Neutral Citation Number: [2016] EWHC 1075 (Ch)

Case No: HC-2015-004020

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 10/05/2016

Before

MR ALAN STEINFELD QC
(sitting as a Deputy Judge of the Chancery Division)

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Between:

TIMOTHY TAYLOR LTD	**Claimant**
- and -	
MAYFAIR HOUSE CORPORATION & ANR	**Defendants**

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- -

Mr. J. Seitler Q.C (instructed by **Messrs Berwin Leighton Paisner LLP)** for the Claimant **Ms. K. Holland Q.C.** (instructed by **Messrs Nicholas & Co.) for** the Defendants

Hearing dates: 7th, 8th, 11th, 12th, 13th, 14th, 15th, 18th, 19th April, 2016

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Judgment Approved

Mr. Alan Steinfeld Q.C.:

Introduction

1. This action raises in an acute form the conflict between a landlords's right to build reserved to it in a lease and the tenant's right to enjoy the demised premises pursuant to the landlord's covenant for quiet enjoyment contained in the lease and/or the landlord's implied covenant not to derogate from the grant.

2. The Claimant, Timothy Taylor Ltd ("the Tenant"), represented by Mr Jonathan Seitler QC, is the lessee of ground and basement floor premises ("the Premises" or "the Gallery") situate at 14 to 15 Carlos Place in the heart of Mayfair in London, which is situated just on the other side of the road from the famous Connaught Hotel. The Tenant occupies the Premises for the purpose of carrying on the business of a high class modem art gallery by the name "Timothy Taylor" under the terms of a Lease ("the Lease") dated 29th January 2007, which was for a term of 20 years from that date and which, accordingly, has just under 11 years to run.

3. The Defendants, Mayfair House Corporation and Mayfair House Corporation CM Inc., represented by Ms. Katharine Holland Q.C., are respectively the head landlord and the immediate landlord in respect of the Lease. I shall refer to them together as "the Landlord". They are associated companies which are owned or controlled by a Mr. Pasha Prinja and a Mr. Theodore Anagnou and/or persons connected with them. The building, of which the Premises forms part ("the Building"), consists of five storeys which from first floor upwards comprise apartments.

4. The Landlord is and has been since 2013 engaged in substantial works of development essentially to virtually rebuild the interior of the Building from the first floor upwards so as to create a number of new apartments which it intends to let. The Tenant complains that this work has been, particularly by reason of the noise generated by the works and the wrapping of the whole building by scaffolding to accommodate the works, substantially interfering with its use and enjoyment of the Premises as an art gallery.

5. The Tenant recognises that the Landlord is entitled to carry out its works and accepts that some disruption to its use and enjoyment of its Premises is inevitable, but complains that the manner in which the work has been carried out and is threatened to be continued to be carried out in the future is unreasonable in that it pays no or scant regard to its rights under the Lease. Accordingly, the Tenant seeks damages for the breaches of its rights which have occurred in the past and declaratory and injunctive relief to regulate how the works should be carried out in the future.

6. The Landlord, for its part, contends that it has at all times carried out its works reasonably with due and proper regard to the rights of the Tenant under the Lease.

7. The Tenant also raises as discrete issues:-

(1) whether the scaffolding as erected is compliant with the Landlord's express entitlement under the Lease to erect scaffolding and, if it is not, whether the Landlord should be directed to dismantle it;

(2) whether the Landlord was entitled to enter the Premises for the purpose of opening up a part of the ceiling of the Gallery to enable the removal of a screed from the floor of the premises above. I say "was" because the Landlord has, it seems, now abandoned the intention to remove this screed and so it is contended before me that this issue is now entirely academic;

(3) whether the Landlord is entitled as part of its works to fill in a light well ("the Light Well") which adjoins the Premises at basement level and to construct a porter's lodge at the bottom of the Light Well.

8. The Landlord insists that all the construction work which its contractors have carried out on

its behalf is compliant with the Tenant's rights under the Lease. It accepts, on the basis of authority to which I shall come, that its right to build under the Lease does not give it an untrammelled right so to do, but claims that it has not, through its contractors, carried out its works in any way unreasonably. It also contends that the Tenant has refused it access to the Premises not just for the screed works, but also for a number of other matters in respect of which it claims to be entitled to enter the Premises under the terms of the Lease. It, therefore, counterclaims for injunctive relief in this regard and for damages referable to past refusals by the Tenant to afford it access to the Premises for these purposes.

The Lease

9. The Lease was, as I have said, dated 29th January 2007. It was granted pursuant to an agreement for lease which is dated 22nd December 2006. Whilst there are other provisions of the Lease which I will consider in more detail when considering the particular issues to which those provisions relate, for present purposes the provisions of the Lease which are the most important are as follows

(a) "The Building" was defined as meaning 14 and 15 Carlos Place, London Wl, shown edged red on Plan 1 (Clause 1.3);

(b) "The Premises" were defined as the ground and basement floors of the Building, shown edged red on Plans 2 and 3 attached to the Lease (Clause 1.34.1). Plan 2 was a plan of the ground floor of the Premises. It showed a mezzanine floor as well, but this was removed as part of the works which the Tenant carried out on the Premises (see below) at the commencement of the letting;

(c) "The Initial Rent" for the Premises was £360,000 for the first three years of the term and then rising to £380,000 for the next two years and was thereafter subject to a rent review (Clause 1.9);

(d) By Clause 2 of the Lease, the Landlord let the Premises to the Tenant "excepting and reserving to the Landlord the rights specified in Schedule 1, Part 1" (Clause 2);

(e) The rights so reserved to the Landlord set out in that Schedule included the following: -

"1-1 Right of entry to Inspect

The right to enter, or in emergency to break into and enter, the Premises at any time during the Term at reasonable times and on reasonable notice except in emergency to inspect them, to take schedules or inventories of fixtures and other items to be yielded up at the end of the Term, and to exercise any of the rights granted to the Landlord elsewhere in this Lease..."

"1-3 **Scaffolding**

The right temporarily to erect scaffolding for any purpose connected with or related to the Building and Premises provided it does not materially adversely restrict access to or the use and enjoyment of the Premises AND the Landlord agrees to use all reasonable endeavours to minimise the time for which scaffolding is erected on or in connection with the Building ..."

"1-7 **Right to erect new buildings**

Full right and liberty at any time -

1-7.1 to alter, raise the height of, or rebuild the Building or any other building, and

1-7.2 to erect any new buildings of any height on any adjoining property of the Landlord

in such manner as the Landlord thinks fit even if doing so may obstruct, affect, or interfere with the amenity of or access to the Premises or the passage of light and air to the Premises, and even if they materially affect the Premises or their use and enjoyment PROVIDED THAT if the Landlord increases the size of the Building then it will [as] soon as practicable vary this Lease by Deed to reduce the Tenant's service charge percentage."

(f) By Clause **4.1**, the Landlord covenanted to:-

"... permit the Tenant peaceably and quietly to hold and enjoy the Premises without any interruption or disturbance from or by the Landlord or any person claiming under or in trust for him or by title paramount."

10. The principal issue in this action is the interrelationship between the covenant for quiet enjoyment in the Lease and the Landlord's right to build reserved to it by paragraph 1-7 of Part 1 of Schedule 1 to the Lease.

The Law

11. There is little, if any, dispute between the parties as to the applicable law. Until 2003 there was little authority on the interrelation between a landlord's right to build and the tenant's entitlement to enjoy the premises undisturbed pursuant to the covenant for quiet enjoyment. That may be because until the decision of the House of Lords in Southwark London Borough Council v Tanner [2001] 1 AC 1 a covenant for quiet enjoyment was generally regarded as being no more than a covenant for good title by the landlord, entitling the tenant to complain of breach thereof only if, as a result of a claim by a person with a title superior to that of the landlord, it was deprived of its use and enjoyment of the whole or a part of the demised premises altogether.

12. In the Southwark case the tenants who lived in a block of flats sued the landlord for breach of its covenant of quiet enjoyment by reason of excessive noise coming from an adjoining flat. Prior to that case, the general view was that a tenant could not sue for breach of the covenant of quiet enjoyment merely by reason of his use and enjoyment of the demised premises being substantially interfered with by activities carried out by the landlord or persons authorised by the landlord in adjoining premises; his only cause of action in such circumstances was to sue in the tort of nuisance.

13. This was the view taken by the Court of Appeal in the Southwark case, but the House of Lords disagreed. It held (see per Lord Hoffmann at pages 10E to 11C and per Lord Millett at page 23D to E) that the covenant for quiet enjoyment was breached if the landlord or persons authorised by the landlord carried out activities on land adjoining the demised premises which substantially interfered with the use and enjoyment of the premises by the tenant, it being irrelevant that the activities would support also an action in nuisance.

14. In Lechouritis v Goldmile Properties Ltd [2003] EWCA Civ 49 the Court of Appeal considered the relationship between the covenant for quiet enjoyment and the (implied) entitlement of the landlord to carry out works on the building of which the demised premises formed part. The entitlement was implied because, although there was no express right to build, the landlord had covenanted with all the lessees of the building, of which the demised premises formed part, to carry out repairs, which included repairing, maintaining and cleaning the exterior of that building, and which gave it therefore an implied right to do so. The landlord had brought in contractors to clean the external walls and windows of the building and to repair various seals between the frames and the wall. The work, which was completed within six months, required scaffolding and sheeting to be fixed to the outside of the building. One consequence of this was that the tenant's restaurant business was quite seriously disrupted: "from outside, the restaurant appeared to be closed; inside, it became dingy and frequently contaminated with building dust" (see paragraph 4 of the judgment of the Court of Appeal: Sedley and Rix LJJ).

