Neutral Citation Number: [2016] EWHC 1994 (Ch)

Case No: HC 2016-001046

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th August 2016

Before :

Mr John Male QC
(sitting as a Deputy Judge)

Between :

PUBLITY AG	**Claimant**
- and -	
CHESTERHILL PROPERTIES LIMITED	**Defendant**

Mr. Martin Hutchings QC (instructed by **Clifford Chance LLP**) for the **Claimant**
Miss Caroline Shea QC (instructed by **Winston & Strawn London LLP**) for the **Defendant**

Hearing dates: 21st, 22nd, 23rd and 29th June 2016
(Further written submissions on 20th and 21st July 2016)

Judgment Approved by the court for handing down (subject to editorial corrections)

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Mr John Male QC (sitting as a Deputy Judge)

Introduction

1. This is a claim by the Claimant, Publity AG ("Publity"), for a declaration as to the existence of a binding tenancy agreement of 1 Chesterfield Hill, London, W1J 5BA ("the Property") and consequential relief including damages. The Defendant, Chesterhill Properties Limited ("Chesterhill"), is the owner of the Property which is a five bedroom house in Mayfair. During the latter part of 2015 and the early part of 2016 Chesterhill and Publity were negotiating for the grant of a tenancy of the Property. As part of these negotiations, Chesterhill carried out various works to the Property at Publity's request. Also as part of these negotiations, Publity paid certain monies to Chesterhill. Publity says that a binding tenancy agreement was created on 1 February 2016. Chesterhill denies that there was any such agreement and also says that it is entitled to retain the monies paid to it because there was a side agreement to that effect.

2. Publity sought interim relief. Its claim for interim relief was unsuccessful. By an order dated 13 April 2016 made by Arnold J, the trial was expedited. Publity was represented at the trial by Mr. Martin Hutchings QC and Chesterhill by Miss Caroline Shea QC. I am grateful to both Counsel for the assistance they gave me throughout the trial. The evidence was heard from 21 to 23 June. Counsel then provided me with written submissions on 28 June which were elaborated upon orally on 29 June. Subsequently, on 14 July Chesterhill sought my permission to put in further written submissions which I granted. On 20 July Chesterhill provided those further written submissions and Publity replied to them on the following day.

3. In the rest of this judgment, I will deal with the following matters:

   (1) The witnesses.

   (2) The facts.

   (3) The issues.

   (4) Summary of conclusions.

The witnesses

4. I heard evidence from the following witnesses.

   For the Claimant

   (1) Mr. Frederik Mehlitz, Chief Risk Officer and Chief Investment Officer and an executive board member of Publity.

   (2) Mr. Stefan Gomoll, a Solicitor who advises Publity on a variety of commercial and legal matters.

   For the Defendant

   (1) Mr. James Liffen, a managing associate at Mishcon de Reya LLP ("Mishcon"), Solicitors for Buckingham Securities & Investments Plc

("Buckingham") a company engaged by Chesterhill to provide property management services for Chesterhill in relation to the Property. Mr. Liffen gave evidence in place of Mr. Nick Minkoff, a partner in Mishcon who was abroad at the time of the trial.

(2) Mr. Rodney Hodges, a director of Rawlinson & Hunter Trustees S.A. which is the trustee of the Ironzar IV Trust which is Chesterhill's sole shareholder. Mr. Hodges is also a director of Chesterhill. I will refer to Mr. Hodges and his colleague, Mr. Andrew McCallum, as "the Trustees".

(3) Mr. Matthew Bees, a consultant acting on behalf of Buckingham.

(4) Ms Kristine Stranga, who is employed by Buckingham as personal assistant to Mr. Halabi.

(5) Mr. Simon Halabi, who is an adviser to Buckingham.

5. A central part of Chesterhill's case was that Mr. Mehlitz and Mr. Gomoll had concocted the document which Publity says is the binding tenancy agreement. I will have to consider their evidence in detail later and I will have to test that evidence against the contemporaneous and subsequent documents and the inherent probabilities before deciding where the truth lies. However, in view of the allegations against Mr. Mehlitz and Mr. Gomoll, I will say a few words in this section of my judgment about how I assessed their evidence. I will also do the same in relation to the other witnesses.

6. So far as Mr. Mehlitz is concerned, I have to make some allowance for the fact that, although he is a good English speaker, it is not his native language. As a result, sometimes he and Miss Shea were at cross-purposes because he was having to translate the question in his mind into German in real time and then answer in English. In some respects his evidence was vague, but I agree with Mr. Hutchings that this makes it the more credible. Also, Mr. Mehlitz's working schedule is such that he is obviously a very busy man. I suspect that in January and February 2016 his mind was on other more important business matters and that this is part of the reason for his vagueness. It seemed to me that getting the tenancy of the Property was not at the top of his list of priorities and so I think that it is understandable that he could be vague on some matters that he was asked about by Miss Shea. Also, as Mr. Hutchings said, and I agree, there were various opportunities in his cross-examination, such as about the meeting on 27 January 2016, where he could have gilded the lily in his evidence, but he did not do so. I will have to test what Mr. Mehlitz said against the contemporaneous documents and inherent probabilities but, notwithstanding the sustained and forceful cross-examination by Miss Shea, I have to say that I regarded him as giving essentially truthful evidence. I also formed the view that Mr. Mehlitz was a highly intelligent man which will be relevant in considering whether or not he and Mr. Gomoll would have been likely to concoct a tenancy agreement which, as will appear later, was open to challenge as, in any event, allegedly not being properly dated.

7. So far as Mr. Gomoll is concerned, I formed the view that he too is a highly intelligent man. He also struck me as having a good knowledge of the contents of the different tenancy agreements and an excellent understanding of the terms of those agreements. Miss Shea again conducted a sustained and forceful cross-examination. Unlike Mr. Mehlitz, Mr. Gomoll was, however, very much inclined to use the cross-examination

as an opportunity to try to argue Publity's case rather than simply answer Miss Shea's questions. This was unfortunate and unnecessary, particularly from a Solicitor. However, I do not think that this was due to an attempt to give misleading evidence but rather, as Mr. Hutchings put it, that Mr. Gomoll is of a combative nature. Also, I bear in mind that concocting documents and giving false evidence would be a matter of the utmost seriousness for him as a Solicitor. Again, I will have to test what Mr. Gomoll said against the contemporaneous documents and the inherent probabilities, but I consider that he too was giving essentially truthful evidence. I acceded to Miss Shea's application that Mr. Gomoll should be out of the courtroom while Mr. Mehlitz gave evidence. Any differences between Mr. Mehlitz and Mr. Gomoll on the critical events were not, in my view, significant. Rather, they were due to Mr. Mehlitz's vagueness on events.

8. Turning to Chesterhill's witnesses, Mr. Liffen was plainly a truthful witness, but his evidence was peripheral to the critical issues. I also found Mr. Bees to be a truthful witness, but again his evidence was peripheral to the critical issues.

9. So far as Ms Stranga is concerned, she gave her evidence in a straightforward way, although when cross-examined her recollection of the detail of events was not good. Also, it struck me that, on some occasions, rather than giving evidence of what had actually happened, she had been influenced by the subsequent falling out of the parties and was inclined to present some aspects of the evidence in a partisan way that was overly loyal to Mr. Halabi. I have in mind particularly the example given by Mr. Hutchings in his closing of her evidence that Mr. Vernon (the letting agent responsible for letting the Property) had said that Publity had "sneaked" in a change to the commencement date of the tenancy agreement. This seemed to me to be inconsistent with the evidence that Mr. Vernon had taken responsibility for the change to the agreement and for what had happened.

10. As to Mr. Hodges, making full allowance for all the matters mentioned by Mis Shea on instructions, I have to say that I found Mr. Hodges to be reluctant to answer Mr. Hutchings' questions in a simple and direct way perhaps, like Ms Stranga, out of loyalty to Mr. Halabi. Also, it struck me that, contrary to Mr. Hodges' denials, he took his orders from Mr. Halabi and that it was Mr. Halabi who "called the shots" in deciding what to do with the Property.

11. As to Mr. Halabi, some of his evidence was unbelievable. So, for example, his assertion that he did not have control, but only a say, under the Trust, struck me as incredible. It seemed clear to me that, as I have just said, it was Mr. Halabi who "called the shots" in dealings with the Property, despite it being Trust property. Having said that, however, I reject the suggestion that he was able to behave in a completely irrational fashion. It seemed to me that, as a man with many years of experience in the property world, he was most concerned that the proposed tenancy agreement should be negotiated and documented strictly in accordance with his instructions and so as to avoid the risk of any uncertainty or ambiguity in the documentation. He is a man who expects high standards of performance from his professionals and he felt seriously let down by Mr. Vernon. He also considered that he was being tricked by Publity. When this happened, he was most concerned to prevent the Property, which had for many years been his family home, from being occupied by people who he regarded as undesirable occupiers. It was for this reason that he behaved as he did when relations broke down between the parties on 2 February 2016 and he proposed that the tenancy should have a start date of

1 January 2016 and then later when breaking off negotiations after Mishcon had offered a tenancy agreement to Mr. Gomoll for negotiation. Overall, I regard Mr. Halabi as having given essentially truthful evidence.

12. Finally, I should mention one person who was not called as a witness. Mr. George Vernon was employed by Carter Jonas LLP who were engaged by Chesterhill to market and let the Property. As Chesterhill's letting agent, it might have been expected that Chesterhill would call him as a witness. However, he was not called as a witness by either side. From what I have seen and heard, and mindful of the fact that he has not had the opportunity to explain himself and defend his actions, it looks to me as though Mr. Vernon did not cover himself with glory in carrying out his role as letting agent for Chesterhill. There is evidence from, for example, Ms Stranga (which I accept), which shows that Mr. Vernon acknowledged that he was fully responsible for the problems which arose: see Ms Stranga's witness statement at para. 19. I therefore need to bear this in mind in considering Mr. Vernon's emails. In considering these emails, especially in so far as they deal with matters after the problems arose on 2 February 2016, I need to approach them cautiously because it looks to me as though by then Mr. Vernon was primarily concerned with protecting his back and trying to get his fee.

The facts

13. In the bundles there are a number of different versions of the tenancy agreement that was being discussed and negotiated by the parties. In order to assist in reading the rest of this judgment and so as to distinguish between the various forms of tenancy agreement, I will use the following definitions:

    (1) "The Trustees' Signed Tenancy Agreement". This is the agreement which was signed by Mr Hodges and Mr McCallum on 15 January 2016.

    (2) "The Amended Tenancy Agreement". This is the agreement which was signed at the Property on 27 January 2016 after Mr. Mehlitz, Mr. Gomoll and Mr. Thomas Olek had met Mr. Vernon there. Mr. Olek changed the commencement date in this agreement by hand from "14th January 2016" to "01th February 2016". Mr. Vernon signed this agreement and ppd it for the landlord.

    (3) "The Posted Tenancy Agreement". This is the agreement which Mr. Mehlitz says he signed, after printing off a copy of the Trustees' Signed Tenancy Agreement that was emailed to him by Mr. Vernon on 27 January 2016. Mr. Mehlitz says that when he was at Munich Airport on 1 February 2016 he posted it to R&H in Geneva. The original has never been located and so no copy of it is in the bundle. It is this agreement which Publity says creates a binding tenancy agreement.

    (4) "The Re-Amended Tenancy Agreement". This was the Amended Tenancy Agreement, but with the commencement date re-amended (by Publity) in manuscript to "14 January 2016" sometime during the afternoon of 2 February 2016, after Mr. Gomoll and Mr. Mehlitz had been informed that Chesterhill did not consent to the commencement date being changed to 1 February 2016.

(5) "The 3 February Tenancy Agreement". Mr. Mehlitz says that this is a copy he took of the Posted Tenancy Agreement. Mr. Mehlitz emailed it to Mr. Hodges and Mr. McCallum on 3 February 2016. Chesterhill accepts that it was emailed to it, but it never acknowledged receipt.

14. Although the central issue is whether or not Mr. Mehlitz printed, signed and posted the Posted Tenancy Agreement on 1 February 2016 as Publity alleges, I need to set out the facts before and after that date in some detail as Chesterhill's case requires a consideration of events before and after that date in order to test the genuineness of the evidence about the Posted Tenancy Agreement. Also, some of these facts go to the issue of whether or not there was a side agreement.

Events up to 27 January 2016

15. Publity is an asset management company incorporated and registered in Germany. Its Chief Executive Officer is Mr. Thomas Olek. Mr. Mehlitz is the Chief Risk Officer and Chief Investment Officer and an executive board member of Publity. Mr. Gomoll is a Solicitor and advises Publity on a variety of commercial and legal matters.

16. In about October 2015 Publity wished to identify a suitable residential property in Mayfair for Mr. Olek and his family to occupy during stays in London. Mr. Mehlitz spoke to Mr. Gomoll and instructed him to begin looking for an appropriate property. Mr. Gomoll contacted several estate agents, including Carter Jonas LLP, in relation to suitable residential properties in Mayfair. On 17 November 2015, Mr. Olek, Mr. Mehlitz and Mr. Gomoll viewed a number of properties, including the Property, together with Mr. George Vernon of Carter Jonas. Mr. Olek considered the Property to be ideal. Mr. Gomoll submitted an offer including a weekly rent of £5,000 to Mr. Vernon on Publity's behalf on 18 November 2016. Mr. Vernon passed it on to Mr. Halabi.

