Neutral Citation Number [2018] EWHC 3200 (Ch)

CR-2017-007215

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
IN THE MATTER OF LONDON BRIDGE ENTERTAINMENT PARTNERS LLP (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
AND THE LIMITED LIABILITY PARTNERSHIP REGULATIONS 2001

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 23/11/2018

Before :

ICC JUDGE BARBER

- -

Between :

(1) LONDON TROCADERO (2015) LLP

Applicant

- and –

(1) HENRY ANTHONY SHINNERS **Respondents**
(2) NICHOLAS MYERS
(As Joint Administrators of London Bridge Entertainment Partners LLP)
(3) LONDON BRIDGE ENTERTAINMENT PARTNERS LLP (IN ADMINISTRATION)

- -

Zia Bhaloo QC and Charlotte Cooke (instructed by **Hogan Lovells International LLP**) for the Applicant
Gary Cowen and Nigel Dougherty (instructed by **Howard Kennedy LLP**) for the Respondents

Hearing dates: 12 and 13 November 2018

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Approved Judgment

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

.....

ICC Judge Barber

1. This is the hearing of certain issues directed to be tried as preliminary issues by a consent order dated 26 July 2018.

The Parties

2. The Applicant, London Trocadero (2015) LLP ('Trocadero'), is the registered proprietor of The London Pavillion, 1 Piccadilly, London W1 ('the Building'), a large five-storey building situated in a prominent location occupying a corner site on Piccadilly Circus. The Third Respondent ('the Company') was the lessee of parts of the Building under various leases. The premises demised to the Company were used as a museum trading under the name 'Ripley's Believe it or Not!' The First and Second Respondents are the joint administrators of the Company, having been appointed on 29 September 2017.

The Lease

3. By a lease dated 2 November 2007 made between (1) London Trocadero Limited and (2) London Bridge Entertainment Partners LLP ('the Lease'), Units G3, G4, G7, C9 and C10 and parts of the first, second, third, fourth, and fifth floors of the Building ('the Property') were demised to the Company for a term of 25 years commencing on 2 November 2007 at an initial basic rent of £1,750,000 per annum, payable quarterly in advance on the modern quarter days (1 January, 1 April, 1 July and 1 October). The passing rent at the date of forfeiture was £2,051,924.35. The Lease included, at Clauses 4.3, 4.4 and 4.5, covenants to repair, decorate and maintain the Property and fixtures and fittings therein. Clause 4.8 of the Lease contained a covenant against alterations.

4. By a further lease dated 10 July 2008 and made between London Trocadero Limited and the Company, a plant room on the fourth floor of the Building was demised to the Company for a term commensurate with the term of the Lease.

The Rent Deposit Deed

5. The parties to the Lease entered into a rent deposit deed on the same date as the Lease ('the Rent Deposit Deed', or 'Deed'), under which the Tenant deposited £2,056,250 ('the Deposited Sum').

Subsequent Events

6. On 20 August 2015, the freehold interest in the Building was acquired by the Applicant.

7. On 29 September 2017, the Company went into administration and the First and Second Respondents were appointed as joint administrators of the Company.

8. The rent which fell due under the Lease on 1 October 2017 was not paid. It was withdrawn from the Deposited Sum on or by 9 October 2017, the Applicant giving notice through its (then) solicitors that it was withdrawing rent for the quarter commencing 1 October 2017 from the Deposited Sum in accordance with the Deed.

9. The Applicant's solicitors served notice pursuant to Clause 5 of the Deed requiring replenishment within 14 days. The Company failed to comply with that notice and a notice pursuant to section 146 of the Law of Property Act 1925, requiring the Company to remedy the breach, was served on 26 October 2017. The Company did not respond and did not replenish the Rent Deposit.

10. On 1 November 2017, Trocadero's current solicitors, Hogan Lovells International LLP, asked the Administrators to consent to a forfeiture of the Lease. The Administrators initially refused and, on 30 November 2017, Trocadero issued an application for permission to forfeit. Consent to forfeit was eventually given on 21 December 2017 and forfeiture took place on 22 December 2017. The application was then amended by consent to seek directions as to the treatment as an expense of the administration of certain obligations of the Company which accrued during the course of the administration while possession was being retained for the benefit of the administration prior to forfeiture.

11. Following further correspondence, certain preliminary issues were directed to be heard by consent.

12. Since the forfeiture, the Property (as part of a slightly larger demise) has been re-let by the Applicant to Exhibitions Holdings Limited, which opened its 'Body Worlds' exhibition to the public on 6 October 2018. The new lease was granted on 18 July 2018 for a term of 10 years with an option to take a further 10 years at a rent of £3 million per annum (compared with £2,051,924.35 payable under the Lease) with a rent free period until 1 December 2018 (4 ½ months).

13. The Respondents maintain that the Applicant's claims for losses arising under the Lease are fatally undermined by the new lease, on the basis that, in consequence of it, the Applicant cannot demonstrate any diminution in the value of the Applicant's freehold reversion or other recoverable loss. This is disputed and is not an issue which I am required to determine. I am not concerned with quantum at all.

The Preliminary Issues

14. The issues which I am required to determine are set out in an agreed directions order dated 26 July 2018, approved by Insolvency and Company Court Judge (Chief Registrar) Briggs on 30 July 2018. The salient parts of that order are as follows:

> 'UPON the application of the Respondents for the hearing of preliminary issues. …
>
> AND UPON the parties agreeing that the Applicant's claimed consequential losses as set out in its Revised Summary of heads of loss and quantum dated 18 April 2018 include loss attributable to void periods in respect of … [the Property] that are: (a) a period corresponding to the period which it would reasonably take to put the Property back into the state of repair and condition such that they can properly be re-let ('Applicant's Works Period'): (b) a further period after the Applicant's Works Period or Respondents' Works Period (as appropriate) that the Applicant claims the Property would be

vacant whilst seeking and completing a new letting to an incoming Tenant ('Marketing Period') (c) any rent-free period granted as an incentive or otherwise to any incoming Tenant ('Rent Free Period')

AND UPON the parties agreeing that the Respondents' position is that the works period above should in fact be defined as the period which it would reasonably take to put the Property back into the state of repair and condition in accordance with the Tenant covenants in the leases of the Property ('Respondents' Works Period')

AND UPON the Respondents admitting that the Landlord (as defined in the Rent Deposit Deed dated 2 November 2007 ('Rent Deposit Deed')) is entitled to withdraw all or any part of the Deposited Sum (as defined in the Rent Deposit Deed) as may be required to satisfy any loss of rent, service charge and insurance suffered by the Landlord (if any) in respect of the Respondents Works Period subject to the statutory cap imposed by section 18 of the Landlord and Tenant Act 1927, but denying that the Landlord is entitled to do so for any period that the Applicants Works Period is longer than the Respondents Works Period

IT IS HEREBY ORDERED THAT:

1.The following issues be heard as preliminary issues:

1.1 On the proper interpretation of the Rent Deposit Deed, is the Applicant's Works Period or the Respondents' Works Period the correct period for which the Landlord is entitled to withdraw loss of rent service charge and insurance from the Deposited Sum?

