Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

First Floor, West Wing, Southgate House, Wood Street, Cardiff. CF10 1EW.
Telephone 029 20922777. Fax 029 20236146. E-mail: rpt@wales.gsi.gov.uk

DECISION AND REASONS OF LEASEHOLD VALUATION TRIBUNAL (WALES)
COMMONHOLD AND LEASEHOLD REFORM ACT 2002 s.168 ("the Act")

Premises:	Flats 1, 2, 3 and 4 Vine Court, Hereford Rd, Monmouth, NP25 3HB.
LVT ref:	LVT/0009/05/14 LVT/0010/05/14 LVT/0011/05/14 LVT/0012/05/14
Hearing:	27, 28 November and 1 December 2014.
Order:	7 January 2015
Applicant:	Blockshare Resident Management Ltd (represented by Mr Haywood, a director of the Applicant)
Respondents:	(1) Mr Adrian and Mrs Clare Raddenbury (2) Mrs Eirys Davies (by her daughter, Mrs Judith Kelly) (3) Mr Raymond Croudace (4) Mrs Margaret Hoult Respondents 1 – 3 represented by Mr Brown (counsel) Respondent 4 – in person
Members of Tribunal:	Mr R S Taylor – Legal Chairman Mr Kerry Watkins FRICS

DECISION

1. The applications pursuant to s.168(4) of the Act (x 4) are dismissed, it being determined that there has been no breach of the leases.

2. The application pursuant to s.20C of the Landlord and Tenant Act 1985 is dismissed.

3. The application pursuant to Schedule 12, paragraph 10 (unreasonable etc. costs) of the Act is dismissed.

Dated 7 January 2015

Lawyer Chairman

REASONS

Introduction.

1. This case principally concerns 4 applications, made pursuant to s.168(4) of the Act, that the Respondents are each in breach of their (materially identical) leases. All applications are dated 12 May 2014 and it was agreed at a pre-trial review that all applications should be heard together.

2. Flats 1,2,3 and 4 are the ground floor flats of the premises, which comprises 10 flats in total. To the rear of each of these ground floor flats there is a yard area upon which "lean-tos" have been constructed and then later developed. The question for us to determine is whether these structures breach the terms of the lease under which the demises have been granted.

The Applicant's applications.

3. The particulars of the Applicant's applications allege the following (we paraphrase):-

    a. In respect of Flat 1.

        i. Breach of clause 2(i) arising from structural alterations (to include cutting, maiming or injury to the property) without written consent of the landlord, in that the First Respondents have:-

            1. Removed a wall between the kitchen and outside space;

            2. Replaced with a brick or concrete wall;

            3. Removed a cavity wall between the bathroom and outside;

            4. Installed a steel beam as a supporting mechanism in place of the wall (albeit in opening the parties removed this item by consent);

            5. Roofed over the new wall with timber beams, boards and felt;

            6. Tiled the interior area to create a bathroom;

            7. Diverted external waste pipes;

        ii. Breach of clause 2(t) and Second Schedule, paragraph 2 to the transfer not to erect additional sheds, outbuildings or extensions;

iii. Breach of clause 2(t) and Second Schedule, paragraph 7 to the transfer not to obstruct light. (This aspect was dropped by the Applicant at the pre-trial review on the 23 September 2014.)

b. In respect of Flat 2.

i. Breach of clause 2(i) not to make structural alterations without the written consent of the landlord in that Second Respondent has:-

1. Erected a brick or concrete wall outside the rear of the Flats 1 and 2, dividing the space between them;

2. Roofed over the area to the rear between the kitchen and the adjoining garage;

3. Plastered the interior of the extended area to form an extension to the kitchen.

ii. Breach of clause 2(t) and Second Schedule, paragraph 2 to the transfer by erecting an extension.

iii. Breach of clause 2 (t) and Second Schedule, paragraph 7 to the transfer, by installation of a pipe and extraction fan. (This was dropped at the pre-trial review.)

iv. Breach of clause 2(o), not to cause a nuisance or annoyance, by installation of a Perspex roof which causes (a) severe noise disturbance during heavy rain and, (b) shedding of rainwater which has caused a build up of moss on the adjoining garage roof.

c. In respect of Flat 3

i. Breach of clause 2(i) not to make structural alterations without the written consent of the landlord in that the Third Respondent has:-

1. Erected a brick or concrete wall outside the rear of flats 3 and 4 to divide the area between the two flats and abutting a retaining wall to the side garden.

2. Roofed over the said enclosed area with timber beams and Perspex sheeting.

ii. Breach of 2(o) not to cause a nuisance or annoyance by installation of a Perspex roof which causes (a) severe noise disturbance during heavy rain and, (b) re-routing of rainwater from the roof which sheds water on to the garden and prevents grass cutting due to saturation.

iii. Breach of clause 2(t) and Schedule 2 paragraph 2 to the transfer not to erect an extension

iv. Breach of clause 2(t) and Schedule 2, paragraph 7 to the transfer by impeding light by moving the outside wall. (This was dropped at the pre-trial review.)

d. In respect of Flat 4

i. Breach of clause 2(i) not to make structural alterations without the written consent of the landlord in that a dividing wall between 2 and 4 has been constructed and a wall abutting the garden retaining wall has been constructed, with the enclosed area being roofed over with timber beams and Perspex sheeting.

ii. Breach of clause 2(o) not to cause a nuisance or annoyance by installing a Perspex roof which causes (a) severe noise disturbance during heavy rain and, (b) re-routing of downpipe resulting in grassed area becoming waterlogged etc.

iii. Breach of clause 2(t) and Second Schedule, paragraph 2 of the transfer by the construction of an extension.

iv. Breach of clause 2(t) and second Schedule, paragraph 7. This was dropped at the pre-trial review.

Summary of the Applicant's applications.

4. At the risk of over simplification, in summary, the tribunal is asked to determine whether breaches have occurred as a result of:-

a. Structural alterations without written consent in respect of all four flats.

b. Nuisance and annoyance in respect of flats 2, 3 and 4. The alleged nuisance and annoyance derives, it is alleged, from noise when it is raining, moss growth and the inability to cut the grass when it is saturated outside of Flats 3 and 4.

c. Erection of extensions in breach of freehold covenant in respect of all four flats, which the Applicant asserts the Respondents are bound to comply with by virtue of the terms of their leases.

The Respondents' applications.

