

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2021] UKUT 0078 (LC)
UTLC Case Number: ACQ/288/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION - Preliminary Issue – Compensation Code – whether claimants had compensatable interest in land – proprietary estoppel – implied grant of tenancy from year to year

BETWEEN:

**SMOKE CLUB LIMITED (1)
(IN ADMINISTRATION)
KAYMONT FINANCE LIMITED (2)
ROBERT ALAN DOYLE (3)**

Claimants

and

**NETWORK RAIL INFRASTRUCTURE
LIMITED**

Respondent

**Re: Crucifix Lane,
London SE1**

**Mr Justice Fancourt, Chamber President
and
Mr Mark Higgin FRICS**

19-22 January 2021 by remote video platform

Miss Tiffany Scott QC for the claimants
Mr Philip Sissons for the respondent

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The following cases are referred to in this decision:

Erimus Housing Ltd v Barclays Wealth Trustees (Jersey) Ltd [2014] EWCA Civ 303

Javad v Aqil [1991] 1 WLR 1007

Introduction

1. This is the decision of the Tribunal on a preliminary issue in a reference in which the claimants claim statutory compensation for the compulsory acquisition of land under powers conferred by the Network Rail (Thameslink 2000) Order 2006 (S.I. 2006 No.3117) (“the Order”).
2. The land acquired (the Reference Land) is Arch 11 Crucifix Lane, London SE1 (“Arch 11”), which was occupied by the First Claimant (“SCL”) and used from May 2009 as a nightclub called “Cable” which also operated from adjoining land (the Retained Land) at Unit 3 Holyrood Court, London SE1 (“Unit 3”). Together, Arch 11 and Unit 3 (“the Premises”) comprise a number of connecting arches beneath London Bridge railway station.
3. The Second Claimant (“Kaymont”) is the sole shareholder of SCL. It is an investment vehicle owned and controlled by the Third Claimant, Mr Robert Doyle (“Mr Doyle”). SCL was incorporated in February 2008 for the purpose of setting up and running Cable.
4. The Claimants claim compensation on the basis that they held a compensatable interest in the Reference Land on the date of the notice to treat, 1 April 2011, and on the date of entry. The acquiring authority entered the Reference Land on 1 May 2013, on which date SCL was in possession of the Premises.
5. SCL is now in administration and Kaymont claims to be a substantial creditor of SCL.
6. The claim for compensation is advanced on the basis that the Claimants (in reality, SCL) owned a long lease of the Premises under the doctrine of proprietary estoppel or constructive trust, which lease was within Part II of the Landlord and Tenant Act 1954 (“the 1954 Act”); alternatively, an annual periodic tenancy falling within the 1954 Act; in the further alternative, an annual periodic tenancy not within the 1954 Act.
7. The Acquiring Authority denies that the Claimants hold any such compensatable interest and assert that SCL was a tenant at will of the Premises.
8. On 22 November 2019, the Deputy President directed that there should be tried the following preliminary issue:

“Whether, as at 1 May 2013 (the valuation date), any of the Claimants had a compensatable interest in land for the purpose of the Compensation Code and, if so, what was the nature of any such interest.”
9. The preliminary issue raises essentially two questions:
 - a. Whether under the doctrine of proprietary estoppel SCL is entitled to a lease of the Premises for a term of 20 years or more from the date when it occupied the Premises, or November 2008, at a rent not exceeding £50,000 p.a.; and

- b. If not, whether by implication of law SCL was granted by about April 2010 a tenancy of the Premises from year to year at a rent of £35,500 p.a.
10. The Acquiring Authority does not contend that an interest acquired under the doctrine of proprietary estoppel is not a compensatable interest in land. Nor does it argue that - as acquiring authority rather than as landlord - it cannot be estopped from denying that SCL has a long lease of the Reference Land.
11. The Claimants appeared at the trial by Ms Tiffany Scott QC and called Mr Robert Doyle and Mr Julian Gill as witnesses of fact. The Acquiring Authority appeared by Mr Philip Sissons of Counsel and called Mr John Hughes, Mr Gavin Wood and Mr Robert Everitt as witnesses of fact. The trial was conducted as a fully remote hearing on Skype. The Tribunal is grateful to Counsel for their cooperative attitude and the preparation of documents that assisted it.

Summary of cases

12. The Claimants' proprietary estoppel claim depends on an agreement said to have been reached at a meeting in South Kensington between Mr Robert Doyle and Mr Euan Johnston on behalf of SCL and Mr Julian Gill, then employed by Network Rail Infrastructure Limited ("NR"), which took place probably at the very end of November 2008 or possibly the beginning of December 2008 ("the November 2008 Meeting"). No one has any documentary record of what was discussed and agreed at the meeting, nor does any subsequent letter or email refer to what was discussed and agreed.
13. Mr Julian Gill was at that time a lettings manager with responsibility for a team of lettings negotiators working on NR's South London portfolio (mainly railway arches beneath London Bridge station and in its vicinity). He had previously been a lettings negotiator but had been promoted in May 2008 to a position that had been created for him: there were no other lettings managers. Mr Gill was subsequently suspended by NR in January 2009 and dismissed in March 2009 on account of an undisclosed conflict of interest.
14. Thrale Limited ("Thrale") (whose principal shareholders were Benjamin Scrimgeour, Nigel Robinson and Mr Gill's wife) was a tenant of various NR properties and in particular held a 25 year lease of Arches 6-11 Crucifix Lane. It was Mrs Gill's interest in Thrale that Mr Gill had not disclosed to his employer.
15. The Claimants' case is that at the November 2008 Meeting, which was a first meeting between Mr Doyle, Mr Johnston and Mr Gill, a finally binding and concluded agreement was made between NR, Thrale and SCL that SCL would be granted a lease of the Premises for a term of at least 20 years at a rent not exceeding £50,000 p.a. The lease was to be granted either by Thrale or by NR, on the basis that NR would decide at a future time by whom the lease would be granted. The reason for the alternative grantors was that a single lease of the Premises could be granted either following NR taking a surrender of Thrale's interest in Arch 11 and then granting SCL a new lease of the Premises, or following NR granting Thrale a lease of Unit 3 so that Thrale could sub-let the Premises to SCL.

16. On the faith of that agreement, the Claimants say, Mr Doyle caused Kaymont to provide funding in the region of £1.2 million to £1.5 million for SCL's extensive fit out and improvement works in the Premises, which SCL spent and then opened Cable towards the end of May 2009. The works were carried out with the full knowledge of Mr Gill and other employees of NR and of Mr Scrimgeour of Thrale.
17. Although a final form of lease, licence to underlet and licence for alterations were never agreed and executed, the Claimants contend that it would be unconscionable for NR to deny that SCL has a 20-year lease of the Premises.
18. The Acquiring Authority's case is that there was no final agreement reached in November 2008 that a certain interest would be granted to SCL or an unqualified assurance to that effect, but at most a broad and general agreement in principle of what NR and Thrale would be willing to grant SCL; that Mr Gill had no authority to reach a binding agreement on behalf of NR or Thrale; that it was clear that further agreement on various matters had still to be reached, and that it was unreasonable for the Claimants to rely on any such agreement in principle in spending large sums on the Premises. In any event, it submits, there is no evidence that SCL rather than Kaymont suffered any detriment in reliance on any agreement or assurance.
19. If no lease arose by estoppel, the Claimants contend that an implied tenancy of the Premises from year to year came into existence in about April 2010 by reason of SCL's possession of the Premises and the payment of rent to Thrale, which was rent agreed and paid for Arch 11 and Unit 3 separately. The grant of such an interest had been discussed in correspondence between NR, Thrale and SCL without objection by anyone and the possibility of a tenancy at will pending the conclusion of the long lease had been expressly rejected by SCL in November 2009. The negotiations for a long lease had stalled by that time. The payment of rent was therefore not properly attributable to the continuing negotiations for the grant of a long lease.
20. The Acquiring Authority contends that no grant of a yearly tenancy should be implied because the parties were still seeking to agree and document a long lease and had not pursued the option of granting an express yearly tenancy in the interim. No such intention should therefore be imputed to Thrale. Despite SCL's objection to an express tenancy at will, the right inference in law is that SCL had become and remained a tenant at will pending conclusion of the negotiations for the long lease.

The facts relating to the proprietary estoppel claim

21. Many of the relevant facts are undisputed, though there is a challenge to some aspects of Mr Gill's and Mr Doyle's account of what was said and agreed at the November 2008 Meeting and a dispute about Mr Gill's level of authority to sign off transactions on behalf of NR. The real dispute is about what conclusions or inferences should be drawn from the primary facts about SCL's preparations to take a lease of the Premises, the November 2008 Meeting and the discussions that took place subsequently.

