OUTER HOUSE, COURT OF SESSION

[2018] CSOH 48

CA95/17

OPINION OF LORD CLARK

In the cause

GATEWAY ASSETS LIMITED, a company incorporated under the Companies Acts and having its registered office at Maybrook House, 40 Blackfriars Street, Manchester, M3 2EG

Pursuer

against

C. V. PANELS LIMITED, a company incorporated under the Companies Acts and having its registered office at 230 Balmore Road, Glasgow, Scotland, G22 6LJ

Defender

Pursuer: Barne QC; DWF LLP
Defender: Brown; BTO Solicitors LLP

16 May 2018

Introduction

[1] This action concerns a lease of premises at Unit 2C, Clyde Gateway Trade Park, Rutherglen between Clyde Gateway Developments Limited and the defender ("the lease"). The term of the lease is 10 years from 3 December 2012 (the "date of entry"). In 2015, the pursuer succeeded to the landlord's interest in the lease. Clause 3.2 of the lease provides for a break option in the following terms:

> "The Tenants shall be entitled to terminate the lease on the 5th anniversary of the Date of Entry by serving upon the Landlords at least 6 months prior written notice thereof (time being of the essence)."

[2] The pursuer seeks declarator that the defender as tenant under the lease has not validly exercised the option in terms of clause 3.2 of the lease to terminate the lease on the fifth anniversary of 3 December 2012. The case called for a proof before answer.

Background

[3] By letter dated 10 December 2015, the pursuer wrote to the defender, stating *inter alia* that:

> "As your new Landlord, we write to confirm that we have appointed David Samuel Asset Management Ltd/ David Samuel Management Limited … to act as asset manager and they are authorised to deal with all aspects of management including the collection of rent and service charges…
>
> Please therefore remit all rent and other charges etc to the respective company, but deal with all communications and correspondence through the offices of David Samuel Management or David Samuel Asset Management Ltd."

This letter was enclosed with a letter, also dated 10 December 2015, from David Samuel Asset Management Limited which referred to the property and stated *inter alia* that:

> "We write to confirm that David Samuel Asset Management Limited has been appointed as the managing agent of the above property and enclose a letter of confirmation to this effect from Gateway Assets Limited."

In both letters, the address of David Samuel Asset Management Limited was given, and after the name of the street it stated "Manchester" followed by the post code.

[4] In early 2017, the shares in the defender were purchased by Allied Vehicles Limited. Stephen Pryor of Allied Vehicles Limited sent a letter dated 19 June 2017 ("the June letter"), with the first line of the address stating "David Samuel Asset Management" and the next

line stating "CCL Estate Company". The word "Manchester" was not in the address. The letter went on to state:

> "As per our lease agreement with yourselves, please accept this letter as written confirmation of our desire to terminate our lease on the property located at Unit 2C, Clyde Gateway Trade Park, Dalmarnock Road, Rutherglen G73 1AN. This decision has been previously communicated verbally and in person."

The June letter was signed by Mr Pryor, who designed himself "Director of Finance, Allied Vehicles Ltd, CV Panels Ltd". There was no reference to CCL Estate Company in either of the letters to the defender dated 10 December 2015 sent by or on behalf of the pursuer.

[5] It was accepted by the defender that the June letter was ineffective to constitute an exercise of the break option in terms of clause 3.2 of the lease, having been served less than six months before 3 December 2017.

[6] By letter dated 26 June 2017, the pursuer's agents wrote to the defender stating that the June letter had not validly exercised the break option under the lease. By letter dated 24 July 2017, the defender's agents replied, stating the defender's position that the break option had been validly exercised and that the lease would terminate on 19 November 2017. The defender's agents referred to and relied upon a letter which they claimed had been sent on 24 April 2017 ("the April letter"). The pursuer's agents replied, requesting a copy of the April letter and stating that it had not been received. The defender's agents subsequently provided the pursuer's agents with a copy of the April letter. The defender's agents stated that it was the defender's position that the April letter had been sent and received. The April letter was addressed to "David Samuel Asset Management" and stated in the next line "CCL Estate Company". The word "Manchester" was omitted from the address. It was therefore addressed in exactly the same terms as the June letter. The April letter referred to the subjects of the lease and went on to state:

> "We refer to the above property and herewith give notice of our intention to terminate the lease on the 5th anniversary of our date of entry in accordance with point 3.2 of our lease.
>
> We trust you will update your records accordingly and look forward to hearing from you".

[7] The pursuer contended that the April letter, if indeed it had been sent, was ineffective in exercising the break option in terms of clause 3.2 of the lease. The pursuer averred that neither the pursuer or David Samuel Asset Management Limited ("DSAM") or David Samuel Management Limited ("DSM") had received the letter. It was not sent by registered post or recorded delivery. In any event, averred the pursuer, the April letter was not addressed to the landlord; further, the April letter gave notice only of an intention to terminate the lease and it did not give notice that the break option was actually being exercised.

[8] The defender contended that the April letter had been sent and that therefore there was an evidential presumption that it had been received. The defender averred that the April letter was effective in exercising the break option. It had been sent to the pursuer's agent. In any event, the defender contended, the pursuer was, as a result of the pursuer's letter of 10 December 2015, personally barred from denying that notice to DSAM was sufficient.

[9] Accordingly, the issues in this case are (i) whether the April letter was sent by the defender and received by or on behalf of the pursuer; and (ii) if so, whether the April letter resulted in the valid exercise of the break option under clause 3.2 of the lease.

Evidence

[10] At this stage, I shall simply set out in general terms the matters covered by the

witnesses in their evidence. To the extent that specific aspects of the evidence are relied upon by either party, these are explained in my summary of the parties' submissions.

