Claim No H10CL117

IN THE COUNTY COURT AT CENTRAL LONDON

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

Date: 6 May 2022

Before :

HIS HONOUR JUDGE MONTY QC

- -

Between :

MILESTAR LIMITED

Claimant

- and -

(1) Mr NARENDRA GANDESHA
(2) HOMERTON HOLDINGS LIMITED

Defendants

- -

Mr Edward Knight and **Mr Owen Curry** (instructed by **Lawrence Stephens Solicitors**) for the **Claimant**
Mr Nathaniel Duckworth (instructed by **Colman Coyle**) for the **Defendants**

Hearing dates: 29, 30 November and 1, 2 December 2021

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Approved Judgment

HHJ Monty QC:

Introduction and the background to the dispute

1. The Claimant tenant seeks new leases of the ground floors of 139, 143 and 145 Homerton High Street. I will refer to these three together as "the Property" and to them individually by their number. The claim is opposed. The Defendant landlords contend that there has been a persistent failure to pay rent and (in respect of 143 and 145) that they intend to redevelop.

2. This is a dispute between members of the same family.

3. The Claimant, Milestar Limited, is a company in which the shares were formerly held as to 25% each by four siblings namely Hitesh, Narendra, Surendra and Kirti. As at the trial, I will refer to them by their first names. Surendra was married to Pushpa. Surendra died on 13 April 2018. His executors were his sons, Amit and Vinesh. Kartik (Hitesh and Surendra's younger brother) is said to be the current holder of Surendra's shares in Milestar. Narendra is the older brother, and he is the First Defendant. Hitesh (who is also known as Harish) runs a pharmacy and perfumery business from the Property, and in recent times part of the Property has also been a COVID-19 vaccination centre. Historically, this has been a family business since the late 1980s.

4. Narendra and Surendra owned a number of properties, including the Property, which is let to Milestar under 3 periodic tenancies, one for each of 139, 143 and 145. Each lease demises the commercial parts of the respective properties at ground floor and basement levels, but not the upper residential parts.

5. Narendra and Surendra also operated a grocery store at 228 Homerton High Street.

6. Narendra and Surendra also owned 141 Homerton High Street ("141"). After Surendra's death, his widow Pushpa became the registered owner of 141 together with Narendra. The ground and basement floors of 141 are occupied by Milestar as beneficial owner (see further below).

7. 141, 143 and 145 are presently set out as one unit, the walls having been knocked through. The Property is used as a pharmacy (141) and a perfume retail business (143, 145), with storage space (139) which was since the onset of the COVID-19 pandemic converted into and used as a vaccination centre.

8. The rent for 139 and 145 is £1,500 per month. There is an issue between the parties as to the rent for 141 and 143, which I shall deal with further below.

9. After a family argument in 2016, a bitter dispute developed, leaving Hitesh and another brother Jayesh firmly in opposition to Narendra and Surendra. Once Surendra died, Hitesh and Narendra were the only directors of Milestar. In view of this conflict, it was agreed between them that for the purposes of the present claim first Narendra will have no involvement in the conduct of the case on behalf of the tenant, and secondly Hitesh represents the controlling mind of the tenant.

10. Proceedings under section 994 of the Companies Act ("the 994 proceedings") were brought by Narendra and Surendra. These were resolved in Hitesh's favour in July

2019 when ICC Judge Jones dismissed the unfair prejudice petition and Narendra and Surendra's estate were ordered to pay indemnity costs. It was held in the 994 proceedings that the Claimant owned 141 beneficially. Narendra and Surendra had contended that they were the beneficial owners. Following that decision, in August 2019 the tenant stopped paying rent, save for a single payment made in June 2020.

11. A claim by Hitesh against Narendra and others for the sale of the family home, 22 Northumberland Avenue, E12 (in which Narendra, Surendra and Hitesh lived with their respective families as well as their other two brothers Jayesh and Sailas) failed at first instance in October 2019 before HHJ Wulwik, but succeeded on appeal before Andrews J in July 2020.

12. A claim by Narendra and Surendra for possession of the upper floors of 141 and 143 succeeded on the incorrect basis (resolved against them in the 994 proceedings) that they were the beneficial owners. The possession order was made on 8 May 2019. There is a claim to set aside the possession order on the basis of false statements by Narendra about the ownership of 141 which at the time of the present trial was due to be listed in January 2022. I have not been told anything about the outcome of that action.

13. The landlords served notices under section 25 of the Landlord and Tenant Act 1954, terminating the leases on 30 September 2020. The notices specified that any claim for new leases would be opposed under grounds (b) (a persistent delay in paying rent), (c) (breaches of other terms of the existing lease) and, in respect of 143 and 145 only, (f) (the landlord intends to demolish or reconstruct the property and it is not possible to do so without the landlord recovering possession).

This claim

14. By the present claim, the tenant applied for new leases. HHJ Gerald ordered that the grounds of opposition be tried as preliminary issues. The trial took place between 29 November and 2 December 2021. The parties were represented by Mr Knight and Mr Curry for the tenant, and by Mr Duckworth for the landlord. I am grateful to them all for their most helpful written and oral submissions.

15. As often happens in this sort of case, there were many matters raised in evidence which were in my view peripheral. I do not need to mention these matters in this judgment, which I will confine to the issues needed to resolve whether the landlord has satisfied the grounds of opposition relied on. I have however reviewed all of my notes of the evidence and all of the documents (spread over 8 volumes, some 4000 pages) in preparing this judgment.

