Neutral Citation Number: 2024] EWHC 89 (Ch)

Case No: PT-2023-000257

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (Ch)

Business and Property Courts of England and Wales
7 Rolls Building, London EC4A 1NL

Date: 23 January 2024

Before :

Ashley Greenbank (sitting as a judge of the High Court)

- -

Between :

Messenex Property Investments Limited

Claimant

- and -

Lanark Square Limited

Defendant

- -
- -

Piers Harrison, counsel (instructed by **William Sturges LLP**) for the **Claimant**
Nathaniel Duckworth, counsel (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing dates: 23 and 24 November 2023

- -

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10.30am on Tuesday, 23 January 2024.

Ashley Greenbank (sitting as a judge of the High Court):

Introduction

1. In this case the Claimant, Messenex Property Investments Limited ("Messenex"), seeks a declaration that its obligations as the tenant under a lease of a formerly mixed-use building to seek consent from the landlord to alterations to the demised premises do not preclude it from carrying out two sets of works. Those two sets of works are: works to add three floors to the building (which I shall refer to as the "Rooftop Works"); and works to the ground floor of the premises to convert it from business to residential use (which I shall refer to as the "Ground Floor Works").

2. Messenex's case is that the Defendant, Lanark Square Limited ("Lanark"), Messenex's landlord, unreasonably withheld consent to the works, and so Messenex is discharged from the covenant requiring the tenant to seek approval.

The hearing and the evidence

3. This claim is brought under Part 8 of the Civil Procedure Rules ("CPR").

4. The hearing bundle contained four witness statements:

   i) a witness statement of Mr Grant Meyrick, a solicitor and a partner in William Sturges LLP, who gave evidence on behalf of the Claimant;

   ii) two witness statements of Mr James Hannon, a solicitor and a partner in William Sturges LLP, who also gave evidence on behalf of the Claimant;

   iii) a witness statement of Mr George Georgiou, a director of the Defendant, who gave evidence on behalf of the Defendant.

5. The witnesses were not cross-examined on their statements. I will address aspects of the witness evidence at appropriate points in this judgment.

Facts

6. My findings of fact are set out in this section.

The title structure

7. Messenex is the tenant under a lease (the "Lease") dated 24 September 1996 granting a term of 200 years less ten days from 14 July 1986 of Marina Point, 14 Lanark Square, London E14 9QD, a four-storey mixed-use building on the Isle of Dogs.

8. There are three interests superior to the Lease.

i) Lanark is the freehold owner of an estate known as Lanark Square in London E14 (the "Estate"). The Estate comprises three blocks of flats – Balmoral House, Aegon House and Marina Point – as well as other surrounding land, buildings, roads and parking.

ii) A head lease of the three blocks of flats was granted on 5 December 1986 for a term of 200 years less one day from 14 July 1986. The head lease is currently vested in Melrose Apartments Property Limited, an associated company of Lanark.

iii) An intermediate lease of the three blocks of flats was granted on 30 June 1988 for a term of 200 years less three days from 14 July 1986. The intermediate lease is currently vested in Lanark.

Relevant provisions of the Lease

9. The Lease contains the following provisions:

i) The premises demised by the Lease are the whole of the building at Marina Point excluding "the basement areas beneath [the building] save any footings foundations and columns aforesaid which run through such basement areas". In particular, Lanark retains the right to possession of the basement parking area beneath Marina Point, Balmoral House and Aegon House. The demise is of the building itself; it does not include any part of the building's curtilage.

ii) Clause 3(f) contains a covenant on behalf of the tenant concerning alterations which is in the following form:

> "(i) That no additional or new building or structure of any kind shall at any time hereafter be erected upon the Demised Premises or any part thereof without the prior consent in writing of the Lessor which shall not be unreasonably withheld or delayed
>
> (ii) Not at any time during the Term to make or permit or suffer to be made any alterations or addition to the main structure or any alterations in the external appearance or layout of the Demised Premises or any part thereof without in any of the foregoing cases the prior written consent of the Lessor (such consent not to be unreasonably withheld or delayed)"

10. The other provisions of the Lease that are relevant to the question of consent to alterations are as follows:

i) Clause 3(g)(i) contains an anti-nuisance covenant. It is in the following terms:

> "Not to do or permit or suffer to be done or remain upon the Demised Premises or any part thereof anything which may be or become a nuisance annoyance or disturbance inconvenience injury or damage to the Lessor or its tenants or the owners or occupiers of any property in the neighbourhood".

ii) Clause 3(g)(iv) contains a covenant against overloading. It is in the following terms:

> "Not to overload or permit or suffer to be overloaded the floors roofs or structure of the Demised Premises or permit or suffer the same to be used in any manner which will cause undue strain or interfere therewith or with the Car Park and not to install or permit or suffer to be installed any machinery on the Demised Premises which shall be unduly noisy or cause dangerous vibrations not to use or permit or suffer to be used the Demised Premises or any part thereof in such manner as to subject the same to any strain beyond that which it is designed to bear".

11. The ancillary rights granted in Schedule 1 of the Lease include rights of way over the Estate's roads for access purposes (paragraph 1), services easements (paragraph 2) and a right of entry onto retained parts of the Estate for the purposes of carrying out repairs to Marina Point (paragraph 3). The Schedule 1 rights do not include a right to use, or erect scaffolding on, the retained parts of the Estate.

1997 Deed of Variation

12. By a deed of variation entered into on 30 January 1997 (the "Deed of Variation"), the Lease was varied so as to add a right to park up to 16 cars in the parking area in the basement and the ground floor parking area "in such locations as shall be allocated by the Lessor from time to time".

Planning applications and decisions

Rooftop Works

13. There are two planning decisions relevant to the Rooftop Works:

i) a decision dated 28 April 2020 granting planning permission in relation to an application submitted on 7 October 2019 (numbered PA/19/02162) for a proposed rooftop extension to provide 3 additional floors to consist of 9 residential flats (the "Original Rooftop Planning Decision");

ii) a decision dated 29 July 2021 approving an application submitted on 11 June 2021 (numbered PA/21/01324) for variation of conditions in the Original Rooftop Planning Decision relating to approved plans and bicycle storage, permitting the relocation of bicycle storage envisaged in

that decision from the basement to the ground floor (the "Variation Decision").

Ground Floor Works

14. There are two planning decisions relating to the Ground Floor Works:

    i) a decision dated 23 June 2020 to grant prior approval for an application submitted on 28 April 2020 (numbered PA/20/00852) for a change of use from offices to five residential units (the "First Ground Floor Planning Decision");

    ii) a decision dated 17 May 2021 to grant prior approval for an application submitted on 24 March 2021 (numbered PA/21/00641/A1) to vary the First Ground Floor Planning Decision to permit the relocation of bicycle storage envisaged in the First Ground Floor Planning Decision from the basement to the ground floor (the "Second Ground Floor Planning Decision").

The exchanges between the parties

15. In a letter dated 26 May 2020, following the grant of permission for the Rooftop Works, Messenex's solicitors, William Sturges LLP ("WS"), wrote to Lanark applying for consent for the Rooftop Works. Lanark now accepts that this letter constituted a formal application for consent under clause 3(f) of the Lease notwithstanding the lack of supporting documentation.

16. On 8 June 2020, WS sent a further letter to Lanark noting that it had not received a response to its letter of 26 May 2020 and informing Lanark that it would "have no option but to advise [its] client to issue proceedings" if it had not received a response by 12 June 2020.

17. On 12 June 2020, Howard Kennedy LLP ("HK"), Lanark's solicitors, responded to that letter by email noting that no formal application for consent had yet been made and that Lanark would require "details of the proposals, including all plans and documentation".

18. In that email, HK also requested that WS respond with their client's proposals for a premium to be paid by Messenex to Lanark for its consent. It subsequently became apparent that this suggestion was made on a mistaken assumption as to the terms of the Lease. I have not referred to it further in this judgment.

19. On 19 June 2020, WS sent to HK by email a copy of the Original Rooftop Planning Decision and a copy of a planning brochure.

20. On 24 June 2020, following the First Ground Floor Planning Decision, WS sent an email to HK attaching a copy of the decision seeking consent from Lanark for the change of use. Lanark accepts that this email was and should be treated also as an application for consent for the Ground Floor Works as set out in the First Ground Floor Planning Decision.

