Neutral Citation Number: [2018] EWHC 3501 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)

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

Date: 19/12/2018

Before:

MR JUSTICE MORGAN

- -

Case No: CH-2018-000135

Between:

SARVENAZ FOULADI

Claimant/ Respondent

- and –

(1) DAROUT LIMITED
(2) AHMED EL KERRAMI
(3) SARAH EL KERRAMI

Defendants/ Appellants

(4) ST MARY ABBOTS COURT LIMITED

Additional Defendant to the Original Claim (but not party to the First to Third Defendants' appeal)

AND

Case No: CH-2018-001136

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)

Between:

SARVENAZ FOULADI

Claimant/
Appellant

- and –

ST. MARY ABBOTS COURT LIMITED

Defendant/
Respondent

- -
- -

Mr Edwin Johnson QC (instructed by **Bircham Dyson Bell LLP**) for the **Claimant**
Mr Gordon Wignall (instructed by **BLM LLP**) for the **First to Third Defendants**
Ms Philomena Harrison (instructed by **Gordon Dadds LLP**) for the **Fourth Defendant**

Hearing dates: 4-7 December 2018

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Approved Judgment

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

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MR JUSTICE MORGAN

MR JUSTICE MORGAN:

Introduction

1. This judgment concerns two appeals against the order of His Honour Judge Parfitt made in the County Court at Central London on 3 May 2018. The order was made to give effect to the judgment which the judge had handed down earlier, on 28 February 2018. The judge began his judgment with a summary of the position at the trial and that summary is still helpful for the purpose of introducing the issues raised by these appeals. I will base the following summary on what the judge himself said.

2. St Mary Abbots Court is a late twenties/early thirties mansion block development in London W14. The dispute concerned the leases of two flats in Block B. The Claimant is the lessee of Flat 62 and occupies that flat with her mother ("Mrs Fouladi"). The First Defendant is the lessee of Flat 66 and the Second and Third Defendants are the occupiers of that flat. Flat 66 is on the top floor in Block B and Flat 62 is directly below. The Fourth Defendant is the landlord. The flats are held on long leases on the same terms. Both flats are toward the higher end of the London market, the valuers agreed £2,400,000 as the expected value of Flat 62, and the leases refer to them as "high-class". The First Defendant is a Maltese registered company which the Second Defendant described as being a family asset holding vehicle.

3. The Claimant's case was that, since 2010, living in Flat 62 has been insufferable as a result of noise disturbance coming from Flat 66. The nature of the disturbance was said to be all the noises created by normal living and in addition particular noises created by the lifestyle of the Second and Third Defendants including the Second Defendant getting home late and moving and using facilities within Flat 66, the Second and Third Defendants having parties or gatherings that went on into the early hours which involved excessive noise including drums and ululations and the Second and Third Defendants' children being allowed to run around Flat 66 at all hours. There were also allegations of noise created or exaggerated deliberately to annoy the Claimant and her mother. The Claimant's case was put in (i) contract, under the First Defendant's lease, and (ii) nuisance.

4. The Second and Third Defendants denied the allegations of excessive noise. The Second Defendant explained that he and his family did all they could to reduce the noise they made because they were aware of how upset it made Mrs Fouladi. They did not wear shoes in the house, their chairs had dampening caps on the feet, devices such as the shower, washing machine and dishwasher were not used at unsociable hours. The Second Defendant accepted that he quite often came in late at night but denied being particularly noisy at those times, although he did watch television. He accepted that the Third Defendant would have friends over and that sometimes they would stay late but denied there would be any drum playing or singing. The children were children and so would run around sometimes but not from early in the morning to late at night: they would be too tired and besides had nursery and school to get up for and be alert at. The Royal London Borough of Kensington and Chelsea ("RBKC") witnessed the alleged noise nuisance and in February 2011, after certain works had been done to the sewage drainage system and shower pumps, decided there was no continuing nuisance.

5. The Claimant's case against the Fourth Defendant was that its conduct surrounding the licence given to the First Defendant to carry out the 2010 renovation works rendered it directly responsible for the nuisance and/or meant that the continuing nuisance was a breach of the covenant for quiet enjoyment within the lease.

6. The Fourth Defendant denied that it did anything to create a responsibility for the alleged nuisance as between itself and the Claimant, either under the lease or in tort, but if it were liable then it considered the First to Third Defendants liable to indemnify it and had served third party proceedings against them in that respect, which, if necessary, were to come on for trial subsequent to this judgment.

The judge's conclusions

7. Following a 8-day trial and a site visit in December 2017, the judge gave a reserved judgment on 28 February 2018. The judgment runs to 46 pages, typed single-spaced. Later in my judgment, when I am considering the challenges made to the judge's findings, I will need to refer to parts of his judgment in considerable detail. For the present, I will record the essential conclusions which he reached.

8. The judge held that the First Defendant had acted in breach of the lease of Flat 66 when carrying out the 2010 works. He further held that the covenants in the lease which the First Defendant had broken were part of a letting scheme which could be enforced against the First Defendant by the Claimant. The judge then held that the 2010 works had given rise to an actionable nuisance on the part of the First, Second and Third Defendants. The judge awarded damages against the First Defendant for its breach of contract and against the First to Third Defendants for nuisance. The judge also held that he should order the First Defendant to carry out works to Flat 62 which would remedy the breach of contract and the nuisance. The judge dismissed the Claimant's claim against the Fourth Defendant for breach of the covenant of quiet enjoyment and in nuisance. The judge then made an order which he considered gave effect to his judgment.

An outline of the appeals

9. The First to Third Defendants have appealed the order made by the judge, with permission given by Arnold J. I will set out their grounds of appeal later in this judgment. The grounds of appeal are lengthy and wide-ranging. They challenge the judge's findings as to liability and quantum and as to the form of order which should be made, even if they were found to be liable. Their Appellant's Notice asks the appeal court to set aside the entirety of the order. So far as the appeal on liability is concerned, there is a challenge to the judge's findings of fact. On the hearing of the appeal, the First to Third Defendants asked for an order for a new trial in place of an order simply setting aside the judge's order.

10. The Claimant has appealed, again with the permission of Arnold J, against the dismissal of her claim against the Fourth Defendant based on the covenant for quiet enjoyment and in nuisance.

11. Mr Wignall appeared on behalf of the First to Third Defendants, Mr Johnson QC appeared on behalf of the Claimant and Ms Harrison appeared on behalf of the Fourth Defendant. Each of these counsel had also appeared at the trial in the County Court.

Grounds of appeal by First to Third Defendants

12. The Appellant's Notice contains eleven grounds of appeal. In this judgment, I will consider Grounds 1 to 9. I will consider those grounds separately and when I do so I will set out the full wording of the relevant ground.

13. The Appellant's Notice also included Grounds 10 and 11. Ground 10 concerned the costs order made by the judge. There is an independent ground of appeal against that costs order which will have to be considered even if all of the other grounds fail. It has been agreed that is not appropriate to deal with Ground 10 until I have given my judgment on Grounds 1 to 9.

14. Ground 11 was a challenge to the judge's decision to refuse to grant a stay of his order pending appeal. In the event, Arnold J granted a stay pending appeal and so I do not need to address Ground 11.

Appeals on fact

15. As will be seen, a number of the grounds of appeal of the First to Third Defendants involve challenges to the judge's findings of fact. In the light of that, it will be helpful to identify the principles which I ought to apply to such an appeal.

16. The principles which are to be applied by an appeal court dealing with an appeal against a finding of fact are well established and have been considered in a large number of cases. As it happens, they have been considered twice recently by the Supreme Court in McGraddie v McGraddie [2013] 1 WLR 2477 and Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600. In the second of these cases, Lord Reed said at [67]:

> "67 It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

17. In addition, there is a helpful summary of the relevant principles in Fage UK Ltd v Chobani UK Ltd [2014] ETMR 26 at [114], as follows:

> "114 Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc [1997] R.P.C. 1* ; *Piglowska v Piglowski [1999] 1 W.L.R. 1360* ; *Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; [2007] 1 W.L.R. 1325* ; *Re B (A Child) (Care Proceedings)*

[2013] UKSC 33; [2013] 1 W.L.R. 1911 and most recently and comprehensively *McGraddie v McGraddie [2013] UKSC 58; [2013] 1 W.L.R. 2477*. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:

i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii. The trial is not a dress rehearsal. It is the first and last night of the show.

iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A [2002] EWCA Civ 1039; [2003] 2 W.L.R. 210* ; *Bekoe v Broomes [2005] UKPC 39* ; *Argos Ltd v Office of Fair Trading [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135* .

116 I make these points not out of any criticism of the judge. Quite the reverse. His judgment was admirably economical. But in their "replacement skeleton argument" Chobani

> criticised him for not having dealt in detail with particular evidential points on which they wished to rely in this court; and attacked a number of his detailed factual findings. The judge heard evidence over seven days and read a mass of material. I would therefore be most reluctant to disturb any of his findings of fact (whether primary or evaluative) unless compelled to do so. …
>
> 117 In addition some criticism was levelled at the judge for not having dealt more comprehensively with the ingredients that needed to be proved in order to maintain a successful claim in passing off. But the judge's judgment must be read against the background of what was actually in dispute between the parties. He dealt with the matters that were in dispute, and if he did not dot every "i" and cross every "t" in relation to what was not disputed, I do not consider that that is a valid ground of criticism."

Ground 1

18. Ground 1 is in these terms:

> (1) "The judge was wrong in his approach to the assessment of the evidence of the Claimant and her mother (Mrs Fouladi). He was wrong in that he considered that he could determine to an acceptable "level of generality" the existence of a noise nuisance from the everyday living sounds of Flat 66 by assessing the evidence of the Claimant and her mother on the basis that, although the quality of the evidence they provided was often exaggerated or otherwise not to be believed, the quantitative effect of that evidence alone was probative. He was also wrong in that, having decided that much of the evidence of the Claimant and her mother could not be accepted, he could and should have tested the extent to which there was a nuisance by reference to the opinion evidence which was available to him, in particular that of Dr Latham. (The assessment of the "Nature and Extent of the Noise Nuisance" is at J/143-185; see also the Further Particulars below.)"

