Neutral Citation Number: [2021] EWHC 779 (Ch)

Long lease of hotel – Construction – Implication of terms - Landlord's break clause – Whether validly exercised – Completion of development – Time – Prevention principle – Waiver – Estoppel – Valuation – Mesne profits – Repudiation of lease

Case No: PT-2019-MAN-000132

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: Maundy Thursday, 1 April 2021

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between :

WIGAN BOROUGH COUNCIL

Claimant

- and -
(1) SCULLINDALE GLOBAL LIMITED
(2) CRAIG BAKER
(3) AMIR MADANI

Defendants

- -
- -

Mr Martin Hutchings QC (instructed by **DWF Law LLP, Leeds**) for the **Claimant**
Mr Andrew Latimer (instructed by **Jolliffe & Co LLP, Chester**) for the **Defendants**

Hearing dates: 22-26 February, 1-5, 10, 11 March 2021

The following cases are referred to in the judgment:

Arnold v Britton [2015] UKSC 36, [2015] AC 1619
BDW Trading Ltd v JM Rowe (Investments) Ltd [2011] EWCA Civ 548
Blue Chip Hotels Ltd v Revenue & Customs Commissioners [2017] UKUT 204 (TCC)
Borwick Development Solutions Ltd v Clear Water Fisheries Ltd [2019] EWHC 2272 (Ch), [2020] 1 WLR 599, reversed [2020] EWCA Civ 578, [2020] 3 WLR 755

Buckland v Papillon (1866) LR Ch App 67
Cooke v Scotfield Ltd [2000] All ER (D) 532
Duval v 11-13 Randolph Crescent Ltd [2020] UKSC 18, [2020] AC 845
Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168, [2010] 3 EGLR 165
Eurobank Ergasias SA v Kalliroi Navigation Co Ltd [2015] EWHC 2377 (Comm)
Fuller v Kitzing [2017] EWHC 810 (Ch), [2017] (Ch) 485
Hersey v Giblett (1854) 18 Beav 174
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896
Mears Ltd v Costplan Services (South East) Ltd [2019] EWCA Civ 502, [2019] 4 WLR 55
Moss v Barton (1866) LR 1 Eq 474
Proxima GR Properties Ltd v Spencer [2017] UKUT 450 (LC), [2018] L & T R 9
Rider v Ford [1923] 1 Ch 541
Rockferry Waterfront Trust v Pennistone Holdings Limited [2020] EWHC 3007 (Ch)
Satyam Enterprises Ltd v Burton [2021] EWCA Civ 287
Siemens Hearing Instruments Ltd v Friends Life Ltd [2014] EWCA Civ 382, [2014] 2 P & C R 5
Swedac Limited v Magnet & Southerns Plc [1989] 1 FSR 243
United Scientific Holdings Ltd v Burnley BC [1978] AC 904

The following additional cases were cited to the court or were referred to in the skeleton arguments:

Active Media Services Inc v Burmester, Duncker & Joly Gmbh [2021] EWHC 232 (Comm)
Beazer Homes Ltd v Durham County Council [2010] EWCA Civ 1175
Ben Cleuch Estates Ltd v Scottish Enterprise [2008] CSIH 1, [2008] SC 252
Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch), [2007] 3 EGLR 101
Biondi v Kirklington & Piccadilly Estates Ltd [1947] 2 All ER 59
Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation [2020] UKPC 23
First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] BCLC 1409
French v Elliott [1960] 1 WLR 40
Kelly v Fraser [2012] UKPC 25, [2013] 1 AC 450
Mackay v Dick & Stevenson (1881) 6 App Cas 251
Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742
Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyds Rep 391
Multon v Cordell [1986] 1 EGLR 44
Sainsbury's Supermarkets Ltd v Olympia Homes Ltd [2005] EWHC 1235 (Ch), [2006] 1 P & C R 17
TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd [2019] EWHC 1363 (Ch), [2019] Bus LR 1970

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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.

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HIS HONOUR JUDGE HODGE QC

<u>Covid-19 Protocol</u>: This judgment was handed down remotely by circulation by email to the parties' legal representatives and representatives of the press and by release to BAILII. The date and time for hand-down is deemed to be 10.00 am on Maundy Thursday, 1 April 2021.

JUDGE HODGE QC:

1. This is my reserved judgment on the trial of a claim issued by the claimant, Wigan Borough Council (**the Council**), on 7 December 2019 against the defendants, Scullindale Global Limited (**Scullindale**), a company incorporated in the British Virgin Islands, Mr Craig Baker, resident in England, and Mr Amir Madani, resident in Dubai. There is also a counterclaim by Scullindale. The claimant was ably represented by Mr Martin Hutchings QC and the defendants were equally ably represented by Mr Andrew Latimer (of counsel). The trial, originally listed to last ten days, took place entirely remotely by Teams over 12 court days, between Monday 22 to Friday 26 February, between Monday 1 to Friday 5 March and on Wednesday 10 and Thursday 11 March 2021. It followed on from a Pre-Trial Review which I had conducted (also remotely by Teams) on 25 January 2021 and a site visit and view, both external and internal, of Haigh Hall and the surrounding Country Park, which I had undertaken in the presence of both counsel over some 2 ½ hours on Saturday 20 February.

2. The remote trial had the advantage that it was more accessible to members of the public with access to an internet connection, and also to the local press, than it would have been had it taken place in a traditional court room in the Manchester Civil Justice Centre. However, at times there were difficulties in sustaining a sufficiently stable audio-visual connection. There were also difficulties in navigating one's way through the growing number of electronic bundles of documents. During the course of Day 7, concerns were raised about the potential use of mobile phones during the hearing. Although the court was satisfied that there had been no interference with the witness evidence, and it recognises that some degree of mobile phone contact (at least by text) may be necessary when the solicitor and the witness are at the same location to enable counsel to seek and to receive instructions, this is more difficult to police outside the formal court setting, and it can give rise to some concerns. Above all, there was lacking the immediacy, the spontaneity and the benefits of personal inter-action and greater visibility that are afforded when all the participants in the trial are present in the same physical forensic space. This was far from the first witness action that I have conducted remotely during this pandemic; but it brought home to me even more clearly than previous trials the limitations of that forensic medium. I am satisfied that conducting this trial remotely did not impair the ability of the court to arrive at a just determination. When the technology works well - and that can be variable – a remote trial can be a useful *"work around"* in the face of the Coronavirus pandemic, and it is certainly better than no trial at all, or justice delayed; but in my experience it is clearly inferior to a face to face trial.

3. This judgment is divided into eight sections as follows: **I:** Introduction and overview **II:** The trial and the witnesses **III:** The Lease: its true meaning and effect **IV:** The validity of the break notice **V:** Valuation issues **VI:** Damages and mesne profits **VII:** The counterclaim **VIII:** Conclusion.

4. During the course of the trial a great many issues were raised which, as the trial has progressed and developed, seemed to me to be of little, if any, real relevance to the issues I need to decide. The fact that I have not mentioned them in this judgment does not mean that they have been overlooked. I have limited my findings of fact to those matters which I consider properly fall for determination, and those additional matters of disputed fact which any appeal court may need to consider if it were to differ from

my conclusions on matters of law. Likewise, I have not found it necessary to refer to all of the authorities that were cited to me: some of them turned on the precise wording of the particular lease or other written instrument or their own particular facts whilst others offered no novel statement of legal principle. I have omitted any reference to authorities cited in support of non-controversial propositions in practitioners' texts. In doing so, I have been guided by the wise observation of Hoffmann LJ (as he then was), when giving a talk on appellate advocacy many years ago in the Inner Temple, that the only cases one really needs to concern oneself with are those that are wrongly decided because all other cases should be consistent with underlying legal principles. A judgment of the Business and Property Courts does not necessarily benefit from being flavoured by a generous sprinkling of superfluous case law authority like the hundreds and thousands on the icing of a child's cake.

I: Introduction and overview

5. As I have previously observed (in *Rockferry Waterfront Trust v Pennistone Holdings Limited* [2020] EWHC 3007 (Ch)), one of the particular pleasures of sitting as a judge of the Business and Property Courts in Liverpool and Manchester is the insight it has afforded me into the sporting and leisure activities of the citizens of the north of this country. In *Fuller v Kitzing* [2017] EWHC 810 (Ch), reported at [2017] (Ch) 485, I had to deal with the nature, and the incidents, of the right to shoot game birds on an estate in Yorkshire. In *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd* [2019] EWHC 2272 (Ch), reported at [2020] 1 WLR 599 but reversed on appeal (see [2020] EWCA Civ 578, [2020] 3 WLR 755), I had to determine the legal nature of the property in stocks of fish contained within a commercial fishery. In the *Rockferry* case, I was concerned with the title to a slipway used to launch sailing boats into the River Mersey by members of the Royal Mersey Yacht Club. In the present case, I am concerned with the fate of Haigh (pronounced "Hay") Hall, an austerely impressive Grade II* listed stately home, built between 1827 and c. 1844 by the 7th Earl of Balcarres, which looks out to the west over Wigan and is set within Haigh Hall Country Park. Both the freeholds of the Park and the Hall are owned by the Council, although the park is operated by an entity operating under the invigorating style of *"Inspiring Healthy Lifestyles"* (**IHL**). The Hall is described at pages 183-6 of the 2006 edition of the volume of *Pevsner's Buildings of England* for *Lancashire: Liverpool and the South-West* (edited by Richard Pollard and Nikolaus Pevsner); and two colour photographs showing the Hall's southern and western exterior facades and the interior ceiling of the staircase hall appear as photographs 53 and 54.

6. On 21 August 2015 the Council granted two planning consents in relation to Haigh Hall. One (Application no. A/15/80480/CU) was planning permission for the *"change of use of Haigh Hall to hotel, with function room facilities, alterations and refurbishment of Hall, including addition of ceremony room to roof, together with new access off Higher Lane, car parking and landscaping … in accordance with the application and plans submitted"*. Consent was granted subject to no less than 16 conditions. Condition 2 provided that: *"With the exception of the detailed matters referred to by the conditions of this consent, the development hereby approved shall be carried out in accordance with the details shown on plan references 14133 -001, 100C, 101E, 102E, 103C, 104G, 107C, 108B, 110E, 111D, 112D, 113B, 114D, 120, 121C, 122A, 123, 124A and 125"*. The other consent (Reference Number A/15/80478/LB) was *"listed building consent for alteration and refurbishment of*

building, including addition of ceremony room to roof at Haigh Hall Haigh Country Park School Lane Haigh Wigan in accordance with the application for listed building consent submitted to the Council on the 09.03.2015". This was subject to six conditions, although conditions 1, 3, 4 and 5 mirrored the corresponding conditions in the planning permission. Condition 2 provided that: *"With the exception of the detailed matters referred to by the conditions of this consent, the development hereby approved shall be carried out in accordance with the details shown on plan references: 14133-001, 100C, 101E, 102E, 103C, 104G, 111D, 112D, 113B, 114D, 124A and 125"*.

7. Pursuant to an Agreement for Lease dated 4 May 2016, the Council granted a Lease of Haigh Hall and certain adjoining land to Scullindale on 23 May 2016 for a term of 199 years from and including 23 May 2016 at a premium of £400,000 plus VAT. Mr Baker and Mr Madani joined in the Lease to give certain guarantees *"as primary obligors*". The overarching issue in this case is whether Wigan has validly terminated the Lease with effect from 22 November 2019 by validly giving a notice dated 16 September 2019 exercising a landlord's break clause which the Council claims had become exercisable following Scullindale's asserted failure to achieve the second *"Milestone"* of completing the refurbishment and redevelopment of Haigh Hall appropriate to a 4 star boutique hotel prior to 23 May 2018 (and thereby constituting an Event of Default under the Lease). Scullindale has remained in occupation of Haigh Hall ever since the break date. It claims to be entitled to do so as lessee under the Lease. The Council claims that Scullindale remains in occupation as a trespasser and is liable as such for damages for trespass or mesne profits. A claim for double the yearly value of Haigh Hall, pursuant to s.1 of the Landlord & Tenant Act 1730, was quietly dropped during the course of the Council's closing. If the break notice was effective to terminate the Lease, then the Council is obliged to pay compensation to Scullindale, based on the lower of either the open market value of Haigh Hall or the premium of £400,000 plus the value of any improvement carried out at the premises prior to the termination of the Lease. This raises an issue as to the relevant valuation date for the purposes of Clause 9.3 of the Lease, and consequently the sum to be paid by the Council to Scullindale.

8. The Council's case is straightforward. The Lease contained a contingent condition subsequent (in the form of a break clause, or option to determine the Lease and to re-purchase Haigh Hall) whereby, should the second *"Milestone"* not have been achieved by 23 May 2018, the Council was entitled to terminate the Lease and re-acquire Haigh Hall (essentially) at market value. This was not dependent on Scullindale being in breach of any of its lease covenants, breaches of which are not relevant to the Council's primary relief sought by its claim. The simple fact is that the *"Development"* (as defined in the Lease) had not been completed by 23 May 2018 in accordance with the relevant planning permissions, triggering an *"Event of Default"* and the Council's consequent right to serve a break notice. The Council's motive for exercising that right, which it could do under clause 9.2 of the Lease *"at any time"*, is said to be neither here nor there. It also does not matter why the Event of Default occurred. The fact is that it did.

9. The defendants assert that the Lease remains on foot, although the guarantors claim that their personal liability has either been discharged or is not engaged in the circumstances of the present case. They deny that any relevant Event of Default has

occurred such as to give rise to a right to terminate the Lease and that the break notice was therefore not validly served. They point to the fact that Haigh Hall achieved a 4* rating from the AA following an overnight inspection on 17 April 2018 with a merit score of 89% against an average of 79%. The inspector noted that: *"Haig [sic] Hall Hotel has a great deal to commend, even at this early stage of development there were many strengths to note."* The defendants contend that as a matter of construction, alternatively by implication, clauses 4.6(c) and 9.2 of the Lease do not permit the Council to rely on its own delay in preventing Scullindale from completing the development in accordance with the planning permissions by 23 May 2018 or by any subsequent date. Likewise, as a matter of construction, alternatively by implication, clauses 4.6(c) and 9.2 of the Lease required the Council to serve any break notice within a reasonable time and not, for example, at any time at all in the remaining 197-year term of the Lease. The defendants say that the Council did not serve any break notice within a reasonable time. By way of an opposed amendment, for which I gave permission in the course of an extemporary judgment delivered on the afternoon of Day 5 of the trial, the defendants alternatively say that as a matter of construction, or alternatively by implication, clauses 4.6(c) and 9.2 of the Lease required the Council to serve any break notice between 23 May 2018 and the completion of the development in accordance with the planning permissions. They say that Scullindale had completed the development in accordance with the planning permissions prior to 16 September 2019, which was the date of the break notice.

10. The Council say that no such terms are to be read or implied into the Lease, not least because they would contradict the relevant provision in the Lease, which is in a standard break clause form, providing, expressly, that the right to terminate the Lease can be exercised *"at any time"* - meaning at any time after 23 May 2018. The Lease does not say *"at any reasonable time"* or impose any other limit on the exercise of the break clause; the Council says that the words *"at any time"* are clear and must be given their unambiguous meaning.

11. The defendants also contend that if, contrary to their case, any Event of Default has occurred, then the Council has waived any right to rely, or alternatively is estopped from relying, upon such an Event. In purporting to serve an unlawful break notice, the defendants say that the Council has repudiated the Lease; although Scullindale has elected to affirm the Lease and so remains the lessee for the remainder of the term, which does not expire until 22 May 2215, i.e.199 years from the date of the grant.

12. The Council says that neither waiver nor estoppel can avail the defendants. As for waiver, at no time between 23 May 2018 and before the exercise of the break clause in September 2019 did the Council act in any way which was consistent only with the Council (as landlord) giving up its rights under the Lease to rely on the relevant Event of Default. Indeed, it is common ground that the Council did not even make the decision to terminate the Lease until a meeting of its Cabinet on 29 August 2019. Furthermore, the defendants' evidence does not show that there was any clear and unequivocal representation (or conduct) by the Council towards the defendants that it would not exercise its break right. At most, the defendants' evidence (much of which is challenged) goes no further than to show that after 23 May 2018 the Council never suggested positively that it would exercise its break clause (and it did not make any decision to do so until 29 August 2019). Even if it is shown that the Council professed itself satisfied with the progress of the works after 23 May 2018 (which the Council

challenges), this could on no basis amount to an unequivocal representation that it would not in future terminate the Lease by serving a break notice; nor would such an expression of satisfaction with the progress of the works be consistent only with the Council giving up its break right. Under the relevant Lease clause, the break right could be exercised *"at any time"* after the relevant Event of Default had occurred. The Council never acted inconsistently with that right.

13. The defendants' case on estoppel (whether by representation or by conduct) is said to face the same difficulty as its case on waiver by election: the lack of any clear and unequivocal representation, communicated to the defendants, that the Council had taken the decision that the break right would definitely never be operated in the future. The further difficulty with the defendants' estoppel claim is said to lie in proving detrimental reliance. Scullindale claims that it would not have continued to carry out the works after 23 May 2018 had it known that the Council would, 16 months later, terminate the Lease. But Scullindale was contractually obliged by the Lease to continue to carry out, and try to complete, the works in any event, even though an Event of Default had already occurred, because otherwise it would have been in breach of its express lease covenant (at clause 4.6(b)) to carry out and complete the works *"diligently….and with all practicable speed"*. Both the Council, as landlord, and Scullindale, as tenant, were obliged to fulfil their respective lease obligations because the Lease continued until it was validly determined. Furthermore, it would not in any event have been inequitable for the Council to resile from its former position because 16 months after the Event of Default had arisen, and at the time when the break notice was served, the works had still not been completed. No waiver or estoppel can therefore be shown.