16. I read the witness statements of, and heard oral evidence from, Hitesh on behalf of the Tenant, and Narendra and Amit for the Landlord. There was also a witness statement of Vinesh but he was not called.

17. I also had the benefit of expert evidence for both sides in relation to ground (f). For the Tenant, Mr Hickey is an architect, and Mr Roe is a town planner. For the Landlord, Mr Matthews is an architect, and Mr McGrath is a town planner. Mr Matthews' Report was not compliant with CPR 35. It is not clear how or why this happened. No point was taken on it by Mr Duckworth, and I permitted Mr Matthews at the outset of his

evidence to confirm that he was aware of, and had complied with, the requirements of CPR 35.

Ground (b): persistent delay in paying rent

18. It is accepted by the tenant that save for the single payment in August 2020, no rent has been paid since August 2019, and that there are arrears of rent under all three of the leases.

19. The failure to pay rent from 26 March 2020 is to be disregarded: section 82(11) of the Coronavirus Act 2020 as amended by the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 2) Regulations 2021.

20. The relevant period is therefore August 2019 to 26 March 2020.

21. It is the tenant's case that it has cross-claims against the landlord which take effect as an equitable set-off. The tenant contends that the result of the set-off is that the relevant rent is not due at all, and any notice based on rent being due is ineffective.

22. It is common ground that under ground (b) the court must determine first whether there has been a persistent delay in paying rent, and secondly whether – in the exercise of the court's discretion (a process which has been described as a "value judgment"; I will deal with the relevant authorities below) – that means that a new lease should not be granted.

23. Since it is the tenant's case that no rent was due, because of the cross-claims, I will deal with that issue first.

24. 'An equitable right to set-off arises where a cross-claim is so closely connected with the claim that it would be manifestly unjust to allow the claimant to recover without taking into account the cross-claim.' See Woodfall, Landlord and Tenant, para 7.114.

25. In *Geldof Metaalconstructie NV v Simon Carves Limited* [2010] EWCA Civ 667, Rix LJ reviewed the authorities on equitable set-off in the context of commercial contracts and held at [43(vi)]:

> 'For all these reasons, I would underline Lord Denning's test [expressed in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* ("*The Nanfri*") [1978] 2 QB 927], freed of any reference to the concept of impeachment, as the best restatement of the test, and the one most frequently referred to and applied, namely: "cross-claims…so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim".
>
> That emphasises the importance of the two elements identified in *Hanak v Green*; it defines the necessity of a close connection by reference to the rationality of justice and the avoidance of injustice; and its general formulation, "without taking into account", avoids any traps of quasi-statutory language which otherwise might seem to require that the cross-claim must arise out of the same dealings as the claim, as distinct from vice versa.'

26. For the landlord, Mr Duckworth submits that in practice this means that the cross-claim must arise under the lease itself, or the contract with which the lease was granted, or otherwise as an incident of the relationship of landlord and tenant.

27. In *Geldof*, Rix LJ also held at [43(i)]:

> 'The impeachment of title test [suggested by Lord Denning in *The Nanfri*: "And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim"] … should no longer be used … It is an unhelpful metaphor in the modern world.'

28. Further, Rix LJ held at [43(v)]:

> 'Although the test for equitable set-off plainly therefore involves considerations of both the closeness of the connection between claim and cross-claim, and of the justice of the case, I do not think that one should speak in terms of a two-stage test. I would prefer to say that there is both a formal element in the test and a functional element. The importance of the formal element is to ensure that the doctrine of equitable set-off is based on principle and not discretion. The importance of the functional element is to remind litigants and courts that the ultimate rationality of the regime is equity. The two elements cannot ultimately be divorced from each other. It may be that at times some judges have emphasised the test of equity at the expense of the requirement of close connection, while other judges have put the emphasis the other way round.'

29. Thus, there is a single test with two elements. The formal element is whether there is a close connection between the claim and the cross-claim, and the functional element is whether it is unjust to enforce the claim without taking into account the cross-claim.

30. One of the best known cases on set-off is the decision of Forbes J in *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137, which was the subject of helpful recent analysis by HHJ Davis-White QC sitting as a Judge of the High Court in *The Kanteen Limited v Three Rivers Property Investments Limited* [2021] EWHC 1787 at [62-64] (the transcript of the judgment incorrectly goes from [62] to [66] and then starts again at [64] and I have not changed the numbering):

> '62. Turning to the well known *British Anzani* case, it seems to me that this case is of assistance because it puts some flesh on the bones in terms of an example of where the court felt that there was a sufficient connection and where manifest injustice would arise were the set-off not to be allowed. In that particular case, which is *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137, Forbes J was dealing with a claim for rent under a lease and the question of whether a claim for damages under a separate agreement to construct the relevant warehouse that were the premises demised under the lease could be set-off against the claim for rent under the lease. He held that the defendants could set-off their claim for unliquidated damages against the claim for rent provided the equity impeached the title to the legal demand for rent - pausing there, that, of course, is the formulation test that Rix LJ said should be abandoned - but although the defendant's claim for damages arose under the terms of agreements that were not leases, there was a sufficiently

close connection between them such that it was only fair and just that equitable set off should be permitted of the claim which went to the very foundation of the claim for rent.

63. I am not going to read out all the relevant passages in the judgment but it does seem to me that the case is a helpful illustration of an example where equitable set-off was permitted. The judge in that case considered a number of arguments that could be put as to why equitable set-off should not be allowed, and, interestingly, the overall test he applied, leaving aside the impeachment of title point, was that from Parker J in *The Teno* [1977] 2 Lloyd's Rep 289, which was:

"Where the cross-claim not only arises out of the same contract as the claim but is so directly connected with it, it would be manifestly unjust to allow the claimant to recover without taking into account the cross-claim, there is a right of set-off in equity of an unliquidated claim."

