[2020 Gib LR 410]

SAILS MANAGEMENT LIMITED v. SLACK and COX

SUPREME COURT (Restano, J.): December 2nd, 2020

Landlord and Tenant—breach of covenant—alteration of property—injunction requiring resident of apartment who installed windows and wall on balcony to restore balcony to original layout—permission for works mistakenly granted in principle by property management company but withdrawn before works commenced

The claimant sought an order against the defendants requiring them to restore their apartment to its original layout.

The claimant was the management company of a residential block of apartments known as "The Sails" in the Queensway Quay Marina, where the defendants lived.

Under a lease in 2004 and a supplemental deed in 2006, the Governor granted Queensway Quay Marina Ltd. ("QQML") a lease of 150 years over an area of seabed lying to the north of Queensway Quay which was defined as "the property." QQML then demised the property to Marina Properties The Sails Ltd. ("MPTSL") pursuant to an underlease in 2007 for the purposes of construction of a residential complex of 42 apartments and associated amenities as well as vessel berthing facilities. The development came to be known as "The Sails" and the apartments were to be sub-underlet to third parties once construction was completed.

Under cl. 3(a) of the second schedule to the underlease, MPTSL agreed to obtain QQML's consent for the making of any external or structural alterations to the demised premises or to the erection of any other buildings thereon. Such consent was not to be unreasonably withheld or delayed but was subject to the Governor's consent. Under cl. 10, MPTSL agreed not to assign or sublet any part of the demised premises on terms and conditions which were inconsistent with the underlease without QQML's consent, which was not to be unreasonably withheld or delayed.

An apartment was sold to a company pursuant to a sub-underlease between MPTSL, the management company and the purchaser. The company's interest in the apartment was subsequently assigned to the defendants, and MPTSL and the management company were parties to the assignment. The effect of the agreements was that the defendants agreed to perform and observe the covenants contained in the sublease, including those set out in cl. 2 of the sublease which referred to the sixth and tenth schedules. Paragraph 22 of the sixth schedule provided as follows:

> "The Lessee shall not make any alteration or addition affecting the external elevation or structure of 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 14 of the tenth schedule provided:

> "The Lessees 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 thereof or make any alteration in the plan or elevation of the Premises or in the services or matters relating thereto 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 Apartment or Apartment forming the property."

Under cl. 4 of the sublease, MPTSL covenanted that every person taking a lease for an apartment would enter into similar covenants. Under cl. 5 of the sublease, MPTSL and the management company covenanted with the defendants that they would enforce the performance and observation by any owner of an apartment of the covenants and conditions contained in the subleases or leases relating to the apartment.

In February 2016, shortly before they completed on the purchase of their apartment, the defendants wrote to the management company and asked for permission to install two patio doors in their covered balcony in order to make better use of the area. The defendants also said that they would like to enclose the southern terrace with glass curtains as a number of other properties had done.

In March 2016, the management company held a meeting and considered the defendants' request. The request was approved in principle. At a further meeting in October 2016, it was agreed that the defendants should be sent a letter confirming that the committee had no objection provided the defendants obtained planning permission. By December 2016, things had changed. The proposed alterations were considered to be a breach of the terms of the sublease. The management committee resolved to instruct lawyers to inform the defendants that they were in breach of the sublease and that the management company would have no alternative but to take steps to stop the works.

The defendants' application for planning permission was granted but the minutes of that meeting recorded the objection of the management company.

A cease and desist letter was served on the defendants on December 22nd, 2016 stating that installation of glass curtains on the front of the balcony would be in breach of para. 22 of the sixth schedule and that if the works proceeded an order would be sought requiring removal of the installation and costs. The defendants stated in reply that the management company had approved the erection of the glass curtains, the external walls and the internal refurbishment of the flat. On the basis of the original

reassurance, the defendants had proceeded to apply for planning permission and order materials, which had arrived shortly before Christmas in 2016. In November 2017, the defendants showed the location of the works to another neighbour, Mr. Isaacs, who was the chairman of the management company at the time. The first defendant gave evidence that Mr. Isaacs told him that he should not be concerned about the neighbour who opposed the works, that the defendants would not have any trouble from him (Mr. Isaacs) or the management company, and that they should just get on with the works.

The defendants proceeded with the works between November 2017 and February 2018.

The management company wrote to the defendants stating that it had come to their attention that the works had gone ahead in breach of the terms of the sublease and demanding reinstatement of the flat to its original condition within 40 days, failing which legal proceedings were threatened. They also sought the sum of £7,573.50. The terms of a compromise were discussed under which the defendants' lawyer indicated that they would remove the structures, but in the event they did not do so.

The management company commenced these proceedings. It submitted that (a) para. 22 of the sixth schedule and para. 14 of the tenth schedule of the sublease resulted in an absolute ban on any alterations or additions to the apartment which affected its external elevation or structure or any changes to the design elevation or appearance of the external decorative scheme; (b) the works were a breach of those absolute covenants; (c) it sought an injunction requiring the removal of the doors and walls which had been built to enclose the defendants' terrace; (d) a prohibition against alterations to the elevation of a building included works carried out within the perimeter of the apartment's balcony; (e) there was no need to show detriment or loss in the case of enforcement of an absolute covenant; (f) there was no merit in the defendants' submission that covenants in the underlease ran with the land or should be implied by law; (g) the underlease was a construction or building lease which contained certain obligations typically found in a development project and was different to the sublease which granted title to purchasers and contained a management scheme for residents; (h) it was perfectly proper for the underlease to provide for external or structural alterations subject to approval; (i) the prohibition not to assign on inconsistent terms did not mean that the sublease should mirror the underlease in every respect; (j) there was no question of implying a term when mutual enforcement covenants and absolute prohibitions on alterations were clear; and (k) the management company had initially granted only "in principle" permission for the installation of patio doors but this permission had been withdrawn shortly before materials had been ordered by the defendants and long before the works were actually carried out.

The defendants submitted that (a) para. 14 of the tenth schedule to the sublease limited the prohibition on alterations to works undertaken outside

the perimeter of the apartment; (b) all of the works had been carried out within the perimeter of the defendants' apartment and the works were not therefore prohibited under the sublease; (c) the right of sub-tenants such as the defendants' neighbour to seek enforcement of the mutual enforcement covenant was subject to the overriding condition that any breach of the conditions be shown to impact sub-tenants to their material detriment and loss; (d) as the neighbour who opposed the works had suffered no such loss or damage, he had no genuine contractual or corporate interest or grievance to defend or other claim to make; (e) the covenants on which the management company relied were not an absolute prohibition on external alterations because they were subject to the overriding condition in the underlease that consent to alterations could be granted, which could not be unreasonably withheld (relying on cl. 3 of the underlease which allowed for alterations to be made by MPTSL read together with cl. 10 of the second schedule of the underlease); (f) the covenant in the underlease which allowed for alterations with consent ran with the land for the benefit of the occupiers of the apartments, including the defendants; (g) a term should therefore be implied into the sublease to the effect that permission could be granted for alterations to an apartment and that such permission could not be unreasonably withheld; (h) a proper examination of the facts showed that permission for the works had in fact been given by the management company; (i) permission had been given not only to the defendants but also to other residents for similar works, which meant that the covenants relied on by the management company had been varied so that alterations could be made provided consent was given; and (j) the works carried out by the defendants were not therefore unlawful and their right to peaceable enjoyment was being interfered with.

Held, ruling as follows:

(1) The first question for the court was whether the works constituted alterations to the external elevation of the building or whether they fell outside the scope of the relevant prohibitions in the sublease because they had been carried out within the confines of the defendants' property. The word "elevation" was not a term of art and meant the exterior plane of a building. The works carried out by the defendants which included erecting windows and a wall in a terrace fell foul of para. 22 of the sixth schedule which prohibited alterations, additions affecting the external elevation of the apartment, external alterations and changes to the existing design elevation, appearance or external decorative scheme of the apartment. Paragraph 14 of the tenth schedule also prohibited alterations to the plan or elevation of the apartment, placing any structure on it or making any material changes or additions to it. Even though alterations were made within the boundaries of the apartment, they still represented alterations to the external elevation of the building, its design and external decorative scheme. The court therefore rejected the defendants' submission that the works fell outside the scope of the sublease (paras. 70–71).

(2) The court also rejected the submission that unless their neighbour who opposed the works could show that he had been affected by the works he could not require the management committee to enforce the terms of the sublease against the defendants. Under cll. 4 and 5 of the sublease, MPTSL and the management company had promised each apartment owner that they would enforce each apartment owner's compliance with the terms of his/her lease, if necessary by taking legal action. Those covenants which provided the mutual enforcement provisions in the sublease were not subject to any qualification and were designed to provide protection to all the apartment owners, who knew they were all subject to the same restrictions. There was no express condition which needed to be met for that to be operative. This sort of covenant was commonly found in long leases granted to tenants of apartment blocks. The apartment owners knew that all the residents in the building were subject to similar obligations, including a prohibition on alterations, and that MPTSL and the management company had promised to enforce the obligations. The fact that there was a single complainant was not in itself remarkable as one neighbour might be the only tenant affected by works. The mutual enforcement covenant was designed for the benefit of any single tenant. The flaw in the submission that the law should limit the circumstances under which a tenant could rely on the mutual enforcement covenant was that it was contrary to the express terms of cll. 4 and 5 of the sublease, which were unconditional and did not require a tenant to show that there was some material loss or detriment suffered. The cross-enforcement scheme had a clear rationale and was well established in models providing for the governance of apartment blocks where there were a number of tenants. The court could not see how the defendants could say that the test of such a term should be implied (paras. 73–75).

