FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LBC/2013/0064** **LON/00BK/LLC/2013/0003**
Property	:	**Flat 34A, 30-34 Upper Montagu Street, London W1H 1RP**
Applicant	:	**Glosmont properties Limited**
Representatives	:	**Carter Lemon Camerons LLP**
Respondent	:	**Elliot White**
Representative	:	**Michael Conn Goldsobel**
Type of Application	:	**Determination of alleged breaches of covenant.**
Tribunal Members	:	**Miss A Seifert FCIArb** **Mr L Jarero BSc FRICS**
Date and venue	:	**Hearings 12th November 2013, 19th and 20th February 2014, 12th March 2014, 21st March 2014 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**17th June 2014**

DECISION

The application

1. The property which is the subject of this application, is a Flat 34A ("the Property"), 30 and 34 Upper Montagu Street, London W1H 1RP ("the Building").

2. The Building is part of a terrace of 5 storey flat fronted town houses. The Property is located on the top (3rd) floor and extends across two of the original terraces. The Building is situated in the Portman Conservation Area within the City of Westminster. The roofs over the terrace are inverted v-shaped 'London Roofs' with central valley gutters.

3. The applicant company applied for an order that a breach or breaches of covenant have occurred, pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002. The lease of the Property was dated 29th September 1978 ("the lease") and was made between Glosmont Properties Limited and Roger Charles Noble for the term of 999 years from 24th June 1978. The Official copy of the Register of Title showed in the proprietorship register that the lessee's interest under the lease vested in Mr Elliot White ("Mr White") on 20th May 2011.

4. Directions were issued by the tribunal on 23rd August 2013, 9th October 2013, 6th January 2014 and 6th March 2014.

The hearing

5. Hearings were held 12th November 2013, 19h and 20th February 2014, 12th March 2014, and 21st March 2014 at 10 Alfred Place, London WC1E 7LR. At the hearings the applicant company was represented by Ms L Mattsson of Counsel, and the respondent was represented by Mr J Kitson, of Counsel.

The inspection

6. The tribunal inspected the Property, Mr and Mrs Bowling's flat (Flat 30A) and other parts of the Building on 20th February 2014. The tribunal was accompanied by Ms Mattsson and Mr Kitson.

7. At the time of the tribunal's inspection of the Property the subject works had been completed. The ceilings in some of the rooms had been removed and new ceilings formed at a higher level. Areas of the ceiling, for instance the hallway of the Property, remained at a lower level and a hatch was observed in the hallway, which was opened to reveal part of the loft space or roof void above. The evidence was that a water tank or tanks are located in this space.

8. The tribunal also inspected Flat 30A, another top floor flat in the Building. In Flat 30A the ceiling heights had not been raised. The tribunal observed that the ceilings in some of the rooms were slightly bowed or uneven. There were various hatches facilitating access to the roof void in Flat 30A as referred to in the evidence of Mr Bowling summarised later in this decision.

The Evidence

9. A substantial amount of documentary evidence was submitted by the parties and was contained in several separate bundles. The length and complexity of presentation of the case was increased by the production of substantial further documentation by the parties during the hearing, in particular a file of correspondence attached to the witness statement of Mr Bowling in February 2013, not previously disclosed.

10. On behalf of the applicant a report dated 2nd August 2012 was provided by Mr Andrew Mousdale. Also provided was a report by Simon J Price BSc FRICS FFPWS of the Price Partnership, Surveyors and Valuers, dated 10th July 2013. Neither Mr Mousdale nor Mr Price was called to give evidence at the hearing.

11. Miss Lasbrey, a director of the applicant company, attended the hearing. Miss Lasbrey confirmed the contents of her witness statement dated 4th October 2013 and gave additional oral evidence. Mr Bowling, who is the husband of another of the directors of the applicant company, confirmed the contents of his witness statement dated 5th February 2014, together with exhibits and gave additional oral evidence.

12. In support of the respondent's case, witness statements were provided by the respondent Mr White, dated 25th October 2013, Mr Jeremy White dated 24th October 2013, and Ms Anastasia Heywood dated 26th October 2013, together with exhibits thereto.

13. On behalf of the respondent a report was provided by Nigel A H McDonough BSc MRICS, of Vail Williams LLP, Surveyors. Mr McDonough attended the hearing confirmed the contents of his report and gave additional oral evidence.

14. Neither Mr Andrew Corden of CECPM Ltd, the previous managing agent, nor Mr Craig Newell of Newell Sheehan, the current managing agent, provided a witness statement or attended the hearing.

15. Ms Mattsson and Mr Kitson provided a chronology and also written submissions.

16. The relevant legal provisions are set out in the Appendix. Reference to the various bundles of documents is stated in square brackets in this decision.

The issues

17. The relevant issues for determination were:

17.1 Whether the area of roof void, which was incorporated into rooms at the Property by the 2011 works, comprised part of the premises demised by the lease.

17.2 Whether the respondent has damaged the applicant company's proprietary interest by incorporating the roof void into the Property, and if so, whether this represents a breach of paragraph 2 of the Fourth Schedule to the lease and imposes liability for extant nuisance.

17.3 Whether Mr White has breached clause 3(3) of the lease by carrying out alterations / works in 2011 without the applicant company's prior written consent.

17.4 Whether Mr White is in breach of paragraph 3 of the Fourth Schedule to the lease by having put down wooden floor and tiles in the Property.

17.5 Whether the respondent sublet the Property without consent in breach of clause 2(6)(C) of the lease / whether consent to sublet has been unreasonably withheld.

The standard of proof applied is on the balance of probabilities.

The tribunal's decision

18. The tribunal reached the following conclusions:

18.1 The area of roof void, which was incorporated into the rooms at the Property by the 2011 works, comprised part of the premises demised by the lease.

18.2 It has not been shown that Mr White has damaged the applicant's proprietary interest and Mr White is not in breach of paragraph 2 of the Fourth Schedule to the lease.

18.3 It has not been shown that Mr White has breached clause 3(3) of the lease by carrying out alterations / works in 2011 without the applicant company's prior written consent, the obligation having been waived by the applicant company and/or the applicant company is estopped from relying on the covenant.

18.4 It has not been shown that Mr White is in breach of paragraph 3 of the Fourth Schedule to the lease.

18.5 It has not been shown that Mr White has sublet the Property without consent / consent to sublet was unreasonably withheld.

Reasons for the tribunal's decision

A. Whether the area of roof void, which was incorporated into rooms at the Property during the 2011 works, comprised part of the premises demised by the lease.

19. The Property is situated on the third floor, which is the top floor of the Building.

20. The premises demised by the lease are identified in the First Schedule to the lease as follows:

"ALL That third floor flat known as..... lying between:
(1) a horizontal plane following the line of the lower edge of the floor or timbers or other structural flooring material supporting or forming the floor of the said flat, and
(2) another plane or planes following the line or lines of the lower edge of the roof joists or timbers or other structural roofing material supporting or forming the roof of the said Building
Which said flat is for identification only shown edged red on the plan attached thereto"

21. The Tribunal were also provided with the equivalent parts of the lease of Flat 30A dated 29th September 1978 (Mr and Mr Bowling's flat), a top floor flat next to the Property, which was in the same terms.

"ALL THAT third floor flat known as....
(1) a horizontal plane following the line of the lower edge of the floor or timbers or other structural flooring material supporting or forming the floor of the said flat, and
(2) another plane or planes following the line or lines of the lower edge of the roof joists or timbers or other structural roofing material supporting or forming the roof of the said Building
Which said flat is for identification only shown edged red on the plan attached

22. Also provided was a copy Miss Lasbrey's lease of 34B, also dated 29th September 1978. This is a second floor flat, not a top floor flat. In contrast to the terms of the above leases of the third floor flats, the lease of 34B, defined the demised premises as:

'ALL THAT second floor flat known as 34B Upper Montagu Street, London, W1H 1RP forming part of the Building known as 30 and 34 Upper Montagu Street aforesaid, lying between:
(1) a horizontal plane following the line of the lower edge of the floor joists or timbers or other structural flooring material supporting or forming the floor of the said flat, and
(2) another horizontal plane following the line of the lower edge of the floor joists or timbers or other structural flooring material supporting or forming the floor of the flat immediately above the said flat
which said flat is for identification only shown edged red on the plan attached hereto"

23. No assistance in the determination of the issues in this dispute was provided by the above mentioned lease plans.

24. In respect of the general legal principles of interpretation to be applied, there little or no dispute between the parties. Mr Kitson referred to the principles to be adopted in disputes concerning the meaning and effect of the contractual provisions of the lease. It is necessary to ascertain the intention of the parties from the words that the parties have used. In doing so the words of the document should be read as a whole, and the meaning given to the terms that would be conveyed to a reasonable person, having all the background knowledge which would reasonably have been available to the parties at the time of the contract (see *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912 per Lord Hoffman, and *BSSI v Ali* [2001] 1AC 251, 259 per Lord Bingham). Mr Kitson also referred to paragraph 2.03 of Lewison's, The Interpretation of Contracts 5th Edition, 2011, which stresses the importance of the objective nature of interpretation and the exclusion of subjective intention. Where there is doubt about the meaning of a grant, the doubt will be resolved against the grantor, which usually means that ambiguities are resolved against the lessor (*Bickenhall Engineering Co v Grandmet Restaurants* [1995] 1 EGLR 110, per Simon Brown LJ).