5. The First Respondents also made an application, on behalf of all Respondents, pursuant to s.20C of the Landlord and Tenant Act 1985 dated 26 June 2014. The date of the application is unlikely to be correct in that it was only submitted to the tribunal during the hearing which took place on the 27, 28 November and 1 December. The parties agreed that it was appropriate for us to consider this application alongside our main determination. The application seeks to prevent the Applicant from recovering the legal costs of these proceedings (said to amount to only £300, the Applicant has been represented by one if its non-lawyer directors, Mr Hayward) via relevant service charge provisions in the lease. Whilst we would have dismissed this application, as we do not consider that it would be just and equitable to make such an order (for our reasons see later), we also determine that the lease does not allow for the recovery of legal costs in any event. This makes the s.20C application, strictly speaking, otiose.

6. At the conclusion of the hearing Mr Brown, on behalf of the 1 – 3 Respondents, also made an oral application pursuant to Schedule 12, paragraph 10 of the Act. This was based upon Mr Hayward's alleged unreasonable conduct of the proceedings. As there are 4 applications, this could amount to an award of costs of up to £2,000. However, for the reasons we set out below, we dismiss this application.

Background.

7. The current directors of the Applicant are Mr Robert Hayward and Mrs Maria Hayward (owners of Flat 7), Mr John Keating (owner Flat 8), Ms Nina Givens (owner of Flat 10) and Mrs Camilla Gwilt (owner of Flat 5).

8. The Applicant was represented throughout by Mr Robert Hayward. The 1 – 3 Respondents were represented by Charles Russell LLP, who in turn instructed Mr Matthew Brown of Counsel. We are most grateful to both Mr Hayward and to Mr Brown for the manner in which they assisted the tribunal and, in particular, to Mr Brown for his helpful skeleton argument dated 12 October 2014, which sets out the law fairly and conveniently for the tribunal. The Fourth Respondent appeared in person. The Second Respondent did not attend in person at the hearing and it was agreed, at the pre-trial review, that her instructions could be made by her daughter Mrs Judith Kelly (upon a suitable consent from the Second Respondent being lodged at the tribunal, which was provided in due course).

Further Mrs Judith Kelly gave evidence to deal with her mother's position, so far as she understood it to be.

9. The tribunal gave procedural directions on the 4 June 2014 and, once the matter had been allocated to a hearing panel, a pre-trial review was held on the 23 September 2014, where further and more detailed directions were given. The original procedural directions did not require a *paginated* bundle and by the time of the pre-trial review there was already a substantial bundle without the benefit of pagination. Rather than require the bundle to be paginated, the tribunal and others who have taken part in the hearing, have managed without pagination. This does mean, however, that numbered pages cannot be referred to in this decision.

10. Whilst there has been extensive lay evidence and documentation for the tribunal to consider, no expert evidence has been sought or produced on behalf of the Applicant. The tribunal was invited by the Applicant to consider some generalised reports which were printed off the internet. We decline to take these into account as they are simply not expert evidence before the tribunal.

11. The factual background to this matter is that at some point, most probably in the 1980s, but nobody is sure precisely when, "lean-tos" were erected outside flats 1 – 4. These were probably quite basic in their structure, with Perspex roofing and some block or brickwork being used to divide the space between Flats 1 and 2 and Flats 3 and 4. It is not known what permission, if any, was obtained to do this. The "lean-tos" created a little bit of extra "utility" space to the rear of the kitchen and bathrooms.

12. In its summary letter dated 13 July 2014, the Applicant states, "All Respondents make the point that extensions were in place before they purchased the property. *We agree with that statement and have never stated otherwise. We do not believe the present structures are original and significant alterations have been made, some by the present owners."* (Tribunal's italics).

13. The Respondent's cases, as detailed below, have variously been that any alleged breach committed prior to the assignment of the respective leases to them is not a breach for which they should be held to be in breach, and that they have either obtained the oral consent of the landlord for any works which they have conducted (Flat 1) or the work is not of a structural nature (Flats 2,3 and 4). As detailed below, the picture painted by the Respondents is of a previously very lax property management regime where directors (in particular a lady called Mrs Jan Croudace) would readily give oral permissions for works to be carried out. It is upon this basis that it is submitted that the Applicant should be estopped from enforcing the provision in the lease which requires written consent for structural

alterations. The tribunal notes that the recent works to Flat 1 are said to have been concluded in or around 2006 (this came from the evidence of the First Respondents, which we accept) and that the first recorded complaint about the works is to be found in company minutes dated 22 June 2009.

14. It is also said by the Respondents that the nuisance/rainwater/moss/grass cutting issues do not, as a matter of fact, amount to nuisance.

15. It is further stated by the Respondents that the covenant not to erect further structures is not binding as against these Respondents, given that the Applicant has not proved that the freehold covenants (from which this obligation is said to arise) are binding in this instance.

Inspection, property layout and works undertaken by the Respondents.

16. The tribunal inspected the property at 10am on the 27 November 2014. All interested parties were present, including Mr Hayward and Mr Brown. Mrs Hoult did not wish the tribunal to inspect the interior of her “lean-to” which could only be accessed by walking through her home. The tribunal notes that it was well able to see what it needed to from the exterior of Flat 4. The tribunal, accompanied by Mr Hayward and Mr Brown (but not others) also inspected the interior of the other three flats and the interior of Flat 5 on the first floor (looking out over Flats 1 and 2 on the ground floor).

17. The Building is a substantial block of flats situated within its own grounds and fronts Hereford Road, on the outskirts of Monmouth Town Centre. It was constructed in the 1970's and provides for 10 flats: 4 on both the ground and first floors and two on the second floor. There are four garages to the side of the building (next to Flats 1 and 2) together with communal paths, grass and shrub areas. A private car park is provided to the rear of the flats for residents and visitors.

18. The building itself has stone effect and white painted rendered elevations interspersed with coloured wall cladding, beneath flat felted and tiled mansard roof coverings. The openings are primarily of UPVC or timber construction some of which are double glazed. The 4 garages have white painted rendered elevations, with flat felted roof coverings and metal up and over doors.

19. We noted some moss growth on the roof of the garages abutting Flats 1 and 2. However, there were other parts of the premises, including a flat roof over the entrance porch and the Mansard roof elevation above Flat 4, which had a similar amount of mossy growth.

20. As already noted above, each of the ground floor flats subject to these applications have, over time, had additional areas added to the rear of them in what would have been a yard area.