21. On 10 July 2020, HK sent an email to WS attaching a document setting out the further information that Lanark would require in order to consider the applications for consent in relation to both the Rooftop Works and the Ground Floor Works. I have referred to this document as the "submission document" in this judgment. Inter alia, the submission document required Messenex to provide certain structural and other drawings. The relevant paragraphs are as follows:

> 2.01 Preliminary drawings submission
>
> Preliminary drawings must be submitted for approval to the Landlord before proceeding with final Architectural and Structural working drawings. This will avoid costly changes to final drawings. The preliminary set of drawings showing the Lease holders design shall minimally consist of two (2) sets of full-size, hard copy prints and one (1) electronic (DWG) copy of the plans, elevations, sections, sketches etc., necessary to describe the design fully.
>
> 2.02 Final drawing submission
>
> A minimum of six weeks prior to the Completion Date, the Lease holder must submit to the Landlord for approval, three (3) sets of full size, hard copy prints and one (1) electronic (DWG) copy of the complete Architectural and Structural working drawings, showing the entire Lease holders work to the Demised Premises.
>
> 2.03 Landlord's Approval:
>
> On the submission of the Lease holders Final Submission, the Landlord's Representative shall carry out a review of the proposals. The Landlord's Representative shall endeavour to review and respond to the Lease holders design submissions within two weeks (ten working days).

The document also provided for the submission of risk assessments and Method Statements at least two weeks prior to starting on site.

22. In the email of 10 July 2020, HK also requested undertakings for legal fees in relation to the applications for consent in the sum of £1,500 plus VAT for the Rooftop Works and £2,750 plus VAT for the Ground Floor Works.

23. On 28 August 2020, WS sent HK replies to Lanark's information requirements as drafted by Messenex's architect. The replies included links to the drawings submitted to and approved by the planning authorities and confirmed that the plans were not preliminary drawings as requested in the submission document, but architect's plans which would be representative of the final build works.

24. On 2 September 2020, on behalf of Messenex, WS agreed to the undertakings for fees requested by HK on 10 July 2020.

25. On 29 September 2020, HK responded to the email from WS of 28 August 2020 noting that they were reviewing the plans attached to the email and advising WS that "drawings can be submitted via any digital download link". In relation to a question concerning the interpretation of paragraph 2.02 of the submission document, HK confirmed that the reference to the "Completion Date" was to the date "when the build is complete". HK also requested further undertakings for architects and surveyors' fees in the amount of £1,750 plus VAT for each of the Rooftop Works and the Ground Floor Works. These were agreed by WS on behalf of Messenex on 14 October 2020.

26. On 16 October 2020, HK sent WS by email a first draft of a licence to alter for the Rooftop Works. The email noted that a site compound licence for the storage of materials during the construction works would also be required and that Lanark proposed to charge £350 per week for such a licence.

27. On 20 October 2020, HK sent an email to WS noting that the plans showed a bicycle store in an area of the basement which was not demised by the Lease.

28. Following the receipt of this email, there were exchanges of correspondence between the parties' advisers concerning Messenex's rights to use the parking spaces in the basement. Following these exchanges, Messenex sought to revise the planning approvals to permit the relocation of the bicycle storage to the ground floor.

29. On 12 November 2020, WS provided to HK a mark-up of the draft licence amended to include the Ground Floor Works. HK responded on 18 February 2021 stating that separate licences would be required for the two sets of works and that HK would prepare a draft licence for the Ground Floor Works. In their email, HK also suggested a compromise in relation to the construction of a bicycle store in the basement; asked for further details of the proposed site set-up for the Ground Floor Works; and requested payment of certain service charges, which Lanark asserted were outstanding.

30. On 16 April 2021, WS sent an email HK informing HK of the application for prior approval to vary the Ground Floor Works by the relocation of the bicycle store to the ground floor. WS also responded to the offer of a site compound

licence by putting forward an alternative proposal involving the use of car parking spaces at ground level for site storage and asked for details of the claim for outstanding service charges.

31. On 30 April 2021, WS informed HK that the same site set up zones would be used for both sets of works and enclosed architect's drawings numbered 501 and 502, which illustrated the site set-up and position of scaffolding on the ground floor and basement respectively.

32. On or about 25 May 2021, WS sent HK a copy of the Second Ground Floor Planning Decision.

33. On 28 May 2021, HK sent WS a separate draft licence in respect of the Ground Floor Works referring to the Second Ground Floor Planning Decision.

34. On 6 July 2021, WS sent HK by email amendments to the two draft licences. In a further email of the same date WS sent to HK, in relation to the Rooftop Works: a copy of Original Rooftop Planning Decision; a planning brochure; a planning application letter dated 10 June 2021 in support of the application, which resulted in the Variation Decision permitting the relocation of the bicycle storage from the basement to the ground floor; and the architect's drawings numbered 501 and 502 showing the site set-up plans. WS also sent, in relation to the Ground Floor Works: a copy of the Second Ground Floor Planning Decision; a planning brochure; plans of the ground floor numbered 1001 and 2001 showing the existing and proposed use of the ground floor (in particular, the relocation of the bicycle store to the ground floor).

35. On 29th July 2021 the Variation Decision was made.

36. On 2 August 2021, HK sent an email to WS: objecting to use of the basement for site storage (as shown on the drawing numbered 502); noting that some of the drawings and documents still indicated that bicycle storage would be in the basement; stating that exterior scaffolding would require a temporary licence and proposing a fee of £250 per week.

37. On 4 August 2021 WS emailed HK attaching an updated planning brochure which included the revised approved drawings for both the Rooftop Works and the Ground Floor Works. The drawings showed: no use of the basement as storage or a site compound; and the bicycle store located on the ground floor.

38. There followed a period during which the licences to alter were negotiated and drafts passed between the two solicitors firms.

39. On 16 November 2021, WS returned the draft licences to HK. At this point, there were three main points in dispute:

i) the time for completion in both licences;

ii) the precise extent of the indemnity given by Messenex in both licences;

iii) the fee to be paid for a hoist and scaffold licence in the licence for Rooftop Works.

40. These issues were resolved between the solicitors by 8 December 2021. On that date, HK asked WS to agree to Messenex's liability for Lanark's legal fees in the total sum of £6,000 plus VAT. HK sent WS clean copies of both licences for approval and asked for "a full set of plans" so that they could be approved by Lanark before engrossing.

41. WS sent the mechanical and electrical ("M&E") drawings for the Ground Floor Works to HK on 2 February 2022.

42. WS returned the licences with minor amendments on 3 February 2022. Also on that date, HK replied to WS requesting the architect's drawings for the Ground Floor Works and architect's, M&E and structural engineer's drawings for the Rooftop Works. WS responded to HK referring HK to the approved drawings accompanying the planning permissions.

43. On 4 February 2022, HK replied confirming that Lanark wanted to see the structural engineer's drawings for the Rooftop Works. WS replied stating that structural engineer's drawings were not available, but would follow the grant of consent.

44. HK circulated engrossments of the two licences on 22 February 2022. The main terms of the two licences are summarized at [62] to [66] below. The documents annexed to the two licences were:

i) in the case of the licence for the Rooftop Works:

a) drawing 501;

b) the plans approved in the Original Rooftop Planning Decision (but no plan which reflected the Variation Decision);

ii) in the case of the licence for the Ground Floor Works:

a) the prior approval planning brochure (from February 2021), the plans in which reflected the Second Ground Floor Planning Decision.

b) the M&E drawings relating to the Ground Floor Works.

45. On 11th April 2022 WS emailed HK notifying them that the documents annexed should be:

    i) in the case of the licence for the Rooftop Works:

        a) the Original Rooftop Planning Decision and the Variation Decision;

        b) the freeholder approval planning brochure (from August 2021);

        c) drawings 501 and 502;

        d) details of the bicycle store;

    ii) in the case of the licence for the Ground Floor Works:

        a) the Second Ground Floor Planning Decision;

        b) the freeholder approval planning brochure (from August 2021);

        c) M&E drawings relating to the Ground Floor Works.

46. After an exchange of emails, it was agreed that the original annexures were correct. On 10 May 2022, WS confirmed to HK that it was holding signed licences for both the Rooftop Works and the Ground Floor Works and asked HK to confirm the amount of costs.

47. On 23 May 2022, HK sent an email to WS stating that there had been "some confusion surrounding the plans". In summary, Lanark objected to the use of the basement parking spaces identified on drawing 502 for a site compound. HK pointed out that, under terms of the licences, Messenex only had the right to store materials in parking spaces referred to in the Deed of Variation. There was no right to use any part of the premises as a site compound. HK suggested that, if Messenex wanted to use car parking spaces on the ground floor (in addition to those which it was entitled to use under the Deed of Variation) as a site compound, it would need a separate compound licence and could only use the available parking spaces identified on an attached plan. Under that licence, Messenex would have to pay a fee of £50 per week per car parking space and a £10,000 deposit to cover potential damage to the spaces.

48. In an email dated 31 May 2022, on behalf of Messenex, WS agreed to remove drawing 502 from the annexures to the licences and to the inclusion of provisions allowing Messenex an option to use the car parking spaces on the proposed terms as a site compound.

49. On 21 June 2022, HK asked WS for a further undertaking in the sum of £2,000 plus VAT and disbursements to cover legal costs regarding the proposed site compound licence.

