[2020 Gib LR 244]

BRYMPTON MANAGEMENT LIMITED v. P.V. BACARESE and N. BACARESE

SUPREME COURT (Yeats, J.): August 24th, 2020

Injunctions—mandatory injunction—restoration of property—no mandatory injunction requiring removal of pergola constructed in breach of covenant—pergola necessary to prevent objects falling onto defendant's property—other residents had been permitted to erect structures in breach of covenants—not fair in circumstances to require removal

The claimant sought a mandatory injunction requiring the defendants to remove a pergola constructed on their balcony.

The claimant was the management company for the Brympton estate. The defendants were the leasehold owners of a ground floor apartment in one of the blocks on the estate. The defendants believed their apartment originally had two small balconies, protected overhead by the balconies above, but that the original owner had joined the two balconies, creating one larger one, the middle section of which was uncovered. The defendants stated that items such as rubbish, cigarette ends and other debris used to fall onto their balcony from above. The claimant had posted notices asking owners to refrain from throwing items from windows but no other action appeared to have been taken. The defendants decided that the only viable option to enable them to enjoy their balcony safely was to cover it.

In 2010, the defendants sought permission from the claimant for the construction of a pergola. The defendants were informed that in the first instance they should seek permission from the Town Planning Department. The defendants obtained the Development and Planning Commission's consent in 2011. The defendants were informed that they would require the consent of the lessor. The claimant's management committee refused consent *inter alia* because the request breached several covenants in the underlease. The application was considered by the committee again in 2013. In January 2014, the committee conducted a survey among residents of the lower floors. Five residents apparently objected to the proposal. The claimant wrote to the defendants in April 2014 refusing permission. The defendants obtained an updated planning permit, which was stated to be "for the purposes of the Town Planning Act only." It was noted that the permission of the landlord or owner of the land was required.

The works covenants provided:

"The Lessee shall not make any alteration or addition affecting the external elevation or structure of the block or the premises or make any structural or external alterations or change the existing design elevation or appearance or the external decorative scheme of the premises."

"The Lessee shall not build set up or maintain or suffer to be built set up or maintained on or in the Premises any building or erection other than or in addition to the structure now forming part therefor make any alteration in the plan or elevation of the Premises or in the services or matters relating thereto or in any party or other wall or make or maintain or suffer to be made or maintained any addition thereto either in height or projection or place or attach or maintain any structure whatsoever on or to any part of the Premises or make or suffer to be made any material change or addition whatsoever in or to the use of the Premises or any building or buildings or erection forming part thereof."

The defendants proceeded to erect the pergola. Lawyers acting for the claimant wrote to the defendants stating:

"If you now stop all works which you have commenced and send to us a detailed set of plans showing the works that you now wish to carry out, then we are instructed by the committee that they will consider such plans and decide whether or not to give consent to such works."

They wrote again, stating that the works were in breach of the covenant in the underlease. The defendants refused to stop the works and the pergola was completed.

The claimant demanded the removal of the pergola. The claimant stated that the pergola was constructed in breach of covenants in the deed of underlease made between United Developers Ltd. (as lessor), the claimant and the defendants' predecessors in title ("the works covenants"). The claimant sought nominal damages in the sum of £1 for breach of the covenants; a mandatory injunction requiring the defendants to remove the pergola and restore the balcony to its original condition; and its costs and expenses.

The claimant had approved structural works by other lessees of a type comparable to the construction of the pergola, including the enclosure of the terrace of a maisonette.

The claimant submitted that (a) construction of the pergola was prohibited by the works covenants (permission would have been granted had it not been for the prohibition in the works covenants); (b) the works covenants had not been varied; and (c) it would be equitable to grant an injunction ordering the removal of the pergola as the defendants had built it knowing that they did not have permission. If an injunction were not granted, "building anarchy" could ensue. Damages would not be an adequate remedy. It was significant that the works covenants were negative covenants prohibiting the doing of certain acts.

The defendants submitted that (a) the claimant was estopped from enforcing the covenants given that it had failed to enforce the covenants against other residents; (b) the works covenants had been varied by practice and were no longer absolute prohibitive covenants; and (c) the claimant had developed a procedure whereby it considered applications for works of a structural nature and therefore the works covenants were now qualified covenants where works could be carried out with consent, and implied into this variation was a term that consent should not be unreasonably withheld, and in the present case permission had been unreasonably withheld.

Held, ruling as follows:

(1) The pergola was a structure that affected the external elevation or structure of the building. Its construction altered the design and appearance of the premises. It could also be described as a structure attached to a part of the premises. It therefore fell within the types of works which were prohibited by the works covenants. At no time had the claimant given the defendants permission to construct the pergola. The defendants' evidence of items falling onto their balcony was not challenged. It clearly presented them with a dangerous situation. The court accepted the evidence that the pergola provided an adequate level of protection against any falling object. The design had been approved by the relevant authorities. It was beyond doubt that the claimant had over a number of years granted permission for works to be carried out which were similar to and/or more extensive than the pergola. The fact that the composition of the committee changed from time to time was immaterial. There should be consistency in approach. The committee had been aware since at least July 2011 that the building of the pergola was prohibited by the works covenant but they continued over time to invite the defendants to seek consent from them to build the structure. There was no evidence as to how many of the defendants' direct neighbours raised concerns when the consultation exercise was carried out. There was no evidence as to the nature of any objections which might have been communicated at any stage to the committee by the defendants' neighbours. The claimant had not presented any evidence as to how the pergola affected the defendants' neighbours' enjoyment of their own properties or the impact it had had on the estate in general. The difference in the positions taken by the committee in respect of the refusal of the defendants' application and the grant of permission to the owners of a maisonette to enclose their terrace was unjustifiable. Either works could be permitted or they could not (paras. 35–44).

(2) The issue of estoppel appeared to have been abandoned by the defendants. In any event, the defendants' situation did not raise a question of estoppel. Rather, it raised one of reasonableness and necessity (para. 47).

(3) The court agreed with the claimant's principal submission that an absolute covenant contained unqualified prohibitions. It was not subject to

any implied term of reasonableness. A landlord was, however, able to release a lessee from an absolute covenant if he thought fit. In the present case the works covenants were absolute covenants. The landlord, United Developers Ltd., had been in liquidation for some time. The works covenants had been entered into by United Developers Ltd., the claimant and the lessees. The claimant could agree to waive the prohibition in the works covenants in any particular case. Theoretically at least, United Developers Ltd. would also have to agree. The court did not find support in the authorities put before it for the proposition that an absolute covenant, like the one in the present case, was varied by past conduct. The works covenants remained in place as absolute prohibitions. They had not been varied. The practical effect of the works covenants might have been varied in cases where the claimant had given permission for works to be carried out but those waivers only applied in those particular cases (paras. 55–58; paras. 64–66).

(4) The works covenants contained absolute prohibitions against the addition or erection of structures like the pergola and alterations affecting the design of the building. The pergola was an alteration or addition to the external elevation and appearance of the block and external decorative scheme of the flat. The defendants constructed the pergola without permission and therefore in breach of the works covenants. The court would award the nominal damages sought of £1 (paras. 67–68).

