Neutral Citation Number: [2022] EWHC 2929 (Ch)

Case No: PT-2021-000217

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (CH D)

Rolls Building, 7 Rolls Buildings
London, EC4A 1NL

Date: 12 December 2022

Before :

Her Honour Judge Claire Jackson sitting as a Judge of the High Court

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Between :

1. RAIL FOR LONDON LIMITED **2. TTL PROPERTIES LIMITED**	**Claimants**
- and - **THE MAYOR & BURGESSES OF THE LONDON BOROUGH OF HACKNEY**	**Defendant**

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Mr Matt Hutchings KC (instructed by **TFL Legal**) for the **Claimants**
Mr Ranjit Bhose KC and Mr Shomik Datta (instructed by **LB Hackney Legal Department**) for the **Defendant**

Hearing dates: 18-20 October 2022

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JUDGMENT

This judgment was handed down remotely and without attendance at 9:30am on 12 December 2022

Her Honour Judge Claire Jackson:

1. This is a dispute between Rail for London Limited ("RfL") and TTL Properties Limited ("TTL") as former and current tenants respectively (collectively "the Claimants"), and the London Borough of Hackney as landlord ("the Defendant"), of a number of railway arches and buildings at Kingsland Viaduct in Hackney ("the Property").

2. As a result of the extension of the East London Line of the London Overground ("ELLX") the Claimants' predecessor in title, London Underground Limited ("LUL"), and the Defendant entered into a series of transactions regarding the Property. The parties accept that one of these transactions was a lease of the Property dated 3 May 1996 ("Lease C") between LUL and the Defendant which provided for rent to be payable. On the face of the lease the basic rent was calculated by way of reference to a sub-lease between LUL and London Industrial (Kingsland Viaduct) Limited ("Workspace"), also dated 3 May 1996 ("Lease D"). Lease D was surrendered on 21 November 2003. LUL became the direct landlord of the sub-tenants and/or was entitled to sublet the individual Arches to sub-tenants ("the Occupational Tenancies").

3. Between 2004 and 2019 LUL, and from September 2009 RfL, continued to pay basic rent to the Defendant using an approximation of the Lease D calculation mechanism and applying such to the Occupational Tenancies. The basic rent paid to the Defendant by RfL for 2018-19, was £1.38 million.

4. In 2019 RfL wrote to the Defendant stating that, given the surrender of Lease D, basic rent was no longer payable under Lease C and they sought recovery of the basic rent

paid since the surrender of Lease D. The Defendant refused asserting that basic rent remained due and payable.

5. At the heart of the dispute is the Claimants' contention that, because of the surrender of Lease D, the "Basic Rent" that is payable to the Defendant under the terms of Lease C is, and will remain for the term of Lease C, nil. The parties have been unable to resolve this dispute.

6. Proceedings were therefore issued by the Claimants seeking a declaration in their favour. The Defendant counterclaims a declaration in its favour. Reimbursement of the rent paid between 2004 and 2019 was not sought in the proceedings and Mr Hutchings KC, Counsel for the Claimants, confirmed in closing submissions that the Claimants will not seek to recover that sum in any event.

Background to the Agreements

7. This section of the judgment draws heavily on the skeleton arguments of the parties.

8. In 1986 the North London Line City Branch, which formerly ran over Kingsland Viaduct, was closed. The freehold of the viaduct, arches and adjacent buildings, including the Property, vested in the Defendant. For the purposes of these proceedings there were approximately 190 arches within the Viaduct and six other buildings.

9. The Defendant's land included commercial units that were let to, or available for letting by, third party occupiers. This included commercial units within the individual arches, save for approximately 20 of the 190 arches which formed bridges over highways or over the Regent's Canal.

10. As at 1 May 1996 the annual rent receivable by the Defendant from the commercial units was in excess of £480,000. Approximately 69 of the individual arches were however unlet, or possibly unlawfully occupied, as at that date.

11. In October 1990, it was estimated that the Defendant's liability for repairs to bring the Viaduct into an acceptable condition was £4.5 million:

"*None of the above improvements can be achieved without the implementation of ELLX and the viaduct will remain, at least over the next ten years, a liability to its present owners, the London Borough of Hackney*."

12. LUL wished to use the railway line running on top of the Viaduct to facilitate a part of ELLX, linking Shoreditch to Dalston. On 30 November 1993 LUL applied to the Department of Transport for an order under the Transport and Works Act 1992 ("TWA") in respect of ELLX. Article 17 of the draft order contained compulsory purchase powers over, inter alia, the Property.

13. The Defendant's statement of case for the public inquiry into the making of an order, dated 13 May 1994, made clear that they supported ELLX in principle, but had a number of concerns, which they wished to see addressed in various ways. These included the grant of CPO powers, in particular over the Property.

14. LUL's statement of case, dated 19 May 1994, noted that LUL had no power to purchase property until the powers had been obtained and funding was forthcoming. As to CPO powers paragraph 19.6.1 stated:

"*LUL seeks compulsory acquisition powers to ensure that it has sufficient control of the properties necessary to undertake construction works, comprehensively refurbish*

the Hackney viaduct and secure safe and effective management of, and access to, these structures in the longer term."

15. On 11 November 1994 LUL gave undertakings to Dalston City Partnership Limited and the Defendant, as parties to the public inquiry, in relation to the exercise of its prospective powers under an order. No undertaking was given in respect of the exercise of CPO powers over the Property.

16. On 13 December 1995 the Defendant's Policy and Resources Committee produced a report recommending terms for the grant of a lease of the Property to London Industrial Plc. The cost of refurbishment of the Viaduct was estimated at £5.25 million to be financed in part by the European Regional Development Fund. The report "… *accepted that it is not appropriate to market the viaduct on the open market for a number of reasons*."

17. On 21 February 1996 the Defendant's Policy and Resources Committee produced a further report recommending that the Head of Legal Services be instructed to complete the transactions relating to Kingsland Viaduct on the basis there set out.

18. The London Underground (East London Line Extension) Order 1997 was made, on 20 January 1997 ("the 1997 Order"). Article 17 conferred on LUL CPO powers over, inter alia, the Property. By 2003 LUL still had not secured funding for ELLX to be constructed.

The Agreements

19. LUL and the Defendant each retained specialist solicitors, Stephenson Harwood and Sharpe Pritchard respectively, to negotiate and/or draft the agreements. Neither firm of solicitors was represented at the trial of this action.

The Principal Agreement

20. On 3 May 1996 an agreement was entered into between (1) the Defendant, (2) LUL, (3) Workspace, and (4) London Industrial Plc ("the Principal Agreement"). Workspace was a special purpose vehicle formed for the purposes of the arrangement to which the Principal Agreement gave effect. London Industrial Plc was a company in the business of letting real estate. It was the Defendant's existing lessee of arches Nos 402-420 ("Union Walk") under three leases for terms of 99 years from 25 March 1994. It was party to the Principal Agreement as guarantor for Workspace.

21. The main terms of the Principal Agreement were as follows:

(a) By clause 2 the Defendant agreed to sell and LUL agreed to purchase the freehold interest in "*the Property*" (as defined) for £1. It included the Property. Completion was to take place on 3 May 1996. The Property was sold subject to the existing occupational tenancies of the arches, other areas, and buildings: clause 9.1, and Schedule 2 ("the Occupational Tenancies"). This schedule recorded the Defendant's existing rent entitlement.

(b) By clauses 2.2 and 5 a scheme of leases were to be executed on the same day between LUL, the Defendant, and Workspace. Copies of the leases were exhibited to the Principal Agreement by way of appendices.

(c) By clause 12 the Defendant agreed to carry out or procure various works, described in clause 1 as "*the Council's Works*". These works included the removal of track bedding at the Viaduct, and the structural refurbishment of the same by levelling and a new reinforced concrete waterproof membrane. There was no stated maximum value of the Council's Works, which were to be undertaken to the standards required

by clause 12.2.2. By the proviso to clause 12.2.3 the date for the completion of all the Council's Works was 3 August 1997 at the latest. If the Defendant defaulted in its obligations in respect of the Council's Works, clause 12.5.1 permitted LUL to undertake them in default and recover the costs from the Defendant to a "Cap" of £2.6 million plus VAT. In such an event, the Defendant covenanted to use its best endeavours to obtain from the European Regional Development Fund all monies it was entitled to claim for in respect of the Council's Works: clause 12.5.2.

