Neutral Citation Number: [2019] EWHC 154 (Ch)

Case No: HC-2016-002997

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Rolls Building,
Fetter Lane,
London,
EC4A 1NL

Date: 31 January 2019

Before:

MASTER SHUMAN

- -

Between :

CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED	**Claimant**
- and -	
CIRCUS APARTMENTS LTD	**Defendant**

- -
- -

Mr Kirk Reynolds QC (6 June) Mr John Taylor QC (5 July) (instructed by **Trowers & Hamlins LLP**) for the Claimant
Mr Philip Rainey QC (instructed by **Norton Rose Fulbright LLP**) for the Defendant

Hearing dates: 6 June 2018, 5 July 2018, 25 January 2019

- -

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.

.....

MASTER SHUMAN

MASTER SHUMAN:

1. I have already determined the first part of the defendant's application, made by application notice dated 7 February 2018. The judgment is reported at neutral citation [2018] EWHC 1376.

2. This is the second part of the defendant's application seeking an order pursuant to CPR 31.12 for the claimant to conduct further searches on the basis set out in a draft order and to disclose any documents located as a result of those searches.

3. The claimant has also made an application for specific disclosure, made by application notice dated 3 March 2017. There are 10 categories of documents set out in the claimant's application notice. They are extremely wide-ranging but have been revised in a draft order handed up to me by Mr Reynolds QC, together with the fourth witness statement of Chris Christou. The categories have become larger but more specific. The claimant also intends to make an application to amend its reply and defence to counterclaim.

4. I am determining the cross-applications for specific disclosure. There are five lever arch bundles of documents before me and a raft of witness statements. The evidence comprises the following:

   (i) On behalf of the defendant:

   (a) 4 witness statements from David Stevens, a partner at the defendant's solicitors Norton Rose Fulbright LLP ("NRF"), dated 13 February 2017, 21 March 2017, 7 February 2018 and 2 March 2018;

   (b) 1 witness statement from Anne-Ceris Graham, a director of the defendant, dated 9 March 2017;

   (c) 1 witness statement from Paul Rands, vice president of Development of Bridgestreet Accommodations London Ltd, dated 21 March 2017; and

   (d) 1 witness statement from Michael Hughes, chartered surveyor of Residential Land Limited, dated 2 March 2018.

   (ii) On behalf of the claimant:

   (a) 2 witness statements from David Marsden, a partner at the claimant's solicitors Trowers & Hamlins LLP ("TH"), dated 3 March 2017 and 14 March 2017;

   (b) 4 witness statements from Chris Christou, an-in-house solicitor at the claimant, dated 8 February 2018, 2 March 2018, 18 May 2018 and 2 July 2018.

5. The parties made submissions before me as follows. Having determined the defendant's strike out application in the defendant's favour, Mr Reynolds QC then made submissions in respect of the claimant's application for specific disclosure and Mr Rainey QC on behalf of the defendant responded. That application was concluded but rather than deal with matters in piecemeal fashion the parties quite properly considered that I should then hear the defendant's application for specific disclosure before giving judgment on both applications. At the next hearing Mr Taylor QC, now

acting for the claimant, sought to reopen the claimant's application. Mr Rainey QC then made submissions on the defendant's application and Mr Taylor QC responded.

6. This case provides a good example of why the disclosure pilot was necessary. So far I have heard two full days of submissions on disclosure alone. Cases must be dealt with justly and at proportionate cost. I question that the overriding objective is being adhered to by the parties given how much of the court's resources have already been allocated to this case and the costs of this exercise to the parties. There is a need for the parties to focus on what is required in a case, it requires both cooperation between the professionals and for the parties to assist the court.

THE FACTUAL BACKGROUND AND PROCEEDINGS

7. I set out the factual background in my first judgment but I shall expand upon that in this judgment as it is relevant to how the parties' articulate their claims in their statements of case. In the raft of documentation there has been a tendency in the witness statements to lose sight of what is in issue, as set out in the statements of case, between the parties.

8. The claimant is the landlord and the defendant is the tenant under a lease dated 26 July 2000 made between (1) Canary Riverside Development PTE Limited and (2) Quinn Properties PTE Limited ("the Lease") for a term of 999 years less three days from 28 May 1997. The Lease demised the property known as the rear part of Eaton House which comprises 45 residential flats together with a ground floor reception and parking spaces numbered 82 – 91 and 100 – 109, 38 West Ferry Circus, Canary Wharf, London E14 ("the Property"). This is technically an underlease as the freeholder is Octagon Overseas Limited, however I shall adopt the parties' description and refer to this as the Lease.

9. The claimant's title is registered under title number EGL365354. The defendant's title is registered under title number EGL445878.

10. The defendant sublet the Property to Bridgestreet Accommodations London Limited ("Bridgestreet") pursuant to an underlease, the licence for which was granted by the claimant on 23 June 2010 ("the Underlease"). Bridgestreet had in fact occupied the Property under a previous underlease granted on 29 March 2005 for a term of 5 years commencing from 10 March 2005. Historically therefore the whole of the Property has been underlet to Bridgestreet, a serviced apartment operator.

11. The defendant wished to assign the Lease to a connected Guernsey SPV Company, now called CA Investments Ltd, and to grant a new underlease to Bridgestreet for a term of 10 years.

12. By letter dated 24 March 2015 and email dated 30 March 2015 the defendant requested the claimant's consent to the assignment. That was refused. The reasons were set out in a letter from Shoosmiths dated 9 April 2015.

13. On 1 May 2015 the defendant applied for a licence to underlet the Property to Bridgestreet, having agreed terms with Bridgestreet. Consent was refused. The reasons were set out in a letter dated 8 February 2016.

14. On 9 July 2015 the defendant and Bridgestreet entered into an agreement which provided that, subject to the claimant's consent the defendant would grant Bridgestreet a new underlease of the Property for a term expiring on 9 March 2025 at a rent of £1,900,000 per annum. The agreement also provided that the parties would enter into 45 separate short term tenancies of each of the flats for terms of 3 years less 1 day from 10 March 2015 at rents adding up to £1,731,000. On 9 July 2015 the defendant entered into those 45 tenancies with Bridgestreet.

15. The claim was issued on 29 March 2016. The claimant alleges three principal breaches of the Lease and seeks declaratory relief as a precursor to forfeiting the Lease.

(1) Use of the Property: paragraphs 6 to 10 of the particulars of claim.

Under clause 10 of the Lease the defendant covenanted "it shall not use the Premises or the Parking Space otherwise than for the Permitted User".

Clause 1.34 defines Permitted User as,

> "For the Premises for serviced residential lettings of each of the Flats and as to the ground floor only as a reception area.
>
> For the Parking Space the parking of private motor vehicles taxed where necessary."

The claimant alleges that in breach of covenant the defendant or its subtenant has used and is using the ground floor or part of the ground floor as a business centre.

(2) Planning: paragraphs 11 to 14 of the particulars of claim.

Under clause 14.1 of the Lease,

> "The Tenant shall observe and comply with all statutes relating to town and country planning in relation to the Premises and the Parking Space…"

The claimant alleges that the use of the ground floor or part of the ground floor as a business centre is in breach of the current planning consent. Further that the planning consent is C3 and as the Property is being used for serviced apartments this is inadequate.

(3) Alienation: paragraphs 15 to 17 of the particulars of claim.

