Case No: H00MK414

IN THE COUNTY COURT AT CENTRAL LONDON

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

Date: 21/03/2024

Before :

HHJ RICHARD ROBERTS

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Between :

SAINSBURY'S SUPERMARKETS LIMITED	**Claimant**
- and -	
MEDLEY ASSETS LIMITED	**Defendant**

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Mr Mark Galtrey of Counsel (instructed by **Dentons UK & Middle East LLP**) for the **Claimant**
Ms Lina Mattsson of Counsel (instructed by **Taylor Walton LLP**) for the **Defendant**

Hearing dates: 22, 23 and 24 January 2024 and hand down of judgment on 25 March 2024

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Approved Judgment

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

.....

HHJ RICHARD ROBERTS

HIS HONOUR JUDGE RICHARD ROBERTS :

Introduction

1. In this case, the Claimant, who is the tenant, seeks a new lease of 329-331 Kentish Town Road, London NW5 2TJ (the Property), pursuant to s.29 of the Landlord and Tenant Act 1954 (the Act). The Defendant, who is the landlord, opposes the grant of a new tenancy on ground (f) of s.30(1) of the Act and this is the trial of that preliminary issue.

2. Mr Galtrey of Counsel appears on behalf of the Claimant. I am grateful for his skeleton argument, dated 17 January 2024, and his closing submissions, dated 24 January 2024. Ms Mattsson of Counsel appears on behalf of the Defendant. I am grateful for her skeleton argument, dated 18 January 2024, and her closing submissions, dated 24 January 2024.

3. The parties have provided the Court with a trial bundle of 3161 pages, contained in 11 volumes; a supplemental bundle; and two authorities bundles. References to page numbers in the judgment below are to the trial bundle unless otherwise stated.

Lay witnesses

4. The Claimant relied upon one witness: Geraint Jamie Cowen, Head of Estates and Investment. Mr Cowen made two witness statements, dated 8 September 2023[1] and 19 January 2024[2].

5. The Defendant relied upon one witness, Pericles Panayiotou Kriticos, a director and the sole shareholder of the Defendant. Mr Kriticos has provided a witness statement, dated 12 September 2023[3].

Expert witnesses

6. The parties were given permission to rely upon expert evidence in the costs case management order of District Judge Worthington, dated 26 May 2023 (sealed on 22 June 2023)[4], which provided[5],

> "5.1 The parties have permission to rely at trial on written evidence from a building surveyor on the issue of whether if the Tenant agrees to the inclusion in the terms of the new tenancy of terms giving the Landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the Landlord could reasonably carry out the work without obtaining possession of the holding and without interfering to a substantial extent or for substantial time with

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[1] 91-93
[2] Supplemental bundle, 3-4, and exhibit GJC1 at 5-14
[3] 94-104
[4] 44-48
[5] 46

> the use of the holding for the purposes of the business carried on by the Tenant."

7. The Claimant relies upon the expert evidence of Christopher Sullivan BSc (Hons) MRICS, Chartered Building Surveyor. His expert report is dated 14 December 2023[6]. The Defendant relies upon the expert evidence of Alistair Slater BSc (Hons) MRICS, Chartered Building Surveyor, and his expert report dated 14 December 2023[7]. Mr Slater and Mr Sullivan have prepared a joint statement summarising the issues upon which they agree and disagree, dated 30 November 2023[8].

Contents

8. I have structured this judgment as follows:

[6] 111-193
[7] 194-248
[8] 105-110

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Amendment of Defence

Introduction

9. In the Particulars of Claim[9], dated 29 July 2021, it was said,

> "7. … The Claimant occupies the whole of the Property for the purposes of its business.
>
> 8. The following are the Claimant's proposals as to the period, rent and other terms of the new tenancy for which he is applying:
>
> (a) **Demise**: Whole of the premises (existing) at 329 to 331 Kentish Town Road, London, NW5 2TJ as demised under the Lease;"

10. In the Defence, dated 24 September 2021, it is said[10],

> "6. That insofar as they differ from those proposed by the Claimant, the Defendant's proposals for the terms of the new tenancy are as follows:
>
> 6.1 Demise: the basement and ground floor only at 329-331 Kentish Town Road, London NW5 2TJ.
>
> …
>
> 11. … The Defendant does not require that any new tenancy shall be a tenancy of the whole of the property comprised in the Claimant's current tenancy."

11. It is common ground that the only part of the demise occupied by the Claimant is the ground floor.

12. The Defendant issued an application, dated 5 January 2024[11], for permission to amend the Defence. The application was supported by a witness statement[12] from Lauren

[9] 10-12
[10] 18
[11] 67-88
[12] 72-74

Windsor, the Defendant's solicitor with the conduct of this matter, dated 5 January 2024, and a draft amended Defence[13], dated 5 January 2024.

Defendant's submissions

13. Ms Windsor says in her witness statement in support of the application[14],

> "5. At the Pre-Trial Review on 15 December 2023, it came to light that the Claimant is no longer intending to seek a new lease of the whole premises, as outlined in their Particulars of Claim. Instead, the Claimant's Counsel stated in open Court that the Claimant intends to reduce its occupation of the building to a proportion of the Ground Floor, in order to seek a lease of a smaller part.
>
> 6. As he explained in the letter from Taylor Walton to the Claimant's solicitors, Dentons UK and Middle East LLP (Dentons) dated 20 December 2023, by reducing the extent of the Property over which the Claimant seeks a new lease, to only a proportion of the Ground Floor, this would leave the Defendant with a commercially unlettable part of the Ground Floor.
>
> 7. Consequently, the Defendant applies to amend its Defence to elect that any new lease granted, is to be of the whole premises, as currently demised by the Lease (dated 18 May 2010)."

14. Ms Mattsson submitted that the reason for seeking to amend the Defence was because Practice Direction 56, paragraph 3.12 provides:

> "Where the claim is an opposed claim and the claimant is the tenant...
>
> (f) if the claimant's current tenancy is one to which section 32(2) of the 1954 Act applies, whether the defendant requires that any new tenancy shall be a tenancy of the whole of the property comprised in the claimant's current tenancy."

15. Ms Mattsson submitted that the amended Defence was in response to the supplementary witness statement of Mr Cowen, dated 19 January 2024, and was a tidying up exercise. She submitted that the Court should grant permission for the amended pleading and leave the submissions relating to the merits of the underlying legal arguments to be heard at the conclusion of the case.

16. In the draft amended Defence, dated 5 January 2024[15], it is said,

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[13] 76-79
[14] 73
[15] 76-79

> "11. The Claimant's current tenancy is one to which section 32(2) of the Act applies. The Defendant does not require that any new tenancy shall be a tenancy of the whole of the property comprised in the Claimant's current tenancy and the holding shall be construed as references to the whole of that property in accordance with section 32(2)(b) of the Act."

Claimant's submissions

17. In his skeleton argument, Mr Galtrey says,

> "4. An application [67] by D to amend its Defence. C opposes this application. Apart from one point, dealt with immediately below, the proposed amendments are not relevant to this trial or to Ground F, but instead to the future trial relating to the terms of the tenancy, which may or may not happen. It is therefore submitted that it would not be an appropriate use of the Court's time during this trial to hear argument about those amendments. …
>
> The extent of the holding
>
> 5. The one amendment proposed that is of relevance to this trial is in fact a legal submission, and so should not be pleaded at all."

18. Mr Galtrey submitted that paragraphs 7 and 8 of the Particulars of Claim were probably wrong when drafted and, in any event, the Defendant had known since September 2023 that the Claimant's case was that it only occupied the ground floor and did not occupy the basement or the first, second and third floors. He submitted that it was untrue for Ms Windsor to state at paragraph 5 of her witness statement that it was only at the pre-trial review (PTR) on 15 December 2023 that the Defendant learned that the Claimant was not occupying the whole of the Premises. Mr Galtrey said that what was said at the PTR was that there was a change in that part of the ground floor was not now being occupied by the Claimant, but the change did not relate to the basement or upper floors. He pointed out that in paragraph 7 of the original Defence, the Defendant said at paragraph 11 that it did not require the tenancy to be of the whole of the property. The only thing that had changed was that the Claimant had moved out of a small part of the ground floor. He said that in the amended Defence, the Defendant was reversing its election. He said that the Claimant had been entitled to rely upon the Defendant's election in the Defence and had done works on the basis of the Defendant's position.

19. Mr Galtrey submitted that the reason for the late amendment was not that the Defendant had only just found out the Claimant was not occupying the basement and upper floors, but that Ms Mattsson and he had addressed the Court for the first time at the PTR as to what the holding was for the purpose of the trial. He said the Defendant was now seeking to plead a proposition of law. He submitted that the Defendant was seeking to reverse the election it had made in accordance with the Civil Procedure Rules because it realised that legally it was in trouble and it wanted to run a new legal argument.

Decision as to amendment

20. This is a very late amendment. There is a heavy burden on a party seeking a particularly late amendment: *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm). The principles to be applied are summarised in the Civil Procedure 2023[16]. The authorities show that the principal matters to be balanced are as follows:

    i) The timing and lateness of the amendment;

    ii) The reason that it has not been made earlier;

    iii) The respective prejudice to the parties;

    iv) The clarity of the amendment sought.

21. I find that:

    i) Ms Windsor's explanation at paragraphs 5 and 6 of her witness statement provide at least a partial explanation as to why the amendment was made so late.

    ii) Although Mr Cowen had stated in his witness statement, dated 8 September 2023, that the extent of the holding comprised only the ground floor of the Premises, the Claimant had never applied to amend paragraphs 7 and 8 of the Particulars of Claim.

    iii) The amendments, and in particular the amendment to paragraph 11 of the Defence, are clear.

22. Balancing the relevant factors referred to in paragraph 20 above and applying the overriding objective in CPR Part 1, I find that the just and proportionate decision is to grant the Defendant permission to amend the Defence on the basis that the legal arguments as to the merits of the amendment, including what is the holding, be dealt with in the parties' submissions after hearing evidence. I order that costs be in the case.

Claimant's application to admit second witness statement of Mr Cowen

23. Ms Mattsson did not oppose the Claimant's application, dated 19 January 2024[17], to seek permission to rely upon an updating witness statement from its witness Mr Cowen.

Admissibility of photographs of Property, taken by Defendant

24. The Defendant submitted a supplementary bundle which contained a series of photographs[18] taken of the Property by Ms Windsor on 17 January 2024.

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[16] volume 1 at paragraph 17.3.8
[17] Supplementary bundle, 15-19
[18] Supplementary bundle, 24-43

25. The Claimant opposed the introduction of these photographs on the grounds that they were received by the Claimant at 6.30pm on Friday 19 January 2024. The photographs have commentary alongside them, identifying what the photograph is said to show. The photographs are not accompanied by a witness statement. Due to the lateness of the disclosure and the absence of a witness statement, the Claimant could not investigate whether the photographs showed what was stated in the commentary. Mr Galtrey submitted that if the photographs were admitted, the Court should ignore the commentary.

26. Ms Mattsson submitted that she was content for the commentary alongside the photographs to be ignored. She said the photographs showed the property as it now was, because the Claimant had constructed a stud wall around a section of the rear of the ground floor, forming an enclosure which was not occupied by the Claimant, and the photographs showed the area of the ground floor which had been vacated[19].

27. I admitted these photographs without the commentary on the basis that it was just and proportionate to do so because the Court and the Parties would be assisted by the photographs as they showed the Property as it now was.

Chronology

28. The Defendant is the freehold owner of 329-331 Kentish Town Road, London NW5 2TJ (the Property), which is registered at HM Land Registry under Title Number LN224275[20]. The Property consists of a basement, ground floor and three upper floors.

29. On 18 May 2010, the Property was demised to the Claimant by a lease[21] between (1) Earnshaw Properties Limited and (2) Sainsbury's Supermarkets Limited ('the Lease'), registered at HM Land Registry under Title Number NGL910940[22]. The Property is shown edged in red on a plan annexed to the Lease[23]. The Claimant's lease is protected by the Act.

30. By a lease dated 18 May 2010[24], the Claimant took a lease for a term of ten years from 24 June 2011 of the ground floor and basement unit of the adjacent property at 333 Kentish Town Road, which is registered at HM Land Registry under Title Number NGL361881. The freehold of 333 Kentish Town Road is owned by Ashok Sachdev.

31. The Claimant operates a Sainsbury's Local store from the ground floor of the Property and no. 333 Kentish Town Road. The Property can only be accessed from Kentish Town Road through 333 Kentish Town Road.

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[19] Supplementary bundle, 38-39 and 42
[20] 571-572
[21] 272-325
[22] 574
[23] 324
[24] 326-363

32. On 13 January 2021, the Defendant served a notice[25] upon the Claimant pursuant to Section 25 of the Act to end the Claimant's tenancy on 30 July 2021 on ground (f) of s.30(1) of the Act.

33. On 22 January 2021 the Camden Development Management gave a draft planning approval decision[26], subject to a s.106 legal agreement, for the erection of a two-storey extension above the existing ground floor facing York Mews and a change of use of the upper floors from ancillary retail floor space to residential to create five flats including alteration to the ground floor elevation facing York Mews and the relocation of plant.

34. On 22 March 2021, the Defendant served a Notice[27] to reinstate the Property in accordance with clause 27.6 of the Lease[28].

35. On 30 July 2021, the statutory period expired in accordance with Section 29A of the Act. The Claimant's tenancy is protected by s.24 of the Act and so has not come to an end.

36. By a decision letter, dated 21 September 2022[29], from Camden Development Management to Savills UK on behalf of the Defendant, the Defendant was granted full planning permission for the flats works, subject to a s.106 legal agreement, as summarised at paragraph 33 above.

37. The Defendant entered into a s.106 agreement, dated 21 September 2022[30], with the London Borough of Camden and a private bank.

38. By a decision letter dated 25 January 2023[31], the Defendant was granted full planning permission to partially lower the existing basement, subject to a s.106 legal agreement.

39. By a s.106 agreement, dated 25 January 2023[32], the Defendant entered into an agreement with the London Borough of Camden and a private bank.

The Property

40. Mr Slater and Mr Sullivan say in their joint statement, dated 30 November 2023[33].

> "3. The Tenant operates a Sainsbury's local store within the ground floor of 329-333. That includes a separate lease to a separate landlord in 333 Kentish Town Road. 329 to 333 are joined together in an open plan retail space at ground floor. Their basements are also connected by a series of openings.

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[25] 521
[26] 2546-2552
[27] 3006A-3006B
[28] 310-312
[29] 2957-2963
[30] 2964-2984
[31] 2086-2090
[32] 2091-2120
[33] 106-107

4. The Property is part of a terraced high street, with three upper floors of the original construction with London stock bricks and wooden sash windows. The ground floor retail space has been extended at the front and rear and aligns with adjacent units within the terrace. There is a basement below.

5. The floor construction between the basement and ground floor, where visible from below, consists of concrete supported from a steel frame. A screed is expected to be present above that but was concealed. There is a vinyl sheet floor finish above which is laid on a timber sheet.

6. The Tenant only trades from the ground floor. The basement is unused and has no stored goods or materials. The tenant advises that they do not use the basement or upper parts of the premises, other than for maintenance purposes. Whilst the upper parts are evidently not in regular use, there is a particular room on the first floor which contains stored items.

7. The ground floor extension has a flat roof, is covered with bituminous felt set below a steel structure, the deck is unknown but is expected to be formed with concrete, as noted to the ground floor.

8. Towards the rear of the property is a series of rooms formed by stud partition walls to provide a manager's office, toilets, a kitchen, and a store. There is also a large walk-in refrigerator connected to plant mounted on the roof, as well as an in store bakery.

9. There is a gas supply into the basement of the 329 which has been isolated and is redundant. This appears to be capable of re-connection which would require testing to confirm.

10. There is no direct electrical supply to the Property, this is taken through 333.

11. There is an incoming water supply to the Property, there is also an incoming water supply in 333.

12. There are drainage connections within the basement of the property serving the ground floor and in 333.

13. The rear of the Property backs onto York Mews, a narrow road with a single entrance/exit route from Kentish Town Road. The road is impinged and is not suitable for large vehicles.

14. The tenant advises that York Mews is not used for deliveries or collections, they only use the front entrance.

> 15. The York Mews facing ground floor of the premises has two useable means of escape, one from 329 and one from 333. There are several windows with security bars at high level, which are boarded over internally. There is a boarded over entrance to a goods lift serving the basement of the property, which is redundant. There is also an access route to the basement of the property which has been boarded over.
>
> 16. There is an opening between the basement and ground floor, which leads to an external loading door in the rear left-hand corner of 329. This opening is 1,850 mm wide, 1,600 mm front to back and 1,980 mm floor to underside of the basement ceiling. There is a 520mm wide single flight set of stairs within this opening which leads to a ground floor loading door to York Mews which has been covered over. It is unclear from the Lease whether this is what is referred to as the staircase between the basement and ground floor."

Basement

41. Mr Sullivan says in his expert report, dated 14 December 2023[34],

> "3.6.4 The basement is free from stored goods, people or anything that could realistically be classed as occupation, there are a few items of redundant plant from previous use, a sump pump to manage water levels and cables and pipes. There are no operational lighting, heating or power supplies."

42. Mr Sullivan provides photographs of the basement in his report at paragraphs 3.2.19[35] and 3.4.6[36]. There are photographs of the basement taken by Ms Windsor on 17 January 2024[37]. It can be seen from these photographs that the basement is unoccupied.

The upper floors

43. Mr Sullivan says in his expert report, dated 14 December 2023[38],

> "First floor
>
> 3.4.8. On the first floor and above of 329-331 Kentish Town Road, the rooms are currently disused or used for storage.
>
> ...

[34] 143
[35] 134
[36] 137-138
[37] Supplementary bundle, 24-27
[38] 139, 140 and 143

> 3.4.10. I understand that since inspecting the Defendant has made arrangements for the material in the first-floor room to be removed and disposed of.
>
> 3.4.11. The second and third floor rooms are derelict, have no operational heating, sanitary provision, or adequate lighting, they are unfit for occupation."

44. Mr Sullivan provides photographs of the first, second and third floors at paragraphs 3.4.10 and 3.4.11 of his report[39], which show that the rooms are unoccupied.

Oral evidence of Mr Cowen

45. In his witness statement, dated January 2024, Mr Cowen says[40],

> "6 At paragraph 10 of the First Statement, I confirmed the extent of the Premises which Sainsbury's were using at that time. Due to works undertaken at the Premises, the extent of Sainsbury's use has varied. I therefore make this second statement to confirm the extent of Sainsbury's use of the Premises.
>
> 7 In the First Statement I confirmed that Sainsbury's used the whole of the ground floor of the Premises only for the purposes of its business. This is no longer the position. Sainsbury's have now vacated a section at the rear of the ground floor. A plan of the ground floor is exhibited as Exhibit GJC1of the Premises is at page [1] of (the 'Plan')[41]. I visited the Premises on Tuesday 16 January 2024 and confirm that Sainsbury's have vacated and are no longer using the area edged and coloured green on the Plan for any business purpose or at all. (the 'Area')."

46. It is common ground that this area edged and coloured green is 26.10m^2.

47. In cross-examination, Mr Cowen said that he did not know the precise date when the partitions were erected on the ground floor, but it was in January 2024. He said he was not aware whether the Defendant was informed before this was done. He did not know whether the partitions were fire-rated. He said they were erected because the Claimant was not using that part of the Premises.

48. He said the photograph at page 12 of the supplementary bundle showed plant used by the Claimant on the top of the roof of the ground floor. He was referred to page 134 of the bundle. He agreed that a number of the services listed[42] (small power, HVAC, fire alarm/smoke detectors, in grid light fittings, CCTV and intruder alarms) remained in the basement but said they were not all necessarily in use. He agreed there was a pump in the basement but he was not sure if it was in use.

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[39] 140-141
[40] Supplemental bundle, 21-22
[41] Supplementary bundle, 6
[42] 134

49. He was referred to page 213 of the bundle. He agreed the photograph showed the foul water drainage facility, which served the toilets. He said that if this pipe was removed, the Claimant could replace the pipe on the ground floor so that the toilets remained serviceable. This would be relatively simple.