25. Ms Mattsson submitted that the Tribunal must consider (1) the background against which the demise was granted, (ii) the facts must reasonably have been available to the parties, (iii) give the lease the meaning it would reasonably have been understood to mean in that context and (iv) if such conclusion flouts business common sense it must be made to yield to this. She also referred to the five principles set out in Lewison, 5th Edition.

26. A 'Roof Works Report' in respect of the Property was provided on behalf of Mr White by Nigel A H McDonough BSc MRICS, of Vail Williams LLPP, dated 1st November 2013 [RB2]. Mr McDonough is a practising Building Surveyor. He inspected the Property on 21st October 2013 and again on 28th October 2013. Together with his report he provided a schedule of photographs. He noted that the Property had undergone alterations to the interior. A list of the evidence reviewed

and passed to him prior to his inspection was included in Appendix 3 to his report.

27. Mr McDonough described the Building in which the Property is contained, as a five storey residential property unit. The Property is on the top floor. He provided a Google plan in which the Property is highlighted in red in the Appendices. From this it could be seen that the original roof construction was what was commonly referred to as a centre valley (London) roof. He provided a drawing showing how such a roof is commonly constructed. Drawing 1 in his report showed the leaning member or rafter supported at the top from a plate on the main wall and at the bottom by another wall or beam. He referred to photograph 19 in the Appendices and said that this showed the top of one such rafter in the Property. Photograph 20 showed the bottom. Mr McDonough concluded that Drawing 1 reflected the construction of the Property originally.

28. Mr McDonough continued by stating that Drawing 1 demonstrated the main purpose of the 'lower horizontal member' was to support the ceiling plaster finish and the valley gutter. It does not form a structural member supporting the roof. On his inspection of the Property he found that the roof was made up of three sloping sections. These were further divided into a front and back section.

29. Mr McDonough stated that on his inspections he found that the central section of the roof had not been altered and was accessed by a single loft hatch outside the shower room.

30. On his second inspection a ladder was raised and Mr McDonough gained access to the remaining unaltered roof void through the above mentioned hatch. Photographs 11-27 attached to his report showed the original rafters to be in place in this area of roof void. The photographs of this area also show a separate horizontal purlin and struts arrangement. The struts were at varying intervals. He demonstrated this arrangement on Drawing 2 in his report.

31. Mr McDonough considered that the age of this purlin and struts arrangement is more recent than the original roof timbers. However, it was not new. In Mr McDonough's view these additional members may have been put in the roof at the same time as the original slate covering was removed and the concrete tile covering that can now be seen in photographs 1 and 2, were installed. Based on the wear on tiled surfaces and the condition of the timbers seen, he considered this has been in place for many years.

32. Drawing 3 showed what work has been undertaken in the relevant area of the Property by Mr White in 2011. This showed, amongst other things, the line of the new decorated plasterboard ceiling. It can be seen that the original horizontal ceiling member has been removed.

33. Mr McDonough confirmed in his evidence that he had asked Mr White whether the ceiling sections that had been removed had any loft hatches. Mr White said they did not. It was noted in Mr McDonough's report that Mr White had stated that when the original ceiling was removed the roof construction was as shown at Drawing 1 rather than Drawing 2.

34. Further, Mr McDonough stated that he considered that a competent builder would have appreciated the need for additional strengthening to the roof or retention of the purlins within the retained structure, had he come across the arrangement in Drawing 2 when opening up the ceilings. As the new ceilings are now generally as shown in Drawing 3, this supported the view that the arrangement in Drawing 1 was what was found by the builder. This view was further supported by Mr McDonough's own inspection of the roof exterior in 2013, which showed no signs of bowing or other defections typical of an insufficiently supported roof.

35. Mr McDonough concluded on the basis of the information provided that the original ceiling was as in Drawing 1. Based on this it was his opinion that the 'ceiling members removed were not-structural and the alteration to a vaulted ceiling is a cosmetic choice'.

36. Mr McDonough provided additional evidence at the hearing. Referring to photographs 11, to 14 (the unaltered roof void), he said that the timber struts are still there. The struts and purlins have been there for a number of years. There was no evidence that there were struts in any other part of the Property. The original slate roof was replaced by a concrete tile covering years ago. The existing ceiling in the hallway is still there. In answer to questions in cross examination Mr McDonough confirmed that the 'lower horizontal member' demonstrated on Drawing 1, was not part of the roof structure. In this roof the 'lower horizontal member' was only there to hold up the ceiling. He commented that in properties such as the Building, where there is a London roof, the main structural support is the main beam and side walls. 99% of the joists do not hold up the roof. However, if something like a hatch was put in the situation might be different.

37. In Appendix 4 to his report, Mr McDonough provided a Glossary of terms. This included 'Rafter': A roof timber sloping in from the eaves to the ridge; 'Purlin': A horizontal beam in a roof at right angles to the rafters and supporting them; 'Joist': A beam, usually timber, directly supporting a floor or ceiling. 'Ceiling': A plastered, panelled or boarded upper surface to a room; 'Ceiling joist': A joist which carries the ceiling beneath it.

38. At the hearing on 12th November 2013 as general background information, two historic plans were produced in respect the Property on behalf of the applicant company. These were 'proposed plans' prepared by Brian Jenkins & Co Chartered Architect, in January 2003 showing proposals for a new kitchen and bath /shower room. It was not

known precisely whether or when these works or part of these works, were carried out. The applicant company also provided sales particulars of the Property prepared by Foxtons Park Lane Sales before the lease was assigned to Mr White, which included photographs of the Property. These documents were considered but were of limited assistance in respect of the position in 1978.

39. In her witness statement Miss Lasbrey, a director of the applicant company and lessee of Flat 34B, said that the Building comprised two adjoining Georgian houses built in or around 1810. Originally consisting of four mid-terraced houses, they were subsequently subject to lateral conversion and each building now consists of flats. The Building is situated in what is now the Portman Conservation area. Miss Lasbrey's flat is on the second floor directly below the Property.

40. In her oral evidence, Miss Lasbrey said that she rented premises in the Building before her lease of Flat 34B was granted in 1978, She recalled that there were water tanks in the roof voids in the building at that time. There was one big one and then this was changed to four smaller tanks. The water tank that was changed was lead. It was above the corridor in the Property and was accessed by a hatch. She did not know if the tanks could be accessed from the common parts.

41. When asked what the applicant company wished to achieve in these proceedings, Miss Lasbrey said that the applicant company wanted to uphold the provisions of the lease, protect its interest, and ensure respect for the lease. When asked whether the applicant company wanted the roof void reinstated, Miss Lasbrey said that she had not contacted the other directors but thought that the directors had varying points of view.

42. Mr Bowling confirmed his witness statement dated 5th February 2013 and gave additional oral evidence at the hearing. Mr Bowling is the husband of one of the directors of the applicant company. Mr and Mrs Bowling live at Flat 30A, a top floor flat. Mr Bowling said that there is pipework in the bathroom of his flat which runs from the ceiling to the flat below. This is a pipe which serves their flat and other parts of the building as well.

43. In respect of water tanks, Mr Bowling said that there is a communal water tank in the roof space above the kitchen in his flat. Mr Bowling said that he thought the water tank is relatively old, perhaps pre-dating his lease, which was granted in 1978, and perhaps even as old as the lateral conversion to the building in about 1920. There is also a communal aerial amplifier, which is used by all the flats in the roof space above his living room. The current aerial amplifier was installed in 2001 and may have replaced an older model. The communal aerial is accessed through the hatch at the top of the stairs.

44. He said he always believed that the roof space above his flat belonged to the applicant company. He and his wife had been asked to store the

applicant company's files in that space in the 1990s and the files are still there. He regarded the roof voids as storage space. Unlike the position in the Property, there are two hatches in Flat 30A, one in the kitchen and one in the spare bedroom.

45. In his evidence Mr White described the ceilings in the Property when he purchased the lease. He said that there was bowing in the ceilings, which were on thin wooden beams. It was not in dispute that certain of the existing ceilings had been removed during the works in 2011 and replaced by higher vaulted ceilings.

46. Mr Kitson submitted that the wording of the Fourth Schedule to Mr White's lease gives rise to four fundamental observations. Firstly, the roof structure is determined by reference to a 'plane' or 'planes' (i.e. there can be more than one plane delineating the extent of the demised property; secondly, the plane or planes do not have to be horizontal, i.e. the plane or planes can be vertical or run at an angle, including following the slope of the roof timbers; thirdly, the plane or planes must be identified by reference to 'structural roofing material'; 'other' qualifies 'roof joists or timbers' as being structural in character; fourthly, the definition of the demise is refers to 'roof' structure, and not 'ceiling' structure. The evidence was that the ceiling was not part of the roof structure.

