Case No: H10CL257

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
The Royal Courts of Justice
Strand
London WC2A 2LL

Thursday 28 April 2022

BEFORE:

HIS HONOUR JUDGE DIGHT CBE

BETWEEN:

BLOCK 6 ASHLEY GARDENS ROOF GARDENS LIMITED

Claimant

- and -

S FRANSES LIMITED & OTHERS

Defendants

MR W CLARK (instructed by Withers LLP appeared on behalf of the Claimant
MR M BUCKPITT (instructed by Wallace LLP) appeared on behalf of the First and Second Defendants
The Fourth Defendant did not attend and was not represented
Further Representation not provided

JUDGMENT
(APPROVED)

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. JUDGE DIGHT: This is a claim to enforce a right of first refusal under Part 1 of the Landlord and Tenant Act 1987 ("the 1987 Act") in respect of two leases ("the Leases") granted on 5 July 2012 over part of the roof space of Block 6 Ashley Gardens, Thirleby Road, London SW1 ("the Building"). Originally the claim related also to a third lease granted to the third defendant's predecessor in title, but that part of the case has been settled.

2. The Building comprises 19 flats. Originally there were 20, but after a lateral conversion of two of the flats by Mr Jaffer, there are now 19, all of which are let on long leases.

3. The Leases were granted above the flats owned by the first and second defendant, numbers 83a and 83b, for a term of years from 25 March 2012 to 24 March 2115 and have since been registered at Her Majesty's Land Registry. The stated consideration on the documents of grant of each of the Leases, in money terms, is a £1 premium, but clause 2 of the Leases provides as follows:

> "In consideration of the lessees' [in this case the defendants] covenants in respect of the works, which are defined in clause 1 of the lease as works to be carried out by the Roof Garden lessees to the existing flat roof of the building briefly described in clause 7.1, including replace the existing surface therefore and works of alterations to create **inter alia** three roof gardens thereon and a new staircase leading thereto as more generally described in the licence, contained in clause 3 below and of the covenants on the first part of the lessee herein after contained and of the rents hereby reserved, first the lessor here demises to the lessee the full title guarantee or that the demised premises …"

By clause 3, the lessees covenanted to carry out and complete the works within a limited period of time. It is apparent, therefore, that, so far as the lease documents are concerned, the consideration for grant of the Leases was wider than the premium of the single pound defined as the premium on the front page of the document.

4. The claimant was nominated by 10 out of the 19 qualifying tenants to acquire the Leases. It is not in dispute that at the time of commencement of proceedings the qualifying tenants were what is known as the requisite majority of the tenants. Their names and addresses are set out in the schedule to the particulars of claim. The solicitors acting for the qualifying tenants served what purported to be purchase notices and default notices under the 1987 Act prior to commencement of the claim.

5. The fourth defendant is the freehold-owning company and the grantor of the Leases. It is not represented in these proceedings and no one has purported to give evidence on its behalf. Control of the company has changed during the course of the events with which this case is concerned, and it may be that that is what has itself given rise to this litigation, at least in part.

6. The first and second defendants are tenants of the Building and the grantees of the Leases. Mr Franses, whom I heard evidence from, is a director of the first defendant. He was also a director of the fourth defendant for a period of about five years, as was his wife, Barbara Swirski, in her case for a period of three years. The second defendant was a director of the fourth defendant between 2010 and 2018.

7. The first and second defendants also bring a Part 20 claim against the fifth and sixth defendants, who are also tenants in the Building, for declarations that they are estopped from contending that they are qualifying tenants entitled to participate in the acquisition.

The Issues

8. By its particulars of claim, the claimant claims, first an order that the first to third defendants shall dispose of their respective roof space lease to the claimant as the nominated person for the consideration provided for by the original disposal at the date of grant, namely £1; secondly, further or other relief.

9. The defendants' pleaded position (and the position set out in the skeleton arguments for trial in the closing submissions) is as follows.

10. First, that notices under section 18 of the 1987 Act had been served on the tenants in the building by the landlord, protecting the purchasers' position. In the course of closing submissions the defendants conceded that there is insufficient material before me to establish that a notice complying with section 18 was given to the requisite majority of the qualifying tenants, and I am asked therefore, in effect, not to deal with this issue and not to make findings of fact as to whether section 18 notices were served. The claimant asks, notwithstanding that concession, for findings of fact to be made on the basis that such findings may be relevant to other issues in the case.

11. Secondly, the defendants say that the purchase notices which were subsequently served by or on behalf of the qualifying tenants as a prelude to seeking transfer to them of the interests which had been acquired by the defendants in breach of the Act are invalid because they require acquisition of the Leases on different terms to those on which they were disposed of to the defendants.

12. Thirdly, the point was taken that the purchase notices were served late. That is a second issue which is no longer pursued.

13. Fourth, it is argued that the default notices served on behalf of the qualifying tenants following non-compliance with the purchase notices are invalid because of the terms on which they require disposal of the purchasers' interest to the claimant.

14. Fifth, it is said that the qualifying tenants, and therefore the claimant and the fifth and sixth defendants specifically, are estopped from relying on their rights under the 1987 Act.

15. Sixth, it is said that the claim made by the claimant is founded on an illegality which they would benefit from if relief were granted in that illegal acts were committed by the fourth defendant in failing to comply with the provisions of the 1987 Act in disposal of the leasehold interests in the first place, and that is fatal to the claim.

16. Seventh, it is said that there was not at the time and there is no longer a requisite majority among the qualifying tenants for acquisition of the interests granted to the

defendants. The basis of the argument that there were not a requisite majority at the time is that, the defendants argue, a number of the tenants were estopped from asserting a right to acquisition. They also argue that as at the date of trial the evidence shows that there is no longer, a majority irrespective of the estoppel argument.

17. Eighth, it is said if the court were to order disposal of the Leases to the claimant then the premium to be paid should include not only the premium of £1 which is stated on the face of the transfer documents but also the sum of approximately £100,000 which the first and second defendants paid toward the costs of the refurbishment of the interior of the Building, together with the costs of works which they carried out to the roof.

18. Ninth, it is said that if the stage were reached where the court had to consider the court's discretion whether to grant relief consideration of the European Convention on Human Rights and the First Protocol thereto would dictate that the court should not grant a remedy to the claimant in any event.

19. Lastly, it is said (a point made really in the closing skeleton of the defendants and the submissions made by counsel at the conclusion of the trial) that the claimant should have withdrawn its claim under section 14 of the 1987 Act because 8 out of the 10 participating tenants have no subsisting interest in the outcome of the litigation.

20. On the face of the documents and the witness statements, there appears to be a wide range of disputes of facts. However, despite the volume of documentary material and the large number of witnesses, in reality there are relatively limited disputes of fact relating to the issues which I have to determine. My determination of those limited disputes of fact has been made much easier by the substantial quantity of contemporaneous documentation from different sources, which seems to me, at a distance of ten years from the events with which I am concerned, to be a better guide to what happened and to what was said at the time of those events than the recollection of the witnesses which has only made its way into statements some nine or ten years after those events and which those witnesses are being asked to recall in the witness box at an even late point in time.

21. It seems to me, bearing in mind the issues, that I should look at the law first and determine such of the issues that I can by reference to the 1987 Act and then turn to my findings of fact.

22. Section 1 of the 1987 Act provides, under the heading, "Qualifying tenants to have rights of first refusal on disposals by landlord" as follows:

> (1) A landlord shall not make a relevant disposal affecting any premises to which at the time of the disposal this Part applies unless—
>
> (a) he has in accordance with section 5 previously served a notice under that section with respect to the disposal on the qualifying tenants of the flats contained in those premises (being a notice by virtue of which rights of first refusal are conferred on those tenants); and
>
> (b) the disposal is made in accordance with the requirements of sections 6 to 10."

It is common ground that the Building was at the date of grant of the Leases one to which Part 1 of the Act applies.

23. Section 5 is headed, "Landlord required to serve offer notice on tenants," and says:

> "(1) Where the landlord proposes to make a relevant disposal affecting premises to which this Part applies, he shall serve a notice under this section (an 'offer notice') on the qualifying tenants of the flats contained in the premises (the 'constituent flats')."

Again, it is common ground that no offer notice was served by the freehold owner on the qualifying tenants in accordance with section 5 of the Act when it should have been.

24. Section 10A of the Act makes it a criminal offence if a landlord:

> "… without reasonable excuse, …makes a relevant disposal affecting premises to which this Part applies—
>
> (d) without having first complied with the requirements of section 5 as regards the service of notices on the qualifying tenants of flats contained in the premises …"

25. Section 11A gives tenants a right to information about the terms on which a disposal has been made:

> "(1) The requisite majority of qualifying tenants of the constituent flats may serve a notice on the purchaser requiring him—
>
> (a) to give particulars of the terms on which the original disposal was made (including the deposit and consideration required) and the date on which it was made, and
>
> (b) where the disposal consisted of entering into a contract, to provide a copy of the contract."

Subsection (4) provides:

> "(4) A person served with a notice under this section shall comply with it within the period of one month beginning with the date on which it is served on him."

26. Under cover of a letter dated 19 March 2020, Withers LLP (the solicitors acting for the qualifying tenants) sent a series of notices to the defendants pursuant to section 11A of the Act requiring them to give particulars of the terms on which the acquisition was made, including the deposit and the consideration and the date of the acquisition, and

asked them to provide a copy of the contract. The evidence shows that the information and documents sought by those notices was not provided.

27. By a letter dated 17 April 2020 Mr Ramsey, the second defendant, said:

> "Unfortunately, Mr Franses of S Franses Limited, the owner of 83a Ashley Gardens, was the person who dealt on our behalf with the company in relation to the sale of the roof garden leases and at present he is recovering from COVID-19. He may be able to assist you further in due course. The company records should give details of the transaction and the company's solicitor at that time was Ms Tania Austin, now at LSGA Solicitors, who I am sure would have many of the details. I would have thought your clients, many of whom are directors of the freehold company, would already have access to this information. Indeed, one of your clients, Dr Amin Jaffer, is a good friend of Lady Arnold who conducted the negotiations on the company's behalf of the sale, and I am sure she would be happy to help."

That response did not, in my judgment, comply with the defendants' obligation to provide the information required by the request made under section 11A. Qualifying tenants are entitled to know the details of the transaction and be provided with a copy of the relevant contract, if any.

