Claim No D03CL420

IN THE COUNTY COURT AT CENTRAL LONDON

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

Date: 16th July 2019

Before:

HIS HONOUR JUDGE SAUNDERS

Between:

LONDON KENDAL STREET NO3 LIMITED **Claimant**

- and -

DAEJAN INVESTMENTS LIMITED **Defendant**

Ms Caroline Shea QC of Counsel (instructed by **Mishcon De Reya)** for the **Claimant**
Mr Nathaniel Duckworth of Counsel (instructed by **David Conway and Co**) for the **Defendant**

Hearing dates: 19th – 21st March 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Saunders

1. These proceedings relate to the claimant's claim for a new tenancy pursuant to section 24 of the Landlord and Tenant Act 1954 ("the 1954 Act"). This is the hearing of a preliminary issue in that the defendant opposes the grant of a new tenancy on ground (f) of Section 30(1) of the 1954 Act ("ground (f)")
2. At the hearing before me, the claimant was represented by Miss Caroline Shea QC of Counsel and the defendant by Mr Nathaniel Duckworth of counsel. I am grateful to them for the detail of their submissions based upon their respective skeleton arguments.
3. I heard from a number of witnesses. For the claimant, I heard oral evidence from Mr Coates. I also considered the witness statement of Mr Morris, a director of the claimant company although he did not give oral evidence and I attach the appropriate weight to it as a result. The defendant's evidence consisted of oral evidence from a Mr Adams and a Mr Jones. I was also taken by the parties to a considerable number of documents within the trial bundle along with the expert report of Mr Rayner (who also did not give evidence at trial). I will explain their individual roles in the section where I deal with their evidence.

<u>The current lease</u>

4. The claimant is the current occupier of Suite C2, Ground Floor, Park West, Marble Arch, Edgware Road, London W2 2UT ("Suite C2") under a lease dated 11 February 2014 made between the defendant as landlord and the claimant as tenant ("the lease"). MWB Business Exchange Centres Ltd act as guarantor.
5. The lease of Suite C2 was granted for a period of five years from and including the 25 March 2013. The contractual term of the lease expired on the 24 March 2018, and the lease continues in existence pursuant to section 24 of the 1954 Act following the claimant's application for a new tenancy.

<u>Termination of the Lease</u>

6. On the 25th March 2017, the defendant served on the claimant a notice pursuant to section 25 of the 1954 Act which specified 24th March 2018 as the date of the termination of the lease. It also stated that the defendant would oppose any application to the court for the grant of a new tenancy pursuant to ground (f), namely, that on the termination of the lease, the defendant intended to demolish or reconstruct Suite C2 (or a substantial part of it) and could not reasonably do so without obtaining vacant possession.
7. By a claim dated 4th December 2017, the claimant made an application for the grant of the new tenancy pursuant to section 24.
8. During the course of the renewal proceedings, the parties agreed that the question of whether the defendant satisfies ground (f) should be tried as a preliminary issue and an

order was made in those terms. The matter comes before me upon this basis and for determination.

The Lease

9. The lease is one of four leases ("the leases") which are each vested in one of a group of companies ("IWG"). Apart from Suite C2, the other three leases relate to Suites C1, A and B. They all occupy part of the ground floor to the building of which they form part at Park West.
10. IWG uses the IWG premises both as its own head office and registered office (in Suite A) and as serviced office accommodation with associated facilities in the other suites whereby short-term licences are granted to office occupiers ("the IWG premises"). Suite C2 itself comprises a kitchen, toilets, a shower room and a large meeting room which are available for common use by the occupants of the remainder of the IWG premises.
11. Park West consists of a large 10 storey building, comprising a vast double height basement; commercial (retail) office space on the ground floor and part of the first floor; and some 500 or so residential leases of apartments occupying a further large part of the building consisting of parts of the ground floor through to the ninth floor.
12. It is common ground between the parties that the works which the defendant says it intends to perform fall within ground (f). However, the claimant remains in dispute with the defendant in that it does not accept that (a) the defendant has the requisite intention required by ground (f); (b) that there is a realistic possibility of the defendant being able to carry out the works; and/or (c) that such works will be commenced within the required three-month period of the end of the lease (or any other reasonable period required by law).

The ground

13. The preliminary issue relates to Section 30(1)(f) of the 1954 Act. This provides that the landlord can successfully oppose an application for a new tenancy under section 24 of the 1954 Act if any of the grounds under subsection 1 are made out. The section provides as follows: -

"(f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work or construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding". (my underlining)

14. I have underlined the crucial part of the ground above. It is for me to determine whether on the termination of the current tenancy the landlord intends to carry out the C2 works.
15. It is common ground between the parties that the proposed works are (a) sufficiently substantial and (b) could not reasonably be undertaken without obtaining possession of Suite C2.
16. The issue is whether the defendant has the current intention to do that at the termination of the tenancy.
17. By virtue of the up-to-date case law, this has to be considered in three ways: -
    (a) First, that the landlord has the requisite subjective intention;
    (b) Secondly, whether this assessment can be made by looking at it objectively; and

(c) Thirdly, whether the requirement of intention is made out on the hypothetical *Franses* basis. [I will deal with an explanation of this in the section regarding law set out below].

Statutory Mechanism

18. Section 25 provides a mechanism by which a protected business lease under the 1954 Act can be brought to an end. This is dealt with by service of a notice by the landlord upon the tenant under section 25 not more than 12 no less than six months before the expiry of the lease.
19. This notice must communicate to the tenant if any ground of opposition is being put forward so as to resist any new tenancy.
20. Although the lease technically comes to an end, as soon as the tenant makes an application for a new lease before the expiry date, the lease will continue on a statutory basis until the matter is determined by agreement or by the court (section 64 of the 1954 Act).

21. Section 64 reads as follows:

"if the effect of the notice is to terminate the tenancy before the expiry of a period of three months beginning with the date on which the application is finally disposed of, the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of three months and not at any time"

22. The practical effect of this is that the tenant is protected for a period of three months and 21 days from the judgment of this Court. Sub – section (2) adds a further 21 days in effect because it says that an application is not fully disposed of until after the time limit for making an appeal has come and gone. Thus that particular period of time is important in assessing intention.

Landlord's intention under ground (f) - time in which to commence the works

23. The date upon which any such intention is to be assessed is the date of the trial of this preliminary issue. The authority for this is Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1959] AC 20 HL. By way of confirmation, this was also adopted by the Supreme Court in the case of Franses which I have earlier mentioned in passing but to which I shall refer in more detail later in this judgment – as it is largely crucial to this decision.
24. There are also two further points which are relevant in terms of intention and time. These are as follows:
    (a) the section 64 component; the tenancy will not come to an end until the period of three months and 21 days has passed following judgment;
    (b) Mr Duckworth's submission that, in reality, this period is extended by a "reasonable period approach". He cites several authorities showing that the courts adopting a more common-sense approach, and accepting, for example, that "achieving a wrecking ball going through the door" at three months and 21 days is in some cases unrealistic.