14. As well as contesting the validity of the termination of the Lease, Scullindale claims that the Council acted in breach of contract by its repudiation of the Lease and/or by breaching the covenant of quiet enjoyment. It is said that the Council has thereby caused loss and damage to Scullindale and is liable for the same. This is said to extend to: (1) the cost of refunding deposits for cancelled weddings (quantified at £66,542.67), (2) the net loss of profit on reservations which had been cancelled by the date of the trial (quantified at £1,073.827, although logically the cost of the refunded deposits should fall to be deducted from this sum to avoid any double recovery, as I think Mr Latimer conceded in closing), and (3) any legal costs which Scullindale does not recover under any order for costs. Further, Scullindale claims a declaration and an injunction prohibiting any unlawful interference by the Council with Scullindale's use and enjoyment of Haigh Hall, or damages in lieu of such an injunction.

15. The defendants resist the Council's claim for damages for trespass and/or mesne profits on the basis that no loss has been suffered by the Council as a result of Scullindale's continued occupation of Haigh Hall. It is said that the value of the freehold land, absent the Lease, is nil. The freehold land, with an empty Grade II* listed building, is a burden on the Council and its ratepayers. The Council has not pleaded that a new lessee has agreed, or at the present time can reasonably be expected to agree, to pay any yearly sum for Haigh Hall. In response, the Council points out that at the date the Lease was granted, and Scullindale took possession, Haigh Hall was a functioning events venue. It pleads that as of 6 March 2020 (the date of its Reply) the Council was preparing a plan for the short-term use of Haigh Hall; but that as it was not known when possession would be given up by Scullindale,

the Council has been unable to make any firm decisions in relation to the future use of Haigh Hall. Since then, of course, the Coronavirus pandemic has intervened, with successive lockdowns of hospitality venues such as hotels and wedding and events venues.

II: The trial and the witnesses

16. At the beginning of the trial there were six lever-arch files, available both in hard copy and digitally in PDF format: a Core Bundle (of 257 pages) which, apart from the Lease, was put to little real use; Trial Bundle 1 (of 317 pages) which contained key documents, statements of case and witness statements; Trial Bundle 2 (354 pages) containing expert reports, court orders and approved costs budgets; a single claimant's exhibits bundle containing 637 tightly packed pages arranged under the name of each of the witnesses who had exhibited the document, the spine of which inevitably broke the first time it was deployed, rendering the hard copy unusable; and two defendants' exhibits bundles totalling 828 pages. There was also a PDF file containing 277 pages of solicitors' correspondence. What was spectacularly lacking was a single chronological bundle, arranged sequentially. This meant that it proved impossible to navigate through the documents chronologically without moving between different bundles, and between different sections within individual bundles. This in turn made it extremely difficult for the court (and presumably also for counsel) to gain an accurate view of the history of events as they had unfolded. On the positive side, the solicitors who had prepared the trial bundles had worked hard both to identify the documents referred to in the witness statements by annotating them with the pages numbers in the exhibits bundles and to avoid duplicating documents in the exhibits bundles by the use of helpful cross-reference sheets. During the course of the trial, three further supplemental bundles (of 109, 210 and 84 pages) were produced in PDF form. Individual documents were submitted by email as the trial progressed. These included: (1) a less heavily redacted version of the report prepared for the meeting of the Council's Cabinet on 29 August 2019 (at which the decision to exercise the break clause had been taken); (2) a 74 page schedule of receipts annotated on behalf of the Council, to which the defendants later added their comments by way of a document in the third supplemental bundle, and (3) revised discounted cash flow forecasts from the experts.

17. By the beginning of the trial, I had received skeleton arguments from both counsel and also separate bundles of authorities (containing both law reports and extracts from practitioners' texts) from both Mr Hutchings and Mr Latimer. During the course of the trial, I received a second bundle of authorities, and then a further VAT case, from Mr Hutchings. As promised during his oral closing, on the afternoon of the last day of the trial I received a third bundle of authorities from Mr Hutchings; and he supplied a final authority by email the morning after the trial concluded, on which Mr Latimer commented by email that same afternoon.

18. I have already mentioned that the trial was preceded by a site visit and view the previous Saturday for about 2 ½ hours. The trial began at 10.00 am on Monday 22 February, with the court aiming to sit for about 5 hours each day, with two breaks of about 30 minutes each, although on occasions (such as on Day 1) fewer, or shorter, breaks were taken. On average, over 20 people attended the trial remotely each day (with attendance peaking at 26). No fewer than six solicitors from DWF requested invitations to attend the trial. At times some 10 members of the public were in

attendance; and, by the end of the trial, two members of the press were in attendance, one of whom (for the Wigan local press) had, I think, attended throughout. On Day 1, both counsel addressed the court in opening, Mr Hutchings for about 3 ½ hours and then Mr Latimer for about 2 hours. The only case law authority relied upon in the oral openings was *BDW Trading Ltd v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548, from which Mr Hutchings cited extensively but which Mr Latimer dismissed as not being directly in point since it had concerned a contract of sale rather than a break clause in a lease.

19. The Council called eight witnesses of fact, all current Council officers or employees. On Day 2 the court heard from **Mr Andrew McGuire**, the Council's Strategic Lawyer, for about 2 hours and then from **Mrs Penny McGinty**, the Council's Assistant Director, Corporate Contracts and Assets, for about 3 hours. Mrs McGinty's qualifications are in the field of town and country planning. She was involved in property and development matters for the Council, and she had acted as the Council's main point of contact with Scullindale and Mr Baker. On Day 3 the court heard from: (1) **Mr Paul McKevitt**, the Council's Director of Contracts and Resources and Deputy Chief Executive, with a background in finance, for about 3 hours; (2) **Mr Philip Haslam**, a qualified surveyor and Strategic Asset manager for the Council, for about 40 minutes; and **(3) Mrs Marie Bintley**, the Council's Assistant Director for Growth and Housing, with a background in planning and development, whose involvement with Haigh Hall had begun in March 2017, for about 40 minutes, and continuing on the morning of Day 4 for a little under two hours. Overnight, between Day 3 and Day 4, Mr Hutchings had considered (for the first time) the original of the previously disclosed, and heavily redacted, version of the Report which had been prepared for the meeting of the Council's Cabinet on 29 August 2019 (at which the decision to exercise the break clause had been taken). As a result, a fuller version was produced, leading to Mr McKevitt being recalled for a further 20 minutes after Mrs Bintley's evidence had concluded so that he could be asked questions about this fuller version of the Report. The court then heard from **Mr Gareth Jones**, a planner and Team Leader in the Council's Development Management Team, for about 2 hours, followed by **Mr Ian Rowan**, a Conservation officer with the Council, whose evidence continued on the morning of Day 5, for about 1 ¾ hours in total. Finally, the court heard from **Mr Robert Thorpe**, the Council's Building Control Manager, whose employment with the Council had only commenced in October 2019, for a little under 1 ½ hours.

20. I find that Mr Thorpe was overly combative in cross-examination and overly defensive of his department, demonstrating, as Mr Latimer rightly submitted in closing, *"a dogmatic refusal to accept even the slightest criticism of his department"*. However, Mr Thorpe was not with the Council at the time of any of the events material to these proceedings, and his evidence was based entirely on the documents. Subject to that qualification in the case of Mr Thorpe's evidence, I consider that all of the Council's witnesses were competent and honest and were seeking to do their best to assist the court. Mrs McGinty was particularly impressive, showing herself to be a brisk, confident, and knowledgeable witness; although I would acknowledge that at times she had gone further than the defendants would have wished in seeking to accommodate the interests of those members of the public who were keen to retain their perceived right to roam at will over land which had been included within Scullindale's demise and in appeasing their concerns. I accept Mrs McGinty's

evidence that she had genuinely failed to recall that the white-lining of the main drive had been mentioned at a meeting on 28 April 2017 when she had come to make the statement that was published in *"Wigan Today"* almost a year later, on 4 April 2018, that the Council were not aware that Scullindale's plans for the main drive *"included road markings"*; and that, from the Council's perspective, the problem was that it had not known that the white-lining was to take place when it did or that it would extend as far in the direction of the Hall as it did. I also accept Mrs McGinty's evidence that the emphasis of the *"joint"* statement released to the Wigan Observer on 10 April 2018 had been as to the Council's ignorance about the timing of the installation of the road markings on the main drive (although I acknowledge that this might have been lost on the average reader of that newspaper). In any event, none of this is relevant to the issues that the court has to decide: the white-lining was applied to the existing driveway and not to the car parking areas and areas of hardstanding, or to the new driveway from Higher Lane, which were the areas addressed by planning conditions 10 to 12; and nor do these conditions relate to the Hall itself.

21. In both his opening and his closing submissions, Mr Latimer placed considerable emphasis upon the following passage in an email written by Mr Jones to Mrs Bintley on 20 September 2018: *"...I do not believe at the moment that we have the evidence to demonstrate a breach of this condition. We might be able to pin something on 'repair', but to make this stick I think a thorough inspection would have to be undertaken. Again, the concern here will be that he undertakes the works and just doesn't inform us."* Mr Latimer comments that this observation was *"... candid, extraordinary and ought never to have been written"*. He rightly observes that *"... no public official has any business trying to 'pin' an allegation on anything, or anyone. Gareth Jones will give evidence against the Defendants, presumably he will be looking to 'make this stick' as a witness as well. Mr Jones appears to be disappointed by the prospect of Craig Baker/Scullindale conforming to the relevant condition despite a 'thorough inspection.' Marie Bintley chose to do nothing to rebuff that email. She saw nothing wrong in it. The email is a telling demonstration of the group-think within Wigan and its attitude towards Scullindale and Mr Baker in this case."* The date of the email is said to be *"telling"*, coming nearly four months after the second Milestone date of 23 May 2018. The Council is said to have been casting around, looking for whatever it might *"pin"* on Scullindale – but Scullindale was none the wiser. The Council is said deliberately to have kept Scullindale in the dark; and Mr Latimer says that that is relevant to the issues of waiver and estoppel. The Council is said to have kept looking for reasons to justify its decision until 28 August 2019, when the Council's Cabinet decided to serve the break notice.

22. Mr Jones rightly accepted in cross-examination that he should not have used the phrases *"pin something on 'repair'"* or *"make this stick"*; but he explained that this was written in the context of drafting a potential enforcement notice, alleging breach of one of the conditions in the relevant planning permission, and in making that enforcement notice *"stick"*. I find that Mr Jones was exasperated by what he perceived to be the defendants' tendency of supplying the information required to secure the discharge of applicable planning conditions after the works had already been completed when this order of events should have been the other way round. I find Mr Jones to be a competent and dedicated planning officer; and I accept his evidence that he takes great pride in his work, that he tries to carry it out to the best of his abilities, and that the Council's planning team went above and beyond the call of

duty in trying to assist Scullindale and Mr Baker to discharge the planning conditions. I reject the suggestions that they could not get a fair hearing from the Council's planning department, that there was unconscious bias on its part, or that there was any battle of wills developing between defendants and the planning department.

23. On the evidence, I entirely reject any suggestion that the Council was seeking to engineer a situation in which, as Mr Latimer suggested, it could *"have its proverbial cake and eat it too"*. I find that the Council has not been seeking to *"pin"* anything on the defendants and then to make it *"stick"*. On the evidence in this case, I am satisfied that the Council genuinely considered itself to be entitled to serve a valid break notice terminating the Lease, and that it considered this course to have been in the best interests of the inhabitants of the Wigan area and of those who make use of Haigh Hall Country Park. Under the constitutional arrangements of this nation, it is not for this court to seek to revisit the merits, or otherwise, of that decision. Rather, the court has to determine whether the Council was acting lawfully within the terms of the Lease in serving the break notice. I am satisfied that the service, on consecutive days in October 2018, of separate prohibition notices by the fire authority, and then by the Council, was not orchestrated by the Council as part of a deliberate, and concerted, campaign to persuade Scullindale to leave Haigh Hall by offering to surrender its lease without the Council being required to pay the full compensation due under the Lease if the break clause were to be exercised. Rather, the service of these notices came about as the result of a complaint by a member of the public regarding the use of the hotel's roof terrace for a cocktail reception which had taken place as part of a wedding celebration on 26 May 2018, although (as Mrs McGinty recognised), the two public authorities may have co-ordinated their visits as a result of this complaint. I do not accept that by causing bailiffs to attend at Haigh Hall some two days later, in order to recover unpaid business rates in respect of the Hotel, the Council was mounting a hostile campaign against the defendants. I note that it was not until Mrs McGinty's email of 21 February 2019 that the Council first mentioned the possible termination of the Lease. I accept Mrs McGinty's evidence, supported by Mr McKevitt, that this was not a negotiating ploy but rather an option which they both genuinely believed was still available to the Council if it could not resolve the public access issues in a way which it considered appropriate if the Lease were to be permitted to continue.

24. After a short adjournment for luncheon, Day 5 continued with an application by Mr Latimer to amend the defence to allege, in the alternative to the defendants' case that the break clause must be exercised within a reasonable time, that, as a matter of construction, or alternatively by implication, clauses 4.6(c) and 9.2 of the Lease had required the Council to serve any break notice between 23 May 2018 and the completion of the development in accordance with the planning permissions. According to Mr Latimer, his application was conceived after the court had provided the parties with *"food for thought"* about whether there might, in fact, be some *"middle ground"* between the *"polar opposites"* of *"at any time"* and *"at any reasonable time"*. The amendment was opposed by Mr Hutchings. After hearing oral submissions, I gave permission for this amendment for the reasons which I set out in the course of an extemporary judgment delivered on the afternoon of Day 5 of the trial. After a further short adjournment, Mr Latimer called the defendants' first witness, **Mr Amir Madani**, the sole director of Scullindale, who gave his evidence

remotely from Dubai for a little over an hour before the court adjourned for the weekend.

25. During the morning of Day 6 of the trial Mr Latimer produced a second supplemental PDF bundle. **Mr Madani** continued his evidence for a little under an hour on the morning of Day 6. **Mr Jones** was then re-called for further questions from both Mr Hutchings and Mr Latimer arising out of the amendments to the defence. After a short adjournment for luncheon, **Mr Craig Baker** began his evidence at about 12.35 pm. Mr Baker's witness statement, which he said that he had put together himself over some four months, comprises 254 paragraphs extending over some 85 pages. It is so diffuse that Mr Latimer found it necessary to prepare a descriptive index to act as a guide to its contents. Inevitably, Mr Baker was in the witness box not only for the remainder of Day 6 but also for the whole of Day 7 and the first 30 minutes of Day 8, a total of some 9 hours in all. Mr Baker is not a director of Scullindale. Through his company, Haigh Hall Hotel Limited, he was appointed by Scullindale to oversee the refurbishment, the management, and the operation of Haigh Hall to create a 4* boutique hotel and wedding venue (with realistic aspirations to 5* status). Through their company, Contessa Hotels & Spas Limited, Mr Baker and his wife, Lisa, have previously successfully restored, and refurbished and (since about 2002) they have operated and managed, the Hillbark Hotel & Spa as an award-winning 5* hotel and event venue at Frankby on the Wirral. They also later refurbished, and they operate and manage, the Leverhulme Hotel as a 4* hotel and event centre located in Port Sunlight Village, also on the Wirral.

26. The defendants' penultimate witness of fact was **Mrs Lisa Baker**, Mr Baker's wife, who is principally involved with the day-to-day operation and management of Hillbark and who left it to Mr Baker personally to over-see and project manage the redevelopment and refurbishment of Haigh Hall (as he had previously done with Hillbark and Leverhulme). Mrs Baker gave evidence for a little under two hours on the morning of Day 8. The defendants' final witness of fact was **Mrs Kelly Clarke (**formerly **Miss Kelly Brown)** who acts as Mr Baker's private secretary and manages his emails. She is also the director of Haigh Hall Hotel Limited and signed the general service and management agreement with Scullindale on its behalf. She gave evidence for about 45 minutes.

27. There was no real challenge to much of the evidence of Mr Madani, Mrs Baker or Mrs Clarke; but that is because they had little relevant evidence to give. Inevitably, since he lives in Dubai, Mr Madani's evidence was largely derived from conversations with Mr Baker (as Mr Madani acknowledged at paragraph 7 of his witness statement). Passages in Mrs Baker's witness statement were lifted verbatim (without even correcting references to names) from the witness statements of Mr Baker (compare Mrs Baker at paragraph 98 with Mr Baker at the end of paragraph 238) and Mrs Clarke (compare, on the inspections by Mr Haslam and Mr McKevitt in June and July 2018, Mrs Baker at paragraphs 91 and 92 with Mrs Clarke at paragraphs 52 and 53, which both Mrs Baker and Mrs Clarke accepted that they had worked on together). I find that neither Mrs Baker nor Mrs Clarke had any clear recollection of what was actually said by either Mr Haslam or Mr McKevitt on these two visits to Haigh Hall; and I derive little real assistance from their evidence in resolving the issues in this case.

28. The Council does challenge important aspects of Mr Baker's evidence. Mr Baker clearly deserves the gratitude of the Council, its Council Tax payers, and the nation generally for securing the removal of Haigh Hall from the *"Heritage at Risk"* register maintained by Historic England. Mr McKevitt acknowledged that, as a result of Mr Baker's work, the interior of Haigh Hall looked *"really good"*; and although, like Mr Jones, aspects of the refurbishment of the bedrooms are not entirely to my taste – but then I am not part of Mr Baker's target market – from my site visit and view I would certainly endorse that assessment. Mr Baker is to be applauded for the enterprise, imagination and attention to detail with which he has set about the task of rescuing Haigh Hall from possible dereliction. His team's vision even extended (I was told) to naming individual bedrooms after squares on the 2005 Wigan edition of the well-known board game, Monopoly. There is some force in the comment of the retired architect, Mr Michael Paddock, in his letter to Mr Baker of 24 October 2020, that *"... it is a great shame that the Council have not applauded Contessa Hotels for saving the future of one of the Town's most historically important buildings and making it publicly accessible as a fine hotel and spa facility"*. I find that Mr Baker has genuine grievances against both the Council and the operator of the Country Park over their treatment of Scullindale in relation to such matters as public access to the land included within its demise, the locking of the *"Stocks Gate"* at the northern entrance from School Lane, the white-lining of the main driveway, the failure to conclude the Woodland Management Plan and plans for the landscaping of the grounds, and the collection of business rates. However, I find that none of these matters had any impact upon Scullindale's ability to complete the Development of Haigh Hall in accordance with the relevant planning permissions, as required by the Lease, either by the second Milestone date of 23 May 2018 or the date of service of the break notice on or shortly after 16 September 2019. They are therefore of no relevance to the issues this court has to decide.