19. This ground is a challenge to the central findings of fact made by the judge. As the ground states, there was a long section of the judgment between paragraphs [143] and [185] in which the judge considered "The Nature and Extent of the Noise Nuisance". He expressed his essential conclusions at paragraphs [182]-[185] in these terms:

> "182. *Conclusions on Nature and Extent of Noise Nuisance* I find that the occupants of Flat 62 could hear day to day living noise coming from Flat 66 to a level which has and continues to have a detrimental impact on the Claimant's occupation of Flat 62. I find that the noises are the noises associated with everyday living. I find also that those noises include on occasion late night parties but that such parties (even if they do include singing and drumming) are not frequent. I find that the noises include those of children playing and running around,

including late at night. The impact of the noise is sufficiently loud to be invasive and disturbing to an objective standard.

183. My summary reasons for these findings are:

(a) Broadly I accept the basic core allegations contained in the diary and emails of day to day living noise. I reject however the exaggerations in the diary. My use of the phrase day to day is intended to exclude such exaggerations and to exclude the allegations of deliberate noise making to annoy (necessarily not part of the everyday).

(b) Furthermore, and even allowing for exaggeration, I accept the evidence of both the Claimant and Mrs Fouladi that they have found living in Flat 66 difficult and disruptive of their day to day lives. This disruption does not prove the nature and extent of the noise nuisance itself but it is consistent with such extent being significant.

(c) These basic core allegations are supported by the RBKC statements, with which they are consistent, and are not undermined by the determination that there was no statutory nuisance. I do not know what criteria RBKC were applying but it seems likely to include the proposition, without more, that day to day noise is not actionable as a statutory nuisance.

(d) My finding that requirements under the lease for noise transmission reduction were not complied means that the barrier between Flats 66 and 62 was not one which was inherently likely to exclude noise transmission.

(e) The failure of the kitchen and bathroom floors to meet building regulation requirements supports my conclusions on the noise transmission issue. Likewise the closeness to the regulatory limit of the wooden floors, combined with the absence of any acoustic mitigation in those floors, also supports those findings (the point being made is simply one of inherent probability).

(f) The recordings as heard by the experts provide some support for the conclusions both as to the day to day nature of the noise and for its level being towards the lower end of what would be bothersome (this being consistent with the agreed statement at paragraph 14).

(g) The criticisms made of the evidence relied on behalf of the Claimant, although successful in some respects,

> fail to undermine that evidence to the extent that would be required for me to reject what I regard as the core claim – of day to day disturbance from the sounds of day to day living.
>
> 184. It follows that I find as a fact that the following material allegations in paragraph 31(2) of the particulars of claim are made out to the extent stated, the Claimant has experienced significant and substantial noise transmission from Flat 66 including the following: noise from the bathrooms; noise from the kitchen; footfall noise, including children running; noise of furniture being moved; noise from voices; doors banging; general unidentified noise transferred from the floor.
>
> 185. I also find that these noises can be heard throughout the day and night. The noises that can be heard include the noises from parties, when they occur."

20. The section of the judgment which had the heading "The Nature and Extent of the Noise Nuisance" started at paragraph [143]. Before that section of the judgment, the judge had set out in apparently meticulous detail his summary of the evidence he was given as to the disputed matters of fact; this summary ran from paragraph [12] to paragraph [97]. The judge then, at paragraphs [98] to [105], summarised the evidence of two acoustic experts, Mr Clarke for the Claimant and Dr Latham for the First to Third Defendants (and, indeed, the Fourth Defendant), to the extent to which the judge found that evidence helpful to him. The judge then dealt with other matters which had been argued before arriving eventually at his consideration of the evidence as to the nature and extent of the noise nuisance.

21. Between paragraphs [143] and [182] of the judgment, the judge engaged in a detailed discussion of the many points in play as to which evidence he should accept as to the nature and extent of the noise nuisance. His detailed assessment of the evidence given by the Claimant and her mother was central to that assessment. He gave a large number of reasons as to why he was cautious about accepting their evidence. He explained that he did not accept large parts of it. His reasons included his consideration of:

    (1) their answers in cross-examination;

    (2) whether they were satisfactory witnesses (he held they were not);

    (3) the medical evidence about them;

    (4) the fact that they were hyper-sensitive to noise;

    (5) the diaries which revealed their personality and their perceptions; their perceptions were in many cases patently untenable; some statements in the diaries were dramatic but worthless; the diaries showed considerable exaggeration and obsessive reactions;

(6) the fact that there had been no demonstration carried out to evidence to the judge on his site visit the extent of the transmission of noise;

(7) the evidence as to the position before the 2010 works;

(8) the arguments about "stacking", the term used to refer to rooms above each other being used for the same purposes; and

(9) the evidence from the Second Defendant.

22. In the course of weighing the evidence, the judge made two specific findings. The first was in these terms:

> "163. However, what I also conclude and this is borne out by the many entries which describe basic domestic activity on the part of the occupants of Flat 66 – cooking and cleaning, children running and playing, people walking, using chairs, watching television and washing – is that the general day to day activity from Flat 66 was audible in Flat 62. I do not consider these many entries are made up and while some of Mrs Fouladi's conclusions about what sounds are, such as angry breathing, deserve no weight, other conclusions, such as footsteps, washing and voices, are likely accurate because they are the consequence of everyday living in Flat 66.
>
> 164. For these matters, and when stripped of its rhetoric and subjectivity, these type of entries comprise the bulk of the potentially relevant material in the diary, the relevant forensic options are either (a) fabricated because there is no sound or (b) these are what was being heard. So far as the diary is concerned (and without at this stage reaching a conclusion about how intrusive these sounds are) I prefer (b)."

23. The second specific finding at this part of the judgment related to evidence which the judge had from officers from the RKBC about what they had observed when they were called by the Claimant on a number of occasions to come to Flat 62:

> "170. I conclude that everyday noises of the type described by the officers could be heard to a disturbing level in Flat 62 coming from Flat 66 and such noises, even at midnight for example, could include children playing. This is what officers recount. Nothing happened to the flooring or otherwise at Flat 66 during the period in question that might have stopped that level of sound from being audible between the two flats. It follows that the basic core of what the Claimant alleges (the everyday type living sounds set out at paragraph 31(ii) of the particulars of claim) could have been audible in general because they were audible by those officers on those particular occasions. Exaggeration, whether in general or otherwise, does not alter this core level of potential disturbance. The logic is:

> The RBKC officers provide reliable statements about their own impressions, albeit those occasions are limited and there are other occasions when officers come and hear nothing remarkable.
>
> However, the fact that RBKC officers record everyday sounds being heard at all strongly indicates that such sounds were audible in Flat 62 from Flat 66.
>
> If the sounds were audible on those occasions then it is unremarkable (since the flooring and other relevant context remained the same) that similar sounds caused by everyday living would have been audible on other occasions.
>
> To a great extent that is what the diaries and emails record and to that extent it is not unlikely, once the RBKC officers evidence is accepted."

24. The first part of Ground 1 contends that the judge was wrong to accept any part of what the Claimant and Mrs Fouladi had said in evidence and therefore wrong to make his findings in paragraphs [182]-[185] of his judgment. In presenting his argument on this point, Mr Wignall took me to the judge's own judgment and emphasised all of the negative points about the evidence of the Claimant and Mrs Fouladi which the judge himself made. That served to demonstrate that it could not be said that the judge had left those matters out of account. Given that he took them into account and explained why, and the extent to which, he was doing so, the assessment of those matters was for the trial judge. It is quite impossible for an appeal court to form any opinion of its own on those matters particularly where what the appeal court is asked to consider is the same material as the judge fully considered when he made his assessment.

25. If I apply the relevant principles as to an appeal against a trial judge's findings of fact based on the assessment of witnesses, this part of Ground 1 can be seen to be completely unsustainable. The judge made no error of law. His assessment was based on the evidence before him so that he had evidence to support his finding. He considered all of the relevant evidence and his decision is fully explained and justified.

26. In fact, it is possible to go further in this case. This is not a case where an appeal court suspects that something might have gone wrong but yet, as a matter of principle, does not interfere with the findings of the trial judge. In this case, the exercise carried out by the trial judge appears to have been impeccable. It was certainly thorough and fully explained. Further, the critical findings which are now attacked were corroborated by his finding at paragraph [170] based on the evidence of the officers from RBKC and that paragraph is not the subject of any challenge by the First to Third Defendants.

27. The second part of Ground 1 is that the judge should have tested the extent to which there was a nuisance by reference to the opinion evidence given to him by one of the expert witnesses, Dr Latham, called by the Defendants.

28. In response to this part of Ground 1, the first point to make is that it is not demonstrated that the judge did not test the evidence of fact by referring to the

opinion evidence. The judge was well aware of the opinion evidence of the two experts. He summarised the contribution which he felt that those experts made when he said in his judgment:

"**Material Findings from the Acoustic Experts**

98. By the conclusion of their oral evidence, there was a large degree of common ground between the acoustic experts. Perhaps the most significant area of disagreement was over whether it was sufficient, so far as nuisance was concerned, for the various floors in Flat 66 to meet the nearest equivalent building regulations for sound transmission or not. In reality this sufficiency issue is not an expert issue but rather a question of law or fact as to whether meeting the standards is what is required to comply with the contractual obligations set out in the Flat 66 Lease or as a measure of what might or might not be acceptable noise disturbance for the purpose of common law nuisance.

99. The standards most often referred to within the expert reports were the regulations for converted premises and the regulations for new builds. These provide limits of 64 db and 62db respectively for impact sounds and 45 db and 43 db for airborne sounds. After testing the experts agreed that the kitchen and bathroom floors of Flat 66 would not meet either standard for impact sounds. The living room wooden floor was measured at 62db and so would meet the standard. All floors would meet the airborne standard, except where adjacent to the lightwell.

100. The experts did not agree as to whether the standards, of themselves, represented a good level of sound insulation. It seems to me this is too limited a question to be helpful. The court must reach a view as to the nature and extent of the noise interference which, in the present case, is largely derived from the accounts of the Claimant and Mrs Fouladi. The test results have an impact on the assessment of that evidence but the court's findings must take all the relevant evidence into account (which includes the test results). It is not sufficient to avoid having to address the real issue by simply applying standards.

