Neutral Citation Number: [2022] EWHC 2760 (TCC)

Case No: HT-2020-000162

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 02/11/2022

Before :

Ms VERONIQUE BUEHRLEN K.C.
Sitting as a Deputy High Court Judge

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Between :

NAZIRALI SHARIF TEJANI

Claimant

- and -

(1) FITZROY PLACE RESIDENTIAL LIMITED
(2) 2-10 MORTIMER STREET GP LIMITED AS A GENERAL PARTNER OF 2-10 MORTIMER STREET LIMITED PARTNERSHIP

Defendants

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T.C. DUTTON KC and MARK LORREL (instructed by **Mortimer Court Chambers**) for the **Claimant**
GARY BLAKER KC and PAUL DE LA PIQUERIE (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Defendants**

Hearing dates: 10 to 13 and 17 October 2022

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 2 November 2022 at 10.30am

Introduction

1. This case is concerned with noise emanating from the façade of an apartment situated at Block 7, Fitzroy Place, London W1T 3BP (the block being known as "7 Pearson Square"). The apartment is number 801 ("the Apartment"). The Claimant, Mr Nazirali Sharif Tejani ("Mr Tejani"), purchased the Apartment off-plan in July 2012. The First Defendant, Fitzroy Place Residential Limited, is the landlord of the residential apartment leases at the development known as and situate at Fitzroy Place, London W1 ("Fitzroy Place") and was the vendor of the Apartment to Mr Tejani. The Second Defendant, 2-10 Mortimer Street GP Limited, was the developer of Fitzroy Place and employer of the main contractor for the development, that is Sir Robert McAlpine Limited ("SRM").

2. Mr Tejani purchased the Apartment pursuant to a written agreement entered into between him, the First Defendant as Seller and the Second Defendant as Developer in 2012 ("the Agreement"). By the Agreement the First Defendant agreed to grant Mr Tejani a lease of the Apartment. The price was £2,595,000. The Development was completed in about May 2016 when the First Defendant granted Mr Tejani a lease in respect of the Apartment commencing on 1 January 2015 for a term of 990 years ("the Lease") as envisaged by the Agreement.

3. Mr Tejani complains of noises emanating from the façade of the Apartment. Whilst there have been several changes to how Mr Tejani's case has been put, by the close of trial the primary claim was that the noises constitute an actionable private nuisance for which the First Defendant is liable. Alternatively, it is alleged that the First Defendant is in breach of the covenant of quiet enjoyment set out at clause 4.1 of the Lease by which:

> "4 Landlords Covenants
> 4.1 Quiet Enjoyment
> So long as the Tenant does not contravene any term of this Lease the Landlord covenants with the Tenant to allow the tenant to possess and use the Premises without interference from the Landlord or from anyone who derives title from the Landlord."

4. Further or alternatively, Mr Tejani claims damages for breach of clause 5.6 of the Agreement on the part of the Second Defendant. By clause 5.6 of the Agreement:

> "The Developer shall take reasonable steps to procure that any defects in the Works which relate to or affect the Apartment or the principal means of access thereto and which are the responsibility of the Building Contractor(s) under the Building Contract in relation to the Works to remedy shall be remedied as soon as reasonably practicable in accordance with the terms of the relevant Building Contract, provided always that the Buyer shall have given notice in writing to the Developer of any such defects no later than twenty - three (23) months following the Certificate Date and provided further that the Developer shall not be liable for any consequential damage whatsoever caused by any such items and defects (including without prejudice to the generality of the foregoing, any damage caused to any finishes, decorations, furnishings, furniture and chattels in the Apartment)."

5. The Re-Amended Particulars of Claim provide particulars in respect of the noise complained of at paragraph 15 of the pleading. These are that the noise can be heard

throughout the Apartment, is intermittent in terms of timing and varies in volume. It is said to occur both day and night, to be loud enough to wake Mr Tejani and his wife while sleeping, cannot be suppressed or masked, and can be heard even if a television or radio is playing irrespective of whether internal doors are closed.

6. The Re-Amended Particulars of Claim further refer to the noise as "a loud clanking sound", "a loud "pop" or "crack" at irregular intervals but at its worst "approximately every 15 minutes". It is alleged by Mr Tejani that the noise has caused him (and his family) "annoyance, discomfort, distress and loss of amenity", that as a result he has been unable to occupy the Apartment as he intended when he purchased it and unable to rent it out (paragraph 37 of the Re-Amended Particulars of Claim).

7. The claim is for damages measured by reference to a diminution in the capital value of the Apartment in the sum of £815,000. Alternatively, for damages for loss of amenity. Various other damages claims set out in the Re-Amended Particulars of Claim are no longer pursued.

8. The First Defendant denies that the noise complained of is such as to constitute an actionable private nuisance and/or breach of the landlord's covenant of quiet enjoyment. Both Defendants take issue with the true nature and extent of the noise complained of and Mr Tejani's case that it is such as to interfere with the average person's enjoyment of the Apartment. Strong objection is taken to Mr Tejani's evidence on an alleged diminution in the capital value of the Apartment because of the noise. In turn, the Second Defendant denies any breach of clause 5.6 of the Agreement, not only on the basis that the requisite written notice of a defect was never given by Mr Tejani to the Second Defendant but also on the basis that reasonable steps were taken by the Second Defendant to procure SRM to investigate and remedy the alleged defect.

The factual evidence

9. I heard factual evidence from Mr Tejani himself, his son Mr Amarali Tejani and his daughter, Ms Reshma Tejani all on behalf of Mr Tejani's claim. Mr Tejani insisted when cross-examined that the noise was unbearable and that the Apartment was not fit for habitation. I formed the impression that this was Mr Tejani's genuinely held belief, although it was clearly not supported by other evidence including the expert evidence. Mr Tejani referred to the noise as "a bang". He also explained that there had been one night when he had been woken up by "a big bang, like something heavy has fallen on the floor". However, it was also apparent that Mr Tejani had rarely stayed in the Apartment for more than "a day or two", using the Apartment as a pied a terre when visiting London from his home in Leicester between August 2017 and March 2018. It should also be noted that Mr Tejani was often vague and sometimes confused when giving his evidence making it difficult to rely on his evidence to any great extent. The difficulties Mr Tejani had when giving evidence are explained by the fact that Mr Tejani suffers from ill health and the fact that he was not very much involved in the relevant events. That is because, on account of his and his wife's ill health, Mr Tejani handed over responsibility for the Apartment to his son, Mr Amarali Tejani in mid-2016. It is therefore Mr Amarali Tejani who dealt with matters in relation to the Apartment from mid-2016 onwards. As a result, Mr Tejani was not well placed to address many of the matters that were put to him in cross-examination.