(5) The following factors militated against the granting of an injunction. (i) The committee had over the years granted permission to other lessees to carry out works in breach of the works covenants, some of which were similar in nature to the pergola. (ii) The committee invited the defendants to apply for planning permission in order to construct the pergola. They did so and obtained the necessary permissions (qualified insofar as they were subject to landlord's consent). (iii) Even after the committee referred the defendants to the fact that there was an absolute prohibition against structural works they continued to invite them to apply for permission. (iv) The defendants had a licence from the claimant to use their extended balcony. Items had occasionally fallen from upstairs windows or balconies creating a hazard for users of the balcony. The pergola provided adequate protection against falling objects. (v) It was confirmed in evidence that the only reason the committee had refused permission was because of the works covenants, and that they would have helped the defendants if they were able to. (vi) The claimant had previously asserted, through the lawyers, that they were able to waive or vary the works covenants. The fact that counsel now said that was incorrect did not detract from the fact that the assertion was made. (vii) In 2016, the committee, as presently constituted, granted permission to the owners of a maisonette to carry out works which were more extensive than the pergola. (viii) There was no real evidence of any neighbours' objections to the pergola. Although there was evidence that neighbours objected, the exact nature and reasonableness of such objections had not been tested in evidence. (ix) There was no

evidence as to whether the particular design of the pergola was objectionable. In fact, the design was approved by the Town Planning Department. It would offend the court's sense of fairness to order the removal of the pergola in these circumstances (paras. 75–78).

Cases cited:
(1) *Chatsworth Estates Co.* v. *Fewell*, [1931] 2 Ch. 224, considered.
(2) *Doherty* v. *Allman & Dowden* (1878), 3 App. Cas. 709, considered.
(3) *Duval* v. *11–13 Randolph Crescent Ltd.*, [2018] EWCA Civ 2298; [2019] Ch. 357; [2019] 2 W.L.R. 761; [2019] P. & C.R. 19; [2019] HLR 12; [2019] L & TR 5; on appeal, [2020] UKSC 18; [2020] 1 A.C. 845; [2020] 2 W.L.R. 1167, followed.
(4) *F.W. Woolworth & Co. Ltd.* v. *Lambert*, [1937] Ch. 37, referred to.
(5) *Roper* v. *Williams* (1822), 37 E.R. 999; Turn. & R. 17, applied.
(6) *Sowden* v. *Smyth-Tyrell*, [2017] EWHC 2477 (Ch), considered.
(7) *Stirling* v. *Maitland & Boyd* (1864), 5 B & S 840; 122 E.R. 1043, considered.

Legislation construed:
Law of Property Act 1925 (c.20) (15 & 16 Geo. V), s.148: The relevant terms of this section are set out at para. 60.

C. Brunt for the claimant;
N. Gomez for the defendants.

1 **YEATS, J.:** Brympton Management Ltd. ("Brympton") is the management company for the Brympton estate. On August 1st, 2017, Brympton issued proceedings against the defendants Paul and Nancy Bacarese. Mr. and Mrs. Bacarese are the leasehold owners of a ground floor apartment in one of the blocks in the estate. Brympton's principal claim is for a mandatory injunction that a pergola constructed by Mr. and Mrs. Bacarese on their balcony be removed.

2 The hearing took place on August 5th and 6th, 2019. In the course of submissions, Nicholas Gomez, who appeared for Mr. and Mrs. Bacarese, brought to my attention the English Court of Appeal case of *Duval* v. *11–13 Randolph Crescent Ltd.* (3). It dealt with legal questions which were thought to be relevant to the issues that need to be determined in this case. At the time, an appeal to the Supreme Court of the United Kingdom was pending. At the conclusion of the hearing, I reserved my judgment. The parties were subsequently advised that, having given the matter some consideration, I was of the view that the outcome of the appeal to the UK Supreme Court should be awaited before I concluded my judgment. The UK Supreme Court handed down its judgment on May 6th, 2020. At my invitation, the parties then provided further written submissions on May 20th, 2020. Additionally, and unrelated to the *Duval* judgment, the defendants made an application to have Louis Russo, a witness in the

action, recalled. (Mr. Russo is the chairman of Brympton's management committee ("the committee").) I ordered the further cross-examination of Mr. Russo and this took place on June 23rd, 2020.

Brympton's claims

3 Brympton say that the pergola was built in breach of covenants contained in the deed of underlease dated December 17th, 1993 ("the underlease") and made between: (1) United Developers Ltd.; (2) Brympton; and (3) Mr. and Mrs. Bacarese's predecessors in title. The underlease prohibits the undertaking of certain structural works. Brympton say that the construction of the pergola is in breach of those prohibitions.

4 Brympton seek nominal damages in the sum of £1 for the breach of covenants. More importantly, they seek a mandatory injunction requiring Mr. and Mrs. Bacarese to remove the pergola and to restore the balcony to its original condition by carrying out works specified in a report dated December 2016 by McKillop Smith, Chartered Building Surveyors. Brympton also claim costs and the reimbursement of expenses incurred which arise from the alleged breach of covenants.

Summary of Mr. and Mrs. Bacarese's defence

5 Mr. and Mrs. Bacarese defend the claim on a number of grounds. First, that Brympton has itself breached the terms of the underlease by failing to enforce covenants entered into by other residents. This, they say, means that Brympton is estopped from enforcing the works covenants against them. Secondly, that the terms of the works covenants have been varied by practice and they are no longer absolute prohibitive covenants. Thirdly, Brympton has developed a procedure whereby it considers applications for works of a structural nature and therefore the works covenants are now qualified covenants where works can be carried out with consent. Implied into this variation is a term that consent should not be unreasonably withheld. In their case, Mr. and Mrs. Bacarese say that permission to build the pergola was unreasonably withheld by Brympton.

The covenants

6 The following covenants contained in the underlease are the relevant ones insofar as this claim is concerned. (It is agreed that by virtue of the provisions of the deed of assignment dated May 21st, 2007, by which Mr. and Mrs. Bacarese were assigned the unexpired residue of the term of years granted by the underlease, they are subject to the covenants contained in the underlease.) Paragraph 21 of the sixth schedule of the underlease:

> "The Lessee shall not make any alteration or addition affecting the external elevation or structure of the block or the premises or make

> any structural or external alterations or change the existing design elevation or appearance or the external decorative scheme of the premises."

Paragraph 15 of the tenth schedule to the underlease:

> "The Lessee shall not build set up or maintain or suffer to be built set up or maintained on or in the Premises any building or erection other than or in addition to the structure now forming part therefor make any alteration in the plan or elevation of the Premises or in the services or matters relating thereto or in any party or other wall or make or maintain or suffer to be made or maintained any addition thereto either in height or projection or place or attach or maintain any structure whatsoever on or to any part of the Premises or make or suffer to be made any material change or addition whatsoever in or to the use of the Premises or any building or buildings or erection forming part thereof."

I shall refer to these two covenants jointly as "the works covenants."

7 The underlease also contains what I will refer to as "the cross-enforcement covenants." Paragraphs 4 and 5 of the underlease provide as follows:

> "4. The Lessor HEREBY COVENANTS with the Lessee that the Lessor will require every person to whom it shall hereafter lease other parts of the Property to enter into similar covenants as are herein contained . . .
>
> 5. The Lessor and the Management Company respectively covenant with the Lessee that they will enforce (if necessary by taking legal proceedings) the performance and observance by any owner of other parts of the Property of the covenants and conditions contained in the lease or leases relating to such other parts of the Property."

8 As can be seen, the first of these clauses provides that all underleases in the estate are to contain similar covenants. The second requires Brympton to enforce the performance and observance of the covenants contained in the underleases. Brympton, it is argued, is therefore obliged to bring these proceedings against the lessees. Not to do so would result in them being in breach of the terms of the underlease and of all the other underleases entered into with the other owners of properties in the estate.

