Neutral Citation Number: [2022] EWHC 212 (Ch)

Case No: PT-2021-000604

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

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 03/02/2022

Before :

MR SIMON GLEESON
Sitting as a Deputy High Court Judge

- -

Between :

HARRY ROLLO GABB	**Claimant**
- and -	
MEGHDAD FARROKHZAD	**Defendant**

- -
- -

Andrew Butler Q.C. (**Directly instructed**) for the **Defendant**
Joanne Wicks Q.C. (instructed by **Forsters LLP**) for the **Claimant**
Hearing dates: 18 & 19 January 2022

- -

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.

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MR SIMON GLEESON
Sitting as a Deputy High Court Judge

Mr Simon Gleeson :

Introduction

1. On the 15 October 2020, the Claimant, who is a long leaseholder, asked the Defendant, his freeholder, for consent to assign his lease. As of January 2022 consent has still not been granted. The question as to why not is at the heart of this trial.

2. The property concerned is a residential flat at 120A Kensington Park Road, London ("the Flat"). Mr Farrokhzad is the landlord, and Mr Gabb is the lessee. The Flat includes almost the whole of the building from the first floor to the roof – however, below the Flat is a ground floor shop and a basement, which is in the hands of the landlord.

3. Mr Gabb has made a number of attempts to sell the Flat by assigning the lease which, he says, have been defeated (or, in the case of the current proposed transaction, are threatened to be defeated) by the unreasonable conduct of Mr Farrokhzad by refusing to consent to the assignment. His case is that because Mr Farrokhzad's conduct has been unreasonable he is therefore entitled to both a declaration that he may assign without consent, and to damages under s. 4 of the Landlord and Tenant Act 1988 (the "1988 Act"). He also seeks an injunction in respect of Mr Farrokhzad's future conduct in relation to the current sale and exemplary damages.

4. In response to this Mr Farrokhzad's counsel, Mr. Butler, has raised a number of issues. His primary case is that Mr Farrokhzad's actions have not been unreasonable. However, he also argues that even if his actions were unreasonable, various formal defects in the communications made by Mr Gabb in respect of his requests for consent mean that those requests do not satisfy the requirements of the 1988 Act, so that liability under it did not in fact arise. It is necessary to deal with these before coming to the fundamental issue of unreasonableness.

5. Mr Butler identifies four broad ways in which he argues that the various communications failed to satisfy the relevant requirements. One relates to the mechanism by which the relevant communications were transmitted, a second relates to their wording, a third relates to what I have called the "ultimatum" issue, and the fourth to the sequencing of events. These points are made in respect of both transactions, but for the sake of clarity I will deal with them in principle before considering the specific facts of the transactions.

6. Consequently, I will deal with the issues as follows:

    1. The lease

    2. The facts

    3. The applicable law

    4. The validity of the various communications

    5. Whether the Landlord's conduct was unreasonable

    6. Potential liability under the 1988 Act

7. What the consequences of the unreasonable behaviour should be at common law

8. What the consequences of the unreasonable behaviour should be under the 1988 Act

9. Whether exemplary damages are appropriate in this case

10. Whether an injunction should be granted in this case.

1. The lease

7. Mr Gabb holds the Flat pursuant to a lease dated 4 December 2007 ("the Lease") which was granted by way of a lease extension under the Leasehold Reform, Housing and Urban Development Act 1993. It is for a term of 189 years from 24 June 1991.

8. The Flat comprises the first, second and third floors of the building known as 120 Kensington Park Road. There is a commercial unit on the ground floor and basement below. The demise of the Flat includes the external walls on the first, second and third floors and the roof (including a roof terrace), as well as the entrance to the Flat, which is separate from the commercial unit. It also includes all wires, pipes, cables or other conduits which exclusively serve the Flat. There is a standard repairing covenant in respect of the demise in clause 3(3).

9. The rent is a peppercorn (if demanded) (cl. 2). There is no traditional service charge provision, but there is an obligation in clause 3(4) to contribute a "due proportion" in arrear to the Landlord's expenses "of constructing repairing rebuilding renewing lighting cleansing and maintaining all things the use of which is common to the demised premises the Building and to other premises (other than any part or parts of the demised premises)", and to any managing agent's fees. However, given that the Lessee's demise includes the external structural elements, there is no shared entrance or other common parts and, it appears, no shared services, there appear to be no, or very limited, "things the use of which is common to the demised premises the Building and to other premises" within the meaning of the clause. The Lessee has never historically been required to make any payment under clause 3(4).

10. The obligation to contribute to common expenses falls within the definition of "service charge" in s.18 of the Landlord and Tenant Act 1985 and is subject to the provisions of that (and other) legislation for the protection of tenants, including s.19 of the 1985 Act (by which service charge costs must be reasonably incurred and reasonable in amount) and the consultation requirements, before work is carried out (often referred to as "major works"), in s.20 of the 1985 Act.

11. By clause 3(20)(c), the Lessee covenants

> "Not to agree to assign or to assign or part with possession or occupation of the whole of the demised premises unless the Tenant shall first obtain in each case the prior written consent of the Landlord (which consent shall not be unreasonably withheld) Provided that on the occasion of every such intended assignment the Tenant shall first procure that:

> (i) Any intended assignee shall covenant direct with the Landlord to pay the rents reserved by and to observe and perform the covenants and conditions contained or referred to in these presents…"

12. By clause 3(20(c)(ii), if the assignee is a limited company, provision is also made for a guarantee to be given by two of its directors.

2. The Facts

13. Mr Farrokhzad was registered as proprietor of the freehold on 15 September 2020, having acquired it by inheritance from the estate of the previous owner, Mr Paul George. Mr Farrokhzad was involved in the management of Mr George's affairs with respect to the Flat for some time prior to Mr George's death, had visited the flat with Mr George during his lifetime, and he and Mr Gabb knew each other for this reason.

14. When Mr Farrokhzad acquired the freehold of the building, Mr Gabb indicated that he was prepared to sell the Flat to him. Mr Farrokhzad initially showed interest in acquiring it. However, on 15 October Mr Gabb told Mr Farrokhzad that he had received an offer of £3.25m for the property from an external buyer, and Mr Farrokhzad indicated that he was not interested at that price. Mr Gabb then accepted an offer of £3.175m from an Oliver Green ("the Green Sale").

15. On the 12 November, Mr Gabb discovered that Mr Farrokhzad had applied for a late-night and all-week alcohol licence as part of a plan to turn the ground floor shop (then unoccupied) into a Sushi bar. He immediately posted an objection to the licence. A short time later Mr Green withdrew his offer – on the basis, according to Mr Gabb, of his discovery of the plan for the Sushi bar.

16. No claim is made in these proceedings relating to the Green Sale.

17. Mr Farrokhzad's next step was a solicitor's e-mail, sent on the 24 December, from Mason & Co, acting on his behalf. This letter alleged breaches of the lease, and threatened major refurbishment works, in respect of which a Section 20 notice was said to be being prepared. It is Mr Farrokhzad's case that this was purely coincidental, and entirely unconnected with Mr Gabb's opposition to the alcohol licence. Mr Gabb's response was (a) to e-mail Mr Farrokhzad asking why he had not raised any of these concerns directly, and (b) to e-mail Mason & Co explaining that the breaches complained of had been agreed by Mr Farrokhzad's predecessor in title, Mr. George, and that this was well-known to Mr Farrokhzad. Mr Farrokhzad's response was to commence proceedings in the First-Tier Tribunal Property Chamber on the 18th January for forfeiture of the lease.

18. It may be significant that these proceedings were not commenced through Mason & Co, but conducted directly by a Mr Mostafavi acting for Mr Farrokhzad. Mr Mostafavi does not appear to be legally qualified, but throughout this saga regularly acted for Mr Farrokhzad. Mason & Co were instructed to cease all communication with Mr Gabb. Mr Mostafavi then contacted Mr Gabb's solicitors directly.

