Neutral Citation Number: [2023] EWHC 2880 (Ch)

Case No: CH-2022-000202

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Chancery Appeals (ChD)
On appeal from the Order of HH Judge Dight CBE
County Court at Central London (Case Number H10Cl 257)

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 20/11/2023

Before:

MR JUSTICE RICHARDS

Between:

S. FRANSES LIMITED (1) **JAMES WILLIAM RAMSEY (2)**	**Appellants**
- and -	
BLOCK 6 ASHLEY GARDENS ROOF GARDENS LIMITED (1) **RINGSTONE LIMITED (2)** **ROYA KHALILI (3)**	**Respondents**

Henry Legge KC and Michael Buckpitt (instructed by **Wallace LLP**) for the **Appellants**
Wayne Clark (instructed by **Withers LLP**) for the **Respondents**

Hearing dates: 16 to 19 October 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE RICHARDS:

1. This dispute concerns the provisions of Part I of the Landlord and Tenant Act 1987 (the "Act"). Very broadly, the Act seeks to give "qualifying tenants" ("QTs") of leased premises a right of first refusal when the landlord makes a "relevant disposal" of an interest in those premises. Moreover, if a landlord makes a relevant disposal to a transferee without first offering the interest to QTs, the Act contains a mechanism for QTs to require the transferee to convey the interest in question to them.

2. In this case, the Appellants were granted leases (the "Leases") over part of the roof space in a block of flats (the "Building") in London by a company called Block 6 Ashley Gardens Ltd who was the landlord of the Building. The First Respondent says that the Leases were granted without QTs of the Building being offered the necessary right of first refusal and that the Act therefore entitles it to a conveyance of the Appellants' interest under the Leases. HHJ Dight CBE (the "Judge") agreed and made orders to this effect on 12 October 2022. The Appellants appeal against this order and the Respondents have filed a Respondents' notice suggesting that the Judge's order should be varied.

THE PARTIES TO THESE PROCEEDINGS

3. So that this judgment can easily be read together with those of the Judge, I will use definitions that are consistent with those used by the Judge. A list of various persons involved and the abbreviations that I will use to describe them is set out below.

Name of party	Role	Definition
Block 6 Ashley Gardens Limited	Freeholder of the Building whose shares are owned by tenants of the Building from time to	D4
S Franses Limited	Grantee of a Lease and tenant of Flat 83A in the Building	D1
Mr Franses	Director of D1 and a director of C from 2013 to 2017. Tenant of Flat 82A with his wife, Ms Swirski	Mr Franses
Ms Swirksi	Director of D4 between 2010 and 2018	Ms Swirski
James William Ramsey	Grantee of a Lease and tenant of Flat 83B. Director of D4 from 2010 to 2018	D2
Ian McCaig	A grantee of a Lease and tenant of Flat 83C. Not an active participant in these proceedings having reached a settlement with C.	D3
Block 6 Ashley Gardens Roof Gardens Limited	The nominee company established by QTs to take a transfer of the Leases from D1 and D2	C

THE JUDGMENT AND ORDER BELOW

The scheme of the Act

4. Relevant provisions of the Act are set out in the Schedule to this judgment. However, the following high-level summary will help to put in context the findings of the Judge and the appeal against his orders.

5. Section 1 of the Act provides that a landlord must not effect a "relevant disposal" of premises to which Part I applies without serving a notice under s5 of the Act on QTs giving them a right of first refusal. Section 10A of the Act imposes criminal liability for a failure to comply, without reasonable excuse, with this requirement. It is common ground that Part I of the Act applies to the Building, that the Leases effected a "relevant disposal" and that QTs were not served a notice under s5.

6. The Act contains provisions addressing the situation where a landlord has made a relevant disposal to a "purchaser" without serving a notice under s5. Section 11A entitles QTs to serve a notice on the purchaser to obtain particulars of the terms of the disposal. In addition, s12B contains provisions that entitle the "requisite majority" of QTs to compel the "purchaser" (D1 and D2 in the context of these proceedings) to transfer the interest acquired to a nominee (C in the context of these proceedings).

7. The first step that the QTs must take in order to exercise this right is to serve a notice under s12B(2) (a "Purchase Notice") requiring the purchaser to dispose of the interest in question to the QTs' nominee on the terms "on which it was made (including those relating to the consideration payable)". Before the Judge there was some dispute as to whether the purported Purchase Notices served were in fact valid. However, it is now common ground that compliant Purchase Notices were served on both D1 and D2 on 22 June 2020 and/or 9 July 2020.

8. Section 19 of the Act gives the court power, on application of an interested person, to make an order requiring any person who has defaulted in obligations imposed under the provisions of Part I to make good the default. However, by s19(2), an application to the court cannot be made unless a notice has previously been served on the person in question requiring the default to be made good (a "Default Notice"). It is common ground that neither D1 nor D2 transferred their Leases in compliance with the requirements of the Purchase Notices. Both before the Judge and in these proceedings, there is a live question as to whether valid Default Notices had been served and so a live question as to whether the Court is entitled to make an order under s19(2) as regards D1 and D2's non-compliance with the Purchase Notices.

The Judge's findings

9. The Judge gave two judgments. His judgment following the trial (the "Trial Judgment") was given on 28 April 2022 and I will refer to paragraphs from that judgment in the format "TJ[paragraph number]". His judgment on consequential matters, including as to the form of order to be made, was given on 12 October 2022 (the "Consequential Judgment"). I will refer to paragraphs in that judgment in the format "CJ[paragraph number]".

Factual conclusions

10. There are some (relatively self-contained) challenges to the Judge's findings on matters of fact. The summary below is intended to be neutral and I will indicate in my summary those factual findings that are challenged.

11. The freehold of the Building is owned by D4. The Building consists of 19 flats. All 19 flats are let on long leases with D4 as landlord (TJ[2]). It is common ground that (i) all tenants of the Building were QTs and (ii) all tenants of the Building were also shareholders of D4 (and vice versa).

12. In early 2011 there was a concern about the state of the roof of the Building which led to discussions among the board of directors of D4. D1, D2 and D3 were aware of these discussions and saw an opportunity: they held leases of flats on the top floor of the Building and by acquiring rights over the roof space, they hoped to be able to turn part of the roof into roof gardens that would enhance their enjoyment of those top floor flats.

13. On 17 April 2011, D3 acting on behalf of himself, D1 and D2, sent an email to Ms Swirski (who was that time a director of D4). The email proposed that D4 would sell the roof area to D1, D2 and D3 for a purchase price of £100,000 on terms that D1, D2 and D3 would take over the financial responsibility for making necessary improvements to the roof (TJ[69]). A board meeting of D4 took place on 18 April 2011, with the minutes of that meeting recording that a majority of directors were in favour provided that all residents of the Building were informed and "the details of the proposal very clearly set out and agreed so there would be no problems at a later stage" (TJ[70]).

14. On 1 May 2011, a circular was sent from Ms Swirski (in her capacity as chairman of D4) to all the then residents of the Building outlining the proposals. Feedback from the residents was generally supportive (TJ[71] to TJ[75]).

15. D4 put a proposal to grant Leases of the roof space on the agenda at its Annual General Meeting ("AGM") held on 11 April 2012. Mr Franses gave evidence that, in the run-up to the AGM, he prepared notices under s18 of the Act and personally put them through the letterboxes of the flats in the Building. If that evidence had been accepted it could have been significant since the service of notices under s18 could, depending on the extent of response or non-response to them, have resulted in QTs losing their right of first refusal. The Judge rejected Mr Franses's evidence, but accepted that he had drafted a template or form of s18 notice without serving actual notices (TJ[89] to [95]). It follows that the Judge found (TJ[94]) that Mr Franses and, from him, D2 were aware at the time of the AGM that QTs at the Building had rights of first refusal.

16. The shareholders passed a resolution ("Resolution 7") at the AGM. I will address the correct interpretation of Resolution 7 when considering D1 and D2's appeal but simply note at this stage that the Judge concluded (TJ[90]) that Resolution 7 operated to give the directors of D4 authority to negotiate leases of the roof to D1, D2 and D3 but fell short of authorising the directors to grant final Leases on conclusion of those negotiations. D1 and D2 challenge that conclusion in this appeal but do not challenge the Judge's conclusion (TJ[90]) that Resolution 7 did not amount to a waiver of QTs' rights of first refusal.

17. The Judge found that rights of first refusal under the Act were not mentioned at the AGM, rejecting the evidence of Ms Swirski to the contrary (see [TJ[104]]). He considered what would have happened if they had been mentioned concluding at TJ[108] (a factual finding that D1 and D2 challenge):

> *I cannot reach the conclusion that if the rights of first refusal had specifically been referred to, they would not have been explored or taken up, or that matters would not have proceeded in a different way.*

18. The Leases were granted on 5 July 2012 although tenants of the Building generally were not notified of this fact until much later. The Leases were in materially identical terms and, accordingly, I will focus for illustrative purposes throughout this judgment on the Lease granted to D1 which I was shown. Principal relevant terms of that Lease were:

    i) The Lease was "tied" to D1's lease of Flat 83A in the sense that (i) the Lease stipulated that the roof space that was demised was to be used only by the lessee of Flat 83A, and/or the family in occupation of that flat, as a private roof garden; and (ii) the Lease and the corresponding lease of Flat 83A had to be owned and transferred as a package so that it would be impossible for someone other than the tenant of Flat 83A to own the corresponding Lease. (This full link between the lease of Flat 83A and the corresponding Lease was achieved following an amendment to the lease of Flat 83A, after the Lease had been granted but no party suggested that this order of events was of any significance).

    ii) The front cover of the Lease contained a table setting out information required by HM Land Registry. Item "LR7" recorded a Premium of £1.

    iii) Clause 2 of the Lease expressed the demise to be in consideration of (i) the Lessee's covenants contained in the Lease, including specifically, the covenant to perform defined "Works" and (ii) "the rents hereinafter reserved".

    iv) The "Works" in question were to the roof. Clause 7 set out the scope of the Works and Clause 3 imposed an obligation on D1 to commence those works "forthwith upon completion", a timescale that was not met in practice.

    v) The rent payable pursuant to Clause 2 was specified to be a peppercorn. D1 was also obliged to pay the "Roof Garden Rate" being 10% of the service charge payable under the corresponding lease of Flat 83A.

    vi) Pursuant to Clause 4.10.2 of the Lease, the lessee agreed to pay D4 certain costs of works required to the roof of the Building for 20 years.