15. In that case, the test which the District Judge at first instance had applied was that the landlord was not in breach of the covenant for quiet enjoyment if, in carrying out the works, it had taken all reasonable steps to minimise the "potential risks" to the tenant. As he had put it (see the citation from his judgment at paragraph 5 of the Court of Appeal judgment):

> "I accept that the defendant is entitled to repair only in such a way that the covenant for quiet enjoyment is not breached and in broad terms, given the extent and nature of the works undertaken by the landlord, I suppose it is inevitable that any tenant will suffer a measure of inconvenience during the duration of the works. There will have been noise; there will have been dust, and there will have been some diminution in the light to the premises as a consequence of the sheeting.
>
> As I have indicated, I am satisfied that the landlord ... was necessarily carrying out a repairing obligation under the terms of the lease. In addition to being necessary, those works were extensive. I am satisfied on the evidence before me today that the defendant took all reasonable steps to minimise the potential risks."

16. On appeal, the District Judge's judgment was reversed by the Circuit Judge, who essentially held that there was a breach of the covenant for quiet enjoyment if the landlord had not taken all possible steps to minimise the disturbance to the tenant. The Court of Appeal reversed the Circuit Judge and restored the judgment of the District Judge. It observed (see paragraph 2) that neither party contended that either of the relevant provisions, i.e the landlord's right to do the work and the covenant for quiet enjoyment, trumped the other and said that that was the correct approach. It went on to hold (paragraph 10):

> "... the obligation to keep the building in repair has to coexist with the tenant's entitlement to quiet enjoyment of the premises he is paying rent for. This by itself points towards a threshold, for disturbance by repairs, of all reasonable precautions rather than all possible precautions."

17. In paragraph 14, it went on to state:

> "The district judge's construction in our view conforms most nearly with what would have been apparent to the parties when they signed the lease. It would have been apparent that the tenant's enjoyment of the demised premises might be made temporarily less quiet and less profitable by the carrying out of structural repairs. It would similarly have been clear that the lessor's rights and obligations were neither to ride roughshod over the lessee's entitlements nor to be unreasonably impeded by them."

18. At paragraph 19, the Court of Appeal said:

> "This lease, like many leases, makes limited provision to compensate the tenant for interruption of the enjoyment of the demise. It is perfectly possible, at least in principle, to make provision in a lease to cover the kind of disruption which has occurred here. In its absence, while there is no obligation or necessity to reflect the disturbance of quiet enjoyment by remitting rental service charges, an offer to do so may well help in establishing the overall reasonableness of the lessor's intervention"

19. In Century Projects Limited v Almacantar (Centre Point) Limited [2014] EWHC 394 (Ch), the tenant of premises comprised in the Centre Point tower in central London sought an injunction against the landlord to restrain it from carrying out building works to the concrete facade of the tower using scaffolding, on the ground that this would constitute a breach of the landlord's covenant for quiet enjoyment and a breach of its obligation not to derogate from its grant. The lease contained a reservation to the landlord of a right to build on adjoining property not dissimilar from the right reserved to the Landlord by the Lease in the present case. The lease also contained an obligation upon the landlord to carry out repairs to the tower and it was common ground that repairs

to the concrete *façade* were needed. In paragraph 45(5) of his judgment, the Judge (Nugee J) stated as follows:

> "Even without authority, therefore, I would have no difficulty in accepting that where a landlord has let premises for a particular purpose and the lease contains both a covenant for quiet enjoyment and an obligation or right on the landlord to do repairs, neither provision trumps the other. On the contrary, they have to be made to fit together. The landlord cannot say that as the tenant took the demise subject to his repairing obligation, the tenant has to put up with the landlord's works, however unreasonably they are carried out. But, equally, the tenant cannot say that having given the covenant for quiet enjoyment, the landlord cannot carry out any work unless it is shown to cause the least possible interference with the tenants business. Both positions are too extreme. The way the two provisions fit together is that the landlord can carry out work provided he acts reasonably in the exercise of his right."

20. The Judge went on in the very next paragraph to hold that that was what he regarded Goldmile as establishing. He examined that case and (at paragraph 47) observed:

> "Precisely what, on the facts of a very different case, would amount to a failure by the landlord to take the reasonable and proper steps required is a matter which was not decided by Goldmile and which, therefore, has to be decided on a case by case basis."

21. Both these cases were concerned, essentially, with works which the landlord was carrying out not for its own profit but pursuant to a repairing obligation which the landlord had entered into with all the lessees of the building of which the demised premises formed part; although, as already observed, in the latter case there was also reserved to the landlord a right to build similar to the right contained in the Lease in this case.

22. The interrelation between a right of this sort and the covenant for quiet enjoyment, or rather the implied covenant not to derogate from the grant, was touched upon by Hart J in Petra Investments Limited v Jeffrey Rogers Plc (2001) 81 P & CR 21, which is a case which preceded Goldmile. The actual complaint in that case was not so much the carrying out of building works by the landlord, but the fact that the landlord had let part of its premises in a shopping precinct, of which the demised premises was part, to an entity which had a damaging effect, so the tenant claimed, on the profitability of its business and which the tenant claimed constituted a breach by the landlord of its implied covenant not to derogate from its grant. The lease contained a reservation to the landlord of a wide power to build, similar to the reservation in the present case, and which also went on to permit the landlord to let or deal with any adjoining premises in any way that the landlord thought fit. At paragraph 44 of his judgment, the Judge said this:-

> "Mr. Gaunt Q.C. on behalf of the Claimant did not seek to argue that the effect of this reservation was to oust entirely the doctrine of non-derogation from grant. He submitted, however, that the paragraph could be relied upon as indicating various types of activity by the landlord (viz. alteration to the building, the letting of any part of the centre for any purpose or "otherwise dealing therewith") which were plainly contemplated as not necessarily being inconsistent with the irreducible minimum implicit in the grant itself.
>
> In broad terms I accept that submission, but I do not find it helpful in identifying what that irreducible minimum was, or what obligations (either positive or negative) are thereby owed by the landlord. If the paragraph is construed as ousting the doctrine in its entirety it is repugnant to the lease and should itself be rejected in its entirety. If it does not, it has itself to read subject to a saving of the irreducible minimum. The most that the clause shows is that not every alteration in the centre, either physical or in terms of its use, was contemplated as being incompatible with the rights expected to be enjoyed by the defendant."

23. Finally, I was referred to the judgment of Neuberger J (as he then was) in Platt & Ors v London Underground Ltd [2001] 2 EGLR 121. The claim in that case was that the landlord had, by activities which he had carried out on adjoining land, breached the implied covenant not to derogate from the grant. Setting out what the Judge regarded as the principles applicable to derogation from grant, the judge stated, *inter alia*, as follows:-

> "1. It is well established that a landlord, like any grantor, cannot derogate from his grant. To put it in more normal language, as has been said in a number of cases, a landlord cannot take away with one hand that which is given with the other...
>
> 4. There is a close connection, indeed a very substantial degree of overlap, between the obligation not to derogate from grant, the covenant for quiet enjoyment and a normal implied term in a contract."

The judge went on to observe that Lord Millett in the Southwark case (supra) had;

> "… explained that, to a large extent, the covenant for quiet enjoyment and the obligation of a landlord not to derogate from his grant amounted to much the same thing."
>
> "5. An express term should, if possible, be construed so as to be consistent with what Hart J [in the Petra Investment case (supra)] called "the irreducible minimum" implicit in the grant itself."
>
> "6. When considering a claim based on derogation from grant, one has to take into account not only the terms of the lease, but also the surrounding circumstances at the date of the grant as known to the parties."
>
> "7. One test which is often helpful to apply where the act complained of is the landlord's act or omission on adjoining land is whether the act or omission has caused the demised premises to become unfit or substantially less fit for the purpose for which they were let..."
>
> "9. The circumstances as they were at the date of the grant of the lease are very important."

24. I deduce from these authorities the following propositions, most of which were common ground between the parties:-

> (a) In a case like the present, the landlord's reservation of a right to build in a way which, but for that reservation, would constitute either a breach of the covenant for quiet enjoyment or a breach of the implied covenant not to derogate from the grant should be construed as entitling the landlord to do the work contemplated by the reservation provided that in doing that work the landlord has taken all reasonable steps to minimise the disturbance to the tenant caused thereby;
>
> (b) In considering what can reasonably be carried out, it is relevant what knowledge or notice the tenant had of the works intended to be carried out by the landlord at the commencement of the lease;
>
> (c) An offer by the landlord of financial compensation to the tenant to compensate the tenant for disturbance caused by the works is a factor which the Court is entitled to take into account in considering the overall reasonableness of the steps which the landlord has taken;

25. Both Goldmile and Century Projects were cases where the works that the landlord was carrying out were works which it was necessary for the Landlord to carry out in order to keep the building, of which the demised premises formed part, in good repair pursuant to the repairing covenants which the landlord had given to all the lessees and occupiers of the building. It seems to

me that this is, in itself, a relevant factor for the Court to take into account in viewing the reasonableness of a landlord's works and the steps which the landlord has taken to minimise the disturbance to its tenant. In both those cases, the works were not being carried out for the personal benefit of the landlord but rather in each case the works were being carried out for the benefit of all the tenants of the building, of which the claimant was one. In a case where, as here, the landlord is exercising its reserved right to do works entirely for its own purposes and where the carrying out of those works, whilst profiting the landlord, confers little or no benefit on the tenant, it seems to me that this is a factor which the Court is entitled to take into account when viewing the reasonableness of what the landlord is doing.

The Facts

26. The facts that have given rise to the Tenant's claims in this case are not significantly in dispute. Where the facts are in dispute I set out in what follows my findings on the basis of the evidence which I have heard.

27. As I have already mentioned, the agreement for lease, pursuant to which the Lease was granted, was entered into on 22nd December 2006. Prior to that time, the Premises had been on the market for some time. However, I am told by Mr. Prinja and Mr. Anagnou, both of whom gave evidence before me, that in the period immediately before the agreement for lease with the Tenant, the market for premises in this part of Mayfair had become quite heated and there were in fact two bidders for the Premises, the other bidder being for a rent which was higher than that being offered by the Tenant, but in the end the Landlord chose the Tenant to be its tenant because its proposed use seemed to be more suitable for the Premises.