19. One of the minor mysteries of this case is the question of what Mr Farrokhzad hoped to achieve by these FTT proceedings. The tribunal found that the breaches complained

of had been agreed with Mr Farrokhzad's predecessor in title, Mr George, on the basis of clear documentary evidence to this effect. Mr Gabb says that Mr Farrokhzad was fully aware of this before he commenced the proceedings, having been involved in the discussions with Mr George. However, even if this was not the case, the breaches were minor and easily remedied, such that there was no reasonable (or even remote) possibility of forfeiture or significant compensation – and indeed Mr Farrokhzad barely escaped the unusual fate of being required to pay Mr Gabb's costs in the matter (FTT LON/ooAW/LBC/2021/0005), the tribunal concluding that he had been guilty of "over-enthusiasm rather than malice" (Tribunal Costs Decision para 25), and that his actions could be condoned in "a person … without legal representation … without a working knowledge of the law". (Tribunal Costs decision para 21).

20. However, the purpose of the commencement of the FTT proceedings is clarified in Mr Mostafavi's letter of the 26 January. This letter threatens that Mr Gabb would be liable to pay the costs of any such proceedings. It also threatens to commission a surveyor's report, for which it claims that Mr Gabb will also be liable. Finally, it claims that notice of the FTT proceedings has been given to Mr Gabb's mortgagee, and registered at the land registry. Taken together, it seems clear that the objective at this point was to bring as much financial pressure to bear on Mr Gabb as was possible in the circumstances. On the 2 February, Mr Mostafavi sent a follow-up letter announcing that all further communications from Mr Gabb or his solicitors would be ignored apart from in relation to the FTT proceedings.

The Holz sale

21. Whilst the FTT proceedings were ongoing, Mr Gabb accepted an offer of purchase from Daniel Holz in the sum of £3.25m ("the Holz Sale"). On 25 February 2021 Forsters, Mr Gabb's solicitors, emailed Mr Farrokhzad and Mr Mostafavi asking them to complete a LPE1 form (conveyancing enquiries) and for Mr Farrokhzad's requirements in relation to licence to assign. There was no response.

22. It appears that Mr Holz was aware of the FTT proceedings, and was prepared to wait for their conclusion. Thus when the FTT gave its decision on 30 April 2021, holding that there were no breaches of the Lease, Forsters sent another email on the 12 May to the same addressees, repeating the request, identifying the landlord's legal duty to respond in a timely manner, and indicating that if a reply was not received by 19 May, legal action would be commenced for unreasonably withholding consent. Again, there was no response.

23. By letter of 20 May 2021, Forsters gave notice of Mr Gabb's claim for unreasonable withholding of consent and asked again for consent to assign and completion of the LPE1 forms within 7 days. This time, Mr Farrokhzad did respond, through Mr Mostafavi, on 27 May 2021. This letter is a difficult communication to understand. Mr Mostafavi appears to say that since the FTT had decided that there had been technical breaches of the covenants in the lease, even though these had been waived by the previous landlord, this rendered the refusal "not unreasonable". Confusingly, he also said that Mr Farrokhzad would be appealing the FTT's decision. On 7 June 2021 Mr Farrokhzad made his application to the FTT for permission to appeal, which was refused on the basis that it was simply an attempt to relitigate points which the FTT had already decided. It is very hard, on the facts available, to see that Mr Farrokhzad or his advisors can have had any real belief that the appeal could have been successful.

24. Although Mr Holz had been prepared to wait for the conclusion of the FTT proceedings, it seems that his expectation had been that once these proceedings were complete the transaction would proceed as normal. On the 8 June his solicitors wrote to Mr Gabb's solicitors asking whether the landlord "continues to be uncooperative", and, upon receiving a non-committal reply, wrote again the following day to the effect that Mr Holz was withdrawing his offer for the property "in view of the ongoing delays and problems with the landlord".

25. That was the position on the 2 July when the Part 8 claim before me was initially commenced. As originally formulated, Mr Gabb claimed a declaration that Mr Farrokhzad's refusal to grant consent was unreasonable; that any future refusal to grant consent based on the breaches alleged in the FTT would be unreasonable; that he could therefore lawfully assign the Lease without consent; along with damages under the 1988 Act and exemplary damages.

The Oppenheimer Sale

26. On 22 October 2021, whilst these proceedings were continuing, Mr Gabb accepted a further offer of purchase from Jonathan Oppenheimer and Carrie Reeves, at a price of £3.2m. ("the Oppenheimer Sale"). It is relevant for some of what follows to note that Mr Oppenheimer is a member of the Oppenheimer family who founded the De Beers diamond mining company, and is himself a former chairman of De Beers and former vice-president of Anglo American. Mr Oppenheimer and Ms Reeves expressed themselves keen to exchange and complete as quickly as possible. Unsurprisingly, they were described as cash buyers with no chain.

27. Consent to assign was requested by letter of 26 October 2021, together with completion of the LPE1 form, by 9 November 2021.

28. Following a chaser sent on 2 November 2021, Mr Mostafavi replied. The essence of his reply was that Homes Property Management Ltd ("HPML") were being appointed managing agents and asking for all communications regarding the LPE1 and consent to assign to be sent to them.

29. Forsters duly requested consent to assign from HPML on 5 November, and sent a draft licence on the 10 November. On 29 November HPML told Mr Gabb that they had forwarded a draft licence to assign to Mr Farrokhzad. The fate of this document is mysterious, since Mr Farrokhzad's evidence is that he did not receive the draft prepared by Forsters.

30. Meanwhile, in October 2021, Mr Gabb had identified some external works of repair, including to the stone details around windows, front door and parapet walls and obtained a quote for carrying them out and repainting, in the sum of £25,635 exc. VAT. He had discussions with HPML about carrying them out by June 2022.

31. On 1 December 2021 Mr Gabb met Ms. Patel of HPML, showed her the property, and provided her with a great deal of the information required to complete the LPE1 form.

32. The LPE1 form was provided on 2 December 2021. This:

i) stated that no section 20 works were proposed in the next 2 years, this being "(N/A)".

ii) referred to the exterior works to be carried out by the Lessee by June 2022;

iii) referred to the absence of a previous service charge but that "one will be instated at a reasonable level" and that a service charge estimate was "to follow"; and

iv) left blank the box relating to "documented unresolved disputes".

33. On 7 December 2021 – 6 weeks after the request for consent to assign and despite the answers given about s.20 works in the LPE1 form – HPML reported that they had been instructed to appoint a surveyor "so the surveyor can inspect the building and provide the list of required major works and costings ASAP" and to appoint Graham Jaffe of Gregory Abrams Davidson as solicitors to provide the licence to assign and ask for necessary references. When contacted by Forsters, however, Mr Jaffe said he had no knowledge of Mr. Farrokhzad.

34. When Mr Jaffe was finally instructed, he requested, by an email of 13 December 2021, a reference for Mr Oppenheimer and an undertaking from Forsters to pay his fees, in the sum of £1,250. The buyer's solicitors reasonably queried why financial references should be necessary, given the peppercorn rent and minimal service charges, but Mr Farrokhzad, through Mr Jaffe, insisted.

35. The undertaking was duly given. So too was the reference, the day after it was requested, under protest as to it being unreasonable in the circumstances.

36. By now it was 14 December 2021, some 7 weeks after the request for consent to assign had been made on 26 October. At this point, Mr Farrokhzad disinstructed Mr Jaffe. This appears to have been because Mr Jaffe had given him clear and unambiguous advice that the reference should be accepted and the licence to assign granted (per his e-mail of the 15 December). Mr Farrokhzad denies this, but provides no convincing alternative explanation – his observation in his witness statement to the effect that Mr Jaffe was disinstructed "because of the threat to amend the Details of Claim" seems irreconcilable with the fact that Mr Jaffe was not instructed in that matter.