(d) By clause 13 Workspace agreed to carry out or procure various works. These works included the refurbishment of the "Property Arches", to include repair and repointing of the undersides of them, and the provision of electricity and sanitation. LI's Works were specified by clause 1 to cost up to £3.2 million (including VAT).

(e) By a "Call" (and "Put") option in clause 14, the Defendant and LUL agreed that in the event of ELLX not having occurred by 3 May 2006, the Defendant would have the option of (or could be required to) "*purchasing [LUL's] freehold interest in the Property and its leasehold interest in Lease C (but subject to Lease D)*" for the price of £1.00. The option was exercisable at any time from 3 May 2006 until 3 May 2017.

(f) By clause 21 the parties agreed that insofar as any of the obligations covenants or conditions contained therein remained at completion to be observed or performed, the Principal Agreement was to continue in full force and effect notwithstanding completion of the sale of the Property or the grant of any of the Leases.

Lease A

22. By Lease A LUL demised back to the Defendant "*the Premises*", being effectively defined as the structure of the Property and airspace above it, but excluding "*the*

Arches and the Buildings". Lease A was for a term of 99 years from 25 March 1994, at a "*Basic Rent*" of "*a peppercorn (if demanded)*".

23. By clause 6.1 it was agreed that on the implementation of ELLX LUL would, by written notice, require the Defendant to surrender Lease A, which surrender would thereupon occur by operation of law. This duly occurred.

Lease B

24. By Lease B LUL let to the Defendant the Property.

25. Lease B is for a Term of 99 years (plus two days) from 25 March 1994 at a "*Basic Rent*" of *"£1 (one pound)*" for each "*Relevant Year*".

26. Lease B makes specific provision for 38 "*Permanent Arches*". Clause 6 makes special provision enabling LUL to require the surrender of any of these if it wishes to regain possession of one or more of them including, inter alia, "*in connection with the Implementation of ELLX*", but "*subject to any Occupational Leases subsisting at that date*". The "*Occupational Leases*" are defined as meaning leases etc "*deriving directly out of [Lease D]*".

27. Save for these Permanent Arches, LUL has no right to call for the partial surrender of any of the other 120 odd Arches demised by Lease B. Nor does it have a right to call for a partial surrender in respect of any of the buildings.

28. It should be noted that Lease B also defines part of the Property as "*Temporary Arches*". Lease B makes no discrete provision for these Temporary Arches. However, as appears from Leases C and D these are ones to which LUL may obtain temporary

access for stated purposes including "*in connection with the Implementation of ELLX*".

29. Other provisions of Lease B relied on by the parties included:

(a) Clause 2.1 and paragraph (b) to Part 1 to Schedule 3, being LUL's reservation of its right to enter and remain on the Premises. This is, inter alia, "*subject to the terms of any Occupational Lease*". This same limitation appears in the Defendant's covenant to provide access in paragraph 11(a) to Schedule 5.

(b) Clause 3 and paragraph 3(1) to Schedule 5, by which the Defendant covenants to keep all Arches (other than the Permanent Arches) "*painted repaired or otherwise decorated to the Minimum Specification*", and to keep the Buildings in good and substantial repair and condition.

(c) Clause 3, paragraph 7(c) to Schedule 5, and Schedule 7, which provides that where the Defendant wishes to assign Lease B, LUL retains a right of pre-emption. Schedule 7 sets out the procedure to be followed. This includes, by paragraph 2(e), LUL taking an assignment "*subject to … the Occupational Leases then affecting the Relevant Premises*".

(d) Clause 3 and paragraph 14 to Schedule 5, by which the Defendant's obligation to insure the Premises includes an obligation that the insurance be in the name of "*the tenant under the Underlease*".

(e) Clause 3 and paragraph 15(a) to Schedule 5, under which the Defendant covenants to comply with the "*Regulations*". These are defined as bearing "*the same meaning as in [Lease D].*"

(f) Clause 8, which confers an option for the Defendant, exercisable upon notice to LUL, to seek the grant of a "*Lease for a further term of 26 years and two days commencing on 25th March 2093 and such Lease shall be upon the terms of this Lease (mutatis mutandis)*".

Lease C

30. By Lease C the Defendant underlet the Property back to LUL for a term of 99 years (plus one day) from 25 March 1994.

(i) Lease C - Rent Provisions

31. Clause 1.1 of Lease C contains the following relevant definitions:

""*Rent" means all sums reserved as rent by this Lease"*

""Basic Rent" means for each Relevant Year the Basic Rent (as defined in the Underlease) that is received by the Tenant pursuant to the provisions of the Underlease (and which for the avoidance of doubt excludes LUL's Rental Proportion)"

""LUL's Rental Proportion" bears the same meaning as in the Underlease"

"Relevant Year" means the year of the Term (calculated in every case from 1st April) which is relevant to any particular calculation"

""Underlease" means the Underlease of the Premises of even date and to be made between the Tenant (1) and London Industrial (Kingsland Viaduct) Limited (2) (as the same may be varied or amended from time to time)"

""Relevant Estimate" means the Relevant Estimate as defined in the Underlease and produced pursuant to the provisions of the Underlease"

""Statement" means the Statement as defined in the Underlease and produced pursuant to the provisions of the Underlease". Clause 1.1 (ibid) further defines the "Agreement" as the Principal Agreement, then recording that it is this Agreement "pursuant to which (inter alia) this Lease was entered into".

32. Clause 2.1 contains the reddendum. So far as material it provides that:

"In consideration for the several Rents hereinafter reserved ... paying during the Term by way of Rent (which shall be deemed to be apportioned between the several Premises in a due and reasonable manner according to the net internal area that the relevant several Premises bears to the entire Premises):

(a) the Basic Rent which shall be paid yearly and in the manner specified in schedule 4

(b) any other sum which may become due from the Tenant to the landlord under the provisions of this Lease."

33. By clause 3.1 LUL covenants to observe and perform the covenants in Schedule 6. Paragraph 1 is concerned with the obligation to pay Rent. In particular:

(a) By paragraph 1(a) of Schedule 6 LUL covenants: "*To pay the Rent at the times and in the manner required by this Lease ...*";

(b) By paragraph 1(d) of the Schedule LUL covenants to supply the Defendant (as "Landlord") *"... within 10 Working days of receipt by it of a true and complete copy*

of any Relevant Estimate or Statement and to notify the [Defendant] as soon as reasonably practicable of any dispute relating to Rent pursuant to the Underlease".

34. Schedule 4 is headed '*The Annual Rent'*. It consists of one paragraph, set out under four sub-paragraphs. It provides materially as follows:

"(a) The annual rent payable by the Tenant under this Lease shall be

(i) the Basic Rent and

(ii) until Implementation of ELLX LUL's Rental Proportion (which for the avoidance of doubt until Implementation of ELLX the Landlord shall be entitled to retain but not further or otherwise)

(b) The Basic Rent and until Implementation of ELLX LUL's Rental Proportion shall subject to the remaining provisions of this schedule be paid by equal quarterly instalments in arrears on each Quarter Day within two Working Days of receipt of such instalments by the Tenant pursuant to the Underlease"

…

Any dispute which may arise between the Landlord and the Tenant under this schedule or other specified provisions of this Lease … may be referred by either party to the determination of an independent chartered surveyor or chartered accountant (as appropriate) … such surveyor or accountant shall (unless the parties otherwise agree) act as an arbitrator in accordance with the Arbitration Acts 1950-1979 …"

35. By clause 3.1 and paragraph 1(d) of schedule 6 LUL covenanted as follows:

"*To supply the Landlord within 10 Working Days of receipt by it a true and complete copy of any Relevant Estimate or Statement and to notify the Landlord as soon as reasonably practicable of any dispute relating to Rent pursuant to the Underlease*"

(ii) Lease C – Other material provisions

36. Clause 1.1 introduces "*Inaccessible Arches*" . There are ten such Arches. Clause 1.1 also defined "*Improved Arch*" and "*Improved Building*" as "*any Arch or Building as has been determined an Improved Arch or Improved Building pursuant to the terms of the Underlease.*"

37. The following provisions of Lease C are also noteworthy:

(a) The definition of "*Occupational Lease*" as meaning a lease etc. "*deriving directly out of the Underlease*".