Evidence for the pursuer

[11] The first witness for the pursuer was Paul Jenkins, a director of the pursuer and of Cedarwood Asset Management Limited. He spoke to his role as director of the pursuer and the steps he instructed to be taken after he was told, on 26 April 2017, in an email from Richard Worrell, that the defender had indicated verbally that it was intending to trigger the break option. Next, the pursuer called Tracey Caslin, a property manager at DSAM. Her evidence in her witness statement concerned a telephone call she had with a director of the defender, Mr Bronsky, on 26 April 2017, in which he mentioned that the defender would be leaving the premises. In her oral evidence, she said she was not certain that it was Mr Bronsky who told her this; it may have been his assistant, Avril. The pursuer's third witness was Richard Worrall, Head of Portfolio Management at DSAM. He spoke to his involvement with the premises and the fact that DSAM did not receive the April letter. He also gave evidence about DSAM not having received the April letter and the manner in which mail is handled at the premises of DSAM. The pursuer then called Andrew Berkeley, a director at DSAM who spoke to the processes for managing mail within DSAM. The next witness for the pursuer was Iain Davidson, a director of the Industrial and Logistics Division at Colliers International, who gave evidence about receiving instructions from the pursuer to act in marketing for re-let the premises let to the defender, as it seemed likely the tenants were going to move although no break notice had yet been served. His evidence also covered inspecting the premises on 5 May 2017 for the purposes of them being re-let and sending an email on 9 May 2017 giving details of a conversation with Mr Bronsky during the

visit to the premises. The email dated 9 May 2017 recorded that Mr Bronsky had made clear that it was the defender's intention to exercise the break clause but that he seemed unsure as to whether notice had yet been served. Finally, the pursuer called Robin Golder, a Chartered Surveyor at Whitecross Building Consultancy Limited, who gave evidence about being instructed by Paul Jenkins to visit the premises, for the purposes of possibly preparing a Schedule of Dilapidations, as the tenant was considering leaving, and making the visit.

Evidence for the Defender

[12] The first witness for the defender was Geraldo Facenna, who is a director of Allied Vehicles Limited and is also a director of the defender (appointed when Allied Vehicles Limited took over the defender in June 2015). He understood that Gerard Bronsky, who was responsible for running the business of the defender, had served an appropriate notice to exercise the break option. Stephen Pryor, although a director of the defender, was not involved in its day to day running and was therefore not aware, when he sent the June letter, that Mr Bronsky had already written a letter exercising the break option. The second witness for the defender was Mr Bronsky. He spoke to having personally typed out and posted the April letter to DSAM. The computer on which it had been written had been destroyed. Stephen Pryor could not have known about the April letter. Mr Bronsky thought he had included the reference to CCL Estate Company in the address of the April letter because that company had previously been the property manager. He could not explain why this mistaken reference (along with the omission of "Manchester" from the address) appeared in the addresses in both the April letter and the June letter. It was not necessary for him to take any steps to confirm that the April letter had been received, for example by sending an email, as Mr Davidson had attended the premises on behalf of the pursuer on

5 May 2017 and Mr Davidson had confirmed that his client had told him that the defender had relocated and was giving up the lease. Thereafter, steps were taken on behalf of the pursuer to put up "To let" signs, which further evidenced that the pursuer was aware that the defender had exercised the break option.

Submissions for the pursuer

[13] The submissions for the pursuer can be summarised as follows. The court was invited to find the pursuer's witnesses both credible and reliable. In relation to the witnesses for the defender, the court was invited to treat Mr Facenna's evidence with considerable caution and to find Mr Bronsky to be an unreliable and incredible witness.

[14] Having chosen not to use recorded delivery or registered post to effect service, the defender was not entitled to rely on the deeming position otherwise available in terms of clause 9.13 of the lease. The onus was therefore on the defender to prove that the April letter was both posted by the defender and actually received by the pursuer. The defender had failed on both counts.

[15] The first issue was whether the April letter was sent. There were a number of points supporting the inference that it was not in fact sent. Iain Davidson visited the premises on 5 May 2017 (a Friday) and sent an email about the visit on 9 May 2017 recording that Gerry Bronsky seemed unsure as to whether the notice had yet been served. Had Mr Bronsky actually sent the notice on 24 April 2017, he would have been in no doubt of the position on 5 May 2017. Mr Bronsky denied that any such conversation with Mr Davidson had taken place and there were also other conflicts in the evidence of him and Mr Davidson. It should be accepted that as at 5 May 2017, and hence after the April letter had allegedly been sent, Mr Bronsky was uncertain whether or not a notice had been served. Secondly, the

June letter, sent by Stephen Pryor, (i) failed to mention at all the April letter, (ii) reflected the position advanced by the pursuer, that a verbal intimation of an intention to move out was communicated to the defender but nothing more, and (iii) the wording in the address was identical to that on the April letter, strongly suggesting that the April letter post-dated the June letter and the address in the April letter was copied from the June letter. No credible explanation had been given as to why Mr Pryor said in the June letter that, "This decision has been previously communicated verbally and in person." If the ultimate source of this information was Mr Bronsky, as it must have been, then the reason that Mr Pryor did not refer to the previous letter must have been because it had not been sent. Mr Bronsky's evidence was that he met Mr Pryor only about three times (once being at a board meeting) and that he did not mention anything to Mr Pryor about the decision being "communicated verbally and in person". The failure by the defender to call Mr Pryor entitled the court to draw adverse inferences: *Wisniewski* v *Central Manchester Health Authority* [1998] PIQR P324.

[16] Mr Facenna's evidence about Mr Pryor's letter was confusing, contradictory and unconvincing. It was also significant that the evidence he came to give was not covered in his witness statement. Moreover, his evidence differed from, and in some respects contradicted, the evidence of Mr Bronsky.

[17] Regard should also be had to the email dated 22 February 2017 sent by Mr Bronsky in which he referred to the defender having "a break option on our lease January 2018". If Mr Bronsky thought the break occurred as at 1 January 2018, then six months' prior notice would have required a notice to be served by 1 July 2017. If that was the defender's understanding of the lease, it was unsurprising that Mr Pryor served the notice when he did.

[18] Mr Bronsky's oral evidence differed from that in his witness statement about

whether he had the lease before him when writing the April letter or whether he used a diary entry. It was a matter of note that Mr Bronsky's diary entry was not produced.

[19] Mr Bronsky agreed that the serving of a break notice was an important matter and one that had been raised by Mr Facenna "half a dozen" times. Mr Facenna's evidence suggested that he left the serving of the break notice to Mr Bronsky. As he said in his witness statement, before April 2017, his "only real involvement" in the defender was to attend board meetings. In any event, Mr Bronsky was aware that serving the break notice was important. And yet he took no steps to check whether it had arrived or to confirm with his co-directors that the notice had been served.

[20] Mr Bronsky's and Mr Facenna's accounts of how the computer with the letter saved on its drive came to be destroyed were also confusing, inconsistent and implausible. Mr Bronsky confirmed in his oral evidence that his computer was backed up. When asked why he had not used his own computer to draft the notice, he could give no explanation. It was also a matter of comment that Mr Bronsky did not mention in his witness statement that he photocopied the letter prior to sending it.