25. Livingston Underwriting Ltd v Corbett and Newson (1955) 165 EG 469 is authority for this proposition - adding a reasonable period (after the three months and 21-day period has expired). Here, it was said "I am satisfied in this case that the landlords do intend to demolish. I am also satisfied that they intend to do so on the termination of the tenancy…… One cannot say this is a question of demolishing the moment the other people walk out. You have to take a reasonable view of the matter, and I think that if they start work within the quarter after the termination of the tenancy, which is the Midsummer quarter, they are within the meaning of "demolishing at the termination of the current tenancy"".
26. In so far as the commencement of the works is concerned, there is nothing within the legislation which requires a landlord to finish in any particular timeframe. There may be arguments (at a later stage) about what constitutes genuine work (or commencement) but the law appears to be settled on this. In my view, from what is a common-sense approach, an appropriate timeframe in relation to the facts of this case would be in the region of six months and 21 days from the date of the judgment.
27. In my view, this is a sensible interpretation of the authorities when one looks at other cases to which I have been referred. For example, in the QBD decision in Franses v Cavendish Hotel (London Ltd) [2017] EWHC 1670, one of the grounds of appeal was that the court applied the wrong test in holding the reasonable time for commencing the scheme was 12 months from obtaining vacant possession. Jay J refers to this length of time in his paragraph 75 of the judgment indicating that:

"75. Turning to the second issue on ground (4), in London Hilton Jewellers Ltd v Hilton International Hotels Ltd [1990] 1 EGLR 112, the Court of Appeal in what appears to have been a ground (g) case rejected the tenant's submission that "a month or so" was unreasonably long. In Edwards v Thompson [1990] 60 P & CR 526, the Court of Appeal allowed an appeal in circumstances where it was clear that the landlord might have to wait "a matter of months or even longer" for the land to be sold. In Method Development v Jones [1971] 1 WLR 168, the Court of Appeal allowed an appeal in circumstances where the landlord would enter into occupation on a rolling or incremental basis over the course of the year."

28. It is of relevance to this case that, in Method Development, Atkinson LJ stated that the length of a reasonable time must be very much a matter of impression for the trial judge. His commentary at that point is instructive:

"(counsel) accepted that, had the judge alighted on three months and given no further explanation, she would have no justifiable complaint. However, it is a more than reasonable inference that the judge considered that the landlord would need up to 12 months because of the practical issues he alluded to… I appreciate that the question is very much fact sensitive, but it involves a consideration not just of how long is reasonably required to initiate the works, but also what is reasonable in all the circumstances of the case in the context of these (under leases)."

28. I consider what can be taken from these authorities - as it relates to 24 (b) above - is that a period of a further 3 months would always be acceptable - but that extending this to 12 months may need greater explanation. There is then, of course, the overarching point of each case turning on its own specific facts to be considered.

Landlord's intention under ground (f) – subjective intention

29. The test is defined by Lord Evershed in the case of Fleet Electrics v Jacey Investments [1956] All E.R. 99 CA at page 102 E. He says: -

"it is not now in doubt that the import of the word "intend" in Section 30(1) (f) of the act is that at the appropriate date or dates…… there must be a firm and settled intention not likely to be changed, or in other words that the proposal for doing the work has moved "out of the zone of contemplation and… into the valley of decision"

30. He goes on to say that:

"it follows, then, that the court, in a case such as this, has to decide whether the landlord has established that he had at the requested dates a firm and settled intention so as to reconstruct the premises"

31. In Zarvos v Pradhan [2003] EWCA Civ 208, Ward LJ expands upon this quite considerably. At his Paragraph 45, he states:

"First, if the judge is to make a finding that the landlord does not genuinely intend that which he says he intends, then the judge, in those circumstances, is finding that he does not believe what the landlord says. If that is his finding, then he should make it plain that he does not believe him and wherever possible should explain why he does not believe him. (The circuit judge) would know that and would not flinch from dealing directly with critical matters of that kind. It is, of course, a harsh finding to make. There may be many cases where the judge need not go so far. If he hangs his judgment on the second limb he does not have to disbelieve the landlord when he sets out his stall. Indeed, the second limb is there precisely to cater for the case with the landlord does not genuinely believe in what he says he intends to do"

32. It follows, therefore, that the judge must say that he does not believe the landlord and in his judgment, why he has made that assessment. If I am to find against the landlord for these reasons, then I must make findings setting out why I have formed that view.

33. Importantly, I refer to the case of Crossco No 4 Unlimited v Jolan Limited [2011] EWHC803. In his judgment, Morgan J says:

"a contractual obligation to carry out the works is powerful evidence that he intends to do just that".

34. The status of an undertaking was explained by Romer J in Espresso Coffee Machine Co. Ltd v Guardian Assurance Co Ltd [1959] 1 WLR 250. His judgment reads:

"Nothing could be clearer than the evidence which he gave, and he repeated more than once, in categorical terms, in the evidence that he gave on behalf his company, that his company did intend, if they got possession of …… to go into occupation. When one adds to that the fact the counsel was authorised to offer, and did offer, to the court the undertaking in the form which my Lord has read, the matter really seems to be put beyond any doubt. Some undertakings are of course unacceptable… The undertaking seems to me to compel fixity of intention-(referring to *Betty's cafe*.) That undertaking had been given and accepted, it is perfectly decisive of the fixity of intention which I agree is a requisite element."

35. It follows that an undertaking can be dispositive of the issue. However, its terms have to be acceptable.

Landlord's intention under ground (f) – objective element

36. I refer, initially, to the case of Cadogan v McCarthy and Stone (Developments) Ltd [2000] L & T R 249 CA. The summary of this case confirms that where a landlord opposes an application for a new business tenancy because he intends to redevelop the holding, but does not have planning permission for the proposed redevelopment, he must establish that he has a reasonable prospect of obtaining permission, not that it is more likely than not that he will obtain it.
37. Mr Duckworth says, and I agree, that this principle could also relate to matters such as vacant possession, bank financing and, in this case, the overriding problem of the tenant taking proceedings for an injunction.
38. The authorities suggest, in my view, that a consideration of the objective element is really a tool which assists in establishing the true subjective intention of the landlord, because if there is some obvious impediment to the landlord's plans that will result in rendering their plans fanciful, then plainly that is going to be a powerful indication that the landlord does not intend to do what he says he is going to do.
39. I also accept Mr Duckworth's submission that the test of reasonableness within this context is akin to that one should apply in a summary judgment application.

Landlord's intention – Hypothetical *Franses* test

40. The law has been significantly altered by the decision of the Supreme Court in S Franses Ltd v Cavendish Hotels (London) Limited [2018] UKSC 62 – a decision which is dated 5th December 2018 – that date is significant to this case in that it was decided after the Section 25 Notice had been served and these proceedings had been issued. In other words, the landlords had served a notice in the belief that the previous less – stringent test applied.
41. The effect of this ruling has been that the landlord's ability to oppose lease renewals has been significantly lessened. In short, a landlord must now demonstrate – in addition to the subjective and objective elements – that its intention to undertake works is held independent of the tenant's right to a new tenancy.
42. In Franses, the tenant operated a textile dealership from the ground floor and basement of a building in Jermyn Street in London. The landlord occupied the remainder of the building as a hotel. The tenant accused the landlord of performing remedial works in the building with the sole aim of using the 1954 Act to refuse a new lease.
43. In the resulting proceedings, under the 1954 Act, the landlord accepted that the works had no practical value and said that the works would not have been undertaken if the tenant had left the premises voluntarily. It was a mere device to obtain possession. The previous practical advice given by lawyers to landlords in this situation was that it was sufficient to put in a programme of works and that would be enough to satisfy section 30(1)(f).
44. The Supreme Court held that whilst motive in and of itself remained irrelevant to ground (f), it is, in some circumstances, useful evidence of the landlord's underlying intention. It was the Court's view that the landlord's intention to demolish or reconstruct the premises must exist independently of the tenant's claim to a new

tenancy. Accordingly, the landlord's intention to carry out the works cannot be conditional upon whether the tenant chooses to seek a new tenancy. The test is whether the landlord would intend to do the works if the tenant left voluntarily. If not, the landlord's intention was conditional and therefore could not achieve the fixed and settled intention that ground (f) requires.

