FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference(s)	**:**	**BIR/00CN/LBC/2020/0002**
Property	**:**	**3 Royal Arch Apartments, The Mailbox, Wharfside Street, Birmingham B1 1RB**
Applicant	**:**	**Royal Arch Management Limited**
Representative	**:**	**Jobsons Solicitors Limited**
Respondent	**:**	**SAB Investments Limited**
Type of Application	**:**	**An application for an order that a breach of covenant or condition in the lease has occurred under section 168 (4) of the Commonhold and Leasehold Reform Act 2002.**
Tribunal	**:**	**Judge D. Barlow** **Mr R P Cammidge FRICS**
Date of Hearing	**:**	**4 November 2021**

DECISION

Decision of the Tribunal

The Tribunal determines that the Respondent has breached the covenants at Regulation 3 and Regulation 6 of the Fourth Schedule to the Lease during a period commencing in January 2019 until the date in July/August 2021 when the former occupier, Ms Saira Mian, ceased to reside in the Property.

The Tribunal determines that the Respondent has not breached the covenants at clause 3.3, clause 3.5(a) and (b), of the Lease or at Regulation 4 or 15 of the Fourth Schedule to the Lease.

Reasons

Background

1. The Applicant landlord ("Landlord") is a residential management company, limited by guarantee of its members. It is also the Respondent tenant's landlord. The Respondent tenant ("Tenant") purchased Apartment 3 in February 2018. Royal Arch Apartments form part of the Mailbox development in central Birmingham. The Tenant holds the Apartment under an underlease dated 8 March 2002, granted for a term of 131 years from 1 January 2000, registered under title number WM767320 ("the Lease").

2. The Landlord has sought declarations from the Tribunal that the Tenant was and remains in breach of covenants in the Lease. The period during which the breaches are alleged to occur is from early spring 2018 until the application was filed on 13 March 2020 and continuing.

3. The directors of the Landlord include several long leaseholders of Royal Arch Apartments who appointed professional managing agents to manage the apartments. From March 2014 until November 2018 Royal Arch Apartments was managed by SDL Property Management ("SDL"). SDL was at the same time, also appointed as company secretary of the Landlord. From 1 December 2018 management was taken over by Wolfs Block Management Limited ("Wolfs"), who was appointed company secretary on 1 December 2018, following the resignation of SDL.

4. The Tenant carried out a programme of refurbishment works ("the Works") to the Property which commenced in early spring 2018. There was an exchange of emails between the Tenant and SDL in April-June 2018 concerning the scope and extent of the Works and some noise complaints caused by the Tenant's contractor's operations. There were delays implementing the programme of Works due to a dispute with the Tenant's contractor followed by the national lock-down in April 2020 which put back final completion and sign-off of the Works to December 2020. The Property was occupied from early 2019, by Ms Saira Mian, a director of the Tenant company, who resided there with her son until July/August 2021.

5. From early 2019 Wolfs entered into a dialogue with the Tenant concerning the Works, in the context of complaints received from Jean-Luc Olveira-Priez and Saulo Menezes de Olveira-Priez, the owner/occupiers of Apartment 4, concerning noise nuisance emanating from the Property. On 13 March 2020, faced with ongoing complaints from Messers Olveira-Priez and Wolfs lack of success in arranging an inspection of the Property, the Landlord's solicitor was instructed to issue this application.

The allegations of Breach

6. The Landlord's initial allegations of breach are set out in the Applicant's statement of case. They concern the Works and complaints of noise nuisance caused initially by the actions of the Tenant's contractors and subsequently by the then occupiers of the Property. The allegations relate to the following Lease covenants:

(i) *Clause 3.3 To permit entry*

to permit the Landlord and its duly authorised surveyors or agents with or without workmen at all reasonable times by appointment (but at any time in case of emergency) to enter into and upon the Premises or any part thereof for the purpose of viewing and examining the state of repair thereof.

(ii) *Clause 3.5 – Alterations*

(a) not to make any structural alterations or additions to the premises or any part thereof or any alterations to the exterior of the premises and not to alter the colour texture or appearance of any glass in the windows.

(b) Not to make any internal non-structural alterations or additions without first having received the Landlord's written consent which shall not be unreasonably withheld.

(iii) *Clause 4.6 Regulations*

Observe and perform the regulations in the Fourth Schedule PROVIDED THAT the Landlord reserves the right to add to alter or waive such regulations in its reasonable discretion.

Fourth Schedule: Regulations

Paragraph 3. Not to do or permit or suffer in or upon the Premises or any part thereof or elsewhere on the Residential Phase any……. act or thing which may be or become a nuisance or annoyance or

cause damage to the Landlord or the Owners or the occupiers of any part of the Building or of any adjoining or neighbouring premises.

Paragraph 4. Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance maintained in respect of the Building or the Residential Phase or may cause an increased premium to be payable in respect thereof……..

Paragraph 6. Not to play or use or permit the playing or use of any musical instrument television radio loudspeaker or mechanical or other noisemaking instrument of any kind……..so as to cause any nuisance or annoyance to any of the other owners tenants or occupiers of the Building and for the purposes hereof the decision of the Landlord (or of a Surveyor appointed by the Landlord for the purposes of this paragraph) as to what constitutes a nuisance or annoyance shall be final and binding on the parties.

Paragraph 15. To cover and keep covered the floor of the Premises with carpet or (in the case of the kitchen utility room and bathroom only) other suitable sound deadening material.

7. The specific actions that the Landlord states give rise to the alleged breaches are as follows:

   (i) Issue 1 - Clause 3.3 – *failure to permit entry*. It is alleged that the Landlord requested access to view the Property for a period of almost 12 months, but was persistently ignored or put off by the Tenant. Excuses were made concerning a dispute with the Tenant's contractor, which did not justify the refusal of the inspection request. The Tenant offered to permit an inspection following completion of the Works. This, the Landlord states, did not constitute a good reason to refuse an inspection of the Property when requested.

   (ii) Issue 2 - Clause 3.5(a) *Not to make any structural alterations* - the Landlord conceded at the hearing that it could not provide any evidence that the Tenant was in breach of the covenant at Clause 3.5(a) of the Lease.

   Issues 3 - Clause 3.5(b) – *Not to make any internal non-structural alterations or additions without the Landlord's prior written consent*. The Landlord alleges that significant internal alterations have taken place, the precise nature of which was unknown at the date of the application, but which included alterations to create new en-suite bathrooms, the removal of internal walls and some drainage

and electrical work, for which no licence had been granted by the Landlord. The Landlord further alleges that soundproofing between the Property and the neighbouring apartments had been removed and not reinstated following completion of the Works, which would justify its refusal to consent to the Works.

(iii) Issue 4 - Regulation 4 - *not to do or permit to be done anything which may void the landlord's insurance or cause an increased premium to be payable*. - The Landlord conceded at the hearing that it could produce no evidence that the actions of the Tenant had caused it to be in breach of Regulation 4.

(iv) Issue 5 - Regulation 3 and 6 - *not to do anything which causes a noise nuisance to the neighbouring properties*. The Landlord alleges that there was a serious noise nuisance emanating from the Property over a long period of time which has resulted in complaints from near neighbours. The noise nuisance includes shouting children, domestic arguments, loud television, music and games consoles, bouncing balls, use of gym equipment and moving furniture, all of which it is said were easily audible in the neighbouring apartments. The Landlord submits that the noise nuisance has been exacerbated by the removal of carpeting and the installation of hard flooring throughout the Property.

(v) Issue 6 - Regulation 15 - *to keep the floors of the premises (other than the kitchen, utility room and bathroom) carpeted*. The Landlord alleges that the Tenant has installed hard flooring throughout the Property in breach of this covenant.