(3) The covenant in the underlease which allowed MPTSL to carry out alterations to the property with consent did not run with the land and should not be implied as a matter of law into the sublease. The developer had the scope to make alterations to the development, which could well arise in the context of the construction of a development, but it was not intended to pass on that right, nor that the subleases which would later be granted should replicate the terms of the underleases. The court therefore rejected the defendants' submission as to the effect of cll. 3 and 10 of the second schedule. Implication of a term would be inconsistent with the express term in the sublease prohibiting alterations (paras. 79–83).

(4) The facts of this case did not establish that the sublease had been varied. Although the defendants had initially been given "in principle" permission by the management company, it was clear that the management company had been mistaken as to its powers under the sublease and that when it was advised that it was not allowed to grant permission for the works, it informed the defendants accordingly and apologized for the confusion and inconvenience caused. The management company rectified

the situation before the planning application was to be considered and before the defendants ordered the materials and the works went ahead. This was not a sound basis on which to mount an argument for the variation of a deed. Nor could Mr. Isaacs's words of encouragement properly be interpreted as evidence of a variation. Rather, Mr. Isaacs was expressing a personal opinion that stealth would win the day. Whatever motivated Mr. Isaacs to say what he did, what he said was no more than a personal view that he thought that the defendants could get away with the works at that stage but nothing more. Nor could the defendants rely on works carried out by other residents in The Sails. The works carried out by one couple were carried out before the management company had been set up, the works carried out by another couple were the subject of an ongoing dispute, and a small number of other works had been permitted to be carried out because of the previous misunderstanding about the legal position. Any permission given in the past was questionable. It might be that the practical effect of those breaches of covenant might have been varied but those waivers applied only in those particular cases (paras. 85–90).

(5) The management company was therefore able to rely on the covenants forbidding external alterations to the defendants' apartment. It followed that there was no breach of the defendants' right to peaceable enjoyment of their property as alleged by them (para. 91).

(6) There were no grounds to refuse the grant of the injunction requested by the management company. In considering whether an injunction should be granted, the court had to determine whether the management company had waived its rights or acquiesced in such a way so as to deprive it of the equitable relief which it sought. The court had to consider whether the management company had by its acts or omissions represented to the defendants that the covenants prohibiting alterations were no longer enforceable. In giving initial approval, the management company had made a mistake about its powers under the sublease but as soon as it understood the true position it informed the defendants accordingly and made clear that the intended works should not proceed. Although the defendants were informed about the legal position, they chose to go ahead with the works. The informal comments by Mr. Isaacs could not be interpreted as a representation by the management company to the defendants that the works were approved. The approval of previous works by others did not operate against the grant of injunctive relief. Finally, the court was not satisfied that this case was solely motivated by rancour such that the management company should be debarred from obtaining the relief sought. Whilst there might be a temptation to say that the works carried out by the defendants appeared to be inoffensive and were unopposed by the overwhelming majority of the residents of The Sails, and that there should be scope for a compromise, that was not the bargain which the defendants and the other residents entered into. The defendants

would be ordered to carry out remedial works to make good and restore their balcony to its original layout (paras. 94–99; para. 102).

Cases cited:
(1) *Berry* v. *Berry*, [1929] 2 K.B. 316, distinguished.
(2) *Brympton Management Ltd.* v. *Bacarese*, 2020 Gib LR 244, distinguished.
(3) *Doherty* v. *Allman* (1878), 3 App. Cas. 709, considered.
(4) *Duval* v. *11–13 Randolph Crescent Ltd.*, [2020] UKSC 18; [2020] 1 A.C. 845; [2020] 2 W.L.R. 1167, followed.
(5) *F.W. Woolworth & Co. Ltd.* v. *Lambert*, [1937] Ch. 37, referred to.
(6) *Marks & Spencer plc* v. *BNP Paribas Security Servs. Trust Co.*, [2015] UKSC 72; [2016] 1 A.C. 742; [2015] 3 W.L.R. 1843; [2016] 4 All E.R. 441, followed.
(7) *Triplerose Ltd.* v. *Patel*, [2018] UKUT 374 (LC), followed.

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

1 **RESTANO, J.:**

Introduction

The claimant, Sails Management Ltd., is the management company of the residential block of apartments known as "The Sails" in Queensway Quay Marina ("the management company") where the defendants live. The management company is seeking an order against the defendants requiring them to restore their apartment to its original layout following works enclosing a balcony which it is alleged were carried out in breach of covenant.

The subleases

2 Under a lease dated September 13th, 2004 together with a supplemental deed dated December 21st, 2006, His Excellency the Governor granted Queensway Quay Marina Ltd. ("QQML") a lease of a hundred and fifty years from October 1st, 1991 over an area of seabed and water lying to the north of Queensway Quay which was defined as "the property."

3 QQML then demised the property to Marina Properties The Sails Ltd. ("MPTSL") pursuant to an underlease dated June 27th, 2007 ("the underlease") for the purposes of construction of what was defined as the "permitted scheme." This was defined in the underlease as the construction of a residential complex of forty-two apartments with associated amenities and berthing facilities for vessels in accordance with plans attached to the underlease on reclaimed land adjacent to Queensway Quay Marina. This development came to be known as "The Sails" and these apartments were to be sub-underlet to third parties once construction was

completed. MPTSL agreed that within six months from December 21st, 2006, it would submit an application to the Development and Planning Commission ("DPC") and that within three years from that date the permitted scheme would be completed.

4 Under cl. 3(a) of the second schedule of the underlease, MPTSL agreed to obtain QQML's consent for the making of any external or structural alterations to the demised premises or to the erection of any other buildings thereon. Such consent was not to be unreasonably withheld or delayed but was subject to the Governor's consent. Further, under cl. 10 of the second schedule of the underlease, MPTSL agreed not to assign or sublet any part of the demised premises on terms and conditions which were inconsistent with the underlease without QQML's consent, and again such consent was not to be unreasonably withheld or delayed.

5 Apartment no. 32 in The Sails was initially sold to Satria (International) Ltd. for £660,000 pursuant to a sub-underlease dated June 25th, 2010 between MPTSL, the management company and Satria (International) Ltd. as the purchaser ("the sublease"). Under an assignment dated March 3rd, 2016, Satria (International) Ltd. assigned its interest in that property to the defendants for the sum of £755,000 and MPTSL and the management company were parties to that assignment.

6 The effect of these agreements is that the defendants agreed to perform and observe the covenants contained in the sublease including those set out in cl. 2 of the sublease and which in turn refers to the sixth and tenth schedules of the sublease. Of particular importance for the purposes of this case, para. 22 of the sixth schedule states as follows:

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

7 Also of importance for this case is para. 14 of the tenth schedule which states as follows:

> "The Lessees 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 thereof or make any alteration in the plan or elevation of the Premises or in the services or matters relating thereto 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 Apartment or Apartment forming the property."

8 Under cl. 4 of the sublease, MPTSL covenanted that every person taking a lease for an apartment would enter into similar covenants. Further, under cl. 5 of the sublease, MPTSL and the management company covenanted with the defendants that they would enforce performance and observance by any owner of an apartment the covenants and conditions contained in the sublease or leases relating to the apartment.

The dispute

9 On February 21st, 2016 and shortly before they completed on the purchase of their apartment, the defendants wrote to the management company and asked for permission to install two patio doors in their covered balcony, one on the northern end and one on the southern end in order to make better use of this area. Further, the defendants said that they would like to enclose the southern terrace with glass curtains as a number of other properties at The Sails had done.

10 On March 31st, 2016, the management company held a meeting and considered the defendants' request. The minutes of that meeting record the fact that the request was approved in principle. Further, the minutes refer to the committee's desire for a standard letter to be produced in response to applications of this sort outlining the procedures to be followed and referred to the importance of highlighting the positioning of drains in the case of glass curtains. The minutes of this meeting show that Josie Richardson and Jay Lonsdale represented Richardsons who are the management company's property managers and that various committee members also attended, including Robert Isaacs, Ross Bell, Katie Emmit-Stern and Norman Savitz. A draft sample letter was later referred to in the minutes as a "post meeting note" and this was also attached to these minutes. This draft required any resident seeking permission for alterations to confirm whether planning permission was required and if obtained, for the relevant documents to be provided to the management company at which point the request for approval would be considered. It also referred to the sort of information which contractors may be required to provide.