Under clause 11 of the Lease the defendant was,

> "Not to underlet share or part with possession of part only of the Premises and Parking Space (as distinct from the whole) in any way whatsoever except by way of underletting or licence for occupation for a period of more than three years of "
>
> 11.4.1 A flat forming part of the Premises

> 11.4.2 Any Parking Space to a licensee or under lessee of a flat forming part of the Premises".

It is alleged that in breach of clause 11.4 the defendant has granted 43 separate three year underleases to Bridgestreet which contain an option to renew. Further that in breach of clause 11.3 the defendant has let or licensed Parking Spaces separately from the Property.

The claimant also alleged in its Reply that the defendant had granted 45 separate underleases, although 43 were pleaded in the particulars of claim, but that they did not reflect the true nature of the agreement between the defendant and Bridgestreet. The claimant believed that the defendant had in fact bound itself to under let the Property to Bridgestreet for a 10 year term. I struck out that allegation, the allegation being one of dishonesty. It was supported by one factual assertion which was insufficient to support such an allegation.

16. In addition the claimant seeks costs under the Lease.

17. In its defence and amended Part 20 counterclaim re-dated 14 March 2017 the defendant has denied all of the breaches.

(1) Use of the Property: paragraphs 4 to 6 of the defence.

The defendant puts the claimant to proof as to the nature and extent of "Business Centre Use". It goes on to plead that such use was within the Lease and in any event had ceased prior to 2 September 2015 so there was no such use at the date of issue of the proceedings.

(2) Planning: paragraphs 7 to 10 of the defence.

The defendant asserts that as the business centre use had been carried out for more than 10 years prior to the expiry of the Underlease the same is lawful pursuant to section 191(2) of the Town and Country Planning Act 1990. In addition the claimant and its predecessors have waived any alleged breach of the covenant both as to using the ground floor as a business centre and the flats as serviced residential lettings for longer and short term lets.

(3) Alienation: paragraphs 11 to 16 of the defence.

The defendant asserts that each separate underlease of a flat is lawfully granted and the option to renew is simply a put option, the effect of which is that the term does not exceed 3 years. It is asserted that all car parking spaces have been sub-let or licensed by Bridgestreet in accordance with clause 11.4.2 of the Lease.

Thereafter the defendant sets out its case on waiver. Its primary position is that the effect of the demand of service charge in advance on 2 September 2015, which has been paid, has waived any alleged right to forfeit in respect of alleged past breaches. It goes on to rely on other examples of waiver in paragraph 15 of the defence.

18. In the defendant's part 20 counterclaim the defendant seeks a declaration in relation to waiver and also a declaration that the claimant withheld consent unreasonably in relation to the following transactions:

(1) consent to an assignment of the Property to Circus Apartments Guernsey Ltd, now known as CA Investments Ltd ("CA"); and

(2) consent to an assignment of the Property to CA and the underletting of the Property to Bridgestreet for a 10-year term.

The defendant also complained that the claimant has unreasonably delayed in responding to the application for consent. The defendant wishes to proceed with the assignment to CA and the underletting to Bridgestreet. The defendant also seeks loss and damages caused by the claimant refusing consent, the difference between the yearly rent payable under the current underleases of £1.731 million and the rent that would be payable on an underlease to Bridgestreet of £1.9 million, together with exemplary damages. At the date of the pleading the quantified damages claim was less than £200,000.

19. The claimant both denies the delay and that it has withheld consent unreasonably. The claimant has raised specific concerns about the strength of the covenant of CA and the fact that it is a Guernsey company. The claimant also has concerns that the proposed assignment would negatively affect the residual value of the claimant's reversion. There was an issue between the parties about expert evidence but that has been resolved. On 27 January 2017 Deputy Master Nurse ordered that the parties have permission to each rely on expert evidence from a lawyer qualified in Guernsey law in respect of the issue of the enforceability of English judgments in Guernsey and a valuer with expertise in the field of valuation of mixed use properties in respect of the issue of the impact of the proposed dispositions on the claimant's reversion.

20. On 10 November 2016 Master Matthews gave case management directions which included an original trial window between 1 May 2017 and 31 July 2017 and at paragraph 3 that the parties should give standard disclosure by list. The parties have also in the meantime sought a number of stays of the proceedings to allow settlement negotiations. Save for extensions of time and the reliance on expert reports in subsequent orders the disclosure order remains intact.

THE LAW

21. Pursuant to CPR 31.6 standard disclosure requires a party to disclose only

"(a) the documents on which he relies; and

(b) the documents which—

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction."

22. CPR 31.5 envisages that the usual order will be to give standard disclosure, that is, the disclosure necessary to give effect to CPR 31.6. CPR 31.5(7) provides that,

> "(7) At the first or any subsequent case management conference, the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of the following orders to make in relation to disclosure—
>
> …
>
> (d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences".

23. The court also has power under CPR 31.12 to make an order for specific disclosure,

> "(1) The court may make an order for specific disclosure or specific inspection.
>
> (2) An order for specific disclosure is an order that a party must do one or more of the following things—
>
> (a) disclose documents or classes of documents specified in the order;
>
> (b) carry out a search to the extent stated in the order;
>
> (c) disclose any documents located as a result of that search."

24. Often such an application is made where it is alleged that either a party has limited the search that it should have carried out or a party believes that there are relevant documents which ought to have been disclosed and it is appropriate for the opposing party to do so. The class of documents specified should be carefully defined so that the disclosure or search is reasonable and proportionate. On the claimant's case both arise here. The defendant's case is that the claimant should carry out further more focused searches and disclose the results of those searches.

25. As Mr Rainey QC rightly reminds me "relevant" document is a useful shorthand but it should not be used in a loose sense. It is not a word that appears in CPR 31.6 or indeed in CPR 31.12 or the practice direction 31A paragraph 5. He referred me to the Court of Appeal's judgment in Shah v HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1154, specifically paragraph 25. He also referred me to the decision of Nugee J in Ward Hadaway v DB (UK) Bank [2013] EWHC 4538 at paragraph 25 where the judge said, "the test is not strictly one of relevance, but is one that is to be determined by reference to the precise wording of CPR 31.6". Further in relation to an application for specific disclosure under CPR 31.12 at paragraph 31 he said, "if the material is not within the ambit of standard disclosure there must be some good reason demonstrated

for saying it has to be produced anyway, as ex hypothesi it does not directly support the defendant's case or adversely affect the claimant's case."

26. CPR PD 31A 5 provides that,

> "In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with."

27. The claimant has also sought unredacted versions of various documents. In Shah v HSBC there are some useful passages about the disclosure of unredacted documents. Lewison LJ said,

> "27. In GE Capital Hoffmann LJ pointed out that it had long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant. Part of a document may be sealed or concealed under the same conditions as a whole document may be withheld from production. The party's oath on the question of relevance is conclusive unless the court can be satisfied, not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case, that the affidavit does not truly state that which it ought to state. The ultimate question was:
>
> "Can one in this case see from the documents produced that the affidavit must be wrong in claiming that the blanked-out passages do not relate "to any matter in question," in accordance with the Peruvian Guano test?"
>
> 28. The question then is not whether the affidavit "may" be wrong; but whether it "must" be wrong. He added:
>
> "The Peruvian Guano test must be applied to the information contained in the covered-up part of the document, regardless of its physical or grammatical relationship to the rest. Relevant and irrelevant information may, as in this case, be contained in the same sentence. Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so."