19. The terms summarised in paragraph 18. above (including terms as to the payment of money) were all set out in the Lease itself. D1 and D2 also agreed orally with D4 that they would undertake certain works to the common parts of the Building (the "Common Parts") in return for the grant of the Leases. The detail of this agreement, including the implications of s2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (the "LP(MP)A") will be considered later in this judgment as it is relevant to C's Respondents' Notice. For the time being, I simply record the Judge's high level analysis of the nature of the bargain for the grant of the Leases set out at TJ[114]:

> *I find that the overall deal was that the Leases would be granted for a stated premium of £1, but also in consideration of the works to be carried out to the roof of the property and the arrangements which had been agreed with the board for a contribution to the works needed to the common parts of the Building in the order of £100,000.*

Throughout the remainder of this judgment, I will refer to the components of that deal as (i) the obligation, set out in the Leases, to perform the "Works" (using the defined term in the Leases) and (ii) an oral agreement to make the "Common Parts Contribution".

20. By around 2017, the D1 and D2's obligations relating to the Common Parts Contribution had been discharged. Mr Franses organised and supervised the relevant works, effectively acting as project manager. However, the start of the Works (to the roof) had been delayed by several factors and did not start until around October 2017.

21. Some discontent about the grant of the Leases emerged at the AGM in 2015. By then there had been changes in the identity of tenants of the Building as flats had been bought and sold. Accordingly, the shareholders of D4 in 2015 were in some cases different from those represented at the AGM in 2012. That discontent gradually swelled and will be considered in more detail later in this judgment. It is sufficient to note that tenants of the Building came to realise that the Leases had been granted without any notice under s5 of the Act having been given and that a majority of QTs might be entitled to exercise their rights under the Act to require D1 and D2 to transfer their Leases. A majority of such QTs entered into an agreement (the "Participation Agreement") that recorded their intention to seek to exercise their rights under the Act and set out a framework for doing so.

22. On 19 March 2020, Withers LLP, solicitors acting for the requisite majority of QTs, sent a series of notices to D1 and D2 pursuant to s11A of the Act. The Judge found that no compliant response to those notices was given (TJ[25] to [28]).

23. On 22 June 2020 and 9 July 2020, Withers LLP served Purchase Notices on behalf of the requisite majority of QTs. It is common ground that these were validly served within applicable time limits.

24. On 21 July 2020, Withers LLP served D1 and D2 with documents purporting to be Default Notices. The Judge concluded at TJ[50] that these were valid Default Notices and that conclusion is challenged in this appeal. It is common ground that, if the documents served on 21 July 2020 were not valid Default Notices, then QTs will have lost all rights to exercise their right of first refusal under the Act. That is because, on 26 March 2021, D1 and D2 served notices under s17(3) of the Act.

<u>The dispute before the Judge and the Judge's conclusions</u>

25. C commenced proceedings in the County Court by a claim form dated 8 September 2020. In its Particulars of Claim, C asserted, that since it had served valid Purchase Notices, and valid Default Notices, the Court should make an order under s19 of the Act requiring D1 and D2 to dispose of their Leases to C for:

> *the consideration provided for by the original disposal, that is as provided for at the date of grant, namely £1*

26. D1 and D2 disputed that they had any obligation at all to transfer the Leases and still less for a consideration of just £1 when they had spent material sums in making the Common Parts Contribution and performing the Works. The arguments before the Judge can, so far as relevant for present purposes, be summarised as follows:

    i) That the Default Notices were invalid (so the Court's power under s19 of the Act to order D1 and D2 to comply with the Purchase Notices was not engaged).

    ii) QTs were estopped from seeking to enforce their rights of first refusal because of delay, acquiescence and/or the fact that Resolution 7 had been passed.

    iii) The Court had a discretion under s19 and, in the circumstances of the case, should decline to make any order under s19.

    iv) D1 and D2's rights under the Human Rights Act 1998 (the "HRA") precluded the Court from making an order under s19.

27. The Judge concluded, at TJ[50], that the Default Notices were valid.

28. The Judge decided at TJ[136] that, since tenants of the Building enjoyed statutory rights under the Act, from which it was not possible to contract out, an estoppel could not in law arise. Nevertheless, TJ[137] to [144], the Judge considered whether the necessary factual ingredients of an estoppel were present. He concluded that the fact that Resolution 7 did not refer to QTs' rights under the Act, and that those rights were not discussed at the AGM, was fatal to any argument based on estoppel.

29. At TJ[146], the Judge dismissed D1 and D2's arguments based on the European Convention of Human Rights ("ECHR") and the HRA. At TJ[153], the Judge explained that he would not exercise his discretion to decline to make any order at all under s19 of the Act. However, he did not order D1 and D2 to transfer their interests in the Leases for a consideration of just £1, the specific remedy that C had sought in its Particulars of Claim. Instead, the Judge concluded that paragraph 2 of C's prayer in its claim form (for "further or other relief") entitled the Court to do something other than require D1 and D2 to transfer their interests for a consideration of £1.

30. The Judge's order (the "Order") giving effect to his judgments was made on 18 October 2022. By Paragraph 1 of the Order, the Judge declared that C was entitled to acquire the Leases from D1 and D2 "on the terms on which they were made (including those relating to consideration payable)". Paragraphs 2 and 3 of the Order fixed the purchase price that C should have to pay as follows:

> *2. The Court … hereby transfers to the [FTT] so much of the claim as relates to the determination of:*
>
> > *a. the amounts expended by [D1 and D2] in respect of the terms referred to in paragraph 1 above; and*
> >
> > *b. such sums (if any) as are payable in accordance with s.12B(7) of the Act.*
>
> *3. The amounts so determined by the FTT (or on any appeal therefrom) once finally determined shall be the sums payable by the*

> *Claimant to [D1 and D2] for the transfers of the [Leases] for the purposes of s.12B(2) of the Act.*

31. When the Order is read together with the Consequentials Judgment, it is clear that paragraph 2a of the Order is referring to the amounts spent by D1 and D2 on both the Works and the Common Parts Contribution.

The Grounds of Appeal and Respondent's Notice

32. D1 and D2 challenge the Judge's order on 11 grounds which I can group under the following headings:

    i) The Judge was wrong to find that the Default Notices were valid.

    ii) The Judge's exercise of discretion was flawed.

    iii) The Judge should have declined to make an order under s19 on the grounds of illegality.

    iv) It was procedurally unfair for the Judge to make an Order requiring D1 and D2 to transfer the Leases for a consideration in excess of £1 when C's pleaded case was that it was entitled to acquire the Leases for just £1. Moreover, the Judge failed adequately to take into account the fact that C was obtaining relief different from that pleaded when making his order on costs.

33. By its respondent's notice, C challenges the provisions of the Order referred to in paragraph 31. arguing that (i) D1 and D2's expenditure on neither the Works, nor on the Common Parts Contribution, should be reflected in the purchase price that C has to pay and (ii) that if (contrary to its primary position) the obligation to undertake the Works is relevant, the purchase price payable could be calculated by reference to the value of those Works to D4, rather than the amount D1 and D2 spent on them.

VALIDITY OF THE DEFAULT NOTICES (GROUNDS 1 AND 2)

34. D1 and D2 now accept that C served valid Purchase Notices. It is sufficient, therefore, to note that paragraph 4 of the Purchase Notice dated 7 July 2020 read as follows:

> *the Tenants require you to dispose of the lease referred to above on the terms on which it was made in accordance with the Original Disposal, including the consideration, to the Nominated Person …*

35. The document on which C relies as constituting a Default Notice to D1 was in the form of a letter sent by its solicitors, Withers LLP, dated 21 July 2020. The first paragraph of that letter refers to the earlier Purchase Notices. The letter then continued as follows:

> *A binding contract transferring the leasehold interest in the Premises to the tenants' nominee company, Block 6 Ashley Gardens Roof Gardens Limited, must accordingly be entered into by the statutory deadline, which we calculate is 22 September 2020.*

> *We enclose a TR1 form, and ask that you arrange for a director to sign this form in the presence of an adult independent witness. Please return it to us by no later than 6 August 2020.*
>
> *If you fail to do this or indicate that there is any reason why the transfer should not take place in accordance with the provisions of the 1987 Act, then our clients will have no option but to commence legal enforcement proceedings against you after the date specified above. Please therefore treat this letter as notice served on you under section 19(2) of the 1987 Act.*

36. Attached to this letter was a Form TR1 in which information on the transferor, the transferee and the property involved had been filled in. Box 8 of the Form TR1 expressed the consideration payable to be the sum of £1.

37. The essence of the Judge's reasons for concluding that the Default Notice was valid is contained in the following extract from TJ[50]:

> *In this case the notice served by the letter of 21 July 2020 cannot therefore be said to be invalid in so far as it asks for a contract in the form of the TR1. It was really just calling on the defendants to comply with their obligations under section 12B and was sufficient notice under section 19(2)(a) of the requirement to make good the default.*

38. I agree with that conclusion. No particular form need be used for a Default Notice. The requirement is simply for a document that does what s19(2) requires, to paraphrase paragraph [6] of Lewison LJ's judgment in *Jones v Mahmut* [2018] 1 WLR 6051. The Default Notice referred to the Purchase Notices. D1 and D2 would have been well aware that the Purchase Notices asserted that they were under an obligation to dispose of the Leases to C, and that they had not transferred the Leases as requested. Those factors, combined with the threat of "legal enforcement proceedings" in the document conveyed the clear message that C was requiring D1 and D2 to make good their default in complying with the duty imposed by s12B(2) of the Act.