64. What Forbes J said is that, while he was:

"… satisfied that it is proper in principle to allow that a cross-claim could be effective as an equitable set-off against a claim for rent, it by no means follows that such a defence is available in all circumstances. The important qualification is that the equity must impeach the title to the legal demand, or in other words, go to the very foundation of the landlord's claim."

65. He went on to say:

"This seems to me to involve consideration of the proposition that the tenant's cross-claim must at least arise under the lease itself, or directly from the relationship of landlord and tenant created by the lease."

66. He considered argument on that point but concluded,

"In these circumstances it is argued that as the cross-claim arises not under the underlease but under the agreement, there is no such close connection as is required".

But the judge went on to say that the underlease in that case did not provide for the relevant agreement to be incorporated into it but,

"If there were, it would be plain that the landlord's breach could properly be said to arise out of the same instrument as their claim for rent. In such circumstances, I should have no doubt that the requirements for an equitable set-off were fulfilled, for the breach of covenant relied on by the tenants is of the type to which equity has in the past allowed relief".

64. He then went on to consider the question posed earlier as to the requirement that equity must impeach the title as to whether it means necessarily that the cross-claims at least arise under the lease itself or directly from the relationship of landlord and tenant, and he decided that it did not. But what I do take away from that is that he was clearly of the view, first of all, that on the facts of that case there was a sufficiently close connection making it manifestly unjust to

refuse to allow set-off, and secondly, that had the relevant right arisen under the lease itself, he almost certainly would not have had any problem with it forming such a sufficiently close connection that it would be unjust to deny a set-off.'

31. The tenant's pleaded case is set out at paragraphs 14 to 21 of the Reply:

'14. As to Paragraph 4: the rent of £2,500 per month was paid by the Company and received by the landlords from time to time in respect of both 141 and 143, as set out at Paragraph 2 of the Particulars of Claim, notwithstanding that the Claimant was absolutely entitled to the freehold of 141 and the landlords from time to time were not entitled to charge a rent. The Defendants have since failed to account to the Claimant for such rent received on the Claimant's behalf.

15. In the premises, the arrears in respect of 143 to September 2020 are £10,417 and not £26,667. Save as aforesaid, the arrears of rent are admitted.

16. Narendra and Amit and Vinesh (as executors) also owe the Claimant £494,104 in respect of a loan account.

17. Narendra received cash takings from the Company's trading between 1 September 2015 and 17 October 2017, which he failed to bank in the Company's bank account, in the sum of £102,177 and for which he has otherwise failed to account to the Company.

18. Narendra has also refused to permit or procure payment by the Claimant of Hitesh's salary, now in arrears of over £200,000.

19. On 16 July 2020, the Parties agreed a payment of £27,000 on account of the rent arrears in return for payment of £15,000 on account of Hitesh's salary.

20. In the premises, the Claimant considers it has cross-claims as against the First Respondent and Amit and Vinesh as executors of the predecessor in title to Holdings' interest in the reversion of the Properties which far exceed the rent arrears.

21. The arrears of rent have accrued in the context of the family dispute and in particular the Claimant's cross-claims for an account of rents and recovery of costs orders.'

32. Thus, by this pleading, and in the evidence put forward by Hitesh in his statement, the tenant raises 4 cross-claims. I have taken the following summary from Mr Duckworth's skeleton argument, and in this judgment I will adopt the definitions set out below:

(1) A prospective claim by the Tenant against Narendra and Surendra, as trustees of the legal estate in No. 141, for an account of unauthorised profits in the form of rent received from (i) the Tenant itself between 1987 and July 2019, (ii) various tenants of the residential flat between 1987 – 2008 and (iii) the former tenants of No. 139 between 1990 and 2015, who it is said occupied part of the yard to No. 141 as part of their demise, ("the No. 141 Rent Claim"). Hitesh says [at paragraph 32(a) of his witness statement] that the total sum due to the Tenant under the No. 141 Rent Claim is "in excess of £800,000".

(2) A prospective claim by the Tenant to recover loans (totalling £494,104 [see Hitesh's witness statement, paragraphs 36-43]) allegedly made by the Tenant to Narendra and Surendra, in the period up to 2015, in respect of the grocery business carried by them in partnership from premises at 228 Homerton High Street ("the Loan Claim").

(3) A prospective claim by the Tenant against Narendra, as director, to recover cash takings from its business with which Narendra is alleged to have absconded between 1 September 2015 and 17 October 2017. Those takings are said to total £102.177 ("the Business Takings Claim") [see Hitesh's witness statement, paragraphs 36-43].

(4) A prospective claim by Hitesh against Narendra for failing to procure that the Tenant company pay off arrears of Hitesh's salary (totalling in excess of £200,000) that are said to have accrued since April 2016 ("the Salary Claim") [see Hitesh's witness statement, paragraphs 47-50].

The No. 141 Rent Claim

33. The dispute here has as its origin payments of £2,500 per month which, in the 994 proceedings, were said by Narendra and Surendra to have been the amount being paid for 141 and 143. ICC Judge Jones held in his judgment, the reference for which is [2019] EWHC 1717 (Ch), as follows:

> 'It is also to be taken into consideration that the Petition asserts and he [Narendra] stated in his second, trial witness statement that the Company had paid rent for No.141 since 2010. He and Mr S. Gandesha [Surendra] having previously elected not to charge rent for a family business. In fact, the rent charged was not for No. 141. It was for the other parts of the premises used by the Company for its business following the purchase of Number 143 in March 2000. The middle wall between 141, 143 and 145 was soon demolished and the Company started to operate from the premises as a whole after about 4-5 weeks.'

