Neutral Citation Number: [2019] EWCA Civ 1848

Case No: A3/2019/0037

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES PROPERTY, TRUSTS AND PROBATE LIST (ChD)
Mr Justice Fancourt
HC-2017-002524

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st November 2019

Before :

LADY JUSTICE RAFFERTY
LORD JUSTICE LEWISON
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

ALDFORD HOUSE FREEHOLD LIMITED	**Appellant**
- and -	
(1) GROSVENOR (MAYFAIR) ESTATE **(2) K GROUP HOLDINGS INC**	**Respondents**

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- -

MR EDWIN JOHNSON QC (instructed by **Forsters LLP**) for the **Appellant**
1st Respondent did not appear and was not represented
MR STEPHEN JOURDAN QC & MR THOMAS JEFFERIES (instructed by **Stephenson Harwood LLP)** for the **2nd Respondent**

Hearing dates : 22nd and 23rd October 2019

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Approved Judgment

Lord Justice Lewison:

Introduction

1. Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") gives qualifying tenants of flats the right to acquire the freehold. One of the requirements for the successful exercise of this right is that notice must be given by a number of qualifying tenants that is not less than half the number of flats contained in the building. So it matters how many flats there are. The principal dispute in this appeal is whether there are 26 flats or 30 flats. The problem arises because the sixth and seventh floors of the building with which we are concerned were undergoing substantial works of construction at the date when the relevant notice was served. Fancourt J decided that there were 30 flats (which included two flats on each of the sixth and seventh floors), and that the notice failed to comply with statutory requirements; so the claim to acquire the freehold failed. His judgment is at [2018] EWHC 3430 (Ch), [2019] 1 WLR 1489. With the judge's permission, the lessees (through the nominee purchaser) appeal.

The initial notice

2. On 23 July 2015 the nominee purchaser purported to give an initial notice under section 13 of the 1993 Act claiming to exercise the right of collective enfranchisement. That date is therefore the relevant date for considering how many flats there were in the building. Seventeen of the lessees claimed to participate in the giving of the notice. The judge held that one of the lessees had not given authority for the notice to be given and three were not qualifying tenants; and therefore there were only thirteen participating lessees who were qualifying tenants. One of the requirements of a valid initial notice is that it must state the names of all the qualifying tenants of flats contained in the premises specified in the notice: 1993 Act s. 13 (3) (d). If it does not do so, it is invalid: *Natt v Osman* [2014] EWCA Civ 1520, [2015] 1 WLR 1536. The group of qualifying tenants may be larger than the group of participating tenants. The initial notice in this case did not state the names of the tenants of the areas described as flats 61, 62, 71 and 72 which were on the sixth and seventh floors of the building. These are the areas in dispute. The judge held that those areas were "flats" as defined by the 1993 Act and therefore that the initial notice was invalid.

The building

3. The building is Aldford House, Park Street, London W1. It faces Park Lane on an island block, a little to the north of the Dorchester Hotel. Simplifying somewhat, Grosvenor Estate owns the freehold; and K Group owns a long headlease. The real contest is between the lessees of the individual flats and K Group. The building consists of commercial space at basement and ground floor levels and a number of residential flats (or intended residential flats) on the ground to eighth floors. It is common ground that, leaving aside the sixth and seventh floors, there are 26 flats in the building.

4. The judge made the following findings about the sixth and seventh floors. Before 2008 there was a single flat on each of the sixth and seventh floors. The underleases of each of these flats had been acquired in 1996 and 1998 respectively by Park Lane Holding Inc ("PLH"), a company in the same ultimate ownership as K Group. In April 2003, planning permission was sought to extend the sixth and seventh floors to create three flats on each floor. On 24 January 2008 PLH was granted licence to carry out alterations. The works involved stripping out the existing flats and the construction of new accommodation on the north-east and south-east sides of the building, above fifth floor level. The east-facing external walls of the old sixth and seventh floor flats were removed, as a result of which the structurally enclosed space on the sixth and seventh floors was very substantially extended, so as to surround the lightwell in the middle of the building. The construction work started in around November 2008 and was very extensive. The rooms on the Park Street side of the old flats were demolished and all the internal rooms were demolished, but the façade was left. The structural work was completed by about 2012.