47. Mr Kitson submitted that the definition of the demise in Miss Lasbrey's lease, granted on the same date as the lease of the subject Property, was highly informative. Her flat was not a property on the top floor. The upper extent of her demise was defined completely differently as *'another horizontal plane following the line of the lower edge of the floor joists or timbers or other structural flooring material supporting or forming part of the flat immediately above the said flat'* (AB2/48). Therefore, whereas Miss Lasbrey's lease is specific that there is a single horizontal plane delineating the upper extent of the demise, the position with the 34A is different, as the definition includes many planes and is not limited to horizontal planes.

48. In contrast, The First Schedule of Mr and Mrs Bowling's lease, also of a top floor flat immediately below the roof of the Building, defines the Property in identical terms to those in the First Schedule of the lease of 34A. Mr and Mrs Bowling's lease and Mr White's lease were originally granted at the same time. Mr Kitson submitted that the draftsman must have intended to distinguish between the manner in which these top floor demises and the demise of the lower flat (Miss Lasbrey's) were defined. This is the context of there being a deliberate intent as shown in the recital of all the leases (AB2/37), for the leases to be in substantially in the same form *'as the circumstances will admit or require'*.

49. Mr Kitson submitted that there is no evidence that the suspended plasterboard ceiling formed part of the 'roof structure', were 'roof joists', 'roof timbers' or 'structural roofing material'. Mr Kitson

referred to the evidence of Mr McDonough. Based on the facts as presented to him, which the applicant are not in a position to dispute, he concluded at paragraph 3.1.21 of his report, that *'the ceiling members that have been removed are non-structural and the alteration to a vaulted ceiling is a cosmetic choice'*. When cross-examined, Mr McDonough confirmed this. His opinion was not challenged by any other expert evidence.

50. Mr Mousdale, the applicant's expert, provided a report [AB1/6/90a-g] but was not called to give evidence at the hearing. In his report he stated that *'A significant element of the works included the removal of the existing ceilings throughout the flat. This has no structural implications'* (section 6). Mr Kitson submitted that had the plasterboard ceilings formed part of the roof structure, then their removal would have had structural implications.

51. Later in his report (section 8), inconsistently, Mr Mousdale stated that he takes *'plan[e] or planes following the line or lines of the lower edge of the roof joists or timber or other structural roofing material supporting or forming the roof of the said building'* as referring to *'the ceiling joists forming part of the roof structure'*. He stated that the majority of the ceiling joists had been removed during the refurbishment and the area of the Property increased, in his view into an area not demised to Mr White. Mr Kitson submitted that Mr Mousdale produced no evidence suggesting that that his construction was correct. Further, the applicant company has produced no evidence to show that the plasterboard ceilings were in situ at the time that the Property was first leased in 1978, the material time.

52. Mr Kitson submitted that Mr White has not incorporated part of the roof void containing the water tank. The definition of the demise in Mr White's lease is wide enough to include more than one 'plane'. He submitted that here is no reason why the water tank cannot be within the demise, just like the pipe running down Mr Bowling's bathroom wall is situated within his demise. Paragraph 5 of the Second Schedule to the lease permits this (AB/4/23).

53. He submitted that there is no evidence as to when this particular water tank was installed or whether or not the position has any bearing on what can be said to be the 'roofing' structure. The only factual evidence about the water tank was from Miss Lasbrey. Her evidence was that there was one big water tank present when she moved in, which was subsequently changed to four smaller water tanks. There was no evidence presented by the applicant company as to the circumstances in which the water tanks were changed, including whether they were changed with permission of the former owner of the Property. It is not known where the 'big water tank' was in prior to or in 1978. The onus is on the applicant to prove this.

54. Ms Mattsson submitted that Miss Lasbrey's evidence was that the communal water tanks were present in the roof void when the lease was

granted in 1978 (AB2/12). Mr McDonough did not believe that the joists removed by Mr White were structural. However he accepted in cross examination that some of the joists (in the area where the water tank is located) could be structural.

55. Ms Mattsson submitted that: (1) At the time of the lease and today the roof void contains communal water tanks and communal pipes. The construction suggested results in an absurd situation where the communal water tanks and pipes could be situated within Mr White's demise. If the parties had intended that the roof void was to be part of the Property demised they would have said so expressly. (2) Mr McDonough confirmed that no hatches were removed in the flat when the ceiling was removed. The only hatch for accessing the roof void was the hatch in the hallway of the Property below the water tanks. It is unlikely that the parties intended the roof void to be part of the demise when there was no access to the same. (3) That the roof joists were present at the time of the demise was evidenced by the neighbouring flat and previous ceilings. (4) The applicant has a right of way over the Property to access the tanks, paragraph 1(3) of the Fifth Schedule (AB/1/28).

56. She submitted that the key issue is what was the *'lower edge of the roof joists or timber of other structural roofing material supporting or forming the roof of the building'*. There was no requirement that the lower edge of the roof joists or timber be structural.

57. Having considered the evidence and submissions as a whole, the tribunal has reached the following conclusions.

58. The area of the roof void which is the subject of this application is that area above the pre-existing of ceiling of rooms in the Property which were the subject of Mr White's works in 2011. This application is not in respect of the area of roof void containing the water tank or tanks, which it is common ground has not been the subject of the works. This area in which the water tank or tanks are situated is accessed from a hatch in the hallway of the Property. In his report Mr McDonough described the layout of this area as including a horizontal purlin and struts arrangement as shown in Drawing 2 in his report. Mr McDonough was the only expert witness called at the hearing, and his evidence in respect of this arrangement in the water tank or tanks area of the roof void was not challenged in cross examination.

59. We now turn to the area of the roof void which was the subject of the works, heightening the ceiling in a vaulted ceiling arrangement. This is demonstrated in Mr McDonough's report at Drawing 3 and in photographs of the Property attached to his report. It is not in dispute that prior to the works the ceilings in the Property comprised a lower horizontal member or ceiling rafters supporting ceiling plaster finish and the valley gutter. We accept Mr McDonough's evidence that this did not form a structural member supporting the roof.

60. The lease of the Property, and the other two flats, the leases of which were produced, were let on 29th September 1978, the relevant time. There is no clear evidence as to what the roof void above the ceiling rafters consisted of that time. Mr McDonough's view was that Drawing 1 in his report reflected the construction of the Property originally. He noted that the struts and purlin arrangement which was observed in the area of the water tank or tanks was a later addition. That arrangement was more recent than the original roof timbers but was not new. It was his view that these additional members may have been put in to the roof at the same time as the original slate covering was removed and the concrete tile covering that can be seen in photographs 1 and 2 in the Appendices to his report were installed. Based on the wear and tear on tiled surfaces and the condition of the timbers he saw this had been in place for many years.

61. However, it does not necessary follow that the struts and purlin arrangement existed in the area roof void which was the subject of the works. Mr McDonough notes that the Mr White had stated that when the original ceiling was removed the roof construction was as per Drawing 1 to his report (the original roof arrangement) rather than Drawing 2 (with purlin and struts).

62. Consistent with this view, Mr McDonough noted that a competent builder (and there is no evidence that Mr White's builders were other than competent builders), would have appreciated the need for additional strengthening to the roof or retention of the purlins within the retained structure. Had they come across the arrangement in Drawing 2. Mr McDonough was of the opinion that the arrangement in Drawing 1 (without struts or purlins) was found. This conclusion is also consistent his inspection of the roof exterior in October 2013, some two years after the works, which showed no signs of bowing or other deflections typical of an unsupported roof.

63. Having considered the available evidence, the tribunal finds that in the absence of evidence to the contrary, that the area roof void in the Property which was the subject of the works was more likely than not to be as shown in Drawing 1 to Mr McDonough's report. Again, in the absence of evidence to the contrary, it is reasonable to assume that this arrangement was in place when the lease was granted in September 1978.

64. In respect of access to the roof void, the arrangements are different in Mr Bowling's flat compared to the subject Property. The tribunal had regard to Ms Mattsson's submission that if there was no access hatch to the roof void in the Property (other than to the part containing the water tank or tanks), then it was unlikely that that area of roof void was demised. However, there was no evidence as to whether or not there were additional hatches in 1978. Mr Bowling's evidence was that there are additional hatches in his top floor flat. Mr Bowling had regarded the roof void above his flat as not part of his demise, but it appears that the applicant company sought his permission to use this as storage space,

which it would not necessarily have done, except out of courtesy, had that area been retained.