21. Flat 1 (Mr and Mrs Raddenbury)

    a. The extension (which is now a bathroom) comprises a built up felt roof covering, the rear elevation being formed by the wall of the garage and a party wall between Flats 1 and 2. The floor is finished with ceramic tiles

    b. In his statement, Mr Raddenbury states that since purchasing the flat in June 2004, the following works have been undertaken:

        i. Repairs to the flat roof.

        ii. Removal of the kitchen, stud walling and ceilings.

        iii. The pedestrian door from the addition into the garage was infilled.

        iv. The glass divide in the party wall between Flats 1 and 2 was removed and infilled.

        v. The window and wall beneath, which opened into the extension from the then shower room was removed.

        vi. A wall was constructed in the opening between the extension and the kitchen.

        vii. The floor covering to the extension was lifted revealing a raised concrete base, the wooden battens were replaced and a sheet of marine plywood fixed to these battens. Ceramic floor tiles were laid to the bathroom and kitchen. Ceramic wall tiles were also fitted to the walls of the bathroom

        viii. The down pipe connected to the guttering of the building was diverted.

        ix. The ceiling was levelled and 4 spotlights fitted.

        x. The opening to the bedroom was moved so that the bedroom was accessed from the hallway.

        xi. Concrete blockwork was used to construct the walls that make up the bedroom.

xii. Two separate openings were created between the bedroom and the lounge which were finished with glass bricks.

xiii. A fire resistant door was installed between the hallway and the lounge.

xiv. The small space from which the lounge, kitchen and bathroom were connected was reclaimed and now forms part of the larger kitchen. The partition walls between this small space and the kitchen were also removed.

xv. The wall between the kitchen and lounge was removed and a steel beam inserted to retain the structural integrity of the premises as a whole.

We accept this description of the works which have been carried out by the Raddenburys.

22. Flat 2 (Mrs Davies, on behalf of her daughter Mrs Judith Kelly at the hearing)

a. The extension comprises a polycarbonate roof covering with the rear wall being formed from the side wall of the garage and a party wall between Flats1 and 2. The Party Wall had a glazed screen, which has subsequently been in filled in 2005/2006 by Mr and Mrs Raddenbury. The floor is finished with vinyl sheet.

b. In Mrs Kelly's statement it is stated that Mrs Davies purchased the flat in June 2009. Further, in 2010 the following works were undertaken to the addition:

i. Two walls internally were insulated and plastered.

ii. The floor was heightened using wooden timbers and Lino was laid.

iii. The roof was replaced with the same material as previously.

iv. Fitted cupboards were fitted to one of the walls.

We accept this description of the works which have been carried out by Mrs Davies.

23. Flat 3 (Mr and Mrs Croudace)

a. The extension comprises of a polycarbonate roof covering which is supported on timber rafters, with a double glazed UPVC window positioned in the rear wall. The internal faces of the walls have been clad in timber panelling. The floor is finished with a vinyl sheet covering. Various cupboards and worktops have been fitted within the space.

b. In his statement, Mr Croudace states that since purchasing the flat in 1999 the following works have been carried out to the extension:

   i. Replacement of the roof covering.

   ii. Replacement of the wooden window.

   iii. Installation of wooden panelling throughout the interior walls.

   iv. Improved the flooring with new wooden battens, a sheet of chipboard is fixed to these battens.

   v. Lino was used to provide the final floor covering.

   vi. Replacement cupboards installed.

   We accept Mr Croudace's description of the works which he says he has carried out.

24. Flat 4 (Mrs Hoult)

   a. The extension comprises a corrugated polycarbonate roof covering, with white painted block work rear wall and a double glazed UPVC window.

   b. In her statement Mrs Hoult states that since purchasing the flat, the following work has been carried out to the extension:

      i. Replaced the rotten wooden window with the UPVC window that exists today.

   We accept Mrs Hoult's description of the works which she says she has carried out.

The terms of the lease.

25. It was agreed between the parties that the terms of each lease were materially identical (save where indicated herein) for the tribunal's purposes.

   Extent of the demise according to the lease and plan.

26. The original demise is dated 6th May 1975 for a term of 99 years. The demise is described as "ALL THAT Flat Number [x] (hereinafter called "the Flat") Vine Court Flats Hereford Road Monmouth aforesaid particularly delineated on the plan annexed hereto and thereon edged red."

27. The tribunal notes that the coloured lease plans are different as between Flats 1 and 2 and Flats 3 and 4. Flats 1 and 2 have the “yard/”lean to”” area enclosed in red, whereas Flats 3 and 4 do not.

Clauses said to be breached.

28. By clause 2(i) the tenant covenants, “Not without the written consent of the Landlord to make any structural alterations *in the Flat* and not to cut maim or injure any of the floors walls or timbers thereof.” (tribunal’s emphasis)

29. By clause 2(o) the tenant covenants, “Not to do or permit or suffer anything in or upon the Flat or any part thereof which may at any time be or become a nuisance or annoyance to the Tenants or occupants of any other flats in Vine Acre Flats or injurious or detrimental to the reputation of Vine Acre Flats as private residential flats …”

30. By clause 2(t) the tenant covenants, “To perform and observe such of the covenants and restrictions contained or referred to in a Deed of Transfer dated the third day of January One thousand nine hundred and sixty six and made between Ryeland’s Developments (Hereford) Limited of the one part and Brownhill Holdings Limited of the other part except as contained in paragraph 1 thereof *so far as the same are still subsisting and capable of taking effect and affect and relate to the property hereby demised.”* (tribunal’s emphasis).

31. The freehold covenant alleged to apply, by virtue of clause 2(t) of the lease, is to be found at Schedule two, paragraph 2 of the transfer, which provides “After the completion of such dwelling house to block of flats offices and outbuildings no additional shed or outbuildings or extensions to the said dwelling house or block of flats shall be erected without [Vendor or Vendor’s Architect] consent.”

Service charge provisions.

32. The service charge provisions are not extensive and provide for the Landlord at Clause 3(B) to “maintain and keep in good and substantial repair and condition and lighted and cleaned and decorated the porch entrance hall staircase and lobby of Vine Acre Flats and the paths and roads enjoyed or used by the Tenant in common as hereinbefore provided and will keep the gardens cultivated and the entrance driveways in good order.”

33. The tenant covenants at 1(b) to pay for the maintenance expenses “ and other heads of expenditure as the same are set out in the first schedule hereto.”

34. The Schedule to the lease does not make any explicit reference to the legal costs of proceedings being recoverable. The extent of legal cost recoverability is described in the

Schedule, paragraph 10, as relating to costs associated " with making representations against or otherwise contesting the incidence of the provisions of any legislation or orders or statutory requirements thereunder *concerning town planning public health highways streets drainage or other matters relating to or alleged to relate to the said building for which the tenant is not directly liable hereunder"* (tribunal's italics). It appears plain to the tribunal, and we so determine, that the service charge provision in the leases subject to this application simply do not provide for the recovery of legal costs of disputed matters before the tribunal *as a service charge.*

35. We do note Clause 2(m), tangentially referred to by Mr Hayward (he may have confused this clause as forming part of the service charge mechanism in the lease) under which the tenant directly covenants "To pay all expenses (to include Solicitors costs and surveyors fees) incurred by the Landlord incidental to the preparation and service of a Notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the court." This, of course, is a direct covenant given by a tenant. The payability, or otherwise, of a sum on account of fees incurred in these proceedings, was not before the tribunal and would, in the first instance have to be properly claimed by the Applicant as an administration charge pursuant to Schedule 11, Part 1 of the Act. This is itself a complicated issue, as highlighted by the case of *Barrett v Robinson* [2014] UKUT 322 (LC).