28. One matter which is in dispute, with which I shall deal straightaway, is to what extent, if at all, the Tenant was, before it agreed to take the Lease, informed of the Landlord's intention to carry out extensive works to the Building. Mr. Prinja states in his witness statement that on several occasions he had spoken to the agents and had told them that any prospective lessee was to be made aware of "our plans to develop the Property substantially and the lease would therefore incorporate appropriate provisions for major future works by the Landlord."

29. He also insists that he told Mr. Anagnou and the agents to tell both the prospective bidders to contact the Landlord's architect to see "... drawings of what sort of development we were planning and thereafter ask any question or get clarification on any matters they thought appropriate." Mr. Prinja also states in his witness statement that the agent subsequently confirmed to him that he had told Mr. Taylor, the owner and director of the Tenant, who gave evidence before me, that "We plan to carry out large scale works on the building and that they should contact Mr. Williams for details of the type of development proposed." He also says that "The rent and indeed the rent we originally sought took account of the fact that substantial development works were planned for the Property and was likely during the course of the lease term."

30. Mr. Anagnou says much the same in his witness statement and refers to a meeting with Mr. Taylor "in early 2006" and to his having been told by Mr. Prinja to make Mr. Taylor aware that there would be significant redevelopment works going on in the Building and that he should contact the architect so that he could obtain the drawings and any information he needed as to what was being planned. However, Mr. Anagnou does not state in terms that he specifically did tell Mr. Taylor about this. Nor is there any direct evidence from the agents that they actually told Mr Taylor any of this.

31. In a letter from the Tenant's solicitors, Berwin Leighton Paisner ("BLP"), dated 30th June 2015 it was stated that Mr Taylor was aware when his company took the lease that in general terms the Landlord intended to carry out some works but he was not warned that they were going to be as extensive as they have transpired to be. This was repeated several times in the Tenant's Statements of Case in these proceedings, each of which was verified by a statement of truth signed by Mr. Taylor. However, when he came on 29th February of this year to make his witness statement, Mr.

Taylor stated that he did not recall there being any discussion about the Landlord's future plans for the Building at any time prior to the grant of the Lease and that he had no recollection of anybody on behalf of the Landlord informing him, or any person acting on the Tenant's behalf, of its intention to undertake a substantial redevelopment of the Building.

32. Whilst I accept, having heard him give evidence before me, that Mr. Taylor has now genuinely convinced himself that he was not told anything about any intention of the Landlord to do any works to the Building, I do not accept that his recollection is correct. I do not believe that he would have told BLP that he had been told something about a general intention on the part of the Landlord to do some works to redevelop the Building, and even more so that he would sign, under statements of truth, statements of the Tenant's case which conceded this to be the case, unless that was his genuine recollection at that time. Moreover, that recollection would fit in with the evidence of Mr. Prinja and Mr. Anagnou that they had asked the agents to inform any prospective lessees that some work was intended.

33. However, I am not prepared to accept that Mr. Taylor was told anything more about the works than that there was a possibility that the Landlord might be carrying out works of some sort to redevelop the Building in the future. I am not prepared to accept that he was told by anyone that there was, at the time that the Lease was being negotiated, any fixed intention by the Landlord to carry out any specific works, let alone that these works would be of such an extensive nature as to be liable to cause significant disturbance to the Gallery.

34. I say this for at least the following reasons. Firstly, it does not seem, on the evidence that was adduced before me, that the Landlord had any specific intention, at the time of the negotiations for the Lease, as to quite what works it was going to carry out to redevelop the Building and when those works would commence. Mr. Prinja and Mr. Anagnou both make reference to prospective lessees being invited to see plans for the works, but, so far as I can see from the evidence adduced before me, there were no such plans at that time tor them to see. Secondly, even when five years later on the occasion of the first rent review under the terms of the Lease, by which time planning permission for the works had already been obtained, the point was raised on behalf of the Tenant, the response from Mr. Prinja, which he told me in evidence was his genuine belief at the time, was that the works were not going to occasion any significant disturbance to the Tenant's use and enjoyment of the Gallery. Thirdly, I find it unlikely, to say the least, that the Tenant would have agreed to take a lease of the Premises and would have carried out the very substantial work which was carried out at the commencement of the Lease to convert the Premises, formerly a banking hall, into a high class art gallery, had it appreciated that the Landlord intended to carry out the sort of substantial works which are now being carried out on the Building.

35. It seems to me, and I so find, that at most the Tenant was told of a general intention upon the part of the Landlord at some stage to carry out some work to the Building, but I do not find that it was told anything more than this. In those circumstances, I do not find, as the Landlord contends, that the initial rent which was agreed for the Lease included any element of discount to take account of the works which were to be carried out by the Landlord.

36. Following the grant of the Lease and pursuant to an express licence granted by the Landlord, the Tenant carried out very extensive works to the Premises to convert them for use as a high class art gallery.

37. On 6th January 2009, the Landlord applied to Westminster City Council ("WCC") for planning permission. The planning application referred to:

> "The erection of a mansard roof extension with plant room above, rear extension at third and fourth floors and infilling of Light Well at ground to fifth floors (to include balconies at first floor only) all in connection with the existing residential flats at 14 to 15 Carlos Place."

There is a dispute, with which I deal below, whether the Tenant was given notice of this application.

38. This permission was granted and further planning permissions amending this permission in various ways were made between then and March 2014.

39. The first rent review date under the Lease was 29th January 2012. On 9th February 2012, negotiations between the respective agents for the Landlord and the Tenant commenced. Ultimately, on 25th September 2012, following negotiations undertaken by email between the principals (i.e. Mr. Taylor for the Tenant and Mr. Anagnou acting on the instructions of Mr. Prinja for the Landlord), the terms agreed were an increase in the rent to £510,000 for the first two years of the next five year term, £520,000 for the third year and £530,000 for the fourth and fifth year, until the next rent review. The terms also included what has been described before me as "sweeteners" for the benefit of the Tenant, namely an agreement entitling the Tenant to make up the outstanding difference on the first year's rent in monthly payments over 12 months starting from 1st January 2013 and the return to the Tenant of a rent security deposit in the sum of £180,000 plus interest.

40. In the course of the rent review negotiations, the Tenant's agent, Mr. Lorenz, raised the issue of the Landlord's intended works in the following terms as recorded in the Landlord's agent's note of a meeting with Mr. Lorenz:-

> "It is understood, if the Landlords are to construct a top floor, then [the Tenant] will bring the possibility of the Landlord scaffolding the entire Building and building a top floor on top of the Building into the rent review negotiation, since the hypothetical willing lessee - assuming that he knew about the proposal as at the valuation date - will be less inclined to take on premises where the Landlord was going to carry out major structural works, than one where he wasn't."

41. The Landlord's response to this was by its agent, Mr. Vaughan, who gave evidence before me, to confirm the instructions that had been conveyed to him by Mr. Prinja, which read as follows:-

> "In so far as our proposed works are concerned, we did specifically mention this in the original Lease with [the Tenant]. We mentioned that we would at some point need to carry out works to the Building. In any case, all our building works are not going to affect him in any substantial way. The reason for this is that most of the structural work mainly occurs at the rear and roof top level of the building. Therefore, there will be no scaffolding or construction work in the front or side of the building. There is only minimal impact to the Gallery. We will only raise some scaffolding in the front and side of the Building once the project is completed and this is only for cleaning the Building. This also will be for a very, very short period. As I said, we allowed for all of this when we signed the original Lease with [the Tenant] and there should be no question of discounting any rent because of this."

42. In my judgment, in the light of this statement, it is highly unlikely that the rent which was agreed for the purposes of this rent review contained any or any significant discount to take account of the Landlord's proposed works. It is true that Mr. Lorenz's reaction to this in an email which he sent to Mr. Vaughan was to state:-

> "In the absence of a Landlord's clear and exact method statement he scratches his head, perhaps fears the worst and makes his bid. That's what we have to evaluate."

43. However, Mr. Prinja confirmed in the evidence that he gave to me that his instructions to Mr Vaughan represented his genuine belief at the time. In these circumstances it seems to me unthinkable that in the negotiations with the Tenant the Landlord would have allowed for any significant reduction in the rent, if any reduction at all, to take account of the proposed works.

44. In support of its contention that an allowance to take account of the works was made in the context of the rent review, the Landlord relies, as I see it, essentially on two factors. The first is that the rent ultimately agreed was significantly below the rent of £610,000 per annum, which by its

agent it had originally proposed. That rent was rejected by the Tenant's agent as "wholly excessive" and even the Landlord's valuation expert, Mr. Scott, did not seek to defend that as being the open market rental at the time.

45. Secondly, the Landlord relies upon the expert evidence of Mr. Scott to the effect that the open market rental for the premises, assuming there were no works, is, in his opinion, significantly higher than the rent which was agreed for the purposes of the rent review. However, the evidence of the Tenant's valuer, Mr. Krendel, was that the open market rental for the Premises at the relevant time was, ignoring the works, in his view below the rent that was actually agreed, albeit that he accepts that the rent agreed was within the parameters of what could reasonably have been obtained.

46. There is little disagreement between Mr. Scott and Mr. Krendel as to what would be the appropriate rent per square foot to be taken as comparable for the constituent parts of the Premises. The essential difference between Mr. Scott and Mr. Krendel is that Mr. Scott went to the trouble of measuring the Premises and came to the conclusion that the Premises were significantly larger than the square footage which Mr. Krendel had assumed. Mr. Krendel went on the floor areas which, from the documents he had seen, which included a note from Mr. Lorenz, indicated that the ground floor was assumed to be 2,520 square feet and the basement 2,335 square feet. These figures are confirmed in documents (the exact provenance of which is not entirely clear) which seem to have been produced at that time showing the floor areas of the Premises in the context of the rent review.