65. The property demised by the lease is set out in the First Schedule. The demise of the other top floor flat is in the same terms, which are distinguishable from the wording used to define the demised premises in the lease of the second floor flat. The tribunal accepts the submission of Mr Kitson that the different wording was used for a purpose. The wording in (2) *'another plane or planes following the line or lines of the lower edge of the roof joists or timbers or other structural roofing material supporting or forming the roof of the said Building'*, were incorporated in order to meet just the sort of factual situation regarding the layout as described by Mr McDonough. The tribunal prefers the interpretation suggested by Mr Kitson and finds that 'structural' applies to 'roof joists or timbers'. The tribunal accepts the evidence of Mr McDonough that the ceiling members removed in the works were not structural. The current position is as demonstrated in Drawing 3, showing the works did not extend beyond the area demised.

66. For the above reasons, the tribunal finds that the area of roof void which were the subject of Mr White's ceiling works was within the premises demised by the lease.

67. The tribunal makes no finding in respect of whether or not the premises demised by the lease included the area roof void in which the water tank or tanks are located, which was not the subject of the 2011 works.

B. Whether Mr White has damaged the proprietary interest by incorporating the roof void into the Property and if so whether this represents a breach of paragraph 2 of the Fourth Schedule and imposes liability for extant nuisance.

68. Paragraph 2 of the Fourth Schedule to the lease provides that the lessee is not to *'do or permit to be done anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the lessor or any lessee or occupier of any other flat or to the neighbourhood'*.

69. The applicant company alleged that Mr White has extended the Property into the loft space / roof void, substantially damaging the applicant's freehold interest. Ms Mattsson submitted that in breach of paragraph 2 of the Fourth Schedule, Mr White has trespassed into the roof void and seeks to permanently deprive the applicant company of the same.

70. Mr Mousdale prepared a report on behalf of the applicant company following his inspection of the Property on 18th July 2012. His report is dated 2nd August 2012 and was revised on 6th November 2013. A copy of this report is included in at AB1/90A-G. At section 6 of his report, Mr Mousdale noted amongst other matters, that Building Regulations

consent had been obtained for the works, which he provided in Appendix C of his report. Although the certificate does not detail the precise extent of the works, he stated that he had no reason to suspect that the certificate was not applicable to the entire renovation project at the Property.

71. Mr Mousdale stated that a significant element of the works included the removal of the existing ceilings throughout much of the Property. He considered that *'This has no structural implication, a centre of the central area has been retained in a flat position as the communal cold water storage tanks are retained above'*. He also stated that he understood that thermal insulation had been introduced *'between the rafters which provide the structure of the roof'*. The insulation was concealed at the time of his inspection, but if this was installed to comply with current Building Regulations as he suspected, then this would have improved the energy efficiency of the Property.

72. Mr Mousdale addressed the quality of the works undertaken at the Property in section 7 of his report. He stated that he is satisfied that the renovation works were of a good standard and generally in compliance with current Building Regulations and have no structural detriment to the overall integrity of the Building.

73. In section 8 of his report, Mr Mousdale stated that he considered that *'The additional space which has been created [by the ceiling works] has significant benefit and increases the height in certain area of the room from the original ceiling height of 2050mm to a maximum height of 3400mm..... under normal circumstances the roof space has a value, of which the freeholder has been unlawfully deprived, and for which the freeholder is entitled to be compensated'*.

74. This conclusion was based on Mr Mousdale's view that Mr White had extended the Property into an area not demised by the lease. As set out in the previous section of this decision, the tribunal has found that it has not been shown that Mr White has extended the Property into an area not demised by the lease. Mr Mousdale gave no alternative basis to support an assertion that the ceiling works had caused damage to the applicant company or other categories of persons mentioned in paragraph 2 of the Fourth Schedule.

75. A valuation surveyor, Mr S Price BSc FRICS FFPWS, inspected the Property on behalf of the applicant company on 10th June 2013. A copy of his report of the same date was at AB1/6/117-123. Mr Price summarised his instructions as a request on behalf of the applicant company to ascertain (a) the diminution in the value of the applicant company's interest in the Building as a result of Mr White's alterations; (b) the extent to which Mr White had put down carpet and linoleum sound proofing material in accordance with the lease (which issue is addressed in the next section of this decision).

76. On the assumed basis that Mr White had unlawfully extended the premises demised to him into the roof void above, Mr Price set out his opinion on the diminution to the applicant company's freehold interest in the building in his report.

77. However, firstly, for reasons explained in the previous section of this decision, the tribunal does not consider that the works carried out by Mr White constituted a trespass. Secondly, even if contrary to the tribunal's conclusions, Mr White's demise did not extend to the area now comprising the vaulted ceilings, the tribunal considers that there was insufficient evidence provided to support Mr Price's conclusions in respect of damage in paragraph 11 of his report. For example, there was no satisfactory evidence to support a contention that there was a loss of a realistic prospect of development potential /hope value for a roof extension or roof terrace as mentioned in the report. There was no evidence that the roof space (now vaulted ceilings) in the Property were used for storage by the applicant company as was the position with Mr Bowling's flat. The area occupied by the water tank remains unaltered as previously.

78. Having considered the evidence as a whole, the tribunal finds that it has not been shown that the respondent has breached Paragraph 2 of the Fourth Schedule to the lease or that there has been nuisance or trespass as alleged.

C. Whether Mr White has breached clause 3(3) of the lease by carrying out alterations the Property without the applicant company's prior written consent.

79. Clause 3(3) of the lease contains a covenant by the lessee:

'Not without the Lessor's prior written consent (such consent not to be unreasonably withheld) cut, maim, or injure any of the walls, floors, ceilings or partitions of the Flat, and not without the like consent make any structural alterations or structural addition to the Flat or to the internal arrangements thereof or remove any landlords' fixtures and fittings therefrom'

80. Mr White did not obtain the applicant company's prior written consent to the works carried out on the Property in 2011, but maintains that there is no breach of clause 3(3) of the lease.

81. The works included the repositioning of the kitchen and bathroom; removal of part of the party wall between the former bathroom and new kitchen and the living room; repositioning of doorways and stud walls; removal of ceiling joists and extending the height of the ceiling; lowering the soil pipe.

82. Mr White's case centred on representations having been made by or on behalf of the applicant company, upon which he relied and suffered detriment, and that this constituted waiver of the covenant in clause

3(3), or that the applicant company was estopped from relying on that clause.

83. Mr Kitson explained that Mr White relied on three areas of representation having been made and relied upon. There was a substantial amount of correspondence produced and referred to and the following is a summary of the main points.

[1] The first representation was in respect of non-structural works prior to 20th June 2011.

84. In his evidence Mr White said that he exchanged contracts for the Property in April 2011. He inspected the Property before purchasing and said that the condition was 'very tired' and little had been done to the Property for a considerable number of years. He recognised that it would represent a good investment if he decorated it and replaced the kitchen and bathroom and that it would be an ideal place for him to live. A survey was carried out by Water Winn, Chartered Surveyors on 21st March 2011 [RB1/B/1-21]. Amongst other matters that report notes the condition of the lathe and plaster ceilings.

85. In about mid April 2011, after contracts had been exchanged, Mr White spoke to Mr Corden of CECPM Limited. Mr White said that he told Mr Corden specifically what work he was proposing to undertake, which was swapping the position of the kitchen and bathrooms and refitting them, in addition to carrying out repair works and redecorating. He said that he particularly recalled explaining to Mr Corden that a lot or work had to be done to repair the ceilings because they were very damaged, sagging, leaking and damp. Mr Corden was interested in the bathroom and kitchen works. Mr White said that after he explained to Mr Corden what he proposed to do, Mr Corden told him that this would not be a problem as far as the applicant company was concerned, if the work was non-structural. Mr White recalled that Mr Corden also said that he did any structural work he would have to apply for a licence.

86. Mr White said he spoke to Ms Heywood, who was assisting him with the project, and repeated his conversation with Mr Corden. Ms Heywood spoke with Mr Corden and sent him an email on 21st April 2011 stating *'Meantime, Elliot is not planning any major alterations, but if he does decide to do more than install a new kitchen/bathroom he will of course apply for a license'.* Ms Heywood's recollection of events was referred to in paragraph 4 of her witness statement dated 26th October 2013 supplemented by her oral evidence.

87. Mr White stated that none of the works planned at that time were structural and in fact very little of what was carried out was structural. He recalled being relieved that he did not have to go through the process of applying for consent for non-structural works. Relying on Mr Corden having said that no licence was required for non-structural works, Mr White appointed a builder who was highly recommended by Ms Heywood, who had had experience of coordinating renovation

projects. Mr White completed his purchase of the Property on 11th May 2011 and works commenced shortly afterwards. As a matter of courtesy, in or about the beginning of June 2011, Mr White wrote to the residents of each of the other flats on the same staircase informing them that works to the kitchen and bathrooms would be carried out.

88. Mr White accepted in his evidence that the lease states that permission is needed for both structural and non-structural alterations to the Property, including to its internal arrangements. However Mr Corden had said that he would be fine doing the works, including changing the positions of the kitchen and bathrooms.