10. Mr Amarali Tejani is Mr Tejani's only son and the person who has dealt with his father's business affairs and properties since 2016. His evidence was not always helpful because he had a strong tendency to answer the questions put to him in cross-examination with questions of his own with the result that the questions put to him often went unanswered. However, what was clear is that Mr Amarali Tejani became frustrated with the delays and failure on the part of the Defendants' agents and/or SRM to remedy what he clearly felt to be a defect in the Apartment. Mr Amarali Tejani maintained that the Apartment was "unhabitable and unusable", although as explained below that is plainly not the case. Mr Amarali Tejani described the noise when giving his evidence as "a loud thud, like as if a weight – literally as if a weight is dropping on the floor" (picking up on Mr Tejani's evidence in cross examination) with other "very small noises in frequency" these being "a click and a pop, so like a click/pop". He also referred to the noise as a "bang" and a "loud bang/thud" with other sporadic noises that are there then following that which are a lot lower in volume". Mr Amarali Tejani's descriptions of the noise as a "loud bang/thud" did not correspond with the expert acoustic evidence including the recordings of the noise jointly presented to the Court by those experts. Nor did they correspond with the description of the noise at paragraph 15 of his witness statement which referred to "a sporadic creaking, popping or clicking sound". In the circumstances, I was forced to conclude that where Mr Amarali Tejani's evidence was contradicted by the expert evidence, the expert evidence was to be preferred.

11. Ms Tejani is a clinical pharmacist at Victoria Park Health Centre in Leicester. Ms Tejani stayed occasionally at the Apartment. In her witness statement, Ms Tejani described the noise as "a loud click/bang occurring frequently". She also described an occasion when she was awoken at night by what she described as a "loud bang" and "the click and bang". In Court Ms Tejani described the noise as "two different types of noises". One was "a loud bang" followed by "clicking". She described the "loud bang" as "a gun shot heard in the distance" and as "definitely louder" than a champagne cork popping. She compared the "clicking" element as "Like a pop", "like a balloon popping, but to a louder extent". Again other than the description of the noise in terms of "clicking", Ms Tejani's descriptions of the noise did not correspond with the expert acoustic evidence or the recordings of the noise as jointly presented to the Court by the acoustic experts.

12. Lastly, I also heard from Mr James Thornton on behalf of Mr Tejani. Mr Thornton is the owner of apartment number 701, the apartment immediately below that belonging to Mr Tejani. Mr Thornton gave evidence in a somewhat relaxed but straightforward manner. Noises like those in issue in these proceedings can also be heard in Apartment 701. Mr Thornton described the noise as "creaking or clicking or popping". A description that aligned much better with the acoustic expert evidence than the descriptions provided by Mr Tejani and his children. Mr Thornton stated that he had "got used to the noise". He did however say that he had visited the Apartment on one occasion for about 10 minutes when he had heard a much louder noise than those he experienced in his own flat and suggested that the noises in the Apartment were of a different order to those heard in his own.

13. On behalf of the Defendants I heard evidence from Ms Emma Louise Hares and Mr Edward Atterwill. Ms Hares is the Property Team Manager with Rendall & Rittner Limited who took over as managing agents of the residential aspects of Fizroy Place from Qube Management in September 2020. Although Ms Hares' evidence did not advance matters to any great extent, I have no doubt that she was a truthful witness. Ms Hares

rightly accepted, for instance, that she was mistaken in suggesting at paragraph 20 of her witness statement that the entry logs for 7 Pearson Square were evidence of the Apartment being accessed, let alone accessed 119 times between 30 June 2021 and 28 November 2021 and 43 times between 3 December 2021 and 23 January 2022.

14. Mr Atterwill is a director of the real estate arm of Aviva Investors ("Aviva"). Aviva are the asset managers for the investment fund to which the Defendants belong. As such Aviva is the agent of the Defendants. Mr Atterwill provided evidence as to the steps taken by Aviva and SRM to investigate and resolve the noise complaint both in relation to the Apartment and Apartments 701 and 901, albeit that most of the information is to be found in the contemporaneous documentation. Mr Atterwill gave evidence in a straightforward and open manner.

The expert evidence

15. I heard expert evidence from 3 different disciplines:

(i) Façade engineering

16. As regards façade engineering, I heard expert evidence from Mr Michael Clarke on behalf of the Claimant and Mr Simon Armstrong on behalf of the Defendants. Mr Clarke is a chartered Architect and Mr Armstrong is an engineer. Happily they agreed on most issues on which they were asked to give evidence. In particular, they agreed that the noises emanating from the façade were most likely caused by thermal expansion of façade components as a result of changes in temperature. They also agreed that it was normal for a façade to emit noise but that this noise was usually unnoticeable. Neither was able to pinpoint the actual cause of the noise and agreed that any remedial works would need to involve incremental interventions followed by acoustic monitoring. They further agreed that serious consideration should be given to investigating the potential contribution (to the noises generated by the façade) by the Ziggurat panels and the introduction of PTFE or Nylon washers at metal-to-metal surfaces and fixings subject to differential movement.

(ii) Acoustics

17. On the subject of acoustics, I heard expert evidence from Mr Teli Chinelis, a Senior Consultant with Finch Consulting with over 20 years' experience in the field of acoustics and noise/vibration control, instructed on behalf of Mr Tejani. Mr Chinelis provided a detailed report addressing factors relevant to an assessment of the noise such as the character of the noise, its loudness, its frequency of occurrence, duration, spectral content, predictability, and impact on sleep. Mr Chinelis also presented the results of acoustic monitoring he undertook in the Apartment over a period of some two weeks from 17 July to 1 August 2020.

18. In turn, I also heard expert evidence on acoustics from Mr Andersen on behalf of the Defendants. Mr Andersen is an acoustic consultant in private practice since 1995 with extensive experience of residential noise and noise nuisance. Mr Andersen also provided a detailed report including the results of his own acoustic monitoring at the Apartment.

19. There was a large measure of agreement between Mr Andersen and Mr Chinelis. For instance, they agreed that the background noise levels throughout the Apartment were

relatively low and accepted the validity of each other's recordings and data. Mr Andersen described the noise as comprising two elements:

> "7.16 The first noise which often preceded the second, was a very short duration, instantaneous high frequency "click/tick" sound. This could be likened to the clicking of a mouse on a personal computer.
>
> 7.17 The second noise, was of slightly longer duration and had a greater low frequency content. This could be considered as a "bump" sound and could be likened to the bouncing of a relatively hard ball (such as a squash ball or similar) on a hard surface (albeit that the volume of the noise within the apartment would be lower than for this example."

20. Mr Chinelis described the noises emanating from the façade as including a range of sounds "cracks, pops, bangs, creaks, ticks, taps". These varied in character and magnitude and lasted for a few milliseconds.

21. What Mr Chinelis and Mr Andersen primarily disagreed about was which standards or published guidance one ought to take into account to determine the extent to which the noise might be classified as a nuisance. In Mr Andersen's opinion the World Health Organisation's 1999 Night Noise Guidelines for Europe provided relevant guidance ("the WHO Guidelines"). Mr Chinelis did not dismiss the WHO Guidelines but in his opinion the guidance was concerned with environmental noise rather than the type of noise in issue in this case. In Mr Chinelis' opinion, Westminster City Council's planning guidance for impact noise in gymnasiums and BS8233:2014 concerning guidance for noise made by lifts in communal buildings were more relevant.

22. In addition to Mr Chinelis and Mr Andersen's evidence there were several other reports from another firm of acoustic consultants known as Sandy Brown obtained by SRM during their investigations into the source of the noises complained of.