[21] The evidence that the April letter was not actually received was itself indicative that it was not sent.

[22] The evidence in Mr Bronsky's witness statement was materially inaccurate and unreliable in a number of respects. For example, in paragraph 8 of his witness statement, Mr Bronsky said that Iain Davidson said that he had been "made aware that we were terminating our lease". In oral evidence Mr Bronsky said that Mr Davidson had confirmed on the telephone that the defender had definitely served a break notice. When challenged on that formulation, he said "I stand by it". Both characterisations of what Mr Davidson was alleged to have said did not accord with Mr Davidson's oral evidence and his email of

9 May 2017. Mr Davidson's evidence should be preferred. In paragraph 8 of his witness statement, Mr Bronsky also said that Iain Davidson stated that "his client had told him that we had relocated and we were giving up the lease". If Mr Bronsky was to be believed, the only information that the pursuer had prior to Mr Davidson's visit was the April letter. Mr Davidson therefore would not have known that the defender had relocated. Mr Bronsky's evidence that there was no discussion at the meeting on 5 May 2017 about the serving of break notices should be rejected in favour of Mr Davidson's evidence.

[23] For these reasons Mr Bronsky's evidence about the creation and posting of the April letter should be rejected.

[24] In relation to whether the April letter had been received, it was Tracey Caslin's evidence that she spoke to someone from the defender, being either Mr Bronsky or Avril, on 26 April 2017. She then spoke to Richard Worrall, who on the same day sent an email to Paul Jenkins. At that stage, according to the email, the person involved in the call had referred to an intention to serve a break notice. It was clear from the subsequent email traffic that it was this intimation of an intention to break that triggered all the activity on which Mr Bronsky relied to "prove" that the April letter had been received by DSAM. It was also clear that, prior to the last date for triggering the break option, no break notice was received by DSAM. It was for that reason that the "To Let" signs were taken down on 12 July 2017 and Mr Golder was instructed to stand down.

[25] Reference was made to a number of emails sent by the pursuer's witnesses after the date of the April letter (24 April 2017) in which reference was made to no break notice having been received. The witnesses in their witness statements and oral evidence also confirmed that they did not receive or see a copy of the April letter at the time. In light of

this, the court should conclude that, if the letter was sent, it was not received by the pursuer or by DSAM.

[26] Mr Berkeley and Mr Worrall both gave evidence in their witness statements and in their oral evidence about the manner in which mail is dealt with in the offices of DSAM. Both confirmed that, despite searches having been made, there was no trace of the April letter ever having been received. Mr Worrall accepted that there was always a chance that an item of correspondence might go astray, but that such an event "very rarely happens". Importantly, there was no evidence of a problem within the offices of DSAM of mail going astray. In this context, it was of interest to note how the subsequent break notice, in the June letter, was promptly dealt with.

[27] The case of *Chaplin* v *Caledonian Land Properties Ltd* 1997 SLT 384 indicated that, if a court accepted evidence that a letter to a particular addressee had been posted then a presumption arose that it was duly addressed and delivered to the addressee. However, this was a rebuttable presumption, which in that case was not rebutted. The presumption only raised an issue of onus and, in the present case, the court had heard evidence and was in a position to make a finding in fact. It would only be in rare cases that such a matter would be determined as an onus point after proof. In *Chaplin*, the petitioner's evidence was that two letters had been sent to the landlords, neither of which had been received. One of the letters was sent recorded delivery, and so it was accepted by counsel for the respondent that it had been sent. In the present case, there was only one letter that was not received and there was no question of a recorded delivery letter going astray. There was also no evidence in the *Chaplin* case "to explain how letters were distributed within Bell Ingram's offices" (387H). That was not the position in the present case. The *Chaplin* case was also of interest

in showing the sorts of steps a tenant might take when concerned about exercising an imminent break clause.

[28] The *Chaplin* case could also be distinguished from the present case because of the terms of clause 9.13 of the lease. Reference was made to *Batt Cables Plc* v *Spencer Business Parks Ltd* 2010 SLT 860. As the lease specifically identified how sufficient service was to be effected, any common law presumption as to receipt was displaced. Had the defender wanted to make use of the deeming provision provided for in clause 9.13 of the lease, it should have sent the letter by registered post or recorded delivery. By choosing not to use these means of service, it was up to the defender to prove that the letter was actually received by the pursuer (or DSAM).

[29] The defender had failed to prove that the letter was received by the pursuer. Further, and in any event, the pursuer had demonstrated that, even if the letter was posted, it was not received by DSAM.

[30] In any event, the April letter did not constitute a valid notice of intention to break the lease. Clause 3.2 of the lease required the service of written notice on the landlords. The April letter was served on "David Samuel Asset Management, CCL Estate Company". Accordingly, there has been a failure to serve the notice on the landlords. This rendered the notice invalid: *Ben Cleuch Estates Ltd* v *Scottish Enterprise* 2008 SC 252; *Balgray Ltd* v *Hodgson* 2016 SLT 839; and *West Dunbartonshire Council* v *William Thompson and Son (Dumbarton) Ltd* 2016 SLT 125.

[31] In relation to the three letters sent in December 2015, these contained nothing which could be construed as varying the terms of the lease. Absent a unilateral right to do so, a bilateral lease can only be varied by agreement. The letters relied on by the defender did not vary the terms of the lease and, in particular, did not change the obligations in relation to the