28. Section 12B contains the right of the qualifying tenants to compel transfers to them or their nominee of interests acquired in contravention of the 1987 Act. It provides as follows:

> "(1) This section applies where—
>
> (a) the original disposal consisted of entering into a contract and no notice has been served under section 12A (right of qualifying tenants to take benefit of contract), or

(b) the original disposal did not consist of entering into a contract."

Subsection (2), which is the key provision in dispute in this case, says:

> "(2) The requisite majority of qualifying tenants of the constituent flats may serve a notice (a 'purchase notice') on the purchaser requiring him to dispose of the estate or interest that was the subject-matter of the original disposal, on the terms on which it was made (including those relating to the consideration payable), to a person or persons nominated for the purposes of this section by any such majority of qualifying tenants of those flats."

29. On 22 June 2020 and 9 July 2020 Withers LLP served what purported to be notices, described as purchase notices in the covering letters, on the first and second defendants. The notices read:

> "(4) The tenants require you to dispose of the lease referred to above on the terms on which it was made in accordance with the original disposal, including the consideration to the nominated person (new disposal).
>
> (5) You are only required to make the new disposal in relation to the premises to which Part 1 of the LTA 1987 applies.
>
> (6) If your interest in the lease referred to above has become the subject of a charge or other incumbrance then, unless the court orders otherwise: (a) in the case of a charge to secure the payment of the money or the performance of any other obligation by the purchaser or any other person, the disposal to the nominated person shall operate to discharge the leasehold interest in that charge; and (b) in the case of any other incumbrance, the leasehold interest shall be disposed of subject to the incumbrance but with a reduction in the consideration payable to you corresponding to the

> amount by which the existence of the incumbrance reduces the value of the leasehold interest."

30. There was no immediate response to those notices, but by a letter dated 26 March 2021 from Wallace LLP, then acting for the defendants, the solicitors wrote:

> "On behalf of our above-mentioned client, we hereby give you notice pursuant to section 17(3) of the Landlord and Tenant Act 1987 ('the Act') that the notice served upon our client pursuant to section 12B of the Act and dated 22 June 2020 and anything done in pursuance of it is to be treated as not having been served or done. This notice is given without prejudice to our client's contention that the disposal of the above-mentioned premises to our client was not a relevant disposal for the purposes of the Act and without prejudice to our client's contention that the qualifying tenants who gave the purchase notice had no rights in respect of the above-mentioned premises."

31. The defendants at trial argue that the purchase notices are defective on a number of bases, but they say that in any event the practical problem it that it is impossible to (re-) transfer the Leases to the claimant on the original terms, including the consideration; that the notice itself should have expressly stated what it was that the defendants should do in compliance with their alleged obligations and the notices; that the notices fail to recognise the fact that the performance of the common part works and carrying out of the roof works was part of the non-monetary consideration which is not referred to in the purchase notices, whereas it should have been; and there should have been a statement in the notices to the effect that any issue relating to those aspects of the consideration which were not specifically or sufficient stated in the notice would be referred to and determined ultimately by the First-tier Tribunal.

32. Mr Buckpitt on behalf of the defendants recognised that there is no detailed mechanism in the Act for how section 12B is intended to work, but he submitted there should have been made plain in the notice and in the default notice (which I will turn to in due

course) what it was that the defendants should have done to comply with their alleged obligations. He argues that the notices should have required the parties to enter a contract for the transfer, which should have dentified the consideration to be provided, the precise extent of which should have been determined by the FTT. He referred in support of that submission to section 17(3) of the 1987 Act, which reads:

> "(3) Where a period of three months beginning with the date of service of a notice under section 12A, 12B or 12C on the purchaser has expired—
>
> (a) without any binding contract having been entered into between the purchaser and the nominated person, and
>
> (b) without there having been made any application in connection with the notice to the court or to the appropriate tribunal,
>
> the purchaser may serve on the nominated person a notice stating that the notice, and anything done in pursuance of it, is to be treated as not having been served or done."

He says that those provisions give rise to an inference that there is an obligation on the alleged defaulting original purchaser to enter into a contract and that accordingly the purchase notice should have specified that the defendants should comply with their obligation by entering into such a contract.

33. The claimant says that the matter is much more straightforward and that one only needs to look at the wording of section 12B to identify the limited steps that the tenants need to take to ensure that a purchase notice is valid. Mr Clark, on behalf of the claimant, submits that there is nothing in section 12B(2) which requires the qualifying tenants to provide the detail or specify the steps suggested by Mr Buckpitt. In support of Mr Clark's submission I was referred to the decision of the Court of Appeal concerning the previous version of these provisions in *Kay-Green & Ors v Twinsectra Ltd* [1996] 1

WLR 1587. The Court of Appeal considered the nature of the obligations on the landlord and the effect of purchase notices purportedly served under the Act as it was then drafted. Aldous LJ at page 1600 of the report says:

> "A purchase notice must give adequate notice to the new landlord of the qualifying tenants' desire to purchase the estate or interest that they should have been offered by the original landlord. That is imperative, in the sense that it must be followed to the letter, but some of the other requirements of section 12 are only directory."

He went on to say at 1601E:

> "A section 12 notice must be in writing and served upon the new landlord in time. Further, it must give adequate notice of the requirement of the qualifying tenants to have the estate or interest in the premises, as defined in section 1, to be transferred to a nominated person. Those requirements are, in my view, imperative."

He continued at page 1602F-G:

> "It is an imperative requirement of section 12(3) that the qualifying tenants should inform the new landlord of the property to be acquired, thereby informing him that the qualifying tenants desire to acquire the estate or interest in that property which was transferred to the new landlord in breach of the original landlord's obligations under section 1. The provisions of sections 12(3)(a) and (b) allowing the qualifying tenants to either acquire the whole of the property or sever and to leave it to a Leasehold Valuation Tribunal to sort out the estate or interest or terms, are in my view directory."

34. Although the statutory provisions are set out somewhat differently now, the reasoning in *Kay-Green v Twinsectra* nevertheless continues to be good law, in my judgment, and aids the construction of section 12B(2). One must have regard to the specific wording of the Act. Section 12B(2) requires a purchase notice to be served. All it asks the qualifying tenants to do in the notice is to specify that the purchaser should "dispose of the estate or interest that was the subject matter of the original disposal" an", so far as the consideration is concerned, the subsection provides "on the terms on which it was made (including those relating to the consideration payable)". That part of the subsection identifies what on the face of it seems to me to be potentially two different elements which need to be referred to: first, the terms on which the original disposal was made; and secondly, within those terms, the consideration payable.

35. The reference to consideration Mr Buckpitt initially argued included consideration in non-monetary terms, but in my judgment that cannot be right, bearing in mind the adjective which follows immediately after the word "consideration", namely "payable". In my view those two words specifically contemplate consideration in monetary terms, and therefore the other works which the purchasers in this case agreed to undertake do not, in my judgment, fall within the expression "consideration payable". Nevertheless, it seems to me that the expression "terms" is sufficiently wide to include the other non-monetary consideration, in this case the works and other payments.

36. The question, however, is whether the purchase notice is required by the wording of subsection (2) to identify or particularise what that non-monetary consideration was. In my judgment, the subsection does not require the qualifying tenants to do so for a number of reasons. First, the terms of the disposal might (as in this case) be relatively complicated, and it might not be possible for the tenants to set them out in the purchase notice in a sufficiently specific way. If there was such a requirement this would provide a hurdle which a tenant might not be able to overcome with ease, defeating the purpose of the legislation. Secondly, again, as in this case, the purchasers might not have answered a request for information or provided the detail which they were obliged to provide under section 11A, and the qualifying tenants might not know specifically or

sufficiently the terms of the original disposal and therefore would not be in a position to specify it. One has to view this as a provision intended to protect tenants, as the social policy behind the Act plainly was. If the tenant were obliged to comply with this provision to specify details which it might not be able to set out correctly, for the reasons I have just explained, the tenants would run the risk of the notice being held to be invalid and for no good policy reason, whereas on the other hand, the person who is the recipient of the notice would in any event already know perfectly well what the terms were on which the transaction had been effected and what needed to be done or paid. The nature, extent and amount of the actual consideration is a matter of fact. In my judgment, the notice under section 12B(2) need only require the purchasers to dispose of the interest on the same terms as those on which they acquired it, without specifying what those terms were. It is sufficient, therefore, in my judgment, for the qualifying tenants simply to follow the wording of the statutory provision in drafting their notices.

37. Turning back, therefore, to the notice which was served under section 12B(2). Clause 4 of the notice, which required the tenants to "dispose of the lease referred to above on the terms on which it was made in accordance with the original disposal, including the consideration", was sufficient, in my judgment, to satisfy the requirements of section 12B(2), and the notices were therefore valid. It is a question of fact as to what the terms of the disposal actually were, and that is something that can be separately explored in the appropriate jurisdiction in due course if the need arises.

38. There is another matter question of law which it is convenient to deal with at this point. There is a dispute as to what the consideration actually was in this case, Mr Clark arguing that, because the challenged transaction was a disposal of an interest in land, the provisions of section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 had to be complied with and that only the consideration for the transaction which was specified in the written contract is to be treated, by virtue of section 2(1) of the 1989 Act, as consideration for the purposes of section 12B etc of the 1987 Act. Both counsel drew my attention to the decision of the Court of Appeal in *Rollerteam & Anor v Riley & Anor* [2016] EWCA Civ 1291, which was a rather unusual case, the facts of

which I need not set out. However, in my view that case focused on a different issue than the one arising here. The challenge for the court in that case was to identify when it was that the section 2(1) compliant contract in that case was formed, which would lead to an analysis of what the enforceable terms were, including the price to be paid. On the rather unusual facts of that case, the Court of Appeal concluded that the contract was only formed when one of the parties entered into the deeds which gave effect to the transaction itself and disposed of the interest which was the subject matter of the contract. That is not the issue here and the facts and reasoning in that case do not assist me in determining what the consideration for the transaction was in this case.

39. Taking the matter shortly, it seems to me, first, that the effect of the 1989 Act is not to render invalid the terms of a contract for the disposition of an interest in land which are not contained in writing, but merely to make them unenforceable. There is clear authority that where a non-enforceable contract has been performed, section 2(1) of the 1989 Act becomes irrelevant: the section is only relevant to the question of whether an executory contract should be enforced subsequently. It necessarily follows, in my judgment, therefore, that it is possible to form a contract some terms of which are not enforceable but which, if performed without the intervention of the court, demonstrates that the non-enforceable terms were nevertheless terms of the contract.