The Property

8. The Property is a three-bedroom apartment on two floors - the second and second mezzanine floors of Royal Arch Apartments. The Mailbox is a high quality, mixed-use development comprising some 200 residential apartments, a hotel, business offices, restaurants, bars and car parking. The Mailbox building has open access to the public to pass through it and is open to the public 24 hours a day. There are residential apartments either side and above Apartment 3 but not below, where the use is commercial.

9. At the rear of the Property there is a large external patio area that is part of the demised premises. The entrance level floor of the Property comprises

an entrance hall, a ground floor WC, an open plan kitchen, dining, living area and a separate office. On the upper floor there is a landing area leading to 3 bedrooms. There are three bathrooms.

Hearing and Evidence

10. Directions were issued on 3 March 2021, for the parties to obtain a single joint expert report covering: the nature and extent of the alterations to the Property; whether the alterations had affected the structural parts of the building, or were just internal non-structural alterations; whether the alterations had affected the fire resistance or insulating properties, including noise attenuation measures, in the Property; whether the alterations had affected the structure of other parts of the building that bound the Property. Mr Hannibal-Law BSc (Hons) MRICS, MFPWS of Barnsley Bate Limited was jointly appointed by the parties on 1 April 2021. He produced his report in June 2021 ("the Expert Report"), which was considered by the Tribunal.

11. The Tribunal were due to inspect the Property on 3 November 2021. However, the inspection was cancelled because the occupier of the Property had not consented to an inspection, and the Tribunal considered that the photographic evidence annexed to the Expert Report, (which could, if necessary be clarified by the Expert at the hearing), to be sufficient for the Tribunal to determine the issues fairly and justly.

12. The parties' written submissions, including witness statements and other relevant documents were contained in a hearing bundle prepared by the Landlord's solicitors, which together with a supplementary bundle, were considered by the Tribunal.

13. The hearing was conducted remotely, as video proceedings. The Landlord was represented by counsel, Mr R. Trivedi. Some of the Landlords' witnesses were present. The tribunal heard from Ms Deborah Murphy of Wolfs and Mr Jean-Luc Oliveira-Priez, the joint long leaseholder of Apartment 4. Mr Neil Rainbow, a director of the Landlord and the long leaseholder of Apartment 5, provided a witness statement in support of the noise nuisance allegation but did not attend the hearing to give evidence.

14. The Tenant was represented by counsel Mr J.R. Gale. The Tenant's primary witness Mr Sheeraz Butt, was present and gave evidence. The Tenant's witness Mr P. Hughes, was also present but did not give evidence because Mr Trevedi did not wish to challenge in cross examination the few

parts of Mr Hughes witness statement that the Tribunal had not ruled to be inadmissible.

15. The expert Mr Hannibal-Law was also present at the hearing and gave evidence.

16. The Tribunal dealt with the alleged breaches item by item, as set out below although not in the same order as some adjustments were required to allow for witness availability.

Issue 1 Clause 3.3 – failure to permit entry

17. Ms Murphy provided a witness statement on 28 July 2021, which confirmed that in December 2018 Wolfs took over management of Royal Arch Apartments from the previous managers SDL. Annexed to her witness statement are copies of the only documents that she says were passed to her by SDL following the handover. The documents comprise: an exchange of correspondence between SDL and the Tenant (copied to the Tenant's planning consultant Gary Moss), which took place on 9 and 11 April 2018, 29 May 2018 and 18 June 2018, concerning the Works. Also annexed is an excel log of noise complaints made by the leaseholders of Apartment 4 between 19 January 2019 and 1 April 2021.

18. The email of 11 April 2018 from Luke Ingram of SDL, to the Tenant includes a request for an inspection on 12 April 2018. Significantly however, Ms Murphy does not refer to this request in her witness statement, in fact she does not mention the refusal to permit entry allegation at all. Her statement deals only with the alleged lack of Landlord's consent to the alterations and the allegations of noise nuisance.

19. When asked at the hearing, where was the evidence of the Tenant's refusal to permit entry? - Ms Murphy said that she had made repeated requests for an inspection so that the Landlord could consider whether to give consent to the alterations. However, the only time the Landlord had been permitted to access the Property was during the inspection with the Expert. Ms Murphy was unable to recall any specific dates or times when she made her inspection requests, she said that when Wolfs took over management she had asked to inspect the property early 2019, to move the licence for alterations forward. For a while there was no response, she was then told that she could inspect once the Works were completed.

20. Ms Murphy said that the requests were followed up with emails to the Tenant and Ms Mian and/or BPG Holding Limited, a property company owned by Mr Butt. When asked why none of the emails were in evidence,

she said that Wolfs had been taken over in July 2021 by Remus Management Limited and she may not have had access to the old Wolfs systems. Furthermore, the solicitor had prepared her statement and she had just signed it. She didn't know how much detail would be required.

21. Ms Murphy also said in evidence that she had met with Ms Mian for coffee on a number of occasions before lockdown and during the easing of restrictions, during which she had made arrangements to inspect the Property. However, although Ms Mian appeared amenable to an inspection, she subsequently cancelled the appointments for various reasons, leading her to question whether Ms Mian had been genuine when making the appointments. She was unable to offer any definite times or dates of when the coffee meetings took place.

22. Ms Murphy admitted that Ms Mian had never refused to allow access and was always amicable, she just hadn't ever confirmed the arrangements. Ms Murphy said that she had not pressed the issue, she just reported it to the Landlord's solicitors. When asked why she hadn't mentioned the meetings with Ms Mian in her witness statement, Ms Murphy said that as they had also discussed confidential matters during the meetings, she didn't think it appropriate.

23. Mr Gale asked Ms Murphy to confirm that she had in fact been able to inspect the property since completion of the Works in December 2020 and had been invited to do so by the Tenant. Ms Murphy said that the reason for not inspecting then, was that shortly after this the country had once again been in official lockdown and after that, the matter was in the hands of solicitors who were trying to arrange the Expert's inspection. She confirmed that there had never been an outright refusal of an inspection, the Tenant would say "oh we'll do it next week", but it just didn't happen. She confirmed that no further requests for an inspection had been made by the Landlord since December 2020.

24. The Tenant's evidence is contained in its Statement of Case and the witness statement of Mr Sheeraz Butt dated 15 August 2021, together with his oral testimony at the hearing. The Tenant states that Clause 3.3 only applies to a landlord's request to inspect for disrepair, but that even so it has always been willing to grant access and has consistently proposed that access should take place after completion of the Works. The Tenant refutes the suggestion that its reasonable proposal as to when an inspection of the Works should take place, amounts to a refusal to grant access.

25. The Tenant goes on the state that the initial delay in arranging access for the Landlord's agent was due to a dispute with its building contractor concerning a safety glass partition. This was immediately followed by the

lockdown restrictions. However, the Tenant states that it had agreed that an inspection could take place within 28 days of the lockdown restrictions being lifted. The Tenant had previously suggested to SDL that the appropriate time for it to inspect the Works was when they were complete and the full picture could be understood, and this was the maintained position with Wolfs.

26. Mr Butt states in his witness statement that the Tenant had never refused to grant access. He says that he specifically asked the Landlord to inspect the property in December 2020 after the Works were completed and that since then the Landlords representatives and the joint Expert have had access to the Property.

Issue 2 (ii) Clause 3.5(a) Not to make any structural alterations

27. Allegation was withdrawn by the Landlord

Issue 3 - Clause 3.5(b) – Not to make any internal non-structural alterations or additions without the Landlord's prior written consent.

28. It is not disputed by the Tenant that the Works are alterations to the Property that fall within clause 3.5(b) and require Landlord's consent.