(b) Clause 6.1, which enables the Defendant to require LUL to surrender any Permanent Arch should the "*Superior Landlord*" wish to regain possession of the same (as to which, see Clause 6 of Lease B, referred to above). The clause provides that LUL shall surrender any such Permanent Arch *"(subject to any Occupational Lease subsisting at that date)*".

(c) Clause 7.7, which provides that the Defendant, in respect of its interest under Lease C, shall not be entitled to raise any objection in respect of the implementation of ELLX or its operation.

(d) Clause 8.1 which confers an option for LUL, exercisable upon notice to the Defendant, to seek the grant of a "*Lease for a further term of 26 years and one day*

commencing on 25th March 2093 and such Lease shall be upon the terms of this Lease (mutatis mutandis)".

(e) Clause 3 and paragraph 3 to Schedule 6, whereby LUL covenants to keep all Improved Arches (other than the Permanent Arches and Inaccessible Arches) painted, repaired or otherwise decorated to the Minimum Specification, and to keep the Buildings in good and substantial repair and condition.

(f) Clause 3 and paragraph 7(g) to Schedule 6, by which LUL covenants:

"*From time to time on written demand and within 15 Working days of such demand during the Term (and at least once a year without demand) the Tenant shall provide the Landlord with particulars of all derivative interests of or in the Premises including particulars of rents rent reviews and service and maintenance charges payable in respect of them and copies of any relevant documents and the identity of the occupiers*"

(g) The Defendant's consent to the underletting of the Premises in the form of Lease D is "confirmed" by paragraph 7 (e) to Schedule 6 of Lease C.

(h) There are numerous (non-rent) cross references to the provisions and definitions of Lease D including: "*Improved Arch*"; "*Improved Building*"; "*Improvement Works*"; "*Minimum Specification*"; "*Permitted Use*"; "*Regulations*"; "*Unimproved Arch*"; "*Unimproved Building*"

Lease D

38. By Lease D LUL underlet the Property to Workspace for a term of 99 years from 25 March 1994.

(i) Lease D – Rent Provisions

39. By clause 2.1 Workspace covenanted to pay LUL "*during the term by way of Rent …*

(a) the Basic Rent which shall be paid in the manner specified in schedule 4

(b) LUL's Rental Proportion which shall be paid in the manner specified in schedule 4

(c) any other sum which may become due from the Tenant to the landlord under the provisions of this Lease"

40. "*Basic Rent*" is defined, by clause 1.1, as follows:

""*Basic Rent" means for each Relevant Year the Percentage of the Net Income*"

41. Each of the three terms appearing in this definition are themselves defined, as follows:

""*Relevant Year" means the year of the Term (calculated in every case from 1st April) which is relevant to any particular calculation*"

""*Percentage" means in respect of Net Income in any Relevant Year (a) for the period until 25 March 1998 85% in respect of any Unimproved Arches or Unimproved Buildings and 44% in respect of any Improved Arches or Improved Buildings (b) for the period from 25 March 1998, 75% in respect of any Unimproved Arches or Unimproved Buildings and 44% in respect of any Improved Arches or Improved Buildings*"

""*Net Income" means Gross Income minus the Expenses in any Relevant Year*". An "*Improved Arch*" or "*Improved Building*" is one in respect of which Workspace has

notified LUL that the "*Improvement Works*" (as themselves defined) have been completed. An "*Unimproved Arch*" (or Building) all those other Arches.

42. In turn, both "*Gross Income*" and "*Expenses*" from the definition of "*Net Income*" are defined, in detailed terms. The definitions provide, inter alia as follows:

> ""*Gross Income" means in relation to each Relevant Year the aggregate of the following actually received by the Tenant: …*"

> ""*Expenses" means in relation to each Relevant Year the aggregate of the following insofar as they are proper and reasonable in amount and properly and reasonably incurred and paid by or on behalf of the Tenant in connection with the Lease or in managing the Premises …*"

"*LUL's Rental Proportion*", which is the second element of the "*Rent*" that Workspace is to pay to LUL, is defined by a formula which equates to 4.275% of "*Gross Income*".

43. Schedule 4, referred to in clause 2.1(a) as stating the "*manner*" in which the Basic Rent is to be paid, comprises a detailed set of procedural provisions, being those in relation to "*Amount*", "*Estimates*", "*Statements*" and "*Verification and Disputes*". These include, within paragraph 4(b), a dispute resolution provision (by default, acting as arbitrator) in respect of "*any dispute … under the schedule …*".

44. Paragraph 1 of Schedule 4 provided, so far as material, as follows:

> "*(a) The annual rent payable by the Tenant under this Lease shall be (i) the Basic Rent and (ii) LUL's Rental Proportion*

(b) The Basic Rent and LUL's Rental Proportion shall subject to the remaining provisions of this schedule be paid by equal quarterly instalments in arrears on each Quarter Day such instalments being based in each case on the estimate of Gross Income and Basic Rent contained in the Relevant Estimate and any balance shall be paid as mentioned in paragraph 3"

(ii) Lease D – Other material provisions

45. There are a number of similar provisions in Lease D to Lease B and/or Lease C. The other noteworthy provisions of Lease D are:

(a) Clause 1.1 contained definitions of "*Improved Arch*" or "*Improved Building*".

(b) Clause 6.2, which requires Workspace to use reasonable endeavours to procure that the Occupational Tenant of any Permanent Arch specified in a Notice given by LUL pursuant to clause 6.1, surrenders the "*Occupational Lease*" in question prior to the surrender of that Permanent Arch by Workspace pursuant to clause 6.1.

(c) Clause 6.5 which provides for "*temporary access*" for LUL to one or more of the 21 "*Temporary Arches*". This right is exercisable by LUL only in order to carry out works to the Structure of the Viaduct "*or in connection with the implementation of ELLX*".

(d) Clause 9.1, which confers an option for Workspace, exercisable upon notice to LUL, to seek the grant of a "*Lease for a further term of 26 years commencing on 25th March 2093 and such Lease shall be upon the terms of this Lease (mutatis mutandis)*".

46. (e) Lease D contained multiple provisions for its termination or determination of parts thereof by LUL at clauses 5 (forfeiture), 7.8 (need for urgent repairs certified by Government) and 8.1(e) (default of Dangerous Use Notice), paragraph 2(a) of schedule 5 (unfitness 3 years after destruction or damage) and paragraph 2(e) of schedule 8 (landlord's pre-emption right)..

The Issues

47. The parties agreed the issues for the Court:

Interpretation

i) Is the correct interpretation of Lease C to the effect that:

a) The First Claimant, and from 2 August 2022 the Second Claimant, has an ongoing liability to pay Basic Rent to the Defendant; or

b) Did LUL's liability to pay the Basic Rent under Lease C cease upon the surrender dated 21 November 2003?

Implied term

ii) Is the term set out at paragraph 44 of the Amended Defence and Counterclaim an implied term of Lease C?

Estoppel

iii) Are the Claimants estopped from denying that the Defendant's interpretation of Lease C set out at i)a) above is correct?

48. The parties further agreed that this is a case where the Court should consider each issue in turn. The parties were agreed that if the Court resolved the case in favour of

the Defendant on issue 1 or 2 that the Court need not determine the legal issues arising from issue 3.

The Claimants' Case

49. The Claimants' case is that each of the issues should be answered in their favour and that the Court should grant a declaration that, in respect of any sums allegedly due to the Defendant (and unpaid), the Basic Rent is not payable under Lease C.