34. Mr Knight, in his skeleton argument, says that the Landlord relies on this paragraph, and the single sentence "In fact, the rent charged was not for No. 141", but Mr Knight said that rent was in fact being paid for 141 and ICC Judge Jones' comment in this sentence was obiter and not binding. For the Tenant, Hitesh confirmed his view, in cross examination, that rent of £2,500 had been paid for both 141 and 143 combined. Mr Knight then confirmed that the Tenant's position was that rent had been paid for both, but the Tenant accepted the finding of ICC Judge Jones.

35. Mr Knight submits that since rent was being paid for 141, and received by Narendra and Surendra as such, at £1,250 per month (the other half of the £2,500 being for 143), there has been a failure to account for that rent. Further, it is submitted that they have received around £131,000 from renting out the upstairs flat at 141, and between 1990 and 2015 they rented the rear yard at 141 for £23,000 per annum. It is therefore said that the Tenant has a claim against Narendra and Surendra's estate for an account and payment of the sums due, which will exceed the unpaid rents in this case. Mr Knight says that this is so closely connected with the Tenant's occupation of the property and the leases thereof that it would be inequitable to allow the Landlord to enforce payment.

36. Amit was cross-examined about the evidence he had given in the 994 proceedings. He said that he believed at that time that the rent was paid for both 141 and 143 but said "it was actually for 143, the rent." He accepted that his view now, that the rent of £2,500 was paid for 143 alone was based on the finding of ICC Jones.

37. In my judgment, ICC Jones found as a fact that the rent of £2,500 was paid for 143 and not for 141, and that is binding on the parties. I do not accept that it was obiter. It was part of the basis upon which the Judge decided that 141 was owned by Milestar. Any claim for a repayment of money paid in respect of 141 is bound to fail and cannot form the basis of a cross-claim.

38. The next aspect under this head is the other rental income for 141.

39. Amit said that 141 was let to asylum seekers, but for the entire 30-year period he was only able to produce 13 pages of documents, only 1 tenancy agreement from 1990, insurance schedules for only 3 years, and there were no partnership accounts produced. Amit said that he had asked the accountants for the partnership accounts some time ago but was told they only went back 5 or 6 years. Even so, none were produced. Amit's schedule of income and expenditure therefore had no real basis for corroboration. It was no more than an estimate calculated on a very broad brush basis using a multiplier based upon very historic and unreliable figures. For example, he took a figure for council tax from a statement from the council which in fact showed that the amount paid for 2011 (and other years) had been £1017.54 (he used £1017.60 in his schedule) whereas in fact after allowances the amount actually paid was £508.77. His explanation that they had previously paid larger amounts, so he ignored the allowances, did not make sense.

40. Amit also said that in addition to the lets to asylum seekers there were some assured shorthold tenancies on and off since 2004, but he had said nothing about those in his witness statement. The copy of an assured shorthold tenancy produced showed that council tax was payable by the tenant; faced with this, Amit said that the partnership was charged council tax so he was not sure what that meant. I do not accept that explanation, which again makes no sense, and it reinforces my view that the schedule is not reliable.

41. Further, there was no evidence about what was spent on buildings insurance other than Amit's estimate from what he said had been paid for other similar buildings.

42. I have concluded that Mr Knight is right in saying that the schedule is not reliable, and that the reason for the partnership accounts not having been produced is likely to be that they show that income exceeded expenditure.

43. I have concluded that, in the absence of reliable evidence to support such a contention (which means that I am not able to determine the amount of any other rental income), there is no basis for saying that there is other rent for 141 which can form a cross-claim.

44. As for the rent for the yard and garage at the rear of 141, Hitesh's evidence was that Narendra and Surendra annexed the yard to 139 and let the whole as a GP's surgery. He thought the rent was £23,000 and that one-third of that was attributable to the yard, which has not been accounted for, and that Milestar had not authorised Narendra and Surendra to receive it on behalf of Milestar.

45. Neither Narendra nor Amit gave evidence in their statements about the yard.

46. In cross-examination, it was put to Hitesh that Milestar had never complained that the lease of the surgery included part of the yard or that Milestar would receive a rent for it, and there was nothing in his statement about any agreement to that effect. I agree with Mr Duckworth that this is reverse engineering on the part of the Tenant, and that nothing is due to Milestar.

47. In conclusion, there is nothing in the No. 141 Rent Claim which can give rise to a cross-claim.

48. If I am wrong about that, then I would have held that Mr Knight is correct in saying that these claims, although historic, are not statute-barred, because they are claims in relation to trust property: section 21(1)(b) of the Limitation Act 1980, and because there is no time bar in relation to any liability to account.

49. More importantly, I do not accept that the cross-claims in relation to the rent for 141 – even if made out – could be set off as equitable cross-claims.

50. First, I reject the contention that the existence of a cross-claim means that rent is not due in the first place. The proper analysis is that the rent is due, but a cross-claim acts as a defence.

51. Secondly, I do not accept that rent in respect of 141 is sufficiently closely connected with the rent claim for 139, 143 and 145 for the reasons submitted by Mr Duckworth (summarised at paragraph 26 above). Mr Knight said that the close connection arose because of the background between all of the parties and the companies, and that the 141 rent had been paid as a result of the relationship of landlord and tenant over 143. I do not agree. It has nothing to do with that relationship, and it does not arise under the lease.