29. Generally, I find Mr Baker's evidence on disputed matters of fact to be unreliable. In the main, I am satisfied that this is due to a combination of imprecise, or faulty, recollection, and Mr Baker's mis-reading of documents and his enthusiasm for the project of delivering Haigh Hall as a fully restored, 5*country house hotel, spa and wedding and events venue, rather than being down to deliberate fabrication on his part. For example, I am satisfied that the table attached to the defendants' further response dated 17 July 2020 to the Council's request for further information does not fairly represent the content of the email traffic involving the Council's Building Control department between October 2017 and June 2018; in reality, it was Building Control that was pressing for fuller information and it was the defendants and their architects who were dilatory in supplying it. I am satisfied that Mr Baker is also guilty of misreading Mr Edden's email of 20 June 2018 and, consequently, that Mr Baker was mistaken in his evidence at paragraph 171 of his witness statement about that email and his earlier meeting with Mr Edden on 13 June 2018, when he asserts that Mr Edden had disputed the existence of any <u>existing</u> building control application: what Mr Edden was disputing was not the fact that an application had been made in October 2017 but the existence of any previous application in 2016 (as is clear from Mr Edden's later email of 10 August 2018, although he mistakenly ascribes the date of the 2017 application to November rather than October). Although it is of no real significance, for what it is worth I find, on the basis of the contemporaneous emails of both Mr Bergman (of IHL) and Mr Haslam, that at their site inspection on 15 October

2019 Mr Baker conveyed the clear impression that Scullindale would be vacating Haigh Hall on 22 November 2019.

30. On the peripheral issue of whether any application for building control approval had been made in 2016, I reject Mr Baker's evidence that it had; although I make it clear that this has no impact on any of the matters that I have to resolve in order to decide the outcome of this case in view of the later delays on the part of the defendants in supplying relevant further detailed information to the Council. Any such application in 2016 would have been made by, or with input from, the defendants' architects, the Paddock Johnson Partnership (**PJP**), as was the case with the October 2017 application (and also the application for the approval of reserved details submitted by PJP on 21 June 2016, which was added to the end of the second supplemental trial bundle). However, no documentary evidence has ever been produced from PJP's files, or otherwise, of any such application having been submitted in 2016; nor is it mentioned either in Mr Paddock's letter to Mr Brown of 24 October 2020 or in the earlier letter from Mr Simon Halliwell (of PJP) to Mr Baker dated 19 October 2020. The assertion that a cheque for the building control application fee of £2,400 was written out on or about 25 September 2015, about a month after the grant of planning permission on 23 August 2015, and was then simply put to one side, to be handed over to the then building control officer, Mr Jim Brown, with a completed building control application, on a visit to Haigh Hall in June 2016 is inherently implausible, as is Mr Brown's suggested explanation for Mr Andrew Marsden's email in September 2017, stating that the Council had no record of any application or payment which was reported at paragraphs 157 and 158 of Mr Baker's witness statement. As Mr Hutchings observed in closing, there is no supporting evidence from Mr Brown, even though he has now left the Council's employment, and Mr Baker says that he had a telephone conversation with him on 16 October 2020. Had a cheque for £2,400 been handed over in June 2016, I would have expected the fact that it had not been presented for payment to have been highlighted by the defendants before September 2017; yet, in cross-examination, Mr Baker said that he had never asked Mr Brown about the progress of the building control application nor had he (or anyone else) ever looked to see whether the cheque had been cashed. I was shown an image of an undated handwritten cheque stub made out *to "Wigan Council re Building regs"*, and a video of the surrounding cheque stubs. The handwriting on the relevant cheque stub is different; and the relevant cheque stub (and one dated 19 September 2015) are preceded by two cheque stubs, and followed by one further cheque stub, all dated 25 September 2015. All of this evidence is just as consistent with a cheque stub having been left blank at the time the cheque was torn out and writing being applied to the cheque stub later. It does not prove that a cheque was made out for the building control application fee in September 2015, still less that it was ever handed over to Mr Brown, together with a completed application form.

31. On the important issues of what was said to Mr Baker by Mr Haslam on 13 June and by Mr McKevitt on 27 July 2018, I prefer the evidence of Mr Haslam and Mr McKevitt because I find their evidence to be inherently more probable, more consistent with the contemporaneous documents, and more consistent with the later course of events. I also find them to be more reliable, and more disinterested, witnesses than Mr Baker.

32. More generally, where the evidence of either of the individual defendants, or the other defence witnesses, differs from the evidence of the Council's witnesses on matters which are material to my determinations, I prefer the evidence of the latter. I do so because I find that the evidence of the Council's witnesses is inherently more probable, it is more consistent with the contemporaneous documents, and it is more consistent with the later course of events.

33. After the conclusion of Mrs Clarke's evidence, at about 12.30 on the afternoon of Day 8, the court adjourned for about an hour. The court then heard from the two expert valuation witnesses, **Mr David Sutcliffe MRICS** (of Fleurets) and **Mr Ian Elliott MRICS** (of Avison Young) who entered the remote witness box, and gave their evidence, concurrently. There was rightly no challenge to the integrity, the professional competence or the relevant experience of either expert. Their evidence extended for a little over 8 hours in total, commencing at about 1.35 pm on Day 8 and concluding at about 11.00 on the morning of Day 10, with, effectively, a late start on Day 9 (at 12 noon) to facilitate ongoing discussions between the experts. Although, to the public and the representative of the press who were observing, the process of taking evidence concurrently may, at times, have appeared to be a little disorganised and unstructured, I think that all of the professionals involved recognised that it had facilitated the identification of the real issues which divided the experts and everyone's understanding of the expert valuation evidence. By the final morning of the experts' evidence, agreement had emerged as to the appropriate valuation methodology, and the remaining differences between the valuers had been identified and understood.

34. In addition to giving expert valuation evidence, Mr Sutcliffe also gave factual evidence of the condition of Haigh Hall. This was admitted in response to the late amendment to the defence, which raised the issue of the state of completion of the development as at the date of the exercise of the break clause on or about 16 September 2019. At paragraph 5.4.7 of his principal report Mr Sutcliffe had stated that at the time of his *"initial"* inspection in October 2019, *"... 15 of the bedrooms were operational. The remaining 15 rooms were at various stages of development. The majority were close to being complete, although items such as tiling, plumbing, decorating, furnishing etc., were still needed to bring them up to an operational standard. It was evident that these rooms had yet to be occupied on a commercial basis. As the valuation date is a month later I have assumed that these rooms would be fully operational. At the time of my subsequent inspection in October 2020 all bedrooms were complete."* Mr Elliott had not inspected Haigh Hall until 13 October 2020 and so he was unable to give evidence relevant to this issue.

35. During his oral evidence, Mr Sutcliffe disclosed that on Monday 23 September 2019 he had visited Haigh Hall incognito, in the guise of a customer who was considering booking a conference with 30-40 delegates, in order to gain an understanding of the building. He had inspected the function and the dining rooms, and also bedroom 101 on the first floor. He said that he had been told by a member of staff that only 15 of the bedrooms were then complete, with the final 15 bedrooms close to completion. Mr Latimer criticised Mr Sutcliffe for having lied about his reason for being there in order to gather evidence against Scullindale, suggesting that that was not the sign of an independent expert, nor the conduct of someone who understood that his first duty was to the court. The net result, so Mr Latimer contended, was that Mr Sutcliffe had

been told that 15 rooms were available to let by a relatively junior member of staff. If he had identified himself, then he would have been passed to someone who could have answered his question properly and who would have said that: (a) 30 rooms had been let for a wedding as recently as 14 September 2019 and (b) door locks from 15 rooms had then been removed and returned to a locksmith for additional works before being reinserted. Mr Sutcliffe had exhibited various photographs to his report which showed the condition of Haigh Hall; but he said that he had taken further photographs, possibly on a second camara or other digital device, which would have shown the uncompleted state of the Hall but which he had been unable to locate. I shall consider these aspects of Mr Sutcliffe's evidence when I come to consider the validity of the break notice.

36. After the conclusion of the expert evidence, Mr Hutchings proceeded to address the court in closing for about five hours on Day 10 and for a further 25 minutes at the beginning of Day 11. Mr Latimer then addressed the court in response, by reference to a helpful written closing which had updated his original skeleton argument, for about 5 ½ hours in total, concluding shortly before 11.00 on the morning of Day 12. Mr Hutchings then replied on issues of law for a little over 1 ½ hours. The trial concluded at about 12.30 pm on Day 12, with the court reserving judgment. I have had to spend virtually all of my leave entitlement in reading back through my notes of the evidence and submissions and in preparing this written judgment whilst the evidence from the trial was still fresh in my mind so that this judgment could be handed down in a timely fashion.

37. After the conclusion of the trial, on the morning of Friday 12 May, I received an email from Mr Hutchings attaching a further authority, *Buckland v Papillon* (1866) LR Ch App 67. Mr Latimer commented on this authority in an email which he sent the same afternoon. Mercifully, the court has been afflicted with no further case law authorities.

III: The Lease: its true meaning and effect

38. Pursuant to an Agreement for Lease dated 4 May 2016, the Council granted the Lease of Haigh Hall and certain adjoining land to Scullindale on 23 May 2016 for a term of 199 years from and including 23 May 2016 at a premium of £400,000 plus VAT. Mr Baker and Mr Madani joined in the Lease to give certain guarantees *"as primary obligors"*. Clause 1 contained various definitions. *"The Premises"* were defined as *"ALL THAT property known as Haigh Hall, Wigan shown edged red on the Plan (being the Plan attached hereto and part comprising title number MAN44141"*. *"The Development"* was defined as *"The refurbishment and redevelopment of the Premises appropriate to a 4 star boutique hotel"*. *"The Works"* were defined as *"the works incidental to the Development"*. *"Practical Completion Certificate"* was defined as *"the certificate or statement issued by the employer's agent appointed by the Tenant under its building contract for the Development"*. *"Planning Permissions"* were defined as meaning *"Planning Permissions A/15/80779/FULL and A/80478/LB insofar as the same relate to the existing building on the Premises but excluding the basement"*. It is common ground that these are not the correct planning permissions and that the definition should have referred to the permissions under Application Number. A/15/80480/CU for change of use and Reference Number A/15/80478/LB for listed building consent.

39. Clause 4.6, headed *"Works and Milestones"*, provides as follows:

"(a) The 'Milestones':

(i) Within 6 months of the date of this Lease at the Lessee's own cost to commence the Works; and

(ii) Prior to 23 May 2018 (insert date 2 years from date of Lease) to complete the Development in accordance with the Planning Permissions

(b) The Lessee shall proceed diligently with the Works and carry on and complete the Development in a good and workmanlike manner in accordance with Planning Permission and with all practicable speed in compliance with the programme which forms part of the Building Contract'

(c) Clauses…..4.6(a)(i) and, 4.6(a)(ii) each represent a Milestone in terms of the Development. If any or all of the Milestones are not achieved in accordance with the timescales set out in the clauses above the Lessor shall have a right to determine this Leaser and serve a Break Notice in accordance with clause 10'.

40. It is common ground that no building contract was ever in fact entered into, and apparently no programme was ever created. The reference to clause 10 was a drafting error; the reference should have been to clause 9. Since there are only two Milestones, clause 4.6 (c) should have read *"If either …"* rather than *"If any or all …"*.

41. Clause 4.7 is headed "Repair and Maintenance" and includes (at (a)) a lessee's covenant: *"Prior to commencement of the Works and after the Development had been completed to put and keep the Premises and landscaped areas in good and tenantable repair and condition and where necessary to re-build the same"*. Clause 4.9 (a) is a lessee's covenant: *"At the expiration of the Term quietly to yield up the Premises to the Lessor in the repair and condition and in accordance with the terms of this Lease together will all Lessor's fixtures safe, undefaced and fit for use"*. Clause 4.10 is the usual lessee's covenant requiring it to permit the Council to enter the premises to inspect their state of repair and condition. The user covenant at clause 4.12 includes (at (e)) a qualified lessee's covenant to use reasonable endeavours to keep the premises open. Clause 5.1 is the usual lessor's covenant for quiet enjoyment. By clause 6.1 (a) Mr Baker and Mr Madani *"as primary obligors"* guarantee to the Council that: *"… until such date that the Milestones are achieved the Lessee will comply with all the Lessee's Covenants in this Lease. If the Lessee defaults, the Guarantors will comply with those obligations and will indemnify the Lessor against all losses, costs, damages and expenses caused to the Lessor by that default"*. Clause 7 (headed *"Provisos"*) includes subclause 7.4 (headed *"Preservation of powers of local authority and planning authority"*) as follows: *"Nothing contained in this Lease shall prejudice or abridge any of the rights and powers for the time being vested in the local authority and the local planning authority for the Borough of Wigan and all such rights and powers shall in regard to the Premises or the tenant or occupier of them be enforceable and exercisable by the local authority and the local planning authority as fully and freely as if this Lease had not been executed."* By clause 8 the tenancy created by the Lease is excluded from the protection afforded to business tenancies by Part II of the Landlord & Tenant Act 1954.

42. Clause 9 of the Lease, headed *"BREAK RIGHT"* provides as follows:

*'9.1 "**Break Date**" a date which is at least 2 months after the service of the Break Notice*

*"**Break Notice**": written notice to terminate this lease specifying the Break Date*

*"**Event of Default**" means the occurrence of one of the following events:*

(a) any Act of Insolvency defined in the Agreement [for Lease] until the date of the Practical Completion Certificate

(b) the Lessee not achieving any or all of the Milestones defined in clause 4.6

9.2 Following an Event of Default the Lessor may terminate this Lease at any time by serving on the Lessee a Break Notice

9.3 If a Break Notice is served in accordance with clause 9.1 then on Termination of this Lease the Lessor will pay to the Lessee the lower of:

(a) The open market value of the Premises; or

(b) The Premium plus the value of any improvement carried out at the Premises prior to the Termination'

9.4 If the parties cannot agree the value in accordance with clause 9.3 this will be determined by the Independent Surveyor in applying the procedure referred to at clauses 4.14 (g)-(n) reading reference to clause 4.14 as clause 9.3

9.5 Termination of this Lease on the Break Date shall not affect any other right or remedy that either party may have in relation to any earlier breach of this lease.

43. It is clear that although this is a professionally drafted lease, the drafting is not of a high standard. The *"Planning Permissions"* have been wrongly identified. There are inappropriate internal references: clause 4.6 (c) wrongly refers to clause 10 rather than clause 9; clause 4.23 wrongly refers to clause 4.7 (b) rather than clause 4.6 (b). Since there only two Milestones, clause 4.6 (c) should have read *"If either ..."* rather than *"If any or all ..."*. It is necessary to refer back to the Agreement for Lease for the definition of *"Act of Insolvency"*. As Lord Neuberger PSC observed in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [18]: *"... when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it."* But, as Lord Neuberger went on: *"However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve."* Mr Hutchings reminded me of the whole of the passage from Lord Neuberger's judgment at [14] to [23].

44. It is common ground that the first Milestone (of commencing the Works by 23 November 2016) was achieved. The issue I have to determine is whether the second Milestone, of completing the Development in accordance with the Planning

Permissions, was achieved by 23 May 2018 or subsequently. In this connection, the first issue of construction I have to determine is what is meant by the requirement to *"… complete the Development in accordance with the Planning Permissions"*. I agree with Mr Latimer that by delineating the scope of clause 4.6(a)(ii) clearly, the court can cut through a mass of evidence; although I do not agree with many of Mr Latimer's related submissions. Mr Latimer submits that the second Milestone does not in terms require the development to be in accordance with building regulations or any requirements imposed by listed building status. That is true; but in my judgment the content of the second Milestone must take its colour from the Lease as a whole and, in particular, the covenant by Scullindale in clause 4.6(b) to *"… proceed diligently with the Works and carry on and complete the Development in a good and workmanlike manner"*. That, in my judgment, imports an obligation to comply with building regulations, and any requirements imposed by listed building status, even apart from the lessee's covenant to comply with statutory obligations in clause 4.16 of the Lease.

45. Mr Latimer refers to the definition of *"Planning Permissions"* in clause 1.16 of the Lease and their restriction to "… *the existing building on the Premises but excluding the basement"*. He points to the fact that clause 1.5 had defined *"the Premises"* as the whole of the demised land and not just the building. In contrast, *"Planning Permissions"*, within the meaning of the Lease, are limited to the existing building (but excluding the basement) and not the grounds (or the new garage). Thus far I agree with Mr Latimer; but I reject his further submission that *"newbuild parts of the building such as a roof terrace"* are also excluded from the scope of the required development, at least to the extent that these are shown on the approved drawings. Mr Latimer also cites the definition of *"the Development"* at clause 1.9 of the Lease as *"The refurbishment and redevelopment of the Premises appropriate to a 4 star boutique hotel"*. He submits that this requirement was met because the Haigh Hall Hotel was refurbished, redeveloped and had a 4 star rating by 23 May 2018. He says that there was no requirement for a minimum number of bedrooms to be open and available. I reject this submission also. I accept Mr Hutchings's contention that the description *"appropriate to a 4 star boutique hotel"* sets the standard of the development and not its extent, which is to be determined by reference to the approved plans (save for the basement, which is expressly excluded, so that the lack of any gym is of no relevance).

