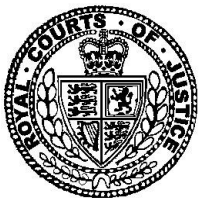

Neutral Citation Number: [2018] EWHC 3071 (Ch) Case No: PT-2018-00417

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

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 15/11/2018

Before :

MR EDWIN JOHNSON QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

SANDHAR & KANG LIMITED **Claimant**

- and -

Defendant

SYED JAFFER IJAZ

- -

Mark Wonnacot QC (instructed by **Fieldfisher LLP**) for the **Claimant**
Mark Warwick QC (instructed by **RLK Solicitors Limited**) for the **Defendant**

Hearing dates: 18th, 19th, 22nd October 2018

- -

Approved Judgment

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

.....

MR EDWIN JOHNSON QC

Edwin Johnson QC :

Introduction

1. This is the trial of a claim for possession of a set of commercial premises ("the Property") known as the S&K Building, 26 Birchall Street, Birmingham B12 0RP.

2. The freehold title to the Property is registered under title number WM549275. The registered proprietor is the Claimant, which has owned the freehold interest in the Property since 1992. I understand that the Property is situated in a redevelopment zone, and forms part of a larger block of property owned by the Claimant, which was referred to in the evidence as Site 1.

3. The Property is occupied by the Defendant and his brother, Syed Adam Ijaz, who together run a shisha lounge from the Property known as Emperors Lounge. I will refer to the business of the shisha lounge, which appears to have been run through limited companies, as "the Business".

4. The Claimant's case is that the Defendant occupied the Property pursuant to a lease or, in the alternative, pursuant to an agreement for lease which, in equity, took effect as a lease. On either basis the Claimant's case is that lease (whether legal or equitable) contained a break clause which the Claimant has operated. The Claimant's case is that this lease (whether legal or equitable) was contracted out of the protection of Part II of the Landlord and Tenant Act 1954 ("the 1954 Act"), so that the operation of the break clause was effective to terminate the lease for all purposes, leaving the Defendant as a trespasser in the Property.

5. The Defendant disputes all of this. His case is that he occupies the Property pursuant to a lease granted for a term of ten years from 18th May 2015, which is protected by the 1954 Act, and which contains no break clause. As such, so the Defendant contends, he is entitled to remain in the Property as the tenant under this lease.

The action

6. The action was commenced by Part 7 claim form issued on 1st June 2018. The Claimant sought an expedited trial. The reason for this was that the Claimant has entered into an option agreement, dated 20th October 2017, in respect of the development site (I assume this is the site referred to as Site 1) of which the Property forms part. I understand that this option, which gives the grantee of the option the right to purchase the development site, is likely to be exercised in the near future.

7. By order made on 10th August 2018 ("the Directions Order") Zacaroli J. gave directions for an expedited trial of the action, with the exception of paragraphs 38-40 of the Defence and Counterclaim and paragraph (2) of the prayer to the Counterclaim. These paragraphs contain a counterclaim for damages on the basis that the Claimant's service of the break notice and attempt to dispossess the Defendant of the Property constituted a breach of the Defendant's lease and a breach of the covenant for quiet enjoyment.

8. Pursuant to the Directions Order the action has now come on for trial before me. Mr. Wonnacott QC appeared on behalf of the Claimant. Mr. Warwick QC appeared on behalf of the Defendant. I am most grateful to both Counsel for their assistance, and for their efficient conduct of the trial.

9. So far as the statements of case in the action are concerned, the Directions Order gave permission for the Particulars of Claim to be amended, and for consequential amendment of the Defence and Counterclaim. Before me Mr. Warwick made an application for permission to re-amend the Defence and Counterclaim. This was not opposed, and I granted permission for the re-amendments. No consequential amendments to the Reply and Defence to Counterclaim were required.

10. In terms of the relief sought in the action, the position is as follows, leaving aside the Defendant's counterclaim for damages which has been excepted from this trial by the Directions Order.

    (1) By the Amended Particulars of Claim the Claimant seeks declaratory relief to establish that the break notice was effective to terminate the Defendant's right to occupy the Property for all purposes, an order for possession of the Property, damages representing any losses which may result from the Claimant being unable to meet its obligations under the Option Agreement as a result of the refusal of the Defendant to vacate the Property, statutory interest on these damages, and costs.

    (2) By the relevant part of its Counterclaim the Defendant seeks declaratory relief to establish that it occupies the Property pursuant to a lease granted for a term of ten years from 18th May 2015, without any break clause, which enjoys the protection of the 1954 Act. The Defendant also seeks any further or alternative relief, including equitable relief, as the Court may deem just.

The witnesses

11. For the Claimant I heard evidence from Udham Singh Kang who, together with his two brothers (Avtar Kang and Swarn Kang) is a director of the Claimant. For the avoidance of doubt, my references to Mr. Kang in this judgment mean Mr. Udham Singh Kang. In his witness statement Mr. Kang described the Claimant as dealing in the purchasing, maintaining, selling, letting and developing of real estate, particularly in the Birmingham area. In his oral evidence Mr. Kang said that he dealt with lettings, and that his brother Avtar dealt with sales. Mr. Kang described himself as retired in his oral evidence, but later in his evidence Mr. Kang clarified this to mean that he was not in the office of the Claimant every day.

12. I also heard evidence for the Claimant from John Monington, who works as a consultant for QualitySolicitors Davisons ("QSD"), a firm of solicitors in Birmingham. Mr. Monington was a solicitor, but now works as a consultant nonpractising solicitor, having given up his practising certificate some years ago. Mr. Monington entered the legal profession in 1973 as an articled clerk. He has extensive and lengthy experience of commercial property work. Mr. Monington has acted for

the Claimant in its property dealings for some 30 years, usually dealing with Mr. Kang. Mr. Monington, through his firm, acted for the Claimant in the transactions which have given rise to this action.

13. For the Defendant I heard evidence from the Defendant himself. The Defendant is aged 26. He is the oldest of three brothers. He has a degree in Biochemical Sciences from Manchester Metropolitan University. I also heard from the Defendant's brother, Syed Adam Ijaz who is aged 25 and, together with the Defendant, founded and managed the Business. In their witness statements both brothers stated that the Business was their first business venture.

14. I also heard evidence from Nadeem Ijaz, who is the father of the Defendant. Mr. Nadeem Ijaz is a self-employed wedding co-ordinator, trading by the name of Perfect Wedding Stages. He also made reference in his witness statement to another business venture in which he had been involved between 2013 and 2015, which involved the creation of a banqueting hall in a property purchased and renovated for this purpose. The Defendant and his brother, Syed Adam Ijaz, assisted their father, from time to time, in the renovation work.

15. For clarity I will refer to the Defendant (Syed Jaffer Ijaz) as the Defendant, to Nadeem Ijaz as Nadeem, and to Syed Adam Ijaz as Adam. It will be understood that I intend no disrespect to the parties in these terms of reference, which I use solely for the sake of clarity.

16. I heard from two other witnesses for the Claimant. The first of these witnesses was Usman Siddique, who is the manager of the Business, having been appointed as manager in June 2017.

17. The second of these witnesses was Avhninder Singh Pawar. Mr. Pawar is a solicitor and a director of Aspect Law Limited, a firm of solicitors. Mr. Pawar was called to give evidence in relation to an issue concerning the witnessing of lease documents which purported to bear, as evidence of witnessing, the signature of Mr. Pawar and the stamp of Aspect Law Limited. The evidence of Mr. Pawar, which was not materially challenged, was that the relevant signatures were not his signatures, and that the relevant stamp was not the stamp of Aspect Law Limited.

18. Mr. Pawar's evidence was not served in accordance with the Directions Order. Instead, an application was made by the Defendant to introduce this evidence by the same application notice, dated 9th October 2018, by which the Defendant sought permission to re-amend the Defence and Counterclaim. As I have said, the application for permission to re-amend was not opposed. The application to introduce Mr. Pawar's evidence was opposed. After hearing argument on the first day of the trial I decided to permit the introduction of Mr. Pawar's evidence, for the reasons set out in a separate judgment which I delivered at the conclusion of the argument over the admission of this evidence.

19. In terms of expert evidence, the Directions Order provided for the appointment of a single jointly appointed expert in the field of forensic document examination. The specific issue on which this expert evidence was required was the issue of the authenticity of the purported signature of the Defendant on a lease document. Michael Handy, a forensic handwriting and document examination expert, was the

single expert appointed for this purpose. Mr. Handy provided a report dated 14th September 2018. Each party was given permission to call Mr. Handy to give oral evidence at the trial, but neither party exercised this permission. Instead, Mr. Handy's report stood as his unchallenged evidence on the issue of the authenticity of the purported signature of the Defendant.

20. There are a number of issues of fact which I will need to resolve, in setting out the factual history of the dispute, relevant to the legal issues which I will have to decide. In resolving those factual issues the credibility of the various witnesses is important. In these circumstances I make the following general comments on the evidence given by the witnesses.

General comments on the witnesses

21. My first general comment relates to the evidence generally in this case. As I have said, there are a number of issues of fact which I need to resolve in setting out the relevant factual history. This task is, in some respects, rendered more difficult by the fact that, in relation to certain key factual issues, there is little or no documentation against which the relevant evidence can be tested. Given that this case, stripped to its essentials, involves a dispute over what happened in conveyancing transactions, this is an unusual position and one which, as I have said, renders the task of resolving certain of the relevant factual issues somewhat more difficult than might have been expected.

22. Turning to the witnesses themselves, I start with Mr. Kang. Mr. Kang was born in India and came to this country in 1963. Mr. Kang's first language is Punjabi. Mr. Kang's oral evidence, which he gave in English, was sometimes a little difficult to follow, and needed to be repeated or clarified. This however did not affect his credibility as a witness, and I am satisfied that I was able to understand what Mr. Kang was saying. My principal impression of Mr. Kang, consistent with what he said in his witness statement, was that he was very experienced in the business of commercial letting, and had a very good understanding of the essentials of what should appear in a lease of commercial premises. In particular, Mr. Kang plainly had a good understanding of the protection offered to commercial tenants by the 1954 Act, and of the importance of utilising the statutory procedures for the exclusion of that protection. One example of Mr. Kang's expertise, which emerged in cross examination, was that he clearly understood the concept of mesne profits. Mr. Kang also gave evidence that he knew about the statutory declarations which tenants were required to make as part of the process of contracting a lease out of the protection of the 1954 Act and had, on many occasions, dealt with such statutory declarations.

23. It was also clear that, in the conduct of his business, Mr. Kang was not a man for paperwork. His dealings were conducted orally, including with Mr. Monington, and it was left to Mr. Monington to document what Mr. Kang had negotiated. This in turn helps to explain, at least to some degree, the absence of documentation to corroborate some areas of Mr. Kang's evidence.

24. My overall impression of Mr. Kang was that he was a reliable witness. His evidence was sometimes vague, in terms of dates, but his recollection of particular meetings and dealings seemed to me to be good. In general terms I was satisfied that Mr. Kang

was providing me with his honest and reliable recollection of the relevant events covered by his evidence.

25. I also found Mr. Monington to be a reliable witness. He is plainly very experienced in commercial property dealings. His evidence was corroborated by the documentary evidence, where such documentary evidence was available. As I shall explain in the following sections of this judgment, there were some gaps in the documentation, relevant to the evidence given by Mr. Monington, which I found surprising, but ultimately I was satisfied that Mr. Monington was a reliable witness, with a good recollection of the relevant events.

26. Turning to the Defendant, I encountered certain difficulties in his oral evidence, both in terms of inconsistencies with the documentary evidence and in terms of the plausibility of some of what I was told by the Defendant in the course of cross examination. There were also some significant differences between, on the one side, the evidence given to me by the Defendant and, on other side, the original case put forward by the Defendant when this dispute commenced, both in the Defendant's pleaded case and in the correspondence from the Defendant's previous solicitors. Relevant instances of these matters are set out in the following sections of this judgment. In overall terms I have approached the Defendant's evidence with a certain amount of caution, particularly where it does not appear to fit with the documentary evidence.

27. The position in relation to Adam's evidence was similar. I encountered similar difficulties, in terms of inconsistencies with the documentary evidence and in terms of the plausibility of some of what I was told by Adam. In a number of instances, and to a greater degree than the Defendant, Adam appeared not to have a reliable recollection of events. A number of questions in cross examination were answered on the basis that Adam did not recall the relevant matter. Relevant instances of these matters are again set out in the following sections of this judgment. In overall terms, I have approached Adam's evidence with a certain amount of caution, particularly where it does not appear to fit with the documentary evidence. The position in relation to Nadeem's evidence was also similar. I again encountered difficulties, in terms of inconsistencies with the documentary evidence and in terms of the plausibility of some of what I was told by Nadeem. I have therefore also approached Nadeem's evidence with a certain amount of caution, particularly where it does not appear to fit with the documentary evidence.

28. The material evidence of Mr. Siddique was largely confined to an alleged meeting between the Defendant, Adam and Mr. Kang which Mr. Siddique said that he had witnessed at the Property in September 2017. This evidence was not of particular assistance to me because, as I shall explain later in this judgment, it emerged in cross examination that Mr. Siddique's recollection of this alleged meeting was not reliably based.

29. Mr. Pawar's evidence was not the subject of any material challenge. He was plainly an honest witness, and I accept his evidence in full.

30. The credibility of Mr. Handy was not in issue, and there was no challenge to his expert report. I therefore accept the expert evidence contained in his report.

31. It is convenient to make reference, in my general comments on the witnesses, to the case of Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm). Mr. Warwick referred me to this authority in his closing submissions, specifically to

the often cited passage in the judgment of Leggatt J. (as he then was) which deals with the problems of evidence based upon recollection; see paragraphs 15-22. At paragraph 22 of his judgment, the Judge said this (I have added italics to quotations in this judgment).

> *"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 crossexamination 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."*

32. Mr. Warwick cited this authority to me, and also the more recent decision of Nugee J. in Holyoake v Candy [2017] EWHC 3397 (Ch), in support of his general submission on the evidence, which was to the effect that the evidence in the present case involved many anomalies and unsupported assertions (on both sides). Mr. Warwick urged me to concentrate on the relevant parts of the pleaded cases, to avoid trying to resolve all of the anomalies in the evidence, and to avoid speculation.

33. In general terms I accept all that Mr. Warwick says in this context. I bear in mind the guidance given in Gestmin as to evidence based upon recollection. I also accept the need to confine myself to the pleaded issues, and to avoid unnecessary speculation. I would only add this. I did find the process of cross examination in the present case to be both useful, and essential in assessing the reliability of the evidence given by the witnesses. I also consider, albeit subject to what I have said in paragraph 21 of this judgment, that there was sufficient documentation in the case to assess the reliability of the witnesses against the documentary records. I also add that the present case involved the recollection of the witnesses in respect of events which, in their material part, occurred between 2014 and 2018. The case was not one where the witnesses were being required to recall the events of many years ago.