> 29. In my judgment the same approach to the sealing or concealing of parts of documents applies in the changed landscape of the CPR.
>
> 30. Leggatt LJ said:
>
> "The court will not ordinarily disregard the oath of the party that the parts concealed do not relate to the matters in question. In the disputed documents the plaintiffs had blanked out the name, amount or other confidential details of transactions unrelated to the Magnet management buy-out, with which the plaintiffs were concerned. The judge made several references to these details as being "at least potentially relevant." That is not the test. The test is whether it is not unreasonable to suppose that the passages blanked out do contain information which may, either directly or indirectly, enable Arthur Andersen either to advance their own case or to damage the plaintiffs' case."

THE APPLICATIONS

28. This litigation is being conducted by the solicitors with increasing hostility. It is becoming a verbal brawl and the parties should not lose sight of their duty under CPR 1.3, which requires them to help the court to further the overriding objective. Part of the court's duty to actively manage cases includes at CPR 1.4(a) encouraging the parties to co-operate with each other in the conduct of the proceedings.

29. This is illustrated by an issue between the parties about the adequacy of the defendant's approach to disclosure. In the context of the claimant's allegation that there was a side agreement between the defendant and Bridgestreet TH had sought disclosure of, in terms, whether the defendant had exercised its put option and granted a further three-year underlease to Bridgestreet, the underlease was due to expire on 8 March 2018. NRF replied, in effect, that the current occupational arrangements with Bridgestreet were of no concern to the claimant. Although I had struck out the allegation in the reply that there was a side agreement, the allegation being one of dishonesty on the part of the defendant, I commented at the last hearing about the relevance of the documentation sought. I pointed out that if a new agreement had been entered into that might alter the rent position and therefore impact on the defendant's counterclaim for the differential in rent. Indeed this was a point made by Mr Christou in his statement dated 18 May 2018. Upon reflection Mr Stevens of NRF sent an email to TH dated 26 June 2018 enclosing the agreement dated 21 March 2018

between the defendant and Bridgestreet and explaining why this had not been disclosed before.

30. The claimant seized upon this to support its submissions that, "this late disclosure provides yet another example of the defendant's patently erroneous and inadequate approach to disclosure and why orders for disclosure are required", paragraph 7 of Mr Taylor QC's skeleton argument. This was supplemented by, as Mr Taylor QC describes it, a catalogue of 8 errors by the defendant. In addition he referred to the fact that the defendant had failed to carry out searches for documents pre-dating 1 January 2015, the date when new owners acquired the defendant. He argued that the search terms said to have been used by the defendant should have generated thousands of documents, not zero. However the disclosure obligation is limited to standard disclosure. If there are no documents that fall within standard disclosure that does not mean that no documents were found during the process but rather that there are no documents to disclose.

31. I do not accept the arguments put forward by the claimant. Context is important. Although Mr Stevens' initial stance was wrong it appears to have been primarily postulated in the context of the increasingly acrimonious dispute between the parties about the allegation of dishonesty that the claimant had set out in its reply, which I subsequently struck out. Quite properly Mr Stevens upon more measured reflection accepted that the up to date occupational arrangements between the defendant and Bridgestreet were relevant to the issues in the case and he disclosed the agreement. It certainly did not help to alleviate the increasing mistrust and tension between the parties and their legal advisers. Although the claimant has not helped matters by accusing the defendant, NRF and Mr Stevens in failing to comply with disclosure obligations and refusing to believe evidence set out in Mr Stevens' witness statements. I do not accept that the manner in which the defendant approached its disclosure obligations in respect of the occupational arrangements between the defendant and Bridgestreet has tainted and fundamentally infects the disclosure exercise that has been carried out. In Mr Steven's first witness statement dated 13 February 2017 he sets out in particular at paragraphs 4 and 5 that he had advised the defendant about the nature and scope of its disclosure obligations and set out what steps he had taken by way of reviewing the documentation in the case before

producing the list of documents. He then sets out in his statement in light of TH's assertion that a side agreement existed between the defendant and Bridgestreet that he had reviewed various documents, including the whole of NRF's conveyancing file with Bridgestreet, the defendant's board minutes and ancillary papers relating to the Property. In Mr Steven's second witness statement dated 21 March 2017 he sets out in paragraphs 11 to 14 the defendant's disclosure exercise.

"11. CAL [the defendant] is a single purpose company and its principal asset is the legal title to the Lease. It holds the Lease on trust for CA Investments Ltd. CAL's board of directors, which include representatives of both Residential Land and IC, authorise the execution of all documentation relating to major asset management decisions, but the day-to-day management of the premises is conducted by Residential Land and CAL's registered office address in Grosvenor Street, W1 is also Residential Land's head office.

12. In the circumstances all documentation and correspondence relating to the premises within CAL's control is held by Residential Land, including copies of CAL's board minutes and all correspondence between representatives of Residential Land and IC. Therefore CAL's search of relevant documentation for the purposes of disclosure was conducted by representatives of Residential Land on behalf of CAL and the disclosure statement was signed, with the express authority of CAL by Residential Land development director, Michael Hughes, a chartered surveyor, who had overall responsibility for coordinating the search …"

He then goes on at paragraphs 13 and 14 to explain the disclosure exercise that was carried out.

32. Mr Hughes, who signed the disclosure statement, has provided a witness statement dated 2 March 2018 confirming what Mr D Stevens said in his statement dated 21 March 2017 and then going on to himself explain the disclosure exercise. At paragraph 3 he says,

"I can confirm that I was made fully aware of CAL's duty of disclosure and the issues in these proceedings (including the claimant's claim that there is a side agreement with Bridgestreet to permit it to remain on the premises for 10 years), and the diligent

search undertaken (as identified in the disclosure statement) was designed to, and I believe did, identify all relevant documentation."

33. Moreover the defendant has also voluntarily disclosed 3 lever arch files from NRF's conveyancing file which contains correspondence relating to the negotiations which culminated in the defendant and Bridgestreet entering into an agreement dated 9 July 2015. Again this has been seized upon by the claimant as an illustration of the defendant's erroneous approach to disclosure: I do not accept that that criticism is made out. As Mr Rainey QC rather poetically put it after Mr Taylor QC had sought to reopen the claimant's arguments on its application, the defendant is acutely aware of its disclosure obligations and the importance of them but the mountain that Mr Taylor QC sought to make was located not in the foothills of the Himalayas but at best in the foothills of the South Downs.

34. I am satisfied with the evidence of Mr Stevens and indeed the other statements filed on behalf of the defendant. The claimant has not persuaded me that there is any ground to go behind the disclosure statement. I accept the evidence contained in the witness statements, all supported by statements of truth.

35. I shall go on to now deal with each parties application and I shall use the numbering set out in their respective draft orders as a reference point. As I have already commented there is an abundance of witness statements, 13 in total, which I have considered.

THE CLAIMANT'S APPLICATION

36. The claimant's application notice seeks an order: 1. that the defendant do disclose certain documentation which is relevant and has not been disclosed; 2. Specific disclosure of documents set out in sub-paragraphs (a) to (j). The draft order attached to the application sets out 10 very broad and wide ranging categories of documents, sought by way of specific disclosure. Over time that has evolved into the draft order which Mr Reynolds QC relied on in his submissions and was not substituted by any further draft order by Mr Taylor QC. I shall therefore refer to the draft order provided by Mr Reynolds QC and my references are to the paragraphs and subparagraphs within that draft order.

37. Paragraph 1.1 seeks an order that the defendant shall carry out a search of all "relevant" documents relating to this claim and then disclose specifically the documents identified thereafter. Mr Rainey QC takes issue with this and says that if I make any order it should be in the usual terms: I agree with him.