46. Clause 4.6(a)(ii) of the Lease requires the Development to be carried out *"in accordance with the Planning Permissions"*. The *"Particulars and Location of Development"* identified in the change of use permission refer to: *"Change of use of Haigh Hall to hotel, with function room facilities, alterations and refurbishment of Hall, including addition of ceremony room to roof, together with new access off Higher Lane, car parking and landscaping"*. Condition 2 of the change of use permission provides that: *"With the exception of the detailed matters referred to by the conditions of this consent, the development hereby approved shall be carried out in accordance with the details shown on plan references: 14133 -001, 100C, 101E, 102E, 103C, 104G, 107C, 108B, 110E, 111D, 112D, 113B, 114D, 120, 121C, 122A, 123, 124A and 125."* The listed building consent refers to *"Listed Building Consent for alteration and refurbishment of building, including addition of ceremony room to roof at Haigh Hall…"*. Condition 2 of the listed buildings consent is in similar terms to condition 2 of the change of use permission, save that it refers to *"… the details shown on plan references: 14133-001, 100C, 101E, 102E, 103C, 104G, 111D, 112D,*

113B, 114D, 124A and 125." The approved floor plans show a hotel with 30 bedrooms (11 on the first floor, 15 on the second floor, and 4 on the third floor), a ceremony room and bar at third floor level accessed by an extension to the existing internal staircase, and the *"lead roof covered in Kerion hard wood decking secured to packing timbers"*. It is the defendants' evidence and case that this is the roof terrace that has been constructed along the western elevation, albeit with the unauthorised addition of a sunken hot tub and a large barbecue type mobile kitchen on castor wheels (as was noted during the Council's site visit and inspection on 29 August 2019 and was apparent during our site visit on 20 February 2021). The approved elevations show a roof terrace function room, a reinstated flag pole, and new cast stone urns to match those historically removed. (*Pevsner*, at pp 184-5, refers to the *"... urns on the parapet (now removed) all around"*.) In the evidence, and also in the submissions at trial, considerable reference was made to the planning conditions. Much of this seems to me to have been misplaced because it is only the planning conditions concerning the House, and not the surrounding grounds, that are relevant for the purposes of considering whether, and when, the second Milestone has been achieved and the Development completed. In my judgment, the focus must be on whether, and when, the development shown on the approved plans has been delivered. These clearly required there to be a 30-bedroom hotel, with a rooftop ceremony room accessed by an internal staircase as an extension to the existing staircase. That was what the defendants intended to deliver, as is made clear at paragraphs 16 and 33 of the witness statements of Mr Madani and Mr Baker respectively. I would also reject the suggestion, faintly advanced by Mr Latimer orally in opening, that it is only such part of the Development as was in fact constructed that is required to be in accordance with the planning permissions; that is not what the Lease states.

47. On the meaning of *"completion"*, I was referred by Mr Hutchings to the summary of the law on practical completion provided by Coulson LJ (with the agreement of Lewison and Newey LJJ) in *Mears Ltd v Costplan Services (South East) Ltd* [2019] EWCA Civ 502, [2019] 4 WLR 55 at [74]. **Practical** completion, which clearly sets a lower threshold than **completion** without any qualifying adjective, *"... can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling"*. I would accept, and adopt, that test, which is the test I have applied.

48. The next issue of construction I must determine is whether there is any temporal limitation to be placed upon the service of the Break Notice pursuant to clause 9 of the Lease. Mr Hutchings contends that the words *"at any time"* mean exactly what they say. Giving the words their natural and ordinary meaning, the break right in clause 9.2 could be exercised at any time, even though the event creating the condition that allows its exercise might have occurred some significant time before. There is nothing uncommercial about this situation, not least because the clause operates in effect as an option to purchase at market value at the time when the break right is exercised. Furthermore, it could hardly have suited either the Council or Scullindale if (as the latter now alleges) the right had to be exercised within a very short time (for example within 1 month after 23 May 2018). This would, in the present case, have led to a situation where the Council would not have been able to give Scullindale a chance, as it did, to see if the Works could be completed (as well as other Lease breaches remedied). Mr Hutchings relies upon the following passage from the judgment of Patten LJ (speaking with the agreement of Arden and Aikens

LJJ) in *BDW Trading Ltd v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 at [78]:

> *"The lease with a break clause entitling the landlord or tenant to terminate the lease after the end of part of the term does not have to be exercised immediately unless the lease so provides. In most cases it will remain exercisable at any time after the right has arisen. The continued acceptance of rent by the landlord will not, without more, operate as a waiver of his rights under the break clause because there is nothing inconsistent between the continuation of the landlord and tenant relationship and the reservation of the right to break. If it is exercisable at any time during the remainder of the term the landlord is not put to an election and does not make an election by continuing to perform the contract until he chooses to exercise his right to break."*

Moreover, the words in clause 9.2 cannot mean *"at any reasonable time"* as the defendants allege. The parties would no doubt have wanted to avoid such an imprecise formula, precisely because of the uncertainty it would create.

49. Mr Hutchings submits that the argument for an implied term also founders for obvious reasons. Without any implication of additional words, clause 9.2 is not unworkable; rather, its form is entirely conventional in terms of lease drafting. The term originally said to be implied is that the break could only be exercised at *"any reasonable time"*. This is said to fail several of the recognised tests for the implication of a term: It is not necessary to give business efficacy to the contract because the contract is effective without it. It is not so obvious as to go without saying. It is entirely lacking in precision. Most significantly, it contradicts, or limits, an express term in the Lease, namely the very term into which it is suggested the word *"reasonable"* is to be introduced. There is said to be a world of difference between being allowed to do something *"at any time"* and only being allowed to do it within *"any reasonable time"*.

50. Mr Latimer contends, either by way of construction or of implication, that the Lease required the Council to serve any break Notice within a reasonable time; and that by delaying almost 16 months, until 16 September 2019, before serving the Break Notice, it did so out of time. Since the Council had the right to inspect the premises, it had the means to discover, in advance, whether the second Milestone was likely to be achieved. Mr Latimer submits that the parties needed certainty, and that the lessee could not spend 196 years or so in a state of suspended animation during which a Break Notice could be served, quite literally, *"at any time"*. That was particularly so in the light of the *"keep open"* covenant in clause 4.12(e) of the Lease. Clause 9.2 could not be read so literally that any lessee could be required to keep the premises open for 100 years or more against a background where its efforts could be negated by the service of a Break Notice *"at any time"*, to take effect only two months later. The phrase itself, *"at any time"*, leaves open the question whether the time is to be a reasonable one or not. In the absence of clear words, the phrase could hardly be construed to mean *"at any **unreasonable** time"*. The words imported a fairly short compass of time; and the court should conclude that any Break Notice was required to be served at a reasonable time. Effectively, Mr Latimer submits, the words *"at any time"* were used in order prevent a party giving notice that it intended to make time of the essence of the exercise of the break clause and, in default, treating the failure to exercise it as an abandonment of the right to terminate the Lease. The real

significance of the use of the words *"at any time"* was to prevent Scullindale from having any means of self-help, by serving notice to make time of the essence of service of the Break Notice. Reliance is placed on observations of mine (sitting in the Lands Chamber of the Upper Tribunal) in *Proxima GR Properties Ltd v Spencer* [2017] UKUT 450, [2018] L & T R 9 at [12].

51. Following the amendment to the defence that I permitted on Day 5 of the trial, after (according to Mr Latimer) the court had provided the parties with *"food for thought"* about whether there might, in fact, be some *"middle ground"* between *"polar opposites"*, Mr Latimer advances an alternative case that clauses 4.6(a) and 9.2 required the Council to serve any Break Notice prior to the actual completion of the Development in accordance with the Planning Permissions. In essence, he submits that clause 9.2 of the Lease provides that the Council may terminate the Lease at any time, but it does not provide that a Break Notice may be served at any time. The sub-clause has to be construed in a way which avoids the absurdity of the Council being able to operate the break clause at any time in a period of about 197 years, effectively converting the Lease into something akin to a tenancy at will. The purpose of the break clause is to create an option in favour of the Council that can be exercised if an Event of Default occurs. The right to determine the Lease only arises on an Event of Default. The Lease does not rule out the possibility of the late completion of the development and attainment of the second Milestone. In the absence of a construction, or an implied term, which requires any Break Notice to be served within a reasonable period of time, the natural and ordinary reading of clause 9.2 of the Lease is said to be that the Council can terminate the Lease at any time before a delayed completion of the Development. In effect, the Council has a window of opportunity in which to terminate the Lease, but that window will eventually close. This is an alternative mechanism by which the court can avoid the entirely uncommercial situation of a Break Notice which can be served *"at any time"* in 197 years, and which reduces the Lease to something akin to a tenancy at will. Such a conclusion would put a long-stop date to the Council's ability to exercise the break clause, and would do so in a way which is entirely consistent with the Council's legitimate expectations under the Lease. It would ensure that Scullindale remained under pressure to complete the Development, and would extend the Council's time for electing to serve any Break Notice whilst ensuring that its ability to do so should not continue forever.

52. At an early stage of the trial, I questioned whether the words *"at any time"* governed the date of termination of the Lease, rather than the date of service of the Break Notice, since clause 9.2 provides that *"Following an Event of Default the Lessor may terminate this Lease at any time by serving on the Lessee a Break Notice"* rather than *"… the Lessor may terminate this Lease by serving on the Lessee a Break Notice at any time"*. Strictly as a matter of syntax, it is probably correct that the words *"at any time"* govern the date of termination, rather than the date of service, of the Break Notice. But in my judgment that would be an unduly syntactical, and strained, construction of the sub-clause. As Lord Hoffmann observed in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913: *"Many people, including politicians, celebrities and Mrs. Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean."* An entirely syntactical analysis of the clause would require the reasonable reader of the Lease to ignore the fact that clause 9.1 has already addressed the expiry of the Break Notice: this requires the Break Notice to specify the

Break Date, and it also specifies that this must be a date which is at least two months after the service of the Break Notice. If applied to the termination date, the words *"at any time"* would therefore be superfluous to requirements. For these reasons, I accept Mr Hutchings's submission that the words *"at any time"* relate to the service of the Break Notice rather than the date of termination of the Lease. I recant my first, overly syntactical, reading of clause 9.2.

53. As a matter of the pure construction of the Lease, I fail to see how it can be possible to read any qualifying words into the clear language of clause 9.2 because to do so would contradict the express language which the parties have chosen to use in the Lease and to which they have subscribed. By no process of construction, however vigorous or benign, can the words *"at any time"* be construed as meaning *"at any reasonable time"* or *"at any time whilst an Event of Default persists" or "at any time between 23 May 2018 and subsequent completion of the Development in accordance with the Planning Permissions"* (as alleged at paragraph 23B of the Amended Defence). The real question is whether any such temporal limitation is to be implied into the words. The defendants seek to do so by contending that some such implied limitation *"is necessary for business efficacy and/or to reflect the reasonable expectation of the parties"*.

54. The test governing the implication of contractual terms is set out at section 6 of Chapter 6 of *Lewison: The Interpretation of Contracts* (7th edn) at paragraphs 6.64 and following, as follows: *"For a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."* Although these requirements are otherwise cumulative, in my judgment the authorities (which are discussed at paras 6.67 to 6.73 of *Lewison*) clearly establish that the second and third requirements (business necessity and obviousness) can be alternatives, in the sense that only one of them needs to be satisfied, although I acknowledge that in practice it is likely to be a rare case where only one of these two requirements is satisfied.

55. As a matter of first impression, any reasonable reader of the Lease would instinctively shy away from any suggestion that the Council's ability to terminate the Lease on the grounds of Scullindale's failure to achieve the second Milestone should endure throughout the remaining 197 years of the contractual term, thereby enabling the Council to bring the Lease to an end many years in the future at only two months' notice. Mr Hutchings sought to avoid this absurd result by submitting that it would have been open to Scullindale to have served notice on the Council making time of the essence of the service of any break notice, failing which it would lose the right to do so.

56. Mr Hutchings cited observations of Russell J in *Rider v Ford* [1923] 1 Ch 541 at 545 as authority for the proposition that the right to exercise an option to take a fresh lease of premises continues as long as the relationship of landlord and tenant continues between the person claiming to exercise the option and the person against whom it is claimed to be exercisable. The authorities cited in support are two decisions of Lord Romilly MR (sitting at first instance in the Rolls Court) in *Hersey v Giblett* (1854) 18 Beav 174 and *Moss v Barton* (1866) LR 1 Eq 474. In the latter case, Lord Romilly

MR cited his earlier decision (as Sir John Romilly MR) in the former case as authority for the proposition that a tenant holding over after the expiry of the term of his lease with the right to call for a new lease may do so at any time *"... if no time is stipulated for within which it is to be exercised, unless the landlord calls upon him to do so and he makes default, in which case the landlord may determine the tenancy"*.

57. In a post-hearing email Mr Hutchings referred me to *Buckland v Papillon* (1866) LR Ch App 67 as a Chancery appeal from Lord Romilly MR, in which both *Moss v Barton* and *Hersey v Giblett* were cited in argument and implicitly approved by Lord Chelmsford LC at page 70. Mr Latimer's response was that the arguments of counsel in *Buckland v Papillon* appear to have proceeded on the assumption that *Moss v Barton* represented the law, with Mr Jessel QC, in reply, unsuccessfully attempting to distinguish *Moss v Barton* on the facts. Consequently, Mr Latimer says, there was no implicit approval of the ratio of *Moss v Barton* by Lord Chelmsford LC as that was never in issue before him. That submission ignores the phenomenon that was Sir George Jessel. From 1873, when he succeeded Lord Romilly MR as Master of the Rolls, until 1881, he sat exclusively as a judge of first instance in the Rolls Court; but after the death of James LJ in 1881 there was considered to be no one of sufficient weight in the Court of Appeal to hear appeals from a judge of Sir George Jessel's standing so, to his regret, by a special Act of Parliament (the Judicature Act of 1881) the Master of the Rolls ceased to be a judge of first instance. A remarkable memory, combined with a formidable knowledge of the diverse technicalities of English equity, enabled Sir George Jessel MR never to reserve judgment in the Rolls Courts, and only very occasionally in the Court of Appeal (and then only at the instigation of his brethren). He was recognised for his impatience of inherited precedent if he deemed it to be the foundation of anomaly. Since it was in the interests of his client to do so, I have no doubt that had Mr Jessel QC considered the first instance authority of *Moss v Barton* to be wrong, he would have contested it on the appeal in *Buckland v Papillon.* I conclude, both on principle and authority, that if a lease (and particularly one for a term as long as 199 years) contains a break clause entitling one (or both) of the parties to put an end to the relationship of landlord and tenant by serving a break notice at any time, thereby triggering an obligation to pay a sum of money to the recipient of the break notice in place of the lease continuing, the counterparty may serve a notice making time of the essence of the service of the break notice.

58. I am therefore satisfied that it would have been open to Scullindale, at any time after a relevant Event of Default, to have served notice on the Council making time of the essence of the exercise of the break clause, with the consequence that, if the Council failed thereafter to serve a Break Notice within a reasonable time, its break option would thereupon have lapsed. Mr Latimer submits that such a conclusion is inconsistent with my own decision (sitting in the Lands Chamber of the Upper Tribunal) in *Proxima GR Properties Ltd v Spencer* [2017] UKUT 450, [2018] L & T R 9 at [12] that where a rent review clause provides that the landlord may start the review machinery *"at any time"*, a notice purporting to make time of the essence would be of no effect because there is no time limit to which it can apply. (I also held that a term that the landlord must start the review within a reasonable time could not be implied because it would have contradicted the express terms of the rent review provisions of the lease.) I agree with Mr Hutchings that that authority has no application to the instant case. It was concerned with the effect of the rent review provisions in a lease, and not with a landlord's break clause. As the analysis of Lord

Simon of Glaisdale in the House of Lords in *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904 at 945E – 946E makes clear, these are very different legal constructs because the activation of a rent review clause (unlike the exercise of an option or a break clause) does not change the legal relationship of the parties, which remains that of landlord and tenant throughout the currency of the lease whether or not the machinery of the rent review clauses is operated. The *Moss v Barton* line of authorities was neither cited nor referred to in *Proxima* for this very reason. That authority is clearly distinguishable.

59. The consequence of my acceptance of Mr Hutchings's submission that Scullindale could have called on the Council to exercise its break clause by serving a Break Notice and, if it omitted to do so within a reasonable time, it would have lost the right to do so thereafter is, in my judgment, that it is not possible to imply any temporal limitation into the words *"at any time"* on the grounds of business efficacy. The Lease will work perfectly well without any such limitation. But the question remains: is it necessary to do so to reflect the reasonable expectations of the parties to the Lease because it is so obvious that it goes without saying? I emphasise that the test is one of necessity and not of reasonableness.

60. In my judgment, that question demands an affirmative answer. However, I cannot accept Mr Latimer's primary contention that it is possible to imply the word *"reasonable"* before the word *"time"* into the phrase *"at any time"* Such a requirement would be entirely lacking in precision. On what basis, and by reference to what criteria, would *"reasonableness"* fall to be assessed, particularly in the context of a lease entered into between a local authority, required have regard to the interests of the inhabitants of the area which it administers, and a commercial hotel operator, concerned to have regard to its own commercial interests? Such a limitation would be subject to too many uncertainties to be capable of any sensible, practical application: it would be pregnant with possibilities (to adopt a phrase familiar from another area of the law of landlord and tenant). More significantly, it would contradict, or limit, an express term in the Lease, namely the very term into which it is suggested that the word *"reasonable"* should be introduced. I accept Mr Hutchings's submission that there is a world of difference between being allowed to do something *"at any time"* and only being allowed to do it within *"any reasonable time"*. If there is to be any temporal limitation, in my judgment it must be of some different character.

61. In the course of the hearing, I suggested that a term might be implied to the effect that a Break Notice might be served at any time between the second Milestone of 23 May 2018 and subsequent completion of the Development in accordance with the Planning Permissions; and that was the formulation that was adopted by Mr Latimer in his amended defence. Judges should always exhibit a measure of caution when considering whether to entertain a solution which they themselves have first devised and suggested. In the present case, it seems to me that both the court and Mr Latimer had overlooked the fact that under this Lease, a Break Notice may be served following any *"Event of Default"* and thus at any time following one of any three events, namely (1) any Act of Insolvency until the date of issue of the Practical Completion Certificate, (2) the failure to commence the Works before 23 November 2016 and (3) the failure to complete the Development in accordance with the Planning Permissions prior to 23 May 2018. Had an officious bystander inquired of any of the parties: Could the Council validly serve a Break Notice if the Development had been

duly completed by 23 May 2018 merely because the Works had not commenced by 23 November 2016, so that the first Milestone had not been achieved, it seems to me that the answer would have been a resounding: *"No, of course not. Don't be so silly!"* Had the question been: Could the Council validly serve a Break Notice after the Development had been duly completed merely because completion was only achieved after 23 May 2018, so that the second Milestone had not been achieved, it seems to me that the resounding answer would have been precisely the same.