29. The Tenant does not assert that a formal written licence for the alterations was issued by the Landlord. Mr Gale summarised the Tenant's position which is that the Tenant relies on the correspondence received from the Landlords managing agents SDL in April, and June 2018. In particular to an exchange of emails between the Tenant and Luke Ingram. The first an email from the Tenant to Luke Ingram dated 9 April 2018, written in response to an earlier letter. The earlier letter was not produced by either party and its content can therefore only be surmised from the response. The Tenant's email of 9 April 2018, responds to 3 points – The response to point 1 provides details the Tenant's planning consultant (Mr Gary Moss) and asks if the Landlord can provide details of *"relevant sections of the lease that you refer to"*. At point 2 the email sets out the scope of the Works as follows:

    a. Removal of all fittings within property
    b. Electrical works (lighting, wall sockets etc)
    c. Installation of new heating system (underfloor)
    d. Installation of new kitchen ground floor and x 3 ensuite bathrooms 1st floor/ x1 WC ground floor
    e. Installation of fitted wardrobes to all 3 bedrooms
    f. Replacement laminate flooring ground floor to tiled flooring

g. Replacement laminate flooring 1st floor to new herringbone laminate flooring (all soundproofed with acoustic boards and underlay)
h. Replacing all doors with new fire doors and frames, toughened glass doors for bathrooms and fire glass wall partition in ground floor hallway
i. Landscaping to the patio
j. Painting and decorating
k. CCTV and alarm
l. Installation of balustrades for staircase
m. New furnishings
n. All works carried out to building regs standards

30. At point 3 the email proffers a sincere apology for the disruption caused by the Tenant's contractor and confirms that they have been requested to keep noise to a minimum and only to work during normal hours. The final point (4) - refers to service charge demands and is not relevant to this case.

31. On 29 May 2018, the Tenant sent a further email to Luke Ingram which states that it included two attachments – the first *a floor plan* and the second "*Notes and initial draft of building regulations application with Approved Design*." The Tenant states that these attachments together with the details provided in the email dated 9 April 2018 comprised full details of the proposed Works.

32. The Tenant argues that Luke Ingram's responses to the emails, dated 11 April 2018 and 18 June 2018 respectively, amount to a consent to the Works conditional on the Works being 'signed off' by the council.

33. The email of 11 April 2018 thanks the Tenant for the information relating to the Works and confirms *"in regard to the lease clause that requires consent for alterations, please refer to section 3, point 3.5..... Copied below for reference."* The letter informs the Tenant that the works require building regulations consent and that the local authority were aware of both the ongoing works to Apartment 3 and the completed works to Apartment 27 (also owned by the Tenant), for which no prior application had been made. The Tenant was asked to liaise with Mark Harding a building control surveyor, in this regard. The email goes on to say *"Provided that the building regulations applications are submitted and approval obtained and copies provided for both Apartment 3 and 27, Royal Arch Management Ltd would be able to review and provide the required consent for alterations (retrospectively in the case of 27). Without such the management company would be required to take action relevant to the breaches incurred."* The letter concludes with some concerns raised by Mike Harding with regard to the Works possibly affecting the fire compartmentation of the Property and asks if an inspection could take place

on 12 April at an agreed time, to confirm that the fire compartmentation and systems were still compliant.

34. The next (in fact only) subsequent correspondence in evidence from SDL is a letter dated 18th of June 2018, from Luke Ingram to the Tenant. In paragraphs 2-5, Mr Ingram refers to previous correspondence concerning skips and noise nuisance emanating from the Property as a consequence of the Works being undertaken and points out that persistent excessive noise at late hours was causing annoyance/nuisance in breach of the lease covenants in Schedule 4 of the lease. The letter requests that the noise nuisance be abated with immediate effect and for the Works that cause noise to be undertaken only between 08:30 to 18:30.

35. Paragraph 6 of the letter states *"furthermore, following previous correspondence we also kindly request confirmation of the works being signed off by the council once completed. SDL Property Management and the directors of Management understandably wish to ensure that all works are compliant to current regulations, for the integrity of the building and health and safety of all occupants. As I am sure you can appreciate, alterations must have consent from the landlord, which although, unable to unreasonably withhold must be compliant, therefore if copies of such consent is not provided, the management company may instruct a survey to inspect in accordance with clause 3.6 of the lease, with this additional cost being payable by yourself as leaseholder, which we could [sic] of course prefer to avoid."*

36. Mr Butt said that when SDL were managing everything was fine. They told him what was required for the Landlords consent and he followed those steps. He had used an internal building design company to project manage the Works but had been directly involved on some issues. The building works took a long time to complete due to a dispute with the contractor over safety glass that had not been quoted for, followed by Covid-19 restrictions.

37. To obtain sign off Mr Butt appointed Stroma Building Control ("Stroma") as the "Approved Inspector" to inspect and certify the internal refurbishment Works as compliant with buildings regulations. Mr Butt said that he preferred Stroma to the Council inspectors because although more expensive, they employed better methods and were, in his view, more thorough and independent.

38. A copy of Stroma's Initial Notice issued to the Tenant on 12 April 2018 was unfortunately not in evidence. Mr Butt confirmed at the hearing that Stroma had made several inspection visits during the course of the Works, but he had only provided copies of one site inspection report for 26 April

2018, which followed an inspection of Apartments 3 and 27. The inspection report contains brief details of the Works requiring certification which include Sound Insulation and Floors. It specifies some compliance/remediation actions relating to fire safety in respect of a glass screen and fire doors and a requirement that the Vents and Fire alarm be recommissioned and tested.

39. The Final Certificate was issued by Stroma on 11 December 2020, pursuant to s51 of the Building Act 1984 and the Building (Approved Inspectors etc.) Regulations 2010. A copy was attached to the Tenant's statement. The Final Certificate confirms that the internal refurbishments to Apartment 3 (the Property) had been completed and met the requirements specified in the notice.

40. Mr Butt acknowledged that he could have provided more information and interim reports on the Works. He said that initially he'd intended providing his own independent surveyors report to confirm that the Works were compliant, however, once Stroma had issued the Final Certificate he thought that would be all that was needed, and the Tribunal had in any event by then determined that a single joint expert should be appointed. Mr Butt was critical of the handover arrangements and management style of Wolfs. He said that he had struggled to get permission for anything because rather than explain what was required, Wolfs had become a mouthpiece for other leaseholder directors who operated double standards.

41. It was also submitted that the Tenant had not carried out any alterations beyond the Works specified in the correspondence, and that the Final Certificate confirms that the Works are compliant with the relevant regulations and therefore the condition stipulated by the Landlord's agent.

42. The Tenant argues that the noise nuisance complaint is a separate matter, which should not have been conflated with approval of the Works, and there is no evidence that the Works have had a negative effect on the acoustic integrity of the building or increased noise transmission to surrounding properties.

43. Mr Gale submitted that taken together, the correspondence with the Landlord's agent constituted a written consent to the Works on the condition that they are signed off by the local authority once complete. When the Final Certificate was issued by Stroma on 11 December 2020, that condition had been met.

44. The Landlord's position as set out in its statement of case is that significant alterations had taken place, that no licence for any alterations had been

sought or given and the precise nature of the alterations, which included electrical and drainage works, were unknown.

45. On the noise issue, the Landlord's statement asserts that the Tenant's contractor had confirmed that sound-proofing between the Property and the neighbouring apartments had been removed but was due to be re-instated. However, the Works had been completed without re-instatement. The statement concerning the alleged failure to re-instate the sound-proofing insulation was not backed by any written testimony. The only evidence concerning this came from Mr Oliveira-Priez during cross examination. He said that during the commissioning of the Works the Tenant's contractor told him that they were removing the sound-proofing insulation but would replace it with new and better insulation. However, after completion of the Works the level of noise escaping the Property was such, that Mr Oliveira-Priez formed a belief that the insulation had not been re-instated.