50. Mr Cowen agreed that if the wall beside the staircase from the ground floor to the first floor came down and a new wall was put up to widen the stairs, one of the two toilets would have to be moved and the refrigerator amended. He said that this was a common piece of work and would not be expensive. He was referred to the refrigerator, shown at page 30 of the supplementary bundle. He did not accept it would have to be moved, and said an amendment could be made to it. He said the stairs were only impinging by a small amount. He said that the Claimant would work around the Defendant's works. He said that he was not aware that any of the pipes to the refrigerator would need moving, but if they did, it was a very simple operation. He said that the Claimant had other fridges which could be used while works were carried out to the refrigerator, and they could use temporary refrigeration, as was commonly done during refurbishment works.

51. He said that one solution was for the toilet to remain in the same location with one pipe. Another solution was to provide another toilet elsewhere in the premises. He said that when works were being carried out across the Sainsbury's estate, it was not uncommon for staff members to use toilets in areas where construction works were taking place.

52. He was referred to the plan annexed to his second witness statement[43]. The two squares on the plan were a manager's office and an area for staff in their breaks. He said that the Claimant would consider it appropriate for those areas to remain for staff use during construction works. He said that day in, day out the Claimant continued to trade while works were being carried out. He said the works proposed in this case were consistent with works carried out across the Claimant's estate.

53. He was referred to page 240, part of Mr Slater's expert report. He accepted that if the noise levels were as stated by Mr Slater, it would be inappropriate to have staff working in these conditions and that it would not be possible to continue to trade during the works.

54. He was referred to page 207, where Mr Slater deals in his report with asbestos at paragraph 5.05. He said that the Claimant entered the basement to manage the asbestos but did not know how often this happened. He said the Claimant would continue to trade while propping works were carried out in the basement, unless the risk could not be mitigated.

55. In re-examination, Mr Cowen was referred to clause 6.2 of the Claimant's lease for the premises next door, at 333 Kentish Town Road[44], which states what alterations they are allowed to make. At 6.2 (d)(i) it is said that the Claimant does not require the consent of the Landlord in relation to any additions or alterations of the premises of a

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[43] Supplementary bundle, 6
[44] 351

non-structural nature. He said that the permission of the Landlord would not be required to install toilets in no. 333.

Oral evidence of Mr Kriticos

56. Mr Kriticos corrected paragraph 1 of his witness statement to say that he was the sole shareholder in the Defendant; his wife was a director but not a shareholder. He referred to paragraph 15[45] and said that the Defendant owned a residential property in Durham, which was his children's flat when they were studying there, and two commercial properties in London.

57. He was referred to the plan on page 1180. He said the Defendant did not intend to break into the party wall. First they had to open up the ceiling to see which of two beams is load bearing. The corridor was 1m wide and was to be extended by 30cm.

58. He was referred to the plan on page 2206. He said the drawing was produced primarily for Camden Council to calculate how much the Defendant would have to pay the Mayor of London and Camden Council to convert the commercial premises to residential use.

59. In cross-examination, Mr Kriticos said he last went inside the Property in December 2023. He had not been to the back of house for about a year. He said he always went to check what he was told by his surveyors and his agents. He said he had been to the basement and back of house about ten times in total in the whole time he had been looking at the development.

60. Mr Kriticos said he had always been the sole shareholder. His wife was a Director. He agreed that any important decisions would be made at a Directors' meeting with him and his wife. He was referred to the minutes of a board meeting on 1 July 2020[46]. The minutes show the meeting was conducted formally. For example, it was checked that there was a quorum. The reference to the Chairman was him. Paragraph 2 of the minutes refers to considering matters concerning the redevelopment of the Property. At paragraph 3 it says that the development should be entered into if planning approval was granted, which it was. He agreed that the development was not entered into yet. It was put to him that in his witness statement at paragraph 31[47] he said he decided to cancel the plans for the new flats. He said that he was running a business and plans changed. He said he thought the minutes were produced around the same time. When it was put to him that the minutes were not signed or dated, he replied that he and his wife trusted each other.

61. He agreed that in 2020 the Defendant was considering converting the upper floors into five flats. This was in 2020. He said he had been trying to get the Claimant out of the upper floors since 2014. He agreed he was only asking the Claimant to give up the upper floors, not the basement or ground floor at that time. He was referred to an

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[45] 96
[46] 2208
[47] 99

email, dated 6 January 2015[48], from Mr Kaimakamis of Atlas, who are the Defendant's agents, in which it is said,

> "Further to our meeting on site and our subsequent conversation this morning, my client would like to put forward the following proposal;
>
> Sainsbury's to surrender the upper floors of 329 & 331 Kentish Town Road to the landlord at nil premium. The landlord will cover Sainsbury's legal and other professional expenses associated with the surrender
>
> If we can reach an agreement, then the landlord will apply for planning permission to convert the uppers into residential flats. There is obviously a planning risk associated with this and there is a strong possibility that the landlord will be left with the liability if planning fails but that is a risk they are prepared to take on. Also, as we discussed on site, if planning is successful, the works would have no impact on Sainsbury's trading.
>
> At the moment the upper floors are completely derelict and are a liability to Sainsbury's."

62. Mr Kriticos said that plans were submitted to the London Borough of Camden. He agreed that the upper floors were a risk with no upside to the Claimant, and had a negative asset value. He agreed that the basement, with its asbestos, also had a negative asset value to the Claimant. He agreed that the Claimant could not work in the basement because of the asbestos.

63. He agreed that on 24 April 2015 the Defendant put in a pre-planning application to Camden Council. He agreed that in the pre-planning application there was no mention of redeveloping the basement, or of any works to the staircase to the first floor. He said that it was intended that access to the flats would be from York Mews, behind the Property. He was referred to a letter, dated 24 April 2015, from Messrs Savills on behalf of Atlas asking for advice for the pre-planning application[49]. He agreed that there was no mention of doing anything to the staircase from the ground floor to the first floor. He was referred to where it is said[50], "The Sainsbury's store at ground floor level will not be impacted".

64. He was referred to the London Borough of Camden's response, dated 3 June 2015[51], in which it is said,

> "Loss of retail floor space

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[48] 2155
[49] 2165
[50] 2168
[51] 2193-2201 at 2194 and 2196

> The supermarket would continue to occupy the ground floor and basement of the building. ...
>
> The proposal would result in the loss of ancillary retail space at the 1st, 2nd and 3rd floor levels of the building; however, the ground and basement level would remain in Class A1 retail use."

It was put to him that it was only because there was no suggestion that the Defendant would be disturbing the retail space on the ground floor, that the London Borough of Camden would grant a change of use of the first, second and third floors from ancillary retail space to residential.

65. Mr Kriticos agreed everything then went quiet until 2019. He said because the Claimant was not responding to them, the Defendant decided to wait until the end of the lease and then go for redevelopment and try to take over the whole building. He said this decision was taken by himself. It was put to him that he had said earlier that all important decisions were taken at directors' meetings. He then said that decisions were discussed in the house with his wife, and he then acted on them. He and his wife did not always record their decisions. He was asked how HUT Architecture got instructed to prepare the plans. He said he had a meeting with HUT in June 2019 and asked them to provide drawings. He said that HUT did not ask him for a letter of instruction or provide a quote.

66. He was referred to the plans by professional architects HUT[52]. He agreed that these plans were produced by HUT for the purpose of obtaining planning permission. HUT produced one plan, labelled E902, showing the existing layout of all the floors[53], and another plan, labelled P902, showing the proposed works. It was put to him that the plan showing the proposed works did not show the staircase to the first floor as any wider than in the plans showing the existing layout. Mr Kriticos did not accept that the Defendant only had planning permission to keep the staircase the same width and said that you needed to look at the drawings on an Autocad system. He said that the HUT drawing labelled P902 was not really correct.

67. He was then referred to the planning permission decision[54], dated 21 September 2022, which says that the proposal which has been approved is by reference to various drawings, which include the drawings labelled E902 and P902[55]. It was put to him that the Defendant only had planning permission to keep the stairs to the first floor at the same width.

68. Mr Kriticos agreed that over the next year he commissioned a costs estimate and a noise survey for the works.

69. He was referred to the Defendant's application for planning permission[56], where he had answered "no" to the question "are there any existing employees on the site or

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[52] 2206-2207
[53] 2207
[54] 2957-2963
[55] 2958
[56] 2394

will the proposed development increase or decrease the number of employees?". It was put to him that this was because the Claimant was going to be able to stay open. There was no reference on the application form to the loss of floor space by widening the staircase. He was then referred to the planning statement[57] provided by Savills on behalf of the Defendant in September 2020. At paragraph 5.4[58] it is said,

> "The proposed development will also convert a small portion of the rear ground floor from retail (A1) to residential use (C3) to provide a residential entrance with required servicing areas off York Mews. Approximately 27sqm will be converted which is considered to be a very minor portion of the overall A1 floorspace at the site and will not compromise the viability of the retail premise located over the basement and ground floor levels. Furthermore, the minor loss of A1 floorspace will be compensated by the provision of an enhanced retail access off York Mews."

70. It was put to him that Savills were saying that the flats works would not compromise the viability of the retail premise located over the basement and ground floor levels. It was also put to him that there was no reference in this paragraph to the staircase being widened. He was not able to give a satisfactory response to either of these points.

71. He was referred to the document "Camden's comments with [Defendant's] response"[59] and the Defendant's response that, "the existing ground floor floor space which is affected by the proposal is limited to 27sqm which is a small proportion of the overall retail floorspace. This floor space is currently used for access and storage only". It was put to him that there was no reference to moving the toilet wall or the fridge. He replied that Savills had made a minor error.

72. Mr Kriticos agreed that in 2021 he paid for a rental appraisal to find out how much the flats would rent for. He was referred to a letter from Mr Kaimakamis, dated 12 March 2021[60]. It was put to him that the only reason that structural elements were being considered was because of the additional load which the addition of two new storeys on the flat roof would cause. He said that structural elements were needed for this and the widening of the staircase.

73. Mr Kriticos said he could not remember when the Defendant cancelled the flats works. He was asked the year and said he could not remember exactly. He eventually said it was some time after the Defendant received final planning approval on 21 September 2022. He agreed that with the flats works, the Defendant had got as far as specifying the door handles before cancelling the project. He said that although the Defendant had planning permission, the London Borough of Camden had only approved 20 square metres for plant at the rear of the Property in the flat plans instead of the 26 square metres requested, and they received information that potential commercial clients might find this too small for their plant. He was asked how this

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[57] 2423-2447
[58] 2437
[59] 2483
[60] 2583

had not been picked up at any point by the Defendant or any of its agents since 2014. He said all of them had made a mistake. He was asked why the Defendant did not cancel the flats on the flat roof and just carry out the proposed flat works on the existing uppers, i.e. the first and second floors. He said he would have to submit a new planning application, which would take a long time, whereas he could continue to improve the upper floors as office space.

74. Mr Kriticos said that the Defendant decided to refurbish the upper floors as offices after the Claimant's s.25 notice, after the Defence but before his witness statement, dated 12 July 2023. He said again that the decision was taken some time in 2022. It was put to Mr Kriticos that he had said that he decided to do the office refurbishment because he did not want any further delay, and was asked when he took any steps in respect of the new plan. He said he had not done anything yet. He had only obtained a single plan, dated 2 August 2023, from HUT Architects[61] a couple of months previously when asked to do so. He agreed this was the only plan that had ever been produced for the office refurbishment. He agreed that until the plan was produced there was nothing about the office plans, apart, he said, from verbal discussions. He agreed there was nothing on this plan about the ground floor.

75. Mr Kriticos was referred to the Defendant's Response to the Claimant's Request for Further Information[62], dated 14 September 2023. He agreed that the Defendant said in answer to the first request, namely what works it intended to carry out, that it intended to lower the basement floor and redevelop the existing upper floors to office accommodation. Question 4 asked why steel beams were necessary if the flats works had been abandoned. It was pointed out to Mr Kriticos that the Reply said that steel beams were no longer required. Mr Kriticos replied that steel beams were required for the widening of the staircase.

76. Question 5 asked when the Defendant intended to carry out the proposed works. The Reply stated that no works programme or draft building contract presently existed. Mr Kriticos confirmed that the position was still that no draft contract, draft programme of works or heads of works existed.

77. He agreed that other than in his witness statement, there was only one piece of paper that described the works which Mr Kriticos says he intends to carry out, and that this plan[63] gave no information about the ground floor at all. He said that the plans from the flats works would be used. It was put to him that he was not telling the truth when he said the Defendant would widen the staircase: the Defendant never had planning permission to do this and for the present works, did not need to widen it. He said he did need to widen the staircase because the Defendant intended to subsequently change the use of the upper floors from office use to residential use.

78. At paragraph 16 of his witness statement, Mr Kriticos says that the Defendant purchased the Premises because it saw potential in developing the building by refurbishing the existing upper floors and the basement. It was put to Mr Kriticos that this was untrue and until 5 February 2021, the Defendant had no plan to refurbish the

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[61] 2131
[62] 20-23
[63] 2131

basement. Mr Kriticos denied this but there is no document prior to 5 February 2021 showing that the Defendant had any such plan. He was asked if he told anyone else about his plans and answered that it was an "aspiration" that he had.

79. Mr Kriticos was referred to an email, dated 5 February 2021[64], from Mr Kaimakamis to Savills, in which Mr Kaimakamis says ,

> "I just caught up with Peri [Mr Kriticos] and due to some interest from new retailers who would want the basement to be brought back into use, he has asked me to prepare a planning application to drop the basement by a metre or so."

80. The email refers to the basement being brought back into use. Mr Kriticos agreed that nobody was working in the basement. He agreed that his plans for the basement were currently far less advanced than his plans for the flats had been when the Defendant abandoned them. He was asked where the Resolution was by the Defendant company to carry out basement works and he said he discussed one with his wife but they did not produce one. He was asked when and he said they had been discussing it for a long time. He said it was when the market showed interest and the market pushed him over the line. He was asked again when this happened and said it was around the time of the email of 5 February 2021.

81. He was referred to a letter from Mr Mistry of Entuitive to Mr Kaimakamis, dated 11 February 2021[65]. He agreed that following the email of 5 February 2021, Mr Kaimakamis had gone to Mr Mistry for a free proposal for the basement. He was referred to a passage under paragraph 3 of the letter[66], which says,

> "We understand that this application is independent to the work on the upper floors, but that if planning is granted then the basement is unlikely to proceed without the work to the upper floors."

82. He was asked whether this was true. After a long pause, he asked to read the paragraph again. He then said he was a bit confused as to what it was saying. After Mr Galtrey had reiterated that the passage was saying that if the works to the upper floors did not proceed, the basement works were unlikely to proceed, Mr Kriticos said that the basement works would proceed anyway. I comment that he had no answer when asked where Mr Mistry would have got this understanding from.

83. It was put to him that he had not offered an undertaking to the Court to carry out the works to the basement. He asked what was meant by an undertaking. It was explained to him. He was very evasive but eventually said that if what was meant was a written undertaking, he had not given one.

84. Mr Kriticos was referred to the Defendant's application for planning permission for the basement, dated 26 March 2021[67]. He was asked why the property name was

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[64] 586
[65] 592
[66] 593
[67] 642-650

given as 329-333 when he did not own 333. He said he had an aspiration to buy it but he had not been able to agree a price.

85. He was referred to a basement impact assessment for 329-333 from Entuitive, dated 26 March 2021[68]. He accepted that he could not have done this project at the time and still could not do it today. He was referred to a plan prepared by Entuitive[69] as part of the impact assessment and to the photograph of the staircase from the basement to the outside hatch taken by Ms Windsor[70]. Mr Kriticos agreed that if 333 Kentish Town Road was not included, this was the only staircase from the basement and the plan did not show any intention to build another staircase from the basement. When it was put to him that there was a need for two fire exits from the basement, he replied that there could be a fire corridor.

86. Mr Kriticos was referred to the Defendant's planning application[71]. At question 15, it was stated that no new or altered pedestrian access to or from the public highway was proposed. He agreed that neither the planning and design statement nor the construction management plan made any reference to another staircase from the basement.

87. He was asked how the Defendant was going to remove a lot of concrete from the basement. He said conveyor belts would bring it out the back, onto York Mews. It was put to him that his witness statement said at paragraph 37 that the ground floor would be used for the conveyor belt for the removal of excavated material and this was not correct. He replied that this would be a matter for the contractor.

88. He was referred to the construction management plan[72]. Mr Kriticos said that Banks Design had not yet been appointed as the main contractor. It was put to him that at box 3 it was said that Mr Liner of Banks Design would be the site project manager responsible for day-to-day management of the works. He repeated that Banks Design had not yet been appointed.

89. He was referred to question 10[73]. He agreed there was no entrance to the Property from Kentish Town Road, other than through 333, the adjoining property, and that there was no plan to produce any new access. He agreed that the Defendant would have to make a planning application for this.

90. He was referred to question 18[74]. He agreed that this document provided that all deliveries and pick ups to site would be to and from vehicles on Kentish Town High Road. He agreed that the CMP was prepared on his instructions. He was referred to question 19[75]. He agreed York Mews was 3m wide and the lorries were 2.4m wide, so they could get into York Mews as long as they could get around the corner. He was referred to paragraph 24d of the CMP and said he did not know how long parking

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[68] 657-717
[69] 681
[70] Supplemental bundle, 26
[71] 645
[72] 832 – 847 at 846
[73] 838
[74] 844-846
[75] 847

bays would be suspended for. It was put to him that at paragraph 19 it was said that Phase 1 would take 40 weeks and it was not realistic to think that the London Borough of Camden would suspend two parking bays for 40 weeks. He was referred to question 22, which said there would be hoarding to the site and traffic sleepers on the parking bays. He was asked how a delivery, for example of concrete, would get from a lorry which was unloading on Kentish Town Road into the basement. He immediately said it would interfere with the pavement. He said there would be a concrete pump on the pavement or road to unload the concrete onto the conveyor. He agreed there was no permission at present to take the concrete through the front of the Property. He was asked how the concrete would get from the ground floor to the basement. I comment that he had no answer to this. He was referred to paragraph 21a of the CMP, where it states that site operatives would control deliveries along the Stukeley Street footway. It was put to him that Stukeley Street was in Covent Garden. He was reminded that he had said earlier that he always went to a site to check that what his contractors were telling him was 100% right. He said that he did not check anything in the CMP and that when he said contractors, he meant architects and structural engineers.

91. He was referred to question 23, which states that if parking suspensions of more than six months are required, a temporary traffic order must be obtained. He agreed he had not done this. He said that he had not heard of a temporary traffic order before Mr Galtrey referred to it. Question 23 refers to a site plan being attached, which shows where the hoarding licence will be located. He agreed there was no site plan attached and said he had no idea where a hoarding licence would be located. At question 24 it was said that no occupation of the public highway was required, which he had contradicted in his earlier evidence.

92. He agreed that the plan in the CMP was unfeasible and the works could not be carried out as set out in the CMP.

93. He agreed that the Defendant would agree to any reasonable requirements to reduce noise. He was referred to question 31 of the CMP which says[76],

> "Banks Design & Build will respect any reasonable request to reduce the duration of noisy activities further if required. Contractors will be required to have all plant and tools fitted with either silencers or dampers so far as is reasonable practical and working methods will be regularly reviewed to ensure that nuisance to adjacent properties and residents is mitigated wherever practical.
>
> Should noise levels reach 80 DB (A) operatives will be informed of the risks to their hearing and supplied (if requested) with either appropriately attenuated ear defenders or earplugs."

94. He agreed that this passage would apply to the Claimant.

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[76] 857

95. He agreed that the Defendant had already dug bore holes, which included breaking out the concrete slab, and carried out an asbestos survey while the Claimant continued to trade but said that this was over a much smaller area.

96. In re-examination, Mr Kriticos said that he did not know what an undertaking was. He said that Atlas were responsible for the CMP, but he accepted he was responsible for it. He said he had no input into the CMP before it went in for planning.

Oral evidence of Mr Sullivan, Chartered Surveyor

97. In examination-in-chief Mr Sullivan said that parts of the floor of the basement were constructed in timber and parts in concrete.

98. In cross-examination, Mr Sullivan said he was an experienced expert witness. He said he had given evidence once in an arbitration and four times in court.