62. In my judgment, it is so obvious as to go without saying that both parties to the Lease proceeded on the footing that a Break Notice could only validly be served at any time whilst an Event of Default still persists. The purpose of the break clause was to enable the Council to take back the premises if either the Works were not commenced, or alternatively the Development was not completed, by 23 November 2016 and 23 May 2018 respectively. However, there is no reason to think that either party ever contemplated that the Council might be able to do so once the Works had been commenced, or the Development had been duly completed, albeit later than they should have been. In the context of a 199 year lease, particularly one containing a qualified obligation on the lessee to keep the premises open, there is every reason to conclude that the parties would never have contemplated this. I am therefore satisfied that all the parties to the Lease proceeded on the footing that a valid Break Notice could only be served *"at any time whilst an Event of Default persists"*; and that a term should be implied into clause 9.3 to this effect. I recognise that this is one of those rare cases where only one of the two alternative requirements of business efficacy and obviousness is satisfied. But the reason for this is that the clause has business efficacy as it stands only because of an equitable principle, enabling time to be made of the essence of an otherwise open-ended break clause, which would not necessarily have been obvious even to the best-advised of contracting parties, and the application of which was firmly challenged in the present case by reference to respectable – if that term can properly be applied to one of my own decisions – reported case law authority.

63. I am conscious that the implied term I have formulated and accepted is not the same as the term that was pleaded by way of amendment to the defence; nor was it ventilated during the course of the hearing. However, in the context of the present case, where the parties and the court are concerned only with the achievement of the second Milestone, it seems to me to amount to the same thing. In the law of rectification, it is trite law that the precise form of the words in which the common intention is to be expressed is irrelevant if, in substance and in detail, the common intention can be ascertained: see *Hodge on Rectification* (2nd edn) paras 4-49 and following. Similarly, it seems to me that the precise formulation of an implied term adopted by the court need not follow exactly the wording pleaded in the relevant statement of case provided both that the latter falls within the compass of the term actually implied by the court and the opposing party is not taken by surprise or otherwise prejudiced by the form in which the implied term has been pleaded. I am satisfied that the Council will not be taken by surprise, or otherwise prejudiced, by the precise formulation of the implied term adopted by the court in this judgment because its practical effect, in the particular circumstances of the present case, is precisely the same as that of the term pleaded by way of amendment to the defence. The wording of the pleaded implied term is specific to the second Milestone event, which is the direct focus of the present litigation, whereas the court's formulation is expressed

more generally and would have been capable of application to the first Milestone event, or to an Act of Insolvency (although these are not engaged by the present litigation).

64. In the different context of the pleading of the implied term preventing the Council from relying upon its own delay, Mr Hutchings had referred me to observations of Nugee LJ (speaking with the agreement of Lewison and Arnold LJJ) in *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287. There the Court of Appeal allowed an appeal and remitted the case for further hearing because the trial judge had decided the case on an unpleaded and unargued basis. At [35] Nugee LJ emphasised (obiter) that: *"This is not therefore a case, as sometimes happens, where one or other of the parties seeks to run a different case at trial from that pleaded. That itself is unsatisfactory and can cause difficulties, as has been said recently by this Court more than once: see UK Learning Academy Ltd v Secretary of State for Education [2020] EWCA Civ 370 at [47] per David Richards LJ where he said that statements of case play a critical role in civil litigation which should not be diminished, and Dhillon v Barclays Bank plc [2020] EWCA Civ 619 at [19] per Coulson LJ where he said that it was too often the case that the pleadings become forgotten as time goes on and the trial becomes something of a free-for-all. As both judges say, the reason why it is important for a party who wants to run a particular case to plead it is so that the parties can know the issues which need to be addressed in evidence and submissions, and the Court can know what issues it is being asked to decide. That is not to encourage the taking of purely technical pleading points, and a trial judge can always permit a departure from a pleaded case where it is just to do so (although even in such a case it is good practice for the pleading to be amended); in practice the other party often, sensibly, does not take the point, but in any case where such a departure might cause prejudice he is entitled to insist on a formal application to amend being made: Loveridge v Healey [2004] EWCA Civ 173 at [23] per Lord Phillips MR."* At [36] Nugee LJ went on to explain that: "*The present case however is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and submissions the cases that had been pleaded, but the Judge decided the case on a basis that had neither been pleaded nor canvassed before him".* For the reasons I have set out in the preceding paragraph, I do not consider that Nugee LJ's observations prevent this court from implying a term in the form I have already indicated.

65. The next issue of construction the court must consider is whether, by construction or by implication, clauses 4.6(a) and 9.2 of the Lease operated to prevent the Council from relying upon its own conduct in impeding or preventing Scullindale from achieving the second Milestone. During his reply, and referring to *Satyam Enterprises* (previously cited), Mr Hutchings cautioned the court to confine Scullindale to its pleaded case which (according to paragraphs 17 and 18 of the defence) is that the Council is prevented from relying upon such delay in the completion of the Development as was caused wholly or in part by itself. This was in response to the court's suggestion that there is a principle that a party to a contract cannot rely upon the counter-party's non-performance of a condition that he has prevented that party from fulfilling. I did not understand Mr Hutchings to disagree with this formulation provided the adverb *"deliberately"* was added in front of the word *"prevented"*, and provided also that the principle does not extend to conduct in the capacity of a public or statutory authority but is confined to conduct in a private capacity.

66. In my judgment, three separate, but related, principles are potentially engaged: The first (**the own wrong principle**) is that, subject to any express term of the contract to the contrary, the court will imply a term that a party to a contract cannot rely upon their own beach of a contractual duty under the contract: see *Eurobank Ergasias SA v Kalliroi Navigation Co Ltd* [2015] EWHC 2377 (Comm) at [50] per Waksman J. *Lewison* (at para 7.117) states that in order to bring the principle that a party may not take advantage of their own wrong into operation, *"... the relevant breach of duty must be a duty owed by one party to the other under the terms of the contract"*. It follows that a case founded upon this principle will fail to get off the ground absent some other available contractual term, whether express or implied. The second (**the prevention principle**) is that in general, a term is necessarily to be implied into a contract that neither party will prevent the other from performing it: see *Lewison*, section 14 of Chapter 6 at paragraphs 6.125 and following. The third (**the co-operation principle**) is that where the performance of a contract cannot take place without the co-operation of both parties, it is implied that co-operation will be forthcoming: see *Lewison*, section 15 of Chapter 6 at paragraphs 6.135 and following. It is clear from the judgment of Lord Kitchin JSC, speaking for the Supreme Court, in *Duval v 11-13 Randolph Crescent Ltd* [2020] UKSC 18, [2020] AC 845 at [47]-[49], that propositions such as these are, at least in general, more properly to be regarded as implied terms of the contract rather than rules of law because, where appropriate, they involve the interpolation of terms to deal with matters for which the parties themselves have made no express provision in their contract. I would add that they are also more properly to be regarded as implied terms of the contract, rather than rules of law, because they remain subject to any express term of the contract.

67. It is also important to bear in mind not only that clauses 4.6(a) and 9.2 of the Lease entitled the Council to serve a Break Notice if the second Milestone was not achieved. Clause 4.6(b) also obliged Scullindale to proceed diligently with the works and to carry out and complete the Development. In the light of these considerations, I accept that the Lease is subject to an implied term which would prevent the Council from relying upon any delay in the completion of the Development that the Council itself may have caused (or, indeed - although this is not actually pleaded – if the Council had actually prevented the completion of the Development). But I also hold that (by reason of clause 7.4 of the Lease), that implied term cannot prejudice or abridge any of the Council's rights and powers as a local authority. Further, in order to rely upon this implied term, Scullindale must succeed in demonstrating a causal link between the conduct of the Council which it relies upon and the non-completion of the Development. During the course of the hearing, I questioned whether this implied term would extend beyond the second Milestone date. However, since Scullindale's obligation to complete the Development continued beyond the second Milestone date, it seems to me that the Council's implied contractual obligation not to delay (or prevent) the completion of the Development is not time-limited.

68. The final issue of construction I have to decide is as to the relevant valuation date for the purposes of clause 9.3 of the Lease. The Council contends for the date on which vacant possession is delivered up to the Council or (if earlier) the date of trial. Mr Latimer submits that this ignores the wording of the Lease. The opening words of clause 9.3 of the Lease are clear: *"If a Break Notice is served in accordance with clause 9.1 then on Termination of this Lease the Lessor will pay to the Lessee the lower of..."* The compensation is payable on termination, i.e. on 22 November 2019.

Therefore this is the relevant valuation date. It is common ground that the premises have fallen in value significantly since 22 November 2019, largely due to the effects of the Coronavirus pandemic. In their joint statement the experts agreed that: *"COVID-19 has had a significant impact on the ability [of the] hotel to operate since the first lockdown in March 2020. It is also agreed that market sentiment is weaker post COVID-19"*. It is common ground that the reduction in value is likely to be in excess of £1 million. If Mr Latimer is correct, the Council will end up having to pay Scullindale over £1 million more than the premises are presently worth. The experts are also agreed that the lifting of lockdown restrictions is *"... an area of significant subjectivity and is heavily reliant on Government advice. This is a fluid situation and the circumstances need to be considered further in the event of changing advice"*.

69. Mr Hutchings accepts that, on its face, the valuation formula would suggest that the relevant valuation date is the date of the termination of the Lease. Nevertheless, he argues that this implicitly assumes that vacant possession is given at that date (i.e. that the Lease terms are complied with). The Council's obligation to pay by reference to a value fixed at the Lease termination date is clearly on the implicit assumption that, in return for the payment, the Council receives the premises back at that point, and it is therefore able to deal with the premises as it wishes, such as by leasing them again at a profit on similar terms, thereby selling another virtual freehold. As a matter of commercial common sense, the drafters of clause 9.3 cannot have meant that a tenant, on whom a valid break notice has been served, and who then, in a declining property market, wrongfully remains in occupation of the premises, in breach of its Lease obligations, thereby profiting from that wrongful occupation by continuing to trade from the premises, should receive, under the valuation formula, the higher price (whilst paying only, at most, modest mesne profits for its wrongful use and occupation). Such a construction of clause 9.3 would allow Scullindale to profit from its own wrong in not yielding up the premises on the termination date in accordance with its covenant (in clause 4.9(a) of the Lease) to yield up the premises. Some support for this construction is also said to be derived from the incorporation of the valuation formula in parts of the alienation provisions of clause 4.14 of the Lease. Mr Hutchings contends that any challenge to the validity of any break notice must operate to suspend the obligation to make the termination payment and it must therefore also suspend the valuation date.

70. In my judgment, the provisions of the Lease are clear as to the relevant valuation date. The payment is due on termination of the Lease; and, absent any clearly expressed provision in the Lease to the contrary (of which there is none), the payment due to Scullindale should be valued as at the termination date. Mr Hutchings's submissions on this aspect of the case really amounted to saying that it would be unfair if the payment to be made to Scullindale in accordance with clause 9.3 of the Lease were not to be assessed as at the date it vacates the premises in circumstances where it has failed to vacate on the Break Date and the value of the premises has fallen considerably in the interval before it actually gives up possession. They reminded me of an observation made by the late Harman J[i] (who sadly passed away during the course of this extended trial) in *Swedac Limited v Magnet & Southerns Plc* [1989] 1 F.S.R. 243 when affirming the proposition that unfair competition is not a description of a wrong known to the law. At page 249 Harman J said that: *"... this alleged tort really amounts to saying that there has been competition and adding the old nursery*

cry 'It's unfair!' To that I would only cite my nanny's great nursery proposition: 'The world is a very unfair place and the sooner you get to know it the better.'"

71. In any event, I find no such unfairness. If the Council can prove that it has suffered any loss as a result of the delay in delivering up vacant possession of the premises on 22 November 2019, then such provable loss would be recoverable as damages for breach of the covenant to yield up in clause 4.9 of the Lease. This would be the appropriate mechanism for ensuring that Scullindale does not profit from its own wrong rather than trying to distort the true meaning and effect of the Lease by adopting an inappropriate valuation date. Any such provable loss would clearly fall within the scope of the guarantors' obligations under clause 6.1(a) of the Lease. However, the Council can only claim to recover the fall in the open market value of the premises since 22 November 2019 if it can prove that had Scullindale delivered up vacant possession of the premises on that date, the Council would have been able to dispose of them for a sum in excess of their current open market value. No such head of loss is pleaded and for good reason; on the evidence (which I will review in more detail when I deal with matters of valuation) there was no realistic prospect of the Council having being able to dispose of the premises before the Coronavirus pandemic took hold and its drastic effects on the hospitality sector became apparent. At the termination date, this was an entirely unforeseeable head of future loss. In the present case, its incidence falls to be determined by reference to the provisions of the Lease. The loss must fall on one or other of the Council and the defendants; and I fear that it falls on the former rather than the latter. It would be neither fair nor just for the loss to fall on Scullindale when, had it delivered up the premises on 22 November 2019, the Council would have suffered this loss in any event. Moreover, Mr Hutchings's argument is laden with the benefit of hindsight. Had market values risen, rather than falling, since the termination date (which would probably have been viewed as the more likely scenario at the date the Lease was entered into in May 2016), I would not have anticipated that the Council would have been contending for any later valuation date. Goose and gander come to my mind.

72. However, I accept that it would not be fair or just for Scullindale to be entitled to claim any interest on the payment which is due to it pursuant to clause 9.3 of the Lease. The delay in receiving payment is due to Scullindale's own conduct in failing, in breach of the covenant in clause 4.9 of the Lease, to deliver up vacant possession of the premises on 22 November 2019. It cannot complain that it has thereby been kept out of the payment due to it. To the limited extent only of any liability to pay interest on the termination payment, I would accept that the obligation to make that payment was effectively suspended until after the determination of the present litigation.

IV: The validity of the break notice

73. In this section of the judgment it is necessary for the court to answer four questions of fact or of mixed fact and law: First, was the Development completed in accordance with the Planning Permissions by 23 May 2018? Second, if not, was the Development completed in accordance with the Planning Permissions by 16 September 2019 (or a day or so thereafter to allow for service of the Break Notice)? Third, if not, was the delay in completing the Development caused by the Council? Fourth, if not, had the Council waived its right to exercise the break clause, or was it estopped from doing so? I am entirely satisfied, on the evidence, that all four of these questions should be answered by a resounding: No.

74. On the evidence I am satisfied that the Council's decision to serve the Break Notice was taken for reasons only partly connected with Scullindale's perceived failure to have completed the Development of Haigh Hall by 23 May 2018 or subsequently. Paragraph 2.1 of the Report to the Cabinet meeting on 29 August 2019 about *"the future options for the Leisure Service at Haigh Woodland Park"* (which was signed off by Mr McKevitt on 13 August 2019) states: *"The success of Haigh Woodland Park has, in some ways, been overshadowed by the problems with the hotel operator Contessa who we leased the Hall to on 23rd May 2016. The problems have been around: - Lack of engagement by the hotel with the rest of the site - A poor relationship between IHL and Contessa - Planning and health and safety breaches in terms of the works that have been undertaken - Complaints about the operation of the hotel - Failure to complete the works."* Paragraph 3.1 noted that the only other option to seeking to enforce the break clause within the Lease on the grounds that the works had not been completed in accordance with planning permission in the timeframe set out in the Lease (albeit that this would come at significant cost to the Council) was to *"Let them continue the work and complete the hotel and accept that there will always be someone unhappy with access. It is also likely that, given the history with Contessa to date, further relationship issues with the hotel are likely to arise from time to time. We will look to manage the relationship with Contessa and continue with all statutory enforcement action."* However, the motivation for the decision to serve the Break Notice which was taken at that Cabinet meeting is not material to its validity. The right to serve a Break Notice conferred by clause 9.2 of the Lease does not depend upon the Council having any particular intention or justification beyond Scullindale's failure to achieve the second Milestone. If that is established, then prima facie the right to terminate the Lease is exercisable without more.

75. The short answer to both the first and the second questions is that the Development was not completed in accordance with the Planning Permissions by either 23 May 2018 or 16 September 2019 (or a couple of days later) because there was no ceremony room on the roof of Haigh Hall or any stairs leading to it and no new cast stone urns had been installed along the palisade to match those historically removed as shown on the approved plans. As was clear from my site visit and view, they are all still missing today. I have already rejected Mr Latimer's submission that *"newbuild parts of the building such as a roof terrace"* are excluded from the scope of the required development to the extent that these are shown on the approved drawings. The ceremony room and the stone urns are clearly not essential to the existence of a functioning four star hotel. However, they are shown on the approved plans, they form part of the Development in accordance with the Planning Permissions, and they had to be completed to avoid triggering the Council's entitlement to serve a Break notice. That is the end of this aspect of the case. But in case I am wrong on this as a matter of construction, I proceed to consider the matter on the basis that the omission of these features of the Development are not determinative of the first two questions.

76. It is absolutely clear that the Development had not been completed in accordance with the Planning Permissions by 23 May 2018. This is acknowledged in the pleaded defence and counterclaim and in the defendants' own witness evidence, despite Mr Latimer's attempts to argue the contrary. I would refer to paragraphs 33, 49 and 50 of the defence (verified by statements of truth from Mr Baker and Mr Madani); to paragraphs 5, 35, and 42 of Mr Madani's witness statement; to paragraphs 91 of Mrs Baker's and 52 of Mrs Clarke's witness statements (in identical terms): and to

paragraphs 5, 164 and 231 of Mr Baker's witness statement. Indeed, Mr Baker's evidence is that following the assurances that he says were received from Mr Haslam and Mr McKevitt in June and July 2018, the defendants spent a further £1,502,450 on completing the Works. In an email sent on 11 March 2021, Mr Latimer quantifies the expenditure over the five quarters from the end of June 2018 to the end of September 2019 at a total figure of £1,111,161. Whichever figure is correct, I reject as absurd, in view of this level of expenditure, any possible suggestion that the references to the Works not being complete was intended to relate only to works other than those to the Hall itself. Clearly, on the defendants' own evidence and case, the Development of the Hall was not complete by 23 May 2018.