17. Pausing here in the chronology, Mr. Halabi and his family formerly occupied the Property as their family home. Chesterhill is the registered proprietor of the Property. The family moved out in 2015 and Chesterhill decided to put it on the market to rent. The Property was not to be sold because Mr. Halabi hoped his children would return to live there. The directors of Chesterhill are Mr. Hodges and Mr. McCallum. They are also directors of Rawlinson & Hunter Trustees S.A. ("R&H") of Geneva which, in its capacity as the trustees of the Ironzar IV Trust ("the Trust"), is the sole shareholder of Chesterhill. The beneficiaries of the Trust are members of the Halabi family.

18. Chesterhill's administrative tasks such as paying rent and utility bills for the Property are carried out on a day to day basis by R&H, working closely with Buckingham. Chesterhill engages Buckingham to provide property management services in relation to the Property, although there is no formal contract. Primary responsibility for arranging the letting lay with Buckingham, for whom Mr. Halabi is a consultant. He also acts as an adviser to R&H. The evidence shows that, as a matter of substance, it is Mr. Halabi who decides what happens to the Property and whether or not any letting of it should take place.

19. Mr. Matthew Bees is a consultant to Buckingham. He performed the role of project manager in connection with the proposed letting of the Property. Ms Kristine Stranga

is employed by Buckingham as personal assistant to Mr. Halabi. Buckingham's Solicitors are Mishcon.

20. Reverting to the chronology, on or about 19 November 2015 Mr. Vernon informed Mr. Gomoll that the landlord had rejected Publity's initial offer and had made clear that a weekly rent of £6,500 was required to secure the Property. After some discussion between Mr. Gomoll and Mr. Vernon about potential improvements to the Property, Mr. Vernon sent Mr. Gomoll an email on 23 November 2015 confirming that the landlord was willing to let the Property, on the basis that it would be a company let to Publity with Mr. Olek as the occupant, for two years with an option to renew for a further year at a weekly rental of £6,500 and a security deposit of £39,000.

21. Mr. Gomoll spoke to Mr. Vernon on the telephone about the difference between the two offers and then sent him an email on 24 November 2015, noting that the difference between the two offers equated to almost £38,000 a year and suggesting that, in consideration of a rent of £6,500, the landlord undertake some improvements to the Property as listed in his email.

22. On 27 November 2015 Mr. Vernon sent Mr. Gomoll an email confirming what improvements the landlord was willing to make. On this basis Mr. Gomoll asked Mr. Vernon to send him a draft tenancy agreement, which Mr. Vernon did later that day. Mr. Vernon also sent Mr. Gomoll a deposit statement for the deposit of £39,000 and said that this sum needed to be paid in order to secure the Property prior to any works commencing.

23. On 30 November 2015 Mr. Gomoll asked Mr. Vernon whether the landlord had confirmed that the Property would be taken off the market as soon as Publity transferred the deposit of £39,300. (The additional £300 comprises fees for the tenancy agreement and references). Later that day Mr. Vernon informed Mr. Gomoll that the landlord had now requested a deposit of £52,000 to take the Property off the market. He also confirmed the improvements which the landlord was willing to make and noted that the landlord had proposed to undertake these improvements as soon as the deposit was received by Carter Jonas. Mr. Vernon stated that the tenancy would not commence until all the works had been completed and intimated that the improvements were provisionally due to be completed by 1 January 2016, although it might be earlier. The draft tenancy agreement attached had a commencement date of "1 January 2016 SUBJECT TO COMPLETION OF WORKS".

24. Mr. Gomoll sent this draft tenancy agreement to Mr. Stephan Kunath who is Assistant to the Board at Publity. Mr. Gomoll pointed Mr. Kunath to clause 4 of the draft tenancy agreement relating to the deposit and explained that "At the moment we intend to substitute the deposit in December with a guarantee and use the deposited sums as rent for the first two months."

25. On 9 December 2015 Mr. Vernon emailed Mr. Gomoll and confirmed that the landlord was content to accept a letter of guarantee, subject to review and agreement on the proposed wording and the identity of the guarantor bank. Mr. Vernon also told Mr. Gomoll that the landlord was now asking for the rent to commence from 15 December 2015 and that he had informed the landlord that "this is highly unlikely unless works have been completed". As the improvements had not yet been completed, and as Mr.

Olek was not yet occupying the Property, Publity was not willing to pay rent starting from 15 December 2015.

26. Although Publity was not willing to agree to the landlord's request to change the rent commencement date to 15 December 2015, it still wished to proceed with the tenancy and therefore arranged to transfer £52,300 from Publity to Carter Jonas. The transfer was made by Publity on 15 December 2015 and received by Carter Jonas on 18 December 2015. At the same time Mr. Olek also signed a copy of a tenancy agreement on behalf of Publity which Mr. Gomoll sent to Mr. Vernon by email on 15 December 2015.

27. On 22 December 2015 Mr. Vernon sent Mr. Gomoll a further version of the tenancy agreement, amended to include annual increases to the rent. The commencement date remained as "01 January 2016 SUBJECT TO COMPLETION OF WORKS". Under clause 1.11, rent was due to start on 1 January 2016.

28. Mr. Olek was reluctant for Publity to start paying rent before the improvements to the Property had been completed and before he was able to occupy the Property. Mr. Gomoll spoke to Mr. Vernon and an email was sent on 22 December 2015 by Mr. Vernon, having first been seen in draft by Mr. Gomoll. Mr. Halabi responded to Mr. Vernon later that day setting out the expected completion date for the works to the Property and repeating the request for the rent to be paid from 1 January 2016.

29. On 6 January 2016 Mr. Gomoll spoke to Mr. Vernon to check where they were with the works to the Property. After that conversation, Mr. Vernon sent Mr. Gomoll an email asking for Publity's bank to draw up the letter of guarantee for the landlord's consent.

30. On 13 January 2016 Mr. Vernon forwarded to Mr. Gomoll an email from Mr. Bees of Buckingham. Mr. Bees' email stated that, given that the improvements to the Property had been completed, the term of the tenancy agreement would start from 14 January 2016. Mr. Gomoll sent it to Mr. Kunath, copied to Mr. Mehlitz.

31. On 15 January 2016 Mr. Vernon emailed Mr. Gomoll a final statement of monies due and an amended and final version of the tenancy agreement. This showed the commencement date as 14 January 2016 with the first payment of rent due on 14 January 2016. At the same time Mr. Vernon stated that Mr. Halabi wished to know if Mr. Gomoll or Mr. Olek would be interested in buying Mr. Halabi's wine collection that was stored on the Property. Mr. Gomoll passed this message on to Mr. Mehlitz and Mr. Kunath.

32. On 15 January 2016 Mr. Hodges and Mr. McCallum signed what I have called the Trustees' Signed Tenancy Agreement. On the same day that Agreement was emailed from the Trustees' office by Ms Estelle Pecherand-Charnet to Ms Stranga who forwarded it to Mr. Vernon also on 15 January 2016. Also on the same day the emailed copy of the Agreement was emailed by Mr. Vernon to Mr. Gomoll. The rent commencement date in that Agreement was 14 January 2016. Mr. Vernon also confirmed that all the works had been completed at the Property. He said that Mr. Gomoll could instruct Mr. Olek that he could deliver his furniture at his convenience.

33. On 20 January 2016 Mr. Gomoll informed Mr. Vernon by email that Mr. Olek intended to visit the Property on 27 January 2016 at 11:15 am for about an hour and asked him to arrange everything accordingly. Mr. Gomoll's understanding was that Mr. Olek would be able to pick up the keys to the Property on that day.

34. On 22 January 2016 Mr. Gomoll emailed Mr. Vernon telling him that Mr. Olek would have only about one hour starting from 11:15 am. Later that same day Mr. Gomoll emailed Mr. Vernon a copy of the bank guarantee for the amount of £52,300 executed by Commerzbank AG on Publity's behalf. Mr. Gomoll said that, unless he heard otherwise from Mr. Vernon, Mr. Olek would bring the original with him to the Property on 27 January 2016. Mr. Vernon replied by email and asked Mr. Gomoll to request that Mr. Olek brought the revised original signed tenancy agreement with him. He also asked Mr. Gomoll for an update on the final payment in order that he could release the keys on 27 January 2016.

35. Mr. Vernon emailed Mr. Gomoll on 26 January 2016 to ask about Mr. Olek's timing for his visit to the Property the following day and for an update as to when the remaining £32,500 would be transferred by Publity. This remaining payment was transferred by Publity that same day.

The inspection on 27 January 2016

36. As set out above, Mr. Vernon had emailed a copy of the Trustees' Signed Agreement to Mr. Gomoll on 15 January 2016. However, Mr. Vernon seems to have been confused about what he had sent and so on 27 January 2016 at 11:19:45 he emailed another copy of that Agreement to Mr. Gomoll. In the email he said "I thought that I had sent this previously apologies if you never received it".

37. Mr. Olek, Mr. Gomoll, and Mr. Mehlitz inspected the Property with Mr. Vernon on 27 January 2016. During their inspection, they noted that a few works remained outstanding. Mr. Olek was content to receive the keys to the Property at that visit, but Mr. Vernon said that the keys could not be handed over while Mr. Halabi's wine collection was still there.

38. Mr. Olek was unhappy that he had not been provided with the keys as he had expected and so he thought it reasonable that Publity should not start paying rent until he had been given the keys which it appeared would not be before 1 February 2016. Accordingly, while he was at the Property, he made a manuscript amendment to the commencement date of the tenancy agreement to change it from 14 January 2016 to "01th February 2016". He then signed the tenancy agreement on behalf of Publity. This version of the tenancy agreement did not bear the signature of Mr. Hodges and Mr. McCallum. However, while Mr. Vernon was at the Property, he countersigned on behalf of Chesterhill writing "p.p. G. Vernon CARTER JONAS".

39. Chesterhill called no direct evidence of what happened at this meeting. I did not hear from Mr. Olek, but I had the evidence of Mr. Mehlitz and Mr. Gomoll. I acceded to Miss Shea's application that when Mr. Mehlitz gave his evidence Mr Gomoll should be out of the courtroom. There were some inconsistencies between what Mr. Mehlitz and Mr. Gomoll said about this meeting. I am satisfied that these were due to the vagueness of Mr. Mehlitz's recollection rather than to any untruthfulness in their evidence.

40. At the meeting Publity learned that it would not get possession until about 1 or 2 February 2016. It makes sense therefore that Mr. Olek would have insisted that the version of the tenancy agreement that Mr. Vernon brought with him bearing a start date of 14 January 2016 should be amended to 1 February 2016. This ties in with what Mr. Gomoll said in his cross-examination that Mr. Olek decided to change the date when he was told that he would not get the keys on that day, i.e. on 27 January 2016.

41. Chesterhill relied upon the fact that the evidence of Mr. Mehlitz and Mr. Gomoll as to the position of people in the room where the agreement was signed was not consistent. I regard the inconsistencies as minor (i.e. by a side table versus by a window sill). What I regard as more important is that the evidence of Mr. Mehlitz and Mr. Gomoll as to the basic sequence of events and the general position of the individuals within the room where it was signed were consistent. Mr. Vernon was either right beside, or two steps away from, Mr. Olek. From the photograph of the room which I was shown, it is clear to me that either of these descriptions puts Mr. Vernon very close to Mr. Olek. Also, both Mr. Mehlitz and Mr. Gomoll were clear in their evidence that Mr. Vernon was likely to be aware that Mr. Olek made the amendment. In order to make the amendments to the commencement date, Mr. Olek would have had to cross out the old date and write in the new date.

42. I am therefore satisfied that Mr. Vernon would have been aware that the amendment was being made by Mr. Olek. If a prospective lessee is signing a tenancy agreement I would have expected a letting agent like Mr. Vernon to be watching what happened to ensure that the tenant signed the document in the right place. Ms Stranga told me, and I accept, that when she met Mr. Vernon on 2 February 2016, he made clear to her how experienced he was in letting properties. That being so, I consider that Mr. Vernon would have been keeping an eye on the signing process and would have seen the change to the commencement date. I reject any suggestion that Publity "sneaked" in the change. Whether Mr. Vernon failed to appreciate the significance of the change, or failed to report it to Buckingham, or thought that he could in due course persuade Buckingham to agree to it, or even thought, as he later suggested, that he could make up the lost rent from his fee does not concern me. I am satisfied that Mr. Vernon did see the change being made by Mr. Olek to the commencement date.

43. Both Mr. Mehlitz and Mr. Gomoll thought that Mr. Vernon would have had authority to sign for Chesterhill, but Mr. Gomoll had residual concerns and would have preferred the agreement to be signed by the directors. Mr. Mehlitz was not sure if Mr. Vernon had authority which, at least in part, explains what he says that he did a few days later regarding the Posted Tenancy Agreement.