37. This was the position when Mr Gabb applied to amend his Details of Claim to add reference to the Oppenheimer Sale into the proceedings. By those amendments he claimed a declaration that Mr Farrokhzad was is in breach of duty; a declaration that he might lawfully assign to Mr Oppenheimer and Ms Reeves, and an injunction requiring Mr Farrokhzad to comply with his statutory duties in respect of any future purchaser, plus reimbursement of the £1,250 paid to Mr Jaffe's firm. A claim for loss, should the sale to Mr Oppenheimer and Ms Reeves fall through, was reserved. Mr Farrokhzad, through his Counsel, consented to the amendments, which were permitted by order of Chief Master Shuman dated 17 December 2021.

38. There have been further events since those amendments were made.

39. The buyers' survey indicated evidence of movement to the parapet wall (forming part of the Flat demise) and of distortion to the staircase (ditto). On 9 December 2021, Forsters, for Mr Gabb, had asked HPML whether this would be covered by a claim on

the building insurance. There was no response until 22 December 2021, when HPML confirmed that it would not and would likely be treated as falling within the Lessee's repairing covenants. HPML clearly reported this to Mr Farrokhzad, and as a result, on Christmas Eve 2021, Mr Mostafavi wrote to Mr Gabb.

40. This letter came as a surprise to Mr Gabb, both as to its receipt and as to its contents. Its receipt was surprising since Mr Mostafavi's position up until then had been that all communication was to be through HPML. Its contents were more so. The letter referenced the buyer's survey, asserted that the items therein identified were structural defects, demanded that the be rectified by 7 January and threatened another round of proceedings before the FTT.

41. It is difficult to avoid the conclusion that the reason that Mr Mostafavi sent this letter directly is that its contents were so absurd that it is highly unlikely that HPML would have agreed to send it on his behalf.

42. Mr Gabb explained that he was already in communication with HPML regarding the parapet wall works, which would be carried out in the Spring, when the weather was dry enough and was waiting for consent for them. Mr Mostafavi replied that FTT proceedings would be commenced if works to the parapet wall and staircase were not carried out by 7 January 2022.

43. On 4 January 2022, Forsters again wrote to the Landlord to urge him to provide consent to assign. The response was received from Mr Mostafavi on 10 January 2022. By way of reply to an enquiry as to how there could be any costs falling within cl. 3(4) of the Lease, Mr Mostafavi alleged that there are "numerous elements which are common to all parts of the Building, including drainage, wiring, plumbing and the like". It is clear that this is not in fact the case. More importantly, this communication attached a document described as a specification of works purporting to be for the "External Refurbishment of 120 & 120A Kensington Park Road" and an "Anticipated Costs Analysis" for those works, totalling £388,237.61. I consider this document further below. The letter went on to say that Mr Farrokzhad refused to give consent to the assignment unless he received a financial reference which addressed specifically the ability of the assignee to pay this amount (or the assignee deposit the amount with a stakeholder). That remains his position as at the date of the hearing.

The Evidence

44. The court heard evidence from both Mr Gabb and Mr Farrokhzad. Mr Gabb was a straightforward witness, and his evidence corresponded closely with the documentation available to the court. I have no hesitation in accepting it. Mr Butler put to Mr Gabb the fact that in his initial letter of objection to the alcohol licence he had claimed to be permanently resident in the Flat with his family, which was not true, and therefore suggested that Mr. Gabb might not be a reliable witness. However, it was clear from the documents that, although he had initially misrepresented his position to the licencing authority, he had almost immediately withdrawn the claim, communicated the true state of affairs to the licencing authority, and apologised. I do not believe that this episode casts any very great doubt on Mr Gabb's evidence.

45. Mr Farrokhzad's evidence was very different. Since this is a Part 8 claim, there is no significant disclosure process, and the parties may put forward what evidence they wish

– and, more importantly, need not put forward any witness whose evidence they do not wish to have examined. This situation is not uncommon. In *Straudley Investments Limited, v Mount Eden Land Ltd* [1996] EWCA Civ 673, Judge Bromley QC, who was provided by the landlord with evidence from a single witness who had been absent on compassionate leave for the majority of the period in which the relevant events occurred, described the result as "not only Hamlet without the Prince of Denmark, but Hamlet also without most of the royal court". The same is true of this case, save that Mr Farrokhzad's position is more closely reminiscent of that of King Lear. Mr Farrokhzad's evidence, in a nutshell, is that he had no idea why what was done was done, and he relied entirely on his advisers for such matters, which he did not understand. I accept that the directions for the case before me permitted only one witness to be called on each side, and it would have been impossible for the defence witness to have been anyone other than Mr Farrokhzad. However the net result of this is that the court can only speculate what the strategy which Mr Farrokhzad's advisers were advising him to pursue actually was.

46. It should be emphasised, however, that Mr Farrokhzad was quite clear that he never delegated the power of decision on any matter to his advisers – they proposed, he disposed. I should say that it was also quite clear that Mr Farrokhzad was not the sort of person to be easily overborne by his advisers – indeed, I formed the view that the position was very much the contrary. I am quite satisfied that the various communications sent on behalf of Mr Farrokhzad – notably those sent by Mr Mostafavi – reflected decisions taken by Mr Farrokhzad himself.

47. Mr Farrokhzad's case was not helped by the fact that Ms. Wicks was able to demonstrate that on a number of points his evidence was at variance with the documents before the court – for example, that although his oral evidence was that his income from properties as a landlord was only around £40,000, his landlord's insurance policy covered rental income of £832,500.

48. This takes me to the extraordinary contrast between Mr Farrokhzad's testimony in the witness box and his witness statements. The drafting of the witness statements is fluent, lucid, and displays a sophisticated knowledge of property law. As Ms. Wicks pointed out, the contrast between the form and delivery of Mr Farrokhzad's evidence in the witness box and his witness statements could hardly have been greater. This is not a fact pattern which inspires confidence in the accuracy either of the testimony or of the witness statements.

49. The reason that this matters is that counsel for Mr Farrokhzad, in discussing what it might be reasonable for Mr Farrokhzad to have said and done, placed great store by the fact that he is an unsophisticated individual, who struggles with the English language, and is motivated solely by a conscientious (although sometimes misplaced) desire to do the right thing. This is certainly the impression that he sought to give in the witness box. However, it is considerably at variance with the documentary evidence of the case. Mr Farrokhzad has had the benefit of legal advice from a number of law firms over the course of the events considered here, and has also had the benefit of instructing leading counsel on a direct access basis (Farrokhzad second witness statement para 3.20) from time to time. Where he has been unrepresented, it seems to have been either because he chose not to be as a delaying tactic, or because he dismisses advisors who give him unwelcome advice.

50. Ordinarily, the conclusion from this would be that wherever there is a conflict of evidence, I would tend to accept that of Mr Gabb over that of Mr Farrokhzad. However, there is in fact very little conflict of evidence in this matter. The chronology is undisputed, and the documents are comprehensive. There is very little doubt about what the parties did when. The issue before the court is as to why what was done was done, and whether – in all the circumstances – the things that were done were reasonable. In this regard, Mr Farrokhzad's evidence was unilluminating.

51. However, the conclusion that I can draw is that I must measure the reasonableness of Mr Farrokhzad's actions against the yardstick of a wealthy and experienced property investor with access to as much professional advice as he chooses to obtain. The court will extend a degree of tolerance to parties who were in honest ignorance of their legal duties. That tolerance will not be extended to those who chose to try and remain in ignorance of those duties in order to be able later to plead ignorance of them.