service of notices. In *Batt Cables Plc* v *Spencer Business Parks Ltd* Lord Hodge confirmed that the validity of the notice must be considered before the "reasonable recipient" test comes into play. In the *Batt Cables* case, the notice was invalid since it had not been served on the landlord. This was subject, however, to a consideration of issues of agency. Lord Hodge considered that in the circumstances of that case a general agency had been created, which meant that service could be effected on the general agents. The *Batt Cables* case did not assist the defender. Firstly, there were no pleadings in the defences relying on DSAM's actual or apparent authority to receive notices. No allegation of general agency was referred to in the pre-litigation correspondence. The absence of pleading was prejudicial to the pursuer since the nature and scope of the authority that was granted by the pursuer to DSAM could have been considered in evidence together with, if relevant, industry practice: *Hexstone Holdings Ltd* v *AHC Westlink Ltd* [2010] EWHC 1280 (Ch). Secondly, the letters had to be construed in context. The appointment was in respect of "Rent & Insurance Matters" and "Service charge matters". The letter from the pursuer referred to appointing DSAM and DSM as asset manager and authorising them to deal with all aspects of management. This did not amount to a general agency. As Mr Worrall explained in his witness statement, DSAM was only providing the "basic property management" services as opposed to "property and asset management" services. Issues such as rent reviews, lease renewals and terminations were to be dealt with by Cedarwood Asset Management Limited. It was Mr Jenkins who dealt with remarketing once the defender's intention to break had been intimated. One of the letters made it clear that the pursuer would deal directly with insurance. Thirdly, the April letter was addressed to "David Samuel Asset Management, CCL Estate Company". Mr Bronsky suggested that the reference to CCL Estate Company was a mistake. Mr Jenkins confirmed that CCL Estate Company is the name of the consortium which has an interest in three

properties, one of which is owned by the pursuer. In light of that, the only sensible way to understand the letter is that it is being served on DSAM as agent for CCL Estate Company. Therefore, even if some form of agency argument were available to the defender, on its face the letter has been served on the wrong landlord.

[32] In any event, the April letter was not sufficiently clear in its terms to trigger the break. A break clause required to be examined to ascertain what the contents of a break notice must state in order for the notice to be valid. However, generally speaking, a break notice must simply, but unambiguously, communicate a particular meaning – namely, that the tenant was exercising an entitlement, conferred by the break clause, to terminate the lease: *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749.

[33] The April letter gave notice only of an "intention to terminate the lease on the 5th anniversary of our date of entry in accordance with point 3.2 of our lease." But clause 3.2 of the lease required intimation that the lease would terminate on the fifth anniversary. That was different from intimating an intention to terminate the lease. For instance, a tenant might indicate to the landlord that it was intending to trigger a break in the hope of extracting improved lease terms.

[34] For these reasons the pursuer's case should succeed.

Submissions for the defender

[35] The disposal of the action involved essentially two questions: first, whether the April letter was sent to the pursuer's agent, DSAM, by first class ordinary post and was received; and, secondly, on the hypothesis that the April letter was sent to the pursuer's agent, whether it was effective as notice of the exercise of the break option. For the avoidance of

doubt, the defender conceded that without proof that the April letter was sent and received the defender could not succeed.

[36] As to the first question, the defender invited the court to hold that the letter was created and posted on the date it bore. The evidence of Mr Bronsky was clear and consistent to that effect, and, despite searching cross-examination, he was not shaken. He dealt personally with every part of the process from composition of the letter down to consigning it to a post box. His evidence was entirely consistent with what was the effectively unchallenged context, namely that the move from the premises had been decided upon some time previously and that there was a general exercise in notifying all relevant persons, including utility suppliers, customers and suppliers.

[37] The apparent criticism of him (and apparently also of Mr Facenna) in respect of disposal of the computer equipment was unfair. On the undisputed evidence, the defender, a small business with antiquated systems, was bought by a much larger business, and a process of integration was then embarked upon. Mr Facenna explained in re-examination that once the decision to proceed in that way was taken the detail of the process was dealt with by people from the accounting and IT departments of the larger group. That is what one would expect. What was required in terms of data and documents was captured and migrated. It was not in the least obvious that anyone should have thought it necessary to capture the metadata from the hard drive of an obsolete desktop computer, so that it could be examined in subsequent litigation. There was a paper file containing the correspondence. As Mr Facenna explained, what was not taken across was scrapped, and no one had asked for the metadata until very recently. If Mr Bronsky was the ultimate source of information given to Stephen Pryor, which might be correct given that Mr Bronsky was in day-to-day

charge, it was possible that the information was filtered through an intermediary and something was, as it were, lost in the translation.

[38] Still less was there any force in the criticism that Mr Bronsky did not take steps to secure corroborative evidence such as by photographing the letter, or emailing it to a colleague. There was no basis to think that such activity would be normal or usual business practice such that failure to do it could be seen as in any way remarkable. As Mr Bronsky explained, in the immediate aftermath of him sending the letter there was significant activity on the part of the landlord in a manner entirely consistent with the notice having been received, so he had no reason to think anything was amiss.

[39] The proposition that the letter was an after the event (and thus dishonest) fabrication was only faintly put to him. There was no evidence to support any such suggestion. Nor was there any basis to think that there was just some mistaken belief on Mr Bronsky' part, that he thought he had sent it when in fact he had not. Mr Bronsky's evidence should be accepted.

[40] If it was accepted that the letter was posted as Mr Bronsky described then that was sufficient to engage a presumption that it was received: *Chaplin* v *Caledonian Land Properties Ltd* 1997 SLT 384 per Lord Rodger of Earlsferry at 386J-387I, citing *Dickson on Evidence* (3rd ed., Vol I, para 28). The question was then whether the surrounding evidence was sufficient to rebut that presumption. The defender could point to no evidence that specifically contradicted any of the pursuer's witnesses as to their not having themselves seen or received the letter, but as Lord Rodger observed in *Chaplin* that was in no way conclusive as to whether the letter arrived at the office in the mailbag. It was that point which constituted receipt, not the subsequent passing of the letter to a particular individual within the office

(cf the observations of Lord Hodge in *Carmarthern Developments Ltd* v *Pennington* [2008] CSOH 139 at para [31]).

[41] On the hypothesis that the defender had proved postage then (as it was put in the older cases referred to in *Dickson on Evidence*) it could do no more. The evidence as to the organisation of the pursuer's agents' office was of a relatively unremarkable and routine system for the opening and distribution of mail. What was described was in no way out of the ordinary or foolproof. It was notorious that letters do go astray from time to time, even in well run offices, and the evidence led in no way excluded that possibility. Assuming that the letter was posted but did not reach any specified individual at DSAM the court was then left to determine whether it went missing between posting and arrival of the mail at DSAM, or after the mailbag arrived at DSAM. The application of the presumption when weighed against the relatively slight and generic evidence led by the pursuer should lead to that question being resolved in the defender's favour.

[42] As the line of authority exemplified by *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *HOE International Ltd* v *Andersen* 2017 SC 313 made clear, there were two logically distinct issues of interpretation. The first question was the interpretation of the notice itself in order to ascertain whether it conveyed the required information. In the present case, that meant asking whether the April letter conveyed to the reasonable recipient of it, who was aware of all relevant surrounding circumstances, the information required by clause 3.2 of the lease.