50. By way of background the Claimants assert that the potential benefits to Hackney of ELLX being constructed were very substantial. They included:

(i) Additional business rates of up to £27 million per annum; and

(ii) Substantial beneficial effects on local incomes and unemployment within a deprived area such that over a period of 30 years it was estimated they would generate for the Treasury £67 million in additional taxation and save £12 million in unemployment benefit.

51. On the issues the Claimants assert that:

i) The ordinary meaning of the language of the definition of Basic Rent and the language governing the contractual mechanism for ascertaining the Basic Rent in Lease C is that LUL's obligation under Lease C was to hand over to the Defendant such Basic Rent as it received from Workspace, ascertained and paid under Lease D. When that Lease was surrendered the Claimants' liability to pay rent under Lease C was determined. The Court does not need to look

past the clear and unambiguous wording which is not inconsistent with business common sense.

ii) It is not necessary to imply a term in order to give Lease C business efficacy and nor was it so obvious as to go without saying. It is open to commercial parties to agree a compromise at the end of "the tug o' war of commercial negotiation" and it is not for the court to impose a different solution to that expressed in their agreement. In any event the term sought to be implied contradicts an express term of Lease C.

iii) The conduct relied upon by the Defendant in relation to estoppel by convention is largely admitted. It is however denied that an estoppel has arisen as there was no shared assumption, no reliance by the Defendant, and insufficient detriment (if any, which was not admitted) to support a declaration as sought by the Defendant. If, which was denied, the Defendant proved that all the elements for an estoppel are present then estoppel by convention is not available as a matter of law as it is a variation without consideration case and the Defendant is relying on the estoppel as a sword not a shield.

The Defendant's Case

52. The Defendant's assert that in the light of the background and the interlocking agreements the commercial purpose of the Agreements was to permit LUL to carry out ELLX without capital payment to the Defendant for LUL's use of its land, on the basis of a lease-back scheme that enabled the Defendant to profit from the commercial rental revenue from the Property for a period of 125 years, which rental revenue would be maximized by an expert third party, namely Workspace. The

Defendant denies that it would receive the taxation benefits the Claimants asserted it would derive from ELLX.

53. As to the issues, the Defendant submits, each being in the alternative, that:

(a) Upon the true interpretation of Lease C, "Basic Rent" remains payable notwithstanding the determination of Lease D, calculable in accordance with the machinery for its calculation as set out in Lease D. Any other interpretation is an affront to business sense;

(b) A term is to be implied into Lease C on the grounds of obviousness and/or business efficacy. The terms proposed by the Defendant are not contradictory to the express terms of Lease C;

(c) The Claimants are estopped by convention from denying that – notwithstanding the determination of Lease D - Basic Rent remains payable under Lease C, calculable in accordance with the machinery of Lease D. In particular, following the surrender of Lease D the parties followed a convention that rent remained due and payable under Lease C. That was a convention the parties jointly followed, but for which the Claimants assumed responsibility given they would start each rent calculation process. This was relied upon by the Defendant as shown by their production of rent invoices and acceptance of payments thereunder, to the detriment of the Defendant, who cannot pursue actions against either its former solicitors or the Claimants due to effluxion of time. The Defendant further denies that this is a variation without consideration case asserting that they are not relying on a new post contractual promise and that they are not using estoppel as a shield as any cause of action arises out of Lease C and not the convention.

The Law

54. The case before the Court is a civil case. As a result, the relevant standard of proof is the balance of probabilities. Given the parties seek cross declarations the Court is not assisted by the burden of proof in this case.

55. The parties agreed the broad principles the Court should apply to the issues before it. The parties however then went on to rely on a number of additional authorities each. For example, on issue 1, despite the parties agreeing the 3 key cases from which the principles of construction are to be derived the parties produced 17 additional authorities for the Court. By the conclusion of the trial the authorities bundle ran to in excess of 1700 pages. In my judgment many of the cases produced to the Court were irrelevant or unnecessary. I was strongly reminded of the warning given by Dillon LJ in *Equity & Law Life Assurance Society Plc v Bodfield Ltd* (1987) 54 P&CR 290:

"... to refer to authorities on other documents merely for the purpose of ascertaining the construction of a particular document is to be deplored as a wrong approach and likely to lead to confusion and error."

56. I have read all the authorities produced by Counsel, which necessitated a delay in the production of this judgment. However, in order to avoid an overly long judgment I do not refer to all the authorities produced by Counsel but instead in the paragraphs below I first set out the broad principles agreed by the parties and then in the remaining paragraphs of this section I list the other cases referred to by the parties during the trial. To the extent it is necessary to refer to any of the authorities in relation to the findings of the Court then more detailed reference is made in the findings section.

Interpretation

57. The parties agree that the principles of contractual interpretation are settled. See Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [21]to [23], Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at [15] to [22], and Lord Hodge in *Wood v Capita Insurances Services* [2017] AC 1173 at [10] to [13].

58. Lord Neuberger stated at paragraph 15 of *Arnold v Britton* that:

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", quote Lord Hofmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

59. In *Wood*, Lord Hodge summarised the approach as follows:

"*10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the*

nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

Implication

60. The law on implied terms is equally settled. See *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] AC 742, per Lord Neuberger at [15] to [31], approving and elaborating on the well-known tests for an implied term, set out in the Privy Council case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266. In order to imply a term the Court must therefore be satisfied that:

"(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that 'it goes without saying';

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract."

61. In *Marks & Spencer* Lord Neuberger noted that the process of interpretation is different to the process of implying terms. He went on to say that in "*most, possibly all, disputes about whether a term should be implied into a contract*" it is only after the process of construing the express words is complete, that the issue of an implied term falls to be considered.

Estoppel by Convention

62. The relevant principles are the same whether they apply to a contractual (as here), or non-contractual situation: *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, [2022] AC 886. They are as follows:

"(a) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them, or implicitly shared whether by words or conduct from which the necessary 'crossing of the line' can properly be inferred.

(b) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(c) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(d) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(e) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

The Other Joint Authorities

63. By section 123 (2) of the Local Government Act 1972, except with the consent of the Secretary of State, the Defendant was prohibited from disposing of land for a consideration less than the best that could reasonably be obtained.

64. The parties further jointly referred to *Amalgamated Investment and Property Co v Texas Commerce International Bank* [1982] QB 84, *Johnston & Sons v Holland* [1988] 1 EGLR 264, *Baird Textiles Holdings Ltd v Marks & Spencer PLC* [2002] 1 ALL ER (CA), *HMRC v Benchdollar Limited* [2009] EWHC 1310 (Ch) and *Cherry Tree Investments Limited v Landmain Limited* [2013] Ch 305. On the final day of the trial Mr Hutchings KC and Mr Datta also addressed the Court on the decision of the Supreme Court in *Guest v Guest* [2022] UKSC 107.

65. The Claimants additionally referred to *Stilk v Myrick* (1809) 2 Camp 317, *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439, *Birmingham, Dudley and District Banking Co v Ross* (1887) 38 Ch D 295, *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, *Combe v Combe* [1951] 2 KB 215, *Meravale Builders Ltd v SSEnv* (1978) 36 P&CR 87, *Brikom Investments v Carr* [1979] QB 467, *Syros Shipping Co SA v Elaghill Trading Co The Proodos C* [1981] 3 All ER 189, *Beer v Bowden* [1981] 1 WLR 522 , *Equity & Law Life Assurance Society Plc v Bodfield Ltd* (1987) 54 P&CR 290, *DW Moore& Co Ltd v Ferrier* [1988] 1 WLR 267, *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, *Johnson v Gore Wood & Co* [2002] 2 AC 1, *Tesco Stores Ltd v Costain Construction Ltd* [2003] EWHC 1487 (TCC), *Riverside Housing Association Ltd v White* [2006] HLR 15, *Haward v Fawcetts* [2006] UKHL 9, *Smithkline Beecham plc v Apotex Europe Ltd* [2007] Ch 71, *Steria Ltd v Hutchison* [2007] ICR 445, *Locke v Candy &*

Candy Ltd [2011] ICR 769, *R (Faraday Development Ltd) v West Berkshire Council* [2016] EWHC 2166 (Admin), *Merthyr (South Wales) Ltd v Merthyr Tydfil CBC* [2019] JPL 989, *W Nagel (a firm) v Pluczenik Diamond Co NV* [2019] Bus LR 692, and *Duval v 11 – 13 Randolph Crescent Ltd* [2020] AC 845.