99. He was referred to paragraph 2.2.8 of his report[77], which sets out the direction for expert witnesses from the Court order dated 26 May 2023. He did not accept that he had gone beyond what the Court had ordered the experts to opine upon. He was referred to paragraph 6.1.25[78], where he discussed the costs of the works. He said that the costs documents were confusing and he thought it would be helpful to the Court to highlight this. At paragraph 6.1.29[79] he commented on whether the works proposed by the Defendant were capable of implementation. He said that this was within his expertise, and as a chartered building surveyor, he was expected to comment on whether building regulations could be met. He said he thought he should explain that there was no entrance to the Property from Kentish High Road. He said that the difference in floor level between the interior and the pavement of Kentish High Road was greater in 329 than in 333 because Kentish High Road was on a slope and this would mean that more permissions would be required to create an entrance. He said he did not know if this was something which could be overcome but it would certainly mean that the Defendant would not be able to commence the works as quickly as it claimed.

100. He agreed he was not instructed to discuss the commerciality of the works but said that as a building surveyor, it was always his responsibility to pick up major points such as the inability to comply with building regulations because of the distance to the exit in the basement. He did not accept that this could be dealt with at a later stage in the development, for example with a fire corridor or sprinkler system. He said that a competent contractor or procurement exercise would address it. He agreed it might be possible to design around the travel distance to the exit, but it was not for him to do so without any more data to rely upon. It was put to him that a fire corridor with two closed compartments could be used as in number 333. He replied that there was not a fire corridor in 333 because it was open at one end. He said that 333 had two means of escape, one of which was at the front, under the stairs going to the upper part of the Premises. Mr Sullivan said that he had carried out a few hundred projects over his thirty-year career and he would not put a project out to tender before resolving how it

[77] 119
[78] 177
[79] 177-178

could lawfully be built. He said that the scheme had not been considered in a way that showed it was a competent project. He said the scheme as it currently stood was not deliverable and it was not for him in the witness box to try to solve all the problems. He referred to the HUT plan of the basement[80]. He said that if you were going to try to produce a corridor to travel the 35m from the front of the basement to the staircase at the rear, one would need to go around or demolish the two pillars which protruded from the side wall. He said that it might not be viable because it would encroach on too much space and there would be too many pitch points.

101. Mr Sullivan said the actual internal area of the basement was 238sqm. He said that in his report, Mr Slater had calculated the volume of the basement as 238 metres cubed at paragraph 5.46[81]. Mr Sullivan said that this was incorrect. Mr Slater had then used this figure to make a number of other calculations including how much waste would be removed and how many skips would be needed, but all of these calculations were based on a flawed assumption. Mr Slater had wrongly used space on York Mews which was not going to be excavated, a void space in an inaccessible area in the centre of the building (which nobody had been in for 150 years) and a 3m exclusion zone (to avoid interfering with the tube line) at the front of the building.

102. Mr Sullivan said he had been involved in about 100 ground (f) cases and the preparedness in the present case was very, very low. He said there should be a very clear design, planning should be clear and there should be no major hurdles to the scheme, which should be articulated well. He said the present scheme was not articulated clearly enough. In the present hurdles and one had to guess how the Defendant would get around them. He said it was not for him to do so. He said that the Defendant's approach was highly unusual and that the Defendant was very far behind.

103. Mr Sullivan was taken to the plan of the ground floor in his report at 4.2.7[82]. He said the wall surrounding the section of the ground floor which had been partitioned off was constructed of fireline board, which is a type of plasterboard which is fire-tested.

104. He was referred to the proposed basement plan included in Mr Slater's report[83]. The current entrance to the basement, from the ground floor, was through 333. If Sainsbury's vacated, they would have to reinstate the wall in the basement dividing 333 from 329-331 and this entrance to the basement would no longer be accessible. Mr Sullivan was taken to two photographs in Mr Slater's report at paragraph 5.30[84]. These show a staircase in the basement, which leads to a former external opening to York Mews, currently boarded over with metal plates. The opening is 1.85m wide and the stairs are 52cm wide.

105. Mr Sullivan did not agree that another entrance on the ground floor would have to be made to carry out the works. He said there was a redundant goods lift in York Mews, which was now blocked off. He was referred to the plan in his report[85], and he said

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[80] 193
[81] 216
[82] 146
[83] 205
[84] 212
[85] 193

that the goods lift which can be seen in the middle of the rear wall could be brought back into use, or removed and the space used to bring materials in and out, for example using a conveyor belt. He said that a scaffold could be put by the staircase out of the basement which was currently blocked. This would widen the staircase so that it could be used during the works. He said he did not know how the Defendant intended to design a staircase from the ground floor to the basement as no drawing had been provided.

106. Mr Sullivan was referred to HUT's planning drawings[86]. One shows the existing layout[87] and another shows the proposed plan[88]. Mr Sullivan referred to 2276, which shows a cross-section. He said the stairs were the existing stairs from the ground floor to the first floor. He agreed that the red shading showing the proposed staircase on 2206 proceeded into the area showing the fridges. Mr Sullivan said that he did not consider that the fridge would be impacted by the proposed staircase.

107. Mr Sullivan said that the staircase from the ground floor to the first floor was currently 1m wide. If the staircase was to be widened, the Defendant could break out the side of the party wall to 327 Kentish Town Road as there is 180mm wide masonry wall going up the stairs[89]. It was put to him that Building Regulations provided that any communal staircase in a residential development needed to have a minimum width of 110cm, and non-residential use, such as offices, required 120cm. Mr Sullivan said that there was no Buildings Regulation requirement to widen the staircase, either for commercial or residential use. He said the minimum required for residential buildings beneath 70m high was 90cm. He said that new Building Regulations had come into force a few months ago following Grenfell, but these were not retrospective.

108. Mr Sullivan said the wall between the staircase and toilet would not have to come down to widen the staircase[90]. He agreed that if the wall did come down, one of the two toilets would be affected. There are five to seven staff working at the Claimant's at any one time, so one toilet was sufficient. He did not think the fridge would need to move because it is 4.3m from the entrance of the doorway to the front of the fridge. He said the fridges were made of composite panels. There was an insulated core and the sections slotted in and out, so it was not very complicated to move the fridge, although he did not think it would need to be moved.

109. He agreed there would need to be a working area around the wall if it was coming down. He said investigations had not been carried out to know whether structural steels would be necessary if the wall was removed. He thought it was unlikely to be a load bearing wall but could not be certain. He said that he did not think the ceiling would be affected by any work to the wall.

110. He said that if the wall did come down, he would put a timber frame up to the ceiling to make a partition wall, with some cross bracing in it, thus creating a screen and providing protection to the public and the staff. A plastic sheet could be put over the

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[86] 2206-2207
[87] 2207
[88] 2206
[89] 158
[90] 2206

top to protect against dust. He said that all that would be affected would be one toilet and 1.5 metres of wall. The wall would be extended between the two toilets to the side of the fridge to create a working environment. Mr Sullivan said the works would inconvenience the Claimant but that it was entirely plausible for the Claimant to continue trading.

111. Mr Sullivan accepted that in order to carry out the asbestos works, the toilets would have to be cut off.

112. He said that the ground floor was not the most sensible place to put ancillary accommodation during the works, which could go for example on the flat roof. He was referred to the photographs of the flat roof[91]. He agreed that the flat roof was of timber structure. He said Mr Slater's evidence that a minimum of four cabins would be required, for one WC, one office, one canteen/mess room and one locked storage container[92], was considerably overstated. He said the best space was probably on the first floor, where there were two or three rooms, that would suit most of these requirements, including a toilet block, although this would need to be reconnected. Alternatively, one could place a structure on the flat roof. He said that there was a refrigeration plant on the flat roof[93], which must weigh nearly a tonne. He said that equipment such as a breaker, which is 700x500mm in its case, or a wacker plate could be carried up to the first floor or stored in a locked box on the ground floor in the sectioned off area. The equipment was portable and could be carried.

113. He was referred to the CMP[94]. He said a CMP was usually completed by the contractor who is going to do the works. Ms Mattsson referred him to the s.106 agreement between the Defendant and the London Borough of Camden[95] and clause 4.1.1(b), which states that on or prior to the implementation date the Defendant must submit to London Borough of Camden for approval a draft Construction Management Plan. He agreed that the current CMP would have to change; this was a working document that would typically be added to.

114. He did not agree that it would be unusual not to use a mechanical digger in the basement. The breaking out of the concrete could be done with hand held equipment, such as a circular saw. He said there was nothing in the CMP that said a mechanical digger was being used. He said the areas being dug in one go were small, 30sqm in size, and it would be difficult to do this with a mechanical digger. The excavations below were London clay, which is not too difficult to dig. Further, he said there would be health and safety issues using a diesel mechanical digger as there would be no ventilation.

115. Regarding noise, Mr Sullivan was referred to Mr Slater's table[96]. He agreed the basement was at most 3m below the ground floor. He said he thought the floor towards 331 was concrete and the floor towards 329 was mainly timber. He agreed that if you were standing next to noise at a level of 85dB, hearing protection was

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[91] 965-968
[92] 208-209
[93] Supplementary bundle, 13
[94] 827-863
[95] 2097
[96] 240

required. He said that if the noise level was 85dB in the basement, you would not need hearing protection on the ground floor. There was no evidence as to what the noise levels in the basement would be at the ground floor. In his table, Mr Slater says that the noise generated by breaking out a cast concrete slab would be 100dB. Mr Sullivan disagreed and said that it could be 85.09dB, according to a Toolstation electronic link to manufacturer's details. Mr Sullivan said that there were multiple floor coverings on the ground floor which would be dampen the sound. Regarding Appendix A, paragraph 2.02 of Mr Slater's report[97], Mr Sullivan said that using a micro hand excavator, the noise level would be 60-70dB and not 91dB, as stated by Mr Slater. He did not agree that, as stated at 2.05[98] of Mr Slater's report, cutting off brick would give noise levels of circa 100dB. He did not agree that a circular saw would generate noise levels of 97-102dB, as stated at 2.06 of Mr Slater's report[99], and said the noise levels would be 90dB. He said pouring concrete was noisy but could take place outside the building, up to 400m away. He said that fixing steel dowels generated noise of 91dB. He said that a wacker plate generated noise of 91dB and disc cutters generated noise of 98dB, but again this would probably be cut in the street, not in the Premises.

116. He agreed that some of the noise would be intrusive but said it would be reasonable to have the public and the Claimant's staff on the ground floor of the Premises throughout the entire period when the works were being carried out. He said there was a legal obligation on contractors to mitigate noise and keep it within reasonable limits under the Control of Pollution Act 1990. He said insulation could be put up to reduce the noise. He said that noise reduces with distance and noise from works in the basement would reduce to 65dB at ground floor level.

117. Mr Sullivan said that when asbestos is removed, you create an enclosure using polythene sheeting. He said he had done his thesis on asbestos and had a lot of experience with it. Everything would be sealed on the ground floor. If there was a split in the flooring, you would cut out a section with a Stanley knife, replace it with an equivalent piece and do a heat weld around it. He said there was no issue at all with the Claimant trading and having the public and staff about while the asbestos was removed.

118. Mr Sullivan accepted that temporary propping would be necessary when structural pillars were removed but the Claimant could continue to trade while this happened. The fact that the Claimant was still trading would not mean additional propping was required. He said Claridge's Hotel had a five-storey super basement constructed while still operating as a fully functioning hotel.

Oral evidence of Mr Slater, Chartered Surveyor

119. Mr Slater said that this was the first time he had given evidence in Court.

120. Mr Slater agreed that on the contents page of his report[100] there were spelling errors at items 4 and 9. Mr Slater admitted that that there were 84 spelling errors in the report.

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[97] 240
[98] 241
[99] 242
[100] 195

Mr Slater said that his secretary failed to spell check the report due to time pressures. He agreed there had been an extension of time for the service of his report. He said he read the report through and there were no spelling mistakes. He gave authority to his secretary for his report to be sent with his electronic signature but something happened to it when it was dispatched. He said he had read it through since and noticed the errors. He agreed that he did not make any changes when he was asked in examination-in-chief if he wished to do so. He replied that he thought this was asking whether his opinions were still accurate.

121. Mr Slater admitted that he produced the map of the Property in his report[101]. He agreed that the red rectangle which he had used to indicate the location of the Property, was misplaced.

122. He was referred to paragraph 5.46 of his report and agreed that his reference to the area excavated extending to 238m³ should refer to the volume to be excavated. He agreed that Mr Sullivan had been correct to say in his evidence that his calculation was incorrect. He said he became aware that this calculation was incorrect after his report was issued but before today. He was asked why he had said that the contents of his report were accurate when asked by Ms Mattsson, when he knew this calculation was inaccurate. It was put to him that this was a central part of his evidence and he had heard Mr Sullivan say that this calculation was wrong but had not changed it in his evidence-in-chief. He answered, "On this occasion, no".

123. He was referred to paragraph 9.03 of his report and his statement of truth[102]. He agreed he had not complied with the statement of truth in relation to the calculation error. He said he last read CPR 35 and PD 35 on Saturday afternoon. He agreed that he had not included in his statement of truth the statement that if he falsely suggested his evidence was true when it was false, he would commit contempt of Court and could potentially be sent to prison. He said his failure to include this statement was a genuine error.

124. Mr Slater accepted that in breach of paragraph 55 of the Civil Justice Guidance for the Instuction of Experts in Civil Claims, he had failed to list in his report or in an appendix all instructions received from his solicitors, together with the date. In the introduction of his report[103], Mr Slater refers at paragraph 1.01 to receiving instructions via correspondence. He was asked where the correspondence was and answered, "In the files in my office". He agreed that he had not listed that correspondence in his report. He said it was an error on his part and it was a direct breach of the Civil Justice Guidance.

125. Mr Slater said he had received from his solicitors a letter of instructions and a bundle of information. He agreed that the Claimant and Court did not know what was in that bundle of information. He was asked whether everything he had been sent was included in the trial bundle, and said that it was. He was asked when he had checked this. At first he said he had checked the previous Thursday or Friday. He then said he had not checked every single page.

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[101] 199
[102] 233
[103] 197

126. Mr Slater said he was familiar with the RICS guidance for experts. He said he last read it a number of months ago. He was taken to the declarations and statement of truth in Mr Sullivan's report[104]. He agreed that the declarations were those which he was required to make by his professional body and it was an error to omit all of them. He said he had forgotten to include these declarations.

127. Mr Slater agreed that he had not attached his CV to his report as required. He said he forgot to include his CV.

128. Mr Slater was taken to paragraph 4.06 of his report[105], and to a note in bold type which reads, "note – should works be restated in the report?). He said this was a note to himself for him to consider.

129. It was put to Mr Slater that RICS guidance states that if an expert subsequently notices any material inaccuracy or omission in his report, he must notify these in writing immediately. Mr Slater said that he had not identified any omissions or gaps in his evidence, and that his report was the whole of his evidence.

130. Mr Slater was referred to paragraph 2.06 of his report[106]. He agreed that the question the Court had asked him to address was whether the Defendant could reasonably carry out the work without obtaining possession of the holding, not what would be easiest, best or most appropriate for the Defendant. He agreed that when looking at how the work could be carried out, one has to look at more than one option. He said that he had done this.

131. Mr Slater was referred to paragraph 3.09 of his report[107]. He said that on the underside of the asbestos sheet material which was fixed to the ground floor, at some stage a non-asbestos material has been applied to it. He was referred to paragraph 5.11[108]. He agreed that he had said floorboards often retained gaps between them, not that these floorboards had gaps between them. He said that he had inspected the floorboards in a small area and had not seen any gaps but this was a risk that should be considered with asbestos. He agreed that whether there were any gaps in the floorboards was pure speculation on his part.

132. Mr Slater said that he had inspected the vinyl covering of the ground floor where it could be seen and had found some areas of damage. He agreed that he had not mentioned in his report that there was any damage to the vinyl covering of the ground floor. I comment that Mr Slater had already said that there were no omissions in his report.

133. It was pointed out to Mr Slater that at paragraph 5.12[109] he said that he did not believe it would be appropriate to undertake the asbestos works with the property occupied. It was put to him that this was not what he was asked, he was asked if the asbestos could be removed with the Claimant in possession. He said there was a risk that asbestos

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[104] 182
[105] 204
[106] 198
[107] 200
[108] 208
[109] 208

fibres could be disturbed and get into the general atmosphere. He agreed this would be a serious breach of asbestos regulations and that no competent asbestos removal contractor would let this happen. He agreed that he was not an asbestos expert and did not do his thesis on asbestos.

134. He said he was not the licensed removal contractor and he was just trying to say there was an elevated risk if the premises were occupied. He was referred to Mr Sullivan's report, where he discusses how asbestos removal works could be carried out[110]. He said he recognised an email from Carringtons Asbestos Division to Mr Kaimakamis[111]. He was asked if he saw this email when he checked the bundle. He was asked if it was sent to him by his instructing solicitors and said he could not recall if he received it at that time. He agreed that, like Mr Sullivan, Carringtons were saying that the decontamination unit should be situated in York Mews. He agreed that Carringtons were experts. He accepted that Carringtons were saying the work would be carried out when the store was open. He said that he accepted Messrs Carrington's evidence as correct as they were licensed asbestos removal experts.

135. Mr Slater was referred to the section in his report dealing with noise[112], where he said at paragraph 5.37 that noise levels would be in the order of 100dB. He was taken to his Appendix A, list of equipment and decibel levels[113] and pages 247-248, where he listed all the documents which he had got the information from. He was asked why he said 100dB rather than 95dB. Mr Slater answered that there was a range and subsequent research he had done said the noise level could be greater depending on the material it was being used on. It was put to him that the CPR and RICS guidance says that where an expert relies upon research, they must cite it. He agreed he had not done so.

136. Mr Slater said that he did not know that the decibel scale was a logarithmic scale. He admitted that he was unaware that 100dB was twice as loud as 90dB. He was asked when he last clicked on the top link listed on page 247 and Mr Slater said when he was preparing his report. He was told it gave a "page not found" link. He said he clicked on all these sites in December 2023 when preparing his report.

137. He was asked how noise diminished with distance and said he would be guessing. It was put to him that Mr Sullivan had said that the noise level on the ground floor while the works were carrying on would be 65dB. He replied that he had nothing to say on that.

138. He was referred to a noise survey commissioned by the Defendant when proposing the flats works[114]. It was a measurement at first floor level. He was told that an Leq level was a time-averaged sound intensity, measured in decibels. The average during the day is around 65dB. It was put to him that once the legally-required noise mitigation measures had been put in place by the contractor, the noise level from the works at ground floor level would be more or less the same as the ambient noise level. He said he could not answer that question but he would be surprised.

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[110] 147
[111] 1859
[112] 214
[113] 240-244
[114] 2265

139. He agreed that all the deliveries would have to be from York Mews and not Kentish Town Road. He was referred to paragraph 5.29 of his report[115], where he agreed with Mr Sullivan that all the deliveries and removals could use the existing access onto York Mews.

140. At paragraph 5.30 of his report[116], he said a contractor would wish to extend the size of the opening from York Mews into the building. It was put to him that was not the question, but whether it could reasonably be done without widening. He said he thought the access would have to be widened by one to 1.5 metres. He agreed this would be within the 26m area, marked green on the plan, at the back of the shop.

141. Mr Slater said that he thought a mini excavator would be needed for the basement works. He agreed this work could be done by hand. It was put to him that there would be a problem using a mini excavator in a basement because of the diesel fumes. He said ventilation measures could be put in. He agreed there was no mention of ventilation in his report. He said he had thought about it at the time but failed to mention it in his report.

142. Mr Slater was referred to his report at 8.0, sub-paragraph 10[117]. He agreed that the staircase did not need to be widened for the purpose of the office works. He said that if the use was changed from commercial to residential, Building Regulations relating to residential would apply. He said his understanding was that these regulations would require the width of the stairs to be 1000mm, based on his review of the Building Regulations. He agreed this was not in his report. He could not point to which part of the Building Regulations this was in. He agreed the staircase was currently 1000mm. When it was put to him that it therefore did not need to be widened, he said this would depend whether it was a firefighting staircase. He agreed that the reference to firefighting staircases was to much higher buildings. He said there was no fire strategy, so one did not know what the Fire Brigade would require. He agreed there was no evidence the Fire Brigade would require a fire-fighting staircase and that this was speculation based on his experience. It was put to him that in his report he said it would be prudent and sensible to carry out the widening of the staircase now, but that this had nothing to do with the Court's direction to the experts. He did not address this but repeated that this was disruptive work and one would widen the staircase when the back of the building was open.

143. Mr Slater agreed that he did not say anywhere in his report that the widening works could not be carried out with the Claimant in occupation. He agreed that it could be carried out with the Claimant.