The evidence

9 As I have already indicated, Mr. Louis Russo gave evidence on behalf of the claimant. Mr. Bacarese was called for the defendants. The defendants also relied on an expert report prepared by Ashley Harrison, a civil engineer.

10 In his witness statement dated February 12th, 2019, Mr. Russo explains that the committee consists of six Brympton residents. He has been the committee's chairman since 2014. Mr. Russo says that Mr. and Mrs. Bacarese made an application to the committee to build the pergola but that this was refused. They nevertheless went ahead and built it. Despite repeated requests for the pergola to be removed and for the damage caused to the building's external walls by the structure's fittings to be made good, the pergola remains in place. Mr. Russo then concludes his statement with the following: "To my knowledge there have not been any other structures like the defendants pergola which have been built on the estate."

11 Mr. Russo was questioned as to Brympton's records. In his witness statement he had asserted that the committee's records of the 26 years it has been managing the estate are stored in a "disorderly manner" in a room within the estate. Importantly, he stated that "the completeness or otherwise of the records is questionable." When asked by Mr. Gomez about this, he confirmed that he could not be sure whether documents were missing. (I observe that a perusal of the disclosure files which contain the claimant's documents suggests that the committee's records are not complete. Letters and documents do not appear to form part of an organized filing system and are not in date order.) The relevance of the committee's record keeping to this case is that the defendants say that Brympton has in the past granted other lessees permission to carry out works of a structural nature.

12 In cross-examination, Mr. Russo was taken through the records and it was suggested to him by Mr. Gomez that these showed that works of a type which were comparable to the pergola had been carried out in the estate. Further, that Brympton had given permission for these structural works to be undertaken. The following are some of the examples put to Mr. Russo (which I set out in the order they were raised at the hearing):

(i) On December 10th, 1993, Brympton granted permission for the purchase of land forming part of the common area and the erection of a balcony at 2 Barham Tower. Mr. Russo said that this had been done in the "early days" when the developer was still on site and the lessee in question had been in negotiation with the Government, but accepted that the records showed that Brympton had granted permission for the works to be carried out.

(ii) Minutes of a meeting of the committee of December 5th, 1993 showed that permission had been granted to the lessee of 2 Blackwood Tower for her to open up a door and erect a balcony. Again, Mr. Russo accepted the contents of the minutes but said that had he been in the committee, he would not have allowed it.

(iii) On October 11th, 1995, Brympton granted permission to the lessee of 2 Barham Tower for the erection of a timber pergola. Interestingly, Brympton's letter states:

> "Given that you will not be altering the exterior walls you may proceed without planning permission. However, if the works do entail structural alterations you will have to obtain Government permits."

Mr. Russo said that he did not agree that the committee had the authority to grant this permission and stated that he has criticized these types of decisions in the past. He did, of course, accept that the records evidenced that the construction of a pergola on that particular balcony had been authorized by Brympton.

(iv) Minutes of a meeting of the committee of March 9th, 1995 showed that permission had been granted to the lessee of 1 Barham Tower to open up a gate from his balcony to the common area.

(v) On November 12th, 1993, Brympton granted permission for the lessee of 2 Cornwallis Tower to erect a balcony on condition that she purchased the area of common land upon which it was to be built. (This appeared to have arisen as a result of an unauthorized conversion of a window into a door.) Mr. Russo was unable to confirm whether the erection of the balcony had actually taken place.

13 Mr. Gomez also referred Mr. Russo to documents which evidenced that Brympton have had a procedure by which lessees could apply for permission to carry out works. A letter of December 13th, 2005 written by Brympton to the Development and Planning Commission in relation to an application for planning permission by a lessee, stated as follows:

> "The correct procedure would have been for [the lessee] to first apply to Brympton Management Ltd for permission to carry out any alterations to the exterior of his flat and full details with plans should have been submitted."

Mr. Russo's reply to this was that there is a procedure in place but its purpose is to consider works which are not prohibited by the underleases: for example, replacing windows, fitting air conditioning units, or other minor works of that nature. This statement is, however, at odds with a letter of February 14th, 2008 again by Brympton to the Development and Planning Commission. In the context of an application by the lessee of 2 Collingwood Tower for the construction of a balcony, Brympton again state that permission should have been sought from them first. (The letter goes on to say that permission is being refused as the balcony would be constructed on communal land.) Further, minutes of the committee of March 3rd, 1998 evidence that a proposal for the construction of a

patio/balcony on the ground floor of Collingwood Tower was approved subject to the purchase of common land.

14 Mr. Bacarese's witness statement dated March 19th, 2018 refers to the problems he and his family encountered when they moved into their property in about May 2007. They noticed that items would fall onto their balcony. These items could only have originated from the apartments above their own. The list of items which the lessees say have fallen onto their balcony is alarming. At para. 9 of his witness statement, Mr. Bacarese states as follows:

> "Since moving into the Property we noticed items would fall into our balcony from the floors above, and I believe from the roof on top of the building. These items would include cigarette ends, lit cigarettes, food, rubbish, water and other liquids, cat litter, nappies, condoms, metal window shutters, red hot charcoals from barbeques, animal faeces, metal awning poles and on one occasion an entire window."

15 As and when Mr. and Mrs. Bacarese complained to Brympton about these occurrences, Brympton would post notices asking owners to refrain from disposing of items by throwing them out of their windows. No other action appears to have been taken and Mr. and Mrs. Bacarese continued to suffer from instances of falling debris. Consequently, by 2010, they decided that the only viable option to allow them to enjoy their balcony safely was to construct a structure which would cover it. They then embarked into correspondence with Brympton seeking permission for the construction of the pergola.

16 As far as the application by Mr. and Mrs. Bacarese for the construction of the pergola is concerned, the first documentary reference is a letter dated July 27th, 2010 from Mr. and Mrs. Bacarese to Brympton. In it they seek permission to build a "roof" over their balcony, and say the following:

> "It is impossible to stop people watering their plants or sweeping everything down on to me . . . I also find cigarette ends which on various occasions have burnt my clothes . . . My plastic furniture is also damaged by cigarette ends, I have had cat litter, used preservatives, dog fouling wrapped in plastic and paper, meat spat out on top of me and redhot charcoal from barbeques."

Mr. Russo had not previously seen this letter but said that it would be "unfair" of him to dispute the claim by Mr. and Mrs. Bacarese that the items listed had in fact fallen on to their balcony.

17 Brympton responded to this letter on September 6th, 2010. They told Mr. and Mrs. Bacarese that in the first instance they should seek permission from the Town Planning Department and then forward its approval to the Committee. Mr. and Mrs. Bacarese obtained the Development and

Planning Commission's consent on February 23rd, 2011, including in-principle consent by the city fire brigade, the Environmental Agency and the Government's Technical Services Department—the latter being concerned with the integrity of waterproofing works which had been undertaken on the building. (The permit provided that permission was granted only because of the lessees' submission that users of the balcony needed to be protected from falling matter from the upper floors.) When these consents were shown to Mr. Russo at the hearing, he unequivocally stated that had the Committee considered that they had the legal right to allow the construction of the pergola, they would have granted permission to Mr. and Mrs. Bacarese to go ahead. That permission had only been refused because of the prohibition contained in the underlease and that they would have treated everyone the same.