66. The Defendant in its written and oral submissions referred the Court to *British Railways Board v Elgar House* [1969] 209 EG 1313, *Woodhouse AC Israel Cocoa v Nigerian Produce Marketing* [1972] AC 741, *Law Land Company Ltd v Consumers' Association Ltd* [1980] 2 EGLR 109, *Sudbrook Trading Ltd v Eggleton* [1983] AC 444, *Mitsui Construction Co. v AG Hong Kong* [1986] 10 Con LR 1, *The Vistafjord* [1988] Lloyd's Rep 343, *Henderson v Merrett Syndicates* [1995] 2 AC 145, *Coventry Motor Mart Ltd v Corner Coventry Ltd* [1997], 24 March 1997, *Ashworth Frazer Ltd v Gloucester City Council* [1997] 1 EGLR 104, *Republic of India v. India Steamship Co Ltd (No 2)('The Indian Endurance')* [1998] AC 878 (HL) at 913E-G42, *Bromarin v IMD Investments Limited* [1999] STC 301, *Law Society v Sephton* [2006] UKHL 22, *Re Golden Key Ltd* [2009] EWCA Civ 636, *Stena Line Ltd v Merchant Nay Ratings Pension Fund Trustees Ltd* [2010] Pen LR 411, *Great Estates Group Ltd v Digby* [2011] 3 EGLR 101, *Aberdeen City Council v Stewart Milne* (2012) SC (UKSC) 240, *Pathfinder Minerals PLC v Veloso* [2012] EWHC 2856 (Comm), *Napier Park European Credit Opportunities Fund Limited v Harbourmaster Pro-Rata Clo 2 B.V.* [2014] EWCA Civ 984, *Mitchell v Watkinson* [2014] EWCA Civ 1472, *Blindley Heath Investments v Bass* [2015] EWCA Civ 1023, *Mears v Shoreline Housing Partnership* (2015) Con LR 157, *Rivertrade Ltd v EMG Finance Ltd* [2015] EWCA Civ 1295 and *ZVI Construction v University of Notre Dame* [2016] EWHC 1924 (TCC).

The Witnesses

67. I received four witness statements for use at the trial: Two for each party. None of the witnesses was able to give evidence of the factual background to the relevant contractual provisions. The statements sought to deal with the factual elements of issue 3 and the contents of a letter sent by LUL to the Defendant in 2004. The Defendant's witnesses were not required to attend for the purposes of cross examination and their evidence therefore stands unchallenged. The Claimants' witnesses did attend the trial.

68. Each of them was straightforward and I am sure tried to assist the Court to the best of their abilities. The difficulty in this case is the significant period which has elapsed since the events with which the witnesses were dealings. Without prompting Mr Dilling forgot a letter he had written or at least considered the letter was not relevant to the reason it is relied upon by the Claimants. Mr Maher accepted, unsurprisingly, that he could not recall matters given the passage of time. He could not for example recall his exact involvement in drafting the key letter in relation to estoppel.

69. As Leggatt J noted in *Gestamin*

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working

practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth. "

70. Without therefore making any negative findings against the witnesses it is in this way that I have approached the evidence in the present case preferring the express terms of the 2004 letter to the understanding of the parties to it at this date, when it has potentially been affected by this litigation.

The Factual Matrix for Issue 1

71. The background section of this judgment was extensive. It incorporated the extensive background placed before the Court. The parties agree however that not all background is necessarily admissible when the Court deals with the first issue in the case: *Cherry Tree Investments*.

72. Given that the document the Court is construing is a lease which was required to be registered at HM Land Registry and which is therefore expected to be conclusive, the Court is restricted in the background facts it can consider when interpreting it. The Court can only consider documents that would have been available to third parties at the time of execution of the Lease.

73. In this case that means publicly available documents which address the genesis and aim of the Lease, which from their skeleton arguments both parties agree includes the other transactions entered into between the parties and the terms thereof. So those matters set out at paragraphs 8 to 15 and 18 to 46 above are relevant parts of the background, or factual matrix, when interpreting Lease C. However, those matters set

out at paragraphs 16 and 17 above are not relevant to the background, or factual matrix when interpreting Lease C as I have no evidence before me that those documents were public documents which could be accessed by a third party at the time Lease C was executed.

74. Likewise, the behaviour of the parties after the contract was entered into, their negotiations and their subjective intentions are not relevant to construing Lease C.

75. In considering issue 1 I have therefore limited my consideration of the factual matrix to those parts of the background which are relevant and admissible.

Findings

76. I now turn to the issues in the case.

Issue 1

77. The starting point in interpreting the rental provisions of Lease C is to read the lease as a whole and to see if the rental provisions of the lease are ambiguous or not in the context of the admissible background.

78. Lease C is a professionally drafted contract of length and with a number of appendices to it. It is not a contract without difficulty as shown by Schedule 4 to the Lease, which provides for calculation of the rent. It is not however, in my judgment, a contract which is so poorly drafted that the principles in *Mitsui* are invoked. Schedule 4 simply has a couple of words missing. That is not the same thing in my judgment as the Schedule, let alone the Lease, lacking in precision.

79. Looking at the rental provisions of the Lease, and in particular the reddendum, this is not a case where the Lease provides that the rent is payable yearly as is the case in many of the authorities put before me. This is a case where the rent identified in the

reddendum is payable at the times stated therein. In this case therefore there is no overriding requirement on the Claimants to pay rent yearly. The requirements are to pay the Basic Rent, as defined, yearly and then to pay other sums as they fall due.

80. The definition of Basic Rent is defined solely by reference to Lease D. This is, in my judgment, crucial to the answer to this issue. The definition of basic rent is not a calculation exercise as was the case in *Sudbrook*. That is dealt with in Schedule 4 to Lease C. The definition of Basic Rent therefore states what is payable on a yearly basis under clause 2.1(a) of Lease C.

81. Reading Lease C as a whole, as part of the suite of agreements signed by the parties on 3 May 1996, and taking into account the admissible background, in my judgment, there is no ambiguity in the definition of Basic Rent. The definition is clear: Basic Rent is payable by reference to sums received under Lease D. There is nothing which sustains the submission that there is ambiguity surrounding what the express words mean or that there is more than one interpretation of the express words.

82. The Defendant's submissions on the counter-factual implications if Lease D had been surrendered immediately after execution do not assist the Court in interpreting Lease C given the clear wording of the Lease. Nor is there a conflict between the clear wording and clauses 5.1 and 7.6 and/or paragraph 7(g) to Schedule 6 of Lease D.

83. There is, I accept, a difficulty in Schedule 4 in relation to what words should be read into the Schedule (both sides agreeing that an implication of some words is necessary here). The parties contend for "*on or after*" or "*or*" respectively. Having considered their submissions I cannot accept that either of these implications work. "*On or after*" does not fit the sentence into which the words are sought to be implied and the simple insertion of "*or*" adds a greater level of uncertainty into the clause. If I had had to

make a decision on this point then having considered how the rental provisions in Lease D worked then I would have favoured the words "*or, if later*". This then deals with the issue raised by the Defendant in relation to balancing payments and adjusted instalments under Lease D and how they are to be paid to the Defendant under Lease C. However this does not result in ambiguity in the definition of Basic Rent or the reddendum of Lease C.

84. The express terms of Lease C which provide for what is to be paid by way of rent, as opposed to how that is to be calculated, can be construed on a straightforward textual approach on the face of the documents, even taking into account the admissible background. Such exercise results in the construction contended for by the Claimants.