39. D1 and D2 argue that the Default Notices did not require them to comply with the Purchase Notices at all and instead purported to require them comply with a different obligation, namely to execute a Form TR1 transferring the Leases for a consideration of £1. I regard that as hair-splitting. In all but the most straightforward of cases, there is likely to be some scope for disagreement as to the correct consideration that is due on a disposal required by s12B(2) of the Act. C cannot be criticised for providing D1 and D2 with a transfer instrument that reflected C's position on the amount of consideration due. Construed purposively (by applying the approach to construction set out in paragraph [24] of the judgment of Lewison LJ in *Pollen Estate Trustee Co Ltd v Revenue and Customs Commissioners* [2013] EWCA Civ 753) the function of s19(2) is to put someone in D1 or D2's position on notice that the 12B(2) duty has not been satisfied and that an application to the Court is imminent. Section 19(2) also prevents the Court's time from being wasted with applications that can satisfactorily be dealt with by agreement. None of those purposes requires a person in C's position to foresee in advance the outcome of what might be a complicated dispute on consideration payable at the risk of losing all ability to enforce the s12B(2) duty if they failed to do so. Accordingly, even if C's position on the amount of consideration payable is shown

to be wrong, the Default Notice still required D1 and D2 to make good their asserted default in complying with the terms of the Purchase Notices.

40. D1 and D2 submit that a Default Notice must accurately specify all the steps that they had to take to comply with the s12B(2) duty. Reliance was placed on the judgment of the Court of Appeal in *Burman v Mount Cook Land Ltd* [2002] Ch 256, but in my judgment that reliance was misplaced since that case concerned a completely different statutory provision, set out in section 45 of the Leasehold Reform, Housing and Urban Development Act 1993, which contained prescriptive requirements applicable to the various notices that had to be served in accordance with that Act. As I have explained, s19 is not prescriptive as to the information that is contained in a Default Notice and prescribes only the overall meaning that is to be conveyed.

41. D1 and D2 argue that the Default Notice is "confused and confusing" because two deadlines are specified: 6 August 2020 for a Form TR1 and 22 September 2020 for a binding contract. I see no force to that argument. The central message of the Default Notice was clear: the duty imposed by s12B(2) had not been complied with and C proposed to take legal action if D1 and D2 did not comply.

42. In a similar vein, I do not accept D1 and D2's argument (which formed their Ground 2) that it is relevant to consider whether the scheme of the Act imposed an obligation on C, D1 and D2 to enter into a contract for the transfer of the Leases. As Lewison LJ held in *Jones v Mahmut,* there are two ways in which the obligation imposed by a Purchase Notice can be complied with: the relevant parties can enter into a contract, or the Court can make an order under s19 of the Act. However, those are simply two ways of complying with the obligation imposed by s12B of the Act. The Default Notice was valid because it required D1 and D2 to make good their undoubted default in complying with s12B.

EXERCISE OF DISCRETION

43. Section 19 of the Act provides that the Court "may" make an order rather than stipulating that it "must" make an order. It is common ground for the purposes of the present appeal that this gave the Judge a discretion whether to make an order under s19 if the necessary requirements were satisfied. C wishes to reserve the right to argue in different contexts, or in a higher court, that s19 obliges a judge to make an order if the requisite conditions are met.

44. By paragraph 1 of the Order, the Judge declared that C is entitled to acquire the Leases from D1 and D2 pursuant to Part I of the Act. The Judge therefore declined to exercise his discretion under s19 not to order D1 and D2 to transfer the Leases. D1 and D2 accept that, to challenge the Judge's discretion in this Court, it is not enough for them simply to persuade me that I would have exercised the discretion differently (see, for example and by analogy the judgment of Mostyn J at [44(v)] of *R v Competition and Markets Authority and others* [2022] 4 WLR 2940). They also accept that I should, as Mostyn J put it, pay "a high degree of deference" to the Judge's exercise of discretion. Nevertheless, they submit that the threshold for interfering with the Judge's exercise of discretion is met for the following reasons:

    i) The Judge misdirected himself as to the scope of his discretion.

ii) The Judge made specific errors either by ignoring relevant considerations, or by taking into account irrelevant considerations, when exercising that discretion.

iii) The Judge failed properly to consider a list of 44 factors that D1 and D2 had put before him in support of their case that no transfer of the Leases should be ordered or, alternatively, that the Judge failed to give adequate reasons for rejecting their arguments in this regard.

The self-direction as to the breadth of discretion (Ground 3)

45. At TJ[150] to [151], the Judge made the following observations on discretion:

> *150 …In my judgment, in so far as the court has a discretion, the factors which the court may take into account are not confined to those which occurred during a specific period. There is nothing in the Act which would limit the period during which relevant factors might arise. However, in my judgment, the test for the exercise of such discretion as there may be is not whether in general terms it would be fair to grant the relief which is sought; it is a much more circumscribed discretion in that it arises at a point where the court has decided that there has been a breach of the Act and the claimants have rights which have been infringed and they are prima facie entitled to the remedy which the Act confers on them in such circumstance…*
>
> *151 Once the right has been established, it seems to me that the court should take the view that the remedy should be fashioned to give effect to the right unless it was inequitable in some way to do so; it is not a more general question of whether it would be fair in all the circumstances to grant relief in the way in which the court might approach the exercise of a discretion when it comes to granting injunctions or making orders as to costs. Under the Act the court undertakes, in my judgment, a much narrower consideration of whether it would be inequitable to give effect to the rights conferred by the Act.*

46. Before the Judge, C had argued that only events occurring after the date of the original disposal were relevant to the exercise of the discretion under s19. Mr Clark alluded briefly to that argument in his skeleton argument for the appeal but confirmed in his oral submissions that C does not seek to challenge the conclusion in TJ[150] that all relevant factors can be considered.

47. D1 and D2 argue that these passages do not set out with sufficient clarity the nature of the discretion that the Judge considered he had. I disagree. The Judge notes, correctly, that s12B(2) imposes a <u>duty</u> on D1 and D2 to convey the Leases to C (see the judgment of Aldous LJ in *Kay Green and others v Twinsectra* [1996] 1 WLR 1587 at 1597B to E). Therefore, any exercise of the discretion in favour of D1 and D2 will result in them being relieved of a duty imposed by s12B(2). The Judge's point is simply that, against that background, the discretion afforded by s19 involves more than a high-level analysis of whether it would be "fair" for D1 and D2 to be obliged to transfer the

Leases. It also involves an analysis of whether they should be relieved from a duty that Parliament has imposed on them.

48. D1 and D2's next argument is that the Judge's conclusion that he had only a "narrow" discretion is at odds with the judgment of Robert Walker LJ in *Michaels and another v Harley House (Marylebone) Ltd* [2000] Ch 104 ("*Harley House CA*"). Mr Legge KC made extensive submissions on conclusions to be drawn both from *Harley House CA* and from the judgment of Lloyd J at first instance, reported at [1997] 1 WLR 967 ("*Harley House HC*"). I will therefore spend some time dealing with these authorities.

49. The judgments in *Harley House* dealt with the aftermath of an ultimately unsuccessful scheme to avoid the effect of the Act. In a very broad outline, a company (T Ltd) held the beneficial interest in the freehold of a substantial tenanted building. F plc wished to acquire that freehold but realised that if it did so the tenants of the building would obtain a right of first refusal under the Act. Therefore, a scheme was devised under which T Ltd would first sell the freehold to an associated group company ("HH") and F plc would acquire the shares in HH. The idea was that the intra-group transfer to HH would fall within s4(2)(l) of the Act and so would not be a "relevant disposal" that triggered tenants' rights of first refusal. Moreover, the sale of the shares in HH would not engage the provisions of the Act since they would not affect any estate or interest in the building. As a result, the scheme's architects hoped that it would result in an economic interest in the freehold of the building passing to F plc without tenants acquiring any rights under the Act.

50. That scheme was implemented in around February 1993. At the time it was implemented, there was doubt on all parties' sides as to whether it truly was effective to prevent tenants from acquiring rights under the Act. Tenants served information notices on HH under what was then s11 of the Act in May 1993. HH provided a response which the tenants considered inadequate and, on 3 December 1993, they served a default notice under s19(2)(a) of the Act asserting that HH was in breach of its obligations to provide information under s11. Nevertheless, the tenants apparently attached little significance to the asserted breach of s11 at the time, trying and failing to raise the funds that would be necessary to acquire the freehold from HH if they successfully served a Purchase Notice under what was then s12 of the Act. Therefore, between 1993 and 1996 there were no further overtures from the tenants. In that period, HH spent a large sum of money developing the building but also made a substantial profit from the letting of penthouse flats.

51. In 1996 just two tenants (Mr and Mrs Michaels) sought to revive the possibility of serving a s12 notice on HH. To do so, they had to assert that the HH's response to the s11 notice in 1993 was incomplete since the time limit for serving a s12 notice would have expired in August 1993 if HH's response to the May 1993 s11 notice was complete (see 989A of *Harley House HC*).

52. The High Court and the Court of Appeal approached the case very differently. In *Harley House HC*, Lloyd J held that the underlying avoidance scheme was effective so that the tenants never acquired any rights under the Act. He nevertheless went on to conclude that, if he was wrong on that issue, Mr and Mrs Michaels were estopped from asserting that there was a continuing defect in HH's response to the s11 notice so as to keep open the prospect of serving a s12 notice (see 990C to F of *Harley House HC*).