101. The experts disagreed as to whether the noise from the ensuite shower pump or the bathroom shower pump were such as to warrant replacement. Dr Latham, essentially, considered these were not intrusive enough to require any remedial action. Mr Clarke considered that since the Claimant and Mrs Fouladi found them intrusive and because they could be easily remedied then they should be. For present purposes I note that neither expert considered that the noise from the shower pumps

> was that loud – Mr Clarke was concerned that it was more intrusive during night use.
>
> 102. In his oral evidence, Dr Latham, described the impact noise from Flat 66's kitchen as one of the worst he had ever tested – a tap could be heard from the Flat 66 kitchen in the Flat 62 living room.
>
> 103. In his oral evidence, Mr Clarke emphasized that sound transfer within buildings is complex and changing elements within a structure can have unpredictable consequences.
>
> 104. Mr Clarke selected a trial sample of the recordings made by the Claimant and Mrs Fouladi. Both experts listened to those recordings and agreed comments which are set out in Appendix B to their joint report. Looking through these comments the following features appear most significant:
>
> (a) On occasion no sound can be identified as relevant, on others only external traffic can be heard (which is the same evidentially as no sound);
>
> (b) Much of the sounds heard are described as low-level;
>
> (c) The types of sound are often shower pump or running water;
>
> (d) The activities identified are everyday – having showers, footsteps, voices, a child crying, the kitchen floor being swept.
>
> 105. Mr Clarke had proposed a solution to the flooring issue which was agreed between the experts to be one which if a best practicable scheme was required throughout Flat 66 would meet such a standard but subject to review of suppliers and practical constraints. It was also agreed, however, that more practicable solutions might be found for the kitchen floor."

29. In these paragraphs, the judge explained the assistance which he derived from the expert evidence. Beyond that, he plainly did not derive assistance from their evidence when considering the matters of historic fact in relation to the period from the completion of the 2010 works until the trial.

30. Mr Wignall submitted that if I considered the report of Dr Latham, I would see that there was evidence there which the judge ought to have regarded as helpful when considering matters of historic fact. One difficulty with that submission is that Mr Wignall only showed me the report of Dr Latham and did not show me a transcript of the evidence he gave in cross-examination. I was told by Mr Johnson that Dr Latham was cross-examined by reference to the evidence which he gave to the court when acting as the single joint expert in the case of Stannard v Charles Pitcher Ltd [2003] Env LR 10. Mr Wignall did not disagree with what Mr Johnson told me. If I were to

form my own assessment of the relevance of the opinions expressed in his report, I would necessarily be looking at only a part of his evidence.

31. Notwithstanding the obvious limitations in such an exercise, I have, as I was invited to do so, considered the parts of Dr Latham's report on which Mr Wignall particularly relied. The first part dealt with ambient and background noise. That part does not directly bear on matters of fact as to how much noise was coming into Flat 62 from Flat 66. Further, I do not see that the judge made any findings of fact contrary to this part of Dr Latham's report. Then Dr Latham stated that he has listened to recordings made by or for the Claimant of the sound in Flat 62. He thought that the recordings were "not helpful" as the signals were enhanced. He did use the recordings to calculate how many of the complaints related to structure borne sound and how much to airborne sound, and matters of that kind. He also calculated the part of Flat 62 which was the subject of the complaints. Then Dr Latham put forward an opinion as to the effect of work done within Flat 62 in 2004. I do not see that as being relevant to the judge's findings of fact which are being challenged in Ground 1. Having read what I was asked to read of Dr Latham's report and allowing for the fact that I did not hear his cross-examination, I do not see anything there which had to be expressly discussed by the judge when making his relevant findings. The judge did hear the cross-examination of Dr Latham and indeed at paragraph [102] of his judgment referred to some of that evidence. Finally, as a general point, even if Dr Latham had given evidence as to what level of sound transmission he would have expected to have occurred between the flats, the real question for the judge was what had actually occurred. The judge had evidence on that subject. He assessed the evidence and he came to his conclusions.

32. In so far as Ground 1 contains an assertion that the judge did not give adequate reasons for not reaching different findings based on Dr Latham's evidence, I do not think that the judge failed to give proper reasons for his conclusions. His findings of fact based on the evidence as to what had happened are meticulously reasoned. Further, he explained the extent to which he derived assistance from the experts. No more was required of the judge.

33. It follows that I do not accept Ground 1.

Ground 2

34. Ground 2 is in these terms:

> "The judge was wrong to have concluded that "the substance of the noise disturbance that I have found Flat 66 [i.e. Flat 62] to be suffering from has resulted from the changes to Flat 66 carried out by the First Defendant" (J/187). There was no evidence in support of this conclusion, the Claimant having elected to call no expert or other evidence to support this part of its case."

35. In relation to some of the ways the claim was put (but not all), it was relevant to ask whether the work to the floor of Flat 66 which was carried out during the 2010 works had resulted in the transmission of noise to a greater extent than was the case of the floor which existed before the 2010 works.

36. The judge's finding which is challenged by Ground 2 was in paragraph [187] where he held:

> "187. I am satisfied that but for the new floor being as it is, the noise disturbance that I have referred to as present would not have been so. Although I consider that there was noise audible from Flat 66 within Flat 62 prior to the changes to Flat 66 by the First Defendant (either actually or potentially) I am also satisfied that the substance of the noise disturbance that I have found Flat [62] to be suffering from has resulted from the changes to Flat 66 carried out by the First Defendant. In this respect it is telling that: (a) Mr Birch described the changes as having no acoustic strategy; (b) that Mr Birch and Mr Neskovic in their email discussions of May 2011 plainly considered there to be a problem as result of the work done; (c) the RBKC officers, having heard the noise, attributed it to 75% (correcting the 85% slip) to poor noise insulation; (d) the experts agree that a scheme as proposed by Mr Clarke would be the best practicable scheme for mitigating noise transfer, thus necessarily implying that such a scheme would achieve improvement over what was done in 2010; and (e) in the immediate run up to trial the First to Third Defendants made an open offer to carry out some part of these works (not I think to the kitchen or bathroom) which, if nothing else, demonstrates a recognition on their part of a link between the state of the floor and the potential (albeit disputed) noise disturbance, otherwise the open offer would just be wasted expense."

37. In this paragraph, the judge reached his conclusions as to the effect of the changes which had been made to the floor in Flat 66. Ideally, the judge should have had evidence as to the physical nature of the floor before the 2010 works and its capacity to act as a barrier to the transmission of sound. Ideally also, he should have had detailed evidence as to the physical nature of the floor after the 2010 works and its capacity thereafter to act as a barrier to the transmission of sound. In the event, the parties did not give the judge any real evidence, and certainly no detail, as to the position in relation to the floor before the 2010 works. It had been suggested that the new floor was "like for like" but the judge rejected that, giving his reasons, and there is no appeal against that finding.

38. The judge was able to make findings elsewhere in his judgment as to whether there was a problem from the transmission of noise through the floor before the 2010 works. In that respect, he held that the problem of noise transmission after the 2010 works had not existed before those works although, before those works, some sounds from Flat 66 could be heard in Flat 62. He was entitled to make those findings. If one combined those findings with his further findings as to the extent of the transmission of sound through the floor after the 2010 works then it followed that the difference in the position was caused by the 2010 works.

39. Ground 2 asserts that the specific matters relied upon by the judge in paragraph [187] do not tell one anything about the floor as it existed before the 2010 works. That is correct but those specific matters were not included to support a finding about the

floor before the 2010 works. They are there to explain a finding about the floor laid as part of the 2010 works. Those matters support a finding that the floor laid by the First to Third Defendant did not have proper sound insulation and that explained why there was noise transmission as the judge had found after the 2010 works.

40. It follows that I do not accept Ground 2.

Ground 4

41. I will take Ground 4 before Ground 3. Ground 4 is in these terms:

> "The judge was wrong to have construed clause 3(f) of the Flat 66 Lease, clause 3(f)(i) of which required the tenant "not without the consent in writing of the Landlord [to] carry out or permit to be carried out any addition or alteration to the Premises", in such a way that provision for a replacement floor had expressly to be included in the licence governing the works. The judge was wrong not to have accepted the submission of the First Defendant, that in all the circumstances, the Fourth Defendant had impliedly licenced the partial replacement floor and therefore given its consent within the meaning of clause 3(f). (See J/108(a)(ii), 120, 133-138.)"

42. By Clause 3(f) of the lease of Flat 66, the lessee covenanted that it would:

> "3(f)(i) NOT without the consent in writing of the Landlord carry out or permit to be carried out any addition or alteration to the Premises or any part thereof and not to alter or cut any of the principal walls or timbers thereof nor erect or build any additional or substituted building whatsoever upon the Premises or any part thereof nor carry out or permit to be carried out any alterations to the heating system the hot water system the general plumbing systems and/or any conduits connected thereto without the previous consent in writing of the Landlord (not to be unreasonably withheld)
>
> (ii) IN the event of such consent as aforesaid being granted and the works thereby authorised being commenced carry them out in accordance with any conditions which may be reasonably imposed by the Landlord and complete them in a good and workmanlike manner to the reasonable satisfaction of the Landlord."

43. The judge held that the work to the floor of Flat 66 as part of the 2010 Works was an alteration to Flat 66 which required permission in accordance with clause 3(f) of the lease. It was also common ground that the lessee of Flat 62 could directly enforce clause 3(f) against the lessee of Flat 66 as clause 3(f) was part of a letting scheme. While the question of the letting scheme including clause 3(f) might have been open to argument, no point of that kind was raised on this appeal.

44. As Ground 4 points out, the judge dealt with the question of a breach of clause 3(f) at paragraphs [133]-[138] of his judgment. He rejected various arguments as to why permission under clause 3(f) was not required. Those arguments have not been repeated on this appeal. He held that a Deed of Licence dated 22 February 2010 did not include a permission for the works to the floor. He also held that permission had not been given orally or by any other written communication.