45. In his judgment, Lords Sumption set this out in some detail and it is instructive to set out what he says between his paragraphs 17 – 20:

"17. This appeal does not, as it seems to me, turn on the landlord's motive or purpose, nor on the objective reasonableness of its proposals. It turns on the nature or quality of the intention that ground (f) requires. The entire value of the works proposed by this landlord consists in getting rid of the tenant not in any benefit to be derived from the reconstruction itself. The commercial reality is that the landlord is proposing to spend a sum of money to obtain vacant possession. Indeed, in many cases, apart from the statutory compensation, landlords with proposals like these will not even have to spend the money. They need only supply the tenant with a schedule of works substantial and disruptive enough to be inconsistent with his continued occupation. If the landlord's argument is correct, the tenant will have no incentive to go to court just to get an undertaking to carry out the works, from which he could derive no possible benefit. He will recognise defeat and leave voluntarily. The landlord will then have no need to give an undertaking to the court and no reason to carry out the works. The result is that no overriding interest of the landlord will be served which section 30 can be thought to protect. The right to obtain vacant possession on the expiry of the existing term, which is all that landlord is getting for his money, is not in itself an interest protected by section 30. On the contrary, in a case where the parties have not agreed to contract out of statutory protection, it is the very interest that Part II of the act is designed to restrict.

18. These considerations are relevant not so much in themselves because in such a case one would usually infer what in this case the landlord has been honest enough to admit, i.e. that the landlord's intention to carry out the works was conditional. It is intended to carry them out only conditionally on there being necessary to get the tenant out, and not, for example, if he left voluntarily or if the judge was persuaded that the works could be done by exercising a right of entry. Does an intention of this kind engage ground (f)? The courts below thought that it was a sufficient answer to this question that the condition was satisfied at the time the trial, because it was by then clear that the tenant would not in fact leave voluntarily the works could not be done by way of the right of entry while he remained in possession. A dictum of Neuberger J in Al – Malik Carpets (Private) Ltd v London Buildings (Highgate) Ltd [1999] All ER 971. suggests that he too would have regarded it as sufficient, although the point was not directly in issue in that case.

19. I respectfully disagree. The problem is not the mere conditionality of the landlord's intention, but the nature of the condition. Section 30(1)(f) assumes the landlord's intention to demolish or reconstruct the premises is being obstructed by the tenant's occupation. Hence the requirement that the landlord "could not reasonably do so without obtaining possession of the holding". Hence also the provisions of section 31A that the court shall not hold this requirement to have been satisfied if the works can reasonably be carried out by exercising a right of entry and the tenant is willing to include a right of entry for that purpose in the terms of the new tenancy. These provisions show that the landlord's intention to demolish or reconstruct the premises must exist independently of the tenant statutory claim to a new

tenancy, so the tenant's right of occupation under a new lease would serve to be obstructed. The landlord's intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily. On the facts found by Judge Saggerson such as in, the tenant's possession of the premises did not obstruct the landlord's intended works, for if the tenant gave up possession landlord had no intention of carrying them out. Likewise, the landlord did not intend to carry them out if the tenant persuaded the court the works could reasonably be carried out while it remained in possession. In my judgment, the conditional intention of this kind is not the fixed and settled intention that ground (f) requires. The answer would be the same if what the landlord proposed was demolition, conditionally on it being necessary to obtain possession from the court.

20. More complex issues would arise if the landlord intended to carry out some substantial part of the proposed works whether or not it was necessary to do so in order to obtain vacant possession from the court, and part of them only if it was necessary in order to gain possession. This might arise if, for example, the unconditional part of the landlord's plan was insufficiently substantial or disruptive to warrant the refusal of a new tenancy, so that spurious additional works had to be added for the sole purpose of obtaining possession. In a situation like that, the answer is likely to depend on the precise facts. If, however, it established that, the time of the trial, with the tenant hypothetically to leave voluntarily, the landlord would not carry out spurious additional works, and the tenants claim to a new tenancy would normally fall to be resolved by reference only to the works which the landlord unconditionally intended.

46. The question is therefore - upon the facts of this case - whether the landlord's real motive in doing these works simply to remove the tenant as distinct from some ordinary commercial reason.

47. The practical approach to this is dealt with by Lord Briggs's judgement at paragraphs 26 and 27 in the same decision. He says: -

"26. In the real world, as a business tenancy approaches its contractual termination date, a landlord may well be faced with alternative future scenarios: will the tenant leave voluntarily or seek a new tenancy? These alternatives may be discussed in negotiations, or at a mediation, before or even after the tenant begins proceedings of the grant of a new tenancy. The landlord may well form alternative intentions to meet both eventualities. If the tenant leaves voluntarily the landlord may just carry out a modest refurbishment before occupying the premises through its own business, or selling with vacant possession. If the tenant plans to fight for a new tenancy, the landlord may intend to do large-scale works, or to demolish premises with significant development value, to be able (under the law as understood by the courts below) to oppose the tenant's application successfully. If the landlord is a company, there may be board minutes in which those alternative intentions are recorded.

27. But by the time of the hearing these alternative intentions about what if any works the landlord will do if the tenant leaves voluntarily will usually just be past history. The tenant will by then have committed substantial costs, and risked liability for the landlord's costs, in pursuing its claim for a new tenancy to a hard-fought hearing. The prospect of voluntary departure may have receded to a purely theoretical irrelevance, like a cloud the size of a

man's hand. In such a case the landlord may no longer have any relevant intention in relation to that hypothetical and indeed counter-factual possibility. In some cases, the tenant may from the outset have manifested such a determination to seek new tenancy at all costs that voluntary departure may never have been a sufficient possibility for the landlord to give it a moment's thought, still less formed an intention about it. To the question in cross examination: "does your company now intend to carry out these works if the tenant goes voluntarily ", the landlord's witness might say, with complete honesty, as at the hearing date, that she and her fellow directors don't waste their valuable time discussing irrelevant hypothetical possibilities.

28. It is to escape this forensic cul-de-sac the legitimate recourse may now have to be had to a forensic examination of the landlord's purpose of motive, as Lord Sumption suggests. As he points out at the beginning of his judgment, the real issue of principle in this case is whether the landlord should be able to resist a new tenancy by reference to intended works of construction if its only purpose in doing them is to get rid of the tenant. Of course, as the cases reviewed by Lord Sumption show, a direct invocation of a purpose test is not permitted by the language of section 30(1)(f), because it speaks only of intention. Parliament has chosen to define this ground of opposition by reference to intention, but cannot have intended thereby to enable the landlord to defeat a claim under the act by asserting and proving an intention to do works purely for the purpose of getting rid of the tenant, such that the works (or the qualifying works) would not be done if the tenant left voluntarily."

48. Lord Briggs goes on to discuss the issue of purpose or motive in resolving the genuineness of any intention. His view (which I am bound to follow) is that it is a factor which can be considered when the Court is deciding intention.

<u>Timothy Taylor case – and its relevance</u>

49. It is often a difficult point to resolve of how the tenant's right to quiet enjoyment and the landlord's duty not to derogate from its grant can be squared with the landlord's right to carry out works.
50. The leading case is Lechouritis v Goldmile Properties [2003] EWCA Civ 49 where it was held that – in this situation – covenants pulling in different directions should be read together and must be assessed against a criterion of reasonableness.
51. The case of Timothy Taylor Ltd v Mayfair House Corporation [2016] builds on this. It is important for me to highlight a passage from the judgment where Mr Alan Steinfield QC (sitting as a Deputy High Court judge) draws together the authorities – including Goldmile, Southwark v Tanner [2001] 1 AC 1 and Century Projects Ltd v Almacantar [2014] EWHC 394 at his paragraph 24:

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

(a) in a case like the present, the landlord's reservation of the right to build in a way which, but for the reservation, would constitute either a breach of the covenant for quiet enjoyment or a breach of the implied covenant not to derogate from the grant should be construed as entitling the landlord to do the work contemplated

by the reservation provided that in doing that work the landlord has taken all reasonable steps to minimise disturbance to the tenant cause thereby;

(b) in considering what can reasonably be carried out, it is relevant what knowledge or notice the tenant had of the works intended to be carried out by landlord at the commencement of the lease;