85. In contrast to this straightforward reading of the definition of Basic Rent from the express terms of Lease C, the construction called for by the Defendant requires the reading into the lease of an entire new subclause. In my judgment the addition of a whole new sub clause in this case goes well beyond the court construing the Lease (*Cherry Tree Investments*), especially given on the Defendant's proposals any such term will require further modifications to be read into other terms of Lease C and Lease D. In my judgment this is too extreme a process for the court to undertake, even on an iterative construction, of an unambiguous clause. Rather to reach the conclusion the Defendant seeks is to engage not in construction of any type but in rectification (which is not sought in this case) or in implying a sub-clause into the lease (as to which see the next issue).

86. Finally given that the relevant words of Lease C are clear and give rise to no ambiguity there is no need for the Court in construing the Lease to look at the business sense (*Rainy Sky*, para 23 per Lord Clarke)

87. In my judgment therefore the proper and correct construction of Lease C is as contended for by the Claimants.

Issue 2

88. The process of construing and implying words into a legal document are different and necessarily sequential. Having determined how the definition of basic rent in Lease C is to be construed I now turn to whether it is appropriate in this case for the Court to imply into the Lease a clause providing for the payment of basic rent on a yearly basis by the Claimants to the Defendant in the event that Lease D had determined.

89. This requires me to consider if the term sought to be implied by the Defendant in this case meets the necessary test for implication. Given the comments of Lord Neuberger in *Marks & Spencer*, I will leave the issue of whether the proposed term is reasonable and equitable until last.

90. Before turning to this issue however it is necessary to note that the Defendant in its pleaded case contended for an implied term as follows:

> *""**Basic Rent**" means for each Relevant Year the Basic Rent (as defined in the Underlease) that is received by the Tenant pursuant to the provisions of the Underlease or pursuant to the Tenant's reversionary interest in the Underlease (if determined) but ascertained in accordance with the Underlease with all necessary modifications (and which for the avoidance of doubt excludes LUL's Rental Proportion)" (the underlining being the term to be implied*)".

91. In his oral submissions Mr Hutchings KC for the Claimant took the point that if Lease D was terminated there is no Basic Rent as defined in the Underlease that is received by the Tenant whether pursuant to Lease D or at all. The Claimants would instead

receive occupational rents. Mr Bhose KC contended that this was a new point taken in closings by the Claimants and that the Defendant had not properly had the chance to answer that criticism but that if the point had merit, which the Defendant denied, it could be readily rectified by a simple change of wording. I therefore gave Mr Bhose KC the opportunity to file an alternative form of wording, which he did in a note to the Court:

*""**Basic Rent**" means for each Relevant Year:*

(a) the Basic Rent (as defined in the Underlease) that is received by the Tenant pursuant to the provisions of the Underlease

(b) where the Underlease is determined the sum that is received by the Tenant ascertained in accordance with the provisions of the Underlease (including its definition of Basic Rent) with all necessary modifications

(and which for the avoidance of doubt excludes LUL's Rental Proportion)"

92. The Defendant submits that each alternative term has the same legal effect.

93. Having considered the matter, whilst the legal effect of the terms should be the same, the alternative form of wording is clearer than the previous wording and avoids the interpretation issue raised by Mr Hutchings KC, whether that issue was right or not. If a court is to imply a clause into a contract it must be clear and should seek to avoid interpretation issues. For the purposes of this judgment therefore when considering whether to imply a term into the contract I will consider the Defendant's alternative wording.

Business Efficacy

94. This involves a value judgment, and as stated by Lord Neuberger in *Marks & Spencer*, at paragraph 21, the more helpful way of putting the requirement may be to ask if "*without the term, the contract would lack commercial or practical coherence*". In my judgment without the implied term sought by the Defendant Lease C does lack commercial and practical coherence within the suite of agreements executed on 3 May 1996.

95. Immediately prior to the suite of agreements being executed the Defendant owned the Property and was generating income from it. The Defendant knew that this was significant. Both parties wished to see ELLX take place for their own reasons: LUL wished to improve their offering of transport to the public, the Defendant wished to see the area it was responsible for improve. Both of these reasons are laudable and entirely in keeping with the duties of the parties as public bodies. However, the completion of ELLX did not require LUL to acquire the rights to the rental from the commercial premises, especially given LUL was not funding the works to the Property. In other words LUL needed the structure but not the occupational tenancy income therefrom.

96. A series of transactions were therefore entered into whereby LUL owned the Property subject to a put and call option in the Principal Agreement. However the income from the Property, in so far as it was commercial rental income from tenants was to be collected by Workspace, which would then take its cut reflecting if it had improved the Property, with the balance paid up the chain to the Defendant. There is no suggestion on the papers before me that the rental of the units by way of Occupational Tenancies would only work if Workspace were and remained party to the series of

agreements. The facts have of course shown that this is not necessary as occupational tenancies of the Property have continued despite the surrender of Lease D.

97. Yet without the implication of a term into Lease C the Defendant's significant income from the Property was taken from it due to a commercial decision reached between LUL and Workspace, without any input from the Defendant, and the income is now fully vested in the Claimants. At the same time the suite of agreements have become a burden to the Defendant rather than a benefit as the Defendant must still pay the rent under Lease B to the Claimants, even if it is just £1 per annum. There was, and is, no commercial reason for this to occur. It is not practical, it does not reflect the financial input to the overall project for ELLX and the improvement of the Property, nor does it reflect the commercial purpose of the entire suite of agreements.

98. Whilst I do not find the Lease as written was commercially absurd for the Defendant to have entered into, given that Hackney Borough citizens would benefit from the new public transport offering, it is in my judgment improbable that the Defendant as a public body would have agreed to the outcome reflected in the express words of Lease C. It would be impossible, if questioned by the residents of the Borough, to defend the loss of rental generating property for consideration of £1 under the Principal Agreements against a liability to refurbish part of the Property and a liability of £99 under Lease B.

99. Lease C as written simply does not make business sense nor does it reflect business efficacy when Lease C is looked at in the context of the transactions as a whole. Business sense and efficacy points towards the parties having overlooked the need for Lease C to provide an alternative calculation mechanism if Lease D was determined in some way. I am supported in this view by the decisions in *Beer v Bowden* and

Coventry Motormart which note that "*if the express provisions of an existing lease result in there being no rent payable, an implication of term will be justified*".

100. The implication of such a term here would entitle the Defendant to continue to receive a proportion of the substantial yearly rent from the Property protecting its commercial rental stream whilst allowing the landlord of the occupational tenants, now the Claimants, to receive the other portion of the rent with that portion directly reflecting any improvement to the Property. In my judgment implication of a term as sought by the Defendant is justified on business efficacy basis. It is further supported by the counter-factual analysis that would have applied if ELLX had not been constructed. In such a scenario the Claimants would have been entitled to no rent under Lease C whilst upon the payment of £1.00 the Defendant would again have been the freehold owner of the Property but subject to Lease D, meaning the Defendant and Workspace retained a commercial rental income from the Property.

Obviousness

101. A term will not be implied unless it is obvious both that a term ought to be implied and also what term is to be implied. This is the "*officious bystander*" test: see Lewison: The Interpretation of Contracts (7th Ed) at paras 6.90 – 6.102. The officious bystander should be a person equipped with all the background knowledge that would have been available to the parties, and which would have been admissible for the purpose of interpreting Lease C.

102. It is necessary to pose the question they would ask with the "*utmost care*": Lewison and *Marks & Spencer* (at [21]). In my judgment an appropriate question, to be asked by them, on 2 May 1996, would have been as follows:

Do you want to include a provision that the determination of Lease D will make no material difference to the bases for, and calculations of, the Basic Rent payable under Lease C?

103. Based on the admissible background and the suite of agreements in my judgment the unanimous answer of notional reasonable people in the positions of LUL and the Defendant would have been "*yes, of course*". There could have been no basis for disagreement by either of these notional reasonable people, in the light of the existing express terms of the suite of agreements.

104. The bystander would then in my judgment have wanted to clarify what that provision would be by asking

Do you agree that if Lease D is determined before Lease C for any reason, that the Basic Rent payable under Lease C should be the sum that is received by the Tenant pursuant to its reversionary interest in Lease D but ascertained in accordance with Lease D, with such modifications that are necessary to reflect the fact that Lease D has been determined?

