Neutral Citation Number: [2018] EWHC 3550 (Ch)

Case No: BL-2017-000237

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS

BUSINESS LIST (ChD)

7 Rolls Building, Fetter Lane, London
EC4A 1NL

Date: 19/12/2018

Before:

MR JUSTICE HILDYARD

Between:

WOWW LTD **Claimant**
WEARWELL LONDON LIMITED
MICHAEL UDO

- and -

Defendant

(1) IQBAL IBRAHIM GANI
(2) ALLI MOHMED

- -
- -

Mr Michael Udo (appeared in **person)** for the Claimants
Ms Kerry Bretherton QC (instructed by **Riverstone Solicitors)** for the Defendants

- -

Judgment Approved

Mr Justice Hildyard:

The question to be addressed in this judgment

1. The question addressed in this judgment is whether any of the Claimants has an arguable right to some form of tenancy of commercial premises owned by the Defendants and comprising Units 6, 7 and 8 of 1-11 Assembly Passage, London (collectively referred to as the "Premises"); and, if so, whether an injunction should be granted to protect and enforce that right until trial. The Defendants contend that none of the Claimants has any such right, and that their claim should be struck out or summarily dismissed. These matters were addressed before me at a hearing on 6

November 2018 ("the 6 November hearing"), the latest in a series of hearings which this messy matter has spawned.

2. Put summarily, the Claimants, who are in occupation of the Premises with the benefit of interim relief given (by consent) to protect them, claim that the third Claimant, a company called Wearwell London Limited ("Wearwell"), was and remains the lawful tenant of the Defendants pursuant either to a ten-year oral lease alleged to have been granted to Wearwell on 13 April 2012 or (if permitted to amend their Particulars of Claim) a periodic tenancy, either quarterly or monthly, arising or to be inferred from the conduct of the parties. In either case, the Claimants contend that the tenancy is a business tenancy which is subject to and protected by Part II of the Landlord & Tenant Act 1954 ("the 1954 Act").

3. The Defendants, on the other hand, submit that oral agreements for leases for more than 3 years are prohibited by section 52 of the Law of Property Act 1925 ("LPA 1925"), and that it must follow that that iteration of the Claimants' case must fail; and that the alternative case that a periodic tenancy is to be inferred, only put forward when that insuperable difficulty was raised, is unsustainable on the facts and should be struck out or summarily dismissed.

4. That summary, however, disguises a plethora of points which have complicated and confused the case, including: (a) a collateral dispute as to the ownership of Wearwell (now the subject of separate proceedings against a Mr Nural Islam ("Mr Islam") who claims still to retain all its shares and thus to be its owner and controller despite the apparent sale of its entire business and assets to the second Claimant, Woww Limited ("Woww"); (b) an issue, which is barely touched on at any of the hearings before me as to whether, if Wearwell had a subsisting tenancy at the time of such sale, such tenancy was validly assigned thereby to Woww; (c) inconsistencies in the position and evidence of all parties and of Mr Islam, and not least, from whom the first Claimant, Mr Michael Udo ("Mr Udo") says he acquired, through his company Woww, ownership of the entire share capital of Wearwell (as well as its assets); (d) documentation which is internally inconsistent; and (e) efforts to compromise the dispute which in the event have exacerbated and prolonged an already extremely tortuous situation. The fact that until recently neither side had instructed solicitors has added to the problems, though the efforts of a variety of CLIPS representatives in previous applications have been exemplary.

5. These complexities, though ultimately they need to be cut down to size to enable resolution of the real issues, also require explanation, both for that purpose and so that the genesis of this dispute can fairly be set in context. So too does the procedural morass at and preceding the 6 November hearing.

Procedural background

6. I have sought to set out in a Note of Directions and Order dated 27 July 2018 ("my July Note and Order", sent to all parties by my clerk on that date) the procedural history and its context up to the end of July 2018, together with some suggestions as to how the difficulties described might in part be addressed. For ease of reference that is attached, and I hope it will suffice to illustrate the procedural complexities up to that date.

7. As part of the background it is convenient to note that: (a) as recorded in my July Note and Order, these proceedings were in fact first issued, on 2 November 2017, in the County Court (though they have since been transferred to this Court); (b) further to my July Note and Order Mr Udo himself and his company Woww, of which he is the sole shareholder and director, were joined as claimants in these proceedings; and (c) given the uncertainties as to the true ownership of Wearwell, on 7 August 2018, separate proceedings were issued by the Claimants and remitted to the Central London Court to determine the issue as to whether Mr Islam or Mr Udo owns Wearwell.

8. As also will be apparent from my July Note and Order, this matter has been a frequent visitor in the Court, and a number of orders have been made to date, including the following:

    (1) On 30 October 2017, Warren J granted an injunction requiring the Defendants to re-admit Wearwell to the Premises (the "October 2017 Injunction").

    (2) Following further alleged attempts by the Defendants to exclude Wearwell from the Premises, a further injunction requiring re-admission (attaching a penal notice) was ordered by Henry Carr J on 17 April 2018 (the "April 2018 Injunction").

    (3) The Defendants made an application to set aside the April 2018 Injunction, however pursuant to my order of 22 May 2018, I ordered that the April 2018 Injunction be continued, but pursuant to new terms of occupation from 4 May 2018 as set out in the schedule to my 22 May 2018 order (the "May 2018 Injunction").

    (4) I also made various other directions in respect of these proceedings in my order for the hearings before me on 9 and 19 July 2018, including that the May 2018 Injunction was to continue (with some amendments) until 28 August 2018 or, in the event that Wearwell brought a further application to extend the term of the May 2018 Injunction, until such date as that application was heard (the "July 2018 Injunction"). Such an application had to be filed and served by no later than 6pm on 28 August 2018. The extension of the injunctive relief ordered in July 2018 was made with the consent of the Defendants.

9. As to the period between the end of July and the 6 November hearing:

    (1) On 7 August 2018, the original November 2017 claim form was amended to add Woww and Mr Udo as claimants, and Mr Udo produced new particulars of claim also dated 7 August 2018 (the "August 2018 Claim Documents"). This was perhaps a misunderstanding of my July Note and Order, since the purpose for which I had suggested such joinder was to resolve the issue of the ownership of Wearwell and: (a) although new claimants were joined, Mr Islam was not; and (b) in the event, as previously mentioned, the issue of ownership has become the subject of fresh separate proceedings. I will return to that later, as also to a dispute whether either the claim form originally issued in November 2017 (along with any accompanying particulars of claim that might exist from that time, although I

cannot recall seeing any such particulars of claim) (the "November 2017 Claim Documents") or the August 2018 Claim Documents were validly served on the Defendants.

(2) Mr Udo, on behalf of all of the Claimants, also provided draft amended particulars of claim (the "Draft Amended Particulars of Claim") to the Defendants and the Court on the morning of 6 November 2018 (i.e. the morning before the hearing to which this judgment relates). I will return to the nature of that amendment later in this judgment.

(3) The Defendants have also, despite saying that the November 2017 Claim Documents and August 2018 Claim Documents were never properly served, produced a Defence to these claims dated 24 October 2018. The Defendants clarified, after a draft of this judgment had been circulated for corrections, that the Defence was produced in the alternative and in light of the Claimants' (now withdrawn) application for default judgment (and in support for relief from sanctions) if, contrary to the Defendants' case, it was held that the claim had been served.