89. The works in the Property started in May or early June 2011. It was considered desirable to remove the false ceilings in the main rooms. In his evidence Mr White described how the ceilings were sagging. There were four separate voids between the roof structure and the lathe and plaster ceilings. There was no access to the roof voids from the common parts. There was also a light well rising through one of the roof voids that provided light into the kitchen. This light well is now in the bathroom. By early June most of the ceilings had been removed and were ready to be replaced once the debris had been cleared. The kitchen and bathrooms had been removed and carpets and floor coverings which were badly worn and damaged had been taken up. The position of a doorway in a room adjacent to the kitchen had been changed. This was to accommodate new storage and was through a stud wall that was non-structural. Mr White thought that the position of another bedroom door in a stud wall had also been changed by this stage, again which was non-structural.

90. In changing the position of the kitchen and bathrooms an issue arose which had not been anticipated originally. A soil pipe needed to be lowered because it ran above the floor height and if not lowered it would have run above the floor in the newly located kitchen. If lowered the soil pipe would need to exit through the front elevation of the Building slightly lower down on the wall. He accepted that permission was required from the applicant company to do this work because it was structural. Also, it was decided to ask for permission to put a new doorway through the structural wall next to the chimney. On or shortly before 9th June 2011 Ms Heywood spoke to Mr Corden to inform him that Mr White wanted to lower the soil pipe and confirmed this in an email [RB1/B/24] attaching photographs and requesting his confirmation that the work could proceed. Mr Corden told Ms Heywood that he did not consider that this would be a problem because it had been done in the next door flat. Ms Heywood also provided Mr Corden with a telephone number and email contact details of the builder.

91. On 14th June 2011 Mr Corden wrote an email addressed the directors of the applicant company.
'Dear Directors

Please see the email below [presumably Ms Heywood's email of 9th June].
I will email the pictures provided which are not much use as the exterior of the property is not shown. I think that the gist of the request is asking for permission to lower the level of the point at which the waste pipe leaves the building in order to site the pipe below the floor level.
I can see no problem with this so long as the property is properly made good thereafter.
I look forward to receiving your thoughts on the subject.....

92. Some of the content of Miss Lasbrey's email to Mr Corden and others dated 14th June 2011 [RB1/B/26] was challenged by Mr White in his witness statement. Miss Lasbrey ended that email by stating:
'Should they not have got Glosmont's consent before moving the kitchen and bathroom? Hilary did when she put in a new bathroom. Do they not need to get building regs completion certificates from Westminster council if changing bath-room to kitchen and vice versa?'

93. On 20th June 2011 Mr Corden emailed Mr White informing him that he needed a licence to proceed with the works [RB1/B/27].
'....Before you acquired the property you telephoned me and I explained that you most certainly needed permission (from the Lessor) to carry out any structural works to your property. I added that changing the units in your kitchen (and other similar related works) did not constitute structural work. I further advised that it would be wise to speak to other residents at the property pointing out that you were planning to have works carried out in your property, discussing with them the hours of work, noise etc. that they may have to endure. I was of the understanding that the works to the property were to be of a minor nature whereas subsequent discoveries have indicated that the works being undertaken are anything but minor.
I have spoken to your acquaintance, Anastasia, about this issue who has approached me regarding obtaining permission to relocate a pipe in your property. I asked for annotated photographs of the building with disclosure on the proposed changes. Instead all that I received was internal pictures of a completely gutted property.
I have recently received a number of complaints regarding unacceptable noise, dirt and the deteriorating condition of the common parts.....
In view of the work being carried out without approval, ***work should stop immediately*** *until approval has been properly sought and granted. To receive approval you will need to submit comprehensive details about the changes being made to the property and a chartered building surveyor's confirmation that the partitions removed are not structural or in any way load bearing. We will also require your undertaking to reinstate the common parts and other areas affected by the works to your property to be properly and thoroughly reinstated.....'*

94. Mr White commented in his evidence that despite what Mr Corden had said previously, he required the works to cease. Mr White accepted that the repositioning of the kitchen and bathrooms and changing the door positions in the stud walls had the potential of comprising breaches of clause 3(3) on the basis that no prior written consent had been obtained. However he was clear that Mr Corden had said that permission would not be necessary for non-structural works. He added that there was no way that he would have commenced the works unless he had been led to believe no licence was required.

95. As a result of Mr Corden's email of 20th June 2011, the works stopped. Mr Corden emailed some of the directors of the applicant company to report this on 21st June 2011. Mr White recalled that in a telephone conversation about this time, Mr Corden was very apologetic and said that he did not think there would be a problem in Mr White obtaining consent. As with this and other conversations with Mr Corden, as Mr Corden was not called as a witness, Mr White's recollection of the communication is not challenged by an alternative account.

96. Ms Mattsson submitted that Mr White's evidence in respect of the representations alleged was muddled. He claimed that he had spoken to Mr Corden 'early on' and confirmed what he was planning to do. When asked whether he had written consent he had said that Mr Corden had confirmed on 20th June that he was allowed to do non-structural work without written consent. When asked further questions he said that he relied on oral consent for non-structural works. He said that he had spoken to Mr Corden and told him what he was planning to do and Mr Corden said that was fine if it was non-structural work. In respect of the works that Mr White told Mr Corden about, Mr Corden said that he told him that the ceiling would be 'repaired'. It was only after consultation with the builder that it was decided to dismantle the ceiling as this was most cost effective. Mr White claimed he told Mr Corden he was swapping the bathroom and kitchen around. Mr Corden told him that if the work was non-structural, no permission was needed.

97. Mr Kitson submitted that the clear and obvious effect of Mr Corden's representations in or about April 2011 was that a licence was not required if the works carried out to the property were not structural. There was no evidence that Mr Corden sought to qualify what 'non-structural' works were. Mr White's understanding that he could carry out non-structural works was supported by the following: Mr White's letter to residents in which he said that works he was doing were non-structural' and that the agent had been informed [RB1/B/23]; the fact that Ms Heywood emailed on 9th June 2011 about moving the soil pipe which was structural work and asking if 'you need us to apply for a licence to alter' [RB1/B/24]; Mr Corden's above email of 20th June 2011 [RB1/B/27]. Mr Corden said that he had explained 'you would most certainly need permission (from the lessor) to carry out any structural works', he did not say that permission would be required for non-structural works.

98. Mr Kitson submitted that the applicant company has not adduced any evidence to counter the fact that it was represented by Mr Corden on behalf of the applicant company to Mr White that a licence from the applicant company was not needed for non-structural works.

99. He submitted that Mr Corden and the directors knew that the works being carried out encompassed much more than simply redecoration and the installation of new kitchen units and bathroom furniture. He referred to correspondence, particularly Mr Corden's email of 14th June 2011 [AB2/4/9] to Miss Lasbrey and some of the other directors, indicated that he was aware at the relevant time that non-structural partitions were being moved.
'....She [Ms Heywood], *has likewise assured me that none of the walls are loadbearing and therefore the works are not deemed structural even though they are moving walls and partitions'.*
This letter was part of the correspondence disclosed in the course of the hearings with Mr Bowling's witness statement dated 5th February 2014.

100. Ms Mattsson submitted that the representation relied on as a 'clear and unequivocal representation' that Mr White did not have to comply with the terms of the lease and obtain prior consent in writing for works falling within clause 3(3) of the lease, was that if non-structural work was carried out, no permission was needed. She submitted that such a representation cannot constitute waiver. There were no 'clear and unequivocal representations' made to Mr White and Ms Heywood that they could carry out the work undertaken without complying with the terms of the lease. It was not credible that Mr White and Ms Heywood believed that they could gut the Property without first letting the applicant company have details of the work they were doing.

101. Ms Mattsson submitted that the evidence did not show that Mr White and Ms Heywood had told Mr Corden the work they would be doing. For example in April 2011 there was no plan to dismantle the ceiling and Mr Corden was told it would be repaired. Mr Heywood had said that she had not told Mr Corden the floorboards would be removed. Mr Corden had not been told in April 2011 that the bathroom and kitchen would be swapped.

102. The evidence was that by 20th June 2011 the flat was 'gutted', the ceilings had been dismantled, the floorboards removed, and the whole of the kitchen and bathroom stripped. Ms Mattsson submitted that the scope of the works was misrepresented to Mr Corden in April 2011.