53. By contrast, in *Harley House CA*, the Court of Appeal concluded that the underlying scheme was ineffective and cast some doubt on Lloyd J's conclusion that an estoppel operated. Therefore, the Court of Appeal approached the matter by considering that it would not exercise its discretion under s19 of the Act to compel HH to comply with the s11 notice. Robert Walker LJ's conclusion on that exercise of discretion, on which D1 and D2 place considerable reliance, is as follows:

> *I do not seriously differ from the Judge's view on the issue of estoppel, although the facts of this case seem to be some way away from the "mistake which, at the material time, everybody shared" identified by Oliver J (at page 155) as being of central importance in Taylors Fashions. Such evidence as there is indicates that in the months after the company's acquisition of the freehold there was real doubt on both sides as to whether the tenants had statutory rights.*
>
> *However for my part I consider that the matter can be decided simply by reference to the Court's powers under s. 19, under which the court has a discretion whether or not to make an order, once a default notice has been served. Whether or not the case can aptly be described as one of estoppel, Mr and Mrs Michaels let two years go by between D.J.Freeman's letter dated 3 December 1993 (which was, I consider, an effective default notice in relation to information about the loan notes) and Merriman White's letter of 1 December 1995. Then the best part of a year elapsed before proceedings were commenced. In the meantime, the landlord's improvements and relettings drastically changed the situation. Even making allowances for the aggressive stance taken by a powerful landlord and for any difficulties which the Michaels had in obtaining legal aid (a circumstance which ill accords with the notion of their promoting the purchase of the freehold for the sum of £15.75m as adjusted under s. 12(4) and (6)) I consider that they have not acted sufficiently promptly to be entitled to relief under s. 19.*

54. D1 and D2 seek to draw the following principles from the exercise of discretion that Robert Walker LJ performed:

    i) Although Robert Walker LJ expressed some doubt as to whether there was a "mistake which… everybody shared", and so apparently doubted the overall conclusion that there was an estoppel, he did not disagree with much of Lloyd J's reasoning. He did not say that it was simply impossible for an estoppel to operate in the context of the statutory provisions in the Act.

    ii) Nor did Robert Walker LJ express doubt about Lloyd J's analysis of the factors that led to his conclusion that it would be unconscionable for Mr and Mrs Michaels to continue to assert defect in the s11 information notice with a view to serving a s12 notice. Those factors included:

        a) Mr and Mrs Michaels had stood by and allowed HH to believe that the time limit for serving a s12 notice had expired. Believing that to be the case, HH had undertaken significant works on its own land that it would not have

undertaken had it believed tenants would seek to acquire an interest in that land (see 989A to C of *Harley House HC*).

b) Lloyd J's analysis, at 989H to 990C, of the consideration that HH could expect to receive if tenants acquired its interest pursuant to s12 of the Act, and a conclusion that the consideration was likely to be inadequate.

iii) When exercising his discretion, Robert Walker LJ did not seek to apply established equitable doctrines such as laches. Instead, his exercise of discretion was informed by the same basic considerations of fairness that are summarised in paragraph 54.ii) above with it being highly significant that, as Mr Legge KC put it in his oral submissions, this was a case of "nearly estoppel".

55. I will explain later in this judgment why I do not fully accept D1 and D2's analysis of the exercise of discretion in *Harley House CA*. At this stage I simply conclude that, even if their analysis were both complete and accurate, it still would not demonstrate that the Judge's self-direction as to the scope of his discretion was wrong in law.

56. A fundamental difficulty with D1 and D2's approach is that they seek to derive, from the outcome of the exercise of discretion in a particular case, principles of general application that Robert Walker LJ did not himself express. In essence, they argue, that if the discretion was of the nature that the Judge described, Robert Walker LJ would not have decided *Harley House CA* in the way he did. However, that approach does not involve the application of a clear legal principle and rather relies on generalised assertions.

57. The high point of D1 and D2's argument on the "misdirection" issue is that the kind of generalised "fairness" based enquiry that Robert Walker LJ is said to have performed is inconsistent with the Judge's self-direction. However, none of the litigants in *Harley House CA* was asking the Court of Appeal to exercise a discretion that would have the effect of relieving anyone from a statutory duty to transfer a property. No notice under s12 of the then Act had been served so as to create any such statutory duty. Mr and Mrs Michaels were asking the Court to exercise a discretion in their favour that would preserve their entitlement to serve a <u>future</u> notice under s12 in circumstances where they had long delayed in taking points that were available to them. Therefore, while I accept that, in *Harley House CA*, Robert Walker LJ at points considered the position that would arise if a s12 notice was served subsequently, he did not need to, and so did not, express any conclusions as to how the discretion in s19 should be exercised in a situation where it would relieve someone from the duty to comply with a Purchase Notice.

58. D1 and D2 criticise the Judge's self-direction at TJ[151] that it is necessary to consider whether it would be "inequitable" to give effect to rights under the Act, arguing that *Harley House CA* demonstrates that the exercise of a s19 discretion does not involve the application of any established equitable principles. However, I consider that to involve a misreading of the judgment. The Judge is using the word "inequitable" in the sense of meaning "unfair or unjust" rather than as indicating a reference to any specific principle of equity.

59. The Judge did not misdirect himself on the scope of his discretion and Ground 3 of the appeal is dismissed.

Failure to take into account relevant considerations (Grounds 4 and 5)

60. Ground 4 is that, in exercising his discretion under s19, the Judge failed to take into account the impact of D1 and D2's rights under the HRA. Ground 5 is that the Judge failed to take into account other relevant considerations, including a list of 44 factors that Counsel for D1 and D2 had referred to in closing submissions.

The 44 factors generally

61. The argument that the 44 factors were not taken into account has an unpromising start since the Judge refers to them in a number of paragraphs of the Trial Judgment (see, for example, TJ[149] and [153]). Conscious of that difficulty, D1 and D2 amplify their challenge on this ground by arguing that the Judge failed to give adequate reasons for rejecting their argument based on those 44 factors. Even though argument did not form part of D1 and D2's Grounds of Appeal, I will consider it. In my judgment, the submissions based on lack of reasons, as developed by Mr Legge KC, were not a separate ground of appeal but rather amounted to an argument in support of Ground 5, namely that, because the Judge did not explain his reasoning on the 44 factors in "sufficient" detail, he cannot have had those factors properly in mind.

62. I do not accept that the Judge's reasoning was insufficient. As explained by the Court of Appeal in *English v Emery Reimbold & Strick Limited* [2002] EWCA Civ 605, there is no "one size fits all" standard that governs the giving of reasons. Certainly, a judge does not need to address every single argument that a litigant advances (see [17] of the judgment of Lord Philips MR). To be adequate, a judge's reasons must explain why one party has won and the other has lost. The Trial Judgment met that threshold since it is apparent from reading it that the Judge's decided that the 44 factors on which D1 and D2 relied were outweighed by a countervailing factor, namely the importance of holding D1 and D2 to compliance with a duty, imposed by Parliament, to transfer the Leases to C. Since the Judge is not obliged to deal with every single argument that a litigant advances, he was not obliged to set out all 44 factors verbatim in his judgment or to provide a commentary on each one singularly since his overall conclusion was that, put together, they were insufficient to outweigh the countervailing factor.

63. D1 and D2 devoted a considerable proportion of their written and oral submissions to an analysis of the 44 factors. I can understand why they did so. They argued that, in the light of the asserted defects in the Trial Judgment, I should exercise the discretion afresh and that position meant they needed to explain the 44 factors in some detail. However, as a result, C sought, in its submissions, to critique D1 and D2's position on the 44 factors and to refer to documents that were before the Judge to bolster C's position that the 44 factors were outweighed by other considerations. For a good part of the proceedings before me, an observer walking into the court might well have thought that they were at a first instance trial rather than an appeal against the exercise of a discretion.

64. I mean no discourtesy to either side in not dealing in detail with all of their submissions on the factors that were said to point both for, and against, the exercise of the s19 discretion. As I have explained, my task is not to decide whether I agree, or disagree, with the Judge. I will instead focus on explaining why, noting the high degree of deference that I should pay to the Judge's exercise of discretion, I will not interfere with it in this appeal.

Whether the Judge ignored the significance of the "purposes of the Act"

65. D1 and D2 submit that the Judge lost sight of the fact that an order to transfer the Leases "did not fit with the purposes of the Act" because the tenants of the Building already had practical control over the roof space because it was owned by D4, a company that was controlled by the tenants. They argue that the effect of the Judge's order was to give tenants of the Building "two bites at the cherry" in relation to the Leases: first the opportunity to defeat the proposal at the AGM and, when they did not do so, a still further opportunity to acquire the Leases pursuant to the Act. There is no force in the argument that the Judge overlooked this relevant consideration: the Judge was well aware that the tenants collectively controlled D4 since D1 and D2 relied heavily on that fact in support of their argument on estoppel (see TJ[128]). D1 and D2's true complaint is as to the weight he gave this factor which was a matter for the Judge since, as I explain in more detail below, he has not reached a conclusion that was "obviously wrong".

Whether the Judge ignored D1 and D2's actions to their detriment and whether he was "compensation blind"

66. D1 and D2 argue that the Judge failed to have regard to the fact that they had acted to their detriment by performing the Works and making the Common Parts Contribution, which would only make sense if they believed that they would retain their interest in the Leases. Moreover, they argue that the Judge was in no position to assess whether they would receive a fair price if they were required to transfer the Leases to C, particularly since C's position, both before the Judge and in the present appeal, is that the purchase price payable should be just £1. Accordingly, they argue that the Judge was "compensation blind" when he exercised his discretion and so overlooked a relevant consideration. On closer inspection, this too is a complaint about the weight that the Judge gave to relevant factors and the assertion that he ignored them is wide of the mark.