Details as to the applications before me on 6 November 2018

10. At the 6 November hearing, the applications before me were as follows:

(1) An application made by Mr Udo to vacate the hearing so that the applications could be heard at a later date (the "Application to Vacate") (pursuant to his application noticed dated 1 November 2018).

(2) An application made by the Defendants to strike out the Claimants' claims in their entirety on the basis that they disclose no reasonable cause of action and/or in default of proper service of the November 2017 Claim Documents and August 2018 Claim Documents (pursuant to their application notice dated 24 October 2018).

(3) In the alternative to their strike out application, the Defendants make an application for summary judgment (pursuant to their application notice dated 26 October 2018).

(4) An application by the Claimants seeking permission to amend their August 2018 particulars of claim; the Draft Amended Particulars of Claim were lodged in advance of the 6 November hearing, although no formal application has been made.

(5) Applications by both the Claimants and the Defendants in relation to the July 2018 Injunction. The Defendants seek to discharge the July 2018 Injunction (pursuant to their application noticed dated 24 October 2018). The Claimants seek an order for the July 2018 Injunction to be continued pursuant to their application notice dated 28 August 2018, although the Defendants claim that they were not served with that application notice.

(6) Finally, the Claimants have also previously made an application for judgment in default, owing to the delay in the Defendants filing their Defence. However, Mr Udo (advisedly, in my view) withdrew this application during the 6 November 2018 hearing; I will therefore not consider it further.

Application to Vacate

11. Mr Udo's application notice dated 1 November 2018 requested that the hearing be vacated in order that he could obtain representation from the Bar Pro Bono Unit ("BPBU"). He requested an adjournment of 3 weeks.

12. At the 6 November hearing, Mr Udo relied on an email exchange with the BPBU on 29 and 30 October 2018. Mr Udo, knowing of this hearing, and fully aware of the need for what was his own application on behalf of the Claimants for an injunction to be determined, left it until 29 October 2018 to request the BPBU's assistance in preparing amended particulars of claim and to request representation at the 6 November 2018 hearing before me. Unsurprisingly, a representative of the BPBU responded on 30 October 2018 to state that they required a minimum of three weeks from the point of receiving all relevant documents to the date of the hearing, and as such they were unable to provide assistance. Therefore, if the hearing was to be adjourned to allow Mr Udo to obtain representation from the BPBU, that hearing could not be listed for at least another three weeks from the 6 November hearing, possibly longer.

13. Mr Udo had had more than adequate time to seek representation. He simply left it too late. This chimes with the impression that he has given since April that in reality he benefits from delay and is not unhappy simply to kick the can down the road. Furthermore, following a hearing before me on 19 July 2018 in these proceedings, I made it absolutely clear that the parties should seek legal representation if this matter was to continue. I cannot recall whether I made specific reference to approaching the BPBU for its assistance, but had Mr Udo made proper enquiries in a timely manner, he would have identified this as a possibility for obtaining representation.

14. I note Mr Udo's reliance on the fact that he had been in negotiations with the Defendants with a view to being granted a tenancy but that, at the "eleventh hour", those negotiations broke down. However, Mr Udo's decision not to seek representation during those negotiations was entirely at his own risk and did not justify pushing back the determination of the outstanding applications, by far the most urgent of which was the Claimants' own application for an injunction.

15. I therefore dismissed the Application to Vacate.

Application to strike out in default of proper service of the November 2017 Claim Documents and August 2018 Claim Documents on the Defendants (together referred to as the "Claim Documents"); or for summary judgment accordingly.

16. The Defendants aver as part of their strike out application (issued on 24 October 2018) that they have never been properly served with any of the Claim Documents. CPR 3.4(2)(c) provides for the striking out of a claim or part of a claim on the grounds of failure to comply with a rule, practice direction or Court order. It appears

from their application notice dated 26 October 2018 and their skeleton argument that the Defendants also rely on this in support of their application for summary judgment. Although the tests may be different, the ultimate point is the same and I think it convenient to deal with the matter compositely.

17. This aspect of the matter has emerged as a further procedural convolution and uncertainty in addition to those I sought to address in my July Note and Order. As can be seen from paragraphs 13 to 15 of my July Note, at that earlier stage I was concerned with the curiosity that Mr Islam, purportedly on behalf of Wearwell, had sent the County Court (in which these proceedings started) a purported notice of discontinuance (dated 4 May 2018) of these proceedings. However, in addressing that issue (and refusing the permission needed for discontinuance in the circumstances as I considered them to be), I did not focus on, and I do not believe any party drew to my attention to, the fact that the Defendants were maintaining that the November 2017 Claim Documents had not been served on them. Since in granting the first injunction in the proceedings by Order dated 30 October 2017 Warren J had proceeded on the basis of (amongst other things) an express undertaking by Mr Islam "by 4.00pm on 31 October 2017 to issue and serve proceedings on the Defendants claiming appropriate relief together with an application notice for the injunction ordered below" I rather assumed that this had indisputably been done.

18. Even by the standards (if that is the right word) of this case, it is an arresting further feature that the Defendants' application now, alleging that they were never properly served with the Claim Documents, is based primarily on the evidence not only of Mr Iqbal Ibrahim Gani ("Mr Gani", the First Defendant) (in a witness statement dated 25 October 2018) but also in a witness statement by Mr Islam, also dated 25 October 2018, in which he states that he never did serve the original November 2017 claim form in question. In paragraph 5 of that witness statement he states as follows:

> "Once the Original Claim Form had been issued Mr Udo discussed the particulars of the claim with me. I was concerned as to the nature of the claims being made and was reluctant to serve the Defendants with the Original Claim Form as I had doubts as to the validity of the claims. As a result, I did not serve the Original Claim Form on the Defendants and kept this with me at home. I still have the original in my possession."

19. That is obviously rather remarkable evidence, which on its face exposes Mr Islam to proceedings for breach of his undertaking to the Court and contempt. The whole context is all the more extraordinary given that Mr Islam appears (although I note that this relates to matters being considered in the other proceedings referred to above) to have formally resigned as a director of Wearwell by formal notice in writing dated 3 October 2017 (a copy of which Mr Udo exhibited to a witness statement dated 27 April 2018). I have had occasion previously to voice great concern as to Mr Islam's continued involvement and intermeddling in this aspect of the dispute, which I have considered and still consider to be disruptive and (at the least) ill-advised. But be that as it may, his evidence now appears to raise real doubt as to the service of the proceedings, and (since service of the claim form is the means by which the Court established and exerts its jurisdiction) on the validity of the proceedings as a whole.

20. Mr Gani's witness statement (of 25 October 2018):

> "confirm[s] that the Defendants have never been served with the Claim Form and Particulars of Claim or the amended Claim Form and Particulars of Claim either in 2017 or in 2018. I have however in the course of these proceedings had sight of these documents."

21. In response, Mr Udo has provided a witness statement dated 24 October 2018. He does not address the question as to whether the November 2017 Claim Documents were served. Instead he focuses on the August 2018 Claim Documents and asserts that they were served on the Defendants by first class post, exhibiting photographs of those documents and bank statements showing a £0.67 transaction with the Post Office on 6 August 2018 in respect of postage (although that is peculiar in circumstances where the August 2018 particulars of claim appear to be dated 7 August 2018).