45. Ground 4 suggests that the judge construed clause 3(f) as requiring that a consent for the purposes of clause 3(f) had to be expressed in a formal licence for works. In fact, the judge did not construe clause 3(f) that way. It is plainly possible to have a formal deed of licence for some works and a less formal written consent for other works. Further, the judge did not hold that a licence could not grant written consent for works without expressly mentioning the works. It is theoretically possible for a consent for works, which are described in the consent, to permit incidental works which are needed in order to carry out the works described. Ground 4 does not appear to involve the contention that the First Defendant was given permission in some informal way apart from the terms of the Deed of Licence. This was confirmed at the hearing where the only point argued by Mr Wignall in relation to Ground 4 was that I should construe the words used in the Deed of Licence as extending to the works to the floor, if necessary by implication.

46. The Deed of Licence is a short document. It gives consent to "the works" which is a defined term whereby it is stated that details of the works were set out in the Second Schedule to the Deed. The Second Schedule refers to five matters. These are:

    (1) Adjust corridor;

    (2) Adjust kitchen;

    (3) Adjust size of bedroom 3;

    (4) Adjust layout of reception room;

    (5) Adjust corridor and internal door width.

47. In the case of each of the five matters referred to in the Second Schedule to the Deed of Licence, the matter is said to be shown on a Plan annexed to the Deed. The Plan is A4 size and very unrevealing. There is no marking on the plan which could be understood to be stating that there was to be any work to the floor of Flat 66.

48. It is possible that if one were able to understand precisely what was involved in the permitted works, it might have been possible to say that it was inevitable that there would be some making good needed to the floor finishes. The 2010 works included alterations which were not included in the five matters referred to above. If those further alterations had been the subject of a written consent, then again it might have been possible to argue that it was inevitable that those alterations would require making good to the floor finishes. However, I do not see how those considerations would enable me to hold that the works as defined in the Deed of Licence included by implication the taking up of the whole of the existing floor and the laying of a new floor, especially a new floor which, on the judge's findings was not like for like.

49. Mr Wignall relied upon certain alleged background facts such as, he said, everyone knew that the First Defendant intended to replace the entirety of the floor of Flat 66. However, on the judge's findings, that was not the case. The judge found that the First Defendant's intentions were not settled. Further, the judge found that Mr Michaels of the managing agents for the landlords had told the lessee's builder and architect that if the lessee wished to do work to the floor, the lessee would have to comply with Contractors Regulation 26 which stated that: "the laying of non-carpet or tiled floors within a flat must be adequately insulated and sound proofed before it is approved …". In the event, the lessee did not ask for permission to replace the floor and the landlord did not grant a permission which had not been asked for.

50. Accordingly, I do not accept Ground 4. I add that, if Mr Wignall were right that the work to the floor was within the definition of "works" covered by the Deed of Licence, then by clause 3 of the Deed of Licence, the lessee would be obliged to comply with the terms of the lease in relation to the works and these would have included Regulation 14 which provided:

> "THE Tenant will cover and keep covered the floors of the Premises with carpet and an underlay other than the floors of the kitchen and bathroom which shall be properly and suitably covered with suitable material to avoid the transmission of noise."

51. As I explain later in this judgment, the floor laid by the First Defendant did not comply with Regulation 14 so that, if Mr Wignall were right about the Deed of Licence, then the First Defendant would have committed a breach of clause 3 of the Deed of Licence which would also have been a breach of clause 3(f)(ii). Accordingly, if I had accepted the argument that the First Defendant had not committed a breach of clause 3(f)(i) of the lease, it would have followed that it had committed a breach of clause 3(f)(ii) instead.

Ground 3

52. Having dealt with Ground 4, I will now deal with Ground 3 which is in these terms:

> "The judge was wrong to have concluded that if the First Defendant had applied for a licence expressly permitting the new floor, then the Landlord is likely to have required an acoustic strategy, whether or not it was one which would have been consistent with the acoustic strategy which the Claimant's expert proposed (J/188 and 189). There was no evidence to that effect, the judge not even purporting to rely on any."

53. The relevant finding of the judge is at paragraph [188] where the judge said:

> "I am also satisfied that in not obtaining permission for the new floor, the First Defendant avoided a situation where it would have been required to meet, among other things, Regulation 26 so far as the new floor was concerned. On the balance of probabilities complying with Regulation 26 (and/or otherwise obtaining permission) would have required an acoustic strategy

> and this is likely to have led to a floor along the lines that the Claimant's expert proposes (and which in substance was also put forward by Mrs Fouladi in an email of September 2010 and was referred to by Mr Birch in his email discussions with Mr Neskovic)."

54. The judge had previously held that the First Defendant had carried out the works to the floor in breach of clause 3(f)(i) of its lease. When the court comes to consider what damages are payable to the Claimant as a result of this breach of covenant, the court will want to compare the situation the Claimant was in following that breach with the situation the Claimant would have been in if the covenant had been performed.

55. There were two ways of performing the covenant. One way was to do no work to the floor. On the judge's finding, the Claimant would have been better off if no work had been done to the floor and, on that basis of comparison, it would not be necessary to consider what terms would have been imposed on the First Defendant as a condition of permission to do work to the floor.

56. The other way in which the covenant could have been performed would have been if the First Defendant had sought and obtained consent to the works to the floor. The judge found that if the First Defendant had asked for consent for its works to the floor, it would have been required to comply with Contractors Regulation 26 which would have required non-carpet and tiled floors to be adequately insulated and sound proofed. That finding does not appear to be challenged by Ground 3. It is also clear that any work to the floor would have to comply with Regulation 14 in the lease. I have set out above the terms of Regulation 14.

57. Ground 3 appears to challenge the finding that complying with Regulation 26 and/or obtaining permission under clause 3(f) would have required "an acoustic strategy". The judge did not spell out what he meant by "an acoustic strategy". I will therefore give that phrase what I consider to be its ordinary meaning in this context. I consider that an acoustic strategy requires a person who is selecting a floor covering to consider what are the acoustic properties of that floor covering and if it emerges that a preferred form of floor covering will not offer sufficient insulation against sound transmission then a new floor covering must be chosen which will provide sufficient insulation. If that is the meaning of the phrase then I have no reason to doubt the good sense of the judge's conclusion. Regulation 14 of the lease of Flat 66 required "suitable" covering in the kitchen and bathroom. Regulation 26 of the Contractors Regulations stated that non-carpeted or tiled floors must be "adequately insulated and sound proofed". In order for the lessee of Flat 66 to comply with these obligations as to suitability and adequacy, the lessee's advisers needed to consider those things which I have stated are involved in an "acoustic strategy".

58. In any case, the judge after many days of evidence, including expert evidence from acoustic experts, considered that compliance with Regulation 26 would require an acoustic strategy. The judge was much closer to the evidence than I am. I was not shown a transcript of the evidence and I was not shown the cross-examination of the acoustic experts, although I have read their reports. In these circumstances, the judge's conclusion is not one with which I would be able to interfere on this appeal.

Ground 5

59. Ground 5 is in these terms:

> "The judge erred in failing to apply the law relating to the recovery of damages in contract. He failed to conclude that it was not in the reasonable contemplation of the First Defendant as the holder of the lease that the works which it undertook might cause noise transference to Flat 62. In the alternative he failed to conclude that the First Defendant had not assumed any liability for noise transference on the renewal of the floor of Flat 66. There was no reason for the First Defendant to have supposed that there had been a re-organisation of flat 62 by the Claimant which might subsequently result in everyday living sounds from flat 66 becoming invasive and disturbing."

60. This ground appears to be about the recoverability of damages for breach of contract. Before I consider the principles as to recoverability of such damages, I need to set out what were the breaches of contract in this case and how the court should approach the question of assessing damages for such breaches.

61. On the judge's findings there were two breaches of contract, a breach of Regulation 14 and a breach of clause 3(f) of the lease of Flat 66. I will take the two breaches separately.

62. Regulation 14 is set out above. In the course of the appeal, there did not appear to be much, if any, dispute as to the meaning and effect of Regulation 14. Equally, the parties did not analyse the words of Regulation 14 in the course of argument. At the beginning of the appeal, I considered with Mr Wignall the application of Regulation 14 in this case and he did not disagree with what I described as my understanding of its effect. It is nonetheless worth spelling out what is required by Regulation 14.

63. Regulation 14 required the lessee to cover and keep covered the floors of the flat in specified ways. The obligation is a continuing one. If, as seems likely, Regulation 14 was not complied with when the First Defendant took an assignment of the lease of the flat, then the First Defendant immediately came under an obligation to cover and keep covered the floors in the specified ways. It was not argued on this appeal that anything in the history of the matter had led to any qualification of this obligation. It was not said that the obligation in Regulation 14 had been modified or varied or waived or that there was any impediment to the Claimant as the lessee of Flat 62 enforcing Regulation 14 against the lessee of Flat 66 under the letting scheme which included Regulation 14.

64. Regulation 14 distinguishes between the floors of the kitchen and bathroom, on the one hand, and the other floors in the flat, on the other. As regards the other floors, they are to be kept covered with carpet and an underlay. The more appropriate reading of Regulation 14 is that the words "to avoid the transmission of noise" do not expressly govern the earlier words "with carpet and an underlay" as they instead govern the reference to the material used in the kitchen and bathroom. If that is right, the requirement to cover the floors with carpet and an underlay does not spell out the quality or standard of the carpet and underlay and there might be some scope for

argument as to what is the minimum requirement as to that quality or standard. However, no such point was raised on this appeal and I need not consider it.

65. Regulation 14 refers to the floors of the kitchen and bathroom. There might have been a question as to whether this was a reference to the kitchen and bathroom which existed at the date of the lease of Flat 66 or whether it referred to whatever rooms were used as a kitchen or bathroom from time to time. This question might have been relevant as the works carried out in 2010 increased the size of the kitchen a little and made alterations in relation to bathrooms. The right answer is probably that the provision applies to whatever is the kitchen and bathroom from time to time. This point was not argued before me and I will proceed on the basis that Regulation 14 should be construed as referring to the extent of the kitchen and bathroom from time to time. Further, it was not argued that there could only be one bathroom. In this case, the 2010 works created two bathrooms.