1.2 On the proper interpretation of the Rent Deposit Deed, and in particular, clauses 2 and 4, is the Landlord entitled to withdraw all or any part of the Deposited Sum (as defined in the Rent Deposit Deed) as may be required to satisfy any:

a) loss of rent, service charge and insurance etc. during the Marketing Period before the Property is re-let;

b) loss of rent, service charge and insurance etc. during the Rent Free Period which the Landlord would afford to a new Tenant; and/or

c) any properly assessed agency fees, management fees, legal fees, lender's fees, Heart of London Bid Levy and utilities standing charges incurred by the Landlord in connection with the re-letting of the Property?

> 1.3 If the obligation pursuant to clause 5 of the Rent Deposit Deed was incurred whilst the Respondents beneficially retained the Property, is it a matter of the Court's discretion whether this liability (and how much) is payable as an expense of the Third Respondent's administration?'

15. Issue 1.1 is concerned with the correct definition of 'Works Period' for the purposes of Issue 1.2. I am told that the parties' solicitors, when drawing up the issues to be determined as preliminary issues at this hearing, initially focussed on the issues collectively described as Issue 1.2, but then found themselves in difficulty as they could not agree on the correct definition for 'Works Period', from which various other periods were claimed to run. Accordingly, they added Issue 1.1. They also added 1.3, which we shall come on to in due course.

16. It is common ground that, pursuant to clauses 2 and 6 of the Rent Deposit Deed, the Landlord is entitled to withdraw sums representing the damages to which the Landlord would be entitled as a result of a failure to perform and observe the covenants and conditions contained in the Lease. Put another way, the Landlord is entitled to withdraw sums properly due to it as damages for breach of covenant.

17. If a tenant is in breach of its obligations to repair a property at the end of the term of a lease, the landlord is, on the face of it, entitled to damages, subject to s.18 of the Landlord and Tenant Act 1927. Prima facie (and subject to s.18), the landlord will be entitled to the cost of the works required together with consequential loss flowing from the breach. That consequential loss may include loss of rent. As the authors of Dowding and Reynolds: Dilapidations, the Law and Practice (6th ed, at para 32-02) put it: 'Claims against tenants for terminal dilapidations frequently include an amount for loss of rent… during the period necessary for carrying out the remedial works.'

18. In the ordinary case, the period over which loss of rent will be awarded is likely to equate to the period reasonably necessary for carrying out the remedial work: Dowding & Reynolds, para 32-07. At the end of that period, the landlord will have received what he was contractually entitled to receive, a property which complies with the repairing obligations in the lease. The landlord is not entitled to go further than the tenant was required to under the lease and then, basing himself on that more extensive work, claim loss of rent for a longer period.

19. The Respondents' Works Period, as defined for the purposes of Issue 1.1, is based upon the 'ordinary' dilapidations model described in Dowding & Reynolds. It is 'the period which it would reasonably take to put the Property back into the state of repair and condition in accordance with the tenant covenants in the leases of the Property'.

20. The Applicant's Works Period is different. The Applicant maintains that, under and by virtue of the Rent Deposit Deed, the Applicant is entitled to withdraw sums from the deposit representing loss of rent referable to 'the period which it would reasonably take to put the Property back into the state of repair and condition such that they [sic] can properly be re-let.'

21. That, then, is the first issue: which 'Works Period' applies.

22. Issue 1.2 then considers whether, under the Rent Deposit Deed, the Applicant is entitled to withdraw sums representing (a) loss of rent etc referable to 'the Marketing Period before the Property is re-let' (the Marketing Period for such purposes being claimed to run from expiry of whichever 'Works Period' is said to apply) (b) loss of rent etc referable to 'the Rent Free Period which the Landlord would afford to a new Tenant' and (c) a selection of fees and charges incurred by the Landlord in connection with re-letting the Property.

23. Issue 1.3 then addresses a discrete insolvency point, namely: 'if the obligation pursuant to Clause 5 of the Rent Deposit Deed was incurred whilst the Respondents beneficially retained the Property, is it a matter of the Court's discretion whether this liability (and how much) is payable as an expense of the Third Respondent's administration?'

The approach to construction

24. The correct approach to construction was not in dispute.

25. The "golden rule" of contractual interpretation is that words should be given their ordinary and natural meaning. The first question in interpreting a contract is always, what is the ordinary meaning of the words used: Lewison on The Interpretation of Contracts, 2015, 6th ed at para 5.01.

26. Where the parties have used unambiguous language, the Court must apply it: Rainy Sky SA v Kookmin Bank [2011] UKSC 50, per Lord Clarke at paragraph 23.

27. In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole document: Lewison at para 7.02. A document executed contemporaneously with the primary document to be construed may be relied on as an aid to construction, if it forms part of the same transaction as the primary document: Lewison at para 3.03.

28. All parts of a contract must be given effect where possible, and no part of it should be treated as inoperative or surplus. The Court should therefore start from the presumption that every clause is intended to have some effect on the parties' rights and obligations: Lewison at 7.03.

29. The ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract: Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912; Rainy Sky SA v Kookmin Bank [2011] UKSC 50 at para 14.

30. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have

been understood to mean: Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, per Lord Hoffmann at page 913.

31. In construing a document, the Court has a variety of tools at its disposal. As confirmed by Lord Hodge in Wood v Capita Insurance Services [2017] UKSC 24 at para 13:

> 'Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity … The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality [or] brevity ….'

32. If there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other: Lord Clarke in Rainy Sky at para 21.

33. As noted by Lord Neuberger in Arnold v Britton [2015] UKSC 36 :

> '14. Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381 and culminating in Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900.
>
> 15. When interpreting a written contract, the court is concerned to identify the intentions of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions….

16. For present purposes, I think it is important to emphasise seven factors.

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it…..