77. This is entirely borne out by the evidence of the Council's own witnesses, both in their witness statements and in the contemporaneous documents. I need only refer to the important site visit log (at page 310 of the Council's exhibits bundle) which records the observations of Mr Haslam and Mr Rowan when they attended Haigh Hall on 13 June 2018. The accuracy of this record was not challenged in evidence: Mr Rowan was not asked about it, and Mr Haslam was not challenged about it when he was referred to it in cross-examination. He explained that he had been told by Mrs McGinty to look to see whether the second Milestone had been achieved. This log entry clearly informed the contents of the Report to the Cabinet meeting on 2 August 2018 which Mr Haslam drafted and which was signed off by Mrs McGinty on 20 July 2018. I accept this log as an accurate record. It reads: *"All ground floor and first floor reception, function and ancillary* [sic] *rooms refurbished. 11 bedrooms completed and fitted out at first floor 4 bedrooms completed and fitted out on second floor 11 bedrooms not completed on second floor together with some communal areas and circulation space 4 bedrooms not completed on 3 floor together with some communal areas and circulation space."* I have already rejected Mr Latimer's submissions that the requirement of *"the refurbishment and redevelopment of the Premises appropriate to a 4 star boutique hotel"* had been met merely because the Haigh Hall Hotel had been refurbished, redeveloped and had a 4 star rating by 23 May 2018 and that there was no further requirement for a minimum number of bedrooms to be open and available.

78. I am also satisfied that the Development had not been completed in accordance with the Planning Permissions by 16 September 2019 (or within a couple of days thereafter). Indeed, at paragraphs 42 and 43 of the defence (verified by Mr Madani and Mr Baker) it is acknowledged that the Development was not complete by the time of the meeting with the three Council officers that took place at Haigh Hall on 29 August 2019 (which was the very day the Cabinet took its decision to determine the Lease). At paragraph 246 of his witness statement, Mr Baker states that it is *"... extremely disappointing that the Council is attempting to end this project as it was just about to complete and come to fruition."* At paragraph 251 Mr Baker records that: *"Only a matter of a few weeks after the Council served the Notice the Works were completed. Any outstanding items not completed such as repairs to windows and landscaping were due to the fact that we were still waiting for the Council to approve our plans for such items."* Reading these two sentences together, I cannot accept Mr Baker's evidence, when I asked him about this paragraph, that the works to the building were all complete by the date of the Break Notice. It is implicit also, in the assertion at paragraph 203 of Mr Baker's witness statement that the existence of the prohibition notice had resulted in the loss of six months' revenue *"... from not being*

able to use 11 bedrooms within the Hotel" between October 2018 to May 2019, that only the 11 first floor bedrooms were available for occupation during that period. In my judgment, Mr Baker's explanation, in answer to a question from the bench about this statement at the end of his cross-examination, that the hotel operator had made a commercial decision only to advertise and use the first floor bedrooms does not make any sense if all of the 15 bedrooms on the second floor were then available for occupation by guests of the hotel.

79. I refer again to the important site visit log (at page 310 of the Council's exhibits bundle) for its record of the observations of Mr Rowan, Mr Jones and Mr Smith when they attended Haigh Hall on 14 May 2019. Again, Mr Rowan was not asked about this entry on the log or about his evidence at paragraph 30 of his witness statement that as at 14 May 2019 *"... it was still clear that the development of the property was still not complete"*. This visit was addressed at paragraphs 33 and 34 of Mr Jones's witness statement, where he comments that *"no real progress"* in respect of the development had been made since 2018 with *"... still around half of the bedrooms at the property to be completed together with works to some of the communal areas"*. The entry in the log was specifically referenced at paragraph 34. However, neither these two paragraphs, nor the accuracy of the log, were challenged, either in the original cross-examination of Mr Jones or when he was later re-called to address the amended defence. I accept this log entry as an accurate record. It reads: *"All ground floor and first floor reception, function and ancilllary [sic] rooms refurbished. 11 bedrooms completed and fitted out at first floor 4 bedrooms completed on second floor 11 bedrooms not completed or second floor together with some communal areas and circulation space."* When Mr Baker was asked about these two log entries in cross-examination (during the morning of Day 7), he accepted that they were both accurate descriptions of the physical state of the Hotel at these two dates (although he maintained that the development had been completed in accordance with the planning permissions). Mr Baker did query why the second entry was the same as the first (which it is, even to the extent of the same misspelling of *"ancillary"*). However, the accuracy of the second log entry is supported by the terms of Mr Rowan's contemporaneous email of 16 May 2019 (at page 50 of the Council's exhibits bundles) which refers to 11 rooms on the second floor and 4 rooms on the third floor as being *"in various stages of completion"*. The explanation for the identical wording is that there had been very little progress with the works over the intervening eleven months.

80. I find that little further progress was made after 15 May 2019 and before the service of the break notice. As Mrs Clarke explained in an email to Mr Smith dated 28 August 2019, re-arranging a site visit for the following day because Mr Baker was taking a last minute holiday until about 4 September, Mr Baker and the tradesmen had *"... not been on site for the last 10 weeks due to the summer holidays and [he] has been occupied at Hillbark during our busy wedding season"*. That would cover the period from about 20 June 2019 to (at least) 4 September 2019. I find that the Briefing Note prepared following their site visit on 29 August 2019 by Mr Littler (Planning Enforcement), Mr Phil Smith (Building Control) and Mr Richard McDonald (Conservation), at pages 143 to 155 of the Council's exhibits bundle, is an accurate record of the state of Haigh Hall as at that date. In particular, I accept the findings of Mr Smith (at page 152) that: *"Work to the first floor is fundamentally complete with guest rooms fully functional and in use. Building works on the second floor are*

ongoing with some guest rooms complete and others in the slow process of being converted. Some minor preparation work has been commenced to the third floor, but no substantial building work has yet been undertaken."

81. I accept the evidence of Mr Sutcliffe as to what he had been told about the number of functioning bedrooms on his incognito visit to Haigh Hall on 23 September 2019 (as set out at paragraph 35 above). That is consistent with the anonymous Facebook posting of 10 September (at page 519 of the Council's exhibits bundle) which reads: *"We are proud of what the team has achieved so far with the renovation of Haigh Hall Hotel* [Heart Emoji displayed] *Yes some rooms are still yet to be completed & a job list that feels like it will never end.. but I am sure you can agree - what has been completed so far is nothing short of luxury!"* I reject Mrs Baker's suggestion that this was not a reference to uncompleted bedrooms but rather to the ceremony room and the basement gym. I also reject Mr Baker's self-serving evidence that all 30 bedrooms had been booked for a wedding on Saturday 14 September 2019. Despite the length, and the detail, of Mr Baker's witness statement, this alleged booking was first mentioned during cross-examination on the morning of Day 7. It was not supported by any shred of documentary evidence. I also reject Mr Baker's evidence that 15 bedrooms were then taken out of commission in order to remove the doors so that a locksmith could ensure that a master key could be produced to open all of the locks. Again there is no supporting documentary evidence for this in, for example, the schedule of receipts.

82. I also accept the evidence at paragraph 5.4.7 of Mr Sutcliffe's principal report as to the state and condition of the property at the time of his inspection in October 2019 (cited at paragraph 34 above). Paragraph 32 of Mr Rowan's witness statement states that it is his recollection that as at 15 October 2019 *"... the internal works undertaken by the defendants had been completed"* although he does go on to add that *"... some of the works were still outstanding. The main issue being the works undertaken to create a roof terrace."* This equivocation was not explored in the oral evidence; and Mr Rowan indicated in his witness statement that his focus had been on permanent fixtures. Insofar as Mr Rowan's recollection is inconsistent with the Council's other evidence, then I consider that his recollection as to the completed state of the hotel development is faulty. I find that by October 2019 only 15 of the hotel bedrooms were operational, with the remaining 15 being at various stages of development and yet to be occupied on a commercial basis. The majority were close to being complete, although items such as tiling, plumbing, decorating, furnishing etc, were still needed to bring them up to an operational standard. I find that following the service of the Break Notice, Scullindale accelerated the pace of the works in order to ensure that by the termination date as much work as possible had been completed. This was done deliberately (and understandably) with a view to enhancing the open market value of the Hotel and thus the amount of the termination payment due to Scullindale.

83. Moving to the third question, I find that the delay in completing the Development was not caused or contributed to by any conduct, still less any default, on the part of the Council. It is for Scullindale to demonstrate both that the matters upon which it relies amounted to a beach of the implied term alleged and also that there was a causal link between those matters and the failure either to achieve the second Milestone or to complete the Development before the time the Council served the Break Notice. In my judgment, it fails on the evidence in both respects.

84. In closing, Mr Latimer relied upon the following examples of delay and obstruction on the part of the Council: (1) The constant changes in the identity of the building control officers, which were aggravated by incomplete record-keeping. (2) Requests for duplicated and/or already submitted information and documents. (3) Changes to, and the inconsistent application of, planning conditions. (4) The late disclosure by the Council of the existence of the phytophthora contamination. (5) The lack of a Woodland Management plan. (6) The Council's failure to promote and publicise alternative areas for public access. (7) The delay in providing an alternative picnic site to draw members of the public away from the Hall. (8) The failure to provide information to the Fire Service Authority, which prolonged the period covered by the prohibition notice it had served on 23 October 2018. Mr Latimer draws attention to the diffuse nature of the problems which he says that the Council ended up creating. He submits that the reality is that Scullindale could not deal with them all before 23 May 2018 as well as completing the Development and obtaining a 4 star rating. He contends that the difficulties external to the building impacted upon Scullindale's ability to complete the development in accordance with the Planning Permissions. He says that the surprising feature of the case is just how much Scullindale did achieve in that time. I reject these submissions. I note that none of them could possibly apply to the ceremony room, the internal staircase serving it, or the installation of the stone urns.

85. Certain of Mr Latimer's complaints (those numbered 1, 2, 3 and 8) relate to the discharge of the Council's rights and powers as a local authority. As such, even if well-founded – and I do not find that they were - they cannot amount to any breach of any implied term of the Lease unless, perhaps, they were the result of a deliberate attempt to prevent Scullindale from completing the Development (which I am satisfied they were not). The other complaints relate not to the Hall itself but to the surrounding land. I do not accept that they in any way prevented Scullindale from achieving the second Milestone or otherwise completing the Development or that they contributed in any way to its failure to do so. Indeed, many of them post-date 23 May 2018 or so nearly precede that date that they can have had no possible impact upon the failure to achieve the second Milestone. The fourth complaint is wholly misconceived and demonstrates the extent to which Scullindale is prepared to go to seek to escape from the consequences of its own delay in completing the Development. There had been express references to the existence of the containment notice: (1) at a meeting attended by (amongst others) Mr Baker, Mrs McGinty, Mr Rowan and Mr Jones on 21 November 2016, (2) in Mrs McGinty's email to Mr Baker of 11 April 2017, and (3) at a further meeting attended by (amongst others) Mr Baker and Mrs McGinty on 28 April 2017 (as recorded in an email from Mrs McGinty to Mr Baker dated 2 May 2017). Mr Latimer complains that the containment notice itself was not provided to Mr Baker until 4 April 2018. The short answer to that complaint is that Mr Baker had known about the containment notice since November 2016 and he could have asked for a copy if he had wanted to know its precise terms and try to understand its potential effect.

86. I am satisfied from the documents that any delays in considering and approving building and planning matters were the result of Scullindale's own failures in making relevant applications and requests and providing relevant information and documentation. Scullindale was itself the author of any delays and difficulties by the manner in which it chose to proceed, by carrying out works first and seeking approval

later rather than the other way around. Had the Council been responsible for any material delays, there would have been a stream of emails from Scullindale, or its architects, complaining about this and insisting upon the Council carrying out its statutory functions. There were none. I find that the true explanations for the delay are that: (1) No formal building contract was ever entered into, and no formal programme of works was ever drawn up (as expressly contemplated by the Lease). (2) Mr Baker acted as the building manager and the task was simply beyond his capabilities and his resources in addition to his other responsibilities. (3) Contrary to clause 4.7(a) of the Lease, Mr Baker elected to defer repairs to windows and rainwater goods until after completion of the Works, thereby preventing at least one bedroom from being fully decorated, fitted out and completed because of dampness affecting the plaster. (4) As explained at paragraph 239 of Mr Baker's witness statement, because of the legacy of wedding bookings, Scullindale had *"... felt it right to focus in the early stages of the refurbishment on those areas which had not previously been designated as a priority, namely the public areas. Therefore [they] did not actually start working on the bedrooms until quarter 1 of year 2* [April to June 2017] *rather than commencing them from the offset which would have likely happened."* (5) I find that the high standards of refurbishment and fit-out of the public and function rooms, which were evident on my site visit and view, diverted time and resources away from the work in the bedrooms. (6) It is possible that (as suggested at paragraph 5 of Mr Baker's witness statement) *"... there were certain aspects of the Works that quite simply could not have been completed within that timeframe such that complying with the Milestones within the Lease was simply not possible"*. The Council clearly wanted the Works completed; and this may have been one reason why they were prepared to defer making any decision to serve the Break Notice.

87. Finally, I turn to consider whether the Council had waived its right to exercise the break clause or was estopped from doing so. For the reasons that follow, I find that the Council had not waived its right to exercise the break clause nor was it estopped from doing so.

88. The judgment of Patten LJ (with which Arden and Aikens LJJ agreed) in *BDW Trading Ltd v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 contains (at [65]-[83]) a useful summary of the law relating to election. Both the seller (Barratt) and the buyer (Rowe) in that case had become entitled to rescind a contract for the sale of land *"at any time"* by the serving a notice of rescission. At [66] Patten LJ emphasised this was not a right exercisable in the event of any breach of the contract by Rowe. Rather, it was an option granted to the parties to terminate their contractual relationship on the non-fulfilment of certain conditions by a specified date. If it was not exercised, the contract would continue to be enforceable according to its terms. Rowe contended that the effect of its failure to fulfil the condition was to put Barratt to an election between rescinding the contract or affirming it. It was contended that Barratt must be taken to have elected to affirm the contract by continuing to negotiate about the form of the warranties and other matters right up to the date when it served its notice. In these circumstances, Rowe argued that Barratt could no longer exercise the right to rescind based on the non-fulfilment of the condition. The Court of Appeal rejected this argument, holding that Barratt had not elected to affirm the contract.

89. The Court of Appeal accepted that it was not necessary to show that Rowe had acted in reliance on any understanding that Barratt had given up its right to rescind because

the doctrine of election, including estoppel, was not concerned with the effect of the conduct on the other party. It also rejected the suggestion that there had to be some kind of conscious decision to elect before a contract could be affirmed: Unequivocal conduct coupled with knowledge of the right to elect was enough. But the Court of Appeal was satisfied that the right to rescind had not been lost. Barratt, acting as it had with the benefit of legal advice, could not say that it had no knowledge of the terms of the contract or that a right to rescind had arisen. Knowledge of such matters was not the same as actually applying one's mind to the question at some particular point in time. But the question whether a party with a contractual right to rescind had waived that right by electing to affirm the contract must depend upon an analysis of the terms of the particular contract, and the circumstances in which the right had arisen. At [77]-[81] Patten LJ said this:

> *77. The classic and common situation in which a party to a contract is put to an election … is where the other party has committed the breach of a significant term of the contract amounting to a repudiation. The innocent party is then faced with a choice between accepting that repudiation and thereby terminating the contract or affirming the contract and thereby waiving the breach. Because the continued performance of the contract is ipso facto likely to amount to an affirmation of the contract, the innocent party is necessarily put to his election and must choose…*
>
> *78. But not all rights to terminate a contract arise in these circumstances or have the effect of putting the party with the right to rescind to an immediate election. The lease with a break clause entitling the landlord or tenant to terminate the lease after the end of part of the term does not have to be exercised immediately unless the lease so provides. In most cases it will remain exercisable at any time after the right has arisen. The continued acceptance of rent by the landlord will not, without more, operate as a waiver of his rights under the break clause because there is nothing inconsistent between the continuation of the landlord and tenant relationship and the reservation of the right to break. If it is exercisable at any time during the remainder of the term the landlord is not put to an election and does not make an election by continuing to perform the contract until he chooses to exercise his right to break.*
>
> *79. The same principle applies in my view to the right to rescind under clause 6.2. It conferred upon Barratt the right to rescind the Contract by the service of a notice at any time following the non-satisfaction of any of the specified conditions. In addition, it also precluded the service of a notice if at the time the party in question was in default of its obligations under clause 6.2. In the case of Barratt this was a reference to its obligations under clause 6.2(iii) to act reasonably and to use all reasonable endeavours to agree the specification, warranties and method statement with Rowe and A&L.*
>
> *80. Barratt was therefore entitled to wait after 7th July before serving its notice and, in the meantime, it was obliged to continue to attempt to agree the form of the warranties and other documents. I cannot see how, in those circumstances, its performance of that obligation was in any way inconsistent with its right to rescind when it was under the contract a necessary pre-condition to the exercise of that right.*

> *81. The correct analysis is, I think, that Barratt did not make an election before 25th November 2008 when it served its notice to rescind and that nothing it did between 7th July and then can amount to a waiver of its rights. It could, of course, have chosen to waive its right to rescind but for that to occur Barratt would need to have indicated its intention to abandon its right in clear and unequivocal terms..."*

90. An election can be communicated to the other party by words or by conduct; although, because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has communicated his election to the other party in clear and unequivocal terms. Once an election is made, however, it is final and binding. Mr Hutchings submits that there would have had to have been a clear and unequivocal indication of the Council's intention to abandon its right to terminate the Lease before any question of waiver or election could have arisen.