The relevant law.

s.168(4) of the Act.

36. By s.168(4) of the Act "A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

37. There was some debate in the hearing as to how the tribunal should take into account matters which have occurred prior to the present Respondents being assigned their demises. By way of example, the construction of dividing walls between the exterior of all flats, and the construction of a wall abutting the garden retaining wall at Flats 3 and 4, do appear to be structural alterations. In the absence of written consent or of clear evidence of an "unambiguous promise or representation" (whether express or implied) that the covenant against structural alterations would not be enforced, is the tribunal's task simply to determine "a breach" whether committed by the current Respondents or previous assignees of the demises?

38. Mr Brown submitted, and we accept, that we must read s.168(4) in the context of s.168 as a whole. s.168(2)(b) makes reference to "the tenant" admitting a breach. It would be surprising if s.168(2)(a) applied to a wider class of people (tenants and former tenants) than in s.168(2)(b).

39. Further, the covenant at 2(i) prohibits a one-off event (structural alteration without written consent) rather than imposing any ongoing duty upon the tenant (for example not to underlet, which continues for as long as a tenant underlets).

40. There was no evidence that there were any issues, concerning alleged breaches, raised on behalf of the Applicant when the leases were assigned to the Respondents.

41. *Even if* a breach occurred prior to the leases being assigned to the current Respondents, we are satisfied that the section does not have one-off breaches by former tenants in mind, in circumstances where the alleged breach was not raised when the demise was assigned. This would accord with the general rule that assignees of a lease are only liable for breaches of covenant while the lease is vested in them.

Estoppel

42. *Swanston Garage (Luton) Management v Langley-Essen* [2008] L & TR 20 provides that the LVT does have jurisdiction to consider whether a landlord has waived compliance with a provision in the lease or should be estopped from enforcing a provision, as this is a necessary ingredient in determining whether a breach has arisen under s.168(4) of the Act. The case suggests that for the landlord to be prevented by waiver or estoppel from relying on the relevant covenants, the tenant would need to be able to show an unambiguous promise or representation whereby the tenant was led to suppose that the landlord would not insist on its legal rights under the clauses.

43. Mr Brown submitted a passage from *Halsburys* which states, "Waiver may be express or implied from conduct, but in either case it must amount to an unambiguous representation arising as a result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance upon the concession."

44. Mr Brown also submitted that when considering the issue of waiver, the tribunal might consider forbearance/acquiescence (howsoever arising) which occurs after a breach has occurred. On this small point we disagree with Mr Brown's submissions. The tribunal is not a court and the jurisdiction it exercises is provided by statute. It seems to us that a forbearance and/or acquiescence which may have occurred post breach would not stop the

breach occurring in the first place. The tribunal's jurisdiction to consider waiver and estoppel arises only in so far as it relates to the question as to whether or not a breach arises under s.168(4).

45. Mr Brown also referred to the "*High Trees"* doctrine (after the seminal case on promissory estoppel whose full title citation is *Central London Property Trust v High Trees House Ltd* [1974] KB 130) in which he asserted (again by reference to a passage in *Halsburys)* the doctrine of estoppel "can only be founded upon a promise by B of future action which is intended to affect the legal relations between A and B and which indicates in a manner which is clear and unambiguous that B will not insist on his strict legal rights. B's representation may be express or implied."

Nuisance and annoyance

46. Mr Brown provided balanced and helpful written submissions as to how we should approach the question of nuisance and annoyance. We agree with his analysis, which we set out below. The Applicant, represented by Mr Hayward, who is not legally qualified and who stated that he did not have access to legal text books, did not provide us with any counter analysis.

47. Nuisance is often equated with common law nuisance, which can take various forms. It nonetheless appears that two forms of nuisance are alleged: (1) unlawful interference with the enjoyment of land; and (2) nuisance by damage (i.e. moss)

48. In terms of the former, Carnworth LJ sought to summarise the relevant principles in the recent case of *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312 (by reference to *Clerk & Lindsell on Torts* (20th ed. ch 20)):

    i) There is no absolute standard; it is a question of degree whether the interference is sufficiently serious to constitute a nuisance. That is to be decided by reference to all the circumstances of the case (20-10).

    ii) There must be a real interference with the comfort or convenience of living, according to the standards of the average man (20-11), or in the familiar words of Knight Bruce VC ". . . 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" *(Walter v Selfe* (1851) 4 De G & Sm 315, at p 322, 20 LJ Ch 433, 15 Jur 416).

iii) The character of the neighbourhood area must be taken into account. Again in familiar 19th century language, "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey . . ." (20-13, citing Thesiger LJ, *Sturges v Bridgman* (1879) 11 Ch D 852, 856, 43 JP 716, 48 LJ Ch 785).

iv) The duration of an interference is an element in assessing its actionability, but it is not a decisive factor; a temporary interference which is substantial will be an actionable nuisance (20-16).

v) Statutory authority may be a defence to an action in nuisance, but only if statutory authority to commit a nuisance is express or necessarily implied. The latter will apply where a statute authorises the user of land in a way which will "inevitably" involve a nuisance, even if every reasonable precaution is taken (20-87).

vi) The public utility of the activity in question is not a defence (20-107).

49. In terms of nuisance by direct physical injury to land, as the name and *Clerk & Lindsell* (20th ed. at 20-26) suggest:

"In nuisances of the second kind, namely, those causing physical damage to land, actual, not merely prospective, damage is essential to a cause of action. Until damage is caused no nuisance exists, only the potentiality of nuisance."

50. In terms of "annoyance" (which is not in itself a tort), the leading authority still appears to be *Tod-Heatley v Benham* (1889) LR 40 Ch D 80,[1] in which Cotton LJ defined the phrase "annoyance or grievance" as meaning (at p93):

"It is not sufficient in order to bring the case within the words of the covenant, for the Plaintiffs to show that a particular man objects to what is done, but we must be satisfied by argument and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done."

51. Lindley LJ made similar remarks, namely (at p95/96):

"Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant."