3. The Law

52. As regards the legal position as between the landlord and the tenant, there are – for the purposes of this litigation - two sources of rights for the tenant. One is the common law right which arises under the lease. This is the right to assign without consent if the landlord unreasonably refuses that consent. The other is the right granted by the 1988 Act to sue the landlord for damages in respect of his failure to grant consent to assign within a reasonable time, unless he has reasons for refusing the consent which are (a) reasonable and (b) notified in good time to the tenant.

53. It should be noted that these two sets of rights are intended to operate together. The statutory regime is said to interlink with, and not to provide an entirely separate code from, the contractual covenant between landlord and tenant – *Footwear Corp Ltd. -v- Amplight Properties Ltd.* [1999] 1 WLR 551 at 559. More importantly, the 1988 Act does not change the position at common law, but supplements it: see *Woodfall: Landlord and Tenant* para 11.128; *Hill & Redman's Law of Landlord and Tenant* paras A[1390]- [1401].

Common law

54. The tenant's covenant not to assign is, in this lease, in a form generally referred to as a "fully qualified" covenant. This means a covenant where the covenanter undertakes not to do something without the consent of the covenantee, and where that consent is not to be unreasonably withheld. Where a tenant covenants not to assign a lease, and the covenant is fully qualified, the proviso qualifies the obligation. If the landlord does unreasonably withhold consent, the obligation ceases to bite, and the tenant is therefore free to assign without consent and may seek a declaration to that effect. As Romer LJ put it in *Woolworth v Lambert* [1937] Ch 37 at 53:

> "If the landlords unreasonably withhold their consent, then there is no covenant on the part of the lessees at all relating to the subject-matter, because the words 'such consent not to be unreasonably withheld' import a condition into the covenant so that the covenant is conditional upon the consent not being unreasonably withheld; the result being that, when a licence or

> consent is unreasonably withheld, there is no covenant on the part of the lessee at all, the condition not having been fulfilled."

55. At common law (unless the lease otherwise provides), a request for consent to assign need not take any particular form nor be served in any particular manner. It is effective when it comes to the attention of the landlord that their consent to assign is being sought. The landlord then has a reasonable time to make up his or her mind: *Wilson v Fynn* [1948] 2 All ER 40 at 42F.

Landlord and Tenant Act 1988

56. This Act imposes statutory duties on the landlord which, by s.4, sound in damages in tort. By s. 1(3):

> "Where there is served on the person who may consent to a proposed transaction a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time -
>
> (a) to give consent, except in a case where it is reasonable not to give consent,
>
> (b) to serve on the tenant written notice of his decision whether or not to give consent specifying in addition -
>
> (i) if the consent is given subject to conditions, the conditions,
>
> (ii) if the consent is withheld, the reasons for withholding it."

By s.1(4):

> "Giving consent subject to any condition that is not a reasonable condition does not satisfy the duty under subsection (3)(a) above."

And by s.1(6), the burden of proof (previously on the tenant) is reversed:

> "It is for the person who owed any duty under subsection 3 above -
>
> (a) if he gave consent and the question arises whether he gave it within a reasonable time, to show that he did,
>
> (b) if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,
>
> (c) if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable,

> and, if the question arises whether he served notice under that subsection within a reasonable time, to show that he did."

57. Under the 1988 Act, the statutory duties are triggered by service of a written application for consent to assign. By s.5(2):

> "an application or notice is to be treated as served for the purposes of this Act if –
>
> (a) served in any manner provided in the tenancy, and
>
> (b) in respect of any matter for which the tenancy makes no provision, served in any manner provided by section 23 of the Landlord and Tenant Act 1927."

58. Thus, where a request is validly served, the landlord's duty is two-fold. He must give consent (except in a case where it is reasonable not to do so); and he must serve on the tenant written notice of his decision.

"A reasonable time"

59. Both at common law and under the Act, the landlord has a reasonable time to consider and respond to the request for consent. The reasonableness of the landlord's position must be tested by reference to the state of affairs at the expiry of the reasonable time: *Norwich Union v Shopmoor* [1999] 1 WLR 531 at 545E-G. The landlord commits a breach of statutory duty by failing to respond within a reasonable time, which is equivalent to a refusal of consent without reasons. It is not open to a landlord to justify a refusal of consent by reference to matters not raised with the tenant prior to the expiry of the reasonable period: *Go West Ltd v Spigarolo* [2003] QB 1140 at [78].

60. What is "reasonable" is heavily dependent on context: the length of a reasonable time depends on the circumstances of the particular case, including those known to landlord and tenant at the time the tenant makes his or her application, and subsequent events - *Go West Ltd v Spigarolo* [2003] QB 1140 at [34]-[39]. Moreover, once the landlord has served notice in accordance with the Act, there is nothing more for him or her to do, so he or she cannot thereafter assert that a reasonable time had not elapsed: *Go West*, above, at [40].

61. For that reason, general, context-less assertions about the length of time which is reasonable are not particularly helpful, but it is worth noting that in *Go West*, Munby J said:

> "It may be that the reasonable time referred to in section 1(3) will sometimes have to be measured in weeks rather than days; but even in complicated cases, it should in my view be measured in weeks rather than months."

62. That was in the context of a commercial lease: Ms Wicks, for Mr. Gabb, submits that a reasonable time for consent to assign a long residential lease (where the financial relationship between landlord and tenant is much more straightforward, and the capital value of the property lies in the lease, not the reversion) is likely to be shorter than for

a commercial lease (where the value of the landlord's reversion is derived from the receipt of substantial rent, and likely to be affected by the covenant strength of the assignee). In an ordinary residential transaction, she says, a week or two is sufficient for the landlord to consider and respond to the application – thus, by way of illustration, in *Lewis & Allenby v Pegge* [1914] 1 Ch 782, 11 days was treated as a reasonable time to have waited for a residential landlord's reply to a consent to subletting.

The test of reasonableness for a refusal of consent

63. The test for an "unreasonable" refusal of consent is the same under the common law and under the Act. The relevant principles were set out as seven propositions by Balcombe LJ in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513 at 519-521. These were condensed by the House of Lords in *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180 at [3]-[5] into three main principles, namely

    a) A landlord is not entitled to refuse consent to assign on grounds which have nothing to do with the relationship of landlord and tenant in regard to the subject matter of the lease;

    b) The question as to whether the landlord's conduct was reasonable or unreasonable is a question of fact; and

    c) The landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable. "Reasonable" is to be given a broad, common sense, meaning.

64. These principles have recently been treated as settled law by the Supreme Court in *Sequent Nominees Ltd v Hautford Ltd* [2019] UKSC 47, [2020] AC 28 at [21]-[25].

65. One proposition of Balcombe LJ which is perhaps not fully captured in the "condensed" three principles is that

> "while a landlord need usually only consider his own relevant interests, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds consent to an assignment that it is unreasonable for the landlord to refuse consent."

66. That proposition is likely to carry most force in the context of residential leases, where the lease represents a valuable and tradeable capital asset, and is an interest which far exceeds, in value and importance, the very limited reversion of the landlord.

67. The mere fact that there are or may be breaches of covenant on the part of the lessee at the time of the assignment is not per se sufficient to justify a landlord's refusal to consent to an assignment. It depends on the seriousness of the breaches and the potential impact of the assignment on the landlord's position - *Straudley Investments Ltd v Mount Eden Land Ltd* [1997] Lexis Citation 4483.

4. The validity of the various communications

68. Mr Butler's starting point is to examine the question of whether various communications satisfied the requirements either of the lease or of the 1988 Act. If a communication did not comply with the requirements of the 1988 Act that it be in writing and served, then no right to damages under that act could arise, and if a communication did not comply with the requirements of the lease, then it could have no effect under that lease. It is therefore necessary to examine in some detail the form of the various communications from Mr Gabb and his solicitors to Mr Farrokhzad and his advisors in relation to the landlord's consent to the assignment.