105. Again, in my judgment having regard to the background to the Lease and the suite of agreements the answer would have been "*yes*". The determination of Lease D as between LUL and Workspace should not have made any difference to the financial terms of the deal as between LUL and the Defendant, nor should the receipt of rent by the Claimants as opposed to Workspace have affected the entitlement or quantum of the sum to be received by the Defendant.

106. I agree with the Defendant that the case before me is closely analogous to the position in the *Aberdeen City Council* case. The suite of agreements together with background

show which contractual solution would have been preferred.

107. The fact that Lease C is a detailed commercial lease and was part of a broader commercial transaction within which all parties were legally represented, is no bar to implication. As Lord Hodge recognised in *Wood*, negotiators of "*complex formal contracts may often not achieve a logical and coherent text*" (at [13]). Similarly, the risks of possible future events occurring (and the consequences if they do) may be overlooked when the most complex of contracts are being drafted: heavy focus on what is going to happen can obscure consideration of what ifs. Despite the very detailed drafting that clearly went into the "*Basic Rent*" provisions in Lease D, the entirely separate point of what was to happen if Lease D was determined, was simply, in my judgment, overlooked in Lease C

Clear Expression

108. The proposed clause is capable of clear expression so as to make it enforceable. It includes a requirement to make "*all necessary modifications*". This requirement is needed because Lease D proceeds on the basis, for example, that "*Expenses*" are those elements "*incurred and paid by or on behalf of the Tenant*" under Lease D, and that "*Gross Income*" means the aggregate of various elements "*actually received by the Tenant*" under Lease D. That will not be the case if Lease D is determined.

109. This does not however render the Implied Term insufficiently precise. The proposed term at paragraph 91 above acknowledges that the moneys have not been received by the Tenant under Lease D but have been received through other means. It then provides that the Lease D calculation mechanism applies to that income. That mechanism is known. This is not therefore imprecise and can clearly be operated given the parties did so between 2004 and 2019.

110. Further Leases C and D provide a contractual means of determination of "*any dispute which may arise*", including "*the Basic Rent*", by way of referral to an independent surveyor or accountant, the default position being that they are to act as an arbitrator. Disagreements as to what is or is not a "*necessary modification*", if they arose despite experience suggesting this is unlikely, will therefore be capable of resolution. In circumstances where the parties to Lease C have made express provision for the resolution of disputes by expert professionals the inclusion within the term of what are or are not "*necessary modifications*" in Lease D is appropriate.

Inconsistency

111. The proposed implied term is not, in my judgment, inconsistent with any of the express terms of Lease C. Mr Hutchings KC for the Claimant asserted that the implied term is inconsistent with the express wording of the definition of Basic Rent. I disagree. Whilst the express wording, when construed refers to the need for Lease D to exist for Basic Rent to be paid, that is not inconsistent with an implied term that rent remains payable if Lease D does not exist. There is a difference between saying "*x happens if y exists*" and "*x only happens if y exists*". Lease C does not provide that Basic Rent is payable if and only if Lease D subsists. There is therefore no linguistic inconsistency in this regard, nor any logical inconsistency.

112. Having read Lease C, and indeed the entire suite of agreements executed on 3 May 1996, there is no term in Lease C, or in the suite, which is inconsistent with the term sought to be implied. There is no clause which provides that rent is only payable if Lease D has not been determined. Nor do the documents require such by way of operation. There is therefore no direct linguistic inconsistency or substantive

inconsistency. The proposed implied term does not therefore do undue violence to Lease C or to Lease D.

Reasonable and Equitable

113. Finally when the term sought to be implied is reviewed in the light of the background material and the entire suite of agreements entered into between the parties then in my judgment the Implied Term is obviously reasonable and equitable for the reasons set out at paragraphs 96 to 98 above.

114. For all these reasons, I find that the test for implying an implied term into Lease C are met and I imply into the Lease the alternative formulation set out at paragraph 91 above.

Issue 3

115. Given the manner in which I was asked to approach this case by Counsel, i.e. to answer each issue in turn and to only deal with an issue to the extent to which I had found for the Claimants on the previous issue, it is strictly not necessary for me to consider issue 3.

116. Having however considered the matter following the conclusion of the trial in my judgment it would be wrong for me not to address the factual matters that arise in relation to issue 3. I conducted the trial of this action and as part of that trial heard oral evidence. That oral evidence went to issue 3. Whilst Counsel for the parties did not want me unless absolutely necessary to engage with what they called "*the legal issue in relation to issue 3*", any future court asked to determine that will need to know the factual context in which that issue is to be determined. In my judgment therefore it is appropriate for me to set out the factual findings I would have made in

relation to the elements of estoppel by convention. If this matter goes further an appellate court will then be able to address the legal application of an estoppel by convention without the need to remit the matter.

117. I therefore note that in relation to estoppel by convention I would have made the following findings (on the counter factual assumption that I am wrong on issue 2):

i) Clause 7.7 in Leases B and C does not prevent a claim based on estoppel by convention as those clauses relate to the implementation and operation of ELLX. The dispute between the parties has not arisen in such context. It has arisen in relation to the management of the tenancies of the Property.

ii) There was a common assumption between LUL, RfL and the Defendant which operated between 2004 and 2019 that rent remained payable by LUL and/or RfL to the Defendant under Lease C despite the surrender of Lease D. LUL, RfL and the Defendant assumed that the rent was payable by application of the machinery in Lease D to the rent received by LUL and/or the Claimants under the occupational leases, taking into account LUL and the Claimants' expenditure. This is shown by the contemporaneous correspondence between LUL, RfL and the Defendant throughout 2004 and 2019, the payment of rent by LUL and/or RfL in that time and the CPO compensation paid by LUL in 2009 for the surrender of Dunloe Street. This also shows that the common assumption was expressly shared between LUL, RfL and the Defendant or was implicitly shared by words and conduct which crossed the line.

iii) The letter dated 25 November 2004 does not detract from the common assumption despite the letters reference to "*The rental income that L B Hackney is due is derived from Lease D, which no longer exists, as LUL are*

the direct Landlords to the occupational tenants. This lease also covers the issue of Improvements and expenses. The current legal situation is deficient and we would like to re-negotiate the lease interests to correct these deficiencies". This is because the letter referred to the rent due to the Defendant being derived from Lease D, not that the rent was no longer payable. Indeed LUL knew of the surrender of Lease D but expressly recorded in the letter that "*We are writing to confirm the rental payment that is due to be made to L B Hackney for the financial year 2003/4. Please note that an anticipated payment of £215,754 will be made, this is the difference between the total rent payable and that which has already been paid on account. It is subject to a final adjustment between LUL and Workspace. Please can you arrange for your accounts department to invoice LUL? This is the due proportion of rent that LB Hackney is due under the terms of Lease A - D. ... and at the end of the year any additional rent as may be due. We would like to confirm that LUL/ELLX project are proposing to spend £724,000 on "improving " the Unimproved arches which include Arch 367-374, Arches 389-392 and Arches 345, 348, 349, 350 and 352. Under the terms of the Lease D it is noted that "Improvement" expenditure can be off set against the rental income. It is therefore expected that L B Hackney will receive no rent from the Kingsland Viaduct for the year 2004/5. We would also like to advise that we are currently marketing vacant arches and premises, which will be let on LULs "standard" operational tenancy agreements that are contracted out of the L& T Act. Whilst the majority of agreements will be for a term of three years it is anticipated that there will be cases where a tenant is proposing significant investment. In these cases we will be prepared to grant a longer*

lease but again it will be contracted out of the Landlord and Tenant Act. Once again we would like to confirm that LUL are interested in entering into amicable negotiations concerning the lease structure and particularly the need for future Arch upgrades such as the lining. The expenditure should be deducted, as are general expenses from the gross rental income received from the viaduct. We would therefore like to arrange a meeting to discuss this proposal."