22. Before November 2008, there had been contact between Mr Johnston and Mr Gill, and separately between Mr Johnston and Mr Scrimgeour of Thrale, in relation to Arch 11 and Unit 3. The context was that Mr Johnston's nightclub, SeOne, in other arches near London Bridge station (which opened in 2000), was known to be within the scope of the planning permission for the Thameslink project, and so was highly likely to be the subject of compulsory acquisition pursuant to the Order. Mr Johnston was keeping an eye out for an alternative venue, which would be outside the range of the Thameslink project and so secure for the longer term.
23. It is material that Mr Johnston was previously the managing director of a company that traded in commercial properties, City and Urban Securities UK Limited, which had been appointed by NR in 1998 as adviser and agent on a number of railway arch developments in the London Bridge area. Mr Johnston therefore must have had a good understanding of how commercial property transactions worked. In that role, Mr Johnston had got to know Mr Gill of NR. Mr Gill had first shown Mr Johnston Arch 11 in 2003, when Mr Johnston was looking to open another venue in Crucifix Lane (which he did elsewhere in 2005, a club called "Jacks"). But Arch 11 on its own was not suitable for use as a night club and it and other arches on Crucifix Lane were let by NR to Thrale for a term of 25 years.
24. It was when Unit 3 also became available in 2007 that Mr Johnston's project for Cable became viable. Mr Gill showed Mr Johnston the Premises again and Mr Johnston expressed interest. Mr Robinson of Thrale was not persuaded that Mr Johnston had access to the necessary funding for the project, so in September 2007 Kaymont provided evidence that it could fund the project. Thrale thereafter was more interested in the proposal, as it had no use for Arch 11.
25. On 18 October 2007, Mr Johnston sent Mr Gill an email containing a "framework offer" for the Premises, suggesting rents escalating to £30,000 in year 5 and £50,000 p.a. in year 6 and thereafter. The email did not specify the length of lease required but stated that the basic works to the Premises were expected to cost £300,000. Mr Johnston was then given access to the Premises that he needed in order to survey them and prepare plans for the development.
26. Mr Johnston (and later SCL) had three principal challenges: to obtain planning permission from the local planning authority, the London Borough of Southwark ("the Council"), for a nightclub of the size that was proposed; to obtain a licence from the Council and justices' licences for late-night operation; and to secure a long-term interest in property that was not at risk of interruption that would justify the substantial investment needed to bring Cable to fruition.
27. An application for planning permission was made on 5 January 2008 and a second application was made in April 2008. NR was supportive of the application and said that the Cable scheme was its preferred scheme for bringing Arch 11 back into use. NR also confirmed that the proposal would not impact on the Thameslink works. Mr Gill had previously assured Mr Johnston – and at the November 2008 Meeting assured Mr Doyle too – that the Thameslink works would not extend beyond Bermondsey Street and so the Premises would not be at risk of compulsory acquisition. This was everyone's

understanding at the time, though the Order conferred power on NR to acquire land over a broader area, including the Premises, if needed.

28. Design of the project proceeded while the Council considered the planning application. On 6 November 2008, the Council informed SCL's architect that it was minded to grant planning permission, subject to a satisfactory s.106 agreement being made. On 28 November 2008, the necessary licence from the Council for late night entertainment was obtained. Mr Doyle told Mr Johnston at that stage that assurances would be required from NR before Kaymont would release funds for the development. It was for that reason that the November 2008 Meeting was arranged with Mr Gill.
29. As Mr Doyle explained in evidence, the assurances that he wanted were that the Premises were not at risk by reason of the Thameslink project and that a sufficiently long lease could be granted. By that stage it was apparent that the cost of the fit out would be over £1 million and Mr Doyle wanted assurance that Cable would be able to remain for the long term. Mr Gill gave the assurance, explaining that Thrale's lease had about 20 years remaining, so if Thrale granted an underlease of the Reference Land SCL would get a lease of that duration. This was acceptable in principle to Mr Doyle.
30. We accept that the assurance that Mr Gill gave was entirely honest. He genuinely believed (wrongly) that the extent of NR's powers to acquire land were limited by the planning permission granted for the Thameslink works in the London Bridge area, which at that time drew a red line along the eastern edge of the carriageway of Bermondsey Street, where it passed the Reference Land. It was not until the detailed design of station works in late 2010 that it became apparent that an emergency escape from the station platforms would need to pass through the Reference Land.
31. We consider that after 28 November 2008 the Claimants believed that there was no longer an obstacle to SCL being able to progress the Cable project, provided that the Premises were not at risk of being needed for Thameslink. The real obstacles – planning permission and licences – had been overcome, or at least in the case of the resolution to grant planning permission Mr Johnston saw it that way. In the event, it took until August 2011 for a s.106 agreement to be signed off, but that is immaterial and was not foreseen. Neither Mr Johnston nor Mr Doyle considered that there was any difficulty in obtaining the grant of a 20-year lease. Arch 11 had, after all, been vacant for years and was dilapidated and damp; Unit 3 was in the control of NR, who were in favour of the Cable project, and Mr Johnston was on friendly terms with both Mr Gill and Mr Scrimgeour. There had been no push back from Mr Gill (though no agreement) on the indicative rents that Mr Johnston had set out in his 18 October 2007 email. SCL had been given access to the Premises before the November 2008 Meeting for the purpose of dehumidification and minor works to open up the space.
32. From Mr Johnston's and Mr Doyle's perspective, both NR and Thrale would clearly be interested in letting their respective parts of the Premises. That was indeed the case, though prior to the November 2008 Meeting no terms had been discussed or agreed. It is what was said at that meeting on which the Claimants now rely for the agreement or assurance on which their proprietary estoppel case is based.

33. The Tribunal heard from Mr Gill and Mr Doyle and also had a witness statement signed by Mr Johnston on 23 April 2013 for a judicial review claim brought by SCL against NR, challenging the issue of the notice of entry for Arch 11. Mr Doyle said that he agreed and adopted Mr Johnston's statement, so far as it was within his knowledge.
34. Mr Johnston's account of the November 2008 Meeting – given with the relative advantage of being only 4 ½ years after the event, as compared with 9 years in Mr Gill's case and 12 years in Mr Doyle's – is brief. Having explained the background to the meeting, he says:

“During that meeting Julian Gill once again explained that the Arch and Unit 3 were not required for the Thameslink project and that Network Rail were committed to completing a formal lease of the Arch and Unit 3 with Thrale to enable us to enter into a formal lease of the Arch and adjacent units, that would enable the Nightclub development to be progressed. Mr Gill also confirmed during this meeting that internal consideration of the development plans for the Arch had been given. It was my impression that the agreement and completion of a formal lease of the Arch and necessary consents to carry out the works were only a formality at this stage.”

Mr Johnston's recollection was therefore that NR was willing to lease Unit 3 to Thrale so that Thrale could deal with SCL.

35. Mr Doyle said that Mr Johnston told him before the November 2008 Meeting that he had already been in discussion with NR representatives and Thrale and that each had assured him that, subject to agreement being reached, each was willing to lease or release their respective part of the Premises. He said that at the meeting Mr Gill said that he was the senior manager in charge of all aspects of lease and tenancy negotiations in respect of NR's South London properties and that he was happy to try to reach agreement with him. He said that Mr Gill said that Thrale was relatively unconcerned whether it surrendered Arch 11 to NR or took a lease from NR of Unit 3, so long as it could offload its interest in Arch 11 at no cost to itself. Mr Gill assured him that NR alone would decide which route to take and that Thrale would accept its decision. Mr Doyle said that he agreed to take a lease limited in length to the residue of Thrale's existing lease – about 20 years.
36. As far as rent was concerned, Mr Doyle said that Mr Gill said that he had discussed this with Thrale (but did not disclose those discussions) and assured him that it would not exceed £50,000 p.a. for the first 5 years and thereafter “subject to usual five year reviews”. Mr Doyle said that he expressed willingness to agree a rent on that basis for the Premises as a whole and Mr Gill accepted that and said that he would work on that basis. Mr Doyle confirmed that he did not know what “usual five year reviews” meant and agreed that there was no further discussion about rent after year 5 of the intended lease.
37. Mr Gill then warned Mr Doyle of the restrictions on works that could be carried out to the arches and that SCL would be responsible for NR's surveyor's costs of supervising the works, but said that he would be able to grant all necessary consents for NR. Mr Gill then explained that, in view of the scale of the works, the long lease would not be signed off until the works had been completed and approved, but he said that that was “a formality”. Mr

Doyle said that he knew that a long lease would not be granted until NR were satisfied that SCL had built the place correctly.