40. Therefore, in my judgment, for the purposes of the 1987 Act the "consideration" is to be taken as whatever the parties agreed would be paid, done or provided by the intended transferee, whether or not the that part of the agreement would have been enforceable if the contract had not been performed because of a failure to comply with section 2(1) of the 1989 Act.

41. I mention in passing, though I will return to my detailed findings of fact in due course, that in my judgment this is not a *Rollerteam* case and that formation of the agreement relating to the terms of this proposed disposal was not delayed until the point of execution of the documents given effect to the transaction (ie completion) but had already formed between the relevant parties sometime earlier.

42. Before I leave section 12B, I want to mention subsection (7), which provides:

> "Where the property which the purchaser is required to dispose of in pursuance of the purchase notice has since the original disposal increased in monetary value owing to any change in circumstances (other than a change in the value of money), the amount of the consideration payable to the purchaser for the disposal by him of the property in pursuance of the purchase notice shall be the amount that might reasonably have been obtained on a corresponding disposal made on the open market at the time of the original disposal if the change in circumstances had already taken place."

Again, these are matters of fact, but whatever has happened, because of inflation, to the value of this property, there is a factual question as to whether there is a change in circumstances which has altered the value of the property itself.

43. Section 13 of the Act, headed, "Determination of questions by Leasehold Valuation Tribunal," provides:

> "(1) The appropriate tribunal has jurisdiction to hear and determine—
>
> (d) any question arising in relation to any matters specified in a notice under section 12A, 12B or 12C …"

Again, there is a limited dispute about what this section means and whether, if I come to the conclusion that there should be a disposal or a transfer of the Leases to the claimant on terms which need to be ascertained, those terms relating to the consideration can be referred to the Leasehold Valuation Tribunal or the First-tier Tribunal, which is, it is agreed, the appropriate tribunal under this provision. It is again, I think, common ground that the questions which may be referred under section 13 to the FTT are questions relating to valuation issues but not to validity of the notices, which remain in the jurisdiction of the court. In my judgment, section 13(1)(a) is a very wide provision, and if the terms on which the original disposal took place or

the consideration payable is in issue, those are issues which may be referred to the FTT under this provision.

44. I have already mentioned section 17 so I move on to section 18, which relates to notices served by prospective purchasers to ensure that rights of first refusal do not arise. Given that the issues relating to section 18 are no longer really matters for me to determine, I do not need to consider that section in greater detail. The concession by the defendants, as I recorded it in the course of closing submissions, was, as I said earlier, that there is before me insufficient material to establish that a notice complying with section 18 was given to the requisite majority of the qualifying tenants.

45. The next relevant provision is section 19 of the Act which is relevant to the dispute relating to the default notices which are relied on by the claimant and which the defendants say are invalid. Section 19, headed, "Enforcement of obligations under Part 1," provides as follows:

> "(1) The court may, on the application of any person interested, make an order requiring any person who has made default in complying with any duty imposed on him by any provision of this Part to make good the default within such time as is specified in the order.
>
> (2) An application shall not be made under subsection (1) unless—
>
> (a) a notice has been previously served on the person in question requiring him to make good the default, and
>
> (b) more than 14 days have elapsed since the date of service of that notice without his having done so."

46. On 21 July 2020 Withers served on the defendants what purported to be a default notice in the form of a letter with attachments, referring to the purchase notices, which had been served, and saying in the second and subsequent paragraphs as follows:

> "A binding contract transferring the leasehold interest in the premises to the tenant's nominee company, Block 6 Ashley Gardens Roof Gardens Limited, must accordingly be entered into by the statutory deadline, which we calculate as 22 September 2020. We enclose a TR1 form and ask that you arrange for a director to sign this form in the presence of an adult independent witness. Please return it to us by no later than 6 August 2020. If you fail to do this or indicate that there is any reason why the transfer should not take place in accordance with the provisions of the 1987 Act then our clients will have no option but to commence legal enforcement proceedings against you after the date specified above. Please therefore treat this letter as notice served on you under section 19(2) of the 1987 Act."

47. The TR1 identities the registered title number of the Leases and, under the heading "Consideration," says:

> "The transferor has received from the transferee for the property the following sum: £1."

The defendants' general submission on this is that, given that the default notice by reference to the TR1, states that the consideration was £1, rather than the other steps to be taken and sums to be paid by the defendants in return for the Leases, and because the notices do not specify the "default" said to have been made by the defendants nor particularise what the defendants need to do to comply with their obligations under the Act, the default notices are invalid and the claimant is not entitled to seek the relief which it does in this claim.

48. The claimant submits that, as with section 12B(2), there is no requirement that the default notice be in a specific form. The notice simply needs to indicate that there has been a default which needs to be made good. The claimant submits that the default referred to in the so-called default notices was sufficiently identified as the failure of the defendants to comply with the purchase notices, which, when properly construed,

referred in turn to the defendants' obligation to transfer the Leases to the claimant in compliance with their duties under section 12B(2) and there was no need to particularise the steps which it is said the defendants had failed to take.

49. I was referred to the decision of the Court of Appeal in *Mahmut & Anor v Jones & Ors* [2017] EWCA Civ 2362, where the Act, albeit in its subsequent amended form, was under consideration. Lewison LJ, who had appeared as counsel in *Kay-Green v Twinsectra*, gave the leading judgment in the case. The learned Lord Justice recorded the fact that the effect of section 12B was that if a purchase notice is served on the new reversioner he has an obligation to comply with it. That there was an obligation to comply with the notice was common ground in that case but the Lewison LJ obviously thought that the proposition was beyond argument. In paragraph 13 Lewison LJ said:

> "I accept, as Mr Staunton submitted, that an application under section 19 is an application of the kind contemplated by section 17. But the main thrust of these provisions is, in my judgment, that the Act contemplates two ways in which the tenants' rights might be vindicated: either by the parties voluntarily entering into a contract following the establishment of the tenants' rights or by the court making an order. Thus, the scheme of the Act is that the court's order requiring the reversioner to comply with his obligations is the equivalent of a contract voluntarily made."

He went on to explain in paragraph 16 as follows:

> "It is of course true that an order made under section 19 is not an order for specific performance which could only be made where there is a binding contract in place, as Mr Staunton says. The order is enforcing non-consensual statutory rights. And as the judge observed at paragraph 11, the order made under section 19 was very similar to the sort of order that would have been made if there had been a binding contract which the court decided ought to be enforced by specific performance."

50. In my judgment, the default which took place in the instant was was in not complying with the purchase notice, which, as I accept from the claimant's submissions, necessarily included an obligation to transfer the property on the terms on which it was originally acquired. The court can order the defendants to make good the default but the Act does not say precisely how. Section 19, on its proper construction, does not require the default notice to specify precisely how the default is to be made good. Moreover, section 17(3) does not assist, in my judgment, because, although it provides a time limit, it does not (as is apparent, it seems to me, from the decision of the Court of Appeal in *Mahmut v Jones*) require the parties to enter into a contract as a result of a disposal in breach of the Act. The section simply provides a time limit or deadline. In this case the notice served by the letter of 21 July 2020 cannot therefore be said to be invalid in so far as it asks for a contract in the form of the TR1. It was really just calling on the defendants to comply with their obligations under section 12B and was sufficient notice under section 19(2)(a) of the requirement to make good the default.

51. The last provision of the Act I want to refer to is section 14, which provides as follows:

> "Where notice has been duly served on the landlord under—
>
> section 12B …
>
> the nominated person may at any time before a binding contract is entered into in pursuance of the notice, serve notice under this section on the purchaser (a 'notice of withdrawal') indicating an intention no longer to proceed with the disposal.
>
> (2) If at any such time the nominated person becomes aware that the number of qualifying tenants of the constituent flats desiring to proceed with the disposal is less than the requisite majority of those tenants, he shall forthwith serve a notice of withdrawal."

52. In the course of closing submissions it was suggested that the nominated purchaser in this case should have withdrawn from the transaction under section 14 because the

participation agreement which was entered into on 17 March 2020, and which was only disclosed at the point where Mr Buckpitt was making his closing submissions, demonstrated, he said, that there were insufficient qualifying tenants with beneficial and legal interest in the property to be acquired and that the nominee purchaser was not able to comply with or satisfy the conditions and obligations imposed on it by the Act. He recognised that the court does not have any specific power to police section 14 but submitted that I should strike out the claim because of the failure to comply with the statutory obligation to discontinue, or alternatively I should take it into account when exercising my discretion at the end of the day. The reason he took that stance is because he says the facts which have come out as a result of the participation agreement being disclosed show that that the gentlemen referred to as "Funders", Messrs Bin Mahfouz, were really the only people who were likely to benefit from the arrangement, rather than the other allegedly participating tenants. However, in my judgment, that is not a route which I can go down, first because the evidential basis is not there. Secondly, there is nothing in the Act to say that the qualifying tenants cannot between themselves rearrange the responsibilities and roles relating to the acquisition of the property, including the funding of it, and what is to be done with it after acquisition. Thirdly, there is no mechanism for policing section 14 and if there is to be an application to strike then it should be made separately rather than via a side wind in closing.

53. Fundamentally, the live oral evidence suggested to that a sufficient number of qualifying tenants wish to continue to pursue the claim whatever the reasons for them doing so, and it is not open to me to reach the conclusion which Mr Buckpitt asks me to reach under section 14(2), that there is an insufficient number of qualifying tenants wishing to proceed with the acquisition of the Leases.

The Facts

54. I heard from the following witnesses (and I am going to refer to them in the order in which they were called). They gave a very considerable volume of evidence, both in the form of witness statements and orally. I hope they will forgive me if I do not recite

their evidence as such, nor indeed refer to all of it. I will only refer to the parts of the evidence where it helps me reach conclusions on the specific issues before me.

55. For the claimant I heard from Mr Frankle, a former tenant of Flat 82b between 2011 and 2018, a partner at Withers LLP, who act for the claimant.

56. Next I heard from Ms Khalili, an artist who has been registered proprietor of Flat 80 since 2009. She lives there with her husband, Cyrus Nasseri, to whom she left all financial and business affairs, including those relating to their flat.

57. Miss Curtis, a solicitor in the property department of Michelmores, was called to give evidence. She told me that her firm had been instructed by Ringstone, the fifth defendant, the owner of Flat 81, and her evidence was limited to that party's disclosure. She gave evidence about the documents on her firm's file relating to the fifth defendant's flat, which did not include a notice served under section 18 in respect of the Leases.