[43] It was possible to dispose summarily of the argument that the April letter was not to be construed as giving notice, but rather as intimating only some inchoate intention or desire to terminate the lease. On a proper analysis there was not the slightest ambiguity attaching to the words "herewith give notice of our intention to terminate the lease on the 5th anniversary

of our date of entry in accordance with point 3.2 of our lease." The notice asked for records to be updated, something which would be entirely otiose unless it was intended to have immediate legal effect. On its plain terms it was a notice which conveyed the information required by clause 3.2 of the lease; that is, notice in writing of the exercise of the break option with the requisite period of at least six months before the fifth anniversary.

[44] There was then the separate question of interpretation of the lease, in order to ascertain what were the conditions to be fulfilled for effective service of the notice. In the present case those conditions were relatively modest. Notice had to be in writing and it had to be given within the requisite period, which was at least six months before the fifth anniversary. The notice in the April letter plainly satisfied both of those criteria. There were no mandatory provisions as to mode of service. The lease provided that certain specified methods (recorded delivery or registered post to the landlord's registered office) were "sufficient". Use of the specified methods would result in deemed service upon proof of posting, but that did not preclude alternative methods. It only had the consequence that those alternative methods did not benefit from the deemed service provisions. That in turn meant only that the defender required to prove service of the notice. It had no further consequence.

[45] That left the point that service was made not on the pursuer itself, but on its agent. Contrary to the submissions for the pursuer, there were averments as to agency, in Answer 9. The question therefore was whether service on the landlord's agent was service on the landlord within the meaning of the lease. In *Ben Cleuch Estates Ltd* v *Scottish Enterprise*, at first instance, it was held by the Lord Ordinary (Reed) that the notice was ineffective, because it had not been served on the landlord, but on the parent company of the landlord. That decision was upheld by the Inner House. While at first sight that might be

thought to be conclusive against the defender in the present case, because the April letter was not addressed to the pursuer but to DSAM, such a conclusion does not follow. When read in the context of the earlier correspondence from the pursuer specifically appointing DSAM as its agent, and inviting the defender to

> "deal with all communications and correspondence through the offices of David Samuel Management or David Samuel Asset Management Limited"

it was clear that the notice was notice given to DSAM in the capacity of agents for the pursuer. In *Ben Cleuch*, an argument was presented unsuccessfully for the defender in the Outer House to the effect that the recipient received the notice as agent for the pursuer. That was rejected by Lord Reed and the argument was not renewed in the Inner House. However Lord Reed's analysis was of value in the present case, and indicated material points of distinction between the present case and *Ben Cleuch*.

[46] If that analysis was applied to the present case a number of things became clear. In the first place the argument that notice to the landlord's agent may in principle be effective as notice to the landlord was in no way foreclosed. Lord Reed proceeded on the basis that the argument was open in principle but held it was not made out on the facts of the case before him. In *Batt Cables Plc* v *Spencer Business Parks Ltd* Lord Hodge held that service on a properly authorised agent was service on the landlord.

[47] Secondly, while the argument in *Ben Cleuch* depended on inference from surrounding circumstances, in the present case there could be no scope for doubt as to DSAM's authority: the pursuer wrote formally to the defender to tell it that DSAM had been appointed as agent and to ask the defender to deal with "all communications and correspondence" through DSAM. That phrase was of the widest imaginable scope, and it

was clear that service of a break notice or indeed any other notice under the lease was within the scope of "all communications and correspondence".

[48] The use of a wide generic word ought to be seen as indicative of an intention to convey a wide generic meaning: *Mars Pension Trustees Ltd* v *County Properties and Developments Ltd* 1999 SC 267. That reasoning applied *a fortiori* to the words "all communications and correspondence" in the letter. If the letter intended to cover some types of communication or correspondence but not others it would not have been difficult, and would have been necessary, to define precisely which types were covered and which were not. The use of the generic term without qualification was a clear indication that all such communications and correspondence were intended to be covered. The evidence bore that out, and in particular Mr Worrall gave evidence that as managing agent DSAM would wish to receive all correspondence. He accepted in cross-examination that all correspondence would come to DSAM in the first instance and DSAM would then apply a filter, dealing with routine matters directly and reporting more significant matters to the pursuer. The inescapable conclusion was therefore that DSAM had the requisite authority and that service on it would in principle be service on the pursuer.

[49] Thirdly, a decisive factor in Lord Reed's rejection of the argument in *Ben Cleuch* was that the particular provisions of the lease in issue required notice to be given at the registered office of the landlord, and that had not been done. The lease in issue in the present case had no similar provision.

[50] If for any reason it was not accepted that DSAM had authority to receive the notice, the pursuer was personally barred from denying that to be the case, in light of the representation made in the letter dated 10 December 2015.

[51] The requirements imposed by the lease in the present case were as follows. Clause 3.2 required only six months' prior written notice. That had been given. Clause 9.13 required that any notice shall be in writing. That had been complied with. Those were the only mandatory requirements. The latter clause provided that the specified methods "shall be sufficient". That form of words in no way precluded the use of alternative methods. The question in such a situation was whether what was done amounted to six months' prior written notice to the landlord within the meaning of clauses 3.2 and 9.13. It was clear that the April letter complied with the essential requirements of the lease.

Decision and reasons

Was the April letter sent?

[52] The sole source of evidence that the April letter was sent to DSAM was Mr Bronsky. His evidence lacked any form of corroboration or support, whether by direct or circumstantial evidence. There were no metadata which could vouch the date of creation of the letter (the computer containing any such data having apparently been destroyed), there was no confirmatory phone call or email and there was no apparent mention to anyone else of the letter having been sent. The point that the computer on which the April letter was said to have been written had been scrapped without such important data having been saved seemed to me to be rather implausible. There was simply no contemporaneous evidence that the letter had been created on 24 April 2017. Viewed on their own, these matters might not be conclusive. But they have to be added to what, in my view, are two central problems arising from Mr Bronsky's evidence. First, the fact that the April letter and the June letter each contain in the address the same erroneous additional company name "CCL Estate Company" and the same omission from the address of the city where the

addressee is located: Manchester. Secondly, the fact that Mr Bronsky's account is contradicted by the pursuer's witnesses (each of whom I found to be credible and reliable) and the contemporaneous correspondence.