47. In his evidence before me Mr. Vaughan appeared to accept that these appeared to be the sort of figures that were being discussed, although he did not specifically confirm that they were agreed. Mr. Lorenz did not give evidence before me, but in his invoice to the client he expressed these floor areas as having been agreed. Mr. Scott, however, thought it appropriate to re-measure the Premises and, furthermore, to include (although this was not something he could re-measure) the mezzanine that had been removed at the commencement of the Lease as part of the Tenant's works.

48. Although I would not go so far as to say that I can find on the evidence that the floor areas were exactly agreed as per Mr. Lorenz's note, nevertheless it seems to me, on a balance of probabilities, that the rent review was negotiated and ultimately agreed on the basis of the sort of floor areas which Mr. Lorenz had noted and which did not include the mezzanine at all. As to that, it is quite plain on the evidence I have seen that the mezzanine was expressly not taken into account on the rent review at the insistence of the Landlord. The reason for this was that the Tenant, through Mr. Lorenz, was arguing that if one took the mezzanine into account that would have a detrimental effect upon the rental for the ground floor of the Premises, as it would make the ground floor much more dingy and cramped. Quite where Mr. Lorenz's figures came from is not entirely clear on the evidence. They do, however, approximately equate to the floor areas set out in the plans to the Lease and it can be reasonably assumed that both parties were, at the time, working on that basis.

49. Mr. Scott's thesis that the open market rental at the time of the rent review was in excess of that which was agreed depends entirely upon his conclusion from his re-measurement that the total floor area of the Premises was some 6,000 feet, taking in the floor area for the mezzanine and a greater floor area for the basement. It does not seem to me that this is a useful or permissible exercise in addressing the question of whether the rent review in 2012 contained within it any allowance for the prospect of the works. I would add that if there had been any concession made in the context of the 2012 rent review for the Landlord's anticipated works, I would have expected that to be set out very clearly in the correspondence and heads of terms that related to the rent review agreement, as the Landlord would surely, it seems to me, have insisted that there be some record that this was done for that purpose.

50. Exploratory or preliminary works commenced in July 2013, which corresponded with the time when the Landlord appointed its Project Manager, a company called Box Associates, acting

through Mr. Hill, who I heard in evidence before me. From then until August 2014, when the works commenced in earnest, there was some work which was carried out at the Premises, mainly of a preliminary nature.

51. It is clear on the evidence that, at that time, the Tenant, by Ms. Cassie Vaughan, who was the manageress of the Gallery and describes herself as "Director of Operations" and who gave evidence before me, was aware that works were going to be required to be done in the Light Well. For that purpose the Tenant was told that the air conditioning units, the pipes for which had been installed in the Light Well as part of the Tenant's works, needed to be relocated. The Tenant did not object to that being done, although Ms. Vaughan told me in her evidence that the work which was required for this purpose was, as she puts it, something of a nightmare. There were also, during that period, isolated incidents of damage being caused to the Premises and a certain amount of noise.

52. Sometime in the middle of 2014, Mr. Hill provided Ms. Vaughan with a sketch plan which showed the design of the scaffolding at ground floor level which the Landlord intended to erect. The scaffolding as shown on that plan was constructed with so called "towers" at the ground floor level in front of the Building. The image conveyed by that drawing was that the scaffolding when erected, although of course not desirable, was not going to be wholly intrusive as the Gallery would still be seen from the street as a gallery open for business and as readily accessible as before.

53. However, when in mid-August 2014 the erection of the scaffolding started to commence, and I deal with this in more detail below, it was of a totally different design. Instead of being supported by towers, it was now being constructed to a design which was in a straight line. The effect of this was that the scaffolding and accompanying hoarding was now going to enwrap the Building as a whole and make the Premises appear to be part of the building site.

54. The scaffolding designs were sent to Mr. Hill on 8th August 2014, but he did not forward them on to Ms. Vaughan until 20th August 2014, by which time the scaffolding was already in the course of erection. Unsurprisingly, this caused Ms. Vaughan to object. In her email to Mr. Hill, she made the point that "With the design as it is we are practically invisible". Mr. Hill's reaction to this was to reply stating that the contractors had explained that "The area between the doors needs to be filled for structural reasons. Without it the scaffold gantry would not be safe to use." Furthermore, Ms. Vaughan was told that it was now too late for the scaffolding to be redesigned.

55. The chosen contractor for the work was a company called Chorus Group Ltd ("Chorus"). They are, on the evidence, highly reputable building contractors and are members of the Considerate Constructors Scheme. There can be no criticism of the Landlord for its choice of these contractors. The Landlord had originally proposed to appoint as its contractors the same contractors as the Tenant had used for its work on the Gallery, but they declined to tender for these works. The tender documents, which Chorus accepted, contained a number of express provisions which required Chorus in carrying out the works to have regard to the requirements of the Gallery and to interfere with the Tenant's use and enjoyment of the Gallery as little as possible.

56. The Tenant adduced in evidence before me the expert evidence of a project manager, Mr. Duffy. Although Mr. Duffy is, in his report, a little critical of the Landlord for not having involved the Tenant in the negotiations of the tender terms, he conceded that "[the Landlord's] tender documents made reasonable reference to the Tenant and specifically requested that construction method statements are prepared to ensure the works are scheduled to minimise impact on the Tenant's operations."

57. Although the Building Contract with Chorus was not signed until 24th September 2014, Chorus took possession of the site on 11th August 2014 and, as already stated, a few days afterwards commenced the erection of the scaffolding. From that time onwards, works began in earnest.

58. The carrying out of these works has, it is common ground, substantially interfered with the use and enjoyment of the premises as an art gallery. In this connection, it seems to me that the best summary is to be found in paragraph 74 of Ms. Vaughan's witness statement where she states

as follows:-

> "The Gallery has experienced very significant levels of noise on a regular and repeated basis since the works began. The levels of noise have been such that members of the Gallery staff have been forced to wear headphones, work offsite and, on a number of occasions, we have had to close the Gallery entirely when the noise reached intolerable levels. There has been a high level of absence due to headaches, migraines and nausea, which coincide with and seem to be caused by the noise."

59. Ms. Vaughan then goes on in her witness statement to detail specific occasions when the noise had reached what she regarded as intolerable levels. Many of the incidents of noise are evidenced by emails complaining about the noise that were sent at that time. From the end of May 2015 and up to the present time the Tenant has, on advice, kept a log which records the noise being experienced. Mr. Seitler for the Tenant has collated all these incidents into what he calls a "Noise Chronology", which very helpfully sets out in tabular form the incidents of high noise being experienced by the Gallery. Suffice it to say - and this is not seriously contested - from the commencement of the works in mid-August 2014 until the present time, the Gallery has been experiencing periods of high levels of noise on almost a daily basis.

60. It was not long after the scaffolding was erected that Mr. Taylor discovered that his friend, who owned an art gallery next door to the building called the Hamilton Gallery, was being paid £50,000 by the Landlord to agree to part of the scaffolding being erected over the airspace above his gallery. It is likely that this, combined with the shock of finding that the Gallery was now going to be totally enclosed by the scaffolding and the hoarding to protect the scaffolding, was what prompted Mr. Taylor to seek a meeting with Mr. Anagnou which, from Mr. Taylor's point of view, was to discuss compensation. The meeting took place on 4th September 2014 at a local club, but as female company was present, Mr. Taylor did not consider it appropriate to raise this at that meeting. However, following the meeting he sent an email to Mr. Anagnou in which he requested what he described as "a reasonable rent reduction to compensate for" disturbance to his business caused by the scaffolding and what he described as additional works which were proposed for later that year, which would cause greater levels of disruption. Mr. Taylor suggested in that letter that he had been advised by Mr. Lorenz that a reduction of 50% backdated to the beginning of the renovations did not seem unreasonable. The letter made reference to what was described as "the level of compensation offered to my neighbour, whose premises are not affected on anywhere near the level that mine are." This was clearly a reference to the £50,000 that had been offered to the owner of the Hamilton Gallery.

61. Ms. Holland for the Landlord submits that it was from this time that the Tenant became wholly uncooperative because it was jealous of the amount of compensation that had been agreed with the Hamilton Gallery. She submits that the Tenant was acting unreasonably in not recognising that the Hamilton Gallery was in a completely different position.

62. I am not sure that I can agree with this. I can well see that it would be extremely galling for Mr. Taylor, given the level of disruption that had already been and was going to be caused to his Gallery both by the scaffolding and by the works, to see that his neighbour, who was not affected on anywhere near the same level, was being offered the sum of £50,000. Admittedly, the £50,000 was to secure for the Landlord a right to build scaffolding in that gallery's airspace, to which the Landlord was not entitled. However, from Mr. Taylor's point of view, I can well see that he felt that he should be entitled to as much, if not more, compensation for the disruption which he was suffering. Indeed, Mr. Taylor, when he gave evidence before me, confirmed that he felt that his Gallery deserved more compensation than the Hamilton Gallery.

63. The upshot, in any event, so far as the evidence before me went, was that there was simply no acceptance of Mr. Taylor's suggestion of a meeting to discuss compensation. Mr. Anagnou replied to Mr. Taylor's email dismissive of the complaint regarding the scaffolding and adding that

it was "... to be expected that there would be some minor disruption during the erection in the beginning for safety regulations. But this is the norm at the start and I'm sure Chorus will try their best." This, of course, entirely ignored the fact that the effect of the scaffolding was to wrap up the Gallery as part of the building site. As regards the disruption because of the works, Mr. Anagnou's response was simply that, in effect, the Tenant should put up with it as building works happened all over London frequently.

64. On 22nd December 2014, the Claimant's original solicitors sent a letter of complaint to the Landlord, complaining about the works and threatening legal proceedings.

65. On 3rd March 2015, the Tenant installed noise monitoring equipment in the basement of the Premises. That equipment remained there until 13th April 2015 when it was removed and replaced at the beginning of June 2015. The explanation which I was given for this was that there was a lull in the amount of noise towards the middle of April and it was thought that the equipment would no longer be required, but the noise started again in earnest at the end of May 2015 when demolition works commenced on the first floor of the Building. Noise monitoring equipment has remained there since.