1.2.3 signed and dated version of the side letter regarding the compensation/incentive to be paid to Bridgestreet attached to email from Fiona Bradley of DWF to Charlotte Tullis dated 26 March 2015 at 12:00

1.2.4 the signed and dated management agreement

38. The claimant submits that this goes to the issue of the business use of the Property. The management agreement is likely to refer to the use of the common parts, as would the incentive. The use of the Property is one of the three principal breaches of the Lease relied upon by the claimant. It is also submitted that this goes to the counterclaim and specifically the claim for the difference in the yearly rent payable under the underleases to Bridgestreet and the rent that would be payable had the claimant not unreasonably refused consent to the proposed assignment and underletting.

39. The relevant part of the defendant's case on business use is set out in paragraphs 5 a and b of the defence. Specifically its case is that business centre use was permitted on the proper construction of the Lease because it is ancillary to permitted use of the reception for serviced residential lettings use and in any event such use had ceased prior to 2 September 2015.

40. The defendant submits that the 26 March 2015 email refers to the 45 underleases granted on 19 July 2015. Rather than go to the point on business use in fact this goes to the issue of the side agreement, which I struck out. This appears to be an attempt to go behind the witness statement of Mr Stevens. It is difficult to see how this relates to the counterclaim other than in an obtuse perhaps tangential way. It does not satisfy the test of standard disclosure and no other good reason has been advanced to support disclosure.

41. The management agreement has already been disclosed at item 6 to the defendant's disclosure schedule.

1.2.5 board minutes of the defendant relating to the property, including board minutes of the board meeting on 20 April 2015 at 2.30pm

42. In Mr Christou's second statement dated 8 February 2018 at paragraph 38 he refers to a redacted email that has been disclosed and that Mr Stevens has said that he has checked all board minutes and that none are relevant. At paragraph 39 he states "with reluctance due to his professional status, I am bound to say that it seems implausible that (for example) the board minutes of 20 April 2015 are not relevant".

43. This was expanded upon at the hearing by counsel who argued that it was relevant for the claimant as landlord to know why the defendant as tenant had made an application for assignment from one company to another. It was postulated that the board meeting minutes will contain information on that point. That is not the test under standard disclosure.

44. Mr Stevens has said in his evidence that he has gone through the board minutes and disclosed such documents that are relevant (I use that as shorthand). Mr Rainey QC further submits that if Mr Christou's statement is put in context this is a request that relates to the side agreement. That is reinforced when one looks at paragraph 40 in Mr Christou's statement. Mr Stevens in his fourth witness statement dated 2 March 2018 at paragraphs 12 and 13 specifically addresses the issues raised by Mr Christou and I accept Mr Stevens' points on this.

45. By way of completeness as to the issue of the reasonableness of the refusal to consent, this is not a case where the claimant is pleading that the defendant had another motive for seeking consent and that it would not explain such motive. The internal workings of the claimant coming to its decision may well be relevant to the pleaded issues in the case but that is a matter for the claimants to disclose not the defendant.

1.2.6 Unredacted versions of:

(a) the email at 11.32am dated 11 November 2016 between Matthew Callaghan of Residential Land and Bruce Ritchie of Residential Land

46. Mr Marsden in his statement dated 3 March 2017 says that the email starts, "I wanted to update you…" which suggests previous correspondence has not been disclosed and should be. Mr Ritchie is described as being the top of the pyramid and the claimant wishes to see an unredacted version of this email.

47. The claimant's evidence on this point does not suggest that the redaction was wrong. Mr Stevens in his evidence has explained his understanding of redaction, the applicable test as set out in Shah and his approach to redaction in this case. The claimant has not satisfied me that an unredacted version of the email should be disclosed.

(b) emails between David Stevens and Amanda Gourlay on various dates

48. This is a reference to emails passing between the defendant's solicitor and counsel at Tanfield Chambers who was instructed on behalf of the residents of other flts on the Canary Riverside estate. They relate to the appointment of Mr Coates as manager of Canary Riverside estate. Mr Christou in his 4th statement dated 18 May 2018 at paragraphs 5 to 13 sets out why the claimant says these emails, in unredacted form, should be disclosed.

49. I go back to the pleaded issues in this case. I fail to see the connection between the issues and this chain of emails. Mr Rainey QC submits that in a letter from the claimant's solicitor's they say 'we may refer to the First-tier tribunal findings in respect of credibility'. In the notes to the White Book 2018, 31.6.2, in the context of standard disclosure it is said that documents which relate purely to cross-examination as to credit and no other issue in the trial are outside the scope of standard disclosure. It does not satisfy the test of standard disclosure and no other good reason has been advanced to support disclosure in an unredacted form.

50. I do note that in an email from Mr Stevens to Mr Marsden dated 23 February 2017 Mr Stevens stated, "for the avoidance of doubt I should make it clear that CAL also reserves the right to rely on any documentation which might go to credit, such as the decision of the FTT appointing a manager over the Canary Riverside estate due to your client's mismanagement (a copy of which your client already holds)." Whilst the defendant has sought to reserve its position in an email that is not its pleaded case. If the defendant does seek to make this part of its case and therefore an issue before the court it will then engage its disclosure obligations.

(c) the email between Angela Jezard and David Stevens on 19 May 2016 at 9.57

(d) any other emails in the email chain at (b) and (c)

51. These go to the same issues as I referred to in paragraphs 48 to 50 above. The claimant elaborated on these points a little by stating that this is part of an attempt by the defendant to paint the claimant in a bad light and the defendant has cooperated and supported residents in their application to the FTT. The reasons that I set out above apply with equal force here.

1.2.7 any notice served pursuant to clause 14.2 of the sub-underlease dated 9 July 2015

1.2.8 any new sub-underlease completed pursuant to clause 14.7 of the sub-underlease dated 9 July 2015

1.2.9 correspondence with Bridgestreet or their solicitors in relation to the sub-underlease and its continuation

52. The claimant says that these go to the exercise of the put option by the defendant. It now transpires that a further agreement was entered into between the defendant and Bridgestreet on 21 March 2018.

53. However these parts of the draft order have not been reformulated by the claimant in light of the disclosure of the further agreement dated 21 March 2018. Putting to one side quantum on the counterclaim, it is difficult to see what issue these documents go to. As I have indicated I am satisfied that Mr Stevens understands the obligations of disclosure and indeed he has disclosed the most recent agreement. That sets out the rent, which forms part of the formula to determine the differential rent claimed by the defendant. I do not consider that these paragraphs, as formulated, fall within standard disclosure or given that the most recent agreement has been disclosed there is any grounds for ordering the specific disclosure sought.

1.3.1 Correspondence between Norton Rose Fulbright and DWF relating to the property

54. This category is extremely wide and appears to go to the side agreement issue. The claimant maintains this is still being sought as it is not satisfied by the defendant's disclosure. As I have already indicated I am not prepared to go behind the evidence of Mr Stevens and Mr Hughes. Indeed much of the litigation file and the conveyancing file already appear to have been disclosed in the claim. In addition the order sought is unfocused and is not in accordance with the overriding objective.

1.3.3 Documents relating to the previous sub-underlettings to Bridgestreet

55. When I questioned how this relates to the issues as set out in the statements of case counsel suggested that this might go to the business use of the Property, that it might be relevant to know why the business use, if any, changed and ceased on 2 September 2015. I refer to paragraph 39 of my judgment. This does not fall within standard disclosure and there are no other grounds advanced by the claimant to justify this disclosure.