19. The third point … is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.…

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed…. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time

> that the contract was made, and which were known or reasonably available to both parties…..
>
> 22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contracts. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. …'

34. I was also taken to the helpful summary of the ejusdem generis principle set out in Lewison on Interpretation of Contracts at 7.13, which provides as follows:

> 'If it is found that things described by particular words have some common characteristic which constitutes them a genus, the general words which follow them ought to be limited to things of that genus.'

35. In Ambatielos v Anton Jurgens Margarine Works [1923] AC 175, the House of Lords, consistent with the approach adopted in the Court below, rejected the suggestion that the ejusdem generis principle could apply in cases where the specific words follow the general words and do not precede them.

The Documents

The Agreement for Lease

36. Ms Bhaloo took me first to the agreement for lease dated 4 July 2007, entered into by the original Landlord and the Tenant prior to execution of the Lease. Clause 5.3 of this agreement provided for a rent commencement date of six months after the date on which the Lease was completed. Ms Bhaloo maintained that this was part of the factual matrix.

The Lease

37. The six month rent-free period was also reflected in the 'rent commencement date' provided in the Lease. The Lease was executed at the same time as the Rent Deposit Deed.

38. Clause 4.7 of the Lease also provided for a six month marketing/advertising period in the run-up to the date of expiration or sooner determination of the term. During that six month period, the Tenant was obliged to "permit the Landlord or its agents to affix upon any suitable part or parts of the exterior of the Demised Premises … a notice for re-letting or selling the same and during such period to permit persons with written authority from the Landlord… to view the Demised Premises at reasonable times of the day".

39. Clause 4.20 of the Lease contained a covenant against assignment without consent. This provided that any consent of the Landlord to an assignment may be subject to, inter alia, a condition that the Tenant and any relevant guarantor shall, prior to completion of the assignment, execute and deliver to the Landlord a deed in the form set out in Schedule 9 to the Lease.

40. Clause 4.21 of the Lease, headed 'Payment of Fees', contained a covenant on the part of the Tenant:

> 'to pay to the Landlord all reasonable and proper costs, charges and expenses (including solicitors', counsels', and surveyors' and other professional costs, fees and disbursements and also including without prejudice to the generality of the foregoing bailiffs' costs, charges and expenses reasonably properly charged or incurred by the Landlord:
>
> 4.21.1 Forfeiture
>
> In or in reasonable contemplation of any proceedings relating to the Demised Premises under Sections 146 and 147 of the Law of Property Act 1925 or incidental to the preparation and service of notices thereunder… and to keep the Landlord fully and effectively indemnified against all reasonable and proper costs, expenses, claims and demands whatsoever in respect of the said proceedings;…..
>
> 4.21.3 Rent Arrears
>
> In connection with the recovery of arrears of rent or rents due from the Tenant hereunder;
>
> 4.21.4 Enforcement of Covenants
>
> In connection with the enforcement of any of the Tenant's covenants herein contained …'

41. Clause 4.30 of the Lease, headed 'Indemnity', contained a covenant on the part of the Tenant 'to indemnify and keep indemnified the Landlord from and against all actions, proceedings, claims, demands, losses, costs, expenses and damages arising in any way directly or indirectly out of the non-compliance by the Tenant with any of its obligations hereunder…' I asked Counsel to provide any case law on the scope of this covenant, which, read literally, appears to be very wide, but they were unable to identify any relevant case law overnight.

42. The Lease also made provision for a guarantor, although in this case no guarantor was provided. Clause 1.1 of the Lease defined the 'Guarantor', as "the person (if any) from time to time guaranteeing the obligations of the Tenant under this Lease… any such guarantor to enter into and observe the covenant specified in Schedule 5'.

43. Paragraph 7 of Schedule 5 to the Lease provided, inter alia, that in the event of forfeiture, the Landlord could by notice in writing require the Guarantor to enter into a new lease of the Property for a term equivalent to the unexpired residue of the term granted by the Lease. Paragraph 8 of Schedule 5 to the Lease went on to provide that, if the Landlord did not require the Guarantor to take a new lease pursuant to paragraph 7, the Guarantor was nonetheless obliged to pay to the Landlord, on demand, "a sum equal to the Rents and other sums that would have been payable

under this Lease but for the [forfeiture] in respect of the period from and including the date of such [forfeiture] until the expiration of six (6) months from such date".

44. Miss Bhaloo submitted that this was again an express recognition in contemporaneous documents of the risk of a void. She also invited me to note something of a theme to the documents, a six month rent-free period, provision for six months marketing, and provision for guarantee obligations in the event of forfeiture, requiring payment on demand of a sum equal to the rents and other sums payable for a six month period under the Lease.

45. The Rent Deposit Deed was executed on the same day as the Lease. It made provision for a deposit (referred to as 'the Deposited Sum') of £2,056,250, which I am told represented one year's rent plus VAT. The Deed contained, inter alia, the following provisions:

> 'the Tenant's Obligations' means the obligations of the Tenant to pay the rents reserved by the Lease and to perform and observe the covenants and conditions on the part of the Tenant contained in the Lease'
>
> '2. Charge
>
> The Tenant hereby charges with full title guarantee by way of fixed charge the Deposited Sum to the Landlord as a continuing security for the payment and discharge of any of the Tenant's Obligations from time to time existing and also for any proper loss which the Landlord may incur in or incidental to and consequent upon forfeiture of the Lease'
>
> 3. Withdrawals
>
> 3.1 The Tenant hereby agrees that in addition to any other right or remedy which the Landlord may have under the Lease or otherwise if and whenever any rent or other payment due to the Landlord under the Lease is not paid on the due date or if and whenever the Landlord becomes liable for any payments which should be payable by the Tenant and the Tenant shall not pay the same within fourteen days of written demand then in any such case the Landlord may at any time and without notice to the Tenant withdraw for its own use and benefit all or any part of the Deposited Sum as may be required to satisfy the same
>
> 3.2 The Landlord shall promptly upon any such withdrawal having been made give written notice thereof to the Tenant
>
> 4. The Tenant hereby agrees that in addition to any other right or remedy which the Landlord may have under the Lease or otherwise the Landlord may at any time and without notice to the Tenant withdraw for its own use and benefit all or any part of the Deposited Sum as may be required to satisfy all or any proper loss which the Landlord may incur in or incidental to

and consequent upon forfeiture of the Lease including without limiting the generality of the foregoing legal costs and expenses on a Solicitor and own client basis Counsel's fees and Bailiffs' costs and Value Added Tax thereon in obtaining and enforcing judgement for forfeiture and an order for possession

5. Replenishment of Account

The Tenant hereby agrees and covenants with the Landlord that if the Landlord shall on any occasion find it necessary to resort to the Deposited Sum then the Tenant will within fourteen days of written demand pay into the Account a sum equal to the amount in respect of which the Landlord has resorted to the Deposited Sum to the intent that the Deposited Sum exclusive of Interest shall remain at not less than the sum specified in clause 1 hereof

…..