58. Mrs Jaffery, the registered owner of the lease of Flat 80 since 2012, gave evidence. She became the proprietor following the loss of her son, who had been the registered proprietor since 2006.

59. Next I heard from Mr de Ste Croix, a director of one of the corporate directors, Ringstone Limited (whom I have already referred to). That is an offshore company which is the registered proprietor of the lease of Flat 81 in the Building, occupied by Her Highness the Maharani of Morvi, who I am now told is in her early 90s. Mr de Ste Croix made a short witness statement dated 28 September 2021. His very limited evidence was that there is no documentary evidence on his files, or the files to which he had access, to show that Ringstone Limited had been notified of the proposed grant of the Leases or that the Maharani was consulted on the proposed grant of the Leases. He also went on to say that the Maharani had not been appointed as the proxy of Ringstone Limited to attend and vote at AGMs of the fourth defendant freehold owner from time to time.

60. I heard from Mr Mitchell, a solicitor and joint occupier of Flat 75 in the Building since 2008, the lease to which is now registered in his wife's sole name. He made a witness statement dated 30 September 2021. As between the two of them (and notwithstanding the fact that his daughters were the prior registered proprietors of the property) he told me, and I accept, that he is the one (of the two of them) who dealt with matters relating to the flat and the lease. He has been for a period a director of the fourth defendant.

61. Last for the claimant, I heard from Mr Nasseri, Ms Khalili's husband, a former diplomat and businessman, who handled the financial and administrative affairs of the family. He became a director of the fourth defendant in 2017 at the point when the questions about the rights of first refusal began to be raised.

62. For the defendants I heard from Mr Franses, a director and shareholder of the first defendant and the occupier, with his wife, of Flat 82a on the top floor of the Building. He made a lengthy and detailed witness statement dated 4 October 2021.

63. Mr Ramsey, the second defendant, gave evidence. He had made a relatively lengthy and detailed witness statement also dated 4 October 2021. He is a publisher and environmentalist. He acquired his interest in Flat 83b on the top floor of the Building in 2008 and was a director and then chairman of the freehold-owning company for some time. He left much of the handling of the acquisition of the Leases and the management of the subsequent refurbishment of the common parts and the roof works to Mr Franses. As his response to the section 11A notice shows (which is set out above), it seems to me that he either was not privy to or did not recall much of the detail of the transaction, having left those things to Mr Franses to deal with.

64. Last, I heard from Ms Swirski, Mr Franses's wife, a solicitor, former chairman of the board of the fourth defendant at the relevant time, who also made a detailed statement dated 4 October 2021. Much of her involvement in the matters in issue in this case is apparent from the contemporaneous documentation, some of which she created. That documentation seems to me to provide the best guide at this stage of what actually happened in so far as she was concerned.

65. As I have emphasised, my findings of fact are based on all the material, but I am greatly assisted by the contemporaneous documentation which provides a consistent and accurate reflection of what happened at the time.

66. The apparent genesis of the case is to be found in early 2011, when there was a concern about the state of the roof of the Building, which was discussed by the board of directors as early as 11 March 2011, as the minutes of the meeting, signed by Ms Swirski, make plain. The condition of the roof seemed relatively poor. The contemporaneous documents show that from about March there was also discussion between the defendants at least as to whether they could acquire the roof and the airspace above it. There is contemporaneous correspondence at the end of March 2011 between Mr Franses, Mr Ramsey and Ms Swirski and Mr McCaig, who is the third defendant, as to the steps which could be taken or the arrangements which could be made for them to take on the repairs of the roof in return for an interest in it.

67. By 7 April 2011 Mr Franses was writing to Mr Ramsey and Mr McCaig, suggesting that a preliminary offer be made, saying that a serious injection of cash by them into the company should be popular. He said in the penultimate paragraph:

> "I welcome your thoughts but would favour us making a preliminary offer, of course subject to contract, and subject to us obtaining the planning consent, this sum would be divided between us **pro rata** in accordance with the square footage we will occupy; likewise, consequent building, landscape and consequent fees. This will save Block 6 dealing with the re-insulation costs of the roof or any issues of safety railing. The current parapet is under the 1.1 metre required. Mr Braids [one of his advisors] did make the point that to some extent we are in a buyers' market, but as I said previously, I feel we should probably collectively offer £100,000 to the area(?) to make it attractive to Block 6 for the three 98-year leases. I think that is the remaining term on our flat leases."

68. Mr Ramsey replied on the same day:

> "I think that £100,000 would be a tempting offer to Block. I'm guessing that the work would cost at least another £100,000. If the roof space we have is tied to our leases, should we not link it to our share of the freehold?"

He identified in the last paragraph:

> "Both I and Barbara have a conflict of interest. Perhaps we should discuss how do we handle the approach if Ian agrees we should make the offer."

69. By 17 April, Mr McCaig, on behalf of the three proposed purchasers, as I read it, was writing to Ms Swirski, making a proposal in respect of the roof of the Building, saying:

> "I'd like to propose that the block sells the roof area to the owners of Flats 83a/b/c. The space would be developed synthetically into a high standard in order to provide outside space for three flats in line with their current footprints. The proposed purchase price is a figure of £100,000. Initial indications are that planning approval and appropriate plans could be finalised by sometime in the summer and the transaction completed at that point. As well as providing a cash injection for Block 6 by the sale of an entirely unutilised asset, which I'm sure would be helpful to the overall health of the block's finances, I would add that there is a material additional benefit in that the financial responsibility for making the required improvements to the roof would fall to the new owners, thus saving the block from what could be a significant additional expense in the near future. I would ask that you put this proposal to the board for its initial consideration at your next meeting. Please don't hesitate to contact me with any questions."

70. The proposal was then considered at a board meeting the following day, as recorded in the minutes of 18 April 2011, circulated on 20 April, signed by Ms Swirski, which referred to the cost of works and redecoration of the common parts. It also mentioned the above email, which was circulated to the directors of the company, and the minutes show that the proposal was explained in detail to the members of the board. The the majority of the board was in favour. At the foot of page 6, the minutes record the following:

> "SR and EA were in favour in principle, as was IB, but on the basis that all residents be informed and the details of the proposal very clearly set out and agreed so there would be no problems at a later stage."

Then just before "any other business", it was agreed that the details of the proposal would be sent to the residents in the form of a circular.

71. The circular was sent, I think, on 1 May 2011 from Ms Swirski as chairman of the board of the freehold owner, referring to the email and offer from Mr McCaig, saying:

> "The board was approached by Ian McCaig on behalf of the residents of the sixth floor, who collectively made an offer to contribute the sum of £100,000 towards the refurbishment works in return for leases to the areas of roof space immediately above their respective flats, which they seek to plant out as roof gardens."

At the foot of the first page of the circular she said:

> "Although the details of the agreement have not been decided or indeed discussed in great detail, the board felt it was important to let all the residents know of the proposal. The directors are mindful to accept it as the roof has no value to the residents in general. But we're also eager to ensure that all the works to the roof are done with minimal inconvenience to the residents."

In the final paragraph she added:

> "There will be many details that need to be addressed and resolved before things might go ahead, and the board will be in discussions with the sixth floor owners in order to do so. However, if there are any particular matters you wish to be raised in the meeting, please let us know by Monday, 16 May."

She emphasised the need for transparency.

72. The contemporaneous emails going back to Ms Swirski show that the residents were generally supportive and were looking forward to discussing it.

73. Michelmores, on behalf of Ringstone Limited, asked a number of questions in relation to the proposed transaction: first, whether it was intended to grant an exclusive lease of the roof area; would other lessees in the block have access to the roof garden; would rights on the roof be strictly limited; what adjustments would there be to the service charges? Ms Swirski's response was that the usage would have to be exclusive to the areas above the respective flats; that there would be further discussions, and that the need for transparency had been stressed; but that so far as Ms Swirski was concerned, it would be a win-win situation.

74. Although the evidence suggests that this circular was sent to all of the residents in the Building, neither Ms Jaffery nor Ms Khalili remember it, but I am satisfied from the email responses that I have referred to that the circular was indeed sent out to all the residents in the Building.

75. There was a further board meeting on 17 May which Mr Franses, who was not then a director of the company and did not become a director until 1 August 2013, attended, at which the directors considered the responses from the residents in the Building. The minutes for the meeting record that the details of an agreement would need to be discussed and settled upon once it was known whether planning consent would be granted, and it was noted that there would have to be an exact division in the lease

between the responsibilities of the freeholder of the Building and the new proposed tenants. Ms Austin of Gardner Austin was to be asked to draft the new leases. It is apparent that there were ongoing negotiations between the defendants and the board.

76. On 27 May 2011 a planning application for development of the roof space was submitted to the local authority.

77. There was a further board meeting on 19 September 2021, at which again Mr Franses was present, during the course of which the progress towards the grant of the Leases was considered, and it was specifically agreed that Ms Austin would be instructed to send out section 20 notices (that is under the Landlord and Tenant Act 1985) in respect of works that were to be carried out to the Building and that there would be further consideration of other technical matters. What there is not in those minutes is any evidence of discussion of the tenants' rights of first refusal under the Landlord and Tenant Act 1987. When Ms Austin wrote back to Ms Swirski on 10 October 2011 in connection with, among other things, the roof gardens, there was no reference to the tenants' rights. The letter was confined to conveyancing matters, not advice.

78. Planning consent was granted on 1 November 2011 and, in the light of that, there was a further board meeting on 15 November, where the proposed new leases were again discussed. Ms Austin was to be asked to draft an agreement. Consideration was given to amendment of the memorandum and articles of the board and it was decided that there would be an AGM soon to approve the amendments. The mechanics of the transaction were yet to be determined.

79. On 17 November Ms Swirski wrote to Ms Austin to settle what I think can probably be described as formal instructions or a formal retainer, saying:

> "Dear Tania, it was hard work but we're there. The board was very relieved to be told the news on Tuesday and I am now authorised to instruct you on the behalf of Block 6 to draft the agreement and the leases in the terms we discussed. The sixth floor have agreed to pay our legal fees of instructing you. However, I confirm the

> retainer for the work is with Block 6. Please let us have your thoughts and retainer letter. The board will liaise with the sixth floor residents directly in order to ensure matters proceed as swiftly as possible and to avoid any duplication of your time. I look forward to hearing from you."

80. In the interim Mr Franses was obtaining advice about the cost of the works to the roof, and on 19 January 2012 was sent a copy of a quote in the figure of £43,000. Ms Swirski was still dealing with the legal aspects of the arrangements and was in discussion with lawyers about the amendments to the memorandum and articles. She was writing to Martyn Brierley of Keelys & Co, taking legal advice.