1.3.4 correspondence between defendant and Ivanhoe, Residential Land and the connected parties relating to the Property

1.3.5 correspondence between the defendant and Ivanhoe/group companies relating to the property and the claim

1.3.6 correspondence between Ivanhoe and Residential Land

56. It was argued on behalf the claimant that it is surprising that there is a lack of correspondence between the parties. In particular given that Ivanhoe is a Canadian pension fund that has an 80% stake in the defendant company the claimant submits one would expect to see regular written reports, particularly in relation to any court or tribunal proceedings. Counsel accepted that this was too wide.

57. This is, again, extremely wide and un-focused. It is also being suggested that Mr Stevens and Mr Hughes have failed in the standard disclosure obligations. As I have already said I do not accept that. In some ways this appears to be a fishing expedition on the part of the claimant and not the focused hunt for documents that fall within standard disclosure. That is supported by Mr Marsden's statement dated 3 March 2017 at paragraph 69 when he said in respect of emails between Ivanhoe and the defendant they should all be disclosed "as they already should have been, so that we can then judge how relevant they are to the issues".

1.3.7 internal emails of the defendant and Residential Land relating to the Property

58. The same points that I have set out in paragraphs 56 and 57 apply here. The claimant additionally argued that these documents may go to the claimant's refusal to consent

to the assignment or underletting and the defendant's reaction to that decision. I do not follow how this goes to the issues to be determined in this case.

1.3.9 documents relating to planning use at the property, including any correspondence with the Council on the subject

59. The claimant submits that the defendant was under a contractual obligation, under the Lease, to comply with planning control. That is uncontroversial. There is no dispute about the planning use of the Property, that is a matter of public record. It is then argued, again, that there must be documents relating to this and none have been disclosed. When I questioned this point further counsel for the claimant accepted that had the list of documents been signed by the defendant rather than Mr Hughes the claimant would have been satisfied. I have accepted that the defendant has complied with its standard disclosure obligations.

1.3.10 any documentation relating to the alleged renegotiation of the rent and how it was arrived at

60. Again it is submitted by the claimant that this goes to the counterclaim. It is said that there must be some documents for example, showing discussions between the solicitors about restructuring and the financial consequences of doing so.

61. Whilst I accept this may have had some focus on the side issue Mr Christou in his second statement dated 8 February 2018 quite clearly refers to the quantum of the defendant's counterclaim. Mr Rainey QC submits that no matter what may have been discussed the agreements set out the rent under the 43 leases. There is no suggestion that the defendant and Bridgestreet are connected, they are independent parties. He accepts that Mr Christou identified in an email dated 24 June 2015 that there would be a rent free period. Mr Stevens addresses this in his fourth statement dated 2 March 2018, specifically paragraphs 34 to 35, and puts this in its correct chronological sequence. He states that the email simply formed part of the ongoing dialogue between the conveyancing solicitors prior to the actual agreement that was entered into on 9 July 2015. I accept the defendant's arguments on this point. Furthermore I do not accept, without more, that pre-contract negotiations are in the circumstances of this case within standard disclosure.

1.3.11 bank statement showing the rent actually paid and when

62. The claimant argues that in order for the defendant to prove its loss, or arguably its loss of chance to enter into a different contractual relationship with Bridgestreet, it needs to adduce evidence of what was received from Bridgestreet. Only then it is submitted can the defendant demonstrate loss. The defendant argues that the counterclaim is based on a contractual liability and it is unnecessary for it to prove rent received by the defendant; it simply needs to adduce the agreements with Bridgestreet.

63. The claimant has put the defendant to strict proof of the amount claimed. One might expect the defendant to adduce evidence from say the managing agent exhibiting the rental accounts for the Property. In principle it is appropriate for the defendant to give disclosure in respect of the actual rent received by Bridgestreet. However the order as drafted is in the context of documents prior to 1 January 2015. I will hear submissions on whether that can be dealt with in an alternative way and in default of being satisfied with any proposal I will order bank statements to be disclosed showing the actual rent paid and when. I will hear argument on what that period should be.

1.3.11 council tax demands to show how the Property is being used

64. I do not follow how this is probative of the issues set out in the statements of case. The use of the flats is not in dispute. The council tax charge will be demanded of either Bridgestreet or the occupier of the flat, not the defendant. Further council tax registers and indeed the business rate register of public documents and can be searched by the public. The claimant has not suggested that the defendant would have control of these documents.

1.3.13 Norton Rose Fulbright's E-file for the transaction with Bridgestreet

65. I questioned the wide ranging nature of this paragraph. The claimant's counsel accepted that "the transaction" meant the proposed underletting to Bridgestreet and its restructuring. He also submitted that this went to the issue of quantum.

66. Mr Rainey QC took issue with the latter point and suggested that it was clearly part of the side agreement issue. It is difficult to see how this goes to the question of

quantum. Furthermore Mr Stevens' has set out in his evidence that he has gone through the e-file in accordance with the defendant's disclosure obligations.

1.3.15 correspondence between Bruce Ritchie and Alan Coates and HML Andertons

1.3.16 correspondence relating to Circus Apartments and the appointment of Alan Coates between various parties identified in the sub-paragraphs (a) to (g)

67. The claimant argued that this concerned the business use of the reception area. When I questioned whether this also went to credibility the claimant's counsel accepted this. He also submitted that the correspondence exists, it is on file, and can readily be made available to the claimant.

68. The defendant quite properly took issue with the wide nature of these paragraphs. I was also taken to the third statement of Mr Christou dated 2 March 2018, which responded to the defendant's application for disclosure, but exhibited to it an email dated 23 January 2018 from Mr Coates. This concerned a meeting convened by Mr Coates, the FTT appointed manager, to discuss proposed works to the Property with the residents. It is difficult to see how a meeting called by the FTT appointed manager with the residents would impact or be relevant to this claim. The claim has been brought by the claimants for a declaration as to alleged historic breaches of the Lease as a precursor to bringing a forfeiture claim. That email does appear to be being used by the claimant to justify a wide ranging trawl of the defendant's documents. By way of example in (b) the claimant seeks correspondence between "the defendant and any resident of Canary Riverside and/or the Residents Association" and in (f) correspondence between Bruce Ritchie and the residents.

69. Not only has the claimant failed to satisfy me that the documents sought fall within standard disclosure or that there would be any other ground to order them by way of specific disclosure I must also have regard to the overriding objective and specifically proportionality. These are wide ranging paragraphs not grounded in the statements of case.

1.3.17 all documents relating to a current status of the occupation Bridgestreet including any correspondence between the defendant and Bridgestreet on the matter

70. This looks again as an attempt by the claimant to seek documentation relating to the side agreement. Insofar as it is not and there are documents relating to this that fall within standard disclosure I am satisfied that the defendant has complied with its disclosure obligations.

71. Save for hearing submissions in relation to 1.3.11 I do not make the orders for specific disclosure sought by the claimant.

72. In addition in the claimant's draft order, albeit not in its application, the claimant seeks an order that the defendant's disclosure list be signed by an appropriate person at the defendant. Mr Marsden in his statement dated 3 March 2017 says that the disclosure statement must be signed by a person who is able to confirm that the proper search has been carried out. He says that the statement should have been signed by the defendant.