The relevant factual history – introduction

34. In setting out the relevant factual history to this dispute I will endeavour formally to record my findings of fact in relation to events, where the facts are in dispute, which I regard as relevant to what I have to decide. I do not include all the oral, written, and documentary evidence in my narrative, but I have taken all of this evidence into account in my narrative and, in particular, in dealing with disputed matters of fact.

35. It is also convenient to divide the narrative into different years, although in doing so it is sometimes necessary to stray outside the particular year in question. The narrative is not therefore rigidly divided between the different years.

36. Given that there is a major dispute over the form and terms of the leasehold interest which exists or (depending upon my decision) existed in relation to the Property in this case, it is important to be clear as to which leasehold document is being referred to when I make reference to leasehold documents. For this reason I will use the trial bundle pagination to make it clear which leasehold document I am referring to. In referring to leasehold documents, I include documentation relevant to the question of whether a leasehold interest was or was not contracted out of the 1954 Act. In using the trial bundle pagination I will give the file number, tab, and page number in square brackets and bold print.

The relevant factual history – pre-2014

37. Mr. Kang gave evidence that, prior to 2014, the Property had stood empty for some years. The Property was originally a foundry. The Property is, as I have said, located in a redevelopment zone and it was clear from Mr. Kang's evidence that the Claimant had been holding the Property for some years with the intention, when market conditions were right, of either redeveloping the Property itself, or selling the Property for redevelopment.

38. Mr. Kang gave evidence that the Property had previously, some considerable time ago, been subject to short term lettings, but it was also clear from Mr. Kang's evidence that the Property had stood empty for some time. Mr. Kang also referred to planning permission having been obtained for the redevelopment of the Property as flats in 2006. This planning permission was renewed, but no redevelopment work was carried out.

39. In 2013 or 2014, the Claimant decided to let the Property, and put a To Let board outside the Property. Mr. Kang gave evidence that there was a lot of interest generated in the Property, but that much of it was from time wasters.

The relevant factual history - 2014

40. In 2014 the Defendant and his brother were looking for premises from which to run a shisha lounge. It was to be their first business venture. Adam saw the To Let board and alerted his brother to the Property, which they thought would be a suitable site for a shisha lounge. They discussed the Property with Nadeem, and Nadeem contacted Mr. Kang by telephone. The result of this contact was a meeting at the Property attended by Mr. Kang, Nadeem, the Defendant, and Adam. Mr. Kang referred in his witness statement to this meeting as being attended by himself, the Defendant, Nadeem and a third party, who left the meeting early. In oral evidence Mr. Kang referred to this third party as a friend of the Defendant and Nadeem. I find that the third party referred to by Mr. Kang was Adam. I will return later to the question of when Adam left the meeting.

41. It was not clear from the evidence precisely when this meeting took place, but it appears to have been in or after April 2014. Mr. Kang's evidence was that the telephone call from Nadeem came in about April 2014, and that the meeting took place shortly

thereafter. The Defendant's evidence was that the meeting took place in early 2014, and could have been in May. I will refer to this meeting as "the First Meeting". The precise date of the First Meeting is not important. I find that the First Meeting took place in April or May 2014.

42. Most of the talking at the First Meeting was done by Mr. Kang and Nadeem. This was because the discussion took place in Punjabi. I understand that Mr. Kang speaks an Indian version of Punjabi, which is not the same as the version of Punjabi spoken in Pakistan. As a result the Defendant and Adam were not able to speak to Mr. Kang, although they claimed to have an understanding of what he was saying. Instead Nadeem, who speaks the Indian version of Punjabi, conducted the conversation with Mr. Kang.

43. It is clear that the First Meeting was concerned with agreeing terms, at least in outline, for the letting of the Property. It is common ground between the parties that a rent free period was agreed. It is also common ground that outline terms were agreed for the lease of the Property. Beyond that there is a conflict. Mr. Kang says that the outline terms were a five year lease at a rent of £25,000 per annum plus VAT, with a 12 month break option capable of exercise by landlord or tenant at any time. Mr. Kang says that a short rent free period was agreed, in order to allow for the obtaining of planning permission for the use of the Property as a shisha lounge. The Defendant, Adam, and Nadeem all say that the outline terms were a 10 year lease at a rent of £25,000 per annum plus VAT, which was negotiated down from an initial demand for £30,000 per annum plus VAT made by Mr. Kang, with no break clause, and with a six month rent free period. The Defendant and Nadeem also said, in their witness statements, that a deposit of £5,000 in cash was paid at the conclusion of the First Meeting. Mr. Kang denied this. The Defendant's oral evidence was they did not have £5,000 in cash on them at the First Meeting, so a telephone call was made to his mother, who took the cash sum from savings, and brought the sum to the Property.

The Defendant's oral evidence was that his mother met one of them outside the Property, dropped off the cash, and then left. The Defendant said that no receipt was given for this sum by Mr. Kang.

44. Adam's evidence in his witness statement, in relation to the First Meeting, implied that he was present throughout the First Meeting. Adam also said, in paragraph 5 of his witness statement, that he had read the Defendant's witness statement, and agreed with its contents. In cross examination however Adam said that he left the First Meeting early, and did not recall the payment of the alleged cash deposit of £5,000.

45. Before resolving the conflict of evidence which exists in relation to the First Meeting, it is convenient to continue with the history. At the First Meeting it was acknowledged on both sides that planning permission would need to be obtained for the use of the Property as a shisha lounge. The Defendant therefore set about obtaining planning permission. Mr. Kang's evidence is that he was contacted in

August 2014 by the Defendant or Nadeem to inform Mr. Kang that planning permission had been obtained. Mr. Kang's evidence is that he asked that the lease be entered into, and provided Mr. Monington's contact details. According to Mr. Kang, he was then asked if a further rent free period could be granted for fitting out purposes. Mr. Kang agreed to a further three month rent free period, and provided a key to the Property so that fitting out work could begin. I accept the evidence of Mr. Kang which I have set out in this paragraph.

46. The Defendant claimed that the work which was carried out to fit out the Property as a shisha lounge cost some £200,000. The Defendant claimed in his witness statement that this was *"As supported by our accounts"*. There was however no way of confirming this figure, because no accounting or other records were in fact produced to support this figure. I accept that a substantial sum would have been required to fit out the Property as a shisha lounge, but I make no finding as to the precise amount of that sum, or as to how and by whom it was paid.

47. Work was also carried out the roof of the Property. The Defendant's evidence in his witness statement was that this work cost £20,000, of which it was agreed that Mr. Kang would pay half. The Defendant said that Mr. Kang had paid his half of this sum, £10,000, in cash. Nadeem gave evidence to the same effect. In oral examination in chief the Defendant said that Mr. Kang had made two payments, in the sum of £8,000, and then another £9,000. In terms of documentary records the bank statements of the Claimant disclosed two payments made by cheque; namely a payment of £8,000 on 2nd December 2014, and a payment of £9,960 on 20th April 2015. The first of these payments matched an invoice in respect of the roofing works, dated 27th November 2014 and identifying the Claimant as the customer, in the sum of £8,000. The second of these payments matched a second invoice in respect of the roofing works, dated 15th April 2015 and again identifying the Claimant as the customer, in the sum of £9,960.

48. There was no accounting or other record of any expenditure by or on behalf of the Defendant in respect of the roofing works or by or on behalf of the company through which the Business was to be operated. This company was Emperors Lounge Limited, which was incorporated on 11th September 2014. In cross examination neither the Defendant nor Nadeem was able to provide a satisfactory explanation for the absence of any documentation to corroborate this part of their evidence. In the absence of such corroboration I am not able to accept this part of the evidence of the Defendant and Nadeem. I find that the roofing works were paid for by the Claimant, without contribution from the Defendant or anyone on the Defendant's side.

49. In the meantime, Mr. Kang had instructed Mr. Monington to act in relation the grant of the lease which had been agreed upon at the First Meeting. There is a note dated 5th August 2018 asking Mr. Monington to call Mr. Kang on his mobile. Mr. Monington made a handwritten note of his telephone call with Mr. Kang. The instructions of Mr. Kang were to access the title deeds for the Property and prepare the necessary draft documents. Mr. Monington's handwritten note records that the lease would be for 5 years, excluded from the 1954 Act, with a 12 month break notice on either side. The landlord would have first option to acquire on a sale. The rent was to be £25,000, with a three month rent free period. VAT was to be payable on the rent. There was to be no deposit.

50. On 13th August 2014 Chancellors, a firm of solicitors, wrote to Mr. Monington saying that they acted on behalf of the Defendant in relation to the lease of the Property. They said that they looked forward to receiving draft documentation *"in order that we may proceed"*.

51. On 20th August 2014 Mr. Monington spoke again to Mr. Kang. The terms of the intended lease were again discussed, and Mr. Kang told Mr. Monington that he believed that planning permission had been obtained for use of the Property as a restaurant. Mr. Monington's brief handwritten note of the discussion refers to *"Planning Restaurant"*, and then goes on to record that the term of the lease was to be five years, with a one

year break right on both sides and a rent of £25,000 per annum, payable quarterly in advance.

52. On 28th September 2014 Mr. Monington wrote to Chancellors in the following terms.

"We now have instructions in this matter and we understand that the following terms apply:-

> *1) the term is to be for 5 years excluded from the Landlord and Tenant Act 1954.*
>
> *2) Either party can terminate the Lease on giving 12 months notice.*
>
> *3) The initial rent is £25,000 plus VAT per annum and there will be a three month rent free period. Rent to be payable quarterly in advance, no security deposit is required.*
>
> *We understand that your client has planning permission for use of the premises as a restaurant and we would be grateful if you could let us have a copy of that permission."*

53. Matters did not however progress at that stage. Mr. Monington's recollection was that he never received a response to that letter, and there is no evidence of a response having been received or sent.

The relevant factual history – 2015

54. By 2015 Mr. Kang was, not surprisingly, becoming restive. There was no sign of the lease of the Property being completed, and no rent was being paid. Mr. Kang's evidence, which I accept, is that he went to the Property to meet with the Defendant around April 2015, in order to tell him to start the lease. The meeting in fact took place with Nadeem because, according to Mr. Kang, the Defendant would ask Mr. Kang to deal with Nadeem. This makes sense, given that the Defendant and Nadeem could converse in Punjabi. At the meeting Nadeem gave Mr. Kang a handwritten note, a copy of which I have seen. The bulk of the handwriting on the note is that of Nadeem. The parts of the note in Nadeem's handwriting record the Defendant's name, date of birth and address, and then refers to a 5 year lease with a two month

pull out option. The solicitors acting are then identified as Chancellors. The rent is recorded as £25,000 per annum, with an 18th May start.

55. Mr. Kang's evidence was that he protested that the two month pull out option was not good enough, because the Claimant had wanted a 12 month break notice. Nadeem's answer was that the Defendant wanted a two month break clause because the Defendant did not know whether the Business would be a success and, if it was not, the Defendant did not want to be tied into paying 12 months rent before being able to get out of the lease. Mr. Kang's evidence was that the break notice was discussed, and that he and Nadeem agreed a three month break option.

56. Mr. Kang's evidence was that he then attended at Mr. Monington's office, updated him on the discussion in the meeting with Nadeem, and handed Mr. Monington Nadeem's handwritten note. Mr. Monington made some brief handwritten notes of his own on the note, recording that the rent would commence on 18th May 2015, quarterly in advance and with VAT thereon, that the 1954 Act would be excluded, and that the landlord would pay costs (I take this to be a reference to the landlord's costs of granting the lease) and that three months was a sufficient break. The last part of Mr. Monington's handwritten notes thus confirms Mr. Monington's evidence that he was told by Mr. Kang that a three month mutual break right was acceptable.

57. Turning to Nadeem's evidence in respect of the meeting in April 2015, Nadeem confirmed in his evidence that he did have a discussion with Mr. Kang in or around April 2015. Nadeem's evidence was however that he contacted Mr. Kang, and said that the Defendant now wanted a five year lease with a two month pull out option because of concerns which he, Nadeem, had as to whether the Business would be a success. Nadeem said that while work was continuing to the Property, and with the Property due to open as a shisha lounge in May 2015, he was concerned about his sons having a ten year lease of the Property. It will be recalled that the evidence of Nadeem, the Defendant, and Adam was that a ten year lease was agreed with Mr. Kang at the First Meeting, and that I have yet to resolve the conflict of evidence as to what was agreed at the First Meeting.

58. So far as the meeting between Mr. Kang and Nadeem in or around April 2015 is concerned, I prefer the evidence of Mr. Kang as to the circumstances in which the meeting came about and as to what was discussed at the meeting, in so far as there is a conflict between the evidence of Mr. Kang and Nadeem in these respects. I therefore accept the evidence of Mr. Kang which I have set out above, in relation to this meeting and its aftermath. I will refer to this meeting, which took place in or around April 2015, as "the Second Meeting". This is a label of convenience. It is not intended to mean that there was no contact between Mr. Kang, on the one side, and the Defendant, Adam, and Nadeem, on the other side, between the First Meeting and the Second Meeting. Rather, and consistent with reference to the First Meeting, it is intended to mark out the second meeting at which outline terms of the intended lease were the subject of oral negotiation and agreement.

59. Resuming the narrative, on 16th April 2015 Chancellors wrote to Mr. Monington, saying as follows.

> *"We act on behalf of the tenant in relation to the grant of a Lease of the above Property.*
>
> *We note that you act for the landlord. Please confirm.*
>
> *Please can you forward draft lease together with all related documentation pertinent to the same.*
>
> *We look forward to hearing from you accordingly."*

60. On the same date (16th April 2015) Chancellors wrote a lengthy letter to the Defendant, at his home address. The opening part of the letter read as follows (the underlining is my own).

> *"We write to acknowledge with thanks your kind instructions to act in respect of the grant of lease of the above property subject to contract.*
>
> *You have instructed us that you are purchasing the lease for a period of 5 years at a rental of £25,000 per annum.*
>
> *You also instruct us that the Lease must contain a 2 month break clause in your favour at any time."*

61. When disclosure took place in this action the first copy of this letter which was provided for inspection by the Defendant's solicitors had the underlined section of the text redacted. I understand that the Claimant's solicitors queried this redaction and, in a later supplemental list of documents, this letter was provided with the redaction removed, so that the underlined section could be read.

62. Chancellors were therefore aware, by 16th April 2015, that the proposed term of the lease was to be five years, at a rent of £25,000 per annum, with a two month break right.