(c) an offer by a landlord of financial compensation to the tenant to compensate the tenant for the disturbance caused by the works is a factor which the court is entitled to take into account in considering the overall reasonableness of the steps which the landlord has taken;

25. Both Goldmile and Century Projects were cases where the works that the landlord was carrying out were works which it was necessary for the landlord to carry out in order to keep the building, of which the demised premises formed part, in good repair pursuant to the repairing covenants which the landlord had given to all the lessees and occupiers of the building. It seems to me that this is, in itself, a relevant factor for the court to take into account in viewing the reasonableness of the landlord's works and the steps which the landlord has taken to minimise disturbance to its tenants. In both those cases, the works were not being carried out for the personal benefit the landlord but rather in each case the works were being carried out for the benefit of all the tenants of the building, of which the claimant was one. In a case where, as here, the landlord is exercising its reserved rights to do works entirely for its own purposes and where the carrying out of those works, whilst profiting the landlord, confers little or no benefit on the tenant, it seems to me that this is the factor which the court is entitled to take into account when viewing the reasonableness of what the landlord is doing"

52. A "Timothy Taylor" letter was written by the defendant's Solicitors in these proceedings just prior to the hearing (on the 18th March 2019) and they rely upon it. It is found at page 34A of the supplemental bundle. It is important to refer to its terms – the material part of which reads as follows:

"our client… has well in mind that, having regard to its covenant for quiet enjoyment and its duty not to derogate from its grant, it must take all reasonable steps to minimise the disruption the works will cause to your client……..

To that end, our client has …..since halting the works (at your client's behest) in February 2018, participated in a number of without prejudice meetings with your client's representatives; has provided your client with documents containing particulars of the works and the likely timescale for them; has given careful consideration with its contractors and professional team as to what measures a client might reasonably undertake in order to minimise disturbance to your client and other tenants of Park West… and, most recently, it has participated in the mediation in which was hoped that consensus might be reached with your client in all matters relevant to the carrying out of the works……"

It then goes on to list proposals under the following headings:

(a) "the manner in which the works will be carried out moving forward - particularly an appropriate method of works which will minimise the impact of the works on IWG and their customers

(b) designated noisy work times which will have the minimum impact on IWG to its business and the businesses of their clients;

(c) timescales for the remaining programme of works and the provision of a detailed scope of works and orders so that your client can fully understand the nature of the works which your client intends to carry out;
(d) the method of such works and, in particular, confirmation that our client's contractors will use the most suitable tools and equipment to ensure noise and vibrations are kept to an absolute minimum;
(e) the implementation of a suitable monitoring program;
(f) provision of reporting lines to ensure IWG is able to contact relevant personnel in the event of queries or complaints along with details of emergency protocols in the event of any problems arising out of the works;
(g) meetings and progress reports
(h) financial compensation-this includes an offer of reduction of 50% of the rent which will be payable in respect of the leases of Suites B and C1 for the four-month period of the noisy works rental discount of 20% of the two-month period the less noisy works.

53. This letter is issued against the background of the history of previous complaints when works were begun prior to the section 25 Notice being served – here, it is not disputed that the claimant received extensive complaints from its customers about substantial noise nuisance and, after reporting this to the defendant, such works were stopped in February 2018 and have not resumed. This explains the reference to the cessation of works in the letter.

Undertaking

54. It is also important to record at this point that – in support of its case – the defendant has tendered an undertaking to the Court to carry out works which is found in the supplemental bundle at page 34 I. It is dated 18th March 2019 (again provided shortly before the hearing):

"We refer to the hearing of the above case due to begin tomorrow at Central London County Court in which connection and as the court records show we are the defendant, Daejan Investments Ltd.

In paragraph 27 of the witness statement of Colin Jones, made on behalf the defendant, of 4 March 2019, a copy of which is contained in pages 156 - 161 of the hearing bundle, he states as follows:

"in order to demonstrate the fixity of the defendant's intention to carry out the C2 works, I'm informed the defendant will provide an undertaking to the court to carry out the C2 works immediately after vacant possession of C2 has been given (whether voluntarily or pursuant to an order of the court in these proceedings) and not to use C2 for any other purpose until after the C2 works have been completed"

In accordance with the resolution of the Board of Directors of the defendant we are authorised to offer the court the defendant's undertaking in the terms referred to above in respect of the carrying out of the works and the restriction on use of the Suite C2 premises subject to the proviso that no order is subsequently made by the court against the defendant and/or its contractors restraining or otherwise imposing conditions in respect of the carrying out of the Suite C2 works and request the court to accept this letter as such undertaking on their behalf."

The Defendant's evidence

55. There were two witnesses for the claimant: Mr Stephen Adams – a Chartered Surveyor and the defendant's Regional Controller (until recently) and now retired although still carrying out work for the defendant and Mr Colin Jones – a Chartered Building Surveyor in the defendant's employment. Both gave oral evidence.
56. Mr Adams' evidence is found in his Witness Statement dated 6th November 2018 found at Page 19 of the 2nd File in the bundles. He confirms that the defendant is part of a group of companies whose parent company is Daejan Holdings Plc – known generally as "the Freshwater Group of Companies".
57. He confirmed that the defendant objected to the claimants having a new lease of Suite C2 for two reasons: The defendant intended to (a) create a new front entrance from Burwood Place being part of the frontage of Suite C2 so as to give direct access to the basement by the creation of a lobby area and (b) open up the floor area for the installation of a staircase and lift to the basement.
58. The basement is substantial and includes a mezzanine area. He refers to a plan which shows that the size of this area amounts to 35,000 ft.² The basement was previously used as a health club/gym and was laid out as a swimming pool, changing rooms, squash courts and related facilities.
59. Mr Adams reported that the state and condition of the basement had been deteriorating for several years as it had been secured back from the tenant occupying this section of the building from as long ago as February 2004. He reports severe damp and corrosion in large parts of the basement which require attention – not only from a practical point of view but also because it needs attention so as to maintain the integrity of the building.
60. As a result, the defendant elected to carry out what he describes as "necessary works" to restore the basement to a state and condition which would enable it to be let on a commercial basis. This would include the installation of a Newton tanking system and resolving a related problem of the corrosion of the basement's steel columns by installation of a cathodic protection system. In addition, he stated that any redevelopment will involve the removal of the mezzanine area which reduced ceiling heights in that area to an unacceptably low level and the creation of new access points to provide an independent connection between the new commercial areas in the basement and the public highway at street level.
61. It was obvious to him, he said, that these works would be intrusive. It was therefore decided to carry out these works together. A firm of contractors, GTCI Limited, were commissioned. They provided a priced specification which would involve the creation of a new entranceway from Burwood Place to the basement development via a new lobby area and the staircase and lift then cost of £188,000. He refers to an email from the Millbridge group – the defendant's building surveyors – dated 20 July 2018.
62. Mr Adams explained that statutory consultation with its residential tenants took place between November 2015 and November 2016. Formal notice of the repair works was given to commercial tenants including claimant in December 2016.