73. I wondered if ordering this might dispel some of the suspicion in this case. However I am not convinced that it would and moreover any order must be grounded in the CPR. Under CPR 31.10(7) where the party making the disclosure statement is a company the statement must also identify the person making the statement and explain why he is considered an appropriate person to make the statement. This is supplemented in the practice direction 31A paragraph 4.3. Indeed this paragraph states that the person making the statement must include his name and address and the office or position he holds in the disclosing party or the basis upon which he makes the statement on behalf of the party. The disclosure statement in the list of documents sets out that Michael Hughes has given that statement and that he is the "development director at Residential Land with responsibility for Circus Apartments, knowledge of the issues and access to the defendant's documents".

74. I am satisfied that the defendant has complied with the requirements of paragraph 4.3 and CPR 31.10(7). I also consider on the evidence before me that Mr Hughes was the appropriate person to make the disclosure statement and it was not necessary for anyone else to do so. In the circumstances I do not make the order sought by the claimant.

75. In addition and even though this was neither contained in the application notice nor the claimant's draft order Mr Taylor QC sought an order that the defendant search

appropriate custodians and use appropriate keywords. He referred specifically to paragraph 75 of Mr Christou's 5th statement dated 2 July 2018, served shortly before the part heard hearing. He submitted these were reasonable and were a proportionate search for the defendant to carry out.

76. This application and indeed the conduct of the parties needs to be brought under control. The application notice, which has not been amended, is an application for specific disclosure. It is not open to the claimant's second counsel to seek to reopen the previous application and go behind what was argued on 6 June 2018. Mr Rainey QC asks me (a) not to go beyond the claimant's application (b) to reject any submissions that go beyond the application and (c) accept that there was a failure by the defendant to disclose the agreement dated 21 March 2018 but that should not oxygenate the standard disclosure application made and argued out on 6 June 2018.

77. I have already set out in this judgment that I do not accept that the mistake not to disclose the 21 March 2018 agreement, which has been subsequently remedied, taints and infects the disclosure process that has been carried out by the defendant. I accept the points made by Mr Rainey QC.

THE DEFENDANT'S APPLICATION

78. The defendant's application seeks an order for specific disclosure under CPR 31.12 requiring the claimant to conduct further searches on the basis set out in the draft order and disclose any documents located as a result of those searches. There are 2 overarching categories of documents: (1) those relating to the business centre and planning issues and (2) those relating to the assignment and underlease issues.

79. The first category relates to the use of the Property. The allegations are set out in paragraphs 8 and 11 to 14 of the particulars of claim. They are put in issue by the defence in respectively paragraphs 5, 8 and 9. Further the defendant's counterclaim includes an allegation of waiver of the right to forfeit and therefore puts the claimant's knowledge in issue. The second category relates to consent. The defendant's case is set out in its counterclaim at paragraphs 21 to 29. The claimant admits that applications were made for consent and that it refused consent but denies that the consent was unreasonably withheld. The reasons given for the refusal of consent are helpfully summarised by Mr Stevens at paragraph 31 and the defendant's pleaded

case in response is summarised at paragraph 32. The claimant does not take issue with these summaries.

80. Mr Rainey QC emphasises that what is sought by the defendant is within standard disclosure. The defendant has identified where the disclosure exercise has not been carried out correctly. It is not asking the claimant to carry out additional searches but to carry out a replacement search so that the exercise is carried out adequately. The defendant has identified the custodians of the documents and provided key word searches. He does accept the criticism of Mr Christou that to include the search word "Eaton" may bring up all electronic documents which relate to the 76 residential flats in Eaton House. Moreover the flats are not referred to internally as "Eaton". The defendant submits that the key word search should be amended to delete the reference to "Eaton". Mr Rainey QC also accepts that "Bruce" or "Ritchie" can be removed. Whilst he submits that they were for the purposes of control only they can be deleted. The defendant also accepts that if the key word search discloses documents but that they are not within the control of the claimant then they do not fall within standard disclosure and do not need to be disclosed. The key word searches proposed are Boolean searches and should reduce the search exercise. Paragraph 8 of the draft order provides a check on the keyword search in that if the number of documents produced proves unmanageable the parties are entitled to amend the keywords by written agreement or the claimant has permission to apply to court.

81. Mr Taylor QC submits that a specific disclosure order should not be made against the claimant because the allegation that the claimant has failed to carry out a proper disclosure exercise is entirely misconceived. In addition he argues that the search terms are disproportionately wide and that the draft order requires the claimant disclose all the documents which are responsive to the search terms.

82. As to the timing of the defendant's application Mr Taylor QC reminds me that the claimant gave disclosure by list on 20 January 2017. He submits that no complaint was made by the defendant about this disclosure until it issued its application notice on 7 February 2018. The clear suggestion here is that this is a tit for tat application. However that is not supported in the correspondence. In an email from Mr Stevens to the claimant's solicitors on 23 January 2017 there was a complaint about the scope of the disclosure exercise carried out by the claimant. "We note from the list that it

appears your client has not disclosed any internal (or indeed external) documentation whatsoever relating to its consideration of our clients applications to assign and sublet and its motivation for refusing the same (other than the inter-solicitors correspondence), despite Mr Hadjiioannou's confirmation that he has searched your client's computers including its email servers." Mr Stevens also went on to complain that it appears that the claimant had not disclosed any emails at all; although this was not strictly accurate. In an email dated 3 February 2017 from Mr Stevens to Mr Marsden he asks for a response to his email of 23 January querying the scope of the claimant's disclosure. He set out in summary some further examples to demonstrate that it was highly unlikely that the claimant had carried out its obligations of disclosure. There then followed a long hiatus in the proceedings where they were stayed to enable the parties to engage in alternative dispute resolution.

the business centre and planning issues (category 1)

83. Mr Stevens in his third statement dated 7 February 2018 at paragraph 16 sets out the relevant facts which provide the foundation to the application for specific disclosure.

    i) The claimant's knowledge about the use of the reception area at the Property in the period 2005 to date, including any use of the reception area as a business centre

    ii) when such use as a business centre began, when it first came to the claimant's attention and when such use came to an end

    iii) any steps taken by the claimant (including acting by its agents) relating to the use of the reception area as a business centre and whether this was permitted under the Lease or pursuant to planning regulations

    iv) the claimant's knowledge about the use of the Property as serviced apartments in the period 2005 to date

    v) when such use as serviced apartments began and when it first came to the claimant's attention

    vi) any steps taken by the claimant (including acting by its agents) relating to the use of the Property as serviced apartments and whether this was permitted under the Lease or pursuant to planning regulations

    vii) whether the claimant has waived the right to forfeit the Lease.

84. Mr Christou's statement in response dated 2 March 2018 does not take issue with the analysis of the facts in issue in the case and neither does his statement dated 2 July 2018.

85. I accept Mr Stevens' analysis of the issues that relate to the first category.

(a) documents internal to the claimant regarding business centre and service department use at the Property, including any emails, memoranda, board minutes or other documents

(b) details of any building inspections and reports which reference business centre and or service department use at the Property

(c) communications between the claimant and the managing agent(s) about business centre and service department use at the Property

(d) communications between the claimant and the council referencing business centre and service department use at the Property

(e) documents relating to the planning use of the Property

Custodians

Keyword searches

86. I am satisfied that the 6 categories of documents identified by the defendant relate to the pleaded issues and fall within standard disclosure. They are also documents that one would expect to be in the claimant's control.

87. The real question between the parties is whether the claimant has carried out its disclosure obligations in respect of the categories identified by the defendant.