52. Thirdly, the payments for 141 were made for years and no repayment was ever sought.

The Loan Claim

53. Milestar says it is owed £494,140 by Narendra and Surendra's executors. Narendra and Homerton say that Milestar owes them money.

54. Reliance was also placed on various company and partnership accounts.

55. In paragraph 36 of his statement, Hitesh said:

> 'The Company's accounts for the year to 31 August 2015 stated the balance owed by Narendra and Surendra, historically referred to in the Company's accounts by their trading name, Mace Mini Market, notwithstanding that Mace Mini Market had ceased trading, was £35,983.'

56. Those accounts show that for 2014, the amount due from Narendra and Surendra was £62,982 and that after repayments said to have been £27,000 the balance due was £35,983.

57. The accounts for 2015 were signed off by Hitesh in August 2016.

58. The same accountants who had produced those accounts also prepared partnership accounts for the year to 31 March 2015 for Narendra and Surendra. These accounts included a page headed Milestar Limited Control Account, and that listed a balance brought forward (ie, owing to Milestar) of £379,103.57 less £52,000 received from Milestar, plus £3,000 rates paid on behalf of Milestar, and £20,000 sales to Milestar. The balance shown as owing as at 31 March 2015 was £431,103.57.

59. Hitesh confirmed that this larger amount, and not the lesser amount shown in Milestar's account, was in his view what the partnership owed to Milestar.

60. He accepted that there were no loan agreements recording the terms of any loans, and that it was not clear when any loans were advanced but accepted that it must have been before March 2015. He said that Narendra and Surendra were always liable to pay this amount, and that this was a running account. Therefore Milestar was entitled to the money.

61. Narendra's evidence about the difference was unhelpfully vague. He could not explain why the figures differed, nor did he know anything about the £52,000 said in the partnership accounts to have been received by Milestar, or the rates, although he did say that the partnership purchased some goods for Milestar and then sold them on. Whilst he said that he had nothing to do with the accounting side, he referred to the accounts in some detail in his witness statement, although in cross-examination he said he had not seen them before (which was clearly incorrect, because the accountants had sent him copies with a detailed email on 11 December 2020).

62. A firm of accountants called Edwards Bailey was engaged to complete what it described as an independent review of the available third party evidence to calculate what the balance of the loan account between the partnership and Milestar was at 31 August 2018, and concluded that £18,518 was owed by Milestar to the partnership. Narendra said that he had provided Edwards Bailey with the partnership accounts for 2016-18. I do not accept that. If he had done so, Edwards Bailey would have listed them as part of the documentation they had reviewed, and they do not. The position is – as Mr Knight put to Narendra – that he has not shown anyone the partnership accounts (which have not been disclosed in these proceedings either) and I can only assume that this is because they do not support the position adopted by Narendra.

63. What is striking is that the Company accounts (showing the loan at £35,983) and the partnership accounts (of which Hitesh obtained a screenshot, showing a loan of £431,103.57) were drawn up by the same accountants. There was no evidence from the accountants and no real explanation of the discrepancy. I rather suspect that the larger figure – in respect of which there was no evidence as to how it arose and no loan documentation was disclosed – was spotted as an error by the accountants, and that the Company accounts are right.

64. I have come to the clear conclusion that I do not need to resolve the question of who owes what, because in my judgment there is no basis for the Loan Claim being an equitable set-off, whether it is the greater or the lesser figure. I am not sure in any event that the evidence before the court was adequate to enable me to reach any clear decision on that question.

65. Applying the principles I have set out above, the Loan Claim does not go to the heart of the relationship of landlord and tenant, and relates to a business carried on at a different property. It does not give rise to an equitable set-off.

The Business Takings Claim

66. This was abandoned by the Tenant on the first day of the trial.

The Salary Claim

67. Milestar accepts that Hitesh's unpaid salary cannot itself be set off against the rent due, but it is submitted that there is an unpaid salary claim for around £175,000 and it is relevant to the court's exercise of discretion.

68. Again, I agree with Mr Duckworth that there is no need to make any findings in this regard. The Salary Claim is a claim by Hitesh against a fellow director of the tenant. It has nothing whatsoever to do with the leases or the relationship of landlord and tenant. It is to be discounted from consideration, in my judgment.

Conclusion on ground (b)

69. Having rejected the set-off claims, I find that there was a persistent delay in paying rent. I will return to consider ground (b) when I look at the position in the round.

Ground (c): breaches of other terms of the lease

70. The only breaches which are pleaded as falling within ground (c) are the non-payment of rent. I agree with Mr Knight that these do not fall within ground (c); non-payment of rent is within ground (b), which I have addressed above.

Ground (f): demolition or reconstruction

71. The issue here is whether there is the requisite intention under ground (f) to demolish or reconstruct the premises.

72. The relevant law can be taken from the summary in *Macey v Pizza Express* [2021] EWHC 2847 (Ch) at [11-12]:

> (1) Intention is a common English word, to be given its ordinary and natural meaning.
>
> (2) Intention means more than merely contemplating that a course of action or bringing about a certain state of affairs might be desirable. In *Cunliffe v. Goodman*, Asquith LJ spoke of a project moving "out of the zone of contemplation – out of the sphere of the tentative, the provisional and the exploratory – into the valley of decision". That is a nice articulation of the borderline, but Asquith LJ also gave a fuller and more nuanced consideration earlier on in his judgment:
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> "The question to be answered is whether the defendant (on whom the onus lies) has proved that the plaintiff, on November 30, 1945 'intended' to pull down the premises on this site. This question is in my view one of fact. If the plaintiff did

no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was no evidence of a positive 'intention', or that the word 'intention' was incapable as a matter of construction of applying to anything so tentative, and so indefinite. An 'intention' to my mind connotes a state of affairs which the party 'intending' – I will call him X – does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.