iv) There was therefore no suggestion in the 2004 letter that the surrender of Lease D had terminated LUL's obligation to pay rent under Lease C. This was first asserted by RfL's in the letter dated the 18th of December 2019: "*I write to you with the objective of setting out RfL's view that it has been mistakenly paying the Council rent under Lease C (defined below). As you will see, it follows from our analysis that any money paid by mistake should be repaid and the Council should accept that no further rent is payable*".

v) Given in 2004 LUL knowing of the surrender expressly acted on the basis that rent remained payable and that in each financial year thereafter until 2019 it was LUL or a Claimant who wrote to the Defendant to start the process by which an invoice would be raised for the rent the Claimants or their predecessors assumed some element of responsibility for the common assumption.

vi) The Defendant relied on the common assumption as shown by the requests for invoices and in producing the invoices which were then sent to the LUL or RfL for payment

vii) This was a mutual dealing between LUL, RfL and the Defendant that was subsequent to the first expression of the common assumption in 2004.

viii) The loss of opportunity to bring a claim against the Claimants for derogation from grant is not, in my judgment, a detriment. Given to get to this point a Court would have to have determined that Lease C was to be construed on its face and that an implied term ought not to be implied regarding rent it is in my judgment extremely difficult to see how in acting in accordance with the terms of Lease C the Claimants were derogating from any grant given the terms of Lease C were known at the time Lease B was executed. Further there would be no obvious need for a term to be implied into Lease C restricting the Claimants' right to terminate Lease D without the Defendant's consent, given the Claimants' right to compulsory purchase orders under the 1997 Order.

ix) The Defendant has however suffered a detriment as a result of the common assumption. I make clear in this section that the former solicitors acting for the Defendant in relation to Lease C have taken no role in these proceedings and therefore I make no findings against them. However, it is clear that the Defendant had solicitors who acted for them in relation to Lease C and the suite of agreements. On the facts before the Court from the detailed background it was a key factor in the Defendant's attitude to the scheme that it should be able to keep its income stream from the Property even if ELLX proceeded. There is no evidence before me that the Defendant changed in this regard during the course of negotiations. Given this factual background therefore it is at least arguable that the Defendant would have instructed its solicitors to ensure that the Defendant had a right, throughout the period of the

Leases under the scheme, to some of the rent from the Occupational Tenancies.

x) This cannot be stated for certain due to the passage of time, the loss of the retainer for the solicitors and the loss of the solicitors' files in a fire. However, it is at least arguable. On that assumption the solicitors were acting for the Defendant and would have owed them contractual duties to comply with their retainer and also a concurrent duty in tort to act with reasonable skill and care (section 13 of the Supply of Goods and Services Act 1982) due to their assumption of responsibility as advisers in relation to the Lease. The solicitors were therefore either required to draft the agreements accordingly, which for the reasons set out at issue 1 was not done, or to advise the Defendant that the proposed draft Lease did not achieve their ambitions. There is no evidence before me that this occurred. I accept, again, however that this might have been shown by the lost files.

xi) On the evidence before me, which I repeat does not include evidence from the Defendant's then solicitors, the Defendant therefore could have presented a claim, with a real prospect of success, for breach of duty against the solicitors for the loss of a share of the rent received by the Claimants from the Property for the remainder of Lease C (that being the loss caused by any breach). There is no reason on the papers before me to suppose that any loss proven as a result of a breach of duty would not have been recoverable as a matter of law.

xii) The cause of action in that regard accrued when Lease C was signed, 3rd May 1996, as from that moment the Defendant was exposed to the risk that if Lease D was determined in any way the Defendant would receive no rental from the

Property (*DW Moore and Co Ltd v Ferrier* [1988] 1 WLR 267). Further the Defendant's rights under any Compulsory Purchase Order were not as valuable as they ought to have been demonstrating, in my judgment, that this is not a case where the accrual of the cause of action was delayed until a contingency occurred.

xiii) The primary limitation period for the claim in tort and contract expired before Lease D was surrendered, and the surrender notified to the Defendant, which on the evidence before me occurred by way of the 2004 letter. However pursuant to sections 14A and B of the Limitation of Actions Act 1980 the Defendant could seek to rely on the extended limitation period for actions founded in tort where the actual damage (being a necessary part of an action in tort) is not known at the time the cause of action accrues. This extends the limitation period in this case to 3 years from the date of actual knowledge or a 15 year longstop period.

xiv) Given the terms of the correspondence between LUL, RfL and the Defendant between 2004 and 2019 and the uncontested evidence of the Defendant at trial there is no factual basis to conclude that the Defendant had actual knowledge of the material facts relating to damage before the expiry of the longstop period in 2011. Further the 2004 letter, whilst raising that the surrender of Lease D had created a lacuna in the agreements, proceeded expressly on the basis that rent remained payable. Hence until 2019 LUL, RfL and the Defendant jointly acted on the basis that the lacuna in the agreements would not result in a loss to the Defendant of a share in the occupational tenant's rental payments. Given that LUL, RfL and the Defendant jointly acted on that

basis (even if they did not tell each other why), the Defendant could not, in my judgment, have understood, either actually or constructively, from the material facts before it that it had suffered loss or that proceedings could be investigated.

xv) As a result, during the longstop period the Defendant did not have the requisite knowledge of loss (section 14A(6) of the Limitation Act 1980) as any knowledge of loss did not relate to the financial loss of Basic Rent payments. It was not therefore a loss which justified the investigation of proceedings (section 14(7) of the Limitation Act 1980). This was directly due to the common convention between LUL, RfL and the Defendant.

xvi) What is clear however is that when the Defendant became aware of the potential loss of the rental income in 2019 they instantly (within 12 minutes) placed the matter in the hands of solicitors to seek to resolve the issue. From this almost instant action to the threat of loss of income, in my judgment, the Court can draw the inference that if the Defendant had had the relevant knowledge between 2004 and 2011 it would have taken legal advice on its position as regards its former solicitors.

xvii) Whilst the Court cannot say that the potential claim against the solicitors would succeed, not least due to the loss of the solicitors' files and the passage of time, the claim would have a real prospect of success for the reasons set out above. The claim if successful would be extremely valuable. The Defendant has therefore lost the opportunity to explore and, if appropriate, bring that claim before the Courts. This is a detriment suffered by the Defendant as a result of the convention

xviii) Whilst an estoppel is generally suspensory of rights and can, in an appropriate case, be revoked by the giving of notice (by analogy *Collier* paragraphs 34 to 40, per Arden LJ) in this case it would be unjust and unconscionable for the Claimants to seek to revoke the convention and to rely on the strict terms of Lease C. The detriment to the Defendant (the loss of opportunity to sue its solicitors for the alleged negligence) will last for the entire duration of Lease C. It is not a detriment which can simply be resolved following the giving of notice.

xix) I accept that the loss of the Claimants' strict contractual rights must be weighed against this detriment. However, it is, in my judgment, a greater detriment to the Defendant to be denied any rent from the Occupational Tenancies and the opportunity to pursue their former solicitors over such loss, than the loss of part of the rent from the occupational tenancies given LUL and RfL have been willing to accept that loss between 2004 and 2019 as shown by their active participation in the convention during that period.

xx) As a result, and if estoppel by convention can succeed as a matter of law, it would in my judgment be unjust and unconscionable to allow the Claimants to seek to resile from the convention and to rely on the strict wording of Lease C.

118. Given Counsel's approach to the case and knowing this matter may come before an appellate court I will say no more on this issue save to note my gratitude to Mr Hutchings KC and Mr Datta for their submissions on this issue including their willingness to address the decision in *Guest* on the day the decision was published.

Conclusion

119. For the reasons set out herein I therefore dismiss the Claimants' case and grant the Defendant's case to the extent of making a declaration that the term set out at paragraph 91 hereof is an implied term of Lease C. I will ask Counsel to seek to agree an order reflecting the terms of this judgment including any necessary declarations and orders as sought in paragraphs two to five of the prayer to the Amended Defence and Counterclaim. If the parties are unable to agree the terms of an order then this will be considered at a costs and consequentials hearing which will be listed in due course.

HHJ Claire Jackson

12 December 2022