63. On 22nd April 2015 Chancellors sent an e mail, addressed to *"Mr Ijaz"*, at Adam's e mail address, acknowledging *"your kind instructions for the grant of lease of the above property* [the Property]*"* and enclosing what was described as their Care and Conduct letter. I take the reference to the Care and Conduct letter to be a reference to the letter of 16th April 2015, which required the counter-signature of the Defendant. The e mail also asked for a payment on account of fees of £500, and various identification details.

64. On 12th May 2015 Jayne Richards, Mr. Monington's secretary, sent an e mail to Chancellors enclosing Office Copy Entries and the Filed Plan for the Property, and the draft lease with plan attached.

65. In relation to the draft lease attached to Ms. Richards' e mail ("the First Draft Lease") **[C1/58/347]**, the following points fall to be noted.

    (1) The First Draft Lease was drafted using a Law Society precedent form of lease known as The Law Society Business Lease (Whole of Building) (Registered) 2008.

    (2) The term of the lease was identified on the front page of the First Draft Lease, by inserted typescript, as running from and including 18th May 2015 to and including 17th May 2020; that is to say a term of five years.

    (3) The rent was identified as £25,000 per annum plus VAT, payable quarterly in advance, with the first payment to be made on 18th May 2015.

    (4) The rent review dates were crossed out, so that there were no provisions for rent review.

    (5) The signature page of the First Draft Lease provided for the landlord and the tenant to sign the document, and for their signatures to be witnessed.

    (6) A plan was attached to the First Draft Lease ("the Lease Plan").

(7) Also attached to the First Draft Lease was a rider, containing additional terms to those contained in the Law Society form of lease. Mr. Monington explained in his witness statement, and I accept, that he used a rider because the Law Society form of lease comes in the form of a PDF document. The PDF document has blank spaces where information can be inserted, but does not permit revision of the standard terms set out therein. This rider ("the Rider") contained two principal clauses, as follows.

(i) Clause 1 of the Rider contained provisions for both landlord and tenant to have the right to break the lease on three months notice.

(ii) Clause 2 of the Rider contained the confirmation of the parties that the required procedure had been followed to exclude the lease from the protection of the 1954 Act, and also contained the agreement of the parties that the provisions of Sections 24-28 of the 1954 Act were excluded in relation to the tenancy created by the lease.

66. Also included with the First Draft Lease was the form of statutory declaration which is required to be made by a tenant, as part of the statutory process for contracting a lease out of the protection of the 1954 Act. This form of declaration was unsigned. The landlord and tenant were identified, by typescript at the appropriate parts of the declaration form as, respectively, the Claimant and the Defendant.

67. On 12th June 2015 Chancellors sent an e mail, again addressed to *"Mr. Ijaz"*, using Nadeem's e mail address. The e mail forwarded the earlier e mail from Chancellors sent on 22nd April 2018, and stated as follows.

> *"Further to our telephone conversation please see email below dated the 22nd April 2015 at 2.26pm."*

68. There is no evidence that Chancellors made any response to the e mail from Ms. Richards on 12th May 2015, enclosing the First Draft Lease. On 4th November 2015 Mr. Monington sent an e mail to Ms. Tabassam of Chancellors, inquiring as to whether they were still instructed. There appears to have been no reply to that e mail. I assume that this was because Chancellors had received no further instructions in respect of the intended lease of the Property.

69. Nadeem's evidence was that, following the Second Meeting, he instructed Chancellors to write to QSD, indicating that his sons wanted a lease of the Property for a five year term with a *"pull out"* clause. Nadeem said that he instructed Chancellors without the knowledge or approval of either Adam or the Defendant. He said that when Chancellors wrote to the Defendant on 16th April 2015, he, Nadeem, was told by his sons that they wanted a ten year lease of the Property without any break. In this he was supported by the evidence of the Defendant and Adam.

70. The Defendant and Adam also claimed that, shortly before the Business opened, on 20th May 2015, Mr. Kang attended at the Property, and provided Adam with a draft of the lease. The version of the draft lease in the trial bundle which was said to be the draft lease allegedly handed over by Mr. Kang is at **[A/23/79]**. It is in the same form as the First Draft Lease, but without the Rider and the form of statutory declaration. The Defendant and Adam said that they told Mr. Kang, at this alleged meeting, that they

had agreed a ten year lease with Mr. Kang. They said that Mr. Kang said that this was fine, and that he would amend the lease accordingly. Adam also said that Mr. Kang took the draft lease away with him.

71. I am not able to accept any of the evidence which I have summarised in my previous two paragraphs. None of it fits with the documentation which I have seen. So far as the instruction of Chancellors is concerned, my finding is that Nadeem instructed Chancellors to act in relation to the grant of the lease with the knowledge and authority of the Defendant and Adam, and on behalf of the Defendant, as the intended tenant under the lease. I making this finding I refer in particular to the following points.

(1) It is clear that Chancellors had first been instructed by 13th August 2014, when they wrote to Mr. Monington to say that they acted on behalf of the Defendant. There could not therefore have been any first instruction of Chancellors following the Second Meeting. There was a very lengthy hiatus before Chancellors wrote again to Mr. Monington on 16th April 2015, again saying that they acted for the Defendant, and asking for a draft lease, but it is clear from the letter of 13th August 2014 that Chancellors had already been instructed.

(2) On 16th April 2015 Chancellors wrote a lengthy client care letter to the Defendant, at his home address. It stretches credulity to breaking point to suggest that this letter was written by Chancellors in circumstances where, unbeknown to them, the Defendant had in fact no idea that they had been instructed to act on his behalf.

(3) On 22nd April 2015 Chancellors sent an e mail using Adam's e mail address, enclosing their client care letter, asking for payment on account of fees, and asking for identification details. By this time however, the Defendant should have received the letter of 16th April 2015 which, according to the evidence of the Defendant, provoked his protest to his father that a ten year lease had been agreed. This does not make sense.

(4) On 12th June 2015 Chancellors sent an e mail, using Nadeem's e mail address, by which they forwarded their previous e mail to Adam's e mail address. By this time however, well over a month had passed since the Defendant and

Adam had made their alleged protest at the instruction of Chancellors by Nadeem. Again, this does not make sense, particularly bearing in mind that the e mail of 12th June 2015 records that someone had spoken to Chancellors on the telephone. Whatever the terms of that telephone conversation it seems unlikely that it can have been an instruction to do nothing further, because the e mail of 12th June 2015 was forwarding the previous e mail of 22nd April 2015.

(5) Given the involved, and important nature of this part of the evidence, one might have expected someone from Chancellors to be called as a witness for the Defendant, in order to explain how it was that, despite the picture created by their correspondence, they were in fact only ever instructed by Nadeem, in circumstances where they were unaware that Nadeem was acting without the knowledge or authority of the Defendant or Adam. There was however no such witness called from Chancellors.

(6) It seems likely to me, and I so find, that the reason why Chancellors ceased to be involved in the matter, following their e mail of 12th June 2015, was because they had not been paid the sum of £500 which they had asked for in their e mail of 22nd April 2015. Mr. Monington gave evidence that, on many occasions, he had acted for the Claimant on letting transactions where the tenants had acted for themselves, without using solicitors. I find that, in the present case, the Defendant made a decision, at some stage in or around June 2015, that he could deal with the letting without using a solicitor.

72. It follows from the finding in my previous paragraph that I also reject the evidence of Nadeem, the Defendant, and Adam, that the Defendant and Adam made their alleged protest at the instruction of Chancellors. I find that there was no such protest, because the Defendant and Adam already knew that Chancellors had been instructed.

73. I also find that there was no meeting, following the opening of the Business, at which Mr. Kang handed over to the Defendant and Adam a draft of the lease, without the Rider, and was told that a ten year lease was required, to which Mr. Kang agreed. It makes no sense that Mr. Kang would hand over a draft of the lease, in circumstances where he had left Mr. Monington in charge of the granting of the lease. This also makes no sense when it is remembered that the First Draft Lease was sent out by Ms. Richards, on 12th May 2015, showing a five year term and including the three month mutual break right contained in the Rider. It is obvious that the First Draft Lease reflected the instructions of Mr. Kang to Mr. Monington, following the agreement reached at the Second Meeting. I find that the first occasion on which a draft lease was provided by anyone acting on behalf the Claimant was on 12th May 2015, when the First Draft Lease was sent out by Mr. Monington, through his secretary Ms. Richards, to Chancellors.

74. There is another reason to reject the evidence of the Defendant and Adam that this alleged meeting took place, at which a draft of the lease was provided, and then taken away by Mr. Kang for amendment. As I have already noted, the draft lease referred to by the Defendant and Adam is at **[A/23/79]**. As I have also already noted, this draft lease is in the same form as the First Draft Lease, sent by Ms. Richards to Chancellors on 12th May 2015 and located at **[C1/58/347]**, save that the draft lease at **[A/23/79]** does not have the Rider. In fact, and save for the absence of the Rider, the two documents are identical. This is apparent from the identical typescript added to each document, and from the manuscript deletion of the wording on the second page of each lease, indicating the day of the month on which rent was to be paid (deleted because the rent was identified, by added typescript, as payable quarterly in advance), and indicating where the rent review dates were to be inserted (deleted because the term was to be for five years with no rent reviews).

75. When the Defendant served his Defence and Counterclaim in the action, there was attached to the Defence and Counterclaim, as D2, what was said to be the draft lease produced by the Claimant for execution. D2 is the draft lease at **[A/23/79]**. The question which arises is how the Defendant came to have in his possession, at the time when the Defence and Counterclaim was served, a draft lease identical, save for the missing Rider, to that sent by Ms. Richards to Chancellors. It could not have been provided directly by Mr. Kang because, according to the evidence of the Defendant and Adam, Mr. Kang took away with him the draft lease which he is alleged to have provided at the alleged meeting. In a witness statement dated 9th August 2018, made in opposition to the Claimant's application for an expedited trial, Hannah Patel, a trainee solicitor with the Bond Adams (the Defendant's former solicitors) said, at paragraph 21

of her witness statement, that a draft lease, without the Rider, had been in circulation since 2015. Adam said in cross examination that the draft lease at **[A/23/79]** had been found in a folder at the Property. The obvious inferences, and I so find, are (i) that the document at **[A/23/79]** came from Chancellors, (ii) that the document at **[A/23/79]** is the same document as Ms. Richards sent to Chancellors on 12th May 2015 (**[C1/58/347]**), but with the Rider, subsequently and by some unknown means, having become separated from the remainder of the document, and (iii) that the draft lease sent by Ms. Richards to Chancellors, at **[C1/58/347]**, was forwarded by Chancellors to the Defendant, or Nadeem, or Adam. In relation to the third of these findings I am unable to say whether the Rider came adrift from the remainder of the document before or after it was forwarded by Chancellors. For present purposes, the relevant point is that the evidence of the Defendant and Adam as to the alleged meeting with Mr. Kang, where Mr. Kang is alleged to have produced and then taken away the draft lease, does not fit with these findings.

76. Now that I have continued my narrative of the factual history to the point where, as I have found, a draft lease was first sent out to Chancellors, I regard it as appropriate to return to the conflict of evidence, resolution of which I previously deferred, in relation to the First Meeting.

77. My findings of fact, in relation to those parts of the First Meeting where there is a conflict of evidence, are as follows.

(1) I find that the term agreed for the draft lease at the First Meeting was five years, not ten years.

(2) I find that the agreed rent of £25,000 per annum plus VAT was proposed by Mr. Kang and accepted by the Defendant. This figure was not negotiated down from £30,000 per annum plus VAT.

(3) I find that a 12 month mutual break option was agreed.

(4) I find that no cash deposit was paid, either at the First Meeting or thereafter, either in the sum of £5,000 or in any other amount.

78. My reasons for these findings of fact are as follows.

(1) Mr. Monington's record of his instruction by Mr. Kang, on 5th August 2014, confirms the five year term of the lease, and the fact that the lease was to contain a 12 month mutual break clause. This is, to state the obvious, consistent with Mr. Kang's evidence as to what was agreed at the First Meeting.

(2) The same instructions were confirmed when Mr. Kang spoke to Mr. Monington on 20th August 2014, when Mr. Kang reported his belief that planning permission had been obtained for the use of the Property as a restaurant.

(3) Mr. Monington's letter to Chancellors of 24th September 2014, which also recorded the five term for the lease, and the 12 month mutual break clause, provides further confirmation of what had been agreed at the First Meeting.

(4) Further confirmation is also provided by Chancellors' letter to the Defendant of 16th April 2015, which confirmed the agreement of a five year term for the lease, but also stated that the lease should contain a two month break clause. As I have

already explained, the critical part of this letter, for present purposes was redacted when the letter was first disclosed. I cannot see any basis on which a right to withhold inspection could have been asserted in respect of the critical part of this letter, and subsequently the letter was disclosed in an unredacted form. As I have said, the letter confirms that a five year term had been agreed for the lease.

(5) The reference to a two month break clause in Chancellors letter of 16th April 2015 also seems to me to be important. I say this because, as is clear from the Second Meeting, Nadeem did want a two month break right by the time of the Second Meeting. This was presented by Nadeem in his evidence as his own decision, motivated by a concern as to whether the Business would be a success. To some extent, I accept this. I accept that there was a concern on the Defendant's side, by April 2015, as to whether the Business would be a success. I also accept that this was the reason why a two month break right was sought from Mr. Kang at the Second Meeting. What I do not accept is that this all happened without the knowledge or authority of the Defendant and Adam, or that the Defendant and Adam then insisted upon a ten year lease with no break option. This does not make sense. What makes much better sense, and I so find, is that the 12 month mutual break right was agreed at the First Meeting. Thereafter, and because of concerns over the viability of the Business and the ability to pay the rent, Nadeem, with the knowledge and authority of the Defendant and Adam, sought to reduce the break period to two months.

(6) In the context of the viability of the Business, the Defendant stated in his witness statement that the Business, following its opening on 20th May 2015, was an immediate success and, within six months, had achieved a turnover of between £20,000 and £30,000 a month *"as supported by our accounts"*. There were however no supporting accounts or other documents to demonstrate that the Business enjoyed this level of success. There is evidence that the original company through which the Business was operated, Emperors Lounge Limited, went into liquidation in December 2017, with an estimated total deficiency of £40,535. The summary of liabilities which showed this deficiency was signed by Nadeem on 27th December 2017. In terms of the running of the Business, Emperors Lounge Limited was then replaced by Emperors Café Limited. The financial picture of the Business disclosed by this evidence appears to have borne out the concerns which caused Nadeem, at the Second Meeting, to try to secure a reduction in the break period to two months.