88. Mr Stevens' evidence, his witness statement dated 7 February 2018, emphasises that the claimant's allegations of breach of covenant are sufficiently serious on their case to bring this claim as a precursor to forfeiting the Lease. He argues that it follows that this matter will have been considered internally, including at board level, and that documents internal to the claimant that relate to the alleged business centre and serviced apartments use should exist. He goes on to state that details of regular building inspections and reports regarding inspections should have been communicated to the claimant and/or retained by its managing agents, Marathon Estates Limited ("MEL"). In any event he argues the claimant would have a right to call for those documents. Further the communications with the council should be in the possession and control of the claimant and/or its agents. By way of illustration Mr

Stevens refers to a letter dated 2 April 2015 from Shoosmith's to NRF which states that "Our client is concerned that the premises may be being operated in breach of planning consent." Then under the heading repair and decoration the solicitors stated, "within the last few weeks it arranged access to the premises for the purposes of carrying out an inspection of the whole property to review compliance with the tenant's covenants to repair and decorate. In the event our client was only allowed access to 3 of the serviced apartments and the common areas."

89. In Mr Christou's statement dated 2 March 2018 he asserts that the "claimant has complied with its disclosure obligations. It has searched for all relevant documents and provided them." He does not address the detailed points raised by the defendant in its application. To an extent that is addressed in the statement that was served shortly before the resumed hearing. At paragraphs 19 to 53 he takes issues with the allegation that the claimant has not complied with its disclosure obligations.

90. The claimant's list of documents dated 20 January 2017 records that the claimant did not search for documents pre-dating 1990 and located elsewhere than the claimant's offices. Therefore the claimant has not looked off-site including the offices of its managing agents, MEL. The search was carried out, and therefore limited to, the claimant's computers and its solicitors carried out a search of its computers. It goes on to record that the claimant did not search back-up tapes, mobile phones, notebooks, PDA devices, portable data storage media, servers, off-site storage, laptops, handheld devices, calendar files, spreadsheet files, document files, web-based applications and graphic and presentation files. There then follows a schedule of 44 general documents. Mr Rainey QC accepted in his submissions that if Mr Christou says there are no laptops and back up tapes then there are none. However it is plain that Mr Christou misunderstood "notebooks" as meaning written notebooks rather than electronic devices. The disclosure list is plainly deficient. The emails that have been disclosed have not been disclosed in native format as required by PD31B, are incomplete in part or without colour.

91. Mr Taylor QC eloquently and with some force elaborated on his skeleton argument to set out why the complaints made by the defendant were misconceived. He accepts that Mr Christou in his fifth statement has corrected the claimant's disclosure statement and sets out the accurate position on the search carried out. Although that is not how it

is put by Mr Christou who has justified the disclosure exercise conducted for the purposes of the disclosure list.

92. Mr Taylor QC sought to explain that Mr Christou had carried out the disclosure exercise twice, once for the purposes of the disclosure list and subsequently in the preparation of his fifth statement. However that is not what the evidence says. On Mr Christou's evidence the search was undertaken prior to the disclosure list only.

93. As to the first category of documents Mr Taylor QC submits at paragraph 24 of his skeleton why the complaints are misconceived. He also argues orally that the claimant has carried out a search over a 10 year period and that as the defendant has not similarly done this over a 10 year period it would be perverse to make an order against the claimant, presupposing that such an order should be made. However the defendant has specifically pleaded that the claimant has waived the alleged breaches of the Lease. Indeed Bridgestreet first occupied the Property in 2005 pursuant to an underlease, the licence of which was granted by the claimant. The claimant's knowledge as opposed to the defendant's is therefore clearly in issue in the claim.

94. Mr Taylor QC argued that the defendant was asking the claimant to carry out searches that it had not carried out itself. Had it come to court suggesting that both sides should carry out such searches he accepts that the position would be different. I have to evaluate and determine the applications as they are argued before me. He then went on to argue that the claimant had carried out its disclosure obligations and that the defendant had not. He referred specifically to Mr Christou's statement, paragraph 42 and the sub-paragraphs thereto, which set out the words that "I asked our IT person to use". This is not in a standard Boolean form and I am not satisfied that such a search has been carried out adequately. That is particularly so when I consider paragraph 44 of Mr Christou's statement when he says that he could not have asked IT to carry out a search on "Circus" as that would have turned up every email on the system, since our address (which is at the bottom of every email) is at Westferry Circus." A Boolean search would have been able to eliminate "Westferry Circus" from its search parameters. Indeed litigation software can carry out specific searches ignoring headers and footers. Mr Rainey QC makes the point that paragraph 42 of Mr Christou's statement does not refer to obvious words such as "assignment" "underlet" or "sublet". Indeed when one considers the objections set out by Mr Christou in

paragraphs 60 to 64 they reveal that the searches do not include obvious words to limit the scope of the search. Mr Christou says that he also carried out a 'common-sense' search. He does not explain what that is and if it was unstructured it is likely to be valueless as an exercise.

95. Mr Rainey QC argues that the searches to be carried out by the claimant are likely to be different to those carried out by the defendant: that is the nature of a landlord and tenant dispute where the reasonableness of the claimant's refusal of consent is in issue and whether the claimant has waived the breaches. He criticises Mr Taylor's compare and contrast approach to the disclosure exercises conducted by the parties and suggest this provides a false comparison. I accept that criticism. What is clear is that both parties are under a duty to provide standard disclosure and that obligation is continuing.

96. Mr Taylor QC submits in respect of the Shoosmith's letter that it referred to repairing obligations and had no relevance to the use as a business centre. That misses the point. If there has been an inspection of the Property and the claimant through its agent sees breaches of the Lease he or she is highly likely to note those breaches and report them to the claimant. They are therefore directly relevant to the state of the claimant's knowledge in respect of waiver. Further a managing agent's knowledge can even be attributed to a landlord.

97. Mr Christou says that 5 of the custodian email accounts identified by the defendant have been searched. He then states that the claimant cannot search the emails or documents of MEL and Lee Baron. However the defendant has not specified MEL or Lee Baron in the list of custodians although it has identified a further 4 people.

98. Mr Taylor QC submitted that if I made an order for specific disclosure the key words sought would yield far too may results. However the defendant has provided for this eventuality by making provision in the order for the parties to either agree in writing different key word searches or for the claimant to have permission to return to court on this issue. I also note in Mr Christou's statement dated 2 March 2018, paragraph 5, that his evidence is "I estimate that for us to comply with the additional searches would be at least 40 hours." This is a claim that is a precursor to the claimant forfeiting a valuable lease. Mr Rainey QC submits that the Lease is worth in the

region of £30 million. It is both proportionate and reasonable for the search to be carried out. I agree with Mr Rainey QC's submissions that it is difficult to see how one reconciles paragraph 34 of Mr Christou's statement, the claimant's disclosure statement and paragraph 40. I am not satisfied that the claimant has complied with its disclosure oblations in respect of the keyword searches that it says it has carried out.

99. I am also not satisfied on the evidence that the searches in the manner set out by the defendant would yield too many results. Mr Rainey QC by way of illustration referred me to category 2, (d) in the keyword. The first section uses 7 words or part words in the alternative with the controller 'and' followed by 16 words, again used in the alternative. I accept the defendant's position that the list is endeavouring to narrow not widen the electronic search. Mr Taylor QC suggested that if the claimant carried out the search as sought it would have to carry out the search 424 times, he then suggested that the figure would be 934 times. He was unable to explain his calculation. Given the restricters that are proposed by the defendant and that the searches are Boolean it does not follow that you simply multiply the search terms, if that is what Mr Taylor QC has done.