23. Very helpfully and at short notice, Mr Andersen and Mr Chinelis prepared a series of audio simulations for the Court. As is explained in the experts' Agreed Acoustic Note, the simulations comprised 4 separate "Noise events" over a 5 minute period corresponding to a frequency / occurrence rate for a sunny daytime period as observed by the experts when taking measurements. The samples were taken from audio recordings made by Mr Chinelis in July/August 2020 and it was agreed between the experts that they represented the typical and most frequently occurring sounds. I was able to listen to the recordings in Court. These were played to me at 30 decibels (DB), 35DB, 40DB, 45DB and 50DB so that I might better understand both the nature of the noises and their loudness. The experts considered the noise at 50DBA Lmax[1] to be the "typical highest level that would occur" i.e. the "typical worst case". 45DBA was considered by both experts to be the upper level of regularly occurring events over a typical 24 hour summer period. The recordings did not include any other ambient noise as would be present in the Apartment. However, they were listened to in Court where the ambient noise of the Court room was, I was told, slighter greater than in the Apartment.

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[1] dBA being the sound level in decibels together with a frequency weighting denoted by the letter A and which is used as broadly agreeing with how humans assess loudness.

(iii) Valuation

24. As regards valuation I heard evidence from Mr Maunder Taylor instructed on behalf of Mr Tejani and from Mr David Rusholme instructed on behalf of the Defendants. Both experts are experienced chartered surveyors and valuers. They were able to agree on the market value of the Apartment in May 2016 at £2,725,000 and in May 2022 at £2,450,000 – a fall in market value of £275,000. In Mr Rusholme's opinion noises such as those described in Mr Andersen's expert report would not impact the Apartment's capital value. Assuming the noise was such as to awake residents frequently at night, Mr Rusholme valued the Apartment at £2,580,000 in May 2016 and £2,300,000 in May 2022. Mr Maunder Taylor on the other hand valued the Apartment on the basis that the noise was "as described by the Claimant" at £1,910,000 (May 2016) and £1,715,000 (May 2022) or on the basis that the noise was "as described by the Defendants" at £2,450,000 (May 2016) and £2,205,000 (May 2022).

25. The valuation methodologies adopted by the valuation experts to determine the market value of the Apartment were very different. In essence, Mr Maunder Taylor made a deduction of 10% for the noise as he considered described by the Defendants and a deduction of 30% for the noise as described by the Claimant. As noted above, Mr Rusholme's view was that if the noise was as described by Mr Andersen it would not have any impact on value. His alternative valuation was based on 2 scenarios, the first that a resident would be frequently awoken during the night and the second on the basis that the Apartment was uninhabitable. Both these scenarios made deductions to the rental income obtainable and assumed that the noise issue would be resolved within 2 years of the valuation date.

26. In the event, much of the valuation evidence was of no assistance to me. For instance, Mr Rusholme's second valuation approach assumed that the Apartment was uninhabitable when the Particulars of Claim were subsequently amended to remove the allegation that the Apartment was uninhabitable. However, for the reasons set out below, where the evidence of Mr Rusholme conflicted with that of Mr Maunder Taylor, I have preferred the evidence of Mr Rusholme.

27. In particular, Mr Maunder Taylor stated on several occasions when giving evidence that his valuations were based on "market evidence". What Mr Maunder Taylor meant by market evidence was not entirely clear and Mr Dutton KC was unable in closing submissions to identify what Mr Maunder Taylor was referring to. However, Mr Maunder Taylor did say while giving evidence:

> A My valuation is based principally on the three comparables I have of the offer made for flat 801 which was conditional on the noise being identified and resolved, the - - what happened in flat 901 where the purchaser bought unaware of the matter and there is an email on the - - in the paperwork concerning that, and the tenant leaving flat 701 and the email concerning the reasons why he left. Those are the - - the market
>
> information on which I based my valuation analysis.

28. It would therefore appear that the market evidence to which Mr Maunder Taylor was referring consisted of three "comparables": (i) *Firstly*, an offer made by Ms Cheng for the Apartment in the sum of £2.8 million in the summer of 2018 which Mr Maunder Taylor referred to as conditional on the noise being identified and resolved. However, the offer was not conditional on the noise being identified and resolved it being Mr Tejani's case that Dexters and Ms Cheng were not told about the noise but instead about a noisy door that was being fixed. Further, it was common ground that the offer was above market value for the Apartment at the time it was made. (ii) *Secondly*, what happened in flat 901 was a reference to the sale of flat 901 in 2018 at less than market value. This, sale at an undervalue it transpired, Mr Maunder Taylor had attributed to the existence of the noise in flat 901. However, that was entirely speculation. There was no evidence whatsoever that the price achieved for flat 901 in 2018 had anything to do with the existence of any noise. Indeed, the buyer had apparently not been told about the noise. (iii) The third item referred to by Mr Maunder Taylor concerned an email from a previous tenant of Apartment 701 which stated that the noise was "the single largest reason we decided not to extend our lease of flat 701". However, whilst taking that information into account, Mr Maunder Taylor had not considered the fact that the current tenant of Apartment 701 has made no complaint in relation to the noise despite occupying Apartment 701 since November 2020. The effect of the issues with the "comparables" or "market evidence" used by Mr Maunder Taylor was significantly to undermine the reliability of his valuations of the Apartment.

The factual background

29. As already noted Mr Tejani purchased the Apartment off-plan in 2012. 7 Pearson Square was built and Mr Tejani obtained possession of the Apartment in May 2016. From May 2016 until July 2017 works were undertaken to the Apartment, firstly consisting of SRM remedying snagging issues or defects and subsequently consisting of improvements to the internal finish of the Apartment in line with the advice of an interior designer commissioned by Mr Tejani. By letter dated 11 October 2016 addressed to the "Building Manager of Fitzroy Place", Mr Amarali Tejani complained of hearing "footsteps from above, draws opening and closing and general loud sounds during certain times of the week". On 18 October 2016, Mr Amarali Tejani wrote to the noise team at Westminster City Council complaining of noise from the upstairs apartment "such as footsteps and general noises".

30. The Managing Agents of Fitzroy Place at the time were known as Qube and the Residential Building Manager was a woman called Tara Bayulken. On 24 January 2017, Ms Bayulken emailed Mr Amirali Tejani referring to the window in the Apartment and stating "my concern is that this is making a noise because of temperature changes and we will not be able to do anything" ("the 24 January 2017 email").

31. Mr Tejani, his wife (Mrs Tejani) and their children, Ms Reshma Tejani and Mr Amarali Tejani started to stay at the Apartment for a day or two periodically from July 2017 onwards i.e. from the time the various works undertaken to the Apartment were completed. The family also stayed in the Apartment for a couple of days over Christmas 2017. However, by March 2018 Mr Tejani and his wife ceased to stay at the Apartment. Mr Tejani says this was because of the noises complained of in these proceedings, although Mr Amarali Tejani accepted in cross-examination that the decline in his mother's health also played a part.

32. Meanwhile, the Apartment was being marketed for sale by Dexters with a price tag of £3,500,000, reducing to £2,999,950 in January 2018. Albeit that by letter dated 30 January 2018, Dexters informed Mr Amarali Tejani that an asking price of £2,500,000 to £2,650,000 would obtain viewers and generate more interest. Mr Amarali Tejani also obtained advice from Dexters lettings suggesting that the Apartment was worth between £1,750 and £1,950 by way of rent per week. Dexters, however, had been requested to market the Apartment at a rental of £2,500 per week.

33. A Ms Jenny Cheng made an offer to purchase the Apartment for £2,690,000 in May 2018, increasing her offer to £2.8 million in June 2018. The offer was subject to a condition being included in the contract of sale that "the door problem" would be fixed by the First Defendant. By email dated 31 July 2018, Mr Amarali Tejani informed Dexters that Mr Tejani had rejected the offer "finding it to be too low for what is included within the sale".