18 The documentary trail continues with a letter written by Messrs. Phillips, solicitors acting for Brympton, to Mr. and Mrs. Bacarese on March 23rd, 2011. They state as follows:

> "This matter raises possible considerations for adjacent premises, and, as you know, you will require the consent of the Lessor before you make any such changes as are proposed . . .
>
> Please be clear that no permission to make any change to the premises has been granted to you and you must take no steps to commence any works until after you have that consent.
>
> The fact that you may obtain planning consent does not alter the position stated above.
>
> Your application will be considered by the committee during the next month and the committee may . . . seek further information from you to assist them to consider this application."

19 A further letter was sent by Messrs. Phillips to the lessees on July 13th, 2011:

> "Your request for consent has been considered by the directors of the management company, and they have decided to refuse such consent.
>
> There are several reasons for this refusal and we believe that your wife has been briefed by the Chairman as to those reasons, so we refer only to one point upon which we have advised.
>
> There is a legal problem in consenting to your request because it breaches several covenants in the underlease.
>
> Further, the management company is obliged to enforce these covenants and can be compelled to do so by the other residents in the estate who might object to what you request to be permitted.

> For this reason, as well as others they had in mind, we have advised the committee that they cannot accede to your request."

20 On receiving this response from Brympton's solicitors, Mr. and Mrs. Bacarese commissioned a report from a health and safety expert. The expert submitted a report on July 18th, 2011 whereby he confirmed that in his opinion users of the balcony were exposed to hazards and recommended the building of a roof structure over it.

21 The matter was brought up again in 2013 and is referred to in the minutes of the meetings of the committee of November 6th, 2013 and November 26th, 2013. Mr. Russo confirmed that the committee were again considering the application, and on January 12th, 2014 they conducted a survey amongst residents of the lower floors. Brympton stated in the notice to the residents that the planning department required Brympton's permission to the works. The notice suggested that any future structures would have to comply with the same design—presumably for the sake of uniformity. Five residents had apparently objected to the proposal. Mr. Gomez questioned Mr. Russo as to why the committee had conducted this survey in 2014 if in 2011 the committee had already been advised that the construction would breach the terms of the underlease. Mr. Russo's reply was that he had not been in the committee in 2011 but he accepted that three of its members had formed part of the committee throughout both periods.

22 On April 7th, 2014, Brympton wrote to Mr. and Mrs. Bacarese refusing permission and referring to para. 21 of the sixth schedule to the underlease. Notwithstanding this refusal, Mr. and Mrs. Bacarese obtained an updated planning permit on November 28th, 2014. The permit did expressly state that a permit was issued "for the purposes of the Town Planning Act only." The letter continued:

> "It does not override the need for any other authorisations that may be required under other legislation or as a matter of law. In particular, applicants should note that the permission of the landlord and/or owner of the land in question is required before any works can start."

23 Thereafter the lessees proceeded to commission the erection of the pergola. On July 16th, 2015, Messrs. Phillips, again acting on Brympton's behalf, wrote to Mr. and Mrs. Bacarese instructing them to stop the construction works. They stated as follows:

> "Our client instructs us that they had refused consent for certain works for which you had in the past requested their consent.
>
> If you now stop all works which you have commenced and send to us a detailed set of plans showing the works that you now wish to carry out, then we are instructed by the committee that they will consider such plans and decide whether or not to give consent to such works.

> If they decide to consent, the works may be subject to such terms and conditions as the committee may require."

24 Having received a response from Mr. and Mrs. Bacarese (a copy of that letter has not been produced) Messrs. Phillips again wrote to the lessees on July 17th, 2015:

> "The works now being carried on are in breach of the covenant in your underlease, which states that you shall not make any alteration or addition affecting the external elevation or structure of the block or the premises or make any structural or external alterations or change the existing design elevation or appearance or the decorative scheme of the premises.
>
> Your admitted breach of that covenant makes you liable not only for the costs of [Brympton] in instructing us to compel compliance with the covenant, but also for damages for breach of covenant by you . . .
>
> If you give the undertakings requested above then [Brympton] is willing to receive from you detailed plans proposing a different alteration to that which they had already rejected.
>
> They do not undertake to agree any such plans but do offer to consider them and advise if they will approve such plans, any such consent being with or without such conditions or alterations as they may require at their sole discretion."

25 Mr. and Mrs. Bacarese replied by letter of July 18th, 2015, again explaining their reasons for building the pergola and, in effect, refusing to stop the works or provide the undertakings requested by Brympton. This letter was then followed by a further letter from Messrs. Phillips of July 20th, 2015. Addressing the point made by Mr. and Mrs. Bacarese that they had a planning permit, the solicitors said as follows:

> "I must point out to you that whether or not you have any such planning consent, and upon whatever grounds it may be based, no breach of the covenant in the underlease is justified or legalized by any such planning permit and that the only party authorized and entitled to waive or vary such a covenant is the management company."

26 A further letter from Messrs. Phillips dated July 27th, 2015 again invited Mr. and Mrs. Bacarese to re-apply to Brympton for permission and stated as follows:

> "The Committee invites you to reapply for permission, providing with that application copies of any Health and Safety Permits and Planning consents which you may have obtained. They will then consider the application anew.

> Please note that having obtained planning consent does not mean you are able to breach a covenant of the underlease.
>
> BML would wish to avoid applying to the court, but we are instructed to make clear to you that if you do not cease the works you are now doing and resubmit your application, there is no other option available but to apply to the court for an injunction to restrain you from your unlawful breach of covenant."

27 The construction of the pergola was completed by Mr. and Mrs. Bacarese notwithstanding the correspondence with Brympton's solicitors. Further correspondence was exchanged in 2016 between the parties, with Brympton demanding the removal of the pergola. As these demands were not complied with, Brympton issued proceedings on August 1st, 2017.

28 In his statement, Mr. Bacarese explains how they were very surprised to have received the letter of July 3rd, 2011 from Messrs. Phillips refusing permission and referring to breaches of the underlease. Mr. Bacarese sets out examples of other structural works which have been undertaken by other property owners in the estate. These alterations include a parking bay which has been converted into a garage, private balconies built on green areas and a patio built on a pavement. Mr. Bacarese asserts that these works "have been carried out without objection by [Brympton]." (Paragraphs 8.1 to 8.7 of the defence also set out examples of works carried out in the estate.) He also says that they went to great care and expense to ensure that the pergola was constructed: ". . . as unobtrusively as possible strictly in keeping with the aesthetics of the other alterations which had been made in or around the building with [Brympton's permission]."

29 In cross-examination, Mr. Bacarese confirmed that since they constructed the pergola, items have fallen on the structure but that fortunately those have not included heavy objects.

30 Mr. Bacarese's understanding was that, as originally built, the premises had two small balconies. Both were on the same façade, one in front of a bedroom and the other in front of the kitchen. This was in common with all the flats above it. The two small balconies would therefore have enjoyed the overhead protection afforded by the balconies above. The original owner then sought to join both balconies creating one long one. The effect was that the middle section was uncovered. Mr. Bacarese's evidence was that all of the similar ground floor flats in the different buildings in the estate had extended their balconies in the same manner. Correspondence disclosed by the committee shows that a licence was granted to the original owner to make use of the communal area between her two balconies. The area is not included in the underlease. No assignment or grant of that land to Mr. and Mrs. Bacarese or their predecessors in title appears to have been effected. This is relevant to a

statement made by Mr. Bacarese in evidence that the pergola had not been built on communal property but rather is contained within his own property.

31 Mr. Bacarese also suggested that the pergola was not an alteration or a modification. It was, he said, an adaptation. He could not agree that it breached the works covenants because the safety of his family came first.