66. The material used to cover the floors of the kitchen and bathroom must be "suitable material to avoid the transmission of noise". The judge held that this obligation required the lessee "to use materials on the floor that would prevent noise transmission, subject to what is practically achievable, rather than only mitigate it". On this appeal, no one sought to challenge that interpretation and I will adopt it.

67. On this appeal, it was accepted that the First Defendant was in breach of Regulation 14 at all times from the completion of the works in 2010. In particular, Mr Wignall took me to a schedule in the report of Dr Latham which showed that on the First Defendant's own case, it had not covered the floors of the living room/dining room, the guests room, the hall and the corridor with carpet and underlay. As regards the floors of the kitchen and bathrooms, the judge found that the materials used to cover those floors did not prevent noise transmission, subject to what was practically achievable. The First Defendant seems to have argued that the materials used in the kitchen were no worse than the materials previously used in the kitchen but that is not material when considering the application of Regulation 14 even if it had been the case and it appears that the judge did not accept that it was the case.

68. In assessing damages for breach of contract, the court compares the actual situation produced by the breach with what the situation would have been if the contract had been performed. Thus, in relation to Regulation 14, if the contract had been performed, the result would have been that the floors in the kitchen and bathrooms would have been covered with suitable material to avoid the transmission of noise and the other floors would have been covered with carpet and an underlay. On the judge's findings of fact, that would plainly have been better than the floor surfaces laid during the 2010 works. It would seem therefore that the First Defendant is liable to pay damages which reflect the effect on the use and amenity of Flat 62 resulting from the floors in Flat 66 falling below the contractual standard and in particular allowing a significant amount of noise to pass from Flat 66 into Flat 62.

69. These conclusions make it somewhat less important to consider the position in relation to clause 3(f) but I will do so. As I explained earlier, when assessing damages for breach of clause 3(f), one compares the situation the Claimant was in following the work to the floor with the situation she would have been in if clause 3(f) had been performed. There were two ways of performing the covenant. One way was to do no work to the floor. On the judge's finding, the Claimant would have been better off if

no work had been done to the floor. The other way in which the covenant could have been performed would have been if the First Defendant had sought and obtained consent to the works to the floor. The judge found that if the First Defendant had asked for consent for its works to the floor, it would have been required to comply with Contractors Regulation 26 which would have required non-carpet and tiled floors to be adequately insulated and sound proofed. It is also clear that any work to the floor would have to comply with Regulation 14 in the lease.

70. It is against that background that Ground 5 raises a question as to what was in the reasonable contemplation of the parties at the date of the lease of Flat 66. Ground 5 begins by asserting that it was not in the reasonable contemplation of the parties that works to the floor might cause noise transference to Flat 62. That submission is plainly wrong. Ground 5 goes on to assert that the First Defendant had not assumed responsibility for noise transference when it renewed the floor. That submission is also plainly wrong. In particular, Regulation 14 plainly shows that care must be taken in relation to floor coverings in Flat 66 and the obvious reason for that requirement is to prevent the transmission of noise to the flat below.

71. The point actually made by Mr Wignall under Ground 5 was a much narrower point and it turned on the fact that the layout of Flat 62 had been altered in around 2004 with the result that a bedroom had been created in Flat 62 which sat underneath what was then the kitchen in Flat 66 and that, after the 2010 works, the bedroom sat underneath an enlarged kitchen and a bathroom in Flat 66.

72. Before the 2010 works, there was a kitchen in Flat 66. I will assume, although this was not properly established, that this kitchen was in the same position at the date of the lease of Flat 66. It was established that prior to 2004 the room in Flat 62 underneath the kitchen in Flat 66 was also a kitchen. Then in around 2004, the Claimant reorganised the layout of Flat 62 and moved her kitchen to another part of the flat and this enabled her to use her former kitchen as a bedroom. At the same time, this new bedroom in Flat 62 was enlarged so that it incorporated adjoining areas which had even before 2004 been used as a bedroom or bedrooms. The 2010 works in Flat 66 extended the kitchen in Flat 66 somewhat. Those works also created a bathroom adjoining the kitchen and the new bathroom was above the bedroom in Flat 62 created in 2004 and above an area which had been used as a bedroom even before 2004. If one were to ignore the Claimant's work in 2004 and consider the pre-2004 layout of Flat 62, the extended kitchen and the new bathroom in Flat 66 sat above one room and part of another room which had always been bedrooms. On this basis, the 2010 works in Flat 66 created a part of a kitchen and a new bathroom over what had always been a bedroom area even if one ignored the changes in Flat 62 in 2004.

73. Mr Wignall contended that the result of the Claimant's changes in around 2004 is that First Defendant was not liable to pay damages for its breaches of contract. This argument on any view goes much too far for at least three reasons. First, the judge held that noise from Flat 66 could be heard throughout Flat 62. Putting the point about the bedroom in Flat 62 being below the kitchen in Flat 66 on one side, the First Defendant has no answer to a claim for damages for the effect of noise on the other rooms in Flat 62. Secondly, the 2010 works in Flat 66 placed a bathroom in Flat 66 above what had been a bedroom before 2004 and remained part of a bedroom after 2004. Any noise from the bathroom into the bedroom below ought to be the subject of an award of damages. Thirdly, Mr Wignall appeared to assume, without any finding

to this effect in his favour, that if the room in Flat 62 which was below the kitchen in Flat 66 had remained a kitchen, there would be no nuisance in relation to that kitchen in Flat 62.

74. In other circumstances, it might be said to be unwise to have a bedroom underneath a kitchen in the flat above. A bedroom underneath a bedroom in the flat above might be a better idea. This is the idea at the heart of Mr Wignall's submission. However, I do not find that whatever remains of Mr Wignall's point on damages (after taking into account the three matters referred to in paragraph 73 above) was outside the reasonable contemplation of the parties at the date of the lease of Flat 66. Regulation 14 in that lease required the floors of a kitchen and a bathroom to be covered with suitable material to avoid the transmission of noise. That regulation does not make any distinction based on the use which is made of the room in the flat below the kitchen in Flat 66. Further, the lease of Flat 66 was for a term of 150 years and contemplated that alterations to that flat could be made with the permission of the landlord. The lessee of Flat 66 would also have contemplated that the other leases in the building would be on the same terms so that the lessee of Flat 66 would have contemplated that the lessee of Flat 62 might carry out alterations at some point to Flat 62.

75. Mr Wignall had further points as regards the limitation on the damages recoverable so far as the 2010 works had an adverse effect on the use of the bedroom in Flat 62 below the kitchen in Flat 66. He submitted that the Claimant had sought to make that bedroom an extremely quiet room by doing two things. The first was that she had installed secondary glazing which reduced the impact of external noise. The second was that, in a way which was not precisely described to me, the bedroom in question was insulated from noise coming from other parts of Flat 62. It was submitted that if the bedroom in question had not been treated in this way and an occupant of that bedroom would still have been exposed to external noise and to internal noise within Flat 62, then the noise from above would not have mattered or would not have mattered so much. I consider that these arguments fail because the work done within Flat 62 cannot be said to be outside the reasonable contemplation of the parties to the lease of Flat 66. There was no attempt made at the trial to establish that the type of secondary glazing used in Flat 62 was unknown or unforeseen at the date of the lease of Flat 66. Further, the fact that an occupant of the bedroom in question would not have been disturbed by noise internal to Flat 62 cannot be said to be in any way unusual. That situation would arise if that occupant lived alone or retired for the night at the same time or later than the other occupants of Flat 62.

76. It follows from the above that the First Defendant is liable for damages for breach of contract and the damages should reflect the loss of amenity of Flat 62 as a result of noise passing into Flat 62 from Flat 66 to the extent that such noise would not have passed into Flat 62 if Regulation 14 and clause 3(f) had been performed.

An additional point

77. Grounds 6 and 7, which I am about to deal with, raise points which are relevant to the claim against the First to Third Defendants in nuisance. Before addressing those points, I wish to comment on a particular feature of the claim in nuisance in this case.

78. The judge held that the transmission of noise from Flat 66 to Flat 62 constituted a nuisance to Flat 62. He also held that most of the noise was transmitted by activities in Flat 66 which were the result of the ordinary use of a residential flat. At the hearing of the appeal, Mr Wignall referred to Southwark LBC v Mills [2001] 1 AC 1 for the proposition that in the ordinary case, in the absence of some other relevant feature, the ordinary use of a residential flat cannot give rise to an actionable nuisance even if the noise generated by that nuisance constitutes a considerable interference with the use of another flat above or below or adjoining the first flat. How then did the judge conclude that the ordinary use of Flat 66 did constitute an actionable nuisance? The answer was that he held that the nuisance was created in this case by reason of the work done to the floor in 2010 when the pre-existing floor which provided good insulation against sound transmission was taken up and replaced by a new floor which did not provide good insulation against sound transmission.

79. I raised with counsel the question of whether the work to the floor in 2010 could produce the result that noise from the ordinary use of Flat 66 after 2010 could be an actionable nuisance. Mr Johnson submitted that it was the work to the floor which was the nuisance and the later transmission of noise was the continuing result of that nuisance. Mr Wignall had not argued the contrary at the trial and the judge had plainly proceeded on the basis put forward by the Claimant. There is no ground of appeal which challenges this analysis as to the basis of liability. Indeed, in his skeleton argument, Mr Wignall accepted the analysis of the Claimant. Further, there is no distinction to be made between the position of the First Defendant and the Second and Third Defendants as regards the works done in 2010 as it is clear on the judge's findings that the choice of the works done in 2010 was made by the Second and Third Defendants and the works were carried out by the First Defendant as lessee of Flat 66 in accordance with those choices.

80. Since there is no ground of appeal challenging the analysis put forward by Mr Johnson, as described above, I will not discuss that analysis. This judgment should not be taken as upholding that analysis nor, indeed, holding that it is unsound. I simply proceed on the basis that the analysis is not challenged on this appeal.