11 The minutes of a further meeting dated October 28th, 2016 record the fact that it was agreed that the defendants should be sent a letter confirming that the committee had no objection provided they complied with its original letter dealing with the planning application and that service charges would be increased accordingly. The constitution of the membership of the committee on this occasion was the same as on the previous occasion except for the fact that Mr. Bell was absent and Terence Richardson also attended.

12 By the time a meeting was held on December 8th, 2016 (on this occasion Mr. Isaacs was absent) things had changed. Mr. Richardson

stated that the works could not go ahead unless there was a unanimous decision from all the residents in writing and that if the works were allowed to continue another resident, Dieter Wood, would take legal action. As a result, the Committee resolved to instruct Charles Gomez & Co. to write to the defendants to inform them that they were in breach of the sublease and that the management company would have no alternative but to take steps to stop the works.

13 As well as applying to the management company for permission, the defendants also applied for planning permission and this application was discussed at a meeting of the DPC on December 16th, 2016. In advance of that meeting, Richardsons on behalf of the management company sent a letter to the DPC dated November 3rd, 2016 which stated as follows:

> "We note from the submitted plans that the proposed construction of a balcony to the rear of the building and more significantly the installation of glass curtains to the front elevation are in breach of the Lessees covenants and is of concern to the property management company.
>
> The proposal, if permitted, will set a precedent for similar proposals which will have a detrimental impact on the design principle of the development.
>
> We would therefore be grateful if you gave us the opportunity to meet to discuss these issues in more detail and if necessary to be allowed to address the Commission during the planning process."

14 The minutes of the DPC meeting were disclosed by the management company's lawyers a couple of days before the trial. Although this late disclosure was unfortunate, I allowed these minutes to be admitted into evidence as this was a public document which was available to both sides and which was relevant to the issues in the case. The minutes show that the application was granted by the DPC but they record the management company's objection to the application as follows:

> "DTP [Deputy Town Planner] stated that planning permission had been granted to a similar scheme and glass curtains had been permitted within this complex in the past. He added that there were no comments to report to the Commission other than an objection received from the Management Company (and referred Members to the copy circulated with the agenda), on the ground that the proposal was a contravention of the Sublease and also commented that the glass curtains would set a precedent and would affect the character of the building. DTP recommended approval of the proposed scheme as it was not considered to have any significant impacts.

> JH commented that if approved the proposal would alter the look of the building and added that given that the management company had objected she would not recommend the approval.
>
> DTP clarified that the management company's objection relating to the Sublease was not relevant to the consideration of the application on planning grounds and that the department's view [w]as that there were no objections to the proposal. He further added that if the Commission approved the proposal on planning grounds, the Management Company can still refuse on the grounds of the lease.
>
> The Commission concurred with the comments made and the Application was subsequently approved unanimously."

15 On the second day of the trial and after the evidence had closed the previous day, Mr. Gomez on behalf of the management company produced three emails dated December 2nd and 12th, 2016 sent by Terence Richardson to Mr. Slack's personal email address. Mr. Gomez explained that they had only come into his possession shortly before he disclosed them and he produced a witness statement signed by Terence Richardson explaining that he had been working from home for several months and on his return to the office on September 3rd, 2020, he came across these emails in hard copy files which he immediately forwarded to Mr. Gomez. The first email dated December 2nd, 2016 and timed 10:37 states as follows:

> "Dear Bob,
>
> I thank you and your wife for taking the time to meet me.
>
> As discussed we have taken legal advice from Charles Gomez, that the question of alterations or of changing the appearance of the estate is a fundamental issue in the lease which can only be changed by unanimous decision taken by all the owners and not by a majority. Neither the Management Company nor the Managing Agents can prohibit or allow the alterations. However owner members in the estate can take action to stop works if they contravene the underlease.
>
> As mentioned I met Dieter in our office the day before our meeting and he is willing to meet up with yourself and other in the Planning Office to discuss the proposed works . . ."

16 In a follow up email on the same day and timed 13:42, Mr. Richardson wrote to Mr. Slack to elaborate on the legal advice received as follows:

"Dear Bob,

I have had further correspondence from Charles Gomez today.

Further to my email below, it would seem that there has been a misunderstanding in the advice forwarded by Charles Gomez. The misunderstanding may have arisen from the fact that when we met the question was raised on whether the Management Company can give permission to the offending alterations. Neither the Head Lessor, the Management Company nor the Managing Agents can give permission to anyone to make an alteration in breach of the contractual terms contained in the underleases. The rationale for this is that each of the flat owners has acquired contractual rights which no third party can interfere with.

It follows that in order for an alteration to be made which affected rights and obligations contained in the underleases, every flat owner would have to agree. Because the matters relate to land, such unanimous agreement would have to be in writing.

On the other hand, the Management Company is obliged to ensure that the scheme contained in the underleases is respected. If therefore the Management Company considers that the proposed works will constitute such a breach then it would be obliged to act to ensure that no breach occurred.

Please see covenant in Paragraph 4 Page 5 in the Sublease:

. . .

I am waiting for further advice from the Management Company and will keep you updated.

I apologise for the confusion and any inconvenience caused."

17 In a further email, dated December 12th, 2016, Mr. Richardson informed Mr. Slack that the proposed alterations were in breach of the terms of the sublease, that he was aware that works had commenced recently in the property and that notice had not been given for these works. Further, he requested the details of the contractor and the nature and extent of the works being carried out.

18 Mr. Finch on behalf of the defendants opposed the admission of these emails into evidence because they had come up so late in the day. I adjourned the trial to enable the parties to make considered submissions on this issue and also to give Mr. Slack a chance to properly check whether he had these emails in his possession. Although all three emails had been sent to the same email address, Mr. Slack later confirmed that he had the email of December 2nd, 2016 timed 13:42 which he said he had misfiled but not the others. In the event, I allowed the application to admit

these emails into evidence as I considered that however unsatisfactory this late disclosure was, it would be an affront to common sense and to any sense of justice to exclude these emails which are clearly material to the issues in the case especially as these emails had been sent directly to Mr. Slack at the same email address and he confirmed that he had received one of them.

19 Returning to the chronology, Charles A. Gomez & Co. then sent a cease and desist letter dated December 20th, 2016 to the defendants which it appears was served on them on December 22nd, 2016. This states that: "The Management Company understands that in breach of the said Paragraph 22 of the Sixth Schedule you intend to install a glass curtain on the front of your north facing balcony." Further, the letter states that if the "offending installation" was proceeded with an order would be sought from the court requiring them to remove it and seeking costs.

20 Triay & Triay were instructed shortly afterwards by the defendants. They sought copies of the management company's minutes and expressed concern about its reluctance to provide them. Further, they made the point in an email dated January 16th, 2017 that in April or May 2016 (in fact it was March 2016) the management company had approved permission for the erection of glass curtains, the external walls and in the internal refurbishment of their flat, and that this request had been approved again in October or November 2016 (in fact October 2016). This was largely correct although, as stated above, approval had been granted in principle and not unconditionally. More importantly, the management company's view about the application had clearly changed in around November 2016 and in the December 2016 meeting, there had been a change of mind.

21 In various email exchanges which followed and which took place between January to April 2017, Freddie Vasquez, Q.C. of Triay & Triay, instructed by the defendants at that time, said that, on the basis of the original reassurance given to their clients, they had then proceeded to apply for planning permission and order materials which had arrived shortly before Christmas 2016. Finally they stated that they were not prepared to provide the confirmation requested that they would not proceed with the works.

22 In an email response dated February 20th, 2017, Charles Gomez of Charles A. Gomez & Co. said that permission could not have been given because no detailed application was ever submitted and that the management company could not give permission to any individual owner to do something which was forbidden under the terms of the sublease.

23 In an email dated March 10th, 2017, Mr. Vasquez then set out a complete narrative of the facts which referred to the fact that the works in question replicated works carried out by Mr. and Mrs. Perry and that

on February 21st, 2016 they had submitted a written request for permission to carry out the works. Further, he referred to the fact that whilst his clients had never received a written reply or acknowledgement to the application, Josie Richardson had told Ms. Cox that the application had been approved and it was on that basis that the planning application had been submitted. Mr. Vasquez also said that his clients had come to learn that Mr. Wood (who occupies the flat directly below the defendants' apartment) had seen the application for planning permission and had objected to the management company which had decided not to review their earlier decision when they met in October, a fact which was confirmed to Mr. Slack by Ross Bell who was a member of the Committee at the time. Mr. Vasquez confirmed that the materials required for the works were ordered immediately after the DPC granted their application and that they arrived on December 22nd, 2016 which was the same day they received the cease and desist letter from Charles A. Gomez & Co.

24 In an email dated April 6th, 2017, Mr. Gomez informed Mr. Vasquez that the management company's unanimous view was that it had not agreed to the proposals and that it was not reasonable for the defendants to incur expenditure knowing that they had no permission to carry out the intended works.

25 On April 11th, 2017, Mr. Vasquez said that the management company was estopped from denying that approval had been given and had to account to the defendants for the expense that they had incurred in reliance of the same which he said was in excess of £40,000. Failing such confirmation, Mr. Vasquez confirmed that his clients would proceed with the works for which they had already obtained planning permission.