22. Mr Udo also states in his witness statement dated 16 October 2018 that Mr Idris Gani ("Mr Idris Gani", the son of Mr Gani, who appears to have been assisting the Defendants with the proceedings) was copied into correspondence with the Court on 7 August 2018, attaching copies of the August 2018 Claim Documents. It appears from the Court's records that that email was sent, although Mr Idris Gani (in his witness statement dated 22 October 2018) claims not to have it.

23. In these circumstances: (a) Mr Udo originally asked for judgment in default of defence (though, as previously noted, he withdrew that application) and now; (b) the Defendants have contended that:

    (1) The rules required the original claim form to be served before midnight on the calendar day 4 months after issue of the claim, and thus before 1 March 2018; but, on the evidence available, it appears that it never was;

    (2) No application to extend time for service of the original claim form appears ever to have been made; and whilst CPR 7.6(3) enables the Court to give an extension for time, that rule provides that:

> "…the court may make such an order only if –
>
> (a) The court has failed to serve the claim form;
>
> (b) The claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
>
> (c) In either case, the claimant has acted promptly in making the application."

(CPR 7.5 and 7.6 do not expressly preclude the parties from themselves agreeing an extension of time: but (as noted at paragraph 7.6.7 of the White Book) in *Thomas v Home Office* [2006] EWCA Civ 1355; [2007] 1 WLR 230, the Court of Appeal held that the agreement must be to a specific date and

must be in writing in a document or exchange of documents by the parties specifically intended to record or confirm that agreement. There has been no such agreement in this case.)

(3) Even if it is assumed that Mr Udo did serve the amended claim form in October 2018 that cannot cure the failure: as Ms Bretherton QC (Counsel for the Defendants) put it in the Defendants' skeleton argument:

> "…the direction [in my July Note and Order] regarding the filing and service of the Amended Claim was made without the Court being advised that the claim had never been served nor any application to extend time for service having *[sic]* been made. It is submitted, that an Amended Claim, presupposes a properly constituted original claim and so this amended claim has no status if the original claim was not served and no steps [were] taken to extend time for service;"

(4) Yet all the while Mr Udo has had the benefit of continuing occupation of the Premises, protected in effect by the Court, with the welcome agreement, or at least acquiescence, of the Defendants, on the assumption of proper compliance with its process.

24. This procedural quagmire is the more difficult given the continuing dispute as to the ownership of Wearwell, now the subject of separate proceedings in Claim Number BL-2018-002033, which have been remitted to the County Court (though see paragraph 74 below).

25. However, although the Defendants' case in this respect might appear compelling, and despite their insistence that they have themselves always complied with the rules, I have been left with the clear feeling that the disposal of the case on this basis would not be fair. There is no evidence (so far as I am aware) that Mr Udo was aware of Mr Islam's decision not to serve the original claim form. The Defendants did not until very late in the day make a point of any of this. It is very difficult to see that they have been prejudiced materially, if at all. Further: (a) Mr Idris Gani acknowledges in his witness statement of 22 October 2018 that he has now had sight of the Claim Documents; (b) the Defendants have been able to produce a Defence (dated 24 October 2018); and (c) the issues in dispute between the parties have been well ventilated at a number of hearings in these proceedings. I therefore do not consider there to be a risk of injustice resulting from any deficiency in service.

26. In such circumstances, and although I will if necessary hear contrary argument form either side since the matter was not specifically addressed before me on 6 November 2018, it seems to me that the neatest solution is likely to be for me to direct that the amended claim form be served as a new claim, and for the costs of the original claim to be dealt with hereafter. I am comforted in this regard by the fact that the notes in the White Book at 7.6.9 clarify that the issue of a fresh claim would not be an abuse simply by reason of the previous default in serving the original claim.

27. In any event, and for the avoidance of doubt, I decline summarily to determine the matter by reference to these procedural irregularities.

The Defendants' applications to strike out or for reverse summary judgment

28. Turning to the substance of the claims, as indicated above, the Defendants seek an order that the Claimant's claim be struck out pursuant to CPR 3.4(2) on the grounds that it discloses no reasonable cause of action (i.e. the ground in CPR 3.4(2)(a)).

29. As in the context previously addressed, in the alternative to their strike out application, the Defendants apply for summary judgment. Summary judgment will be awarded in circumstances where the Claimants' claims have no real prospect of success, or where those prospects of success are merely fanciful. The interpretation of the meaning of "fanciful" in this context was clarified by the House of Lords in *Three Rivers No 3* [2001] UKHL 16. Per Lord Hope at paragraph 95:

> "In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based."

30. Lord Hope went on to say, in the next sentence:

> "The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

31. Although the tests for strike out and summary judgment are different, in that a strike out is ordinarily to be determined by reference to the pleadings and whether the case as pleaded can be proved whereas for the purposes of summary judgment the viability of the claim on the evidence may be considered if the factual context pleaded is unsustainable or fanciful, there is a clear overlap between them. In both contexts, the ultimate decision called for is whether there is any sufficient reason shown why it would be unjust for the claim to be disposed of without a full trial on the evidence and after disclosure.

32. In this case, the Defendants' application to strike out was primarily based on the contention that (to quote their application notice dated 24 October 2018) "the pleaded case relies upon a legal impossibility". That is a true basis for striking out if the contention is established. However, that is also relied on in the Defendants' application for summary judgment, now elaborated to explain (in their application notice dated 26 October 2018) that it is "the existence of a 10 year oral lease which is legally impossible". That later application notice also relied on: (a) the failure of Mr Udo to provide the share certificates evidencing his (or Woww's) ownership of Wearwell; and (b) the evidence of Ms Nisa Halpin to the effect that Mr Udo is "not

present very often" at the Premises and "does not appear to be running a business contrary to the whole basis for the claim/interim injunction".

33. I shall deal later with (a) and (b) above; but given the overlap in the two applications I shall address the sustainability of the claim in its original form and as proposed to be amended without distinguishing between the Claimants' two applications unless necessary.

Application to strike out: CPR 3.4 (2)(a)

34. The claim form originally issued (in November 2017) in the name of Wearwell London Ltd sought a declaration that it was and is the lawful tenant of the Defendants in respect of the Premises "under a tenancy protected by the provisions of Part II of the Landlord and Tenant Act 1954".

35. In particulars of claim dated 7 August 2018 it was pleaded (on behalf of all the Claimants, Mr Udo and Woww having been added further to my July Note and Order) that the tenancy was "at a rent of £1,000 per calendar month" and for a "fixed period of 10 years and thereafter for a renewable term" all agreed by an oral agreement on 13th April 2012 between Wearwell and the Defendants. The pleading then related that in mid-2016 "the Defendants came to the [Premises] and demanded…an increased rent of £1,500 per calendar month" and Wearwell "considered there was no option but for that to be agreed and paid…"

36. It was further pleaded that "The said Lease created a commercial lease under Part II, Landlord and Tenant Act 1954 and the said Lease has not been lawfully determined."