5. The proposals changed during the course of the works. Instead of creating three flats on each floor, it was decided to create two flats per floor. Planning permission for the revised scheme was granted on 29 September 2011. Another planning permission was granted on 26 June 2012 to allow further extension of the space at sixth and seventh floor levels into the lightwell. The windows on the Park Lane façade were replaced pursuant to another planning permission granted on 20 March 2013. These works finished around mid-2013, leaving the new premises as a structurally complete shell.

6. At that time, the existing underleases of the old flats were surrendered by PLH and on 24 July 2013 K Group granted new underleases of each of the four intended new flats, numbered 61, 62, 71 and 72. Each new underlease was granted to a different corporate tenant. At that time, there was no physical division between the two flats on each floor. The new underleases did, however, contain plans that showed that there was to be a dividing wall between them. The plans were marked (with red lines to indicate the extent of the premises demised) in such a way as to exclude the structure of the external walls and the intended dividing wall from the demise. The work to fit out the flats had not been done at that time; and had still not been done by the trial date.

7. In December 2014 K Group became aware that the lessees were planning to claim the freehold. In consequence, K Group carried out further work. Dividing walls were erected on the sixth and seventh floors to separate the two intended flats, and a partition screen was erected on the balconies on the Park Lane side on both levels. Further, work was done to install suspended ceilings and new boarding for the floors. The new dividing walls each had two pairs of large doors in them, intended to facilitate access by builders and others from the northern side to the southern side of the building in connection with the future fitting out of the premises. These doors were no longer in existence when the judge inspected the building on the first day of the trial. The walls had been made complete. However, there were photographs taken shortly after the relevant date showing these pairs of doors. They were not doors of the type that one would expect to see in a residential flat. They were large, flat-panel doors, designed to give a large space through which building materials and equipment could be taken. The doors had key and bolt locks but no door handles. They were kept locked.

8. The judge summarised the physical condition of the sixth and seventh floors on the critical date at [15]:

> "Accordingly, on the relevant date, the structural works on the sixth and seventh floor premises had long since been completed and they contained new raised floorboarding and suspended ceilings but no internal walls (other than the dividing wall), pipes, cables or other items of fit out. The two sets of premises on each floor (as identified in the new underleases) were separated from each other by the dividing wall and the locked pairs of access doors, which were designed to be opened to facilitate work to fit out the flats for occupation. Separate access to each of the intended new flats could be gained via the lifts and staircase in the northern or southern core of the Building."

9. At [29] the judge added:

> "The original separate sets of premises (flats 60 and 70) were effectively demolished internally, amalgamated into newly-built space and then divided up. Each of flats 61, 62, 71 and 72 was a newly-constructed set of premises as a result of the works carried out on behalf of K Group between around 2008 and 2013."

10. On the basis of his findings of fact, the judge decided that there were four flats on the sixth and seventh floors of the building (two on each floor). The lessees argue that the judge was wrong so to hold.

What is a flat?

11. Section 101 of the 1993 Act contains relevant definitions:

> "dwelling" means any building or part of a building occupied or intended to be occupied as a separate dwelling;
>
> "flat" means a separate set of premises (whether or not on the same floor)— (a) which forms part of a building, and (b) which is constructed or adapted for use for the purposes of a dwelling, and (c) either the whole or a material part of which lies above or below some other part of the building; …"

12. There are two issues here. Although Mr Johnson QC argued them in a different order, the logical sequence is:

    i) Was each of the areas comprised in the underleases of the sixth and seventh floors a "separate set of premises"; and if so

    ii) Was each of those areas constructed or adapted for use for the purposes of a dwelling?

Separate set of premises

13. This part of the definition was considered by this court in *Cadogan v McGirk* [1996] 4 All ER 643. Millett LJ said:

> "In my opinion, the word 'separate' suggests both 'physically separate' or 'set apart' and 'single' or 'regarded as a unit'. The definition is concerned with the physical configuration of the premises. It was conceded by the appellants that the rooms which form part of the flat do not have to be contiguous. Many sets of chambers in the Inns of Court are physically divided by a common staircase and landing but they would, I think, be regarded as a single 'separate set of premises'. The question is one of fact and degree, and must largely be one of impression. The degree of proximity of any part of the premises which is not contiguous is likely to be decisive."

14. This directs attention at the physical configuration of the premises, rather than at their use or intended use. It is probable that what is said to amount to a separate set of premises must be an objectively recognisable physical space, rather than simply a red line drawn on a plan: *Majorstake Ltd v Curtis* [2008] UKHL 10, [2008] 1 AC 787.