44. Both Mr. Mehlitz and Mr. Gomoll were clear, and I accept, that Mr. Olek was not happy and made his unhappiness known to Mr. Vernon. This is consistent with Mr. Olek changing the date and with Mr. Vernon perhaps thinking, wrongly as it turned out, that he could in due course persuade Buckingham to agree the change.

45. Later that day, after the inspection had concluded, Mr. Vernon emailed Mr. Mehlitz at 13:26:30 to apologise for the confusion that morning. By this email Mr. Vernon also attached the wine inventory and asked if Publity wished to buy any items. Mr. Vernon also attached another copy of the Trustees' Signed Tenancy Agreement which he said was "for your keeping". He also said that the landlord had said that Publity had full access to the Property for deliveries.

46. Mr. Mehlitz emailed back to Mr. Vernon at 13:36 expressing Mr. Olek's displeasure that Mr. Vernon did not feel able to trust Mr. Olek with a set of keys after he had received the initial deposit, then the bank guarantee and the final payment. Mr. Mehlitz went on to say that Mr. Olek now felt that the contract should start when the carpet downstairs had been replaced and the other minor property issues had been rectified. The email concluded that "If that helps you I will arrange for Thomas to buy GBP5 to 10K of champagne and wine". It seems to me that this email is consistent with Mr. Vernon having been told at the meeting of Mr. Olek's displeasure and being aware that the commencement date had to change. The reference to "If that helps you..." suggests to me that Mr. Vernon knew that there was money to make up from the reduction in rent due to the changed commencement date.

47. Later that day Mr. Mehlitz's email proposing that the commencement date be linked to replacement of the carpet was forwarded by Mr. Vernon to Mr. Bees for a response and his thoughts. Mr. Bees replied to Mr. Vernon on the same day stating that he thought that Mr. Mehlitz was "insane" and that Mr. Vernon should take the matter up with Ms Stranga. It appears that Mr. Vernon did not take the matter up with Ms Stranga.

Events after 27 January 2016

48. On 28 January 2016 the original signed document comprising the Trustees' Signed Tenancy Agreement was couriered by R&H to Mr. Vernon.

49. On 29 January 2016 Mr. Vernon emailed Mr. Gomoll and confirmed receipt of the final payment by Publity. When Mr. Gomoll forwarded this email to Mr. Mehlitz, he asked if Mr. Mehlitz had received a reply from Mr. Vernon to his email of 27 January 2016 about the commencement date. Mr. Mehlitz confirmed that he had not. Mr. Vernon did reply later that day apologising regarding Mr. Olek and the refusal to hand over the keys, saying that it was not the fact that he did not trust Mr. Olek with the keys, but that he was purely the messenger following instructions from the landlord.

50. Mr. Gomoll replied later that day thanking Mr. Vernon for his confirmation that the keys would be available from 9 am on 1 February 2016. With this confirmation, arrangements were made by Publity for Mr. Olek's furniture to be collected in Leipzig on 1 February 2016. Some furniture was delivered both from Germany and from Harrods to the Property on 1 and 2 February 2016. The furniture was in the process of being delivered until delivery was prevented in the circumstances described below when the locks to the Property were changed.

The events of 1 February 2016

51. I come now to the events of 1 February 2016 which was a Monday. The evidence on these events, and in particular the evidence regarding the Posted Tenancy Agreement, was given by Mr. Mehlitz. Chesterhill maintains that that Agreement was concocted by Mr. Mehlitz and Mr. Gomoll and that it was a fraud. This is a matter which I will have to consider in detail in due course under the first issue. Although it will lengthen this judgment what I will do in this section of my judgment is simply set out what Mr. Mehlitz said and I will then deal later with Chesterhill's challenges to his evidence. I will deal with the matter in this way because Chesterhill relies in part upon subsequent events so as to try to discredit Mr. Mehlitz's evidence. I therefore need to set out those subsequent events before I can address Chesterhill's case.

52. Mr. Mehlitz says that while he was at his home in Munich he printed out and then signed a copy of the tenancy agreement that he had received by email from Mr. Vernon on 27 January 2016. This was the tenancy agreement with the commencement date of 14 January 2016 signed by Mr. Hodges and Mr. McCallum and which I have called the Trustees' Signed Tenancy Agreement. In his first witness statement Mr. Mehlitz says that he did this on the understanding that keys would be given to Mr. Gomoll on 1 February 2016. Having signed it, he dated it next to his signature with the date on which he signed it, i.e. 1 February 2016. He did not date it on the page and in the place for dating the tenancy agreement. He then sent it by normal post to Chesterhill at 34 Rue de l'Athénée, PO Box 393-1211 Geneva 12, Switzerland.

53. In his second witness statement, Mr. Mehlitz gives more detail about the circumstances surrounding the signing and sending of this agreement. Further details also emerged during his cross-examination. He said that he printed out a hard copy of this agreement on his personal printer at home in Munich. He believed that he did so before 1 February 2016, i.e. over the weekend. He signed and dated the copy while at home. He wrote the date when he signed it by placing the date next to his signature. As the agreement is dated 1 February 2016, he believed that he must have done this on the morning of 1 February 2016, though he cannot recall for certain and may have done so over the weekend. He then made a copy of the signed agreement on his home printer (which can also copy documents) and put the signed agreement with his original signature in a C5 sized envelope. As he did not know exactly how much the postage to Switzerland would be, he decided to affix more stamps to the envelope than necessary and he used two EUR 1.45 stamps. He addressed the envelope to Chesterhill in Geneva at the address mentioned above. He believed that he got that address by telephoning a colleague, either Mr. Gomoll or Mr. Kunath, who gave him the address and did so in a funny French accent. That person may have got the address from a Google search. He telephoned early in the morning because he has young children and is used to early starts to his day. He did not open his laptop. He says that, as he was flying to London that morning, he wanted to send the signed agreement directly to the directors of Chesterhill in Geneva. The directors names, Mr. Rodney Hodges and Mr. Andrew McCallum, were on the agreement together with their signatures.

54. Mr. Mehlitz says that he then drove to Munich airport on the morning of 1 February 2016 in order to catch a flight to London. He drove a Sixt rental car from his home to Munich airport and he dropped the car off at the Sixt Diamond Lounge. While walking from that lounge to the Lufthansa check-in, he passed a Deutsche Post postbox and he posted the envelope in that box. He then caught his flight (LH 2472) to London which departed at 09:20 German time. In his second witness statement he corrected the date of his flight which in his first witness statement he mistakenly gave as 2 February 2016.

55. It is this agreement said to have been put in the post that I have called the Posted Tenancy Agreement and which Publity relies upon as creating a binding agreement.

56. The Posted Tenancy Agreement was never received by R&H in Geneva. After Chesterhill received Publity's evidence in the interim application it caused a search to be carried out of Chesterhill's registered office in Jersey but there was no record of any such document being received there. The search was carried out in the Jersey office because Publity's evidence referred to the document being sent to "the Defendant" and not to it being sent to R&H.

57. Mr. Hodges gave some oral evidence explaining the system for dealing with post at the Geneva office. After he had concluded his evidence and returned to Geneva, he provided a second witness statement dealing with a search that had just been made of the Geneva office. The Posted Tenancy Agreement was not found in the Geneva office nor were there any signs of it having been received there.

Events after 1 February 2016

58. On 2 February 2016 Mr. Gomoll attended the Property in the morning with Mr. Benjamin Reul (a former banker and now an employee of Publity), Mr. Mehlitz and Mr. Vernon. Mr. Vernon handed Mr. Mehlitz the keys. Mr. Vernon also brought with him the tenancy agreement signed by Mr. Olek on 27 January 2016 and countersigned by Mr. Vernon, and which I have called the Amended Tenancy Agreement. Mr. Vernon took a photograph of Mr. Mehlitz holding the keys and the tenancy agreement. Mr. Mehlitz and Mr. Gomoll then left to go to another meeting elsewhere in London.

59. With Chesterhill's consent German removal men and Harrods staff were moving in furniture belonging to Publity. This process had started the day before and continued on 2 February 2016.

60. Also on the morning of 2 February 2016, Ms Stranga was told by Mr. Halabi to attend at the Property to hand over the keys to Publity. She was told that the keys were not to be released unless and until she obtained a signed copy of the tenancy agreement which had to be line for line the same as the agreement which had been signed by the Trustees. She printed out a copy of that agreement together with an extra page dealing with substitute bank accounts, Mr. Vernon came to her office at around lunchtime, i.e. after the events described in the previous paragraph, and she told him that he needed to check the agreement line by line and that everything must be signed. He seemed a little offended by this and said words to the effect that this was not his first time arranging a letting. She and Mr. Vernon started walking towards the Property. Ms Stranga asked Mr. Vernon to confirm that the agreement was the same line for line and he said that it was. Ms Stranga then asked Mr. Vernon about an additional sheet dealing with the substitute bank accounts. He said that he had forgotten this and that he would have to go back to his office to print it off. He also said that there was no need for Ms Stranga to attend at the Property. He said that he would send scanned copies of the tenancy agreement out to both sides that day.

61. Ms Stranga relayed all of this to Mr Halabi and all seemed to be fine. However, at about 1 pm that day, Ms Stranga received a call from Mr Vernon who was very distressed. He said that he had just realised that the agreement signed by Publity had a different start date on it, i.e. 1 February 2016, rather than 14 January 2016. Ms Stranga told Mr. Vernon in no uncertain terms to sort it out immediately. She then phoned Mr. Halabi who was not at all happy. Mr. Halabi was on his way back to his office with Mr. Bees from a meeting. When Mr. Halabi returned to his office, he told Ms Stranga and Mr. Bees to go round to the Property and get the keys back from Mr. Vernon, that nobody was to move into the Property and that the deal was off.

62. While Mr. Mehlitz and Mr. Gomoll were at their meeting elsewhere in London, Mr. Gomoll received a call from Mr. Vernon to tell him that builders had come to the Property in order to change the locks. Mr. Vernon asked Mr. Mehlitz and Mr. Gomoll

to return to the Property to try to find an amicable solution to the question from which date rent would be payable.

63. When Mr. Mehlitz and Mr. Gomoll returned to the Property, they met Mr. Vernon. Discussions ensued and they were told that Mr. Halabi did not agree to Publity having the keys to the Property. Mr. Halabi was telephoned and he seems to have relented a little in that he was prepared to allow Publity back into the Property if Mr. Mehlitz confirmed in writing that rent would be payable from 14 January 2016. Mr. Mehlitz agreed to this and re-amended and revised the handwritten amendments that Mr. Olek had made on 27 January 2016 on the version of the tenancy agreement countersigned by Mr. Vernon. This re-amended and revised agreement is what I have called the Re-Amended Tenancy Agreement.

64. After Mr. Mehlitz made the handwritten amendments and while they were all still in front of the Property, Ms Stranga arrived at the Property. It seems that Mr. Halabi had had second thoughts about relenting and she told Mr. Mehlitz and Mr. Gomoll that, unless Publity provided the deposit in cash and agreed to pay rent from 1 January 2016, Mr. Halabi would not allow Publity into the Property.

65. Mr. Mehlitz did not agree to this and told Miss Stranga that he had just re-confirmed that Publity was willing to pay rent from 14 January 2016. Mr. Mehlitz then had to leave to catch a flight to Stuttgart. In cross-examination Mr. Mehlitz said that he had a copy of the Posted Tenancy Agreement with him in his bag which was in a car nearby, but he did not produce it or mention it at any time in all the various discussions.

66. After Mr. Mehlitz left, it was agreed that Mr. Gomoll should meet Mr. Halabi. Later that day they met at Mr. Halabi's offices in Berkeley Square. The meeting was civilised. Mr. Halabi blamed Carter Jonas for what had happened and said that he did not want them to play any further part in the transaction. Mr. Halabi asked whether the bank guarantee made out to Carter Jonas could be replaced by a bank guarantee made out to the landlord or by a cash deposit. Mr. Gomoll said that he would have to take instructions, but that Publity considered that it had a valid and binding tenancy agreement with Chesterhill. By this he meant the Re-Amended Tenancy Agreement. Mr. Gomoll did not mention the Posted Tenancy Agreement. However, Mr. Halabi cut him off from saying anything further about any existing agreements as he wanted a new tenancy and he wanted it to be drafted by Mishcon. Mr. Halabi said that if Mr. Olek agreed to the modifications, then the tenancy agreement could proceed as planned. Mr. Halabi also said that if Mr. Olek did not agree by the next Monday, then he would arrange for the £84,500 rent and the guarantee to be returned by the following Monday. Mr. Gomoll agreed to meet Mr. Nick Minkoff, a partner in Mishcon, the following day.

67. The next day, 3 February 2016, Mr. Gomoll met Mr. Minkoff and Mr James Liffen, a managing associate. Mr. Gomoll showed Mr. Liffen the Re-Amended Tenancy Agreement. Mr. Liffen took a copy of the Agreement. Mr. Gomoll did not mention the Posted Tenancy Agreement.