91. Mr Hutchings submits that, in order for a party to lose a contractual right as a result of common law election, there must, first, be two mutually exclusive courses of action and, second, there must be a clear and unequivocal communication to the counter-party of the choice to pursue one inconsistent right instead of another. There are said to be two principal reasons why this principle is inapplicable in the present circumstances.

92. First, waiver by election only applies where there are mutually inconsistent rights. A right to terminate the Lease *"at any time"* is not inconsistent with allowing the Lease to continue and treating it as on foot after the right to break has arisen (for example, to see whether the Milestone could be met, albeit late). The principle which is in operation in present circumstances is not like the situation where a party repudiates a contract and the innocent party has to elect timeously whether to affirm it or to terminate the contract by accepting the repudiation. This is made clear in the *BDW Trading* case itself. The question whether a party with a contractual right to rescind has waived that right by electing to affirm the contract must depend on an analysis of the terms of the particular contract and the circumstances in which the right has arisen. As in the *BDW Trading* case, it is difficult to see how, where the right to terminate can be exercised at any time, the Council's delay in exercising that right could ever have amounted to acting in a way inconsistent with the right. The Council did not have to choose, because the Lease said it did not have to. Furthermore, as the *BDW Trading* case also shows, until it exercised the right, the Council was entitled to enforce the Lease terms as much as it was also obliged to comply with its own obligations under the Lease as landlord. Secondly, it follows that it does not matter that the right to break was only exercised 16 months' after the Milestone date unless, in the meantime, the Council had, by clear and unequivocal communication to Scullindale, made it clear that it had decided to abandon its right to terminate under the break clause. I accept these submissions.

93. Mr Hutchings submits that even if one takes the defendants' pleaded case and their evidence at face value, and puts aside the inherent improbability that the Council would have made clear its choice to abandon its right at a time when Scullindale was clearly significantly behind in achieving the second Milestone, as well as being in serious breach of the Planning Permissions, there was no sufficiently clear and unequivocal communication. Equitable estoppel might have arisen had the Council

unequivocally represented to Scullindale after 23 May 2018 that it would not in future exercise the break clause. If, in reliance on that representation, Scullindale had then acted to its detriment, such that it would be inequitable for the Council to resile and exercise the break clause inconsistently with that representation, then the Council would have been prevented from doing so. However, Scullindale's case on equitable estoppel founders for the same reason as its case on waiver by election. At no point had the Council represented, either expressly, implicitly or by its conduct, that it would not exercise its break right. There was no positive promise not to elect to serve any Break Notice.

94. I consider that there is considerable force in these submissions. But it is appropriate for me to set out the defendants' evidence and case in detail and then to make my findings of fact upon it.

95. The defendants rely first upon representations said to have been made by Mr Haslam and Mr McKevitt as related by Mr Baker at paragraphs 164 and 231 of his witness statement and confirmed by Mrs Baker and Mrs Clarke (in identical terms) at paragraphs 91-92 and 52-53 of their respective witness statements.

96. The matter is pleaded at paragraphs 37-41 of the amended defence as follows:

> *"37. On or about 13 June 2018 Phil Haslam, a strategic asset manager of the Claimant, visited Haigh Hall Hotel. Mr Haslam inspected the hotel and confirmed to the Second Defendant that the Claimant was content with the progress of the completion of the Development.*
>
> *38. On or about 27 June 2018, the Claimant's Deputy Chief Executive Paul McKevitt, visited the Haigh Hall Hotel. Like Mr Haslam before him, Mr McKevitt spoke to the Second Defendant. Mr McKevitt told the Second Defendant that the Claimant was content with the work done and the progress which had been achieved to date.*
>
> *39. The Second Defendant understood that Mr Haslam and Mr McKevitt were visiting to inspect progress to date, the second Milestone having passed. The net effect of either or both of these visits was that the Claimant demonstrated that it was satisfied with the progress towards completion of the Development and/or the Claimant through the words and conduct of Mr Haslam and/or Mr McKevitt made unequivocal representations to that effect.*
>
> *40. In reasonable reliance on the words and conduct set out above, the First Defendant spent or caused to be spent approximately £2,000,000 on progressing the Development.*
>
> *41. That money would not have been spent had the Defendants been told that the Claimant believed that it had grounds to serve a break notice and, at the minimum, work would have been suspended and no further sums spent until that serious issue had been resolved.*

I note that Mr Latimer quantified the invoiced expenditure between July 2018 and September 2018 at £1,111,161.

97. Paragraph 164 of Mr Baker's witness statement reads: *"Shortly after the second anniversary of the Lease in June 2018, Phil Haslam and Paul McKevitt attended the Property to inspect it and see what works had been completed. At this inspection, even though the Works were about 75% complete, both made it very clear they were happy with the state of the building. Indeed at this inspection Mr McKevitt represented that the Cabinet were very happy and fine with everything and the amount of progress that had been made to that date. There was no reference to any breaches of the Lease and certainly no suggestion that the Council had any plans to serve a Break Notice. The message was very much to crack and complete the job."*

98. Paragraph 231 of Mr Baker's witness statement reads: *"At the second anniversary stage of the Lease Phil Haslam attended the Property to inspect the progress of the Works. Although the Lease stated we should have completed the Work by that time I would estimate about 75% of the Work was finished by that time. Despite it not being completed, Phil Haslam said that he was satisfied with the progress that had been made and could see what a good job we had done, so much so that the building was no longer on the at risk register which he said was a main factor for the Council. I was told to carry on and complete the Works. Paul McKevitt made similar comments."*

99. Mr McKevitt had made it clear in his witness statement that he had not attended any meeting at Haigh Hall on 27 June 2018 as he had been in Northumberland on that date; but that he had attended the property on 27 July 2018 with Mrs McGinty. At the beginning of his evidence, Mr Baker corrected paragraph 164 of his witness statement to make it clear that there had been two separate visits, one by Mr Haslam on 13 June and the second by Mr McKevitt on 27 July 2018.

100. The relevant evidence of Mr Haslam is to be found at paragraphs 21 and 22 of his witness statement. In cross-examination Mr Haslam was clear that he did not say that he was happy with the progress of the works but merely with their standard. He did not have any authority to give any assurance that the Council would not exercise the break clause in the Lease and he did not do so. It was clear to him that the second Milestone had not been achieved because the Hotel was not yet complete. I accept this evidence, which also accords with the inherent probabilities and the way that matters unfolded.

101. The relevant evidence of Mr McKevitt is to be found at paragraphs 20 to 27 of his witness statement. In opening, Mr Latimer accused Mr McKevitt of equivocation in his written evidence. In his oral closing, he submitted that both the witness statements of Mr Haslam and Mr McKevitt had been *"over-processed"* by the Council's legal representatives, unlike the witness statement of Mr Baker which had the virtue of being all his own words. I reject both of Mr Latimer's criticisms. In cross-examination, Mr McKevitt firmly stood by the evidence in his witness statement. He had not given any assurances to Mr Baker, and certainly not on behalf of the Council or its Cabinet because it had not yet met. Mr McKevitt simply could not recall whether he had by then been made aware of the recommendation in the Report to Cabinet for its meeting on 2 August 2018, which Mrs McGinty had signed off on 20 July, that delegated authority should be given to him *"... to waive the Council's ability to terminate the Lease in respect of Haigh Hall Hotel and surrounding land, subject to satisfactory resolution of issues of access described in this report"*. In any event, as Mr McKevitt pointed out, Cabinet had not yet met and it might have rejected

the recommendation. Mr McKevitt acknowledged that he might have said that the works that had been carried out to date *"looked nice"*, but he was adamant that he had not given any assurances. I accept Mr McKevitt's evidence, which again is consistent with the inherent probabilities and the way that matters unfolded.

102. I find that neither Mrs Baker nor Mrs Clarke had any clear recollection of what was actually said by either Mr Haslam or Mr McKevitt on their visits to Haigh Hall. I reject Mr Baker's evidence about what was said by Mr Haslam and by Mr McKevitt. It is self-serving, contradicted by their evidence - which I find to be reliable - and inconsistent with the way in which matters unfolded. At no time did Mr Baker ever suggest that by the end of July 2018 the Council had already elected not to exercise the break clause. There were clear opportunities to do so when: (1) Mrs McGinty had reported to Mr Baker (by email on 8 August 2018) that at its meeting the previous Thursday the Cabinet had *"... delegated the decision to Paul McKevitt, Deputy Chief Executive. However, a further report may be required to go back to Cabinet later in the year."* (2) Mrs McGinty warned Mr Baker (by email dated 21 February 2018) that if Council officers were unable to agree a date for unrestricted public access with Mr Baker *"... the members are minded to instruct the legal services to prepare a report on the legal options, including for the termination of the lease"*. (3) The Council actually served its Break Notice. No challenge to its validity on the basis of waiver or estoppel was raised in Jolliffe's initial correspondence with DWF and before Jolliffes' letter of 28 October 2019. Indeed, I find that at the site inspection on 15 October 2019 both Mr Baker and Mr Madani gave the impression that Scullindale would be vacating Haigh Hall on 22 November 2019.

103. Secondly, Mr Latimer relies upon the correspondence between August 2018 and February 2019 about resolving access issues affecting Haigh Hall and its grounds as amounting to a representation by conduct that the Council would not be exercising the break clause. The Council accepts that it did not explicitly warn Scullindale that the option of terminating the Lease remained open until Mrs McGinty's email of 21 February 2019 (previously cited). Mr Latimer submits that this correspondence is consistent only with the Lease remaining in existence for the remainder of the contractual term of 199 years.

104. I reject this alternative line of argument. I do not view this correspondence as amounting to a clear and unequivocal indication or representation of the Council's intention to abandon its existing right to terminate the Lease. First, Scullindale knew, from Mrs McGinty's email of 8 August 2018 (previously cited), that Cabinet had delegated the decision to Mr McKevitt but that a further report might be required to go back to Cabinet later in the year. Scullindale would have been looking to a decision authorised by Mr McKevitt and communicated to Scullindale. Secondly, and in any event, the correspondence is entirely equivocal. It depended upon, but did not necessarily assume, the continued existence of the Lease. Thus the text for the side letter proposed in Mrs McGinty's email of 21 January 2019 expressly provided for it to last *"... for the period of 12 months from the date of this letter, and so long as the Premises are occupied by the Company and the leasehold interest also remains vested in the Company"*.

105. Insofar as the defendants rely upon estoppel rather than waiver, the argument founders on the lack of any sufficiently clear and unequivocal representation, for the reasons already given. But, in addition, I am satisfied that there was no sufficient

detrimental reliance. Although over £1 million was spent on Haigh Hall after June 2018, I am satisfied that this money would have been spent in any event. In cross-examination on the afternoon of Day 7 Mr Baker made it clear that it had always been Scullindale's intention to finish the Works. He recognised that it had been under a legal obligation to do so. He accepted that even had there been no representations by Mr Haslam or Mr McKevitt, he would probably have carried on with the works (although he suggested that he would probably have spoken to a lawyer, a suggestion which I reject). He added that more than anything, he would have wanted to save the building. I am satisfied that Scullindale would have carried on with the Works because: (1) it was legally obliged to do so, (2) it would have hoped that if it completed the Development, albeit late, the Council would elect not to exercise the break clause but, should it do so, (3) Scullindale would benefit from an increased payment on termination pursuant to clause 9.3 of the Lease. Indeed, that is precisely what Scullindale proceeded to do.

V: Valuation issues

106. Notwithstanding the provision in clause 9.4 of the Lease for the value in accordance with clause 9.3 to be determined (in default of agreement) by an Independent Surveyor, the parties have agreed that it should be determined by this court. Both experts agreed that the optimum use of Haigh Hall is as a wedding and function venue, with some ancillary bedrooms sales being generated from a mix of corporate and leisure business. The room rate tariffs were also agreed. Initially the valuers disagreed about valuation methodology; but, during the course of the expert evidence, Mr Sutcliffe moved from his profits method of valuation to Mr Elliott's discounted cash flow (**DCF**) approach. The rationale for this, as Mr Elliott explained, *"... is to allow the valuer to include real growth in income which mirrors the approach taken by buyers and sellers of this type of asset"*. I am satisfied that this is the correct valuation approach to apply in the present case, which concerns an immature and developing, rather than an established and stable, hotel and weddings and events business, operating at the upper end of the market. It is supported by the RICS Information Paper, *"Capital and Rental Valuation of Hotels in the UK"* (2nd edn), which addresses the discounted cash flow approach at para 2.5.1 and states: *"Potential purchasers may be financial, institutional and international investors that undertake a DCF approach in determining the price they are prepared to pay for a property. This is particularly the case for new developments, as well as at the upper end of the hotel sector (such as, 4-star and 5-star hotels). In these circumstances, the valuer will reflect the market and adopt a DCF approach to valuation."* This basis of valuation is explained at paragraphs 16.5 to 16.7 of Mr Elliott's principal report.

107. By the final morning of their evidence, both valuers had produced revised discounted cash flow calculations which adopted an agreed discount rate of 14.2%, comprising inflation at 2% plus a terminal exit yield of 12.2% which was determined by the valuers' assessment of the level of risk attached to the realisation of their projected cash flows. On the assumption that the existing tenant's fixtures and fittings were to remain in place, this produced valuations (as at the lease termination date of 22 November 2019) of £4.2 million (Mr Sutcliffe) and £5.14 million (Mr Elliott) on the assumption that the hotel operator was not liable to account for VAT on Asian weddings and dry hire. Mr Sutcliffe (but not Mr Elliott) produced an alternative valuation of £3.6 million on the basis that turnover and operating profit fell to be

reduced to reflect the liability for VAT on Asian weddings and dry hire. At one stage I questioned the valuers about whether it might be appropriate to make some additional overall deduction from any market valuation to reflect any taint caused by the publicity which had attached to the breakdown in the relationship between Scullindale and the Council, IHL and members of the public and also the problems over access to the grounds within the demise. However, I was assured by both valuers that, with the exception of the application to alter the definitive map to show a public right of way through the grounds of Haigh Hall, all the circumstances of the case had been factored into the exit yield that they had both agreed and adopted.

108. The principal difference between the valuers concerned the fair maintainable turnover (or total revenue) for the hotel and its weddings and events business, and thus its net operating income. This in turn was driven by the likely number of weddings each year: Mr Elliott assumed that this would grow to 80 per year whilst Sutcliffe assumed that this would rise to only 65 per year. Both valuers assumed that there would be an additional 20 other events each year. The experts' joint statement acknowledged that their opinions were *"... subjective as this is an immature business with anticipated trading levels not being supported by proven accounts"*.

109. In their oral evidence both valuers themselves acknowledged that this was a really difficult valuation exercise. Mr Sutcliffe acknowledged that both valuers were *"speculating"* as to the likely number of future weddings whilst Mr Elliott referred to this element of the valuation as being *"quite subjective"*. This was because there were no reliable historic trading figures for Haigh Hall for them to work from and it was difficult to obtain accurate and reliable comparable data for reasons of commercial confidentiality and sensitivity. Further, the valuation of hotels was always a complex exercise, involving a number of variables each of which could have a significant impact on the end figure. A further weakness of Haigh Hall as a wedding venue, in comparison with others, was its relatively remote situation. The building was attractive, but it was not situated in an attractive location. Although the Hall was well placed for both Manchester and Liverpool and their hinterlands, there was a lot of existing competition.

110. In closing, Mr Hutchings acknowledged the difficulty faced by both the experts and the court in attempting to identify the number of weddings each year that a hypothetical purchaser of Haigh Hall would assume and factor into his market bid. He accused Mr Elliott of over-optimism and of being unduly influenced by Mr Baker's enthusiasm and his overly optimistic business plans. He pointed to the opacity of Mr Elliott's raw data and calculations, the vagueness of his references to comparables, and his reliance upon commercial confidentiality in that regard.

111. Mr Latimer acknowledged that both experts had been doing their best to assist the court but he submitted that they were not equal: Mr Elliott was the more experienced. Mr Latimer made it clear that he was not impugning Mr Sutcliffe's honesty or his integrity; but he did challenge his independence as an expert, citing his incognito visit to Haigh Hall on 23 September 2019 and his close identification with his client and his instructing solicitors to the extent of using the word *"we"* in the context of requesting documents from the defendants. Perhaps inevitably, close contact with their respective clients has informed the views of both expert valuers; but I do not consider that this has compromised the independence or the impartiality of either expert.

112. The court is thus placed in the unenviable position of having to choose between the views of two apparently competent and reputable valuers. Having had the benefit of seeing and hearing both valuers giving their evidence and answering questions concurrently, without in any way dismissing the evidence of Mr Sutcliffe I formed the clear view that Mr Elliott had the greater experience and understanding of, and also a greater *"feel"* for, the hotel sector of the hospitality business. His competence as a valuer in this sector was apparent from his oral evidence; and my contemporaneous note was that he seemed far more knowledgeable about hotels than Mr Sutcliffe, whose experience lay in valuing licensed premises more generally. That was exemplified by Mr Elliott's initial preference for, and his greater experience of, the appropriate DCF approach to valuation in the present case, which was later, and rightly, acknowledged by Mr Sutcliffe to be the correct method of valuation rather than Mr Sutcliffe's originally favoured profits method. Early in their oral evidence, Mr Sutcliffe had said that he used the DCF method *"infrequently"* because he considered it to be prone to errors. Mr Elliott had said that he was at pains to use what he believed to be the right method of valuation for the particular case, that the DCF approach was not more prone to error, and that it allowed the valuer explicitly to deal with growth in the business. As Mr Latimer rightly acknowledged, an expert who changes his mind in the course of reasoned debate is to be commended; but I consider it to be appropriate to place more reliance upon the views of an expert who gets it right in the first place. I also consider that Mr Elliott has benefited from the opportunity to become better informed about the business model and running of a dedicated wedding venue as a result of his discussions with Mr Baker about his operations at Hillbark Hotel - which Mr Elliott considered to be *"sound"* – but without thereby allowing his independence to be compromised. I consider Mr Elliott's business commentary at section 15 of his principal report to be soundly evidenced and reasoned although I acknowledge that it lacked transparency as to how he had arrived at his estimated fair maintainable trade for the property; in oral evidence Mr Elliott explained that he had assumed that the number of weddings and other events would stabilise at 80 and 20 respectively in Year 3. This number of weddings is supported by the figures for Hillbark during 2019 of 80 and approximately 70 per year for Rowton Hall near Chester (which was referenced by Mr Sutcliffe at page 30 of his principal report) although I bear in mind that Mr Elliott said that his team did not consider Rowton Hall to be comparable to Haigh Hall.