(7) So far as the alleged payment of the cash deposit was concerned, this allegation first appeared in the witness statements of the Defendant and Nadeem. It was not referred to in the Defence and Counterclaim, either in its original and amended forms, where paragraph 8 set out what was alleged to have been agreed at the First Meeting. The allegation that the sum of £5,000 was dropped off outside the Property, part of the way through the First Meeting, was made by the Defendant in the course of cross examination, when he claimed that his mother brought this sum to the Property so that it could be paid as the deposit. There was no evidence from the mother to confirm this. I found it difficult to believe that the sum of £5,000 in cash would be available, at the drop of a hat, to be brought round to the Property, and then handed over without even a receipt

being sought. I found the evidence of a cash deposit having been paid at the First Meeting to be unsatisfactory, and I reject it.

(8) I found it difficult to understand how the Defendant and Adam could be so categoric as to what was discussed and agreed between Mr. Kang and Nadeem, bearing in mind that both the Defendant and Adam, on their evidence, could not speak the Indian form of Punjabi spoken by Mr. Kang, and had, at least, some difficulty in understanding what Mr. Kang was saying. In Adam's case there was the additional difficulty that, by his own admission in cross examination, he left the First Meeting early. In these circumstances it is difficult to see how Adam could either give any evidence of what was finally agreed at the First Meeting, or confirm the evidence of the Defendant as to what was agreed at the First Meeting.

(9) Generally, I found Mr. Kang to be a more reliable witness than any of Nadeem, the Defendant, and Adam. Mr. Kang's evidence is also supported by Mr. Monington's evidence of the instructions given to him by Mr. Kang following the First Meeting. I found Mr. Monington to be a reliable witness.

79. Returning to the narrative, on 4th November 2015 Mr. Monington wrote to Chancellors, to find out whether they were still instructed. According to Mr. Monington, there was no response to that e mail.

The relevant factual history – 2016

80. Mr. Monington's evidence was that Mr. Kang, who was becoming a bit fed up with the delay in putting the lease in place, instructed Mr. Monington to post a new set of documents directly the Defendant. In his reference to a new set of documents Mr. Monington explained that he meant new versions of the documents sent out under cover of Ms. Richard's e mail of 12th May 2015; namely the First Draft Lease and the statutory declaration form. Mr. Kang informed Mr. Monington that he, Mr. Kang, would speak to the Defendant to let the Defendant know that the documentation would be sent to him by QSD, and that all he needed to do was sign, and swear, and have the documentation witnessed, where indicated by signature post it notes to be placed on the documents by Mr. Monington. Mr. Kang would then obtain the signed, sworn and witnessed documents from the Defendant, and would forward them to Mr. Monington.

81. Mr. Monington's evidence was that he first posted the statutory declaration form to the Defendant. This went out first because, before the lease could be completed, Mr. Monington needed to ensure that the statutory procedure was followed for contracting the lease out of the protection of the 1954 Act. This required compliance with the steps set out in Section 38A(3) of the 1954 Act, which provides as follows.

> *"(3) An agreement under subsection (1) above shall be void unless–*
>
> *(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ("the 2003 Order"); and*

> *(b) the requirements specified in Schedule 2 to that Order are met."*

82. Schedule 2 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ("Schedule 2") essentially requires the person who will be the tenant under the relevant lease to make a declaration in response to the notice served under Schedule 1 to the Order ("Schedule 1"). The declaration confirms that the required notice has been given and confirms the acceptance, on the part of the prospective tenant, of the contracting out of the relevant lease. If the notice under Schedule 1 is served less than 14 days before the relevant lease is entered into or (if earlier) a contract for the grant of the lease is entered into, the declaration to be made by the prospective tenant must be a statutory declaration. Reference to the declaration or statutory declaration must be contained in or endorsed on the relevant lease. The agreement that Sections 24-28 of the 1954 Act will not apply to the lease must also be contained in or endorsed on the relevant lease.

83. Thus it was that Mr. Monington sent out first the form of statutory declaration, as the notice required to be served on the Defendant by Section 38A(3)(a) of the 1954 Act. This form of statutory declaration was the form of statutory declaration required by Schedule 2, in a case where the Schedule 1 notice was served less than 14 days before the tenant became committed to the relevant lease. The prescribed form for the Schedule 1 notice is not in the same form as the prescribed form for the Schedule 2 statutory declaration, but the boxed warning in the prescribed form of Schedule 1

    notice is included within the wording of the boxed warning in the prescribed form of the Schedule 2 statutory declaration.

84. Mr. Monington explained in his oral evidence that he used the Schedule 2 statutory declaration form, in unsigned form, as the notice required by Schedule 1 because it contained, within the form, the warning required to be given in a Schedule 1 notice.

85. Mr. Kang's evidence was that, following his instruction Mr. Monington, he (Mr. Kang) did telephone the Defendant or Nadeem to say that a document was on its way. Mr. Kang's evidence was that, some time thereafter, the Defendant or Nadeem telephoned Mr. Kang to say that the document had been signed and would be brought to Mr. Kang's house. According to Mr. Kang, Nadeem did bring the document to Mr. Kang's house. Mr. Kang then looked at the document to confirm that it had been signed, and saw that it had been signed.

86. Mr. Kang's evidence, which was confirmed by Mr. Monington, was that Mr. Kang then took the signed form of declaration to Mr. Monington's office, and handed it over to Mr. Monington. At the same meeting Mr. Kang signed the lease to be granted, in the form of a lease and counterpart, with Mr. Monington witnessing his signature. Mr. Monington's evidence was that the lease and counterpart were in the same form as the First Draft Lease so that, in particular, they contained the Rider. Mr. Monington then posted the lease and counterpart to the Defendant for his signature. Again, the arrangement was that Mr. Kang would obtain the signed documents from the Defendant, and would return them to Mr. Monington. Mr. Monington's evidence was that he explained to Mr. Kang that he, Mr. Monington, would need to date the lease and counterpart on completion, rather than the parties dating the lease and counterpart.

87. Mr. Kang's evidence was that he again warned the Defendant or Nadeem to watch out for the lease documents in the post, and to sign and return them to Mr. Kang. Some time later, according to Mr. Kang, the Defendant or his father came to Mr. Kang's house and handed over an envelope, which was said to be the signed lease, although Mr. Kang did not check this. Mr. Kang then took the envelope to the offices of QSD, and left it there to be given to Mr. Monington. Mr. Monington was not able to give any evidence confirming that he received this envelope, or that he dated, and thereby completed any lease signed by the Defendant. In this respect Mr. Monington had no recollection.

88. The original of the statutory declaration returned by Mr. Kang to Mr. Monington was not available, nor was any copy of that document available. Also unavailable was the original or any copy of the document subsequently provided in an envelope to Mr. Kang, and left for Mr. Monington at his office. Mr. Kang assumed that this document was the signed lease. The evidence of Mr. Monington was that these documents were somehow lost.

89. I have placed in 2016 the above sequence of events, relating to the evidence of the sending out of the statutory declaration and the subsequent sending out of the lease and counterpart. This is because it seems to me that the above sequence of events must have taken some time to occur. It seems likely to me however that this sequence of events probably commenced in 2015, and continued over into 2016.

90. I am forced to be vague about dates because neither Mr. Monington nor Mr. Kang gave any dates for this sequence of events in their evidence. Not only this, but Mr. Monington had no record of his sending out to the Defendant either the form of statutory declaration or the lease and counterpart, or of Mr. Kang attending at his office to return the signed documents.

91. I found this absence of documentation surprising. I was particularly surprised that the form of statutory declaration and the lease and counterpart (as already signed by Mr. Kang), should have been sent out with no form of covering letter, a copy of which would have been retained on Mr. Monington's file. I also found it surprising that no copy of the statutory declaration which was said to have been signed by the Defendant, or what Mr. Kang assumed to be the subsequently signed lease was retained on Mr. Monington's file. Mr. Monington's explanation for the absence of any covering letter, which I paraphrase, was that, in dealing with an unrepresented tenant (strictly unrepresented prospective tenant) he needed to be very careful not to give any impression that he was in any way accepting any obligation to advise or act for the tenant. His concern was that an unrepresented tenant might subsequently turn round and try to claim that Mr. Monington was under some duty to the tenant, and that any form of communication to the tenant might help the tenant to create an impression of that kind. I accept that Mr. Monington did have a concern of this kind, and that this was the reason for the absence of any covering letter. I remain surprised however that no internal documentary record exists of any of the sequence of events which I have described above. I have said that Mr. Kang was not a man for paperwork, but the same was not true of Mr. Monington, who struck me as a careful and competent conveyancer.

92. At this stage however, it is necessary to mention the position of both Mr. Warwick and Mr. Wonnacott in their closing submissions. Both Counsel were agreed that a lease of the Property was completed (using completion in its technical sense to mean the grant of a valid lease) in 2016. I will refer to this lease as "the 2016 Lease". There is a dispute

over what the terms were of the 2016 Lease, but it was common ground that the 2016 Lease was granted, as a valid lease, in 2016.

93. This begs the question of how the grant of the 2016 Lease came to be completed. Aside from the sequence of events described above, there was no evidence of any other sequence of events by which the 2016 Lease came to be granted. In these circumstances, and notwithstanding my concerns over the absence of dates and supporting documentation, and notwithstanding the absence of evidence from Mr. Monington that he actually received a lease, or a lease and counterpart with the witnessed signature of the Defendant, which he then dated and thereby completed, I find as follows.

(1) I find that the sequence of events which I have described above did occur as described by Mr. Kang and Mr. Monington in their evidence.

(2) I find that the grant of the 2016 Lease was completed by Mr. Monington at some stage in the first half of 2016.

(3) The above findings necessarily include a finding that the statutory declaration form sent out by Mr. Monington was returned to Mr. Kang in a signed form,

and was then provided to Mr. Monington. I will refer to this signed form of the statutory declaration as "the First Statutory Declaration".

94. As I have said, there is a dispute over the terms of the 2016 Lease. There is also a dispute as to whether the 2016 Lease was contracted out of the 1954 Act. It is appropriate to defer my consideration of these disputes until after I have continued the narrative further. I will also defer to later in this judgment the question of whether the First Statutory Declaration was sworn by the Defendant, or simply signed.

95. Mr. Monington's evidence was that the loss of the First Statutory Declaration and the 2016 Lease came to light in mid or later 2016. The Claimant, by its directors, had been negotiating and granting options to a developer in respect of other properties which the Claimant owned in the vicinity of the Property. The Claimant, by its directors, thought that the developer might be interested in Site 1, which included the Property. Mr. Monington was asked to provide copies of the leases affecting Site 1 for the developer to see. When Mr. Monington checked the file for the Property, he found that the First Statutory Declaration and the First Lease were missing. Mr. Monington reported this to Mr. Kang, and suggested that Mr. Kang ask the Defendant for a copy of the 2016 Lease. Mr. Kang's evidence was that he spoke to Nadeem or the Defendant, but was told that they did not have a copy of the 2016 Lease either. Mr. Kang reported this to Mr. Monington, who advised that they would have to go through the same process as before; that is to say the process of getting the statutory declaration sworn and the lease signed in the required manner.

96. The evidence of Mr. Monington and Mr. Kang was that they did then follow the same process as before. The form of statutory declaration was sent out to the Defendant by Mr. Monington. Mr. Kang's evidence was that the statutory declaration was returned to his house by Nadeem or the Defendant at some time in November 2016. The statutory declaration was not in an envelope and so, Mr. Kang said in his evidence, it was easy to see that it was a signed declaration. The next day Mr. Kang took the statutory declaration to Mr. Monington's office and handed it over to Mr. Monington.

At the same time Mr. Kang signed the lease and counterpart which were to comprise the new replacement lease of the Property. Mr. Monington then posted the lease and counterpart to the Defendant for signature by the Defendant, and Mr. Kang warned the Defendant or Nadeem that the documents were on their way. The evidence of Mr. Kang was that he told the person he spoke to that he needed the documents signed quickly, because he was going on holiday to Dubai in January 2017. Mr. Kang also said that the documents should not be dated. Mr. Kang's evidence was that he added this warning because he was aware that Mr. Monington would be dealing with the dating of the documents.

97. The form of statutory declaration which was signed by the Defendant is available. A copy of this document, which I will call "the Second Statutory Declaration" is at **[A/26/106]**. In relation to the Second Statutory Declaration I note the following.

(1) The Second Statutory Declaration is in the form of the statutory declaration in Schedule 2.

(2) The Second Statutory Declaration bears a signature which the Defendant accepts is his signature.

(3) The Second Statutory Declaration is expressed to be made on 18th November 2016.

(4) The Second Statutory Declaration bears a signature of the person before whom the Second Statutory Declaration is expressed to have been made. The signature is identified, by a stamp underneath the signature, as that of Mohammed Shabir, a Commissioner of Oaths, of JR Jones Solicitors, whose address was also given. Mr. Shabir was not called as a witness, but I understand that there is a Mohammed Shabir of JR Jones, and that JR Jones is a firm of solicitors, whose address is correctly given on the stamp.

(5) Also above the stamp the following writing appears in manuscript, in square brackets, accompanied by a second signature identified as that of Mr. Shabir.

> *"Signature Syed Jaffer Ijaz witnessed, as no advice sought, hence only signature witnessed."*

98. The Defendant's evidence was that he did not sign the Second Statutory Statutory Declaration on 18th November 2016. He accepted that he was in Birmingham that day, but said that he was with his fiancée. The Defendant's evidence was that Mr. Kang came to the Property in September 2017 and presented the Defendant with a document for signature, which the Defendant signed without reading. The Defendant also claimed that the document he signed in September 2017 had no other signature or handwriting on it. Adam also gave evidence that Mr. Kang had visited the Property in September 2017, and presented the Defendant with a document to sign, which the Defendant signed without reading. There was also the evidence of Mr. Siddique describing the visit of Mr. Kang to the Property in September 2017. Mr. Siddique said that he saw Mr. Kang give the Defendant a document, which the Defendant signed and returned. Mr. Siddique said that he recalled this meeting because it was the only time Mr. Siddique saw Mr. Kang come to the Property for any purpose other than collection of rent.

99. I do not accept that the Second Statutory Declaration was signed by the Defendant in September 2017. I find that the Second Statutory Declaration was sworn by the Defendant on 18th November 2016 in the presence of Mr. Shabir, as recorded on the Second Statutory Declaration. I also find that the Second Statutory Declaration was provided to the Defendant for swearing, and was returned, sworn, to Mr. Kang in the manner described in the evidence of Mr. Monington and Mr. Kang which I have summarised above.

100. My essential reason for these findings is that the Second Statutory Declaration is expressed to have been made before Mr. Shabir on 18th November 2016. If I was to accept the Defendant's evidence, this would also, as it seems to me, require me to make one of the three following findings.