The further cross-examination of Mr. Russo

32 Following the hearing, it came to Mr. and Mrs. Bacarese's attention that a roof structure had very recently been erected on the top floor terrace of one of the maisonettes forming part of the estate. As a result, they sought, and I ordered, the further questioning of Mr. Russo. Photographs of the structure were produced. It has a large steel frame and has what appears to be a pitched tiled roof. Mr. Russo confirmed that it had recently been erected and that it had been done by the Government as a temporary measure to remedy a defect in the terrace that was causing water ingress in the property. He had been advised of this by the owner of the maisonette.

33 Mr. Gomez put to him that the committee had in 2016 granted the maisonette's owners permission to enclose the terrace and build a roof over it. He suggested that the roof structure looked the same in style and size to that which was contained in the plans submitted at the time and that it therefore looked like the first steps towards the enclosing of the terrace. Mr. Russo agreed that the structure was similar to that set out in the plans but maintained that he had been told that this was simply a temporary measure. However, what was clear was that the committee had in 2016 granted permission for significant structural works to be carried out on the terrace of the maisonette. Mr. Russo justified it by saying that the family needed an extra bedroom and that the committee had wanted to help. Furthermore, unlike in Mr. and Mrs. Bacarese's case, the neighbours had not objected. He also stated that the maisonette's owners had worked with the committee to arrive at an acceptable design whereas Mr. and Mrs. Bacarese had pushed ahead without the committee's agreement. When it was pointed out to Mr. Russo that in 2014 he himself had written to Mr. and Mrs. Bacarese stating that the underlease prohibited the carrying out of structural works, he said that in the case of the maisonette the committee had tried to help with the best of intentions. Mr. Russo also explained that the maisonette was a semi-detached property and reiterated that the neighbours had not objected.

The report by the defence expert

34 Ashley Harrison produced a "Structural survey report" on the pergola dated May 2019. Mr. Harrison was not called to give evidence because the report was not challenged by Brympton. In the report, Mr. Harrison

observes that the pergola was structurally sound and would be able to protect against objects of up to 2–3 kg. falling from a height of 6–7 storeys. At paras. 4.03 and 4.04 of his report, Mr. Harrison then states as follows:

> "[4.03] In comparison with a material awning, the fabric covering would provide little to no protection and should not be considered for overhead protection. The material would be much more prone to rips, tears and burning from falling objects (which have been reported to range from awning poles to lit cigarette ends) when compared to the timber alternative.
>
> [4.04] The timber pergola will provide adequate protection from falling objects above, although it may not stop heavy objects falling from a considerable height, it will prevent typical items (awning poles, bbq cooking equipment e.g. tongs) from falling onto the balcony floor and absorb part, if not all, of the kinetic energy from heavier objects. The timber pergola will provide a greater deal of protection when compared to a material awning, especially from sharp/hot objects that will tear/burn fabric."

Discussion and conclusions on the evidence

35 The pergola is a structure which affects the external elevation or structure of the building. Its construction altered the design and appearance of the premises. The pergola can also be described as a structure attached to a part of the premises. It therefore falls squarely within the types of works which are prohibited by the works covenants.

36 The question of whether the pergola was built on property belonging to Mr. and Mrs. Bacarese or on communal reserved property is therefore irrelevant. (In any event, I observe that all that Mr. and Mrs. Bacarese have is a licence to use the common land in between the two original balconies as a balcony extension. It is not part of the premises as demised by the underlease. The right to use the balcony cannot be confused with the reservation of the external wall of the building by the underlease and the obligations which come with it.)

37 At no time has the committee given Mr. and Mrs. Bacarese permission to construct the pergola.

38 Mr. Bacarese's evidence as to the fact that the items which he detailed have, at various times, fallen into his balcony was not challenged. Clearly, that presented Mr. and Mrs. Bacarese with a dangerous situation. I also accept, in accordance with the evidence of the expert, which is not disputed, that the pergola provides an adequate level of protection against any such falling object. The design of the pergola was approved by the Town Planning Department and other relevant authorities.

39 It is beyond doubt that the committee has over the years granted permission for the carrying out of works which are similar and/or more extensive in nature to the pergola. Whether any such works have caused, or would have caused had they been undertaken, a more significant impact on the appearance of the buildings in the estate is not a matter which has been properly considered at trial.

40 In my judgment, the fact that the composition of the committee changes from time to time is immaterial. What is permissible cannot depend on who is serving on the committee at the time. There should be consistency in approach. In any event, the committee which instituted proceedings against Mr. and Mrs. Bacarese has itself granted permission for significant structural works to be undertaken in the estate. They certainly granted permission for the enclosing of the terrace on one of the maisonettes and its conversion into a bedroom.

41 The committee was aware since at least July 13th, 2011 (the date on which it is first raised by their lawyers) that the building of the pergola was prohibited by the works covenants. Despite this, they continued over time to invite Mr. and Mrs. Bacarese to seek consent from them for the building of the structure. Indeed, even after construction of the pergola had started, Messrs. Phillips invited Mr. and Mrs. Bacarese to send them plans of the works so that the committee could decide whether or not to grant its consent (letters of July 16th and 17th, 2015). Furthermore, by letter of July 18th, 2015, Messrs. Phillips say that "the only party authorized and entitled to waive or vary [the works covenants] is the management company." (Christopher Brunt, who appears for Brympton, now submits that this statement is in fact incorrect and that Brympton cannot unilaterally waive any prohibition contained in an absolute covenant.)

42 A letter dated February 8th, 2014 from an owner of one of the other buildings in the estate is contained in the disclosure bundle. It appears that the owner is reacting to the consultation exercise which was carried out by the committee in early 2014, and raised objections to the building of the pergola. She states that the view from her balcony would be restricted if a similar structure was built in her block; litter would accumulate on the pergola which could not be cleaned; and there is a risk that rain falling on the pergola would make noise. This letter was not put to Mr. Russo or Mr. Bacarese. It is in the disclosure bundle and strictly not in evidence. I will in any event comment on the objections. First, I do not see how the pergola could obstruct the view from a higher floor. It may well be the case but this was not tested at trial. Secondly, it would seem to me that a roof structure like the pergola could be easily cleaned. As to the third issue, the noise, I am unable to make any comment without having heard evidence on the matter.

43 There is no evidence as to how many of Mr. and Mrs. Bacarese's direct neighbours raised concerns when the consultation exercise was carried out. There is no evidence as to the nature of any objections which may have been communicated at any stage to the committee by Mr. and Mrs. Bacarese's neighbours. There is no evidence as to what representations, if any, have been made to the committee after the actual construction of the pergola. There is no evidence that any other owner has encouraged or required the committee to bring these proceedings. Mr. Russo simply referred to the fact that neighbours had objected when the consultation exercise was carried out but did not provide any details. (He also referred to the existence of a letter but none was produced in evidence or identified. I assume he must have been referring to the letter highlighted above.) Brympton have not therefore presented any evidence in these proceedings as to how the pergola affected Mr. and Mrs. Bacarese's neighbours' enjoyment of their own properties or the impact that it has had on the estate in general.