[53] The evidence of Mr Bronsky was that he typed out the address having before him the letters sent in December 2015, which informed the pursuer of the appointment and role of DSAM/DSM. As was accepted by him, the letters that he had before him in fact contained no reference to CCL Estate Company. His evidence was that the reference in the second line of the address, which he typed, to CCL Estate Company must have been a mistake made by him, that being, to his knowledge, the previous managing agent. Similarly, the omission of "Manchester" was not explained by him, other than to say that the postcode would suffice.

[54] It is beyond coincidence that these same two mistakes appear in the June letter prepared by Stephen Pryor. There was no suggestion that there actually could or did exist any other document which contained the address with these errors in it and which Mr Bronsky and Mr Pryor might both have used as a style or template when composing their letters. On the contrary, Mr Bronsky was clear that he had before him the letters received from or on behalf of the pursuer in December 2015 and, as I have said, used these for the purpose of composing the details of the addressee in the April letter. Further, it is clear on the evidence that it would not have been possible for Stephen Pryor to copy the address from the April letter. The photocopy of it said by Mr Bronsky to have been made at the time was, on his evidence, held in Mr Bronsky's file. There was no suggestion of Stephen Pryor having access to that file. Indeed, the evidence of Mr Facenna was that Stephen Pryor hardly ever attended at the defender's premises, where the file was kept. It may be the case that the file was moved when the move was made by the defender to the premises of Allied Vehicles in May/June 2017. But there was little other than general

evidence about the movement of items to these premises and again there was nothing about where the letter would have been kept and how or why Stephen Pryor would have access to it. Crucially, however, if somehow Stephen Pryor had before him the April letter when composing the June letter, there is absolutely no explanation of why he would have decided to send the June letter to the same broad effect as the April letter and, of fundamental importance, why he would state in terms that previous notice had been given "verbally and in person", when he had before him what purported to be a notice in writing. On the evidence, I regard it as impossible to conclude that the two mistakes in the address were made first by Mr Bronsky and then copied by Mr Pryor. The alternative suggestion that, by pure happenstance, Mr Bronsky had earlier independently made the same two mistakes that Mr Pryor came to make is beyond the bounds of reality.

[55] In order to explain the omission in the June letter of any reference to previous notice in writing, it might be said that Stephen Pryor may not have known about, or checked, whether the previous letter was sent. But of course that must mean that it wasn't before him when writing the June letter, which contained the same two errors in the address, and could not therefore be the source of the errors.

[56] There are further difficulties about the evidence of Mr Bronsky. Mr Davidson, a witness for the pursuer, sent an email on Tuesday 9 May 2017, having visited the premises on Friday 5 May 2017. He stated in the email that: "Whilst [Gerry Bronsky] made it clear their intention was to exercise their December break, he seemed unsure as to whether notice had yet been served?" Mr Davidson's evidence was that he did not usually discuss issues such as break notices with tenants and the only reason he mentioned this in his email of 9 May 2017 must have been because this information had been volunteered to him by Mr Bronsky. Mr Davidson could not recall the conversation but he said that given what he

had been told in his instructions (that no break notice had been served) it was important for him to report back on the issue. This was accordingly a reference in a near-contemporaneous email to the fact of a discussion having occurred between Mr Davidson and Mr Bronsky and to its contents. Mr Bronsky's position was simply that there had been no such discussion. That begs the question of how it then came to be referred to in the email from Mr Davidson. No basis was suggested, in evidence or submissions, for the proposition that Mr Davidson had for some reason simply invented this part of the content of the email or mistakenly recorded a discussion which had never in fact occurred. I therefore accept his evidence as to why this matter was mentioned in the email dated 9 May 2017 and I reject that of Mr Bronsky.

[57] Further, Mr Bronsky's evidence was that, during a telephone call with Mr Davidson prior to his inspection on 5 May 2017, Mr Davidson said he definitely knew that the defender had served a break notice. Mr Davidson's evidence on this was quite clear: he knew (having been so advised on behalf of the pursuer in an email dated 27 April 2017, which was produced) that no break notice had been served. There is therefore a stark and irreconcilable conflict between these two accounts of events. Mr Bronsky's account must proceed upon the basis that Mr Davidson had been told about the April letter, by someone on behalf of the pursuer or DSAM. But that would of course mean that the April letter had been received, with the consequence that virtually the whole of the evidence for the pursuer, from several witnesses, along with a number of contemporaneous emails which referred to no notice having been sent, were a complete fabrication. On this point, I again accept the evidence of Mr Davidson and I reject the evidence of Mr Bronsky.

[58] I conclude that the evidence of Mr Bronsky that he prepared and sent the letter on 24 April 2017 is not credible. However, even if I had not found it to be lacking in credibility,

it would have been so unreliable, in light of the various issues which I have just discussed, as to be quite unable to be accepted.

[59] We do not have the evidence of Stephen Pryor and so we do not know such things as whether he composed and typed the June letter himself or how he came to use the address that was used. Nor do we know how he came to include in the June letter the reference to notice having been given verbally and in person. In relation to the pursuer's contention that adverse inferences should be drawn because of the absence of Mr Pryor as a witness, reference was made to *Wisniewski* v *Central Manchester Health Authority*. In that case Brooke LJ identified the relevant principles as follows (at 340):

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

[60] The context in which the pursuer referred to *Wisniewski* was the contention that the clear inference was that Mr Bronsky's letter must have post-dated and copied Mr Pryor's letter. If that is taken to be "the issue" for the purposes of the first of Brooke LJ's points, the question arises as to how that first point is satisfied: what evidence might Mr Pryor have been expected to give on that specific issue? It seems to me that there is no basis for concluding that Mr Pryor could give evidence on that particular point – that Mr Bronsky's

letter post-dated and was copied from Mr Pryor's letter. In relation to the fourth of Brooke LJ's points, on behalf of the defender, it was said, under reference to Mr Facenna's evidence, that Mr Pryor had been sacked and that there were obvious reasons for not citing a person whose employment had been terminated. I was given no basis as to why the pursuer did not call Mr Pryor either, which on the face of it was open to the pursuer to do. Had there been a basis for drawing an adverse inference on the specific issue identified, I would have taken these factors into account.