Ground 6

81. Ground 6 is in these terms:

> "The judge was wrong not to have concluded that by re-organising flat 62 the Claimant had rendered the flat and her perception of noise unduly sensitive, with the result that there was no liability on the part of the First to Third Defendants in private nuisance. In the alternative, the judge was wrong not to have concluded that it was not reasonably foreseeable by the First Defendant that the works executed in Flat 66 might cause the Claimant to perceive sounds of day-to-day living from Flat 66 to such an extent that she found them invasive and disturbing."

82. This ground of appeal makes two points. The first point involves the allegation that the layout of Flat 62 made it unduly sensitive to noise. The second point is that it was not reasonably foreseeable that the works in Flat 66 would produce an unacceptable

level of noise in Flat 62. Ground 6 asserts that there is no liability in nuisance for one or other of these reasons. I will deal with these assertions on the facts assuming in the first instance that these matters could, in law, provide defences to the claim in nuisance.

83. The assertion about undue sensitivity is based on the changes in the layout of Flat 62 in 2004 and other suggested changes in Flat 62. I considered the facts as to those matters in relation to Ground 5 above. I said in paragraph 73 above that the assertion made in Ground 5 ignored three matters. The three matters were

(1) the judge held that noise from Flat 66 could be heard throughout Flat 62 and not just in the bedroom below the kitchen;

(2) the 2010 works in Flat 66 placed a bathroom in Flat 66 above what had been a bedroom before 2004 and remained part of a bedroom after 2004;

(3) Mr Wignall appeared to assume, without any finding to this effect in his favour, that if the room in Flat 62 which was below the kitchen in Flat 66 had remained a kitchen, there would be no nuisance in relation to that kitchen in Flat 62.

84. I consider that on the judge's findings, the noise from Flat 66 would have been an actionable nuisance to Flat 62 even if the room in Flat 62 had been a kitchen and not a bedroom. So even if the change in layout of Flat 62 in around 2004 produced the result that the noise from the kitchen in Flat 66 was more disturbing than it would otherwise have been, there would still have been an actionable nuisance to Flat 62. Further for the reasons given in paragraph 75 above, I do not accept on the facts that secondary glazing and any other internal works in Flat 62 made it unduly sensitive to noise from Flat 66.

85. The second point raised by Ground 6 relates to the reasonable foreseeability of a nuisance being caused to Flat 62. As to that, it was obviously reasonably foreseeable that the nuisance in this case, which was replacing one floor with another and reducing the sound insulation, would affect the amount of noise transmitted from Flat 66 to Flat 62. If the point being made is confined to the fact that the room in Flat 62 below the kitchen in Flat 66 was a bedroom, I have already discussed what would have been in the reasonable contemplation of the lessee of Flat 66 when I considered Ground 5. For essentially the same reasons as I gave when I considered reasonable contemplation for the purposes of Ground 5, I consider that it was reasonably foreseeable that the work to the floor in Flat 66 would cause an unacceptable level of noise to be transmitted to Flat 62.

86. As Ground 6 fails on the facts, I do not need to consider some interesting submissions made by Mr Wignall as to the continued existence of a defence of special sensitivity on the part of a claimant and whether that defence has been replaced by a test of foreseeability as explained by the Court of Appeal (and in particular by Buxton LJ) in Network Rail Infrastructure Ltd v Morris [2004] Env LR 41. I also do not need to consider the further submission that if the defence of special sensitivity has been superseded in the case of a nuisance which causes physical damage it has not been superseded in the case of a nuisance which causes of diminution in the amenity and enjoyment of the use of land.

87. Finally, I note that Ground 6 challenges the finding of liability in nuisance but does not raise any separate point as to the damages recoverable in the event of it being held that the First to Third Defendants were liable in nuisance.

Ground 7

88. Ground 7 is in these terms:

> "The judge was wrong to have concluded that the Second and Third Defendants are liable in private nuisance "because they have occupied [flat 66] without regard to the First Defendant's lease obligations in circumstances where it would necessarily be the consequence of ignoring those obligations that the noise of their day to day activities will be an unreasonable interference with the use of flat 66 [meaning flat 62]" (J/194)."

89. This Ground arises out of what the judge said when he was considering the claim in nuisance. He set out the principles as to the law of nuisance at paragraphs [121] – [125]. At the trial, the Claimant had relied very heavily on the decision in Stannard v Charles Pitcher Ltd [2003] Env LR 10. That case had similarities with the present case in that the lessee of the flat above the claimant's flat had altered the floor of the flat above in a way which increased the transmission of noise into the claimant's flat below. In Stannard, the lease of the upper flat contained a covenant which specified certain standards to be achieved in relation to floor coverings in the flat. The judge in that case held that both parties had agreed that this clause was part of the material background against which it fell to him to determine whether what had been done to the floor was reasonable for the purpose of the law of nuisance. He then explained at [23]:

> "23 As stated above, it does seem to me that one of the important features of the overall circumstances of this case is the obligation upon the sixth defendant under his lease, in relation to minimisation of noise. The fact that the covenant is not enforceable by Mr Stannard is of course unfortunate and I should be careful to avoid equating specific obligations owed under the lease with setting the standard for what would constitute noise nuisance. The lease assigned to Mr Al Sharekh, by clause 3, establishes a covenant in the following terms: "In accordance with the said general scheme and for the benefit of the lessees of the other flats comprising the building the lessee hereby covenants with the lessor and the company and the lessees for the time being of the other flats comprised in the building and with each of them that the lessee will from time to time and at all times hereafter during the said term: … (c) observe and perform all and singular the reservations and obligations set out in the fourth schedule hereto."
>
> The fourth schedule contains this provision:
>
> "16. To keep the floor of all living rooms bedrooms and entrance halls in the said flat covered with carpet or other

> suitable materials and the floors of the kitchen bathroom and toilets covered with linoleum or other suitable material so as to minimise the penetration of sound into other flats in the building." "

90. In the present case, the judge referred to Stannard at [122] when he said:

> "The terms of the leases were undoubtedly relevant to the decision in *Stannard*. They were described by the judge as *one of the very material circumstances that applies*…. Mr Wignall agreed with the general proposition that the terms of leases are relevant to the assessment of what is lawful or not lawful as a matter of potential liability in nuisance between flats. Mr Wignall did not disagree with the description of the law in *Stannard* but distinguished it on the facts: it was an example of a defendant doing an obvious and excessive step which made their actions unreasonable in the context of nuisance. The Defendants here, it was said, did no such thing."

91. In that passage, the judge recorded Mr Wignall's agreement with the legal proposition as to the relevance of the terms of the leases when considering the law of nuisance.

92. Ground 7 is a challenge to a later piece of reasoning which is part of a passage at paragraphs [193] and [194] of the judgment which is as follows:

> "193. I have set out the relevant legal requirements above. In the present context the "situation specific" assessment of the standard required is informed by the following considerations:
>
> (a)These are residential flats which are part of a letting scheme;
>
> (b) All leases have within them provisions designed to provide some protection from noise transfer;
>
> (c) The role of the Fourth Defendant includes being able to regulate issues which are relevant to noise transfer and its reduction (Regulation 26 being the most pertinent example);
>
> (d) Plainly the flats are intended for residential use and all other things being equal residential use will not amount to a noise nuisance;
>
> (e) However, all other things being equal, in context, includes the expectation of all owners and occupiers of the block that their co-owners and occupiers will comply with the mutual lease obligations;
>
> (f) This, just as much as the give and take necessary for adjacent residential occupation, is part of that which must be done in order to be considerate to the appropriate standard and is part of convenient reciprocity;

> (g) The description of the flats within the lease as *high-class* does not add anything in the present case;
>
> (h) Building regulations, of themselves, are of no assistance in this respect. What matters for nuisance purposes is the consequence to the neighbour's property and whether that consequence is within or without that which in the circumstances is acceptable.
>
> 194. It follows that I find that the First to Third Defendants have committed nuisance to the Claimant, as owner of Flat 62, throughout their occupation of Flat 66. This is because they have occupied without regard to the First Defendant's lease obligations in circumstances where it would necessarily be the consequence of ignoring those obligations that the noise of their day to day activities will be an unreasonable interference with the use of Flat [62].
>
> 195. No attempt has been made to distinguish, in argument, the nuisance claims against the First Defendant, the Second Defendant and the Third Defendant."

93. At the hearing of this appeal, Mr Wignall continued to accept that the terms of the lease were a most material consideration when considering the liability of the First Defendant in nuisance. However, what Mr Wignall now wishes to argue is that the terms of the lease are only relevant in nuisance as regards the liability of the First Defendant but not as regards the liability of the Second and Third Defendants. His position now is that the terms of the lease are irrelevant as regards the liability of the Second and Third Defendants who are not parties to the lease. That is contrary to the express position taken by him on behalf of the Second and Third Defendants below.

94. Mr Johnson objects to the Second and Third Defendants being permitted to argue a new point on appeal. I agree that the point is a new point. Mr Johnson relied on the decisions in Jones v MBNA International Bank (Court of Appeal, 30 June 2000, unreported) and Crane v Sky In-Home Ltd [2008] EWCA Civ 978. Those cases explain the attitude which an appeal court should take to a point being raised on appeal when that point was not raised at the trial. Mr Johnson submitted that if the Second and Third Defendants had raised this point in the course of the trial, then it would have given rise to fact sensitive questions which were not addressed as the point had not been taken.

95. Although the authorities cited by Mr Johnson make it clear that the court should be slow to allow new points to be taken on appeal, I am far from clear that if this new point had been argued at the trial, it would have made any difference to the evidence which would have been called or the way in which the evidence would have been examined. The position which was agreed at the trial was that the terms of the lease of Flat 66 were relevant to the assessment of what is lawful or unlawful as a matter of potential liability in the law of nuisance: see how the judge described matters at paragraph [122] of his judgment. It was not said that the terms of the lease were conclusive so it would seem that the parties would have appreciated that any other matters relevant to liability in nuisance would still have to be investigated at the trial.

In these circumstances, without finally deciding whether to allow Mr Wignall to raise this new point, I will consider the submissions made on the point and then decide what should be done.