66. On 15th June 2015, BLP sent a letter of claim to the Landlord's solicitors, Nicholas & Co. That letter raised the complaints which were subsequently to be made in the proceedings, concerning the way in which the works were being carried out and which I will deal with in some more detail below. The particular spark for the letter appears to have been that the Landlord was now intending to remove the screed which contained asbestos under the floor in one of the flats which lay immediately above the Premises. To enable that to be done the Landlord was asserting that it needed to access the Premises to open up the ceiling of the Gallery, something which would require the Gallery to vacate for a period in excess of three to four weeks whilst the work was being done. The Landlord was claiming to be entitled under the Lease to enter the Premises to do this work.

67. As regards these works, the letter asked for an undertaking by the Landlord not to carry out the screed works without first providing the Gallery with full details of the works. In a letter in reply from Nicholas & Co. to BLP dated 22nd June 2015, that undertaking was given. By letter dated 24th July 2015, Nicholas & Co., on behalf of the Landlord, gave notice of details of the work which the Landlord intended to do for the purpose of removing the screed. The letter indicated that the work would require the removal of all artwork from the Gallery and store room, the creation of a scaffold tower that would then be enclosed, the removal of the ceiling below the screed and the installation of temporary works to the underside of the floor. The Gallery would have to be vacated during the time that the work was taking place. It was stated that the aim was "to carry out these works as soon as possible and this will require access to the Gallery in line with the provisions of the Lease." The letter went on to state: "Whilst we note that you object to any entry onto your client's demise for this purpose, we would point out that paragraph 1-1 of Schedule 1, Part 1 to the Lease reserves to our client a right to enter your client's demise at any time at reasonable times and on reasonable notice (except in an emergency) to, *inter alia*, "exercise any of the rights granted to the Landlord elsewhere in this lease". Paragraph 1-7 of the same Schedule reserves to our clients the right to "alter" the Building which, on the face of it, is wide enough to encompass the removal of the screed."

68. That letter prompted a response in a letter from BLP dated 12th August 2015 that, if the Landlord attempted to exercise this right, that would be a trespass perpetrated by the Landlord and their contractors "... and there is a risk of a breach of the peace occurring, in relation to which our client will not hesitate to call the police." The same letter went on to state that the Tenant would be seeking a declaration from the Court that the Lease did not permit the Landlord to enter the Premises in order to carry out the proposed works and an injunction to prevent such entry.

69. Ms. Holland has described that response as unjustified and inflammatory. I agree that the

response could have been couched, perhaps, in somewhat less intemperate terms. Nevertheless, the Landlord had, by its solicitors, claimed that it was entitled to enter the Premises on reasonable notice to carry out the works and it could be said, it seems to me justifiably, that that constituted an implicit threat so to do. At all events, it seems to me that it was the issue concerning the Landlord's entitlement to come onto the Premises to carry out the screed removal work, combined with the correspondence which was passing at that time between the solicitors and a failure to agree an appropriate regime for the carrying on of the works, which sparked the issue of these proceedings on 17th September 2015.

The reasonableness of the manner in which the Landlord has carried out the works

70. The Tenant accepts that the Landlord is entitled to carry out the works of redevelopment in which it is engaged, save that it contests the entitlement of the Landlord to enter its Premises to carry out the screed removal works. It further contests whether the Landlord is entitled to do its intended works at the bottom of the Light Well. I will deal with those separately as they raise, it seems to me, discrete issues. But it says that the Landlord has not taken all reasonable steps to minimise the disturbance to the Tenant and so is in breach of its covenant for quiet enjoyment.

71. The Landlord contends that it has, at all times, acted perfectly reasonably in the way that it has carried out the works. It recognises that the carrying out of this work is bound to cause some considerable disturbance to the Tenant, since those works cannot be carried out without, at times, generating high levels of noise. As it was put, quite graphically, by one of the Landlord's witnesses, you cannot hammer a nail in without creating noise.

72. However, the Landlord claims that it has at all times used all reasonable endeavours to ensure that the works have been carried out with minimal disturbance to the Gallery. It claims that it has at all times sought to maintain proper liaison between it, its contractors and the Gallery. In particular, Mr. Hill told me in evidence, and I entirely accept, that until the matter became litigious, when as a result Ms. Vaughan was told not to meet him anymore, he used to have regular meetings with Ms. Vaughan to discuss the works some two to three times a week.

73. Ms. Holland relies upon the fact that the Landlord's contractor, Chorus, is a member of the Considerate Contractors Scheme, which involves continuous monitoring by those in charge of the scheme, and that there have been no complaints from WCC as to the manner in which the works have been carried out. She makes the point that almost all of the potential criticisms of the contractors referred to by Mr. Duffy in his report were in fact based on wrong assumptions. For example, Mr. Duffy mistakenly thought that the contractors had not utilised methods aimed at reducing the amount of noise being generated by the works, when in fact on the uncontested evidence they have done so.

74. The Landlord also relies upon the fact that, when complaints were made as to the noise levels, it did adopt a programme of, so far as practicable, confining high levels of noise to two hours on and two hours off, and ultimately, although not agreed, the hours that it adhered to were ones to which the Tenant did not object.

75. Furthermore, the Landlord makes the point that the real difficulty in being able to agree with the Tenant the permitted "noisy periods" was that, as a result of what it says was the unreasonable refusal of the Tenant to allow its own noise monitoring equipment to be placed in the Premises, it was unable, with the aid of its acoustic expert, to be able to come to an agreement with the Tenant as to what level of noise was to be regarded as "noisy".

76. I can see significant force in all of these points. Ms. Holland also makes the point that, until Mr. Taylor learned about the payment being made to Hamilton Gallery, there was a good degree of cooperation between the Landlord and the Tenant and it was only after he had learned of the payment that was to be made to the Hamilton Gallery that his attitude changed, particularly following the refusal of the Landlord even to discuss with him the payment of some compensation. I can also see the force in this, although, as I have said, it seems to me that Mr. Taylor's attitude

was, in the circumstances, entirely understandable.

77. Ms. Holland also makes the point that, on the evidence of Mr. Hill and Mr. Cooper, which I have no reason not to accept, the Landlord and Chorus were, through their respective Project Managers, going out of their way to seek to accommodate the reasonable requests of the Gallery and, save on one occasion, when this was not possible for reasons which were promptly explained and an apology given, had at all times ceased carrying out any noisy work at times which the Gallery had notified them were required to be kept quiet for some particular event which was taking place in the Gallery. Again, I accept all of this.

78. Further, Ms. Holland asks me to find that the Tenant's complaints about the level of noise being experienced in the Gallery are exaggerated. She points out that noise and how it affects one is essentially a subjective matter. She points to evidence from her own witnesses that, in their experience, the level of noise is no greater than that which is experienced in other building works.

79. I am entirely prepared to accept that the level of noise that was experienced by the Gallery was no more than one gets in any building site, but I cannot accept that Ms. Vaughan's evidence regarding the noise levels being experienced is in any way exaggerated. It seems to me that these building works are undoubtedly generating, at times, high levels of noise, which is bound to be disturbing to customers and staff in what is supposed to be a peaceful and quiet high class art gallery in Mayfair. It seems to me, on the basis of the expert evidence on both sides, which so far as the level of noise is concerned does not essentially differ, that at times during the carrying out of the works high levels of noise have been experienced. Indeed, the weekly notices which since July 2015 have been sent to the Tenant informing it of the works for the forthcoming week refer at times to high levels of noise being expected. On this basis, I do not know how it can seriously be suggested that Ms. Vaughan is exaggerating in what she says about the noise.

80. The issue is not whether or not high levels of noise are at times being created by the works, but whether the Landlord has been acting reasonably in the exercise of its right to build by taking all reasonable steps to minimise the amount of disturbance being suffered by the Tenant, even if it cannot totally eliminate that disturbance. The question that I have to decide is, therefore, not whether the works that are being carried out and are threatened to continue to be carried out would constitute an actionable nuisance, as they may well do, but whether the Landlord has been exercising its right to build unreasonably.

81. This is not an easy issue to determine. Mr. Seitler, in his closing submissions to me on behalf of the Tenant, relied upon ten factors which he said are present in this case and which render what the Landlord was doing unreasonable. I do not intend to go through all of them; some of them are good and some of them are perhaps not such good points. I have, however, come to the view in the end that the Landlord has been acting unreasonably in the exercise of its right and is, therefore, in breach of its covenant for quiet enjoyment for the following reasons.

82. Firstly, it seems to me that we are dealing here with premises which were let for use as a high class art gallery in the centre of Mayfair for a high rent. In my judgment that requires that the right to build should be exercised with a particular regard, so far as that was reasonably possible, to the need of the Tenant keep the Gallery running and with as little disturbance to it and its customers and staff as possible.

83. Admittedly, the right to build is expressed in wide and untrammelled terms. Nevertheless, it has to be exercised reasonably if the carrying out of the works is not to be a breach of the rights of the Tenant under the Lease, which includes the benefit of an unqualified covenant for quiet enjoyment. The Landlord is not obliged to offer to the Tenant any form of discount for the works. However, as was noted in the Goldmile case (supra), an offer by a landlord of a discount to the tenant can affect, as it was put in that case, "the overall reasonableness" of the landlord's works. By the same token, as it seems to me, a point blank refusal, as here, of the Landlord to offer any form of discount from what is otherwise a very full rent for the Premises is something that, as Mr. Seitler

put it and I accept, somewhat raises the bar as to what reasonableness requires. I have already rejected the submission that the Landlord had given a (hidden) discount for the works either in the rent agreed when the Lease was originally granted or at the first rent review.

84. In their submissions to me, the parties have tended to deal with the two elements which have been most concerning to the Tenant as though they were two quite separate issues: namely the scaffolding and the noise. Whilst it is understandable for these to have been dealt with in that way, it seems to me that essentially both the scaffolding and the noise are part and parcel of the carrying out of the works and need to be considered together for their cumulative effect.