[61] However, I do not consider that I could draw any adverse inferences from the absence of Mr Pryor which add anything of materiality to the inferences I am able to draw from the actual evidence. It does not appear likely, on the evidence, that he could speak to the veracity or otherwise of the suggestion that the April letter was sent. We have the June letter which was agreed in the joint minute to have been prepared by him. The terms of that letter, and in particular the reference to prior notice having been given "verbally and in person", suffice for the purposes of drawing the inference that the April letter was not before him when he wrote the June letter. Taking that as correct, he could not therefore have copied the mistakes made in the address in the April letter. As I have noted, there was no evidence that Mr Pryor could have used some other document as a style or template for the address which had the same mistakes in it. The only conclusion I can draw, from the evidence, is that he made the mistakes in the address. I was given no basis to conclude that the reference to "verbally and in person" could somehow have been a mistake or simply an invention by Mr Pryor. I infer from the presence of this expression in the letter that this must have been communicated to him and, on the evidence, it was accepted by Mr Facenna that the ultimate source of this information must have been Mr Bronsky. I am able to draw these inferences from the actual evidence. There are accordingly no particular additional

inferences which I need draw from the absence of Mr Pryor as a witness, even if I was prepared to do so. Thus, I do not draw any adverse inferences from his absence as a witness.

[62] For these reasons, I conclude that the April letter was not sent.

If the April letter was sent, was it received?

[63] Having concluded that the April letter was not sent, it follows that it was not received. However, having regard to the submissions made, it is appropriate that I consider, on the hypothesis that the April letter was sent, the question of whether it was received. I have no doubt in concluding that, as a matter of fact, the April letter was not received into the hands of any of the witnesses for the pursuer. Indeed, there was no suggestion that it was so received. The contemporaneous email correspondence among those who later gave evidence for the pursuer shows that no notice had been received by any of them. That does not of course exclude the possibility that the April letter reached the offices of DSAM and then was lost.

[64] The evidence about the pursuer's mail receipt and distribution system was to the effect that an administrative person opened all of the letters and placed those which identified the appropriate person to receive the letter in an individual folder for that person. The rest were given to Mr Jenkins. Mr Jenkins then checked that all of the letters had been put in the correct folders. The folders were then taken to the identified individuals and handed to them at their desks. The pursuer's witnesses, including Mr Jenkins, were not challenged on their accounts of this procedure.

[65] In my opinion, the evidence of the pursuer's witnesses rebuts the presumption of receipt of the letter which would have arisen had I concluded that the April letter had been

sent. Plainly that evidence does not exclude the possibility that, if I had accepted that the letter had been sent, it had been lost in the post. But if that is what occurred, it creates no difficulty for the pursuer: if the letter was lost in the post then it was never in fact received. It is the presumption as to receipt which can be rebutted by evidence as to the management and distribution of mail: *Chaplin* v *Caledonian Land Properties Ltd*. As to the related point that the letter could have been received but somehow mislaid or lost after having reached DSAM, that is dealt with and contradicted by the evidence as to how mail was received, checked and distributed.

[66] I do not accept the pursuer's ancillary submission that the *Chaplin* case can be distinguished from the present case because of the terms of clause 9.13 of the lease. In support of that contention senior counsel for the pursuer referred to *Batt Cables Plc* v *Spencer Business Parks Ltd*, where Lord Hodge stated:

> "I am satisfied that clause 10 of the lease did not add to the requirements of clause 2.2. It repeated the need for notice in writing. Otherwise, as counsel for the pursuers submitted and counsel for the defenders accepted, the clause merely provided means by which a party serving a notice could prove sufficient service without having to prove receipt of the notice by its contractually specified recipient."

[67] The submission before me was that as the lease specifically identified how sufficient service was to be effected, any common law presumption as to receipt was displaced. I do not regard Lord Hodge's observations as supporting that view. The point being made was that deemed service could be achieved by complying with the provision. Otherwise, proof of receipt was required, but the evidential presumption applied in *Chaplin* can still be utilised for that purpose. Lord Hodge was not saying that a provision in the lease as to deemed receipt displaces the presumption of actual receipt which arises on proof of posting.

[68] However, as the parties accepted, if deemed receipt under the lease provision cannot be relied upon, and if the presumption of receipt because of proof of sending is rebutted, there is a need to prove by other means that the notice was actually received, which of course was not done or attempted here.

[69] I therefore conclude that, even if the April letter was sent, it was not received and any presumption which could arise to that effect has been rebutted by the evidence for the defender.

Did the April letter, if sent and received, constitute valid notice of exercise of the break option?

[70] I accept the submissions for the defender that there are two separate issues of interpretation: first, interpretation of the notice itself to see whether it conveyed the information required under clause 3.2; and secondly, interpretation of the terms of the lease as to what is required for service of the notice (*Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd*; *HOE International Ltd* v *Andersen*). In *Mannai* it was said that the construction of a document was to be approached objectively (Lord Steyn at 767):

> "The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene"

In *HOE International Ltd* v *Andersen*, it was held that the meaning of a contractual notice is governed by the general principles that govern interpretation of commercial contracts. In addressing the question of how the reasonable recipient would have understood the April letter, one has to take into account the relevant objective context. Further, the purpose of a contractual notice is important: a notice under a break clause serves only one purpose: to determine the lease. In my opinion, the April letter conveyed to the reasonable recipient of it, who was aware of all relevant surrounding circumstances, the information required by

clause 3.2 of the lease. The words "herewith give notice of our intention to terminate the lease on the 5th anniversary of our date of entry in accordance with point 3.2 of our lease" may be viewed as having an element of ambiguity arising from the phrase "our intention". However, there is specific reference in the letter to giving "notice…in accordance with point 3.2 of our lease". The reasonable recipient would not in my view understand that to refer simply to notice of a possibility of termination; there was no need under the lease, or on any other ground, to give notice of something short of actual termination. This was also a notice given under reference to a specific clause in the lease. Further, the notice asked for records to be updated and I agree with the defender's submissions that this is something which would be entirely otiose unless it was intended to have immediate legal effect. I therefore conclude that the notice conveyed the information required by clause 3.2 of the lease.

[71] On the separate question of interpretation of the lease, in order to ascertain what were the conditions to be fulfilled for effective service of the notice, I also accept the defender's submission that the requirements were merely notice in writing within the requisite period (at least six months before the fifth anniversary of the date of entry).