38. Mr Doyle said that he took it, in view of what Mr Gill said, that Mr Gill had full authority from NR to discuss and agree terms and that he was satisfied that all present left the November 2008 Meeting believing that binding terms had been agreed.
39. In cross-examination, Mr Doyle confirmed that he knew that Thrale's cooperation was required, as part of the deal; that he had never met the owners of Thrale; that he did not know about the connection with Thrale through Mrs Gill or to whom at Thrale Mr Gill had spoken; and that any deal was dependent on an agreement between NR and Thrale. He said that he got the impression that NR had agreed to facilitate a new nightclub under London Bridge station, and that the mechanics of how NR structured the arrangement with Thrale were of no interest or consequence to him. It was for NR to sort out. He did not accept that there had to be further negotiations between NR and Thrale because "from my perspective they had agreed one and they had agreed the other"; but he did agree that Thrale would have to be involved in the arrangements, "to settle the bargain".
40. Mr Doyle agreed that the lease was to be limited to whatever term Thrale had left and that no start date for the lease was agreed; it was up to Mr Gill to decide the level of the rent and Mr Gill had said that he couldn't give an exact amount as he had to go away and consider it.
41. It was clear to us that, from Mr Doyle's and SCL's perspectives, the detail of the lease was a mere loose end ready to be tied, and that with Mr Gill's assurance that the Thameslink project would not be a problem, the resolution to grant planning permission and the grant of the necessary licences, the project was definitely proceeding. The exact detail about the lease did not matter to Mr Doyle. He is and was at the time clearly a very wealthy man – or had access to substantial family resources – and the exact amount of the rent was an irrelevance. He said that he did not think that the lease was dependent on finalising the length of term, the start date and the rent. He likened the deal to a financial trade: done informally on the phone, a ticket written and then settled by the back office.
42. Mr Gill's evidence about the November 2008 Meeting was provided first in a witness statement signed on 29 June 2018. He said that he told Mr Doyle that he would be able to provide security of occupation for SCL, either by taking back Arch 11 from Thrale or by granting a lease of Unit 3 to Thrale, at NR's choice, and that Thrale was in agreement because the Reference Land was of no value to it. He said that he knew such arrangements were acceptable to NR and that he was therefore happy to confirm to Mr Doyle that NR would deliver and ensure Thrale's cooperation.
43. Mr Gill also said that, as a result of his discussions with Thrale, he told Mr Doyle that the rent would not exceed £50,000 p.a. for the first 5 years and thereafter would be subject to the usual rent reviews. He had not settled the amount of the rent with Thrale. He said that he agreed that the build project could proceed but that there would have to be external approval of the building works, for which SCL would have to pay.
44. Mr Gill's account of the November 2008 Meeting in his witness statement ends as follows:

“At the end of the meeting and satisfied that agreement had been reached on all points I was happy to confirm that Spacia [NR] would proceed with NRIL to complete the legal formalities. I left the meeting with a clear understanding that on the basis of what had been discussed and agreed Robert [Doyle] would invest substantial funds in the Proposal.”

45. In his oral evidence, Mr Gill said that so far as his personal authority to conclude a transaction was concerned, with his promotion to lettings manager in 2008, which was a Band 3 salary post at Spacia, there came an increase from £10,000 to £50,000 in his personal authority, as all Band 3 employees at Spacia had that level of authority. That was later disputed by two witnesses called on behalf of the Acquiring Authority, Mr Wood and Mr Everitt, who explained that transactional authority was something that was individually granted to Spacia employees and that there was no standard authority level based on salary level. In any event they said – and eventually Mr Gill conceded – a person who negotiates a deal cannot by themselves authorise the transaction, even if it is within their authority level. A second approval is required, though in practice, in his case, Mr Gill regarded that as a rubber-stamping exercise.
46. On any view, we find that Mr Gill could not himself have agreed the transaction with SCL so as to bind NR. We also preferred the evidence of Mr Wood and Mr Everitt to that of Mr Gill and do not accept that his authority level was increased automatically (or in fact at all) on his promotion to lettings manager. This was a bespoke position for Mr Gill that had no established authority level for it, and no document exists confirming that Mr Gill’s authority level had changed from £10,000. In practice, Mr Gill carried on without regard to his authority level and his portfolio manager was content to sign off his deals.
47. In cross-examination, Mr Gill accepted that he was wrong not to disclose to NR his conflict of interest arising from his wife’s shareholding in Thrale, and then gave a frank description of the informal way that he operated in order to achieve his yearly targets and ensure that his immediate superior, Simone Bailey, could achieve her annual bonus for completed deals. Mr Gill accepted that he put extra deals in place so that she could achieve her bonus target, and that his usual approach was to create a written yearly periodic tenancy, which the formal lease when eventually granted would replace. It was a way of getting the deals in the bank, as he put it. There was a standard form of periodic tenancy and the specific terms agreed for that tenancy were invariably the terms that went into the formal lease. The delay in granting the lease then did not matter. He said that he did things a certain way and no one questioned it. The main issue was to get the correct rent and have no problem tenants, which he achieved. He said the whole thing ran brilliantly and was only superseded by a more restrictive approach once he had been sacked.
48. It was also made clear by Mr Gill that his *modus operandi* was a way of getting around in practical terms the need for a formal licence for alterations before any fit-out works could take place. The works were just done under the periodic tenancy and were not overseen in the same way that they would be if a formal licence had been granted first. He said that he did hundreds of deals on railway arches in that way, by granting a periodic tenancy, but that he took care to check that the arches were not damaged. Mr Gill seemed to be of the view that the rest was a matter for the Council’s building control, not a matter for the landlord to concern itself with.

49. He accepted however that no periodic tenancy was expressly granted to SCL in 2008. He attributed that to the need for discussion with Thrale about the way forward (i.e. which company would grant SCL a lease) and agreement on essential terms, such as rent; also because Christmas was always a busy time of year and he was having an extension built at home, so his eye was off the ball. Of course, it did not happen after January 2009 because Mr Gill was first suspended and then dismissed by NR.
50. In relation to the November 2008 Meeting, Mr Gill accepted that he was not employed by Thrale at that time but said that he had regular contact with Nigel Robinson, who was in charge of Thrale's Crucifix Lane arches. He said that Mr Robinson had approached him previously about taking back Arch 11 but NR was not interested at that time. However, he suggested that once Unit 3 became vacant the picture changed and Mr Robinson gave him authority to commit Thrale to particular terms and told him that he could do the deal with SCL. Mr Gill said that Mr Robinson had said that he (Mr Gill) should judge whether the deal with SCL was good enough for Thrale to take a new lease of Unit 3 or hand back Arch 11. Mr Gill said that Mr Robinson told him that he was happy with a "de minimis" rent, by which he meant about £8,000 to £10,000 p.a., but that he (Mr Gill) had not agreed a rental figure with him. This was why he said to Mr Doyle that the total rent would be no more than £50,000 p.a. However, Mr Gill believed that the rent for Unit 3 would be £15,000 p.a.
51. Mr Gill confirmed that at the November 2008 Meeting no commencement date for the long lease was discussed with Mr Doyle and Mr Johnston. He could not recall whether the basis of the rent review was discussed. He accepted that it was understood and agreed that a written lease would be prepared and signed in due course. He accepted that there were no heads of terms agreed and he generally did not produce these: he just operated on the basis of what he could produce and what was agreed.
52. Mr Gill accepted that a surrender of an existing lease would have to go through a formal procedure, involving a report and valuation process and authorisation. The grant of authority to sub-let he described as a management issue, not something that he would deal with.
53. There were few if any material developments before Mr Gill was suspended in January 2009, save that Mr Gill said that he went to discuss with Mr Robinson what decision Thrale and NR should make about the structure of the proposed lease for SCL.
54. In February 2009, Thrale became aware that SCL was agitating for progress.
55. Mr Wood said in evidence that he had been contacted by Mr Johnston on about 27 February 2009 about a proposed lease of Arch 11 and a separate lease of Unit 3. An email to Mr Scrimgeour of that date confirms that Mr Wood had no background details on what may have been discussed, and that he would like to hear from Mr Scrimgeour. Mr Scrimgeour's reply by email on 2 March 2009 was:

"RE. Euan Johnston, yes, what he tells you is correct – we were negotiating with Julian Gill for some time about taking unit 3 and 6 Holyrood Court to be used as the escapes and toilet block facilities etc **but nothing was concluded** and time went by – suddenly Euan is desperate to move ahead with the letting of space to

him in our arches in Crucifix as his project has now got financial backing. Since we can't negotiate with Julian for the time being I do need to try and come to agreement with you about the letting of these units asap". [emphasis added]

It is therefore clear that neither NR nor Thrale had any knowledge that a deal had been struck. The email is also inconsistent with the notion that Thrale had given Mr Gill authority to reach agreement on its behalf with SCL. It is inconceivable that if a final agreement had been reached on behalf of Thrale with its authority at the November 2008 Meeting, Mr Scrimgeour, the director and principal shareholder of Thrale, did not know about it in March 2009.