81. In respect of the roof gardens themselves, Mr Brierley's response to Ms Swirski was, in paragraph 3.1 of his email, as follows:

> "From a corporate law perspective, I do not see any issues providing you and James Ramsey abstain from voting on the resolution to approve the grant of leases and you clearly minute the directors' meeting at which such issues are proposed. I assume that no further shares are to be allotted to the new leaseholders of the roof gardens, ie otherwise giving them enhanced voting rights over what they currently enjoy."

He asked various other questions and then, in his pre-penultimate paragraph, said:

> "I trust that you have already considered the issues at 3.2 and 3.3 above, but if you would like to discuss any of these issues further then I will pass you on to Jill Briggs in our real estate department, who will be able to advise you further in this regard."

Those issues related to the Leases and the common parts

82. In her response on 31 January 2012, Ms Swirski confirmed that she was aware that the conflicted directors could not take part in the voting. She said in paragraph 3.3 of her response:

> "I am hoping to get everyone round a table to discuss fully and hopefully agree on the extent of maintenance obligations (**Inaudible**) to finalise the details so we can move forward. Should the parties reach final agreement, does this need to be approved by shareholders? I I need to ensure that we have an AGM by mid-March but doubt whether the parties will have concluded a final agreement by then. Once I am more certain about the details agreed between the parties, I will ask Jill to quote us for the remaining work."

She did not ask Mr Brierley about the property law issues or ask to be referred to the property law department. When he came back to her on 2 February, he gave her advice about the obligations of the company and the directions under section 190 of the Companies Act 2006 but there was no reference to the rights of first refusal under the 1987 Act.

83. By now Ms Austin had instructions to draft the Leases, and the correspondence in February shows that Mr Franses was chasing her for them. The minutes of the board meeting on 22 February 2012 show that Ms Swirski had not heard from Ms Austin about the drafts. The board was told about the need for the proposal to be put before the shareholders and approved by ordinary resolution, and there was further discussion about the amendments to the memorandum and articles. Again, there was no discussion of the rights of first refusal.

84. The correspondence shows that the reason why Ms Austin had not completed the drafting was because she was seeking more detailed instructions about the terms of the lease. At about the same time the drafting of the resolutions for the intended annual general meeting with the fourth defendant freehold-owning company was taking place. Ms Swirski, by her email of 2 March to Mr Brierley, sought advice about how the

resolution to approve the board entering the Leases should be drafted. Mr Brierley took on that obligation and amended some of the draft documents and proposed what became resolution number 7 at the AGM, which I will turn to in a moment.

85. In paragraphs 27 and 33 of her witness statement, Ms Swirski says, in respect of the period before the proposed AGM:

> "We also needed to agree the terms of the roof leases to the extent required for the section 18 notice. We therefore delayed the AGM for a short time to 11 April 2012."

In 33:

> "I recall that Tania mentioned the circulated right to buy notice. During our discussions in January, Martyn suggested that we might want to work with the conveyancer at Keelys about this. Given Tania's delays in providing the draft roof leases and the delays in receiving the final figures from the top floor flat owners, we believe the new wording of the ordinary resolution would be sufficient to cover the company's statutory obligations."

86. In my view, Ms Swirski mis-recalls what happened at that point. There is no mention of the rights of first refusal in correspondence. There is no suggestion in her emails with Mr Brierley that the rights of first refusal were in issue. There is no suggestion in the correspondence from Ms Austin that the rights of first refusal needed to be dealt with. It is surprising. One would have thought that the conveyancing solicitor would have mentioned the rights, but there is no contemporaneous evidence to suggest that she did so.

87. On 8 March 2012, the draft leases were sent to the fourth defendant., and on 13 March the proposed resolutions for the AGM were circulated. The AGM had by then been fixed for 11 April 2012.

88. There is a dispute about the meaning of resolution number 7. This reads as follows:

> "That the directors be authorised to negotiate the lease of the roof to Mr Ian McCaig, Mr James Ramsey, being a director of the company, and S Franses Limited, being a company connected to a director, on terms beneficial to the company and at their discretion and in accordance with City of Westminster's planning consent dated 11 November 2011 (reference 11/05106/4) and to be approved for all purposes including but not limited to section 190 of the Companies Act 2006 and otherwise."

89. It is suggested, first, that the effect of the draft resolution properly construed was to give authority to the fourth defendant to grant leases to the three proposed lessees, and, secondly, that the final wording conferring approval "for all purposes" somehow covered the rights of first refusal. I heard argument and evidence on both of those issues. The evidence, it seems to me, does not assist in construing the resolution. The evidence of the defendants, in essence, is that the resolution conferred authority for grant of the Leases. The evidence of the tenants was that they did not understand that is what it was doing.

90. In my judgment, this document has to be construed in the normal way in the proper factual context without reference to what the parties thought that it meant or intended it to say. The words used for the nature of the power intended to be conferred on the directors was that they "be authorised to negotiate the lease of the roof". In my judgment, "negotiate" is somewhat different to "grant" or "sell" and the ordinary reader of such a document would think that it meant just what it says, namely negotiate. I recognise that in some commercial contexts negotiating a transaction might be said to include completion of it, but to the ordinary reader of this notice I do not accept that is what the reader would have taken from this document. Therefore, in my judgment, what the shareholders thought they were agreeing to by necessary inference and the authority which was granted to the company at the time was to reach an agreement rather than sell the property or grant the Leases. Secondly, if the words

"and to be approved for all purposes" is intended to include approval for the purposes of the 1987 Act, that needed to be spelled out. It was not and, in my judgment, on the face of it, this was not an indication to the shareholders that they were being asked to consider (and in effect waive) their rights of first refusal.

91. Between the date of the draft resolutions being sent out and the date of the AGM, Mr Franses drafted and, he says, sent out notices under section 18 of the Act, being notices by the prospective purchasers to ensure that rights of first refusal did not arise. He described his methodology in preparing the notices in paragraph 22 and following of his witness statement, which he then explained in greater detail when he came to give live oral evidence. He told me that he had drafted the notice in long-hand and he produced in evidence the original draft, the genuineness of which was not challenged by Mr Clark on behalf of the claimant. Mr Franses then said that using his draft he had typed the notice on his laptop. Unfortunately there was no hard evidence of this because the laptop which Mr Frances used at the time crashed sometime later in 2015 and although his company's IT specialist tried to recover the documents he could not do so.

92. In paragraph 25 of his statement Mr Franses continued:

> "I printed a copy of the notice for each flat. I had left at space at the notice into which I wrote the relevant names. I placed each notice in an envelope and delivered one to each flat in the block on the morning of 5 April, keeping track of this on a list of the flats. I recall that I started delivering the notices at the top of the block and worked my way down. To ensure that the process was thorough I had also previously asked Barbara to verify a list of leaseholders and provide the addresses for those leaseholders who did not live in the block, to whom I sent the notices by post in addition to the copies posted through the letterbox."

At 26:

> "I have not been able to find a copy of the notice itself. As mentioned above, I typed the notice on my laptop, which subsequently crashed, losing all of my documents. I have not been able to locate a hard copy of the notice either. Most of our documents were stored in S Franses Limited's gallery in German Street. In February 2017 we received judgment against us in our gallery lease renewal proceedings and there is a possibility that we might have to vacate the gallery within a period of just over three months' time. We'd been there since 1991 and there was a lot to clear out. Although we'd appealed and were ultimately successful and did not have to leave, we started preparing for moving in case relief was refused. Documents that seemed to be no longer relevant were shredded or filed away. I have not as yet been able to find a copy of the notice, although I have been able to find my longhand notice mentioned above."

93. The creation of the draft was not challenged by the claimant. It is accepted that a notice was drafted by Mr Franses after he had received advice not from a solicitor but from a Mr Cherry, a surveyor. Mr Franses' evidence was that he had not previously been aware of the relevance of the 1987 Act until advised by Mr Cherry after which he had created and addressed and put a letter through the 20 letterboxes of the flats in the Building and sent out a further five copies by post. In the light of the whole of the evidence, and while I accept that he drafted a notice in longhand, I reject his evidence that he put it through the 20 letterboxes he mentioned and sent a further five copies by post. It is, in my judgment, inherently unlikely. As he has explained, he can no longer find any trace of the many copies he created, nor the soft copy said to have been created on the which computer crashed and is no longer available.

94. Mr Ramsey gave evidence that he did not really understand the relevance of the 1987 Act, although he told me that Mr Franses had mentioned it and said he needed to send various notices out. He could not confirm that he personally had received a copy of the notice. He said, "I think I received a copy. I'm not really clear that I received

it,". Although it was said that Mr Franses had taken a copy to the AGM, he says while it was mentioned at the AGM he did not remember seeing it. When pressed, he said that he could not recall having a hard copy of the notice in his hand. Mr Frankle, who was held up by the defendants as a witness whom they could not criticise, could find no such notice or covering letter among his papers. Ms Khalili does not recall receiving such a notice. Her husband, to whom she would have passed any such document relating to the flat, does not recall seeing such a notice. Nor does Ms Jaffery. Mr Mitchell said to me that he is confident that no notice relevant to the flat would have been missed and he does not remember ever receiving or seeing a section 18 notice.

95. The threads, when pulled together, in my judgment lead me to the conclusion that there is no evidence on which I could find that the notice was served, and I therefore reject Mr Franses' evidence in respect of it.

96. Mr Franses was, during this period of time, also pressing Ms Austin to complete the drafting of the Leases and was keen that the matter should proceed. He was in relatively regular correspondence with her, although nothing particularly turns on the terms of the correspondence itself.

97. The AGM took place on 11 April 2012. There are a number of documents evidencing what took place. The draft of the minutes of the meeting have been provided together with corrections along with the final version which was approved at the subsequent year's annual general meeting. The board was represented by Ms Swirski, Lady Arnold, Ms Barrett and Mr Ramsey. Of the shareholders, the following were present: David Franses, Charles Fearn, Ms Khalili and her husband, Mr Nasseri, Mr Franses, Mr and Mrs Frankle and Mr McCaig. The meeting started at 6.05 pm and lasted until 7.26 pm. It was Mr and Ms Frankle's first meeting.