15. The judge's conclusion on this issue at [28] was:

> "I consider that each part of each of the floors, as separately demised on the relevant date, is a separate set of premises within the meaning of the definition of "flat". Each part of each floor was given its separate identity not just by being enclosed by external walls and a dividing wall, but was given functional identity (as well as a precisely defined extent) by the terms of the new underleases. Each demised area was separated from the other by the dividing wall with doors in it. The doors were kept locked. They were there for the purpose only of facilitating the fitting out of the flats at a later time. The doors were not there so that each demised area could be used together with the other demised area, only for passing through one flat into the other. It was intended that, after completion of the fit out, the doors would be removed and the dividing wall fully built. Each demised area was in my judgment a separate set of premises on the relevant date and held as such by different tenants under the terms of the new occupational underleases."

16. I am very doubtful whether the judge applied the right test in this paragraph. The test that the judge applied appears to me to have been a mix of (a) title; (b) future intention and (c) physical configuration.

17. I agree with Mr Johnson that the relevant question is whether there was or was not physical separation between the various spaces. Mr Johnson emphasises the fact that, on the judge's findings, the two areas on each floor were divided by large flat panel doors which one would not expect to find in a residential flat, and that they had been

installed to facilitate the passage of building materials and equipment. But that, too, mixes up the purpose of the doors and the physical configuration of the two areas.

18. Mr Jourdan QC, on the other hand, points to the judge's findings that:

    i) A partition screen was constructed on each balcony.

    ii) Each of the two areas had its own separate front door leading off the common parts.

    iii) Each of the two areas was separated by a dividing wall containing the large flat panel doors, which were kept locked and had no door handles.

19. In my judgment, the physical separation between the areas was enough for each area to amount to a "separate" set of premises. The fact that the separation was potentially reversible with little effort does not, in my judgment, mean that the two areas were not in fact separate on the relevant date. In my judgment, therefore, the judge was right in his conclusion on this issue.

Constructed for use for the purposes of a dwelling

20. The judge found that each of the two areas on each of the two floors was a newly constructed space. So the question under this head is: were they constructed for use for the purposes of a dwelling?

21. The judge answered this question "yes". He said at [34]:

> "In my judgment, the statutory definition of "flat" in the 1993 Act is, like the definition of "house" in the 1967 Act, concerned with the purpose for which premises have been constructed or subsequently adapted. The relevant question is whether they have been constructed or adapted for use for the purposes of a dwelling or for use for some other purposes. If the latter, the separate set of premises so constructed or adapted is not a "flat". The test is not whether the separate set of premises has reached such an extent of fitting out, or remains in such good condition, that it can actually be used for living, eating and sleeping purposes on the relevant date…. Each of the four separate sets of premises in existence on the sixth and seventh floors have been constructed for use for residential purposes, even though their current condition precludes actual use for those purposes."

22. Mr Johnson's argument is that the works had not reached a sufficient stage to qualify. The two areas had never achieved a state of construction sufficient to enable anyone to use them as their home. Put another way, the two areas had not been "constructed" (past tense) for use for the purposes of a dwelling: they were in the course of construction for that purpose. The judge rejected that argument. He said at [35]:

> "Of course, if the sixth and seventh floors had not yet been constructed so as to create separate sets of premises, there could be no "flats" within the definition. But once the separate

> sets of premises exist and are let for residential purposes, they have been constructed for use for the purposes of a dwelling within the meaning of the definition even if they could not actually be used as such on the relevant date. It is the separate set of premises that needs to have been constructed, not an inhabitable dwelling."

23. The judge found support for his conclusion in the decision of the House of Lords in *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5, [2008] 1 WLR 289. That case concerned a building in Mayfair. The question was whether it was a "house" for the purposes of the Leasehold Reform Act 1967. Section 2 (1) of that Act defines "house" as follows:

> "For purposes of this Part of this Act, "house" includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes…"

24. The building in question had originally been built as a single private residence in the 18th century. It had been used as such for some 200 years until 1942 when it was occupied by the Free French Government in exile. After the war, part of the building was occupied for business purposes, and the upper parts were fitted out as flats. By the relevant time, the upper parts had been largely stripped back to the original structure. They were unoccupied, very dilapidated and incapable of being occupied as residences. The House of Lords decided nevertheless that the property was a "house". Lord Neuberger said at [17]:

> "The fact that the property had become internally dilapidated and incapable of beneficial occupation (without the installation of floor boards, plastering, rewiring, replumbing and the like) does not detract from the fact that the property was "designed … for living in", when it was first built, and nothing that has happened subsequently has changed that."