103. Ms Mattsson referred to various emails including the following: 21st April 2011 Ms Heywood email to Mr Corden: *'Elliot is not planning any major alterations, but if he does decide to do more than install a new kitchen/bathroom he will of course apply for a licence'* [RB1/B/22]; Mr Corden's email of 20th June 2013 to Ms Heywood that he had been led to believe *'that the works to the property were to be of a minor nature whereas subsequent discoveries have indicated that the works*

being undertaken are anything but minor' [RB1/B/27]; email dated 21st June 2011 from Ms Heywood to Mr Corden *'Following our recent telephone conversation I confirm the following: Elliott is comprehensively refurbishing the flat...'* [RB1/B/31]; email 15th July 2011 from Mr Corden to some of the directors *'my initial conversation with Anastasia before the purchased the property was on the basis that the works they were planning were cosmetic and therefore did not require consent. It transpired that they were most certainly not cosmetic.....'* [AB2/4/56]; email from Mr Corden to some of the directors dated 23rd January 2012 *'....The work carried out to Flat 34A were significantly underplayed when the matter was originally discussed and since the fallout that subsequently ensued...';* email dated 20th June 2011 from Mr Corden to some of the directors *'....Carol is worried that the works they have carried out may adversely affect the structure. This would then put the work under the classification of structural and they have assured me that this is not the case. Notwithstanding and regardless of whether it is structural or non-structural, they have not complied with the terms of the lease. I did advise them that if they were planning to have any walls taken away or repositioned they would need to obtain verification from a surveyor prior to doing so. They should also have sought permission from Glosmont under the terms of the lease' .....'* [AB2/4/14].

104. Having considered the evidence as a whole, tribunal finds that the representation was made to Mr White and or Ms Heywood in April 2011 by Mr Corden on behalf of the applicant company, that no prior written consent of the applicant company was required for non-structural works to the Property. There is some dispute in respect of whether Mr Corden knew the precise nature of all of the works proposed. It is unfortunate and unhelpful that Mr Corden did not give evidence at the hearing and was not available for cross examination. The tribunal has carefully considered the evidence of the witnesses at the hearing and the documents provided, and finds that it is more likely than not that at the time when the representation were made in or about April 2011, that no consent was required for non-structural work, that Mr Corden had sufficient knowledge of the general nature of the works that were intended. It was not necessary that each and every item of work was known to him. Mr White relied on the representation and incurred expense in carrying out the works. In the circumstances the tribunal finds that requirement to obtain the Lessor's prior written consent was waived in respect of non-structural works (which was the entirety of the works at that stage) until 20th June 2014. It follows that Mr White is not in breach of clause 3(3) in respect of works carried out in the Property up to 20th June 2014.

[2] The second representation alleged was that on 22 June 2011 Mr White was told that if he submitted a 'list of the works' he could recommence the works and there could be no objection.

105. It was submitted that the only requirement was 'a list of work'. This could include any structural work included in the 'list'. Reliance was

placed on the representation in an email dated 29th July 2011 [RB1/B/38] that an application including a surveyor's report had to be submitted by 5th August 2011 or 'all work must stop'. Mr White also alleged that no objections were raised when the pipe was removed on 14th July 2011.

106. Mr Kitson submitted that following Mr Corden's email dated 20th June 2011 informing Mr White that all work must stop immediately, the evidence was that the worked stopped. It restarted in early July 2011. Mr Corden appeared to be having difficulties with the directors at that time. He wrote an email stating that he is *'hoping that following my conversation with one of the directors today that I have prepared the ground for a more reasonable and structured meeting than may otherwise have been the case'* [RB1/B/30]. The concern was structural works, not the non-structural works.

107. On 22nd June 2011 a Board meeting took place at which Mr White and Ms Heywood were present. Mr White's recollections are at paragraph 22 and 23 of his witness statement and at paragraph 10 of Ms Heywood's witness statement. Their recollections of what took place at this meeting were not challenged in the evidence. This was that the works could recommence provided firstly, that notice was given for the erection of scaffolding and, secondly, that an application for consent was made (not determined, just made). No concerns were raised in respect of the non-structural removal of the ceilings and stud wall between the former two bathrooms. The chief concern was that a report was provided, which Mr White did provide on 30th June 2011. This was treated as a formal application for consent [RB1/B.34], *'Thank you for your recent application and report from Mike Snellgrove which was received by email 30th June 2011. The application has been passed to the directors of Glosmont Properties Limited for their consideration....'*.

108. The extent of the works that were to be carried out was generally identified in the Space Design Report (including the removal of ceilings, removal of a wall between the kitchen and lounge and connection to existing plumbing system) ('the first report'). Mr Kitson submitted that there could be no doubt that by this stage that the applicant company knew the full extent of works that were to be carried out. Ms Heywood's email dated 21st June 2011 [RB/B/30-31] stated *'.....Elliott is comprehensively refurbishing the flat by re-wiring re-plumbing, re-decorating, putting in a new kitchen and bathrooms, replacing the ceilings...'*

109. Miss Lasbrey did not dispute the recollections of Mr White and Ms Heywood of the meeting on 22nd June 2011. Mr Bowling was not at the meeting.

110. It appeared from the evidence that Mr Corden and the directors were aware that the works had recommenced in or about 4th July 2011 following the submission of the first report. The works continued to

completion. Mr Corden and the applicant company took no further steps to stop the continuing works either by writing to Mr White or issuing proceedings for an injunction. Instead Mr Corden on behalf of the applicant company in effect encouraged the work continuing, by seeking a second surveyor's report ('the Lewis Berekley Report').

111. Ms Mattsson relied on an email dated 29 July 2011 [RB/B/38] that a revised application had to be submitted by 5/8/11 or 'all work must stop'. Mr Corden wrote to Ms Heywood on 29th July 2011, '*.... A revised application for consent is to be submitted by you by the end of next week (no later than Friday 5th August 2011). If we have not received the application by then, all work must stop until the application has been presented and duly considered otherwise it is the intention of the directors to liaise with the District Surveyor's office and refer the matter to Westminster City Council for further consideration.....*'.

112. It is common ground that the application and the Lewis Berekley Report was received by the above date, although there is some dispute about whether the correct version of a plan was included. However, even if the plan was not included with the application there was no evidence that Mr White was told to stop works and wait for the application to be considered because of the missing plan.

113. Amongst the documentation it was noted that various emails passing between the parties indicated that it was known by Mr Corden / the applicant company that the works were continuing. Examples were Mr Corden's email dated 7th July 2011 [AB2/4/46]; Miss Lasbrey's email dated 14th July 2011 [AB2/4/52]; Mr Prevett's email dated 28th July 2011 AB2/4/65].

114. Ms Mattsson submitted that Mr White's claim that he had been told that all they had to do was to put in any application and then they could continue with the work as they saw fit, is wholly incredible. Ms Mattsson referred to various items of correspondence including an email dated 14th July 2011 [AB1/5/50] from Ms Heywood to Mr White and Mr Corden, in which it was stated '*It is now for the Directors to respond to Elliot as a formality, saying yes he can move the pipe which I understand from the Managing Agent could not be refused as this would be deemed unreasonable...*'. Mr Corden responded on the same date [AB1/5/51] stating '*....The fundamental issue from the directors' perspectives is that ...any planned changes should be applied for and approved in accordance with a correct and proper procedure...*' . She also submitted that the claim that when the works restarted there were no complaints from the applicant company is unsustainable in the light of Miss Lasbrey's evidence and the email from Ms Heywood on 14th July 2011 [AB1/5/50] stating that the builder has complained that every morning as his men arrive, there are complaints that he is working at all. Ms Mattsson submitted that the works had already been completed by 29th July 2011. However the correspondence indicates that this was not the position, in particular in respect of the floor coverings.

115. Having considered the evidence and submissions, the tribunal finds that the representations at the meeting on 22nd June 2011 and the applicant company's conduct, namely standing by in the knowledge that the works were being carried out to completion, were sufficient to found an estoppel or waiver. The applicant company was aware of the terms of the lease but stood by and in effect acquiesced in the works continuing. The tribunal is satisfied that it has been shown that Mr White continued with the works in reliance on the representations and conduct, and incurred expense in doing so. In the circumstances the tribunal finds that the applicant company has waived or is estopped from relying on the requirement for prior consent to the works carried out to the Property in 2011.

(3] The third representation alleged was that retrospective consent would be granted / would not be unreasonably withheld

116. The tribunal has considered whether there was a representation that retrospective consent would be granted or would not be unreasonably withheld. Various items of correspondence refer to the possibility of formal retrospective consent as a possible solution to the dispute. For example in an email dated 19th January 2012 [AB2/4/93]. Mr Corden wrote to some of the directors, *'Are there any objections to the issue of retrospective consent for the alterations to the property? The adaptations to the property have been overseen by authorised 'delegates' of Westminster City Council so as such I do not see that you can now challenge the legalities of the alterations that have been carried out....'*

117. Mr Kitson, amongst other matters, referred to an email dated 23rd January 2012 from Mr Corden to some of the Directors [RB1/B/97], *'...The employment by the owner of Flat 34A of a firm of surveyors authorised and sanctioned by Westminster City Council to issue Certification on the council's behalf and to oversee the project and apply for retrospective consent from the freeholder.....'*. Mr Kitson submitted that this was a representation that the parties anticipated retrospective consent.