68. Later that day Mr. Liffen emailed Mr. Gomoll a draft tenancy and said that his clients' instructions were that the tenancy was to commence from 1 January 2016, that rent was to be payable from that day and that a further deposit of £84,500 was to be paid at the commencement of the tenancy instead of the guarantee. Mr. Liffen also noted that the copy of the tenancy agreement which Mr. Gomoll had provided to him that morning

"was never dated and completed and our clients never gave authority for it to be completed. It was signed in anticipation of terms being agreed which they never were."

69. Mr. Gomoll replied by email later on 3 February 2016 asking Mr. Liffen a number of questions, including from whom he was taking instructions. Mr. Liffen replied later that day stating that they had taken their clients' instructions and that "unfortunately it seems that the parties are not in agreement. In the circumstances we are not instructed to carry out any further work in relation to this matter".

70. Later on 3 February 2016 Mr. Mehlitz emailed Mr. Hodges and Mr. McCallum a copy of the Posted Tenancy Agreement. This emailed copy is what I have called the "3 February Tenancy Agreement". Mr. Mehlitz did not mention the Posted Tenancy Agreement in this email. In his email Mr. Mehlitz asked for confirmation whether any third party had rights to the Property that could interfere with Mr. Olek's peaceful enjoyment of the Property. In his oral evidence he said that he included this wording as a result of a suggestion by Mr. Gomoll. This email and the attachment were received by Mr. Hodges and Mr. McCallum, but they never replied to it.

71. Subsequently, Mr. Gomoll asked Mr. Reul to meet the directors of Chesterhill at R&H to ascertain whether or not they wished to proceed with the agreement that they had signed as directors. This meeting took place in Geneva on 5 February 2016. No agreement came out of this meeting.

72. Mr. Olek was to arrive in London on 8 February 2016. Mr. Gomoll asked Mr. Vernon to attend with Mr. Olek at the Property to see whether Mr. Olek could gain access to it. When Mr. Olek and Mr. Vernon attended the Property, the keys held by Mr. Olek did not work. Mr. Vernon emailed Mr. Halabi and asked for confirmation as to whether Mr. Halabi had changed the locks and "what we should advise the tenant". Mr. Bees from Buckingham replied to Mr. Vernon's email on the same day objecting to "your prospective tenant [having] amended the date on the agreement without consent and therefore breached a basic facet of the agreement and made it invalid".

73. There were some subsequent emails from Mr. Vernon which might seem to assist in the resolution of the first issue in that they might suggest that he considered that there was a binding tenancy agreement. However, I will not set these emails out because, as I mentioned earlier, it seems to me that, after the parties fell out, Mr. Vernon's concerns were to protect his back and to get his fee. I therefore place no weight on these emails from Mr. Vernon.

74. After some correspondence between Solicitors, proceedings were issued on 31 March 2016. Publity made an application for interim relief supported by a witness statement from its Solicitor, Mr. Scully, a partner in Clifford Chance. That application was not pursued but was adjourned generally. The case was listed for a trial on an expedited basis.

Other findings

75. There are two other areas where, for the sake of completeness, I will make brief findings as they were the subject of a certain amount of cross-examination, although the results of the cross-examination were not greatly relied upon in closing submissions. They concern: (1) whether or not Publity was going to make office use of the Property; and (2) the reason for Mr. Halabi breaking off negotiations.

76. As to (1), the main evidence relied upon by Chesterhill was the nature of the furniture delivered to the Property. I agree with Mr. Hutchings that this evidence was, at best, ambiguous. Some people might regard that furniture as suitable for residential use, whereas others might regard it as suitable for office use. It struck me as more suited to residential use. I reject the suggestion that Publity was going to make office use of the Property. I am satisfied that Publity's proposed use was residential.

77. As to (2), I think that the reason Mr. Halabi broke off negotiations was that he was infuriated by what he regarded as Mr. Vernon's incompetence and that this affected his view of Publity who he thought were trying to trick him. Mr. Halabi was plainly fed up with the quality of the service he was getting from Mr. Vernon. In cross-examination he somewhat disparagingly described Mr. Vernon's firm's standard form of tenancy as a "Mickey Mouse" agreement. Mr. Halabi turned to advisers he trusted, i.e. Mishcon, to prepare the sort of tenancy agreement that he felt that he could rely upon. Mr. Halabi's view of Mr. Vernon affected his assessment of Publity and its officers. I do not consider that Mr. Halabi was trying to get a higher rent. The different terms that he sought from Publity such as a commencement date of the 1st January 2016, were a form of compensation from Publity for what he regarded as being tricked by them and let down by Mr. Vernon.

The issues

78. Counsel agreed the following list of issues.

(1) Was a valid and binding tenancy agreement between the Claimant and the Defendant in relation to the Property created on 1 February 2016 and, if so, what were its terms?

(2) Did the Claimant take possession of the Property?

(3) Is the Claimant entitled to possession of the Property pursuant to the tenancy agreement and, if so, what relief should be granted to it?

(4) Is the Claimant entitled to damages from the Defendant for breach of the tenancy agreement and, if so, on what basis, how should those damages be assessed and in what amounts should they be awarded?

(5) Is the Defendant entitled to retain the sum of £52,000 paid to it by the Claimant in relation to the Property?

(6) Alternatively to paragraph 6 above, is the Claimant entitled to restitution of those same sums?

(7) Is the Defendant entitled to £283 by way of damages from the Claimant?

Issue (1): Was a valid and binding tenancy agreement between the Claimant and the Defendant in relation to the Property created on 1 February 2016 and, if so, what were its terms?

79. Chesterhill contends that there was no valid and binding tenancy agreement created on 1 February 2016. It relies on the following grounds. First, it says that the Posted Tenancy Agreement was concocted by Mr. Mehlitz and Mr. Gomoll and was a fraud. Secondly, and alternatively, it says that Publity has failed on the balance of probabilities to prove that that Agreement was printed, signed and posted as alleged. Thirdly, it says that there was no agreement between the parties on the commencement date of the tenancy agreement. Fourthly, it says that the Posted Tenancy Agreement was not dated in the way required by the agreement so as to make it legally binding. Fifthly, it says that the grant of the lease was conditional upon the production of the original bank guarantee, which did not take place. I will take these grounds in turn.

Grounds (1) and (2)

80. Although it involves me going over some of the facts again, in order to deal with Chesterhill's case I need to examine in detail the events regarding the Posted Tenancy Agreement the contemporaneous documents and also some of the subsequent events.

81. On behalf of Chesterhill, Miss Shea mounted a full scale attack on the genuineness of the Posted Tenancy Agreement and invited the Court to find that neither Mr. Mehlitz nor Mr. Gomoll was telling the truth. Miss Shea mounted her attack under three main headings: (i) the evidence was inherently incredible; (ii) the evidence was wholly inconsistent with the events which unfolded; and (iii) the evidence was inconsistent with how Publity's case was apparently put in its application for interim relief. I will take these three headings in turn.

82. Under the heading inherently incredible, Chesterhill first questioned why Mr. Mehlitz felt the need to sign another agreement on the morning of 1 February 2016 at all as he had been present when Mr. Olek and Mr. Vernon signed the Amended Tenancy Agreement on 27 February 2016. In my judgment Mr. Mehlitz had good reason to do what he did in that he was not sure if Mr. Vernon could sign on behalf of Chesterhill. In this regard, it seems to me that what matters was Mr. Mehlitz's understanding of Mr. Vernon's authority, rather than Mr. Gomoll's understanding, Mr. Gomoll being more forcefully of the view that Mr. Vernon had authority. However, it was Mr. Mehlitz who signed the Posted Tenancy Agreement and therefore I consider it is his evidence or belief about authority which is the most relevant. I am satisfied that Mr. Mehlitz had doubts about Mr. Vernon's authority.

83. Next, Chesterhill questioned why, if Mr. Mehlitz felt the need to sign a further agreement, he did not amend the commencement date in the Posted Tenancy Agreement to reflect what he said had been agreed with Mr. Vernon on 27 January 2016. This point troubled me because the clear impression I got from the evidence was that Mr. Olek was very unhappy with Chesterhill's behaviour and wanted to change the commencement date to 1 February 2016. This being so, it does not make sense for Mr.

Mehlitz to go back on what Mr. Olek wanted to do. However, on reflection, I accept Mr. Mehlitz's explanation as credible, namely that the Posted Tenancy Agreement was the only one that had come from the landlord and so, by signing it, Mr. Mehlitz could be sure that an agreement was in place. If Mr. Olek was about to move in to the Property and if his furniture was going to be delivered there from Germany, it makes sense that Mr. Mehlitz was concerned there should be no question marks over the validity of the tenancy agreement.

84. Next, Chesterhill questioned Mr. Mehlitz's choice of the address which he used and why he did not use the address that appeared on page 3 of the tenancy agreement, i.e. an address in Jersey. Chesterhill also questioned why Mr. Mehlitz should phone a colleague to find out the address, rather than use the address already available within the very document that was being signed. Also, Chesterhill questioned why Mr. Mehlitz did not himself search for the R&H address on the Internet. Again, I find Mr. Mehlitz's explanations for all these matters to be credible. He wanted to get the tenancy agreement to those who had signed it. He did not have their address and so he spoke to a colleague to try to get the address and the colleague found it for Mr. Mehlitz. He could not remember who the colleague was, but he thought that it was Mr. Kunath or Mr. Gomoll because of the colleague's "funny" French accent. Mr. Gomoll confirmed that he did not speak to Mr. Mehlitz. Mr. Kunath was not called as a witness. It seems to me that it is likely that Mr. Mehlitz spoke to Mr. Kunath. I agree with Mr. Hutchings that Mr. Mehlitz's vagueness is not a reason why I should reject his evidence, but rather it does him credit as he did not attempt to embellish his evidence.

85. Chesterhill placed much weight on the fact that the involvement of R&H, as distinct from Mr. Hodges and Mr. McCallum qua directors of Chesterhill, had never been communicated to any of Mr. Mehlitz, Mr. Gomoll, Mr. Olek or Mr. Kunath before 1 February 2016. This point was developed at some length both in cross-examination and in Chesterhill's written closing with particular reference as to when Mr. Mehlitz and Mr. Gomoll might, or might not, have received a compliments slip showing the Geneva address of R&H. Without wishing to deal with this point too shortly or simply, it seems to me that Mr. Hutchings had the answer to these points which is that a Google search against the names of Rodney Hodges and Andrew McCallum, which two names appeared as signatories on the Posted Tenancy Agreement, would bring up R&H. As was apparent from the screenshot that was provided to me, the address given on the R&H website was the address in Geneva. This being so, if, as I find to be the case, Mr. Mehlitz rang Mr. Kunath for information about the address and if, as I think must have happened, Mr. Kunath did not have the address but did a Google search then that would inevitably lead to the address which Mr. Mehlitz says that he used.

86. Next, Chesterhill challenged the evidence that Mr. Mehlitz gave about his printer/scanner and questioned why he did not simply use the Posted Tenancy Agreement as an email attachment at the same time that he copied it. However, as Mr. Hutchings said in his reply, I have no evidence as to the kind or quality of Mr. Mehlitz's printer/scanner, its specification and its capabilities. I therefore consider that I cannot place any weight on this criticism by Chesterhill of this part of Mr. Mehlitz's evidence because I cannot assess what his printer/scanner could and could not do. The same comment applies to Chesterhill's next criticism which was that Mr. Mehlitz could have scanned the document to his email without the need to open his laptop or to collect or

forward the email at that stage. Again, as I have no evidence about the type of printer/scanner, the details of his laptop or his email account, I reject this criticism.

87. Finally, Chesterhill questioned why Mr. Mehlitz chose to use the post at all when all other documents were sent by email. However, as I understood his evidence, which I accept, Mr. Mehlitz said that his experience was that formal documents should be sent by post. This was a formal document.

88. I turn to Chesterhill's second main head of criticism, namely that Mr. Mehlitz's evidence was inconsistent with unfolding events. In particular, Chesterhill said that there were a number of occasions when the Posted Tenancy Agreement could and should have been mentioned in discussions between Publity and Chesterhill, but it was not mentioned at all. Chesterhill relied upon Mr. Mehlitz's failure to mention the Posted Tenancy Agreement on 2 February 2016, first, when the keys were handed over, secondly, upon returning to the Property after Mr. Vernon had called Mr. Gomoll to tell him that there was problem, thirdly, when Mr. Mehlitz left to catch his flight, and fourthly, when he left Mr. Gomoll to deal with the problem. Again it seems to me that Mr. Hutchings was correct when he said that Mr. Mehlitz had no reason to focus on the Posted Tenancy Agreement. On the first occasion the focus was on getting hold of the keys and the Amended Tenancy Agreement. Then, on the second occasion, Mr. Mehlitz was faced with a complicated and difficult situation where I consider his main concern was to try to sort out that situation rather than further complicate matters by producing yet another tenancy agreement. And, in any event, Mr. Mehlitz's evidence, which I accept, was that the agreement was in his bag in a car parked away from the Property. Then, on the third occasion, Mr. Mehlitz was in a hurry to leave because he had a flight to catch back to Germany and therefore it is understandable that he would leave Mr. Gomoll to sort out the problem and not provide him with the Posted Tenancy Agreement. As to the fourth occasion, I did not understand it to be suggested by Chesterhill that Mr. Gomoll had a copy of the Posted Tenancy Agreement at that meeting and therefore there would be no reason for him to mention it.

