accordingly the Tribunal determines that the Respondent is in breach of the Covenant.

Costs

26. The Respondent made an application pursuant to s.20(C) Landlord & Tenant Act 1985 for an order that all or any of the costs incurred, or to be incurred, by the Applicant in connection with these proceedings were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

27. Mr Paine made it clear to the Respondent and to the Tribunal that the Applicant did not intend to levy any of the costs of these proceedings as service charges or other costs against the tenants in the building in question. It was therefore unnecessary for the Tribunal to consider the application further.

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Mark Martynski (Chairman)

28 September 2006