26 The defendants did in fact proceed with the works although much later on, between around November 2017 and February 2018. As a result, Mr. Gomez wrote to Mr. Vasquez on February 28th, 2018 stating that it had come to his client's notice that the works had gone ahead in breach of the terms of the sublease and demanding reinstatement of the flat to its original condition within forty days, failing which legal proceedings were threatened. Mr. Vasquez replied the same day to say that he was no longer instructed. Mr. Gomez also sought the sum of £7,573.50 (as at April 2018) under para. 20 of the sixth schedule of the sublease.

27 On March 5th, 2018, Leigh Debono of Verralls wrote to Mr. Gomez to confirm that he was taking instructions from the defendants. Discussions followed and the terms of a compromise were discussed between the parties' lawyers. In an email dated April 17th, 2018, Mr. Debono wrote to Mr. Gomez and stated as follows:

"I am instructed that my clients will duly proceed to remove the offending structures.

However, they are as yet unable to provide a timeline as they are to consult workers yet.

I would ask that you consider allowing my clients 7 days to do this."

28 In the event, the defendants did not remove the offending structures and proceedings were commenced on August 21st, 2018.

Witness evidence

The claimant's evidence

29 The management company's first witness was Neal Higgins, CEng MICE of Belilos, Civil and Structural Engineers, who produced a report dated May 2019 in support of the claim following a site visit. In the report Mr. Higgins confirmed that the alterations he had observed were the installation of a three panel door to the covered terrace at the southern end with an infill of partitioning above it and the erection of a partition wall with a double door set back about 50cm from the balustrade at the northern end. There is also a glass curtain running along the balustrade at the southern facing balcony.

30 In cross-examination, Mr. Higgins confirmed that the alterations in question had been effected within the external walls of the defendants' property. Further, he explained that the works carried out were not structural and that reinstatement, if required, was simply a question of removing the new walls and doors and making good the notches on the walls, rendering and redecorating the area.

31 The management company then called Mr. Boylan who is a resident of The Sails and has been one of the directors of the management company since September 6th, 2018. He explained that these proceedings had been commenced following the defendants' failure to put the property back to its original state after having agreed to do so by July 31st, 2018 following an agreement reached with Leigh Debono, the lawyer at Verralls who acted for the defendants before Mr. Finch took on the case. Although Mr. Boylan was not a director of the management company when the defendants sought permission for the works in 2016, he confirmed that he was familiar with the history of this case and that the management company had changed its mind about the works when it became clear from legal advice received that they were not allowed under the sublease.

32 Mr. Boylan confirmed that there had been a discussion with the residents of The Sails about amending the subleases but that Mr. Wood was opposed to this. He also confirmed that he had installed glass curtains

in his balcony, as had other residents of The Sails. In his view, this was just a decorative feature and not an alteration to the property.

33 In cross-examination, Mr. Boylan confirmed that he had not considered the terms of the underlease and that the management company's actions were based on the covenants contained in the sublease. He also confirmed that when requests for permission to carry out alterations had been made by residents in the past, these requests were referred to Paul Butler of QQML for his approval if approved by the management company.

34 Mr. Boylan's estimate was that around thirty per cent of the tenants in The Sails had made alterations to their properties and that around ten percent of the tenants had made alterations to the exterior of their apartments. Putting to one side residents who had installed glass curtains, Mr. Boylan confirmed that there were two other tenants who had carried out external alterations. The first were Mr. and Mrs. Perry whose alterations the defendants were replicating. Mr. Boylan's understanding was that those works had been carried out at the time the development was built. The other residents who had carried out external works were Mr. and Mrs. Savitz who had removed an internal wall facing the terrace and replaced it with glass curtains as well installing a second set of glass curtains adjacent to the balustrade at the end of the balcony. Mr. Boylan confirmed that the works carried out by Mr. and Mrs. Savitz were the subject on an ongoing dispute.

The defendants' evidence

35 The defendants called Mrs. Doreen Perry who is an apartment owner at The Sails. She explained that she had bought her apartment directly from the developer. She confirmed that her apartment has a similar layout to the defendant's apartment, that the works carried out to her apartment were similar to the ones in question and that she had not been threatened with legal proceedings by the management company. She confirmed that when Mr. Butler showed her around her apartment, she inquired about the possibility of enclosing the balcony and he informed her that this was not a problem. She then engaged Barry Brindle of AKS, Architects & Engineers to draw up the plans for these works and which Mr. Butler approved at the time. Mrs. Perry explained that Mr. Butler was effectively acting as the management company at that time as The Sails had just been built and a proper management committee had not yet been established.

36 Mrs. Perry confirmed that she had been informed by Katie Stern in 2016 that the defendants' permission application had been granted by the management company. She explained that she felt that the defendants' position was unfair and that they found themselves in this situation because of Mr. Wood's animosity towards them.

37 Mr. Slack then gave evidence and explained that he completed on the purchase of his apartment around March 3rd, 2016. Shortly before then, he had met Mr. Wood who lived in the apartment below, and Mr. Wood asked him whether he intended to enclose his balcony which he told him was known as "the black hole." Mr. Slack pointed out that it was ironic that Mr. Wood had first suggested that better use would be made of the space if his balcony was enclosed at either end as Mr. and Mrs. Perry had done. On February 21st, 2016, and still before completing on the purchase of the apartment, Mr. Slack wrote to the management company and stated: "We would like to add two patio doors to the property, one on the northern aspect and the second on the southern aspect." Mr. Slack also confirmed that he had also approached Paul Butler seeking his consent to the proposed works and that Mr. Butler had said that he did not have any objection to the proposals but that he had told him that he was unable to provide him with a letter confirming his approval because of an ongoing dispute with Mr. and Mrs. Savitz concerning alterations to the exterior of their apartment.

38 Mr. Slack said that around April 2016 he was informed by the management company that permission had been granted for the works to go ahead although he had not received anything in writing and that he had not received a letter in the terms of the sample attached to the management company's minutes of March 31st, 2016.

39 It was put to Mr. Slack that the works carried out were not limited to installing patio doors as his application letter stated but also included building walls within which the doors were fitted. Mr. Slack said that this had come about following a site meeting in around July 2016 when Ms. Stern on behalf of the management company told him that this was what was required which resulted in a change to the plans for DPC approval. At this site meeting, Mr. Slack said that Ms. Stern also informed him that the management company had approved the works at a further meeting which they had held but that Mr. Wood was concerned that the intended works would encroach into his property because he thought that the defendants were planning on drilling a hole through the concrete slab which formed the base of their apartment to gain access to the void above his ceiling. Mr. Slack said that he informed Ms. Stern that this was not the case and that in his view, the works had been approved.

40 Later on that year in September 2016, Mr. Slack confirmed that he had invited Mr. Wood to view the plans which had been prepared by AKS. Mr. Slack said that Mr. Wood studied these for about an hour and concluded that they looked really good and had not disapproved of them in any way. Things changed, however, about two months later in early November 2016 when Mr. Wood rang Mr. Slack to say that he was no longer happy with the planning application because he had been told by Mr. Savitz that waste pipes were going to be fitted in the void above his

ceiling. Mr. Slack said that he confirmed to Mr. Wood that this was not the case but that, despite this, Mr. Wood remained opposed to the plans and told him that he was going to fight the application and get it stopped. Shortly afterwards, Mr. Slack invited Mr. Wood to his apartment to try and clear the air and to explain to him that it had never been his intention to fit a waste pipe in the void which formed part of Mr. Wood's apartment. Further, and presumably because the defendants' idea was to fit a toilet in this area, he said that the floor could be raised to get the necessary fall for the waste pipe or that, as an alternative, a macerator could be installed. Mr. Wood, however, remained steadfast in his opposition and said that the works could not go ahead without his approval. This resulted in a heated exchange between Mr. Slack and Mr. Wood which has led to a falling out between them.

41 A couple of weeks later, Ms. Stern together with Mr. Savitz, who was also a member of the management company, went to the defendants' apartment to view the plans on site. Mr. Slack said that they indicated to him that his plans would be approved again despite Mr. Wood's complaints as they understood that there was no question of encroachment into Mr. Wood's apartment. Mr. Slack said that he was later informed that the management company had indeed approved the application as expected. This came to his attention as Ms. Stern and Mr. Ross had informed Ms. Cox about this.

42 Turning to the application for planning permission, Mr. Slack explained that the DPC had received no objections at the end of the three-week consultation period following the filing of the application but that this period had been extended at Mr. Wood's request, although, in the event, Mr. Wood did not object to this application. Mr. Slack's view was that Richardsons did not send a representative to attend the meeting to object either.

43 Mr. Gomez put it to Mr. Slack that having attended that DPC meeting, he would have been aware of the management company's letter to the DPC dated November 3rd, 2016 (as recorded in the DPC minutes of that meeting) objecting to the application on the ground that it contravened the sublease and setting out its concerns that glass curtains set a precedent which affected the character of the building. In response, Mr. Slack said that he had not seen the DPC minutes which only emerged shortly before the hearing. In his view, Richardsons had only expressed concerns about a breach of the terms of the sublease and requested a meeting with the DPC to discuss those concerns which, to the best of Mr. Slack's knowledge, did not take place. Mr. Slack confirmed that the planning application was granted at the DPC meeting held on December 16th, 2016 with approval in writing following on January 10th, 2017.