69. The lease itself made clear that certain communications under it must, to be valid, be "notices", and for this purpose "notices", to be effective, were to be communicated in accordance with the requirements of s.196 of the Law of Property Act 1925. It is common ground between the parties that the request for consent to assign was not specified in the lease as a "notice", and was therefore not required to be served in accordance with s.196 to be effective. The lease did not impose any other requirement in respect of other types of communication required under it.

70. It is quite common in commercial agreements for a mixture of different forms of communication to be provided for. Communications which have the effect of bringing into force operative provisions of an agreement are frequently surrounded with some form of formality by that agreement, the purpose of which is to provide relative certainty as to whether and when any particular obligation arose or ceased to apply. Such provisions have two purposes – the giver of the notice, by complying with them, safeguards himself against an argument by the recipient that notice was never received, and the recipient of the notice is safeguarded against attempts by the giver of the notice to argue that the notice was not in fact intentionally given. However, it is almost never the case that all communications under a contract are required to be by notice. The parties are free to choose whether to apply any particular level of formality requirement to any particular type of communication provided for by the contract. If they do not, then the question of whether the communication was in fact made becomes a matter of evidence to be proved in the usual fashion.

(a) The mode of delivery of the communications

71. In relation to the Holz Sale, the relevant communications were the request for consent first made on 25 February 2021, the repetition of that request on 12 May 2021, and the further request made on 20 May 2021.

72. Mr Gabb's case is that the communications were sent, and Mr Farrokhzad does not dispute that they were received, and understood to be requests for consent. Thus both elements of the common law requirement – intentional communication and knowing receipt – were present.

73. The 1988 Act requires that in order to trigger liability, a request for consent must be both "written" and "served" (s.1(3)). Since at least some of the requests made in this context were submitted by e-mail, it is necessary to begin by identifying two separate issues in relation to them. One is as to whether an e-mail communication is "written", and the other is as to whether and when it is "served". It was accepted on both sides that e-mail communications constituted "writing", and this is clearly correct – they fall

within the scope of "reproducing words in a visible form", as used in the definition of "writing" set out in Schedule 1 to the Interpretation Act 1978, and this conclusion has been reinforced by the Law Commission (see Law Commission, Electronic Commerce: Formal Requirements in Commercial Transactions: Advice (2001) and Law Commission, "Electronic execution of documents" (Law Com No 386, 2019)), and more recently confirmed in the November 2019 Legal Statement on Cryptoassets and Smart Contracts of the UK Jurisdiction Taskforce. Mr Butler's challenge was therefore mounted on the basis that they were not "served".

74. I note in passing that this means that the case of *E.on v Gilesports Ltd* [2012] EWHC 2172 (Ch), which was raised by both sides in their submissions, is not relevant in this context. In that case it was common ground between the parties that the effect of the lease in question was that s.196 did apply to the relevant request, and that its submission by e-mail did not comply with the requirements of that section. An e-mail could therefore not constitute a notice within s.196. That may be right or it may be wrong. However, it is not material here, since the parties agree that s.196 does not apply to these communications.

75. The meaning of the term "service" in this context is not entirely clear. I think the correct approach is that taken by Lord Salmon in *Sun Alliance Co v Hayman* [1975] 1 WLR 177 (CA), that "According to the ordinary and natural use of the English words, giving a notice means causing a notice to be received … Statutes and contracts often contain a provision that the notice may be served upon a person by [various mechanisms]. The effect of such a provision is that if a notice is served by any of the[se] methods of service, it is, in law, treated as given and received" (at p. 185). In respect of a communication which is not subject to any degree of formality under a contract, that communication can be said to have been "served" where it has been caused to be received.

76. Mr Butler argues that the term "served" is restrictively defined for this purpose by s.5(2) of the 1988 Act. This provides that, in the absence of any other provision, a notice may be regarded as "served" for the purposes of s.1(3) if it is served in a manner provided for by the Landlord and Tenant Act 1923.

77. This provides as follows:

i) "23. Service of notices.

(1) Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there, or, in the case of a local or public authority or a statutory or a public utility company, to the secretary or other proper officer at the principal office of such authority or company, and in the case of a notice to a landlord, the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf.

(2) …"

78. Mr Butler's argument is therefore, in effect, that in respect of any communication required by a lease where the lease does not explicitly provide a mode of "service"

with respect to that communication, the provisions of s.1(3) can only be triggered by a document which is served in accordance with s.23.

79. This would be a somewhat surprising conclusion, and Ms Wicks advances in opposition to it what I would characterise as the orthodox position. She says that s.5(2) of the 1988 Act effectively provides the server of a notice with a choice. On the one hand, he may serve his notice in any way which is effective under the lease. However, he may also, if he chooses, serve his notice in a form that complies with the requirements of s.23, unless the notice which he is serving is a notice of a kind where the lease makes different provision as to service. Thus, if a lease provides that a particular communication must be made in accordance with (say) s.196, only a communication made in accordance with that section will be effective. However, for a communication about which the lease is silent, the communicator has a choice. He can either send the communication in the normal fashion and hope to prove it as a matter of evidence in due course. Or he can deliver it in accordance with s.23 and put the matter beyond doubt. There are of course good reasons why a communicator might well wish to avail himself of the certainty provided by s.23 – the facts of *Jet2.Com Limited v S C Compania National De Transporturi Aeriene Romanae Tarom S.A.* [2012] EWHC 622 provide an illustration of the sorts of evidential issues than can arise where the communication is made without formality.

80. The question that I am asked to determine is therefore as to whether a communication which (a) is valid under the lease itself, but (b) in respect of which the lease makes no explicit provision surrounding its communication, should be disregarded under the 1988 Act because it does not comply with s.23? In my view, it should not.

81. Mr Butler submits that this construction is unfair to the landlord. He argues that although the aim of the statute was primarily to benefit the tenant, it also manifests a desire to provide clarity as to exactly when the Landlord's liability under the Act might arise. This was given effect by making the provisions for service of written notice a precondition to that liability arising. He argues that the effect of 5(2)(b) is to apply the requirements of s.23 as a precondition for a landlord's liability arising in respect of any communication under the lease in respect of which the lease does not explicitly provide a mode of service. Thus, in his submission, a communication which the lease does not mandate to be made in any manner must be made in accordance with s.23 in order to trigger the landlord's liability under s. 1(3) of the LTA 88.

82. I cannot accept Mr Butler's submissions on this point. I do not believe that it was the intention of the draftsman of the 1988 Act to do anything more than to provide a further remedy in respect of conduct which is already in breach of the lease. The Act is not intended to rewrite the lease, but to supplement it. I am reinforced in this conclusion by the fact that the Landlord protection point urged by Mr Butler does not in fact arise if the criteria for a valid contractual notice under the common law have been established. If it can be demonstrated as a matter of evidence that a request for consent has been intentionally sent by the Tenant and knowingly received by the Landlord, such that the common law right has been engaged, I can see no reason why the 1988 Act should not be called into play to supplement it. It seems to me that this conclusion is entirely in line with the idea that the 1988 Act supplements rather than rewrites the lease, and that I accept Ms Wicks' submission that a request which is valid under the terms of the lease is valid for the purposes of the Act by reason of s.5(2)(a), even if it is not served in compliance with either the s.196 criteria or the s.23 criteria.

(b) The Form of words used in the communications

83. Mr Butler also takes a point as to the form of words used. It is entirely clear that in order for a communication to satisfy the requirements under the contract, the terms of the communication must be such that the sender must clearly intend the communication, and the recipient must clearly understand what is being communicated. Where a communication is made in such a form that the recipient could not reasonably have been expected to understand, and did not understand, what was being communicated, then there is of course no communication. However, what is important in this context is that the recipient understood the substance of what was being communicated. Like Kipling's tribal lays, there are many ways of composing a request for consent to assign, and, provided the substance is understandable, every single one of them is right.