25. He continued at [18]:

> "In my judgment, the words "designed or adapted for living in", as a matter of ordinary English, require one first to consider the property as it was initially built: for what purpose was it originally designed? That is the natural meaning of the word "designed", which is a past participle. One then goes on to consider whether work has subsequently been done to the property so that the original "design" has been changed: has it been adapted for another purpose, and if so what purpose? When asking either question, one is ultimately concerned to decide whether the purpose for which the property has been designed or adapted, was "for living in"."

26. On the facts of that case, therefore, there was a time stretching over the best part of 200 years when the property was not only capable of being occupied as a house, but

was in fact occupied for that purpose. What the House of Lords decided was that something that was once a house did not cease to be a house simply because it had fallen into a dilapidated state.

27. In the subsequent case of *Hosebay Ltd v Day* [2012] UKSC 41, [2012] 1 WLR 2884 the Supreme Court considered two buildings, one of which was used for hiring out individual rooms with self-catering facilities; and the other of which was used entirely as offices. Each had originally been built as a large house. Again, the question was whether either building qualified as a "house" for the purposes of the Leasehold Reform Act. Lord Carnwath said at [35] that once it was accepted that a "literalist" approach to the definition was inappropriate:

> "… I find myself drawn back to a reading which accords more closely to what I have suggested was in Lord Denning MR's mind in *Ashbridge* [1965] 1 WLR 1320, that is a simple way of defining the present identity or function of a building as a house, by reference to its current physical character, whether derived from its original design or from subsequent adaptation. Furthermore, I would not give any special weight in that context to the word "adapted". In ordinary language it means no more than "made suitable". It is true that the word is applied to the building, rather than its contents, so that a mere change of furniture is not enough. However, the word does not imply any particular degree of structural change."

28. At [36] he explained *Boss Holdings* as follows:

> "That interpretation does not of course call into question the actual decision in the *Boss Holdings* case…. The basis of the decision, as I understand it, was that the upper floors, which had been designed or last adapted for residential purposes, and had not been put to any other use, had not lost their identity as such, merely because at the material time they were disused and dilapidated. It was enough that the building was partially "adapted for living in", and it was unnecessary to look beyond that… That reasoning cannot be extended to a building in which the residential use has not merely ceased, but has been wholly replaced by a new, non-residential use."

29. Thus, *Boss Holdings* was a case in which a building once had an identity as a house; and had not lost that identity because of subsequent events. By contrast in *Hosebay*, the two buildings, although originally designed for living in, had lost their identity. The identity of each building at the relevant date was to be ascertained by reference to "its current physical character" however that had been produced. I do not consider that the judge was justified in finding support for his conclusion in *Boss Holdings*, in the light of his finding that what had been the flats on the sixth and seventh floors had lost their identity as a consequence of the extensive structural works.

30. The statutory definition of "house" in the Leasehold Reform Act 1967 differs from the definition of "flat" in the 1993 Act in a number of respects. First, whereas the definition of "house" starts with a building that has been "designed", the definition of

"flat" starts with a set of premises that has been "constructed". The ordinary meaning of "designed" is "planned or intended". A building in the course of construction may well have been "designed" for a particular purpose, without having yet been "constructed" for that purpose. The breadth of that phrase is, however, limited by two other features of the definition of "house" namely (a) there must be a building and (b) it must be reasonable to call it a house. If a putative flat is in the course of construction, it has not yet been "constructed" for any purpose. Second, whereas a house must be designed "for living in", a flat must be constructed "for use for the purposes of a dwelling". This is more than simply requiring that a flat must be constructed for the purposes of a dwelling. It must be constructed for *use* for that purpose. A purpose may be a future purpose. But if a separate set of premises is to be constructed "for use" as a dwelling, it must, in my judgment, be in a state in which it is suitable for use as a dwelling. An interpretation of "for" as meaning "suitable for" is a commonplace in the law of patents. It also coincides with the interpretation that Lord Carnwath put on "adapted" in *Hosebay* ("made suitable"); and would therefore achieve consistency in the definition. Mr Jourdan accepted that in a case of adaptation rather than construction, there had to be some physical work which changed the previous identity of the premises from something that was not suitable for use as a dwelling to something that was. I cannot see any warrant for different tests being applied to the constituent parts of the definition. Accordingly, in my judgment the same meaning should be ascribed to that word in that part of the definition of "flat" which refers to "construction … for use for the purposes of a dwelling". In these respects the definition of "flat" differs not only from the definition of "house" in the Leasehold Reform Act 1967; it also differs from section 4 (1) (a) of the 1993 Act which refers to premises or parts of premises not "occupied or intended to be occupied for residential purposes". As far as the latter section is concerned, the judge said at [129]:

> "In most cases, parts of premises that are occupied or intended to be occupied for residential purposes within the meaning of section 4(1)(a)(i) will be so occupied (or intended to be occupied) because they are flats. However, that does not mean that only flats within the meaning of Part I of the Act can be intended to be so occupied. Had the draftsman of the Act intended the two matters to be synonymous he could and would have referred simply to "flats" in section 4(1)(a)(i). The essential distinction raised by section 4(1) is between residential space and non-residential space (excluding the common parts). Thus, it is not a surprising conclusion to reach that floors of a residential block that are being rebuilt as new flats but are not yet completed, such as to be capable of occupation, are nevertheless premises that are intended to be occupied for residential purposes, rather than floors occupied or intended to be occupied for non-residential purposes. The distinction between the separate tests has the following consequence where flats are in course of construction: the number of qualifying tenants in the building or part of a building is determined without counting any tenants of the intended flats, but in determining whether or not Chapter 1 of

> Part I applies to the self-contained building or part of a building at all such premises are treated as residential parts."

31. I agree with what the judge said here. But it seems to me that if (as I consider the judge rightly held), flats in the course of construction are left out of account in counting the number of qualifying tenants, they must equally be left out of account in counting the number of flats in the building.

32. In the present case it is not possible to go back to the use of the sixth and seventh floors before the works of construction were undertaken because, on the judge's findings, the original flats had indeed lost their identity. So we are concerned with premises in the course of construction, which were intended to be used for residential purposes but which, at the relevant date had not in fact been used for that purpose and were incapable of use for that purpose. It is important to stress the narrowness of the issue. Some of the examples given by Mr Jourdan (a flat gutted by fire or stripped out for refurbishment) would still qualify as flats because they had at some stage in the past been constructed for use as a dwelling and had not subsequently lost their identity.

33. Mr Jourdan placed some reliance on cases decided under the Rent Acts. I did not derive help from those cases. The relevant criterion for protection under the Rent Acts was whether premises had been "let as" a separate dwelling. That naturally directs attention to the terms of the letting, rather than the physical condition of the property.

34. It is, of course, the case that premises may be a "dwelling" (or even be used for the purposes of a dwelling) even though they lack cooking facilities: *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301. But there may well be cases in which it is difficult to decide whether a set of premises has reached the stage at which it is suitable for use as a dwelling. A case in which plumbing has been installed but sanitary ware has not; or a case in which electrical installations have reached first fix stage are examples. They can be left for cases in which it is necessary to decide. But on the judge's findings in this case the physical condition of the areas on the sixth and seventh floors "precluded actual use" for residential purposes. In the light of that finding it cannot be said that they were suitable for use for the purposes of a dwelling.

35. Mr Jourdan also relied on section 11 of the 1993 Act which gives qualifying tenants the right to receive information about superior interests. Mr Jourdan's point was that the information that such tenants were entitled to receive did not include information about the physical condition of parts of the building; and that the 1993 Act gave the qualifying tenants no right of inspection (at least before the service of the initial notice). If, therefore, there was uncertainty about whether a particular part of the premises was or was not a flat, there would be no means of resolving the uncertainty before service of the initial notice. Section 17 (2) of the 1993 Act, which gives the nominee purchaser a right of access to any part of the premises specified in an initial notice, takes effect only once the initial notice has been given. I do not consider that section 11 is a reliable guide to the interpretation of the definition of a "flat". It is common ground that whether something is a flat depends at least in part on its physical condition; whether that physical condition is simply a separate set of premises or something suitable for use for the purposes of a dwelling. If there is a difficulty in deciding whether something satisfies the test (whatever it is) section 11 does not provide the answer. In addition section 11 contains no machinery for making

inquiries about the future intentions of the holder of any interest in the premises. So to the extent that whether something is or is not a flat depends on its intended use, section 11 does not assist either.