44 Mr. Gomez also referred Mr. Slack to the management company's minutes dated December 8th, 2016 where it was clear that Mr. Richardson's view was that the works could not be carried out and that Charles Gomez & Co. should be instructed to write to the defendants to inform them that they were in breach of the sublease. Mr. Slack said that he was not aware of this at the time.

45 Mr. Slack said that shortly after being notified of the DPC's decision on December 16th, 2016 he ordered the materials from Total Façade and asked whether there was any chance of getting the windows before Christmas that year. The door and glass curtains in fact arrived in Malaga from the UK on December 22nd, 2016 which was the day he received the cease and desist letter from Charles Gomez & Co. When Mr. Gomez put it to Mr. Slack that he should not have proceeded to place the order without the management company's approval, Mr. Slack said that as far as he was concerned, approval had been granted and that this had been communicated to him by committee members. He made the point, however, that he did not go ahead with the works for another ten months or so as he accepted that it became clear at that point that there was a problem.

46 Mr. Slack explained that he and Ms. Cox held a meeting with Mr. Richardson in April 2017 who asked them not to do anything for a while as he hoped to resolve the matter within three months, which did not in fact happen. In early November 2017, Mr. Slack and his partner met Robert Isaacs, a neighbour who was the Chairman of the management company at the time, who visited them at their apartment to see some fitted wardrobes which they had installed. The defendants took the opportunity to show Mr. Isaacs the location of the intended works which they were keen to get on with. Mr. Slack recalled that Mr. Isaacs told him that the matter had gone on long enough and they should not be bothered by Mr. Wood who he said would not put his hand in his pocket to fight them. According to Mr. Slack, Mr. Isaacs said that the defendants would get no trouble from him or the management company and that they should just get on with the works. Mr. Slack said that in the light of what Mr. Isaacs had said he went ahead straightaway and instructed Total Façade to carry out the works which were mostly completed before Christmas of that year. Although the balcony has now been enclosed, the planned internal alterations have not been carried out.

47 Mr. Slack said that he was puzzled as to why he and his partner had been singled out in relation to works which had no impact on the neighbours and why similar action had not been taken against other residents (including committee members), although they had no desire that this should happen. He explained that there were seven cases which he was aware of where alterations had been carried out. For example, he said that he was aware that in his previous apartment, Mr. Isaacs had

swapped the kitchen and bathroom areas so that the bathroom was over the living room of the apartment below. Mr. Slack also said that he was aware that Mr. Isaacs had applied for permission to carry out external and internal works but later changed this application to limit it to internal works only in the light of the cease and desist letter sent in this case.

48 It was put to Mr. Slack that Mr. Debono had reached a compromise on his behalf providing for the offending structure to be taken down by August 31st, 2018. Mr. Slack said that he was not happy with the advice he received from Mr. Debono and that he had not consented to the compromise which Mr. Debono proposed on the defendants' behalf, which included payment of over £7,000 in costs.

49 When it was put to Mr. Slack that he knew that he did not have the management company's consent for the works when he ordered the materials and carried out the works, he said that he had been told too many times by the management company that he had consent for the works and that he believed that he had been given permission. Although Mr. Slack had indicated at one point that he might file a counterclaim against the claimant for amounts spent on materials and works, he confirmed that he was no longer pursuing this and that in his opinion, the only reason he was being sued was because Mr. Wood had put pressure on the management company to take action against him.

50 Mr. Slack was recalled at a further hearing following the late disclosure of three emails from Richardsons to Mr. Slack dated December 2nd and 12th, 2016 set out above. Mr. Slack confirmed that he had traced the email dated December 2nd, 2016 timed 13.42 which he had misfiled electronically. He said that he had not seen the email timed 10.37 of the same date and did not have the email dated December 12th, 2016 even though these emails were all sent to his personal email address. Further, Mr. Gomez made the point that the email of December 2nd, 2016 timed 10.37 was actually contained below the email sent later on that day at 13.42 and which Mr. Slack said that he had received, although Mr. Slack maintained that he had not seen the earlier one.

51 The email which Mr. Slack confirmed he had seen at the time states that the management company had received advice from Charles Gomez which clearly stated that the management company could not give permission for the alterations. In response to this email, Mr. Slack said that Mr. Richardson had told him that the management company or the managing agents did not have the right to grant or refuse permission. In his view, this meant that because permission had been granted it could not be revoked and he was free to proceed with the works. In Mr. Slack's opinion this was clear when the chairman of the management company, Mr. Isaacs, told him: "If I were you, I would just get on with it. This needs resolving and we are all behind you."

52 Ms. Cox confirmed that she agreed with the evidence which had been given by Mr. Slack.

53 The defendants also relied on hearsay statements served under cover of notices issued under the Civil Evidence Act 1968 as follows:

(a) Statement made by Katie Stern to Doreen Perry shortly after March 31st, 2016 to the effect that the alterations for which the defendants had applied for consent in February 2016 had been approved by the management company.

(b) Statement made by Katie Stern to the defendants shortly after March 31st, 2016 to the effect that permission had been granted by the management company for the alterations to their apartment.

(c) Statement made by Josie Richardson to the defendants in April 2016 to the effect that the defendants' application to make alterations to their apartment had been approved.

(d) Statement made by Ross Bell in April 2016 to Ms. Cox that the management company had approved their application for alterations.

(e) Statement made by Dieter Wood during early 2016 to the defendants to the effect that they should apply to make alterations to their apartment along the lines of those carried out by the Perry family as it would improve the appearance and correct what was known as "the black hole."

Submissions

54 Mr. Gomez relies on para. 22 of the sixth schedule and para. 14 of the tenth schedule of the sublease which he says result in an absolute ban on any alterations or additions to the apartment which affects its external elevation or structure or any changes to the design elevation or appearance of the external decorative scheme. By way of comparison, Mr. Gomez refers to para. 13 of the tenth schedule of the sublease which is a qualified covenant as it provides that poles, masts and other apparatus cannot be erected "without the previous consent in writing of the management company, such consent not to be unreasonably withheld." In Mr. Gomez's submission the evidence of Mr. Higgins shows that the works constitute a breach of these absolute covenants as they involve external alterations and alterations or erections affecting the elevation of the apartment.

55 Although in the claim form the management company seeks an order requiring the defendants to carry out remedial works to make good and restore the premises to its original layout, in his closing submissions Mr. Gomez confirmed that the management company did not require the removal of the glass curtains but maintained its claim for an injunction requiring the removal of the doors and walls which had been built to enclose in the northern and southern ends of the defendants' terrace.

56 Mr. Finch first submitted that cl. 14 of the tenth schedule of the sublease limited the prohibition on alterations to works undertaken outside the perimeter of the apartment as was clear by the use of the words "other than in addition to the structure now forming part thereof." He said that Mr. Higgins had confirmed that all the works had been carried out within the perimeter of the defendants' apartment and that this meant that the works were not therefore prohibited under the sublease. He argued, therefore, that if a resident bricked up a balcony this was not in breach of the terms of the sublease so long as the wall was built within the perimeter of the resident's balcony.

57 Mr. Finch then argued that the right of sub-tenants such as Mr. Wood to seek enforcement of the mutual enforcement covenant was subject to the overriding condition that any breach of the conditions had to be shown to impact sub-tenants to their material detriment and loss. He said that the defendants were entitled to the "equivalent benefit" enjoyed by MPTSL under cl. 4(1)(i) of the underlease which provided that QQML could not exercise its rights of re-entry and forfeiture unless the breaches of covenant relied on caused material detriment or loss to QQML. As Mr. Wood had suffered no such loss or damage, it was submitted that he had no genuine contractual or corporate interest or grievance to defend or other claim to make.

58 As for the covenants relied on by the management company, Mr. Finch said that these were not an absolute prohibition on external alterations because they were subject to the "overriding condition" in the underlease that consent to alterations could be granted which could not be unreasonably withheld and which was subject to DPC approval. In support of this argument, Mr. Finch relied on cl. 3 of the underlease which allows for alterations to be made by MPTSL read together with cl. 10 of the second schedule of the underlease which states that MPTSL promised:

> "10. Not to assign or sublet all or any part of the demised premises on terms and conditions which are inconsistent with these presents without the Lessor's consent such consent not to be unreasonably withheld or delayed."

59 In Mr. Finch's submission, this meant that the covenant in the underlease which allowed for alterations with consent ran with the land for the benefit of the occupiers of the apartments in The Sails, including the defendants. Mr. Finch also argued that this meant that a term should be implied in the sublease to the effect that permission could be granted for alterations to an apartment and that such permission could not be unreasonably withheld. In support of this proposition Mr. Finch referred to the test for implying terms as set out in *Marks & Spencer plc* v. *BNP Paribas Security Servs. Trust Co.* (6) and applied in *Duval* v. *11–13 Randolph Crescent Ltd.* (4).