67. There is no force to the argument that the Works and Common Parts Contributions were ignored not least since they are all referred to in the Trial Judgment. Moreover, TJ[158] demonstrates that the Judge was proceeding on the basis that D1 and D2 would not just receive the nominal consideration for which C was arguing and that the FTT would determine the value of "non-monetary consideration [that] has passed in quite substantial sums" with C having to pay the amount so determined to D1 and D2 in return for the Leases. The Order makes it clear that the discretion was exercised in circumstances where the Judge had decided that D1 and D2 were to receive consideration that included the aggregate sums spent on the Works and the Common Parts Contribution. No doubt D1 and D2 consider that this level of consideration is inadequate but the Judge could quite reasonably take a different view, even before the FTT had ascertained the full amount. The Judge was not "compensation blind".

Whether the Judge ignored the fact that tenants "stood by" and permitted D1 and D2 to perform the Works

68. Next, D1 and D2 argue that the Judge overlooked the fact that the tenants of the Building, through their shareholdings in D4, "stood by" and allowed them to perform expensive works only to emerge with an exercise of the right of first refusal after those works had been completed. Both sides took me through contemporaneous documents

with D1 and D2 emphasising correspondence that made no mention of the possible exercise of rights under the Act and C emphasising documents showing the extent of tenant unrest following 2015. Both sides rightly acknowledged that I was just being shown a part of the overall picture.

69. The documents that I was shown were indicative of a complicated and evolving dynamic between D1 and D2 and other tenants with some salient features being as follows:

i) At the time of the AGM, tenants of the Building were supportive of the proposal for D1 and D2 to obtain Leases in return for undertaking works to the roof and the common parts (see TJ[72]).

ii) Following the grant of the Leases, D1 and D2 undertook works to the Common Parts to a good standard and tenants were pleased with those works (TJ[115]). However, the Works stalled and did not commence until October 2017.

iii) By 2015, certain tenants of the Building, including a Dr Jaffer and Ms Jaffrey, had some concerns about the roof garden transaction. They noted that D4 had transacted with its directors and so were concerned that a full price might not have been obtained. There was some quite heated correspondence between the tenants and the board of D4 on this issue.

iv) Dr Jaffer and other dissatisfied tenants were requesting information from the Board of D4. There was some debate among directors about the extent of information that should be provided. Dissatisfied tenants appear not to have received all the information they were requesting. A note of a meeting that took place on 29 May 2016 suggests that, on that date, Dr Jaffer was not even aware that the Leases had been granted. An email dated 30 September 2016 from another dissatisfied tenant (Mr Darun Dhanija) suggested a similar misunderstanding since the author was suggesting a process under which the roof gardens would be a communal asset, available to all tenants of the Building. The earliest document that I was shown confirming to dissatisfied tenants that the Leases had been granted in 2012, was dated 16 December 2016.

v) Dissatisfied tenants did not suggest in the correspondence in 2015 and 2016 that they had any right of first refusal. However, it is not possible for me to make any findings as to whether they were aware of their rights under the Act at this time. By contrast, both Mr Franses and Mr Ramsey (who were directors of D4 while correspondence with the dissatisfied tenants was ongoing) were aware of the right of first refusal provided by the Act.

vi) D1 and D2 needed some sort of waiver from D4 because they had not started works "forthwith" on the Leases being granted (see paragraph 18.iv) above). That waiver was apparently given in a licence agreement between D4, D1 and D2 executed on 31 May 2017. Significantly, that licence agreement was executed by Mr Ramsey on behalf of D4 just before the appointment to the board of D4 of directors who were objecting to the roof garden project. The grant of that licence caused a good degree of resentment on the part of the incoming directors. A letter from their solicitors dated 21 June 2017 indicated that the licence had been improperly rushed through before the new directors' appointment.

vii) Minutes of a board meeting held on 12 June 2017 suggest that the incoming directors were by then aware of the "legal right of first refusal". Yet the solicitors' letter of 21 June 2017 made no mention of the Act.

70. It is not possible, at this remove from the evidence, for me to decide whether the tenants "stood by" and allowed D1 and D2 to perform the Works without mentioning rights under the Act of which they were aware or whether, as C argues, D1 and D2 proceeded with the Works knowing that they were "on risk" of the tenants choosing to exercise their right of first refusal. Nor would it be right for me to attempt to do so since I have not heard all the evidence and the way it was tested in cross-examination. Having been shown a snapshot of the documentary evidence, I conclude that the Judge was entitled to form the conclusion that the allegation of "standing by" was not made out or was insufficient, when weighed together with other factors, to cause him to exercise his discretion to relieve D1 and D2 from their duty to comply with the Purchase Notice.

Whether the Judge failed to take into account matters of "illegality" or the "connection" between C and D4 (Ground 10)

71. Ground 10 was that the Judge failed to give due weight to the connection between C and D4 but, as advanced orally, became an allegation that the Judge failed to have regard to "illegality" arising out of the Participation Agreement. The parties to that agreement include a majority, but not all of, the tenants of the Building and are defined in the agreement as the "Participators". The Participation Agreement acknowledges that two residents of the block (Mr Abdelelah Salam Bin Mahfouz and Mr Yaser Saleh Bin Mahfouz (the "Funders")) would fund both the costs of exercising tenants' rights under the Act and any purchase price payable for the Leases pursuant to the Act. In return, the Funders would have control over that process and would also between them be beneficial owners of the shares in C. Other Participators could, in return for making a discretionary contribution to the costs of the project, become shareholders in C, but that would be a matter for the Funders in their sole discretion.

72. By Clause 6 of the Participation Agreement, all Participators (including the Funders) "acknowledge" that if C acquires the Leases in exercise of rights under the Act a number of matters need to be addressed including "the transfer of certain areas of the Roof Spaces back to [D4] to be used and managed as common parts of the Building". That, argue D1 and D2, demonstrates that, if C acquires the Leases, D4 will benefit from its own illegal action (consisting of granting the Leases to D1 and D2 without first serving a notice under s5 of the Act) by obtaining a re-transfer of part of the very interests that it granted. D1 and D2 argue that this is not simply a fanciful possibility since the Funders are the sole directors and shareholders of C and are also directors of D4 and so can ensure that the transfer back to D4 takes place. It is said that the Judge failed to give sufficient weight to this factor.

73. I reject this aspect of D1 and D2's challenge to the Judge's exercise of discretion. The Judge was aware of the Participation Agreement and it was a matter for him to decide how much weight to give to it as a guide to the exercise of discretion. A drawing attached to the Participation Agreement that was expressed to set out "a potential solution for the future use and management of the Roof Spaces (subject to the transfer of certain areas of the Roof Spaces back to [D4]" shows a relatively small part of the roof as being reserved for D4's use and then only for "access for maintenance

purposes". The Judge could quite reasonably form the view that any "benefit" to D4 was modest. Moreover, while the Participators are indeed the sole directors and shareholders of C, there are other shareholders and directors in D4. The Judge was entitled to conclude, as he did at TJ[125], that he should not assume that C and D4 would act as if they were one company. He was entitled to conclude that it was not certain that D4 would even obtain a benefit.

74. D1 and D2 make a more specific criticism of the following passage from TJ[125]:

> *As to the question of alleged illegality the defendants argue that there is an obscure or opaque relationship between the claimant and the fourth defendant, who appear to be aligned, and that if the claimant were to succeed then the fourth defendant would be benefitting from its own illegal act in not complying with section 5 of the 1987 Act at the very commencement of the transaction leading to the grant of the Leases, which they point out is a criminal act. The defendants assert that Messrs Bin Mahfouz effectively control the fourth defendant. As I said earlier, the benefit to the participating tenants from the litigation will depend, having regard to the participation agreement, on the goodwill of those gentlemen. If this issue were to be made a substantive plank of the defence it seems to me that this was not sufficiently explored, if at all, in cross-examination. Without further evidence I cannot conflate the claimant and the fourth defendant. They are separate corporate entities. [emphasis added]*

75. They argue that the Participation Agreement was disclosed only after the evidence had closed and, accordingly, it was unfair of the Judge to accuse them of insufficient cross-examination on its terms. However, this is to misunderstand the Judge's reasoning. His point is not that there should have been cross-examination on the terms of the Participation Agreement but that, if it was said that C and D4 were effectively a single corporate entity, that matter should have been explored in cross-examination. In other words, the point about cross-examination follows on not from the sentence immediately before, that refers to the Participation Agreement, but rather the sentence before that which references the allegation that the Funders "effectively control the fourth defendant". Even if the relationship between C and D4 was "obscure or opaque", it did not follow that D4 would act in accordance with the wishes of C or of the Funders. Perhaps the point could have been expressed more clearly but this was an oral judgment.

Specific alleged errors said to have infected the Judge's exercise of discretion

Estoppel (Grounds 6 and 7)

76. D1 and D2 do not seek to argue in this appeal that an estoppel operates to prevent C from asserting its rights under the Act. Therefore, they do not directly challenge the Judge's conclusions on the question of estoppel. Instead, D1 and D2 rely on the proposition that the proper exercise of the Judge's discretion under s19 should be informed by an analysis of whether this was a case of "nearly estoppel" (see paragraph 54.iii) above). Therefore, they submit, to the extent that the Judge made errors on the question of estoppel, those errors will have caused him to conclude that the case was

not as "nearly" an estoppel as it actually was with the result that the exercise of his discretion was flawed.

77. I reject the premise of this argument. True it is that, when exercising the discretion of the Court in the case before him, namely whether to require a person to provide information pursuant to a request under what was then s11 of the Act, Robert Walker LJ had regard to some of the factors which Lloyd J had in mind when reaching his conclusions on estoppel. However, that was simply the approach taken in that particular case. Robert Walker LJ's judgment does not state that the exercise of any discretion under s19 must proceed by considering how close the case is to an estoppel. D1 and D2's reliance on the concept of a "nearly estoppel" is misplaced.