[72] The next issue is whether, service not having been made on the pursuer itself, it was effected upon the pursuer's agent. In *Ben Cleuch Estates Ltd* v *Scottish Enterprise*, at first instance, it was held by the Lord Ordinary (Reed) that the notice was ineffective, because it had not been served on the landlord, but on the parent company of the landlord. That decision was upheld by the Inner House, the reasoning being explained as follows: (at paragraph [60]):

> "The matter turns, in our opinion, on the proper application of Clause FOURTH (B). That clause confers on the tenants an option to bring the lease to a premature end after 14 instead of 25 years. It provides that, in order to exercise that option, the

> tenants must 'give to the Landlords' at least one year's written notice of termination. It was accepted on the defenders' behalf, rightly in our opinion, that for a break notice to be effective, it required to comply with that requirement (*Muir Construction*; *Capital Land Holdings*; *Scrabster Harbour Trust*: we note that, in *Mannai Investment*, pp 781B–C, Lord Clyde identified the requirement in that case that the notice had to be served on the landlord or its solicitors as part of the substance of the power to serve the break notice). The dispute was as to whether what occurred constituted such compliance. In our opinion, that dispute can be resolved very shortly: a notice addressed to a party other than the landlord and sent to the registered office of that other party cannot be regarded as a notice given to the landlord."

[73] However, in the present case the letter dated 10 December 2015 from the pursuer stated that DSAM/DSM had been appointed to act as "asset manager" and "are authorised to deal with all aspects of the management, including the collection of rent and service charges". The letter further stated that the defender should

> "deal with all communications and correspondence through the offices of David Samuel Management or David Samuel Asset Management Limited"

Lord Reed's analysis at first instance in *Ben Cleuch* provides some support for the view that service upon an authorised agent will suffice ([2006] CSOH 35, at para [137]):

> "The defenders' third argument was that, since notice was given to Bonnytoun, and it was acting as agent for Ben Cleuch for all purposes relating to the Premises, notice was therefore validly given. I have come to the conclusion that this contention must be rejected for a number of reasons. Clause FOURTH (B) requires that notice be given to the landlord. If no more were said, then it seems to me to be at least arguable that notice might effectively be "given to the landlord" by giving it to the landlord's agent, authorised for the purpose. It also appears to me to be arguable that an inference might be drawn from the evidence in the present case that Bonnytoun had implied authority to accept service of notices on behalf of Ben Cleuch (although I would not wish to express a concluded view on that point without a fuller citation of authority than I received in parties' submissions). Clause SEVENTEENTH however requires that, where notice is given by post, it must be sent "to the registered office of the party... or... to such other address as shall have been last notified to the other party for that purpose". In a case where notice is to be given to the landlord, "the registered office of the party" must, in my view, be the registered office of the landlord, rather than that of its agent: the agent is not party to the lease; and the only agents contemplated by the lease itself have limited functions, as explained earlier, which would not extend to the service or receipt of break notices. It is on the other hand arguable that the words "such other address as should have been... notified... for the purposes" are capable of including the address of an agent authorised to

> accept service of such a notice, provided that that address has been notified to the tenant for the purposes of clause SEVENTEENTH. The principal difficulty with the argument for the defenders, however, is that, even if it were inferred that Bonnytoun had implied authority to accept service of a break notice as the landlord's agent, there is no evidence that Bonnytoun's address was notified to the defenders for that purpose, as required by clause SEVENTEENTH. I have explained earlier why Miss Forrester's e-mail to Miss McGowan on 19 January 2004, and Miss McGowan's e-mail to Mr Fish on 8 November 2004, cannot be regarded as constituting such notification."

Unlike the position in *Ben Cleuch*, in the present case there is no provision in the lease which requires notice to be given at the registered office of the landlord.

[74] In *Batt Cables Plc* v *Spencer Business Parks Ltd* Lord Hodge held that service on a properly authorised agent was service on the landlord. His Lordship stated (para [37]):

> "Where, as in *Lemmerbell Ltd*, the agent sends the break notice and thus seeks to bring the lease to an end, it is clear that there must be evidence of authority which extends to the power to destroy the subject matter of the agency. But where the agent receives the notice, it is in my opinion sufficient to show that the principal has empowered the agent to receive correspondence and either act on it or initiate action on it within the principal's organisation. There is nothing in the case law to which I was referred which supports the view that an agent who is charged by his principal to receive and process all correspondence relating to the principal does not have power to receive a break notice from a tenant of the principal. It is in my view important to observe that, in contrast to the person giving a break notice which initiates the termination of the lease, the recipient of a valid notice has no discretion to prevent that termination."

[75] In my view, it is quite clear that DSAM was given authority to receive correspondence such as a notice to exercise a break option. The defender was given a formal notification that DSAM had been appointed as the pursuer's agent and the defender was told to deal with "all communications and correspondence" through DSAM. Giving these words their ordinary and natural meaning, it is quite clear that service of a break notice falls within the scope of "all communications and correspondence". As Lord Prosser observed in *Mars Pension Trustees Ltd* v *County Properties and Developments Ltd* of the word "fitness" (at p273-275):

> "The word is a generic one. There are various species of fitness. State of repair is one of these. There are other species of fitness. But the use of a generic word cannot to my mind refer to them 'solely'. (The fact that the word 'dogs' covers terriers, spaniels and retrievers does not mean that the word 'dogs' can be concerned 'solely' with these species, and not with collies). Its sense covers all, and I see no basis for chopping its reference down in this way, or for seeing it as less than clear…
>
> It appears to me that if it had been intended that the clause should apply to some kinds of fitness, and not others, it would not have been difficult, and would have been necessary, to say so expressly."

If for any reason DSAM did not have actual authority to receive the notice, the letter dated 10 December 2015 held that out to be the case and would in my view have sufficed to establish ostensible authority. As an alternative, the terms of the letter dated 10 December 2015 result in the pursuer being personally barred from denying that DSAM were authorised to receive a break notice. I would add that, on the evidence, in practice DSAM did indeed receive all correspondence.

[76] I therefore conclude that, had the April letter been sent and received, it would have constituted sufficient notice for the purposes of clause 3.2 of the lease. However, in light of my findings that the April letter was not sent, and even if it was sent it was not received, that conclusion is academic.

Conclusion

[77] For these reasons, I shall sustain the first plea-in-law for the pursuer, repel the defender's pleas-in-law and grant decree in terms of the first conclusion in the summons.