36. In essence, therefore, I accept Mr Johnson's submission. A separate set of premises is not a flat (as defined) unless at some stage in its history it has reached a stage of construction to be suitable for use for the purposes of a dwelling. On the judge's findings the intended flats on the sixth and seventh floors had not reached that stage. Accordingly, they were not flats. It follows that at the relevant date the building contained 26 flats rather than 30. The initial notice was therefore not required to name the lessees of what would become the remaining four flats. If, therefore, the initial notice was authorised by thirteen qualifying tenants or more, it was validly served.

37. Whether it was so authorised depends on what was called the "authority point"; to which I now turn.

The authority point

38. Flat 53 is held by a Bahamian company called Rokkibeach Ltd. One of the issues raised below (and now raised on appeal by Respondent's Notice) is whether Ms McNeil the signatory of the initial notice on behalf of Rokkibeach was validly authorised to sign it. Rokkibeach has two directors, both of which are Bahamian companies: Carnoustie Ltd and Morfontaine Ltd.

39. The directors of Rokkibeach purported to pass a number of resolutions conferring such authority on Ms McNeil and Mr Mikailian. Each of the resolutions was signed by Mr Taylor and Ms Munnings purporting to sign on behalf of Carnoustie and Morfontaine respectively.

40. Rokkibeach's articles of association contain two relevant provisions. Article 71 provides:

> "The directors may, by a resolution of directors, appoint any person … to be an … agent of the Company…"

41. A resolution of directors is defined in the articles as being either a resolution approved at a duly constituted meeting of directors; or a resolution consented to in writing by a simple majority of directors. It is not therefore necessary for a resolution of directors to be considered at a board meeting.

42. Article 73 of Rokkibeach's articles of association provides:

> "Any director which is a body corporate may appoint in writing any person its duly authorised representative for the purpose of representing it at meetings of the Board of Directors and the person so appointed shall be entitled to exercise the same powers on behalf of such body corporate as the body corporate could exercise if it were an individual director."

43. The two corporate directors of Rokkibeach were Carnoustie and Morfontaine. Mr Jourdan's first argument is that for either of those directors to authorise Mr Taylor and Ms Munnings to represent them at board meetings of Rokkibeach, there ought to have

been an appointment which complied with article 73 of Rokkibeach's articles. Their nomination as authorised signatories did not achieve that purpose. The fallacy underlying this argument is the assumption that a board meeting was required in order to bring a directors' resolution into existence. It did not. In my judgment, therefore, article 73 has no application to the facts of this case.

44. The first of the resolutions relied on as conferring authority states that it was a resolution in writing of the directors; and names the directors as Carnoustie and Morfontaine. The resolution resolves to issue a power of attorney to Mr Mikailian and Ms McNeil "in order for them to sign on behalf of the company any initial notice." It is then signed "for and on behalf of" Carnoustie and Morfontaine respectively each of which was described as "Director". The signatories were Mr Taylor and Ms Munnings. The critical point is that neither of those individuals purported to act as director. All that they did was to sign the resolution on behalf of Carnoustie and Morfontaine.

45. The issue under this head therefore boils down to the question: were Mr Taylor and Ms Munnings properly authorised to act on behalf of Carnoustie and Morfontaine respectively in signing those resolutions?

46. On 19 June 2015 the respective boards of Carnoustie and Morfontaine passed identical resolutions. They began:

> "The chairman informed the meeting that the Authorized Signatory list of Societe Generale Private Banking (Bahamas) Ltd will be accepted with immediate effect.
>
> "On motion duly made, seconded and carried, it was: Resolved that the authorised signatories list of Societe Generale Private Banking (Bahamas) Ltd ('SGPBB') dated 19 June 2015 be confirmed as the Authorized Signatories of the Company until such time as the appointment is cancelled by further Resolution of the Directors and that all previous authorized signatory lists of the Company be and they are hereby cancelled with immediate effect."

47. The list is dated the same day. Its title page describes it as "Authorized Signatory List". It begins:

> "The following is the list of persons who are authorized to sign on behalf of Société Générale Private Banking (Bahamas) Ltd ('SGPBB'), either acting in its own capacity or in its capacity as trustee of third party account(s) with effect from 19 June 2015."