63. In November 2017, they commenced the works. In his evidence, he fully accepted the basis of works involved highly intrusive noise levels in particular from those parts of the basement which sit beneath the claimant's occupied premises and that it would involve some level of disruption. As could be expected, complaints were received from the claimant and the tenants of Suites A and B - who are all companies within the Regus group (now IWG). There was a threat of a claim for an injunction. I have been shown solicitors correspondence which passed between the parties demonstrating this was the case.
64. Mr Adams explained that, in his view, his company take their responsibilities, in this regard, very seriously. As a result, the defendant decided to cease the works in the hope that his company and the claimant would be able to agree programme of reasonable measures to attenuate any disruption and allow the works to proceed. There was a meeting on 6 March 2018. This did not resolve anything and the works remain in abeyance.
65. In July 2018, Mr Adams confirms that his company's view was that to reach agreement may prove to be a slow process. In his evidence, he described it as "an impasse". He goes on to say:

"24. In the circumstances and given there was no logistical impediment or financial reason to hold up the carrying out of the C2 works the defendant decided to separate those from the basement works and carry out and complete them as a discrete exercise as soon as possession was obtained of Suite C2….". (A summary of the C2 works was prepared by Millbridge) …. – a copy is exhibited to his statement. ("the decoupling")

66. He also confirmed that there were no planning difficulties. The opening up of the front elevation on Burwood Place to create the new entrance resulted in planning consent being obtained from Westminster City Council on 6 June 2017. No other consents were required. The financial position of the defendant to carry out the work is without question-the holding company's last consolidated balance sheet entries as at 31 March 2018 showed a net worth of £2,535,005,000.00.
67. Mr Jones' evidence, after confirming his understanding was the same as the issues dealt with by Mr Adams, confirmed that "by early August 2017" the claimant had awarded the building contract to GTCI Ltd which included the facade at Burwood Place to create an entrance- under the supervision of Millbridge. He attended a pre-contract meeting on the 10th August 2017 at which the contract was agreed (for a period of 62 weeks) at a contractual price of £1,695,525.30 plus VAT. In his witness statement, he exhibits the minutes of the meeting at which the contract was agreed.
68. He reports a further meeting took place on 7 September 2017 about the proposed works. This was followed by site progress meetings on 6 November 2017 and then 4 December 2017, 20 December 2017, 9 January 2018, 25 January 2018 and 14th of February 2018 with a view to carrying out works in the basement. These are supported by various minutes exhibited to his statement. He also exhibits a copy of the building contract which is extensive at pages 52 to 516 of his exhibit "CJ3".
69. Mr Jones says that, by July 2018, the works were not progressing as hoped due to difficulties with negotiations with the claimant. He confirms Mr Adams evidence that the basement works been stopped in February 2018 due to complaints. In the meantime, his company had been making payment of the monthly prolongation payments to GCTI - this is believed to be in the sum of £9000 per month.

70. He confirms that he was instructed by the Board of Directors that the works to the facade of Burwood Place should be opened up as soon as Suite C2 area was vacant. In particular, it is important to consider his paragraphs 20 and 21 in this respect:

"20. The access point created by the C2 works on the Burwood Place elevation aside from being an important entrance the basement will greatly facilitate the carrying out the works in the basement. It would also be advantageous to have two means of access to and egress from the basement when the remaining works are carried out which will both serve as a means of escape on completion of the works; as well as providing another point of access for workmen and the delivery of materials during the works.

21. The opening up of the Burwood Place elevation and the creation of new entrance lobby within what is currently Suite C2 will also have the advantage if the new proposed finished floor levels are to be checked as the work proceeds to ensure, for instance, new staircases are correctly set of steps and rises measurements so landing at any level is properly maintained throughout the large area of the basement, the upper basement area on the mezzanine floor which each have differing levels."

71. He then goes on to consider the defendant's continuing intention to carry out the C2 works in his paragraphs 22 to 26 (inclusive). In particular, he considers that the period of three months in 21 days from judgment is a sufficient period so that GTCI Ltd can be mobilised. He predicts that, provided the defendant starts the works promptly, they will not fall foul of any planning consents which are due to expire on 5 June 2020. A temporary hoarding will have to be erected in what will be the entrance lobby to the basement and reception area which forms part of Suite C1. He believes that a temporary reduction in the size of the usable reception area of Suite one will not amount to any more than a 1 m wide strip for a period of two weeks.

72. In his oral evidence, he confirmed that he was confident that the works can be undertaken promptly and well within, for example, a three-month period.

73. There is a particular point with Mr Jones's witness statement which I should deal with at this stage. It is dated 4th March 2019. This date is important as Miss Shea, for the claimant, quite rightly cross-examined Mr Jones during the trial as to why this witness statement fails to mention any details at all on a meeting which took place any a few days earlier, on 28th February 2019 at which Mr Jones was present when it was decided to re-couple the works (after having, as Mr Adams describes, earlier de-coupled them).

74. This minute demonstrates that the defendants gave considerable attention to the project in the light of this litigation – and decided to change their earlier decision and commence both sets of works (which would now include the basement) as soon as they had achieved vacant possession– and yet, curiously, there is no mention in Mr Jones' witness statement of this change of approach. Indeed, it can be read as if nothing has changed. In his oral evidence, he was unable to cast much light on this obvious discrepancy.

75. Mr Jones provided a second witness statement dated 19th March 2019 during the hearing. It attaches the minutes of the meeting discussing the C2 works at Millbridge on the 28th February 2019 which is found at page 60 of the supplemental bundle. They set out a programme of works – including the basement. It is said that there will be a lead – in time of 8 weeks before commencement; and then - accepting that it will involve very noisy works –

that these will be timetabled together over a 12-week period right at the commencement of the contract to minimise disruption – matters Mr Jones confirmed in his oral evidence.

The failure to mention the earlier meeting in his witness statement is odd. However, upon balance, I am prepared to accept that Mr Jones is not a director and that he most probably signed his witness statement without sufficient attention which, whilst extremely disappointing, is not fatal to the remainder of its content.

The Claimant's Evidence

76. There were two witnesses for the defendant; Mr Simon Coates who is the head of estates of IWG (formerly Regus) and Mr Richard Morris who is a director of the claimant company. Mr Morris did not give oral evidence. His witness statement, therefore, has limited evidential value. In any event, much of it is uncontroversial.

77. In fairness to Mr Coates, he has only worked for the claimant since October 2018 so he only has direct knowledge of matters raised by this hearing from that date. He describes Park West as "very popular with clients". The rate of occupancy has been consistently high and at the time he made his statement, on 12 March 2019, it had 83% occupancy. 37 different clients occupied the space in turn occupying 207 desks. He described how the extent of demand is so great that IWG was actively considering moving their head office staff to an alternative location in order to maximise the amount of lettable space.

78. He complains about the defendant's planned works on a number of bases. First, if the defendant was allowed to construct a hoarding (albeit a temporary one) (by reference to the plan prepared by consultants dated 10 January 2019), then he opines that that will reduce the space available in the reception area which is already quite limited. It would mean that a table 2 chairs will have to be removed leaving only one table and two chairs for the visitors to the centre which he describes as "inadequate".

79. Mr Coates expressed his grave concern about the interference that the proposed works will have in the reception area. He described them as being very disruptive to visitors and that they would interfere with the performance of the centre management team's day-to-day responsibilities. This is due to what is described as "extreme noise interference". In particular, he expressed concern at the high level of noise that would be produced based upon past experience within the building and the effect this will have on clients and which would pose a serious risk to IWG's business reputation.

80. His concern is that the noise, vibration and dust experienced during implementation of the works would "inevitably form a negative association". His concerns are set out in paragraph 25 of his witness statement as follows:

"25. Overall, the works will materially adversely affect IWG's ability to trade from Park West and the noise, vibration and dirt will impede its ability to both generate new business, as well as servicing existing clients, who have to endure these issues. If the extent of the interference to IWG's business is as feared, then the claimant and IWG will not hesitate in taking action to protect its business from harm that cannot be compensated for, including IWG's clients leaving Park West altogether; clients demanding compensation for the duration of the works, which IWG will have to absorb without recompense; and/or a reputational

damage to IWG's brand as a high-class serviced office provider. IWG will take whatever action is necessary to protect against such harm, including seeking an order restraining the defendant from undertaking the works the premises at all." This is abundantly clear.

81. Mr Morris' written evidence largely deals with confirmatory evidence relating to the dust vibration noise levels generated by the previous works of which he first became aware on the 6th November 2017. He describes them as "intolerable". They are said to have commenced at 8:30/9:00 AM concluding anywhere between 11:30 and 13:30 during the working week on a daily basis. He indicates that the parties have been unable to agree anything with regard to any proposed works.