X cannot, with any due regard to the English language, be said to 'intend' a result which is wholly beyond the control of his will. He cannot 'intend' that it shall be a fine day tomorrow: at most he can hope or desire or pray that it will. Nor, short of this, can X be said to 'intend' a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents and cross-currents of circumstance that, not merely is it quite likely not to be achieved at all, but, if it is achieved, X's volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence. If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X 'intended' that result."

Thus:

(a) The question of intention is one of fact.

(b) Intention involves a decision in the landlord to bring about a certain state of affairs. That decision may not be tentative or indefinite, but – to use the language of later cases – must be "a firm and settled intention". I shall – as did the parties before me – refer to this as the "subjective" element or "subjective" intention.

(c) Although it might be said that intention is entirely subjective, it is quite clear from Asquith LJ's judgment that it has what may be called an "objective" element. As Asquith LJ noted, one cannot intend a result wholly beyond the control of one's will. Although I shall – as the parties did before me – refer to this as an "objective" element or "objective" intention, it is really no more than an expression of the fact that, in order for an intention to be rationally held, it must be capable of achievement. Whilst an intention may be thwarted by circumstance but be an intention nonetheless, an intention to bring about a state of affairs must be rooted in reality.

(d) For that reason, it goes too far to treat the requirement of "intention" to oblige a landlord to undertake – in the sense of actually actioning – all of the steps necessary to realise his or her intention. That would amount to a requirement that there be a realised intention or an intention in fact executed to the extent of the landlord's ability. This was stressed in *Betty's Café v. Phillips*, where it was noted that the language of intention could not:

> "…be treated as having (in effect) substituted for the word 'intends' in paragraph (f) (as in paragraph (g)) of the section the words 'is ready and able' so as to impose upon the landlord the onus of proving that, at whatever be the proper date, he has not only finally determined upon the course proposed but has also taken all necessary steps for the satisfaction of any requisite conditions to which the course proposed is subject. The relevant word is 'intends', a simple English word of well-understood meaning. The question whether the intention is at the relevant date proved has, in my judgment, to be answered by the ordinary standards of common sense…"
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> (3) It follows that what a landlord does or does not do in pursuit of his or her intention may cast light on the nature and existence of that intention. But it is no requirement for the satisfaction of either section 30(1)(f) or section 30(1)(g), merely potential evidence as to the existence of the intention that is required. Neither party disputed that a court could (in theory, at least) properly conclude that there was the requisite intention on the landlord's evidence alone, unsupported by any other evidence or any outward attempt to bring that intention about.
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> In *S Franses Ltd v. Cavendish Hotel (London) Ltd*, the Supreme Court articulated a gloss to the foregoing, making it clear that a firm and settled intention under section 30(1)(f) (and, by a parity of reasoning, section 30(1)(g)) would not be sufficient where that intention was "conditional". If a landlord had, say, a firm and settled intention to demolish the building the subject of a lease, but only so as to ensure the termination of the lease, such that if the tenant surrendered the lease, the demolition would not proceed, then such an intention – albeit firm and settled – would not satisfy the demands of section 30(1) of the 1954 because it was "conditional". As Lord Sumption (with whom Lady Hale, Lady Black and Lord Kitchin JJSC agreed) noted:
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> "This appeal does not, as it seems to me, turn on the landlord's motive or purpose, nor on the objective reasonableness of its proposals. It turns on the nature or quality of the intention that ground (f) requires. The entire value of the works proposed by this landlord consists in getting rid of the tenant and not in any benefit to be derived from the reconstruction itself. The commercial reality is that the landlord is proposing to spend a sum of money to obtain vacant possession. Indeed, in many cases, apart from the statutory compensation, landlords with proposals like these will not even have to spend the money. They need only supply the tenant with a schedule of works substantial and disruptive enough to be inconsistent with his continued occupation…"

73. The date at which the landlord must hold the requisite intention is the date of the hearing.

74. I am entirely satisfied that the landlord has the requisite intention.

75. Each party called expert evidence from a planning consultant.

76. For the Defendants, Mr McGrath set out the following in his report.

(1) A scheme was prepared and submitted to the London Borough of Hackney in April 2020 for pre-application advice.

(2) The proposed scheme was for the demolition of the existing buildings and the erection of a three/four storey building, with retail space on the floor and basement levels and four residential units on the upper levels.

(3) Following that, a planning application was submitted on 14 December 2020.

(4) The application was broadly in line with the proposed scheme which had been the subject of pre-application advice, but with adjustments to the size of the retail space and the four residential units.

(5) The application went out to public consultation on 21 January 2021. It concluded on 11 February 2021.

(6) A revised scheme was later submitted, in May 2021, after certain issues had been raised by the planning authority. There were alterations to the proposed roof, a reduction in height of the ridge line and setting back from the building line, and alterations to the internal layout and residential mix.

(7) Mr McGrath says that planning from now on would take some 12-14 weeks from a decision by the planning committee. There could be a period of further consultation.

77. Mr McGrath expressed the view that the probability of obtaining planning permission was greater than 50% and up to 60%; he characterised the chances as "better than reasonable and are good to very good."

78. Mr McGrath identified in his report a number of factors which led him to reach that conclusion about the chances of success.