34. Dane Architectural Systems ("Danes") were the specialist subcontractor with responsibility for the design manufacture and installation of the façade of 7 Pearson Square during the build. They attended the site to investigate a noise complaint in relation to the façade of Apartment 701 (not 801) on 4 April 2018 and produced a report entitled "Noise /Creaking Investigation" dated 30 April 2018. The report stated that the as-built works had been installed in line with the construction drawings and that Danes could not discern any apparent cause for the noises complained of.

35. Buro Happold Engineering ("Buro Happold"), consulting engineers, attended 7 Pearson Square on 17 August 2018 to undertake an initial inspection. On 17 December 2018, Buro Happold produced a report for Aviva following acoustic testing in the Apartment in November 2018. The report concluded that the noises were emanating from the mullion beside the sliding door system of the living room and suggested that the noises were the result of thermal expansion at different rates for different materials in the façade. The report suggested certain remedial actions for Apartments 701, 801 and 901.

36. Investigations were then carried out by SRM and Danes in mid February 2019 and remedial works were carried out by Danes from 25 to 28 February 2019 and again in late March 2019. However, these works did not resolve the noise issue and Danes proposed further remedial works in a report dated 17 May 2019. These further works were carried out in June (4 days) and July 2019. Shortly thereafter, Mr Amarali Tejani reported to Aviva that the noise was still occurring. He explained in an email dated 17 July 2019 that "the noise occurs at no specified time but can occur 3-4 times within the hour. The noise is still very noticeable within my living room and can be heard from the bedroom also".

37. Further investigations followed and on 11 October 2019, Danes produced a programme of further remedial works proposing that these be carried out from 21 to 25 October 2019. In the event issues with access to Apartment 1001 (required to place a crane on its balcony) resulted in delays and these further remedial works were not undertaken until mid March 2020 and reported upon by Danes on 26 March 2020. Once more these works failed to remedy the situation with the tenants at Apartment 701 reporting continuing "creaks".

38. On 28 April 2020, SRM emailed Aviva proposing further acoustic monitoring for Apartments 701, 801 and 901 with a view to establishing a baseline "for the current scale

of the issue, which will be used to plan further intrusive works". On 7 May 2020, Danes produced a timeline listing various investigations and remedial works undertaken commencing with a reference to an email reporting a creaking mullion in Apartment 701.

39. On 4 June 2020, Sandy Brown, consultants in acoustics noise and vibration hired by SRM, provided a risk assessment and method statement for on-site noise and vibration measurements which they then undertook on 2 July 2020 in Apartments 701 and 901. They reported on a "Low level intermittent popping sound", "a very short click and on occasion accompanied by a short pop". They reported that:

> "The typical event level is in the range of L_{AFmax} 30-47 DB and the ambient noise levels in the apartments is in the region L_{A90} 25-30 DB. While impulsive sound levels of 45DB are relatively low, the sound does have a distinctive character which is quite noticeable when occurring regularly" and
>
> "The typical level of noise from the click is between L_{AFmax} 30DB and L_{AFmax} 45DB."

40. Sandy Brown's view was that the noises were caused by thermal movement of the façade components and that the effect as heard in each apartment was caused by local façade elements rather than being transmitted from elsewhere on the façade.

41. A meeting ensued between Sandy Brown, SRM and Danes to discuss further investigations on 29 July 2020 and SRM produced a plan of works on 21 August 2020 which was revised on 11 September 2020 to address access difficulties in relation to Apartment 1001. Further acoustic surveys were undertaken in Apartments 701, 801 and 901 on 19 October 2020 followed by further remedial works starting on 20 October 2020 and again in November 2020 and on 7 December 2020. However, once more the issue was not resolved resulting in further proposals from SRM for more investigations and another plan of works from SRM dated 15 January 2021. On 3 February 2021, Sandy Brown reported on acoustic surveys undertaken in Apartments 701, 801 and 901 on 26 October 2020, Apartments 701 and 901 on 2 November and Apartment 901 on 6 November, 15 November and 15 December 2020. Sandy Brown noted that "the various mitigation measures that have been adopted to date have not eliminated the click".

42. In June 2021, Aviva instructed TFT LLP ("TFT"), a firm of chartered building surveyors and project managers, to assist with the investigations. TFT provided Mr Amarali Tejani with a further SRM Plan of Works. Further investigations and works were proposed and undertaken in July 2021 when the façade was wrapped with thermal insulation. Danes then produced a method statement for the installation of stitch plates on 27 October 2021.

43. Further noise measurements were taken by Sandy Brown in the Apartment in mid March 2022 (over a period of 48 hours) and Sandy Brown issued an update to their earlier reports on 28 March 2022. That report addressed the particulars of the noise complained of set out at paragraph 15 of the Re-Amended Particulars of Claim. The author of the report, a Mr Richard Muir, recorded his opinion that the noise was intermittent, occurred night and day but only occasionally at night. In his opinion the levels recorded were unlikely to result in sleep disturbance and would be masked by any other activity in the room. He noted that BS8233:2014 and the WHO 1998 guidelines were relevant standards in terms of noise guidance but that neither document provided an objective measure of noise

nuisance. Finally he wrote that "[t]he residual issue remains that the façade emits noise in the range of L_{AFmax} 30-50 DB which is consistent with my previous surveys".

The noise

44. It seems to me that the acoustic experts are largely agreed when it comes to the type, nature and loudness of the noise complained of. Both describe the noise primarily as a click, albeit that Mr Chinelis referred to "cracks, pops, bangs, creaks, ticks, taps" and Mr Andersen to a "click/tick" and "bump" sound. They agree that the noise is intermittent, occurs over milliseconds and that the frequency of occurrence of the noise is significantly reduced at night time (i.e. between 11pm and 7am). They refer to a noise event at 50DBALmax as the "typical worst case" and a noise event at 45DBA Lmax as "the highest typical level" with the range typically being between 20 to 45DB (as recorded in Tables 3 and 4 of Mr Chinelis' expert report). Their findings broadly tally with those of Sandy Brown and were illustrated by the sound recordings played to me in Court.

45. It should also be noted that Mr Chinelis only heard the noise on one of his five visits to the Apartment. Mr Clarke heard it on one of his two visits to the Apartment. Mr Armstrong heard it and described it as "creaking" which he could only hear if he ignored all the other noises coming from the street etc.

46. As for the loudness of the noise, subjectively I found the recordings at 30 and 35DBA barely audible and at 40DBA very quiet. The noises then consisted of an audible click and double click or click/tick when played at 45 and 50DBA. The sound recordings played to the Court were a far cry from anything that could be described as loud noises, a loud bang or loud thud and closest in terms of description to Mr Andersen's comparison of hearing the click of a computer mouse, albeit a little louder at 50DB. I therefore accept Mr Andersen's description of the noise as the most accurate.

The Claim for nuisance

The law

47. Paragraph 19-01 of Clerk & Lindsell on Torts (23rd Ed) seeks to provide some definition of what will constitute a nuisance. It states that "[t]he essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land" and that whilst actionable nuisance is incapable of exact definition a private nuisance is "an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise of enjoyment of … his ownership or occupation of land …".

48. In *Lawrence and another v Fen Tigers Ltd and others* [2014] UKSC 13, Lord Neuberger said this about nuisance:

> "3. A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of making a living in society, or more correctly in a particular society".