144. Mr Slater disputed that the most suitable location for the Claimant's staff's facilities was the upper floors, once refurbished into office space with toilet facilities, saying that the ground floor would be the most suitable. He said temporary facilities would be erected on the ground floor and the sources for electricity and water supplies. He said the contractor would plumb in a temporary toilet on the ground floor even though

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[115] 211
[116] 211-212
[117] 230

there was one on the upper floors. He said the toilet drain could be routed into the front drain of the basement vaults or it would be possible to use a chemical toilet.

145. At paragraph 5.17 of his report Mr Slater says there would have to be investigation by a structural engineer to confirm if the flat roof structure could take additional loads. He was referred to a letter, dated 22 March 2021, from Mr Mistry to Mr Kaimakamis[118]. Mr Mistry says that the existing roof joists are capable of supporting a single-storey residential building. He agreed that a single-storey residential building was likely to be heavier than the welfare facilities, and it was perfectly possible for temporary accommodation to be put on the flat room from a load bearing perspective. He agreed that his concern at 5.17 was now of less concern.

146. He said a wacker plate could be stored in the basement or hoisted onto the roof. He said he could not say whether the equipment could be stored in the vaults because he did not know how much equipment would be needed. He agreed that when he said that in his opinion it could not be stored in the

Assessment of Mr Sullivan and Mr Slater

147. I found Mr Slater to be unaware of his duties to the Court and unreliable as an expert.

148. His report contained 84 spelling errors and a map he had provided was inaccurate. Yet more concerning was his failure to take responsibility for the errors. He said that when he read his report through, there were no spelling mistakes and that it was after he gave authority to his secretary for the report to be sent, with his electronic signature, that "something happened to it". I found this unconvincing and untrue.

149. Mr Slater repeatedly made claims which were then shown to be unlikely to be truthful. He said he had last read CPR 35 and PD 35 on the Saturday afternoon before the trial. Yet he had not noticed that his statement of truth was incorrect and far shorter than the statement of truth which he should have used. He said he had checked every page of the information he had been sent was in the trial bundle, then conceded that he had not. He said he was familiar with the RICS guidance for experts. When asked when he had last read it, he said a number of months ago. Yet he did not include any of the declarations required by the RICS guidance. Nor did he attach his CV to his report as required. He said that when preparing his report in December 2023, he had clicked on all the links to the websites where he had obtained information about the noise levels produced by different pieces of equipment, yet in Court it was shown that the top link gave a "page not found" message. He said that when he had inspected the vinyl covering on the ground floor of the Premises, he had seen areas of damage. However, he had to concede that he had not mentioned these areas of damage in his report. Nor had he mentioned them when asked whether there were any omissions in his report, even though he was arguing that these areas of damage were significant because they meant that it would be unsafe to carry out asbestos works while the Claimant remained in occupancy. He said at paragraph 5.11 of his report, "Floorboards often retain gaps between them", which he said could allow asbestos fibres to enter the ground floor area. In cross-examination he had to concede that he had not seen any gaps between floorboards on the ground floor and

[118] 2586

that his evidence was pure speculation. Nonetheless, he continued to argue that it was true to say as a generality that "Floorboards often retain gaps between them".

150. Mr Slater states at paragraph 5.6 of his report[119] that "an approximate area to be excavated extends to 238m³." He agreed that area was measured in m² and volume in m³, and that he should have referred to the approximate volume to be excavated. He also agreed that Mr Sullivan was correct in saying that Mr Slater's calculation was incorrect. He said he had known that the calculation was incorrect before the trial but conceded that he had not corrected it. Further, he had heard Mr Sullivan's evidence that the calculation was incorrect. Mr Slater is a member of the Royal Institution of Chartered Surveyors and the RICS guidance provides at paragraph 6.2 b, "Where you significantly alter your opinion … you should amend your reports to reflect that fact". Further, Ms Mattsson asked Mr Slater if there was anything he wished to change in his evidence and he said there was not. Mr Slater had no answer as to why he had not corrected his calculation which he knew to be wrong. Regrettably, I find that Mr Slater is not a reliable witness, he has no understanding of his duties to the Court under the CPR, the Civil Justice Guidance or the RICS Guidance, and that he does not understand the importance of providing truthful evidence.

151. Mr Slater concluded at paragraph 5.12 of his report[120], "I do not believe it would be appropriate for the [asbestos] work to be undertaken with the property occupied". The question for Mr Slater, as provided for by District Judge Worthington, was whether the Defendant "could reasonably carry out the work without obtaining possession of the holding". Mr Slater never said, as he should, that this question was outside his expertise because, as he conceded, he had no expertise in asbestos. Further, he did not address whether the removal could reasonably be carried out with the Claimant in occupation of the Property. When he was shown a quotation obtained by Mr Kaimakamis from Messrs Carringtons, a specialist asbestos removal firm, he immediately conceded that the Claimant could remain in occupation while the asbestos was removed. He said that he had already seen this quotation prior to the hearing, but he never sought to change his evidence until he was confronted with this email in cross-examination.

152. In his report, Mr Slater said as a categorical fact at paragraph 8.01,

> "1200mm is the minimum width required in compliance with approved documents K1 building regulations. ... In this regard amendment of the staircase at this opportunity is prudent and sensible, noting the disturbance it would otherwise cause at a later date when the ground and basement floor were occupied."

153. In cross-examination, he was unable to identify which Building Regulation he said required the minimum width of the staircase to be 1200mm. He eventually conceded that the stairway did not have to be more than 900mm, whether for residential or commercial use. He then sought to add a new justification, namely that the staircase may need to be widened as a firefighting staircase. He cited no authority for this, and I find that it was baseless. Finally, he repeated Mr Kriticos's evidence that it may be

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[119] 216
[120] 208

necessary to widen the staircase if there may be a change of use to residential accommodation on the upper floors in the future. Ms Mattsson had to concede shortly before closing submissions that no building regulation approval was required for the refurbishment of the upper floors. None of the points made by Mr Slater as to the widening of the staircase should ever have been taken, as they were all unsustainable. However, in any event a future change of use of the upper floors is irrelevant to the question that Mr Slater was tasked with answering. The question for Mr Slater related to the present proposed works and not some unspecified works at some unspecified time involving unspecified building regulations.

154. In short, I found Mr Slater's evidence on the staircase unsatisfactory on multiple levels, not least because he could identify no building regulation or other basis for his opinions.

155. Regarding the issue of noise, I found Mr Slater's evidence exaggerated and superficial. Although he cited noise mitigation measures, he failed to take them into account in arriving at his conclusion. Further, Mr Slater had no understanding of how sound would diminish over distance. He eventually conceded that during basement works, the noise levels , on the ground floor would be about 65dB, which is the normal ambient level at the Property.

156. For the aforementioned reasons, I found Mr Slater to be a witness on whom I could place very little reliance.

157. In contrast, I found Mr Sullivan to be an authoritative, reliable and helpful witness. His report contained the appropriate declarations and statement of truth, to comply both with CPR 35 and the RICS guidance for experts. In appendix A, he included a detailed CV[121]. At appendix B he provided a list of the documents he had examined.

158. Mr Sullivan's report was internally consistent and consistent with his oral evidence. It is true that some of his evidence relating to the absence of any planning permission for access from Kentish Town Road to the front of the Property and the Defendant's breach of building regulation in failing to provide an additional means of escape from the basement went outside the scope of the experts' instructions from the Court. However, he did not conceal this but said that as a chartered surveyor, he would draw this to any client's attention. The material that went beyond the scope of the experts' instructions was not disputed by Mr Slater and I found it of assistance.

159. I find that were there is a conflict between the evidence of Mr Slater and Mr Sullivan, I prefer the evidence of Mr Sullivan.

The issues

160. The Parties agree that in considering the Defendant's opposition to the grant of a new tenancy under ground (f) of s.30(1) of the Act, there are the following issues:.

i) What is the totality of the works proposed by the Defendant?

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[121] 183-186

ii) Are the parties obliged to carry out the ground floor and basement works under the terms of the current tenancy?

iii) Has the Defendant proved on the balance of probabilities a genuine, settled intention to carry out the works?

iv) What is the extent of the holding?

v) If the holding is the ground floor of the Property, has the Defendant proved on the balance of probabilities:

a) that the works are "to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof;

b) That the Defendant cannot reasonably carry out the ground floor works without obtaining possession of the holding.

vi) If the holding is the ground floor and the basement, has the Defendant proved on the balance of probabilities:

a) that the works are "to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof;

b) That the Defendant cannot reasonably carry out the ground floor and basement works without obtaining possession of the holding.

vii) On the basis that the holding is the ground floor, and the Defendant proved ground (f) of s.30(1) has the Claimant proved on the balance of probabilities s.31A(1)(a) of the Act?

viii) On the basis that the holding is the ground floor and the basement, and the Defendant has proved ground (f) of s.30(1) of the Act has the Claimant proved on the balance of probabilities s.31A(1)(a) of the Act?

ix) On the basis that the holding is the ground floor and the basement, Defendant has proved ground (f) of s.30(1) of the Act has the Claimant established on the balance of probabilities s. 31A(1)(b) of the Act?

The totality of the works

161. In the experts' joint statement, dated 30 November 2023, at paragraph 17 the parties' expert surveyors agree the proposed works, which can be summarised as followed[122]:

i) Lowering the floor of the basement by excavating the ground below the existing slab level areas in the basement to a new depth of between 560mm and 960mm to form new slab level and removal of spoil.

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[122] 107-108

ii) Casting a new concrete floor where previously excavated.

iii) Creating a new compartment wall on the ground floor within a storage area to the rear left-hand corner of 329 Kentish Town Road.

iv) Formation of a new staircase between the ground floor and the basement.

v) Refurbishment of the upper floors of the Property for commercial office use.

vi) Removing existing asbestos materials to the underside of the ground floor.

Work to upper floors

162. The parties agree that the work to the upper floors is refurbishment and does not engage ground (f) of s.30(1) of the Act:

i) Mr Sullivan says in his expert report at paragraph 2.2.15[123],

> "The Experts have agreed that no substantial works of construction, reconstruction or demolition are proposed to the upper parts of the premises."

ii) The experts say in their statement of issues agreed and disagreed at paragraph 17 xiii)[124],

> "The landlord is proposing to refurbish the upper parts of the property for commercial office use. No details have been provided on this work, although no structural works are proposed which would impact the occupation of the ground floor."

iii) When Mr Galtrey was opening the case, Ms Mattsson stated that the Defendant admitted that the works to the first, second and third floors did not engage s.30(1)(f) of the Act.

Law - contemporaneous documents

163. In *Simitra Global Assets Limited v Ikon* [2019] EWCA Civ 1413, Males LJ said,

> "48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in

[123] 120
[124] 108

> commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."

Section 30(1)(f) of the Act

164. S.30(1)(f) of the Act provides,

> (1) The grounds on which a landlord may oppose an application under section 24(1) of this Act, or make an application under section 29(2) of this Act, are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say:—
>
> that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;

165. I bear in mind that in *Heath v Drown* [1973] AC 498, the House of Lords held that for the purposes of s.30(1)(f) of the Act, the phrase "obtaining possession of the holding" means obtaining legal possession which would yield physical possession".

Genuine and settled intention to carry out the works – the law

166. The parties agree that the legal test is set out in the Supreme Court case of *S Franses Ltd v Cavendish Hotel (London) Ltd* [2019] A.C. 249[125]. The Defendant must show all the following:

i) That it has, at the date of this hearing, a genuine and settled intention to carry out the works[126];

ii) That it would be practically able to carry out the works[127];

iii) That it would carry out the works whether or not the Claimant voluntarily gave up possession i.e. that the purpose of the works was not just to successfully oppose the Claimant's application for a new tenancy[128].

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[125] Joint authorities bundle, tab 6
[126] Paragraph 16: "The touchstone of ground (f) is a firm and settled intention to carry out the works."
[127] Paragraph 8: "The landlord had to prove … (ii) that it would practically be able to do so."
[128] Paragraph 19: "The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily."

Genuine and settled intention to carry out the works - Defendant's submissions

167. In his witness statement, Mr Kriticos says[129],

> "32. Thus the intention now is for Medley to implement the basement planning consent, which includes the lowering of the floor in the basement by 560-930mm in order to create a continuous structural slab at level -3.23m, reconfigure the rear of the ground floor to provide access to the upper floors and by adapting slightly the designs/construction drawings we have produced, refurbish the existing upper floors into offices for which no planning consent is required. These offices can then, in the future, be converted to residential units with minimal works subject to planning."

168. Miss Mattsson submits in her closing submissions,

> "7. The initial intention was to keep the Premises connected to the neighbouring property, 333 Kentish Town Road, owned by Ashok Sachdev. Mr Kriticos gave evidence that he had hoped to buy No 333, but could not agree the terms or a price with Mr Sachdev. The Landlord is now proceeding on the basis that only the Premises will be redeveloped and the wall between the Premises and 333 reinstated (as per the Tenant's reinstatement obligations).
>
> 8. During the process of obtaining the planning consents, the Landlord tested the market and came to the conclusion that it will have a much better return on its investment if it proceeds with the commercial redevelopment only at the current time. Mr Kriticos therefore gives evidence that the Landlord's intended works are ('the Works'):
>
> 32. Thus the intention now is for Medley to implement the basement planning consent, which includes the lowering of the floor in the basement by 560-930mm in order to create a continuous structural slab at level -3.23m, reconfigure the rear of the ground floor to provide access to the upper floors and by adapting slightly the designs/construction drawings we have produced, refurbish the existing upper floors into offices for which no planning consent is required. These offices can then, in the future, be converted to residential units with minimal works subject to planning."

169. Ms Mattsson submits that the widening of the stairs from the ground floor to the first floor is clearly shown in plan P901 and E902[130]. She said that the planning consent

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[129] 99-100
[130] 2206-2207

shows the whole of the wall being moved into the rear part of the ground floor, which would involve steelworks.

170. Ms Mattsson submits that any suggestion that there are too many hurdles for these works to be undertaken is without merit. She says that as pointed out by Mr Sullivan, the surrounding properties are being developed. She submits in her closing submissions at paragraph 21,

> "(1) Compliance with Building Regulations for the basement will be considered by the appointed design and build contractor together Building Control - there are a number of ways to fire engineer use of the basement;
>
> (2) The final design of access to the basement will be designed considered by the appointed design and build contractor - the stairs are shown in planning permission plan P009, revision H. The suggestion that stairs cannot be built is without merit - clearly access to the basement can be created in the same way as access to the basement exists currently from No 333."

171. Ms Mattsson submits that Mr Kriticos was criticised during cross examination for not having finalised design drawings detailing all aspects of the works and how they were going to be implemented. She submits that Mr Kriticos explained in his witness statement at paragraph 27[131],

> "The intent is for us to go out to specialist contractors tender for the design and execution of these works as soon as we have a date for vacant possession."

172. Ms Mattson argued that the Claimant's expert, Mr Sullivan, readily accepted that building works are often undertaken by 'design and build contract' and that the appointed contractors will, once appointed, design the final scheme, and engage with the structural engineers and building control to finalise the scheme and building drawings, although he considered this not to be the best approach.

173. Ms Mattsson submits that Mr Kriticos and his wife have £3,000,000 available to carry out the development, which is costed at approximately £800,000[132]. The Defendant has spent over £200,000 in preparation for the redevelopment, which Ms Mattsson submits is a vast amount of money to spend if you do not intend to carry out the works.

174. Ms Mattsson submits that Mr Kriticos was an honest witness. He confirmed in re-examination that he did not know what a court undertaking was. Once this had been explained, he gave a written undertaking to the Court as follows:

> "On the day of 23 January 2024 Pericles Panayioutous Kriticos, director of the Defendant, was represented by Lina Mattson of Counsel and gave an undertaking to the Court promising to

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[131] 101
[132] 1896-1924

> (1) carry out the excavation and ancillary works to the basement of 329-331 Kentish Town Road, London, NW5 2TJ ('the Premises'), in compliance with the planning permission with reference 2021/1470/P; and
>
> (2) to widen the staircase from the ground floor to the first floor of the Premises to no less than 1200mm by removing the wall on the left side of the stairs when facing Kentish Town Road together with all necessary ancillary works;
>
> subject to the Defendant obtaining vacant possession of the Premises. This undertaking is limited to if the Defendant obtains vacant possession because I do not consider it possible to undertake the works described above without vacant possession as these works are not permitted under terms of the Lease dated 18 May 2010 and the Claimant has never offered any particularised terms of access for the works to be undertaken.
>
> And to be bound by these promises until the works set out above have been completed."

Genuine and settled intention to carry out the works - Claimant's submissions

175. Mr Galtrey submits that it was clear from the evidence that the Defendant cannot satisfy any of the three limbs of the legal test for intention to carry out the works. He makes the following submissions:

i) Mr Kriticos candidly accepted in cross-examination that despite a company resolution and significant expenditure (£150,000) on surveys and planning permission, the Defendant never had a settled intention to proceed with the plan to develop flats on the upper floors. Mr Kriticos said that the Defendant reserved its final decision depending on further information that might come to light. Mr Galtrey submitted that it is clear from *Franses* (supra) at paragraph 9 that such a conditional intention is insufficient. In the event, the Defendant decided not to proceed with the flats works, cancelled the plan and returned the necessary funding to its lender.

ii) The basement works are far less advanced and far less certain than the flat works were when the Defendant abandoned them. Further, it was also clear from the evidence of Mr Kriticos and Mr Slater that the basement works, as set out in some detail in the planning applications and associated documents, are not lawful or practical. They suggested that at some time in the future, a contractor would be brought in who would resolve the legal and practical problems.

iii) It is not credible to suggest that having decided to cancel the flats works which appeared to have been potentially very valuable and were at a far more advanced state, the Defendant nevertheless intends to widen a staircase that, as Mr Slater accepted in cross examination, was not and is not required by building regulations to be widened.

iv) The basement works were not the idea of the Defendant but were said by Mr Kriticos to have been suggested by an unidentified potential tenant.

v) The chronology is telling. The section 25 notice was served by the Defendant, stating that it intended to carry out ground (f) works on 13 January 2021[133]. However, the first mention of the possibility of works to the basement only came later, on 5 February 2021[134]. The Defendant cannot have been contemplating the basement works when the section 25 notice was served.

vi) Mr Kriticos accepted in cross-examination that the Defendant had wanted since 2014 to recover the upper floors (not the basement) from the Claimant. By an email dated 28 October 2018 from Mr Kaimakamis of Atlas[135], he says, "We would like to discuss the possibility of Sainsburys handing back the derelict uppers to the landlord".

vii) The Defendant gave very serious consideration to developing flats on the upper floors. Mr Galtrey submits that the Defendant's s.25 notice was issued with the plan of relying on the flats works to oppose the new lease on ground (f). At some point, although Mr Kriticos could not say when, the flats works were cancelled, which left the Defendant with a problem. With the cancellation of the flats works, there were no genuine works that could be used for the ground (f) opposition.

viii) Mr Galtrey submits that the Defendant devised a two-fold solution:

a) Claim that the flats works would have included a widening of the staircase (which the Defendant's expert, Mr Slater, admitted in cross examination was not required for building regulation approval), and arbitrarily claim that these widening works would be done, even though the flats works were not going to be carried out, and that ground (f) was thereby engaged.

b) Claim that the basement works would proceed without the flats works, even though the Defendant had been clear from the outset with his own contractors that that would not be the case. In a letter, dated 11 February 2021, from Mr Harvey Mistry MEng (Hons) CEng MIStructE, Senior Engineer at Entuitive, regarding a fee proposal for undertaking the structural elements of the basement lowering, he says[136],

> "We understand that this application is independent to the work on the upper floors, but that if planning is granted then the basement is unlikely to proceed without the work to the upper floors. As such, we would propose to consider the lodging charges from the wider development concurrently with the basement impact assessment."

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[133] 556
[134] 586
[135] 2158
[136] 592-594 at 593

176. Mr Galtrey submits that both sets of works were contrived for the sole purpose of opposing the grant of a new tenancy and would not be done if the Claimant gave up possession voluntarily. He says that the Defendant's two-fold scheme is reminiscent of the works proposed in the Supreme Court case of *Franses,* in which the landlord proposed lowering a floor and moving a wall, and in which the Court found that the landlord did not have the requisite intention to carry out these works.