85. As regards the scaffolding, it was this which was, as I have noted above, essentially the trigger for the Tenant's discontent. I can well understand why that was so. It seems to me that the way the scaffolding was designed and erected paid no or little regard to the interests of the Tenant and was, for that reason, entirely unreasonable.

86. The scaffolding is dealt with by an express reservation contained in Schedule 1, Part 1 to the Lease, paragraph 1-3. There is, by that paragraph, conferred on the Landlord: -

> "The right temporarily to erect scaffolding for any purpose connected with or related to the Building and Premises provided it does not materially adversely restrict access to or the use and enjoyment of the Premises ..."

That right, it seems to me (and this was not contested), is one that also has to be exercised reasonably so as, so far as possible, not to interfere with the Tenant's right to quiet enjoyment.

87. As mentioned above, prior to the erection of the scaffolding, the Tenant, through Ms. Vaughan, was shown by Mr. Hill a sketch plan indicating how the scaffolding might be erected in what I might call a "sympathetic" way, which preserved the open aspect of the Gallery. Instead of that being done, however, the scaffolding as actually erected caused the Gallery to be "enwrapped", as it has been called, in the whole Building, giving the impression to outsiders that the Gallery had entirely disappeared and was now part of what was a building site. I can well understand why Ms. Vaughan and Mr. Taylor were appalled at this.

88. Mr. Seitler submits that erecting the scaffolding in this way was a breach of a provision in the licence granted by the Landlord at the commencement of the Lease for the carrying out of the Tenant's works, whereby the Landlord agreed "not materially to alter the external appearance of the ground floor of the Building without the prior written consent of the Tenant, such consent not to be unreasonably withheld or delayed." I do not agree with this submission. It seems to me that this provision relates to permanent alterations to the external appearance of the ground floor of the Building and not some temporary interruption of that appearance by the erection of scaffolding. Indeed, on Mr. Seitler's contention, any form of scaffolding would be prohibited as necessarily that would temporarily alter the external appearance of the ground floor of the Building and yet there is the express reservation to the Landlord as regards scaffolding to which I have referred.

89. However, I can see no justification for the scaffolding having been erected in the way that it was. The scaffolding experts who gave evidence before me, the Tenant's expert being qualified as a structural engineer, are agreed that the scaffolding could have been erected on the basis of pillars or towers. This would have preserved to a much larger extent the external appearance of the Gallery in the way that had been indicated on the drawing which had been shown to Ms. Vaughan. I have also been shown photographs of other premises in different parts of London where this technique has been used and where one can see that the external appearance of the premises, though necessarily altered by the scaffolding, does not give the Impression that the premises have disappeared virtually altogether.

90. Furthermore, both experts were agreed that the hoists could have been altered so that the low level hoist was, so to speak, swapped with the high level hoist such that deliveries of materials would, on the whole, be effected further away from the entrance to the Gallery than as the

scaffolding was actually designed. In consequence of the hoists being placed in the way that they are, the front of the Gallery is frequently blocked by lorries delivering building materials for these works. I have been shown photographs which indicate that happening and the evidence suggests that that has been happening frequently almost every day.

91. Ms. Vaughan, in her witness statement, sets out at paragraphs 61 to 67 what the effect of the scaffolding has been. She says, and this has not been challenged, that the scaffolding has the effect of making the Gallery space look as though it is part of the Landlord's building site and therefore closed, particularly when large vehicles are parked outside which hide the Gallery's existence and the branding on the scaffolding hoarding. She makes the points that:

i) the vehicles delivering building materials to the site have been parked outside the building on a regular basis since the works began,

ii) when vehicles are parked outside the Building, loading and unloading building materials, the entrance through the scaffolding to the front door of the premises from Carlos Place is blocked, which means that people approaching the Premises from the north are confronted with an obstruction to the only visible entrance,

iii) contractors regularly block the scaffolding corridor, which entails that the entrance to the Premises from the north, along Carlos Place, is closed and people trying to get into the Premises need to walk around the whole building in order to find a useable entrance.

92. She also makes the point, with which I sympathise, that she finds it, as she puts it, very depressing to enter the coffin-like enclave created by the scaffolding on a daily basis. She adds that she feels that "The scaffolding has had a profound impact on staff morale: my colleagues are particularly frustrated at the uncertainty over the duration of the scaffolding, the darkness, noise levels and the Gallery's apparent inability to influence the situation." She also refers to the scaffolding hindering the delivery of art to the Premises. She makes the point that the scaffolding has had a really significant impact on the Tenant's business; staff are often asked why the Gallery has closed down or how long the Gallery will be closed for or when it will be reopening. Furthermore, Ms. Vaughan makes reference to an email which Mr. Taylor received from another New York art dealer commenting that he had seen the "unfortunate" scaffolding hiding the gallery.

93. One then has to ask whether there were reasonable steps that the Landlord could have taken to minimise the disturbance thus caused by the scaffolding. The answer to this question, in my opinion, is clear. The Landlord could have designed the scaffolding on the lines set out in the drawing which Mr. Hill had shown to Ms. Vaughan and which incorporated towers instead of a straight line and where the low level hoist was swapped with the high level hoist so as to minimise disturbance from deliveries to and from the building site.

94. Ms. Holland submits that the Landlord cannot be regarded as unreasonable in this regard because it relied upon the design by a firm of specialist scaffolding contractors employed by Chorus. However, I have seen no evidence whatsoever that in commissioning that company to design the scaffolding that company was ever asked to consider whether scaffolding on the lines set out in Mr. Hill's sketch would be feasible. Indeed, Mr. Doble who gave evidence on this point on behalf of the Landlord was unable to recall whether Mr. Hill's sketch plan had even been shown to the scaffolding contractors. The expert evidence suggests that, had they been asked to consider whether scaffolding along the lines of Mr. Hill's drawing was feasible, they would have concluded that it was and would have designed the scaffolding accordingly. Instead of this, it seems to me that what happened here was that without any regard to the interests of the Tenant whatsoever the scaffolding company was simply asked to design the scaffolding to accommodate the works - and this they did.

95. Equally, I can see nothing to show why the hoists were designed in the way that they were so that the main hoist which was used to bring up materials to the site from ground level was

placed virtually right outside the door of the Gallery. Ms. Holland suggests that this was because of health and safety concerns. Again, I find it difficult to see on the evidence why there were health and safety concerns that dictated that the hoists be erected in this way. I can understand, although the evidence on this is somewhat scant, that WCC might have preferred neither hoist to interfere with what was marked on the ground as some form of pedestrian crossing in Carlos Place, but I do not see how that could affect whether the high level or the low level hoist was to be right outside the main entrance to the Gallery. It seems to me that when it came to the design of this scaffolding, the interests of the Tenant were simply overlooked.

96. In the light of the expert evidence, it seems to me that the excuse that was given to Ms. Vaughan when she raised a complaint about the scaffolding was simply fobbing her off. There was no particular structural reason, according to the expert evidence, as to why the scaffolding had to be designed in the way it was, rather than with towers. Furthermore, when Ms. Vaughan objected to the scaffolding and was told that it could no longer be put right because that would involve having to dismantle the whole scaffolding, that was itself untrue in the light of the expert evidence. Certainly, had Ms. Vaughan been told in time, the scaffolding could quite easily have been redesigned and re-erected in a form that would be more acceptable to the Tenant without having to dismantle it all together.

97. In the circumstances, I hold that the Landlord was exercising its rights unreasonably when it erected the scaffolding in the way that it did and in a way that substantially interfered with the use and enjoyment of the Premises as an art gallery and thereby breached both the express covenant as to quiet enjoyment and the implied covenant not to derogate from its grant. Furthermore it seems to me on the evidence that the scaffolding as erected does to a material extent impede access to the Premises and is therefore not justified by the scaffolding right reserved to the Landlord by the Lease even if, contrary to my view, the scaffolding as erected could be justified by a reasonable exercise of that right. I accept that to an extent the disturbance to the Landlord has been mitigated by its ability to advertise the Gallery and its exhibitions on the hoarding but (a) on most days at the front of the Building the Gallery's logo is hidden from view by the lorries delivering building materials and (b) the signage on the hording at the side of the Building, although better than nothing, does not do much to indicate that the Gallery is still there.

98. The issue of noise is perhaps not quite as clear cut. What, however, it seems to me is strikingly missing here, despite the points that Ms. Holland makes on the Landlord's behalf, is any real liaison with the Tenant right from the start of the works, indeed from before the start of the works, to inform the Tenant as to the likely duration of the works, the noise levels likely to be experienced and to discuss with the Tenant the means of being able to mitigate the impact of the noise on the use of the gallery.

99. Again, bearing in mind that we are here dealing with a high class art gallery let at a very substantial rent, the need for such liaison is all the more essential. What should have happened here is that the Landlord, through its Project Manager and, perhaps, Chorus's Project Manager also, should have sat down with the Tenant, perhaps with Ms. Vaughan, maybe with an expert to assist her, to discuss the works right at the start to agree what should be regarded as high levels of noise, and to plan between them how the noisy work could be carried out without causing as much disturbance as has in fact been caused. It is, in my judgment, striking that it does not appear from the evidence that it was until quite a long way into the commencement of the works, and only after complaints from the Gallery, that any attempt was made to limit the hours for noisy work. Even as late as June 2015, when BLP were retained on behalf of the Tenant, there had still not been any meaningful discussions to seek to agree periods of noisy and non-noisy works and the levels at which noise was to be regarded as noisy.

100. In this latter regard, the Landlord makes great play of the fact that it was not until November 2015 that the Tenant was persuaded to allow the Landlord to have its own monitoring equipment installed in the Premises. I agree that it might have been better for the Tenant to have agreed to this

at an earlier stage. On the other hand, it seems to me that too much can be made of the noise monitoring equipment. This equipment may be necessary if the Court is to determine for the purposes of the grant of an injunction quite what levels of noise are to be regarded as "noisy" and what levels of noise are to be regarded as "quiet". However, it is hardly necessary to enable an experienced contractor to be able to determine what works are likely to create high levels of noise and what are not.