52. Finally, Bowen LJ expressed the view that (p97/98):

..."Annoyance" is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows

[1] The case was cited by the Court of Appeal recently: Trustees of Coventry School v Whitehouse [2013] EWCA Civ 885

the truth, but of the ordinary sensible English inhabitant of a house – if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort."

Enforcement of freehold covenant via clause 2(t) of the lease.

53. Mr Brown emphasised the proviso contained within clause 2(t) to the lease, namely that the freehold covenant needed to be "… still subsisting and capable of taking effect and affect and relate to [the flat in question]." Again, Mr Brown provided the tribunal with a fair written summary of the law which we accept. It appeared to the tribunal that Mr Hayward was unable to grasp this particular point, something which we refer to on the question of the Respondents' unreasonable costs application below.

54. On the issue of enforceability of freehold covenants, the authors of *Gray and Gray, Elements of Land Law* (5th ed. at 3.4.33) state:

"…one rule retains undiminished vigour and importance: there is a necessary correlation of benefit and burden. A party seeking to enforce a restrictive covenant must establish both that he is entitled to the benefit of the covenant and that the person against whom he seeks enforcement is subject to the burden of the covenant. If he can prove only one of these requirements his action must fail." (tribunal's emphasis)

55. Similarly, *Francis on Restrictive Covenants and Freehold Land* (4th ed. at 9.4) warns in the context of building developments:

"It is often assumed by residents' groups and the like…that it is simply necessary to show that the land which is to be the subject of the building development is bound by the covenants which it is alleged will be broken. What such groups and advisors forget is that, unless there is an effective claimant…no claim to enforce can be made. Likewise, unless the potential defendant can be made liable, the same outcome will follow."

56. Mr Brown submitted, in his skeleton,

> "At the present time there is no evidence whatsoever to suggest that the original Vendor - or any successor in title - exists (in fact the Respondents understand the Vendor was dissolved in 1999) and is entitled to enforce the covenants contained within the Transfer. In fact, the Applicant has not even provided a copy of the Transfer itself. That makes the task almost impossible, for the land potentially benefitted is described (according to the Applicant's register of title) in that document as "*the remainder of the land comprised in the Title above mentioned or the part or parts thereof for the time being remaining unsold (and all other parts of the Estate)…"*. Unfortunately, we do not know:

i. What other land was comprised in the "*Title above mentioned*";
ii. Which "*part or parts thereof*" remained unsold at the date of the Transfer;
iii. What land made up the "*Estate*" at the date of the Transfer.

Without knowing those matters, the Tribunal cannot say whether or not the covenant in question remains enforceable as against the Applicant. That is not merely a slip up or a mistake that can be overlooked. As *Gray and Gray* explain, without proof that the benefit has been transmitted, a claim to enforce a restrictive covenant *must* fail. As such, without any evidence to prove the same, it is submitted that the Tribunal cannot possibly determine, on balance, that the covenant in question remains "*subsisting and capable of taking effect*"."

57. The tribunal agrees with and adopts this analysis.

The evidence

58. We heard from numerous witnesses both for the Applicant and the Respondent. We summarise the relevant parts of that evidence here.

On behalf of the Applicant

59. Mr Hayward gave evidence first.

a. We were impressed by Mr Hayward as a well meaning individual who was doing his best to bring some order to the rather chaotic historical property management at the premises. Whilst Mr Hayward impressed as doing his best as, in effect a litigant in person, he appeared at times to be out of his depth and unable to appreciate some of the legal realities of the situation all parties now find themselves in.

b. The manner in which the premises were managed, he said, changed in 2009 when his wife took over as a director. He described the unhappy history, since then, of attempts to sort out management difficulties and the debates which had taken place in company/residents' meetings.

c. It was clear that the relevant oral permissions, if proved, would have been given by Mrs Jan Croudace. At the time Jan Croudace was a director of the Applicant she was not on the legal title to her flat (although her husband was). However, Mrs Croudace was appointed and discharged director's functions. Of significance to the tribunal was Mr Hayward's acceptance that at the material times Mrs Croudace had the authority to bind the Applicant.

d. Mr Hayward's starting point was set out in his letter dated 13 July 2014, often referred to in the hearing as the "common ground" letter (so referred to as the proceeding quote has a sub-heading in bold, entitled "common ground"), which states "All Respondents make the point that extensions were in place before they purchased the property. We agree with that stated and have never stated otherwise. We do not believe the present structures are original and significant alterations have been made, some by the present owners."

e. In his oral evidence Mr Hayward confirmed this view, save for Flat 4, which he accepted had not been significantly altered during the Fourth Respondent's tenure.

f. When the issue as to enforceability of freehold covenants (relevant due to clause 2(t)) was put to Mr Hayward, it was clear that he simply did not understand the legal position.

g. Mr Hayward agreed that he had no reason to doubt the extent of the work described by the Respondents.

h. Mr Hayward emphasised that consents had not been given in writing for works which had been undertaken. He was keen to emphasise that any verbal permissions given did not necessarily explicitly match the extent or stage of works which the First Respondents undertook to their flat.

i. Mr Hayward emphasised the current management difficulties in accessing the exterior of the roof with the "lean-tos" in place.

60. Mrs Hayward

a. Mrs Hayward was generally supportive of her husband Mr Hayward and appeared a genuine witness.

b. Mrs Hayward emphasised that historically the "lean-tos" had been "temporary" in their construction.

c. Mrs Hayward also outlined the difficult management history, particularly since she had become more involved.

d. Mrs Hayward did not believe that she had seen works which had been undertaken to the interior of Mrs Davies' Flat 2 when she spoke with the occupants.

e. Mrs Hayward referred to sub-tenants having complained of noise nuisance, but she had to accept that she did not have direct evidence of the same.

61. Mrs Briscoe did not give evidence in person. Mrs Briscoe sent a letter outlining a medical reason why she was unable to attend at the tribunal. Whilst her evidence in respect of noise is noted it has limited weight due to the fact that the Respondent's did not have an opportunity to challenge Mrs Briscoe and accordingly we place very little weight on this evidence.

62. Mr Keating also agreed that Mrs Croudace had the authority to bind the Applicant during her time as a director. He accepted that he was not party to the key conversations. Mr Keating was guarded in the manner in which he gave his evidence.

63. Mrs Givens accepted that she had had a new boiler and flue installed at her property which is Flat 10. Mrs Givens did not have written consent from the landlord for this work to be carried out, but suggested that there were no directors functioning at the time this work was undertaken.