50. In the background to the exchanges concerning the proposed site compound licence, there was on-going correspondence between Mr Daniel Coleman of Messenex and Mr Georgiou of Lanark in relation to an offer made by Lanark to purchase Messenex's interest in Marina Point. In an email dated 3 August 2022, Mr Coleman accepted in principle an offer from Lanark of £10.5m for Messenex's interest in Marina Point.

51. The discussions regarding the sale of Messenex's interest in Marina Point broke down, but as part of those exchanges the issue of the outstanding service charges that Lanark asserted were due came to the fore once more.

52. On 3 November 2022, WS informed HK that counsel had been instructed to draft proceedings in relation to the unreasonable withholding of consent to the alterations.

53. On 4 November 2022, HK made revised proposals in relation to the use of ground floor car parking spaces for a site compound and the erection of scaffolding. As part of these proposals, HK informed WS that the payment of all outstanding service charges in full would be a precondition to the completion of both licences for alterations and that Messenex would be required to take a licence of all the car parking spaces that had been offered (rather than take an option). HK also requested an undertaking for a further £3,500 plus VAT for legal costs, which was to include costs incurred dealing with the site compound licence.

54. On 15 November 2022, WS replied to HK agreeing to the revised proposals on behalf of Messenex except that:

    i) Messenex wanted an option to use the additional parking spaces and would not pay for any spaces that it did not use;

    ii) Messenex did not agree to pay the service charges as a condition for the grant of the licences.

55. On 18 November 2022, HK sent an email to WS stating that it was "not compulsory" for Lanark to offer the "additional aspects" referred to in the email of 4 November 2022 and that the terms were not negotiable. In this email, HK reiterated the requirement for the service charges to be settled before the grant of the licences for alterations.

56. On 28 November 2022, WS responded to HK agreeing to all the points except the payment of the service charges, which WS stated should be dealt with separately.

57. In a second email of the same date, WS confirmed that Messenex would agree to pay HK's additional legal costs up to a maximum of £3,500 plus VAT but subject to the following conditions:

    i) any additional wording for the licences to cover the points that had now been agreed should be provided to WS within 5 working days;

    ii) WS would provide a response within 5 working days;

    iii) the licences must be completed within 14 days;

    iv) if the two licences did not complete within 14 days, the undertaking was to be treated as withdrawn.

58. On 5 December 2022, HK sent an email to WS refusing to accept an undertaking on those terms.

59. On 19 December 2022, WS sent HK a pre-action protocol letter and made an open offer of compromise.

60. On 31 March 2023, Messenex issued proceedings.

61. The Original Rooftop Planning Decision as varied by the Variation Decision lapsed on 28 April 2023 as a result of the failure of Messenex to begin the development before that date (which was a condition of the permission).

The terms of the draft licences for alterations

62. Over the course of their negotiation, several versions of the draft licences to make alterations were produced. However, subject to various exceptions that I describe later in this judgment, the basic structure of the draft licences remained the same and the changes over the course of the negotiations were relatively minor.

Licence for the Rooftop Works

63. The key terms of the engrossed version of the licence for the Rooftop Works (as circulated by HK on 22 February 2022) are summarized below.

    i) The "Works" are defined as: "the alterations and additions to the Subunderlet Premises briefly described in Schedule 1 and more particularly described in the Planning Permission and the Plans . . ."

ii) The "Planning Permission" is defined as "the Planning Permission dated 28th April 2021 (Ref/PA/19/02162) for the development of the Subunderlet Premises to construct the New Flats, a copy of which is annexed to this deed". (The reference to "28th April 2021" was an error. It should have been a reference to "28th April 2020".)

iii) The "Plans" were defined as the "drawings and specification for the Works listed in Schedule 1 and annexed to this deed and any additional drawings or specification or any varied or substituted drawings or specification for the Works that the Three Landlords may from time to time approve (such approval not to be unreasonably withheld or delayed)".

iv) "Three Landlords" refers to the freeholder, headlessee and intermediate lessee.

v) Licence for the Works is granted by clause 3.1.

vi) A right to erect a hoist and scaffold on or around the building (as shown in drawing 501) is granted by clause 3.3.1 for a fee of £300 per week (clause 3.3.15).

vii) Clause 4 sets out the covenants of Messenex.

a) Clause 4.1 contains requirements that Messenex had to fulfil before works commenced. These included:

i) to submit any Plans not already submitted for approval (such approval not to be unreasonably withheld or delayed) (clause 4.1.1);

ii) to obtain all "Necessary Consents" and produce them for approval (such approval not to be unreasonably withheld or delayed) (clause 4.1.2);

iii) to provide a programme for construction of the Works showing the design, supply, installation, construction, completion, and maintenance of the Works (clause 4.1.5);

b) Clause 4.8 provided for Messenex to provide a "Method Statement" relating to each "Key Element" to the Three Landlords for approval before commencing the Works.

The "Key Elements" were defined to include: the location of the hoist and scaffold; routes for delivery of material and removal of waste; storage areas for material and plant at the demised

premises; construction methods; site logistics; site security; and details of any structural reinforcement works to the building including structural calculations.

c) Clause 4.9 provided that a Method Statement must include:

i) a programme for each element of the Works;

ii) plans and drawings necessary to show the position of the Works and the methodology for carrying them out;

iii) structural reports, calculations and drawings (as required by the Three Landlords);

iv) a specification for the Works;

v) details of the means and route by which the tenant proposed to access the demised premises.

d) The Three Landlords were then either to approve the Method Statement or to provide written comments on it (clause 4.10). Messenex was permitted to resubmit a draft Method Statement on any number of occasions (clause 4.11.2). Any disputes were to be subject to arbitration (clause 5.21).

e) Under clause 4.22, all plant, equipment, and materials were to be stored on the demised premises, which was deemed to include the parking spaces which Messenex had the right to use under the Deed of Variation. (In earlier versions of the draft licence, the equivalent clause required materials to be stored on the demised premises themselves.)

f) Messenex agreed to pay £2,750 plus VAT in respect of legal costs, and £1,750 plus VAT in respect of architectural and surveyor costs (clause 4.29).

64. The plans attached to the engrossed licence for the Rooftop Works were the plans approved in the Original Rooftop Planning Decision.

Licence for the Ground Floor Works

65. Subject to necessary changes to reflect different descriptions of the proposed works, and to refer to relevant planning permissions and plans, the substantive provisions of the licence for the Ground Floor Works were similar save that:

i) the licence also contained a licence for a change of use;

ii) some of the covenants contained in the licence for the Rooftop Works were omitted from the licence for the Ground Floor – in particular, the covenants regarding a building contract and collateral warranties (see below);

iii) there was no requirement for a Method Statement (see below);

iv) there were no clauses relating to a hoist or scaffolding; and

v) Messenex agreed to pay £4,000 plus VAT in respect of legal costs and £1,750 plus VAT in respect of architect's and surveyor's costs (clause 4.23).

66. The plans attached to the engrossed licence for the Ground Floor Works reflected the Second Ground Floor Planning Decision (including the bicycle store on the ground floor).

The witness evidence

67. As I have mentioned above, the documentary evidence included four witness statements.

68. The witness evidence filed on behalf of Messenex was provided by two partners in WS, Messenex's solicitors. For the most part, their evidence provided a narrative of the course of the negotiations between the parties and is reflected in the narrative that I have provided above.

69. The witness evidence filed on behalf of Lanark comprised a statement from Mr George Georgiou, the sole director of Lanark. The main points that I take from his evidence are as follows:

i) Mr Georgiou was appointed as director of Lanark on 19 December 2022, but he was "a decision maker on behalf of Lanark" before that time. All decisions made on behalf of Lanark at all material times were made by Mr Georgiou.

ii) In the early stages of the negotiations (before July 2020), Mr Georgiou was confused as to the precise scope of Messenex's application. It was for this reason that he asked for a document to be prepared setting out Lanark's requirements. This was the submission document that was sent by HK to WS on 10 July 2020.

iii) Mr Georgiou says that the precise scope of the application remains unclear to him, but the proposed works are "substantial" and that "for this reason, Lanark's solicitors requested structural engineer drawings in

the [submission document] in respect of the proposed works, which Messenex did not provide".

iv) In relation to the negotiations concerning Messenex's proposals to use other parts of the Estate (not forming part of the demised premises) to erect scaffolding or for use as a site compound, Mr Georgiou treated these proposals as commercial negotiations outside the scope of Lanark's obligations under the Lease.

v) As regards Messenex's initial proposals to use the basement car park for the site compound, Mr Georgiou regarded the proposal as inappropriate due to their impact on other leaseholders and users of the basement car park. The revised proposal was to use some of the ground floor parking spaces to erect scaffolding and for use as a site compound. Lanark requested a payment for the use of a fixed number of spaces because:

a) it would be unsafe to allow other users to park close to the building site where scaffolding was erected, and a site compound was in place;

b) Lanark would lose income from renting the car parking spaces during the works; and

c) "the only sensible way to do this would be to cordon the entire area off."

vi) As part of the negotiations of the additional rights, Lanark requested payment of the outstanding service charges (in the sum of £79,393.59 for the period to September 2022).