177. The Defendant did not offer an undertaking in the usual way at the outset, nor immediately after cross-examination, when it was put to him that he had not offered an undertaking. Mr Galtrey submitted that the undertaking was only offered immediately before closing submissions, and only after the Defendant's expert, Mr Slater, had been shown to be totally unreliable. He submitted that the unavoidable inference was that the undertaking, like the suggested works, was no more than a tactic to get the tenant out. He submitted that the Court should decline to accept the undertaking on the grounds that it doubts the Defendant's veracity. He further submitted that the proposed undertaking was conditional and was not subject to any time limit on it; as such it was too uncertain to be enforceable and should not be accepted.

Findings: undertaking

178. In cross-examination of Mr Kriticos, it was put to him that he had not offered an undertaking to carry out the works. I found Mr Kriticos to be evasive and disingenuous. The question had to be put a number of times. Mr Kriticos said he was unaware that an undertaking could be given and asked if he could give one. I found this answer implausible, bearing in mind that Mr Kriticos is a very experienced civil engineer and businessman, and is advised by specialist property lawyers and a property development company, Atlas. In re-examination, Mr Kriticos was not asked about providing an undertaking. The Defendant did not offer an undertaking after Mr Kriticos had given evidence.

179. The Claimant's expert, Mr Sullivan, and Mr Slater then gave evidence. It would be no exaggeration to say that Mr Slater contradicted himself numerous times in cross-examination and withdrew many of his arguments in his report and the joint statement.

180. On the third day of the trial, prior to closing submissions, Ms Mattsson provided the Claimant with a typed undertaking from the Defendant. Mr Galtrey pointed out to her that the undertaking was hopelessly vague and as a consequence was unenforceable. Ms Mattsson accepted Mr Galtrey's criticism and added that the work would be carried out after a year after the Defendant was granted possession of the property.

181. Although an undertaking can be given at any time, the common practice is to give a written undertaking prior to trial. As was said by Lord Sumption in *S Franses Ltd v Cavendish Hotel (London) Ltd* (supra) at paragraph 6,

> "In accordance with a common practice in this field, the landlord supported its evidence of intention with a written undertaking to the court to carry out the works if a new tenancy was refused."

182. I refused the Defendant permission to put in the undertaking for the following reasons:

i) Even with the re-draft of the undertaking as a result of Mr Galtrey's intervention, I found that it was still likely to be unenforceable. The undertaking is a conditional one and has no time limit for when the works must be completed. As such, I found the undertaking too uncertain to be enforceable.

ii) I found the undertaking was not genuine. I found Mr Kriticos' explanation for not having provided an undertaking, namely that he was unaware of the ability to provide an undertaking, unlikely bearing in mind that the Defendant's solicitors specialise in commercial property. It can be seen from the Defendant's solicitors letter to the Claimant dated 13 March 2023[137], that the Defendant's solicitors have a mastery of the issues in this preliminary issue, including the need for the Defendant to prove a genuine and settled intention to carry out the works. Further, an undertaking was not offered in re-examination or at the end of the first day of the hearing. It was only offered on the third day, after Mr Slater had been cross-examined and on any view his evidence had been very substantially undermined.

iii) I accept the force of Mr Galtrey's submission that he would have wanted to examine Mr Kriticos upon the undertaking. No explanation was given by Ms Mattsson as to why the undertaking was not given at the end of the first day or on the second day, when Mr Kriticos could have been recalled and cross-examined upon it.

iv) Ms Mattsson submitted that prior to the trial, the Defendant was unaware that the Claimant was disputing that the Defendant intended to carry out all or any of the works. With respect to Ms Mattsson, this submission was wholly unsustainable. The Claimant's Part 18 request for further information and request for disclosure[138], dated 14 September 2023 states,

> "Request
>
> The Claimant disputes that the Defendant intends to carry out all or any of the works described in the particulars in the defence..."

Findings - genuine and settled intention to carry out the works

Works to ground floor

183. Mr Kriticos accepted in cross-examination that the Defendant had wanted since 2014 to recover the upper floors and not the basement from the Claimant. By an email,

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[137] 3002-3003
[138] 20-23

dated 6 January 2015[139], from Mr Kaimakamis of Atlas, who are the Defendant's agents, it is said,

> "Further to our meeting on site and our subsequent conversation this morning, my client would like to put forward the following proposal;
>
> Sainsbury's to surrender the upper floors of 329 & 331 Kentish Town Road to the landlord at nil premium. The landlord will cover Sainsbury's legal and other professional expenses associated with the surrender."

184. In April 2015, the Defendant made a pre-planning application to the London Borough of Camden for the change of use of the upper floors from ancillary retail floor space to residential and the erection of a rear extension to provide flats[140]. This application did not make any change to the staircase from the ground floor to the first floor. I accept Mr Galtrey's submission that this was because the Defendant knew that planning permission was unlikely to be obtained if the retail use on the ground floor by the Claimant was not maintained. In the letter which accompanied this pre-planning application, dated 24 April 2015[141], from Savills on behalf of the Defendant to the planning services at London Borough of Camden, there was no mention of any works to the staircase and it was said[142],

> "As discussed above, the Sainsbury's store at ground floor level will not be impacted as part of the proposals and there will be no loss of retail footfall area as part of the change of use."

185. When London Borough of Camden replied to Savills by a letter dated 3 June 2015[143], they expressly said under the heading "Loss of retail floor space",

> "The supermarket would continue to occupy the ground floor and basement of the building. …
>
> *The principle of development*
>
> *Loss of retail floor space:*
>
> The proposal would result in the loss of ancillary retail space at the 1st, 2nd and 3rd floor levels of the building; however, the ground and basement level would remain in Class A1 retail use."

186. Mr Kriticos was asked in cross-examination why everything went quiet regarding the re-development between 2016 and 2019. He answered that because the Claimant was not responding to the Defendant's request that it surrender the upper floors, the

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[139] 2155
[140] 2172-2192
[141] 2165- 2171
[142] 2168
[143] 2193-2201 at 2194 and 2196

decision was taken to wait until the end of the lease and then go for redevelopment and try to take over the whole building.

187. There are minutes of a board meeting on 1 July 2020[144]. The minutes are taken formally. It was checked that there was a quorum. The two Directors, Mr Kriticos and his wife, were present. Paragraph 2 of the minutes refers to considering matters concerning the redevelopment of the Property. At paragraph 3 it says[145],

> "Resolution
>
> After due and careful consideration, it WAS RESOLVED that the development plans should be entered into subject to the relevant planning approvals being granted."

188. In the Defendant's application for planning permission, dated 21 September 2020[146], to convert the upper floors from ancillary retail use to residential use, the Defendant was asked under the heading "Employment", "Are there any existing employees on the site or will the proposed development increase or decrease the number of employees?" and answered "no". I find that the Defendant answered "no" because the Claimant was going to be able to stay open. Significantly, there was no reference on this application form to the loss of floor space by widening the staircase from the ground floor to the first floor.

189. The Defendant instructed HUT Architects to provide drawings. HUT Architects provided a drawing, E902[147], showing the existing layout of the ground, first, second and third floors of the Premises, and a drawing, P902[148], showing the proposed works to the ground, first, second and third floors.

190. I accept Mr Galtrey's submission that drawings P901 and E902 show that the width of the staircase from the ground floor to the first floor would remain the same without being widened. I reject Mr Kriticos' answer in cross-examination when he said that the plans were not really correct and you needed to look at the drawings on an Autocad system.

191. In the planning statement[149] provided by Savills on behalf of the Defendant in September 2020, at paragraph 5.4[150] it is said,

> "The proposed development will also convert a small portion of the rear ground floor from retail (A1) to residential use (C3) to provide a residential entrance with required servicing areas off York Mews. Approximately 27sqm will be converted which is considered to be a very minor portion of the overall A1 floorspace at the site **and will not compromise the viability of**

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144 2208
145 2208
146 2394
147 2207
148 2206
149 2423-2447
150

> **the retail premise located over the basement and ground floor levels.** Furthermore, the minor loss of A1 floorspace will be compensated by the provision of an enhanced retail access off York Mews." (my emphasis)

192. When it was put to Mr Kriticos that Savills was saying in terms that the change of use works would not compromise the viability of the Claimant's retail business, he had no answer to this point. It was put to him that there was no reference to the toilet and fridge on the ground floor having to be moved because the wall was not going to be moved. He replied that Savills had made a "minor error". I find that Savills had not made a minor error. Their evidence was consistent with HUT's drawing, which showed that the wall was not moving.

193. It was put to Mr Kriticos in cross-examination that planning permission was granted by the London Borough of Camden based upon the drawings provided by HUT Architects. I found Mr Kriticos was evasive and obstructive in answering this question. Mr Galtrey had to take him to the planning decision letter from the London Borough of Camden, dated 21 September 2022[151], which shows that planning permission was approved on the basis of the drawings provided by HUT Architects, including P902 and E902.

194. An engineering firm, Entuitive, were instructed by Mr Kaimakamis on behalf of the Defendant. Entuitive provided a letter, dated 12 March 2021[152], in which a senior engineer, Mr Mistry, says that the only structural elements to the Defendant's works at the Property are the addition of two storeys to the existing flat roof at the rear of the structure. There is no reference to the widening of the staircase from the ground floor to the first floor.

195. I found Mr Kriticos extremely evasive when answering the question as to when the Defendant took the decision to cancel the flats works and instead refurbish the upper floors as offices. He initially would not even give the year, saying he could not remember exactly. Eventually he said it was after full planning permission was obtained on 21 September 2022. Mr Kriticos said that the Defendant stopped the flats works because they considered there would be insufficient space at the rear of the Property for plants works for commercial clients. I find it implausible that the Defendant had been considering the flats works from 2014 to 2022 with professional advisers, including Atlas, Entuitive and Savills, and only after eight years considered that there would not be sufficient plant room at the rear of the Property, and as a consequence cancelled the flats works. I found this answer untruthful, and this has a serious consequence on Mr Kriticos' credibility.

196. I find that the Defendant's Section 25 Notice was issued on 13 January 2021[153] with the intention of relying on the flats works to oppose ground (f) and not works to the basement or widening of the staircase from the ground floor to the first floor. At some point, the Defendant cancelled the flats works. Mr Kriticos was asked in cross-

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[151] 2957-2963
[152] 2583
[153] 521

examination when the Defendant cancelled the flats works and said he could not say when it was. I find it implausible that he would not know this date.

197. Mr Kriticos agreed that the Defendant's decision to refurbish the upper floors as offices came after the Defendant's s.25 Notice on 13 January 2021 and after the Defendant's Defence was served on 29 September 2021. He said the decision was taken some time in 2022.

198. Mr Kriticos said that the Defendant decided to refurbish the first and second floors as offices because it could do this without obtaining planning permission and it did not want any further delay. I find this implausible because since 2022, the Defendant has only obtained one plan from its architect, dated 2 August 2023[154], when it was asked to do so. there was nothing on this plan about the ground floor. On Mr Kriticos' own admission, the Defendant has taken no practical steps to further these works. He agreed in evidence that there was no draft building contract, no draft programme of works and no heads of terms.

199. In the Defendant's response to the Claimant's Request for Further information[155], dated 14 September 2023, the Defendant was asked why steel beams were required. I find the Defendant's reply highly informative: the Defendant says that steel beams are no longer required for the construction of the residential flats. Mr Kriticos accepted in cross-examination that the staircase did not need to be widened for the office refurbishment but said this would be required if there was a change of use to residential use. Eventually, shortly before closing submissions, the Defendant conceded that the staircase did not need to be widened for building regulations purposes for residential development. I find that the Defendant did not seek planning permission to widen the staircase when obtaining planning permission for the flats works. They have sought to argue in the present case that they needed to widen the staircase for building regulations. They eventually, and only before closing submissions, abandoned this as it was baseless. The suggestion that they may need to widen the staircase in the future is wholly irrelevant to the present case, and moreover they cite no basis in the Building Regulations for needing to do so. All of this reflects very adversely on the credibility of the Defendant and Mr Kriticos.

200. At paragraph 16 of his witness statement, Mr Kriticos says that the Defendant purchased the Property because it saw potential in developing the building by refurbishing the existing upper floors and the basement. Mr Kriticos was forced to agree that prior to the email of 5 February 2021 from Mr Kaimakamis to Savills, stating that a potential new retailer had said that they would want the basement to be dropped by a metre or so, there was no document from the Defendant showing any intention or desire on the Defendant's behalf to carry out basement works. He was asked if he told anyone else about his desire to carry out basement works and he answered that it was "an aspiration" of his. Unfortunately I have to find that he was not telling the truth and that he and the Defendant were not considering works to the basement prior to 5 February 2021.

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[154] 2131
[155] 20-23

201. There are no minutes of a board meeting confirming that the Defendant had changed its development plans and now had resolved to carry out works to the ground floor and the basement. There are no company minutes recording a resolution to enter into these works. Ms Mattsson submitted that one would not expect minutes of a meeting because the directors were husband and wife and they trusted each other. I find that this submission is undermined by the fact that there were minutes in relation to the flats works. The Defendant offered no explanation for why there were minutes for the flat works but not the office refurbishment and basement works. I find that the absence of a minute for a board meeting confirming that the Defendant passed a resolution to carry out the ground floor and basement works is further evidence showing that the Defendant does not have a genuine and settled intention to carry out the works.

202. The Defendant says that it has spent approximately £150,000 on the preparatory work for the flats development and £50,000 for the basement works. I find the significance of this expenditure is considerably weakened by the fact that it was accepted by the Defendant that approximately £150,000 of this sum was in relation to the flats works, which Mr Kriticos said the Defendant never had a settled intention to carry out. Mr Kriticos said that regarding the flat works, the Defendant was reserving its final decision depending on further information that may come to light.

203. I accept the evidence of Mr Sullivan in his report at paragraph 4.5.7[156],

> "It is unclear if there are any plans to undertake these works, the confirmed scheme as described in the order of cost estimate KTR basement March 22 states at 1.93 that the new staircase is not required, there is no reference to widening the staircase elsewhere in that document and no costs have been allowed."
>
> Regulations are generally not retrospective, but I anticipate that these works are being undertaken in anticipation of the subsequent redevelopment of the upper floors to residential use, for which the Defendant has planning consent and states in the witness statement that they may consider undertaking at a later stage."

204. I find that the Defendant has failed by a very long way to prove on the balance of probabilities that it has a genuine and settled intention to carry out ground floor works to widen the staircase from the ground floor to the first floor.

Works to basement

205. I find that the proposed works to the basement are also a contrivance to get the Claimant out of the Property. I find that these works were always conditional on the works to the upper floors taking place. In a letter, dated 11 February 2021[157], from Harvey Mistry, Senior Engineer at the Claimant's agents, Entuitive, to Mr Kaimakamis, Mr Mistry says regarding the basement,

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[156] 159
[157] 592-594

> "We understand that this application is independent to the work on the upper floors, but that if planning is granted then the basement is unlikely to proceed without the work to the upper floors."

206. When Mr Kriticos was asked whether this passage was true, I found him evasive and dissembling. At first, after a long pause, he asked to read the paragraph again. He then said he was a bit confused as to what it was saying when the passage is simple and clear. Mr Kriticos had no answer as to where Mr Mistry would have obtained his understanding from if not from Mr Kriticos. It is clear law that a conditional intent is insufficient to establish a genuine and settled intention.

207. Mr Kriticos was referred to a basement impact assessment for 329-333 from Entuitive, dated 26 March 2021[158]. He accepted that he could not have done this project at the time and still could not do it today. He was referred to a plan prepared by Entuitive[159] as part of the impact assessment and to the photograph of the staircase from the basement to the outside hatch taken by Ms Windsor[160]. Mr Kriticos agreed that if 333 Kentish Town Road was not included, this was the only staircase from the basement and the plan showed that there was no intention to build another staircase from the basement.

208. As the basement works stand, they cannot be lawfully carried out in accordance with Building Regulations.

209. Mr Kriticos agreed in cross-examination that the plan set out for the works in the CMP was totally unfeasible. Moreover, I find that the CMP stated matters that were untrue, in that it said:

    i) In reply to question 3: Mr Liner of Banks Design was the site project manager. In fact Banks Design had not been appointed.

    ii) In reply to question 21a, reference was made to site operatives controlling deliveries upon Stukeley Street, which is in Covent Garden.

210. I find that the timeline in the CMP was wholly unrealistic. I find that the CMP was not a genuine document and seriously damages the Defendant's credibility.

211. I conclude that the Defendant does not have a genuine and settled intention to carry out the basement works.

Would the Defendant be practically able to carry out the works?

212. It is common ground between the Parties that at this stage, the Defendant does not have to have dotted every 'i' and crossed every 't'. However, I find that the evidence shows that the Defendant could not lawfully practically carry out the works for the reasons set out below.

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[158] 657-717
[159] 681
[160] Supplemental bundle, 26

213. Further, it is agreed between the Parties that the basement works could not be carried out lawfully in compliance with building regulations Part B.

214. The Claimant's expert, Mr Sullivan, says in his expert report[161],

> "5.5.5 The travel distance from the final exit on York Mews to the front of the property is considerably in excess of these distances. If the chamber in the centre of 331 is also included the distance is yet further. I have marked up a basement plan using a bar scale (appendix C) There are 7 bars shown front to back, the distance is therefore in excess of 35m. It is closer to 40m if the chamber to the centre of 331 is taken into account. On that basis, the basement is incapable of meeting Building Regulations, and it will be illegal to occupy it. The basement only works if a further staircase is introduced, or the property remains open to 333. There is no plan to introduce a further staircase. Even if there was, it is unclear where that could be located without impinging on the use of the retail space, resulting in loss of space and rental income.
>
> ...
>
> 6.2 Overall conclusion
>
> 6.2.1 ... The scheme appears incapable of having a staircase being formed as planned without disabling access to the upper parts. The inability to comply with Building Regulations Part B in minimum travel distances appears to be incapable of being overcome."

215. I find that the travel distance from the final exit on York Mews to the front of the Property is not a mere detail which can be characterised as dotting every 'i' and crossing every 't' but is fundamental to whether the works can be practically and lawfully carried out. The Defendant's expert, Mr Slater, had no answer as to how the inability to comply with Building Regulations Part B in minimum travel distances could be overcome. Ms Mattsson sought at length to explore with the Claimant's expert, Mr Sullivan, how the inability to comply with Buildings Regulations Part B could be overcome. Mr Sullivan, consistent with his report, said he did not see how it could be overcome. There is no evidence before the Court as to how this inability to comply with Buildings Regulations Part B can be overcome. Ms Mattsson was driven to saying that a design and build contractor would in some wholly unspecified way be able to overcome the inability to comply with Buildings Regulations Part B. I find that this inability to show that it would be practical to carry out the works in compliance with Building Regulations is another piece of cogent evidence which shows that the Defendant does not have a genuine and settled intention to carry out the works, and that the works cannot be practically carried out.

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[161] 173 and 180

216. In cross-examination Mr Kriticos was referred to a plan prepared by Entuitive[162] as part of the impact assessment and to the photograph of the staircase from the basement to the outside hatch taken by Lauren Windsor[163]. Mr Kriticos agreed that if 333 Kentish Town Road was not included, this was the only staircase from the basement and the plan showed that there was no intention to build another staircase from the basement.

217. Mr Kriticos was referred to the Defendant's planning application[164]. At question 15, it was stated that no new or altered pedestrian access to or from the public highway was proposed. He agreed that neither the planning and design statement nor the construction management plan made any reference to another staircase from the basement.

218. I find that there is no evidence to support Ms Mattsson's assertion that access to the basement can be created in the same way as access to the basement exists currently from No 333. The plans put before the Court by the Defendant do not show how the staircase can lawfully be built.

219. It is common ground that at present, there is no entrance to the Property from Kentish Town Road. Mr Sullivan says in his expert report[165],

> "3.1.1.3. The Property is accessed via the Tenant's front entrance in 333 on Kentish Town Road. There is no entrance into the demised property from the front."

220. The Defendant has not made a planning application for permission to make an entrance to the Property from Kentish Town Road. The Defendant provides no explanation for why it did not do so when seeking planning permission. I find that the Defendant did not seek planning permission for an entrance from Kentish Town Road because there was no genuine, settled intention to carry out the works to the basement. The alleged works to the basement have arisen as a contrivance to justify the ground (f) opposition since the s.25 notice was served. Nor has the Defendant applied for parking suspensions for the building works to be carried out. Mr Sullivan said that it would be very difficult to obtain parking suspensions on Kentish Town Road. In his report, Mr Sullivan says[166],

> "1.1.10 ... It has a busy road to the front with parking limitations and a narrow road to the rear. Loading and removal of waste/ materials will be challenging."