9. Repayment

The Deposited Sum shall be repaid to the Tenant as soon as reasonably practicable after the earlier of the following dates namely:

9.1 the date of expiration or sooner determination of the term of years granted by the Lease;

9.2 the date on which the Tenant can demonstrate to the Landlord's reasonable satisfaction that the Tenant's net profits after deduction of tax for the three previous consecutive years have been equal to at least three times the basic annual rent then payable under the Lease

9.3 the date of the assignment of the Lease with the Landlord's prior written consent

PROVIDED that if on such date (but excluding the date specified in clause 9.3 hereof) there shall be a subsisting material breach of any of the Tenant's Obligations the Landlord shall not be obliged to release the Deposited Sum until fourteen days after all such breaches have been remedied to the Landlord's reasonable satisfaction

10. Forfeiture

10.1 If the Lease shall be forfeited the Deposited Sum shall continue to be available to the Landlord in the manner hereinbefore provided until it shall be exhausted or until there shall be no further liability of the Tenant to the Landlord

> whereupon as soon as reasonably practicable any remaining balance of the Deposited Sum shall be repaid to the Tenant.'

46. It will be seen that Clause 2 of the Rent Deposit Deed charges the Deposited Sum to the Landlord as a continuing security for (a) 'the payment and discharge of any of the Tenant's Obligations from time to time existing' and (b) 'also for any proper loss which the Landlord may incur in or incidental to and consequent upon forfeiture of the Lease'. For ease of reference, I shall refer to these two limbs as Clauses 2(a) and 2(b) respectively.

47. Ms Bhaloo submitted that Clause 3.1 complemented Clause 2(a) and Clause 4 complemented Clause 2(b). I accept that submission.

48. It is clear from the presence of Clause 2(b) and Clause 4 that the Rent Deposit Deed must have been intended by the parties to do more than charge the deposit as a continuing security for the performance of the Tenant's obligations under the Lease itself. A reasonable person, with all the background knowledge reasonably available to the parties at the time of entering the Deed, would understand Clause 2(b) and 4 of the Deed to impose obligations on the Tenant (and to confer rights in favour of the Landlord) over and above those contained in the Lease.

49. The assumption by the Tenant of an obligation to compensate the Landlord (from the deposit) for 'proper loss which the Landlord may incur in or incidental to and consequent upon forfeiture of the Lease' must have been intended to go further than the Tenant's obligations under Clause 4.21 of the Lease (to 'pay to the Landlord all reasonable and proper costs charges and expenses… reasonably properly charged or incurred by the Landlord … in or in reasonable contemplation of [s.146] proceedings', for example). These would be covered under 'the Tenant's Obligations' in any event and so would fall within Clause 2(a) and 3.1 of the Rent Deposit Deed. The opening words of Clause 4 of the Deed include the phrase: 'in addition to any other right or remedy which the Landlord may have under the Lease'. There is also a change of language; in Clauses 2(b) and 4 of the Deed, the language of 'loss' is employed, unlike Clause 4.21 of the Lease. I also remind myself that all parts of a contract must be given effect where possible, and that no part of it should be treated as inoperative or surplus. The Court should therefore start from the presumption that every clause is intended to have some effect on the parties' rights and obligations: Lewison at para 7.03.

50. The challenge lies in determining the scope of the additional obligations intended by the parties at the time of executing the Deed and, in particular, what a reasonable person, with all the background knowledge reasonably available to the parties at the time of entering the Deed, would understand the parties to have meant by the term, used in both Clause 2(b) and 4, 'proper loss which the Landlord may incur in or incidental to and consequent upon forfeiture of the Lease'.

51. The express wording of the Rent Deposit Deed itself provides little assistance on this. The Respondents argued that the reference in Clause 4 of the Deed to 'legal costs and expenses on a solicitor and own client basis counsel's fees and bailiffs' costs and VAT thereon in obtaining and enforcing judgement for forfeiture and an order for possession' was relevant to determining whether to limit the scope of Clause 2(b) and Clause 4 to 'the costs and expenses associated with the procedure of forfeiting the

lease and obtaining possession of the Property.' Costs of this nature were already provided for in Clause 4.21 of the Lease, however, and so were already covered by Clauses 2(a) and 3.1 of the Deed. For the reasons already given, it is clear that Clauses 2(b) and 4 of the Rent Deposit Deed were intended to go beyond the obligations contained in the Lease. Moreover, as confirmed by the House of Lords in Ambatielos v Anton Jurgens Margarine Works [1923] AC 175, the ejusdem generis principle does not apply in cases where the specific follows the general; a fortiori where, as here, the specific words in question are prefaced by the phrase 'without limiting the generality of the foregoing'.

52. Ms Bhaloo maintained that 'proper loss' meant simply 'not improper'. I was not greatly assisted by this. As confirmed by Lord Hoffmann, the meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean: Investors Compensation Scheme Ltd v West Bromwich Building Society, loc cit at page 913.

53. The parties had differing approaches to the sub-clause 'in or incidental to and consequent upon forfeiture of the Lease' reflected in both Clause 2 and 4 of the Rent Deposit Deed. The Respondents maintained that the disjunctive should be respected, so that loss had to be either 'in forfeiture of the Lease' or 'incidental to and consequent upon forfeiture of the Lease'. The Applicant maintained that the phrase 'in or incidental to' was well known and that accordingly for the purposes of Clauses 2 and 4, the loss had to be either 'in or incidental to' or 'consequent upon' forfeiture. Neither option was a particularly pleasing fit. Ultimately, however, little turned on this; Ms Bhaloo maintaining that on any footing, even if the Respondents' option was correct, her client's claimed heads of loss fell within the second limb of that option, being 'incidental to and consequent upon'. She was content to proceed on that basis.

54. In more carefully drawn documents, the scope for close analysis of such issues would be greater. In this case, however, the Court is concerned with a relatively unsophisticated document. Given the standard of drafting of the Deed overall, I shall proceed on the footing that the Applicant's heads of loss are pursued as loss 'incidental to and consequent upon' the forfeiture.