The relevant legislation and legal principles

70. As I have mentioned above, Messenex's case is that Lanark unreasonably withheld consent to the Rooftop Works and the Ground Floor Works.

71. This issue involves consideration of section 19(2) of the Landlord and Tenant Act 1927 ("LTA 1927") which implies into all leases containing a covenant not to carry out alterations without the landlord's consent a proviso that consent to improvements will not be unreasonably withheld. Section 19(2) provides as follows:

> (2) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without a licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be

> unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.

72. There is no dispute between the parties that the Rooftop Works and the Ground Floor Works should be regarded as "improvements" for the purposes of section 19(2) LTA 1927.

73. Section 19(2) applies "notwithstanding any express provision to the contrary" and so, if the express terms of the lease are less favourable to the tenant, the statutory provisions apply in priority to the terms of the relevant lease. The Lease is potentially more favourable to the tenant than the provisions of section 19(2) in that it also provides in clause 3(f) for any consent not to be unreasonably delayed. It has been no part of Messenex's case before this court that consent has been unreasonably delayed. I have treated clause 3(f) and section 19(2) as being of similar scope or, where section 19(2) makes specific provision – for example, in relation to costs – as if the provisions of section 19(2) apply.

The issues between the parties

74. There are three issues before the court. In summary, they are:

i) the scope of any application for consent made by Messenex;

ii) the reasons on which Lanark relies for withholding consent;

iii) whether Lanark acted unreasonably in relying upon those reasons.

Issue 1

75. The first issue (Issue 1) concerns the scope of the applications for consent. The parties put it in the following terms:

> "What applications were made for consent under clause 3(f) of the Lease; when and by what means was each application made; what was the nature and scope of the works in respect of which consent was being sought in each case?"

76. In relation to the Rooftop Works, the parties agree that the request contained in the Messenex's solicitors' letter dated 26 May 2020 was an application for consent under clause 3(f) of the Lease in relation to the Rooftop Works and that the request contained in the e-mail from Messenex's solicitors dated 24 June 2020 was an application for consent under clause 3(f) of the Lease in relation to the Ground Floor Works – notwithstanding its reference only to a change of use of the ground floor premises. However, the parties differ significantly in their approaches to the effect of the subsequent correspondence and negotiations on those applications.

The parties' submissions

77. Mr Harrison, for Messenex, submits that the court should consider the request contained in the application as a continuing one so that, where information was delivered over a period of time – from the time at which information was initially provided to the issue of proceedings – the court should determine the nature and scope of the application by reference to the circumstances pertaining and information which has been provided up to the time at which proceedings are issued. He relies on the judgment of Eve J in *Ideal Film Renting Co. v Neilson* [1921] 1 Ch 575 ("*Ideal*") (at p582) in support of this submission. He also refers to the leading text of *Crabb, Seitler and Seitler, Leases: Covenants and Consents* (Hart 3rd ed.) at 8.3.2.

78. On that basis, he says that the fact that, on 22 February 2022, Lanark's solicitors were able to circulate engrossed versions of the licences for the Rooftop Works and the Ground Floor Works demonstrates that Lanark was at that stage clear as to the nature and scope of the works and the applications. The later exchanges concerning the negotiations for a site compound licence did not affect the proposed alterations to the demised premises.

79. Mr Duckworth, for Lanark, takes a different view. He submits that the only applications for consent made by Messenex to Lanark under clause 3(f) of the Lease were the application contained in the Messenex's solicitors' letter dated 26 May 2020 in relation to the Rooftop Works and the application contained in the e-mail from Messenex's solicitors dated 24 June 2020 in relation to the Ground Floor Works. Their scope was defined by reference to the documents that were attached to them at the time – principally the planning consents obtained by Messenex on 28 April 2020 and 23 June 2020. Those applications remained static. They included proposals which Messenex no longer intends to pursue and most importantly referred to the bicycle storage being located in the basement, which was not part of the demised premises. If Messenex wanted to obtain consent for an amended proposed set of works, it was required to make new applications. A new application would require a degree of formality.

80. Mr Duckworth relies on the decisions in *NCR Ltd v Riverland Portfolio No1 Ltd (No2)* [2005] EWCA Civ 312 ("*NCR*") and *Royal Bank of Scotland Plc v Victoria Street (No.3) Ltd* [2008] EWHC 579 (Ch) ("*RBS*") in support of his position. On his approach, the extract from the judgment of Eve J in *Ideal* (at p582) and the passage from *Crabb, Seitler and Seitler* (at 8.3.2) on which Mr Harrison relies relate only to the time at which the reasonableness of any withholding of consent is to be judged. They do not relate to the nature and scope of any application.

Discussion

81. It is common ground between the parties that neither the Lease nor the legislation (section 19(2) LTA 1927) prescribes any particular form or degree of formality for an application for consent to be made. The important point is that it must be clear to the landlord that a request for consent to particular works has been made and that a response is required.

82. Lanark's case is that the process of application and consent and the serious legal consequences that flow from it require a degree of formality. Mr Duckworth points to the judgment of Carnwath LJ in *NCR* – a case concerning an application for consent to the underletting of a property under the Landlord and Tenant Act 1988 ("LTA 1988") – where he says (*NCR* [19]):

> First, a clear distinction needs to be drawn between informal exchanges, both internally and between the parties, and the formal process of application and decision contemplated by the Act. On the one hand, it is in all parties' interests that there should be such free exchanges, with a view to reaching an agreed solution, without prejudicing their respective positions under the Act. On the other hand, the serious legal consequences resulting from the statutory scheme require that the process of application and decision should be subject to a reasonable degree of formality.

83. Mr Duckworth also refers to a later passage in Carnwath LJ's judgment, where he concludes that a purported variation to an application for consent does not invalidate the original application – and the landlord remains under a duty to respond to it. Carnwath LJ says this (at *NCR* [27]):

> 27. In my view, the point is in any event misconceived. The failure to inform Riverland of this change may have been discourteous. But it does not mean that the application was invalidated. The original application had not been withdrawn and Riverland remained under a duty to consider it on its own terms. Of course, if, before or after consent to an underletting has been obtained, the terms of the underletting are changed materially, then a revised consent may be needed. However, the

> lessor's duty at any time can only be related to the proposal which is actually before him.

84. Mr Duckworth submits that this passage demonstrates that an application once made remains static and that a further application is required if a purported variation to that application makes a material change to its scope. In support of this proposition, he also refers to the decision of Lewison J in *RBS* - a case involving a consent to assign a lease – where he says (at *RBS* [40]):

> In my judgment the landlord is entitled to make a decision on the basis of the application as presented by the tenant. If the tenant wishes to make alternative proposals in order to overcome the landlord's reasons for objection it is up to the tenant to do so. There is no bar on the making of multiple applications for consent to assign. I do not consider that the landlord has a statutory duty imposed by the Landlord and Tenant Act 1988 to facilitate the tenant's overcoming the landlord's reservations. If the landlord does so that is a matter for him and no doubt it is courteous and good tenant relations to do so, but I do not consider that the Act imposes a duty to that effect.

85. Both *RBS* and *NCR* concerned the provisions of section 1 of the Landlord and Tenant Act 1988 ("LTA 1988") which relate to covenants on the part of the tenant not to enter into an assignment or underlease of property without the consent of the landlord. Mr Harrison, for Messenex, points out that section 1 LTA 1988 imposes a duty on the landlord to respond to an application for consent "within a reasonable time". There is no such requirement in LTA 1927. He says that it is understandable that a greater degree of formality is required in such cases so that the parties are aware of the time from which the landlord is under a duty to respond.

86. I have not been pointed to any direct authority that deals with this issue in the context of an application for consent to the making of alterations under section 19(2) LTA 1927.

87. Messenex's case is that an application for consent to alterations can be a continuing process. In a case where consent is withheld rather than refused, that process can continue up to the issue of proceedings and the scope of the application and the reasonableness of the landlord's withholding of consent should be judged at that time. In support of Messenex's position, Mr Harrison referred me to a passage from the decision of Eve J in *Ideal* where Eve J said (at p582):

> That brings me to the substantial question I have to decide: Has the consent of the defendant been unreasonably withheld to the making of these assignments? I agree that in answering that question I have to consider the circumstances and the knowledge

> of the lessor at the date when the request was made, but in this connection it must not be overlooked that the request was a continuing one down to the commencement of the action, and that a good deal happened between May 22, 1920, when the defendant received the first letter from the liquidator, and June 23, when the writ was issued. In considering the defendant's attitude I must, I think, pay regard to the circumstances subsisting at the later date. Was the defendant on that date acting reasonably in still withholding his consent?