44 The evidence on the granting of permission to the owners of the maisonette to enclose their terrace which arose in the further cross-examination of Mr. Russo is significant. Mr. Russo explained that the committee granted permission for those works because they wished to help the owners of the maisonette. But, by that stage, the committee was fully aware that the advice from their lawyers was that the underlease prohibited the carrying out of such works. I observe that, at the August hearing, Mr. Russo had in fact said that if the committee had been able to help Mr. and Mrs. Bacarese they would have done so and that they would have treated everyone the same. That the only reason that permission was refused was because the underlease prohibited the granting of permission. Whilst I understand that Mr. Russo explained at the later June hearing that there was a distinction between both cases insofar as neighbours' consents were concerned, in my judgment the difference in the positions taken by the committee is unjustifiable. Either works can be permitted or they cannot. Affection towards particular property owners and/or their predicament is not a ground to treat them differently.

Estoppel

45 The first of the grounds of defence is what Mr. and Mrs. Bacarese say is the failure by Brympton to enforce covenants entered into by other residents. All underleases have obligations not to do any act which will become a nuisance or annoyance or cause damage to any other owner or occupier or their property (para. 8(i) of the sixth schedule to the underlease). There is also a prohibition (if one were needed) against throwing or allowing to be thrown any rubbish or refuse out of any window (para. 6 of the tenth schedule of the underlease). Despite repeated pleas by Mr. and Mrs. Bacarese for action to be taken against other owners in respect of the

rubbish and items which were being thrown out of windows and were landing on their balcony, Brympton took no steps beyond placing occasional notices in communal areas. Mr. and Mrs. Bacarese say that this means that Brympton are now estopped from enforcing any potential breach of covenants in their underlease against them.

46 This point was addressed by me when I considered Brympton's application for Mr. and Mrs. Bacarese's defence to be struck out. Leaving to one side the practical difficulties in identifying the persons responsible for an item falling or being thrown from a higher floor, in a judgment dated August 17th, 2018, I observed as follows (at para. 40):

> "Even if I were to accept that there has been a failure by Brympton as alleged by [Mr. and Mrs. Bacarese] it would be unreasonable to say that the only result which can follow is that Brympton is unable to itself take any action against others."

47 Mr. Gomez did not make any submissions on this ground of defence at trial and the point seems to have been all but abandoned. In any event, I consider that Mr. and Mrs. Bacarese's situation does not raise a question of estoppel. Rather, it raises one of reasonableness and necessity in constructing the pergola having been unable to deal with their health and safety issues by relying on the protection afforded by the covenants entered into by their neighbours. I will address this further in the course of the judgment.

***Duval* v. *11–13 Randolph Crescent Ltd.* (3)**

48 The case concerned the granting of permission by a landlord to a lessee to carry out works which would otherwise have resulted in a breach of a covenant in the lease. Another lessee in the same building sought a declaration from the court that the landlord could not do so because the lease required the landlord to enforce the covenants at the request and cost of any other owner. The Court of Appeal declared that the grant of a licence in those circumstances would indeed amount to a breach of the cross-enforcement covenants. The appeal by the landlord to the United Kingdom Supreme Court was dismissed.

49 The leases contained two provisions regulating what works could be carried out in the building. Clause 2.6 prohibited alterations, improvements and additions unless the landlord's consent was first obtained. Clause 2.7 prohibited, amongst other things, the cutting of walls. There was then a provision requiring the landlord to enforce, "at any other lessee's request and cost" the observance of these covenants (cl. 3.19). The landlord granted a lessee (a Mrs. Winfield) permission to carry out works which involved removing a load-bearing wall. This clearly fell within cl. 2.7. Another lessee (Dr. Duval) objected and sought the declaration from the court.

50 Lord Kitchin's judgment in the Supreme Court considered that there was an implied term in the cross-enforcement covenant that the landlord could not put it out of its power to enforce cl. 2.7 by licensing its breach. His conclusion was based on a list of factors which he considered relevant in construing the proper interpretation of these clauses. First, the leases were long-term leases purchased for substantial sums. They have value which lessees could quite properly expect to retain or enhance. Secondly, the parties to the leases would have appreciated when they executed the contracts that works to their flats would need to be carried out over the years by way of maintenance or upgrading of utilities *etc*. Thirdly, any such routine improvement works or modifications would not impact on other lessees' enjoyment of their own flats and it was reasonable for the landlord to be able to consent to these as it was able to do pursuant to cl. 2.6. Fourthly, the parties to the lease would have appreciated that it was desirable for a landlord to manage the building and fulfill its obligations under the leases. All these factors of course broadly apply to the properties at the Brympton estate.

51 In discussing the landlord's obligation to enforce breaches of cll. 2.6 or 2.7, his lordship said the following ([2020] UKSC 18, at para. 55):

> "55. In my view it necessarily follows that the landlord will not put it out of its power to enforce clause 2.7 in the lease of the offending lessee by licensing the activity that would otherwise be a breach of that clause. The clause is an absolute covenant and, under clause 3.19, the complainant lessee is entitled, on provision of security, to require the landlord to enforce it as an absolute covenant. As Lewison LJ said at para 27 of his judgment, it would not give practical content to the obligation if the landlord had the right to vary or modify the absolute covenant or to authorise what would otherwise be a breach of it."

52 At para. 57 he continued:

> "I recognise that if a landlord waives its right to complain of an activity by a lessee in breach of clause 2.7 it cannot subsequently bring a claim against that lessee for breach of the covenant. But that does not mean to say that the landlord has not acted in breach of its obligation under clause 3.19 to another lessee. In my view it would be uncommercial and incoherent to say, as the landlord does, that clause 3.19 can be deprived of practical effect if it manages to give a lessee consent to carry out work in breach of clause 2.7 before another lessee makes an enforcement request and provides the necessary security."

53 The underleases in the Brympton estate have the prohibition contained in the works covenants and also have a cross-enforcement covenant. Therefore, neither the landlord or Brympton can avoid breaching

the cross-enforcement covenant by simply licensing a breach of the works covenants. In this regard, I consider it relevant to the issues in this case to also quote from Lewison, L.J.'s judgment in the Court of Appeal. It is a passage that the Supreme Court did not expressly, or it seems to me impliedly, disagree with. Lewison, L.J. said ([2018] EWCA Civ 2298, at para. 33):

> ". . . the landlord has *power* to license what would otherwise be a breach of covenant; but commits a breach of clause 3.19 in doing so. The landlord has no obligation to inform the body of lessees in advance of what it proposes to do. If a lessee wishes to enforce clause 3.19 against the landlord she has a right of action. If the landlord has already granted the licence and it has been acted upon then the landlord will be unable to enforce the covenant (whether by injunction, forfeiture or damages) as regards what has been licensed. In that event the lessee's only remedy against the landlord under clause 3.19 will be in damages for breach of that covenant. In the sort of cases postulated by Mr Johnson it seems unlikely that the damages would be substantial. Where the licence has not been granted, or if granted has not been acted upon, it is possible that the court might grant an injunction either preventing the grant, or requiring the licence to be undone. But before deciding whether to grant that remedy the court would have to consider what the lessee's objections were to the grant of the licence. If they were bad reasons, or no reasons at all, that would be a powerful factor militating against the grant of an injunction." [Emphasis in original.]

54 The landlord in the Brympton underleases can therefore grant permission for works to be undertaken which would otherwise constitute a breach of covenant. However, if he does so then he commits a breach of the cross-enforcement covenant. The only remedy for that breach when permission has been acted upon (and assuming proceedings were brought by another lessee against the landlord) would be damages.

Variation of the works covenants

55 I agree with Mr. Brunt's principal submission that an absolute covenant contains unqualified prohibitions. It is not subject to any implied term of reasonableness (see *F.W. Woolworth & Co. Ltd.* v. *Lambert* (4) ([1937] Ch. at 58)). A landlord is, however, able to release a lessee from an absolute covenant if he thinks fit. In our case the works covenants are absolute covenants.