100. Mr Taylor QC also argues that the identified custodians in (g) to (j) are people who do not work for the claimant, do not work from the claimant's offices and the claimant has no right to go to their offices. It does not follow from those submission that the claimant does not have a right to call for or be provided with documents from those people. Paragraph 5 of the draft order addresses this point. If the claimant does not have the documents in its direct possession or have a power to call for or be provided with the documents they will not fall within the claimant's disclosure obligation. Although one would expect an agent, certainly during the period of the agency, to deliver up documents that are not personal to the agent. Further as Mr Rainey QC rightly points out managing agents manage estates, they carry out or instruct others to carry out checks and inspections in respect of the estate. Whilst it may be that Louise Berwin does have extensive knowledge, as suggested by the claimant, that is not a substitute for the claimant calling for documents from its own agents, that it is entitled to call for.

101. I accept the defendant's arguments that the search carried out by the claimant was not done properly and needs to be carried out again together with an electronic search in the terms sought.

the assignment and under lease issues (category 2)

102. Mr Stevens in his third statement at paragraph 33 sets out the relevant facts that are relevant to category 2.

i) The claimant has assessed the covenant strength of the proposed assignee as being inadequate

ii) The claimant has assessed the covenant strength of the defendant as proposed guarantor as inadequate

iii) The claimant has service charge payable at c. £350,000 per annum

iv) The claimant has calculated the defendant's security deposit offers as inadequate in light of the annual service charge payable

v) The claimant has assessed the difficulty of enforcing a judgment against a Guernsey registered company

vi) The claimant has assessed the value of its reversion

vii) The claimant has assessed the impact of the proposed assignment and underletting on its reversion

viii) The claimant may have an obligation to consult with and seek consent from its lender

ix) The claimant was prepared to consent to the underletting to Bridgestreet in 2010 but not in 2015 or subsequently

x) The claimant wishes to purchase the Lease from the defendant or purchase the defendant itself

xi) The facts set out in paragraph 83 as to category 1 are also relevant under category 2

103. Again Mr Christou's statement in response dated 2 March 2018 does not take issue with the analysis of the facts in issue in the case and neither does his statement dated 2 July 2018.

85. I accept Mr Stevens' analysis of the issues that relate to the second category.

(f) internal and third-party documents and communications relating to the consideration of the defendant's request for consent to the proposed assignment and/or under letting of the Property and the claimant's refusal of the same, including but not limited to:

i. The claimant's assessment of the covenant strength of the proposed signee and/or hypothetical covenant strength of the defendant in the event that the assignment were to proceed

ii. reports and/or board minutes and/or the claimants book of minutes of general meetings and/or property management team meeting minutes and/or memoranda insofar as they relate to the Property since 2010

iii. any calculations that allow the claimant arrive at the level of the security deposit that would be acceptable

iv. any assessment of the reasonableness of either: (i) the level of the security deposit that the claimant considered to be acceptable or (ii) the level of the service charges levied on the defendant in respect of the Property

v. The consideration of the enforceability of a judgment against the Guernsey registered company

vi. reports and appraisals, relating to the valuation of the claimants reversion, including in the event that the proposed assignment and/or under letting were to proceed

(g) internal communications and documents, and communications with any lender/mortgagee (including Abbey national Treasury services plc (trading as Santander)) relating to the claimant seeking lenders/mortgagee's consent to the proposed assignment and/or under letting

(h) the claimant's consideration of the defendant's application to under let the Property to Bridgestreet in 2010

(i) any attempts by the claimant (or any related parties) to purchase the Property from the defendant or purchase the shares of the defendant itself

The custodians

keywords

104. I am satisfied that the 4 categories of documents identified by the defendant, including the sub-paragraphs to (f) relate to the pleaded issues and fall within standard disclosure. They are documents that one would expect to be in the claimant's control.

105. The issue between the parties is again whether the claimant has carried out its disclosure obligations in respect of the categories identified by the defendant.

106. Mr Stevens' evidence, paragraphs 36 to 44, sets out obvious deficiencies in the claimant's disclosure. In summary there are no documents recording decisions taken by a sole member, no board minutes, no inter-director communications and nothing going to the assessment of the service charge which is relevant to the adequacy of the security deposit. By way of illustration Mr Stevens specifically refers to the claimant's articles of association, paragraph 15.4, which provides that when decisions are taken by a sole member of the claimant these are to be recorded in writing and delivered to the claimant for entry in its book of minutes of general meetings. As the claimant had only one member, Octagon Overseas Ltd until 24 March 2015 and then Riverside Crem 2 Ltd it follows that there must be written records of decisions taken by that member that are relevant to the category 2 issue. He also observes that there have been changes of directors in the period when the claimant was responding to the defendant's request for consent and that one would expect to see communication between the outgoing and incoming directors. I accept Mr Stevens' identification of the deficiencies in the claimant's disclosure in respect of category 2.

107. The points that I have set out in respect of category 1 also applies to the documents and search sought in respect of category 2 documents. Mr Taylor QC refers to Mr Christou's third statement to support his proposition that the complaints are misconceived. Mr Christou records that when a request for consent is made he discusses it with his principal, who is dyslexic, so that matters are dealt with by telephone. Whilst his principal may prefer to deal with matters orally that does not explain why there are no records. Mr Christou states that he is not in the habit of taking a note of calls as he "would be forever preparing attendance notes". That is the explanation as to why there are no documents recording the decisions taken by the claimant's board or Mr Christodolou. Similarly as the office is small where rooms are shared and communications take place orally there are no inter-director communications. Mr Taylor QC finally submits on this issue that there is no document in the context of the security deposit which is not legally privileged. Of course if a document is privileged that does not mean that it is not disclosable, merely that it is not available for inspection. Mr Taylor QC suggests that there may be a lack of documentation in respect of the consent issue because it took place within a short time frame. I do not accept this point. There may well have been, as Mr Rainey QC, submitted a flurry of documents. Further whilst a document written by a solicitor may attract legal advice privilege but that does not necessarily mean that the instructions on which it is based are inevitably subject to the same privilege. Someone at the claimant undoubtedly took the decision not to grant consent.

108. Mr Taylor QC reiterated that the defendant had failed to provide disclosure. He argued that the defendant's reaction to the refusal of consent was disclosable. I do not accept that proposition. The issue is whether the claimant's refusal of consent was

reasonable not the reaction of the defendant. It is not part of the claimant's pleaded case that the application for consent for either the assignment or the underletting was not genuine.

109. The claimant again alleges that the keywords are oppressive in quantity. I have already dealt with this issue. I do not accept the claimant's argument that they are oppressive and in any event there is a proposed safety mechanism within the defendant's draft order.

110. For the reasons set out above I shall make an order for specific disclosure in the terms sought by the defendant, save for the deletion of the words "Eaton" "Bruce" or "Ritchie" in the list of keywords. Mr Christou has criticised paragraphs 2 and 3 of the draft order as being without limit. I do not accept that criticism. They refer back to the wording in paragraph 2 which recites part of the standard disclosure wording. However for the avoidance of doubt the defendant may wish to amend paragraphs 2 and 3 to recite the wording from paragraph 1.

111. If there are any further points in respect of the proposed wording of the order I will hear submission from counsel.