88. Mr Harrison also referred me to an extract from *Crabb, Seitler and Seitler, Leases: Covenants and Consents* (Hart 3rd ed.) where the authors state (at 8.3.2):

> The date on which reasonableness is to be judged depends on the circumstances. In any action by the tenant for a declaration, it is the date of the landlord's refusal (if any) or where there has simply been a withholding, the date of issue of the claim…

89. This passage from *Crabb, Seitler and Seitler* is clearly focussed on the time at which the reasonableness (or otherwise) of the landlord's actions (or inaction) is to be determined. Mr Duckworth also argues that the judgment of Eve J in *Ideal* does not support Messenex's position. In any event, *Ideal* was decided before the introduction of LTA 1927.

90. I agree with Mr Duckworth that it is not clear from the passage from Eve J's judgment in *Ideal* whether Eve J is contemplating that the "request" remains static, but the facts and circumstances by reference to which the reasonableness or unreasonableness of the landlord's actions are judged can be determined at the commencement of proceedings or whether the scope of the "request" can also be treated as determined at that time. However, notwithstanding those limitations, I agree with the broad thrust of Mr Harrison's submission.

91. As a starting point, there is no "formal process of application and decision" contemplated by clause 3(f) of the Lease or by section 19(2) LTA 1927. There is no reference in section 19(2) to an application or even a request for consent. This is in contrast to section 1 LTA 1988 which expressly refers to a "written application" by the tenant for consent and imposes obligations on the landlord to respond within "a reasonable time" to an application. Section 19(2) simply imports a covenant that consent is not to be "unreasonably withheld". The only question therefore is whether consent has been unreasonably withheld.

92. As part of the process of determining whether consent has been unreasonably withheld, it will of course be necessary to determine the nature and scope of the proposal that was put to the landlord against which the reasonableness of the landlord's withholding of consent can be judged. In practice, I can understand that it would be good practice for tenants to make a written application for

consent that clearly sets out the scope of the works for which consent is requested and expressly requests consent. However, it would seem me that all that is ultimately required for the purposes of section 19(2) is that at a point in time: (i) the landlord was aware that it was being asked to give its consent to certain works; and (ii) the scope of the works to which the landlord was being requested to give consent are sufficiently clear. Those issues have to be determined by reference to the facts and circumstances at that time. In a case where consent has been withheld rather than refused, that point in time can be any time up to the date on which proceedings are commenced and – as stated in *Crabb, Seitler and Seitler* at 8.3.2 – the reasonableness or otherwise of the landlord's response is then judged by reference to the facts and circumstances at the date on which proceedings are commenced.

93. I turn now to the facts of this case. It is clear to me that at the time at which Lanark's solicitors circulated the engrossments (on 22 February 2022) both parties were clear as to nature and scope of the proposed works on the demised premises. There was a subsequent exchange of correspondence concerning the attachments to those engrossments, but that did not affect the scope of the works. The subsequent negotiations around the licence for the site compound in the additional car parking spaces took place against the background of that proposal. I agree with Mr Harrison that those negotiations did not affect the scope of the works for which consent was requested under the Lease as they did not affect the demised premises – although they may concern the reasonableness or otherwise of Lanark's response (a point to which I will return later in this judgment). Furthermore, Lanark was well aware that it was being asked for consent to the proposals as set out in the engrossed licences. It is against those proposals that the reasonableness of Lanark's withholding of consent should be judged by reference to the facts and circumstances existing at the time of the commencement of these proceedings (per Eve J in *Ideal* and as set out in *Crabb, Seitler and Seitler* at 8.3.2).

Issue 2 and Issue 3

94. The second issue before the court (Issue 2) concerns the reasons given by Lanark for withholding consent. The parties expressed this issue in the following terms:

> What were the reasons why the Defendant had not given its consent to the works sought by the application(s) by the time these proceedings were issued?

95. The third issue (Issue 3) concerns the reasonableness or otherwise of Lanark's withholding of consent to the proposals on the basis of those reasons. The parties expressed this issue in the following terms:

> Which (if any) of those reasons were reasonably held and was the landlord acting reasonably or unreasonably within the meaning of clause 3(f) of the Lease in failing to give consent to the works by the time these proceedings were issued?

96. In their list of issues, the parties identified four reasons on which Lanark relies for withholding consent to the proposed works. In summary, those reasons are:

    i) Messenex was asked to provide, but failed to provide, structural engineer's drawings;

    ii) the works involve trespass on property retained by Lanark;

    iii) Messenex failed to provide unconditional undertakings for Lanark's reasonable costs;

    iv) lack of clarity in the Messenex's proposals.

97. I propose to address Issues 2 and 3 together by reference to the reasons that Lanark has advanced for withholding consent to the proposed works.

The relevant legal principles

98. There was little dispute between the parties on the main legal principles that should be applied when approaching these issues. I will address any contentious issues in the context of my discussion of the reasons provided by Lanark for withholding consent. For present purposes, it will assist my explanation if I set out the principles which were largely agreed between the parties.

Issue 2 – identification of reasons for withholding consent

99. As regards Issue 2, the parties agree that the reasons on which a landlord relies as grounds for withholding consent must be the actual reasons that influenced the landlord's decision at the time (*Tollbench v Plymouth City Council* (1988) 56 P & CR 194 at p200). Those reasons need not have been communicated to the tenant (*Kalford v Peterborough City Council* [2001] 3 WLUK 474 per McCombe J at [38]-[40]).

100. The identification of those reasons involves a "a subjective enquiry" into "what was in the mind of [the landlord] at the time" (*Tollbench v Plymouth City Council* (1988) 56 P & CR 194 at p200 and *Iqbal and others v Thakrar and another* [2004] 3 EGLR 21 ("*Iqbal*") per Peter Gibson LJ at [27]).

Issue 3 – whether those reasons were reasonably held and whether Lanark was acting reasonably in relying upon them

101. Issue 3 involves an objective enquiry as to whether the reason in the landlord's mind was reasonable or unreasonable (*Iqbal* [27] per Peter Gibson LJ). In relation to this issue, in his skeleton argument, Mr Harrison set out an extract from the leading text of *Woodfall: Landlord and Tenant, looseleaf edition* which (at paragraph 11.262) summarizes the key principles taken from the judgment of Peter Gibson LJ in *Iqbal* (at [26]) with some minor refinements as follows:

> 1. The purpose of the [covenant] is to protect the landlord from the tenant effecting alterations and additions that damage the property interests of the landlord.
>
> 2. A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests.
>
> 3. It is for the tenant to show that the landlord has unreasonably withheld his consent to the proposals that the tenant has put forward. Implicit in that is the necessity for the tenant to make sufficiently clear what his proposals are, so that the landlord knows whether he should refuse or give consent to the alterations or additions.
>
> 4. It is not necessary for the landlord to prove that the conclusions that led him to refuse consent were justified, if they were conclusions that might be reached by a reasonable landlord in the particular circumstances.
>
> 5. It may be reasonable for the landlord to refuse consent to an alteration or addition to be made, for the purpose of converting the premises to a proposed use even if not forbidden by the lease. But whether such refusal is reasonable or unreasonable depends on all the circumstances. For example, it may be unreasonable if the proposed use was a permitted use and the intention of the tenant in acquiring the premises to use them for that purpose was known to the freeholder when the freeholder acquired the freehold.
>
> 6. While a landlord need usually only consider his own interests, there may be cases where it would be disproportionate for a landlord to refuse consent having regard to the effects on himself and on the tenant respectively.
>
> 7. Consent cannot be refused on grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment.

> 8. In each case, it is a question of fact depending on all the circumstances whether the landlord, having regard to the actual reasons that impelled him to refuse consent, acted unreasonably.

102. I did not understand Mr Duckworth to demur from those basic principles.

103. I should also refer to an additional point. In his submissions, Mr Duckworth asserted that it is not necessary for Lanark to show that all of its reasons are reasonable. If the court finds that some of its reasons are good reasons for withholding consent, Lanark should be regarded as having acted reasonably in withholding consent.

104. I accept that point to some extent. The question is addressed in the Court of Appeal's decision in *No.1 West India Quay (Residential) Limited v East Tower Apartments Ltd* [2018] EWCA Civ 250 ("*No.1 West India Quay*"), to which I was referred by the parties on another issue. In that case, where the court had found that some of the reasons advanced by the landlord for refusing consent to an assignment of a lease were reasonable, but others were not Lewison LJ (with whom the other members of the court agreed) said this (at [42]):

> In short, in my respectful opinion, the judge asked himself the wrong question. The question was not: would the landlord have maintained the unreasonable reason if the reasonable conditions had been complied with? Rather it is: would the landlord still have refused consent on the reasonable grounds, if it had not put forward the unreasonable ground? To put the point another way: the question is whether the decision to refuse consent was reasonable; not whether all the reasons for the decision were reasonable. Where, as here, the reasons were free-standing reasons each of which had causative effect, and two of them were reasonable, I consider that the decision itself was reasonable.