> 4. In *Sturges v Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, nor merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.
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> 5. As Lord Goff said in *Cambridge Water Co v Eastern Countries Leather plc* [1004] 2 AC 264, 299, liability for nuisance is: "kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which 'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action': see *Bamford v Turnley* (1862) 3 B&S 66, 83, per Bramwell B." I agree with Lord Carnworth JSC in para 176 below that reasonableness in this context is to be assessed objectively."

49. The facts of the present case immediately beg the question of the extent of the interference with the claimant's reasonable enjoyment of his land required before something (here noise or noises) will constitute an actionable nuisance. It was common ground that the alleged inconvenience needed to be more than "trifling" but beyond that the parties did not clearly identify any line of demarcation. However, the key area of dispute between the parties lay in the extent, if any, to which the noise(s) complained of would disturb an average person's sleep. The obvious inference being that both parties considered that a noise that led to frequent awakening at night would constitute a nuisance.

50. Paragraph 19-11 of Clerk & Lindsell cited by Mr Dutton KC as providing a useful summary of the general principles applicable refers to the need for there to be "a real interference with the comfort or convenience of living according to the standards of the average man". The text goes on to state that:

> "… the discomfort must be substantial not merely with reference to the claimant; it must be of such a degree that it would be substantial to any person occupying the claimant's premises, irrespective of his position, in life, age, or state of health; it must be "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people"" citing *Walter v Selfe* (1851) 4 De G & Sm 315 at 322.

51. To that Mr Dutton KC added that when considering what constitutes a sufficient interference to amount to an actionable nuisance the character of the neighbourhood should be taken into account – essentially to identify what would be the reasonable expectations of people occupying property in that neighbourhood. A point echoing Thesiger LJ's famous dicta in *Sturges v Bridgman* (1879) 11 Ch. D. 852 at 856 to the effect that whether an interference constitutes an actionable nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances: what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey".

52. In turn, Mr Blaker KC relied on the recent case of *Kay v Windrush Riverside Properties Ltd* [2022] EWHC2210 (TCC) in which HHJ Russen said:

> "The objective elements of the test to determine whether or not what the neighbour considers noisome is in law an actionable nuisance, imported by the concept of a reasonable user having regard to the locality, also mean that the court will approach the question of what the neighbour might reasonably be expected to put up with by applying the standards of the average person. On this aspect, a number of subsequent cases have applied the test formulated by Knight Bruce V.-C. in *Walter v Selfe* (1851) 4 DE G & Sm 315, at 322, where he put the point as follows:
>
> > "… ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"

53. I have taken from these authorities that for the noise the subject of the current action to give rise to an actionable nuisance it must be such as to materially interfere with the ordinary comfort of the average person living in the Apartment taking into account the character of the neighbourhood.

Is the noise such as to give rise to an actionable private nuisance on the facts?

54. I have not found taking the character of the neighbourhood particularly pertinent on the facts of the present case. That is because on the one hand (as was submitted by Mr Blaker KC) the Apartment is situate in central London meaning that there will be noise intrusion in the Apartment. As Mr Chinelis explained in his expert report:

> "Noise levels inside the Apartment are a combination of sources including environmental noise intrusion (i.e., road, rail and air traffic) through the external building fabric, noise generated from building services serving the apartment, building services serving other parts of the building and activities from neighbours, as well as the noise events associated with the source of the annoyance."

55. Mr Chinelis also went on to state that "it is evident that the dominant sounds in the Apartment are those associated with transportation noise break in and the noise generated from various mechanical ventilation building services (that serve the Apartment"). Indeed Mr Blaker KC was at pains to point out that traffic including sirens could be heard inside the Apartment, that people gather in the square below the Apartment and that there is a bar in the immediate vicinity where music is played and which stays open until midnight. One could not therefore expect total silence (or anything like) in the Apartment.

56. On the other hand, despite the location of the Apartment, the background noise levels in the Apartment were reported as being relatively low (as was for instance stated by Mr Andersen at paragraph 7.9 of his expert report). Further, it seems to me that the noise(s) complained of in these proceedings are different to the general environmental noise intrusion to which Mr Chinelis was referring. The noise complained of being a distinct,

albeit intermittent, click/tick sound, some but not all of which would be masked by the ambient noise in the Apartment caused by the matters referred to by Mr Chinelis. Hence, it seems to me that the location of the Apartment is less relevant than it might otherwise have been.

57. As already noted, both parties seemed to accept that a key indicator as to whether the noises are such as to materially interfere with the ordinary comfort of the average person living in the Apartment was whether the noises would cause a person to wake up at night. It was common ground that the noise events were significantly reduced at night-time when compared to the daytime/evening (paragraph 18 of the acoustics' experts Joint Statement refers). It was also common ground that the noise(s) were less audible from the master bedroom than in the living room as was amply demonstrated by Tables 2 and 3 in Mr Chinelis' expert report.

58. There was no evidence presented from any sleeping experts but some limited guidance can be found in published materials. Mr Chinelis referred to Basner et al where it is suggested that 10% of people would be woken up by a noise at 73DB. However, the acoustic experts were agreed that the "typical worst case" level of the noise complained of was 50DBA. In other words, the noise is nowhere near as loud as 73DB. Mr Andersen referred to the WHO Guidelines for Community Noise which states that "For good sleep, it is believed that indoor sound pressure levels should not exceed approximately 45DB L_{Amas} more than 10-15 times per night (Vallet & Vernet 1991) and most studies show an increase in the percentage of awakenings at SEL values of 55-60DBA …". However, again there was no question of the noise occurring at a level of 45DB more than 10 to 15 times a night. Rather the noise (i.e. click/tick) might exceed 45DB once or twice a night and then by no means every night according to Mr Chinelis' Table 3. In short, the available published guidance together with the recordings got nowhere near establishing that a person would be woken up at night let alone frequently. That is without taking into account the additional fact that Mr Chinelis' recordings taken in the master bedroom were taken with the bedroom door open and Mr Chinelis' evidence that with the door closed he would expect the sounds to be reduced by some 15 to 20DB.

59. Mr Anderson's view was that the noise would not awake an occupant of the Apartment based upon both his subjective observations and the results of his acoustic measurements. Mr Chinelis did not provide an opinion as to whether he would expect the noise(s) to awaken someone. Instead he suggested that to the extent that Mr Tejani had been awoken this might be because he was starting to wake up naturally and that "non acoustic factors of this noise … increased his awareness and recollections of the noise". Mr Clarke, the Claimant's façade engineering expert having heard the noise said that he "wouldn't consider it a problem personally" (Day 3 at page 161 of the Transcript).

60. That brings me to the factual evidence of the Tejani family. The witness statements of Mr Tejani, Ms Reshma Tejani and Mr Amarali Tejani cumulatively cite six specific instances of being awoken by the noise at night. Although, Mr Tejani accepted in evidence that on one of two of the occasions to which he referred in this witness statement he was not in fact woken up by the noise but by his wife. That is a far cry from evidence of being regularly or frequently awoken by the noise at night. Further, I accept Mr Blaker KC's points that most people wake up in the night from time to time, that the measured data is inconsistent with the idea that the noise would wake a person at night (particularly in the master bedroom) and that it is no doubt difficult to be sure as to what noise may have woken Mr Tejani, Ms Reshma Tejani or Mr Amarali Tejani up on any particular

occasion. To this falls to be added the fact that there is no contemporaneous documentation suggesting that the noise in the Apartment impacted sleep and no suggestion on the part of the Tejani family that the noise was such as to prevent any of them from going to sleep.