37. The plea of a lease with an agreed and renewable 10-year term appears to have been based on: (a) Mr Udo's understanding of what Mr Isalm expressly warranted when allegedly selling (in fact, to Woww) the business of Wearwell on the terms of a sale agreement dated 3 October 2017 (the "Business Sale Agreement", to which the parties in addition to Woww were Wearwell as seller and Mr Islam as Guarantor); and (b) subsequent evidence by Mr Islam in the proceedings (in October 2017).

38. As to (a) in paragraph 37 above, the alleged Business Sale Agreement contained express provision for the assignment of the leasehold interest enjoyed in the Premises by Wearwell; and Mr Islam warranted that "he" had "occupied the premises for approximately 20 years under a verbal agreement (oral tenancy) with the landlord in either a personal capacity or as an incorporated company, of the premises". The penultimate phrase must connote that such occupation was variously over the course of time by Mr Islam personally or by a company: for the avoidance of doubt, the Defendants have always acted individually. Further, Mr Islam also warranted that "Wearwell….has a verbal agreement with the landlord of the premises."

39. As to (b) in paragraph 37 above, it is the fact that (though he later told a different story, as will later appear) Mr Islam in a witness statement in these proceedings dated 30 October 2017 stated as follows:

> "In 1998 I orally agreed a tenancy with [the Defendants] of the premises by my former company Studio B & N Limited. This company ceased trading on 17 July 2012 when my wife left as

> director following our divorce. At this time Studio B & N Limited owed some £7,000 in rent but this was written off by the Defendants and they agreed, orally, a new tenancy with the Claimant at a rent of £1,000 per calendar month payable monthly. This was to be for 10 years, renewable…
>
> Until 2016 that rent was paid albeit sometimes late…
>
> In mid-2016 the Defendants came to the premises and demanded the Claimant pay an increased rent of £1,500 per calendar month. I considered there was no option but for that to be agreed. I refer to the copy of an example of an invoice for rent…"

40. The Defendants deny these arrangements. But the objection they press now is one of law. The Defendants' original application, made before the Claimants had suggested any amendment to plead a different arrangement, and thus when the Claimants' case relied on there having been an oral agreement for a lease with a renewable 10-year term, was made on the basis that such a case must fail because as a matter of law it is impossible to create orally a lease of more than three years.

41. By section 52 of the Law of Property Act 1925, leases of land, except such as are not required by law to be made in writing, are void for the purpose of creating a legal estate unless made by deed. A lease for a term not exceeding three years may be made orally (whether or not the lessee is given power to extend the term). Although a lease otherwise than by deed for more than three years, though void for the purpose of creating a legal estate, might be treated as a valid contract, such a contract itself, being for the disposition of an interest in land, is required to be in writing in a document setting out all the terms: and see section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which imposed more stringent requirements than had previously been required, and in effect abolished the old doctrine of part performance under which an oral contract might yet become enforceable if there were sufficient acts of part performance.

42. Put shortly, therefore, a lease for a term of more than three years must be made by deed: an oral lease for more than three years is void. It follows that, as a matter of law, the claim to a 10-year oral lease cannot succeed, and must be struck out, as the Defendants contend. The Claimants may have recourse in respect of Mr Islam's warranties: but that does not affect the Defendants and cannot rescue an arrangement which is bad in law.

The Claimants' application to amend to plead an alternative tenancy

43. Faced with this legal roadblock, Mr Udo, on behalf of Wearwell, has sought to raise an alternative case in the Draft Amended Particulars of Claim, to the effect that, by virtue of Wearwell's occupation of the Premises over a significant period of time (since at least June 2012) in exchange for the payment of rent on a periodical basis pursuant to quarterly invoice demands, a periodic tenancy has arisen "from the conduct of the parties." It is well established that a periodic tenancy may be created by inference where a person occupies land with the owner's consent and rent assessed on a periodic basis is paid and accepted; but it is up to the person asserting

the tenancy to make good his claim: see *London Baggage Company v Railtrack Plc* [2000] L. & T.R. 439 at 449.

44. I must consider: (a) whether an amendment at this stage should be permitted if the new basis of claim is sustainable; and (b) whether the new basis of claim is sustainable or itself liable to be disposed of summarily. The order in which I take these points could be reversed; but I shall address them in that order.

45. Whilst the Draft Amended Particulars of Claim were only provided to the Defendants and the Court on the morning of the hearing, when no formal application had been filed seeking permission to amend, the skeleton argument of Ms Bretherton did pre-empt the essence of the new argument advanced in the Draft Amended Particulars of Claim. Ms Bretherton was right to include this in her skeleton, given that she was acting against a litigant in person, and in any event because it is well established that (assuming there to be no Limitations or similar point) a Court will be unlikely to strike out a claim which may be saved by amendment.

46. In my view, this is also not a case where a party is being ambushed with a new and unforeseen argument immediately prior to, or during a full trial for final determination of the proceedings. Prejudice is clearly more likely to be suffered in those circumstances, but such circumstances do not arise here.

47. It is also noteworthy that paragraph 7 of the Defendants' Defence dated 24 October 2018 addresses, to some degree, the alternative argument which the Claimants are seeking to make in their Draft Amended Particulars of Claim.

48. Therefore, unless I determine that Mr Udo's amended claim would in any event by struck out, or that summary judgment should be awarded in favour of the Defendants, I will allow permission to adopt the Draft Amended Particulars of Claim. In dealing with the remaining applications, I will therefore assume that the Draft Amended Particulars of Claim represent the Claimants' presently pleaded case; and I turn to discuss the Defendants' contention that no sufficient case has been demonstrated on the evidence to warrant full trial, and that that therefore the saving amendment should be refused and/or summary judgment should be granted.

49. The Draft Amended Particulars of Claim emphasise particularly the following circumstances as supporting the inference that a periodic tenancy was granted to Wearwell in respect of the entirety of the Premises which still subsists:

    (1) payment of rent on a periodical basis;

    (2) the long period of exclusive possession since first payment of rent in respect of the premises by Wearwell in June 2012;

    (3) continued payment of rent since then;

    (4) rendering by the Defendants of quarterly invoice demands for rent;

    (5) "there being no 'holding over' lease";

(6) there being no other reason for payment of such rent, nor any state of negotiations which might indicate that no tenancy was intended to be established thereby;

(7) there being no intention to contract out of the 1954 Act;

(8) there being no extant notice to quit;

(9) the demanded increase in rent, followed by demand and acceptance of increased rent;

(10) the shared understanding of the parties that Wearwell wished to occupy the Premises with a view to creating a successful long-term business utilising machinery in place there which cannot reasonably be moved without great expense, not as a tenant prepared to leave at short notice at the will or whim of the Defendants.

50. Further evidence put before the Court to date does suggest that Wearwell's business was being carried out from the Premises since 2012, either immediately upon the incorporation of Wearwell on 13 April 2012 or in the months that followed. That Wearwell carried on business from the Premises does not appear to be in dispute. Mr Udo has also adduced evidence in the form of an invoice for rent dated 1 January 2017 addressed to Wearwell, and images of cheque stubs for 2012 and 2014 showing payments to "London Garments" (the name under which the Defendants appear to have conducted business in their capacity as the landlords of the Premises) to support the proposition that Wearwell was paying rent in exchange for its occupation (it is not clear from the cheque stubs whether this is the Company cheque book for Wearwell, although Mr Udo's witness statement dated 6 November 2018 states that it is).