101. One of the complaints made by the Landlord before the installation of its own monitoring equipment is that its contractors needed to have that equipment to have what it called remote access to the data so that the workers on site would be instantly able to see whether the work that they were doing was generating more than the permitted level of noise and would then be able to take action to diminish the noise. However, on the evidence before me, the Landlord and its contractors have never in fact utilised even their own monitoring equipment for this purpose since it was installed. Thus, I conclude that the only real function of the monitoring equipment was to provide evidence for the Court.

102. As regards the failure to provide advanced information, the Tenant also relies upon the fact that, according to Mr. Taylor's evidence, the Tenant was not given notice of the planning application and knew nothing about the works, therefore, until planning permission had been obtained. I have to say that I see little in this particular point.

103. Mr. Prinja says that he personally sent the planning application to the Tenant by courier. Mr. Taylor denies that he was actually ever given notice of the planning application as in fact was required by statute. There is, indeed, no direct evidence, so far as I can see, apart from the uncorroborated word of Mr. Prinja, as to whether the Tenant was ever in fact given notice of the planning application. However, as I see it, nothing particularly turns on this. We know that the Tenant knew about the planning permission by 2012 when its valuer raised this very point in the context of the rent review negotiations which I have dealt with above. So whether or not Mr Taylor knew about the planning application and the permissions at the time when they were made seems to be irrelevant to the matters which I have to decide and so I make no finding either way on this.

104. However, this does not, as it seems to me, go to the point that in planning an operation of this magnitude it seems to me that it was incumbent upon the Landlord, via its Project Manager and other professionals employed, to "sit down with the Tenant" and to explain to the Tenant carefully what was proposed and, as I have said, seek to agree the method whereby the work could be carried out with the minimum of disturbance. Of course, some disturbance was going to be inevitable. The Tenant could have taken the view that given the amount of the disturbance it would need to find alternative accommodation during the time that the disturbance was carrying on, but, on this I agree entirely with Ms. Holland; the Tenant has entered into a lease which reserved to the Landlord the power to carry out those works.

105. Nevertheless, by not telling the Tenant in advance about the magnitude of the works and what the Tenant may experience, the Landlord was depriving the Tenant of the ability to take up this option. Moreover, even with the Tenant there, it might have found it less disturbing if, with the scaffolding not erected in the way that I have described above, noisy works were planned in a way that enabled the Tenant to plan in advance the activities which it could carry out on the premises. For example, when there were particularly noisy works going to be carried out, it would have the ability to arrange that staff should stay at home to do their work. It could further arrange for customers not to come to the Gallery during the time when the noisiest of the works were being carried out.

106. Part of this has been mitigated by the provision to the Tenant of weekly work ahead statements. However, this did not commence until well into the works on 24th June 2015 and after complaints had been raised by the Tenant when Box Associates issued an instruction to Chorus requiring details of the following week's works to be provided every Friday by 11 am for the

duration of the works. Even then, the details which were then provided each week, although they warn the Tenant of the nature of the works that are going to be carried out in that week and the extent to which they are going to be noisy, do not give any particular guidance to the Tenant as to when exactly those works are going to be carried out.

107. Another aspect of the failure properly to liaise with the Tenant is the failure to give any real indication to the Tenant as to how long the works are going to last. I would accept that in part this has been due to the Tenant. For example, the Tenant's objection to the Landlord carrying out its Light Well works, which I will deal with, may have delayed work commencing on the Light Well and thereby potentially delayed the works as a whole. However, it does seem to me that it is unreasonable when a landlord is carrying out such major works as this around a tenant whose premises have been virtually incorporated into the building site not to give the tenant a more accurate idea as to when it can expect the works to cease.

108. I therefore conclude that the Landlord has not acted reasonably in exercising its right to build combined with its scaffolding rights under the terms of the Lease and has thereby been in breach of the covenant for quiet enjoyment. I will consider further below what remedies I ought to give for that breach and for future breaches.

The Screed

109. I will deal with this issue briefly. It is an issue which could have been entirely academic, as Ms. Holland suggests to me I should treat it, given the abandonment by the Landlord of the intention to carry out the screed works as originally envisaged. However, the Landlord has kept the issue alive by contending in its Defence and Counterclaim that it was entitled to enter upon the Premises for the purposes of carrying out the works for the removal of the screed and that, as a result of the Tenant's refusal to allow it to do so, it has had to redesign the apartment above the premises which has delayed the works and cost it money for which it counterclaims damages.

110. Ms Holland contends that, given the abandonment of the Landlord's intention to remove the screed, it is inappropriate to grant any declaration and, given that her clients promptly gave the very undertaking which was sought by the Tenant, an injunction would never have been necessary if, the Court having granted the declaration, the Landlord had undertaken to abide by it. I accept that the grant of declaratory relief is discretionary and that on the authorities the Court ought not to grant a declaration which goes to a matter which is wholly academic. For the reasons that I have given, it does not seem to me that in this case the declaration would be wholly academic. I agree, however, that in the circumstance an injunction is not required should I by the declaration rule against the Landlord.

111. I turn, therefore, to consider the issue of whether or not the Landlord is or was entitled to enter the premises for the purposes of carrying out the screed works. The Landlord relies upon two provisions in the Lease which it contends entitles it to do so. The first is clause 3.8 of the Lease. This contains a covenant which is headed "Entry to Inspect and Notice to Repair". In general, it is designed to enable the Landlord to enter the premises for the purpose of viewing its state of repair and, if it finds that there have been breaches by the Tenant of its repairing covenant, to give the Tenant notice to carry out the works specified in that notice and entitling the Landlord, if the Tenant does not do so, to do the work itself and to charge the Tenant for the cost of so doing. Thus, Clause 3.8.1 obliges the Tenant to permit the Landlord to enter the Premises

> "...to ascertain whether or not the covenants and conditions of this Lease have been observed and performed" (Cl.3.8.1.1.) and
>
> "... to view the state of repair and condition of the Premises ..." (cl. 3. 8.1.2)

The next sub-paragraph provides for the Landlord to be able to

> "... give to the Tenant ... a notice ... specifying the works required to remedy any breach of the Tenant's obligations in this Lease as to the repair and condition of the Premises."

112. Clause 3.8.1.2 goes on, however, after the words "to view the state of repair and condition of the Premises" to provide that the Landlord may "... open up floors and other parts of the Premises where that is necessary in order to do so (subject to the Landlord making good forthwith) ..."

113. The Landlord contends that the words "necessary in order to do so" should be given a very wide meaning and, in effect, give to the Landlord a carte blanche to come on to the Premises and open up floors and other parts of the Premises for whatever reason the Landlord considers to be necessary. In my judgment, that is an extravagant construction of the Clause. It seems plain to me that the words "to do so" in Clause 3.8.1.2 mean that the Landlord can open up floors and other parts of the Premises where that is necessary in order to view the state of repair and condition of the Premises and nothing more than that. That is the natural meaning of the words used and clearly the intention, as it seems to me, of the Clause as a whole.

114. In addition, the Landlord relies upon the right reserved to the Landlord in Schedule 1, Part 1, by Clause 1-1 to enter the premises:

> "… to inspect them, to take schedules or inventories of fixtures and other items to be yielded up at the end of the Term, and to exercise any of the rights granted to the Landlord elsewhere in this Lease."

Those rights, so it contends, include the right to build under Clause 1-7. Rights reserved to a landlord under the terms of a lease are to be construed narrowly against the landlord - see William Hill (Southern) Limited v Cabras (1986) 54 P & CR 42. In my judgment, what is described by Clause 1-1 as the "Right of entry to Inspect" does not extend to coming on to the Premises and, indeed, occupying them for a significant period of time, for the purpose of carrying out building works on adjoining property belonging to the Landlord. That, it seems to me, would be to give to the Clause an extravagant rather than a narrow meaning. The rights that it seems to me Clause 1-1 is referring to are rights that entitle the Landlord to come on to the Premises for the sort of matters which are already referred to in that Clause.

The Light Well

115. As mentioned above, the Landlord intends to carry out work to the Light Well down to the basement level and to create at that level a porter's lodge. Initially, the Tenant was content for the Landlord to carry out this work, but later, presumably having obtained legal advice, now contests the Landlord's entitlement so to do. The Tenant relies on two factors. Firstly, it contends that the Light Well is a "common part". Secondly, it contends that by reason of there being in the Light Well ventilation pipes that solely serve the Premises, those pipes are part of the Premises as defined in the Lease and that must entail that the Light Well itself at basement level is part of the Premises.

116. As to the first point cl.1.4 of the Lease defines "The Common Parts" as

> " the areas and amenities for use in common by the tenants and occupiers of the Building ... limited to the entrance halls, landings, staircases edged green on Plan 2 & 3 but not the lift."

Mr. Seitler for the Tenant relies upon the fact that on plan 3 to the Lease the Light Well is shown edged green. However, despite this edging, it is impossible to see how the Light Well can answer the description of a "common part" as set out in Cl.1.4. It is neither an entrance hall, landing, nor a staircase, nor is it in any sense an area for use in common by the tenants and occupiers of the building. Mr. Seitler suggests that it could be regarded as a "landing" although he accepts that that is normally confined to areas attached to a staircase, which the bottom of the Light Well clearly is not.

117. Furthermore, this argument suffers from the difficulty that the bottom of the Light Well is itself described in the Lease as a "courtyard" - see paragraph 1-8 of Schedule 1, Part 1 - which confers on the Landlord the right to enter upon the premises "to access the courtyard on the lower ground floor". The explanation for the green edging may be that the draftsman had originally

intended that this courtyard was going to be shown edged green also, but omitted to include words to that effect when the Lease was actually drafted.