89. The next occasion relied upon by Chesterhill was when Mr. Gomoll met Mr. Halabi at his offices later on 2 February 2016. Again, Chesterhill poses the question - why did Mr. Gomoll not mention the Posted Tenancy Agreement? The answer to this question was clear to me from the evidence of both Mr. Gomoll and Mr. Halabi. It is that Mr. Halabi was simply not interested in hearing from Mr. Gomoll about any past agreements. Mr. Halabi wanted to set up a new agreement. In these circumstances, it would make no sense for Mr. Gomoll to mention the Posted Tenancy Agreement as this might only further aggravate Mr. Halabi. Mr. Halabi did not want to hear about any previous tenancy agreements and stopped Mr. Gomoll from mentioning them. It seems to me that the same applies to the next occasion relied upon by Chesterhill, i.e. when Mr. Gomoll visited Mishcon's offices on the morning of 3 February 2016. As Mr. Hutchings said, that meeting was about getting a new deal not looking at any past deals. In that sort of situation, where Mr. Minkoff was looking to the future to prepare a new agreement, I consider that Mr. Gomoll was hardly going to be arguing about the past and an old agreement.

90. Next, Chesterhill relied upon the fact that, when Mr. Mehlitz emailed the 3 February Tenancy Agreement to Mr. Hodges and Mr. McCallum on 3 February 2016, he did not mention the fact that he had already posted the Posted Tenancy Agreement. However,

as Mr. Hutchings said, and I agree, there was no need for Mr. Mehlitz to say that it had been posted.

91. Next, Chesterhill relied upon Publity's failure to mention the Posted Tenancy Agreement every day between 3 February 2016 and 31 March 2016. However as Mr. Hutchings said, and I agree, there was no reason for Publity to do so because the 3 February Tenancy Agreement had been emailed to Mr. Hodges and Mr. McCallum on 3 February 2016 and there was no response from them querying that document. There were no howls of outrage from Mr. Hodges and Mr. McCallum challenging the genuineness of that document. So far as Publity was concerned, Chesterhill, through Messrs. Hodges and McCallum, had that document and had made no objection to it. Indeed, it might be said that what was significant was not so much the silence by Publity about the Posted Tenancy Agreement, but rather the silence by Chesterhill about the 3 February Tenancy Agreement.

92. Chesterhill also relied upon the fact that, in spite of visiting Mr. Vernon several times following 2 February 2016, with a view to him supporting the claim that a binding tenancy had been agreed, Mr. Gomoll did not tell Mr. Vernon about the Posted Tenancy Agreement. Again, however, there was no reason for Mr. Gomoll to tell Mr. Vernon any such thing because Mr. Gomoll knew very well that Mr. Halabi had a dim view of Mr. Vernon and that Mr. Vernon was out of the picture so far as Mr. Halabi was concerned.

93. I turn to Chesterhill's third main head of criticism, namely that Publity's case at trial was different from that which it advanced for the purposes of the interim injunction application.

94. As a general point, I agree with Mr. Hutchings that it can sometimes happen that there are differences in the way in which a case might be put at the time of an interim application and then at trial. This can be as a result of the need for a party to get the interim application on quickly, and to prepare the evidence in a rush, and then having the opportunity and time to scrutinise the documents more closely in the time available for preparation for the trial. However, this general point is not in any way decisive because I must examine Chesterhill's specific points.

95. Turning to the specific points, Chesterhill first criticised the use of the words "[sent] to the Defendant" in paragraph 6 of the Particulars of Claim, which accompanied Publity's interim application and said that it was only upon exchange of witness statements in early June 2016 that Chesterhill learned that it was alleged for the first time that the Posted Tenancy Agreement was sent to R&H at their Geneva office. It seems to me that this is a groundless criticism. The fact of the matter is that the substance of Mr. Mehlitz's evidence was that the Posted Tenancy Agreement was sent to the Defendant, but via its representative R&H.

96. Next, Chesterhill criticised the wording of paragraph 16 of the first witness statement of Mr. Scully in support of Publity's application. I agree that that paragraph could have been fuller and more explicit, but I cannot accept the suggestion that there was some sort of deliberate intention by Publity to create a misleading impression. The same applies to the next criticism made by Chesterhill, namely that the reference in parenthesis at the end of the first sentence of paragraph 16 of that witness statement to

the "cover note" sent to Chesterhill created a misleading impression as to which tenancy agreement had been signed by Mr. Mehlitz.

97. Next, Chesterhill suggested that Mr. Mehlitz changed his story and that it was highly significant that the details from Mr. Mehlitz about posting the agreement at the airport emerged not in Mr. Mehlitz's first witness statement, but only in his second witness statement upon the insistence of Chesterhill's Solicitor that Mr. Mehlitz's travel documentation be disclosed. I disagree. I think that it is wrong to suggest that Mr. Mehlitz "changed his story". What happened is that in his second witness statement he gave more details about the Posted Tenancy Agreement and corrected a mistaken date in his first witness statement.

98. The next point made by Chesterhill concerns Mr. Scully's reference in paragraph 16 of his witness statement to the Posted Tenancy Agreement being "sent to Chesterhill" rather than R&H. (Emphasis added). However, bearing in mind that Mr. Scully was using "Chesterhill" as a defined expression in his witness statement, I find nothing untoward in Mr. Scully's definition. I reject the suggestion by Chesterhill that this was "at the very least cryptic, if not positively misleading, evidence".

99. The last point raised by Chesterhill under this head concerns the searches carried out by R&H. The point was that, in the evidence of Mr. Madden (the Solicitor for Chesterhill) on the interim application, reference was made to a search of the "Company's offices". Chesterhill said that it must have been obvious that this did not refer to the Geneva office of R&H and yet at no stage prior to exchange of witness statements did Publity assert its case that the Posted Tenancy Agreement had been sent to R&H in Geneva. As I read Mr. Madden's witness statement, "the Company" was not a defined expression and therefore it is perhaps not surprising that Publity did not respond saying that the Posted Tenancy Agreement had been sent to R&H in Geneva.

100. I have now considered, and rejected, the main points raised by Chesterhill in its closing submissions as to why it says that the Posted Tenancy Agreement was concocted by Mr. Mehlitz and Mr. Gomoll.

101. In its closing Chesterhill summarised its case on this aspect as follows:

> **"After negotiations with Mishcon for the grant of a new tenancy broke down, [Mr. Gomoll and Mr. Mehlitz] agreed between themselves to send the Posted Tenancy Agreement by email to [Mr. Hodges and Mr. McCallum] and on 3 February 2016, in an effort to create an act of acceptance of the offer contained in the Trustees' Signed Tenancy Agreement, [Mr. Gomoll and Mr. Mehlitz] realised at some stage after 3 February 2016 that trying to accept the offer represented by the Trustees' Signed Tenancy Agreement after the events of 2 February 2016 was too late, following the dispute which arose on that date. The result was that the email of 3 February 2016 failed to achieve the desired effect. Accordingly, they concocted a story, however unlikely, which would (if true) have constituted an acceptance of that offer which predated the breakdown which occurred on 2 February 2016, and would have rendered the events of that day irrelevant."**

102. If this is what Mr. Mehlitz and Mr. Gomoll did, then it would be a most serious matter. In these circumstances, I will do what Publity invited me to do in its closing, namely to consider the inherent probability that Mr. Mehlitz and Mr. Gomoll would have conspired in this way.

103. Just pausing here, as I mentioned at the start of this judgment, on 14 July 2016 Chesterhill sought my permission to put in further written submissions. These submissions were to address Mr. Hutchings' reliance in his written closing upon Re H (Minors) [1996] AC 563 and passages from Phipson on Evidence, 18th Ed, at paras.6-55 and 6-56 which Chesterhill said it had not had the opportunity to reply to properly. I granted permission and subsequently received Chesterhill's Supplemental Closing Submissions on 20 July, which Publity replied to the following day. I have had regard to what was said by Chesterhill in its Supplemental Closing Submissions and in the following paragraphs I have considered the inherent probability of Mr. Mehlitz and Mr. Gomoll acting as set out in Chesterhill's summary of its case which I have quoted above.

104. In considering the inherent probability, the starting point is that neither Mr. Mehlitz nor Mr. Gomoll stood to gain anything by creating documents in the way suggested above by Chesterhill. Neither of them, nor Publity, would make any financial gain. All that would happen is that, subject to Chesterhill's other grounds of challenge, there would be a tenancy established of the Property at a rent negotiated in the open market. Neither Mr. Mehlitz nor Mr. Gomoll was going to live in the Property, apart from any visits to Mr. Olek in London. There is no suggestion that either would benefit financially or personally from establishing the existence of a binding tenancy agreement. Securing the tenancy agreement was a minor part of their jobs and Mr. Gomoll was only roped in because of the proximity of London for him of his Channel Islands base. In the case of Mr. Mehlitz, he seems to have had other more pressing things to do, as is evidenced by the way in which he had to leave for Germany on 2 February 2016. There is no evidence that Mr. Mehlitz or Mr. Gomoll were under any particular pressure from Mr. Olek to secure the Property. They had looked at other properties and, if they had taken the view that there was no binding tenancy of the Property, they could have looked elsewhere. It was not suggested in the evidence that this was a "must have" property.

105. I formed the view that Mr. Mehlitz and Mr. Gomoll are both highly intelligent men. They had nothing personal to gain from concocting a tenancy agreement. They, and in particular Mr. Gomoll, had everything to lose. He is a Solicitor and creating a fraudulent document and coming to Court to give evidence on oath and to lie would have serious consequences for him. Also, as Publity argued, and I agree, the alleged deception by them goes further in that, on Chesterhill's case, they must also have lied to Clifford Chance (Mr. Scully) in the instructions they gave him. They then approved of, and encouraged, an expedited trial so that they could come to Court to give evidence for Publity and, on Chesterhill's case, lie on oath and then be subjected to cross-examination which might expose these lies. In these circumstances, it seems to me to be inherently improbable that Mr. Mehlitz and Mr. Gomoll would have acted in the way set out above in Chesterhill's summary of its case.

106. There is one further point. In his evidence Mr. Gomoll showed himself not only to be highly intelligent, but also to be well aware of the terms of the tenancy agreement and he clearly understood how they operated. If, as Chesterhill argues, there was a concocting of documents, this was a remarkably inept concoction. I say this because it

has been concocted in a way which enables Chesterhill to mount a challenge on the grounds that Publity failed to date the tenancy agreement in the way directed by the agreement. From hearing their evidence, and especially that of Mr. Gomoll, it struck me that if he had been going to concoct a tenancy agreement, he knew his way around the agreement well enough so as to ensure that there would not be the sort of challenge that Chesterhill has been able to mount in relation to the dating of the Posted Tenancy Agreement.

107. For the above reasons, I reject Chesterhill's challenge to the evidence of Mr. Mehlitz and Mr. Gomoll. I conclude that the Posted Tenancy Agreement was not concocted by Mr. Mehlitz and Mr. Gomoll. On the balance of probabilities, I am satisfied that it was printed, signed and posted as alleged by Publity.

108. I had some anecdotal evidence from the witnesses about the claimed reliability of the German and Swiss postal systems and what happens to undelivered letters, but I had no expert evidence about any of these matters. In the absence of such expert evidence, I do not place significant weight on that anecdotal evidence. Although I had reservations about Mr. Hodges' evidence, I accept the evidence that a search of the Geneva office did not reveal the Posted Tenancy Agreement or the envelope. In these circumstances, it seems to me that the likelihood is that the Posted Tenancy Agreement went astray in the post.

Ground (3)

109. In Chesterhill's written closing submissions this ground is put under the heading "No agreement as to commencement date". Chesterhill's point is that, if I found the Posted Tenancy Agreement to have been signed, dated and posted as alleged, it was ineffective as an agreement because there was no offer capable of acceptance.

110. Miss Shea referred me to Chitty on Contracts, 32nd Ed, at para.2-097:

> **"What amounts to rejection; counter-offers. A rejection terminates an offer, so that it can no longer be accepted. For this purpose an attempt to accept an offer on new terms (not contained in the offer) may be a rejection accompanied by a counter-offer. Thus in *Hyde v Wrench* the defendant offered to sell a farm for £1,000. The offeree replied offering to buy for £950, and when that counter-offer was rejected, purported to accept the defendant's original offer to sell for £1,000. It was held that there was no contract as the offeree had, by making a counter-offer of £950, rejected, and so terminated, the original offer. A communication can amount to a counter-offer only if it relates to the subject matter of the original offer. Where, for example, A offered to indemnify B in respect of legal costs incurred in litigation against both of them, it was held that this offer was not rejected by B's seeking compensation from A for loss of employment in return for B's co-operating with A in the litigation to an extent beyond that which B was already bound to give. The negotiations for such compensation were said to be "collateral" to the offer of indemnity and therefore not to amount to a rejection, by way of counter-offer, of the original offer.**

This offer accordingly remained open for acceptance and had been accepted by conduct.