The Defendants' case that the proposed amended plea is unsustainable

51. Put shortly, this evidence, which cannot be assessed summarily, seems to me to be sufficient to support the alternative plea sought to be introduced by amendment, unless whatever periodic tenancy to be inferred was somehow either brought to an end or replaced.

52. However, the Defendants contend that, leaving aside for the present procedural objections to its late introduction, the alternative plea simply cannot be made good for at least three reasons:

(1) Even if there arose at one time (after June 2012) a periodic tenancy of some kind, this was surrendered by operation of law when new written tenancies at will were granted in 2016 and 2017: I describe these alleged arrangements ("the alleged TAWs") in more detail below;

(2) The alleged TAWs, and indeed any periodic or other contractual tenancy, were then terminated by Mr Islam ostensibly on behalf of Wearwell on 10 April 2018;

(3) The TAWs were not protected under the security of tenure provisions in the 1954 Act, and, even had there been a periodic or other contractual tenancy any protection was lost upon surrender.

The alleged TAWs

53. According to the Defendants, the alleged TAWs were entered into on 1 April 2016 with respect to the three Units comprising the Premises, as follows:

(1) One in relation to Unit 6, entered into between Mr Islam and the landlord (the landlord being referred to as "London Garments" which, as referred to above, is a business name intended to refer to the Defendants and is not incorporated).

(2) One in relation to Unit 7, entered into between Ms Fatima Doly ("Ms Doly", Mr Islam's second wife) and London Garments.

(3) One in relation to Unit 8, entered into between "Mr Nurul Islam t/a Wearwell Ltd" and London Garments.

54. Thereafter, according to the Defendants, three further alleged TAWs mirroring these agreements were entered into on 1 April 2017, apparently by way of renewal of the 2016 agreements.

55. A witness statement (apparently made jointly by both of the Defendants) on 1 May 2018 states

> "We have attached two most recent copies of the tenancies for each of the three units we rented to Mr Nurul Islam and his wife Fatima Doly (2016 and 2017) for the court to have a look at" (emphasis added).

That might suggest that TAWs were entered into prior to 2016; and at the 6 November 2018 hearing, Ms Bretherton indicated (on the Defendants' instructions) that TAWs were entered into prior to 2016; but there was no written evidence, nor any detailed evidence to that effect, and I consider that I must proceed on the basis that any contention that there were previous TAWs would itself raise an arguable issue.

56. On that basis, the nub of the Defendants' answer to the Claimants' new assertion of a periodic tenancy is that the alleged TAWs constitute irrefragable written evidence that whatever arrangements preceded them, from and after their conclusion: (a) Wearwell was itself not a tenant at all (since all the tenancies of the Units comprising the Premises were granted to individuals); or, alternatively, (b) if the tenancy at will of Unit 8 is to be read as being in its name, then Wearwell never had anything more than a tenancy at will of part of the Premises (Unit 8) terminable on notice by either party and in fact terminated in April 2018.

57. This aspect of the matter seems to me to turn on whether there is any factual basis or legal ground on which it is seriously arguable that the alleged TAWs: (a) are not authentic (as Mr Udo suggested); or (b) did not in fact represent the true or definitive basis for the occupation of the Premises or in reality interrupt Wearwell's continued

and exclusive possession of the whole of the Premises; or (c) were not intended to and/or could not in law displace any pre-existing periodic or other contractual tenancy of the whole Premises that the Claimants allege existed.

58. As to (a) in paragraph 57 above, in emails sent to the Court immediately after the 6 November hearing, Mr Udo expressed himself to be surprised by the sudden emergence of the alleged TAWs when they were first sent to him (he says) in May 2018 and "doubtful as to the authenticity of all these documents in that any number of Tenancies at Will can be created dated back to the convenience of the Defendants' case."

59. There are certainly curiosities in the presently available evidential record. It does appear that although Mr Udo told me that the possibility of dividing the Premises into smaller units for business rate purposes (and in particular, so as to attract the relevant Council's 100% small units business rate discount), had been suggested by a "very good friend" of Mr Islam who worked for the Council and had been discussed in Mr Udo's presence in April 2017, no written TAW was ever exhibited by any of the parties (or Mr Islam) until May 2018, when the Defendants produced "two most recent copies…for the court to have a look at" attached to a witness statement dated 1 May 2018 made jointly by the two Defendants. Those same two Defendants had made an earlier witness statement dated 23 April 2018 referring only to a tenancy at will of the entire Premises which (it is stated) they "gave to Mr Islam approximately in the year 2000" and to "a verbal agreement with Mr Islam which he has now ended". There is not a whisper there of any written agreement.

60. Further, the first of the alleged TAWs is dated 1 April 2016, and thus (according to Mr Udo) well before the suggestion to present the Premises as comprising three separate small business premises had been made by Mr Islam's friend at the Council.

61. Moreover, although Mr Islam in a witness statement dated 23 April 2018 confirmed that he had been a tenant of the Defendants since 2000 and that the Defendants "gave me the units on a 'tenancy at will' with a one-month termination notice for both sides", he did not suggest that there was any agreement in writing; and the further evidence he gave in April 2018, though it chimed with the Defendants' evidence of the same date, was entirely inconsistent with his original averment of the grant of a 10-year oral lease to Wearwell in his witness statement dated 30 October 2017.

62. Mr Udo also stresses that the Business Sale Agreement makes no mention of any written agreements, whether the alleged TAWs or otherwise; and indeed, in the Business Sale Agreement (to which the Defendants were admittedly not parties) Mr Islam as Guarantor warranted that:

    (1) "he *[sic]* ha[d] occupied the premises for approximately 20 years under an *[sic]* verbal agreement (oral tenancy) with the landlord in either a personal capacity or as an incorporated company"; and

    (2) "Wearwell London Ltd, the Seller, has a verbal agreement with the landlord of the premises."

63. The Defendants' contention that Wearwell did not occupy any of the Premises is also at odds with the evidence that Wearwell routinely paid the rent for an amount referable to the entire Premises.

64. Thus, although the suggestion of forgery and fabrication would have to be particularly pleaded and distinctly proved, there are issues as to the origin and status of the alleged TAWs which, at the least, invite enquiry.

65. As to (b) in paragraph 57 above, there are similar issues in that regard as to the true intended effect of the alleged TAWs, and in particular as to whether the real intention of the parties was only to present the picture of three separate premises to the Council in order to capture the business rate concession, but not to override or replace the subsisting or underlying relationship between the Defendants and Wearwell and/or Mr Islam established over the course of some (nearly) 20 years, which might (at least arguably) amount to a periodic tenancy.

66. Mr Udo is adamant that the reality of the matter is that Wearwell continued in exclusive possession of the whole of the premises. There is a dispute as to that, and (for example) as to whether parts were sub-let by Mr Islam and Mrs Doly to others (and, in particular, Ms Nisa Halpin who told me in a witness statement dated 25 October 2018 that her occupation was "allowed…by Mrs Fatima Doly and Mr. Islam"). But Mr Udo has pointed to witness statements made prior to the revelation of the alleged TAWs in May 2018, in which both: (a) Mr Islam and; (b) the Defendants described the whole Premises as being subject to a single tenancy from 2000 onwards; and it seems to me to be well arguable on the present state of the record that Wearwell was indeed a tenant with exclusive possession of the whole.