46. Mr Butt confirmed in evidence the contractors had replaced the original ground floor wall insulation, with a layer of heavy rockwall acoustic insulation which provided significantly better acoustic insulation than the original insulation.

47. Ms Murphy confirmed the Landlord's position in her witness statement which is that the Tenant had been notified on several occasions by SDL that it needed Landlord's consent to the alterations but that no consent was sought and none was given. In evidence she said that following Wolfs appointment she had tried to move the licence forward but was unable to progress it without inspecting the Property because there had been issues with noise complaints. Ms Murphy said that she requested a detailed specification but was told by the Tenant that one had already been provided to SDL. She contacted SDL who confirmed that the only details provided by the Tenant were those set out in the exchange of emails dated 9 and 11 April 2018 and 18 June 2018, exhibited to her witness statement.

48. Ms Murphy did not address the allegation that sound-proofing insulation was removed and not re-instated in her witness statement or in evidence at the hearing. When asked whether there was any reason why consent to the alterations could not now be given, she said that the Landlord did not want to give consent because of the noise issues and there were some additional concerns about a boiler in the roof void which required a surveyor inspection. Ms Murphy also said that consent was being withheld on the advice of the Landlord's solicitor.

49. Mr Trevedi submitted at the hearing that the correspondence from SDL could not constitute consent to the alterations because SDL was not

authorised by the Landlord to grant consent to alterations. He suggested that although SDL was appointed by the Landlord to manage the building, the appointment did not extend to granting consent to alterations. It should be noted that this was not an argument put forward by the Landlord in its statement of case or witness statements, or in the skeleton argument filed on behalf of the Landlord. It was a point raised for the first time by counsel during the hearing.

50. Mr Trevedi also submitted that the letter of 11 April 2018 made clear that consent was a two-stage process. The Tenant first needed to demonstrate regulatory compliance following which the Landlord would be able to review and provide the required consent. The correspondence with SDL, Mr Trevedi submitted, pushed the Tenant away from the managing agents to the Landlord for consent to the alterations.

Expert Evidence

51. Mr Hannibal-Law of Barnsley Bate Limited, chartered building surveyors, was jointly appointed by the parties to provide an expert report on:

    a. The layout of the apartment and the alterations to it.
    b. The nature of the flooring and the adequacy of the insulation.
    c. The nature and adequacy of the wall insulation.

52. He inspected the Property on 27 May 2021 with a colleague. He was accompanied by the Landlord's representative, Ms Murphy and Mr Peter Hughes, an environmental health officer who was attending on behalf of the Tenant. Mr Hannibal-Law reported his findings in June 2021. Floor plans showing the current layout of the Property are attached to his Report together with colour photographs showing various rooms within the Property. There is a comprehensive description of the apartment.

53. The Report confirms that, within the constraints of the limited information available concerning the original layout, alterations appear to have been made to the ceiling covings, bed-board extensions and inset light fittings. Internal partitions appear to have been altered to provide a recessed aperture in the left lounge wall, a glazed partition installation and the removal of a rear partition in the kitchen area to create an open plan layout. There appears to be further new partitioning in the hall, the front bedroom, the upper floor landing and the rear left bedroom to create new ensuite/dressing areas.

54. The floors throughout the lower level are covered by large smooth finished marble tiles. The upper floor has similar tiles in the bathrooms and

hardwood effect herringbone flooring on the landing and bedrooms. The floors all appeared to be fully bonded to the substrate below but there did not appear to be any significant change in floor levels that would indicate increased insulation. The stairs treads and risers were overlaid with hard vinyl and metal nosings.

55. During the inspection the television volume was increased from its setting of 20 to 50. The treadmill was operated and the persons inspecting used the stairs while Mr Hannibal-Law took decibel readings from the adjacent apartments. The decibel levels were 32dBA when the treadmill and television were in operation and persons walked around. When persons were climbing the stairs, the level rose to 37dBA

56. Mr Hannibal-Law stated that he could not be definitive about the extent of insulation within the walls and partitions without an intrusive inspection but there was evidence of rockwall type insulation filling an exposed part of the cavity. His 'knock' testing of the other partitions yielded a dull sound which indicated the presence of insulation within the cavity. Furthermore, Mr Hannibal-Law concluded that the decibel readings from the adjoining apartment indicated that noise transmission was relatively low.

57. In evidence Mr Hannibal-Law was asked if the neighbouring apartment from which the decibel levels were recorded was carpeted. He couldn't recall. He confirmed that a decibel level of 32-37dBA was about the same as a refrigerator hum and agreed this was a low level of noise. No ambient readings were taken but Mr Hannibal-Law confirmed that the ambient level for rural environments was about 30dBA and for urban 40-45dBA, and that the activities yielding the readings taken from the neighbouring apartment could not be construed as creating an unacceptable level of noise.

58. Mr Hannibal-Law confirmed that he had no specific acoustic qualification other that CPD training undertaken as part of his RICS training.

59. Mr Butt referred in his witness statement to the findings of a separate report he had obtained from Mr Peter Hughes, an expert in environmental health issues, concerning the floor and wall installations and their acoustic properties. A copy of the report was annexed to Mr Butt's witness statement. However, as Mr Hughes had not carried out an intrusive inspection and had not observed the method of construction or the insulation used by the contractor, the report was largely his opinion evidence based on what Mr Butt had told him. As the Tribunal had ordered a single joint expert report to on these issues, and no request had been made by the Tenant for permission to adduce an additional expert report, Mr Hughes statement was ruled inadmissible to the extent that it commented on the issues that had been referred to Mr Hannibal-Law.

Issue 4 - Regulation 4 - not to do or permit to be done anything which may void the landlord's insurance or cause an increased premium to be payable

60. Allegation withdrawn by the Landlord.

Issue 5 - Regulation 3 and 6 - not to do anything which causes a noise nuisance to the neighbouring properties

61. The Landlord's application filed on 12 March 2020, mentions noise nuisance only in the context of it being a consequence of the Tenant removing sound proofing from the walls and replacing carpets with hard flooring. However, the Landlord's Statement of Case, dated 6 April 2020, expands on the allegation citing a specific breach of the tenant's covenant 'Not to do anything which causes a noise nuisance to neighbouring properties'. The statement incorrectly refers to paragraph 5 of the Fourth Schedule (Regulations), but it is evident from the details of the alleged breaches, which include noise nuisance from shouting, loud television, music, games consoles and moving furniture, that the actions complained of fall within paragraphs 3 and 6 of the Regulations.

62. Detailed evidence in the form of an excel log of complaints received by Wolfs between January 2019 and April 2021 was annexed to Ms Murphy's witness statement dated 28 July 2021 - exhibit 'DM2'. The complaints commence on 19 January 2019. There are 5 complaints in 2019, the last on 2 July 2019. All are from Mr Oliveira-Priez and mainly concern a loud television. After that there are no entries until 1 and 7 April 2020 which are complaints about the occupant breaching lockdown rules.

63. On 14 April 2020, the log records that a treadmill was delivered which was creating vibration and glass rattling until 9.00pm. There follows a catalogue of complaints over the next 10 months, on a regular, almost weekly basis concerning loud music, use of the treadmill, loud televisions, computer games and general noise. Mr Oliveira-Priez complains of heavy balls being thrown, yelling and loud arguments. On 25 June 2020, the log records that the police had opened a case and the council had confirmed that they would send a letter to the neighbours concerning noise and antisocial behaviour. There is an allegation of aggressive behaviour on 2 August 2020 which was reported to the police. The last entry is dated 1 April 2021, which complains about loud noise from fitness training, heavy weights being dropped causing furniture, pictures and crockery to shake.

64. Also attached are photographs of some notes apparently written by the occupant's minor son, which are referred to in Mr Oliveira-Priez's statement. All the logged complaints are from Mr Oliveira-Priez and his

husband. There is surprisingly no evidence confirming what, if any, action was taken by Wolfs in response to the complaints.

