RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

DECISION ON APPLICATION UNDER S.168 (4) COMMONHOLD AND LEASEHOLD REFORM ACT 2002

LON/00AY/LBC/2008/0071

Property	**Flat 53A,Camberwell New Road, London SE5 ORZ**
Applicant/ Landlord	**Nita Lina Elvira Dellapina and Angelo Dellapina**
Respondent's/ Tenant	**Robert Michael Candelent Wilson**
Application	To determine, whether, the Respondent has breached terms or conditions of the Lease dated 18 May 1983
Tribunal	Ms M Daley LLB(Hons) Mr T Johnson FRICS
Date of Hearing/ Paper Determination	05 February 2009

1. The Application

(i) The Tribunal received an application (the first application)dated 17 November 2008 under Section 168 (4) of the Commonhold and Leasehold

Reform Act 2002 to determine whether the Respondent had breached a covenant or condition of his lease.

(ii) The Directions, given on 19 November 2008 required that -: i) the Applicant's application and the attached documentation will be treated as the Applicant's statement of case, save that the Applicant must serve on the Respondent all correspondence relevant to the issue and a copy of the Applicant's surveyor's report and any plans prepared after his inspection of the works alleged to have been carried out.

(iii) On or before the 12 December, the directions provided that the Respondent was directed to serve a reply, and the Applicant to serve a brief response by 19 December 2008.

(iv) The matter was to be dealt with by a Tribunal on the documents alone without a hearing on 5th January 2009.

(v) On 12 December 2008 the Respondent made an Application (the second application)to the Tribunal on the basis that the Landlord was in breach of the terms of the lease and also sought a variation of the terms of the lease. The Respondent also sought to have the matter dealt with at an oral hearing.

(vi) The matter was set down for hearing on 5 February 2009 at 10 am. Subsequently the Tribunal wrote to the Respondent on 3 February 2009 indicating that the Tribunal believed that it did not have Jurisdiction to deal with the second application, and on the agreement of the parties the matter would be dealt with as a paper determination. (The question of the Tribunal's Jurisdiction is dealt with below).

2. Documents Received

Bundle of documents including the lease

3. Matters in Issue

The Tribunal at the paper determination, decided that the following facts were in issue.

(a) Whether the lease include the covenant or condition relied on by the Applicant; and

(b) Whether, the alleged facts constitute a breach of that covenant or condition. and

(c) That the Applicant is not estopped from asserting the alleged facts.

4. The Law

The relevant Law is set out below-:

S.168 COMMONHOLD AND LEASEHOLD REFORM ACT 2002

(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.

This subsection is satisfied if-

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(2) (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 a leasehold valuation Tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

6. The Lease

The Tribunal were provided with a copy of the original lease dated 18th May 1983 between The Ironstone Freeholds Limited(the landlord) and Alfiati Nguyen Thanh Thuy (the tenant) The relevant terms of the lease are as follows-:

"2.8 Not to cut maim or injure any of the walls or internal partitions of the demised premises nor to make any alterations in the demised premises.

2.13At all times during the term herby granted to observe the regulations specified in the First Schedule hereto and its is expressly declared that breach of any regulations on the part of the Lessee shall constitute a breach of covenant under this Lease.
The First Schedule
4. Not to do any act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor or its tenants or the occupiers of any adjoining or neighbouring flats or the neighbourhood nor any illegal or immoral act upon the demises premises or any part thereof.
8.Not to reside or permit any other person to reside in the demised premises unless the floors thereof(including the passages but excepting the bathroom, toilet and kitchen) are covered with close carpet or good quality felt except while the same shall be removed for cleaning repairing or decorating the demises premises or for some other temporary purpose..."

7. The Paper determination

The Applicant's case

(1) The Applicant in his Application, provided the Tribunal with the following information in support of the breach, It was stated that the Respondent had prior to the purchase of the lease (which took place on 15 September 2008) contacted the Applicant with various pre contract enquires including a schedule of proposed work which the tenant wished to carry out. By letter dated 27 August 2008, The Applicant's Solicitors the Sterling Partnership, indicated that the Applicant was agreeable to the proposed work save that they did not agree to "*any alteration to the walls including the removal or construction of new ones*" . The letter further stated that they would need a Licence for alterations.