84. Mr Butler's position as to the e-mail of 25 February 2021 is that it did not in fact request consent to the assignment. It simply asked the recipient to let the writer know "your requirements in relation to the licence". His point is that the communication should only be interpreted as a request for licence to assign if it absolutely explicit in those terms.

85. I agree that the wording of the e-mail of the 25th is not, on its face, a clear and unambiguous request in the form that it would be required to be were it specified to be required to be a notice within the lease. However, here again, the question before me is not a matter of construction of the words, but a matter of establishing by evidence whether the words used were in fact intentionally communicated and knowingly received as constituting a request for consent to assign.

86. There is no doubt that this communication was intended as such a request by Mr Gabb's solicitor – it had been sent as a result of the receipt of an estate agents memorandum of sale, and in that context I do not believe that the inclusion in the communication of the requests (a) for the LP1 Form and (b) to know of any terms to be specified into the licence to assign, detract from that part of it which constitutes the request for consent. The intention of the sender is clear - in their e-mail of 12 May, Forsters clearly indicate their understanding that the e-mail of the 25th was indeed a request for a consent to an assignment. More importantly, the understanding of the communication by the recipient is equally clear - Mr Farrokhzad, in para 23 of his first witness statement, states that the e-mail of the 25th was a "request for consent to assign". Thus, it seems clear that the document was intended by its communicator, and understood by its recipient, to be a request for consent to assign. If this is the case, then it is not open to the court to go behind that common understanding of the parties.

(c) the "ultimatum" issue

87. It is not necessary to deal with the question of whether the e-mail of the 12 May constituted a separate, second request for consent or not. However, it is one of a number of communications in this action in respect of which Mr Butler advances a novel proposition. The e-mail of the 12th set a deadline for response of the 19th, and stated that if this deadline were not met, then legal proceedings would be commenced. Mr Butler says that the inclusion of these provisions mean that the communication could not be a valid request for the purpose of s.1(3). His argument is that this form of request does not accord with the statutory regime (namely, by requiring consent within a fixed time, and furthermore an unreasonably short time), and therefore is not a valid request within the meaning of s.1(3).

88. The basis of this submission is the argument that if a letter in these terms is treated as engaging the s.1(3) duty, it effectively imposes two conflicting duties on a landlord; a duty to respond within the time fixed by the letter, and a duty to respond within the time required by common law and statute. Mr Butler argues that it would be unreasonable to permit such a letter to have this effect, and that therefore the letter itself must be invalid to the extent that it seeks to do any such thing.

89. I do not accept this argument. A threat to commence legal action after a certain period is entirely separate from the duty to consent within a reasonable time imposed by common law and statute. Even if a letter of this kind were to threaten to commence litigation within a wholly unreasonable timescale – say, a few hours – the duty to consent within a reasonable time under the statute would be completely unaffected. The same is of course true the other way around – the determination of what is a reasonable time to provide consent is not dependent upon or set by the terms of the communication requesting it.

90. I note in passing that Mr Butler also suggested that, because the e-mail of the 12 May is not specified in the Amended Details of Claim as a request, that Ms Wicks could not rely on it as such at the hearing. Even if this were a Part 7 action, and the relevant document were a statement of case, I would not accept this argument – the idea that a party can be prevented from relying on a document included in an agreed bundle before the court strikes me as an odd one, and there is no suggestion that Mr Farrokzhad's case is in any way prejudiced by the omission of the specific reference from the document.

(d) The required sequence of events under the lease

91. Mr. Butler argues that the various communications are not sufficient to engage the common law duty or the s.1(3) duty because they do not comply with clause 3.20(c) of the lease. His starting point is that any such request is invalid if it is not made in accordance with the terms of the lease – see *Allied Dunbar Assurance plc -v- Homebase Ltd.* [2003] 1 P&CR 6 at para.16. He says that these communications were incompatible with the terms of the lease in two respects:

    1. clause 3.20(c) is clear in that it requires the tenant "not to <u>agree to assign</u> or to assign…unless the Tenant shall first obtain in each case the prior written consent of the Landlord…" (emphasis added). He argues that the words underlined make clear that the Tenant was required to obtain prior written consent before agreeing to assign the Lease. In the present case, the very first communication from Forsters on 25 February 2021 made clear that Mr Gabb had already had an offer accepted. Thus, he argues, Mr Gabb must have agreed to assign the lease before obtaining the Landlord's prior written consent, and had therefore not complied with clause 3.20(c);

    2. clause 3.20(c) also contains a proviso that the Tenant "on the occasion of each and every such intended assignment … shall first procure" that any intended assignee shall covenant direct with the Landlord to pay the rents and observe and perform the covenants etc. Mr Butler says that this apparently absurd requirement is in fact entirely practical, since it could be complied with by procuring a formal consent from the putative assignee to this effect. Mr Gabb clearly did not enter into any such agreement before forming the intention to enter into the assignment. This, Mr Butler says, makes clear that Clause 3.20(c)

was not complied with, and that therefore no valid request for consent was ever made.

92. I do not accept either of these propositions. I also note that, although a number of authorities were cited by Mr Butler in this regard, the point seems to me to be a simple one of construction. I think it is clear from the drafting of the clause that what it requires is that prior to the effecting of the assignment itself, the tenant must procure that the landlord's consent has been obtained and that the assignee has covenanted to pay rents and observe the other covenants in the lease. As regards the first sub-point above, it seems to me to be clear that the tenant must obtain the consent of the landlord before either entering into the assignment, or entering into a binding legal agreement to do so. Mere successful negotiation is not an "agreement to assign" in this sense. As regards the second, the words "intended assignment" must be simply a way of describing the assignment which the tenant proposes to enter into. To give them any other construction would place the tenant in a curiously circular position, in which he would be obliged to obtain from the putative assignee his consent to the covenant before forming the intention to assign the lease to him.

93. I therefore do not accept any of Mr Butler's technical points challenging the validity of the various requests for consent to assign. These requests were validly made, and had the effect of triggering rights both under the lease and under the 1988 Act. We therefore move to the question of whether Mr Farrokhzad's conduct with respect to them was reasonable.

5. Unreasonableness

94. Mr Butler submits – correctly – that the question of whether a landlord is acting reasonably with regard to a request for consent to assign only arises at all whilst there is a live request before him. It is therefore necessary to consider the two sets of requests with which we are concerned.

The Holz Sale

95. The Holz transaction was initially agreed shortly before the 25 February, at a point when FTT proceedings were on foot between Mr Gabb and Mr Farrokhzad. However, it seems to have been the common intention of all parties that completion of the transaction would have to await the outcome of the proceedings. This was not a matter of great concern either to Mr Gabb or Mr Holz, both of whom (along with their legal advisers) seem to have regarded Mr Farrokhzad's case as hopeless. However, I do not think that Mr Farrokhzad can be criticised for not granting consent to assign in circumstances where it appears that all those involved had agreed to await the outcome of a subsequent event before the assignment took place.

96. The question therefore is as to the reasonableness of Mr Farrokhzad's conduct after the conclusion of the FTT proceedings. Mr Butler argues that Mr Farrokhzad was entitled to the same time as any other landlord faced with a request to assign, and that a delay of 11 business days, in those circumstances, would not be unreasonable.

97. The problem with this argument is that Mr Farrokhzad was not in the position of any other landlord faced with a request to assign. He had known since 25 February that this request would be received almost as soon as the FTT handed down its decision, and the

communication of the 20 May requesting consent to assign had been foreshadowed for three months. This fact alone dispenses with the idea that the Landlord was entitled, after receipt of the FTT decision, to the same amount of time for consideration of the request that he would have been entitled to had the request been a surprise to him.