Mr Frank Rayner

82. There is an expert report of Mr Rayner dated 18th January 2019. He was not called to give evidence at the trial by agreement of the parties. who was not called to give evidence during the hearing.

80. His view was that the defendant's proposed works are so substantial that the defendant would require vacant possession of Suite 2 in order to undertake them. This was agreed between the parties.

The Claimant's position

84. The claimant does not accept that the defendant can establish the requisite intention within ground (f).

85. The intended works are said to form part of a much bigger project, including the basement works, which the defendant has had to abandon in the past, because of the unlawful interference those works caused to IWG's ability to use their premises for the purpose for which they had been let. It is said that that the interference amounted to a breach of its covenant for quiet enjoyment and the defendant has implicitly conceded this by ceasing the basement works in February 2018 and as no works have been carried out since that date-following complaints.

86. It is also said that the proposed works to suite C2 would repeat what is described as the "intolerable disturbance" to these offices in breach of the covenant for quiet enjoyment under the leases and in derogation from the defendant's grant. In addition, the works proposed would involve the erection of a hoarding within the demise of suite C1. The claimant's position on this is that this does not fall within the defendant's qualified right of entry and would be a trespass on the suite C1 demise.

87. The claimant says that it will have no hesitation in seeking interim injunctive relief to prevent the defendants works from unlawfully interfering with its ability to use the IWG premises for the purposes for which they were let.

88. As a consequence, it is claimed, that there is a high risk that (a) the defendant will be unable to undertake the C2 works at all or (b) will be unable to do so within a reasonable period taking into account the three month and 21 day period allowed following termination of the lease. This would mean that the defendant would not be able to satisfy the requirement of ground (f) that the landlord must intend to do the works "at the termination of the current tenancy".

89. It is said that the undertaking given by the defendant does not work. Not only is its effect negated by the above, but it comes with conditions which take it well outside the ambit of authorities such as Timothy Taylor - because it could never be effective.

The Defendant's position

90. The claimant already accepts, in principle, that the C2 works satisfied ground (f). Their case is solely directed towards intention.

91. The claimant also accepts that the defendant will not have any difficulty funding the C2 works-they form part of a large, well-established, group of companies with a healthy balance sheet. There is no planning difficulty.

92. The defendant says that its intention to carry out the works cannot be seriously doubted as they are contractually committed to GCTI and, by means of its undertaking, to the court to carry out such works.

93. The works are said not to be bogus and the claimant accepts that; a matter which Miss Shea confirmed represented the claimant's stance during the trial.

94. The defendant says that it committed itself contractually to do the C2 works in October 2017 - long before any notices were served. The Defendant has always had the funds available. There are no planning or other impediments to the works and, as the law stood in 2017 when the "conditional intention" point was not then available, the required intention under law had been met.

95. There is then the commercial sense of the deal. The defendant still continues to have the claimant as a tenant of suite C1 and other IWG companies in suites A and B.

96. By comparison, C2 is said to represent a tiny area within the scope of the leases and that it commands a modest rent (£16,000 per annum). It is said that this is not, therefore, a typical case of the defendant trying to achieve a greater rent by removing the existing 1954 Act tenant and re-letting, at a higher rent, to someone else. It is said that it may indeed prove the opposite.

97. The defendant says it is logical that they would wish to develop the basement and convert C2 into the main entrance. Once the works have been carried out, the basement area (which is substantial and potentially marketable) will be watertight and lettable. It can only be described as a good commercial decision. There will now be a dedicated entrance fronting onto the main road which the property does not enjoy at present.

98. In so far as the hoarding is concerned, the defendant has reserved powers that entitle it to obtain access to C1 for the purpose of the carry out works, whether of repair or redevelopment, to other parts of the property. The works will, at most, take two weeks. The area affected will merely be a slither of C1 that is just over 1 m wide. Disruption is said to be significantly limited. Any difficulties that would occur with the removal of table and chairs (in a reduction of the area currently used as a reception) could be reduced by putting up plastic sheeting.

99. Time is said not to be a problem. The procurement process has completed and it is claimed there is a contractor ready, waiting and contractually committed to do the C2 works. The evidence shows that there is an eight-week lead-in period for GCTI which is less than the

periods of time allowed by the law set out above. It is said that the claimant has not advanced any intelligible reason as to why, given the above, the defendant will be unable to commence the C2 works within the statutory time frame.

The Claimant's closing submissions

100. The first issue that Ms Shea raised was by reference to the terms of the lease. She says I should not accept that clauses in relation to a covenant for quiet enjoyment and derogation from grant are essentially the same. Since Southwark London Borough v Tanner (decided by the House of Lords) a covenant for quiet enjoyment is breached if the landlord or persons authorised by the landlord carried out activities on land adjoining the demised premises which substantially interfere with the use and enjoyment of the premises by the tenant-it being irrelevant that the activities would also support an action in nuisance.

101. In addition, and if I am to understand her correctly, she distinguishes the facts and circumstances of this case from Timothy Taylor on the basis that, in that case, it was a converse of the situation here. That case dealt with the situation where the works carried out by the landlord substantially interfered with the use and enjoyment of the premises as an art gallery. There were very significant levels of noise on a regular and repeated basis where staff were forced to wear headphones, work off-site, and where there were high levels of absence due to headaches, migraines and nausea. The noise there had reached intolerable levels such that the gallery had to be closed.

102. This, it is said, is different to the current case because the repair works carried out by the landlord were properly reserved in the lease but what it does do is underpin the need for the landlord to carry out the works and exercise its rights under the lease reasonably. The lease here – in this case – is less well-defined. However, irrespective of that, the landlord must carry out its works reasonably, and that leaves the defendant open to legal proceedings which would put the "conditional intention" required at some risk.

103. The claimant says that the lease supports the proposition that – in view of the noise and disruption caused by the proposed works, then they will almost certainly lead to an application for an injunction on good grounds.

104. The relevant terms of the lease are as follows:

Clause 5.1:

"*that the tenant shall and may peaceably hold and enjoy the demised premises during the term without any lawful interruption by the landlord or any person rightfully claiming through under or in trust for it or by title paramount"* – (the covenant for quiet enjoyment)

Paragraph (1) of the Second Schedule of the Lease:

"*the rights to erect or to consent hereafter to any person erecting a new building will to alter any building for the time being on any land adjoining neighbouring or opposite to the demised premises notwithstanding that such alteration or erection may diminish the axis of light and air enjoyed by the demised premises….. but not so as to adversely affect the ability of the tenant or any authorised under tenant or any licensee to carry on their business from the demised premises and provided that in all cases proper means of access to the demised premises is available at all time and the rights granted herein are not materially affected and*

that such repairs or other works are carried out as expeditiously as possible and the persons so entering shell calls as little damage disturbance inconvenience and disruption as is reasonably practicable…" – a qualified right to rebuild

Paragraph (2) of the Second Schedule of the Lease:

"*unto the landlord its servants or agents and licensees at all reasonable times so far as may be necessary with or without workmen the right on giving reasonable notice of at least two working days (except in emergency) to the tenant to enter and remain upon the demised premises with all necessary tools appliances and materials for the purpose of repairing or rebuilding any adjoining or contiguous premises belonging to the landlord…. but not so as to adversely affect the ability of the tenant or any authorised under tenant or any licensee to carry on their business from the demised premises and provided that in all cases a proper means of access to the demised premises is available at all times and the rights granted herein are not materially affected and that such repairs or other works are carried out as expeditiously as possible and the person so entering shall cause as little damage disturbance inconvenience and disruption as is reasonably practicable* – the qualified right of entry.

105. Both paragraph 1 and paragraph 2 of schedule 2 reserve rights to the tenant (the claimants in this case) not to be adversely affected in their ability to carry on their business which, it is said, opens up the right of the claimant to seek an injunction if, as is extremely likely, there will be disruption which interferes with their ability to carry on their business. This coupled with the requirement that any works be carried out reasonably can, it is said, only lead to one conclusion.