48. The list is then divided into three categories of signatory: A, B and C. Mr Taylor is a category B signatory and Ms Munnings a category C signatory. The notes to the list state that:

> "All legal agreements must be signed by two (2) signatories of which one must be a category A signatory"

49. The first argument is that the effect of the resolution was to incorporate not merely the list of persons authorised to sign on behalf of Carnoustie and Morfontaine; but also the limitations on that authority. The first limitation is that contained in the introductory rubric to the list: namely that the authority extended only to the relevant company acting in its own capacity or as trustee of third party accounts. The second limitation is the division of the signatories into the three specified categories, each with their own powers.

50. The judge took a middle course. He held that the opening rubric had not been incorporated into the resolution; but that the division into three categories had. It is, I think, clear that the opening rubric cannot have been incorporated into the resolution verbatim. It would make no sense at all for Carnoustie to authorise persons to sign on its behalf but to have limited their authority to cases in which a different company was acting in its own capacity or as trustee of third party accounts. Mr Jourdan accepted that the opening paragraph must be altered so as to make it applicable to the relevant company (i.e. Carnoustie or Morfontaine). But he said that the power to sign was limited to a case in which the relevant company acted in its own capacity or in its capacity as trustee of third party accounts. I accept that submission. As David Richards LJ pointed out in the course of argument, the resolution confirmed the "Authorized Signatory List" which most naturally describes the document so-called. I can see no principled reason to distinguish between different parts of that document. But that does not, in my judgment, provide a reason to say that Mr Taylor and Ms Munnings lacked authority. Each of the companies is the holder of an office, namely that of being a director of Rokkibeach. In exercising the powers and duties of that office I consider that a director acts in its own capacity. The capacity in which it acts is the capacity of office holder. It is true that from some perspectives a director may be the agent of the company; or a fiduciary for the company. But that does not, in my judgment, alter the fact that when exercising its independent judgment about what is in the best interests of the company it is acting in a personal capacity. I would reject Mr Jourdan's argument under this head.

51. The next argument is that the giving of authority to Ms McNeil and Mr Mikailian to sign the initial notice on behalf of Rokkibeach was a legal agreement. It required at least one category A signatory. Since neither Mr Taylor nor Ms Munnings was in that category, no valid authority was given.

52. In my judgment this argument misses the point. The list is a list of signatories entitled to sign on behalf of Morfontaine and Carnoustie. In that context "legal agreements" must refer to legal agreements to which Morfontine or Carnoustie were party. The restriction on signing legal agreements was therefore a restriction on signing legal agreements which bound Carnoustie or Morfontaine. The objective, presumably, was that neither Carnoustie nor Morfontaine should be exposed to potentially onerous legal liabilities by a junior signatory. But neither of those companies was exposed to any liability. There may well have been a liability to indemnify the servers of the initial notice against proper costs incurred in the course of their agency. There may also have been a contingent liability to pay the landlord's costs in the event that an initial notice was withdrawn. But the party liable would have been Rokkibeach; not Carnoustie or Morfontaine. I do not consider that the restriction on signing legal agreements had anything to do with signing anything on behalf of Rokkibeach.

53. Mr Jourdan also mounted an argument to the effect that the only authority that could have been created by the list of authorised signatories was ostensible authority. Ostensible authority depended on some form of estoppel for its effectiveness. K Group had not relied on the signatures. On the contrary, it challenged them. It was not, therefore, bound by any estoppel. I do not accept this argument either. In the first place it seems to me to be clear that the adoption of the list of authorised signatories amounted to the grant of actual authority to sign what the signatories were authorised to sign. In the second place, the relevant estoppel would not be an estoppel as between Rokkibeach and K Group; but between Rokkibeach and Carnoustie or Morfontaine. Rokkibeach was entitled to act on the basis that a valid resolution had been passed. This is no more than the application of the "indoor management" rule: see *Mahoney v East Holyford Mining Co* (1875) LR 7 HL 869, 894.

54. In my judgment, therefore, Rokkibeach validly authorised the giving of the initial notice on its behalf. If Rokkibeach is counted as one of the participating lessees, the minimum statutory requirement is satisfied.

Other issues

55. Other issues were raised by the Respondent's Notice; but they do not arise.

Result

56. I would allow the appeal.

Lord Justice David Richards:

57. I agree.

Lady Justice Rafferty:

58. I also agree.