98. Thus, even if Mr Farrokhzad had done nothing at all, his conduct would have been unreasonable. What actually happened was that, despite the decision of the FTT, an e-mail was sent on his behalf on 27 May refusing consent (on the basis, inter alia, that the FTTs conclusions were incorrect, and that the Landlord would appeal against them), and this was repeated on the 7 June. Another e-mail came from Mr Mostafavi on the 10th suggesting that consent might be given if the Tenant agreed that the FTT was wrong, paid the Landlords costs and dropped his claim for recoupment of his costs against the Landlord. None of these conditions could, by any stretch of the imagination, be described as reasonable. Mr Butler accepts that these communications did not satisfy the requirements of s.1(3), because they constituted neither consent, nor a reasoned refusal of consent, and that the conditions suggested were unreasonable – indeed, he could hardly do otherwise. He does argue that the conditions set out in the letter of the 10th should be disregarded on the basis that Mr Holz had in fact withdrawn on the previous day, and that they could therefore not have contributed to the failure of that sale. However, I regard them as very material evidence of Mr Farrokhzad's state of mind, and in particular his desire to string the process of giving consent out for as long as possible – indeed, it is the letter of the 10th which provides the clearest evidence that we have of the fact that Mr Farrokhzad had no intention of complying with his statutory duty to consent in a reasonable time without unreasonable preconditions.

The Oppenheimer Sale

99. The application for consent to assign in respect of the Oppenheimer Sale was made by solicitors' letter dated 26 October 2021.

100. Ms Wicks submits that given the straightforward nature of the transaction, and everything that had gone before, it should only have taken a short time for the Landlord to have considered the application for consent and responded with notice under 1(3) of the 1988 Act. He did not do so.

101. What he seems to have done is to have embarked on an extended campaign of delay. There were three prongs to this. One was the appointment of managing agents, who – as noted below - were explicitly instructed on their appointment that they should use the fact that they were newly appointed to drag out the time taken to respond to queries from the Tenant. The second was the formation of a conviction that major works were required to the building. The third was the sudden desire to require financial references from a man recognised by all involved to be a billionaire. We will deal with these in turn.

The managing agents

102. Mr Farrokhzad, through Mr. Mostafavi, responded to the letter of the 26 October by informing Mr Gabb on the 4 November that Homes Property Management Ltd ("HPML") were being appointed managing agents and asking for all communications regarding the LPE1 and the request for consent to assign to be sent to them. It is impossible to say whether HPML were appointed before or after receipt of the request

of the 26th – Mr Farrokhzad says it was before, but the agreement appointing them seems to have been executed on the 2 November. However, what is clear is that Mr. Mostafavi wrote to HPML on the 8 November asking that "if contacted by the leaseholder can you kindly explain that it will take a little while to gather all the information since this is a new instruction" – in other words, asking them to delay. His explanation for this request was that he wanted to instruct a surveyor, establish service charge requirements, and collect and forward the documents relating to the FTT proceedings.

103. This strategy was relatively unsuccessful. The person dealing with the issue at HPML, Ms. Patel, seems to have been both diligent and proactive. On 1 December 2021 Mr Gabb met Ms. Patel, showed her the property, and provided her with a great deal of the information required to complete the LPE1 form. Thus an LPE1 form was received from HPML on 2 December 2021. It seems likely that this form was compiled entirely on the basis of public information and information provided by Mr Gabb, and without the benefit of any co-operation from Mr Farrokhzad.

104. As noted above, I do not believe that HPML were knowingly involved in delaying the consent to assign. However, I do believe that the actions of Mr Farrokhzad in appointing them at the time that he did, and then failing to provide them with the information necessary to enable them to perform the actions which they were appointed to perform, were tactics intended to delay the giving of consent, and were therefore unreasonable.

The proposed s.20 works

105. Mr Butler submits that Mr Farrokhzad sincerely believed that the property was in such a dilapidated state that major works to it were required, that these works should be paid for by the tenant, and that he was therefore unable to grant consent to assign until he had had a survey conducted and an estimate obtained for these works. He also argues that the prospect of the incoming tenant being required to pay for these works was a matter of such significance that he required very significant levels of comfort that that incoming tenant would be able to meet these claims.

106. This would have made some sense had Mr Farrokhzad either (a) taken any steps to quantify this cost during the period in which he was on notice that Mr Gabb wished to assign, or (b) obtained an estimate of these costs during that period. He first raised the prospect of such works on 24 December 2020. However he appears to have done nothing at all about this until 7 December 2021, when he asked HPML to instruct Robert Shutler to conduct a survey. The result of this was the curious document entitled "External Refurbishment – 120 and 120A Kensington Park Road" prepared by Mr Shutler's firm, Metropolitan Development Consultancy. This appears to be an estimate for a complete refurbishment of the entire building. It is not – and does not purport to – cover only the works which Mr Gabb would be required to contribute to under the lease, it is explicitly an estimate for refurbishment (which Mr Gabb would not be required to contribute to) rather than repairs (which he would). Mr Farrokhzad accept that its preparer was not provided with any information at all about the lease itself. This is probably just as well, since on a cursory examination the bulk of the work contained in the estimate appears to be to that part of the property which is demised to Mr Gabb. If Mr Farrokhzad had wished this work to be done, he would have had to pay for the majority of it himself, and to have obtained the permission of Mr Gabb to allow the work to be done on his premises. The conclusion of this report – that the work identified

therein would have a total cost of £388,237.61 - may well be correct in respect of the work which it describes – I do not have the benefit of expert evidence on the point, and am therefore not a position to say. However, that work seems to be completely unrelated to any potential liability of the incoming tenant.

107. I therefore consider that Mr Farrokhzad's conduct in having a document prepared on this basis and then representing it as a potential liability of the incoming tenant was unreasonable.

The reference

108. It was not until the 13 December 2021 that Mr Farrokhzad instructed a solicitor in respect of the licence to assign. It seems from the correspondence that by this time either he or his advisors were becoming nervous about his obligation to give consent in reasonable time and, having exhausted the tactic of simple delay, they sought alternative approaches. Thus Mr Farrokhzad decided that he needed a further financial reference from Mr Oppenheimer. He had already been provided with a letter from the Chief Executive of the Oppenheimer family office, "Oppenheimer Generations", confirming that Mr Oppenheimer "had access to sufficient family wealth to comfortably complete on any residential property transaction". Given that the only outgoings under this lease were the insurance premium and a reasonable service charge to be established, this would appear to be more than adequate. Mr Farrokhzad, however, seems to have been adamant that the reference make specific reference to the figure of £388,237.61, and this was requested on the 10 January. Since, as was established above, this figure did not – and was not intended to – relate in any way to the potential outgoings of the tenant, the request that it be explicitly referenced in the financial reference was also unreasonable – indeed, given the actual level of outgoings, the request for a further reference itself seems unreasonable per se.

The overall delay

109. Mr Butler's case is that the 7 weeks between the first request in the Second Consent Application (26 October 2021) and the 15 December 2021, when Mr Gabb advanced his amended claim, did not exceed a reasonable time. He supports this by reference to a series of delays and miscommunications between Mr Farrokhzad and his various agents, which he calls a "perfect storm" of misfortunes. My response to this is that this is a matter between Mr Farrokhzad and his advisers and agents, but not for Mr Gabb. If a person is under a statutory duty to do a particular thing reasonably, and fails to do it because of the ineptitude or failure of his agent, he is liable for his action. He may well wish to take the resulting loss up with that agent, but that is his issue. Where I have an obligation to a third party, and I fail to perform that obligation because of the failure of my intermediary, my liability is no different from what it would have been if there had been no such intermediary. Mr Farrokhzad's "perfect storm" is irrelevant to the question of whether the acts done on his behalf in his name were unreasonable. In my judgement, they were.