98. First the amendment to the articles was discussed and agreed. The directors' appointments were dealt with. Then the question of the roof terraces was turned to in accordance with the order of the resolutions on the draft resolution. Under the heading, "Point 7 – The Roof Terraces," the minutes say:

“Barbara Swirski explained in brief the issue, which was to allow the roof to be sold to the three leaseholders on the top floor, who would then have the roof included in the demise of their leases. Barbara Swirski advised that all the investigation work, preparatory work and planning work was paid for by the lessees on the top floor and not by the leaseholders of Block 6.

Simon Franses continued in more detail as to the process so far and how it was planned that all the leaseholders would benefit from such a sale. Simon Franses first explained the long process of making a planning application to Westminster, hitting a few hurdles along the way, making some changes to the outline of the application and finally coming up with a proposal that the planning department were happy with. Planning permission for the roof terrace was granted.

Simon Franses added that the cost to build the terraces would amount to close on £325,000 and be borne by the three benefitting leaseholders. He further advised that the maintenance of the terraces and therefore the roof underneath would fall onto the shoulders of those roof terrace owners, thus relieving the remainder of the flat owners of that financial burden. Barbara Swirski asked the question on behalf of the leaseholders, 'What's in it for us?' and went on to answer that the top lessees were contributing an amount currently thought to be £100,000 to be used to redecorate the internal common parts of Block 6.

Lady Arnold and Irene Barrett offered to the assembly that it had been some considerable time since the common parts had been refurbished and that the building badly needed it. The condition of the communal staircase lighting and carpets was affecting the value

> of the flats in a negative way. The roof sale option was a win-win situation for everybody.
>
> Barbara Swirski and James Ramsey, having material involvement in the matter, were not going to vote. A vote on the roof sale issue was taken and those present voted unanimously to agree to the sale."

99. The minutes were either originally drafted or looked at by Scott Thrower, the property manager, who then sent them by email to Mr Swirski on 13 April. He highlighted certain areas in red which he said she needed to deal with, and then said in his covering email:

> "I imagine you may wish to insert the relevant dates of the laws which were discussed and explained."

100. Amendments were made to the draft minutes by, I infer, Ms Swirski, but none of the amendments related to the 1987 Act or the rights of first refusal. Resolution 7, relating to negotiation of leases, was approved. Notwithstanding the terms of the minutes, it seems to me that what the shareholders had agreed to was a negotiation. The minutes refer to a sale but that word does not appear in the resolution. There was relatively little opposition to the proposal at the meeting. Mr Frankle told me that he could not remember anyone objecting at the AGM. He said, by reference to the minutes I have just quoted, and in particular item number 7, that he understood what had been proposed, there was nothing objectionable to it and it would not cost the tenants anything. He said, "I can't recall exactly the detail but the minute is broadly accurate, that £100,000 would be paid to decorate the common parts. What was being proposed was clear. It wasn't underhand or sharp or unclear. I was in favour. I don't recall anyone raising any objection."

101. Ms Khalili gave evidence that she had not heard talk about rights of first refusal and that while she understood that the use of the roof was going to her neighbours she did not view it as a transfer (my word, not hers) and believed that others in the Building

would still be entitled to rights over the roof. She said, "I voted in favour because it was in the first month that I was there and we were new, and the others knew each other and seemed to have a good relationship with each other and the directors. I didn't want to create chaos. I didn't want a roof garden myself but I saw the roof as something for everybody." She specifically said, "I didn't hear the words 'purchase', 'buying' or 'selling'." As to the right to buy, she said, "I never heard Ms Swirski say that all the leaseholders had a right to buy the roof space. She didn't say we had the right to vote against it. They were friends."

102. Ms Khalili's evidence is, in my judgment, slightly at odds with Mr Frankle's, and in so far as there is a dispute I prefer his because, without any disrespect, he is a lawyer well used to dealing with such matters, and Ms Khalili told me herself that really she abdicated responsibility for the financial administrative matters of the family to her husband. On the other hand her husband also told me that he did not realise that a sale of the roof space was being proposed and that his focus had been on the need for repairs to the roof itself.

103. Mr Franses said that he had taken a copy of the section 18 notice with him to the meeting, but for the reasons I have already explained, there is no evidence to suggest that anyone mentioned it or that it was referred to.

104. In paragraph 41 of her witness statement Ms Swirski says:

> "As to the roof garden leases, I briefly explained the background referring to the poor state of the roof and the regular occurrence of leaks."

Then she dealt with the history and went on significantly to say:

> "I further stated that, although leaseholders had a right to buy, the freeholder would not sell to anyone without shareholder approval. If they're unhappy with the proposal then they just need to vote against it. I also explained that if they decide to support the

proposal then the ordinary resolution was for all purposes, which included any right to buy."

I am afraid I cannot accept that evidence because it is at odds with everything else that appears in the contemporaneous documentation and the other oral evidence which I heard and accepted.

105. Ms Swirski's evidence itself about rights of first refusal is somewhat confused. At one stage relatively early on in her cross-examination she said that she had not known what a section 18 notice was but that her husband had said there was to be a buyer's notice. She said, "I now know it's a section 18; I didn't at the time. I spoke to Brierley about certain things that needed to be done and he had no better idea than me." She later said that, having spoken to Mr Brierley who had agreed to draft wide wording for resolution 7, "I thought we were covered by the wide wording to cover any obligations the company had under the Landlord and Tenant Act which the freeholder might have." She went on, "When I talked to Martyn Brierley I said, I needed approval or wording to be as wide as possible for the shareholder to approve the actual deal. I didn't give him a specific notice to cover. He made the wording as wide as possible to cover anything we needed to do." The inference she was asking me to draw from this was that the wording provided by Mr Brierly was to include approval for the purposes of the 1987 Act. She later in her evidence said that she had known that there was a possibility of a Landlord and Tenant Act issue from her experience a long time earlier in 2010 and 2011 when she had lived in Birmingham in premises where the landlord had served a section 5 notice at the point when that landlord was disposing of his freehold interest in those premises.

106. Ms Swirski's evidence is at odds with the other evidence. In my judgment, she is mistaken in the evidence that she has given both in her witness statement and in the witness box. I find that at the AGM there was no express reference to the 1987 Act or to the tenants' rights of first refusal. It is (and, in my judgment, always would have been) an obviously important issue if anyone had been aware of it, and the only person who appears to have been aware of it was Mr Franses. If there had been express

discussion of it, it would have found its way into the minutes, specifically when Ms Swirski was being prompted to include in the final version of the minutes reference to the statute which she had talked about in the course of the AGM itself.

107. The defendant submits that the vote at the AGM means that whether or not there was reference to the rights of first refusal, such rights would not have been taken up. The only person who gave evidence about this was Mr Mitchell, although he was not present at the meeting. His evidence to me was that he was not at all sure that if the rights of first refusal had been raised, that the tenants would not have been interested in them. His own position about the proposal for the works to the roof at the time was that it did not affect him and he was not particularly concerned about it. But that is not to say he did not accept that those rights would not have been looked at in greater detail had they been specifically mentioned.

108. I cannot reach the conclusion that if the rights of first refusal had specifically been referred to, they would not have been explored or taken up, or that matters would not have proceeded in a different way.

109. A post-AGM circular was sent out to the tenants, dated 13 April, in which the tenants were given an update as to what was going on but again, there was no reference to any rights of first refusal or to the 1987 Act.

110. Mr Franses, in the light of the AGM, pressed Ms Austin to continue with her drafting.

111. On 23 April there was a further board meeting at which an update on the roof leases was to be provided. The drafting was still continuing during the course of April 2012 and Ms Austin was emailing the directors of the company for specific instructions on some of the draft provisions in the lease. By the middle of May 2012 the leases appeared to be in final form, save in respect of the provisions relating to the percentage of the service charge to be borne by the new lessees of the roof space parts, and Mr Frances and Ms Austin were in correspondence about that in the late part of May.

112. It is apparent from correspondence which I have seen in the period leading up to June that Ms Austin was giving detailed advice to the directors of the company about the drafts which she had prepared, but again there was no discussion or advice concerning the 1987 Act.

113. The Leases were granted on 5 July 2012.

114. I find that the overall deal was that the Leases would be granted for a stated premium of £1, but also in consideration of the works to be carried out to the roof of the property and the arrangements which had been agreed with the board for a contribution to the works needed to the common parts of the Building in the order of £100,000.

115. There is no doubt that afterwards the defendants made a substantial cash contribution towards the costs of the common parts and that Mr Franses organised and supervised those works and acted as *de facto* project manager for them. All of the tenants who gave evidence about it were complimentary about the quality of the works which were overseen by him. An extension of time was granted for the roof works to be carried out. The planning consent for the roof was revised. Progress was being made.

116. Notwithstanding that progress there is no correspondence informing the other tenants in the Building, the other shareholders of the company, that the Leases had been granted. Although there was a further AGM on 28 August 2013, the minutes of that meeting, while approving the minutes of the previous year, do not go on to say that the Leases had in fact been granted by then. Nor is there any mention of the roof to the Building.

117. I find that the first time that the tenants who were not directors or occupiers of the top floor of the Building discovered that there had been a sale of an interest in the roof space was when Mrs Jaffery (who could not give the precise date) in late 2014 or early 2015 discovered from Zoopla that one of the top floor flats had the benefit of a roof garden. She said that she had been surprised to spot that when looking at Zoopla. She was sure that she had not previously been aware of the defendants ownership of an interest in the roof because if she had been aware of, in her words, either the proposal

to grant the Leases or the actual grant of the Leases at an earlier stage, then what she saw on Zoopla in 2014 would not have taken by her surprise. She had noticed that works to the roof had been going on but thought that they had been paid for out of service charges.

118. It was at the next AGM on 26 August 2015 that unrest about the grant of the Leases really first surfaced. There was a lot of somewhat acrimonious correspondence between the parties during the course of 2015, and it is plain that there was, as Mr Mitchell told me, not a happy atmosphere in the Building. In an attempt to try and placate some of the tenants, at the request of the board, accountants wrote a letter on 30 September 2016 confirming that £98,000 had been paid out by the defendants on what they described as the redecoration, maintenance and improvements of internal common parts of block 6. The exact figure they were able to substantiate was £98,583.

119. Thereafter solicitors began to become involved, and the acrimony, as I read it, became worse. By the summer of 2017, and notwithstanding that, for various reasons, the defendants were told by solicitors to stop work on the roof because of licence irregularities everyone in the Building was aware that works on the roof had started and was progressing.