55. This still left unresolved what a reasonable person, with all the background knowledge reasonably available to the parties at the time of entering the Deed, would understand by the phrase 'proper loss … incidental to and consequent upon', as used in Clause 2(b) and 4 of the Deed. I explored this in submissions with Counsel. Ms Bhaloo's primary stance was that no causation test applied; I should simply give the phrase 'consequent upon' its 'natural' meaning. Pressed further, her secondary position, as developed in submissions, was (in effect) that a 'but for' test applied; as a consequence of the forfeiture, she argued, the Applicant was left without a tenant; but for the forfeiture, the Applicant would have enjoyed continued entitlement under the Lease to rent, service charges and insurance. Even after finding a new tenant, the Applicant remained without rent, as one of the terms of the re-letting was that a rent free period of 4 ½ months was granted. That rent void was also, she argued, a consequence of the forfeiture; but for the forfeiture, the Applicant would have enjoyed entitlement to rent over that 4 ½ month rent free period

56. The 'but for' test of causation, however, would not ordinarily apply in a contractual context. In the context of this case, it would limit the function of the term 'proper', as used in Clauses 2 and 4 of the Deed, to 'proven', at best.

57. It seems to me that a reasonable person, with all the background knowledge reasonably available to the parties at the time of entering the Deed, would not understand the term 'proper loss …. incidental to and consequent upon forfeiture of the Lease', as used in Clauses 2(b) and 4 of the Deed, to include any consequential loss, however remote. A reasonable person reading the Deed would proceed on the basis that the Landlord and Tenant under the Lease and the Deed, as commercial parties, must have meant there to be some limit on the consequential losses covered by Clauses 2(b) and 4, other than the amount of the deposit itself, and would take the parties' reference to 'proper loss', in context, to mean loss of a type and extent in the reasonable contemplation of the parties at the time of entering the Deed as the probable result of forfeiture.

58. I would add that, to the extent that the phrase 'consequent upon' might otherwise lend itself to more than one construction, the construction set out at paragraph 57 above, modelled broadly upon the most accessible and readily applicable of the two limbs of the 'Hadley v Baxendale' test of remoteness, is consistent with business common sense.

59. Ms Bhaloo maintained as her primary position the contention that there was no need to import common law concepts of causation into the Deed, but argued that, even if those were applied as a cross check, the losses claimed by her client as recoverable from the rent deposit met the 'Hadley v Baxendale' test set out at paragraph 57 above. The heads of loss listed under paragraphs 1.1 and 1.2 of the Consent Order which she was seeking to establish as recoverable from the Deposit Sum were all, she submitted, heads of loss which were in the reasonable contemplation of the parties at the time of entering into the Lease and the Rent Deposit Deed as a probable result of forfeiture. As she put it, there is 'no more obvious loss than a loss of income when a lease is prematurely determined.'

60. The commercial purpose of Clauses 2(b) and 4 of the Rent Deposit Deed, she argued, was to cover the Applicant for the lost rent, service charges, insurance and other expenses incurred whilst the Property was 'put back into shape' and re-marketed. A marketing period was envisaged by Clause 4.7 of the Lease; a rent-free period was agreed in the Agreement for Lease and incorporated in the Lease itself. These factors, she submitted, must all be considered as part of the context in which the terms of the Rent Deposit Deed were formulated and agreed. The purpose of the Rent Deposit deed, she argued, was to protect the Applicant from such loss.

61. On behalf of the Respondents, Mr Cowen submitted that the primary commercial purpose of the Rent Deposit Deed was to secure the payment and discharge of the Tenant's obligations under the Lease. The purpose was not, he submitted, to give the Landlord the benefit of an open-ended liability on the part of the Tenant in the event of forfeiture. He maintained that Clause 9.2 of the Deed (which in broad terms provided that, in the absence of any subsisting breaches, the Deposited Sum should be returned as soon as reasonably practicable after the date on which the Tenant could demonstrate to the Landlord's reasonable satisfaction that the Tenant's net profits after deduction of tax for the three previous consecutive years had been equal to at

least three times the basic annual rent then payable under the Lease) supported this conclusion. Should the Tenant reach this profit threshold, the deposit would have to be returned and any additional obligations on the part of the Tenant, over and above those contained in the Lease, would cease.

62. There is a superficial attraction to this argument. Standing back, however, it is clear that the profit threshold contained in Clause 9.2 must have been chosen for a reason. In my judgment, the 'reasonable person', reading Clause 9.2, would conclude that the parties agreed this provision on the footing that, in the event that the Tenant reached such a profit threshold, the risks of forfeiture would materially decrease to such an extent that a deposit was no longer required. Clause 9.2 must therefore be viewed in that context.

63. Construing the document as a whole, it is clear that the Rent Deposit Deed served a dual commercial purpose; to secure the payment and discharge of the Tenant's obligations under the Lease, undoubtedly: but also, to afford the Landlord a degree of protection in the event of forfeiture. To conclude otherwise would be to ignore the impact of Clauses 2(b), 4 and Clause 10.1, the latter of which specifically provides that the Landlord's rights of recourse to the Deposited Sum survive forfeiture.

64. Turning his attentions specifically to Issue 1.1, Mr Cowen submitted that the correct 'Works Period' is the period which it will reasonably take to put the Property back into the state of repair and condition in accordance with the covenants contained in the lease: Dowding & Reynolds (6th ed.), paras 9.06, 32.07. He argued that the Applicant's alternative formula, 'such that it can properly be re-let' is not a standard of repair which the law recognises and is not supported by the wording of the Rent Deposit Deed or the Lease either.

65. The classic authority on this issue is Proudfoot v Hart (1890) 25 QBD 42. In that case, Lord Esher MR propounded the test for a general repairing covenant as "such repair as, having regard to the age character and locality of the house would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it". This test is still recognised as the standard of repair which would apply in the case of a general covenant to repair: Dowding & Reynolds (6th ed) at para 9-06.

66. Mr Cowen argued that there were a number of deficiencies with the Applicant's alternative formula. In particular, it was unclear what the word "properly" meant in the phrase "such that it can properly be re-let'. The phrase, he argued, does not provide any details of the hypothetical re-letting. A property which is repaired to a very poor standard might still be 're-let' to a class of persons who might otherwise not be able to afford the premises and who are a different class of persons to the class who might have been expected to take a letting of the premises. To take an extreme example, the property in this case might "properly be re-let" to a warehouse for storage purposes. That might require a significantly lower standard of repair than that envisaged by the Lease. Conversely, if, for the sake of argument, a high profile retailer, such as Cartier, was interested in taking the property as a flagship retail store, it might require a very high standard of repair (and a higher standard of repair than the class of persons who might otherwise take a large space in Piccadilly Circus) in order to ensure that the premises can "properly be re-let" .