105. So, if the conclusion that I reach is that some of the grounds on which Lanark relies are reasonable and others are not, the question is whether Lanark acted reasonably in withholding consent in the light of those reasons.

The structural engineer's drawings

106. I will turn now to the reasons given by Lanark for withholding consent.

107. The first of these is that Messenex was asked to provide, but refused and failed to provide, the structural engineer's drawings required to demonstrate that the proposed works (in particular, the Rooftop Works) were sound in structural engineering terms and otherwise consistent with the covenant in clause 3(g)(iv) of the Lease (overloading).

Issue 2

The parties' submissions

108. Messenex's position is that the failure of Messenex to provide the structural engineer's reports and drawings was not a reason that Lanark withheld its consent. Although the reports and drawings were referred to in the submission document sent on 10 July 2020, in subsequent discussion and negotiation it was agreed that the relevant drawings would be provided at a later stage (after approval for the works).

109. Mr Harrison noted that there had been no objections from Lanark or HK to the plans attached to the architect's responses to the submission document, which were sent to HK under cover of WS's email of 28 August 2020.

    i) In relation to the Rooftop Works, every version of the draft licence referred to the provision of structural drawings as part of the Method Statement (see clause 4.9) and so was consistent with the structural drawings being provided at a later stage. The issue was resurrected by HK in their email of 3 November 2022, but subsequently dropped.

    ii) In relation to the Ground Floor Works, the position was even clearer. The provisions regarding the provision of a Method Statement (including the obligation to deliver structural reports and drawings) were deleted after the first draft following a comment by WS that the plans and specifications already provided should "provide sufficient detail". And several covenants (concerning the provision of a building contract and collateral warranties) that were present in the licence for the Rooftop Works were removed from the draft licence for the Ground Floor Works following a comment from WS that the Ground Floor Works were "not structural".

110. Lanark's case is that the structural integrity of the building was a legitimate concern for Lanark. The failure of Messenex to provide the structural engineer's drawings and reports as requested in the submission document was a reason for Lanark withholding its consent. This was clear from the witness evidence of Mr Georgiou, which was unchallenged.

111. Furthermore, Mr Duckworth says the history of the negotiations does not undermine and indeed supports that evidence. The structural report submitted by Messenex in support of its original planning application provided only an initial assessment, but identified the increase in "dead loads" as a material issue that would require "comprehensive analysis". The submission document issued by Lanark on 10 July 2020 provided for a two-stage process under which preliminary drawings were to be provided before approval was given and final

drawings for the works would be provided at a later stage after approval, but before the completion of the works. The provisions relating to the Method Statement in the licence for the Rooftop Works reflect the second stage in that process. The draft licences did not need to provide for the provision of the preliminary drawings because the intention always was that they were to be provided before approval was given and the licences signed. The drafting was entirely consistent with that approach.

Discussion

112. On this issue, I will begin with Mr Georgiou's evidence.

113. Mr Harrison says that there is no clear statement in Mr Georgiou's witness statement to the effect that he (and so Lanark) was relying upon the failure to provide assurance in relation to structural integrity as a reason for withholding consent. I disagree. The statement is reasonably clear. Mr Georgiou's evidence is that the works were "substantial" and that "for this reason, Lanark's solicitors requested structural engineer drawings in the [submission document] in respect of the proposed works, which Messenex did not provide". The clear implication is that the structural integrity of the building was a concern and the failure to provide the structural drawings was a reason for Lanark withholding its consent.

114. The other point that I take from Mr Georgiou's statement is that Mr Georgiou treats the proposals as a whole. His statement does not distinguish between the Rooftop Works and the Ground Floor Works. The reference to the works being "substantial" and to the structural drawings not having been produced relates to the entire project. That does not seem an unreasonable perspective. Although there were separate planning permission processes for the Rooftop Works and the Ground Floor Works, the project was planned as a whole, the draft licences were negotiated in parallel, the proposal to add three storeys to the building and, at the same time, to reconfigure the ground floor affected the structural integrity of the building as a whole, and there was significant interrelationship between the Rooftop Works and the Ground Floor Works – see, for example, the transfer of the bicycle storage from the basement to the ground floor. My starting point is therefore that Mr Georgiou's evidence is that the failure to provide structural drawings was a reason for Lanark withholding its consent to both the Rooftop Works and the Ground Floor Works.

115. In some respects, the documentary evidence supports the evidence in Mr Georgiou's witness statement. The submission document is reasonably clear that a two-stage process was envisaged by Lanark involving the submission of some preliminary structural drawings before consent was given and then more detailed structural drawings at a later stage, but before completion of the works. Once again, no distinction is made between the Rooftop Works and the Ground Floor Works. There is no suggestion in the correspondence that Lanark accepted

that the provision of the architect's plans (on 28 August 2020) met this initial requirement.

116. The draft licence for the Rooftop Works is consistent with the two-stage approach. As Mr Duckworth submits, it assumes that preliminary structural drawings will be delivered before the licence is signed and the drawings required by the draft licence as part of the Method Statement procedure form the second stage of the process. Consistent with that approach, HK requested the drawings in relation to the Rooftop Works in the exchange of emails between 2 and 4 February 2022 with specific reference to the structural engineer's drawings for the Rooftop Works. Although Mr Harrison says that the point was subsequently dropped, and so was not a reason for withholding consent at the time of the issue of proceedings, I do not accept that submission. There is no evidence to support it, only an absence of any reference to the provision of drawings in the later correspondence. And, as Mr Duckworth submits, that absence of evidence is explained by the fact that the parties were dealing with other matters which appeared more pressing at the time, principally the negotiation surrounding the site compound, the use of car park spaces to erect scaffolding and the unpaid service charges.

117. Although the provisions of the draft licence for the Ground Floor Works are not expressly inconsistent with a requirement that preliminary structural drawings would be provided before consent was given, the absence of the provisions relating to the Method Statement removes the second stage of the process envisaged by the submission document. Furthermore, it is notable that HK in the email correspondence between 2 and 4 February 2022 prior to the production of engrossments refers only to the provision of structural engineer's drawings for the Rooftop Works and not the Ground Floor Works. The evidence does therefore tend to support Mr Harrison's position that the requirement in the submission document for the provision of preliminary structural drawings in relation to the Ground Floor Works had been dropped by Lanark before the proposals were in their final form at the time of the circulation of the engrossed documents in February 2022 and certainly by the time of the issue of proceedings.

118. That having been said, Mr Duckworth says that I have to accept Mr Georgiou's evidence that the failure of Messenex to provide structural engineer's drawings was a reason for Lanark withholding its consent to both Rooftop Works and the Ground Floor Works. As I have said, in my view, Mr Georgiou, and Lanark, regarded the proposals as a package. Accordingly, even if the requirement for the drawings in relation to the Ground Floor Works had fallen away, the failure of Messenex to provide structural engineer's drawings in relation to the Rooftop Works was regarded as a reason for withholding consent to both sets of works and remained a reason at the time of the issue of proceedings.

Issue 3

119. I now turn to the question of whether, in all the circumstances, Lanark acted reasonably in withholding consent on the ground that it had not received the preliminary structural engineer's drawings.

120. On this issue, Mr Harrison relies primarily on his argument that the documents required the provision of structural drawings at a later stage, that HK, on behalf of Lanark, had accepted that approach and that it was therefore unreasonable for Lanark to rely on the failure of Messenex to provide the preliminary drawings in advance.

121. For the reasons that I have given, in my view, that was not the case in relation to the drawings for the Rooftop Works. Furthermore, the underlying reason that Lanark wanted to view the preliminary structural engineer's drawings before providing its consent was a reasonable one. The addition of three floors to a four-storey building is on any analysis "substantial". The question of the effect of those proposals on the structural integrity of the building had already been raised as a potential concern by Messenex's own structural engineer. It was, in my view, reasonable for any landlord in those circumstances to require some assurance in the form of preliminary structural drawings in relation to the structural integrity of the building before consent was given even if more detailed drawings and reports were to be prepared after consent had been given through the Method Statement procedure. (See by way of example, *Iqbal* [35]).

122. As Mr Duckworth points out, the effect of Messenex's argument is that Lanark was being asked to provide consent to the works in advance of receiving the drawings so that the consent effectively became conditional upon their later provision. But it is not for the landlord to design conditions on which consent can be given. It is for the tenant to formulate a proposal in relation to which the landlord should grant or refuse consent (see *Iqbal* [31] – [32]).