118. It was noted that in an email from Mr Corden to some of the Directors dated 20th January 2012 [AB2/4/94] it was stated that, *'....I do now consider that Mr White has complied with the requests made of him at the previous meeting in the summer and personally see no reason for withholding consent....'* It was noted that this and the previous emails referred to were not addressed to Mr White.

119. By this stage the works had been complete for several months, prior written consent was not possible and retrospective consent was not part of the mechanism under clause 3(3).

120. The tribunal has considered the evidence and submissions and is not persuaded that a representation was made during this period to the

effect that retrospective consent would be granted or would not be unreasonably withheld or that retrospective consent would be considered in place of prior written consent.

121. For the above reasons the tribunal has reached the conclusion (based on its findings in respect of the first and second representations) that the applicant company has waived or is estopped from relying requirement for prior written consent in clause 3(3) and finds that it has not been shown that there was a breach of that covenant as alleged.

122. In respect of the above issues, the tribunal has also considered whether the representations made or actions taken by individual directors could be regarded as being made on behalf of the applicant company. Taking a realistic and practical approach to the correspondence, the tribunal is satisfied that the practice was for the individual directors such as Miss Lasbrey to take an active role and that in the absence of formal Board meetings, apart from for instance that in June 2011, this can be taken as indicating applicant company's general stance during the course of the events which are the subject of these proceedings. However, there may also have been instances where individual residents who are also directors, voiced their personal concerns about ongoing works, such as is noted in Ms Heywood's email of 14th July 2011 regarding comments made to the builder.

D. Whether Mr White is in breach of paragraph 3 of the Fourth Schedule to the lease by having put down wooden floor and tiles in the Property.

123. Paragraph 3 of the Fourth Schedule provides that the lessee is *'to cover all floors of the Flat (other than bathroom and kitchen floors) with carpet and underlay and to cover bathroom and kitchen floors with linoleum or similar sound-deadening material'.*

124. In her witness statement Miss Lasbrey said that the purpose of the above provision was to minimise the transfer of noise from Mr White's flat to the flat below. By way of background, Miss Lasbrey recalled that the previous owner of the Property used to rent out the flat usually to young professional men and women, and did so for about eight years. She said that during the time that the previous owner rented out the flat she heard people coming and going up and down the stairs and the occasional banging on their front door, but could not hear them when they were actually in the Property.

125. Miss Lasbrey said that she attended the inspection of the Property on 18th July 2012 together with Mr Mousdale and others. She said that the day and night before the inspection, Mr White had put down carpet, but this was not finished at the time of the inspection.

126. In his evidence Mr White said that he had carpeted the entire Property and laid vinyl coverings in the bathroom and kitchen. This is supported by an entry in his bank statement showing carpets purchased on 7th

July 2012 for £1,072 [RB1/72] and a receipt showing vinyl floor covering was delivered and fitted on 22nd September 2012 [RB1/73]. This is also supported by letting particulars which included photographs of the living room and kitchen with the appropriate floor covering [RB1/79-80].

127. Ms Mattsson submitted that on 4th August 2011 the applicant company wrote to Mr White and Ms Heywood, who was assisting him in the works to the Property, to remind them of the lease's requirements as to floor coverings. It was submitted that notwithstanding this, Mr White proceeded to remove the carpets and laid engineered timber floor coverings throughout the Property. It was stated that Mr Corden, the managing agent at the time, made it clear that no consent had ever been granted for the floors [AB2/89]. The day before Mr Mousdale's inspection in August 2012 a new carpet was partly fitted on top of the engineered timber floor boards, but the work was not completed to a reasonable standard. It was contended that the engineered timber floor and the partly fitted carpet allowed transference of noise to other flats within the Building.

128. In her witness statement Miss Lasbrey said that she had lived in the Building for 35 years and had never heard the level of noise which she heard following the alterations to the Property. She said that once Mr White moved in she could hear 'every footfall, snatches of quite distinct conversation, music and what she thought were video games. She said that she tried to speak to him about this to no avail, and personally instructed Solicitors to write to him. Following this solicitors were instructed on her and the applicant's company's behalf.

129. In her oral evidence Miss Lasbrey was that at the time of Mr Mousdale's visit the carpet had been put down but the tiling was not laid. She accepted that the carpets were laid in July 2012. However, the applicant company was not aware that the breach had been remedied until Mr White's witness statement was received shortly before the hearing on 12th November 2013.

130. Mr Bowling, in his witness statement, stated that his and his wife's flat, Flat 30A, is next to Mr White's flat. Their bedroom is next to Mr White's reception room. Since Mr White carried out alterations to the Property there has been a marked increase in noise affecting his flat and as a consequence he and his wife recently moved out of their bedroom. He spoke to the occupiers of the Property and since then there had been a slight improvement. In his oral evidence said that there had been no need to complain about the noise before January 2014. He had made no complaints to the applicant company about the noise. He telephoned the occupiers one night but there was no reply. He sent a letter and texts to the occupiers. After two of three texts he received a reply and the noise was turned down. Following another noise incident he again wrote to the occupiers. Both of these events occurred in January 2014. He had been away in December 2013 and over Christmas 2013.

131. In respect of whether Mr White had complied with the terms of the lease by laying the appropriate floor coverings, Ms Mattsson submitted that the applicant company was only informed when Mr White's evidence was served prior to the hearing on 12th November 2013 that the lease requirements had been complied with.

132. Mr Kitson submitted that there was no evidence to show that Mr White is currently in breach of the lease. The applicant company had not even produced evidence to show that the floor covering initially installed (before the carpet and vinyl/linoleum were laid) did not fall within the phrase in paragraph 3 of the Fourth Schedule 'similar sound-deadening material'.

133. Mr Price inspected the Property on 10th June 2010. In his report he noted that the floor are mainly covered with 'thin' carpet and underlay on grippers over the engineered board noted in Mr Mousdale's report and that tiles were present in the shower room and kitchen.

134. In his report Mr Mousdale noted that at the time of his inspection on 18th July 2012, fitted carpets had been installed generally throughout the Property, albeit with the exception of the kitchen and bathrooms. Beneath the carpet modern stripped timber boarding was installed by Mr White prior to his inspection as part of his refurbishment. The works to the carpet were not complete in certain areas and his view was that this would allow transference of noise to continue. It was noted that in Mr Mousdale's report he stated that he had been advised that *'sound insulation bats'* were laid between the floor boards in an attempt to lessen the sound transmission between flats. He could not confirm this as the sound insulation measures were covered by various floor coverings when he inspected.

135. Mr Kitson submitted that the floor coverings in the Property are in accordance with the requirements of the lease, and the applicant company has suffered no damage.

136. Following the tribunal's inspection of the Property in February 2014, it was conceded by on behalf of the applicant company that Mr White had appropriately tiled the kitchen and bathroom. It is clear from the evidence that by the summer of 2012 carpet had been laid over the wooden floors. Mr White's evidence was that tiling / linoleum was laid in the kitchen and bathroom in September 2012.

137. It was submitted by Mr Kitson that the applicant company should have inspected the Property to check whether Mr White was in breach of the lease before commencing these proceedings. The applicant company's expert had inspected and should have noticed compliance with the lease terms.

138. Ms Mattsson submitted that Mr White knew that this was a breach which was alleged and there was no reason why his representatives had

not informed the applicant's representatives that the alleged breach had ceased. She submitted that the applicant company had acted reasonably in bringing the application. However, in closing submissions she indicated that the applicant company no longer sought to rely on the alleged breach.

139. Having considered the evidence and representations as a whole, the tribunal finds that Mr White in or about summer or early autumn 2012 Mr White laid carpet and tiles and or linoleum as required by the paragraph 3 of Schedule 4 of the lease and there is no breach of that covenant.

140. Although Miss Lasbrey's evidence was that she personally suffered from the noise as she described the tribunal does not consider that this constitutes a breach of either paragraph 2 or 3 of the Fourth Schedule.

141. In respect of the current complaint of noise by Mr Bowling in 2014, there was no evidence that this related to any breach of Mr White's lease alleged in these proceedings. This relates to events in 2014, and Mr Bowling has achieved some improvement by contacting the occupiers.

E. Whether Mr White has sublet the Property without consent / whether consent to the subletting has been unreasonably withheld.

142. Clause 2(6)(C) of the lease provides as follows:

'Not at any time during the said term to underlet or part with possession of the Flat as a whole without the Lessor's prior written consent, such consent not to be unreasonably withheld in the case of an underletting of the Flat as a whole to a respectable and responsible person by a written underlease or written agreement for a term certain not exceeding three years, or for an annual or lesser periodic tenancy, in either case at the nest market rent reasonably obtainable without payment of a premium and provided that such underlease or agreement shall contain [various provisions]'.