96. If Mr Wignall is right that the terms of the lease of Flat 66 are relevant to the assessment of the liability of the First Defendant in nuisance but are not relevant to the assessment of the liability of the Second and Third Defendants in nuisance, I do not see how that would make any difference to the liability of the Second and Third Defendants on the findings made by the judge. The judge's central findings were set out in paragraphs [182] to [185] of the judgment. Those findings fully support the conclusion that the transmission of noise from Flat 66 was a nuisance to Flat 62. The nuisance was caused by the works to the floor in 2010. Those works were done by the First Defendant as it was the lessee under the lease but they were also done by the Second and Third Defendants who, on the judge's findings, made the choice as to what works were to be done in 2010. Accordingly, on the judge's findings, even if one disregarded the terms of the lease of Flat 66, the correct finding was that the First to Third Defendants were liable in nuisance.

97. Accordingly, even if the Second and Third Defendants were permitted to argue the new point about the terms of the lease of Flat 66, I would not have set aside the judge's finding that the First to Third Defendants were liable in nuisance on that account.

98. So far, I have not discussed whether the terms of the lease of Flat 66 were relevant to the liability of the Second and Third Defendants in nuisance. Indeed, although Mr Wignall did not argue this, it might be said that the terms of the lease were also not relevant to the liability of the First Defendant in nuisance. Whether the First Defendant had or had not committed a breach of contract (by failing to comply with a contractual standard) is not obviously relevant when one is considering the standard which is laid down by the law of nuisance and whether an occupier has complied with that standard. However, I can say that I am inclined to take the view that the fact that a lease lays down a contractual standard for conduct does not tell one very much, if anything, as to what the law of nuisance should impose as the relevant standard. There will no doubt be cases where certain conduct would not amount to an actionable nuisance but yet the contracting parties can expressly agree, if they wish, that one of them will be given a higher degree of protection pursuant to an express contract. If that is right, I would also be inclined to hold that the requirements of the law of nuisance should apply equally as regards the First Defendant who is bound by the contractual provision and the Second and Third Defendants who are not so bound.

Ground 8

99. Ground 8 is in these terms:

> "The judge was wrong to have ordered the Appellants to pay £40.18 damages per diem up to the completion of the Scheme of Works which he had ordered. When the Second and Third Defendants are out of Flat 66 at the commencement of the works, or on holiday or otherwise absent, there will be no sounds of ordinary daily living and therefore no loss. Given that the judge had decided that an award of general damages

> should affect interference with amenity value (J/221), he was wrong to have ordered damages to be recoverable after the date of his Order without proof of damage (Order, para.3(2).)"

100. The judge dealt with the assessment of damages at paragraphs [213] to [229] of his judgment. His approach to assessment was the same for the claim in nuisance and the claim for breach of contract. At [221], he held he would consider the extent to which the amenity value of Flat 62 was damaged by the nuisance. He held that the noise from Flat 66 was "a real and constant presence" for the occupiers of Flat 62. At [223], the judge referred to the periods when the Claimant's (and her mother's) diaries and emails did not record noises from Flat 66. In that respect, the judge did not think that these periods showed that there had been a difference in the nature or extent of the nuisance. At [226], the judge held that damages should be assessed at £281.25 per week from 6 November 2010 when the Second and Third Defendants moved into Flat 66.

101. There is no challenge to the award of a weekly rate of damages from 6 November 2010. It was clear from the evidence at the trial that there were times when the Second and Third Defendants were not living in Flat 66 in that they were away for one reason or another. It was not suggested to the judge that he should work out how many days or weeks the Second and Third Defendants were away and deduct those days or weeks from the period for compensation after 6 November 2010. If that point had been raised, the answer may well have been that the approach to the assessment of damages should be done in a more broad brush way without going into that amount of detail.

102. Having dealt with the damages in relation to the period from 6 November 2010, the judge then held that damages should continue at a daily rate of £40.18. I do not know if the award of damages at a continuing daily rate had been discussed at the hearing. At any rate, when the intended ruling appeared in the draft judgment released by the judge, he was not asked to reconsider that draft ruling. He then handed down his judgment containing that ruling. The judge dealt with the form of the order and consequential matters at a hearing on 3 May 2018. The First to Third Defendants did not raise any point about the order for a daily rate of damages at that hearing. The order which was made included the order that the First to Third Defendants pay damages at a daily rate of £40.18 from the date of the order until the First to Third Defendants completed the work needed to remedy the nuisance.

103. On this appeal, Mr Wignall does not challenge the award of damages up to the date of the order. The appeal is against the award of a daily rate after the date of the order. There was discussion at the hearing as to the jurisdiction of the court to award continuing damages in this case. I hold that the court did have that jurisdiction. By its order on 3 May 2018, the court ordered the First to Third Defendants to carry out works to remedy the nuisance. It was clear that those works would not be begun or completed immediately. At [210], the judge stated that in the period up to the completion of the remedial works, damages would continue to be payable at a daily rate. Further, the court declined to grant an injunction restraining the Second and Third Defendants from living in Flat 66 before the completion of the remedial works. At [211](b), the judge said when declining to grant such an injunction he regarded an award of day to day damages as a proportionate substitute remedy.

104. Accordingly, I hold that the court had jurisdiction to award continuing damages in addition to the mandatory injunction requiring the First to Third Defendants to carry out remedial works and also in substitution for an injunction restraining the Second and Third Defendants from living in Flat 66. That was the jurisdiction which the judge said that he was exercising.

105. I have explained that when the judge awarded damages for a period in the past, he was not asked to deduct from the period for compensation the days when the Second and Third Defendants were away from Flat 66. The parties and the judge adopted the same attitude in relation to the period after 3 May 2018. Accordingly, Ground 8 raises a point which was not raised before the order was made. If the point had been made, there could have been various submissions made as to the right response. The judge might very well have taken the view that it was not appropriate to adopt a different attitude for the future as compared with the past. I will not allow the First to Third Defendants to raise this point for the first time on appeal.

106. Mr Wignall raised a further matter at the hearing. He told me on instructions that the Second and Third Defendants had spent many months this year living in their home in Malta and not in Flat 66. Mr Wignall said that the new circumstances meant that even if the order for a daily rate could not be challenged by reference to matters which preceded the order, I should set aside the order in the light of the changed circumstances. Mr Johnson on instructions did not accept that the factual position was as described by Mr Wignall. I was not given any evidence on this disputed question and I am not able to make any finding about it. I therefore cannot consider allowing the appeal pursuant to Ground 8 on the basis of new evidence which was not available when the order was made. I will not comment on the possibility referred to at the hearing of an application being made to the judge for a variation of the order in the light of an alleged change in circumstances.

107. I will not allow an appeal on Ground 8.

Ground 9

108. Ground 9 is in these terms:

> "The judge was wrong to have concluded that he was entitled by way of a mandatory order to require the First Defendant to undertake a scheme of works such as that proposed by Mr Clarke or to have made the order in the wide-ranging terms specified (J/230(a)). He was entitled only to grant an order the effect of which would be to require the First Defendant to comply with the terms of its lease. By regulation 14 of the regulations in the second schedule of the lease, carpet and underlay were required as a covering of the floors of Flat 66, save that the kitchen and bathrooms were required to be "covered with suitable material to avoid the transmission of noise" (see (J/108(a)(iii)). The making of the Order was outside the proper exercise of the judge's discretion."

109. The judge held that it was appropriate to make a mandatory order requiring the First Defendant to carry out remedial works to abate the nuisance. He made a detailed

order providing for work to be approved and then carried out. At paragraph 16 of his order, he gave the parties liberty to apply for such further orders and directions as may be required "in connection with the Scheme of Works and/or making good/repairs". The Scheme of Works had been defined earlier in the order as referring to a substituted floor arrangement for Flat 66.

110. Ground 9 asserts that the court could only make an order which tracked the wording of Regulation 14 in the Lease of Flat 66. I do not agree. First of all, the judge was entitled to make an order requiring the First Defendant (and possibly also the Second and Third Defendants) to remedy the nuisance. As the judge had power to make such an order it was open to him to specify precisely what work should be done to abate the nuisance. Speaking generally, it is highly desirable that a mandatory order of that kind spells out the detail of the work which is to be done so that there is clarity and certainty as to what is required by the order. Further, in regard to Regulation 14, that Regulation refers to suitably covering the floors of the kitchen and bathroom with "suitable material". Again, it was desirable for a mandatory order to specify what is required as "suitable material" rather than simply making an order repeating the contractual words of "suitable material".

111. The judge did not define the required works by his order of 3 May 2018. The Claimant invited him to do so but he explained that, certainly in relation to the contractual obligations on the First Defendant, if there were various different ways of complying with its contract, the choice of method should in the first instance lie with the First Defendant. The judge's order then laid down a procedure whereby the First Defendant would identify what it intended to do and then the acoustic expert for the Claimant would consider whether to approve the works identified by the First Defendant. If the identified works were approved by the Claimant's acoustic expert then they were to be submitted to the landlord for permission pursuant to the lease. When approved in that way, the First Defendant was then obliged to carry out the works.

112. The order provided that the approval of the Claimant's acoustic expert to the identified works was not to be unreasonably withheld. If approval were given, then there ought not to be a difficulty. If approval were withheld, then the First Defendant might accept that approval had been reasonably withheld and submit a further set of proposed works. If the First Defendant wished to contend that approval had been unreasonably withheld then the First Defendant could apply to court to determine that that was so and could ask the court to specify the works to be done.

113. One point made by Mr Wignall, as I understood him, was that it was not right that the Claimant's acoustic expert could withhold approval placing the burden on the First Defendant of arguing that consent had been unreasonably withheld. Such an argument would require the First Defendant to show that no reasonable person in the position of the acoustic expert could withhold approval. That is a much higher threshold to cross as compared with simply persuading the judge to prefer the First Defendant's scheme of works to that required by the Claimant's acoustic expert. I recognise the arguability of that point. However, I consider that it is adequately dealt with by paragraph 16 of the Order which gives the parties liberty to apply to the court in connection with the proposed works. I would construe paragraph 16 of the Order as permitting the court to decide on such an application what work it wishes to order to be carried out even without going so far as holding that no reasonable person could take the view adopted

by the Claimant's acoustic expert. Mr Johnson argued the contrary. If I had accepted Mr Johnson's argument, I might have been more prepared to alter the earlier provision in the order in so far as it allowed the Claimant's acoustic expert to withhold approval if a reasonable person could withhold approval and even where the court would have taken a different view from the acoustic expert.