67. As to (c) in paragraph 57 above, Mr Udo relies on the same points as above to the effect that it was not the real intention or effect of the alleged TAWs to upset the subsisting tenancy in favour of Wearwell of the whole of the Premises, but simply to present arrangements which would secure a business rates discount or exemption. He also submits that if, as appears so far to be the Defendants' and Mr Islam's case now, Wearwell as a body corporate was not a party to any of the alleged TAWs (that relating to Unit 8 being between the Defendants and Mr Islam personally), then by the like token Wearwell as a body corporate cannot be bound, nor its rights overridden, by any of them, leaving its periodic tenancy intact. Further, he submits that Mr Islam should not be taken to have intended to bind Wearwell, or to have had any authority to do so.

68. In my view, Mr Udo's submission that the alleged TAWs cannot have terminated the subsisting periodic tenancy of the whole in favour of Wearwell that he asserts is not without its difficulties. It may not follow from the fact that Wearwell was not a party to the alleged TAWs that they were not intended to replace any pre-existing arrangements. Further, and with particular reference to Mr Islam's intentions and authority on behalf of Wearwell, the fact is that at the time of the exhibited alleged TAWs (April 2016 and April 2017), Mr Islam was the only shareholder and sole director of Wearwell; and in such circumstances, any attempt to distinguish between his intentions and that of his company, or to deny his authority, may be problematic.

69. But it seems to me that even if Mr Udo fails to establish that point (and I emphasise that I do not determine it) the other points he makes remain arguable. The true

purpose and effect of the alleged TAWs, and whether they were intended to put an end entirely to the previous arrangements, seem to me to be matters which cannot safely and satisfactorily be determined summarily; and in such circumstances I would not think it right to foreclose these further arguments as to whether Mr Islam should be treated as acting on behalf of Wearwell and with its actual authority.

70. More generally, and reminding myself that the test in the context of an application for summary determination of a matter on the basis that no trial is warranted nor would be of any real utility in fairly disposing of the matters in issue, it seems to me that there is simply insufficient clarity as to the arrangements governing the occupation of the whole or at least part of the Premises by Wearwell to warrant summary disposition of the claim on the basis that the alleged TAWs define the relationship between the parties in respect of the Premises. In that regard, I consider that the Claimants must be entitled to explore these inconsistencies after disclosure and by cross-examination at a trial.

Alleged termination of whatever rights Wearwell had by act of Mr Islam

71. The Defence avers that, on 10 April 2018, Mr Islam terminated the alleged 2017 TAWs in writing. According to clause 3.2 of the alleged TAWs, a tenant was entitled to terminate at any point. Subject to one caveat very properly admitted by Ms Bretherton (and as to which see later) a tenancy at will does not attract the protection of the 1954 Act.

72. Thus, if the alleged TAWs determine the relationship between the parties, there is (subject only to that caveat) no doubt that they can be terminated on notice at any time unilaterally by either party. However, if the true relationship between the parties in respect of the Premises was that Wearwell occupied the whole or part under a periodic tenancy, protected upon its termination under the 1954 Act, I need to consider whether Mr Islam's action in April 2018 was: (a) binding on Wearwell; and (b) sufficient and effective to put an end to the tenancy and remove any right to security of tenure under the 1954 Act.

73. As to the alleged termination of the alleged TAWs, and bearing in mind the fact that by April 2018 Mr Islam may well no longer have been a director of Wearwell, the Defendants put their case in this regard in two ways:

    (1) their primary case is that, despite the reference to "t/a Wearwell Ltd" in the alleged TAW for Unit 8, none of the alleged TAWs were granted to any of the Claimants, and could thus be and were terminated by Mr Islam acting on his own behalf in respect of Units 6 and 8 and with the authority of his wife in respect of Unit 7. (Ms Doly's witness statement dated 24 October 2018 purports to confirm that Mr Islam had the authority to terminate the alleged TAW for Unit 7 on her behalf (as she was the named tenant under that agreement);

    (2) their alternative case will be (it has not yet been pleaded out) that if (contrary to their position) the alleged TAW for Unit 8 is, by reason of the reference to "t/a Wearwell Ltd", to be construed as having been in favour of Wearwell as a separate corporate entity, Mr Islam nevertheless had authority to agree to its termination and did so.

74. As to (1) in paragraph 73 above, although on behalf of the Defendants Ms Bretherton argued that if the tenant of Unit 8 was in fact Wearwell, that would have been stated in the agreement without the need to refer to Mr Islam personally, the contrary seems to me to be arguable, and I do not think it would be fair or justifiable to determine the matter summarily.

75. As to (2) in paragraph 73 above, the order of Marcus Smith J dated 24 September 2018 in the separate proceedings brought by the Claimants against Mr Islam makes it difficult to conclude that Mr Islam was a director of Wearwell as at 10 April 2018; the Companies House Register indicates that Mr Islam's directorship of Wearwell terminated on 13 March 2018 (although, as noted in paragraph 19 above, there is written evidence which suggests it may have terminated on 3 October 2017), and Marcus Smith J did not order that that filing be removed from the Register (indeed, he ordered that a subsequent filing dated 23 April 2018 indicating the subsequent reappointment of Mr Islam as a director should be removed). Based on the presently available evidence, there would therefore appear to be a real prospect of success in arguing that Mr Islam did not have actual authority to terminate the alleged TAW for Unit 8 on behalf of Wearwell. I should however add that Mr Islam claims (in an email sent to the Court after the 6 November 2018 hearing before me) not to have been aware of the hearing before Marcus Smith J, and the orders made at that hearing, until after the event. As such, it might be the case that the matters dealt with before Marcus Smith J are yet to be finally determined.

76. Ms Bretherton made 2 additional points:

    (1) Even if Mr Islam did not have actual authority to terminate the alleged TAW for Unit 8, he did have ostensible authority to do so, which the Defendants (understanding Wearwell to be Mr Islam's company) relied on in good faith. Ms Bretherton added that, if Mr Islam was acting without the actual authority of Wearwell, Wearwell may have a damages claim against Mr Islam.

    (2) Ms Bretherton also referred to Mr Udo's suggestion that the three units constituting the Premises had to be considered in the round, and were not capable in practice of being divided up. On that basis, Mr Islam, Ms Doly and Wearwell (if Wearwell is found to be the tenant of Unit 8) might be considered as joint tenants of the Premises. If that were so, then any such joint tenancy could be terminated by any one of the joint tenants, and would not require any separate termination by Wearwell in order for Wearwell to lose its interest in the Premises. Ms Bretherton referred me to the case of *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478 in making that submission.

77. However, neither of these points was ventilated in any detail before me, nor were they addressed in Ms Bretherton's skeleton argument (although I acknowledge that Ms Bretherton's skeleton argument was drafted prior to the provision of Mr Udo's Amended Particulars of Claim). Moreover, it strikes me that these arguments raise potentially complex matters of law that ought to be given proper consideration at trial. Determination of the ostensible authority argument would also require a more careful assessment of what the Defendants knew about Mr Islam's authority to bind Wearwell (and how they came to know it) and Mr Udo's interest in the Company at the point at which Mr Islam purported to surrender the Premises. I note the Defendants' witness statement dated 1 May 2018 states that they had always been led

to believe that Wearwell was Mr Islam's company and that they had never been informed of any transfer of Wearwell to Mr Udo. Nevertheless, that evidence ought, in all fairness, to be tested, particularly in circumstances where the Defendants' primary case appears to be that the agreements they entered into were with Mr Islam and Ms Doly in their personal capacities, in which case Mr Islam's authority to bind Wearwell would not be relevant.