120. There was some limited litigation in 2019 in the Chancery Division of the High Court during which Deputy Master Bartlett, at hearing which was not attended by the freeholder, made a declaration in favour of Mr Ramsey, effectively preventing the freeholder from interfering with continuation of works on the roof.

121. The dispute then developed into the litigation which is now before me. The claim against the third defendant was settled in May 2021 on terms that there be a sublease granted by the third defendant to a new company controlled, on the face of it, by Messrs Bin Mahfouz, to the existing tenants to enable them to put air conditioning units on the roof. The terms of that settlement have been criticised by the defendants.

122. I do not intend to make detailed findings about the change in the composition of the board or the allegations which the mainly new tenants and directors and shareholders

made against the old directors and shareholders, because it seems to me that those factors do not hold the keys to the matters that I have to decide. The litigation appears to have been generated by the fact that the tenants, some old, some new, felt that they had not been properly and sufficiently "kept in the loop" at the time of the grant of the Leases about what was going on and that the dealings of the board with the defendants had not been transparent. Had the tenants been aware of the rights of first refusal, the transactions might have taken a different course. It comes down, really, to a lack of trust between the defendants and the other occupiers of the Building.

123. I want to move on and look at the issues which I identified at the beginning of this judgment.

124. I have already dealt with the service of the section 18 notices, the validity of the purchase notice and the default notices.

125. As to the question of alleged illegality the defendants argue that there is an obscure or opaque relationship between the claimant and the fourth defendant, who appear to be aligned, and that if the claimant were to succeed then the fourth defendant would be benefitting from its own illegal act in not complying with section 5 of the 1987 Act at the very commencement of the transaction leading to the grant of the Leases, which they point out is a criminal act. The defendants assert that Messrs Bin Mahfouz effectively control the fourth defendant. As I said earlier, the benefit to the participating tenants from the litigation will depend, having regard to the participation agreement, on the goodwill of those gentlemen. If this issue were to be made a substantive plank of the defence it seems to me that this was not sufficiently explored, if at all, in cross-examination. Without further evidence I cannot conflate the claimant and the fourth defendant. They are separate corporate entities. The claim would not exist at all if the fourth defendant had not acted in breach of its obligations under the 1987 Act, and I cannot conclude that the claimant would therefore, if it succeeded, be benefitting from what is really being said is its own breach of the Act. It is simply not supported by the facts. It ignores the well-established legal principle that the claimant

and the fourth defendant are separate legal entities. It is, in any event, a conspiracy theory too far.

(The luncheon adjournment)

126. I turn now to the defence of estoppel by convention or acquiescence, which the defendants contend crystallises at two alternative stages: first, when the Leases were granted; and secondly, when the roof works were carried out. I bear in mind also that Mr Buckpitt submits that the discretion which the court has to consider before granting any final relief should take account of the factors that he relies on in support of his argument that the claimant and two of the defendants are estopped from asserting their legal rights in respect of the grant of the Leases to the defendants.

127. In his argument Mr Buckpitt said that a majority of the tenants had agreed at the AGM that the defendants would be granted leases on the roof in return for the defendants' £100,000 contribution to the works to be carried out to the common parts and the works which were to be carried out by the defendants on the roof. He submits that it does not matter whether the rights of first refusal were actually discussed arguing that there was a shared consensus between 14 of the qualifying tenants and the first and second defendant that the Leases would be granted and that this consensus was subsequently relied on by the defendants to their detriment such that the tenants should be estopped from relying on their strict legal rights. He says that an estoppel arose again when the roof works were commenced and as they continued, because the tenants in the Building knew that the works were in progress and being carried out but did nothing to assert their rights or prevent the defendants from acting to their continuing and increasing detriment, and that the delay in bringing these proceedings only reinforces the merits of the defendants' position. He says that, drilling down, everyone agreed to the arrangement and that people knew one way or another that the roof would no longer be a communal asset. He relied on the evidence of Mr Frankle, who gave evidence that nothing sharp or underhand was going on and that Mr Mitchell said that he had no concerns about what was proposed. The shareholders, he submitted,

benefitted from the arrangement which they voted for, when they could have voted against them and they should now be estopped from resiling from that position.

128. Estoppel is pleaded first in paragraphs 80 and 83 of the defence, in respect of entering into the roof space. The plea is as follows:

> "80. In the circumstances it was expressly or alternatively impliedly agreed and represented by those lessees at the AGM.
>
> (a) They agreed to an approved grant of leases in pursuance of the proposal and/or that there was no objection to the same.
>
> (b) In so far as the proposal was carried into effect, it would be on the basis that the first and second defendants and Mr McCaig and their successors in title would own the leases granted free of any claims by or through them and would be able to enjoy and use the roof spaces demised there by the roof garden in conjunction with their flat.
>
> I The fourth defendant need not take any steps to comply with any obligations he may have had under the 1987 Act in respect of carrying the proposal into effect.
>
> (d) Such rights as may have been available under the 1987 Act would not be exercised by the lessees if a section 5 notice under the 1987 Act was served upon them and in the event that the proposal was carried into effect and the leases were granted."
>
> "83. Accordingly, by reason of the matters above, there was a mutual adoption. There was shared assumption between all of the then qualifying tenants present or represented at the 2012 AGM, including the fifth and sixth defendants and those other tenants who agreed to the proposal and the first and second defendant and

> Mr McCaig. But the grant of the roof space lease would be valid and effective in law and not in contravention of the 1987 Act and that the qualifying tenants would not avail themselves of rights of first refusal if a section 5 notice under the 1987 Act was relied upon."

129. So far as the works to the common parts are concerned, that is pleaded from paragraph 88 onwards, the nub of which is in paragraph 92, which says:

> "Accordingly, by reason of the matters above, there was a mutual adoption of a shared assumption between the then qualifying tenants, including those who remain qualifying tenants, and the first and second defendants and Mr McCaig/the third defendant, that the roof space leases were validly granted and not susceptible to acquisition under the 1987 Act."

130. Then, lastly, the estoppel said to arise as a consequence of the inaction of the tenants at the time of the roof works is pleaded between paragraphs 95 and 101 which were carried out between 2017 and May 2019.

131. On the other hand the claimant submits that the qualifying tenants cannot contract out of the rights which they have under the 1987 Act and there cannot therefore be an estoppel in any event, and that in any event the claim fails on its facts. Mr Clark submitted that there was no clear and unequivocal representation or shared common assumption, and he relies on the fact that there was no reference by the defendants to the 1987 Act at any stage in their dealings with the tenants which Mr Buckpitt's pleading seemed to require.

132. So far as reliance is concerned, Mr Clark submitted that there was no reliance, bearing in mind that Mr Franses' case is that he had protected himself from any claims under the 1987 Act by service of the section 18 notices in any event.

133. Although Mr Clark said I do not need to rule on whether the qualifying tenants could be estopped as a matter of law, I was taken to the decision of the Court of Appeal in *Yaxley v Gotts* [2000] 1 Ch 162, where the question arose in that case in a slightly different circumstance. In that case the Court of Appeal gave guidance on whether parties could be estopped from relying on statutes. Clarke LJ in the penultimate paragraph of his judgment said:

> "It seems to me that in considering whether a particular estoppel relied upon would offend the public policy behind a statute it is necessary to consider the mischief at which the statute is directed. Where a statute has been enacted as a result of the recommendations of the Law Commission, it is, as I see it, both appropriate and permissible for the court to consider those recommendations in order to help to identify both the mischief which the Act is designed to cure and the public policy underlying it. Indeed, although I agree with Robert Walker LJ that they cannot be conclusive as to how a particular provision should be construed, I entirely agree with Beldam LJ that the policy behind section 2 of the 1989 Act can clearly be seen from the Law Commission Report to which he refers."

He continued:

> "… it seems to me that the answer is likely to depend upon the facts of the particular case. So, for example, an attempt to apply the principles of estoppel by convention is likely to fail, as in *Godden v Merthyr Tydfil Housing Association* [1997] NPC 1 CA, whereas an attempt to apply the principles of proprietary estoppel might well succeed, depending upon the facts of the particular case."

134. Beldam LJ gave his own separate reasons for the conclusions which the Court of Appeal reached, saying as follows:

> "The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it. This was not a provision aimed at prohibiting or outlawing agreements of a specific kind, though it had the effect of making agreements which did not comply with the required formalities void. This by itself is insufficient to raise such a significant public interest that an estoppel would be excluded. The closing words of section 2(5) '… nothing in this section affects the creation or operation of resulting, implied or constructive trusts' are not to be read as if they merely qualified the terms of section 2(1). The effect of section 2(1) is that no contract for the sale or other disposition of land can come into existence if the parties fail to put it into writing; but the provision is not to prevent the creation or operation of equitable interests under resulting implied or constructive trusts, if the circumstances would give rise to them."

135. Applying those policy considerations and principles in the present case, it seems to me the situation is rather different. Under the 1989 Act, as Beldam LJ said, what the court was concerned about was whether there could be an estoppel relating to facts outside the creation of a contract which the Act itself specifically contemplated as giving rise to resulting, implied or constructive trusts. A proprietary estoppel, which was in issue in *Yaxley*, which confers an equity on a claimant to be satisfied by the court is not so very different from those sorts of trusts and therefore it was unsurprising that the Court of Appeal found as it did. The policy of the 1989 Act was not to defeat such a claim.

136. The situation here, it seems to me, is rather different because the very plain policy of the 1987 Act is to confer on tenants specific rights which they are entitled to enjoy in the circumstances where they might not know exactly what is or was going on. My finding that the parties could not contract out of their rights and, in my judgment, cannot be estopped from relying on them, is not only consistent with the policy behind the Act itself but in my view is reinforced by the fact that the policy is backed up by

criminal sanctions for contravention of the tenants' rights. It seems to me highly unlikely that, as a matter of jurisprudence, criminal sanctions could be defeated by an estoppel by convention, because it is not a matter for the parties but for the state to determine whether the criminal offence has been committed.

137. If I am wrong in my conclusion that the tenants cannot be estopped from asserting their rights I have to consider what the defendants need to establish if they are to succeed on their assertion that there is an operative estoppel.

138. The most recent relevant decision setting out the principles is that of the Supreme Court in *Tinkler v Commissioners for Her Majesty's Revenue and Customs* [2021] UKSC 39, in the course of which the court approved, subject to some comment, the decision of Briggs J (as he then was) in a case called *HM Revenue & Customs v Benchdollar Ltd & Ors* [2009] EWHC 1310 (Ch). The relevant passage is contained in paragraph 45 of the judgment of Lord Burrows, where he says:

> "Having referred to a number of the leading cases on estoppel by convention examined above, including *The Indian Endurance*, *The Vistafjord* and *Keen v Holland*, but not *The August Leonhardt*, Briggs J set out the following very important statement of principles at para 52:
>
> > 'In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings … are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied

> upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.'"