65. In evidence Ms Murphy was asked about Wolfs policy for dealing with nuisance allegations. She was unable to describe any formal written policy but said that her practice was to log the complaint with the building concierge who would knock on doors. The visit would be followed up by email, but she had not thought to provide any record of the actions taken by the concierge or any of the follow up emails. Ms Murphy had not considered whether a restraining injunction might have been a preferable course of action because it was her practice to go to the company solicitor for advice.

66. Ms Murphy said that she was aware of Mr Oliveira-Priez having contacted the council about the noise nuisance and assumed it was because he felt frustrated that nothing was happening, and no one was taking his complaints seriously.

67. The Landlord's allegation is also supported by a witness statement dated 22 July 2021, filed by Mr Oliveira-Priez. It confirms that he has lived next door to the Property, at Apartment 4 since 2007 with his husband and twin boys. He confirms that from around January 2019 they had been subjected to continual noise from the television and loud music. He made repeated requests to the occupier to turn down the volume, but this did not happen. After the treadmill was delivered in April 2020 the noise and vibration caused their apartment and furniture to shake. This was often exacerbated by a personal trainer and frequent, numerous visitors despite the lockdown rules. This went on for months but has now stopped.

68. Mr Oliveira-Priez confirmed that the log was reflective of the issues complained of, but by no means comprehensive as noise was an almost daily occurrence. Mr Oliveira-Priez states that after the application was made, the occupiers of the Property started to complain about his children and they received some abusive comments and notes from the son. However, in evidence Mr Oliveira-Priez confirmed that he did not hold the child responsible for the notes. The views expressed were, he believed, merely a reflection of the views of his parents.

69. Attached to Mr Oliveira-Priez' statement are copies of some emails sent to Wolfs in February/March 2021 complaining about the ongoing noise nuisance and the proceedings, and also copies of the notes he received.

70. Mr Oliveira-Priez also gave oral evidence at the hearing. He said that there had been some noise late in the evenings during the course of the Works, but this had been remedied by discussion with the contractors. He had

overheard conversations between the contractors about the removal of noise insulation, but they had confirmed to him that it would be reinstated and improved. However, the level of noise indicated to Mr Oliveira-Priez that this had not been done.

71. Mr Oliveira-Priez confirmed that prior to Ms Mian and her son moving in he had not experienced noise nuisance from previous occupiers. He said that at first, he tried to reason with Ms Mian, but was then threatened with violence by Mr Butt. Mr Olveira-Priez confirmed that the log accurately reflected their complaints. Nothing came of his complaint to the council, but he did not know why. The noise was, he said quite intrusive, they could hear clearly the televisions, music being played and domestic arguments, which his family found quite distressing. The occupiers would also bounce balls on the tiles in the lounge.

72. Mr Oliveira-Priez confirmed that following Ms Mian's departure in July/August 2021, new tenants moved in who they don't hear at all. It was put to him that the return of noise level to the pre-2018 level indicated that lack of insulation may not be the problem. Mr Oliveira-Priez said that he thought it just indicated that the new tenants were exceptionally quiet and possibly didn't use the television.

73. In cross examination Mr Oliveira-Priez confirmed that his apartment had hard floors throughout. It was put to him that his comment about being threatened by Mr Butt was untrue, to which he said that Mr Butt had threatened to punch him if he knocked on their door again.

74. The Landlord's allegations were also supported by a witness statement from Mr Neil A. Rainbow, the leaseholder of Apartment 5, who is also a director of the Landlord. He confirmed that he is aware of the issues raised by his neighbour Mr Oliveira-Priez. He also confirmed that although two apartments away he had also suffered noise and vibration from the treadmill for a period of months during lockdown and also from a ball being thrown against a wall or tiled floor, which caused glasses on his wall to shake. Mr Rainbow did not attend the hearing and was not therefore available for cross examination.

75. Mr Butt comments briefly on the allegations in his witness statement dated 15 August 2021. He first states his assumption that at all times the noise complaints related only to the Works and that the findings of the joint expert clarified that the noise levels emanating from the Property were well below relevant regulatory levels.

76. Mr Butt acknowledges in his statement that there had been increased noise levels during the Works but says that following completion this ceased to

be an issue. At paragraph 43 of his statement, he also acknowledges that after the Coronavirus lockdown in March 2020, there were increased complaints about noise because the occupants of the Property could no longer use an external gym and the minor child, aged 13, who is autistic, and had to be home schooled, which at times led to some challenging behaviour.

77. Mr Butt attached a copy of a letter dated 25 June 2020, received from Birmingham City Council concerning a noise complaint of loud amplified music. Mr Oliveira-Priez confirmed in evidence the complaint had been made by him and appears to relate to the entry in the log of the same date. Mr Butt submitted that the complaint had not been considered significant enough to warrant an investigation by the council. He also states that the occupant of the Property had cause to complain to Wolfs about noise nuisance from Apartment 4, but no action had been taken by Wolfs.

78. At paragraph 46 of his statement Mr Butt referred to a 'diary' of noise complaints held by the Landlord which was referred to in correspondence between the parties' representatives in March 2021. He complained that he had not had sight of the 'diary' and was unable to answer generalised accusations until the specific accusations in the 'diary' were received. The 'diary' referred to appears to be the excel log of complaints that was attached as exhibit 'DM2', to Ms Murphy's witness statement dated 28 July 2021.

79. Mr Gale also raised this issue early in the hearing and submitted that where a Landlord seeks a declaration to justify the service of a s146 Notice the breaches must be clearly put and clearly alleged. The Landlord's failure to specify the correct lease term in the application and the late extension of the alleged breaches to include the noise nuisance complaints from the neighbour, the details of which were not provided until the log was filed on 28 July 2021, had not allowed the Tenant sufficient time to fully consider the log of complaints and provide a detailed response. This was Mr Gale submitted, an application concerning alterations to the Property without consent, to which the Landlord had tacked on a nuisance allegation that is insufficiently pleaded. Mr Gale also said that the occupiers had moved out in July 2021 and it was Mr Butt's understanding that there had been no issue concerning noise since then.

80. Mr Trevedi interposed to confirm that Ms Saira Mian and her son, the former occupiers of the Property, were in fact Mr Butt's wife and son. Why Mr Butt had chosen not to mention his personal relationship to Ms Mian in his witness statement or the revised statement of case is unclear. However, the Tribunal determined that the Landlord's case had been pleaded with sufficient clarity for it to hear evidence on the noise nuisance allegation.

Furthermore, given the relationship between Mr Butt and Ms Mian it is inconceivable that the allegations of noise nuisance as detailed in the log had taken either by surprise, or required additional time for them to consider any response.

81. Mr Butt gave oral evidence. He said that although he knew that Jean-Luc Oliveira-Priez was the neighbour next door he had not met him personally and denied ever having threatened him with violence. He did not want to be out of line by saying that Jean-Luc had made it up, only that if it had happened, he was surprised it wasn't mentioned in his statement. Mr Butt also said that although he had been provided with a copy of Mr Oliveira-Priez' statement he hadn't read it.

82. Mr Trevedi asked him to explain why he hadn't mentioned in his statement that the occupants of the Property were his wife and son and had given the impression that he was not also residing at the Property. Mr Butt did not explain why he hadn't been clear about the relationship, but said that he worked mostly in London and was hardly ever at the Property because it was not his main residence.

83. When asked why his wife had not provided any evidence given that the allegations predominantly related to her actions, Mr Butt said that he was giving evidence on her behalf. When challenged about the correctness of this approach, given the importance of hearing direct testimony, he said that it was for Mr Trevedi to decide how important it was.

84. Mr Butt confirmed that the gym equipment had been purchased for use by his son because the gym was closed due to Covid 19 restrictions. Mr Trevedi referred Mr Butt to the acknowledgement in his statement that there had been noise, but that everything was being done to reduce the noise. Mr Butt simply replied that he was standing by his statement.

85. He was then referred to the log of complaints and asked if he denied the numerous allegations of noise nuisance. Mr Butt said that he was aware of the allegations but didn't know how many decibels it took to annoy his neighbour. He didn't know what his threshold was. The complaints had been made to his wife not him and he couldn't speak for her. He said that generally when neighbours make a noise you speak to them, but Jean-Luc had an aggressive manner, so he had asked him to report his complaints to the managing agents not him. Mr Butt also said that he had not been close to his wife since early last year due to work commitments in London, Birmingham and Manchester.

86. Mr Butt was asked why he had not provided any response to the detailed log attached to Ms Murphy's statement. He said that it was his habit when

people make accusations not to respond. When asked if he wanted to give any oral testimony in response to the detailed complaints he declined. However, when pressed Mr Butt said that it was not his business what his neighbour thinks, but that Jean-Luc and his other neighbours, including Mr Neil Rainbow, all had hard flooring throughout, it was double standards to suggest that his flooring was causing noise and his family was being victimised. Jean-Luc was, he said, sensitive to sounds most people would not hear. This was because he was obsessed with there being insulation issues which had caused him to exaggerate his complaints and make wild assumptions about a basketball net which they did not have.

87. Mr Butt said that his wife and son had only been residing in the Property temporarily until the other apartment to which they had now moved, was finished, and that there had been no complaints about noise from the new neighbours.

88. Mr Butt was asked to agree that Jean-Luc was in fact the victim of bullying and threats because he had complained about the noise. Mr Butt said that was wrong and made no sense because this was not a complaint about anti-social behaviour.

Issue 6 - Regulation 15 - to keep the floors of the premises (other than the kitchen, utility room and bathroom) carpeted

89. There is no dispute that the Property now has hard flooring throughout.

90. The submissions on this are largely legal:

    a. In his witness statement, Mr Butt submits that s19(2) of the Landlord & Tenant Act 1927 applies, because the replacement hard flooring is an improvement which implies an entitlement to reasonable consent, notwithstanding any contrary wording in the lease. Consent has however been unreasonably withheld.

    b. Mr Gale submitted that this is not an absolute covenant, but one that is qualified by clause 4.6 of the lease which reserves a right for the Landlord to add alter of waive any of the Schedule 4 Regulations in its reasonable discretion. The Landlord's agent was informed of the Tenant's intention to replace the flooring on 11 April 2018 as part of the Works and had not objected, it had just asked for confirmation of sign off by the council once the work was completed. That, Mr Gale submitted, operated as a waiver of the covenant as contemplated by clause 4.6, subject to a condition, which was met once the Works were signed off by Stroma.

c. Mr Gale also submitted that the Landlord's waiver of the covenant on numerous other apartments was extensive enough to be considered a general waiver of this covenant.

91. The Landlord's position is:

a. Section 19(2) of the 1927 Act does not apply because it is an absolute and unqualified prohibition and it is irrelevant therefore whether or not the hard flooring constitutes an improvement.

b. The Expert Report does not conclusively suggest that the hard flooring is not a cause of the noise nuisance.

c. Although hard flooring may be prevalent in other apartments this does not constitute a general waiver and a waiver of covenant cannot be implied from a landlord's actions towards other leaseholders.

d. The Landlord can exercise discretion under clause 4.6 to waive the covenant, and if it does, that discretion should be exercised reasonably. However, the Landlord is not obliged to exercise the discretion and hasn't done so.

92. The facts and evidence supporting the parties' positions has largely been covered above but the following is also relevant.

93. Mr Butt confirmed in evidence that he'd employed Heritage, a specialist flooring company to install the flooring. On the lower floor electric heat mats had been laid under the marble tiles, over a layer of floor levelling compound and sound insulation. On the upper floor sound insulation had been laid above and below the joists before the heat mats and 'wood effect' flooring was installed above. He also submitted that he was renovating a ¼ million pound flat, so why would he do that without ensuring that it was properly insulated.

94. Mr Trevedi said that the Landlord had not given any express consent to other leaseholders who had replaced carpets with hard-flooring, its practice was to wait and see if there were any noise issues and then rest on the covenant.

The Law

95. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002, in particular section 168(4), which reads as follows:

"A landlord under a long lease of a dwelling may make an application to [the appropriate tribunal] for determination that a breach of a covenant or condition in the lease has occurred."

96. The Tribunal must assess whether there has been a breach of the Lease on the balance of probabilities.

97. A determination under Section 168(4) does not require the Tribunal to consider any issue other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to the question of whether or not there has been a breach. As explained in *Vine Housing Cooperative Ltd v Smith (2015) UKUT 0501 (LC),* the motivations behind the making of applications, are of no concern to the Tribunal, although they may later be relevant to a court.

98. The Lease is to be construed applying the basic principles of construction of such lease as set out by the Supreme Court in *Arnold v Britton [2015] UKSC 36*. Hence the Tribunal must identify the intention of the parties by reference to what a reasonable person, having all of the background knowledge which would have been available to the parties, would have understood the language in the contract to mean, in their documentary, factual and commercial context, disregarding subjective evidence of any party's intentions.

The Tribunal's Deliberations and Determination

99. *Issue 1 – Clause 3.6 failure to permit entry*. The only written evidence of a request for entry to the Property is within the email from Luke Ingram dated 11 April 2018 (referred to in paragraph 18 above). However, in his later email of 18 June 2018 Luke Ingram states that an inspection will only be required under clause 3.6, if the Works are not signed off by the council. As the Works can only be signed off on completion of the Works the Landlord's agent implies that an inspection of the Works will not be required until the Works are complete and then only if the Works have not been signed off.

100. The Landlord has not provided written evidence of any requests for an inspection of the Property following the appointment of Wolfs. Ms Murphy stated in evidence that from January 2020 numerous requests were made to the Tenant and to Ms Mian. She was however unable to produce a single email or letter to substantiate the efforts made by her to arrange an inspection or the purpose of the inspection. Ms Murphy did confirm that no outright refusal had been made by the Tenant, but the necessary arrangements for an inspection were never confirmed and she was, in

effect, fobbed off. Some of the cancelled arrangements were made during social visits with Ms Mian.

101. The Tenant denies that it has refused access. It accepts that some requests to inspect were made by Ms Murphy and that the Tenant had, in turn, suggested that the appropriate time to inspect was following completion of the Works. Covid 19 restrictions then intervened but the Tenant states that it offered to permit an inspection within 28 days of the restrictions being lifted. Following issue of the Final Certificate in December 2020 the Tenant suggested an inspection but Ms Murphy said the offer was declined because by then proceedings were underway which provided for an inspection by the joint expert.

102. What is missing from the Landlords case under clause 3.6 is a clear timeline of specific requests for an inspection to take place on specific dates for the purpose of '*viewing and examining the state of repair'* of the Property, backed by copies of the relevant correspondence. Alternatively, if the correspondence had been mislaid or was no longer accessible, a witness statement setting out these details in full.

103. Ms Murphy may have been fobbed off, but it was her job to put together sufficient evidence to demonstrate that the Landlord's agent had pressed for access to the Property for the purpose set out in Clause 3.6 and had been unreasonably refused. Her evidence is that the casual sounding arrangements she had made with Ms Mian over coffee were subsequently cancelled for reasons that she began to suspect were not bona fide, and that she was on several occasions put off by the Tenant making counter proposals concerning the appropriate time to inspect.

104. It appears from the facts and evidence put forward that Ms Murphy did not press for an inspection in terms that would indicate to a reasonable tenant that it was in breach of Clause 3.6 of the lease. Furthermore, as the Tenant's suggestion as to timing was consistent with the representation of the Landlord's former agent that an inspection of the Works would only be required following completion of the Works if there was no sign off, it was not an unreasonable suggestion.

105. For these reasons the Tribunal does not find on the balance of probabilities, that the evidence supports the Landlords allegation that the Tenant has breached clause 3.6 of the Lease.

106. Issue 3 - Clause 3.5(b) – Not to make any internal non-structural alterations or additions without the Landlord's prior written consent which shall not be unreasonably withheld.

107. The covenant is qualified by the express requirement that consent is not to be unreasonably withheld. Therefore in order to determine whether there has been a breach of this covenant for the purposes of a section 168(4), the Tribunal needs to be satisfied as to all three elements of the covenant: (i) that the tenant has altered the premises, (ii) that the tenant did not have the consent of the landlord and (iii) that the consent of the landlord was not unreasonably withheld.

108. There is no dispute that the Works constitute alterations requiring consent under this covenant. The Tenant argues that the second element is satisfied by the correspondence between SDL and the Tenant dated 9, and 11 April 2018 and 18 June 2018. Alternatively, consent is being unreasonably withheld because the Landlord has wrongly conflated the alleged breaches of the Regulations in respect of noise nuisance and flooring, with the Tenants alterations.

109. The Landlord argues that consent to the Works was never sought by the Tenant or given. That SDL had no authority to give consent to the Works and had not done so, and that it was reasonable for the Landlord to withhold consent until the cause of noise nuisance issues had been determined.

110. The email to Luke Ingram dated 9 April 2018, was clearly intended to provide details of the proposed alterations to the Landlord's agents. That is acknowledged by Luke Ingram in his email of the 11 April 2018, which refers specifically to Clause 3.5. The email confirms that provided a building regulations application was submitted and approval obtained, the Landlord would be able to review and provide the required consent. It is difficult to see how this exchange of emails is anything but a request for consent to alterations by the Tenant followed by confirmation of the terms on which consent would be provided.

111. On 29 May 2018 a floor plan and details of the building regulations application was sent to Luke Ingram. On 18 June 2018 he refers to the previous correspondence and requests that confirmation of sign off from the council be provided *once the Works are completed*. The email confirms that the consent of the Landlord is required, which cannot be unreasonably withheld, but the Works must be compliant with current regulations. It warns that if consent is not forthcoming SDL would then need to arrange a survey to inspect pursuant to clause 3.6, which would result in avoidable costs to the Tenant. The clear implication is that the Tenant can proceed with the Works and that once written confirmation of regulatory compliance was provided the Landlord's formal consent would be forthcoming. The email does not suggest that formal consent would be subject to an inspection, unless the Works were not signed off following

completion. Neither does Luke Ingram suggest that consent would be subject to any further formalities such as a written licence.

112. A reasonable Tenant would be entitled to assume that the correspondence from Luke Ingram provided it with sufficient authority from the Landlord to carry out and complete the Works to the Property subject to one condition, that it obtains sign off from the council for those parts of the Works that are subject to regulatory compliance.

113. The Landlord is a residential leaseholders' property management company, owned by the members, who's board of directors are various long leaseholders. The directors have, as is entirely usual, appointed professional managing agents to manage the building on the Landlords behalf. All the Landlord's pleadings, statements and copy correspondence concerning the Works are from the managing agents, not the directors. No evidence has been provided by the Landlord to confirm or suggest that there was any limitation on SDL's authority to authorise the Works on its behalf, indeed this point was not raised until the hearing. On the contrary, the email chain suggests that the SDL did have authority. The statement *"Provided that the building regulations applications are submitted and approval obtained and copies provided for both Apartment 3 and 27, Royal Arch Management Ltd would be able to review and provide the required consent for alterations (retrospectively in the case of 27)…"* has a degree of certainty that is not circumscribed by any additional caveats.

114. There followed a lengthy delay in completing the Works due to a contractor dispute followed by Covid 19 restrictions. In December 2018 Wolfs took over management but were not initially provided with the above correspondence. In January 2019 Ms Mian appears to have moved into the apartment despite the Works not having been fully completed. At about the same time Ms Murphy says that she attempted to progress the Landlord's consent and requested plans and specifications of the Works. Mr Butt told her the information had already been provided to SDL who she contacted and who provided her with the April – June 2018 emails.

115. Ms Murphy then requested an inspection but was told by the Tenant that it would be preferable to wait until the Works were completed. Once again there is a complete absence of any documentation concerning Ms Murphy's attempts to finalise the issue of formal consent. She does not address the contents of Luke Ingram's emails or appear to consider that the alterations might have already been approved, subject to regulatory sign off. Ms Murphy appears instead to have started the process again requesting detailed specifications and plans of the Works so that she could arrange for a surveyor to inspect the Property.

116. In January/February 2019 Ms Murphy began to receive complaints from Mr Oliveira-Perez about noise from the television. As the only evidence concerning the possibility that noise insulation had not been re-instated by the contractor comes from Mr Oliveira-Perez, it appears likely that his assumption in this regard did, at this point, become conflated with the noise nuisance issue. Having not, at that time, received confirmation that the Works were either completed or signed off, it was not an unreasonable assumption.

117. The noise complaints continued and in March 2020, having failed to arrange a surveyor inspection to view the progress of the Works or consider the terms of any licence, Ms Murphy instructed solicitors to seek a declaration that the Tenant was in breach of covenant, citing as a fact, that the during the Works insulation between the apartment and those adjoining it had been removed and not re-instated. It appears from the evidence that this assertion was entirely based on the assumption made by Mr Oliveira-Perez. An assumption which although not unreasonable, was not confirmed by any other evidence and was not backed up by the Expert Report, which indicates that there is an insulating layer within the new partition walls and that noise transmission from the Property to the other apartments is relatively low.

118. The Tribunal finds therefore that the correspondence from Luke Ingram on 11 April and 18 June 2018, as agent for the Landlord, authorised the Tenant to carry out the Works subject to a condition that on completion the Works would be signed off by the council. Completion of the Works was delayed for various reasons some, including the pandemic and national lockdown, outside the Tenant's control, all of which contributed to the condition not being met until issue of the Final Certificate on 11 December 2020, some 9 months after these proceedings were issued.

119. The Landlord's position is not that any conditional consent given by Luke Ingram had been revoked for failure to have the Works certified, or due to concerns that the Works were unduly protracted or may have compromised sound insulation. Neither has the Landlord disputed the Tenant's evidence that the Works are the only alterations it has made to the Property. Instead the Landlord has consistently argued that consent was neither requested or given and (at a very late stage) that even if Luke Ingram's emails imply consent, he had no authority to give consent. The Tribunal finds otherwise, consent was given to the Works by the Landlord's agent, subject to a condition which has now been met. There is no evidence to suggest that Luke Ingram of SDL did not have authority to authorise the Works on the Landlord's behalf or that the alterations carried out were anything but the Works.

120. For the above reasons the Tribunal finds that the Tenant is not in breach of Clause 3.5(b) of the lease.

Issue 5 - Regulation 3 and 6 - not to do anything which causes a noise nuisance to the neighbouring properties

121. What constitutes a private nuisance is largely determined by application of the common law. Cases indicate that it is a condition or activity which unduly interferes with the use and enjoyment of a person's property. It includes acts or omissions that that interfere with, disturb, or annoy a person exercising ownership or occupation of their property. A person will be liable under common law in nuisance if they cause it, continue it, or adopt and authorise it. In this case the person in occupation was a director of the Tenant company and her minor son. The Tenant was therefore in day to day control of the Property during the relevant period and is therefore responsible for any actionable nuisance caused by the occupiers or the contractors.

122. The issue for the Tribunal is whether the Tenant is in breach of Regulation 3 and 6 of the Lease. Regulation 3 is quite general and applies to any act or thing which may be or become a nuisance or annoyance to the owners or occupiers of any adjoining or neighbouring premises. Regulation 6 is specific to the playing or use of musical instruments, televisions, loud speakers or other noise making instruments so as to cause a nuisance or annoyance to other occupiers of the building. The allegations include the playing of loud televisions and amplified music, in breach of Regulation 6. The allegations of unacceptable noise from gym equipment, bouncing balls, shouting and moving furniture all fall within Regulation 3. There is also an allegation of threatening behaviour which could constitute a nuisance in breach of regulation 3 because it causes a disturbance that interferes with the neighbouring owners enjoyment of his property.

123. The Landlord provided an extensive log of complaints received from Mr Oliveira-Priez, who also provided a witness statement and gave evidence. The evidence was virtually unchallenged by the Tenant. Mr Butt commented on the allegations very briefly in his witness statement, mainly to bolster his argument that the alterations to the Property had not compromised noise insulation. He admits that the contractors were noisy at times and that following lockdown there were increased complaints about noise due to home schooling and the installation of gym equipment for his son who is autistic and sometimes has challenging behaviour. He denied ever having threatened Mr Oliveira-Priez with violence.

124. Mr Butt was unable to provide a cogent reason for the Tenant's failure to engage with the Landlord's evidence of noise nuisance. It is very surprising that a witness statement was not provided by Ms Mian as the allegations were primarily directed at her actions and she is, in effect the Tenant. Mr Butt said that he often chose not to respond to criticism and did not accept any responsibility for the feelings of his neighbours when they complained about the noise nuisance. It was evident from Mr Butt's evidence and that of Mr Olveira-Perez, that relations between them are very poor

125. Mr Oliveira-Perez gave evidence in a straight-forward manner without any apparent exaggeration. He came across as a sincere and honest witness whose evidence concerning the incidents of noise nuisance was largely unchallenged and therefore accepted by the Tribunal. By contrast Mr Butt was evasive in his statements about the identity of the occupiers and also at times during evidence. He was unnecessarily truculent in his responses to Mr Trevedi during cross examination, offering very little argument in response to the allegations until questioned by the Tribunal.

126. Although there was some noise nuisance caused by the contractors the issue appears to have been raised with the Tenant and satisfactorily resolved by the time Ms Mian moved in and the Tribunal therefore makes no findings about the contractor's noise.

127. The Tribunal considered the witness statement evidence of Mr Rainbow, but as his motivation for confirming the allegation was disputed by the Respondent, was unable to afford it much weight as he had chosen not to attend for cross-examination.

128. The log of complaints in evidence confirmed that there were noise complaints concerning loud televisions from January 2019 and a complaint about unspecified loud noise in July 2019. After that there is nothing in the log concerning noise complaints until April 2020, some nine months later. This followed lockdown, the delivery of gym equipment and the issue of these proceedings in March 2020. After that the complaints are numerous, almost weekly until March 2021. Mr Oliveira-Perez' evidence is that the log does not include every incident of noise, that they were disturbed on an almost daily basis and only reported some of the incidents.

129. Mr Butt said that the complaints were exaggerated because Mr Oliveira-Perez is over-sensitive to noise and obsessed with his assumption about the removal of insulation. The Tribunal considered this argument and rejected it. First, because it would be quite usual for anyone subjected to long term noise nuisance to become more sensitive to noise from an

expected source and secondly because Mr Oliveira-Perez confirmed that once Ms Mian had left the Property, the noise stopped. Mr Oliveira-Perez had no compliant about his pre-2018 neighbours or his post Ms Mian neighbours. This does not indicate a tendency to hyper-sensitivity about noise. It does however indicate that the use of the Property for all normal purposes is unlikely to create noise nuisance.

130. On the evidence provided, the Tribunal finds it more likely than not that Ms Mian and/or her son (for whom she was responsible) caused persistent noise nuisance on various dates and times during a period commencing in January 2019 until she moved from the Property in July/August 2021 (the precise date was not given). The Tribunal preferred Mr Oliveira-Perez' evidence to that of Mr Butt concerning the allegation of threatening behaviour and also finds that the Tenant permitted threats to be made to Mr Oliveira-Perez.

131. It is clear from the evidence that Ms Mian, a director of the Tenant company, was aware of the complaints and her failure to engage meaningfully with those complaints or these proceedings, indicates a carelessness or indifference to the degree of nuisance her families actions have caused to her neighbour.

132. The Tribunal therefore finds that the Tenant was in breach of Regulation 3 and Regulation 6 on various dates during the period commencing on 19 January 2019 until the date in July/August 2021 when Ms Mian and her son left the Property.

Issue 6 - Regulation 15 - to keep the floors of the premises (other than the kitchen, utility room and bathroom) carpeted.

133. The Tribunal considered the arguments and submissions of the parties including the authorities provided by Mr Trevedi, and makes the following findings.

134. Mr Butt argues that the replacement of the carpets with hard flooring is an improvement which falls within s19(2) and that consent was being unreasonably withheld. He may be correct. This is because clause 3.5 prohibits the making of alterations without consent. Therefore, any proposed alteration that is in the nature of an improvement might fall within s19(2), notwithstanding that there is a contrary provision in the lease. There is some authority for Mr Butts proposition in the judgement of Luxmore J. in *Balls Bros Ltd v Sinclair [1931] 2 Ch. 235 (1931)*, referred to in the Applicant's authorities provided in support of its argument that there is an absolute covenant against this type of alteration.

The issue is whether replacement of the carpets, as part of the general refurbishment Works, falls within clause 3.5 and is an alteration which constitutes an improvement within s19(2), or just work that falls within the scope of the absolute covenant.

135. However, the parties made no legal argument or submissions on this particular point and as the Tribunal was able to determine the issue on the grounds below, it made no determination of the possible application of s19(2) to these alterations.

136. The Tribunal finds that the Tenant's email of 9 April 2018, notified the Landlord's agent of its intention, as part of the Works, to replace the carpets throughout the Property with hard flooring which would be "*sound proofed with acoustic boards & underlay"*. The Landlord is not, contrary to Mr Gales submissions, obliged by clause 4.6 of the lease to consider waiver of Regulation 15, but the Tenant's clear intention to breach the covenant, was not objected to or even commented on, by the Landlord's agent. Perhaps not surprisingly, as it appears to be the Landlord's somewhat risky practice to attempt to 'stand on the covenant' pending any adverse outcome.

137. However, the Landlord's agent went further than acquiescence. In its emails of 11 April and 18 June 2018 it authorised the Tenant to carry out the Works, which included replacement of the carpets, on the condition the Works were signed off by the council. The Tribunal finds therefore that the conditional consent contained in these emails operated as a waiver of the covenant, as contemplated by the contractual provision at clause 4.6 of the lease. The Tribunal did not, as a consequence, need to consider Mr Gale's general waiver submission.

138. The Final Certificate from Stroma indicates that the Works were compliant following the interim inspections, which included floors and sound insulation.

139. The Tribunal therefore finds that the Tenant is not in breach of Regulation 15 of the Fourth Schedule to the lease.

Costs

140. In its statement of case the Applicant indicated that it would seek contractual costs pursuant to clause 3.8 of the Lease, that is costs incurred in contemplation of proceedings under s146 or s147 of the Law of Property Act 1925. In response the Tenant said that if contractual costs are claimed it would seek an order under s20C of the Landlord and Tenant Act 1985. However, as by the date of the hearing no claim for contractual costs

pursuant to clause 3.8 had been made by the Landlord, and no s20C application had been made by the Tenant, the Tribunal was not seized of either issue and could not make any determinations.

Name: D Barlow **17 January 2022**

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, the 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