56 I pause here to look at whether the fact that Brympton is not the *landlord* of the estate is relevant to the issues being considered. As I have already referred to, the underleases in the estate were entered into between United Developers Ltd. as lessor; Brympton as the management company;

and the individual purchasers—the lessees. United Developers Ltd. had previously entered into a headlease with the Government of Gibraltar. As leasehold owner of the entire estate, it was then able to demise individual properties by way of underlease.

57 In evidence, Mr. Russo confirmed that United Developers Ltd. had been in liquidation for some time. It certainly has not featured in any of the relevant correspondence which was referred to at the hearing. Mr. Russo further confirmed that Brympton is in negotiations with H.M. Government of Gibraltar for United Developers Ltd.'s interests in the headlease to be assigned to Brympton. That has not yet happened. Brympton has therefore never become the landlord of the estate. Brympton is simply the management company. (All lessees in the estate are in turn members of the management company.)

58 I have found it proven that Brympton has licensed, or has purported to have licensed, works which would ordinarily be prohibited by the works covenants. It cannot have done so as landlord. Is that material? It seems to me that it is not. The works covenants were entered into between all three parties to the underlease. It is the parties to a particular contractual arrangement who are able to vary it. Therefore Brympton could agree to waive the prohibition contained in the works covenants in any particular case. Theoretically at least, United Developers Ltd. would also have to agree. (As already highlighted, if permission is given for works to be carried out in breach of the prohibitions contained in the works covenants, then that would result in a breach of the cross-enforcement covenant.)

59 Mr. Brunt submitted that there has been no variation of the works covenants. He also suggested that, in practical terms, it would be a "recipe for mayhem" if the works covenants were deemed to no longer be absolute covenants. Mr. Gomez, on the other hand, submitted that the works covenants have been varied by the conduct of the committee over the years. As he put it, what was once forbidden is no longer so. The works covenants are no longer absolute covenants. They are now covenants which should be read as prohibiting works without consent. In such a case, consent is not to be unreasonably withheld. He relies on Lewison, L.J.'s judgment in the Court of Appeal in *Duval* (3) and in particular the passage at para. 29 (which he submits the Supreme Court did not dissent from). His Lordship stated ([2018] EWCA Civ 2298, at para. 29):

> "If one lessee is released from his obligation either in whole or in part, I consider that the existing state of circumstances has been disturbed. Although I accept, as Mr Johnson submitted, that in those circumstances the covenant itself has not been waived (see Law of Property Act 1925 s 148); it seems to me that the practical effect of the covenant has been varied, in that it no longer forbids that which

> was once forbidden. Clause 3.19 is concerned with the practical effect of the obligations; not merely the words on the page."

The reference to "existing state of circumstances" was a reference to a phrase used in an authority cited to that court by one of the parties—*Stirling* v. *Maitland* (7) (5 B & S at 852) as follows:

> "I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."

Lewison, L.J. considered that the "existing state of circumstances" in the context of the *Duval* case was the fact that each lessee was subject to similar binding obligations.

60 I do not agree that Lewison, L.J.'s quote can be given the interpretation that Mr. Gomez seeks to give it. It seems to me that what the learned judge is saying is that once the absolute covenant is waived in a particular instance, then that which was forbidden in respect of that case is no longer forbidden—although it then has the consequence that there is a breach of the cross-enforcement covenant. Indeed, this is what s.148 of the (English) Law of Property Act 1925 provides (which was referred to in the passage by the judge and which I refer to for the context of what was said only as it is not a statute which applies in Gibraltar):

> "[A waiver] . . . shall not be deemed to extend to any instance, or to any breach of covenant or condition save that to which such waiver specially relates, nor operate as a general waiver of the benefit of any such covenant or condition."

This supports my conclusion that Lewison, L.J. was referring simply to the variation of the practical effect of the prohibitory covenant in any one particular case.

61 In his written submissions dealing with the *Duval* appeal (3), Mr. Gomez also raised the fact that all property owners in Brympton are members of the management company. That Brympton holds annual general meetings, and there is no evidence that any lessee has ever objected to Brympton's policy of giving permission for works. Furthermore, he asserts, although I have seen no evidence on this, that Brympton have approved assignments of properties which have had external works carried out to them. This, it is submitted, means that Brympton has acquiesced to and legitimized what would otherwise have been breaches of the works covenants. I cannot accept that a failure to raise an objection by its members at annual meetings, or on assignment of underleases, has the effect of varying the works covenants. Because of the terms of cl. 4 in

every underlease (which provides that the lessor will require all lessees to enter into similar covenants), to vary a covenant would require the express, and it seems to me unanimous, consent of all underlessees.

62 Mr. Gomez also referred to two further authorities in support of Mr. and Mrs. Bacarese's case. The first is *Chatsworth Estates Co.* v. *Fewell* (1). There, the plaintiff sought damages and an injunction against a defendant who was using his property as a guest house in breach of a covenant prohibiting anything other than residential use. The defendant admitted the breach but relied on the fact that the plaintiffs had permitted other breaches by other owners of that same covenant to contest the relief sought. Farwell, J. said as follows ([1931] 2 Ch. at 231):

> "Now, as stated in many authorities, the principle upon which this equitable doctrine rests is that the plaintiffs are not entitled to relief if it would be inequitable to the defendant to grant it. In some of the cases it is said that the plaintiffs by their acts and omissions have impliedly waived performance of the covenants. In other cases it is said that the plaintiffs, having acquiesced in past breaches, cannot now enforce the covenants. It is in all cases a question of degree. It is in many ways analogous to the doctrine of estoppel, and I think it is a fair test to treat it in that way and ask, 'Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his house as a guesthouse?'"

63 The second of the authorities was *Sowden* v. *Smyth-Tyrell* (6). This was a challenge to the High Court of an arbitration award which had considered breaches of clauses in a tenancy agreement prohibiting alterations or additions to a farm building. HHJ Paul Matthews, sitting as a judge of the High Court, said ([2017] EWHC 2477 (Ch), at para. 47):

> ". . . I see no reason why a representational or conventional estoppel, if made out on the facts, could not apply to prevent a landlord from enforcing a liability for breach of covenant which otherwise would apply."

[The judge then referred to the quote in the *Chatsworth Estates* case which I have just set out.]

64 I do not find support in these authorities for the proposition that an absolute covenant, like the one in our case, is varied by past conduct. They deal with whether equitable relief should be granted to enforce a breach.

65 In my judgment the works covenants remain in place as absolute prohibitions. They have not been varied. The practical effect of the works covenants may have been varied in cases where Brympton has given permission for works to be carried out but those waivers only apply in those particular cases.

66 As I conclude that the works covenants have not been varied, I need not consider Mr. Gomez's submission that if Brympton have a practice to hear applications for the licensing of works prohibited by the works covenants, it must act reasonably.

Breach of the works covenants

67 The works covenants contain absolute prohibitions against the addition or erection of structures like the pergola and alterations affecting the design of the building. The pergola is an alteration or addition to the external elevation or structure of the building; and/or alters the design elevation and appearance of the block and external decorative scheme of the flat. Mr. and Mrs. Bacarese constructed the pergola without permission. They therefore did so in breach of the works covenants.

68 As set out in the claim form and particulars of claim, Brympton seek damages in the sum of £1. I shall make this nominal award. Although I do not have to decide the point, for the same reasons which inform my decision on whether or not to grant the injunctive relief and which I discuss below, I doubt that anything other than nominal damages would have been appropriate in this case in any event.