118. The Tenant's alternative argument relies upon the definition of Premises as including (see Clause 1.34.2) "the adjoining conduits exclusively serving the Premises" and the definition of "adjoining conduits" (see Clause 1.1) as including all the pipes on, over or under the Building that serve the Premises. The ventilation pipes were laid in the Light Well as part of the Tenant's works for which the Landlord granted license after the commencement of the Lease. They were accordingly not there when the Lease was granted and it is, in my opinion, therefore doubtful whether they can be regarded as part of "the Premises" for the purposes of the Lease. But even if they are, it seems to me that only means that they belong to the Premises and are, therefore, subject to the Tenant's repairing covenants. I do not see how the presence at the bottom of the Light Well of pipes that exclusively serve the Premises and are, therefore, to be regarded as part of the demise can render the whole courtyard under which those pipes are situate part of the demise itself.

119. I accordingly conclude that the Landlord does have the right to carry out works down to the bottom of the Light Well in order to construct a porter's lodge. That will obstruct the Tenant's right to light, but the Landlord has offered and the Tenant has accept that in lieu thereof it will install so called light boxes to give a similar effect.

The Remedies

120. This leaves over the question of what remedies I should grant for the breaches, both present and anticipated, which I have found and for the issues which I have determined. As regards the breaches that I have found thus far, in accordance with what I have held above, the Landlord has been in breach of the Tenant's covenant for quiet enjoyment and its implied covenant not to derogate from its grant since the commencement of the works when the scaffolding was put up, that is to say since the middle of August 2014. I can only award damages in that regard.

121. The Tenant was seeking at one stage damages referable to an alleged loss of profits during the time that the work was carried out. However, its figures show that during the time that the works have been carried out, it has not actually suffered any loss of profits. Indeed, it has increased its sales and therefore, presumably, its profits during that time. It was, at one stage, relying upon a report from a forensic accountant who extrapolated from previous figures what he regarded as a rising trend in profits, which was not reflected entirely in the time that the works were carried out, and deduces from that that the failure of the profits to rise in accordance with that extrapolation indicates a loss of profits. However, it seems to me that, absent expert evidence to show that the profits in this area of art dealing could be expected to have risen at the extrapolated rate, this evidence is not helpful and, indeed, Mr. Seitler did not press it on me.

122. An alternative, and, as it seems to me, a more attractive way to assess the damages is to assess what it can be regarded the Tenant has lost in terms of its use and enjoyment of the Premises and this can, it seems to me, be assessed by reference to what can be regarded as a reasonable rebate in the rent which it is contractually bound to pay for premises which have been rendered by the breaches of covenant materially less fit for its occupation.

123. There is little disagreement between the experts as to what this should be. Mr. Krendel suggests a rebate of between 20% and 30% and believes that 25% would be a reasonable rebate. Mr. Scott accepts a rebate in the order of 15% in these circumstances might be appropriate. It seems to me that an appropriate rebate to reflect the works, and having regard to the fact that some works would have been carried out anyway, would be a rebate of 20% of the rent which is otherwise payable. I accordingly order that the damages payable for breach of the covenants should be assessed at 20% of the rent payable under the terms of the lease from 14th August 2014, when the scaffolding commenced to be erected, until the date of this judgment.

124. As regards future breaches, the Tenant seeks injunctive relief. As regards the scaffolding, it seeks an order that the Landlord be ordered to dismantle the scaffolding and to re-erect it with a

tower design and with the hoists appropriately rearranged.

125. As regards the noise, it seeks an order that the Landlord restrict noisy works to particular hours during the day and suggests how the level of noisy work should be measured. It suggests it should be measured at over 55 decibels. The Landlord's acoustic expert suggests that this level is far too low as it does not reflect properly the ambient noise in the Gallery and, therefore, does not reflect the noise that would be experienced by the Gallery absent any works. He also suggests that setting the level so low would be difficult to police. The injunction which the Tenant now seeks is not one which requires the Landlord Tenant to restrict the noise during these hours, but to use all reasonable endeavours to do so and the Landlord submits that it may be difficult to assess what those endeavours require.

126. I have come to the conclusion that an injunction in the sort of terms now sought would be impracticable and probably unworkable. I regard it as inherently difficult to set a precise limit as to what constitutes "noisy" and what constitutes "not so noisy" works. Furthermore, the requirement to use reasonable endeavours is so vague that I can well anticipate that to grant an injunction in those terms is only going to lead to further satellite litigation if and when the Tenant claims that the injunction has been breached and the Landlord claims that it has in fact used all reasonable endeavours to keep the noise within the limits ordained by the Court.

127. There are few cases in which an injunction in this form has been granted. I was referred to just one, a decision on an interlocutory application by HHJ Hodge QC sitting as a Judge of the Chancery Division in Hiscox v Pinnacle [2008] EWHC 145 (Ch). In the case before him, such an injunction may have been justified, particularly since it was being granted only on an interlocutory basis. I am not convinced that it would be sensible for such an injunction to be granted in this case.

128. To grant the injunction in relation to reassembling the scaffolding would, in my judgment, be wholly disproportionate. On the evidence before me, it would probably take the best part of more than 12 weeks for the necessary permissions to be obtained for the scaffolding to be reassembled and for the work to do that to be done. Given that the Tenant has had to put up with the scaffolding now for getting on for 19 months and will in any event have to put up with it for another three months it seems to me that it would be wholly disproportionate and, in the end, probably not convenient for such an injunction to be granted. The better course would be to allow the scaffolding to remain in place and instead to grant damages in lieu of the injunction. The same, it seems to me, applies to the noise levels.

129. Accordingly, in my judgment, the better course here would be, instead of granting any of the injunctions sought, to award damages in lieu of the injunctions at the same rate as for the past breaches. I would accordingly order that in lieu of the injunctions sought in regard to future works and the removal of the scaffolding, the damages should be assessed on the basis of 20% of the rent for the Premises from the date of judgment until the work is completed.

130. I should perhaps add that by directing damages to be assessed on the basis which I have mentioned, I am not to be taken as giving a carte blanche to the Landlord to finish the works in any way it thinks fit without any regard whatsoever to the Tenant's rights. I have assessed the damages in lieu of the injunctions sought on the basis that the breaches of covenant which will be carried out in the future will not be any more serious in terms of their disruption of the Tenant and its business than those that have occurred in the past. Accordingly, the assessment is on the basis that the Landlord's contractors will seek to adhere to the two hours on/two hours off policy in regard to noisy and less noisy work to which it has mostly adhered in the past, that it will afford the Tenant "quiet times" when particular events are occurring at the Gallery on reasonable notice having been given and that it will not otherwise increase the amount of disturbance to the Tenant so as to drive the Tenant out of the Premises altogether. Should anything of that sort occur, I propose to grant to the Tenant liberty to come back to the Court to invite the Court to revisit the basis upon which the damages in lieu of the injunctions are to be assessed.

131. As to the screed, as indicated above I will make the declaration as sought by the Tenant, but I see no need or purpose in granting an injunction as sought.

The Counterclaim

132. That leaves the Counterclaim, with which I can deal very briefly. By paragraph (1) (a) of the Prayer to the Counterclaim, the Defendant seeks an order that the Tenant do forthwith permit entry to the Landlord's contractors for the purposes of inspecting the services serving the Premises. I would accept that the Landlord is entitled to enter the Premises of this purpose, but I do not see in the evidence any real refusal of the Claimant to permit the Landlord so to do. There have been occasions when appointments have been made, but it has not been possible to keep to those appointments. The entitlement of the Landlord to enter the Premises is on reasonable notice. On the evidence that I have heard, there is no continuing intention on the part of the Tenant to prevent the Landlord's contractors from coming on to the Premises to inspect the services, provided proper notice is given. I see no justification, therefore, for granting an order in the terms ought.

133. By paragraph (1) (b) of the Prayer, an order is sought to enable the Landlord's contractors to enter the Premises for the purposes of fixing the light boxes. It does not seem to me that this is something that strictly under the terms of the Lease the Landlord is entitled to do. In any event, the light boxes are being fixed for the benefit of the Tenant as a substitute for the obstruction to the natural light which the filling in of the Light Well is going to involve. If the Tenant were to obstruct the Landlord in doing this (and I have seen no real evidence that it has done or intends to do so) it will simply be depriving itself of the benefit of these light boxes. So I see no need or justification for the order sought.

134. Paragraph (1) (c) of the Prayer seeks the like relief in regard to the installation of acoustic measuring equipment in the Premises. This does not seem to me to go to any right that the Landlord has under the Lease and is a matter that was and is only relevant for measuring the levels of the noise for the purpose of these proceedings. So I see no need or justification for the order sought.

135. Paragraph (1) (d) of the Prayer seeks the like relief in regard to repairing or replacing parts of the skylight of the Building, which have been damaged in the course of the works. The Tenant clearly wishes to have these skylights repaired and plainly, if it obstructs the Landlord in doing this, it will simply not have those skylights repaired or replaced. Again, for those reasons, I see no purpose in granting the order sought.

136. As regards paragraph (1) (e), which concerns the works to infill the Light Well, I am not at all convinced for like reasons as in regard to the screed work that the Landlord is actually entitled to come on to the Premises for the purposes of doing works to infill the Light Well. However, the evidence before me is that it does not need to enter the Premises for the purpose of doing its work on the Light Well and so I see no purpose in granting an order for that purpose. However, as the proceedings plainly raise the issue of whether the Landlord is entitled to carry out its proposed works to the Light Well and I have held that it is, I propose to make a declaration to that effect.

137. As regards damages, any special damages arising from any of the matters which I would have found has been stood over, but in any event, in the light of my findings, I do not see how there can be any damages that could flow from the matters alleged to which the Landlord would be entitled. Accordingly, save as stated above I would dismiss the Counterclaim.

The Order

138. The order which I have made is somewhat complicated and I will accordingly hear submissions from the parties as to the right order to make to give effect to what I have held in my judgment above.