221. I find that the fact that the need for planning permission to make an entrance to the front of the Property from Kentish Town Road and the need to obtain parking suspensions has not even been considered by the Defendant is more evidence showing that the Defendant does not have a genuine and settled intention to carry out the basement works.

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[162] 681
[163] Supplemental bundle, 26
[164] 645
[165] 126
[166] 116

222. I find that on the Defendant's own evidence before the Court, it would not be practical to carry out the works. Mr Slater says at paragraph 8.01,

> "10) The exact methodology is not presented, nor are there any design drawings."

223. The Defendant's "Construction/Demolition Management Plan" (CMP), dated 19 April 2021[167], which was provided to the London Borough of Camden, states at box 3 that the site manager responsible for day-to-day management of the works is Mr Jake Liner of Banks Design. In cross-examination, Mr Kriticos said that Banks Design had not been appointed, which contradicts box 3 of the CMP. This plan provides a timeframe for the works to be carried out[168]. This provides that within the first month, the Defendant should "begin community liaison". The Defendant has complied with this: there is a letter from the operations manager at Banks Design, who was responsible for submitting the CMP[169]. This says,

> "Dear Neighbour,
>
> We are the contractor working at 329-331 Kentish Town Road and we would like to introduce ourselves prior to our being on site.
>
> We are currently expected to start works late June 2021 and our anticipated programme length is 40 weeks
>
> The scope of work includes the lowering of the existing basement level ranging from 270 millimetres to 730 millimetres.
>
> A first phase will include demolition and excavation which will involve regular waste away vehicles to remove spoil from site. We have produced a construction management plan which outlines how we intend to carefully manage this along with all other aspects of the build."

224. The timeline provided that the work could commence in June 2021 if the draft CMP was approved. If the CMP had to be resubmitted because the first draft required further development, the timeline says that the work could commence in late July 2021. It is said in paragraph 8 of the CMP[170], "Target start date is June 2021".

225. The CMP provides in paragraph 18b.[171],

> "As demonstrated on the above Transport for London Road Network Map, delivery drivers will be requested to approach

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[167] 828-863
[168] 832
[169] 839
[170] 835
[171] 844-846

> the site from Fortress Road and south onto Kentish Town Rd, under guidance from a banksman.
>
> Once they have completed their delivery they will be directed to return down Kentish Town Road."

226. The CMP provides[172],

> "Please refer to question 24 if any parking bay suspensions will be required to provide a holding area.
>
> 2no Parking bay will be suspended so vehicles do not queue or circulate on the public highway. Deliveries will be given set times to arrive, dwell and depart."

227. The CMP also provides[173],

> "21 a ... A designated site operative will ensure that traffic flow is maintained at all times and that any inconvenience to other road users (drivers, cyclists and pedestrian) is kept to a minimum. All subcontractors and suppliers will be required to give 48 h notice of deliveries. Deliveries will be allocated time slots to ensure good control and coordination and to minimise the chance of any disruption to other road users.
>
> The designated site operatives will be responsible for the movement materials from delivery vehicles to the site. Where necessary site operatives will control deliveries along the Stukeley St footway to ensure pedestrian safety is maintained at all times. Where deliveries will be made from the curb side in front of the site, the designated site operative will be responsible for the movement of materials from delivery vehicles to the site."

228. I find that as of June 2021, the Defendant could not comply with its own CMP timeline. It was a very long way from being able to carry out the ground floor and basement works. In June, July or August 2021, it could not practicably carry out the basement works because:

i) The travel distance from the final exit on York Mews to the front of the Property in the basement was considerably in excess of the maximum permitted. It would not be able to comply with Building Regulations Part B and so could not be lawfully carried out.

ii) There was no plan to introduce a further staircase.

iii) There was no planning permission to make a new entrance to the Property from Kentish Town Road.

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[172] 848
[173] 851

iv) The Defendant had not applied for parking suspensions for the building works to be carried out.

v) If lorries had approached Kentish Town Road to make deliveries in June 2021, there were no parking suspensions and there was no access to the Property from Kentish Town Road.

229. What is also conspicuous is that in January 2024 the problems identified above had still not been resolved, and as a consequence the works still could not be carried out, over 2½ years after the Defendant's CMP timeframe.

Conclusion on genuine and settled intention

230. I find that the Defendant has failed to prove on the balance of probabilities that;

i) It has, at the date of this hearing, a genuine and settled intention to carry out the works;

ii) It would be practically able to carry out the works;

iii) It would carry out the works whether or not the Claimant voluntarily gave up possession.

231. This finding is sufficient to dispose of this case. However, as I have been addressed at length as to the other issues in this case, for completeness I set out my findings below.

Is either party obliged to carry out the works under the tenancy?

232. It is not submitted by either Party that they are obliged under the terms of the current tenancy to carry out all or any of the works listed at paragraph 17 of the experts' joint statement[174].

The extent of the holding - overview

233. It is common ground that the only part of the Property occupied by the Claimant was the ground floor, excluding a 26m^2 area at the rear:

i) In the original Defence, the Defendant said[175],

> "3. … It is denied that the Claimant occupies the whole of the Property for the purposes of its business. The Property comprises of three floors for commercial office usage and a basement area. Neither of these are used and or occupied by the Claimant for the purposes of its business or at all."

ii) In his witness statement, dated 19 January 2024, Mr Cowen says[176],

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[174] 107-108
[175] 16
[176] Supplementary bundle, 4

> "As a result of the works, I confirm that the only areas of the Premises which Sainsbury's uses are:
>
> (a) the area edged and coloured blue on the Plan[177]; and
>
> (b) a small area at the rear of the flat roof as shown in the photographs[178] at pages [7-9]."

iii) Mr Kriticos accepted in cross-examination that the basement and upper floors had a negative asset value to the Claimant and were not used by the Claimant.

234. Mr Galtrey submits that, applying the definition of holding in s.23(3) of the Act, the holding is the occupied part of the Property and is therefore only the ground floor of the Property, excluding the 26m^2 area at the rear.

235. Ms Mattsson relies upon s.32(2)(b) of the Act and submits that the holding is the whole of the Property, and as a consequence the holding is the ground floor, basement and upper floors of the Property.

Defendant's submissions as to the extent of the holding

236. Ms Mattsson submits that the definition of holding in s.23(3) of the Act does not apply where the Landlord has elected that the new lease to be granted is of the whole of the Demise, and she relies upon s.32(2)(b) of the Act. She referred the Court to *Pumperninks of Piccadilly Limited v Land Securities PLC* [2002] Ch. 332[179] at paragraph 21, where Charles J said,

> "In my judgement those sections [30(1)(f) and 31A] should not be construed and applied in isolation and sections 23(1) and (3), 32 and 35 are also of particular relevance."

237. Ms Mattsson submits in her closing submissions,

> "23. The Tenant's case is that the words 'the following' in subparagraph (2)(b) of s 32 mean that for the purpose of the grounds of opposition in s 30, the holding is just the part occupied by the tenant at the date when the order is made for the new lease ('the relevant date') (expanded upon below). It follows that there are two completely distinct definitions of 'the holding' in operation at the same time. This, it is submitted, is wrong for the reasons set out below.
>
> ...
>
> 26. The following principles are relevant to determining whether 'the holding' has one or two definitions under Part 2 of the 1954 Act:-

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[177] Supplementary bundle, 6
[178] Supplementary bundle, 7-9
[179] Joint authorities bundle, tab 5

> (1) The 1954 Act is drafted so that the only date which is relevant is the date when the order for the new lease is made - that is 'the Relevant Date' for all of the provisions (the Act is not drafted so as to take account of any 'preliminary issue hearing'): Caplan v Caplan (No1) [1962 1 WLR 55].
>
> (2) Section s32(2) is mandatory and accordingly once the landlord has 'elected' the court has no discretion to grant a tenancy over any part other than the whole property demised under the current lease.
>
> 3. The purpose of the mandatory Ground (f) is to allow a landlord to redevelop property."

238. Ms Mattsson submits that there is only one relevant date, and that is the date upon which the order for a new tenancy is made, and not the date of the decision of the preliminary issue as to whether the Defendant has established (f) of s.30(1). She submits in her closing submissions,

> "29. It is submitted that it would make a mockery of a landlord's (mandatory) right to redevelop the property it owns under Ground (f) – subject to paying compensation for the 'holding' under s 37 - if the tenant could following the landlord's election under s 32(2):
>
> (i) move its business operation into a small part of the premises let, say, the day before the hearing (the Act only envisages the one hearing) thereby shrink the 'holding' under Ground (f) and;
>
> (ii) be granted a tenancy of the whole of the property let under its current tenancy, which is mandatory.
>
> ...
>
> 31. The whole of Part II - in particular sections 31A and 37 - is, it is submitted, was drafted assuming there is one definition of the holding only - not two at the same time.
>
> 32. It follows that on the tenant's case - all that it has to do is to offer the landlord access to the shaded blue area[180], but not the basement or the upper floors etc. If it does offer such access, then it defeats Ground (f) - and gets a tenancy of the whole. It is then of course, entitled to deny access to the rest of the building. Such access would not be permissible under s35 as it would be inconsistent with the very security of tenure and policy of the Act: Renewal of Business Tenancies 6th Edition 7-221.
>
> ...

[180] This is a reference to a plan exhibited to Mr Cowen's second witness, supplementary bundle, 6

> 34. This would, it is submitted, because the Tenant's case that there are two definitions of the 'holding' to be applied at the same time yields an absurd result."

Claimant's submissions as to the extent of the holding

239. Mr Galtrey submits that "holding" is defined in s.23(3) of the Act[181], which provides:

> "In the **following** provisions of this Part of this Act the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies." (my emphasis)

240. Mr Galtrey submits that the effect of this definition is that the holding is only those parts of the demise that the Claimant is occupying, and not the whole of the demise.

241. Mr Galtrey then refers to s. 32, which provides,

> "32. Property to be comprised in new tenancy.
>
> (1) Subject to the **following** provisions of this section, an order under section 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order.
>
> (1A) Where the court, by virtue of paragraph (b) of section 31A(1) of this Act, makes an order under section 29 of this Act for the grant of a new tenancy in a case where the tenant is willing to accept a tenancy of part of the holding, the order shall be an order for the grant of a new tenancy of that part only.
>
> (2) The **foregoing** provisions of this section shall not apply in a case where the property comprised in the current tenancy includes other property besides the holding and the landlord requires any new tenancy ordered to be granted under section 29 of this Act to be a tenancy of the whole of the property comprised in the current tenancy; but in any such case—
>
> (a) any order under the said section 29 for the grant of a new tenancy shall be an order for the grant of a new tenancy of the whole of the property comprised in the current tenancy, and

[181] Joint authorities bundle, tab 1, p. 2-3

> "(b) references in the following provisions of this Part of this Act to the holding shall be construed as references to the whole of that property." (my emphasis)

242. Mr Galtrey submits that:

i) S.32(1) of the Act is subject to "the following provisions of this section".

ii) S.32(2) of the Act is subject to "the foregoing provisions of this section", i.e. subsections 32(1) and 32(1A), but not any earlier section or any later section or subsection (so not s.31 or s.33, or s.32(3)).

iii) S.32(2)(b) of the Act is subject to "the following provisions of this Part of this Act", i.e. subsection 32(3) and s.33-46, but not any earlier section in Part II (so not s.30) nor any later section in Part III or Part IV.

243. Mr Galtrey submits that the references to 'following' and 'foregoing' are deliberate and precise and make sense in the context of the whole scheme of the Sections that make up Part II of the Act. The overall scheme and sequence of the sections in Part II of the Act follows a chronological order through the process of the renewal of a tenancy under the Act:

i) Sections 23 and 24 explain which tenancies are continued by the Act on the expiry of their contractual term;

ii) Sections 25 to 28 deal with how either party can initiate the process of terminating the continuing tenancy and /or granting a new tenancy;

iii) Section 29 explains that a new tenancy will be granted unless a landlord successfully opposes its grant;

iv) Section 30 sets out the grounds upon which a landlord may oppose the grant of a new tenancy;

v) The outcome of that opposition under section 30 determines the way forward:

a) If the opposition is successful, section 31 explains how the tenancy comes to an end;

b) If (and only if) the opposition is unsuccessful, sections 32-35 set out what the terms of the new tenancy are to be, and section 36 provides for the grant of a new tenancy on those terms.

244. Mr Galtrey submits that s.32(2) of the Act and the reference to the "following provisions" is only engaged if and when the landlord's opposition has already failed, and the Court has determined that a new tenancy will be granted. In the provisions preceding s.32 (including s.30 of the Act), the holding has the ordinary meaning, namely the occupied part. Normally, the tenancy would be of the holding only, and so the following sections (s.33-36 of the Act) when dealing with the terms of the new tenancy, make reference to the holding:

i) S.34 of the Act provides that the rent will be that which "the holding might reasonably be expected to be let in the open market";

ii) S.36 of the Act requires the landlord to grant, and the tenant to accept, "a tenancy of the holding".

245. He says that in the unusual case where s.32(2) of the Act applies and the landlord has elected that the new tenancy will not just be of the holding but instead of the whole of the premises, then the rent needs to be that of the whole of the premises, and so does the order for a new tenancy.

246. I was referred by both Parties to the case of *I & H Caplan Limited v Caplan (No. 1)* [1962] 1 WLR 55[182]. In this case, the tenant of premises occupied for business purposes claimed a new lease under the Act. The landlords opposed the claim on the ground that they themselves intended to carry on business there, but the Court of Appeal, reversing the decision of Lloyd-Jacob J. on this point tried by him as a separate issue, decided it against them. The landlords also alleged that the tenant had ceased to carry on business at the premises and had no intention of resuming business there and, therefore, was outside the Act. The Court of Appeal referred the case back to the Chancery Division to determine whether "at the date of this order and in the events which have happened," the tenant was entitled to the grant of a new tenancy. The tenant contended that under section 32(1) the relevant date was not that of the order of the Court of Appeal. The House of Lords held that the relevant date was that when the grant of a new tenancy came to be made, reversing the decision of the Court of Appeal. Lord Reid said at pages 58-60,

> "The only question which has to be decided and the only question which, in my view, can properly be decided in this appeal is the proper time for designating the holding under section 32. The position when the Court of Appeal made their order was that there had been no inquiry into the facts except on the question of the respondents' intention with reference to section 30 (1) (g) .
>
> ...
>
> I doubt whether the first time the appellant asked for the grant of a new tenancy was in fact at the hearing before the Court of Appeal but, whether that be so or not, I do not agree that that is the proper date under section 32. It specifies the date of an order for the grant of a new tenancy, not the date when such an order is asked for, which, owing to appeals or other causes of delay, may be long before the order is granted. The policy of the Act appears to be that not only the extent of the holding but also the rent, duration and other terms of the new tenancy should be determined as nearly as may be at the time when the new tenancy is granted and this seems right because

[182] ±Joint authorities bundle, tab 1

> circumstances may alter and the tenancy ought not to be granted in light of obsolete conditions.
>
> "It is quite true that section 32 cannot be applied with literal accuracy because there may have to be some small interval between the hearing of the evidence and the making of an order, but circumstances are unlikely to change in so short a time. If, for any reason, any considerable time elapses and either party maintains before the order is made that there has been a material change, then it may be necessary to take further evidence."

247. Mr Galtrey submits in his closing submissions that,

> "27 a. The question for D to answer is this: if (as contended by D) the extent of the holding cannot be different between the trial of the preliminary issue and the trial of the terms of the new tenancy, why was the appeal in Caplan necessary, and why did the House of Lords not simply point that out to the tenant who was worried that the holding had changed since the trial of the preliminary issue (in that case Ground G, which also refers to the holding)? The answer of course is that it was so obvious to both parties and their Lordships that the holding for Ground G purposes might end up being different from the holding for section 32 purposes, and so the appeal was necessary."

248. Mr Galtrey referred the Court to Reynolds & Clark *Renewal of Business Tenancies*, 6th edition, under the subheading "2. The Property s.32" at paragraph 8-012[183], which I set out at paragraph 258 below. Ms Mattsson had submitted that it would make a mockery of a landlord's right to redevelop a property if the tenant was able to move its business operation into a small part of the Premises, and therefore shrink the holding under ground (f). Mr Galtrey says that this submission was misconceived and that one of the consequences of the definition of a holding in section 23(3) was that the tenant could shrink the holding. In support of his argument, he referred the court to Reynolds & Clark, at paragraph 148.

249. Mr Galtrey observed that by shrinking the holding, the tenant runs the risk that the landlord can subsequently elect that the new tenancy be of the holding and not the whole of the property.

250. Mr Galtrey referred to *Narcissi v Wolfe* [1960] Ch 10, in which it was held that the premises genuinely occupied by the tenant at the date of the order constituted the holding irrespective of his motive for occupying them.

251. Mr Galtrey submits that there is an important auxiliary point, that only arises if the Defendant is right and the holding for ground (f) purposes is the whole of the demise. He says that PD 56 provides that the landlord must make the election as to the extent of the Property at the first opportunity: in the claim form if the landlord is the

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[183] Joint authorities bundle

Claimant (56PD.7 paragraph 3.7(2)[184]), and in the Defence if the landlord is the Defendant (56PD.12 paragraph 3.12(2)(f)[185]). In the Defence, it is said at paragraph 6.1[186] that the Defendant's proposals for the terms of the new tenancy are that the Demise is "the basement and ground floor only". Mr Galtrey continues that if the Claimant's case on s.32(2) of the Act is correct, the ground (f) trial (or any other ground of opposition) will proceed by reference to the holding using the conventional definition and the issue will be whether the Defendant's plans will interfere with the Claimant's continued use of what it is actually occupying. Then, if the Defendant's opposition fails, at the trial of the terms of the new tenancy, the Defendant can take a view as to whether it would rather confine the tenant to the part that it is occupying at that time.

252. However, Mr Galtrey submits that if the Defendant's construction is correct, the Defendant is given an unfair advantage: the Defendant can, just before the ground (f) trial, as in this case, amend its Defence to reverse its initial election and require any new tenancy to be of the whole premises, making it much easier to succeed on ground (f). If the ground (f) opposition succeeds, the election becomes irrelevant as there will be no new tenancy. If the ground (f) opposition fails, the Defendant can reverse its election and leave the Claimant with a new tenancy of only the occupied part. Mr Galtrey submits in his closing submissions at paragraph 32 that,

> "The drafters of the act, and of the CPR, cannot have intended to give landlord a tactical 'free hit' in this way. If D is right about the legal effect of section 32(2) in respect of the holding, then the landlord should not be permitted to change its election at will to suit the way that the tactical wind is blowing: it is fixed with its original election."

Finding as to the extent of the holding

253. I find that the question as to what the holding is for the purposes of the present proceedings is one of construction of the Act. S.30(1)(f) of the Act provides that a landlord may oppose an application for a new tenancy on the following ground:

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

254. The works to be considered are those which are to be carried out on the holding. The holding is defined in s.23(3):

> "In the **following** provisions of this Part of this Act the expression 'the holding', in relation to a tenancy to which this

[184] Civil Procedure 2023, vol. 1, p 2047
[185] Civil Procedure 2023, vol. 1, p.2048-2049
[186] 18

> Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies." (my emphasis)

255. I find that the effect of s.23(3) is that the holding is only those parts of the demise that the Claimant is occupying, and not the whole of the demise. The Defendant accepts that the occupied part of the demise is only the ground floor, excluding the 26m^2 area at the rear.

256. I find that it is of great significance that s.32(1) of the Act is subject to "the following provisions of this section", i.e. 32(1A), 32(2) and 32(3), and not any earlier section, or any later section. S.32(2) applies to "the foregoing provisions of this section". When I put the point to Ms Mattsson when she was making her submissions that insertion of the words "following provisions of this section" would not include sections prior to s.32, including s.30, she replied that the word "following" was otiose and could be ignored. Ms Mattsson provided no reasoning nor authority for this submission. I find that this is an impossible construction because it would involve re-writing s.32 of the Act. The parliamentary draftsman has identified by the use of the words "following" and "foregoing" precisely which provisions of section 32 each subsection of s.32 is subject to. I accept Mr Galtrey's submission that the differences between subsections 32(1) and 32(2) are deliberate and precise and cannot be ignored.