A rejection of an offer is not prevented from having the effect of terminating the offer by reason of being contained in a communication expressed to be "subject to contract". The effect of these words is that the negotiations will lead to the conclusion of a legally binding agreement only on the execution of a formal contract. They have no bearing on the question whether the communication amounts to a rejection of the offer, as to preclude its subsequent acceptance."

111. As I understood matters, there was no difference between Counsel that the applicable legal principles are as set out above, i.e. that a rejection terminates an offer so that it can no longer be accepted, and that the same applies to a counter-offer. Instead, the difference between Counsel was in their analysis of the facts. Although it will lengthen this judgment, it will therefore be convenient if I set out again the key facts that are relevant to this ground and then apply the above principles to those facts.

112. On 15 January 2016 Mr. Hodges and Mr. McCallum signed the Trustees' Signed Tenancy Agreement. On the same day that Agreement was emailed from the Trustees' office by Ms Estelle Pecherand-Charmet to Ms Stranga who forwarded it to Mr. Vernon also on 15 January 2016. Also on the same day the emailed copy of that Agreement was emailed by Mr. Vernon to Mr. Gomoll. The commencement date proposed in that Agreement was 14 January 2016.

113. On 20 January 2016 Mr. Gomoll emailed Mr. Vernon stating that Mr. Olek would visit the Property on 27 January 2016 at 11:15 am. On 22 January 2016, Mr. Gomoll emailed Mr. Vernon stating that Mr. Olek would have only approximately one hour starting from 11:15 am.

114. On 27 January 2016 at 11:19:45 Mr. Vernon emailed a further copy of the Trustees' Signed Tenancy Agreement to Mr. Gomoll. Mr. Vernon stated "I thought that I had sent this previously apologies if you never received it". Bearing in mind that the meeting at the Property was due to take place that day at 11:15, this statement suggests to me either that Mr. Vernon was running late for the meeting or that he used his mobile to email it while at the meeting.

115. The meeting duly took place at the Property on 27 January 2016. It was attended by Mr. Olek, Mr. Gomoll, Mr. Mehlitz and Mr. Vernon. Apart from the email mentioned in the previous paragraph, there is no suggestion in the evidence that either the proposed start time or the duration changed. The meeting therefore started at about 11:15, or possibly soon after that email was sent, and lasted about one hour. During the course of the meeting a tenancy agreement was signed. This would have been towards the end of the meeting and after the inspection had taken place. It was signed by Mr. Olek as tenant and by Mr. Vernon "pp" as the landlord. The typed commencement date of "14th January 2016" in that agreement was amended in manuscript by Mr. Olek to "01th February 2016".

116. This is the agreement which I have called the Amended Tenancy Agreement. The effect of changing the commencement date by a little over two weeks was a reduction in the total rent of over £13,000.

117. Doing as both Counsel invited me to do, and looking at these facts in terms of offer and acceptance, the commencement date offered by Chesterhill in the Trustees' Signed Tenancy Agreement sent on 15 January 2016 was 14 January 2016. At the meeting on 27 January 2016, that commencement date was altered by Publity to 1 February 2016. It seems to me that by doing so Publity rejected the offer made by Chesterhill. In place of the rejected offer, Publity made a counter offer with a commencement date of 1 February 2016 and at a rent reduced by over £13,000.

118. Applying the principles set out above from Chitty, I consider that the offer made by Chesterhill contained in the Trustees' Signed Tenancy Agreement was no longer capable of acceptance. Publity made a counter-offer which amounted to a rejection of Chesterhill's offer. As it is put in Chitty, the rejection of the offer contained in the Trustees' Signed Tenancy Agreement terminated that offer so that it could no longer be accepted.

119. Continuing with the chronology, also on 27 January 2016 Mr. Vernon emailed another copy of the Trustees' Signed Tenancy Agreement to Mr. Mehlitz. Mr. Vernon did this after the meeting had concluded because the email was sent at 13:26:30 and refers to the meeting earlier that day. Mr. Vernon said "sorry for the confusion and I must express apologies both to you and Thomas". After attaching an inventory of wine, Mr. Vernon went on "I have also attached the landlord's signed agreement for your keeping". The attached agreement was another copy of The Trustees' Signed Agreement.

120. Pausing here, it seems that on 27 January 2016 Mr. Vernon was in something of a state of confusion about whether or not he had previously sent the Trustees' Signed Tenancy Agreement to Publity. So, in the morning he emailed a copy to Mr. Gomoll at 11:19:45. Then in the afternoon at 13:26:30 he emailed another copy to Mr. Mehlitz "for your keeping". However, he had in fact already sent it to Mr. Gomoll on 15 January 2016.

121. Mr. Hutchings relied upon the email sent by Mr. Vernon to Mr. Mehlitz on 27 January 2016 at 13:26:30 after the meeting had concluded as amounting to a further offer by Chesterhill. He argued that there is no reason why one party (i.e. Chesterhill in this case) may not make the same offer again and again and that if one party does so then the other party (i.e. Publity in this case) may accept one of those later offers even though it has rejected one of the earlier offers. So, Mr. Hutchings' argument continued, when on 1 February 2016 Mr. Mehlitz signed, dated and posted the Posted Tenancy Agreement, Publity thereby accepted Chesterhill's further offer made in the email sent on 27 January 2016 at 13:26:30.

122. In considering Mr. Hutchings' argument on this point, I think that Mr. Vernon's email sent on 27 January 2016 at 13:26:30 must be seen in context. The context was that Mr. Vernon had previously forwarded the Trustees' Signed Agreement to Mr. Gomoll on 15 January 2016. However, on the morning of the meeting on 27 January 2016, Mr. Vernon sent it again because he was uncertain and confused about whether or not he had previously sent it, witness the words in his email: "I thought I had sent this previously apologies if you never received it". At the meeting Mr. Olek amended the

commencement date thereby rejecting and terminating Chesterhill's offer. Then in his email sent at 13:26:30 Mr. Vernon again attached the Trustees' Signed Tenancy Agreement "for your keeping". These words suggest to me that what Mr. Vernon was doing was attaching that Agreement for information or record purposes and not so as to make a further offer. I do not think that Mr. Vernon's email sent at 13:26:30 in some way revived the terminated offer. It seems to me that the sending of that email was simply a matter of information or record rather than the submission of a new and revived offer.

123. Furthermore, there is no suggestion in the evidence that either the Trustees or Mr. Halabi had authorised the making of the sort of repeated offers that Mr. Hutchings contemplated in his argument. In this regard one thing was quite clear to me from the evidence, namely that no offer could be made by Mr. Vernon without the approval of the Trustees and Mr. Halabi. Neither the Trustees nor Mr. Halabi ever authorised Mr. Vernon to make repeated offers of the kind contemplated by Mr. Hutchings in his argument.

124. The next event in time is that on 28 January 2016 the original signed document comprising the Trustees' Signed Tenancy Agreement was couriered to Mr. Vernon.

125. To complete the chronology relevant to this ground, before he flew out of Munich on 1 February 2016 and while at home Mr. Mehlitz printed off a copy of the Trustees' Signed Tenancy Agreement. He signed it, put the date by his signature and posted that agreement which I have called the Posted Tenancy Agreement. Looking at the matter in terms of offer and acceptance, by doing so Mr. Mehlitz was trying to accept the offer contained in the Trustees' Signed Tenancy Agreement. However, as I have found above, that offer had been rejected and terminated. I therefore agree with Miss Shea that the offer contained in that Agreement was no longer capable of acceptance.

126. Accordingly, it seems to me that Publity's case that there was a binding tenancy agreement fails on this ground.

127. For completeness, I should mention that Chesterhill also relied on what Mr. Mehlitz said in his email sent on 27 January 2016 at 13:36. This email was in response to that from Mr. Vernon sent at 13:26:30. In that email, Mr. Mehlitz first relayed Mr. Olek's displeasure at not being trusted with a set of keys and then went on that "[Mr. Olek] now feels that the contract should start when the carpet downstairs has been replaced (as initially agreed) and the other minor property issues have been rectified".

128. In view of my conclusion in the last but one paragraph, I do not think that Chesterhill needs this email in order to succeed on this particular ground. However, this email does reinforce me in my conclusion that the offer contained in the Trustees' Signed Tenancy Agreement, with a commencement date of 14 January 2016, had indeed been rejected and that what was up for acceptance now was a different commencement date. I say this because in this email Publity was proposing a different start date. So if, contrary to my decision above, Mr. Hutchings was correct that Mr. Vernon's email sent at 13:26:30 somehow revived the offer contained in the Trustees' Signed Agreement, it seems to me that the email sent by Mr. Mehlitz at 13:36 was a rejection of that revived offer.

129. Finally on this ground, I find it useful to do as Miss Shea invited me to do and to step back and consider whether or not the parties were ad idem as at the point at which Mr.

Mehlitz signed the Posted Tenancy Agreement. Prior to that date, Chesterhill had proposed a commencement date of 14 January 2016, but at the inspection on 27 January 2016 Publity changed that date to 1 February 2016 and rejected 14 January 2016. A little later Publity then proposed to Chesterhill that the date should be when the carpet downstairs had been replaced and other minor property issues rectified. Chesterhill never agreed to either of these dates proposed by Publity. Indeed, when Mr. Mehlitz signed the Posted Tenancy Agreement, Chesterhill had not replied to the proposal by Publity to change the commencement date. It is instructive to consider what Chesterhill's position was at the time that Mr. Mehlitz signed the Posted Tenancy Agreement. By then Mr. Bees had been forwarded Mr. Mehlitz's email sent on 27 January 2016 at 13:36 proposing the commencement date linked to replacement of the carpet and had been asked for a response and his thoughts. That evening, Mr. Bees replied to Mr. Vernon that he thought that Mr. Mehlitz was "insane" and that Mr. Vernon should take the matter up with Ms Stranga. It appears that Mr. Vernon did not take it up with Ms Stranga. So, on Chesterhill's side there was no agreement either to the commencement date of 1 February 2016 or to the contract starting when the carpet downstairs had been replaced and the other minor property issues rectified. Indeed, Chesterhill thought that Publity was "insane" in its proposal to vary the commencement date.

130. So, doing as Miss Shea asked me to do and stepping back, it seems to me that, as at the time Mr. Mehlitz signed the Posted Tenancy Agreement, the parties were not ad idem on the commencement date of the tenancy agreement. This reinforces me in my conclusion that Chesterhill succeeds on this ground.

Ground (4)

131. This ground concerns the dating of the Posted Tenancy Agreement. Chesterhill says that the Posted Tenancy Agreement was not dated as required by the Agreement and that therefore it is not binding.

132. In order to deal with this ground, I must first set out certain provisions of that Agreement. In this respect, every single version of the tenancy agreement passing between the parties contained the following provisions:

> "(i) A statement on the front page as follows: "These promises will be legally binding once the Agreement has been signed by both parties and then dated" (emphasis added).
>
> (ii) A definition of "Binding Date" as follows: "A Tenancy Agreement is not, technically, a legally binding contract until it has been "executed" by being Dated, after both parties (or their authorised representatives) have signed."
>
> (iii) At clause 1.1 in the Summary of Core Terms the instruction "**Insert here** (only after this Agreement has been signed by, or on behalf of, both parties) **the binding Date of this contract** (emboldened text appears as such in the tenancy agreement and has not been added), followed by a blank box which is to be filled in with the DATE.
>
> (iv) Clause 9 contains under the heading "SIGNATURES of the PARTIES, IMPORTANT" the words "these promises will be legally binding once the

Agreement has been signed by both parties and then dated". There are then two blank boxes for the signature of the landlord and tenant.

133. It can be seen from these provisions that the parties attached some importance to the dating of the agreement. It can also be seen that what had to be dated was the Agreement and not the signature of the parties to the Agreement.

134. Although the Court does not have the Posted Tenancy Agreement, it does have the 3 February Agreement which Mr. Mehlitz said, and I accept, was a copy he took of the Posted Tenancy Agreement on the morning of 1 February 2016. In that document, the blank box in clause 1.1 of the Summary of Core Terms has not been completed with any date. However, on the last page of the Agreement, in the blank box for the signature of the tenant, there appears Mr. Mehlitz's signature followed by "February 1st 2016". Mr. Mehlitz's evidence was that he was recording the date that he signed the Posted Tenancy Agreement. Certainly that is how the date appears in the box after clause 9. What Mr. Mehlitz did not do was to enter any date in the box in clause 1 of the "Summary of Core Terms".