79. The principal factor was planning policy. In a lengthy section of his report, Mr McGrath set out the planning policy context, with reference to the London Plan, the Hackney Local Plan, and the National Planning Policy Framework. The key difference between Mr McGrath and Mr Roe, the Claimant's expert, was over the loss of the chemist shop and the vaccination centre, and how that fed into the planning policy question.

80. Mr Roe in his report said that because the application site comprises a retail and medicinal unit it is classed as an "essential community service". Therefore, the proposal constitutes an erosion of an existing essential community facility, contrary to Policy LP8 of the Local Plan.

81. There was some lively cross-examination of both experts on this issue in particular.

82. Mr Roe said that his conclusion was that the likelihood of the Landlord obtaining planning permission was less than 40% - he said "the prospects are not good … there is always a possibility, but the prospects are low … the balance is against the application, predominantly because of the loss of the pharmacy." There were a number of other

factors which Mr Roe identified in his report, and I will deal with those later in this judgment.

83. The problem with Mr Roe's evidence was that in my view he was not properly independent.

84. On 10 February 2021, his firm wrote to the planning authority, in a letter signed by Mr Roe, formally objecting to the planning application. The objections mirror the points set out in Mr Roe's expert report. The letter is expressed to be sent on behalf of "our client, Milestar Ltd."

85. On 2 September 2021, his firm wrote a further letter to Hackney, again on behalf of Milestar, in which it was said that Milestar "strongly objects" to the proposed development (by now, the revised development).

86. Mr Roe's firm was therefore engaged by Milestar to act as its planning consultant. It was put to Mr Roe in cross-examination that his role was to persuade Hackney not to grant planning permission. Mr Roe said that his job was to express his independent view, but it is clear that there was no reference in his expert report to this relationship with Milestar. This is a clear conflict. I do not see how anyone acting for Milestar in that way could be an independent expert in these proceedings, and I was surprised that Mr Roe could not see this was a problem. There was no indication in Mr Roe's report that he had taken into account any alternative view or focussed on anything other than the negative points. I agree with Mr Duckworth that I cannot place much weight on Mr Roe's evidence.

87. In any event, I much prefer the evidence of Mr McGrath, which struck me as more balanced and independent. I also think he was right to say that a pharmacy is retail use in planning terms (and Mr Roe was wrong about that), so the real issue in terms of planning was the use of part of the premises as a vaccination clinic. Mr Roe would not accept that a pharmacy by itself was within LP8 of the Hackney Local Plan Policy. He said that it was the predominant use of the premises, and it could be within LP8 just as a pharmacy, but I thought he was confusing the position with its use as a designated community pharmacy within the Local Plan. As Mr McGrath said, that clinic would not be lost as it was in 139 and could still operate from there, albeit in a slightly smaller space. I was also impressed by Mr McGrath's evidence about how in planning terms the new building would be "a big plus for the council" as the present street scene is unattractive. I recognise that this is subjective, but it seems to me that Mr McGrath is more likely to be right about this aspect than Mr Roe.

88. I was also less than convinced that Mr Roe was right about the reduction in retail space. It seemed to me that Mr Duckworth was right about that, and Mr Roe's figures were wrong; there is no substantial reduction in space (Mr Roe said it was 169m^2 whereas the actual reduction was 96m^2).

89. Of further significance were Mr Roe's comments on the fact that the planning authority had not identified any issues in relation to LP8 or the London Plan. Mr Roe attributed that to the fact that they had not yet visited the site, and that he was not sure what information they had. This seemed to me to miss the point, because the authority had already said in an email that it had no concerns about the loss of the pharmacy (which I expect was because there are others in the local area). It was put to Mr Roe that this

was simply the view of the planning consultant and it was not clear that the planning officer had been to the site (he mentioned this on a number of occasions). I thought his evidence on this was unrealistically pessimistic, particularly because as is clear the planning authority had sight of the precise points raised by Mr Roe in his report when they were set out in the letters of objection, including the use (and loss) of the clinic. Ultimately, Mr Roe was obliged to say that he did not think the planning officer had looked into the matter in sufficient detail. I do not accept that is the case. I very much prefer Mr McGrath's views on the likely chances of obtaining permission.

90. I also heard evidence from the Defendant's expert architect, Mr Matthews and read the report of the Claimant's expert architect, Mr Hickey, as well as their joint report. Mr Matthews had in my view correctly been asked to express his view on the planning scheme as submitted. The real problem with Mr Hickey's evidence was that he had been asked to consider alternative schemes of development. That seems to me to be irrelevant.

91. The only real issues were first, whether a perforated brick wall which screens one area from another could be removed, and Mr Matthews said that it was not structural and that it could be removed; and secondly, the nature and extent of a right of way over the rear yard, but (as in the case of the loss of the pharmacy) the fact is that the planning authority did not see this as a problem.

92. The question of whether the tenant might obtain an injunction to prevent these works (because of the right of way) in my view fell away, for the reasons summarised by Mr Duckworth in closing. In the absence of any clear evidence to suggest that an injunction (if applied for – and that was less than clear, because of the tension between the various parties who would have to consent to an application) would be granted, I do not think that this can be regarded as a problem for the proposed development.

93. Ultimately, as set out in their joint report, both architects agreed that the scheme was feasible subject to adequate safeguarding of the retail premises and public below and an appropriate risk assessment of the demolition and construction activities to enable work to be undertaken over occupied areas.

94. It is plain that the Landlord has expended time and energy as well as money in relation to the proposal. In my view the prospects of getting approval are, as Mr McGrath says, good or very good.

95. I have therefore concluded that the Landlord has established the requisite intention under ground (f).

Conclusion

96. Looking at the position as a whole, it is clear in my judgment that the Landlord's grounds of opposition under grounds (b) and (f) succeed.