67. Mr Cowen maintained that the Respondent's definition of 'Works Period' was the correct period for the purposes of issues 1.1 and 1.2. It merely envisaged a standard of repair in line with the standard required by the Lease: "in accordance with the Tenant's covenants in the leases of the Property". This formula, Mr Cowen contended, took into account the actual wording of those covenants and the nature of the hypothetical letting envisaged as fixing the standard of repair required for the Lease.

68. In relation to Issue 1.2, Mr Cowen acknowledged that Clause 2 of the Deed secured the payment and discharge of any of the Tenant's Obligations and that Clause 3.1 permitted the Landlord to have recourse to the Deposited Sum in relation to breaches of those obligations. He further acknowledged that, in addition, Clauses 2 and 4 also permit the Landlord to recover "any proper loss which the Landlord may incur in or incidental to and consequent upon forfeiture of the Lease" (skeleton argument para 34).

69. He maintained however that the loss of rent, service charge, insurance and other proposed heads of loss incurred during the Applicant's Work Period (to the extent that it exceeded the Respondents' Works Period), the Marketing Period or during the Rent Free Period did not qualify as 'proper loss' incurred by the Landlord 'in or incidental to and consequent upon forfeiture of the Lease'.

70. At paragraph 46 of his skeleton argument, he put the matter thus: "it is not the forfeiture of the lease which leads to those alleged losses. Rather, it is the Applicant's decision to use the premises by re-letting them to another Tenant which leads the Applicant to suffer those losses. The Applicant is under no obligation to make such a decision. The Landlord might choose, at that point, to demolish the premises or to occupy them itself or to redevelop them for an entirely different use or to mothball them. That choice is nothing to do with the Respondents. The decision to re-let [is], in effect, the "novus actus" or break in the chain of causation between the forfeiture and the alleged losses. By way of example, if the Landlord chose, instead, to occupy the premises itself, it would not suffer those losses".

71. I am not persuaded by the argument that the Landlord's decision to re-let of itself somehow operated as a break in the chain of causation between the forfeiture and the alleged losses. Given the nature and location of the premises and the commercial context, there is an unreality to the argument that, as at the date of entering the Lease and the Deed, the parties envisaged that on forfeiture of the Lease, the Landlord might simply have decided to move into the premises itself, or to 'mothball' the premises. Moreover, as Ms Bhaloo put it in reply, the decision to re-let did not cause loss, it brought it to an end.

72. Nor, for reasons already given, am I persuaded by a further argument run by Mr Cowen that, given the reference in Clause 4 of the Deed to 'legal costs and expenses on a solicitor and own client basis counsel's fees and bailiffs' costs and VAT thereon in obtaining and enforcing judgement for forfeiture and an order for possession', I should treat the scope of Clause 2(b) and Clause 4 as limited to 'the costs and expenses associated with the procedure of forfeiting the lease and obtaining possession of the Property.'

73. Mr Cowen maintained that there had to be some limit to the loss covered by Clauses 2(b) and 4. He argued that, if the only test to be applied to trigger entitlement to the deposit is "is there a rent void following forfeiture?", the Landlord would have complete control over how much to take from the deposit. In relation to the rent-free period of four and half months for example, the Landlord could have chosen a one year rent-free period and claimed the whole Deposited Sum under the Deed on that basis alone. It was inconceivable, he argued, that, at the time of executing the Lease and Rent Deposit Deed, the parties intended that on a forfeiture, one party should have such total control.

74. I have some sympathy for this submission. As previously indicated however, it seems to me that a reasonable person, with all the background knowledge reasonably available to the parties at the time of entering the Deed, would take the parties' reference to 'proper loss…incidental to and consequent upon forfeiture of the Lease', in context, to mean loss of a type and extent in the reasonable contemplation of the parties at the time of entering the Deed as the probable result of forfeiture. That construction, which accords with business common sense, serves to temper what might otherwise be a commercially unacceptable open-ended liability.

75. Mr Cowen further argued that, if the Lease had come to an end naturally and there was, as is often the case, a dilapidations claim, then, as a matter of common law, the Applicant could not claim rent, service charges and insurance in respect of the Applicant's Works Period (in so far as it exceeded the Respondents' Works Period), the Marketing Period and the Rent Free Period. Against that backdrop, he argued, the parties cannot have intended that if the Lease was forfeited, (even if for a reason other than dilapidations), the Applicant would be entitled to these sums.

76. In this regard he referred me to Dowding & Reynolds at para 32-02, which provides:

> "Loss of rent cannot generally be claimed over the period necessary for marketing the premises once the works have been completed, because that would have been incurred even if the premises had been delivered up in repair".

77. I was also referred to the case of Marchday Group v British Telecommunications plc [2003] EWHC 2627 (TCC), in which HHJ Seymour QC rejected a formulation of a claim for loss of rent for the period during which works were carried out plus a period during which the repaired building would then be required to be marketed in repair to secure a letting. At paragraph 54 of his judgment, he put the matter thus:

> 'As I have indicated, Marchday's case was that it was entitled to compensation for being deprived of the opportunity to let the Demised Premises during the period in which works to the whole of the Building were in fact being undertaken, those works being completed on 27 April 2001, plus a period of six months in which to market the Demised Premises. The logic underlying this formulation of claim eludes me. I could understand a claim put on the basis that as a result of breaches of repairing covenants a property was unable to be let from the date of the expiry of the relevant term until a letting was in fact achieved, but I cannot see any justification in law or logic for a

> claim based on a period for alleged repairs plus a "marketing period", unless it was accepted by the claimant that it ought to have achieved a letting by the end of the period in respect of which a claim was made but had failed, by reason of its own deficiencies, to do so.'

78. Mr Cowen also referred me to the case of Pgfll SA v Royal and Sun Alliance Insurance [2011] 1 P & CR 11, where HHJ Toulmin QC confirmed that whilst loss of rent over the period of any reasonable repair works may in principle be claimed, it was for the landlord to prove, on the balance of probabilities, that the carrying out of those repairs after the end of the term had prevented or would prevent the letting of the premises for the whole of that period. In many cases, Mr Cowen argued, the evidence will show that the premises could not be let on the open market for a period even if they had been delivered up to the landlord in a state of repair according with the covenants in the lease. Therefore, he reasoned, if the works would take 10 weeks to complete but the evidence shows that the landlord would not have been in a position to let the premises for, say, 20 weeks, then the landlord has not suffered any loss as a result of the disrepair; the property would have been empty for that period (and more) even if delivered up in good repair. The landlord must show actual loss arising from the breach of covenant.