56. Following that exchange, a meeting took place between Mr Scrimgeour and Thrale's solicitor and Mr Johnston on 3 March 2009 to seek to agree terms for an underlease of Arch 11. It was identified that a lease of Unit 3 "would also need to be granted by Network Rail" and that Mr Scrimgeour would make contact with Mr Wood at NR about the proposed sub-letting of Arch 11. The solicitor's note records:

"The form of underlease would need to be approved as part of the process of issuing the licence to sublet. There was no reason why the negotiation of the underlease terms could not be done in parallel with seeking Network Rail's consents but DHO [Mr Ogden, Thrale's solicitor] said he would need to have the principle terms agreed. EJ [Mr Johnston] said that he had not been able to do this yet. There was no reason why terms could not be agreed there and then, however."

This note too is quite inconsistent with Mr Johnston having left the November 2008 Meeting with a final deal having been agreed or with terms having already been agreed. The note then records a discussion about the heads of terms for a proposed new underlease to SCL, i.e. an interest in Arch 11 to be granted to SCL by Thrale. A rent of £18,000 p.a. with a first rent review in 2014 was agreed in principle.

57. On 11 March 2009, Mr Wood emailed Mr Johnston confirming that, subject to agreement on the final terms, NR had agreed to grant Thrale "agreements" in respect of Arches 3 and 6 Holyrood Court (which included Unit 3) to be used in conjunction with a sub-lease of Arch 11. On the following day he emailed Mr Scrimgeour saying that things were more complicated than he thought, in view of the scale of the works proposed, and that they needed to take a close look at the rents. No terms had therefore been agreed between NR and Thrale even at that stage.
58. On 16 March 2009, solicitors who by then were acting for SCL emailed Philip Doyle (the brother of Mr Doyle) and Mr Johnston about the undertakings for costs that Thrale's solicitors were seeking and pointed out that clear heads of terms were still awaited for both proposed leases. The email warns them that investing £60,000 at that stage in the project is "highly risky", and:

"Whilst Ben Scrimgeour may have every good intention to proceed, there could be disagreement over the detailed terms of the lease and the lease arrangements with Network Rail are by no means guaranteed, nor is the timescale."

This email implies that Mr Johnston could not have told the solicitor that a final agreement was reached with NR and Thrale at the November 2008 Meeting.

59. In the event, SCL took the risk against which it was warned and greater risks besides in proceeding to fit out and open the Premises in May 2009. All this time, correspondence on a “subject to contract” basis was being conducted between SCL’s solicitors and Thrale’s solicitors and Mr Johnston was negotiating with Mr Everitt of NR about the grant of a lease of Unit 3. In response to an email from SCL’s solicitor chasing papers for the preparation of a long lease, Mr Ogden replied:

“I note your comments but you and your client will surely appreciate that my client does not have a lease of the additional arches yet. Terms have not been agreed with Network Rail and this needs to happen before my client is going to be in a position to grant any sublease. This is not a matter over which they have control. It will follow that neither my client nor I can yet confirm anything as to the terms of the additional lease nor the rent.”

60. By 15 April 2009, Mr Everitt had proposed to Mr Scrimgeour a tenancy agreement of Units 3 and 6 on standard terms (i.e. a yearly periodic tenancy), subject to rent being agreed at £17,500 p.a., with a view to allowing Thrale to sub-let Unit 3 to SCL and then instructing solicitors to draw up a 20-year lease in line with Thrale’s existing lease of the Crucifix Lane arches.

Analysis of the proprietary estoppel case

61. The Claimants contend that the agreement reached at the November 2008 Meeting, such as it was on the evidence, amounted to a final agreement and so an assurance by NR that a long lease would in due course be put in place. In their skeleton argument, the Claimants contend that there was an immediately binding and settled agreement reached, and that Mr Gill assured the Claimants that NR would be able to deliver secure occupation of the Premises by one means or another, either by NR granting a new lease or by Thrale granting an underlease for at least 20 years. In opening the case, Miss Scott submitted that it was not necessary to say that Mr Gill had authority on behalf of Thrale to conclude a deal, only that he had in practice the ability to procure Thrale to do what he wanted to do.
62. In argument after the evidence had concluded, Miss Scott agreed that her case was that in the November 2008 Meeting there was an immediately binding deal that SCL would be granted a lease of the Premises for a term of at least 20 years at an annual rent of not more than £50,000 p.a. for the first 5 years of the term, and that the lease would be granted either by Thrale or by NR, that being a matter for NR to decide.
63. It is not of course possible, in view of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, for the Claimants to argue that a binding agreement for the grant of a long lease of the Premises was made at the November 2008 Meeting. What is argued is that the terms of a deal were finally concluded and that Mr Gill assured the Claimants that a lease on those terms would by one means or another be granted to SCL. All parties recognised that a formal lease would in due course be prepared and executed, but nevertheless – because

the terms needed had already been agreed – the deal was treated as binding from the time of the meeting.

64. There is no difference between the parties as to the legal principles that apply. There must be an assurance or promise by an owner of land, A, to another person, B, relating to a sufficiently identified property and interest in the land, which must be of such a character that B reasonably understood it as intended by A to be relied upon by B as giving rise to an immediate or future interest in the property. B must reasonably rely to his detriment on the assurance or promise, motivated at least in part by it, such that it becomes unconscionable for A to resile from what has been promised or deny B an interest in the property: see Snell's Equity (34th ed) at 12-038 – 12-046 and Megarry & Wade's The Law of Real Property (9th ed) at 15-007 – 15-020.
65. NR disputed that each of these requirements was satisfied, but it is sufficient to focus in the first instance on whether there was any clear assurance given that SCL would acquire a sufficiently defined leasehold interest in the Premises on which it was reasonable for SCL to rely.
66. We find that only an agreement in principle was made at the November 2008 Meeting. There was no attempt to agree all the terms that would be necessary for a final, binding agreement. Mr Gill's way of operating was to reach a basic agreement and then let the tenant into occupation to carry out works, with documentation to follow later, first in the form of a standard periodic tenancy and then, in fulness of time, a formal lease. There was no suggestion that a formal lease would not be required in this case: SCL certainly wanted it, to provide the necessary security in the long term, and Mr Gill intended that there should be one, but neither side wanted the conveyancing process to hold up SCL's possession and works.
67. In this case, there was no agreement on the necessary terms for a final, binding agreement. The length and commencement of the term of years was not agreed, nor was the rent to be paid, nor the basis of the rent review, nor even the grantor of the lease. The rent and the grantor had deliberately been left open by Mr Gill, so that he could first engage with Thrale after the meeting about the best way to proceed (which he said that he did) and then decide whether to take back Thrale's interest. The amount of the rent could clearly be dependent on that decision. It may well have been the case that SCL was not bothered about the precise identity of the term of years or whether the rent was £40,000 p.a. or £50,000 p.a., but these were matters that had to be decided before SCL could have a lease. The rent had to be decided before SCL could even be granted a periodic tenancy, if that was what Mr Gill intended to put in place.
68. Mr Gill did not in fact have authority to bind NR to the terms of a deal with SCL. Whether he had authority is a different question from whether in practice what Mr Gill decided was carried into effect. The way that he operated meant that the extent of his authority did not matter in practice because his portfolio manager invariably did what he wanted. But that means that any deal was dependent on the manager's decision. No one else at NR is alleged to have held out Mr Gill as having authority to reach binding agreements, nor is it suggested

on behalf of SCL that Mr Gill's position carried with it usual or implied authority to conclude a transaction.