61. Finally, I must add that I would not expect the noises I heard played in Court to wake anyone up.

62. I have therefore concluded that the noise complained of is not such as to awaken the average person when sleeping in the Apartment, let alone frequently. That leaves the question of whether, although the noise is not such as to disturb sleep in any meaningful way, it is still such as to materially interfere with the ordinary comfort of the average person living in the Apartment. I have concluded that it is not. The acoustic expert evidence demonstrates that most of the sounds emanating from the façade are either inaudible or very quiet. Contrary to Mr Tejani's case, I accept Mr Andersen's evidence that the vast majority of the sounds complained of would be supressed by a television being on or music playing. That is also in accordance with the evidence of Mr Chinelis to the effect that he would expect a television to be on at a volume of about 60-65DB (thus masking a 50DB sound). To the extent that there are exceedances of 45DB during the day or evening the sounds, best compared to the click of a computer mouse, cannot in my judgment be equated with materially interfering with the ordinary comfort of the average person living in the Apartment. It no doubt goes without saying that in my judgment the suggestion that the Apartment is uninhabitable or unusable is untenable – which no doubt explains why the allegation was removed from the Particulars of Claim.

63. Mr Chinelis suggested that the noise might constitute an actionable nuisance on the basis that there were instances in which the noise was louder than the maximum recommended limits in BS8233:2014 for lift movements. He similarly noted that there were instances in which the noise was louder than the limits imposed in draft guidance provided by the Association of Noise Consultants included in Westminster City Council's "Environmental Supplementary Planning Document" for noises caused by dropping weights in gymnasia. However, neither of these sources of information or guidance were concerned with a noise of the type in question. Mr Tejani and Mr Amarali Tejani's suggestion when giving oral evidence that the noise was as if a weight was dropping on the floor was not at all in line with the click/tick sound and may I fear have been intended to align with Mr Chinelis' evidence about noise limits on the dropping of weights in gymnasia. I could not accept Mr Tejani and Mr Amarali Tejani's evidence on this point. I also accept Mr Andersen's evidence that the sources of guidance referred to by Mr Chinelis are particularly stringent, in essence setting limits designed to ensure that no noise is audible from the activities concerned and (unlike the WHO Guidelines) not based on any research studies concerned with the impact of noise on residential occupants of land.

64. My conclusion that the noise is not such as to materially interfere with the ordinary comfort of the average person living in the Apartment is supported by the fact that Mr Tejani went to stay in the flat to recuperate from major surgery in the Summer of 2021 and that the family chose to use the flat for special occasions such as Christmas 2017 and birthdays which I would not expect them to have done if the noise was such as to materially interfere with their comfort whilst staying in the Apartment. However, I do not accept the Defendants' submission that Mr Amarali Tejani and Ms Tejani have been using the Apartment regularly regardless of the noise. Their evidence, which I accept, is

that mostly they do not use the Apartment. Both live and work in Leicester. Moreover, Ms Tejani stays with her partner in Purley when down South and not at the Apartment. Nor did the log recording comings and goings into 7 Pearson Square from the car park using the Tejani family's electronic keys evidence regular use of the Apartment when looked at carefully.

65. Lastly in support of my conclusion is the evidence in relation to Apartment 701. Notably, Apartment 701 has been let out since 4 November 2020 with no complaint from the tenants in relation to noises. Mr Thornton's evidence was that he had got used to the noise and he did not think it significant enough to mention it to any potential tenant. As already noted, there is an email from Mr Thornton's previous tenants to the building manager dated 9 June 2020, in response to an enquiry on his part as to the extent of the noise, stating that the noise was one of the main reasons the tenants did not want to continue with the lease. Yet there is no evidence of those same tenants complaining to Mr Thornton during their period of occupation of the flat and in a second email, the tenant (or the tenant's daughter) reported that she had heard "creaks" stating "I work at the desk and usually hear some throughout the day" but there was no suggestion in the quoted email that this was a problem for her.

66. Whilst there was some suggestion that the noise might be louder in Apartment 801 than in Apartment 701, that was not borne out by the information gathered in the various Sandy Brown reports. It was not supported by Sandy Brown's conclusion that the effect as heard in each apartment is caused by the local façade elements rather than being transmitted from elsewhere on the façade. In other words, Apartment 801 is not the epicentre of the noise. Nor would Mr Thornton's evidence of hearing a louder noise on the one occasion he visited the Apartment be sufficient evidence to conclude otherwise.

67. Considering my conclusion on liability there is no need for me to address the issues of quantum. However, had I had to address the issue of quantum I would not have been able to accept the evidence of Mr Maunder Taylor for the reasons set out above. Further, given my findings on the actual nature and level of the noise complained of, even assuming I had concluded that the noise was sufficient to give rise to an actionable nuisance, I would have accepted Mr Rusholme's evidence that the noise as described by Mr Andersen is not such as to impact the capital value of the Apartment.

68. The result of those findings would have been a need to quantify damages for loss of amenity in accordance with the principles governing the award of damages for nuisance set out by the House of Lords in *Hunter v Canary Wharf* [1997] AC 655, per Lord Lloyd at 696. As to that there is no valuation evidence that I would have been able to rely upon. Mr Maunder Taylor did not address the question of the value of any loss of amenity to the Apartment because of the noise. Further, whilst Mr Rusholme looked at determining a reduction in the capital value of the Apartment by reference to a reduction in the rental he did so on the basis of two assumptions neither of which are applicable on the basis of my findings. The first being that an occupant of the Apartment would be frequently woken up by the noise which I have found not to be the case. The second on the basis that the Apartment was uninhabitable – a scenario that clearly does not apply. There was, accordingly, no evidence of a loss of notional rental value as a result of the noise as described by Mr Andersen and as I have found it to be.

69. That said, it would have been possible to assess damages in accordance with the approach taken by Ramsay J in *Dobson v Thames Water Utilities Limited* [2011] EWHC 3253 in

which the learned judge considered that the use of rental values provided a sound basis on which to assess damages for loss of amenity using a range of percentage deductions. In that instance, Ramsey J's percentage deductions ranged from 1.25% to 5% depending on the extent of the nuisance suffered – the nuisance in that instance being "vile" smells experienced by the claimants to varying degrees over a period of some 10 years.

70. However, it is also relevant to note that in *Dobson v Thames Water Utilities Limited* [2009] 3 All ER 319, prior to remitting the case to Ramsey J to assess damages, Waller LJ said this in the Court of Appeal:

> 34. On ordinary principles, it must also be clear that a claimant must show that he has in truth suffered a loss of amenity before substantial damages can be awarded. If the house is unoccupied throughout the time of the (transitory) nuisance, has suffered no physical injury, loss of value or other pecuniary damage, and would not in any event have been rented out, we are unable to see how there can be any damages beyond perhaps the nominal. A homeowner may be posted abroad, or working elsewhere without knowing when he will return, but may wish to keep the house available for himself at any time. He may be living elsewhere and waiting for the market to rise before selling. The house may be empty awaiting renovation. In none of those situations would there be any actual loss of amenity. So in this way also, as a matter of practicalities, the assessment of common law damages for loss of amenity to the land is likely to be affected by the actual impact of the nuisance upon the occupier, or the lack of it.
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> 35. It follows that the actual impact upon the occupiers of the land, although not formally the measure of common law damages for loss of amenity, will in practice be relevant to the assessment of such damages in many cases, including such property, loss of capital value, loss of rent or other pecuniary damage, arises.".