(1) Mr. Shabir's signature was forged on the Second Statutory Declaration by a third party, who also purloined or fabricated the stamp of JR Jones, at some time after the Defendant put his signature to the Second Statutory Declaration.

(2) Someone attended on Mr. Shabir, on 18th November 2016, and duped Mr. Shabir into thinking that he was the Defendant

(3) Mr. Shabir put his signature to the Second Statutory Declaration, and affixed his firm's stamp to the Statutory Declaration in the absence of the Defendant or anyone impersonating the Defendant, thereby committing a serious act of dishonesty.

101. There is no evidence to support any of the above findings, and none of them carry any credibility. The first of the above findings would require the finding of dishonest activity by an unspecified and unknown third party. The second of the above findings would be impossible, on the Defendant's evidence, because the Defendant claims that there was no other writing on the Second Statutory Declaration when he signed the document.

102. As to the third finding, I do not see how I could possibly make a finding of this kind. Mr. Shabir was not called as a witness in this action, nor does Mr. Shabir appear to have been given any notice that his integrity was to be called into question in the manner entailed by the Defendant's account of the circumstances in which he signed the Second Statutory Declaration. I have seen e mails which were sent by Mr.
Sheppard, the Defendant's solicitor, to Mr. Shabir in August and September 2018, seeking the assistance of Mr. Shabir. Mr. Shabir does not appear to have replied to these e mails. One of Mr. Sheppard's e mails, sent on 5th September 2018, does however refer to a conversation between Mr. Sheppard and Mr. Shabir, which I assume to have been a telephone conversation. According to Mr. Sheppard's e mail, Mr. Shabir did say, in this conversation and after being provided with a copy of the Second Statutory Declaration, that the signature on the Second Statutory Declaration was his, and that he did recall a gentleman attending his offices on 18th November 2016 and swearing the Second Statutory Declaration before him. There is no record, in Mr. Sheppard's e mails, of Mr. Shabir being informed that what the Defendant was actually going to say was that he, the Defendant, signed the Second Statutory Declaration in September 2017. Indeed, in the first of Mr. Sheppard's e mails to Mr. Shabir which I have seen, sent on 22nd August 2018, Mr. Sheppard refers to the
Second Statutory Declaration as having been *"executed on 11 November 2016"*. I take the reference to 11th November 2016 in this e mail as being a mistaken reference to 18th

November 2016. So far as I can see, there is no evidence of Mr. Shabir being given any notice that the Defendant would be giving evidence at this trial which would raise the question of whether Mr. Shabir had committed a serious act of dishonesty. I find this very surprising.

103. I also bear in mind other points. In his original Defence and Counterclaim, and in his Amended Defence and Counterclaim the Defendant accepted that he signed a document on 18th November 2016, which was brought to the Property by Mr. Kang, and which the Defendant did not read. It was only in the Re-Amended Defence and Counterclaim, for which I gave permission on the first day of the trial, that the Defendant's pleaded case was changed to bring it into line with the evidence in the Defendant's witness statement. The original, and first amended case of the Defendant was consistent with the Defendant having signed the Second Statutory Declaration on 18th November 2016.

104. In addition to this, the evidence of both the Defendant and Adam as to what was alleged to have been signed in September 2017 was vague. Neither read the document the Defendant is alleged to have signed. As for Mr. Siddique, his evidence was confined to his recollection that the Defendant signed a document, presented to him by Mr. Kang, in September 2017. I do not regard this recollection as reliable. Mr. Siddique said that he remembered the incident because he had only ever seen Mr. Kang come to the Property to collect the rent. It emerged in cross examination however that, in the previous month, Mr. Kang had paid a visit to the Property in connection with insurance. It therefore seems unlikely that Mr. Siddique, the manager of the Business, only saw Mr. Kang visit the Property once for something other than rent collection.

105. Mr. Wonnacott also made the point in his closing submissions, which I accept, that there was a deemed admission on the part of the Defendant of the authenticity of the Second Statutory Declaration, as dated 18th November 2016 and as expressed to be made before Mr. Shabir. The Second Statutory Declaration, at **[A/26/106]** was a document disclosed by the Claimant in this action. Mr. Wonnacott referred me to CPR Rule 32.19, and made the point that no notice had been served on behalf of the Defendant pursuant to Rule 32.19, requiring the Second Statutory Declaration to be proved. The consequence was that there was a deemed admission of the authenticity of the Second Statutory Declaration.

106. Returning to the narrative, it will be recalled that the evidence of Mr. Kang and Mr. Monington was that when Mr. Kang attended at Mr. Monington's office, to return the Second Statutory Declaration sworn by the Defendant, Mr. Kang also signed the lease and counterpart which were to replace the lost 2016 Lease. Mr. Monington witnessed Mr. Kang's signature. The signed lease and counterpart were then sent by Mr. Monington to the Defendant. Mr. Kang warned the Defendant or Nadeem that these documents were on their way, and said that the documents needed to be signed (without dating) quickly. As with the process of sending out the documents in connection with the grant of the 2016 Lease, there were no documents to support this particular part of the evidence of Mr. Monington and Mr. Kang. Again, I found it surprising that there was no record of the signed lease and counterpart being sent out by Mr. Monington. I have however already accepted that the Second Statutory Declaration was sent out to the Defendant, and returned to Mr. Kang in the manner described by Mr. Monington and Mr. Kang in their evidence. I have also accepted the evidence of Mr. Monington and Mr. Kang as to the process by which the 2016 Lease came to be completed. The account given by Mr. Monington and Mr. Kang of the sending out of the signed lease

and counterpart to the Defendant is consistent with their evidence, which I have already accepted, as to the circumstances in which the Second Statutory Declaration came to be sworn. I therefore accept, notwithstanding the absence of supporting documentation, the evidence of Mr. Kang and Mr. Monington as to the signing, by Mr. Kang, and sending out of the lease and counterpart which were to replace the 2016 Lease.

107. Mr. Monington also gave evidence that the lease and counterpart which he posted to the Defendant were in the same form as the First Draft Lease, so that they included the Rider and the Lease Plan.

108. The evidence of Mr. Kang was that at some time in late November or early December 2016, Nadeem came to his house with one version of the lease sent out by Mr. Monington. Mr. Kang saw that the lease was the full lease document, by which Mr. Kang meant that the lease included the Rider and the Lease Plan. Mr. Kang also noticed however that the term of the lease had been changed, in manuscript, from five years to ten years. Mr. Kang was concerned about this change, and sought advice from Mr. Monington. Mr. Monington's advice was that the change was acceptable, because there was still the three month break right in the lease. Mr. Kang accepted that advice. In that conversation Mr. Monington also asked Mr. Kang if he had both copies of the lease (ie lease and counterpart). Mr. Kang said that he had only one copy. Mr. Monington told Mr. Kang that he needed both copies (lease and counterpart). Mr. Kang spoke to Nadeem and told him that he, Mr. Kang, needed the other copy of the lease. Nadeem agreed to do this. Mr. Kang's evidence was that shortly after Christmas he received a telephone call from Nadeem to say that Nadeem would drop off the other signed copy of the lease at Mr. Kang's house. Nadeem did this shortly afterwards. According to Mr. Kang the document was not in an envelope. Mr. Kang's evidence was that he checked the document, and saw that it was the full document, with Rider and Lease Plan and also with the term amended in manuscript to ten years.

109. The evidence of Mr. Kang which I have summarised in my previous paragraph was confirmed by Mr. Monington, so far as it involved Mr. Monington.

The relevant factual history - 2017

110. The evidence of Mr. Monington was that Mr. Kang came to his office on 3rd January 2017 with two leases, apparently signed by the Defendant, and with the Defendant's signature apparently witnessed. I take Mr. Monington's reference to two leases to refer to what Mr. Monington believed to be the lease and counterpart. Mr. Monington dated the two documents, in manuscript, that day; that is to say 3rd January 2017. Copies of the two documents are at **[A/27/109]** and **[A/28/118]**. For ease of reference I will refer to the document of which a copy appears at **[A/27/109]** as "the First Lease Document". For ease of reference I will refer to the document of which a copy appears at **[A/28/118]** as "the Second Lease Document".

111. The evidence of Mr. Monington was that he then posted to the Defendant, using the address for the Defendant shown on these documents, the original of the First Lease Document, and retained a copy of the First Lease Document on his file. Mr. Monington also sent a certified copy of the First Lease Document to the business address of the Defendant. Mr. Monington retained the original of the Second Lease Document on his file. Mr. Monington's evidence was that he was then contacted by Avtar Kang, the

brother of Mr. Kang and co-director of the Defendant. Mr. Avtar Kang told Mr. Monington that the Defendant had been in touch, and had asked for a further copy of the lease to be sent to his e mail address. Mr. Monington made a handwritten note of this e mail address, which was in fact what I understand to have been Nadeem's e mail address, on a post it note. On 10th January 2017 Ms. Richards, Mr. Monington's secretary, e mailed a copy of the completed Second Lease Document to the e mail address which he had been given. The e mailed copy of the Second Lease Document contained the Rider and the Lease Plan.

112. Having set out the evidence of Mr. Monington and Mr. Kang as to the circumstances in which the First Lease Document and the Second Lease Document came into existence, I must return to 2016 and the evidence of the Defendant. The Defendant's evidence was that in 2016 there was flooding at the Property. This resulted in a claim on the insurance for the Property, in respect of which the insurance company required to see the lease of the Property. The Defendant said that he or Nadeem asked Mr. Kang for the amended lease. The amended lease was a reference back to the Defendant's evidence, which I have rejected, that he had a meeting with Mr. Kang, following the Second Meeting, where he agreed a ten year term for the lease. The Defendant said that Mr. Kang then provided the amended lease in or around July 2016.

113. This alleged amended lease is at **[A/25/100]**. I will refer to this document as "the Defendant's Lease Document". The Defendant's Lease Document is undated. It shows an amended term of ten years. It bears a signature which the Defendant accepts is his signature. It has the signature of Mr. Kang, witnessed by Mr. Monington. It has no Lease Plan and no Rider. The evidence of the Defendant was that this amended lease had a sticker, which instructed the Defendant where to sign the Defendant's Lease Document. The Defendant's signature purports to be witnessed by Mr. Pawar, and purports to bear the stamp of Aspect Law Ltd, the firm of solicitors of which Mr. Pawar is a director.

114. The Defendant's evidence was that he signed the Defendant's Lease Document, which already had on it the purported signature of Mr. Pawar and the purported stamp of Aspect Law Ltd, in or around July 2016. As no photocopier was available for the purposes of making a copy of the lease to send to the insurance company, Nadeem took photographs of the Defendant's Lease Document using his mobile phone. Subsequently it has been possible to access these photographs because, so I was told, the photographs were automatically uploaded to what was described as the One Drive Server, from where they could be downloaded on to Nadeem's computer. I was provided with copies of screenshots of the downloaded photographs. The downloaded photographs include the pages of the Defendant's Lease Document. The electronic information on the screenshot of the first page of the Defendant's Lease Document describes the photographs of the Defendant's Lease Document as *"8 of 17"*, and gives the *"Date created"* as 13th July 2016. There are also further screenshots of the pages of the Defendant's Lease Document, shown as created on 12th July 2016, together with screenshots of other miscellaneous documents which, as I understood the evidence, were intended to demonstrate what photographs were in the folder of photographs containing the photographs of the Defendant's Lease Document. The sticker, indicating where the Defendant was to sign the document can be seen in the screenshot of the signature page.

115. The Defendant confirmed that the copy of the Second Lease Document e mailed by Ms. Richards on 10th January 2017 was received by Nadeem, and forwarded to the solicitors who were acting for the Defendant in connection with the closure of the Business by the licensing authority, following trouble which had occurred at the Property in late 2016. According to the Defendant the Business remained closed until April 2017, when it re-opened. Both Nadeem and the Defendant said that they did not read the copy of the Second Lease Document when it was e mailed on 10th January 2017. It was simply forwarded to the solicitors acting for the Defendant in relation to the revocation of the licence for the Business.

116. The Defendant accepted that the signature, purporting to be his signature, which appeared on the Second Lease Document was his signature. He denied that this signature had been witnessed by Mr. Pawar. In relation to the First Lease Document the Defendant denied that the signature which purported to be his signature was his signature.

117. So far as the First Lease Document was concerned, the expert opinion of Mr. Handy, as stated in his report, was that there was strong evidence to support the conclusion that the Defendant did not sign the First Lease Document. Mr. Handy was not able to rule out the possibility that the Defendant signed the First Lease Document, but he considered this unlikely. Given this conclusion, it seems to me that my finding must be that the signature which purported to be the signature of the Defendant on the First Lease Document was not the signature of the Defendant, but a forgery.

118. So far as the witnessing of the First Lease Document and the Second Lease Document were concerned, Mr. Pawar gave evidence, which I accept, that the signatures on the First Lease Document and the Second Lease Document, which purported to be his signatures, were not his signatures, that the stamp which purported to be the stamp of Aspect Law Ltd was not the stamp of Aspect Law Ltd, and that the address, telephone and fax numbers which were given as those of Aspect Law Ltd on the stamp were not those of Aspect Law Ltd. Mr. Pawar also gave evidence, which I accept, that the address shown on the stamp had, in the past, been used by a struck off solicitor with whom Mr. Pawar's firm had had problems, and who had apparently been providing unauthorised legal services.

119. I therefore find that the signature of the Defendant on the Second Lease Document, that is to say the genuine signature of the Defendant, was not witnessed.

120. Where does this leave matters, in terms of the lease which was intended to replace the lost 2016 Lease? My findings are as follows.

121. I accept the evidence of Mr. Monington and Mr. Kang, which I have summarised above, as to the circumstances in which the First Lease Document and the Second Lease Document were returned to Mr. Kang, and provided to Mr. Monington. I therefore accept that the First Lease Document and the Second Lease Document were returned to Mr. Kang, as Mr. Kang described, apparently both signed by the Defendant, with the signatures of the Defendant apparently witnessed by Mr. Pawar, and with the Rider and the Lease Plan included in both the First Lease Document and the Second Lease Document. I also accept that the First Lease Document and the Second Lease Document were provided to Mr. Monington by Mr. Kang, on 3rd January 2017, and were dated that day by Mr. Monington. I also accept that Mr. Monington, in dating the two documents on 3rd January 2017, considered that he was thereby completing, in lease

and counterpart, the lease to replace the lost 2016 Lease. I have already said that I regard Mr. Monington and Mr. Kang as reliable witnesses, but the findings which I have just set out also fit with my findings in relation to the Second Statutory Declaration, and with the documentary evidence from January 2017; most obviously the First Lease Document and the Second Lease Document themselves.