78. I do not, therefore, need to decide whether the Judge was right to hold at TJ[136] that the tenants could not be estopped from relying on their statutory rights under the Act. The proper exercise of the Judge's discretion did not depend on the answer to that question of pure law. Rather, it depended on a weighing up of competing considerations. Having decided that the tenants could not be estopped from relying on statutory rights, the Judge did not close his mind to relevant factors. Rather, at TJ[138] to [145], the Judge made further findings on the ingredients of an estoppel in case, contrary to his conclusion, an estoppel could lie. These findings, together with the totality of his findings on relevant circumstances as set out in the Trial Judgment were properly taken into account in the exercise of his discretion.

79. D1 and D2 are critical of the following passage at TJ[144]:

> *144. Nor in my view did an estoppel arise at a later stage when the works to the roof and the common parts were carried out. It is obvious that the tenants, as I have said earlier, knew that the works were being carried … but they were not aware that they had given up rights in reliance on which the defendants agreed to carry out such works…*

80. D1 and D2 argue that this passage demonstrates an error of law since *Munt v Beasley* [2006] EWCA Civ 370 shows that a proprietary estoppel can be present even in circumstances where the person being estopped is unaware of their precise legal rights. I am far from convinced that the error alleged is present. The passage I have quoted appears in a part of the Trial Judgment in which the Judge is discussing estoppel by convention. The extent to which the tenants were aware of their rights under the Act seems, in principle, to be relevant to the question of whether their conduct "crossed the line" so as to involve the tenants assuming some element of responsibility for any reliance by D1 and D2 on an asserted common assumption. In any event, the Judge was entitled to take into account the tenants' knowledge of their legal rights in deciding how to exercise his discretion under s19.

Interpretation of Resolution 7 (Ground 8)

81. D1 and D2 make two related criticisms of the Judge's interpretation of Resolution 7. Their first argument is that, at TJ[89] and TJ[90], he applied a flawed approach to the construction of that resolution. The word "negotiate" could mean "haggle" but it could equally mean "conclude". Since the sense in which the word was used was not obvious from Resolution 7 itself, the Judge should have looked at extrinsic evidence, including

the minutes of the AGM, rather than ignoring that extrinsic evidence. Their second point is that, whatever Resolution 7 meant, the minutes of the AGM demonstrated that tenants of the Building were happy for the Leases actually to be granted. Therefore, whichever way it is approached, D1 and D2 argue that the Judge did not properly appreciate that the QTs, most of whom were represented at the AGM, positively agreed to the Leases being granted.

82. The first aspect of D1 and D2's argument prompted some disagreement about whether extrinsic evidence could be of any material weight in construing shareholder resolutions of a company given the principle set out by Lewison LJ at [125] of his judgment in *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736 and the parties helpfully provided me with further written submissions on that issue.

83. I have concluded, however, that whatever the correct approach to the construction of Resolution 7 and whether or not the QTs present at the AGM positively approved the Leases, Ground 8 is not made out.

84. D1 and D2's focus on what Resolution 7 meant, or what QTs said at the AGM overlooks other highly relevant matters. The Judge found that QTs' rights of first refusal were not discussed at the AGM even though both Mr Franses and D2 knew at the time that the tenants had these rights. Therefore, Mr Franses's address to the AGM which explained the proposal which was instrumental in persuading QTs to agree to it (if that is what they did) omitted the highly material fact that QTs had a right of first refusal. I am certainly not suggesting that the omission was deliberate, and the Judge did not do so either. However, the Judge clearly considered the omission was material (see TJ[142]) not least since he considered it possible that events might have turned out differently if the right of first refusal had been mentioned. A further highly relevant consideration is that, because of flat sales and purchases in the meantime, QTs represented at the AGM were, in material respects, different from the QTs who authorised the service of the Purchase Notice.

85. Accordingly, in my judgment, D1 and D2's challenge on Ground 8 fails to engage with what the Judge considered to be the salient aspects of Resolution 7 and proceedings at the AGM. The Judge was clearly entitled to be influenced in the exercise of his discretion by his conclusion that QTs were not told the whole story at the AGM. The weight he gave to that factor was a matter for the Judge. I am not prepared to conclude that, even if QTs did approve the grant of the Leases at the AGM, that factor, whether alone or together with other factors, obliged the Judge to exercise his discretion in D1 and D2's favour.

Factual finding in TJ[108] (Ground 9)

86. Next, D1 and D2 criticise the Judge's finding at TJ[108]:

> *I cannot reach the conclusion that if the rights of first refusal had specifically been referred to, they would not have been explored or taken up, or that matters would not have proceeded in a different way.*

87. D1 and D2 recognise that this represents an evaluative conclusion by the Judge on a question of fact. They thus rightly accept that I should not interfere with this conclusion

unless it is "plainly wrong" in the sense that no reasonable judge could have reached it (see, for example, paragraph 2(i) and 2(ii) of Lewison LJ's judgment in *Volpi v Volpi* [2022] 4 WLR 48).

88. In my judgment, D1 and D2 have come nowhere near surmounting that high hurdle. I recognise that the Leases granted restricted use of the demised premises to tenants of the top floor flats. However, the Judge was not finding that tenants of the lower floor flats would be interested in paying for a lease that benefited only tenants of the top floor. His counterfactual finding was wider than that and included the question of whether, had tenants known of their rights under the Act, "matters would not have proceeded in a different way". In 2011 and 2012, tenants of the Building did not object to the specific proposal before them: to grant Leases to D1 and D2. However, at the time they did not know that they had any rights of first refusal. Had they known of their rights it is quite possible that they would have acted differently at least in some respects. The Judge's finding was simply that he would not rule out that possibility. It was entirely open to him.

OTHER ASPECTS OF D1 AND D2'S APPEAL

The HRA

89. D1 and D2 rely on their rights under the HRA in connection with a few of their grounds of appeal which I address all in one place. The parties are agreed that conceptually the HRA could be relevant in all or any of the following ways:

    i) as a guide to the construction of relevant statutory provisions (so that, if necessary a statutory provision can be "read down" so as to be compatible with the HRA);

    ii) if the provisions of the Act are incompatible with the HRA so that this court is asked to make a declaration of incompatibility; and

    iii) as a guide to the exercise of discretion under s19 of the Act.

90. D1 and D2's appeal does not raise any relevant question of construction. All parties are agreed, at least for the purposes of the present proceedings, that by using the word "may" in s19, Parliament afforded the Judge a discretion as to whether to make an order. No party invites this court to make a declaration of incompatibility.

91. Therefore, rights under the HRA are relevant in D1 and D2's appeal only to the extent they affect the Judge's exercise of discretion or the parameters within which he is entitled to exercise that discretion. In my judgment, neither aspect leads to any conclusion different from that which I have set out above. The HRA does not compel the court to exercise its discretion in D1 and D2's favour since the discretion involves balancing the competing rights of D1 and D2 (including their A1P1 rights to peaceful enjoyment of their possessions) against C's legitimate interest in enforcing a duty that Parliament has enacted to pursue a legitimate aim (see paragraph [67] of the judgment of Henderson J in *Artist Court Collective Ltd v Khan* [2016] EWHC 2453). Moreover the Judge, when exercising his discretion bore well in mind the fact that D1 and D2's A1P1 rights were engaged.

Illegality

92. D1 and D2 wish to pursue "illegality" as a separate ground of appeal. I was not entirely clear what this separate ground added to the arguments that I have already considered in connection with the Judge's exercise of discretion. I think the way in which it was ultimately put is that, even if the Judge properly had matters of "illegality" in mind when exercising his discretion, nonetheless the principles set out in *Patel v Mirza* [2017] AC 467 and/or *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] AC 304 meant that it was not open to the Judge to make an order requiring D1 and D2 to transfer their Leases to C in circumstances where D4 would "benefit" from the transfer.

93. I reject that argument. D1 and D2 rely on D4's "illegal act" being granting the Leases without first serving a notice under s5 of the Act. Section 10A is capable of imposing criminal liability for such an act but there is a defence of "reasonable excuse". It is not for me to determine whether that defence is available or not. However, it is at least arguable that, if D4 genuinely and reasonably believed that proceedings at the AGM obviated the need for any s5 notice, no offence was committed.

94. In any event, D4 is not seeking to enforce any agreement, still less an "illegal agreement" that engages the principle in *Patel v Mirza*. It is not party to the Participation Agreement and it is C, and not D4, who is entitled require D1 and D2 to comply with the Purchase Notice. As I have explained, the Participation Agreement contemplates that D4 might obtain some modest benefit if C successfully acquires the Leases. However, obtaining that modest benefit will depend on a subsequent agreement being concluded between D4 and C. While the Funders control C (both at board and shareholder level) and are also directors and shareholders in D4, the Judge permissibly declined to regard D4 and C as a single unit.

95. The principle in the *Welwyn Hatfield Borough Council* case is not engaged for similar reasons. Whether D4 will actually obtain any "benefit" should C acquire the Leases is uncertain and, even if it does, the Judge was entitled on the evidence before him to conclude that the benefit is modest. Moreover the nexus between D4's averred unlawful act (granting the Leases without first serving a notice under section 5) and the averred "benefit" is slender.

The decision to refer matters to the FTT (Ground 11)

96. The first aspect of D1 and D2's Ground 11 is that it was procedurally unfair for the Judge, to make the Order entitling C to acquire the Leases for (broadly) the amount spent in respect of the Works and the Common Parts Contribution in circumstances where C's case was that it was entitled to acquire the Leases for £1.