97. Had the Landlord failed on ground (f), I would have held that this is a case where the persistent failures to pay rent were such that it would not be fair to the Landlord to be compelled to have new leases with this Tenant. In my judgment, the position is as set out by Lewison LJ in *Horne & Meredith Properties v Cox and Billingsley* [2014] 2 P&CR 18 at [27]:

> 'The ... question ... has been described as a discretion, although I would myself prefer to describe it as a value judgment. The phrase "ought not" does to my mind suggest that there would usually be some fault or culpability on the part of the tenant. The overall question under this head is whether it would be fair to the landlord, having regard to the tenant's past behaviour, for him to be compelled to re-enter into legal relations with the tenant.'

98. Further, I note what was said by Ormerod LJ in *Lyons v Central Commercial Properties* [1958] 1 WLR 869 (CA) at 878:

> 'The object of paragraphs (a), (b) and (c) of section 30, as I see it, is to enable the judge to refuse to grant a new lease to a tenant who has shown himself to be unsatisfactory in the performance of his obligations under the contract of tenancy.'

99. Had I only been considering ground (b), I would have reached the same conclusion, that the Landlord's opposition succeeds.

Permission to appeal

100. The Claimant tenant seeks permission to appeal. I have received written submissions from Mr Knight and Mr Curry, and written submissions from Mr Duckworth.

101. Permission to appeal is sought solely in respect of my finding that ground (b) was satisfied.

102. I found in favour of the Defendant landlord on ground (b) because I held that there was no set-off available to the tenant.

103. What is said is that I was wrong to have held that the finding by ICC Judge Jones that rent of £2,500 was payable for 143 was binding on the tenant, whereas in fact that was obiter.

104. I have already dealt with that argument, and rejected it. I do not believe I was wrong.

105. It is then said that my findings that there was no other rent for 141 which could form a cross-claim was wrong, as was my decision that the claim regarding the repayment of rent for 141 (which I held could not be set off as an equitable cross-claim). Reliance is placed on *Secretary of State for Defence v Spencer* [2019] EWHC 1526 (Ch), which is said to be binding authority that the effect of an equitable cross-claim is that the rent is not due because it cannot be recovered by action.

106. I agree with Mr Duckworth that these points turn on whether I was wrong to conclude that (i) the existence of a right of equitable set off does not mean that the rent did not "become due" for the purposes of s.30(1)(b) of the 1954 Act and (ii) the tenant's intended cross-claims were not sufficiently closely connected to the rent claim to be capable of ranking as an equitable set off. I dealt with all of this in the substantive part of my judgment. I do not believe that I came to an incorrect conclusion.

107. As to reliance on *SSD v Spencer*, that was a case on whether equitable set-off can be applied to the statutory procedure under Case D in Schedule 3 to the Agricultural Holdings Act 1986. The issue on the appeal was this, at [16]:

> "The question is therefore whether the words 'rent due' stated in a notice to pay under Case D mean rent due taking account of any claim against the landlord in equitable set-off or rent due irrespective of any such set off. The Secretary of State contends that the Recorder wrongly concluded that the term takes equitable set off into account."

108. Birss J as he then was held that the Recorder at first instance was right to have referred to the three criteria in *Fearns v Anglo-Dutch Paint and Chemical Co Ltd* [2010] EWHC 2366 (Ch), that i) the set-off must be properly asserted, ii) it must be quantified, and iii) the assertion and quantification must be made reasonably and in good faith.

109. Birss J held at [29]:

> "The limiting criteria also provide a short answer the Secretary of State's submissions regarding the difference between the availability of equitable set-off as a defence to an action to recover a debt or rent arrears, and its availability as a 'self-help' remedy for suspension of a creditor's or landlord's rights pending action. The Secretary of State contends that equitable set-off as a 'self-help' remedy is unworkable in the context of Case D, as it does not require the tenant to actually bring a claim against the landlord for the sums to be set-off. Equitable set-off could therefore be used to frustrate the Case D procedure indefinitely, which cannot have been intended by Parliament. I am not persuaded by this point; a tenant attempting to set-off unmeritorious and/or disingenuous claims would fail, as they would not meet the criteria from *Fearns*."

110. I do not agree that *SSD v Spencer* affects my conclusions. The relevant test in relation to ground (b) is that summarised in Woodfall, which I have set out above, namely: 'An equitable right to set-off arises where a cross-claim is so closely connected with the claim that it would be manifestly unjust to allow the claimant to recover without taking into account the cross-claim.' That is not the same issue which arose in *SSD v Spencer* and in any event I found – in my view correctly – that there was nothing which amounted to an equitable set-off. My findings mean that in my view there is nothing in the suggestion that overpaid rent in respect of 141 should be set off – that is an argument I have rejected and I think I was right to have done so.

111. Finally, it is submitted that in respect of the 141 Rent Claim, the Loan Claim and the Salary Claim, the Court should in any event have found that there was a cross-claim which was relevant to the Court's power to grant a new lease, even where the cross-claim (a) did not amount to an equitable set-off; or (b) was unquantified.

112. Not only was that not an argument run at the trial, I agree with Mr Duckworth that a cross-claim which is not an equitable set-off cannot defeat an otherwise good claim under ground (b).

113. Permission to appeal is therefore refused. As cogent as the written submissions are, they do little more than repeat points on which I found against the landlord (save for the final point, which appears to be a new one), and I do not consider that there is any reasonable prospect of successfully appealing my decision.

(End of judgment)