6. Liability under the 1988 Act.

110. Mr Butler accepts that no counternotice as required by the 1988 Act was served in respect of the Oppenheimer sale. As regards this sale, I think the position under the 1988 Act is therefore clear.

111. The position as regards the Holz sale is more complex. Again, it is accepted that Mr Farrokhzad did not serve a counternotice containing reasons as required by s.3(2)(b). For the reasons set out above, I think it is clear that Mr Farrokhzad's delay in giving the relevant consent to assign after the FTT decision was unreasonable, that Mr Holz withdrew on the 9 June because of that delay, and, as a result, the position on liability is clear. However, Mr Butler says that there is no actual damage, since Mr Farrokhzad's unreasonable behaviour did not in fact cause Mr Holz to pull out of the transaction. This is at variance with the documentary evidence, but he argues that there were in fact other issues between Mr Farrokhzad and Mr Gabb, and that it was a combination of all of these, and not simply Mr Farrokhzad's unreasonable behaviour, which caused Mr Holz to pull out.

112. This is a hard argument to make –in the letter of 20 May from Mr Gabb's solicitors to Mr Farrokhzad, the only issue raised (besides access to documents and a request to see the insurance policy) was a claim for £650 in relation to the dust problem. I cannot see that this last can have had any bearing on Mr Holz's decision. I therefore find that the statement in the communication from Mr Holz's lawyers that he withdrew from the sale "in view of the ongoing delays and problems with the Landlord" is entirely accurate.

7. Consequences of these findings at common law

113. It would be impossible, given the unreasonableness of Mr Farrokhzad's behaviour in respect of the Oppenheimer sale, to resist the action for a declaration that as a result of this unreasonable behaviour the covenant not to assign without consent in the lease has fallen away, and that Mr Gabb can validly assign the lease without that consent to any person he wishes.

114. I note in this regard that It was suggested to me that the declaration concerned should be limited to the sale to Mr Oppenheimer, on the basis that to go further would be to interfere with Mr Farrokhzad's legitimate property rights. I do not accept this. I think the basic position is clear – as Romer LJ put it in *Woolworth v Lambert* [1937] Ch 37 at 53, where a landlord unreasonably refuses consent under a fully qualified covenant, the covenant itself falls away. It is clear that the common law position is that a tenant is legally entitled to assign his lease to whomsoever he pleases (see *Doe d. Michinson v Carter* (1798) Term Rep 57, and *Woodfall: Landlord and Tenant* 1.113.). A lease generally places restrictions on this right through covenants. However, when those covenants fall away, the common law position revives. It would, I think, be perfectly open to the court to restrict declaratory relief to one particular sale. However, I can see no reason to restrict the declaration in this way in this case.

8. Consequences of these findings under the 1988 Act

115. I have found that Mr Farrokhzad's unreasonable behaviour was the cause of the loss of the Holz sale. The fundamental loss here is the difference between the two prices – Mr Holz had offered £3.25m, whereas Mr Gabb's current buyer is offering only £3.2m, so in principle the award should be £50,000. However, that is not Mr Gabb's case. He claims as damages in respect of the Holz Sale the costs he has had to incur on the property, by way of council tax and interest on mortgage payments, which would otherwise have been avoided if the sale to Mr Holz had proceeded. Evidence to support the figures was presented in court, and I accept it. He also claims the abortive sale costs

in relation to the proposed sale to Mr Holz. This results in a total damages claim of £8,204.48p.

116. As regards the Oppenheimer sale, that transaction is ongoing despite Mr Farrokhzad's behaviour, and may well complete. If it does, the only claim in damages that Mr Gabb will have will be in respect of the sum of £1,250 plus VAT. This is the amount of the costs undertaking which was given to Gregory Abrams Davidson, on which Mr Gabb remains liable even though Mr Jaffe of that firm was disinstructed by Mr Farrokhzad before the work on which he was instructed was completed. This amount is properly included in the calculation of damages.

117. This is not, however, the end of the story. If the Oppenheimer sale does not complete, and the reason for that non-completion is the conduct of Mr Farrokhzad, then Mr Gabb will have to market the property again and find an alternative buyer. I note that the price in that transaction may well be negatively affected by the way in which Mr Farrokhzad has behaved as landlord. If the price of that alternative sale is lower than the £3.2m which Mr Gabb would have received had the Oppenheimer sale gone ahead, then Mr Farrokhzad will be prima facie liable to pay to Mr Gabb the difference between the two prices, along with any further costs incurred. This is an appropriate result for two reasons. One is that it ensures that any long term devaluation of the property resulting from Mr Farrokhzad's actions will come out of his own pocket. The other is that he is now very powerfully incentivised to ensure that the existing transaction completes as quickly as possible.

9. Exemplary Damages

118. Exemplary damages are appropriate where a landlord pursues a deliberately obstructive policy designed to prevent the tenant assigning their lease for their own gain, regardless of whether that policy succeeds: *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324. This is consistent with a line of cases in which exemplary damages have been awarded against landlords, usually of residential property, who have sought, tortiously, to force their tenants out: see *McGregor on Damages*, 21st edn, para 13-025.

119. As regards the amount of such damages, *McGregor on Damages* paras 13-033 – 13-046 lists eight criteria which the Courts have applied when determining the appropriate quantum. In *Design Progression v Thurloe*, Peter Smith J had regard to those which were relevant at [146]-[150], ultimately awarding £25,000 by way of exemplary damages where a landlord sought to thwart the assignment of a ground floor shop lease (which had only two years left to run) with a view to getting the premises back.

120. Ms. Wicks has sought to persuade me that this is the case here. In particular, she says that Mr Farrokhzad's conduct has constituted a strategy designed and executed to drive down the value of the property, so that he can buy it himself at an undervalue. Mr Farrokhzad indignantly denies this, and is adamant that in no circumstances would he want the property for himself. I note that this is not entirely incompatible with his having a desire to acquire the property at an undervalue.

121. Ms. Wicks' case is that the only plausible explanation for Mr Farrokhzad's conduct is such a preconceived strategy. I do not accept this. Even in commercial contracts

between sophisticated parties, it is by no means unknown for the human trait of being difficult for the sake of it to emerge. This is particularly the case where a party has no particular incentive to procure any particular result, but has a power to obstruct others. The repeated exercise of this power may be motivated by nothing more than an inchoate idea that eventually someone will offer something of value to make it stop. I am strongly of the view that that is the case here. However, there is simply no evidence on either side as to what Mr Farrokhzad's motivations for his conduct might have been, and I do not regard it as appropriate to award exemplary damages on the basis of pure guesswork. Consequently, I am not able to make an order for exemplary damages in this case.

10. Injunction

122. Ms Wicks seeks not only declaratory relief but also now also an injunction requiring Mr Farrokhzad to comply with his s.1 duty in respect of any future purchaser.

123. A *quia timet* injunction should be granted only where there is a "real risk that an actionable wrong will be committed" – see *Gee on Commercial Injunctions*, 7th Edn. para.2-045 et seq. Mr Butler argues that there is no need to grant any such injunction, since Mr Farrokhzad has no intention of committing any actionable wrong, and is quite content for an assignment to take place. That assurance may be open to question given Mr. Farrokhzad's conduct to date, but it cannot be completely disregarded.

124. I do not think that such an injunction is appropriate in this case. Given the form of the declaration which I propose to make, Mr Farrokhzad's involvement in any future sale will be restricted to hoping, for the sake of his own pocket, that it completes at or above the price of the Holz sale. I regard that as sufficient to dispose of this matter.