64. Mrs Gwilt described her difficulties with the First Respondents in trying to arrange cavity wall insulation to be installed. This is not something which could be agreed. We note that there is no requirement in the lease for cavity wall insulation to be installed. As Mrs Gwilt's flat is over Flat 1, she was able to describe the difficulties she had faced with alterations she had wished to effect, due to the fact that the downpipes had been sealed into Flat 1. Mrs Gwilt stated that the fabric of the premises needed to be maintained and that "it has not been managed well" in Mrs Gwilt's evidence but note that she was not party to any of the alleged conversations between Mrs Croudace and the First Respondents. Mrs Gwilt's flat had had extensive internal works done to it and it does not appear that any written permissions were given by the landlord for this to take place.

On behalf of the Respondents

65. Mr Raddenbury

    a. Mr Raddenbury came across as a capable, professional person. The tribunal has accepted both his and Mrs Raddenbury's evidence, in the round. However, we have taken particular care to weigh and assess what we have been told and have not accepted either Mr or Mrs Raddenbury's evidence uncritically. The tribunal has been very alive to the fact that, so far as Flat 1 is concerned, Mrs Croudace (see below) appears overwhelmed by a medical complaint which has been present at all material times. As such, we have been particularly anxious in the manner in which we have assessed the Raddenbury evidence, it being essentially the best evidence we have in support of *their* claim to benefit from an estoppel.

b. Mr Raddenbury set out the nature and extent of the works undertaken since he had purchased his property in 2004. Nobody has disagreed this with this (recorded above).

c. Mr Raddenbury told the tribunal that they have spent about £20,000 on the development of their "lean-to" into a bathroom. The flat was purchased for about £76,000.

d. He explained that the works were not done in one go, due to personal finance constraints. Works were completed as and when funds were available.

e. Mr Raddenbury deferred to Mrs Raddenbury so far as conversations which were had with Mrs Croudace, which he was not party to.

f. Mr Raddenbury, as noted, is a professional person who stated that he had previously owned leasehold property. The tribunal was somewhat at a loss as to why Mr Raddenbury has allowed himself to get into this situation, rather then seek the written consent which the lease clearly requires. He had no answer to this.

66. Mrs Croudace gave evidence as follows:-

a. She is afflicted with a medical condition which made it difficult for her to stay focussed on the tribunal proceedings and, from time to time, she would leave the hearing (albeit not when giving her evidence).

b. Mrs Croudace has suffered from her medical condition at all material times. This will have made the task of discharging director's duties difficult for her.

c. Mrs Croudace's evidence was that consent was often given by her on a verbal basis. She was unaware of any unauthorised work being undertaken. Historically, the minutes of company meetings had been considered a good enough record for her. Candidly, she accepted "with hindsight I would have managed building works by all Flat owners very differently."

d. In respect of the First Respondents, she stated that she recalled a conversation with Claire Raddenbury (then Raynor) in which she discussed proposed internal development works being undertaken in Flat 1. Mrs Croudace's position was that she insisted upon a structural engineer's report being obtained prior to any work being undertaken – the clear implication, in the tribunal's view, being that if the works were in a format acceptable to a structural engineer then her permission was granted.

e. Mrs Croudace also referred to speaking to Mrs Raddenbury on a number of occasions and that "we would often discuss the progress of their internal development works."

f. Mrs Croudace also referred to the lax and informal approach generally at the premises, with residents, for example, simply posting notices on a communal notice board as a means of letting other residents know what they were doing to their property.

67. Mrs Raddenbury

a. Mrs Raddenbury also impressed the tribunal as a professional and competent individual. Given that Mrs Croudace's evidence was somewhat vague, much of the Flat 1 application rested upon the view we took of Mrs Raddenbury's evidence. We viewed it anxiously and critically. We found Mrs Raddenbury to be guarded in the manner in which she answered some questions.

b. We were told of a conversation in or about 2004 where Mrs Croudace had required a structural engineer's report. It is said that this was the occasion when a verbal permission was given for works to be undertaken. The report was later offered to Mrs Croudace, who declined to hold a copy of it on behalf of the Applicant. We were told about how residents' meetings were updated as to the progress of the works and the issues (in terms of inconvenience of builders etc. on site) it had caused for the occupants of the premises.

c. We were told of a later request for the glass partition between Flats 1 and 2 to be removed and blocked up, especially given the anti-social behaviour of the occupants in Flat 2 at that time.

d. A letter dated 28 April 2005 has caused us to pause carefully for reflection. In it, Mrs Raddenbury (then Claire Raynor) writes to Justine Johnson (then owner of Flat 2) in respect of a forthcoming residents meeting on the 19 May 2005. The letter concerned the proposed replacement of an existing lounge window at Flat 1. The letter states "I can confirm that I will be able to attend and wondered if this was the correct forum in which to bring up a query I had about our property, Flat 1." Why, it might be asked, was Mrs Raddenbury writing to ask if she could seek the general approval of the company at a meeting if she honestly believed that all she required was the oral permission of a director, as alleged to have taken place earlier between her and Mrs Croudace in 2004. This might be thought to excite doubts as to the veracity of the evidence given about the alleged 2004 oral

permission. Mrs Raddenbury had no satisfactory answer to this point, save to say that she could not remember.

68. Mrs Judith Kelly gave evidence on behalf of her mother Mrs Eirlys Davies:-

    a. She frankly conceded that works undertaken to her mother's "lean to" had not been with any consent. She referred, attractively and persuasively, to the works undertaken (plastering the wall, putting in a suspended floor etc. – see above for full list) as being works of "gentrification" rather than being structural in their nature.

    b. The tribunal found Mrs Kelly to be a straightforward and honest witness.

    c. There is an unfortunate dispute between Mrs Kelly and Mrs Hayward as to whether the latter was aware of the works of "gentrification" as a result of having attended at the Flat 2 in the capacity as a neighbour. It is an invidious task to invite the tribunal to chose whose account, as between Mrs Kelly and Mrs Hayward, we should prefer. Both ladies appeared straightforward and honest in their accounts to us. The tribunal declines to make a finding on this particular point, it is not essential to the resolution of the key issues in hand and the disagreement is most likely the result of a misunderstanding on someone's part rather than anything else.

69. Mr Croudace gave evidence that he told his wife, Mrs Croudace, what works he was intending to do to the "lean-to" at Flat 3. Again, the works are perhaps best summarised as being in the nature of gentrification rather than structural. From his point of view, a director of the Applicant (his wife) was aware of the works and he required no further permission.

70. Mrs Margaret Hoult played only a small part as a litigant in person and in the evidence which she gave. It was not clear to the tribunal that Mrs Hoult had a full grasp of all the issues which were in play. We would have been troubled had she appeared totally "on her own" where the issues might have a significant impact upon her. However, whilst not directly represented by Mr Brown, her position "fell in" behind the 1 – 3 Respondents, as the issues which engaged her also applied to them as well. Mrs Hoult told us that she had replaced a window to her "lean-to" on a like for like basis.