79. These authorities, however, arise in the context of dilapidation claims. Whilst they are undoubtedly relevant background, it is important not to lose sight of the specific contractual documents under scrutiny. The document with which we are primarily concerned is the Rent Deposit Deed, which clearly imposes obligations beyond those habitually contained in a lease. It must be construed as a whole, against the backdrop of the Lease executed the same day, and in its own commercial context. In this regard, what was and what was not included in the Lease fall to be considered. What was included in the Lease was Clause 4.7, which envisaged a six month marketing period and allowed the Landlord and its agents access to the Property over that period for viewings. What was not included in the Lease was a guarantor. The Lease made provision for a guarantor, but none was provided. Had a guarantor been provided, under the terms of the Lease, that guarantor would, on forfeiture, have been obliged either to take a lease for a term equivalent to the unexpired residue of the term granted by the Lease, or to pay the Landlord on demand a sum equivalent to all sums payable under the Lease for a period of six months. Those are relevant factors on any contextual analysis of the Deed.

Conclusions on Issues 1.1 and 1.2

80. I have some reservations as to the manner in which Issues 1.1 and 1.2 have been drafted. I understand that the drafting of these issues was agreed between the parties' respective solicitors before Counsel were instructed. It is unfortunate, it seems to me, that Counsel did not take the opportunity to re-visit the wording of the issues before the matter came to be heard. Similar considerations apply to Issue 1.3, which I shall address shortly.

81. As it is, in the light of my conclusions on Issue 1.2, Issue 1.1 is largely academic.

82. For the reasons given, I am satisfied that a reasonable person, with all the background knowledge reasonably available to the parties at the time of entering the Deed, would

understand the phrase 'proper loss…incidental to and consequent upon forfeiture of the Lease', as used in Clause 2(b) and 4 of the Deed, to mean loss of a type and extent in the reasonable contemplation of the parties at the time of entering the Deed as the probable result of forfeiture. This construction also accords with business common sense.

83. Considering the Rent Deposit Deed as a whole, together with the Lease, in their factual and commercial context, it is clear that, at the time of entering the Lease and the Deed, a rent void of up to six months may reasonably be supposed to have been in the contemplation of both parties as the probable result of forfeiture. Clause 4.7 of the Lease supports this. The Lease provided for a marketing and advertising period of six months in the run up to natural expiry of the term; it would have been apparent to both parties to the Lease and the Deed that, in the event of premature termination of the Lease by forfeiture, the Landlord would not have the benefit of that marketing period. The Lease also allowed for a guarantor who would, on forfeiture, either take up a new lease equivalent to what, but for the forfeiture, would have been the unexpired residue of the term, or pay on demand by the Landlord a sum equivalent to six months of the rents and other sums due under the Lease. This, again, is an indication of a perceived six month rent void exposure in the event of forfeiture. In the event, the Tenant had not provided a guarantor. At the time of entering the Lease and Rent Deposit Deed, the parties would therefore have been aware that this layer of protection for the Landlord was missing. A loss of rents, services charges and insurance for a period of six months from the date of forfeiture was in their reasonable contemplation as the probable result of forfeiture.

84. The Rent Deposit Deed is clearly framed in a way that goes beyond the obligations imposed on the Tenant under the Lease. In context, a reasonable person with all the background knowledge reasonably available to the parties at the time of entering the Deed would understand the purpose of the Deed to be not only to secure performance of the Tenant's obligations under the Lease, but also to provide the Landlord with some, at least, of the protection missing from the Lease by virtue of the absence of a guarantor.

85. Taking all such matters into account, on a true construction of the Deed, I conclude that, under Clauses 2(b) and 4 thereof, the Lessor is entitled to withdraw from the Deposited Sum such sums as may reflect actual loss of rent, service charges and insurance suffered prior to re-letting the Property, in respect of a maximum period of six months running from the date of forfeiture, subject to credit being given for any sums withdrawn from the Deposited Sum pursuant to Clause 2(a) and 3.1 referable directly or indirectly to the same (or any part of the same) heads of loss and six month period.

86. I should add that this approach applies only to Clauses 2(b) and 4 of the Deed; any sums withdrawn from the Deposited Sum pursuant to Clauses 2(a) and 3.1 are referable to the Tenant's Obligations (as defined) and as such are subject to well established case law and legislation governing compensation for breaches of a lessee's obligations under a lease. Analysed contextually, it is clear to me that Clauses 2(b) and 4 were intended to address a different risk, arising from the lack of a guarantor who, in the event of forfeiture, could have been called upon by the Landlord to pay a sum representing the rent, service charges and insurance which would, but for the forfeiture, have been payable under the Lease for a six month period. On a

contextual construction of the Deed and the Lease, this, in my judgment, frames the extent of responsibility implicitly undertaken by the Tenant under Clause 2(b) and 4 of the Deed.

87. In the light of my conclusions, Issues 1.1 and 1.2 are largely academic. Nonetheless, since the parties have requested rulings on these matters, I shall rule.

88. Dealing first with Issue 1.1: in my judgment, the Applicant's Works Period is unworkable. It is not a standard of repair which the law recognises, it is not reflected in the wording of the Rent Deposit Deed and it raises more questions than it answers. It is unclear what the word "properly" means in the context of the phrase "such that it can properly be re-let", as the phrase does not provide any details of the hypothetical re-letting. In its present form, it does not represent commercial common sense and should not be imputed to the parties.

89. In contrast, the Respondents' version is grounded in case law (see by way of example Proudfoot v Hart (1890) 25 QBD 42; Dowding & Reynolds: Dilapidations, the Law and Practice (6th ed, at para 32.02)) and merely envisages a standard of repair which is in line with the standard required by the Lease – "in accordance with the Tenant's covenants in the leases of the Property". That takes into account the actual wording of those covenants and the nature of the hypothetical letting envisaged as fixing the standard of repair required for the Lease.

90. To the extent that a conclusion on Issue 1.1 is required, therefore, my conclusion is that, subject to Paragraphs 82 to 86 above, the Respondents' Work Period is the correct period.