78. It is also not clear whether the Defendants' case is that, to the extent that the alleged periodic tenancy (if one ever existed) was still in place at the point at which the alleged TAWs were terminated, that termination (and the alleged surrender of the Premises by Mr Islam) would also have constituted the surrender of the alleged periodic tenancy. However, even if the Defendants do make that argument, that also runs up against the issue of Mr Islam's authority to surrender a tenancy on behalf of Wearwell at a time when he was not, based on the current evidence, a director of Wearwell.

Security of Tenure

79. If a periodic tenancy of the Premises with Wearwell as tenant is to be inferred and has never validly been terminated, it is not strictly necessary for me to consider the security of tenure point: but it is (as matters presently stand) a short one.

80. The Draft Amended Particulars of Claim aver (at paragraph 16) that "At the time of the demise, the Defendant well knew or ought to have known that the Claimant intended and did use the premises for the purpose of its business." That is plainly at the least arguable: indeed, the business use does not appear to be disputed.

81. Part II of the 1954 Act applies to:

> "any tenancy where the property comprised in the tenancy is or include premises which are occupied by the tenant and are so occupied for the purpose of a business carried on by him or for those and other purposes."

82. These terms are widely defined. Thus: (a) ""business" includes a trade, profession or employment, and any activity carried on by a body of persons, whether corporate or unincorporate"; (b) "premises" extends even to bare land; and; (c) occupation by a company which the tenant controls will suffice.

83. It is trite law that a periodic tenancy is capable of being protected by Part II of the 1954 Act (i.e. the security of tenure provisions). In the case of a tenancy granted for a term of years certain the parties may contract out of the security of tenure provisions before the tenancy is entered into, subject to following and satisfying prescribed statutory requirements. But that does not apply to periodic tenancies; and in any event there is no suggestion that there was any attempt or intention to contract out.

84. In her skeleton argument on behalf of the Defendants, Ms Bretherton (who was in the difficult position of not really being able to know quite what would be argued by Mr Udo) anticipated an argument that a protected tenancy had arisen by virtue of

Wearwell's possession and payment for its use and occupation pursuant to the orders made by consent over the past 9 months. She argued that "[o]ccupation pursuant to an interim injunction granted by the Court cannot possibly be the grant of a tenancy to the Claimants or any of them." I would tend to agree: but that was not what I understood to be the principal argument advanced. The claim is primarily based on the grant of a tenancy well before these proceedings.

85. For comprehensiveness I should also record that the question, if it be found that there was no periodic tenancy of the whole Premises but that Unit 8 was subject to a TAW in writing granted to Wearwell or for its use and occupation, of whether that TAW is also protected by the 1954 Act, was also raised at the 6 November 2018 hearing. Ms Bretherton acknowledged that it was potentially arguable that the definition of a "tenancy" in section 23 of the 1954 Act is such that the TAW might attract that protection (if, as Ms Bretherton also clarified in writing following circulation of a draft of this judgment, the TAW is not in reality and substance a tenancy at will). I say no more on that point for present purposes, except to thank Ms Bretherton for her scrupulous observance of the duties of Counsel when appearing against a litigant in person.

86. For present purposes, it is sufficient that the Claimants thus appear to me to have an arguable case that they have the protection of Part II of the 1954 Act in respect of Wearwell's occupation of the Premises under an alleged periodic tenancy as alleged by the Claimants.

Additional points made in the application for reverse summary judgment

87. As noted in paragraph 32 above, the Defendants have also sought to rely on: (a) Mr Udo's failure (up to that point) to produce the share certificate showing ownership of Wearwell despite my previous requests; and (b) the evidence of Ms Nisa Halpin ("Ms Halpin") that in truth Mr Udo does not use the Premises.

88. I can be brief on both points. As to (a), I have indeed repeatedly suggested to Mr Udo that it would assist to see the certificates evidencing his (or Woww's) ownership of the shares in Wearwell; and although in paragraphs 10 and 11 of a witness statement dated 28 August 2018 Mr Udo told the Court that he had found these I am not aware of them having been exhibited. Nevertheless, the issue (as to the ownership and direction of Wearwell and in particular whether it was properly joined in these proceedings) to which these went has, for present interlocutory purposes, been addressed by the order of Marcus Smith J of 24 September 2018 (see paragraph 63 above: Marcus Smith J's order also contained a recital stating that Woww was the shareholder of Wearwell). Any further dispute must be adjudicated in the separate proceedings brought against Mr Islam in which that order was made.

89. As to (b), Ms Halpin has become a frequent deponent in this matter. She has earlier expressed an interest in becoming a tenant, at least of part of the Premises. She may be in a position of some conflict. I do not ignore her evidence to the effect (to quote her witness statement dated 25 October 2010, which is also relevant to the question whether an injunction should be granted) that "Mr Udo is rarely present at the Units and as far I can see does not operate any business, manufacturing or trade activities from the Units" and "has no staff working at the Units". I take into account also the photographic exhibits showing Ms Halpin's own materials. However, Mr Udo in his

witness statement of 25 October 2018 insists he does continue his business there, and intends to expand to enable him to undertake more business. There is thus a conflict of evidence which I cannot fairly resolve summarily.

Conclusion as to summary disposition

90. In all these circumstances, and having regard to conflicts in the evidence which I cannot resolve, I propose to allow the amendment to plead a periodic tenancy; and I consider that, with that amendment, this matter cannot properly and fairly be disposed of summarily.

91. The Claimants are entitled to have these matters tested at trial, after disclosure.

Application for continuation/grant of injunctive relief

92. That brings me to the question whether in such circumstances the Claimants (or any of them) should be protected by injunction to ensure they may quietly enjoy the Premises pending final adjudication of the matter.

Should Mr Udo be precluded from relief by reason of previous defaults?

93. I must first deal with one procedural point taken by the Defendants in relation to the status of the July 2018 Injunction and the Claimants' alleged failure to comply with my orders made following the hearings before me on 9 and 19 July 2018.

94. In those orders, I directed that, if an application to continue injunctive relief were not made by 6pm on 28 August 2018, the July 2018 Injunction would expire. If such an application were made, the terms of the July 2018 Injunction would continue until the date on which that further application was determined.

95. Mr Udo on behalf of the Claimants asserts that such an application was duly made on 28 August 2018. Although he was not able to provide any evidence of that at the 6 November 2018 hearing, he identified, the following day, the relevant application notice and his witness statement in support of that application. The application notice bears a Court stamp suggesting that it was filed on 28 August 2018. Mr Udo also identified that copies of these documents were included in the hearing bundle for the hearing in the other proceedings before Marcus Smith J on 27 September 2018. That appears to be so.