60 Mr. Finch then submitted that a proper examination of the facts of the case showed that permission for the works was in fact given by the management company in this case. He further submitted that permission was given not only to the defendants but also to other residents in The Sails for similar works. This meant that the covenants relied on by the management company had been varied so that alterations could be made provided consent was given. Following *Berry* v. *Berry* (1), Mr. Finch said that this variation superseded the terms of the sublease.

61 For all these reasons, Mr. Finch submitted that the works carried out by the defendants were not unlawful and he alleged that their right to peaceable enjoyment was therefore being interfered with. As for the claim for costs and expenses, it was submitted that the provision relied on was limited to recovering the costs of preparing and serving an abatement notice and did not extend to lawyers' fees.

62 In response, Mr. Gomez said that the works were clearly caught by cl. 22 of the sixth schedule which prohibited any alteration to the external elevation of the building or change to the existing design elevation or appearance or external decorative scheme of the apartment. Mr. Gomez also said that even if the words in para. 14 of the tenth schedule which Mr. Finch focused on were unclear, the covenant as a whole was clear in that it prohibited alterations to the plan or elevation of the building and that Mr. Finch's construction flew in the face of that prohibition.

63 Mr. Gomez relied on *Triplerose Ltd.* v. *Patel* (7) as authority for the proposition that a prohibition against alterations to the elevation of a building includes works carried out within the perimeter of the apartment's balcony. The issue in *Triplerose* was whether a covenant against "any alteration in the elevation" of an apartment was capable of being broken by alterations at the rear rather than only the front façade of the flat ([2018] UKUT 374 (LC), at para. 1). The court concluded that the replacement of a tall window with a door at the rear of the building which gave onto a flat roof constituted an alteration to the elevation of the building. Mr. Gomez submitted that if the replacement of a window with a door at the rear of a building constituted a breach of a covenant prohibiting alterations in the elevation of a building, the works in this case were caught even more clearly by the prohibition.

64 Mr. Gomez submitted that there was no need to show detriment or loss in the case of enforcement of an absolute covenant and that there was no merit in Mr. Finch's arguments that covenants in the underlease ran with the land or should be implied by law. Mr. Gomez pointed out that the underlease was a construction or building lease which contained certain obligations typically found in a development project and therefore was different to the sublease which granted title to the purchasers of the apartments and which contained a management scheme for residents of

The Sails. In his submission, it was perfectly proper for the underlease to provide for external or structural alterations subject to approval as this catered for alterations which might need to be made to the building once construction works got underway, and he gave as an example the possible change to the configuration of an apartment for one reason or another. Further, the prohibition not to assign on inconsistent terms did not mean that the sublease should mirror the underlease in every respect but was aimed at ensuring that the sub-letting of the apartments was in accordance with what was provided for in the underlease *i.e.* the sub-letting of forty-two apartments with associated amenities and berthing facilities for vessels. By way of an example, Mr. Gomez submitted that this prevented sub-letting as commercial units properties designated as residential apartments.

65 Mr. Gomez said that in order for a term to be implied, various conditions had to be met as set out by the Supreme Court of the United Kingdom in *Marks & Spencer plc* v. *BNP Paribas Security Servs. Trust Co. (Jersey) Ltd.* (6) ([2015] UKSC 72, at para. 18):

> "[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

66 In Mr. Gomez's submission, there was no question in this case of the law implying a term especially when mutual enforcement covenants and absolute prohibitions on alterations were clear and where such prohibitions were not subject to any implied term of reasonableness: *F.W. Woolworth & Co. Ltd.* v. *Lambert* (5) ([1937] Ch. at 58).

67 As for the history of this particular matter, Mr. Gomez submitted that the management company had only initially granted "in principle" permission for the installation of patio doors but this permission was withdrawn shortly before the materials were ordered by the defendants on December 16th, 2016 and long before the works were actually carried out in November 2017. Mr. Gomez referred to the letter which Richardsons sent to the DPC, dated November 3rd, 2016, notifying them of their concerns about the proposed works. He said that even if the defendants had not seen this letter at the time, they would have known about the management company's reservations which were noted by the DPC at the meeting on December 16th, 2016 which the defendants attended. Further, the December 2016 emails also had to be taken into account. Even if, as Mr. Slack said, he could only recall one of these emails, that email alone made the position clear. This meant that when the defendants ordered the materials

for the works, they would have known that there was a problem. After this and before the works were actually carried out, the defendants received the cease and desist notice on December 22nd, 2016 and considerable correspondence followed between the parties' respective lawyers which would have only reinforced the position.

68 Mr. Gomez said that the works carried out by Mr. and Mrs. Perry were different as they had purchased their property from the developer at an early stage when the management company had not yet been set up and Mr. Butler had consented to the works on behalf of the landlords. The other exterior works referred to were those carried out by Mr. and Mrs. Savitz and it was pointed out that those works were the subject of an ongoing dispute.

69 Mr. Gomez also made reference to the judgment of Yeats, J. dated August 24th, 2020 in *Brympton Management Ltd.* v. *Bacarese* (2), which concerned the erection of a pergola on a balcony in Brympton estate in breach of a similar covenant. In that case, Yeats, J. rejected the submission that the covenant in question had been varied as a result of the management company having allowed similar works in the past. In Mr. Gomez's submission, this showed that there was no merit in the argument that previous permission or concessions for similar works could be relied on to say that there had been a variation of the terms of the sublease. In that case, the injunction sought for the removal of the pergola was not granted for a number of reasons including health and safety because evidence had been provided to the effect that the defendants were exposed to a dangerous situation with debris falling onto their balcony. Mr. Gomez said that there were no such reasons militating against the grant of the order in this case. To highlight the straightforward nature of the relief being sought, Mr. Gomez cited the following passage from Lord Cairns' speech in *Doherty* v. *Allman* (3) (3 App. Cas. at 719–720):

> "I said that there is here no negative covenant—not to turn these buildings to any other use. My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had 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 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 a 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 the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

Analysis

70 The first question which I must answer is whether the works constitute alterations to the external elevation of the building or whether they fall outside the scope of the relevant prohibitions in the sublease because they have been carried out within the confines of the defendants' property.

71 The word "elevation" is not a term of art and means the exterior plane of a building. This is clear from the *Triplerose* decision (7) where it was held that replacing a door for a window in the same aperture of a building without the landlord's consent was a breach of covenant against alterations to the elevation of that apartment. Following that reasoning, the works carried out by the defendants which included erecting windows and a wall in a terrace similarly fall foul of para. 22 of the sixth schedule which prohibits alterations, additions affecting the external elevation of the apartment, external alterations and changes to the existing design elevation, appearance or external decorative scheme of the apartment. Paragraph 14 of the tenth schedule also prohibits alterations to the plan or elevation of the apartment, placing any structure on it or making any material changes or additions to it. Even taking into account possible drafting infelicities relied on by Mr. Finch because of the use of the words "other than in addition to the structure now forming part thereof," the wording used in para. 14 of the tenth schedule when read as a whole makes it plain that like para. 22 of the sixth schedule, alterations such as the building of walls and windows enclosing a balcony are prohibited. Even though such alterations may be made within the boundaries of the apartment, they still represent alterations to the external elevation of the building, its design and external decorative scheme. I therefore reject Mr. Finch's submission that the works fall outside the scope of the sublease.

72 Mr. Finch then said that unless Mr. Wood could show that he had been affected by the works, he could not require the management company to enforce the terms of the sublease against the defendants because the mutual enforcement covenants are subject to an implied term that enforcement is conditional on an apartment owner establishing some form of detriment. Mr. Wood did not give evidence so it is not possible to say much about the nature of his objection, although there is some suggestion that his concern is related to the defendants' plans to include a bathroom in the enclosed balcony area which is located above his living area.

73 Under cll. 4 and 5 of the sublease, MPTSL and the management company promised each apartment owner that they would enforce each apartment owner's compliance with the terms of his/her lease, if necessary

by taking legal action. These covenants which provide the mutual enforcement provisions in the sublease are not subject to any qualification and are designed to provide protection to all the apartment owners who will know that they are all subject to the same restrictions. There is no express condition which needs to be met for this to be operative. This sort of covenant is commonly found in long leases granted to tenants of apartment blocks although in some cases, like in *Duval* (4), a condition is included that costs are paid and security given for those costs by a tenant as a condition of that tenant requesting enforcement against another tenant in the building. This means that each apartment owner knows that all the residents in the building are subject to similar obligations, including a prohibition on alterations, and that MPTSL and the management company have promised to enforce those obligations. The fact that there is a single complainant is not in itself unremarkable as one neighbour may very well be the only tenant affected by works and the mutual enforcement covenant is designed for the benefit of any single tenant.