71. The difficulty for Mr Tejani, on any assessment of damages for loss of amenity, would have been that this is not a property in which he ever intended to live permanently. Rather, he had bought the Apartment as an investment with a view to reselling it and was using it as a pied a terre in London while waiting for the property market to improve. Accordingly, even assuming that Mr Tejani had continued to use the Apartment periodically for short visits to London, which is far from certain given his and his wife's very poor health, his loss of amenity and the corresponding damages would on any view have been small.

The claim for breach of the Landlord's covenant of quiet enjoyment

72. Mr Dutton KC's case was that "reliance on the covenant for quiet enjoyment does not really advance C's case – the reason being that the claim under the covenant stands or falls with its claim for nuisance" (paragraph 33 of Mr Dutton KC's Note of Closing Submissions refers). It follows from that submission that there is no need for me to consider the claim for breach of the landlord's covenant of quiet enjoyment separately.

The claim for breach of the Agreement

73. It is at this stage relevant to refer to various provisions of the Agreement. As already noted, the Agreement was for the sale/purchase of the Apartment and reflected the fact

that the sale/purchase was off-plan. The relevant provisions were helpfully summarised at paragraph 7 of the Claimant's Note of Closing Submissions. In short:

(i) By clause 2(1) of the Agreement it was agreed that the Second Defendant would grant (and Mr Tejani take) "the Lease" of the Apartment, "the Lease" being defined by reference to an agreed form of draft lease;

(ii) The price for the grant of the Lease was £2,595,000 payable as provided by the Agreement;

(iii) By clause 4.1 of the Agreement it was agreed that the grant of the Lease would be completed on the Completion Date. That term was defined as meaning the date for completion nominated by the Seller at the same time as providing the Buyer with a "Certificate". "Certificate" was defined as meaning a certificate (issued by the person acting as project manager in relation to the "Works") that the Works had progressed to such a stage that the Apartment was now "Ready for Occupation";

(iv) The Second Defendant's obligations in relation to the execution of the Works were then set out in clause 5 of the Agreement. These provisions included what was to happen in the event of snags or defects in the Works. Notably, clause 5.6 set out the Second Defendant's obligation in respect of "*defects in the Works which relate to or affect the Apartment*".

74. Mr Tejani's pleaded case is that "pursuant to Clause 5.6, the Defendants are obliged, to remedy any defect arising from the Works and failure to remedy such defects) is a breach of contract giving rise to a claim for damages".

75. That is plainly not correct. *Firstly*, clause 5.6 does not impose any obligation on the First Defendant. *Secondly*, the obligation imposed on the Second Defendant by clause 5.6 is not an absolute obligation but an obligation to "take reasonable steps to procure that any defects in the Works which relate to or affect the Apartment … and which are the responsibility of the Building Contractor(s) under the Building Contract in relation to the Works to remedy shall be remedied as soon as reasonably practicable in accordance with the terms of the relevant Building Contract".

76. In addition to those points, it is the Second Defendant's case that:

(i) *Firstly*, there is no defect present in the Apartment;

(ii) *Secondly*, Mr Tejani cannot rely on clause 5.6 of the Agreement because he did not give written notice of the defect complained of within 23 months of the Certificate Date;

(iii) *Thirdly*, whilst Mr Tejani has not pleaded a failure on the part of the Second Defendant to take reasonable steps to procure that SRM remedy the alleged defect, one sees from all the steps set out in paragraphs 20 and 21 of the Defence together with Mr Atterwill's witness statement and the contemporaneous documentation that the Second Defendant did take reasonable steps to procure SRM to remedy the alleged defect as soon as reasonably practicable; and

(iv) *Fourthly*, the Second Defendant relies on various exclusion and limitation of liability provisions set out in clauses 5.6, 5.10, 5.12 and 5.16 of the Agreement which the Second Defendant submits have not properly been addressed by Mr Tejani.

77. I deal with each of the defences raised by the Second Defendant in turn.

(1) Is there a defect within the meaning of clause 5.6?

78. In my judgment there is a defect in the Works in that the façade does not comply with the Specification. It may not be a major defect but it is a defect. BS ISO 6707:208 defines a defect as a "*fault or deviation from the intended condition of a material, assembly, or component*". Paragraph 6.19 of the Specification provided that "*the cladding shall be constructed to ensure that the noise generated by thermal movement is unnoticeable under normal conditions*". It is common ground that the noises emanating from the façade are most likely caused by thermal movement of certain components within the façade and that the façade emits audible sounds. The façade engineering experts were also agreed (as can be seen at paragraph 6.4 of their joint statement) that whilst it was normal for a façade to emit noise "*this noise is usually unnoticeable*". It was suggested by the Defendants (and more particularly Mr Armstrong, the Defendants' façade engineering expert) that the sounds were not noticeable under "normal conditions" meaning under everyday living conditions within the Apartment. In my judgment that is not correct. Some of the sounds coming from the façade are audible and therefore noticeable under normal conditions such as if a person was reading a book or working quietly in the living room.

(2) Notice under clause 5.6

79. By clause 5.6 of the Agreement, the obligation on the part of the Second Defendant to take reasonable steps to procure that any defects in the Works are remedied was imposed upon the Second Defendant "*provided always that the Buyer shall have given notice in writing to the Developer of any such defects no later than twenty-three (23) months following the Certificate Date …*". The natural meaning of these words is that the obligation imposed on the Second Defendant was conditional on written notice having been given within 23 months of the Certificate Date. The fact that notice must be given in writing is clearly stated in clause 5.6 and re-iterated by clause 23.1 of the Agreement which provides that any notice required to be given under the Agreement is to be in writing.

80. Further the consequences of written notice not being given are spelt out at clause 5.16 of the Agreement which provides that:

> "The Developer shall have no further liability under this Clause 5 following the expiry of a period of twenty-four (24) months following the Certificate Date save in relation to any works then outstanding under Clause 5.6 in respect of which notice has been given to the Developer prior to expiry of the period referred to in Clause 5.6."

81. Accordingly, in the absence of written notice being given by the Buyer to the Developer within 23 months of the Certificate Date, the parties agreed that the Developer would have no further liability to procure that any defect in the Works was remedied by the

Building Contractor or otherwise under clause 5 of the Agreement. There was no attempt on the part of Mr Dutton KC to construe the wording of clause 5.6 and the obligation imposed on the Second Defendant other than as conditional on written notice being given by Mr Tejani within 23 months of the Certificate Date.

82. The Certificate Date is not in fact known but it is common ground that the Certificate must have been issued in April / May 2016 and that accordingly the 23 months referred to in clause 5.6 of the Agreement expired in April / May 2018. However, no written notice of the defect complained of in these proceedings was given by Mr Tejani to the Second Defendant prior to May 2018.