114. In so far as the First to Third Defendants are objecting to the order requiring that the Scheme of Works be designed with "an acoustic strategy", I can see no objection to that. An acoustic strategy requires the designer to address the acoustic properties of the proposed works. That is a matter of central importance in this case in order to ensure that the nuisance is remedied, that Regulation 14 is complied with and that the landlord will have the information it needs when considering whether to give permission to the proposed work.

The result in relation to the appeal by the First to Third Defendants

115. Having now addressed all nine grounds of appeal put forward by the First to Third Defendants, my conclusion is that their appeal should be dismissed on each ground and the judge's order should not be set aside or varied. It will, however, be necessary at the hand down of this judgment to reset the timetable in that order for the First Defendant to carry out remedial work.

The Claimant's appeal

116. At the trial, the Claimant had contended that the Fourth Defendant was in breach of the covenant for quiet enjoyment and was liable, with the First to Third Defendants, for the nuisance which they had created. The judge dismissed both claims. The Claimant now appeals.

117. The Claimant's argument principally related to the claim in nuisance. The Claimant accepted that the Fourth Defendant would not be liable in nuisance merely because it failed to intervene to stop the creation of the nuisance and that would be the position even if the Fourth Defendant knew that the First to Third Defendants were creating a nuisance. The Claimant does not submit that the Fourth Defendant authorised the nuisance. Instead, what the Claimant submits is that the Fourth Defendant participated in the creation of the nuisance and thereby became liable with the other Defendants for the nuisance.

118. As to the claim in quiet enjoyment, this did not receive much attention at the hearing of the appeal. By the covenant for quiet enjoyment in the lease of Flat 62, the landlord covenanted that the lessee should peaceably hold and enjoy the demised premises during the term "without any interruption by the Landlord or any person rightfully claiming under or in trust for it".

119. As to the claim for breach of the covenant for quiet enjoyment, I understand that the Claimant's case is that this case involved an interruption by the Fourth Defendant; that submission can be seen to be consistent with the submission that the Fourth Defendant participated in the nuisance. Because the Claimant submitted that the Fourth Defendant did not authorise the nuisance, the Claimant does not seek to bring the claim within the other limb of the covenant for quiet enjoyment, that is, that the interruption was by a person rightfully claiming under the Fourth Defendant.

Although the First Defendant claimed its lease under the Fourth Defendant, that lease did not permit the works which were done and the Claimant does not contend, as I have explained, that the Fourth Defendant authorised the works.

120. The parties did not appear to disagree as to the relevant legal principles, save that they do not agree as to what principle I should derive from the decision of the Court of Appeal in Chartered Trust plc v Davies [1997] 2 EGLR 83. In these circumstances, I will set out a brief summary of the law and then refer further to that case.

121. A landlord is not liable for a nuisance caused by his tenant merely because he does not take steps (which are available to him) to prevent what is being done, even where he knows that his tenant is causing a nuisance: see Malzy v Eichholz [1916] 2 KB 308. Although the continuing authority of this decision was questioned in Chartered Trust plc v Davies, its authority was recognised by Lord Millett in Southwark LBC v Mills [2001] 1 AC 1 at 22A-B; the remarks of Lord Hoffmann in the same case at 15D-E appear to be to the same effect although he did not cite Malzy v Eichholz.

122. Malzy v Eichholz was considered in more detail by Lord Neuberger in Lawrence v Fen Tigers Ltd (No 2) [2015] AC 106 at [11]-[14]. He ruled that the earlier case was still good law. The other members of the Supreme Court agreed; see, in particular, Lord Carnwath at [51].

123. It is clearly established by Southwark LBC v Mills and Lawrence v Fen Tigers Ltd (No 2) that a landlord can be liable for the nuisance of the tenant if he participates in the nuisance or authorises it. Some of the authorities, dealing with the concept of authorisation refer to "authorisation by letting" to the tenant in question. In that context, it has been held that merely granting a lease which does not allow the landlord to prevent the nuisance does not make the landlord liable. The landlord is only held to authorise the nuisance by the letting if the commission of such a nuisance is an inevitable consequence of the letting. But the concept of authorising the nuisance is not confined to a case of authorisation by letting.

124. The concept of "participation" was considered in Lawrence v Fen Tigers Ltd (No 2). Lord Neuberger said at [18] that such participation must be "active" or "direct". He also said at [26] that the notion of authorising or participating in a nuisance was not limited to cases of landlords but was a general principle of tortious liability. I interpret this as indicating that what the court should do is to apply the general principles as to when someone is a joint or several tortfeasor and so liable for a tort committed by him with others. My reading of the judgment of Lord Carnwath in that case, at [57]-[59], is to the same effect.

125. In this case, Mr Johnson argues that the conduct of the Fourth Defendant in connection with the works to the floor amounted to the Fourth Defendant participating in the nuisance caused by those works. Before considering that submission further, I comment that it is at first sight very odd, on the facts of this case, that it is being submitted that the Fourth Defendant did not authorise the works to the floor but yet it participated in the nuisance caused by those works.

126. In many cases, there would appear to be a sliding scale of connection between a landlord and a nuisance carried out by his tenant, as follows:

(1) a landlord failing to take steps to prevent a nuisance when he does not know that a nuisance is being carried out;

(2) a landlord failing to take steps to prevent a nuisance when he does know that a nuisance is being carried out;

(3) a landlord authorising a nuisance; and

(4) a landlord participating in a nuisance.

I do not say that it is impossible to find that a landlord has participated in a nuisance created by his tenant even where he has not authorised the nuisance. A case where that could arise is where, on the particular facts, the landlord is directly involved in the nuisance but cannot be said, separately, to have authorised it because his authority for the nuisance was not needed under the pre-existing terms of the lease. Indeed, in Lawrence v Fen Tigers Ltd (No 2), it was held that the landlord had not authorised the nuisance by letting the premises to the tenant but the Supreme Court went on to consider whether, on the facts, the landlord was liable on the ground that he had participated in the nuisance.

127. Returning to the facts of this case, the connection of the landlord with the works was that the landlord's consent to the works to the floor in Flat 66 was needed but, on the judge's findings, such consent was not sought and was not given. Further, the landlord was in a position to inspect the works and was given certain information about the works. Nonetheless, Mr Johnson submits that the involvement of the landlord did not amount to the landlord authorising the nuisance. Nonetheless, he asks me to find that the involvement of the landlord amounted to the landlord participating in the creation of the nuisance.

128. The judge held that the case was governed by the principle in Malzy v Eichholz. He held that the failure of the Fourth Defendant to prevent the works to the floor did not render it liable in nuisance. He distinguished Chartered Trust plc v Davies on the ground that the Fourth Defendant was not in possession and control of Flat 66.

129. It is clear that the Fourth Defendant could have taken steps to prevent the First Defendant carrying out works to the floor. The works required consent under clause 3(f) and the Fourth Defendant did not give that consent. The Fourth Defendant knew that works to the floor were being carried out. However, the judge did not make a finding that the Fourth Defendant knew that the works involved a nuisance. The Fourth Defendant could have made enquiries and might then have established the position but that would not support a finding that the Fourth Defendant knew of the commission of a nuisance.

130. Mr Johnson submitted that the Fourth Defendant had control of the works because it had the power to withhold consent to the works or to grant consent subject to conditions. He also stressed that that Fourth Defendant knew that the works were being carried on. He relied heavily on Chartered Trust plc v Davies. Indeed, I do not think that his case would have been arguable but for the reliance he sought to place on Chartered Trust plc v Davies. Mr Johnson pointed out that the landlord in that case was held liable in nuisance for failing to stop the nuisance of which it was aware and which it might have been able to stop.

131. It is clear that some of the reasoning in that case is not consistent with the law as stated in Malzy v Eichholz. It is also now clear that the law is correctly stated in Malzy v Eichholz and that is the law which I ought to apply in this case. Chartered Trust plc v Davies was not cited in Southwark LBC v Mills and the actual decision was explained in Lawrence v Fen Tigers Ltd (No 2) at [14] as being possibly justified on the ground that the landlord in that case was in possession and control of the common parts of the shopping centre. As I will apply the legal principles as stated in Malzy v Eichholz, it follows that I will not apply the incompatible statements of principle in Chartered Trust plc v Davies.

132. It follows that I consider that the judge was right to apply the law as stated in Malzy v Eichholz in this case and, applying that law, was right to hold that what the Fourth Defendant had failed to do, when it did not prevent the First Defendant carrying out works to the floor, did not make it liable for the nuisance which was created. Mr Johnson does not submit that the landlord authorised the nuisance. On the judge's findings of facts, I consider that he was right to hold that the actions or omissions of the Fourth Defendant did not amount to participation in the nuisance.

133. It follows from this reasoning that the interference with the enjoyment of Flat 62 did not amount to an interruption by the Fourth Defendant so as to amount to a breach by it of the covenant for quiet enjoyment.

134. Accordingly, I will dismiss the Claimant's appeal against the Fourth Defendant.

A final comment

135. Before parting with the case, I wish to pay tribute to the trial judge for the quality of his judgment in this case. This cannot have been an easy case to try. Emotions plainly ran high on both sides. The judge was not impressed by the evidence given by the Claimant and her mother but he rightly directed himself that he did not have to reject everything that was said on their behalf. Equally, although the behaviour of the First to Third Defendants was open to specific criticisms, the judge used very moderate language in that respect and was not prepared to hold that they had done very much which went beyond using Flat 66 for ordinary purposes. The problem as found by the judge was that the floor laid as part of the 2010 works was not a suitable floor to prevent the transmission of noise and was worse than the floor which was there before the works. As I have said more than once already, the judge's consideration of the large body of evidence appears to me to have been meticulous and his findings were clearly expressed and he correctly decided all the disputed points of law.