122. This leaves outstanding what may be said to be three areas of mystery.

123. First, there is the forgery of the Defendant's signature on the First Lease Document. This is baffling. Why should the Defendant's signature be forged on the First Lease Document, but not on the Second Lease Document? It was not suggested that Mr. Monington or Mr. Kang was responsible for this forgery and, in case there be any doubt in the matter, I find that they were not responsible for the forgery. This means that the forgery must have occurred when the First Lease Document was out of the hands of Mr. Monington and Mr. Kang. It seems to me that the evidence is not available for me to make a reliable finding as to how this forgery came about. It was put to Nadeem, in cross examination, that he had forged the Defendant's signature on the First Lease Document, in the absence of the Defendant being available to sign. I do not think however that the evidence is available for me to make a finding of this kind. I also take the point, made by Mr. Warwick in closing submissions, that if it was being said that Nadeem had forged the Defendant's signature on the First Lease Document, there needed to be expert forensic evidence to support that allegation, and there was none.

124. For reasons which I shall explain, it seems to me that it is not necessary, for the purposes of my decision, to make a finding as to how the forgery of the Defendant's signature on the First Lease Document came about. In these circumstances it seems to me that this particular question is one where I should be mindful of Mr. Warwick's submission that I should resist the temptation to speculate on non-relevant matters. I therefore make no finding in this respect, beyond the finding that neither Mr. Monington nor Mr. Kang was responsible for the forgery.

125. Second, there is the forged signature of Mr. Shabir and the false Aspect Law stamp, which appear on the First Lease Document, the Second Lease Document and the Defendant's Lease Document. Again, it was not suggested that Mr. Monington or Mr. Kang was responsible for the forgery or the false stamp and, in case there be any doubt in the matter, I find that they were not responsible for the forgery or the false stamp. This means that these acts of subterfuge must have occurred when the First Lease Document and the Second Lease Document were out of the hands of Mr. Monington and Mr. Kang. The same applies to the Defendant's Lease Document, so far as it was in the hands of Mr. Monington or Mr. Kang. Again, it seems to me that the evidence is not available for me to make a reliable finding as to how the forgery and use of the false stamp came about. There is the evidence of Mr. Pawar as to the activities of a struck off solicitor which his firm encountered, using the address on the false stamp. I am however wary of making a finding simply on the basis of this evidence. For reasons which I shall explain, it seems to me that it is not necessary, for the purposes of my decision, to make a finding as to how the forgery and use of the false stamp came about. Again, I am mindful of Mr. Warwick's submission that I should resist the temptation to speculate on non-relevant matters. I therefore make no finding in this respect, beyond the finding that neither Mr. Monington nor Mr. Kang was responsible for the forgery or the use of the false stamp.

126. Third, there is the Defendant's Lease Document. I accept that the evidence of the photographs shows that the Defendant's Lease Document was in existence, signed by the Defendant, on 12th July 2016. The screenshot of the signature page of the Defendant's Lease Document shows the Defendant's signature as purporting to be witnessed by Mr. Pawar, with the false Aspect Law stamp. Given my earlier findings in this respect, it must be the case that the Defendant's signature on the Defendant's Lease Document was not in fact witnessed by Mr. Pawar.

127. How then did the Defendant's Lease Document come into existence? If it existed in July 2016 in a signed form it cannot have come into existence as one of the lease documents posted to the Defendant by Mr. Monington following the swearing of the Second Statutory Declaration. It must have had an earlier provenance.

128. In closing submissions Mr. Wonnacott advanced the following hypothesis to explain this mystery. He pointed out that, allowing for differences in the quality of copying, the Defendant's Lease Document appears to be the same as Second Lease Document, save that the Second Lease Document bears the date of 3rd January 2017 on the front page, and has a date for rent review written in manuscript on the second page. Mr. Wonnacott reminded me of Mr. Kang's evidence as to the process which resulted in the grant of the 2016 Lease. Mr. Kang referred to an envelope being provided to him by Nadeem or the Defendant which, so Mr. Kang was told, contained the signed lease. Mr. Kang did not check the contents of the envelope, but dropped off the envelope at the offices of QSD for Mr. Monington. Mr. Wonnacott suggested that what might have happened was that the Defendant, having been provided with lease and counterpart to sign in respect of the grant of the 2016 Lease, returned only one of these documents to Mr. Kang, but retained the other. Later, when Mr. Monington provided the Defendant with the lease and counterpart for signature by the Defendant, following the swearing of the Second Statutory Declaration, the Defendant accidentally provided, in place of one of the documents sent out, a document which included the Defendant's Lease Document. This document was then dated 3rd January 2017 by Mr. Monington, as the Second Lease Document.

129. The obvious flaw in this hypothesis is that the Defendant's Lease Document does not have the Rider or the Lease Plan, while the Second Lease Document includes both Rider and Lease Plan. This assumes however that I accept that the Defendant's Lease Document is a complete version of the lease document which had been signed by the Defendant either in or before July 2016. I do not accept this. I do not accept that Mr. Monington ever sent out to the Defendant a lease document which excluded either the Rider or the Lease Plan. Nor do I accept that Mr. Monington ever completed a lease document which did not contain the Rider and the Lease Plan. To have done so would have made no sense. The Rider is critical to the form of lease which Mr. Monington had been instructed to grant; that is to say a lease contracted out of the 1954 Act, and containing a break clause. It would have been a serious act of negligence for Mr. Monington to have sent out, or to have completed a lease without the Rider. It would also have been less than competent for Mr. Monington to have made the same mistake with the Lease Plan. I am not prepared to accept that Mr. Monington was incompetent in either of these respects.

130. I have also already made a finding that the sequence of events which resulted in the completion of the 2016 Lease was as described by Mr. Monington and Mr. Kang in their evidence. This includes my finding that, when Mr. Monington sent out the lease

and counterpart, as signed by Mr. Kang, to the Defendant for signature, the lease and counterpart were in the form of the First Draft Lease, thus including the Rider and the Lease Plan.

131. I do not accept that the photographs of the Defendant's Lease Document, which were accessed through Nadeem's computer, demonstrate that the Defendant's Lease Document could not have been part of a document which contained the Rider and the Lease Plan. As became apparent in cross examination, the evidence of the provenance of those photographs did not preclude the possibility either that the photographs taken in July 2016 were not photographs of the entirety of the lease document, or that some of the photographs of the entire lease document had not, for whatever reason, found their way into the screenshots of which copies were available in the trial bundle.

132. I therefore find that the Defendant's Lease Document comprises only part of a lease document, which did include the Rider and the Lease Plan.

133. I make this finding without reliance upon the hypothesis suggested by Mr. Wonnacott, which I have explained above. I note however that the hypothesis would explain why the Defendant's Lease Document corresponds to the Second Lease Document, but is missing the Rider and Lease Plan. If the Defendant's Lease Document was only a partial copy, made in July 2016, of a lease document which contained the Rider and the Lease Plan, this would explain why the same document (if it was the same document), when provided to Mr. Monington on 3rd January 2017 as the Second Lease Document, contained the Rider and the Lease Plan.

134. Ultimately I do not find it necessary to make a finding of fact in relation to the hypothesis advanced by Mr. Wonnacott, which I have summarised above. For reasons which I shall explain, I do not think that it is necessary for me to do so. The relevant finding seems to me to be my finding that the Defendant's Lease Document is not a complete version of the lease document which had been signed by the Defendant on or prior to 12th July 2016. I find that the complete lease document which the Defendant signed, of which the Defendant's Lease Document comprises part, contained both the Rider and the Lease Plan.

135. This leads on to the resolution of a question which I left outstanding earlier in this judgment; namely the terms of the 2016 Lease. It is common ground that it was completed as a valid lease, but did it contain the Rider and, so far as this matters, the Lease Plan? If the Defendant's Lease Document is good evidence as to the content of the 2016 Lease, the answer to this question would be no. For the reasons which I have already given however, I do not accept that the Defendant's Lease Document is good evidence as to the content of the 2016 Lease. I have found that the Defendant's Lease Document is not a complete version of the lease document which was signed by the Defendant, and that the complete version of this lease document contained the Rider.

136. If therefore the Defendant's Lease Document is not good evidence of the content of the 2016 Lease, I am left with my findings (i) that Mr. Monington did not ever send out a lease document to the Defendant or complete a lease document which did not contain the Rider and the Lease Plan, and (ii) that the lease and counterpart sent out by Mr. Monington to the Defendant for signature in 2016 were in the form of the First Draft Lease. It seems to me inevitably to follow from these findings, notwithstanding the gap in Mr. Monington's evidence concerning actual completion of the 2016 Lease, that the

2016 Lease, which it is common ground was completed as a valid lease, contained the Rider and the Lease Plan. I so find.

137. Although I do not regard this as necessary to my decision, I also find that the term of the 2016 Lease was five years. This is consistent with my finding that it was not until the replacement lease and counterpart came to be signed by the Defendant, at the end of 2016, that Mr. Kang was first confronted with the demand for a ten year term, as opposed to the previously agreed five year term.

138. The other question which I left unresolved was whether the First Statutory Declaration, which preceded completion of the 2016 Lease, was sworn by the Defendant, or only signed. I have found that the Second Statutory Declaration was properly sworn by the Defendant. In these circumstances my finding is that the First Statutory Declaration was also properly sworn by the Defendant.

The relevant factual history – 2018

139. I can take the relevant events of 2018 much more quickly. By letters dated 15th March 2018 Mr. Monington, acting on behalf of the Claimant, served a notice ("the Break Notice") on the Defendant. The Break Notice itself was addressed to the Defendant, was stated as being from the Claimant, and identified the Property in the following terms.

> *"Premises: Land and Building at Birchall Street, Digbeth, Birmingham, B12 0RP as demised by the lease dated 3RD January 2017 and made between SANDHAR & KANG LIMITED (1) and Syed Jaffer Ijaz (2)* ***(Lease)****"*

140. The actual notice given by the Break Notice was in the following terms.

> "WE, Davisons Solicitors of Sycamore House, 54 Calthorpe Road, Edgbaston, Birmingham, B15 1TH for and on behalf of the Landlord **GIVE YOU NOTICE** that the Landlord intends to terminate the term of the Lease on 30th day of June 2018 in accordance with supplemental clause 1 of the Lease so that the Lease will determine on that date"

141. The Break Notice was therefore drafted on the basis that it was being served pursuant to a lease of the Property dated 3rd January 2017. In fact two copies of the Break Notice were served, each under cover of a letter dated 15th March 2018 from Mr. Monington, with one copy of the Break Notice containing an indorsement of receipt to be signed and returned by the Defendant.

142. It is common ground that the Break Notice was served on the Defendant, and would have been effective to terminate any right of the Defendant to occupy the Property as from 30th June 2018 ("the Break Date"), provided that (i) there was a validly granted lease in existence dated 3rd January 2017, (ii) that lease contained the Rider, and thus the three month break right, and (iii) that lease was validly contracted out of the protection of the 1954 Act. (i), (ii) and (iii) are all in issue.

143. Mr. Kang's evidence was that following the service of the Break Notice he received a telephone call from Nadeem, wanting to come and see him. Mr. Kang agreed to this,

and there was a meeting at Mr. Kang's house, attended by Mr. Kang, Avtar Kang, Mr. Kang's son (Jagdeep), Nadeem, and the Defendant. The meeting took place on 28th March 2018, which was a Wednesday.

144. Mr. Kang gives a detailed account of this meeting in his witness statement. According to Mr. Kang, Nadeem told him the Break Notice had been received at a bad time, because a family wedding was about to be celebrated, and the Break Notice had spoiled the wedding celebrations. Nadeem said that it would have been better if the Break Notice had come later, so that he could have enjoyed the wedding without having to think about emptying and leaving the Property. Mr. Kang said that he was sorry about the timing, but that the agreed break period had been extended from two months to three months. Mr. Kang gave the Defendant another copy of the Break Notice at the meeting, and the Defendant and Nadeem said that they understood that the lease would come to an end on 30th June 2018. Mr. Kang also said that he would speak to Mr. Monington and see if any extra time could be given before they had to vacate. Nadeem asked if they would get any compensation, to which Mr. Kang responded no. They all then shook hands, and Nadeem and the Defendant left.

145. Mr. Kang's evidence was that he did speak to Mr. Monington the next day, to see if any extra time could be given, and gave him an account of the meeting. Mr. Monington's advice was that the Claimant could only grant a monthly licence for one or two months. Mr. Monington confirmed in his witness statement that he received this call from Mr. Kang on 29th March 2018, was told what had occurred at the meeting by Mr. Kang, and discussed with Mr. Kang the possibility of giving the Defendant more time by way of a monthly licence. As a result of his conversation with Mr. Kang, Mr. Monington also wrote a letter to the Defendant on 29th March 2018, recording the fact that the meeting had taken place, and recording the fact that a copy of the Break Notice had been given to the Defendant by Mr. Kang at the meeting. Mr. Monington took this step because he was concerned because one of his earlier letters of 15th March 2018 had been returned to him, marked *"addressee gone away"*. Mr. Monington was concerned that there might be a challenge to the Break Notice on the basis that it had not been served in sufficient time to give three months notice by 30th June 2018. In fact Mr. Monington wrote to Mr. Kang on 27th March 2018, asking Mr. Kang to effect personal service of the Break Notice. This explains why Mr. Kang gave the Defendant a copy of the Break Notice at the meeting on 28th March 2018. In fact Mr. Monington's concerns were unnecessary. In his witness statement the Defendant accepts that he received both copies of the Break Notice on or around 17th March 2018.

146. In their evidence the Defendant and Nadeem accepted that this meeting on 28th March 2018 took place. Their accounts of the meeting are considerably less detailed than that of Mr. Kang. In so far as the accounts of the meeting given by the Defendant and Nadeem are in conflict with the account of the meeting given by Mr. Kang, I prefer the account of Mr. Kang. I find the account given by Mr. Kang of the meeting to be the more detailed and credible. In particular, the Defendant and Nadeem both say that there was no mention of the terms of the lease, or the Rider, or a break clause at the meeting. I do not accept this evidence, if and in so far as it is in conflict with the evidence of Mr. Kang that he, Mr. Kang, made express reference to the fact that a two month break right had originally been sought, and three months had been given. I also do not accept this evidence, if and in so far as it is conflict with Mr. Kang's evidence that the Defendant

and Nadeem said that they understood that the lease would come to an end on 30th June 2018.

147. On 10th April 2018 Bond Adams, who were by then instructed to act as solicitors for the Defendant, sent an e mail to Mr. Monington, asserting that the Defendant had no knowledge of any right to terminate the lease, and that the Break Notice was of no effect.

148. Following an exchange of e mails between solicitors, Mr. Monington sent to Bond Adams, on 19th April 2018, a copy of the First Lease Document which, it will be recalled, had the signature of the Defendant which I have found to be a forgery. The copy also contained the Rider and the Lease Plan. Following a further exchange of e mails, Bond Adams responded by a letter dated 1st May 2018. That letter asserted that, on 3rd January 2017, the Defendant had entered into a lease of the Property. The letter alleged that this lease had not contained the Rider. The letter attached a copy of the First Lease Document, with the Lease Plan, but without the Rider. The Rider was included in the attachment to the e mail, but was expressed to be a separate attachment. The contention of Bond Adams was that the Rider had not formed part of the lease granted on 3rd January 2017. In other words the contention was that the lease was comprised in the First Lease Document, with the Lease Plan but without the Rider. There was no allegation in this letter that the Defendant's signature had been forged on the First Lease Document.

149. This action was commenced shortly after these exchanges, by claim form issued on 1st June 2018.

150. The Defence and Counterclaim served by the Defendant contained a denial that any lease had been entered into on 3rd January 2017. The Defendant was cross examined on this denial, which was in conflict with what had been stated in the letter from Bond Adams dated 1st May 2018. The Defendant was also cross examined on his evidence that the lease of the Property which he signed was the Defendant's Lease Document, which was signed in or around July 2016. Ultimately, I doubt that these particular points matter, in terms of the legal arguments, because there is in existence the Second Lease Document, which the Defendant accepts that he signed, and which is dated 3rd January 2017. The point does go to the credibility of the Defendant. In his witness statement the Defendant said that he did receive a draft of the letter of 1st May 2018, but did not have the opportunity to consider the letter and did not approve it, and that Bond Adams were subsequently dis-instructed, to be replaced by the Defendant's current solicitors. The Defendant was also critical of Bond Adams in cross examination, when asked about statements made by Bond Adams on his behalf.

151. In his witness statement Adam also refers to the receipt of the draft of the letter of 1st May 2018, but says that he too did not have the opportunity to read this letter, and did not approve it. In their witness statements both the Defendant and Adam incorrectly refer to the letter of 1st May 2018 as being dated 3rd May 2018.

152. I found it odd that the Defendant and Adam should receive a draft letter from the Defendant's solicitors, presumably for the approval of the Defendant, but should then, for some unspecified reason, not have the opportunity to read or approve the draft of what was plainly an important letter. I do not accept that the criticisms made of Bond Adams are justified. In particular, I do not accept that I should treat the letter of 1st

May 2018 as a letter which was not written on the instructions of the Defendant, or as a letter which was not written with the approval of the Defendant.

The legal position

153. Now that I have completed my narrative of the events which I regard as relevant. I turn the legal consequences of my findings. It seems to me that it is appropriate to proceed as follows.

(1) I will start with the 2016 Lease which was, it is common ground, granted as valid lease. The task is to identify what kind of lease it was, and what rights to terminate existed under the 2016 Lease.

(2) It is then necessary to consider what, if any leasehold interest was created after the 2016 Lease.

(3) It is then necessary to consider what effect, if any, the Break Notice had upon the Defendant's right to occupy the Property.

154. Before embarking on the three stage analysis which I have set out in my previous paragraph, I should mention that, at the outset of his closing submissions, Mr. Wonnacott referred me to Portland Managements Ltd v Harte [1977] 1 QB 306. On the basis of this authority Mr. Wonnacott argued that the position, in terms of the burden of proof, was as follows. The Claimant had not admitted that the Defendant had been granted any tenancy other than a contracted out tenancy containing a three month break which had expired. If the Defendant was to defeat the claim for possession, the burden was on the Defendant to prove that he had some different form of tenancy, which gave the Defendant a right to keep the Claimant out of possession. If the Defendant could not do that, so the argument went, the Claimant was entitled to recover possession.

155. I am doubtful that the principles stated in Portland Managements Ltd v Harte can directly be transposed to the present case. The present case is not one where the Claimant has proved its title to the Property, and the Defendant is left to establish that he has a right to remain in occupation of the Property. The position is a good deal more complicated than that. It is not in dispute that the Defendant has been granted, on at least one occasion, a leasehold interest in the Property. What matters in the present case is whether the Defendant's leasehold interest in the Property has been brought to an end by the Break Notice. I do not think that this question is answered by resort to the burden of proof or by resort to the principles stated in Portland Managements Ltd v Harte. In my view the correct approach to the identification of the legal position is the three stage analysis I have identified above, to which I now turn.

156. Starting with the 2016 Lease, the position is relatively straightforward. I have already found that the 2016 Lease, as granted, contained the Rider. It therefore contained the three month break right in clause 1 of the Rider.

157. I have also found that, prior to the grant of the 2016 Lease, the Defendant received the First Statutory Declaration, in draft form, from Mr. Monington, and returned the First Statutory Declaration, duly sworn, to Mr. Kang, who returned the First Statutory Declaration to Mr. Kang. Strictly, the sending out of the First Statutory Declaration, as a draft, did not comply with the requirement in Section 38A(3) of the 1954 Act that the

notice be in the form set out in Schedule 1. The subsection does however permit the notice to be substantially in the form of the notice set out in Schedule 1. Mr. Warwick accepted, correctly in my view, that the prescribed form of statutory declaration, which contains the warning which appears in the prescribed form of the Schedule 1 notice, was sufficient to amount to a notice substantially in the form of prescribed form for the Schedule 1 notice. Compliance with Section 38A(3) was therefore achieved, in relation to the grant of the 2016 Lease.

158. This leaves the requirements of Schedule 2. The evidence does not permit me to make a finding on whether the draft form of the First Statutory Declaration, which did duty as the notice required by Section 38A(3), reached the Defendant more than 14 days before completion of the grant of the 2016 Lease. It seems likely that it did, but the point does not seem to me to matter. I say this because the Defendant swore the First Statutory Declaration before completion of the grant of the 2016 Lease. If the draft form of the First Statutory Declaration was served on the Defendant less than 14

days before completion, a statutory declaration would have been required; see paragraph 4 of Schedule 2. If service occurred more than 14 days before completion, only a signed declaration would have been required; see paragraph 3 of Schedule 2. It seems to me, and I did not understand this to be in dispute, that if the situation was in fact one where only a signed declaration was required by Schedule 2, the First Statutory Declaration met this requirement; effectively by going further than this requirement. If however the situation was one where a statutory declaration was required, this was provided.

159. So far as the 2016 Lease was concerned, it would have been necessary for the 2016 Lease to have complied with the requirements of paragraphs 5 and 6 of Schedule 2, which provide as follows.

> *"5. A reference to the notice and, where paragraph 3 applies, the declaration or, where paragraph 4 applies, the statutory declaration must be contained in or endorsed on the instrument creating the tenancy."*
>
> *"6. The agreement under section 38A(1) of the Act, or a reference to the agreement, must be contained in or endorsed upon the instrument creating the tenancy."*

160. I have found that the 2016 Lease contained the Rider, which contained the confirmations set out in clause 2 of the Rider. Those confirmations were, in my view, sufficient to satisfy the requirements of Schedule 2.

161. I therefore conclude that the 2016 Lease contained a mutual three month break right, and was contracted out of the protection of the 1954 Act. While it is convenient in

this judgment to refer to contracting out of the protection of the 1954 Act I should mention that this is not strictly accurate. The actual agreement which is sanctioned by Section 38A(3) is an agreement that the provisions of Sections 24-28 of the 1954 Act shall not apply to the relevant lease. I should also mention, again to be strictly accurate, that the 1954 Act uses the expression *"tenancy"* rather than *"lease"*.

162. I then proceed to the question of what, if any leasehold interest was created after the 2016 Lease.

163. For the reasons which I have already given, I do not regard the Defendant's Lease Document as either having created any leasehold interest after the 2016 Lease, or as constituting good evidence of any leasehold interest created after the 2016 Lease. This therefore seems to me to leave the First Lease Document and the Second Lease Document as the only available candidates, on the arguments before me, for the creation of a leasehold interest after the 2016 Lease.

164. The First Lease Document can be ruled out at the outset. It was not signed by the Defendant. I have found that the signature on this document which purports to be the Defendant's signature was forged.

165. This leaves the Second Lease Document, which was signed on behalf of the Claimant, and was signed by the Defendant. The Second Lease Document purported to create a lease for a term of ten years. As such, it was required to be made by deed; see Section 52 of the Law of Property Act 1925. By Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 an instrument is only validly executed as a deed by an individual if it is signed by the individual in the presence of a witness who attests his signature, or is signed at the individual's direction and in his presence and in the presence of two witnesses who each attest the individual's signature.

166. The Second Lease Document was validly executed as a deed on behalf of the Claimant, which is of course a limited company. In the case of the Defendant however, I have found that the Defendant's signature was not witnessed by Mr. Pawar.

167. Mr. Wonnacott argued that it did not matter that the Defendant's signature was not witnessed by Mr. Pawar. Provided that the Defendant's signature was witnessed by the person who forged the signature of Mr. Pawar, that was sufficient. The subterfuge did not matter. This argument assumes however that the Defendant did sign the Second Lease Document in the presence of the person who purported to be Mr. Pawar. I have not made a finding to this effect, and I do not consider that I am able, on the available evidence to make a finding to this effect. As a matter of fact, the position seems to me to be that it has not been proved, to my satisfaction, that the Defendant's signature on the Second Lease Document was witnessed by any person.

168. Mr. Wonnacott's second argument was that he could rely on an estoppel. His argument was that the Defendant had authorised delivery of the Second Lease Document as a deed, and that the Defendant was estopped from denying that his signature was witnessed. I was referred to a passage from Emmet and Farrand on Title, at 20.015, where the operation of such estoppel is explained, by reference to what was said by Pill LJ in Shah v Shah [2001] EWCA Civ 527 [2002] QB 35, at paragraph 33. The relevant extract from the judgment of Pill LJ, at paragraph 33, is in the following terms.

> *"33 Having considered the wording of section 1 in the context of its purpose and the policy consideration which apply to deeds, I am unable to detect a statutory intention totally to exclude the operation of an estoppel in relation to the application of the section or to exclude it in present circumstances. The section does not exclude an approach such as that followed by Sir Nicholas Browne-Wilkinson in TSB. For the reasons I have*

> *given, the delivery of the document in my judgment involved a clear representation that it had been signed by the third and fourth defendants in the presence of the witness and had accordingly been validly executed by them as a deed. The defendant signatories well knew that it had not been signed by them in the presence of the witness, but they must be taken also to have known that the claimant would assume that it had been so signed and that the statutory requirements had accordingly been complied with so as to render it a valid deed. They intended it to be relied on as such and it was relied on. In laying down a requirement by way of attestation in section 1 of the 1989 Act, Parliament was not in my judgment excluding the possibility that an estoppel could be raised to prevent the signatory relying upon the need for the formalities required by the section. In my judgment, the judge was correct in permitting the estoppel to be raised in this case and in his conclusion that the claimant could bring an action upon the document as a deed."*

169. Mr. Warwick's response to this argument was that an estoppel had not been pleaded in this respect, and it would not be right to rely on an estoppel to make up for the absence of the witnessing of the Defendant's signature, in a case where the estoppel had not been pleaded. In response to this argument Mr. Wonnacott referred me to paragraph 20 of the Re-Amended Defence and Counterclaim, where it is pleaded that the Defendant's signature on the Second Lease Document was not witnessed, and to what he said was the denial, in the Reply and Defence to Counterclaim, of the contention that what was referred to in the Re-Amended Defence and Counterclaim as *"the Purported Lease"* was of no effect. His argument was that the consequences of this issue involved matters of law, which I was in a position to decide.

170. I do not accept that there was sufficient in the pleaded cases to incorporate or amount to pleaded cases on this issue of estoppel. It seems to me that this issue of estoppel was not raised in the pleaded cases. It also seems to me, on reading Shah v Shah and, in particular, on reading the facts of that case as recorded in the judgment of Pill LJ, that the question of whether an estoppel of the kind identified by Pill LJ does arise in any particular case is a fact sensitive question, which depends upon the facts of the relevant case. It also seems to me that the question of whether such an estoppel had arisen in the present case would have required consideration of matters which were not covered by the statements of case in the action, and which were either not covered in the written and oral evidence in the action, or were covered without the estoppel argument being in mind as a pleaded issue. In these circumstances I accept the argument of Mr. Warwick that estoppel is not available to Mr. Wonnacott as a means of curing the defect in the Second Lease Document created by the fact, as I have found, that it has not been proved that the Defendant's signature on the Second Lease Document was witnessed by anyone.

171. I therefore conclude that the Second Lease Document did not take effect as a deed, and thus did not take effect as a valid lease at common law.

172. This leaves the possibility that the Second Lease Document did qualify as an agreement for lease, and thereby took effect as a lease in equity.

173. It is well established that a lease which is void at common law may take effect as an agreement for lease; see Woodfall's Landlord and Tenant, Volume 1, at 5.004. In the present case Mr. Wonnacott had prepared arguments, as part of his closing submissions, to support his case that the Second Lease Document, as a contract for the grant of an interest in land, was compliant with the requirements of Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. In the event it was not necessary for me to consider these arguments. In his closing submissions Mr. Warwick accepted, correctly in my view, that the Second Lease Document did take effect as an agreement for the grant of a lease.

174. The next step in Mr. Wonnacott's argument was that the Second Lease Agreement, as an agreement for lease, took effect as a lease in equity. In this context I was referred to Cowen v Phillips (1863) 33 Beav. 18, Zimbler v Abrahams [1903] 1 KB 577 and Walsh v Lonsdale (1882) 21 Ch. D. 9.

175. In Walsh v Lonsdale the defendant and the plaintiff had agreed to enter into a lease of a mill for seven years, at a yearly rent payable in advance, with provision for one year's rent to be paid in advance, on demand, together with any proportion of the rent due for the period prior to such demand being made. The lease was to be granted by the defendant, as landlord, to the plaintiff, as tenant. The plaintiff was allowed into possession of the mill pursuant to this agreement, and paid the rent quarterly (not in advance). The defendant made a demand for a year's rent in advance, and for the unpaid proportion of the rent payable for the previous year. The defendant then exercised the remedy of a distress in respect of the rent which had been demanded. The plaintiff sought an injunction to restrain the distress, on the basis that it was illegal. The plaintiff's primary argument was that no distress could be levied because there was no lease in existence, but only an agreement for lease.

176. At first instance the injunction was granted, but on appeal it was decided that the distress was not rendered illegal simply because a valid lease at common law had not been executed. In his judgment Jessel MR explained the position in the following terms.

> *"There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, "I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for reentry." That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of*

distress merely because the actual parchment has not been signed and sealed."

177. Mr. Wonnacott argued that this principle applied equally in the present case, so that the Second Lease Document, even if not a deed, could be treated as a lease in equity, granted upon the terms contained in the Second Lease Document.

178. In response to this argument, Mr. Warwick argued as follows.

(1) The relevant agreement for lease can only be treated as a lease in equity if it is capable of specific performance. In the present case the Claimant had not pleaded a claim for specific performance.

(2) The Defendant would resist any claim to specific performance of an agreement which included a break option, because he did not agree to this.

(3) The remedy for a void lease is specific performance, not enforcement of the resultant lease. Mr. Warwick cited Parker v Taswell (1858) 2 De G. & J. 559 and Zimbler v Abrahams [1903] 1 KB 577 .

(4) Even if (3) could be overcome, the Claimant wished to seek possession. Such a claim depended upon a subsequent step; namely the service of a break notice pursuant to the break option. In the absence of a lease, there was no break option which could be exercised.

179. The last of the above arguments seems to me to arise for consideration in the third stage of my analysis of the legal position; namely what effect, if any, the Break Notice had upon the Defendant's right to occupy the Property.

180. The second of the above arguments seems to me to be ruled out by the Second Lease Document. The Defendant did agree to the terms of the Second Lease Document, which included the break rights in clause 1 of the Rider. The Defendant signed the Second Lease Document, and thereby bound himself to what is accepted to have been an agreement for the grant of a lease in the terms of the Second Lease Document.

181. The third of the above arguments seems to me to involve a misreading of the two decisions cited by Mr. Warwick in this context. Parker v Taswell involved a claim for specific performance, but the relevance of the case for present purposes is that it establishes that a lease which is void at common law may take effect as an agreement for lease. That is a principle which is not in issue in the present case. Zimbler v Abrahams involved an agreement which did not create a lease, but could be construed as an agreement to grant a lease for life. It was therefore held that the defendant was entitled to specific performance of this agreement, because it took effect as an agreement to grant what was then, prior to Section 149 of the Law of Property Act 1925, a valid form of lease; namely a lease for life. I do not read either of these decisions as meaning that the person who has the benefit of an agreement for lease is confined to the remedy of specific performance, and cannot separately assert that the agreement for lease takes effect as a lease in equity. Indeed, such a reading of these decisions would, as it seems to me, be inconsistent with the decision in Walsh v Lonsdale, where the distress was held to be lawful, because a lease existed in equity, without the need for a claim in specific performance.

182. The first of the above arguments is potentially more formidable, if not quite for the reason advanced by Mr. Warwick. There is no claim for specific performance pleaded in Amended Particulars in the action, nor in the Reply and Defence to Counterclaim. The claims in the Amended Particulars of Claim are based on *"the Lease"*. The Lease is defined in paragraph 3 of the Amended Particulars of Claim to mean a lease dated 3rd January 2017. There is no express pleading of an agreement for lease of that date, capable of specific performance and constituting a lease in equity.

183. While I was not shown any authority which seemed to me to support the proposition that the pleading of a claim to specific performance was an essential pre-condition to the pleading of the existence of a lease in equity, I can see the wider point that a specific claim to a lease in equity has not been pleaded, at least in express terms, in this action.

184. I do not think however that it would be right to rule out the argument that the Second Lease Document took effect as a lease in equity, simply on the basis that this has not been pleaded in express terms by the Claimant. The Amended Particulars of Claim do plead a lease dated 3rd January 2017, and the Second Lease Document is dated 3rd January 2017. The status and effect of the Second Lease Document has been exhaustively investigated and debated, both in the evidence and in the arguments before me. In contrast to the position in relation to the estoppel argument which Mr. Wonnacott sought to raise, I am satisfied that the evidence and arguments which I have heard have covered all those matters which required to be investigated in order to determine whether the Second Lease Document took effect as a lease in equity. Also, and again in contrast to the position in relation to the estoppel argument, I consider that the pleaded cases are sufficient to encompass the issue of whether the Lease (as defined in the Amended Particulars of Claim) took effect in equity, even if it did not take effect as a valid lease at common law. It also seems to me that it would be most unfortunate, and unlikely to help either party, if I was to decline to deal with the question of whether the Second Lease Document took effect as a lease in equity simply on the basis that this particular analysis of the legal position had not been pleaded in express terms in the Amended Particulars of Claim.

185. I therefore conclude that the present case is one where the principle in Walsh v Lonsdale applies. The Second Lease Document can be treated as creating a lease in equity, on the terms of the Second Lease Document, notwithstanding that the Second Lease Document failed to take effect as a valid lease at common law.

186. In relation to the second stage of my analysis of the legal position, this leads me to the following conclusion. There was a leasehold interest which was created after the 2016 Lease; namely the lease in equity created by the Second Lease Document. I will refer to this lease in equity as "the Equitable Lease".

187. This brings me to the third stage of the analysis of the legal position. What effect, if any, did the Break Notice have upon the Defendant's right to occupy the Property?

188. The starting point for this stage of the analysis is to determine what effect, if any, the creation of the Equitable Lease had upon the 2016 Lease.

189. Mr. Wonnacott's argument was that the creation of the Equitable Lease effected a surrender by operation of law of the 2016 Lease. He referred to the well-established principle that the grant by the landlord of a valid new lease to a tenant works a surrender

by operation of law of an existing lease held by that tenant, where the new lease is to be begin during the currency of the existing lease; see Woodfall at 17.023.

190. Mr. Warwick argued that this principle did not apply where the new lease was only a lease in equity. He argued that the new lease which replaces the existing lease must be a valid lease. The Equitable Lease was not a valid lease because it was not validly granted at common law. The answer to this argument seemed to me however to be found in the next section of Woodfall to that to which I have just referred. At 17.024 the editors of Woodfall say as follows.

> *"In order to amount to a new lease for the purpose of effecting a surrender of an existing lease, the new lease must either vest a valid legal estate or, at the least, be specifically enforceable. Thus, where an agreement for lease was not specifically enforceable because certain conditions had not been performed, entry into the agreement did not operate as a surrender."*

191. This seems to me to establish that an agreement for lease which is capable of specific performance, and which thereby gives rise to a lease in equity, is capable of effecting a surrender by operation of law of an existing lease.

192. I therefore conclude that the grant of the Equitable Lease, by the Second Lease Document, did effect a surrender by operation of law of the 2016 Lease, the term of which would still have been continuing on 3rd January 2017. I therefore conclude that the Equitable Lease did have the effect of terminating, and replacing the 2016 Lease.

193. This conclusion renders it unnecessary to consider a question which would have arisen, if I had decided that the 2016 Lease had continued in existence, and had not been brought to an end by the grant of the Equitable Lease. On that hypothesis, the break right could still have been exercised, because I have found that the 2016 Lease included the Rider, and thus the break right. A successful operation of the break right in the 2016 Lease would have brought the 2016 Lease to an end for all purposes, because I have also decided that the 2016 Lease was successfully contracted out of the protection of the 1954 Act. On this hypothesis however, Mr. Warwick's argument was that the Break Notice could not have been effective to terminate the 2016 Lease, because the Break Notice made specific reference a lease dated 3rd January 2017. The 2016 Lease was not granted on 3rd January 2017. As such, so the argument went, the Break Notice was not, on this hypothesis, a valid notice, because the Break Notice was expressed to be given under a lease which did not exist.

194. Whether the error which, on this hypothesis, appeared in the Break Notice would have invalidated the Break Notice depends upon the test which emerges from Mannai Investment Company Ltd v Eagle Star Life Assurance Company Ltd [1997] AC 749. Essentially therefore, one has to decide what was required of a break notice served by the landlord pursuant to clause 1 of the Rider, and how the Break Notice would have been understood by a reasonable recipient of the Break Notice. Although these questions do not arise for my decision, because they depend upon a hypothesis which, on my findings and reasoning, does not apply, I will state, albeit only very briefly, what my answer to these questions would have been, if the hypothesis had arisen.

195. In the case of a break notice served by a landlord under clause 1 of the Rider, the formal requirements for the break notice were very limited. The break notice was required to be a written notice to terminate the lease, and was required to specify the Break Date, which was defined to be a date falling at least three months after service of the break notice. Thus, it seems to me that the relevant question becomes whether a reasonable recipient of the Break Notice would have understood that the Break Notice was being given for the purposes of terminating the 2016 Lease. As Mr. Wonnacott reminded me, in his reply to Mr. Warwick's closing submissions, the hypothesis upon which this question arises is that, at the date when the Break Notice was served, the 2016 Lease remained in existence, as the then continuing lease of the Property. On that basis Mr. Wonnacott submitted, a reasonable recipient of the Break Notice would have understood that the Break Notice was being given for the purposes of the terminating the existing lease of the Property; namely the 2016 Lease. It seems to me that Mr. Wonnacott was right in this submission. If therefore I had decided that it was the 2016 Lease which remained in existence on the date when the Break Notice was given, I would have decided that the Break Notice was not invalidated by its failure to give the correct date for the 2016 Lease.

196. The next question is whether, on the basis of the Equitable Lease, the Claimant was entitled to exercise the three month break right in the Rider. This brings me back to the argument of Mr. Warwick, consideration of which I previously deferred, that there was no lease by reference to which the break right could be exercised. I do not accept this argument. As to the existence of a lease, I have concluded that there was a lease in existence at the time when the Break Notice was served, namely the Equitable Lease. Given that the terms of the Equitable Lease were those set out in the Second Lease Document, it seems to me to follow that the Equitable Lease contained, and was subject to the break rights contained in clause 1 of the Rider.

197. Mr. Warwick was not able to cite any authority to me which supported the proposition that a break right in a lease which took effect in equity only was incapable of exercise. As Mr. Wonnacott pointed out, in his reply to Mr. Warwick's closing submissions, the principle of equity which was applied in Walsh v Lonsdale was the principle that equity looks upon that as done which ought to be done. This meant, in Walsh v Lonsdale, that the parties to the relevant agreement were treated as though they were in the relationship of landlord and tenant, under a completed lease which contained the provisions which the parties had agreed should be contained in that lease. As such, the exercise of a right of distress for unpaid rent was not unlawful. In the present case I find it difficult to see how the situation is distinguishable. As at the date when the Break Notice was served the parties fell to be treated, in equity, as if they were parties to a completed lease which contained a three month break right. Given this position, it seems to me that the Claimant was entitled, as against the Defendant, to exercise this break right by the service of the Break Notice.

198. I therefore conclude that the Break Notice was effective to terminate the Equitable Lease, subject to the question of whether, following such termination, the Defendant was entitled to the protection of the 1954 Act, as a business tenant of the Property.

199. Section 69 of the 1954 Act contains the definition of a *"tenancy"*, as that expression is used in the 1954 Act. The definition includes an agreement for a lease. As such, it seems to me that the Equitable Lease was capable of being protected by the 1954 Act, but was also capable of being contracted out of the protection of the 1954 Act, provided that the requirements of Section 38A(3) of the 1954 Act were complied with. I should

mention that it was not suggested before me that an equitable lease could not be contracted out of the 1954 Act. The argument in the present case was whether the requirements for contracting out were met.

200. The question therefore becomes whether there was compliance with the requirements of Section 38A(3), prior to the grant of the Equitable Lease. It seem to me that there was. I can state my reasons for this conclusion fairly shortly, as they largely follow from my analysis of the same question in relation to the 2016 Lease. As I have found, the Second Statutory Declaration was provided to the Defendant in draft form, prior to the grant of the Equitable Lease. This was, for the reasons I have stated earlier in this judgment, sufficient to satisfy Section 38A(3)(a). There are then the requirements of Schedule 2. I have found that the Defendant swore the Second Statutory Declaration on 18th November 2016; that is to say well in excess of 14 days prior to the grant of the Equitable Lease, on 3rd January 2017. In those circumstances a statutory declaration was not strictly required; see paragraph 3 of Schedule 2. It seems to me however that the Second Statutory Declaration, in going beyond the requirement for a declaration, did satisfy the requirement for a declaration.

201. Turning to the Equitable Lease itself, and the requirements of paragraphs 5 and 6 of Schedule 2, the Equitable Lease included the Rider, and thus the confirmations contained in clause 2 of the Rider. It seems to me that those confirmations, as they appeared in the Rider, were sufficient to satisfy the requirements of paragraphs 5 and 6 of Schedule 2. In stating this conclusion I should mention that, in the case of the Second Lease Document, clause 2.2 of the Rider does not record the date on which the Second Statutory Declaration was sworn. The relevant part of clause 2.2 is left blank. Equally, clause 2.1 and clause 2.2 refer, respectively, to the required notice under Section 38A(3)(a) and to the statutory declaration as being annexed to the Second Lease Document. The Second Statutory Declaration is not annexed to the Second Lease Document, either in draft or sworn form. I accept however the argument of Mr. Wonnacott that none of these omissions actually constituted a failure to comply with the requirements of paragraphs 5 and 6 of Schedule 2.

202. I therefore conclude that the Equitable Lease was successfully contracted out of the protection of the 1954 Act, so that Sections 24-28 of the 1954 Act did not apply to the Equitable Lease.

203. This in turn leads to the conclusion that the Break Notice was effective to terminate the Equitable Lease for all purposes. There was no statutory continuation of the Equitable Lease effected by the 1954 Act. The Equitable Lease came to an end on 30th June 2018. Thereafter the Defendant had no right to remain in occupation of the Property.

Conclusion

204. The outcome of the trial is as follows.

205. It follows from my previous conclusions that the Defendant has no right to remain in occupation of the Property, and has had no right to remain in occupation of the Property since the expiration of the Break Notice, on 30th June 2018.

206. Accordingly the Claimant is entitled to an order for possession of the Property.

207. I have not dealt with the claim for damages which is made by the Claimant in this action, and it was not the subject of argument before me. It is not clear to me as to whether and, if so, to what extent, the Claimant has actually suffered a loss or will suffer a loss of the kind alleged in the Amended Particulars of Claim. If necessary, I will hear Counsel on what, if anything, needs to be done in relation to this damages claim. I will also hear Counsel on the question of what, if any declaratory relief should be granted to the Claimant, assuming that such declaratory relief is still sought.

208. Turning to the Defendant's counterclaim it seems to me that it falls to be dismissed, so far as it has been included in this trial by the Directions Order. The counterclaim for damages has been excluded from this trial by the Directions Order. It seems to me however that this counterclaim for damages also falls to be dismissed, in the light of what I have decided in this judgment. Given however that the counterclaim for damages was excluded from this trial by the Directions Order I will hear Counsel, if necessary, on what should be done in relation to the counterclaim for damages.

209. I will also hear Counsel on all other matters consequential upon this judgment, if and in so far as they cannot be agreed.