96. The Defendants allege, however, that they were never served with the application notice. Although it was included in the bundle for the hearing before Marcus Smith J, the Defendants are not a party to those other proceedings (against Mr Islam), so that cannot be deemed to be good service of the application on them. Mr Udo has not referred to any other evidence that he served the Defendants with his 28 August 2018 application and in his email to the Court on 7 November 2018 (the day after the hearing), he accepted that he might have omitted, in error, to serve the application on the Defendants.

97. Whilst I appreciate Mr Udo's candour in that regard, this is not the first time that he has apparently failed to comply with an order of this Court, as my July Note and Order records at some length.

98. In addition, and as the solicitors for the Defendants pointed out to me in an email after the 6 November hearing, I also ordered on 11 October 2018 that the Claimants must issue another application for continued injunctive relief by 18 October 2018, so that that application could be determined. I did so on the assumption that there was no "live" application to continue the July 2018 Injunction. The Claimants did not make that further application. After the 6 November hearing, Mr Udo stated that his excuse for not filing the application was that he had already made an application on 28 August 2018 (which was yet to be determined). However, it seems to me that Mr Udo ought to have raised that point prior to 18 October 2018, not least so that the outstanding injunction application could have been brought to the Defendants' attention in a timely manner.

99. There is also a question relating to Mr Udo's compliance with the terms of payment under the July 2018 Injunction, although I shall return to this below.

100. All this signifies that Mr Udo has now, on a number of occasions, not given proper attention to orders of this Court. The fact that Mr Udo has been acting as a litigant in person (save for where he has had pro bono representation at Court) is not an excuse; as set out in my reasons for dismissing the Application to Vacate, he has had more than adequate opportunity to obtain legal advice (following recommendations by me to do so).

101. However, it does not necessarily follow that I ought to dismiss his application on that basis alone. This is particularly so in circumstances where: (1) it does appear to me that, albeit belatedly and not entirely punctiliously, Mr Udo has sought to make good any previous failures; (2) Ms Bretherton's skeleton argument did address why the July 2018 Injunction should be discharged on the merits (rather than for procedural non-compliance); and (3) the Claimants' application for the continuation of injunctive relief has therefore not come entirely out of the blue.

Is an injunction merited?

102. I now turn to the merits of the Claimants' application for continued injunctive relief.

103. As I have concluded that the Defendants' summary judgment and strike out applications have failed, on the basis that the Claimants' claims do have a real prospect of success, it follows that there is a serious question to be tried. So, the question is whether by reference to the staged approach mandated by the *American Cyanamid* test, the interlocutory intervention of the Court is appropriate, or at least the means of ensuring the least injustice.

104. Would damages be an adequate remedy for the Claimants? This principally comes down, as it seems to me, to whether Mr Udo in fact is or has the prospect of conducting business from the Premises which would be irreparably adversely affected if he is at risk of interruption of his use and occupation because it is no longer protected by order of the Court. There is a further consideration that Mr Udo's evidence and the Business Sale Agreement seems to suggest that there is machinery belonging to Wearwell (or potentially now Woww) at the Premises of some value (about £75,000 according to Mr Islam's witness statement dated 30 October 2017)

which would have to be moved at some expense and then presumably moved back if the Claimants were to succeed; but the evidence as to its user is slight.

105. In this context, Ms Halpin's evidence that the Claimants seldom actually use the Premises is relevant, even if its weight is uncertain.

106. On previous occasions when seeking interlocutory relief, Mr Udo has relied on particular events of importance to his fashion business which are said to make especially damaging any interruption of Wearwell's use of the premises and the machinery. Thus, for example, in August 2018 he told me that he was in the process of preparing for London Fashion Week in September, the implication being that Wearwell's ability to operate from the Premises would severely hamper such preparation (thereby impacting on Wearwell's business). London Fashion Week is now over; but it may be that these are (at least) yearly events.

107. For the purpose of the present application, in his skeleton argument submitted on behalf of the Claimants, Mr Udo also provided links to promotional videos allegedly showing aspects of Wearwell's manufacturing process taking place at the Premises. Again, the implication was that there would be significant disruption to this manufacturing process, and consequently Wearwell's business, if this process had to be moved. However, such promotional material does not necessarily show that any such manufacturing is currently on-going.

108. The evidence as to real irremediable damage to the Claimants is thus rather difficult to gauge, although unless I accept that Mr Udo is doing no business at the Premises, in the nature of things damages may not be an adequate remedy in circumstances where a business would, in the absence of an injunction pending trial, be denied access to its place of business and need to relocate. It strikes me that that is particularly so in the case of a manufacturing business.

109. Conversely, the damage to the Defendants would be monetary and thus compensable. The difficulty is that the Claimants appear to be in a presently difficult financial position; and any cross-undertaking to cover the damage to the Defendants if the Claimants ultimately fail to establish their right may not be of much real value on its enforcement, especially given that any value in the machinery on the Premises may not be easy to realise.

110. I turn, therefore, to the next stage and the balance of convenience. Again, assuming some business is being or will be undertaken, the inconvenience to the Claimants of interrupted possession would be likely to be significant; but the doubtful value of the cross-undertaking is again a consideration.

111. That leaves as the "counsel of prudence" preservation of the *status quo*, which would favour an injunction, with such protections for the Defendants as the Court considers reasonable and appropriate to insist upon. In truth I suspect that any other 'solution' would pave the way for even greater muddle and uncertainty. That has also been a factor in my decision and in eventually predominating over my concerns that Mr Udo has (as I have previously said) too often been guilty of 'kicking the can down the road', stretching to breaking point the patience of the Defendants, who have for the most part shown admirable restraint.

112. In all the circumstances, and not without some reservations, I am minded to grant an injunction until trial, subject to conditions which I presently suggest would include that:

(1) The Claimants must within 14 days pay all outstanding arrears of 'rent' (without taking into account any 'rests' or 'rent-free periods' such as have been discussed, but in the event never concluded, between them) and any outstanding rates or Council tax.

(2) The Claimants must propose terms as to user appropriate in the context of a periodic tenancy, along the lines presently in place, for agreement with the Defendants: and I shall consider any disagreement in that regard and give directions accordingly.

(3) In addition to the usual cross-undertaking, the Claimants must provide security in a sum to be discussed for future rent payments.

(4) The injunction will lapse immediately and without further order if rent is not paid within 14 calendar days of the due date.

113. However, I shall hear further argument as to these and any other conditions that may be suggested with a view to establishing the least unsatisfactory way, in this awkward case, of holding the ring until trial

114. I confirm that once these details have been determined and an Order made, this matter must be sent to the County Court for its adjudication together with the other proceedings I have mentioned that have been commenced against Mr Islam, though I shall leave to the County Court what further directions such as a formal order for a concurrent or consolidated trial would be appropriate.

115. Finally, and though it may be unnecessary to say so, I emphasise for the avoidance of any doubt that all that I have determined is that there is a serious question to be tried, and that the status quo should be preserved in the meantime; nothing in this judgment at this interlocutory stage connotes any view as to the ultimate merits of the case, beyond that the case has not been demonstrated to be fanciful or unarguable. Unless the parties find a way to settle their differences, as I have urged them to do throughout, the case must thus proceed to trial in the County Court, after disclosure and exchange of evidence, when, with the benefit of cross-examination, the factual uncertainties to which I have referred may be explored, clarified and finally determined.