143. The applicant company alleged that Mr White sublet the Property in breach of clause 2(6)(C) in July 2013.

144. In or about January 2012, Mr White had raised the possibility of renting out the Property and sought consent from the managing agent. In May 2012, about eight months after the alterations were completed which was in or about September 2011, and unknown to Mr White, who was a director of the applicant company, a Board meeting was held on 21st May 2013 in which it was resolved:

[The applicant's solicitors] will send a letter to [Mr White] on behalf of the company putting him on notice that he will breach his lease if he sub-lets [the Property] without obtaining [the applicant company's]

consent, and making it clear that [the applicant company] will refuse any such consent on the basis that it believes that [Mr White] has materially and substantially breached the terms of his lease.

145. In her witness statement Miss Lasbrey said that on 28th May 2012 the applicant company's solicitors wrote to Mr White explaining that if he wanted to sub-let the property he would need to obtain the applicant company's prior written consent.

146. The applicant company's solicitors wrote to Mr White on 2nd July 2012 referring to his having approached Mr Bowling on 30th June 2012, asking for consent to a proposed subletting to commence on 3rd July 2012. Miss Lasbrey said that this letter made it clear that the applicant company required its surveyor to inspect the Property and that any breaches of the lease be remedied before consent to an underletting took place. As referred to in previous sections of this decision, such inspection of the Property took place on 18th July 2012.

147. Mr Kitson submitted that at that stage the decision had already been taken that consent to subletting would be refused, although there was no reasoned or particularised basis for the Board having reached this decision. This decision was equivocally confirmed to Mr White in a letter dated 28th May 2012 [RB1/B/50]. As recalled by Mr White in his witness statement, this letter pointed out that the lease required him to obtain the applicant company's prior written consent before consent would be granted, and went on to say that consent would not be granted. Mr White said that this appeared to be on the basis that hardwood floors had been laid rather than carpet and works had been done to the ceilings and walls and the waste pipe had been lowered without prior consent. Mr White did not accept that he was in breach of his lease and considered that the refusal of consent was unreasonable. However, this resulted in his taking the Property off the rental market at that time as is confirmed by a letter from Foxtons dated 3rd July 2012. The proposed subletting in 2012 did not proceed.

148. The question of subletting the Property arose again in 2013. Mr White's evidence was that he was in regular contact with the new managing agent, Mr Newell, and sought permission to sublet the flat. He referred to email correspondence relating to that application [RB1/B/53-71].

149. Mr White's evidence was that he wanted to have everything in place in respect of the 2013 proposed subletting before applying to the applicant company for consent. To this end, he obtained the signatures of the subtenants in advance. He had contacted Mr Newell earlier in July 2013 with regard to the proposed subletting. Mr Newell had replied in an email on 3rd July 2013 including an extract from his lease. He stated:
'In order for the freeholder to consider an application to sublet we would need the following:
Full name and addresses of the proposed tenants
Occupation of the proposed tenants

References on the tenants these can be from a credit reference agency or 3 of the following references from bank, previous landlord, accountant, solicitor.
Copy of the proposed tenancy agreement.
The Landlords costs of £250 + VAT – these will need to be paid with the request for a licence.
Hope this helps.'

150. Mr White responded in an email dated 9th July 2013 attaching the documents for the proposed subtenants [RB1/B/55]. He did not pay the £250 plus VAT.
Mr White wrote:
'As the tenants are students it will not be possible to get credit references however their father who is guaranteeing the rent will be sending bank statements later today. The guarantor has also agreed to pay the first six months rent upfront and the second six months accordingly. The tenants are currently interested in having the property for one year.... If there are any costs incurred during this process please don't hesitate to contact me on my mobile....'

151. On 10th July 2013 Mr White emailed Mr Newell [RB1/B/70] as follows:
'It was good to speak with you today in relation to the letting of my property. If you would please confirm that in our conversation you had mentioned that you had been approached the freeholders of 30 and 34 Upper Montagu Street in relation to the letting of my flat and they have declined to give me consent to rent out my property as they feel I am in breach of the lease with the extension of my ceiling height.'

152. Mr Newell's response, on the same day (10th July 2013), was consistent with Mr White's recollection in his evidence [RB1/B/71]. This email was marked without prejudice but was referred to by both side's Counsel during evidence and submissions.
'Without prejudice I stated that they were minded not to grant consent due to the legal dispute whereby the freeholders believe that there is a clear breach of the terms of your lease. They do not feel that withholding consent in these circumstances is unreasonable.'

153. Mr Kitson submitted that the resolve of the applicant company not to grant consent to the subletting was expressed after the relevant information was supplied in respect of the prospective subtenants. Mr White obtained the signatures of the subtenants in advance and only signed the lease on 10th or 11th July 2013 when consent to the subletting was arbitrarily refused by the applicant company. No objections were raised by the applicant company in respect of the subtenants, or in respect of the terms of the sub tenancy. The only objection was that referred to in the above correspondence, the alleged breach of the lease comprising the extension of the ceiling height in the Property. Consent having been asked for and unreasonably refused Mr White proceeded to enter into the subletting. Mr Kitson submitted that it was not open to the applicant company subsequently to add to the reasons for refusing consent that had been given (*Bromley Park Garden Estates v Moss*

[1982] 1 WLR 1019). He submitted that the relevant date was 10th July 2013 when Mr White was informed by the new agent that consent would not be granted because of the raised ceiling heights.

154. Mr Kitson referred to S19(1) Landlord and Tenant Act 1927. The effect of an unreasonable refusal of consent is to release the tenant in respect of the transaction for which consent has been refused from his obligation to obtain consent. The tenant can sublet or assign without consent (Woodfall para 11.128).

155. Ms Mattsson submitted that Mr White required the applicant company's written consent before subletting. It had been made clear by the applicant company's solicitors in May 2012 that until all the alleged breaches of the lease were remedied, no consent to subletting would be granted.

156. In respect of the 2013 subletting, Mr Newell had informed Mr White that one of the requirements was that the he pay £250 plus VAT. This was not paid. Mr White's evidence was that Mr Newell would not accept this as he was trying to resolve the situation amicably without bringing the difficulties to the Board. Ms Mattsson submitted that it was not credible that Mr Newell told Mr White that he would not accept a fee, but produced no evidence to support this.

157. Ms Mattsson submitted, amongst other matters, that firstly Mr White never made an application for prior written consent to sublet and that this was shown by his not having paid the £250 plus VAT; secondly, if an application was made it was not unreasonable for the applicant company to refuse permission to protect the right to forfeit (*Yorkshire Metropolitan Properties Ltd v Co-operative Retail Services Ltd* [2001] L&TR 26). She submitted that the applicant company's approach was anything but arbitrary and unreasonable, and that the subletting is in breach of the lease.

158. Having considered the evidence and submissions the tribunal has reached the following conclusions.

159. It was common ground that it is essential that prior consent to the subletting was sought. The tribunal considers that the evidence of the conversations and exchanges of emails referred to above shows, that consent was sought from the applicant company's agent to the 2013 subletting.

160. The tribunal notes that the initial reason provided for not allowing the 2012 proposed subletting as shown in the applicant company's resolution and subsequent correspondence, was on the basis that Mr White had substantially and materially breached the lease. By the time of the 2013 request for permission to sublet, this had been streamlined to a single reason which it is not open to the applicant company to add to, namely that Mr White had extended the ceiling heights. As previously stated no objection was raised in respect of the proposed sub

tenants or the terms or form of the sub tenancy. The applicant company evinced a clear determination to reject the application for reasons stated in the email of Mr Newell dated 10th July 2013, and put it beyond themselves to properly consider the application at that stage. The reason for refusal was a bad reason as there was no breach of the lease (as the tribunal has concluded for reasons set out earlier in this decision).

161. In respect of the requirement to pay £250 plus VAT, this was not paid by the time the applicant company in effect refused the application. However, the tribunal considers that this does not alter the position, as the applicant company refused consent for an entirely separate reason.

162. In the circumstances the tribunal finds that the applicant company has not shown that Mr White has breached clause 2(6)(C) of the lease.

Section 20C of the Landlord and Tenant Act 1985

163. Section 20C entitles a tenant of a dwelling to apply for an order that some or all of the costs incurred or to be incurred by a landlord in connection with proceedings before the LVT are to to be taken into account in determining the amount of the service charge. Mr White sought an order under section 20C in respect of the proceedings before the tribunal.

164. The applicant company has not shown in this application that Mr White is in breach of his lease. The tribunal considers that it is reasonable in the circumstances to make an order under section 20C , and orders that the costs incurred by the applicant company in connection with these proceedings should not be taken into account in determining the amount of the service charge.

Costs

165. Although the application has been unsuccessful, the tribunal does not consider having regard to the complexity of the case overall, that either party has acted unreasonably in defending or conducting the proceedings. Accordingly no order for costs is made under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Name: A Seifert Date: 17th June 2014

Judge of the First-tier Tribunal

Appendix

Leasehold and Commonhold Reform Act 2002

Section 168 No forfeiture notice before determination of breach

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of covenant or condition in the lease has occurred.

Landlord and Tenant Act 1985

Section 20C Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before court, residential property tribunal, or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs, to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application,