123. The question is, once again, whether the position is any different for the Ground Floor Works. Mr Harrison says that there were no structural issues in relation to the Ground Floor Works. This position was accepted by HK on behalf of Lanark as part of the negotiation for the licence for the Ground Floor Works. It follows that it cannot be reasonable for Lanark to rely upon structural issues to withhold consent to those works. Mr Duckworth says that the Ground Floor Works were equally substantial and required the removal of potentially load-bearing walls. But even if there was no other evidence, it was reasonable for a landlord in Lanark's position to require some assurance as to the structural integrity of the building before giving consent to the Ground Floor Works.

124. As discussed above, the failure of Messenex to provide structural engineer's drawings for the Ground Floor Works themselves was not a reason for Lanark

withholding consent to those works. However, the Rooftop Works and Ground Floor Works were viewed by Lanark as a package. The failure of Messenex to deliver structural engineer's drawings in relation to the Rooftop Works was a reason for Lanark to withhold its consent to the project as a whole. That was not an unreasonable approach given the inter-relationship of the two sets of proposals.

125. It follows that Lanark was not unreasonable in relying upon the failure to produce preliminary structural engineer's drawings in relation to the Rooftop Works as grounds for withholding its consent to the Rooftop Works and Ground Floor Works.

Trespass on retained land

126. The second reason on which Lanark relies for withholding its consent to the proposed works is that the works involve trespass on property retained by Lanark and/or the exercise of rights over that retained land which Messenex does not possess under the terms of the Lease.

127. On this question, Mr Harrison made two main points.

i) The first was a threshold issue as to whether in order for a reason to the be a legitimate reason for the purposes of section 19(2) LTA 1927 it must relate directly to the works themselves or whether the reasons could extend to other interests of the landlord (such as trespass on retained land or the exercise of rights which the tenant did not possess or had not agreed the terms on which it would be entitled to exercise appropriate rights).

ii) The second was that the grant of the additional rights was not an issue at the time of the issue of proceedings and so the issue of trespass was not one on which it was reasonable for Lanark to rely.

128. Mr Harrison addressed both of the issues to which I refer above as part of his submissions on Issue 2. This was, on the basis that, if the risk of trespass or Messenex's lack of additional rights was not a legitimate reason for withholding consent and so it could not have been one which was properly relied upon by Messenex. In his skeleton argument, Mr Duckworth's answer on Issue 2 was simply that the question of trespass on retained parts of the Estate was an issue referred to in Mr Georgiou's statement and there was no evidence to contradict that statement. In argument, however, Mr Duckworth did engage directly with Mr Harrison's submissions on Issue 2.

129. Given the subjective nature of the test involved in Issue 2, it seems to me that Mr Harrison's points are better made in the context of what the parties describe as Issue 3 – that is whether the reason given was reasonably held by Lanark and

whether it was reasonable for Lanark to rely upon it. Furthermore, given that the substance of the parties' arguments on Issue 3 was much the same, I intend to deal with Mr Harrison's points in that context.

130. I will deal with Mr Harrison's two points in turn.

Must the reasons be confined to the works themselves?

The parties' submissions

131. On the first issue, in summary, Messenex says that the only dispute between the parties following the issue of the engrossments on 22 November 2022 concerned use of some of the ground floor car parking spaces as a site compound. The licence for the use of a hoist and scaffolding for the rooftop works had been agreed but then became the subject of further negotiations. Messenex does not dispute that Lanark was entitled to negotiate terms for those additional rights as it saw fit to do so. Messenex accepts that there was no obligation on Lanark to act reasonably in relation to the negotiation of terms for the additional rights either under section 19(2) LTA 1927 or under the terms of the Lease. However, these additional rights do not affect the actual works on the demised premises. The negotiation of the terms for these additional rights was a separate matter from the question of consent for the proposed works. Consent was only required for the works on the demised premises themselves. A landlord was not entitled to withhold consent for the works in circumstances where the additional rights could be negotiated separately and at a later stage as contemplated by the draft licence for the Rooftop Works.

132. Lanark says that the question of consent relates to the proposal before the landlord. The Rooftop Works and the Ground Floor Works both required the exercise of additional rights. Lanark was entitled to negotiate the terms for the grant of those rights as it saw fit. It was reasonable for Lanark to take into account the potential infringement of rights relating to the retained property in determining whether to give or withhold consent to the works. Messenex's analysis involved an artificial distinction between the works themselves and their implementation.

Discussion

133. My starting point on this issue is once again, the judgment of Peter Gibson LJ in *Iqbal*. The first two principles that Peter Gibson LJ identifies in *Iqbal* at [26] (which are those set out in the extract from *Woodfall* to which I referred above) are, in summary: (i) that the purpose of the covenant (obliging the tenant to seek the consent of the landlord to any alterations) is to protect the landlord's property interests and so (ii) the landlord is not entitled to refuse or withhold consent on grounds which do not relate to the landlord's property interests.

134. It is possible to read that second principle narrowly and so restrict quite severely the grounds on which a landlord might rely for withholding consent. However, later case law suggests that this principle should not be given an overly restrictive reading.

135. The example to which I was taken was the case of *Sargeant v Macepark (Whittlebury) Limited* [2004] EWHC 1333 (Ch) ("*Macepark*"). In that case, Lewison J accepted that a landlord's trading interests from an adjoining or neighbouring property could properly be taken into account as a reason for refusing or withholding consent to carry out alterations. He said this (*Macepark* [53] and [54]), when referring to the judgment of Lloyd J in *Sportoffer Limited v Erewash Borough Council* [1999] 3 EGLR 136:

> 53. In *Sportoffer Ltd v. Erewash Borough Council* [1999] 3 E.G.L.R. 136 the landlords were the local authority, and operated a municipal leisure centre. The tenants were the tenants of a squash club and applied for consent to a change of use to use as a leisure centre. The landlords objected on the ground that the proposed change would damage the viability of their municipal leisure centre; and their refusal was upheld as reasonable by Lloyd J. He was referred both to *Whiteminster Estates* and to *International Drilling Fluids*. He concluded:
>
> > "I would find it surprising if a landlord could not reasonably take into account the circumstances of other property of his own, whether let or in hand, when considering an application for a consent to change of use under a lease. A shopping centre is an obvious example, but not the only case, where estate management considerations may suggest that one type of use be allowed under a lease but others not, because of the circumstances of other adjoining property.
> >
> > I find nothing in Balcombe L.J.'s judgment, nor in the case cited by him in relation to the proposition which I have mentioned, which suggests that this is not legitimate or that Sir John Pennycuick's decision in *Whiteminster Estates Ltd* is wrong. I therefore hold that, following Sir John's decision, a landlord can legitimately take into account considerations relating to adjoining property of his own, whether let or not."
>
> 54. On the facts he held that the landlords' concern for their own trading interests was a reasonable concern, and that consequently, the refusal of consent was justified. In the analogous field of restrictive covenants affecting freehold land, a covenant taken for the protection of a business carried on on land owned by the covenantee has been held to be a covenant taken for the benefit of land; in other words, a property interest: *Newton Abbot Co-Operative Society Ltd v. Williamson and Treadgold Ltd* [1952] Ch. 286.

And he concluded (at *Macepark* [55]):

> 55. In my judgment there is no rule of law which precludes a landlord from relying under any circumstances on perceived damage to his trading interests in adjoining or neighbouring property as a ground for refusing consent to an assignment or change of use. Whether the particular perception is reasonable and whether, if reasonable, it justifies a refusal of consent or the imposition of a condition, is a question of fact in each case.

136. I also note that in *Macepark*, Lewison J rejected a submission of counsel for the tenant in that case that in cases concerning alterations, the landlord's objections must be limited to the works alone and cannot extend to the use that may be made of them. He said this (at *Macepark* [56]):

> 56. Mr Dowding submitted in the alternative that a different principle applies in cases concerning alterations. In such a case, he submitted, the landlord's objection must relate to the works alone, and not to the use to be made of them. However, Peter Gibson L.J.'s proposition (5) in *Iqbal* says in terms that the use of the property following alterations may be a reasonable ground of objection, depending on the particular facts. In addition, as Slesser L.J. pointed out in *Lambert*, a landlord may rely on "personal" reasons as a ground for refusal. Suppose that the operator of a petrol filling station lets an adjoining piece of land to a supermarket. Suppose that the supermarket then applies for consent to erect its own petrol filling station on the leased land. On the face of it, it seems to me to be reasonable for the landlord to object on the ground that he would be damaged by the erection of a competing filling station next door. I do not accept Mr Dowding's submission. Mr Dowding submits as a fall-back position that the circumstances in which a landlord is entitled to object to an alteration on the grounds of its use are confined to a conversion of the premises to a proposed use, and not as here, an alteration to extend property for the same use as that currently carried on. He bases this submission on the way that Peter Gibson L.J. formulated proposition (5) in *Iqbal*. But in my judgment, as Mr Male submitted, Peter Gibson L.J.'s use of the phrase "converting the premises to a proposed use" is explicable because that was the proposal he was considering. I conclude that, in an appropriate case, a landlord is entitled to object to alterations on the ground that he has a reasonable objection to the use that the tenant proposes to make of the altered property, whether that use is the same as or different from the use carried on in the remainder of the property.