The injunction sought by Brympton

69 Mr. Brunt submits that it would be equitable to grant an injunction ordering the removal of the pergola. He provides a number of reasons in support. First, Mr. and Mrs. Bacarese proceeded to build the pergola knowing that they did not have permission to do so either from the planning department (as their consent was conditional on landlord's consent being obtained) or from Brympton itself. This of course is correct. Mr. Brunt also relied on the *Chatsworth* case (1). He submitted that a passage at p. 233, was particularly relevant. There the judge said ([1931] 2 Ch. at 233):

> "This is peculiarly a case for an injunction. Whatever his previous knowledge, the defendant knew before the date of the writ, June 4 1929, that he was breaking the covenant and that the plaintiffs objected. In the face of that he elected to go on in assertion of his supposed legal right, to which I have held he is not entitled. In those circumstances I ought to give the plaintiffs the only substantial relief I can, namely, an injunction. Damages are no remedy, because the object of the covenant is not to make persons pay for committing breaches but to prevent those breaches."

Mr. Brunt's submission, however, ignores a crucial aspect of the evidence of Mr. Russo at the main hearing. That permission would have been granted had it not been for the prohibition contained in the works covenants.

70 Secondly, if an injunction were not granted then he submits that "building anarchy" could ensue. Other lessees would be emboldened and carry out any works they wished to carry out. In my judgment, this is somewhat of an exaggeration. Any works would require planning permission. That in itself protects against indiscriminate building or works. Further, refusing an injunction in one case does not prevent Brympton from taking steps in another case which factually may be very different. Indeed, Brympton could well be advised that there are steps which it can take to draw a line under this case and allow it to take effective enforcement action in worthy cases.

71 Thirdly, damages are not an adequate remedy. I accept that this is the case. However, as has already been observed, although there is evidence that neighbours objected, the exact nature and reasonableness of such objections has not been tested in evidence. Furthermore, I again refer to the fact that the evidence is that absent the prohibition contained in the works covenants, permission would have been granted.

72 Fourthly, the works covenants are negative covenants in that they prohibit the doing of certain acts—namely the addition of structures *etc*. This, Mr. Brunt says, is significant and he relies on the House of Lords case of *Doherty* v. *Allman & Dowden* (2). The case involved a proposed conversion of stores into flats in what was said by the plaintiff to be in breach of the terms of the lease. The Lord Chancellor said the following (3 App. Cas. at 719–720):

> ". . . [I]f there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

73 It has not been argued that the *obiter* proposition referred to in *Doherty* (that with negative covenants there is no discretion to exercise) is no longer good law. However, I consider that I am unable to apply it strictly here because of the particular facts including Brympton's conduct over the years. Had it simply been a question of works being undertaken by Mr. and Mrs. Bacarese and Brympton objecting, then there may not have been any discretion to exercise. However, there are numerous factors

in this case that require me to consider the proper exercise of my discretion. It would be unjust to do otherwise.

74 Fifthly, Mr. Brunt asserts that Brympton have not acted in bad faith. That may be, but I would also observe that the committee should be acting in the interests of all its members and treating all lessees the same. The fact that a landlord can act as capriciously as he likes (as Mr. Brunt put it) may be the correct legal proposition. However, the committee should be applying a consistent policy. I do not see the fairness in the committee seeking an injunction against one lessee but licensing another lessee to undertake similar (or even more extensive) works. The committee is not a private landlord with its own particular business interests. It is a committee established by and for its members.

75 I consider the following factors relevant in the exercise of my discretion as to whether or not to grant an injunction:

(i) The committee has over the years granted permission to other lessees to carry out works in breach of the works covenants. Some of those works are similar in nature to the pergola.

(ii) The committee invited Mr. and Mrs. Bacarese to apply for planning permission in order to construct the pergola. They did so and obtained the necessary permissions (qualified insofar as they were subject to landlord's consent).

(iii) Even after the committee referred Mr. and Mrs. Bacarese to the fact that there was an absolute prohibition against structural works they continued to invite them to apply for permission.

(iv) Mr. and Mrs. Bacarese have a licence from Brympton to use their extended balcony. Items have occasionally fallen from upstairs windows or balconies creating a hazard for users of the balcony. The pergola provides adequate protection against falling objects.

(v) Mr. Russo confirmed in evidence that the only reason the committee had refused permission was because of the works covenants. That they would have helped Mr. and Mrs. Bacarese out if they had been able to.

(vi) Brympton have previously asserted, through their solicitors, that they are able to waive or vary the works covenants. The fact that counsel now says that this was wrong does not detract from the fact that the assertion has been made.

(vii) In 2016, the committee, as presently constituted, granted permission to the owners of a maisonette to carry out works which are more extensive in nature than the pergola.

(viii) There is no real evidence of any neighbours' objections to the pergola. Although there is evidence that neighbours objected, the exact

nature and reasonableness of such objections has not been tested in evidence.

(ix) There is no evidence as to whether the particular design of the pergola is objectionable. In fact, the design was approved by the Town Planning Department.

76 These factors militate against the granting of an injunction. It would offend this court's sense of fairness to order the removal of the pergola in these particular circumstances.

77 Mr. Gomez, in the context of his argument that the works covenants have been varied, referred me to *Roper* v. *Williams* (5) where the Lord Chancellor stated (37 E.R. at 1001):

> "If therefore the landlord in some particular instances lets loose some of his tenants, he cannot come into equity to restrain others from infringing the covenant to whom he has not given such a licence. He may have a good case for damages at law; but if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot with any justice come into equity for an injunction against those tenants."

It appears to me that this sentiment also holds true in this case.

78 For all these reasons, the mandatory injunction sought by Brympton ordering the pergola to be removed and to restore the premises is refused.

Costs pursuant to cl. 19 of the sixth schedule to the underlease

79 Brympton further claim from Mr. and Mrs. Bacarese the costs they have incurred arising from the breach of the works covenants. They do so pursuant to cl. 19 of the sixth schedule to the underlease which provides as follows:

> "[The lessee covenants to] pay all costs charges and expenses (including solicitor's costs and surveyor's fees) incurred by the Lessor or the Management Company for the purpose of and incidental to the preparation and service of any notice arising out of any breach or non performance of any of the covenants on the part of the lessee herein contained."

80 Two issues arise. The first: are the costs envisaged by cl. 19 limited to that incurred in *serving a notice*? In Brympton's particulars of claim, the clause is relied on for its claim for costs arising from the breach of the works covenants. I have not heard submissions on the point but it seems to me that costs pursuant to this clause would indeed be limited to costs incurred in the service of a notice (including preparatory work). It does not extend to costs, for example, following service of any notice or indeed the costs of these proceedings.

81 The second issue is how should this clause affect any costs order I make? I have found that Mr. and Mrs. Bacarese have breached the works covenants but awarded only nominal damages. I have then refused the main injunctive relief sought by Brympton. In practical terms, Mr. and Mrs. Bacarese have succeeded in this action. However, is Brympton in any event entitled to the costs and expenses incurred in, and incidental to, the preparing of a notice/correspondence setting out the breach? I will hear the parties on this and on costs generally.

Postface

82 I feel compelled to conclude by emphasizing that my decision to refuse the injunction sought by Brympton has been made on the particular facts of the case. Prohibitions as to structural works typically contained in underleases are essential for the good and proper management and upkeep of estates like Brympton.

Ruling accordingly.