(2) By letter dated 1.9.08, the Respondent's solicitors Campbell Hooper agreed on their client's behalf to proceed on the basis of a Licence for alteration, and asked to be provided with a copy of the same. This was forwarded to the Respondent on 2 September 2008. It is common ground that this licence was never entered into. On 5th September 2008 Alex Hare of Sterling Partnership emailed Anita Gill of Campbell Cooper and informed her that

the Applicants who lived in the ground floor property could hear building works and wished to exercise their right to inspect the property.

(3) The Bundle of document's included an email sent by the Respondent to his Solicitor on 10.9.08 which states "... *The Walls have gone. They were gone by Friday eve. Polish contractors did not understand. If I can have details I will speak to freeholder.*"

(4) This was confirmed by the Applicant's Surveyor Charles Matthews in an email to Alex Hare of Sterling Partnership dated 21 November 2008. He also confirmed that the floor covering at the premises was "ordinary laminate".

(5) The Tribunal were not presented with any evidence that the matters complained of constituted a Nuisance or Annoyance as set out in the first Schedule of the lease (Although the Respondent refers to noise as a result of the work undertaken).

The Respondent's case

(6) The Respondent set out his position in his response sent undercover of a letter dated 12 December 2008. At paragraphs 7 and 15 the Respondent admits that the internal walls have been removed.He states at paragraph 15 that:-" ...*all the works were undertaken in the belief that the landlord was prepared to give consent to alterations and would not unreasonably withhold approval* ."

(7) The Respondent also stated in his response that the previous tenants had laminated flooring and that as the landlord accepted rent from them the had acquiesced to their breach.

(8) In an undated letter sent to the Applicant's surveyor Mr Matthews, the Respondent states at paragraph three of that letter that "*The whole flat floor (including bathroom and Kitchen) has been covered with the highest quality sound reducing underlay (felt) available, so complying with the requirements of the lease.* "

(9) The Tribunal were also provided with an invoice and Technical data sheet . This described the product as Domestic Needlefelt Underlay and stated that the composition of the material used was 60% Recycled wool and Synthetic fibres, 40% Recycled Jute fibres.

(10) The Respondent on 12 December 2008 applied to the Tribunal for an Application to vary the lease, and for breach of covenant. By letter dated 6 January 2009 the Applicant's solicitor stated that the claim for a variation did

not fall within section 35 of the Landlord and Tenant Act 1987. They also stated that the Tribunal did not have Jurisdiction to consider the claim for breach of covenant.

(11) By letter dated 30 January 2009 the Respondent asked the Tribunal to confirm whether it had Jurisdiction to consider the alleged breach of covenant. On 3 February 2009 a letter was sent by the Tribunal indicating that the Tribunal believes that it does not have Jurisdiction.

The Decision of the Tribunal

(i) The Tribunal having read the documents have reached the following decision.

(ii) The Tribunal find that the Respondent is in breach of clause 2.8

(iii) The Tribunal have reached this determination for the following reasons-:

(iv) The Tribunal refer to the wording of the terms of the lease which states:- Not to cut maim or injure any of the walls or internal partitions of the demised premises nor to make any alterations in the demised premises".

(v) The Tribunal having considered the Surveyor's letter, and the admissions made by the Respondent have determined that there has been a breach of clause 2.8.

(vi) The Tribunal have had no evidence placed before it by the Respondent, that the matters complained of constitute a nuisance and annoyance in breach of clause 4 of the first schedule of the lease, the Tribunal therefore find on a balance of probabilities that no breach of clause 4 of the first schedule occurred.

(vii) The Tribunal find that the Respondent is not in breach of clause 8 of schedule 1. The Tribunal in considering the documents placed before it, have determined on a balance of probabilities that the Applicant has not proved that that the Respondent has failed to comply with clause 8 of first schedule of the lease. The terms of the lease require the Respondent to fit felt underlay, in the documents provided by the Respondent, there is evidence that he paid for underlay which he states was fitted at the premises. The Tribunal have not been provided with

any evidence to the contrary, accordingly the Tribunal find that no breach of clause 8 of the first schedule has occurred.

(viii) The Tribunal having considered the Respondent's application dated 12.12.08 find that the Tribunal do not have Jurisdiction to consider the alleged breaches of covenant, which are alleged breaches of section 11 of the Landlord and Tenant Act 1985.

(ix) The Tribunal note that the Applicant was at the outset prepared to grant and licence in respect of some of the work undertaken at the premises, and that the Respondent has indicated by implication in paragraph 18 of his response that he would be prepared to comply with an order for specific performance, should the parties proceed on that basis, then forfeiture proceedings might by avoided.

Signed

Dated 5-2-09