106. The conclusion is that the claimant will immediately seek an interim injunction preventing the carrying out of the works. This will be based upon their rights reserved in the lease supported by case law. The claimant says that it is highly likely that the kind of disruption which led to the works ceasing in February 2018 would exist again. Their clear intention would be to seek an injunction preventing the works in these circumstances.

107. Therefore, the defendant cannot comply with the requirements now set out in *Franses*

108. Ms Shea says that it is important for the defendant to establish a fixity of intention. She describes the defendant's actions as" bumbling along" since 2000. She describes a series of "very fat reports" coming from several highly technical specialists at a rate of approximately one a year. She says that, despite this, nothing significant has taken place – and that there has been no works (or any likelihood of works) since February 2018. The claimant's solicitors wrote to the defendant in February 2018 yet it took the defendant's solicitors well over a year to respond in March 2019 (just prior to the trial).

109. There have been changes in the works. A decision was made to "decouple" the C2 works in September 2018 but on the 28th February 2019 (at the board meeting) (and significantly after *Franses*) a decision was made to re-couple the works. She says that this is the first time "anywhere in the papers" that the defendant had resumed its intention to do the works within the relevant time frame (in terms of actually doing the works themselves).

110. She also points to the fact that Mr Adams agreed in his oral evidence that there had been only few meetings-three "without prejudice" meetings to try and settle and the fourth meeting

being a “chance encounter”. This, she says, is contrary to the defendant’s claimed intention to pursue the matter as one of great importance.

111. This casual approach is said to have been reflected by the fact it is clear from Mr Rayner’s expert report that the original brief that he had been given by the defendant had changed during the course of its preparation. Mr Jones was unable to confirm any of the actions which had taken place since the board meeting on the 28 February 2019 apart from directing the court to a graphic setting out proposed timetable.

112. The undertaking given openly by the defendant is seen to be “heavily qualified”. As Ms Shea indicated in her submission, “they see an injunction coming” and that undermines the undertaking. The decision to uncouple and then re-couple the works shows an indecisive approach to the defendant’s presumed intention to carry out the works. This is said to be against the background that there was no sign of any intention to resume the abandoned works prior to the 28 February 2019, the board meeting minutes being the only documentary evidence of that intention.

113. I was then taken to sections of Mr Adams’ witness statement as evidence in relation to decoupling and re-coupling the works. In paragraphs 23 and 24 of Mr Adams’ witness statement, he says:

“By July 2018 it was already apparent to the defendant the process of seeking to agree a programme of attenuating measures for the claimant and other Regus tenants would be a slow one and that discussions might not lead to an accord. Further, the impasse had already created a significant delay in carrying out both the repair works and the initial development works. In the circumstances and given there was no logistical impediment or financial reason to hold up the carrying out of the C2 works, the defendant decides to separate those from the basement works and complete them as a discrete exercise as soon as vacant possession was obtained for Suite C2”

At Paragraph 25:

“this decision by the defendant to decouple the C2 works from other basement works was confirmed by resolution of the defendant’s Board of Directors on the 13th September” …

114. I was then taken to a section of the transcript of the evidence of Mr Adams in this trial- found in the day 2 transcript at 130.

“Question: you took the view that there was very likely to be great difficulty in resuming (the works) in that form. You just accepted that if injunctive proceedings were brought you might be in trouble, but you did know when the board resolution came to be made that the landlord had to prove that C2 works would take place on the termination of the tenancy within a reasonable period of the termination of the tenancy?

Answer: yes

Question: that remained?

Answer: yes

Question: the basement in abeyance, the C2 works had to be reactivated?

Answer: yes

Question: it informs the landlord's decision to decouple the C2 works. Otherwise they would have been held up while the basement works stayed in abeyance. So if at the date of the board resolution the claimant had contacted Daejan and announced it was willing to leave Suite C2 voluntarily, there would have been no need for the decoupling, would there?

Answer: if they had, then yes"

The claimant says at best that this is Mr Adams accepting that the C2 works were designed to keep the hopes of the landlord alive in relation to being able to recover possession but they would not have resolved to decouple them if it had not been thought that this was the only way it was going to be possible to do them. The decoupling took place because the basement works were in abeyance and there was no indication of them being resumed.

115 Therefore, the reason for the decoupling in September 2018 was to satisfy ground (f) because, it is claimed, the defendant knew that they were unable to satisfy that provision in relation to pursuing the whole of the basement works which were in abeyance. It is claimed Mr Jones confirms this to a large extent in his evidence-although he was not aware of the legal niceties, this is further evidence that the defendant has failed to prove a fixed, settled and unconditional intention independently of the intention to satisfy ground (f).

116. I am then asked to infer from the evidence that the defendant had not approached the implementation of those works with anything like the kind of commercial intent or urgency which might otherwise have been expected. As Ms Shea suggests, the defendant exhibited no" commercial get – go" about this at all.

117. A further complication to carry out the work is, so it is said, that Mr Adams had several stakeholders to pacify in Park West (such as in the residential areas) and refused to say in his evidence whether he would have started the work without agreement.

118. The claimant's case is there are substantial obstacles to the defendant in carrying out the works. First, there are the difficulties with the lease as set out above coupled with the fact that such works would be divided into repair works (which are recoverable by service charges) and items of capital expenditure (which are not recoverable) so different considerations apply.

119. At the outset of the works, the defendant intended to do all the works but ceased the basement works because of the threatened injunction proceedings. It is said that it is interesting to note that it was simply a threat of proceedings which led to the cessation of works in February 2018.

120. The claimant says that, because of the decision now to do all the works, there is going to be more nuisance. There will be drilling into concrete and the works in the basement will cause a considerable difficulty. On any reading of Mr Adams's evidence, he took the matter seriously and accepted the claimants had the ability to obtain an injunction.

121. Difficulties are compounded by the fact that the defendant cannot do the works outside office hours for fear of infringing the residential tenants' rights linked with the fact the carrying out the works during office hours will create problems for the commercial tenants. The legal argument about the effect of the provisions in the lease is complex.

122. For these reasons, it is argued that the defendant does not have a reasonable prospect of overcoming these obstacles. The claimant's main witness, Mr Coates, is said, in his oral evidence, to have said nothing contrary to the fact that the claimant will issue proceedings.

Reasoning

123. The starting point for me, in deciding this case, is that the claimant accepts that the defendant is not lying when it says that it intends to carry out the works.

124. There are several important themes in the claimant's submissions which bear proper examination. These are as follows:

(a) the works carried out previously and which ceased in February 2018 were disruptive-including a large degree of noise nuisance. The extent of the noise nuisance (which included drilling into concrete pillars) is self-evident. It is notable that the works immediately ceased following threats of an injunction. I also accept that they would be disruptive in an office environment and consequently affect the business of the defendant's customers.

(b) there must be a risk (accepted by Mr Adams in his oral evidence) that the claimant will issue injunction proceedings based on the evidence of the previous disruption. That may have an impact on the timescale of the proposed works

(c) any injunction proceedings will not only be based on noise nuisance but on the implied covenants of quiet enjoyment not derogating from grant along with an examination of the relevant paragraphs of the lease-such as paragraph 1 of schedule 2.

(d) there is a lengthy history to this matter. There is some merit in the claimants claim that the matter has meandered over several years.

125. Despite these claims, I have to say that, I found Mr Adams's evidence to be measured, reasonable and, in my view, persuasive. He is an experienced man who I regard with integrity and, in my view this was reflected in his oral evidence – which was to a considerable extent supported by the documentary evidence before me. I have found that he sought to assist the court by explaining as best he could (bearing in mind he is not a director) his understanding of the defendant's intention to carry out the works throughout the whole of this period. He appears to be the only witness who has that knowledge.