97. I reject that argument. D1 and D2 had themselves put in issue the amount that they had spent on the Works and the Common Parts Contribution (see, for example, paragraph 81 of their Defences). They had also raised, in paragraph 112 of their Defences, the argument that performing the Works caused the Leases to increase in value for the purposes of s12B(7) of the Act. In the postscript to this judgment, I canvas the question whether s12B(2) and s12B(7) set out mutually exclusive regimes for determining the consideration that C must pay. However, whether s12B(7), s12B(2) (or both) apply, those sections, rather than any amount specified in a Purchase Notice or in pleadings,

fix the amount that C must pay to acquire the Leases. Given the findings that the Judge made as to the "terms" on which D1 and D2 acquired the Leases, and acknowledging that those findings are challenged by C's respondent's notice, the Judge did not err in requiring the FTT to determine the matters specified in paragraph 2 of the Order since those matters could affect the amount of consideration that the Act required C to pay for the Leases.

98. I also reject the second aspect of D1 and D2's Ground 11, namely that the Judge overlooked the fact that C had failed on its pleaded case when making his costs order. The Judge explicitly had this point in mind at CJ[31]. No doubt D1 and D2 consider that the Judge should have awarded C a lower percentage of its costs than the 80% he did award (see CJ[35]). However, the Judge had dealt with the trial and was better placed than I am now to decide what a reasonable and proportionate costs award would be. He did not step outside the generous bounds of his discretion in making the costs award that he did.

99. D1 and D2 place some reliance on the statement of Lloyd J at 985H of *Harley House HC* that "it might be argued that, if the notice under section 19 identifies the alleged default in specific terms, it is only that default (if such it be) that can be put in issue in the proceedings." However, that statement was made in connection with an alleged default in an information notice that was served under what was then s11 of the Act. I respectfully see the force of Lloyd J's point that, if a QT is asking the Court to make an order to enforce compliance with an information notice, the Court's order might properly be limited to requiring the provision of information that was specified in that notice. However, as I have explained, s12B contains a mechanism for determining the price that C must pay for the Leases which is inconsistent with the price payable being conclusively determined by the terms of a Purchase Notice. Moreover, Lloyd J himself said that his statement was not part of the binding ratio of his decision since he had heard no argument on it. Accordingly, the statement of Lloyd J does not cause me to depart from the conclusions above.

THE RESPONDENT'S NOTICE

100. The provisions of the Order set out in paragraph 30. might be said to depart from a purely literal interpretation of s12B(2) of the Act which requires D1 and D2 to dispose of the Leases "on the terms on which [they were] made (including those relating to the consideration payable)". Both sides realistically accept that it is not possible for C to acquire the Leases on <u>exactly</u> the same terms as those on which they were granted (since the Works have been performed and the Common Parts Contribution already made). Neither side argues that the Judge should have ordered D1 and D2 to do the impossible and transfer the Leases on those very terms. Instead, both sides accept that at least in principle s12B(2) could be satisfied by an order requiring C to pay a sum of money that is reflective of compliance with the terms of the Leases. However, they have very different perspectives on (i) those "terms" that are relevant and (ii) the basis of calculation of sums of money that are reflective of those terms.

101. By its respondent's notice, C argues in essence that:

    i) Section 2(1) of the LP(MP)A means that, because the agreement to make the Common Parts Contribution was not set out in writing, it was not a contractually

binding obligation. Accordingly, the Judge should not have ordered that D1 and D2's costs of complying with an unenforceable obligation should be reflected in the amount payable by C for a transfer of Leases.

ii) The obligation to perform the Works was not "consideration payable" under the Leases. Rather, that obligation was just one of the covenants contained in the Leases that are simply part and parcel of the estate in land that the Leases created. Accordingly, the Judge should not have directed the FTT to determine sums that D1 and D2 expended in connection with the Works so as to form an element in the purchase price of the Leases payable by C.

iii) Even if, contrary to the arguments set out in paragraph (ii), the obligation to perform the Works does have some bearing on the purchase price payable by C, it is relevant to consider not the absolute amount that D1 and D2 spent in performing Works, but rather the value of the Works to D4.

Argument 1 – the effect of the LP(MP)A

102. I respectfully agree with the Judge's conclusion, set out at TJ[38] that s2 of the LP(MP)A applied to the agreement under which D1 and D2 agreed to make the Common Parts Contribution.

103. The Judge made findings on the nature of that agreement at TJ[41], concluding that it was made before the Leases were granted. Therefore, the Judge's conclusion was that D1, D2 and D4 reached an oral agreement under which D1 and D2 agreed to make the Common Parts Contribution in return for D4 agreeing (after the date of the oral agreement and in fulfilment of promises contained in that agreement) to grant the Leases. That was a contract for the sale or other disposition of an interest in land (namely the granting of Leases) which fell within s2(1) of the LP(MP)A because it was not in writing.

104. D1 and D2 seek to resist this conclusion by reference to the judgment of the Court of Appeal in *Rollerteam Limited v Riley* [2016] EWCA Civ 1291. However, I consider that their reliance on that authority is misplaced.

105. *Rollerteam* distinguishes between two different situations:

i) A and B agree that, if B promises to execute a disposition of interest in land, A will promise to perform certain acts. That is an executory contract for a disposition of an interest in land to which s2 of the LP(MP)A can apply.

ii) A says that, if B executes a document effecting a transfer of land, A will perform certain acts. That is a contract that, as Henderson LJ put it in *Rollerteam*, "exchanges a promise for a performance" that is outside the scope of s2 of the LP(MP)A. B's execution of the transfer of land is consideration for A's promise. There is no point at which B undertakes an executory or future obligation to execute the document transferring land.

106. Given the Judge's finding at TJ[41], the agreement under which the Common Parts Contribution was made falls within paragraph 105.i) above rather than paragraph 105.ii). Therefore, the question in essence is whether the "terms" referred to in s12B(2)

on which C is to acquire the Leases is a reference only to "enforceable" terms. I see no reason to construe the provision in this way.

107. The first point to note is simply that Parliament has used the expression "terms". It has not made any specific reference to the ability or otherwise of those terms to be enforced. Moreover, Parliament was, in s12B, legislating specifically in relation to dispositions of interests in land and s12B was enacted after s2 of the LP(MP)A. Parliament, therefore, would have realised there were statutory restrictions on the enforceability of terms relating to transfers of the very interests in land with which it was concerned in s12B. If it had wished to limit the "terms" that mattered for the purposes of s12B to enforceable terms, it could be expected to say so expressly.

108. A "purposive" construction of statutory provisions support this conclusion. Section 12B of the Act is engaged when all has not gone according to plan. An intermediate purchaser has acquired land from a landlord in circumstances where QTs have not been offered the necessary right of first refusal under s5. The Act addresses matters by looking backwards from the date of the Purchase Notice, ascertaining what the intermediate purchaser had to pay to acquire the property and, very broadly, permitting the QTs to step into the purchaser's shoes by acquiring the property on those terms. That is a rational way of dealing with the competing interests of the intermediate purchaser (who may well have acquired the property innocently being unaware of QTs' rights of first refusal) and those of the QTs themselves (who have a legitimate interest in the proper exercise of the right of first refusal that Parliament has granted them). Significantly, and appropriately since the Act can operate to deprive the intermediate purchaser of their property, the Act recognises that the intermediate purchaser should not suffer the kind of disproportionate loss that might arise if they were entitled to a consideration that is either nil, or fixed by reference to something other than the price the intermediate purchaser paid to acquire the property. The concern for a proportionate protection of the intermediate purchaser's property rights is also evident in s12B(7) which provides for the intermediate purchaser to retain the benefit of at least part of any increase in value of the property since its acquisition.

109. Those aspects of s12B, under which QTs step into the intermediate purchaser's shoes, and care is taken to respect the intermediate purchaser's property rights, would be undermined if s12B were concerned only with enforceable "terms". Instead of sensibly and rationally looking back from the date of the Purchase Notice and asking what the intermediate purchaser paid to acquire the interest, it would, on C's approach, be necessary to look forward from the date of the intermediate purchaser's agreement and ask which of those terms were enforceable and which were not. Moreover, that analysis could produce outcomes that are inconsistent with the overall intention for the QTs to step into the purchaser's shoes. An "honourable" intermediate purchaser who acquires a property on terms that are not legally enforceable, but chooses to honour the obligations nonetheless, would suffer a detriment since the QTs would not be required to pay anything in respect of the unenforceable term even though that had resulted in an actual cost to that intermediate purchaser. By contrast, the QTs would enjoy a windfall attributable solely to the fact that the intermediate purchaser was foolish enough to enter into an agreement that contained some unenforceable terms but honourable enough nevertheless to comply with those terms. That outcome would be inconsistent with the scheme of s12B read as a whole.

110. Accordingly, in my judgment, both the ordinary meaning of the statute and considerations of purposive construction point in the same direction and against C's argument that only "enforceable" terms matter for the purposes of s12B(2). I respectfully disagree with a contrary view expressed by the Lands Tribunal in *Woodridge v Downie* (1998) 76 P&CR 239, LT. I was shown the judgment of the Court of Appeal in *Staszewski v Maribella Ltd* [1997] 30 HLR 213 on which D1 and D2 relied as supporting their analysis. However, there was no express discussion in *Staszewski* of the possibility that the "term" in question might be unenforceable by virtue of s2(1) of the LP(MP)A. On page 223 of the report, Potter LJ's judgment includes a reference to the contract for sale of land not being the subject of "any formal variation". D1 and D2 suggest this is a plain reference to s2 of the LP(MP)A but I disagree. The statement in question appears in counsel's submissions (and indeed the submissions of counsel on the losing side) rather than in Potter LJ's conclusions. I do not consider that *Staszewski* provides binding authority on the question, although I am reassured that the overall conclusion of Potter LJ on the issue before the Court of Appeal, set out on page 224 of the report, is consistent with the one that I have reached.