74 The correct approach to the implication of terms was set out by the Supreme Court of the United Kingdom in *Marks & Spencer* (6) ([2015] UKSC 72, at paras. 14–32) and applied by the Supreme Court of the United Kingdom in *Duval*. These decisions make it clear that first the express words in an agreement must be construed and once that is done, the issue of an implied term falls to be considered. In order for the law to imply a term, a number of conditions must be satisfied, including showing that the agreement lacks commercial or practical coherence without the implication of the term in question.

75 The flaw in Mr. Finch's submission that the law should limit the circumstances under which a tenant can rely on the mutual enforcement covenant is that it flies in the face of the express terms of cll. 4 and 5 of the sublease which are unconditional and do not require a tenant to show that there is some material loss or detriment suffered. This cross enforcement scheme has a clear rationale and is well established in models providing for the governance of apartment blocks where there are a number of tenants. Clause 4(1)(i) of the underlease on which Mr. Finch relied deals with forfeiture of the sublease by QQML and is therefore completely irrelevant. I cannot see, therefore, how the defendants can say that the tests of business efficacy or obviousness are satisfied for a term to be implied.

76 Mr. Finch further relied on *Duval* (4) because he said that the works in that case concerned removal of part of a load-bearing wall which could have been damaging to the building. In Mr. Finch's submission the neighbour's complaint in that case was well founded which he said could hardly be argued in this case. In *Duval*, the key question for the court was whether the landlord of a block of flats was entitled to grant a licence to a lessee to carry out works which would otherwise breach a covenant

in the lease and where a neighbour was opposed to the works. The Supreme Court decided that if the landlord granted a licence for the structural works as it was minded to do, it would itself be in breach of its enforcement covenant with the other leaseholders and that there was an implied term in the lease that the landlord would not put it out of its power to enforce the relevant covenant in the leases of other lessees by licensing what would otherwise be a breach of it. There was, however, a marked difference between the lease in *Duval* and the sublease in that the lease in *Duval* contained two clauses dealing with repairs, one which related to routine repairs and alterations which the landlord could give permission to be carried out and which, by operation of s.19(2) of the Landlord and Tenant Act 1927, could not be unreasonably withheld. The other relevant clause which was the subject of the proceedings was directed to more fundamental works which were subject to an absolute prohibition and could not be carried out without the consent of all the other lessees.

77 The different nature of the works does not therefore assist the defendants because the scheme dealing with alterations in *Duval* was materially different to the blanket prohibition in the sublease. On the contrary, I consider that the reliance placed by Mr. Finch on *Duval* in this regard is fruitless because, if anything, it is the covenant prohibiting works in *Duval* which is comparable to the covenants being relied on by the management company in this case where all alterations are prohibited. The implication of a term in that case ensured that the landlord did not agree to prohibited works and therefore promoted the practical content of the landlord's obligation to enforce prohibited works for the benefit of all tenants. In this case, rather than promoting the prohibition on alterations, what the defendants are saying is at odds with the intention behind the covenants in question.

78 The next issue is whether the covenant in the underlease which allows for MPTSL to carry out alterations to the property with consent should run with the land or be implied as a matter of law into the sublease. Mr. Finch submitted that the intention that this covenant runs with the land for the benefit of the defendants as successors in title is expressed by reason of the combined effect of paras. 3 and 10 of the second schedule of the underlease. These covenants in the underlease allow for MPTSL to make alterations with consent and prohibits MPTSL from sub-letting on inconsistent terms to the grant which it received.

79 Ascertaining what the objective meaning of language used in an agreement is not a literalist exercise focused solely on analysing the wording of a particular clause and it is important to consider the contract as a whole and the wider context in which it was made. In this case, it is important to take into account that MPTSL was granted a long lease for the purposes of the construction of a development. This is clear from

the second recital to the underlease which states that under para. 10 of the second schedule of the underlease as read with cl. 4(vii) of a supplemental deed (the latter was not provided and I therefore assume it is of no relevance) MPTSL was granted the property with the intention that it would build forty-two apartments with associated amenities and berthing facilities which it would then sell on to third parties. MPTSL was required to produce plans for approval to the DPC within six months and to use its best efforts to complete the development three years afterwards. As part of that scheme, para. 3 of the second schedule provided for "external or structural alterations to the demised premises [the development as a whole] or to the erection of any other buildings thereon" subject to QQML's approval and DPC approval if necessary. The developer no doubt needed to have the ability to deviate from the original plans as the building works progressed and this is the way that this was achieved.

80 The owners of the apartments then bought long leases over their apartments which were all subject to an agreed set of promises clearly designed to ensure that a standard was maintained in the development and which includes the prohibition of external alterations. Further, MPTSL and the management company promised that they would take action against any tenant who breached this prohibition. There are of course different ways in which the question of alterations can be approached but that is what was agreed in this case and that was the basis on which the apartment owners purchased their apartments.

81 The natural and ordinary meaning of paras. 3 and 10 of the second schedule seem clear especially when one has regard to the overall purpose of this covenant and the underlease as a whole. The developer had the scope to make alterations to the development which is something which could well arise in the context of the construction of a development but it was not intended to pass on that right nor was it intended that the subleases which would later be granted should replicate the terms of the underleases. The sublease clearly does not mirror the underlease in various respects, including on the question of external alterations. The purpose of para. 10 of the second schedule was to ensure that MPTSL did not sublet the land for something other than for what it had been granted, namely, building a complex of forty-two apartments with associated amenities and berthing facilities for vessels. It would be inconsistent if, say, MPTSL had built an office block with a view to letting out offices but that is not the case.

82 I therefore reject Mr. Finch's submission as to the effect of cll. 3 and 10 of the second schedule of the sublease. In my view, this represents a literal and decontextualized assessment which fails to take into account

the differences between the underlease and the sublease, the clear intention of the parties and the express prohibition on alterations contained in the sublease.

83 The other way in which Mr. Finch put this part of his case was that the law should imply a term to allow for alterations subject to consent being given which could not be unreasonably withheld. I do not consider this argument persuasive either because the implied term suggested is inconsistent with the express term in the sublease prohibiting alterations. This means that rather than the law implying a term so that the content of the practical effect of the ban on alterations is not undermined (as was the case in *Duval* (4)) the sublease would be modified to replace an absolute prohibition with a qualified prohibition. The argument that there should be an implied term therefore breaks down at virtually every stage of the *Marks & Spencer* test as it is not sensitive to the express terms of the sublease and does not satisfy the tests of business efficacy or obviousness. The prohibition on alterations has a clear rationale which is to ensure that the building's integrity is not affected and that its structure or design is not altered.

84 Finally, the defendants argued that there had been a variation of the sublease and Mr. Finch relied on *Berry* v. *Berry* (1) in support of this part of his case. *Berry* v. *Berry* is authority for the proposition that equity can override the common law in allowing for a deed to be varied even where the variation had not taken place by way of a further deed.

85 When the defendants first sought permission to carry out certain works (which later expanded in scope) in around March 2016 this was approved "in principle" by the management company. It is clear, however, that the management company was under a misapprehension about its powers under the sublease but when it was advised that it was not allowed to grant permission for the works, it informed the defendants accordingly and apologized for the confusion and inconvenience caused. The email from Terence Richardson dated December 2nd, 2016 and timed 13.42 makes the position abundantly clear as it states that permission could not be granted by the management company, that each apartment owner had acquired contractual rights which no third party could interfere with and that the management company would take action if it considered that the proposed works constituted a breach of the terms of the sublease.

86 Mr. Finch submitted that the management company could not change its mind and that the defendants were entitled to rely on the original permission but I do not see why this should be the case. The management company proceeded on a mistaken basis for a period of time but rectified the situation before the planning application was to be considered by the DPC on December 16th, 2016 and before the defendants ordered the

materials and the works went ahead. This is not a sound basis on which to mount an argument for the variation of a deed.

87 The defendants also relied on the fact that having initially put the works on hold, Mr. Slack said that he then proceeded with the works in November 2017 because Mr. Isaacs encouraged him to do so. To the extent that this conversation was being relied on in support of the defendants' case on variation, it has to be put into context. Prior to that conversation, the defendants had been informed in writing that permission for the works could not be granted as they were contrary to the terms of the sublease and they had received a cease and desist notice from the defendants' lawyers. An exchange between the defendants' lawyers and the management company's lawyers followed. All of this should have left no doubt in the defendants' minds about the management company's position and which clearly had an effect on them as they held off with the works for a period of around ten months. Mr. Isaacs's conversation with Mr. Slack took place some months later in a social setting when the question of the works came up. I have no reason to conclude that Mr. Isaacs's comments were not accurately recounted by Mr. Slack. When viewed in context, however, I do not consider that they can properly be interpreted as evidence of a variation. Rather, Mr. Isaacs was expressing a personal opinion that stealth would win the day even though he must have been fully aware how strongly Mr. Wood felt about the matter and that there was no need for Mr. Wood to "put his hand in his pocket," as he put it, to require enforcement when the management company was under an obligation to enforce the ban on alterations. Whatever motivated Mr. Isaacs to say what he did, what he said was nothing more than a personal view that he thought that the defendants could get away with the works at that stage but nothing more.