139. Briggs J (as he then was) in a subsequent case discussed the need for the conduct to have "crossed the line" holding that his first principle should be amended to include that the crossing of the line between the parties may consist either of words or conduct from which the necessary sharing can properly be inferred.

140. Lord Burrows explained his philosophy or understanding of the *Benchdollar* principles in paragraph 51, where he said:

> "Those ideas are as follows. The person raising the estoppel (who I shall refer to as 'C') must know that the person against whom the estoppel is raised (who I shall refer to as 'D') shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption."

141. So far as the nature of the original understanding is concerned, I was referred to an earlier decision of the Court of Appeal called *SmithKline Beecham plc GlaxoSmithKline & Ors v Apotex Europe Ltd* [2006] EWCA Civ 658, in which Jacob LJ looked at the element of an estoppel where what was being asserted was an

estoppel by convention or an estoppel by representation, and he said at the end of paragraph 102:

> "It was not disputed that for either kind of estoppel, the representation or common assumption as the case may be, must be unambiguous and unequivocal. That is inherent in the very nature of an estoppel."

142. Turning to the facts of the present case, the clear representation or understanding of the sort envisaged by Jacob LJ has to be something which falls within the pleaded case of the defendants in the paragraphs that I have referred to. Notwithstanding Mr Buckpitt's plea to the contrary during the course of closing submissions, in my judgment the fact that resolution number 7, which was voted on at the AGM, does not refer to the 1987 Act, and the fact that, as I find it, there was no express reference at the AGM to the 1987 Act or to the rights of first refusal is fatal to the estoppels which he asserts. The evidence simply does not support his submission that there was a common assumption that the Leases would be granted free from challenge. His submission is much more general than that. It really comes down to the fact that there was, on his case, a common assumption that the defendants would get leases and that there would not be any subsequent challenge to them. Even that general submission, it seems to me, is not supported by the evidence. Moreover, the majority of the tenants who gave evidence were unaware that there was to be a disposal of an interest in the roof at that stage. That is consistent with my construction of resolution number 7.

143. In my judgment, there is not a case which crosses the line. One only has to look, it seems to me, at paragraph 51 of Lord Burrows's speech in the *Tinkler* case to see that none of the elements he identifies necessary for establishing an estoppel by convention were made out by the evidence.

144. Nor in my view did an estoppel arise at a later stage when the works to the roof and the common parts were carried out. It is obvious that the tenants, as I have said earlier, knew that the works were being carried but but they were not aware that they had given up rights in reliance on which the defendants agreed to carry out such works.

145. I turn then to look at the arguments raised under the European Convention on Human Rights and the First Protocol to the Convention. I was asked to take account of article 8, the right to respect for private and family life, having regard to the facts that the Leases have now made the roofs and roofspaces part of the flats occupied by the first and second defendants and their families; and second, the First Protocol right in respect of property, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

Mr Buckpitt's submission is that the court, as a public body in considering and applying the Act and in exercising its discretion, is bound to act in a way that takes into account and is proportionate and compatible with the Convention rights in play. He says that any order made under section 19 would plainly interfere with those rights.

146. In principle it seems to me that the rights of the defendants under the Convention are engaged. However, it is not open to me to find that the legislation is incompatible with the Convention, (that is a right reserved to the High Court), and it is fair to say that I am not being asked to do so. I am asked to construe it in a way that is compatible with the defendants' convention rights. I bear in mind that the rights of first refusal and the mechanism for enforcing them under the Act are rights and mechanisms which have been legislated for by Parliament in the usual way and provided for by law. Parliament has debated and decided on the conditions in which the rights can be exercised. The Act has been considered many times by the higher courts without there being any suggestion that it infringes the rights of parties to whom challenged disposals have been made. There is on the face of the Act nothing that would infringe the principles of article 8 or article 1 of the First Protocol. Nor is there any material on which I could properly conclude that there would be an infringement of such rights if the court were to grant the relief conferred on claimants by the Act. The reference to the Convention does not, in my judgment, take the matter any further.

147. If the qualifying tenants have rights under the Act then, in my judgment, they are entitled in principle, subject to the exercise of any discretion in the court, to have a remedy in respect of those rights where they are infringed, so long as any remedy is in conformity with the principles contained within the Act.

148. In so far as it is suggested that the remedies afforded by the Act are not proportionate, then I am afraid I part company with Mr Buckpitt. The Act is what it is. The proportionate remedy for infringing the Act by making a disposal which the person making the disposal was not entitled to make is to reverse the disposal, and that is what the Act provides for. The rights and remedies conferred on claimants under the Act are proportionate having regard to the protection which the policy behind the Act seeks to confer on tenants in the claimants' position.

149. As far as the exercise of any discretion is concerned, Mr Buckpitt in his closing submissions in paragraph 55, sets out 44 factors which he said should persuade the court not to grant a remedy to the claimant. There is a considerable overlap in those factors with the factors that he relies on in support of his argument that the claimant should be estopped from obtaining the relief which it seeks and those that he relies on in support of his argument that the Convention rights prevent the grant of any relief.

150. There was also a dispute about the width of the discretion and the period of time relevant to the exercise of the discretion, the defendants submitting that the relevant period was, in effect, unlimited and the claimant submitting that the relevant period only started running after service of the default notices. I was referred to the decision of the Court of Appeal in *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104 and in particular to the passage in the judgment of Robert Walker LJ (as he then was), the sole judgment in the case, at page 126, between letters C and E, which appears to the suggest that the relevant period in that case was that which started after the default notice had been served. It seems to me that was conclusion which the learned Lord Justice reached on the facts of that particular case and does not assist me in the present case. In my judgment, in so far as the court has a discretion, the factors which the court may take into account are not confined to those which occurred during a specific

period. There is nothing in the Act which would limit the period during which relevant factors might arise. However, in my judgment, the test for the exercise of such discretion as there may be is not whether in general terms it would be fair to grant the relief which is sought; it is a much more circumscribed discretion in that it arises at a point where the court has decided that there has been a breach of the Act and the claimants have rights which have been infringed and they are prima facie entitled to the remedy which the Act confers on them in such circumstances.

151. Although Robert Walker LJ referred to a discretion whether or not to make an order once the default notice has been served, it does not appear to me that he then regarded it as a very wide discretion. Once the right has been established, it seems to me that the court should take the view that the remedy should be fashioned to give effect to the right unless it was inequitable in some way to do so; it is not a more general question of whether it would be fair in all the circumstances to grant relief in the way in which the court might approach the exercise of a discretion when it comes to granting injunctions or making orders as to costs. Under the Act the court undertakes, in my judgment, a much narrower consideration of whether it would be inequitable to give effect to the rights conferred by the Act.

152. In my judgment, having regard to the series of factors relied on by Mr Buckpitt, this is a case in which the court could and should give effect to the right which the Act conferred on the qualifying tenants.

153. Parliament has decided that there is a right to have the transaction to be reversed. I would not, for the reasons I have already given, have found that the claimant is estopped from asserting its right even if an estoppel were possible. The other 44 factors relied on by Mr Buckpitt do not, in my judgment, show such injustice or inequity or unconscionability that the court should not grant the remedies which the claimant has a prima facie right to under the Act. The question, ultimately, is as to the precise nature of the relief which should be granted.

154. I have already considered the nature and extent of the consideration for the disposals in this case. The total consideration was more than the £1 stated on the TR1. However, in

the prayer,in their claim form the claimant seeks a return of the Leases to them for a payment of £1. Mr Clark submitted that paragraph 2 of the prayer, which seeks "further other relief" in the conventional way, is wide enough to enable the court to refer to the FTT the question of the precise nature and extent of the non-monetary consideration elements of the transaction which the claimant must "pay" for the return of the Leases to it. In support of that submission relies on paragraph 31 of the judgment of Neuberger J (as he then was) in *Kirin-Amgen Inc v Transkaryotic Therapies Inc (No 2)* [2002] RPC 3, where his Lordship said:

> "In summary, it appears to me that where there is a claim for 'further or other relief' then, unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed, the position is as follows. Firstly, relief will not normally be accorded in respect of a claim of a type which is not pleaded. Secondly, relief will not be accorded which is inconsistent with the relief specifically claimed, but that does not, of course, preclude alternative relief being granted, for instance, damages or a declaration in lieu of an injunction, or damages in lieu of specific performance. Thirdly, relief will not be granted if not supported by the allegations in the pleaded case. Fourthly, relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise."

155. Mr Clark submits that if he is wrong about the effect of paragraph 2 of the prayer to the claim form, that I should grant him permission to amend. Mr Buckpitt submits that the suggestion that the non-monetary element of the consideration should be referred to the FTT has never featured in the case in such a way as to effectively put his clients on notice that it was an issue which they would have to address and that I should refuse relief because throughout the claimants have taken the stance that they would only pay £1 for return of the Leasese.

156. It seems to me that it has always been apparent that the claimant is relying on its right to have the Leases transferred to it on the same terms as they were transferred to the defendants. That is inherent in the notices served under section 12B(2) and the default notice. I do not accept that the possibility of a reference to the Leasehold Valuation Tribunal has not been in the contemplation of the parties or that the suggestion of such a reference at this stage takes anyone by surprise. Certainly, so far as any increase in value is concerned, it is something which was specifically referred to by the defendants in paragraph 125(k) of the defence.

157. Looking back at the principles set out by Neuberger J (as he then was)in *Kirin-Amgen*, the claim here is of a type which was pleaded. The relief which is now sought is not inconsistent with the relief specifically claimed. Last, the relief is, in my judgment, supported by the allegations in the case, and the defendants cannot, in my judgment, reasonably claim that the claim for it takes them by surprise.

158. In so far as permission to amend is necessary for reference to the Leasehold Valuation Tribunal to be made, I would grant that limited permission to amend. In conclusion, therefore, it seems to me that the claimant, having established its right, is entitled to an order that the Leases be transferred to it on the same terms as those on which they were originally disposed of but that the question of what those terms are, given that non-monetary consideration has passed in quite substantial sums, should be referred to the Leasehold Valuation Tribunal. The precise terms of the order to be made following this judgment should be left to be dealt with at a further hearing.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge