Neutral Citation Number: [2024] EWHC 3544 (Ch)

Case No: BL-2021-000862

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 12th November 2024

Before:

MR JUSTICE RICHARDS

- -

Between:

SOUTH BANK HOTEL MANAGEMENT COMPANY LIMITED	**Claimant**
- and -	
(1) GALLIARD HOTELS LIMITED	**Defendants**
(2) STEPHEN STUART SOLOMON CONWAY	
~~**(3) CHRISTOPHER JOHN DUFFY**~~	
(4) LODGESHINE LIMITED	
(5) GALLIARD HOMES LIMITED	

Case No: PT-2021-000367

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

Between:

LODGESHINE LIMITED

Claimant

-and-

SOUTH BANK HOTEL MANAGEMENT COMPANY LIMITED

Defendant

- -
- -

- -
- -

MR MATTHEW BRADLEY KC (instructed by **PCB Byrne LLP**) for the **Claimant**

MR NICHOLAS TROMPETER KC (instructed by **DMH Stallard LLP**) for the **Defendants**

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Approved Judgment

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MR JUSTICE RICHARDS:

1. This is my judgment on the various consequential matters. I use defined terms used in my judgment reported at [2024] EWHC 2484 (Ch) unless a contrary interpretation appears.

Galliard's requested declaration

2. Galliard requests a declaration in the following terms:

> Such equitable interest as SBHMC may have had in Lodgeshine's leasehold title to the [Annex] … is extinguished.

3. That proposed declaration is quite broad in its scope. SBHMC did not plead a remedy in this form and, therefore, the scope of the declaration has not been extensively explored at trial. I am concerned that there is some risk of unintended consequences if I make a declaration in broad terms that have not been fully examined at the trial.

4. The Defendants suggest that it might be possible to deal with the risk of undue breadth by limiting the scope of the declaration to equitable interests arising as a result of the FSC. That perhaps would have dealt with some obvious concerns, such as the risk of completely extraneous equitable interests being inadvertently extinguished. However, on balance, I remain concerned about a residual risk of unintended consequences. I am reinforced in my conclusion by considerations of utility. My judgment is there for all to see and I do not consider that making the declaration adds sufficiently to the judgment to warrant making it. I will not make the declaration.

Costs of the Main Claim - Lodgeshine

5. The issue is whether Clause 4.4 or Clause 4.33 of the Underlease entitles Lodgeshine, contractually, to its costs of the Main Claim on an indemnity basis. I will come on later to a similar question relating to Lodgeshine's costs of the Rent Claim.

6. Clause 4.4 of the Underlease contains a covenant by SBHMC that provides, so far as material, as follows:

> 4.4.1 To pay and indemnify the Landlord [i.e. Lodgeshine] and (as the case may be) any superior lessor any mortgagee or their or the Landlord's respective professional advisers against all reasonable costs and expenses properly incurred by them in connection with:-…
>
> > 4.4.1.3 the recovery or attempted recovery of arrears of rent or other sums due from the Tenant [i.e. SBHMC]…

7. The central question is whether that extends to the Main Claim. Lodgeshine submits that it does because the Main Claim was a mechanism by which SBHMC sought to set aside the Underlease and so avoid its liability to pay rent and other sums to Lodgeshine. Since Lodgeshine participated in the Main Claim to preserve its entitlement to rent on the Underlease, it submits that its costs were "in connection with" the recovery of rent and so the contractual promise in Clause 4.4.1 is engaged.

8. SBHMC objects that this contractual claim is not pleaded. That is true but it seems to me not to be an absolute bar to my consideration of the point. I have to consider costs anyway and when I do so, I have to choose the basis of assessment that corresponds most closely with any contract that the parties have entered into (see *MacLeish v Littlestone* [2016] 1 WLR 3289). Therefore, it seems to me that unpleaded or not, I should at least consider the terms of Clause 4.4.1. That said, the fact that the point is not pleaded has a significance that I will come on to.

9. The question is whether as a matter of principle any costs associated that Lodgeshine incurred with the Main Claim are necessarily "in connection with" the recovery, or attempted recovery, of arrears of rent. One way to test that is by looking at what the Main Claim involved.

10. On its face, the Main Claim concerned matters going well beyond matters dealing with SBHMC's obligation to pay rent. There are allegations of breach of trust against Galliard Hotels, allegations of breach of directors' duties against Mr Conway, allegations that Galliard Hotels, Lodgeshine and Galliard Homes participated in economic torts and allegations that Lodgeshine received assets knowing that it was obtaining them in breach of trust. Even the Invalidity Claim goes beyond entitlement to rent and argues more generally that "nothing had happened" when the Annex Lease Scheme was purportedly implemented so that SBHMC's freehold interest in the Annex was unencumbered.

11. I also note that the claims brought specifically against Lodgeshine pursuant to the Main Claim were economic tort claims not directly concerned with rent and knowing receipt claims that were really concerned with what Lodgeshine knew.

12. I accept that Lodgeshine had an interest in the outcome of the Main Claim. That is clear from the way matters were conducted at trial. Both sides proceeded on the basis that aside from rectification and disputes about calculation, the Main Claim would largely determine the Rent Claim. The difficulty I have is how I can say at present that <u>everything</u> that Lodgeshine incurred in connection with the Main Claim was in connection with the recovery or attempted recovery of rent.

13. For example, if Lodgeshine paid £50,000 for an opinion on prospects of success of an economic torts claim against it, I find it difficult to say that that was obviously "in connection" with recovery or attempted recovery of rent. Lodgeshine could conceptually be a perpetrator of an economic tort and also entitled to receive rent. Conversely, if Lodgeshine paid £50,000 for a memorandum as to why the Lease and Underlease were duly executed, I find it much easier to see a basis on which it could be said that that was incurred in connection with the recovery or attempted recovery of rent.

14. Mr Trompeter KC said in his submissions that it is not really possible to give much colour on billing arrangements between members of the Galliard group as to how Lodgeshine shared costs as those might be privileged. I am prepared to assume that there is some difficulty of this kind but it does not help. I do not consider that I can determine that all Lodgeshine's costs fall within Clause 4.4.1 in an evidential vacuum even if there is a reason for that vacuum. Had the matter been pleaded, perhaps some way could have been found of explaining what Lodgeshine had paid for but, in the event, it has not.

15. Mr Trompeter KC suggested that it might be possible to "draft around" the issue by specifying some broad parameters that will determine which of Lodgeshine's costs of the Main Claim are covered by Clause 4.4.1 and which are not. However, given the evidential vacuum consequent on the fact there is no pleaded position as to the effect of Clause 4.4.1 in the light of costs that Lodgeshine has paid, it would be difficult to do more than say that Lodgeshine's costs of the Main Claim are covered by Clause 4.4.1 if they are incurred in connection with the recovery of rent. That would achieve little, since it just spells out the terms of the contract.

16. Accordingly, I will not determine that all of Lodgeshine's costs of the Main Claim necessarily fall within Clause 4.4.1.

17. Clause 4.33 contains a covenant by SBHMC:

> To keep the Landlord fully indemnified from and against all actions claims and losses arising in any way directly or indirectly out of the state of repair or use of the Premises or any breach of the Tenant's covenants contained in this Lease or arising from any act neglect or default by the Tenant any undertenant or their respective servants or agents or any person on the Premises with the actual or implied authority of any of them

18. Clause 4.4.1 is the most natural route for Lodgeshine to claim a contractual entitlement to its costs. I do not consider that the position is any better under the "fall-back" Clause 4.33. The evidential vacuum is just as acute, in my judgment.

19. I will not determine that Lodgeshine is entitled to a contractual indemnity for all costs of the Main Claim.

Clause 4.4.1 – indemnity basis or standard basis?

20. It is common ground that Clause 4.4.1 applies to Lodgeshine's costs of the Rent Claim and the dispute between the parties in that regard, therefore, was as to whether it corresponds to standard basis or indemnity basis. I will consider that issue now since I have just been considering the wording of Clause 4.4.1, even though the issue is strictly relevant to the costs of the Rent Claim rather than the Main Claim.

21. As I have said, *MacLeish v Littlestone* is authority that I should select the basis of assessment for the costs of the Rent Claim that corresponds most closely with the Underlease. Various authorities demonstrate how much the precise wording of the contract matters.

22. So, for example, in *Primeridge Ltd v Jean Muir Ltd* [1992] 1 EGLR 273 an obligation to pay "all proper costs charges and expenses … incurred by the Landlord … [i]n connection with … the recovery of arrears of rent" was held to correspond to the standard basis because of the qualification by reference to "proper costs".

23. In *MacLeish* itself the tenant's obligation was to pay "all costs and expenses … incurred by the lessor … in or in contemplation of … the recovery, or attempted recovery of arrears of rent". The Court of Appeal held that it was not particularly

relevant that this phrasing did not require only that "reasonable" costs would be covered since under both a standard and indemnity basis of assessment a receiving party had no entitlement to unreasonable costs. However, the Court of Appeal did consider that it was significant that the covenant extended to "all costs and expenses … which may be incurred" without qualification and concluded that this formulation corresponded to an indemnity basis.

24. In *Criterion Buildings Ltd v McKinsey* [2021] EWHC 314 (Ch) HHJ Paul Matthews held that an obligation to pay costs "properly incurred" was consistent with an indemnity basis. He doubted the conclusion in *Primeridge Ltd v Jean Muir* but in any event held that there was a difference between the concept of "proper costs" and "costs properly incurred".

25. In another case, *Alafco Irish Aircraft Leasing Sixteen Limited v Hong Kong Airlines Ltd* [2019] EWHC 3668 (Comm), the covenant was to pay "all reasonable costs and expenses (including reasonable legal expenses) incurred". Moulder J concluded that that was consistent with the indemnity basis, because it required the payment of "all costs". She also picked up the point that the reference to the "reasonableness" of costs could not support any distinction between the indemnity and standard bases.

26. The judgment of Cranston J in *Euro-Asian Oil SA v Credit Suisse AG* [2016] EWHC 3340 (Comm) reached a somewhat different conclusion. There the covenant was to "protect, indemnify and hold … harmless from and against any and all damages, costs and expenses (including reasonable attorney fees)…". Cranston J held this was more consistent with lawyers' costs being awarded on a standard basis primarily because of the requirement that they be reasonable. He was not persuaded that the use of the word "indemnify", or the fact that the provision covered "all costs" led to a different conclusion.

27. The authorities do not speak with one voice and I have not found the question entirely straightforward. I conclude as follows in the context of Clause 4.4.1:

    i) First of all, I agree with Mr Trompeter KC that the use of the word "indemnity" is more suggestive of the indemnity basis than the standard basis.

    ii) I construe Clause 4.4.1 as providing that in order to be within its scope the costs in question must first be "properly incurred". That phrase does not seem to be aimed at questions of the proportionality of the costs (a feature of the standard basis of assessment). First, the word "proportionality" is not used. Second, the question of whether a cost is "properly incurred" is looking more at the circumstances in which the costs were incurred (i.e. whether it was "proper" to incur the costs) rather than at the amount of those costs.

    iii) I am reinforced in that conclusion by the fact that Clause 4.4.1 does include some restriction on the amount of costs that is drafted by reference to "reasonableness". Therefore, once a cost is "properly incurred", the relevant question as to amount is whether it is "reasonable". As noted in *MacLeish* and *Alafco*, that is not a point of distinction between an indemnity and standard basis.

iv) Another pointer in favour of the indemnity basis is the use of the word "all" when describing costs that are covered.

28. By a slender margin, I have concluded that the cumulative effect of these indications is that Clause 4.4.1 is consistent with an assessment on the indemnity basis.

Costs of various applications made in the Main Claim

29. The costs of various applications have been reserved to me as trial judge.

Disclosure applications of 25 March 2024 and 30 April 2024

30. These were disclosure applications that were compromised by agreement.

31. The general approach where applications are compromised is that there is often little point in a court embarking on a determination of disputed facts solely in order to enable it to decide costs (see *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939). The court's discretion in such cases is at large. There are no general principles and it is simply a matter of effective and pragmatic case management for the court to apply when deciding its approach to costs. At one extreme there will be the application that was compromised but was bound to end in a particular way. At another extreme there will be an application compromised that was finely balanced. Often, if the court considers that it cannot do better, it will be right to make no order for costs.

32. Here, I am concerned with disclosure applications. It is often difficult to know, in disputes about disclosure, whether one side is obviously in the right or one side is obviously in the wrong. At this distance from the applications, I do not really know the documents whose disclosure was in dispute and it is difficult to tell whether any side would obviously have won or obviously have lost.

33. The application of 25 March 2024 was a complicated disclosure application. It was listed with a time estimate of the best part of a day before a High Court judge. It was obviously thought to be difficult at the time. Galliard ultimately agreed to provide further documents by way of disclosure having previously asserted privilege over them.

34. SBHMC describes that as "a capitulation" but at this distance from the application, I am not equipped to say that it was a capitulation in relation to an application that was likely to succeed. It is just as possible that, given the dynamic under which Howard Kennedy had copies of the documents but Galliard did not, it just took a while for Galliard to see the documents and decide that they should be disclosed as a matter of pragmatism and realism and because they were thought ultimately to support Galliard's case. I do not see any secure basis for making any order in relation to the 25 March application other than no order for costs.

35. I regard the disclosure application of 30 April 2024 as similar. It is not obvious to me that it was a run-of-the-mill case. It was compromised and I do not have sufficient information to look behind that compromise to do anything other than make no order for costs.

Disclosure application on the first day of trial

36. This application occupied an hour or so at the beginning of trial. It ultimately resulted in Galliard obtaining disclosure of an entirely redacted document, Mr Bradley KC having explained in his submissions that that was going to be the outcome.

37. I find it difficult to categorise that as a "win" for Galliard. Galliard did not really get anything at all.

38. I also regard the disclosure application as being wrapped up in the trial itself. Mr Bradley KC says it was annoying and interfered with his preparation. I do not doubt that. However, I consider that was part of the rough and tumble of the trial. The right order for that application is costs in the case.

Expert evidence

39. Next there was an application relating to experts at E2.16 of the bundle. The background was that there was some suggestion that it was necessary to instruct a joint expert to deal with matters of valuation. That did not progress very far and became mired in some disagreement about the nature of the instructions and similar. Ultimately, a consent order was agreed on 12 February 2024 deferring the exercise until after trial. By that order, certain costs were reserved.

40. I cannot tell the rights and wrongs of this particular application at this distance from it. It was compromised by a consent order. I propose to make no order for costs in relation to that application.

The PTR

41. The "PTR" was not really a PTR in the usual sense. It was, in substance, a hearing to consider applications to amend and strike out heard very shortly before trial. Ultimately, I came to the view that Galliard's application to strike out allegations of deliberate concealment of the FSC should be dismissed. That turned out to be a pyrrhic victory for SBHMC as the allegation failed at trial.

42. SBHMC succeeded in securing permission to advance the Room Lease Claim. SBHMC also succeeded in getting permission to rely on further particulars of concealment.

43. Galliard succeeded to a significant extent at least in getting permission to assert matters going to the earlier knowledge of Mr Duggan, Mr Lakha KC and Mr Marley.

44. In the ordinary run, I would have dealt with costs there and then but I simply ran out of time at the hearing. Looking back, I suspect that the "there and then" order would have been:

    i) SBHMC to obtain its costs of Galliard's strike out application which failed;

    ii) SBHMC to obtain its costs of its own amendment application which succeeded; and

    iii) Galliard to obtain its costs of its amendment application which largely succeeded.

45. I do not see any reason for making a different order simply because of the happenstance that I ran out of time at the PTR and am now dealing with the matter at trial. I acknowledge that an order in these terms means that SBHMC will receive some costs associated with claims that failed at trial. However, that is a fact of life that goes with the system of "pay as you go" for the costs of interlocutory applications.

Costs of Main Claim generally – indemnity basis or standard basis?

46. I exercise the discretion that CPR 44.2 gives me and I have considered the guidance given by the Court of Appeal in *Thakkar v Mican* [2024] 1 WLR 4196.

47. I take into account all the circumstances including, but not limited to, the conduct of the paying party. The normal position is that costs are awarded on a standard basis. To obtain costs on an indemnity basis the receiving party needs to surmount a high hurdle by demonstrating that there are some circumstances or conduct that takes the case out of the norm.

48. If an application for indemnity costs is based on the paying party's conduct, that conduct must be unreasonable to a high degree, but it does not have to demonstrate a moral lack of probity or conduct deserving of moral condemnation. Moreover, the fact that conduct complained of happens regularly in litigation does not preclude it from being "outside the norm".

49. There is no presumption or starting point that a failed allegation of fraud attracts indemnity costs. However, it often will and persons making such allegations are running a risk. That is partly because of consequences for the person against whom the allegation is made. It may also be that alleging fraud wrongly is an aspect of more general unreasonable conduct of the litigation.

50. I am going to set out my conclusion and then explain how I have reached that conclusion in the light of various parties' objections.

51. My conclusion is that up to and including 15 May 2024, SBHMC must pay costs that Galliard incurred on the standard basis. After 15 May 2024, SBHMC must pay Galliard's costs on the indemnity basis.

52. The relevance of 15 May 2024 is that, by that date, SBHMC had the documents surrounding execution of the FSC, formation of the Annex Lease Scheme and all the documentation relating to the search for the FSC that was said to have been deliberately concealed. I consider that was a pivotal moment. Before then, the position was, at least from SBHMC's perspective, that:

    i) It was clear that there was a FSC and it was at least reasonable to suppose that key people at Galliard knew about it.

    ii) It also looked like the Annex Lease Scheme breached a straightforward reading of the FSC.

    iii) Given the apparent clarity of the FSC, it was not unreasonable to wonder whether Galliard knew that the Annex Lease Scheme involved such a breach.

iv) SBHMC was being told that the "search documents" were subject to litigation privilege and that the documents surrounding the entry into the FSC and the Annex Lease Scheme were covered by legal advice privilege.

53. In those circumstances, given that the directors of SBHMC were unaware of the Annex Lease Scheme at the time and did not find out about it until 2017, there was something that SBHMC was entitled to find odd.

54. I am not accusing Galliard of being obstructive in disclosure and I am not suggesting that its claim to privilege in relation to documents surrounding the Annex Lease Scheme, the FSC or the search documents was wrong. I accept that Galliard was in a difficult position because it did not have the documents and had to rely on Howard Kennedy to find them. The simple point I am making is that from SBHMC's perspective, there was something that looked odd and it was not unreasonable to wonder whether some fraud was going on.

55. The documents that Galliard had supplied by 15 May 2024 ultimately enabled it to defeat the allegation of fraud. However, after getting these documents SBHMC persisted with and, indeed, doubled down on its allegations of fraud. It pleaded new allegations of deliberate concealment in the "red text". At the trial before me, in oral closings, Mr Bradley KC explained SBHMC's position as being that Galliard is not an organisation that operates itself according to usual standards of honesty. There was a degree of "mission creep" at trial. Although the proceedings did not allege that Mr Philips was in on the conspiracy at times SBHMC's case sounded very much like they proceeded on the basis that he was. The case also proceeded on the basis of allegations against Mr Galman, Mr Huberman and Mr Hirschfield.

56. I agree with Galliard that the fraud case was extensive. It is true to say that the Room Lease Claim did not depend on any allegation of fraud. I also accept that the allegation of "deliberate concealment" was not an allegation of fraud. However, many claims did assert fraud and the asserted presence of fraud was at the heart of the defence to the limitation argument. So even recognising that there is no starting point that indemnity costs should be awarded, I consider that the facts and circumstances justify indemnity costs from 15 May 2024.

57. In arguing for indemnity costs throughout, Galliard says that the fact that it is reasonable to suspect fraud is not a tonic against indemnity costs. I agree with that as a general statement, but Galliard's submission operates at too high a level of generality. I have explained aspects of the case specifically that, in my judgment, make indemnity costs from the start inappropriate. It is appropriate for me to consider the conduct of the parties when performing that evaluation by virtue of CPR 44.2(5). It is, therefore, relevant to consider whether allegations were reasonable or not.

58. Galliard says that SBHMC's position on disclosure throughout was exorbitant but I simply cannot audit the parties' entire behaviour on disclosure matters. No doubt some of SBHMC's disclosure requests were, with hindsight, excessive. However, until it had the material that I have outlined by 15 May 2024, I am not satisfied that it was out of the norm for SBHMC to feel that there might be some smoking guns that it had to tease out in the disclosure process.

59. Galliard also says that 15 May 2024 should not mark any change in the basis on which costs are awarded because, even if SBHMC had had the material right at the beginning, they would still have doubled down on fraud allegations as it ultimately did. I am not satisfied that is necessarily correct. It is a submission based on hindsight. It is realistically possible that, if Galliard had produced documents earlier, that might have reduced the suspicions that SBHMC had.

60. In arguing for costs on the standard basis throughout:

    i) SBHMC says that Galliard has been shown to have, at a high level, done something wrong and has been saved only by limitation arguments. However, limitation is not a "technicality", it is a defence to the claim. An appeal to the asserted immorality of Galliard's behaviour overlooks the fact that the court applies the law and SBHMC wrongly advanced a case based on fraud with all the consequences that that has for a large company such as Galliard and its chairman.

    ii) SBHMC points to an apology that it gave for the failed allegations of fraud. I accept that there was an apology and it was repeated in court yesterday. However, it was given late and after SBHMC had lost.

    iii) SBHMC point out that it won on construction and rectification. It did but, in my judgment, awarding standard basis costs throughout would not reflect the seriousness of the failed allegation of fraud.

    iv) Reliance is placed on the allegation of deliberate concealment but I think the reliance there is overstated. I explained what the concealment was, a decision not to positively announce matters to investors. I described it as a hard-nosed business decision which some other company directors might not have taken. I did not go further than that.

    v) It is also said that the trial showed that Galliard made a number of mistakes. I agree but again they are not such, in my judgment, as to remove the case for indemnity costs.

    vi) Criticisms were made of the cross-examination of Mr Duggan and Mr Lakha KC. I have concluded that neither Mr Duggan nor Mr Lakha lied to the court and I hope the judgment made that clear. However, the allegations put to Mr Duggan and Mr Lakha in cross-examination do not outweigh the prejudice to Galliard as a consequence of the way in which SBHMC put its case by alleging fraud.

Galliard's costs of the Main Claim – a percentage reduction?

61. SBHMC succeeded on some issues, most notably construction and rectification of the FSC. The starting point of course, is that the unsuccessful party pays the successful party's costs and the court should not be too ready to depart from that position. Moreover, the fact that a successful party has failed on some issues does not always amount to sufficient justification for a percentage-based or an issues-based costs order. Especially in complex litigation with lots of issues, it is quite possible to fail on some issues on a route to overall victory.

62. However, as Mr Bradley KC points out in his submissions, ultimately what is required is a case-specific evaluation. There is no requirement that a case be "exceptional" in order for a percentage-based costs order to be made. All that is needed is a justification for a departure from the general rule that the winner receives all its costs. No gloss is needed on the court's general discretion and there is no requirement that the points be taken unreasonably in order for a percentage-based or issues-based costs order to be made.

63. In my judgment, the defence to the dishonesty allegation that Galliard was advancing relied on the propositions that (i) Mr Conway genuinely thought that the Annex was excluded from the scope of the development that Investors were to acquire and so (ii) when Mr Philips advised that the Annex Lease Scheme could be implemented to prevent SBHMC getting the economic benefit of the Annex, Mr Conway did not think he was doing anything wrong.

64. The first part of that analysis was always going to involve an exploration of the factual background such as (i) the Galliard parties' knowledge of the FSC, (ii) Mr Conway's and Galliard's intentions for the Annex, (iii) the planning history of the Site, (iv) the way the Site was marketed and (v) perceptions on issues at the time, for example the CIS issue.

65. Moreover, some of those allegations would have to be looked at when looking at the question of deliberate concealment. So, for example, the extent of Mr Conway's knowledge of the FSC conceptually could go to the question of whether he deliberately concealed it. So could the question of whether he thought that there was a "mistake" in the FSC.

66. The construction and rectification arguments that Galliard advanced covered very similar ground to the matters that Galliard was raising as a defence to allegations of dishonesty. It is not right, therefore, to regard construction and rectification as giving rise to costs that were entirely incremental.

67. That said, Galliard was hoping, by raising construction and rectification points, to get more mileage out of points that were going to be considered anyway. If the construction and rectification arguments were successful, Galliard would have a complete defence to the whole claim rather than just the allegations of fraud. In the eventuality, the findings that I made were sufficient for Galliard to defeat the allegations of fraud but they were not sufficient to establish the construction of the FSC and the remedy of rectification which Galliard sought.

68. There would have been some saving of time and costs if rectification and construction had not been put in issue. At the most basic level some legal arguments on rectification and corrective construction would not have been necessary, and legal submissions on the concept of laches might not have been necessary.

69. However, I consider the need for additional legal submissions on the rectification and construction issues to be simply roundings. They are not themselves enough to justify a departure from the general rule.

70. I consider the witness evidence to be slightly different. I have looked through the witnesses who gave evidence and I have re-read my judgment. My overall impression

is that the court might have heard from a couple of witnesses fewer and might have heard a bit less from Galliard's witnesses than it did if the case was just based on defending the allegation of fraud rather than putting forward construction and rectification arguments. That point is brought out by considering just a couple of the witnesses who gave evidence.

71. SBHMC mentioned Mr David Conway as a witness whose evidence was completely unnecessary. I do not agree with that. Even if a pure honesty defence was being advanced, Mr David Conway had valuable evidence to give about the process of exchange and the FSC and so on the institutional knowledge of that contract which would have been relevant to Mr Conway's honesty. However, I do agree that the court would have had a bit less evidence from Mr David Conway if no construction or rectification arguments were pursued.

72. Mr Bradley KC also mentioned Mr Angus. Even with a pure "honesty" defence his evidence as to what financial return was being sought from the Site had something to say about whether Mr Conway thought the Annex was part of the interest which Investors were obtaining. That said, I agree that Mr Angus's evidence might have been a bit less if no construction or rectification argument was being advanced.

73. My conclusion that the court might, in the absence of construction and rectification arguments, have heard a bit less from some witnesses, and might not have heard from some at all, does justify some reduction to Galliard's recoverable costs. I consider the right reduction is a 15% reduction so that Galliard obtains 85% of its costs. I hope that in explaining my reasoning, I have explained why I do not accept SBHMC's arguments for a 50% reduction and I do not accept Galliard's proposal that there should be no reduction at all.

74. I do not agree with SBHMC that it enjoyed success on deliberate concealment so as to get a higher percentage reduction. I agree that some of SBHMC's arguments in the Invalidity Claim landed but overall it failed in that claim as well, as Mr Trompeter KC pointed out.

75. Overall, I do not think that the failure of Galliard's arguments on construction in connection with the Room Lease Claim alters the conclusion much either and I have already dealt with the suggestion that errors and mistakes by Galliard should justify a reduction to its costs. My overall conclusion is that Galliard should have 85% of its costs of the Main Claim.

Costs of the Rent Claim

Part 36 consequences after expiry of the "relevant period"

76. It is common ground that Lodgeshine made a compliant Part 36 offer in the Rent Claim and beat that offer. The "relevant period" for acceptance of that offer expired on 13 June 2024. The offer was made after all disclosure but did not include the counterclaim. The question is whether it is unjust for the consequences in CPR 36.17(4) to apply and in determining that, I apply the following approach:

    i) I will consider all the circumstances of the case and, in particular, the specific matters raised in CPR 36.17(5).

ii) I am being invited to make an order that departs from the norm set out in CPR 36.17(4). I should not make an exception simply because I consider the CPR 36.17(4) regime harsh or unjust. Rather, there must be something about the particular case which takes it outside the norm and makes the usual Part 36 consequences unjust (see *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB)).

iii) Since I am not exercising an unfettered discretion in relation to costs, when I consider departing from CPR 36.17(4) consequences, the question is not whether SBHMC had reasonable grounds for declining to accept the Part 36 offer, but whether the usual order following beating the Part 36 would be unjust (*Matthews v Metal Improvements* [2007] EWCA Civ 215).

77. SBHMC's argument in support of the proposition that it would be "unjust" for Part 36 consequences to apply is principally an argument that the offer made no sense. SBHMC submits that the Part 36 offer dealt with the Rent Claim only and ignored SBHMC's counterclaim. SBHMC invite me to consider what would have happened if it had accepted the offer and paid £1.2 million, submitting that the proceedings would still have been necessary to deal with its counterclaim for rectification and the Main Claim as well.

78. I do not accept that the Part 36 consequences would be unjust. I am prepared to accept that the Part 36 offer presented something of a dilemma for SBHMC. However, the problem with SBHMC's analysis is that the Main Claim was not going to succeed, as we now know, so relying on a wish to preserve the Main Claim as an indicator of unjustness is difficult to sustain. Conceptually, accepting the Part 36 offer could have narrowed issues. At the very least it would have resulted in a determination of what rent was due and obviated the need for the debates we had yesterday about interest and VAT, for example. More generally, it might have been an opportunity for SBHMC to reflect on the strength of the Main Claim.

79. That said, Galliard continued to defend the counterclaim and lost. I have therefore considered whether it would be "unjust" to award Galliard indemnity costs which would include the costs of defending the counterclaim.

80. However, ultimately I accept Mr Trompeter KC's submission that the counterclaim has made no significant difference. The Part 36 offer was made shortly before trial. Once the relevant period expired, trial was near and the counterclaim absorbed little, if any, time in submissions and little, if any, time at trial. Witness statements were already prepared, so I agree with Mr Trompeter KC that the fact that the counterclaim was unresolved by the Part 36 offer is not an indicator that the usual consequences of Part 36 are "unjust".

81. SBHMC made no separate argument as to the "unjustness" of the consequence specified in CPR 36.17(4)(d) beyond the general submission summarised in paragraph 77 above. Having rejected that argument, I will not disapply the CPR 36.17(4)(d) consequence.

82. The next question that arises is the interest rate for the purposes of CPR 36.17(4)(a). That provision admits of the possibility that the interest rate applied after the end of the relevant period can be more than compensatory where it applies. However,

Mr Trompeter KC explained that Galliard does not seek anything more than a compensatory rate of interest.

83. SBHMC suggests the compensatory rate of interest would be base plus 1%. Galliard suggests the compensatory rate of interest would be base plus 4%. The point is to approximate the borrowing costs of someone in the general position of Galliard. Galliard is certainly a significant business but it is not a large listed company and is not the absolute highest credit. An interest rate of base rate plus 1% is appropriate for truly large companies who can be presumed to borrow very cheaply. However, I think base plus 2% for Galliard is more appropriate.

84. That is my conclusion as to what would be a compensatory rate of interest. I note that the Underlease may provide for a contractual rate of interest to apply to various unpaid amounts and my determination of the compensatory rate does not cut across any such contractual right.

85. Finally, I note that SBHMC does not dispute Galliard's assertion that Galliard has a choice, in the period following expiry of the relevant period, to elect between costs on the basis specified in CPR 36.17 and its contractual rights pursuant to the Underlease.

Costs before CPR 36 consequences apply

86. These costs consequences are governed by CPR 44 rather than CPR 36. As I have explained earlier in the judgment, the Underlease itself provides for Lodgeshine to recover its costs of the Rent Claim. The basis specified in the Underlease corresponds to the indemnity basis and, accordingly, pursuant to CPR 44, I award Lodgeshine its costs of the Rent Claim on the indemnity basis.

87. I consider that it is appropriate to apply some percentage reduction to reflect the fact that costs before expiry of the relevant period will, by contrast with the position afterwards, have included some material costs associated with the counterclaim which ultimately Galliard lost. I do not accept Galliard's argument that I should make no such reduction because it had offered to concede the counterclaim earlier on, perhaps even before proceedings were commenced. The point is that after proceedings were commenced Galliard was contesting the counterclaim.

88. There is little clear guidance as to how much of Galliard's costs prior to expiry of the relevant period would apply to the counterclaim, and how much to the Rent Claim itself. I consider a 20% reduction to Galliard's costs of the Rent Claim prior to expiry of the relevant period is appropriate to deal with the lack of success on the counterclaim.

89. I consider that the applicable compensatory rate of interest for the purposes of CPR 44 is the base rate plus 2% figure that I have explained above. There was some suggestion in SBHMC's written submissions served in advance of this hearing that it may wish to argue that interest should run only from the date of today's order. However, that point is not pursued.

Direction to costs judge on allocation of residual items of costs

90. I am invited to provide a high level direction to the costs judge as to the proportion of non-specific costs that should be allocable to the Rent Claim and the proportion allocable to the Main Claim. There was not much difference between the parties. Galliard suggests it should be a 95-5 split in favour of the Main Claim; SBHMC suggests 97-3. I think in this case I can split the difference and I indicate a 96-4 split.

Permission to appeal

91. I refuse permission to appeal which is sought in relation to three issues.

92. The first such issue is s21(1)(b) of the Limitation Act. I consider that there is not a realistic prospect of success on this issue. SBHMC had not pleaded any detailed case on s21(1)(b) and its arguments emerged piecemeal in a somewhat unsatisfactory way largely in closing submissions. At trial, little was said about the concept of conversion and diminishing trust property and it was not explained at trial how SBHMC could be seeking to recover an asset (the freehold interest) that it already held. SBHMC now wishes to rely on authorities not cited to me and arguments not made. I do not consider that there is a sufficient prospect of success on s21(1)(b) to warrant the grant of permission to appeal on issue one.

93. Issue two is a straightforward disagreement with the analysis that I reached on this issue on whether there was a continuing breach. I am not satisfied that there is a sufficient prospect of success to grant permission to appeal on that issue.

94. Issue three concerns the Invalidity Issue. I consider it largely to involve a challenge to my factual evaluation that Mr Conway was acting in good faith when executing the relevant documents. So, while I am certainly not claiming infallibility, I consider the appropriate course is for me to refuse permission and the Court of Appeal to grant permission if so minded.

Stay

95. The question is whether I should stay that part of the order that requires the Chief Land Registrar to remove the UN1 registered against Lodgeshine's leasehold title to the Annex.

96. Lodgeshine says that it does not propose to dispose of its leasehold interest in the Annex any time soon and so a stay is unnecessary. However, without some sort of stay, it could, entirely properly, change its mind because of changed circumstances. If it did, and my order is varied on appeal, SBHMC could be in the position of trying to obtain an interest in the Annex back from a stranger to the judgment who it may or may not know.

97. I consider that the balance comes down in favour of permitting a stay for a period of a couple of months to give SBHMC time to go to the Court of Appeal to seek permission to appeal. If the Court of Appeal has not given its answer in two months, SBHMC can always ask the Court of Appeal for a longer stay.

98. It did not seem controversial that SBHMC should give a cross-undertaking as the price of securing this limited stay. I would ask the parties to agree that cross-undertaking between themselves.

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(This Judgment has been approved by the Judge)

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