257. I find that as a matter of construction:

i) s.32(2) of the Act is only engaged if and when the landlord's opposition to a new tenancy has already failed and the Court has determined that a new tenancy shall be granted.

ii) In the provisions preceding s.32 (including s.30 of the Act), the holding has the ordinary meaning: the Occupied Part.

iii) I find that Ms Windsor's submission in her witness statement at paragraph 6 that the Claimant, by reducing the extent of the property, leaves the Defendant with a commercially unlettable part of the ground floor is misconceived. If the Defendant's opposition to the grant of a new tenancy on ground (f) of the Act fails, the Defendant can elect pursuant to s.32(2)(b) that the new tenancy must be of the whole property.

iv) The effect of section 32(2)(b) of the Act is only to make these obvious changes, and not to have any effect on the operation of any preceding sections, including s.30 of the Act in general and ground (f) in particular, which always use the conventional meaning of the holding: the Occupied Part.

258. I find that this construction is supported by Reynolds & Clark on *Renewal of Business Tenancies*, 6th edition at paragraph 8-012[187],

> "2. The Property s.32
>
> It follows from these two decisions [*I & H Caplan Limited* (supra) and *Narcissi v Wolfe* [1960] Ch 10; [1959] 3 WLR 431] that the tenant has considerable scope for improving his position by enlarging the holding before the date of the order. For example, part of the premises might be sub-let at the date when the landlord serves s.25 notices on the tenant and sub-tenant. If the sub-tenant does not apply for a new tenancy, but vacates the sub-let part before the hearing of the tenant's application for a new tenancy, the tenant can, if he wishes, move into occupation of the sub-let part before the date of the hearing, in which case he will be entitled to a new tenancy of the whole of the property.
>
> ... Since the works to be considered under ground (f) are those which are to be carried out on 'the holding' and since the question of what is 'the holding' depends upon what parts of the premises comprised in the current tenancy are occupied by the tenant at the date of the hearing, the tenant can simply move out of those parts other than that which he wishes to be treated as 'economically separable', in which case the size of the holding will be reduced to that smaller part which he still occupies and the application of ground (f) and of s.31 must be considered in relation to that smaller holding."

259. Ms Mattsson argued that the above passage from Reynolds & Clark was not about the extent of the holding or s.32. I find that this submission was wrong because:

i) The previous main heading, above paragraph 8-006, is "The Property (S.32)"

ii) I & H Caplan is digested on this same point two paragraphs above the quoted extract.

iii) The passage immediately before the quotation discusses the converse position, where the tenant can enlarge the holding during the process of the trial by moving into a part of the premises that it was not previously occupying, thereby adding it to the holding.

260. Both parties alleged that the House of Lords' decision in *I & H Caplan* (supra) supported their contentions. I have no hesitation in preferring Mr Galtrey's submission that *I & H Caplan* is supportive of the Claimant's position. The House of Lords stated that the holding for the purposes of s.32 of the Act was to be determined at the date of the order granting the new tenancy, and not on the trial or appeal of the preliminary issue of whether the landlord's ground of opposition was made out. I

[187] Joint authorities bundle

accept Mr Galtrey's submission that if the extent of the holding could not be different between the trial of the preliminary issue and the trial of the terms of the tenancy, the appeal in *I & H Caplan* would have been unnecessary.

261. I reject Ms Mattsson's submission that this construction involves two definitions of holding at the same time. The Court is potentially considering the matter at two different times. Firstly, when considering the issue of s.30(1)(f) of the Act and secondly when considering the terms of the new tenancy under s.32-35 of the Act. I find that s.46 of the Act underlines the point that the holding may be considered at two different times by saying,

> "46. Interpretation of Part II.
>
> (1) In this part of the Act:-
>
> subject to the provisions of section thirty-two of this Act, "the holding" has the meaning assigned to it by subsection (3) of section twenty-three of this Act."

262. As to Ms Mattson's submission that it would be wrong if a tenant could reduce the size of the demise and obtain compensation for the holding under s.37, I find that this is misconceived for the reason stated by Mr Galtrey in his closing submissions: "Although sections 37 and 38 do refer to the holding, those sections apply where the tenant is quitting the holding i.e. no new tenancy is being granted, and so cannot apply where section 32(2) also applies."

263. As to Ms Mattsson's submission that s.32(2) of the Act is mandatory and accordingly, once a landlord has "elected", the Court has no discretion to grant a tenancy over any part other than the whole property demised under the current lease, I again find that this is misconceived. The Court at this stage is not granting a tenancy but is determining whether the landlord's opposition under ground (f) of s.30(1) of the Act has been made out.

264. Late in her closing submissions, Ms Mattsson said she had received instructions to say that the Defendant's position in its amended Defence at paragraph 11 that any new tenancy must be of the whole of the Property was final and irrevocable. Mr Galtrey submitted that Ms Mattsson should withdraw her "instructions" on the grounds that she was giving evidence. He said this evidence should have been given by the Defendant and he would have cross-examined him on it. Ms Mattsson refused to withdraw this evidence on the basis that it was her instructions. With respect to Ms Mattsson, I find she was giving evidence, which is impermissible and as a consequence, I pay no regard to it. Moreover, I find that the Defendant's assertion that the new tenancy must be of the whole of the Property and that this was final and irrevocable, is entirely irrelevant for the reasons given above when considering the Defendant's opposition to the grant of a new tenancy on ground (f) of s.30(1). For completeness' sake, I would add that I find that the Defendant could change its position at any stage prior to the Court determining the terms of a new tenancy.

Conclusion as to holding

265. I conclude that for the purposes of considering ground (f) of s.30 of the Act the defining section is s.23(3) and the holding is the occupied part of the premises. It is common ground that the occupied part is only the ground floor, excluding the 26m^2 area at the rear. Therefore the basement is not in scope when considering ground (f) of s.30 of the Act.

Would works to the ground floor engage ground (f) of s.30(1) of the Act?

Introduction

266. There is a colour photograph of the staircase from the ground floor to the first floor at the rear of the property[188].

267. As I have already found, there is only architect's drawing[189] which shows the proposed works to the upper floors. This a drawing by HUT, dated 2 August 2023, entitled "Kentish Town Road typical office plan". There is no plan at all of the ground floor.

268. It is common ground that if the staircase from the ground floor to the first floor is widened, it would project into the part of the basement occupied by the Claimant by about 8 inches (i.e. 20cm).

Defendant's submissions

269. Ms Mattsson makes three submissions:

i) The landlord's proposed works do not have to be effected upon the whole or a substantial part of the holding. The issue of substantiality relates to the work or the premises comprised in the holding affected by the work, not the extent of the holding upon which that work is to be effected.

ii) It is not open to the tenant, in challenging ground (f), to contend that the landlord ought to be doing different or other work. She refers to *S Frances Ltd v Cavendish Hotel* (London) Ltd [2019] (supra) at paragraphs 15 and 35.

iii) She says that the works to the stairs involve removing a wall and moving or replacing structural steels.

Claimant's submissions

270. In his closing submissions, Mr Galtrey submits,

> "35. c. To the extent that the widening of the staircase would require works within the Occupied Area, then even on C's case on the meaning of section 32(2) that small part of those works would fall within the holding. If D is right on the meaning of

[188] Supplementary bundle, 37
[189] 2131

> section 32(2), the widening works will all fall within the holding.
>
> 36. The part of the widening works that would fall within the holding are not however works that engage Ground F. D has never articulated which part of the wording of Ground F it relies on, but it cannot be argued that the works are either a demolition or reconstruction of a "substantial part" of the holding: at their highest they affect only a tiny proportion of the holding."

271. Mr Sullivan says in his expert report, dated 14 December 2023, when dealing with the Defendant's proposal to widen the staircase[190],

> "6.1.32. The works are not within the cost plan … The rationale to widen is not clearly articulated."

Finding as to whether the works to the ground floor would engage ground (f) of s.30(1) of the Act

272. I find that the alleged works to widen the staircase do not engage ground (f) for three reasons.

The works intended

273. Firstly, I have found that the Defendant has not proved on the balance of probabilities that it has a genuine and settled intention to widen the staircase from the ground floor to the first floor.

Demolition, reconstruction or substantial work of construction

274. Secondly, it is conspicuous that even in her closing submissions at paragraph 36, Ms Mattsson does not say which part of ground (f) the Defendant relies upon.

275. I find that the purported widening of the staircase is not a demolition or reconstruction of the premises comprised in the holding or a substantial part of those premises.

276. I find that the proposed work to the staircase would amount to construction. The question is whether the construction is substantial. This is a question of fact and degree. Ms Mattsson submitted that the works to the staircase would involve removing a wall and moving or replacing structural steels. I find that there is no evidence for this submission at all. There is only one plan for the office refurbishment, and that does not show the ground floor[191]. As Mr Sullivan observes in his report at paragraph 4.5.7[192],

> "It is unclear if there are any plans to undertake these works, the confirmed scheme as described in the order of cost estimate

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[190] 179
[191] 2131
[192] 159

> KTR basement March 22 states at 1.93 that the new staircase is not required, there is no reference to widening the staircase elsewhere in that document and no costs have been allowed."

277. I have considered the discussion in Clark and Reynolds on *Renewal of Business Tenancies* at 7-126 to 7-129[193]. I have noted the cases of *Marazzi v Global Grange Ltd* [2002] EWHC 3010 (Ch); [2003] 2 E.G.L.R. 42., digested at paragraph 7-128 and *Ivorygrove Ltd v Global Grange Ltd [2003] EWCA 1409 (Ch); [2003] 1 W.L.R. 2090,* digested at paragraph 7-129 of Clark and Reynolds.

278. I accept Mr Galtrey's position that the proposed works in the present case are less substantial than those in the cases of:

i) *Atkinson v Bettison* [1955] 1 WLR 1127. In this case, the tenant's premises consisted of three floors. The landlord's proposed works were confined to the ground floor, involving the removal of the existing shopfront and its replacement with an arcade entrance suitable for a jeweller's shop, together with the removal of a wall at the back. The county court judge held that these works did not constitute a reconstruction of a substantial part of the premises, a decision with which the Court of Appeal declined to interfere.

ii) *Percy E Cadle & Co v Jacmarch Properties* [1957] 1 QB 323. In this case, the tenant's premises consisted of the ground and basement floors of the building. The ground floor was split into two parts. The front part was used as a tobacconist's shop while the back was used as a men's hairdressers. Access to the basement was by means of steps outside the ground floor. The basement was used for storage. The landlord's proposal was to convert the two floors into one self-contained unit (incorporating the first floor of the building, which was occupied by another tenant). New inner staircases were to be installed and a new floor was to be laid in the basement. It was intended to put new lavatories into the first floor. The Court of Appeal found unanimously that the County Court Judge was entitled to reach the conclusion that he did that the landlord's proposal did not constitute a reconstruction of a substantial part of the premises.

Could ground floor works reasonably be carried out without Defendant obtaining possession of the holding?

279. It is agreed by the Defendant's expert in the "Statement of issues agreed and disagreed"[194] at paragraph 28,

> "The works to the ground floor can be undertaken without possession of the Property."

280. Ms Mattsson sought to argue that the experts did not consider the widening of the wall in the joint statement. I reject this submission because the experts say that they do not agree[195],

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[193] Joint authorities bundle, tab 8
[194] 105-110 at 109

> "40. The extent to which the Landlord proposes to widen the staircase between ground and first, and whether that work is necessary, and can be achieved in another way."

281. Moreover, Mr Slater admitted in cross-examination that he did not say anywhere in his report that the staircase from the ground floor to the first floor could not be widened without the Defendant obtaining possession. More importantly, he admitted that the widening of the staircase could be carried out with the Claimant remaining in occupation of the ground floor.

282. For completeness' sake, I would add that I accept the following evidence, which all demonstrates that the works to the ground floor could reasonably be carried out with the Claimant remaining in occupation:

i) Mr Sullivan said in his expert report[196],

> "Widening the stairs to the first floor
>
> 4.5.5. ... This work would take place within the compartmented area and would not be expected to impact on the Claimant's occupation."

ii) Mr Sullivan said in cross-examination that even if the wall between the stairs to the first floor and the toilet came down, this would only inconvenience the Claimant and not stop it remaining in occupation and trading. He provided a clear and convincing account of how one could put a timber frame up to the ceiling to make a partition wall, with some cross bracing in it, thus creating a screen and providing protection to the public and the staff. Plastic sheeting over this would stop dust going past it. He said you would extend the wall between the two toilets to the side of the fridge to create a working environment. He said that all that would be affected would be 1.5 metres of wall and one of the two toilets, and only one toilet was required as there were only 5 to 7 staff.

iii) Mr Sullivan also said in his expert report[197],

> "5.2.14. The noise level expected to reach ground floor trading area have not been confirmed by the Defendant. The Defendant has prepared an Environmental Noise & Vibration Survey and Assessment Report dated 8 September. However, this noise survey was undertaken in order to establish the current prevailing environmental noise climate around the site and does not provide any analysis of the likely noise that will transfer to the ground floor during the Works."

Mr Sullivan said that the noise levels on the ground floor from the works in the basement would be at around 65dB. In cross-examination, Mr Slater conceded

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[195] 109
[196] 158
[197] 158

that the level of noise on the ground floor from work in the basement would be about 65dB. I bear in mind that the level at which employers must provide hearing protection and hearing protection zones is 85dB and that the noise survey recorded the average noise level on the first floor of the Property as 65dB[198].

iv) Mr Cowen, the Claimant's Head of Estates and Investment, said that the Claimant commonly carried on trading across its estate while works similar to those proposed by the Defendant were carried out, and I accept that evidence.

v) The Defendant's agent Savills stated in a document entitled "Camden Comments with Applicant's Response", dated 13 November 2020[199],

> "The retention of the existing ground floor is beneficial in that it means that the retail operative [Sainsbury's] can remain in situ and continue trading at the premises throughout the construction of the development."

vi) I accept the evidence of Mr Sullivan that if a toilet needed to be moved, this would be a straightforward task. Similarly, an amendment could be made to the refrigerator.

Conclusion

283. I conclude that even if the Defendant had established a genuine and settled intention to carry out the works to widen the staircase from the ground floor to the first floor:

i) The ground floor works would not amount to substantial construction;

ii) In any event, the Claimant could remain in occupation of the ground floor while the ground floor works were carried out.

284. As a consequence, the works would not engage ground (f) of s.30(1) of the Act and the Defendant's opposition to the granting of a new lease must fail.

If holding included the basement, would ground (f) of s.30(1) be engaged?

Introduction

285. The parties addressed me as to what the position would be if:

i) The Defendant had proved on the balance of probabilities a genuine and settled intention to carry out the works;

ii) I had found that the holding included the basement.

286. It is common ground that one would be looking at the totality of the works to the ground floor and the basement.

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[198] 2265
[199] 2483-2488 at 2483

Defendant's submissions

287. Mr Slater conceded that underpinning and the excavation and removal of soil from the basement were not to the holding. In his report Mr Slater says[200],

> "6.1.13 Underpinning – works are linked to breaking out the slab, the slab will be removed around the perimeter where the underpinning will take place. Once the concrete is broken out, the soils are understood to be London clay and will not be noisy to remove, especially if the work is undertaken by hand. Underpinning is below the premises and holding in any definition.
>
> ...
>
> 6.1.17 Excavation and removal of soil. – it is expected this will be a manual process with spades, as no mechanical digger etc., has been proposed with the construction and demolition plan. These works are below the premises and holding in any definition."

Claimant's submissions

288. In his closing submissions, Mr Galtrey says,

> "35 b. On C's case on the meaning of section 32(2), the basement works clearly fall outside the holding and do not engage Ground F.... Even if the basement itself falls within the holding, it does not follow that the basement works are works to the holding: as the landlord is at pains to point out in the context of section 31A, the actual excavations are to be carried out below the holding and so are not works to the holding itself. It was accepted by Mr Kriticos in evidence that no structural works were to be carried out to the roof of the basement. That leaves only the residue of the works (such as the removal of the asbestos) that are works to the holding.
>
> ...
>
> 39. As noted above, in respect of the basement works, it is only the works to the holding itself (and not the slab below) that fall to be considered, and it is not even arguable that those are sufficiently substantial. Ground F is therefore also not engaged."

[200] 206

Findings as to whether ground (f) of s.30(1) of the Act be engaged if the holding included the basement

289. I have already found that the works to the ground floor do not engage ground (f) of s.30(1) of the Act.

290. I find that the basement works would not engage ground (f) for the following reasons.

Intended works

291. Firstly, I have found at paragraphs 183-231 on the balance of probabilities that the Defendant does not have a genuine settled intention to carry out the basement works.

Reconstruction, demolition, works of substantial construction

292. Secondly, I find that the works to the basement are not substantial works of construction, reconstruction or demolition for the following reasons.

i) Mr Slater's evidence, which is accepted by Mr Sullivan, is that:

a) Underpinning – works linked to breaking out the slab and removing the slab around the perimeter where the underpinning will take place, is below the Premises and not work to the holding.

b) Excavation and removal of soil is below the Premises and not work to the holding.

c) Mr Slater agreed that the work to the basement could be carried out through the existing entrance in York Mews. He suggested that the opening to York Mews should be increased by 1.5m. He agreed that this increased opening would go into the 26m^2 area which the Claimant had ceased to occupy.

ii) I accept Mr Sullivan's evidence that the basement would be dug out with hand tools as opposed to a mechanical digger. The breaking out of the concrete could be done with hand held equipment, such as a circular saw. He said the areas being dug were small, 30sqm in size, and it would be difficult to do this with a mechanical digger. The excavations below were London clay, which is not too difficult to dig. Mr Slater conceded in his report[201], "It is expected this will be a manual process with spades, as no mechanical digger etc., has been proposed with the construction and demolition plan". There was nothing in the CMP that said a mechanical digger was being used.

iii) In cross-examination, it was put to Mr Slater that if a diesel mini excavator was used, ventilation would have to be added to the basement. Mr Slater said that he had considered the issue of ventilation. However, Mr Slater does not mention ventilation anywhere in his report, and I find that he was only considering ventilation in the witness box.

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[201] 200

iv) Mr Kriticos conceded in cross-examination that no structural works were to be carried out to the roof of the basement.

v) Mr Sullivan stated that the Claimant could continue to trade while temporary propping was in use when structural pillars were removed but while this happened. He said Claridge's Hotel had a five-storey super basement constructed while still operating as a fully functioning hotel.

vi) Mr Slater conceded in cross-examination that he could not say that work equipment could not be stored in the basement, for example in the vaults at the front of the basement, which were not going to be dug out because the information provided by the defendant did not state the number of each item of equipment to be used.

vii) I find that the removal of asbestos is not substantial works of construction, reconstruction or demolition.

293. Thirdly, I find that the Claimant could remain in occupation while works to the basement were carried out:

i) Regarding noise, I accept the evidence of Mr Sullivan that:

a) Propping of the ground floor would not be noisy at all. It would involve installing freestanding metal acro props, which will be adjusted into place.

b) Angle grinding, is noisy but is not needed for long operations and will be undertaken outdoors.

c) Disc cutting of columns will be noisy but will only take around 30 minutes per column.

d) Compaction of the ground prior to pouring concrete is short lived and will take perhaps a day to do the whole area. These works are below the Premises and not part of the holding.

e) Compacting concrete is a short process and not noisy. This works would be below the Premises and not part of the holding.

ii) Mr Sullivan says in his report[202],

> "1.1.11 It is my opinion that the level of disruption to the claimant will not be so substantial, and they need not cease occupation of the areas they currently occupy, or need to the ground floor."

iii) Mr Sullivan accepted that the noise caused by the basement works could be mitigated. He says in his report[203],

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[202] 116

> "6.1.34. It is clear that the interference can be minimised and the Defendant is legally obliged to minimise. The Claimant can continue with their works with some but tolerable noise from the Works."

iv) Mr Sullivan concluded in his report[204],

> 6.2.2. The Works can be undertaken in a way which will cause limited disruption to the Claimant and does not require them to cease occupation."

294. For the aforementioned reasons, I find as a fact that even if the Defendant had proved a genuine and settled intention to carry out basement works:

i) The works do not amount to work of demolition or reconstruction of the Premises comprised in the holding or a substantial part of those Premises or a substantial work of construction on the holding or a part thereof.

ii) In any event, the basement works could reasonably be carried out with the Claimant remaining in occupation of the holding.

S.31A(1)(a) of the Act - the holding being solely the ground floor

Introduction

295. I was addressed in the alternative as to whether the Claimant would have a defence under s.31A(1)(a) of the Act if the Defendant had the requisite intention and if the widening of the staircase engaged ground (f) of s.30(1) of the Act. I therefore summarise the parties' submissions and set out my findings below.