137. In this passage from *Macepark*, Lewison J is addressing the use to which a property might be put following alterations and its effect on the use of an adjoining property. For similar reasons, it seems to me that there is nothing in

principle to preclude a landlord from withholding consent to proposed works because of other potential effects on retained adjoining property during the implementation of the works – including that the proposed means of implementing the proposed works involves the exercise of rights over the retained property which the tenant does not possess. The question of the reasonableness of that view and, if reasonable, whether it justifies a refusal or withholding of consent or the imposition of a condition, would be a question of fact that has to be determined by reference to the facts of the case.

138. As regards the question of whether it is permissible to separate out, as Messenex, invites me to do, the question of consent to the works themselves from their proposed means of implementation, section 19(2) involves consideration by the landlord of the actual proposal that is put to it by the tenant. It is not a theoretical or hypothetical exercise. It is for the tenant to formulate the proposal and for the landlord to give or not give consent and, of course, only to refuse or withhold consent reasonably. The landlord is entitled to take into account the implications of the proposals for implementation of the works in deciding whether to refuse or withhold consent. Whether the landlord does so reasonably is a question of fact in each case.

Were the additional rights an issue between the parties at the relevant time?

139. The second issue is whether the terms for the grant of the additional rights was an issue at the time of issue of the proceedings.

140. The proposed works by reference to which Lanark's withholding of consent must be judged are the proposed Rooftop Works and proposed Ground Floor Works as enshrined in the engrossed licences circulated by HK on 22 February 2022. Those licences included a licence for the use of the scaffolding and the hoist at an agreed fee in the licence for the Rooftop Works, and, in the licence for the Rooftop Works and the licence for the Ground Floor Works, permission for plant, equipment and materials to be stored on the demised premises, including the car parking spaces which Messenex had the rights to use under the Deed of Variation. The proposed licences did not include any permission for use of any part of the premises as a site compound.

141. The question of the reasons for and the reasonableness, or otherwise, of Lanark's position has to be judged at the date of the issue of proceedings. As can be seen from the background facts that I have set out above, by that time, any issues relating to the grant of the additional rights that were required by Messenex to carry out the proposed works had been resolved. The outstanding issue – other than the conditionality of the indemnity for costs to which I will turn later in this judgment – was Lanark's demand for the payment of the outstanding service charges to be paid before the licences would be granted.

142. The request for payment of the outstanding service charges was not a new issue. The request had been made earlier in the negotiations (as early as 12 November 2020, see HK's email of that date). However, it was only following the circulation of the engrossed licences in February 2022, that the payment of the outstanding service charges became entangled with the grant of the additional rights that Messenex required to implement the proposals. Mr Duckworth says that the linking of the payment of the service charges to the grant of the additional rights was just part of the commercial negotiations for those rights. Lanark was entitled to demand whatever terms it wanted for those rights.

143. Having taken into account all the circumstances, in my view, the potential trespass on the retained Estate was not a legitimate reason for withholding consent by the time of the issue of proceedings on 31 March 2023. The terms on which Messenex could have access to the retained land had been agreed by 28 November 2022 – the date of the relevant email from WS in which WS on behalf of Messenex agreed to Lanark's terms.

144. The outstanding issue was the payment of the outstanding service charges. However, that was a separate dispute. Lanark made the payment of the services charges a pre-condition to the grant of the licences for the works by Lanark. It was not part of the terms for the grant of the additional rights. Lanark was not acting reasonably in withholding consent on this ground.

Unconditional undertakings as to costs

145. The third reason given by Lanark for withholding its consent to the proposed works is that Messenex failed to provide unconditional undertakings for Lanark's reasonable costs incurred in connection with the applications and the negotiations carried on for the grant of the additional rights needed for Messenex to carry out the works.

146. As I have identified in the background facts set out above, Messenex provided unconditional undertakings for costs at various stages of the negotiations. This reason relates to the request for an undertaking in respect of £3,500 made by HK in an email dated 4 November 2022 to cover costs of amendments to the documents following the discussions over the additional rights required by Messenex to implement the works (including the site compound licence). In its email of 28 November 2022, WS gave the undertaking on behalf of Messenex, but the undertaking was subject to various conditions tied to the completion of the licences to alter and, in particular, was expressed to be withdrawn if the licences were not completed within 14 days.

147. Mr Harrison points out that Mr Georgiou does not refer in his witness statement to the failure to provide an unconditional undertaking as a reason for Lanark withholding its consent to the grant of the licences. However, I am satisfied that

the failure to provide an unconditional undertaking was at least one of the reasons why Lanark withheld its consent to the proposed works. It was also one of the issues between the parties over which negotiations for the provision of the additional rights finally broke down in November 2022.

148. Mr Harrison says that unconditional undertakings were given by Messenex to cover Lanark's reasonable costs up to the stage at which engrossments were circulated. Those undertakings were reflected in the draft licences. The further request on 4 November 2022, in reality, related to the costs of the separate commercial negotiations over the terms on which the additional rights might be provided. These costs did not relate to the licences for the proposed works on the demised premises and it was unreasonable for Lanark to rely upon the failure of Messenex to provide an unconditional undertaking in relation to these costs as a reason for withholding consent. In any event, more than 90 per cent. of the costs were covered by the unconditional undertakings.

149. Mr Duckworth says that it is well-established that a landlord is entitled to an undertaking for its reasonable costs of dealing with an application for consent and is entitled to refuse consent if it is not forthcoming. Messenex has never suggested that the additional amount requested was unreasonable. The conditions placed on the undertaking would have required Lanark to provide the site compound rights and grant the licences without the payment of the service charges and without receiving any assurance as to the structural integrity of the building. The undertaking provided by Messenex was not a proper undertaking to bear the landlord's costs, which should operate irrespective of whether the licences completed.

150. For the reasons that I have given above in relation to the issues regarding trespass on the retained land, I do not accept Mr Harrison's harsh distinction between issues that relate directly to works on the demised premises and those which relate to other matters which are necessary in order to implement the works in the manner proposed by the tenant. In any event, I have no evidence on which to allocate the costs referred to in this final request between costs relating to the proposed works on the demised premises and costs relating to the provision of the additional rights. There is no suggestion on the part of Messenex that the amount requested is unreasonable. In the circumstances, it seems to me that the refusal to provide an unconditional undertaking is potentially a good reason for withholding consent to the grant of the licences.

Lack of clarity

151. The final reason given by Lanark for withholding its consent to the proposed works is a lack of clarity in Messenex's proposals. It is expressed by Lanark in the list of issues as being that "by the time of the issue of proceedings, [Messenex] failed to provide [Lanark] with the documents reasonably required

to make an informed decision; [Messenex's] intended scheme did not match the scheme to which its applications for consent made on 26 May and 23 June 2020 related and there was accordingly a basic lack of clarity about [Messenex's] applications and… the circumstances were such that Lanark could not reasonably be expected to give its consent".

152. This reason is referred to in Mr Georgiou's witness statement. However, Mr Georgiou's focus, similar to that of the description in the list of issues is on "the applications for consent made on 26 May and 23 June 2020". For the reasons that I have given in relation to Issue 1, in my view, the proposed works for which the landlord is being requested to give consent may develop over time up to the date of the issue of proceedings. All that is required is that at the relevant time: (i) the landlord was aware that it was being asked to give its consent to certain works; and (ii) the scope of the works to which the landlord was being requested to give consent are sufficiently clear. In this case, by the time of the circulation of the engrossments on 22 February 2022, the works to which Lanark was being requested to give consent were sufficiently clear and known to the parties. Accordingly, the reason as given by Lanark was not a good reason for withholding consent and Lanark was not acting reasonably in relying upon it.

Reasonableness of the decision

153. I have found that some of the reasons advanced by Lanark for withholding its consent were themselves reasonable and others were not. In those circumstances, I have, following the decision of the Court of Appeal in *No.1 West India Quay*, to ask myself whether Lanark's decision to withhold consent to the works was reasonable.

154. In my view, the decision to withhold consent was reasonable: as in *No.1 West India Quay*, the reasons given are self-standing and I have found that two of them are reasonable. This relates particularly to the request for structural drawings to provide some assurance as to the effect of the proposals on the structural integrity of the building.

Disposition

155. I refuse to grant the declarations requested by Messenex.