135. In these circumstances, the rival positions can be summarised as follows. Publity said that the obligation to "Insert" the date in a particular place was not a substantive operative requirement. The operative requirement was, at most, to date, and not to date the Tenancy Agreement in the box provided in clause 1.1. So, as the Tenancy Agreement had been dated by Mr. Mehlitz after his signature in the box after clause 9, that was sufficient. Publity further submitted that, as a matter of contractual interpretation, the words "Insert here..." could not mean that, if the date was not inserted precisely in the box, or on that very page, that the tenancy agreement was somehow not binding. If placing the date precisely in the box was not a substantive operative requirement, then why, argued Publity, should the date have to appear at all on the page containing the "Summary of Core Terms". Why, the argument went on, could it not appear, as it did, next to the signature of Publity on the last page of the Agreement. Provided the document was clearly signed and dated somewhere, it did not matter precisely where in the document that occurred. Provided the dating was clear, the agreement had been "executed" as required by the definition of "Binding Date".

136. In contrast, Chesterhill said that the intention of both parties as shown by the above provisions was that no tenancy agreement should be binding unless and until it had been "dated" in accordance with the terms of that agreement. Chesterhill submitted that the only reasonable interpretation of the provisions set out above was that the parties did not intend the agreement to be binding unless and until the box at clause 1.1 had been filled in. Chesterhill said that it may not be wholly clear as a question of construction whether, on the one hand, it was in the gift of one party or another to fill in the box following each party having signed and thus unilaterally render the signed agreement binding; or whether, on the other hand, it followed from these provisions that no agreement could operate as a binding agreement unless the date upon which the parties had agreed had been inserted into the box at clause 1.1. Chesterhill submitted that the correct answer to that ambiguity is that the date must have been a date which was agreed by the parties, since otherwise any party which signed the agreement first, and not in the company of the other party, would be vulnerable to the tenancy agreement becoming binding at a point when the process was beyond the first signing party's control. This,

said Chesterhill, was an unsatisfactory and uncommercial outcome, which it submitted rendered the requirement for the agreement to be dated lopsided. If the parties were stipulating in so many different provisions that the agreement must be dated in order to be effective, what justification was there, said Chesterhill, for reading that requirement as belonging exclusively to whichever of the parties signed second in time. Finally, Chesterhill argued that it was clear that it was the agreement which had to be dated and not the signature of a party to that agreement.

137. I prefer Chesterhill's arguments on this ground for the following reasons.

138. First, picking up on Chesterhill's final argument above and looking at the 3 February Tenancy Agreement (which is a copy of the Posted Tenancy Agreement) and reading that Agreement as a whole, what has been dated is Mr. Mehlitz's signature and not the Agreement. This is apparent from the way in which the date appeared on the last page of the Agreement next to Mr. Mehlitz's signature and in the box for a signature. The provisions which I set out above in paragraph 132 make clear that it is the Agreement which has to be dated and not one party's signature.

139. Secondly, I reach this conclusion simply by looking at the 3 February Tenancy Agreement as a whole and taking account of the provisions set out earlier and without regard to the evidence of Mr. Mehlitz. If regard is had to the evidence of Mr. Mehlitz, then his evidence was that he was adopting his normal practice of recording the date on which he signed, rather than dating the Agreement.

140. Thirdly, as a matter of construction, it seems to me that what was required under the Agreement was that there be an agreed dating and not a unilateral dating. This was not a case where there was to be a lease and counterpart. Instead, there was to be a single document signed by both parties and then dated. As Miss Shea pointed out, and I agree, any party which signed the single document first, and not in the company of the other party, would be vulnerable to the tenancy agreement becoming binding at a point when the process was beyond the first signing party's control. It seems to me that what the tenancy agreement required was dating with an agreed date, rather than with a date unilaterally imposed by one party on the other. In so deciding, I am not suggesting that the date had to be in the very box set out in clause 1.1 of the Summary of Core Terms. I agree with Publity that it would be absurd to say that the agreement was not binding if, say, the parties agreed upon a date and then, by mistake, entered that agreed date outside the box. Instead, what I am saying is that whatever date is entered on the agreement must be an agreed date rather than one unilaterally imposed by one party on the other. There is no suggestion in the evidence that Chesterhill, the Trustees or Mr. Halabi ever agreed to 1 February 2016 as being the date on which the tenancy agreement should take effect. Instead, what happened was that Mr. Mehlitz simply unilaterally wrote in a date that was not agreed by Chesterhill. In other words, he sought to impose that date on Chesterhill without that company ever agreeing to that date.

141. Fourthly, it is useful to do as Miss Shea suggested and test what I have said in the last paragraph by considering a case of where, rather than a single agreement being signed, a lease and counterpart are executed in separate documents. Miss Shea said, and I agree, that it would be strange if in that situation the landlord could sign the lease, and the tenant could then sign and date the counterpart independently of any agreement with the landlord as to the date on which the agreement was to become effective, and thereby bind both parties. In that situation, neither party could be bound until an agreed date

was entered on the lease and counterpart. It seems to me that if this is the approach where there is a lease and a counterpart, then the same should apply where there is a single document comprising the tenancy agreement. The date the tenancy agreement takes effect has to be agreed between the parties, rather than imposed by one party on the other without that other party's agreement.

142. Fifthly, this conclusion is consistent with the way in which the parties were conducting themselves in that they were working towards a handover meeting to take place at the Property on 2 February 2016 when the tenancy would take effect, Mr. Vernon would hand over the keys, the tenancy agreement would be provided to the parties and Mr. Olek would then in due course move in. The parties were not working towards a position where one party imposed the tenancy agreement on the other prior to that handover meeting and without that other party's agreement.

143. I therefore conclude that Chesterhill also succeeds on this ground.

Ground (5)

144. Chesterhill next contends that completion of the tenancy agreement was conditional on the delivery up of the original bank guarantee in favour of Chesterhill and that no such original guarantee was provided to Chesterhill in circumstances that would create a binding agreement.

145. In my judgment there is nothing in this point. It is correct that in his email sent on 26 January 2016 at 13:51 Mr. Vernon said that he could not release the keys until receipt of "the original agreement and letter of guarantee". However, nowhere in the prior negotiations or in any of the different versions of the tenancy agreement was there any agreed term that made receipt of the original guarantee a pre-condition to the grant of a tenancy. And, in any event, Mr. Vernon had already been sent a copy of a Commerzbank letter of guarantee in the sum of £52,300 by Mr. Gomoll by email on 22 January 2016 which Mr. Vernon forwarded on to Chesterhill on the same day. In Mr. Gomoll's email he said that Mr. Olek would bring the original with him to the meeting at the Property that was to take place the next week. Mr. Vernon confirmed in his email to Mr. Halabi sent on 8 February 2016 that "We have the original guarantee". It seems to me that this must have been given to him by Publity at the meeting at the property on 27 January 2016 or soon thereafter. If this was not the case, then Chesterhill could have called Mr. Vernon to prove the contrary, but it did not do so.

146. I am therefore satisfied that there was no agreed requirement as a pre-condition to the completion of the tenancy agreement that the original guarantee be provided. And, in any event, Mr. Vernon had the original guarantee. This ground therefore fails.

The terms of any binding agreement

147. The last aspect of issue (1) is: what were the terms of any binding agreement? If, contrary to my decision, there was a binding agreement, then it was on the terms of the Posted Tenancy Agreement.

Issue (2): Did the Claimant take possession of the Property?

148. In its written closing Publity said that this issue was relevant to relief and, in particular, what relief by way of injunction should be granted. As will appear below from what I say about issue (3), issue (2) ceased to be of any real relevance because there was agreement between Counsel on the appropriate relief if I held that there was a binding tenancy agreement. In so far as issue (3) remains relevant, as I have decided on issue (1) that there was no binding tenancy agreement, I consider that Publity did not take up legal possession of the Property. It could not do so because it never had a tenancy.

Issue (3): Is the Claimant entitled to possession of the Property pursuant to the tenancy agreement and, if so, what relief should be granted to it?

149. In view of my decision on issue (1), it follows that Publity is not entitled to possession of the Property. The question of relief under this issue does not therefore arise.

150. For completeness, I should add the following. Publity claimed, amongst other things, an order for specific performance. This claim was elaborated upon in Publity's written closing. However, after discussion with Counsel, it was agreed that, if I found there to be a binding tenancy agreement, there would be no need for specific performance. This is because Publity would have a leasehold interest in the Property entitling it to possession. The appropriate relief would be an order for possession and damages for the period of unlawful eviction. An order for specific performance would not have been needed or appropriate.

Issue (4): Is the Claimant entitled to damages from the Defendant for breach of the tenancy agreement and, if so, on what basis, how should those damages be assessed and in what amounts should they be awarded?

151. It follows from what I have just said about specific performance that, if I had found that there was a binding tenancy agreement, Publity would not have been entitled to damages in lieu of specific performance.

152. Accordingly, the only live issue on damages concerns the correct level of damages for the period (assuming that there is one) during which Publity was kept out of the Property. Again, after discussion with Counsel, it appeared that there was no real difference between the parties on this issue.

153. This claim for damages would only have arisen if I had found that there was a binding tenancy agreement. If there was a binding tenancy agreement, Chesterhill's actions in preventing Publity from taking possession of the Property would have been a trespass and an unlawful eviction. Publity confined its claim for damages under this head to the amount of the rent which it covenanted to pay under the tenancy agreement for the period of its unlawful exclusion from the Property. Although other damages were originally claimed, at trial Publity abandoned those claims and sought no other damages apart from the amount of that rent. Chesterhill accepted that, if I held that it had unlawfully excluded Publity from the Property, it would not be entitled to any rent for the period of the unlawful exclusion. So, effectively, the parties agreed either that no rent should be paid for the period of unlawful exclusion or, if rent was payable for that period, that Publity should be entitled to damages equivalent to the amount of that rent.

154. In these circumstances, if it had been relevant, and if Chesterhill had insisted on rent being paid for the period of any unlawful exclusion, I would have awarded Publity damages equal to the amount of that rent. If Chesterhill had waived any right to such rent, then there would have been no need for me to award any damages.

Issue (5): Is the Defendant entitled to retain the sum of £52,000 paid to it by the Claimant in relation to the Property?

Issue (6): Alternatively to paragraph 6 above, is the Claimant entitled to restitution of those same sums?

155. I will deal with these two issues together.

156. Before setting out the rival cases I should mention three preliminary agreed points. First, these issues only arise if, as I have found, there is no binding tenancy agreement. This claim falls away if there is a binding tenancy agreement. Secondly, Chesterhill conceded that Publity is entitled to the return of £32,500. Thirdly, Mr. Halabi conceded in cross-examination on day 3 that, if the improvement works cost less than the sum paid, then the difference would have to be repaid. There is such a difference and it is £6,648.71.

157. In summary, the rival cases on this issue were as follows. Publity contended that the payment was a pre-contract deposit in respect of an intended tenancy and then a part payment of rent in respect of a tenancy that never materialised. That, said Publity, is how the parties treated the payment. In contrast, by a late amendment to its Defence and Counterclaim which I allowed during the course of the trial, Chesterhill contended that there was a side agreement pursuant to which it was entitled to retain the monies paid in return for taking the Property off the market and carrying out the improvement works. Chesterhill also contended that there was an implied term of that side agreement to the effect that, if the tenancy agreement did not materialise and if Chesterhill had performed the works, then no repayment was to be made save in respect of any excess of funds over and above the actual costs expended by Chesterhill in performance of its side of the bargain. Chesterhill accepted that, if there was either no side agreement or no implied term in any such agreement, Publity was entitled to the return of the monies.

158. I was referred by Mr. Hutchings to Potters v. Loppert [1973] Ch. 399 at 405F to H, 406A to D and 413D to E; Chillingworth v. Esche [1924] 1 Ch. 97 at 107/108 and also to various passages from Goff & Jones: Unjust Enrichment, 8th Ed, 2011. I will not lengthen this judgment by setting out any extracts from these cases or the textbook as it seems to me that Chesterhill's claim to retain these monies stands and falls with the pleaded side agreement. If there was no side agreement, or if there was a side agreement without the claimed implied term, then that is an end to Chesterhill's defence to the claim for the return of these monies.

159. In order to decide this issue, I need to set out the sequence of events that led to the payment. However, before I do so, I have to say that I agree with Mr. Hutchings that Chesterhill faces three fundamental problems with this part of its case. First, the pleaded agreement is vague in the extreme. No date is pleaded as to when it arose. I asked Miss Shea when it arose and she said either on 4 December 2015 when Mr. Vernon sent his email to Mr. Halabi recording a conversation which Mr. Vernon had had with Mr. Gomoll and he (Mr. Gomoll) had given the green light to proceed on the basis of the

terms discussed, or when the money was paid by Publity on the 15th December 2015. Nor is there any indication of whether it was oral or in writing or part oral and part writing and whether the emails pleaded in paragraph 29 of the ADC are part of, or the whole of, the alleged side agreement. Secondly, in the amendment it is pleaded that Chesterhill "will rely on the whole course of dealings between the representatives of the Claimant and of the Defendant". The key representative of Chesterhill was Mr. Vernon, yet he has not been called. I struggle to see how Chesterhill could hope to make out an agreement between Mr. Vernon, as a representative of the Defendant, without calling him and, importantly on this issue where the alleged side agreement and its terms are hotly disputed by Publity, without Mr. Hutchings having the opportunity to cross-examine Mr. Vernon on, for example, whether or not he actually considered there to be a side agreement. In this regard, from some of Mr. Vernon's emails I strongly suspect that Mr. Hutchings would have made considerable progress in cross-examining Mr. Vernon and in establishing that there was no such side agreement as alleged by Chesterhill. Thirdly, on reviewing the emails relied upon in the amendment, it seems to me that the date upon which any such side agreement arose would have arisen would have been the 15th December 2015 when the monies were paid by Publity. However, earlier on that day Mr. Olek signed an agreement which dealt explicitly with how Mr. Vernon received the money and which flatly contradicted the alleged side agreement.