69. We do not accept Mr Gill's evidence that Mr Robinson had authorised him to conclude a deal on behalf of Thrale. There is nothing to suggest that Mr Robinson was himself authorised by Thrale to do so, and in any event Mr Gill did not act as if he had authority on behalf of Thrale. What he told Mr Doyle was that he would be able to get Thrale to do what he proposed, not that he had authority to conclude a transaction. The first thing that he did after the November 2008 Meeting was meet Mr Robinson to try to agree which structure would be preferable.
70. We are satisfied that what Mr Gill meant was that Mr Robinson had allowed Mr Gill to try to negotiate agreed terms for a transaction that would involve Thrale's interest in the Reference Land. In other words, Mr Gill was at liberty to discuss proposals that involved Thrale's interests too, to see if a deal in principle could be reached. Depending on the terms of the deal, NR and Thrale would then discuss matters such as the structure of the deal and the rent. In Mr Gill's mind, we are satisfied that there was no clear distinction between an agreement on basic heads of terms and a final binding agreement, because of the unusual and informal way in which he operated; he had no involvement in the later stages of documenting the transaction, beyond bringing into existence the standard form periodic tenancy that was used as an interim tenancy. It is also material that Mr Gill accepted that he did not have any responsibility for granting a licence to sub-let or for negotiating a surrender of a lease or part of the premises demised.
71. Mr Gill's unusual approach was unique to him. There is no suggestion in the evidence that Thrale proceeded in a similar way and would have regarded themselves as bound by an informal agreement about the basic terms of a lease. The evidence of how Thrale reacted in February 2009, when it became aware that SCL was seeking the grant of an underlease of Arch 11, demonstrates clearly that it had not conferred authority on Mr Gill to reach any agreement with SCL: it set about negotiating the terms of an underlease on a subject to contract basis. All that had happened was that Mr Robinson had delegated to Mr Gill the conduct of the negotiations with Mr Johnston relating to Arch 11.
72. Whether Mr Gill had authority on behalf of NR or Thrale to conclude a deal is in one sense beside the point. There could be no informal lease for 20 years nor an oral contract to grant such a lease, even if the necessary terms for such a grant had been agreed. But, in another way, the absence of authority to act on behalf of Thrale (and Mr Gill's own recognition that a formal lease was required) casts light on the claim that an assurance was made to the effect that a long lease would certainly be granted by one means or another and was reasonably relied on by the Claimants. NR could not, as Mr Doyle and Mr Johnston both knew, grant SCL a lease of the Premises without the cooperation of Thrale. Without Thrale's cooperation NR could only grant a reversionary lease of the Reference Land, which was certainly unacceptable to SCL. It is self-evident that the lease to be granted had to be a lease in possession. Mr Doyle and Mr Johnston did not believe that Mr Gill was acting on behalf of Thrale. Mr Doyle said that he knew that Thrale's cooperation and agreement was required, but he was no doubt comforted by Mr Gill's statement that Thrale would follow his guidance. Mr Johnston, who made his witness statement much closer in time to the events in question, did not suggest that Thrale were agreeing anything with SCL; he said

that NR were committed to entering into a lease with Thrale so that SCL could enter into a lease of the Premises. The evidence therefore does not prove that SCL believed that Mr Gill was making any agreement or assurance on behalf of Thrale.

73. In that light, the argument that an immediately binding agreement for a long lease was made there and then, at the November 2008 Meeting, is unsustainable. There were important matters still to be discussed and decided after the meeting. Had a final agreement been made at that meeting, Mr Johnston would have protested when, in March 2009, Thrale and NR separately set about trying to negotiate with him terms on which leases could be granted. Instead, he submitted to detailed subject to contract negotiations. Even if an assurance of a binding commitment had been given by Mr Gill, which we do not accept, it could not have been reasonable for the Claimants to rely on such a statement in spending large sums on the Premises when Mr Doyle and Mr Johnston both understood that the agreement of Thrale was required before NR could grant a lease in possession of the Premises.
74. In our judgment, Mr Gill undoubtedly gave Mr Doyle and Mr Johnston the impression that he was confident that he could procure the grant of a long lease to SCL, once the works of fitting out were satisfactorily completed. Mr Gill himself clearly believed that he would be able to bring it about. He believed, although he did not have authority to bind NR or Thrale, that he had the backing of the portfolio manager at NR, who in due course would approve what he invited her to approve, and that he could persuade Thrale to do the deal that he had negotiated, in one form or the other. He had total confidence in his own ability to achieve these matters and would doubtless have conveyed that confidence to Mr Doyle and Mr Johnston. However, he had no certainty of being able to do either.
75. Given Mr Doyle's business experience and Mr Johnston's commercial property transaction experience, they must both have realised that they were being invited to trust in Mr Gill alone, as Mr Doyle frankly said that he did. A substantial public body like NR would never have given authority to a single letting agent like Mr Gill to create binding long leases of valuable and structurally important property in an informal way at a first meeting. We consider that both Mr Johnston and Mr Doyle would have known that and were indeed told that a formal lease had to be granted. The grant of a long lease of land is very different from a market deal of the kind that Mr Doyle described. In any event, applying his suggested analogy, it is telling that no one wrote the ticket recording the terms of the deal.
76. NR had not committed formally to support any particular transaction – no one else with the necessary authority had been involved before the November 2008 Meeting. Thrale, though it was interested in principle in the deal that Mr Gill had proposed, had not agreed any terms with NR or with SCL and was not committed to anything. Mr Gill's confidence might well have been proved justified, had he not been suspended and then dismissed by NR, but the turn of events once he disappeared from the picture serves to demonstrate that the "deal" agreed in November 2008 was no more than his own creation at that stage. The contemporaneous documentary evidence shows that neither NR nor Thrale knew anything about a concluded deal or the terms that had been discussed. That there was no such deal is confirmed by the content of the meeting note of 3 March 2009 between SCL and Thrale and the email dated 25 March 2009, referred to in para 54 of Mr Johnston's witness statement, to the effect no terms had yet been agreed between Thrale and NR.

77. If there had been an assurance given in circumstances that were viewed by all as a binding commitment, one would have expected to see some record of the fact. But there is no document or email from any party referring to a deal having been concluded. It is true that SCL went into full occupation of the Premises and started to carry out preliminary works, but that simply reflected Mr Doyle's and Mr Johnston's confidence in Mr Gill's informal approach and his being able to bring about the deal that he had described. It also reflects their anxiety to be able to proceed, with a view to opening the club in May 2009: the spring bank holiday weekend was regarded as the second most profitable time of year for a club of that kind. The reason why SCL proceeded with the works was that Mr Doyle and Mr Johnston trusted Mr Gill and were willing to take some risk in order to get Cable open as soon as possible. That is demonstrated by the fact that SCL ignored the warning of its own solicitors on 16 March 2009 that it was proceeding at high risk and that the grant of the lease was by no means guaranteed.
78. In the light of these findings and for these reasons, we conclude that there was no sufficient agreement and assurance given at the November 2008 Meeting that SCL had or would certainly acquire in future a defined long lease of the Premises. Further, it was unreasonable for the Claimants to rely on what Mr Gill said, given what they knew (or must have known) about the position of Thrale and the need for further terms to be agreed and a formal lease to be granted.
79. In view of our findings and conclusion on these questions, it is unnecessary to consider the further argument of NR that there was no sufficient evidence that SCL, the putative lessee, rather than Kaymont or the Doyle family, had suffered detriment by paying for the fit out works and the costs of opening Cable in reliance on NR's assurance. The argument was advanced rather tentatively and SCL insisted that full disclosure of the nature of the expenditure had previously been given to NR, although the documents were not in the bundles prepared for the preliminary issue.

The implied periodic tenancy argument

80. The Claimants' alternative case is that there must be deemed to have been granted by Thrale to SCL a tenancy from year to year of Arch 11 and Unit 3. This is said to have arisen as a matter of law by reason of SCL's expenditure on and exclusive possession of Arch 11 and Unit 3, the operation of SCL's business in the Premises with effect from May 2009 and the payment of quarterly rent for Arch 11 and Unit 3. The rent payment for Unit 3 started in July 2009 and for Arch 11 in March 2010. In both cases, rent was also paid retrospectively, from April 2009 in the case of Unit 3 and from May 2009 in the case of Arch 11.
81. It is common ground that no periodic tenancy was expressly agreed with SCL, though all parties knew that both NR and Thrale were willing in principle to proceed with a periodic tenancy agreement pending the eventual grant of a long lease. Indeed, both Thrale and SCL knew that NR was granting Thrale a periodic tenancy of Unit 3 so that Thrale could grant an equivalent interest to SCL. Both NR and Thrale referred in communications to the grant of a periodic tenancy, and a written periodic tenancy of Unit 3 was signed on behalf of Thrale in April 2009 and finally by NR in May 2010.