71. It was agreed at the pre-trial review that a number of background witness statements could simply stand as their evidence. These included Tony Crook, Mike Frost, Rosemary Robinson and Jo Howells. None of the applications ultimately turn on this evidence, given that the "common ground" was that the lean-tos have been in situ for many years.

Closing submissions

Mr Brown, on behalf of the 1 – 3 Respondents

72. Mr Brown:-

a. Invited the tribunal to ignore structural alterations which occurred prior to the assignment of the present demises and to focus on what breaches are alleged to have been caused by the current Respondents.

b. Shortly, and correctly (for reasons articulated already), submitted that the case in respect of 2(t), which sought to rely upon a freehold covenant, was hopeless.

c. He submitted that the allegations of nuisance and annoyance were misconceived and that the presence of moss, water on a communal garden and noise of rain fell far short of nuisance and/or annoyance. He reminded the tribunal that moss is to be found on other parts of the premises. There was, he said, no evidence that waterlogged grass had not been able to be cut. He referred to the evidence as embarrassingly light, a description with which we agree.

d. Reminded us that there was no expert evidence as to what work had been carried out.

e. Invited us to ignore the works carried out at Flat 1 as the clause against structural alterations without consent refers to alterations, “in the flat.” He submitted that as the works were to the rear of the flat, they could not be said to be “in the flat.” He invited us to adopt this approach, rather than defining “in the flat” as the area edged red.

    i. In interpreting the clause 2(i) invited us to objectively assess the common intention of the parties at the date of the lease.

    ii. Invited us to contrast the wording of 2(i) (“in the flat”) with 2(t) which clearly had external erections and extensions in mind.

f. If we were against him on the “in the flat” interpretation, we were invited, in any event, not to find a breach at Flats 3 and 4, as the “lean to” is located in an area which is not edged red in respect of them.

g. Alternatively (if we were against the interpretation of “in the flat”) submitted that the works to Flats 2 and 3 were cosmetic and not structural in nature. The phrase “gentrification” was adopted.

h. Alternatively (if we were against the interpretation of “in the flat”) suggested that the works of a structural nature (as opposed to the works of a cosmetic nature) were carried out with the verbal consent and knowledge of the Applicant, via Mrs Croudace.

i. Submitted that the verbal consent granted had been a full consent in the knowledge of all material circumstances, due to the fact that the structural engineer’s report had been offered by Mrs Raddenbury to Mrs Croudace.

j. By way of further alternative argument, submitted that the Applicant had acquiesced in the breach by virtue of it having taken so long and been so obvious to all at the premises as to what was happening.

k. Referred to promissory estoppel as capable of being either suspensory or extinctive in its effect. Further, the breach not to alter the structure was a one off breach.

l. Mr Brown, wisely in our view, did not seek to develop an earlier written argument (not made by him) that a record in company meeting minutes counted as a written permission. This submission, had it been pressed upon us, would have been rejected out of hand and we mention it here only for completeness.

Mr Hayward, on behalf of Applicant

73. Mr Hayward

a. Submitted that 2(i), 2(o) and 2(t) had all been breached.

b. Emphasised the requirement for permission to be in writing

c. Highlighted the fact that Mrs Croudace’s evidence was vague as to whether she actually gave express permission (despite the tribunal having directed at the pre-trial review that any further witness statements must “provide such further detail of the circumstances of any alleged oral permission to carry out works and the extent of the works which have been carried out.”)

d. Emphasised that the permission in respect of the bathroom window being blocked up would not have been granted in 2004 and questioned whether further consent had been granted when it was later actually undertaken.

e. Suggested that in respect of Mrs Raddenbury “she would say that” in respect of her alleged verbal permission and that her evidence was not good enough for the tribunal to form a view that an unambiguous representation had been made.

f. Reminded us that no permission has been sought by Flat 2 and the works therein were structural in nature.

g. Highlighted the unsatisfactory feature of Mrs Croudace giving permission to her husband.

h. Invited us to treat “in the flats” as being in the area edged red.

i. Argued that the test for nuisance here was subjective rather than objective.

j. Persisted in arguing that 2(t) was relevant.

k. Stated his costs were £300, which he intended to try and recover via the service charge provisions.

l. Invited us to consider a solicitor’s report which advised about the situation pertaining at the premises.

74. Mrs Hoult made no substantive closing address.

The tribunal’s determination.

75. We do not deal here with all issues which have been canvassed and some issues (particularly so far as the applicable law) have already been dealt with elsewhere in this decision. Here we deal with the essential matters which go the heart of the issues, as we see them, between the parties.

76. We are unpersuaded by Mr Brown’s attempt to persuade us that “in the flat” should mean anything other than the area clearly marked red on the plan which accompanies the lease. This definition appears to us to be expressly provided for in the lease. This means that works “in the flat” appear to have been undertaken to Flats 1 and 2, but not Flats 3 and 4.

77. We are not persuaded that the works *by the current Respondents* in Flats 2, 3 and 4 amount to structural works. We adopt the phrase used by Mrs Kelly in finding that they were works of gentrification only. We have no expert evidence before us as to whether any of the “works of gentrification” carried out by these Respondents would have “cut, maimed or injured” the premises. We cannot, in these circumstances find this point made out.

78. Some, but not all, of the works to Flat 1 are structural in nature. There would be a breach of the lease unless the First Respondents have persuaded us that an estoppel arises which prevents the Applicant from enforcing clause 2(i).

79. We place no reliance upon the solicitor's report as the tribunal, with the benefit of both a 3 day hearing and extensive legal submissions, must be the arbiter of both law and fact.