83. It was originally suggested on behalf of Mr Tejani that Mr Amarali Tejani's letter to the Managing Agent dated 11 October 2016 comprised the requisite notice. However, Mr Dutton K.C accepted at trial that the letter, that referred to hearing "*footsteps from above, draws opening and closing and general loud sounds*", could not properly be construed as referring to the defect / noise at issue in these proceedings. Mr Dutton KC was in my view correct not to seek to rely on the 11 October 2016 letter not least given the similar letter sent by Mr Amarali Tejani to Westminster City Council complaining of "*hearing noise from the upstairs apartment such as footsteps and general noises*" which further supported the Second Defendant's case that the complaint made in the 11 October 2016 letter did not relate to any clicking or creaking noises emanating from the façade of the Apartment.

84. Instead, Mr Dutton KC sought to rely on the 24 January 2017 email sent by Ms Tara Bayulken (the then Residential Building Manager) to Mr Amarali Tejani, which referred to the window and stated "my concern is that this is making a noise because of temperature changes and we will not be able to do anything", as providing the requisite written notice for the purposes of clause 5.6 of the Agreement. In my judgment that email clearly cannot constitute the written notice required by clause 5.6 of the Agreement. The document is not a written notice given by Mr Tejani (or someone acting on his behalf, such as Mr Amarali Tejani) to the Second Defendant be it of a defect in respect of the window or of any other defect. I accept the evidence that Ms Bayulken was employed by Qube and that Qube were acting as the Second Defendant's agent in relation to the reporting of defects but that does not assist Mr Tejani's case. An email sent by Ms Bayulken to Mr Amarali Tejani cannot constitute a written notice from Mr Tejani to the Second Defendant. The Second Defendant makes the further point that this argument on behalf of Mr Tejani was not pleaded but I do not consider that anything turns on that for present purposes.

85. It follows that in my judgment the requisite written notice was not given by Mr Tejani to the Second Defendant by or before May 2018 and that accordingly Mr Tejani cannot rely on any alleged breach of clause 5.6 of the Agreement. Indeed, in the absence of the requisite notice under clause 5.6, the Second Defendant was to have no further liability for defects post May 2018 by virtue of clause 5.16 of the Agreement.

(3) Did the Second Defendant fail to take reasonable steps to procure that SRM remedy the defect as soon as reasonably practicable?

86. Given my conclusion on the notice issue, I need not address whether the Second Defendant did in fact take reasonable steps to procure that the defect be remedied as soon as reasonably practicable. However, having heard both parties at length on that issue and

to address the position were I wrong in my conclusion on the absence of the requisite notice, I address the matter below.

87. It is common ground that all the testing and remedial works listed by the Defendants at paragraphs 21 and 22 of the Re-Amended Defence were taken. These were expanded upon by Mr Atterwill at paragraphs 27 through to 32 of his witness statement by reference to the contemporaneous documentation evidencing the various investigations and remedial works undertaken by or on behalf of the Defendants. I have referred to many of these steps in the factual background section of this judgment set out above. It is also clear that Aviva took several steps to get SRM to investigate and remedy the issue as is evidenced by (i) the fact that most of the investigation reports are addressed to SRM; and (ii) correspondence passing between Aviva and Mr Amirali Tejani such as in April and May 2019 which records acceptance on the part of SRM of responsibility to resolve the issue. Although it transpired that not all the relevant correspondence was included in the trial bundle.

88. The investigations and remedial works undertaken were reviewed by Mr Armstrong, the façade engineering expert instructed by the Claimant. In Mr Armstrong's opinion the investigations undertaken were reasonable. He concluded at paragraph 8.5 of his expert report:

> "Based on the reports prepared by Dane and Sir Robert McAlpine listed in section 5 of this report I do not think that the investigations have gone far enough into determining the source of the noises but I consider them to have been reasonable. I concur with their general approach to try and eliminate components or elements by their temporary removal or substitution. It is also apparent from the reports that poor access from the Claimant into the apartment to investigate or work on the apartment has hampered progress by Dane and Sir Robert McAlpine."

89. In turn at paragraph 7.3 of their Joint Statement the façade engineering experts agreed that "the previous strategy of incremental interventions followed by acoustic monitoring was still the most sensible approach that would enable sequential elimination of possible sources of noise related to the thermal expansion of the façade components".

90. It was of course for Mr Tejani to establish breach of contract on the part of the Second Defendant and therefore that the Second Defendant had failed to take reasonable steps to procure that the defect be remedied as soon as reasonably practicable. Yet, there was no positive case on the part of Mr Tejani as to what steps it was said ought to have been taken by the Second Defendant that were not taken by way of procuring SRM to remedy the defect, or undertaking investigations or remedial works.

91. That said, there is some force in Mr Tejani's case that the steps that were taken by the Second Defendant were not taken as quickly as they might have been. There were periods of delay in steps being taken to investigate and remedy the defect and Mr Amarali Tejani had to chase the Managing Agents for updates which was no doubt frustrating. In that context, Mr Dutton KC in closing relied on two periods of what he referred to as inactivity. The first between Danes' 4 April 2018 survey and investigations undertaken by Buro Happold in November 2018. The second relating to the period from March 2020 to date. However, the periods of alleged inactivity are not correct. For instance, the agreed chronology records Danes producing a report on 30 April 2018 and Buro Happold then attending the site to carry out an initial inspection on 17 August 2018 and to carry

out acoustic testing in mid October 2018, all in the context that the 30 April 2018 Danes' report concluded that the as-built works had been installed in line with the construction drawings. Indeed, in an email dated 14 May 2018, the then building manager, Mr Andrew Denney, made clear to Mr Amarali Tejani that despite Danes' report Aviva did not consider the issue closed and that the managing agent had been instructed to engage a building surveyor to investigate the issue further which is what they did. Similarly, as regards the second alleged period of inactivity since March 2020, the agreed chronology records various continuing investigations and remedial works post March 2020 notwithstanding the additional problems caused by the various covid lockdowns.

92. There was clearly also a series of extraneous factors not attributable to the conduct of the Second Defendant which contributed to delays including the difficulties in identifying the cause of the problem, the fact that the remedial works undertaken were not straightforward (requiring for instance the use of a spider crane and equipment for the outside of the façade at height), the numerous difficulties with obtaining access not just to Apartment 801 but to other Apartments including Apartment 1001 which was needed in order to execute certain of the remedial works. As regards Mr Armstrong's last point at paragraph 8.5 of his report it is no doubt not surprising that there were access issues with regard to the Apartment given both the fact that Mr Tejani does not live in the Apartment but in Leicester and the difficulties caused by the various lockdowns during the covid pandemic.

93. Taking all the evidence and matters set out above into account it is not possible to conclude that the Second Defendant failed to take reasonable steps to procure that SRM remedy the defect as soon as reasonably practicable.

(4) Exclusion and limitation clauses

94. Considering my findings in relation to notice and breach of clause 5.6, I clearly need not address the Second Defendant's reliance on exclusion and limitation of liability provisions set out in clauses 5.6, 5.10 and 5.12 of the Agreement. That said, I think that Mr Blaker KC rightly accepted during his oral closing submissions that these provisions were not in fact apt to exclude or limit any liability or damages payable on the part of the Second Defendant for breach of clause 5.6. Clause 5.16 of the Agreement is however pertinent and I have addressed that provision above.

Conclusion

95. I have much sympathy with Mr Tejani and his wife who it is clear are both suffering from ill health and who will no doubt be very disappointed with the outcome of these proceedings. However, in conclusion for the reasons stated above Mr Tejani's claims must fall to be dismissed.

96. I will hear the parties separately as to any consequential issues arising such as in relation to costs.