82. The willingness of NR and Thrale to proceed in this way appears to stem from Mr Gill's unorthodox approach to securing a property deal, which involved sidestepping formality relating to the terms of long leases and licences to underlet and to alter by putting in place an interim periodic tenancy at the agreed rent and then letting other matters follow at a (much) later date. When granted, the long lease would replace the tenancy agreement that had been created.
83. At no stage was there a concern on the part of either NR or Thrale about creating a tenancy or lease with security of tenure under the 1954 Act.

The facts relating to the implied periodic tenancy argument

84. The material facts that we find are the following.
85. Following the meeting between Thrale and Mr Johnston of SCL on 3 March 2009, at which an initial rent of £18,000 p.a. for Arch 11 was agreed, there were discussions between NR and Thrale resulting in a proposal made by Mr Everard of NR to grant Thrale a periodic tenancy of Unit 3, to get things moving quickly and facilitate a sub-letting to SCL. The tenancy could be changed later to a lease if required (email 3.4.09, Sue Millson of Thrale to Mr Scrimgeour of Thrale, recording conversation with Mr Everard of NR). That proposal was confirmed by Mr Everard to Mr Johnston on 9 April 2009 and to Mr Scrimgeour on 15 April 2009.
86. On 16 April 2009, Mr Scrimgeour agreed that proposal and asked NR to issue a tenancy agreement for Thrale. A draft tenancy agreement of Units 3 and 6 was sent to Thrale on 21 April 2009, at a rent of £17,500 p.a., with a view to a sub-letting of Unit 3 to SCL. Mr Johnston was told that a tenancy agreement had been provided. Thrale signed it and sent it back to NR with the first rent payment on 1 May 2009. Thrale decided at that stage to await the signed part from NR before sending a draft tenancy agreement to SCL, not expecting there to be any significant delay in that regard. At the same time, Thrale was giving consideration to the terms of the intended eventual underlease to SCL, in particular the rent to be agreed between it and SCL.
87. On 19 May 2009, a discussion between Thrale's and SCL's respective solicitors noted that there would be a single underlease in due course and a periodic tenancy to start with, for the whole of the Premises. SCL's solicitor emailed Thrale's solicitor on the same day confirming a "periodic tenancy of the whole property to be replaced by a sublease of the whole when NRIL grant your client a lease of the additional arches". On 2 June 2009, SCL's solicitor asked for a tenancy agreement for all the Premises, pending grant of the underlease.
88. By this time Cable had already opened for business. It is clear that SCL wanted a tenancy concluded, to provide it with appropriate security for its operations, and both Thrale and SCL understood and intended that a periodic tenancy would be granted and then later replaced with an underlease, once Thrale had been granted an underlease of Unit 3 by NR.
89. A draft tenancy agreement of the Premises was expected by SCL in mid-June but did not materialise. This was because Thrale was still awaiting the execution by NR of the tenancy

agreement of Units 3 and 6 that it had signed previously. By 30 June 2009, Thrale had raised with NR the question of whether a tenancy at will might be granted by Thrale to SCL in order to get money (i.e. rent) out of SCL. Mr Gill thought that a tenancy at will would serve that purpose and said that it was “suggested in exasperation” because NR had not executed the tenancy agreement.

90. Rent invoices to SCL were then prepared and sent on 3 July 2009, one for the period from 20 April 2009 to 23 June 2009 and a second for the following quarter. On 7 July 2009, Thrale’s solicitor suggested to SCL’s solicitor a sub-tenancy at will of Unit 3 pending completion of a tenancy. SCL’s solicitor advised Mr Johnston and Mr Philip Doyle not to agree a tenancy at will. That advice was accepted and there was no response to Thrale’s solicitor about the proposal. But the first invoice was paid by SCL on 14 July 2009, after Mr Gill had sent a chasing email. The second invoice (for rent falling due on the June quarter day) was paid on 29 July 2009, immediately following an email from Mr Gill to Mr Doyle warning him that non-payment would result in Thrale not paying NR rent for Unit 3, which would leave SCL at risk of NR re-entering the Premises.
91. Rent was therefore paid by SCL in response to the invoices, which did not identify the nature of the tenancy under which rent was demanded, after a proposal for a tenancy at will had been made to which SCL did not respond. The June quarter day’s rent was paid in recognition that it was required to be passed up as rent to NR, so impliedly acknowledging the existence of a NR/Thrale tenancy of Unit 3.
92. A further quarter’s rent was paid for Unit 3 shortly after the September 2009 quarter day.
93. By November 2009, negotiations for the grant of a long lease of the Premises had stalled for about 4 or 5 months. Thrale’s solicitors commented that it was impossible to finalise the lease because there was no response from SCL about the rent and the commencement date of the lease. Thrale considered that it would be necessary to begin the process again, notwithstanding the apparent agreement on terms in March 2009, and considered once more the possibility of putting a tenancy at will in place.
94. At about the same time, Mr Gill – who by this time was acting for Thrale – was engaged to sort out an issue about the rent for Arch 11. It arose because Mr Gill met Mr Philip Doyle by chance in the Crucifix Lane area and, when chatting about Cable, Mr Philip Doyle told Mr Gill that his brother, Robert Doyle, had said that Mr Johnston had agreed a year’s rent-free period for the intended lease. Mr Gill reported back to Mr Scrimgeour, who knew no such thing.
95. Mr Gill at Mr Scrimgeour’s request then emailed Mr Philip Doyle to seek to clarify Thrale’s position and then arranged a meeting with him. In the email of 25 November 2009, Mr Gill said that he hoped to have a draft lease available within a week or so; that this could not be granted until NR granted Thrale a lease of Unit 3, which might take some time, and that “at present, as you are aware, we have a tenancy agreement”. Mr Gill’s understanding was therefore that Thrale’s tenancy of Unit 3 was in place, permitting the grant of a similar tenancy to SCL. He then explained why there was no rent free period and that a rent for Arch 11 would be required to be paid by SCL at the rate of £22,500 p.a.

96. Mr Gill then stated that it was important for Thrale to get the outstanding rent paid quickly – which again must be a reference to the rent for Arch 11, since the rent for Unit 3 was being paid by SCL – and that “I am able to grant you a tenancy at will on the site to run until the sub lease is completed”.
97. Mr Philip Doyle responded immediately expressing concern about what Mr Gill had written. The meeting took place a few days later. Mr Gill put the rent scheme and the proposed tenancy at will to Mr Philip Doyle again, who was angered by it, on the basis of what he believed had been agreed on 3 March 2009. In Mr Gill’s words, “Mr Doyle went mad at me”. Mr Philip Doyle asserted that he was a tenant with tenants’ rights – that his lawyers had advised him not to sign any tenancy at will; that he wasn’t going to pay any more; and that he would only pay rent on the basis that he was a tenant with rights.
98. In his oral evidence, but not in either of his witness statements, Mr Gill added that he agreed with Mr Philip Doyle that Thrale could accept rent on the basis that he had tenants’ rights. We are not persuaded that Mr Gill did in fact make any such comment in 2009. Given the absence of any similar observation in his witness statement and the very long time that has passed since 2009, the claimed recollection of this additional express comment is not reliable. However, since it mattered not to Mr Gill whether SCL had tenants’ rights or not, it is inherently unlikely that he would have challenged Mr Philip Doyle and we find that he did not do so. Mr Gill must very clearly have understood that SCL was asserting that it was entitled to security of tenure and that it was having nothing to do with an express tenancy at will.
99. Mr Gill then phoned Mr Scrimgeour and told him what had happened in the meeting. It is likely (and we find) that Mr Gill related to Mr Scrimgeour the objection to a tenancy at will. The view that Mr Gill and Mr Scrimgeour reached was that it made no difference to Thrale whether SCL paid rent as a tenant at will or under a periodic tenancy because, with luck, in a relatively short time there was going to be a lease in place.
100. On 15 December 2009, Mr Gill emailed Mr Philip Doyle, confirming a rent of £18,000 p.a. for Arch 11 but no rent-free period and said: “Hopefully, we can resolve this and move forward with the lease”.
101. Negotiations for the lease nevertheless remained becalmed between December 2009 and February 2010, when Mr Gill again emailed Mr Philip Doyle saying: “from our point of view, Thrale and Smoke Club need to move forward and agree the terms of the sub leases”. He added that he “would like to regularise our situation and begin invoicing Smoke Club Ltd for the space, back dating the invoice to the opening date of the May bank holiday”.
102. There was no reply from SCL but Mr Gill emailed Mr Philip Doyle again on 25 February 2010 seeking to facilitate the supply by SCL to NR of drawings for the improvements that SCL had carried out in 2009 and proposing a payment of rent on account. The drawings were required by NR in connection with the grant of a licence for alterations, which needed to be resolved for the grant of a long lease of Unit 3 to Thrale.