80. Having approached the evidence in an appropriately careful and critical manner we are persuaded that the Raddenbury's were given permission to undertake the works which they subsequently undertook. We are satisfied for these reasons:-

    a. Having heard from many of the occupants of the premises, it is clear that the management regime which was operated in or about 2004 – 2006 (and probably later) was very lax indeed. Mrs Croudace accepts that she should not have conducted herself in the way in which she did, granting oral permissions. At a time when the occupants were living in easy harmony this appeared to Mrs Croudace as an appropriate way to proceed. It was not. Other occupants in the premises, including directors of the Applicant who have given evidence on behalf of the Applicant (Mrs Gwilt and Mrs Givens) have, to a greater or lesser extent, also benefitted from works which are probably structural in nature, without the written consent of the landlord. It is clear that from 2009, Mrs Hayward, with Mr Hayward in the wings, tried to bring more appropriate management to bear. However, the period in question is long before Mr & Mrs Hayward's active involvement in the management of the premises when things were, we find, conducted in a very lax, informal and relaxed manner.

    b. Mrs Raddenbury refers to having asked for permission in 2004 from Mrs Croudace. Her recollection was that she was simply told that she must obtain a structural engineer's report. We are satisfied that the report, which in due course was offered to Mrs Croudace, would have contained the material essentials of what was proposed to be done. She was aware, in the round, of the works which were going to be undertaken and chose not to accept the invitation from Mrs Raddenbury to inform herself more deeply in the detail.

    c. Whilst we have viewed Mr and Mrs Raddenbury's evidence carefully and critically, on the balance of probabilities, we believe what they are telling us. They found a relaxed regime and asked for and obtained verbal permission. They are intelligent people who spent in excess of £70,000 in purchasing the lease and then a further £20,000 developing it as described. Whilst the letter of the 28 April 2005 (as described above) has caused us to reflect as to whether we are right to believe what we are being told, it does not deflect our overall conclusion of the matter. The letter demonstrates a responsible attitude to obtaining consent for works (which on this occasion were less extensive than the works subject to oral permission in 2004) to

be undertaken and we accept that Mrs Raddenbury simply could not recall why it was that she wrote on this occasion rather than simply asked Mrs Croudace again. Here she did not attempt to gild the lily. We take this view in the context of the generally relaxed management culture we have found to exist at the time and bear in mind that Mrs Croudace has had medical issues at all material times which may have meant she was not always available for consents to be sought. Given that we accept what we are being told, on the balance of probabilities, it seems to us that an estoppel must arise preventing the Applicant now seeking to enforce clause 2(i) as against the First Respondents. We find that a clear enough representation has been made on behalf of the Applicant, that permission was being granted by Mrs Croudace insisting on a structural engineer's report. This representation was clear enough to cover matters both expressly and impliedly included within the works, such as the drain re-routing. The First Respondents have then significantly acted to their detriment in reasonable reliance upon this representation and it would now be unconscionable for the Applicant to be able to enforce the clause. The estoppel here has an extinctive effect.

d. Having accepted the Raddenbury's principal evidence, on the balance of probabilities, we see no reason to doubt Mrs Raddenbury's account of seeking later permission to block up the dividing window. This accords with Mrs Croudace's vague recollection of being updated from time to time.

e. We do not accept that this tribunal has jurisdiction to consider the question of acquiescence. We reject the notion, advanced by Mr Brown, that we should comment upon it "in order to assist the parties" resolve their disputes. We are concerned only with a question of a breach and a breach here which has been acquiesced in remains a breach, in our view. However, on the facts as we have found them to be there is not a breach as the estoppel operates so as to prevent clause 2(i) being enforceable against the First Respondents in any event.

f. We reject the 2(t) freehold covenant alleged breach out of hand for the reasons articulated by Mr Brown and already articulated by the tribunal. We accept that the evidence in support of nuisance and/or annoyance is embarrassingly thin and the breach is not made out.

g. We have put the guarded style of Mrs Raddenbury's evidence down to both nerves and a sense of frustration that she was having to deal with this application at all. So far as the latter is concerned, we have little sympathy with the Raddenburys, as they are both capable and intelligent people who could have avoided "heaping coals in

their own lap" by simply following the provisions of the lease they had covenanted to abide with. However, nerves and/or annoyance at the situation in which Mrs Raddenbury found herself in do not deflect us from seeing that what Mrs Raddenbury told us was the truth.

s.20C Landlord and Tenant Act 1985

81. The tribunal has jurisdiction under s.20C "as it considers just and equitable in the circumstances" to make an order blocking the landlord from the contractual recovery, under the lease, of the costs of the proceedings before this tribunal. No case law was submitted to us.

82. As we have already noted, the service charge mechanism does not provide for contractual recovery of such costs, so the point becomes academic given this determination. However, the tribunal would state that we are not critical of the stance which Mr Hayward has taken. We have found him to be a genuine and straightforward individual who has been left with the unenviable task of trying to sort out a property management nightmare. Despite the fact that the Applicant has lost, we think that it was an entirely reasonable application to bring in the circumstances and for the evidence to be tested as it was. We have commented above that the Raddenburys (who had the most to lose if the breach application was successful) have largely brought the costs and aggravation of this dispute upon themselves by failing to follow the terms of their lease. Upon this basis, we would not have exercised a discretion under s.20C had the occasion called for us to do so.

Schedule 12, paragraph 10 of the Act "unreasonable costs."

83. Under Schedule 12, paragraph 10 of the Act the tribunal can make an order of up to £500 if it regards, the proceedings to have been conducted "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings." As there are four applications this could amount to a penal award of costs of up to £2,000.

84. Given our overall finding as to how Mr Hayward had conducted the Applicant's case all trigger facts are clearly not in play save for the issue of "otherwise unreasonably in connection with the proceedings."

85. It was Mr Brown's argument that for Mr Hayward to persist in his clause 2(t) argument was simply timewasting. The tribunal indicated that it was a complicated question to consider to which Mr Brown submitted that after Mr Hayward was in receipt of his skeleton argument dated 12 October 2014, he should have properly addressed his mind to the legal issues in play, which were clearly set out for him. It was his submission that the costs of the

proceedings and the hearing had been enlarged by the 2(t) issue and by the pursuit of an embarrassingly thin nuisance claim.

86. The tribunal is of the view that there can be no question of unreasonable costs arising prior to the pre-trial review directions being complied with and the 12 October 2014 skeleton being sent to Mr Hayward. We accept that some individuals might have recognised the way in which the "wind was blowing" after that point. However, the tribunal is designed to accommodate litigants in person and some of the questions which it is called upon to determine, as here, are legally complicated. Whilst Mr Hayward might be guilty of not being able to take a hint as to what his best arguable points were, we are not satisfied that, on this occasion, his persistence should be castigated as behaviour falling within the unreasonable costs provisions.

87. Further, even if we were wrong about that and Mr Hayward crossed the line into being unreasonable, we are far from satisfied that the "hopeless issues" (nuisance and 2(t)) significantly enlarged the costs or final hearing (i.e. after the skeleton, which we accept would have incurred additional costs on account of these points having to be addressed) such that a costs sanction would be appropriate. The hearing ran until lunch time on the 3rd allotted day and we struggle to see how, even if these issues had not been pursued, the matter could have been brought within two days.

88. Upon this basis we decline to exercise our discretion to make an unreasonable costs award.

Dated 7 January 2015

Lawyer Chairman