160. Putting these problems to one side for the moment, I will now set out the sequence of events as recorded in the emails and other documents.

161. On 24 November 2015 Mr. Gomoll emailed Mr. Vernon making clear that Publity would only agree to pay £6,500 per week if, as part of the deal, Chesterhill would carry out improvement works specified by Publity. He stated that "in consideration for a 2 year lease..at a weekly rent of GBP 6,500...the Landlord improves the property...as follows....."

162. On 27 November 2015 Mr. Vernon emailed Mr. Gomoll a copy of a draft tenancy agreement and a deposit statement stating that the deposit would need to be paid to secure the Property prior to any works commencing. As I read this email, what Mr. Vernon was saying was no more than "unless you pay the deposit due under the agreement now (i.e. before it is signed) to show your intention to take the Property under a tenancy agreement, the landlord will continue marketing." Hence Mr. Vernon's description of the money as a "fee of intent". Also, the attached agreement described the deposit in precisely the way it is described in the agreement which Mr. Olek later signed and returned on the day that Publity paid the £52,000. Also, that agreement refers to the security deposit of £39,000 (not £52,000 at this stage) being held by the agent as a stakeholder. Furthermore, the enclosed "deposit statement" was headed "subject to contract and satisfactory references" and refers in terms to the monies as a "deposit". I agree with Mr. Hutchings that these various points mean that the amount that was to be held, when the tenancy agreement was to be entered into, was to be held "in case the Tenant fails to comply with the terms of that Agreement": see the definition of "Deposit" in the agreement.

163. Mr. Vernon had a meeting with the Trustees on 30 November 2015. After the meeting and on the same day Mr. Vernon emailed Mr. Gomoll and stated that "in order to take the property off the market the landlord has requested an 8 week deposit to be paid (£52,000), this is needed to secure the property. Please see attached amended statement of works this deposit will be held by Carter Jonas and returned at the end of the tenancy

subject to the properties condition at the commencement date...they are agreeable on the following terms @ £6,500 per week". I have added the emphasis as this passage shows the purpose of the deposit. This purpose contradicts the alleged side agreement.

164. Mr. Vernon attached to this email the same form of tenancy agreement which describes the deposit in the same way as he had done in his covering email and in the same way as the deposit was described in the agreement signed by Mr. Olek when the money was eventually paid on 15 December 2015.

165. So, I agree with Mr. Hutchings that the parties agreed to increase the deposit from £39,000 to £52,000 and that the timing of the payment would affect the point at which the Property was taken off the market so that the works could begin. However, the timing of the payment did not affect the agreed description of the payment or the character in which the payment was agreed to be. That agreed description and character was that it was still the payment of a deposit pursuant to the tenancy agreement that Mr. Vernon attached to each email to Publity dealing with the deposit. This was confirmed by the evidence of Mr. Halabi in cross-examination when he effectively admitted that Publity had to show its intention to take the tenancy by paying the security deposit under the tenancy agreement early.

166. Not only was that Mr. Halabi's understanding, but it was also Publity's understanding. So, on 3 December 2015 Mr. Gomoll emailed Mr. Kunath enclosing a copy of the tenancy agreement, saying that "the Landlord will start the renovation as soon as the Contract is signed [and] the deposit deposited with the agent...At the moment we intend to substitute the deposit while it is still December, with a guarantee and use the deposited sums as rent for the first two months". Again, the money is described as a deposit.

167. This was also the understanding of Mr. Vernon. So, he referred, for example, to the sums as a "deposit" in his email to Mr. Gomoll that preceded the email mentioned in the previous paragraph. He said "the landlord has proposed to undertake the works as soon as the deposit has hit our account..." (my emphasis).

168. So, both sides regarded the money in the same way, i.e. it was, and had the character of, a deposit.

169. Pausing here, on analysis of the emails so far, I cannot see that there was any side agreement of the kind pleaded in the amendment as at the first date suggested to me by Miss Shea, i.e. 3 December 2015.

170. Moving on, I agree with Mr. Hutchings that there is further support for Publity's case on this issue in the way the money was described when paid on 15 December 2015. So, on that day, Mr. Gomoll emailed the signed tenancy agreement to Mr. Vernon and asked that it be held "in escrow until further notice". I have described above how the tenancy agreement described the monies. On the same day £52,300 was paid by Publity. Mr. Vernon confirmed receipt of funds by his email dated 18 December 2015 when he said "we are in receipt of moneys equalling the two months' rent".

171. It seems to me that, if there was a side agreement, it is at this later date suggested to me by Miss Shea (i.e. 15 December 2016) that it would have come into existence because by sending the money and the signed tenancy agreement Publity signified its agreement

to what was being proposed by Chesterhill. But, there is no suggestion in Mr. Vernon's emails, or in Mr. Gomoll's emails, that Publity was signing up to the side agreement pleaded in the amendment. Quite the contrary. What Publity was signifying its agreement to was the provisions of the tenancy agreement which Mr. Olek agreed by signing on behalf of Publity. That agreement provided in clause 1.12 that "A security DEPOSIT of £52,000 is to be paid on or before the signing of this Agreement and is to be held by the Agent as stakeholder". Also, "Deposit" was defined in the definitions section of the agreement as "the money held by the Agent or the Landlord in a Stakeholder capacity during the Tenancy in case the Tenant fails to comply with the terms of this Agreement".

172. So, on a consideration of the emails relied upon in the amendment together with the other emails referred to by Mr. Hutchings and the various attachments, I conclude that the pleaded side agreement does not get off the ground. It is contradicted by the emails. It is contradicted by the attachments. It is contradicted by the agreement which Mr. Olek signed up to on 15 December 2015 and which Mr. Vernon sent to Publity at every relevant stage of the discussions. It is contradicted by the way in which Mr. Vernon and Mr. Gomoll characterised the payment.

173. Furthermore, coming back to the second fundamental problem which I mentioned earlier, bearing in mind that the pleaded case on the side agreement in the amendment relied upon "the representatives of [Chesterhill]", one of whom was Mr. Vernon, it seems to me that it would be unfair to Publity if I was to find that there was such an agreement when Mr. Hutchings did not have the chance to explore it in cross-examination with Mr. Vernon in his capacity as a representative of Chesterhill. I have already rejected Chesterhill's case on the alleged side agreement but, if it was necessary to do so, I would be prepared to draw adverse inferences against Chesterhill on the issue of the alleged side agreement due to its failure to call Mr. Vernon. In this regard, Mr. Hutchings relied upon Wisniewski v. Central Manchester Health Authority [1998] P.I.Q.R. 324 per Brooke LJ at p.340. The inference I would have drawn from the failure to call Mr. Vernon is that there was no side agreement.

174. As this issue falls to be resolved as at either 3 or 15 December 2015, it is not strictly relevant for me to have regard to subsequent events, but for the sake of completeness I should record that, as Mr. Vernon and Mr. Gomoll had agreed, the parties were to try after the 15 December to agree a guarantee instead of a security deposit and, if they did, the money would be treated as a payment of the first two months' rent. This is what happened. This is again inconsistent with Chesterhill's case as it seems to me that Mr. Vernon and Mr. Gomoll considered that, and agreed that, Chesterhill was holding the money as stakeholder and that, if the parties thereafter agreed a guarantee for the intended tenancy, the money would be treated as a payment on account of rent. This is also supported by the way in which Mr. Vernon described the £52,000 in the statement which he sent Mr. Gomoll on the 15th January 2016. In that statement he described the £52,000 as a "Fee of Intent" and further stated:

> **"Rent due for the period 14th January 2015 to 14(03)2015 (£84,500.00) less Fee of Intent (£52,000)".**

175. So, the money was now to be treated as part payment of rent pursuant to the arrangement that Mr. Vernon made with Mr. Gomoll. This is how the payment was

described by the parties when making the arrangement. This is inconsistent with the alleged side agreement.

176. In support of the alleged side agreement and the implied term, Miss Shea urged on me Mr. Halabi's evidence as to his experience of what happened in the market. The gist of that evidence was that it was market practice to require a payment to forward-fund works on the understanding that any excess of payment over the actual cost of the works would be repaid, but also on the understanding that if the tenancy does not transpire then the party who had incurred the cost of the works and performed the works would be entitled to keep the advance payment, subject to any returnable excess. This may be what Mr. Halabi believed to be the position, but his subjective beliefs are irrelevant to this issue. Equally, it seems to me that his understanding of how the market operated and market practice is irrelevant because I am concerned with what was agreed between Mr. Vernon and Publity and there is no suggestion in the evidence that they were seeking to implement market practice.

177. From the evidence which I heard from Mr. Halabi, it may be the case that he believed that this money was being paid on a different basis to that which I have found and which was more favourable to Chesterhill. However, I have to decide this case on the basis of what the parties to the negotiations agreed and not on the basis of Mr. Halabi's belief. Mr. Halabi's belief was never communicated by Mr. Vernon to Publity. Nor was any arrangement reflecting Mr. Halabi's belief ever proposed by Mr. Vernon to Publity. Nor was any such arrangement agreed by Mr. Vernon in the emails which I have analysed above. It may be that Mr. Halabi was let down by Mr. Vernon, but that is not a matter for me.

178. If I am wrong in my analysis above and if there was a side agreement, Chesterhill still needs to satisfy me that there was an implied term in that side agreement. The implied term suggested by Miss Shea in closing was that, if the tenancy did not materialise and if Chesterhill had performed the works in accordance with the agreement, then no repayment of the Fee of Intent was necessary, save in respect of any excess of funds over and above the actual costs expended by Chesterhill in performance of its side of the bargain. In view of my conclusion that there was no side agreement, I will take the question of an implied term shortly. On what I heard, I am not satisfied that such a term was either so obvious as to go without saying or to be necessary for business efficacy. If one does as Miss Shea asked me to do and one looks at the matter in terms of risk allocation, it seems to me that it is just as likely that the parties contemplated that the landlord should bear the risk because it might benefit from the improvements to the Property, as that the tenant should bear the risk.

179. As I have found that there was no binding tenancy agreement and no side agreement, I conclude that Publity is entitled to the return of the relevant monies.

Issue (7): Is the Defendant entitled to £283 by way of damages from the Claimant?

180. This issue arises as follows. Publity moved various items of furniture into the Property on 1 and 2 February 2016. Chesterhill says that the presence of these chattels amounted to a trespass against it on the basis that Publity never had a tenancy. It says that the chattels are being stored at Minerva Road Warehouse, 4-6 Minerva Road, London, NW10 6HJ and it seeks damages in respect of the cost of storage.

181. I have found that there was no binding tenancy agreement. However, in its written closing Publity argues that it had a licence and that that licence was never expressly revoked. If it was impliedly revoked by the events of 2 February 2016, Publity says that there is no evidence that it was ever permitted to remove its chattels thereafter, that that was a breach of an implied term of the licence entitling it to remove its chattels and so any losses suffered by Chesterhill derive from its own breach of the licence terms.

182. Although I have found that there was no tenancy agreement, it seems clear to me that Publity had a licence to enter the Property and place its chattels there. This appears from Mr. Vernon's email to Mr. Mehlitz on 27 January 2016 in which he stated "The landlord has said you have full access to the property for deliveries..." The furniture was moved in pursuant to this permission. Furthermore, Mr. Vernon and Chesterhill knew that the furniture was being moved in on 1 and 2 February 2016 and sanctioned it. When the parties fell out, Publity was not asked to remove the furniture. Nor was Publity given any opportunity to remove its furniture when the negotiations finally ended. In my judgment, it was necessarily implicit in the licence that Publity was entitled to be given notice to remove its furniture, an opportunity to do so and a reasonable time to do so. Chesterhill did none of these things. Accordingly, in my judgment Publity is right when it says that any losses suffered by Chesterhill derive from its own breach of the licence and not from any wrong by Publity.

Summary of conclusions

183. My conclusions are as follows. The Posted Tenancy Agreement was printed, signed and posted as described by Mr. Mehlitz. However, it did not create a binding tenancy agreement because at that time there was no offer by Chesterhill for Publity to accept. Also, it was not dated as required by the Agreement. There was no side agreement as pleaded in the Amended Defence and Counterclaim. Chesterhill's claim to £283 by way of damages fails.

184. On circulating this judgment in draft on 1 August 2016, I invited Counsel to agree a draft order to give effect to my conclusions. The parties have been unable to reach agreement. I will therefore deal with all outstanding matters on a date to be fixed.