103. On 19 March 2010, Thrale sent SCL two invoices in respect of Arch 11: one for a quarter's rent from 25 March 2010 and the other for the "arrears" of rent from 22 May 2009 to 24 March 2010, based on a rent of £18,000 p.a. There was a further invoice for the March quarter's rent for Unit 3.
104. On 23 March 2010, SCL paid the March quarter's rent for both Arch 11 and Unit 3. The "arrears" of rent were paid on 14 September 2010. Rent for both properties was later paid for the June 2010 quarter and subsequent quarters.
105. On 27 May 2010, NR finally returned to Thrale the executed tenancy agreement of Unit 3.
106. On 27 October 2010, Mr Stephen Walsh of NR wrote to Thrale noting the sub-letting of Arch 11 and stating that no written approval had been granted. He asked for details of the occupiers and the terms of their occupation. Mr Gill replied on behalf of Thrale on 12 November 2010 stating that NR was fully aware of the sub-letting and had continued to accept rent from Thrale in the knowledge of the sub-letting, which meant that the sub-letting was deemed approved, and that NR had accepted the change of use to a night club.
107. On 22 November 2010, NR sent Thrale a land interest questionnaire relating to possible land acquisition under the Thameslink Order. The land included Arch 11 and Unit 3. It required Thrale to identify all occupiers and the terms on which they occupied. Mr Gill on behalf of Thrale completed and sent a response to NR on about 16 December 2010, which identified SCL t/a Cable as the occupier of Unit 3 on a lease "co terminus [sic] with headlease", at a rent of £17,500 and not excluded from security of tenure. The response in relation to Arch 11 similarly identified SCL on a lease "co terminus with headlease" at a rent of "£18,000 per annum plus vat stepping upwards", not excluded from security of tenure.
108. In particulars of claim dated 19 April 2011, after NR had served on Thrale a notice to treat, SCL was identified as an occupier of part of Thrale's leasehold property, among others, on the basis of a "Tenancy inside act lease to be granted to mirror Thrale Ltd lease" at a rent of £35,500. That was therefore a summary of SCL's interest in the Premises as a whole.
109. What Mr Gill thought the position was in December 2010 or April 2011 is irrelevant to the question of whether a periodic tenancy was impliedly granted to SCL, since there had been no express consensual grant of an interest to SCL. Further, Mr Gill, when completing the land acquisition documents in 2011 doubtless had an eye to the value of Thrale's interest, when compulsory acquisition of part of its interest was on the cards. With a rack-rented lease or tenancy of Arch 11 and Unit 3 within the 1954 Act, Thrale's reversionary interest in the Premises was more valuable.

The law of implied grant of a periodic tenancy

110. It is ultimately a question of fact whether the grant of a periodic tenancy should be inferred. The applicable law is not complex or disputed.

111. Generally, in view of the prevalence of security of tenure in modern landlord and tenant relations, it is less likely than it was in the first half of the 20th Century that the grant of a tenancy will be inferred from possession and payment of periodic rent. Exclusive possession and payment of rent are factors, possibly strong factors, but there may be a different explanation for possession or payment, or both, which makes them at best equivocal. If the circumstances and conduct of the parties negate any intention to enter into a periodic tenancy agreement, the law does not infer a grant. Thus, for example, if the parties are negotiating the terms of an intended lease and the putative lessee goes into possession and starts to pay rent, it is likely to be wrong to attribute to them the intention to create some different interest. That is particularly so if the negotiation is for a lease to be excluded from security of tenure. The test of what the parties are to be taken to have intended is an objective one; it is not a question of their actual, subjective intentions.
112. In Javad v Aqil [1991] 1 WLR 1007, Nicholls LJ reviewed the relevant authorities and said:

“As with other consensually based arrangements, parties frequently proceed with an arrangement whereby one person takes possession of another’s land for payment without having agreed or directed their minds to one or more fundamental aspects of their transaction. In such cases the law, where appropriate, has to step in and fill the gaps in a way that is sensible and reasonable. The law will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply. Thus if one party permits another to go into possession of his land on payment of a rent of so much per week or month, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a weekly or monthly tenancy. Likewise, if one party permits another to remain in possession after the expiration of his tenancy. But I emphasise the qualification ‘failing more’. Frequently there will be more. Indeed, nowadays there normally will be other material surrounding circumstances. The simple situation is unlikely to arise often, not least because of the extent to which statute has intervened in landlord-tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend upon a fair consideration of all the circumstances, of which the payment of rent on a periodical basis is only one, albeit a very important one. This is so however large or small may be the amount of the payment.

To this I add one observation, having in mind the facts of the present case. Where parties are negotiating the terms of a proposed lease, and the prospective tenant is let into possession or permitted to remain in possession in advance of, and in anticipation of, terms being agreed, the fact that the parties have not yet agreed terms will be a factor to be taken into account in ascertaining their intention. It will often be a weighty factor. Frequently in such cases a sum called ‘rent’ is paid at once and in accordance with the terms of the proposed lease: for example, quarterly in advance. But, depending on all the circumstances, parties are not to be supposed thereby to have agreed that the prospective tenant shall be a quarterly tenant. They cannot sensibly be taken to have agreed that he shall have a periodic tenancy, with all the consequences flowing from that, at a time when they are still not agreed about the terms on which the prospective tenant shall have possession under the proposed lease and when he has been permitted to go into possession or remain in

possession merely as an interim measure in the expectation that all will be regulated and regularised in due course when terms are agreed and a formal lease granted.

Of course, when one party permits another to enter or remain upon his land on payment of a sum of money, and that other has no statutory entitlement to be there, almost inevitably there will be some consensual relationship between them. It may be no more than a licence determinable at any time or a tenancy at will. But when and so long as such parties are in the throes of negotiating larger terms, caution must be exercised before inferring or imputing to the parties an intention to give to the occupant more than a very limited interest, be it licence or tenancy. Otherwise the court would be in danger of inferring or imputing from conduct, such as payment of rent and the carrying out of repairs, whose explanation lies in the parties' expectation that they will be able to reach agreement on the larger terms, an intention to grant a lesser interest, such as a periodic tenancy, which the parties never had in contemplation at all."

113. Those observations were made in the context of a case in which an intended tenant was let into occupation pending the conclusion of negotiations for the grant of a lease and paid rent quarterly at the agreed rate for the lease. The decision of the Court of Appeal was that the judge was right that in the circumstances the creation of a periodic tenancy could not be inferred and the occupier was merely a tenant at will.
114. In Erimus Housing Ltd v Barclays Wealth Trustees (Jersey) Ltd [2014] EWCA Civ 303, a commercial tenant held over after the expiry of a 5-year, contracted out lease, having opened negotiations for a new 3-year lease. The landlord had countered with proposals for a contracted out 6-year lease. The tenant continued to pay rent at the rate passing under the expired lease. The negotiations were fitful and leisurely. Eventually, the parties did reach agreement but the new lease was never granted. Instead, the tenant chose to vacate and gave a short period of notice. The landlord contended that a new tenancy from year to year had been impliedly granted, such that at least 6 months' notice to quit was required to terminate the new tenancy. The tenant argued that it was only a tenant at will.
115. The judge decided that a new yearly tenancy had been granted and the tenant appealed. The Court of Appeal decided that the judge had been wrong to regard the negotiations as so desultory that the occupation and payment was attributable to a different interest. The negotiations were slow but did reach agreement. The right analysis was that the parties were negotiating for a new lease and the tenant remained in possession in anticipation of that event. The rent being paid was acceptable, the landlord had no reason to seek possession and possession was given while the negotiations were progressing. There was therefore no reason to attribute to the parties a different intention to grant an interest that they had not contemplated.
116. Patten LJ said at [23]:

"The payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties' contractual intentions fall to be determined by looking objectively at all relevant circumstances. The most obvious and most significant circumstance in

the present case, as in Javad v Aqil, was the fact that the parties were in negotiation for the grant of a new formal lease. In these circumstances, as in any other subject to contract negotiations, the obvious and almost overwhelming inference will be that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing negotiations. In the landlord and tenant context that will in most cases lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease. The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act This point is given additional force in the present case by the fact that the intended new lease, like the old lease, was to be contracted out.”