296. Section 31A(1)(a) provides,

> "31A Grant of new tenancy in some cases where s. 30(1)(f) applies.
>
> (1) Where the landlord opposes an application under section 24(1) of this Act on the ground specified in paragraph (f) of section 30(1) of this Act, the court shall not hold that the landlord could not reasonably carry out the demolition, reconstruction or work of construction intended without obtaining possession of the holding if—
>
> (a) the tenant agrees to the inclusion in the terms of the new tenancy of terms giving the landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the landlord could reasonably carry out the work without obtaining possession of the holding and without interfering to a substantial extent or for a substantial time with

[203] 179
[204] 181

> the use of the holding for the purposes of the business carried on by the tenant;"

Defendant's submissions

297. I accept Ms Mattsson's submission that the Court must address three issues:

i) Has the Claimant given access and facilities such that the Defendant can reasonably carry out the widening of the staircase from the ground floor to the first floor?

ii) Can the Defendant reasonably carry out the widening of the staircase without obtaining possession?

iii) Can the widening of the staircase be carried out without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried out by the Claimant?

298. Ms Mattsson submits that the Claimant has not set out the terms of access and other facilities which it proposes by way of terms of the new tenancy which it says will be sufficient to enable the Defendant to carry out the intended works.

Claimant's submissions

299. In the Particulars of Claim, dated 29 July 2021, the Claimant states[205],

> "10 The Claimant relies on Section 31A of the Act to the extent it:
>
> 10.1 agrees to allow a provision in the new tenancy for the Defendant to access the Property for carrying out the works, such access to be reasonable and will cause no interference to the Claimant's business at the Property"

300. Mr Galtrey reiterates paragraph 10.1 of the Particulars of Claim at paragraph 24 of his skeleton argument, where he says,

> "C would agree to the inclusion of all necessary terms in the new tenancy to allow the works to be carried out in the manner suggested by Mr Sullivan, satisfying the first limb of section 31A."

301. Mr Galtrey submits that the widening of the staircase would not interfere to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried on by the Claimant. He relies upon the evidence of Mr Sullivan in his report at paragraph 6.1.32[206] that the work can be undertaken within one to two days and would cost approximately £700.

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[205] 11
[206] 179

Finding as to s.31A(1)(a) of the Act - holding being the ground floor

302. Firstly, I consider whether the Claimant has given access and facilities such that the Defendant can reasonably carry out the widening of the staircase from the ground floor to the first floor.

303. The Claimant has said that it agrees to allow a provision in the new tenancy for the Defendant to access the Property for carrying out the works, and I accept that evidence.

304. Whilst it is true that the Claimant has not agreed precise terms, I find that it would be impossible for the Claimant to do so because the Defendant's works to the staircase are not within the costs plan and there is no draft building contract or draft programme of works. The Defendant repeatedly said in its evidence that its design and build contractor would provide a detailed plan as to how the works would be carried out. As Mr Slater says in his report at paragraph 6.14[207],

> "As noted above, the Claimant [should be 'Defendant'] has yet to appoint a building contractor to undertake these works. Consequently, no formal methodology has been proposed with the construction phase health and safety plan, as this is a matter for the appointed contractor."

305. I conclude that the Claimant has proved on the balance of probabilities that it has agreed to allow a provision in the new tenancy for the Defendant to access the Property for carrying out any works to widen the staircase.

306. Secondly, I have already found at paragraphs 279-282 above that works to widen the staircase from the ground floor to the first floor could be carried out with the Claimant remaining in occupation of the holding.

307. Thirdly, I find that the widening of the staircase could be reasonably carried out without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried out by the Claimant for the following reasons:

i) I repeat paragraphs 279-282 above.

ii) I accept Mr Sullivan's evidence that if the staircase between the ground floor and first floor was to be widened[208],

> "it can be achieved by demolishing the layer of construction within the current enclosure, that provides a further 18 cm. Plaster is likely to be another 2.5-5 cm. The work can be undertaken within perhaps 1-2 days and will cost approximately £700."

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[207] 232

[208] Mr Sullivan's expert report, dated 14 December 2023, at paragraph 6.1.32, 179

iii) In "Camden Comments with Applicant's Response", dated 13 November 2020[209], London Borough of Camden comment[210],

> "It is important to understand what the implications would be for the ground floor retail unit."

On behalf of the Defendant, Savills reply[211].

> "The existing ground floor floorspace which is affected by the proposal is limited to 27sqm which is a small proportion of the overall retail floor space. This floorspace is currently used for access and storage only. This small reduction in floor space **would not compromise the viability of the retail premise/operator. ...**
>
> The current occupier has been consulted in relation to the proposals and has not raised any concern over the loss of the 27sqm at ground floor. ...
>
> It is important to note that the existing ground floor will be retained and will need to accommodate the continuing retail use." (my emphasis).

308. I accept the evidence of Mr Sullivan that the Defendant has not carried out any investigations to know whether structural steels would be necessary if the wall was removed.

Conclusion

309. I conclude that on the basis that the holding comprised the ground floor, if the Defendant had proved on the balance of probabilities ground (f) of s.30 of the Act, I would have found that the Claimant proved s.31A(1)(a) of the Act on the balance of probabilities. Therefore, the Defendant's opposition to the Claimant's tenancy on ground (f) would have failed.

s.31A(1)(a) of the Act - if the holding included the basement

310. Firstly, I have found at paragraphs 301-304 above that the Claimant has given access and facilities such that the Defendant can reasonably carry out the works to the ground floor and the basement.

311. I have already found that the Defendant has not proved on the balance of probabilities a genuine and settled intention to carry out works to the ground floor and basement.

312. Secondly, I have already found that the works to the basement could be carried out with the Claimant remaining in occupation of the holding.

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[209] 2483-2488
[210] 2483
[211] 2486

313. Regarding the removal of asbestos, there was initially a conflict of opinion between Mr Sullivan and Mr Slater as to whether asbestos could be removed with the Claimant remaining in possession.

314. Mr Slater says in his expert report[212],

> "5.11 … Floorboards often retain gaps between them, particularly in floors of the age expected at the property. As the asbestos sheeting is fixed to the underside of the floor, there is a risk of potential fibre release through the floor during the removal process. …
>
> 5.12 Given the nature of the asbestos removal work and the environment in which they must be executed, I do not believe it would be appropriate for the work to be undertaken with the property occupied, particularly noting the regular footfall of members of the general public."

315. Mr Sullivan says in his expert report[213],

> "4.3.5. An airtight enclosure will need to be formed, along with segregated transit routes and decontamination facilities. The access and egress will be through the existing opening between basement and ground floor and straight on to York Mews, fully isolated from the trading store above.
>
> 4.3.7. When the asbestos removal works within the basement are undertaken, the aim will be to remove the asbestos intact, in accordance with normal practice. Given the concrete floor, screed, wooden sheet and vinyl floor covering, the works can progress below, with the Claimant remaining above.
>
> …
>
> 6.1.5. There are asbestos removal works within the basement, the aim will be to remove the asbestos intact, in accordance with normal practice. Given the concrete floor, screed, wooden sheet and vinyl floor covering, the works can progress below, with the tenant remaining above.
>
> …
>
> 6.1.12. Asbestos can be removed with the tenant in situ, there is no impact on them at all."

316. In cross-examination, Mr Slater said he did not carry out an inspection of the floor and did not see any gaps in the floor and accepted he had not said he saw any gaps in

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[212] 208
[213] A-H, tab 28, page 147

his report. He accepted that his comment regarding floorboards often retaining gaps was pure speculation.

317. The Defendant obtained a quote from Messrs Carringtons, a specialist asbestos removal firm, for the removal of asbestos from the basement. Messrs Carringtons sent a quotation to the Defendant's agent Mr Kaimakamis by an email dated 23 February 2022[214]. This quote was provided on the basis that the Claimant would be remaining in occupation.

318. Mr Slater accepted in cross-examination that Messrs Carrington were experts in asbestos removal and he would not seek to argue with their opinion that the Claimant could remain in occupation while the asbestos was removed.

319. For the aforementioned reasons, I find that the Claimant has proved on the balance of probabilities that the Defendant could carry out the work without obtaining possession.

320. Thirdly, I find that the works to the basement could be reasonably carried out without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried on by the Claimant for the following reasons:

i) I repeat paragraph 293 above.

ii) I accept the evidence of Mr Sullivan at paragraph 5.3.11 of his report that[215],

> "Access can be achieved by reinstating the existing redundant, staircase leading to the basement of 329 Kentish Town Road from York Mews. This would be a more practical and commercial solution."

iii) I accept Mr Sullivan's evidence at 5.3.12 of his report[216],

> "In my opinion spoil created during the works could be directed out of the basement via conveyor directly into grab-bags positioned at the York Mews entrance, these could then be removed as they fill up using a telescopic handler."

iv) I accept the evidence of Mr Sullivan, who says in his report[217],

> "1.1.11 It is my opinion that the level of disruption to the claimant will not be so substantial, and they need not cease occupation of the areas they currently occupy, or need to the ground floor."

321. Ms Mattsson referred the Court to the case of *Pumperninks of Piccadilly Limited v Land Securities PLC* (supra)[218]. In this case, the landlord demised to the tenant a shop

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[214] I, vol. 6, 1859
[215] 170
[216] 171
[217] 116

which formed part of a building and was defined so as to exclude all structural or loadbearing parts of the building. The landlord opposed the tenant's application for a renewal of the "eggshell tenancy" thus created, relying on the ground in section 30(1)(f) that it intended to demolish the demised premises or a substantial part of them. Charles J said,

> "18. The overall effect of the intended works is therefore that effectively the eggshell and thus the material enclosing the "demised premises" will be removed and what was the Tenant's shop will become part of an open space including other parts of the ground floor. That open space will have to be fitted out by, or on behalf of, the new occupier or occupiers to provide a floor, a ceiling, plastering or other wall covering and such internal partitions as may be appropriate. The new ceiling may or may not be at the existing height. The manner in which the whole space is divided up will depend on whether it is let as a whole or in parts. The Landlord's intention is that the new floor will be lower than the existing floor to avoid the small "step up" from street level that now exists.
>
> 19. To enable a new lease of the "demised premises" to be granted it would be necessary for it to be provided with support from other parts of the building. Any new lease of an eggshell within the ground floor area would have such support through the operation of the covenant for quiet enjoyment and the principle that the lessor cannot derogate from his grant. This would be so whether the lessor or the lessee carried out the work to provide such support.
>
> ...
>
> 42. More generally, and in my judgment importantly, the arguments advanced on behalf of the Tenant fail to have proper regard to the fact that in this case when the works that the Landlord intends to carry out are completed:
>
> i) the premises demised by the lease (i.e. the eggshell) and rights enjoyed with it and thus the holding will no longer physically exist and be capable of occupation, and
>
> ii) before the Tenant can occupy the holding under the new tenancy it seeks (i) some of the works carried out by the Landlord will have to be undone, and (ii) additional work will have to be carried out.
>
> ...

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[218] Joint authorities bundle, tab 5

> 47. In more general terms, in my judgment when a tenant agrees to the inclusion in the terms of the new tenancy (which in broad terms has to be of the holding – see s. 32) of terms giving access and other facilities for carrying out the work intended and that work will have the result that the holding will no longer exist they cannot be terms that enable the landlord to carry out the works without obtaining possession of the holding.
>
> ...
>
> "55. ... In my judgment this evidence supports the view that what the Tenant is ultimately seeking is reinstatement of something which the works intended by the Landlord will have destroyed and which is not reasonably compatible with the purpose and effect of those works and therefore the conclusion that the Landlord could not reasonably carry out the intended works without obtaining possession."

322. Chadwick LJ said,

> "94. It follows, as it seems to me, that if the proposed works were carried out with access and facilities given pursuant to the terms of a new tenancy, the property comprised in that new tenancy would thereafter be unusable by the tenant for the purposes of its business. It is not, I think, in dispute that the property comprised in the new tenancy would be incapable of use without reinstatement of (at the least) a floor, and (very probably) surface covering to the walls and a suspended ceiling. The tenant could not do that work, consistently with the terms of the current tenancy, without the consent of the landlord. It is, I think, inconceivable that the court would impose terms in the new tenancy (under section 35(1) of the Act) which permitted reinstatement without the consent of the landlord. The court would be required to have regard to all relevant circumstances; and those circumstances would include the tenant's agreement, to be assumed in the context of section 31A(1)(a) of the Act, to the landlord having access and facilities to remove the floor, the existing surface covering to the walls and the suspended ceiling. To permit the tenant to reinstate – so as to undo the works which the landlord has been permitted to carry out - would be inconsistent with that agreement. And, in the circumstances that the tenant has agreed to the landlord carrying out works which remove the need for rights of support, it seems to me impossible to say that the rights of support previously enjoyed would be continued under section 32(3) of the Act."

323. Ms Mattsson submits in her closing submissions,

> "43. *Pumperninks of Piccadilly Ltd* is thus authority for the proposition that section 31A cannot be relied upon when the landlord's works have the effect of expanding the physical envelope of that which previously demarcated the tenant's holding e.g. by lowering the floor of a basement such that the tenant's holding would simply 'float' in the air space created (as the extent of the tenant's demise would not extend to the newly created floor and the holding would be 'destroyed'). In such circumstances, the landlord cannot 'reasonably' carry out the intended works without obtaining possession – i.e. terminating the tenant's legal right to possession - because otherwise the landlord will, having completed the work, have to grant a new lease for a use which cannot be undertaken and/or for a holding which no longer exists. In such a case, the tenant is likely to have an insuperable difficulty in seeking to rely on s.31A: see 'Renewal of Business Tenancies', para 7-243-247"

324. I find that the case of *Pumperninks of Piccadilly Ltd* turns on its own facts and is distinguishable for the following reasons:

i) *Pumperninks of Piccadilly Ltd* involved an "eggshell" tenancy, that is a tenancy which excluded all structural or loadbearing parts of the building. The Claimant's lease, dated 18 May 2010[219], was not an "eggshell tenancy" excluding all structural and loadbearing parts of the building.

ii) Secondly, I find that in contrast to *Pumperninks of Piccadilly Ltd,* after the basement works were carried out:

a) Unlike in *Pumperninks of Piccadilly Ltd*, the Claimant's shop would not "become part of an open space including other parts of the [basement]".

b) Unlike in *Pumperninks of Piccadilly Ltd,* it would not be the case that "the holding will no longer physically exist and be capable of occupation".

c) In *Pumperninks of Piccadilly Ltd* "every physical built thing in the demise will be removed". That is not the case here.

iii) I find that in the present case the only difference after the basement works were carried out would be that the floor would be 56cm-96cm lower. The basement would not become an open space. The Claimant is not seeking that the floor of the basement be reinstated.

Conclusion

325. I conclude that if:

i) The holding had comprised the ground floor and the basement; and

[219] 271-325

ii) The Defendant had proved on the balance of probabilities ground (f) of s.30 of the Act,

I would have found that the Claimant proved on the balance of probabilities.s.31A(1)(a) of the Act and the Defendant's opposition to the Claimant's tenancy on ground (f) would fail.

Finding as to Section 31A(1)(b) of the Act

326. Section 31A(1)(b) of the Act provides:

> "Grant of new tenancy in some cases where s. 30(1)(f) applies.
>
> (1)Where the landlord opposes an application under section 24(1) of this Act on the ground specified in paragraph (f) of section 30(1) of this Act[F2, or makes an application under section 29(2) of this Act on that ground,] the court shall not hold that the landlord could not reasonably carry out the demolition, reconstruction or work of construction intended without obtaining possession of the holding if—
>
> ...
>
> (b) the tenant is willing to accept a tenancy of an economically separable part of the holding and either paragraph (a) of this section is satisfied with respect to that part or possession of the remainder of the holding would be reasonably sufficient to enable the landlord to carry out the intended work."

327. Section 31A(2) provides,

> "For the purposes of subsection (1)(b) of this section a part of a holding shall be deemed to be an economically separate part if, and only if, the aggregate of the rents which, after the completion of the intended work, would be reasonably obtainable on separate lettings of that part and the remainder of the premises affected by or resulting from the work would not be substantially less than the rent which would then be reasonably obtainable on a letting of those premises as a whole."

328. S.31A(1)(b) of the Act was argued very briefly before me.

329. It is common ground that there is no evidence as to whether the aggregate of rents which, after the completion of the intended work, would be reasonably obtainable on separate lettings of the ground floor and the basement and upper floors of the Premises would not be substantially less than the rent which would then be reasonably obtainable on the letting of those Premises as a whole.

330. I find that the absence of evidence as to the rents obtainable on separate lettings after the intended works are completed is fatal to the Claimant being able to satisfy s.31A(1)(b) of the Act.

Summary of findings

331. It is common ground that the totality of the works is summarised in the experts' joint statement, dated 30 November 2023, at paragraph 17[220].

332. Neither Party submits that the other is obliged to carry out all or any of the works under the terms of the current tenancy.

333. I find that the Defendant has failed to prove on the balance of probabilities at the hearing a genuine and settled intention to do the proposed works to the ground floor and the basement. In the light of this finding, the Defendant's opposition to the grant of a new tenancy on ground (f) specified in s.30(1) of the Act must fail and the Claimant is entitled to the grant of a new tenancy.

334. I find that the holding for the purposes of this preliminary hearing as to whether the Defendant has proved ground (f) of s.30(1) is the part of the demise occupied by the Claimant, namely the ground floor.

335. I find that even if the Defendant had established a genuine and settled intention to carry out the ground floor works, ground (f) of s.30(1) of the Act would not be engaged because:

    i) The widening of the staircase from the ground floor to the first floor would not involve demolishing or reconstructing the premises comprised in the holding or a substantial part of those premises or carrying out substantial work of construction on the holding or part thereof.

    ii) The widening of the staircase could be reasonably carried out without obtaining possession of the holding.

336. I find that even if the holding included the basement, the Defendant would have failed to have proved ground (f) of s.30(1) because it failed to prove:

    i) A genuine and settled intention to carry out the ground floor and basement works;

    ii) The proposed ground floor and basement works would not involve demolishing or reconstructing the premises or a substantial part of those premises or carrying out substantial work of construction on the holding or part thereof;

    iii) The ground floor and basement works could be reasonably carried out without obtaining possession of the holding.

337. I find that even if the Defendant had proved on the balance of probabilities ground (f) of s. 30(1) of the Act, the Claimant would have proved on the balance of probabilities s.31A(1)(a).

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[220] 107-108

338. I find that if the Defendant had proved on the balance of probabilities ground (f) of s. 30(1) of the Act, the Claimant would have failed to prove on the balance of probabilities s.31A(1)(b).

Final conclusion

339. I find for the reasons summarised above, the Defendant's opposition on ground (f) of s.30(1) of the Act fails and the Claimant is entitled to a new tenancy pursuant to s.29 of the Act.

Orders

340. I annex to this judgment:

i) A draft preliminary issues order

ii) A draft directions order

for the Parties to perfect.

Costs

341. If the parties cannot agree an order as to costs, I will hear the parties' submissions at the hand down of judgment hearing. In order to assist the parties, my provisional view is that costs should follow the event, pursuant to CPR 44.2(2)(a). The Defendant should pay the Claimant's costs on a standard basis, subject to a detailed assessment.

342. CPR 44.2(8) provides,

> "(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

343. The Claimant's budgeted costs are set out at paragraph 9.1 of the Order of District Judge Worthington, dated 22 June 2023[221], and total £101,460. The Claimant's incurred costs are set out in the Claimant's costs budget, dated 2 June 2023[222], and total £12,834.

344. In *MacInnes v Gross* [2017] EWHC 127 (QB) at paragraphs 25 to 28 Coulson J (as he then was) said that the Court should award 90% of the budgeted costs (the costs assessed by the Court). This was approved by Davis LJ in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 at paragraph 40. Applying this guidance, 90% of the budgeted costs of £101,460 is £91,314.

345. In *Cleveland Bridge UK Limited v Sarens (UK) Limited* [2018][223], Joanna Smith QC, sitting as a Deputy High Court Judge, said the payment on account in respect of the

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[221] 48
[222] 89
[223] EWHC 827

incurred costs should be a reasonable sum because the incurred costs, unlike the budgeted costs, have not been subject to judicial scrutiny. She assessed this at 70% of the sum being claimed[224]. Applying this guidance, 70% of the incurred costs of £12,834 is £8,983.80.

[224] Para. 21