Argument 2 – "covenant not consideration"

111. C relies strongly on the judgment of Zacaroli J in *York House (Chelsea) Ltd v Thompson* [2020] Ch 1. That case concerned leases granted for no premium and at a peppercorn rent but nevertheless containing tenants' covenants, either express or implied. Zacaroli J held that despite the tenants' covenants (which were expressed to be part of the consideration for the grant of the leases), the leases were still "gifts" for the purposes of s4(2)(e) of the Act. C reasons that (i) a "gift" is a transfer that is made otherwise than for "consideration", (ii) the judgment in *York House* means that tenants' covenants cannot be "consideration" (since the leases in those cases could otherwise not have been gifts) and therefore (iii) the covenant to perform the Works is similarly not consideration for the purposes of s12B(2) of the Act.

112. D1 and D2 do not challenge C's interpretation of *York House*. Indeed, Mr Legge KC accepted in paragraph 22 of his skeleton argument dealing with C's respondent's notice that the covenant to perform the Works is not "consideration" for the purposes of s12B(2).

113. Nevertheless, in my judgment C's Argument 2 must fail. As D1 and D2 point out, s12B(2) requires them to "dispose of the estate or interest that was the subject-matter of the original disposal, on the terms on which it was made (including those relating to the consideration payable)". The emphasis added to this quotation is my own designed to bring out D1 and D2's argument, which I accept, that s12B(2) is concerned with identifying "terms". While it is made clear a provision for "consideration payable" is an example of a "term", the natural reading of s12B(2) is that something can be a "term" even if it does not relate to "consideration payable".

114. C has not sought to argue that the obligation in the Leases to perform the Works was anything other than a "term" on which D1 and D2 obtained the Leases. In my judgment, this obligation was a "term". Accordingly, a natural interpretation of s12B(2) is that the obligation to perform the Works should, contrary to C's Argument 2, be taken into account for the purposes of s12B(2). Moreover, in my judgment, the same considerations of "purposive interpretation" that I have outlined in paragraphs 108. and 109. support this conclusion. Complying with their covenant to perform the Works

required D1 and D2 to incur cost. It would be contrary to the scheme of s12B(2) if this cost fell out of account altogether when deciding how much C should have to pay D1 and D2 to acquire the Leases.

Argument 3 – "value to the landlord"

115. If contrary to its Argument 2, D1 and D2's obligation to perform the Works must be taken into account for the purposes of s12B(2), C argues that the value to be taken into account should be the value of the Works to D4. Accordingly C argues that the Judge was wrong to proceed on the basis that what mattered was the cost to D1 and D2 of performing their obligations.

116. Section 12B(2) does not make the position clear one way or the other. That is perhaps unsurprising since, as I have explained in paragraph 100., read literally s12B(2) appears to envisage that QTs are entitled to acquire the Leases on the same terms as governed their original grant. On that literal interpretation, no questions of "value to landlord" or "cost of performance" would arise. Accordingly, Argument 3 arises only because of the parties' common position recorded in paragraph 100. above.

117. C supports its argument by reference to sections 5E and 8C of the Act. Those sections are engaged if a landlord complies with the obligation under s5 to notify QTs of their rights of first refusal before making the relevant disposal. If, under that relevant disposal, the landlord seeks non-monetary consideration, the landlord must notify the QTs of that fact by way of a notice under s5E. QTs are entitled, in response to a s5E notice, to elect under s8C to satisfy the non-monetary consideration by paying a cash sum instead. However, it would appear that any such election would not entitle the QTs to acquire the relevant interest from the landlord on paying a cash sum in lieu of the non-cash consideration. Rather, s8C(3) appears to envisage that QTs exercise their rights against an intermediate purchaser of the protected interest who provides the non-monetary consideration to the landlord and receives a monetary amount in lieu from the QTs. By s8C(4) the cash sum payable in lieu is calculated by reference to the "value in the hands of the landlord" of the non-monetary consideration.

118. C reasons that, if it acquires the Leases from D1 and D2 following a transfer to them that was impermissibly not preceded by a notice under s5, they should be in the same position they would have been in had a s5 notice been given. Accordingly, C argues that any consideration payable in respect of the term of the Leases requiring D1 and D2 to perform the Works should similarly be calculated by reference to the value of the Works to D4.

119. This is not a mere academic quibble. C argues that for several reasons, including what it submits to be relatively limited obligations of D1 and D2, coupled with D4's existing rights to recover the cost of works from tenants of the Building pursuant to the service charge provisions, the value of the obligation to D4 is considerably lower than the amounts that D1 and D2 spent in complying with the obligation. That said, C does not ask me to make findings whether "value to D4" actually differs from "cost to D1 and D2".

120. While there is a superficial attraction to C's analogy with s5E and s8C, on closer analysis, I consider that analogy to be flawed. First, s5E and 8C do not set out any right of general application to permit QTs to pay a cash sum in lieu of non-cash

consideration. Section 8C is likely to apply in relatively limited situations involving an intermediate purchaser who is prepared to purchase the relevant interest, and provide the landlord with the non-cash consideration, in full knowledge that QTs are likely to purchase the interest so acquired for a cash sum calculated by reference to the value to the landlord of that non-cash consideration. Second, s5E and 8C by definition apply where there has been compliance with s5: landlord, QTs and intermediate purchaser will be well aware that the transaction in which they are involved is governed by s5C and 8E. Little balancing of competing interests is necessary in such a case since the QTs are free to make, or not make, an election under s8C and the landlord and intermediate purchaser are free to transact, or not transact, with each other.

121. However, where a landlord sells to an intermediate purchaser without first serving a s5 notice, thereby engaging s12B(2), there are competing interests to be balanced as I have explained in paragraphs 108. and 109. above. There has been a breach of s5 and an intermediate purchaser, who may well have acquired the relevant interest entirely innocently, faces the prospect of losing it. As I have explained, the Act balances those competing interests by providing, very broadly, for the QTs to step into the shoes of the intermediate purchaser. That approach is more consistent with the consideration attributable to the Works being valued by reference to the actual cost to D1 and D2 rather than by reference to the benefit to D4. For example, if as C argues but D1 and D2 dispute, the benefit to D4 of the Works is nil (because D4 could recover the entirety of those costs from tenants of the Building pursuant to service charge provisions) then a result similar to that canvassed in paragraph 109. above could arise. D1 and D2 could receive nothing in relation to the costs of performing the Works and C will obtain a windfall benefit. I regard that construction of s12B as contrary to the scheme of the Act and I reject C's Argument 3.

DISPOSITION

122. D1 and D2's appeals are dismissed. C's challenge set out in its respondent's notice is also dismissed. My clerk will be in touch with the parties with a view to finalising the terms of an order and consequential matters.

POSTSCRIPT

123. I have now disposed of the appeal and respondent's notice that the parties have brought to this court. However, during the hearing before me, I raised the following questions about paragraphs 2 and 3 of the Order and the parties helpfully prepared written submissions on those matters.

    i) Paragraph 3 of the Order appears to suggest that the aggregate of <u>both</u> (i) amounts expended by D1 and D2 in respect of the terms of the Lease and (ii) "sums payable in accordance with s12B(7) of the Act" will be the sums payable by C to D1 and D2 for the transfers of the Leases "for the purposes of s12B(2) of the Act". However, it is possible to read s12B(7) as setting out an exclusive code for the determination of consideration payable that applies if a trigger condition is satisfied, namely that the "property … has since the original disposal increased in monetary value…". If that interpretation is correct, then it is possible that the FTT should have been directed to decide whether this is a "s12B(2) case" or a

"s12B(7) case" and determine the consideration payable by reference to either s12B(2), or s12B(7), but not both. I refer to this an issue of "s12B(7) exclusivity".

ii) Relatedly, performing the Works involved D1 and D2 in expending money (which, given my rejection of Arguments 2 and 3) is to be taken into account pursuant to paragraph 2a of the Order. Performing the Works might also have caused the value of the property demised under the Leases to increase, so engaging s12B(7) and paragraph 2b of the Order. It seems reasonably clear that this matter should not be counted twice, both under paragraph 2a and paragraph 2b, but there is perhaps a question whether D1 and D2 could choose whether to pursue a case based on s12B(7) or one based on the ordinary provisions set out in s12B(2). I refer to this as a question of "s12B(7) optionality".

124. I am grateful to both parties for their submissions on the questions of s12B(7) exclusivity and of s12B(7) optionality. However, in those submissions, neither party sought permission to amend their grounds of challenge to the Order and my conclusion in paragraph 122. is that the Order is not varied or set aside. It follows that the points made in paragraph 123. should not affect the ongoing proceedings before the FTT. The parties have agreed a short amendment to the Order to address the risk of the double count I have alluded to in paragraph 123.ii).

APPENDIX – RELEVANT STATUTORY PROVISIONS

The Law of Property (Miscellaneous Provisions) Act 1989

2 Contracts for sale etc. of land to be made by signed writing.

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

The Landlord and Tenant Act 1987

12B – Right of qualifying tenants to compel sale, &c, by purchaser

(2) The requisite majority of qualifying tenants of the constituent flats may serve a notice (a "purchase notice") on the purchaser requiring him to dispose of the estate or interest that was the subject-matter of the original disposal, on the terms on which it was made (including those relating to the consideration payable), to a person or persons nominated for the purposes of this section by any such majority of qualifying tenants of those flats…

(7) Where the property which the purchaser is required to dispose of in pursuance of the purchase notice has since the original disposal increased in monetary value owing to any change in circumstances (other than a change in the value of money), the amount of the consideration payable to the purchaser for the disposal by him of the property in pursuance of the purchase notice shall be the amount that might reasonably have been obtained on a corresponding disposal made on the open market at the time of the original disposal if the change in circumstances had already taken place

19.— Enforcement of obligations under Part I.

(1) The court may, on the application of any person interested, make an order requiring any person who has made default in complying with any duty imposed on him by any provision of this Part to make good the default within such time as is specified in the order.

(2) An application shall not be made under subsection (1) unless—

> *(a) a notice has been previously served on the person in question requiring him to make good the default, and*
>
> *b) more than 14 days have elapsed since the date of service of that notice without his having done so*