88 Reliance was also placed by the defendants on works carried out by other residents in The Sails. Mr. Slack referred to six residents (excluding Mr. Boylan who had fitted glass curtains in his balcony) who had carried out what were described as internal or external structural alterations. Mr. Boylan accepted that some residents had carried out works and that the practice in the past had been for the management company to first consider any requests for permission to carry out works and, if appropriate, to refer the request to Mr. Butler on behalf of the headlessor for his approval.

89 The works carried out by Mr. Savitz are the subject of an ongoing dispute. The works carried out by Mr. and Mrs. Perry were carried out when they bought their apartment from the developer in 2010 and the management company had not yet been set up. As for the other cases, what appears to have happened is that a small number of works have been allowed to be carried out and that this has only happened because of the misunderstanding about the true legal position which has now been

cleared up. In *Bacarese* (2), Yeats, J. concluded that the absolute prohibitions in respect of works at Brympton estate had not been varied because the management company allowed similar works in the past. Similarly, I do not consider that the works already carried out in other apartments at The Sails means that there has been a variation of the sublease. What it means is that any permission or concession given in the past to those apartment owners is questionable. As Yeats, J. observed (2020 Gib LR 244, at para. 65), it may be that the practical effect of those breaches of covenant may have been varied but those waivers apply only in those particular cases.

90 For these reasons, I have not been persuaded that the principle set out in *Berry* v. *Berry* (1) can be successfully invoked by the defendants in this case. If anything, the facts of that case show how far removed the facts of this case are from the sort of factual scenario which might result in a deed being varied without a further deed being executed. In *Berry* v. *Berry*, a husband and wife had entered into a separation deed providing for maintenance and some years later when the husband could no longer afford the maintenance agreed to, they entered into a new agreement in writing but not under seal varying the terms of the original agreement. The court held that a claim by the wife under the original deed after she had acted on the later agreement should not succeed even though under the common law a deed could not be varied by an agreement which was not made under seal. Although the later agreement was not made under seal, the court nevertheless held that it provided a good defence to the husband in equity. Understandably, the court was not prepared to allow a technicality to prevent the operation of a clear and written variation of a deed. For the reasons which I have given, the facts of this case do not bear the weight of establishing that the variation of a deed has in fact taken place.

91 For all these reasons, I conclude that the management company is able to rely on the covenants forbidding external alterations to the apartment. It follows that there is no breach of the defendants' right to peaceable enjoyment of their property as alleged by them and that the works constitute a breach of para. 22 of the sixth schedule and para. 14 of the tenth schedule.

92 The defendants (and indeed most of the residents of The Sails) may feel with the benefit of hindsight that a more relaxed regime giving the landlord greater powers when it comes to alterations would work just as well for all concerned. They may also feel that a single apartment owner can wield too much control as things stand. That, however, does not render the sublease uncommercial or incoherent or justify the parties' bargain being rewritten by the courts.

Relief

93 This now brings me to the question of relief and whether I should grant all of the items of relief sought by the management company and, in particular, whether I should order the defendants to carry out remedial works to make good and restore the apartment to its original layout. Mr. Gomez submits that the position is a strict one and seeks the application of the principle enunciated by Lord Cairns, L.C. in *Doherty* v. *Allman* (3) in its full rigour, *i.e.* that when parties enter into an agreement and agree to a negative covenant with their eyes wide open, the court must enforce what they have agreed to. Although in *Bacarese* (2) the judge refused to grant an injunction despite having found a breach of an absolute covenant against alterations, Mr. Gomez said that case was distinguishable for a number of reasons. The tenants in that case were exposed to a dangerous situation, namely debris falling onto their balcony which the management company was doing little to prevent. Further, even after the committee had pointed out the absolute prohibition against the works to Mr. and Mrs. Bacarese, they continued to invite them to apply for permission and granted permission to the owners of a maisonette in the same estate to carry out works which were more extensive that the pergola.

94 In considering whether an injunction should be granted, I must determine whether the management company has waived its rights or acquiesced in such a way so as to deprive it of the equitable relief which it is seeking. This in turn requires me to consider whether the management company has by its acts and omissions represented to the defendants that the covenants prohibiting alterations are no longer enforceable so that even if there has been a breach of covenant in a technical sense, the court should not grant the order which is being sought.

95 Turning first to the initial approval given by the management company. As I have already said, the management company made a mistake about its powers under the sublease but as soon as it understood the true position, it informed the defendants accordingly and made it clear that the intended works should not proceed. Had the defendants dropped the matter then, they might have felt aggrieved about the fact that they had incurred the costs of making the application for planning permission which they may not have bothered with in the first place if the management company had been clear from the start. That, however, is water under the bridge because when the defendants were informed about the legal position, rather than dropping the matter they chose to go ahead with the works. When he gave evidence, Mr. Slack said that the management company had approved the works too many times for it to change its mind and that he had done nothing wrong. I found that Mr. Slack's recollection in this regard had become refracted through the prism of self-justification. Whilst it is true that the management company did change its mind, I do not consider that it behaved unreasonably in taking legal advice and

informing the defendants accordingly especially as this happened before the order for the windows had been placed by the defendants.

96 I turn now to the comments made later on by Mr. Isaacs. I do not consider that these comments can be interpreted as the management company representing to the defendants that the works were approved for the reasons which I have set out above or that they should militate against the grant of relief. It is usual that members of management committees of this sort like Mr. Isaacs are also residents in the estate in respect of which they carry out their duties. These duties may well include taking action against their own neighbours which may not be conducive to good neighbourly relations and may even place them in an invidious position. It would, however, be a recipe for chaos and confusion if informal comments made by officers of management committees to their neighbours (such as those made by Mr. Isaacs) could then be used against the committee as a whole. This is particularly so where, as in this case, it is clear that those comments do not represent the views of the management company which has made its position clear in writing.

97 The other issue which I must consider is whether previous works carried out in The Sails should operate against the grant of injunctive relief. As I have already found, such previous works cannot be said to amount to a representation on the part of the management company that the covenants against alterations were no longer enforceable especially when it is clear that the management company was mistaken about the strict terms of the subleases when it came to alterations. I do not therefore consider that this feature of the case should disentitle the management company from obtaining relief against the defendants.

98 Finally, the defendants have highlighted that the objection which lies behind this claim is that of Mr. Wood and that none of the other residents are opposed to the works. Further, they maintain that this is nothing more than a petty grudge on Mr. Wood's part following a falling out between them and that the courts should not entertain such matters. Mr. Wood appears not to have opposed the enclosure of the balcony initially but later became concerned about the intended change of use of the enclosed balcony area to include a bathroom which is located above his living area. When he raised this objection, he fell out with the defendants and battle lines were drawn. Whatever the reason, when Mr. Wood purchased his apartment he bought it on the basis that all residents were prohibited from carrying out alterations to their properties and that the management company would police enforcement of that prohibition. Against this background, I am not satisfied that I can conclude that this is a case which is solely motivated by rancour such that the management company should be debarred from obtaining the relief sought. Whilst there may be a temptation to say that the works carried out by the defendants appear to be inoffensive, that they are unopposed by the overwhelming majority of the

residents in The Sails, and that there should be scope for a compromise, that is not the bargain which the defendants and the other residents entered into.

99 In my judgment, therefore, I do not consider that there are grounds to refuse the grant of the injunction as requested by the management company.

100 Apart from this, the management company is also claiming nominal damages in the sum of £1 and legal fees, surveyor's costs and other reasonable costs, charges and expenses under para. 20 of the sixth schedule of the sublease. Separately there is also a claim for costs. Paragraph 20 of the sixth schedule provides as follows:

> "The Lessee shall pay all costs charges and expenses 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 notwithstanding that forfeiture for such breach shall be avoidable otherwise than by relief granted by the Court."

101 This covenant clearly states that the amounts which can be claimed under this covenant relate only to the preparation and service of the notice arising from the breach. Although not contained in the particulars of claim, the management company's lawyers have stated in correspondence that the costs incurred as at April 2018 amounted to £7,573.50 and they linked this claim to para. 20 of the sixth schedule. The defendants state that this provision only allows for costs and expenses which relate to the preparation and service of an abatement notice and not to lawyers' fees and that the claim being made in this regard is misguided to a large extent. In order that I can fully understand what costs are being claimed by the management company, I require further particularization from the management company on this aspect of its claim.

Conclusion

102 For the reasons set out above, I give judgment for the management company on its claim and order that the defendants carry out remedial works to make good and restore the northern and southern ends of their balcony to their original layout. I will hear the parties as to what period of time would be reasonable for compliance with my order and as to the precise terms of the order to be made.

103 As the management company did not seek the removal of the glass curtains installed by the defendants, I make no order in that regard. That does not mean that the glass curtains installed by the defendants or indeed other residents of The Sails are permitted under the sublease but rather that as the matter has not been argued, I am unable to adjudicate upon it.

104 As I have granted the injunction sought, I do not consider that there is any need to award damages even if only nominal damages are being claimed. I will hear the parties further on the management company's claim for costs and other expenses claimed as well as any other matters arising from the handing down of this judgment.

Order accordingly.