91. Dealing next with Issue 1.2 (a): On a true construction of the Rent Deposit Deed, I conclude that from the Deposited Sum the Landlord is entitled to withdraw sums representing actual loss of rent, service charge and insurance pursuant to Clauses 2(b) and 4 in respect of such part of the Marketing Period as falls in the period of six months running from the date of forfeiture, subject to credit being given for any sums withdrawn from the Deposited Sum pursuant to Clause 2(a) and 3.1 directly or indirectly referable to the same (or any part of the same) heads of loss and six month period.

92. For the reasons already given, it would have been apparent to both parties at the time of entering the Deed that, in the event of premature termination of the Lease by forfeiture, the Landlord would not have the six month marketing period in the run up to expiry envisaged by Clause 4.7 of the Lease. Loss of marketing opportunity can therefore reasonably be supposed to have been a head of loss in the contemplation of both parties at the time of entering the Deed as a probable result of forfeiture. On a contextual construction of the Deed and the Lease, however, for the reasons already indicated, the extent of responsibility implicitly undertaken by the Tenant for this head of loss under Clause 2(b) and 4 of the Deed was in my judgment subject to an overall limit of six months running from the date of forfeiture.

93. Dealing next with Issue 1.2(b): On a true construction of the Rent Deposit Deed, analysed in context, I do not consider that the Landlord is entitled to withdraw sums representing loss of rent, service charge and insurance pursuant to Clauses 2(b) and 4 in respect of the rent-free period which the Landlord chose to grant on re-letting the

Property. Leaving aside the fact that the rent-free period fell outside the period of six months running from the date of forfeiture, such loss cannot reasonably be supposed to have been in the contemplation of both parties as a probable result of forfeiture at the time of entering the Deed. Whilst the degree of probability for such purposes has been the matter of judicial debate (see by way of example the differing formulations adopted by their Lordships in The Heron II [1969] 1 AC 350), what is clear is that the contractual test requires a higher degree of probability than the 'reasonably foreseeable' test for remoteness in tort. In my judgment the rent-free period granted in this case barely met the tortious threshold, still less the contractual. Whilst I accept that the Lease itself provided a rent-free period, as Mr Cowen rightly submitted, market conditions fluctuate and the Lease itself was to run for 25 years. Whenever the Lease might come to an end, the Landlord had a choice, and would make that choice according to prevailing market conditions. This may have involved a lower headline rent rather than a rent-free period; some tenants would prefer that option. A rent-free period was not a sufficiently probable outcome to satisfy the contractual test of remoteness.

94. Dealing next with Issue 1.2(c): On a true construction of the Rent Deposit Deed, the Landlord is not entitled, under Clauses 2(b) and 4 of the Deed, to withdraw sums representing the fees and charges said to have been incurred by the Landlord in connection with re-letting the Property. Such loss cannot reasonably be supposed to have been in the contemplation of both parties at the time of entering the Deed as the probable result of forfeiture. The Landlord would have incurred such charges or similar had the Lease expired by effluxion of time. In contrast to the position on marketing, the early termination of the Lease by forfeiture had no material impact in this regard.

Issue 1.3

95. I have considerable reservations with regard to the manner in which Issue 1.3 has been formulated. It is plain from established authority that the question whether a given debt should count as an expense of the administration is not a matter of the discretion of the court: Re Toshoku Finance UK Plc [2002] 1 WLR 671 per Lord Hoffmann at paragraph 38: Jervis v Pillar Denton Ltd [2014] EWCA Civ 180 per Lewison LJ at paras 16 and 77.

96. Read literally, therefore, Issue 1.3 lends itself to only one answer. I reject Mr Dougherty's argument that the equitable origins of the Lundy principle render it a matter of the Court's discretion as to whether or not to treat a given debt as an expense of the administration. This flies in the face of the reasoning of Lord Hoffmann in Re Toshoku.

97. The real issue to be determined is whether the obligation of the Company under Clause 5 of the Rent Deposit Deed, to top up the Deposited Sum within 14 days of the Applicant's demand dated 9 October 2017, following the Applicant's withdrawal from the Deposited Sum of £615,577.31 in respect of rent payable in advance for the quarter commencing 1 October 2017, falls within the Lundy principle.

98. At the hearing, I invited the parties to address me on the Lundy issue, but they declined that invitation. On reflection, I can see why. The obligation under Clause 5 is essentially an obligation to top up a security. Merits aside, it will not be feasible to

rule on whether any part of the replenishment obligation arising under Clause 5 may properly be treated as an expense of the administration under the Lundy principle until there has been a determination or binding agreement as to what other sums the Applicant is entitled to retain from the Deposited Sum, or at least common ground that, on any footing, such other sums equal or exceed the balance of the Deposited Sum currently held by the Applicant.

99. Accordingly, the Lundy issue will have to be determined another day.

100. Without ruling on the point however, it does seem to me that an application of the Lundy principle in the present case would arguably take matters beyond existing case law. I say this for the following reasons.

101. First, rent in respect of the period of the Administrators' occupation has already been paid; on or about 9 October 2017, the Applicant withdrew, from the Deposited Sum, the sum of £615,577.31. This represented the quarter's rent plus VAT, payable in advance, due on 1 October 2017.

102. Second, whilst, in the events that transpired, the Administrators were in occupation for practically a whole rental quarter, the replenishment obligation arising under Clause 5 is, on its face, an 'all or nothing' obligation; on service of the requisite notice under Clause 5 on 9 October 2017, the Company was obliged to replenish the full sum withdrawn (£615,577.31) within 14 days, regardless of whether the Administrators were in occupation for one month or the whole quarter. It would clearly be wrong to treat the whole sum of £615,577.31 as payable as an expense of the administration, regardless of how long the Administrators were in occupation.

103. Third, the nature of the obligation arising under Clause 5, which is essentially an obligation to top up a security, raises the question whether an application of the Lundy principle in this case would be compatible with the pari passu principle.

104. That said, I do see the force of the argument that ordinarily, rent for the period of the Administrators' occupation would be payable as an expense of the administration and that (on the assumption that the Applicant could establish that its other claims equalled or exceeded the balance of the Deposited Sum currently held), its position would be considerably worsened (and the position of unsecured creditors significantly – some might say unjustly - enhanced) if the Lundy principle is not applied.

105. Regrettably, however, for the reasons indicated, these matters are not currently for me to determine. The Lundy issue will have to be determined on another day.

106. I will hear submissions on costs on the handing down of this judgment.

ICC Judge Barber
23 November 2018