126. In terms of Mr Jones, the defendant's only other witness, I accept that there was a clear discrepancy between the evidence set out in his witness statement dated 4 March 2019 (made shortly before the trial) and his knowledge based on the board meeting that he attended on the 28 February 2019. I am prepared to accept, on balance, for reasons previously stated, that he did not intend to deceive the court or act dishonestly but that he signed his witness statement (admittedly with a statement of truth) without the appropriate level of care that is expected. This does not negate the remainder of his evidence relating to the timescales for carrying out the works if vacant possession were to be obtained.

127. Insofar as the claimant is concerned, I would apply the same conclusions to Mr Coates' evidence as I did to Mr Adams. He gave clear, straightforward evidence not seeking to exaggerate bearing in mind he was only recently appointed. Mr Morris' written evidence is somewhat limited but, as I say, uncontroversial.

128. The first matter that I must consider is the question of subjective intention. It is of considerable significance that the claimant does not dispute that the defendant intends to carry out the works.

129. In terms of looking at that subjective intention objectively, it is important to note that even in the relatively early stages of negotiations, there were documents (found in the supplementary bundle) which show that there were discussions (on the part of the defendant) conducted by Mr Adams - who confirmed this in his oral evidence - about whether there should be a break clause in the lease entered into with the claimant. This is, in my view, indicative of the fact that, at an early stage, and at the very least, suite C2 was going to be dealt with in a different way to the other leases which were granted.

130. I would refer to Mr Adams' report to the board found at tab 28 page 90 which demonstrates that he reported, at that time, that the leases of suites A, B and C1 should be granted for 10 years but for the lease of suite C2 which was to be granted for a period of only five years. The leases were, indeed, granted for these terms which is consistent with the defendant's case. More importantly, it tends to demonstrate that suite C2 was to be treated differently.

131. He says: "except for suite 2, where a five-year lease has been agreed in case access to the basement is required, the start date in each case is 2013". This is consistent with his evidence that the defendant had the basement in mind that stage. It is further consistent with his evidence that this area of the building has suffered water and other damage since the then existing tenant (the health centre) had moved out in 2004.

132. The building contract has exhibited to it an engineer's report from One Engineers Ltd dated April 2016 which is, in fact, I note a fourth revision (showing that this was in mind at an even earlier stage). It gives a detailed specification of the C2 works along with construction of the lift pit into which the C2 lift is going to be inserted. It is also supportive of the defendant's case in that it mentions that certain exploratory works had already been carried out at that time.

133. In bundle 6, there are several architect's plans from May 2016 along with engineer's plans. They mention that Regus (now IWG) might surrender C2. It is my view that these documents are significant (and supportive of the defendant's case) in that they show what is in the defendant's mind at that time – a considerable period of time before this dispute arose.

134. I pause at this point to record that all of the above was completed well before the section 25 notice was served and, in that sense, it must be seen as evidence untainted by the dispute which leads me to the conclusion that this intention was reached at a much earlier stage.

135. It is of considerable weight, in my view, that the defendant had entered into a substantial contract for the works with GCTI for an amount of £1.6 million – a not insignificant amount. Standing charges continue to be paid and, whilst affordable insofar as the defendant is concerned, are at their lowest, in my view, indicative of an ongoing commitment.

136. Then there is the undertaking. I fully accept that it is heavily qualified and, as such, its effect is weakened insofar as these proceedings are concerned due to the conditions attached. However, in the light of any prospective proceedings for an injunction, I consider these terms are both reasonable and realistic. Their effect is to move from a situation where (if

unqualified) the undertaking would be hugely determinative to one where, at the very least, it remains a significant factor that must have some weight. My view is that it is entirely reasonable for the defendant's solicitors to be careful (noting the background of this dispute and the previously threatened injunction proceedings) as it is an undertaking to the court. In this sense, I agree with Mr Duckworth that it is a realistic and practical approach to the dispute.

137. I then consider the question of the potential injunction. I have to accept that there is a real possibility that such proceedings will be issued by the claimant if the work commences and that they may succeed (to a certain extent) if the works cause disruption. However, it must also be said the grant of a complete injunction is far from automatic and that these issues will have to be decided in separate proceedings.

138. I acknowledge that there may be difficulties for the defendant in terms of (a) the effect of noise nuisance and (b) the reserved rights which are found, in particular, in the second schedule of the lease.

139. However, I see no reason why they are not capable of resolution. I do not agree that they could be resolved by rectification proceedings (particularly in this case) but experience suggests that, even if an injunction of some kind is granted, its terms would be tailored in such a way so as to protect both parties and retain their rights under the lease. In other words, that the terms of any such injunction (assuming it is granted) would not be absolute. There may be provisions, for example, limiting the times at which such works take place or other provisions which limit any potential disruption.

140. My view is that, on any interpretation, particularly where there is a deficiency in draughtsmanship (as both parties recognise here), a court would be reluctant to leave the parties in a situation whereby one party (the defendant) is prevented from carrying out works on their own property, in particular where they are necessary such as in the basement.

141. It is a realistic assessment in my view that any such proceedings are capable of resolution by its terms. Indeed, this is the very approach which is suggested in the Timothy Taylor case and has already been proposed by virtue of the defendant's Timothy Taylor letter.

142. Having said this, I cannot accept that a company of the defendant's standing (part of a substantial group of companies with extensive assets) would be prevented from carrying out such works within a reasonable period – let alone the period allowed by law. It is supportive of the defendant's case that, Mr Coates, in his oral evidence, accepted that he would not necessarily launch into proceedings from day one of commencement of any works but would monitor the works (and their effect upon the business) before doing so. In my view, that is a very realistic commercial decision consistent with both his oral and written evidence. In that sense, it is telling.

143. The long stop date for the commencement of works is six months and 21 days (or thereabouts). The question then arises as to whether the defendant has a real and not merely fanciful prospect of being able to commence the works within that period.

144. Subject to the potential delay caused by injunction proceedings, (which I must accept) the evidence before me shows that (a) a contract for the works is in place with a continuing

penalty for non-compliance, (b) that this included an eight-week lead time and (c) that Mr Jones was confident the works could commence in that time confirming GTCI's own opinion. I accept that this is the case.

145. Even if work is delayed, this does, in my view, give more than sufficient time for the works to commence within the six months and 21-day window. It is important to note that the target is achieved when the works commence not when they are completed.

146. The most significant obstacle must be the potential injunction. The claimant must establish that the defendant has no real prospect of establishing that the works are allowed by the reservations granted by the lease and that it is not committing a breach of that lease.

147. Whilst accepting the defendant can do nothing to avoid such proceedings, I cannot find that that is the case. I have already given my reasons about the practical approach that a judge will adopt in considering injunction proceedings; it is not for me to conduct an exercise in construction in these proceedings; there has to be a reasonable prospect of the defendant establishing that they can do the works subject to some kind of condition in view of the competing nature of the clauses in the lease.

148. My simple view is that, in injunction proceedings, for the reasons given above, this is capable of resolution.

149. The position here is that the defendant has no difficulty in funding the works; the contracts are in place; there are no difficulties with planning; the timescales for commencement are realistic and they are encouraged to commence due to problems in the basement which need to be resolved. There is evidence of a subsisting intention (albeit at times the level of activity has changed) for some time. In my view, the intention set out in *Franses* is made out

150. Finally, there is the question of the hoarding. The effect of erecting the hoarding and working in the reception area of C2 will be minimal. The evidence before me shows the area affected is just 1 m wide and the works will be in place for a matter of two weeks. In the scope of this dispute, this is a minor matter there is simply the loss of a table and two chairs and common areas for a relatively short period of time, I am confident that disruption with reasonable adjustments can be kept to a minimum particularly in the context of the whole of this dispute.

Conclusion/Decision

151. In view of my findings above, I find, on balance, on the preliminary issue, that the defendant has the requisite intention to carry out the works.

HHJ Saunders

16th July 2019