The parties’ submissions

117. Mr Sissons, for NR, submitted that, as in the Erimus Housing case, the parties remained at all times in negotiation for the grant of a new lease of the Premises, even though the negotiations were desultory. SCL had been given exclusive possession in anticipation of the grant of a long lease, and the rent eventually paid reflected the rent agreed to be payable under that lease. Although the parties did at one stage discuss the possibility of the grant of a periodic tenancy as an interim measure, that did not progress, even when NR eventually granted Thrale a periodic tenancy of Unit 3. The parties continued to negotiate the terms of a licence for alterations, reflecting the works that SCL had carried out to the Premises. This too was delayed by NR’s inefficiency, but it nevertheless demonstrates that the intention was to document a long lease of the Premises in due course. Progress in that regard was overtaken by the notification in February 2011 that a notice to treat in respect of Unit 11 would shortly be served by NR .
118. Mr Sissons submits that the right conclusion must therefore be that SCL remained a tenant at will of the Premises, having become one at an earlier time, notwithstanding the payment of rent for the Premises as a whole from March 2010. Nothing had otherwise changed at that time, and the attempt to document a long lease was still both parties’ objective. There was no meeting of minds about the basis on which rent was paid: Thrale wanted a tenancy at will; SCL wanted something more.
119. Miss Scott on behalf of SCL submits that there was a significant change by March 2010 because SCL had made it quite clear (and Thrale knew) that it claimed tenants’ rights and refused categorically to sign a tenancy at will, which was followed by payment of rent for the whole of the Premises for the first time. The rent therefore must have been demanded and paid on a different basis at that time. This was not a case, she emphasised, in which there was any concern by any party about the acquisition of security of tenure under the 1954 Act. Since both Thrale and SCL were content that a periodic tenancy should exist as an interim interest, to be replaced later by the grant of a long lease, there is no reason not to infer the grant of a periodic tenancy. When NR finally executed the periodic tenancy of Unit 3 in favour of Thrale in May 2010, there was no reason to expect Thrale and SCL to bother documenting a tenancy agreement at that stage, since SCL had been in exclusive possession for a year and was paying rent. By that stage, all negotiations for the long lease had ceased.

Conclusions

120. We consider that the occupation of SCL before and after the November 2008 Meeting was as gratuitous licensee, to enable SCL to take steps to prepare for its intended use of the Premises. A basic understanding had been reached between Mr Gill (acting principally for NR) and SCL about the grant of a lease, but further discussions were required between NR and Thrale before the terms of a long lease could be agreed. Mr Scrimgeour and Mr Robinson of Thrale were content for SCL to have access to the Premises and start their works. The extent of works being carried out by SCL increased considerably in 2009, such that SCL probably had exclusive occupation of the Premises some time in January 2009, though Thrale still was entitled and able to enter the Premises.
121. From 4 March 2009, when there was agreement on heads of terms with Thrale, SCL was either still a mere licensee or at most a tenant at will, given that there were then agreed terms for a long lease and negotiations “subject to contract” were being pursued. It would have been understood at that time that SCL was in occupation and fitting out in anticipation of the grant of a lease.
122. However, by April 2009 the intention of all parties – communicated between them – was for SCL to be granted a periodic tenancy of the Premises once Thrale had a periodic tenancy of Unit 3. That was recognised by NR, Thrale and SCL to be a better means of enabling SCL to have secure possession and Thrale to recover rent pending the further negotiation and documentation of the long lease. Two factors here were unusual and markedly different from the facts of Javad v Aqil and the Erimus Housing case:
 - a. First, no one had any objection in principle with the express grant to SCL of a periodic tenancy as an interim interest. Indeed, Thrale had signed a tenancy agreement of Unit 3 with NR and NR had confirmed permission to sub-let for that very reason. It was intended in the spring of 2009 that SCL would have a more substantial interest than a mere licence or tenancy at will.
 - b. Second, there was no issue at any stage about creating an interest – whether a tenancy or a lease – with security of tenure. In that regard, there was objectively no other reason for the parties to avoid creating an interest informally, before the grant of the intended lease.
123. SCL and Thrale were waiting for NR to execute the superior tenancy agreement before entering into an express tenancy agreement of the Premises. That was the position when Cable opened, in May 2009. At that stage, SCL asked Thrale for a tenancy agreement of the whole of the Premises but Thrale did not provide one. The conclusion from that is that, at that stage, there was no intention to bring the tenancy agreement into being.
124. Relatively shortly after that, Thrale sent SCL invoices for Unit 3. That could have been seen as Thrale relenting on the grant of a periodic tenancy, but 3 days later Thrale wrote to SCL proposing a tenancy at will. Subjectively, SCL did not want one; but that was not communicated to Thrale and the proposal was not rejected. Instead, SCL paid the rent demanded without demur. The first instalment paid was compensation for the fact of

beneficial occupation in the past; the second was future rent. In view of the fact that payment directly followed the proposal of a tenancy at will, the conclusion to be drawn objectively (regardless of Mr Doyle's or Mr Johnston's private intentions) is that SCL was tendering rent for a tenancy at will. The impression created was that, at that time, Thrale was not going to grant something more until NR had granted its tenancy of Unit 3.

125. The negotiations then tailed off for some months and in November 2009 Mr Gill offered Mr Doyle a tenancy at will of Arch 11. This was vehemently rejected by Mr Philip Doyle, who claimed tenants' rights (i.e. a tenancy with some degree of security of tenure) and refused to pay rent other than as a full tenant. This was clearly understood and accepted by Thrale, who did not disagree at any time. The rent for Arch 11 was then agreed at £18,000 p.a. At this time, it was still expected that the parties would proceed with the grant of the lease in due course, but Thrale said that it also wanted to regularise the occupation by payment of rent.
126. Invoices for rent of Arch 11 were sent on 19 March 2010. There was still an aspiration to have a long lease granted at some time (though no progress had been made other than to agree the rent) but both parties wanted an interest in place in the interim, SCL for security reasons and Thrale in order to justify demanding rent.
127. The fact that rent was demanded and paid at a time when the eventual grant of a lease was in contemplation therefore does not, on the particular facts of this case, negative an intention to grant some other interest in the meantime. That is exactly what the parties originally envisaged and had discussed. NR had indicated that Thrale was entitled to sub-let and – unlike in the case of Unit 3 – Thrale already had the interest out of which a periodic tenancy could be granted.
128. In the circumstances, demand and payment of rent for Arch 11 cannot be attributed to a tenancy at will. That is because SCL had in emphatic terms refused to make payment on that basis and Thrale had neither disagreed nor made clear when demanding rent thereafter that it was only payable for a tenancy at will. The fact that the parties were still engaged on negotiations for the grant of a long lease of the whole of the Premises does not imply that they did not agree to grant a lesser interest in the meantime. The facts of the current case are unusual in that respect: the negotiations for the long lease do not lead to the strong inference that the parties did not intend to create some other intermediate interest, to use the words of Patten LJ, nor was such an interest inconsistent with their intention to create a long lease later.
129. In our judgment, payment of the March 2010 quarter's rent for Arch 11, based on an annual rate of £18,000 p.a. agreed in November 2009, followed by payment and acceptance of further quarters' rent for Arch 11, created an annual periodic tenancy of Arch 11, with security of tenure under the 1954 Act. Rent was demanded and paid separately for Arch 11 and therefore it was a tenancy of Arch 11 that was impliedly created. There is nothing in the facts, as we have found them, to require a single periodic tenancy of the Premises to be taken to have been intended. Following the execution by NR of the tenancy agreement of Unit 3 in May 2010, Thrale and SCL could very easily have put in place a single written periodic tenancy agreement of the Premises, but neither party suggested that. There was no other

event that can be interpreted as converting the tenancy at will of Unit 3 into an annual periodic tenancy of the Premises as a whole.

130. It might perhaps be surprising that the legal effect of what was done is different in the case of Arch 11 from Unit 3. The reason is, as we have stated, that it is ultimately a question of fact whether the grant of a tenancy from year to year should be inferred. The circumstances and time at which rent was first paid for Unit 3 were materially different from the circumstances in which rent was first demanded and paid for Arch 11. Nothing done at the latter time had the effect of terminating the existing tenancy at will of Unit 3, or of granting a single tenancy of the Premises. Rent was calculated, demanded and paid separately for the two parts of the Premises. When rent was first paid for Arch 11, NR had still not executed the periodic tenancy of Unit 3. In those circumstances, there is nothing to justify a conclusion that the tenancy at will had been surrendered by the grant of a single periodic tenancy of the Premises.
131. We therefore conclude that, as at 1 May 2013, SCL had a compensatable interest in land for the purposes of the Compensation Code, namely a periodic tenancy from year to year of Arch 11, the Reference Land, with security of tenure under the 1954 Act.

Mr Justice Fancourt, Chamber President

Mr Mark Higgin FRICS

30 March 2021