113. For these reasons, I consider that Mr Elliott's assessment of 80 as the number of wedding bookings when the business stabilises in Year 3 is likely to prove more accurate than Mr Sutcliffe's estimate of 65. However, I also consider that a hypothetical purchaser would be likely to take the prudent and cautious approach of formulating his bid on the basis of the slightly reduced number of 75 weddings per year by the time the business becomes fully established in Year 3. Subject to this slight reduction in the number of weddings, I would endorse Mr Elliott's valuation approach except that I consider that a hypothetical purchaser would be more likely to adopt the round figure of £100,000 for capital expenditure adopted by Mr Sutcliffe rather than Mr Elliott's figure of £125,000. In particular, I agree that Mr Elliott is correct to adjust turnover (and thus operating profit) in each year of his DCF model to allow for the effect of inflation going forward, and also to stabilise the number of events in Year 3 in accordance with his understanding of normal practice in the hotel valuation sector.

114. I would invite Mr Elliott to prepare, and Mr Sutcliffe to agree, a revised DCF calculation going forward. This should be on the basis that tenant's fixtures and fittings will remain in place in light of the undertaking that Mr Latimer offered on behalf of the defendants that fixtures and fittings would be left at Haigh Hall when Scullindale vacates the premises. This was rightly welcomed by the Council as a sensible and pragmatic way forward, which would avoid the risk of further potential litigation about what could lawfully be removed from Haigh Hall and what consequential remedial works would be required. Had Scullindale proposed to set about removing the tenant's fixtures and fittings from Haigh Hall, it would have been appropriate to discount the market value to reflect this. In doing so, I would have adopted Mr Sutcliffe's approach of deducting £920,000 for fixtures, fittings and equipment, plus an allowance of two months' for disruption, rather than Mr Elliott's VAT-exclusive figure of £770,000. This is on the basis that the defendants' response dated 3 March 2020 to the Council's request for further information No 5 stated that the total sums expended by Scullindale on Haigh Hall had included approximately £920,000 on fixtures and fittings *"with VAT being paid on such sums"*; and there was no challenge to this figure. It would therefore not be appropriate to discount the figure of £920,000 to reflect VAT being included within this sum (as Mr Elliott's DCF valuation sought to do). It would also have been appropriate to make an allowance for disruption, as Mr Sutcliffe's alternative DCF valuation does.

115. That leaves one outstanding matter on open market value, which is whether the turnover figures should be reduced to reflect the fact that the hypothetical hotel operator would be liable to account for VAT on *"dry"* hire and Asian weddings (as is clearly the case where drink is supplied for a wedding by the hotel operator). This was not a matter that had featured in either expert's report or in their joint statement. Both valuers had originally assumed that all sales were liable to VAT and therefore turnover should be reduced by the VAT element on all sales. It was Mr Elliott who first raised the issue whether *"dry"* hire and Asian weddings might be an exempt supply for VAT purposes on the basis of information received from Mr Baker, apparently conveyed to him during a visit by a VAT inspector, and subsequently confirmed by inquiries made by Mr Elliott of two other operators. The experts were agreed that around half the actual wedding bookings for 2020 were from Karma Weddings, who are a specialist Asian wedding organiser. These weddings are *"dry"* hire and include the entire property.

116. Mr Hutchings submitted that the court should proceed on the basis that none of the turnover is an exempt supply for VAT purposes. He relied upon the decision of the Tax & Chancery Chamber of the Upper Tribunal in *Blue Chip Hotels Ltd v Revenue & Customs Commissioners* [2017] UKUT 204 (TCC) that the supply of the hire of a room licensed for civil wedding ceremonies is not an exempt supply of the *"grant of any interest in or right over land or of any licence to occupy land"* within Item 1 of Group 1 of Schedule 9, Part II of the Value Added Tax Act 1994. There it was held that in order to be a supply of the leasing or letting of immovable property, a transaction between an owner of an interest in a property ("the landlord") and another person ("the tenant") had to: (a) confer on the tenant the right to occupy the property as if the tenant were the owner; (b) allow the tenant to exclude from enjoyment of such a right persons who were not permitted by law or by the contract to exercise a right over the property; (c) be for an agreed period which could be restricted but could not be occasional and temporary; and (d) be in return for payment. How the

transaction was classified by the parties was not determinative, and regard had to be had to the objective character of the transaction and the circumstances in which it took place. Where the landlord actively exploited the property to generate significant added value, the transaction was excluded from the scope of the exemption. A supply could not be characterised as a leasing or letting of immovable property within the scope of the exemption if the landlord did more than simply make property available to the tenant for a period, but actively exploited the property to add significant value to the supply. In the *Blue Chip Hotels* case, the appellant had not simply made a room available to customers; it had actively exploited the room by obtaining approval for its use for the solemnisation of marriage and the formation of civil partnerships and performing all the required activities to maintain such approval. Those activities went further than simply ensuring that use by the customers of the room was not disturbed by third parties; and the appellant's role was more active than that which would arise from a mere letting of immovable property. Accordingly, by its active exploitation of the room, the appellant had added significant value to the supply of the room. The supply of the room was therefore outside the scope of the exemption for the leasing and letting of immovable property; and the taxpayer's appeal was accordingly dismissed.

117. Mr Hutchings submitted that it has to be assumed that the reasonably efficient operator will act in accordance with the law. No element of the weddings and events business was an exempt supply. The initial views of both valuers had been correct. Neither had known about the potential applicability of this exemption; and they had been right to proceed on the basis that the whole of the turnover of Haigh Hall was liable to VAT and that no part of it represented an exempt supply.

118. Mr Latimer pointed to paragraph 1 of the decision and submitted that the *Blue Chip Hotels* case was concerned with the VAT treatment of the hire of the room used for the wedding ceremony, and not the room or rooms used for the wedding reception. He referred me to paragraph 44 of the decision which shows that the service provided by the hotel was not simply making the ceremony room available to its customers, and that the decision turned on the fact that the hotel was providing *"... a more complicated service than simply making the property available to the customer for a period"*. Mr Latimer relied upon the facts – although I do not think that these had been clearly demonstrated by the evidence – that, in reality, VAT was not being charged on *"dry"* hire and Asian weddings, and that this had not been challenged by the Revenue & Customs Commissioners despite a recent VAT inspection.

119. Certainly, I do not consider that the decision in the *Blue Chip Hotels* case is determinative of the issue I have to decide. It is, I think, implicit in the decision that the liability of the wedding package to VAT was not in issue; but there is no suggestion that the weddings involved *"dry"* hire or the particular features of what have been referred to by the parties and their experts (without intending any disrespect) as *"Asian weddings"*. In reply, Mr Hutchings did not accept the relevance of Mr Latimer's distinction between the use of a ceremony room and the provision of a wedding package. He submitted – in my view correctly - that the real test was whether any services, other than a room or rooms, were being provided.

120. I have found this issue probably the most difficult in the case to determine. That is because of the lateness of the point in the case at which the issue first surfaced and the consequent lack of relevant, and clear, evidence to resolve the issue. I simply do not

know precisely what is, and what is not, being provided by way of *"dry"* hire or for an Asian wedding. Nor is it competent for me definitively to resolve the liability for VAT on the provision of such services in the absence of the Revenue & Customs Commissioners. But I do not consider that it is necessary for me to do so because, in my judgment, the real issue is how this grey area would be viewed by the hypothetical purchaser of Haigh Hall and their professional advisers when pitching their open market bid for the property. In my judgment, they would certainly not assume that the price of such events or weddings packages would inevitably escape the risk of being held liable for VAT. Rather, they would approach their bid on the footing that here was the potential for some added value if they were able to get away with not accounting for VAT on such packages. Doing the best I can in difficult circumstances, I consider that the hypothetical purchaser would assume that there was a 50/50 chance of avoiding having to pay VAT on such packages. I therefore direct that the revised DCF calculation should be prepared on the basis that the turnover figures should be reduced to reflect a 50% chance of VAT being applied to their Asian weddings and "dry" hire elements.

121. Both valuers assessed the value of the improvements as equivalent to their respective market valuations of the premises. Mr Sutcliffe made a deduction for the cost of the premium whereas Mr Elliott did not; but since the payment to be made to Scullindale on termination of the Lease is to be the lower of the open market value of the premises or the premium plus the value of the improvements, it does not matter which approach to the treatment of the £400,000 premium is correct since, even if Mr Elliot is right, the payment to be made to Scullindale is capped at the true open market value of the premises. Effectively, whichever approach to the treatment of the premium is correct, the alternative basis for calculating the payment under clause 9.3 (b) of the Lease is redundant.

VI: Damages and mesne profits

122. The Council claims damages for trespass or mesne profits from the defendants in respect of the period from 22 November 2019 until possession is delivered up. So far as the calculation of mesne profits is concerned, I understood Mr Hutchings to accept in closing the method of assessment set out at paragraph 16.23 of Mr Elliott's principal report although not his precise figures. In my judgment this is indeed the correct method of assessment if any mesne profits are properly payable. The starting figure should be the stabilised Year 3 net operating income as it appears from the revised DCF calculation. From this should be deducted the costs of the tenant's works amortised at 10%. Mr Elliott assessed the tenant's bid at 40% of the resulting figure which I would accept. However, that still leaves the exercise of quantifying the costs of the tenant's works.

123. According to the spread sheet supplied with the defendants' further response dated 17 July 2020 to the Council's request for further information, the defendants claim to have spent some £4,435,549 on works to the property; and this was the figure adopted in Mr Elliott's calculation. This would appear to be inclusive of VAT (which would presumably have been recoverable by Scullindale) and include the premium of £480,000 (inclusive of VAT). On the morning of Day 6 of the trial Mr Hutchings produced a colour-coded schedule and analysis of figures extracted from the invoices disclosed by the defendants. These were said to total £2,412,039.10, of which the Council disputed up to £1,066,680.49. On Monday 8 March, in the interval before the

trial resumed on Day 11 Mr Latimer produced a responsive schedule in which he accepted that £900,156.02 fell to be deducted from the figure of £2,412,039.10 if this were accurate; but he contended that Mr Hutchings's schedule appeared to omit unquantified items of expenditure. The defendants had not had the time to list out specific omissions as that would have involved working through more than 800 disclosed receipts. At the very least, the claimant's total for receipts of £2,412,039.10 was not an agreed figure. Against that unsatisfactory background, and had it proved necessary, I would have felt compelled to direct an inquiry as to the defendants' actual expenditure, to be conducted by a District Judge of the Business and Property Courts in Manchester, if the appropriate figure could not be agreed between the parties.

124. In closing Mr Hutchings referred me to paras 19.012 (Liability for mesne profits and other losses) and 19.013 (Amount of mesne profits) of *Woodfall: Landlord and Tenant*. I accept that the amount of the mesne profits for which a tenant who holds over after the termination of his tenancy is liable is an amount equivalent to the ordinary letting value of the property in question; and that this is so even if the landlord would not have let the property during the period of trespass. However, in a case where the landlord would not have let the property, he has suffered no actual loss so the liability of the former tenant to pay mesne profits is in the nature of restitution for unjust enrichment; and the value of the occupation to the former tenant may therefore be taken into account. On the unusual facts of the present case, I am satisfied that whether mesne profits fall to be assessed by reference to the loss which has been caused to the Council, or restitution of the value of the benefit which Scullindale has received from its continuing possession of the premises, the end result is that the Council should be entitled to recover nothing by way of mesne profits.

125. Mr Latimer submitted that nothing should be payable for mesne profits and that the amount of mesne profits should therefore be assessed as nil. Since Scullindale had remained in possession after the break date, the Council had not had the burden of maintenance, insurance or any of the other liabilities that can come with an ageing building, and it had not incurred any potential liability for business rates. There is no evidence that the Council could have relet the property. It had taken the better part of two years, between 2014 and 2016, to negotiate the lease to Scullindale. Even if a potential lessee had come forward, the Council would have been into the first lockdown in March 2020 before there was any realistic prospect of a new lease being signed. The reality is that no lessee would have taken the hotel in 2020; nor was it was even clear, until early 2021, that vaccines might be capable of working on a mass scale to bring down Covid infections. Even now, lockdown measures are not expected to be entirely lifted until June 2021. Likewise, it cannot be said that Scullindale has enjoyed any windfall benefit. It has endured several months of lockdown restrictions of varying severity and its wedding business had ended when the break notice was publicised. I accept these submissions, which are entirely borne out by the evidence.

126. Mr Hutchings emphasised that a trespasser should not be able to use another person's land without paying compensation, and that mesne profits are payable even if the landowner would not have relet the premises. However, I do not accept that mesne profits are payable if the premises are effectively unlettable and the trespasser makes no profit from them because they are incapable of beneficial occupation. In my

judgment, mesne profits are awarded on either a compensatory or a restitutionary basis and not as a matter of legal right simply by virtue of legal ownership.

127. On the issue of rental value and mesne profits, both valuers accepted that even if Scullindale had vacated Haigh Hall on the termination date of 22 November 2019, there would have been no realistic prospect of achieving a re-letting of that property before the effect of the Coronavirus pandemic on the hospitality sector had become apparent, and the first national lockdown had been introduced, in March 2020. Both valuers agreed that the pandemic had had a significant impact on the ability of the Hotel to operate since the first lockdown in March 2020 and that market sentiment is weaker after the pandemic. Both valuers also agreed *"that post Covid-19 … the business is likely to be loss making"*. Whilst (as Mr Elliott states at paragraph 13.10 of his principal report) there may be *"a wall of money keen to invest"* in the hotel sector, I find that from March 2020, and continuing up to the present time, Haigh Hall would have been viewed, in the short-term, and for the immediate future, as a liability rather than as an asset. I am satisfied that it would have generated no immediate rental income for the Council and no immediate profit for any hypothetical hotel or events operator. Even before the pandemic, Haigh Hall Hotel Limited had made a loss for the financial year ended 30 June 2019 of £5,156; and even with no business rates to pay since March 2020 and Government grants of £42,342, the loss for the following financial year increased to £89,106.

128. The reality is that the Council has suffered no financial loss, and Scullindale has derived no financial benefit, from its continued possession of Haigh Hall since 22 November 2019. That is entirely the effect of matters consequent upon the global pandemic which were entirely outside the parties' own control and were extraneous to their continuing, enforced relationship. In these unusual, indeed unprecedented, circumstances, I would award the Council nothing by way of mesne profits.

VII: The counterclaim

129. Scullindale alleges two breaches of contract on the part of the Council. First, it says that the Council repudiated the Lease by its unlawful attempt to operate the break clause. That repudiation was never accepted because Scullindale never gave up possession of Haigh Hall. Secondly, it is said that the Council was in breach of the covenant for quiet enjoyment, not only by serving an invalid Break Notice, but also by reason of the extra-judicial pressure which was brought to bear upon Scullindale by the Council's public communications, which made it clear that Haigh Hall was being re-possessed and taken back within the Council's control. That had an immediate, disastrous, and entirely predictable effect on weddings bookings at Haigh Hall, both existing and potential.

130. I proceed on the footing that I am wrong in my conclusion that the Council has not validly exercised the break clause and that at all times the Lease has remained in place.

131. The juridical nature of options and break clauses was considered by Lord Simon of Glaisdale in *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904 at 945E – 946E, albeit in the course of considering stipulations as to time in rent review clause in leases and distinguishing them from stipulations as to time contained in options and break clauses. As explained by Lewison LJ (with the agreement of Black LJ and Sir

Timothy Lloyd) in *Siemens Hearing Instruments Ltd v Friends Life Ltd* [2014] EWCA Civ 382, [2014] 2 P & C R 5 at [24]: *"In its classic form an option is a unilateral (or 'if') contract. The promisor agrees to do something (typically to sell something) if the promisee does or refrains from doing something. The promisee himself does not make any promise: it is up to him whether he does or refrains from doing whatever it is that triggers the promisor's obligation. That is why it is called an option."* At [28] Lewison LJ said that it has never *"... been doubted that the principles applicable to compliance with conditions upon which an option to renew depends apply equally to compliance with conditions upon which a break clause depends."*

132. Mr Hutchings relies upon observations of Mr Peter Whiteman QC (sitting as a Deputy Judge of the Chancery Division) in *Cooke v Scotfield Ltd* [2000] All ER (D) 532 at [35] that to seek to exercise an option to purchase without fulfilling the condition precedent to it is not a breach of the option and certainly not a repudiatory breach. There is no obligation to exercise the option and, on that basis, it is not possible to say that the person electing to do so is in breach of any such obligation. Mr Hutchings points out that the case is cited at foot-note 28 at page 18 of *Barnsley's Land Options* (6th edn) as authority for the proposition that: *"Because the exercise of an option is not obligatory, the purported exercise of option at a time when any conditions precedent to its valid exercise have not been satisfied, although of no effect, will not amount to a repudiatory breach of contract."* I accept that proposition as correct, both in principle and as a matter of authority. The invalid exercise of a break clause in a lease cannot be treated as a breach of contract because there is no relevant contractual obligation that can be breached. Even if it could amount to a breach of contract, if it is exercised in good faith, and particularly where it is exercised after taking apparently competent legal advice as to the validity of the break notice (as I find to have been the case here), the invalid exercise of a break clause in a lease cannot amount to a repudiatory breach of the lease (assuming a lease to be capable of repudiation).

133. I accept Mr Hutchings's submission that the service of a notice in the mistaken, but genuine, belief that a contracting party has the right to do so to put an end to the contract does not necessarily mean that the mistaken party thereby repudiates the contract; it is all a matter of fact. In considering whether a contract has been repudiated, it is necessary to consider all the circumstances, and, in particular, the conduct of the party alleged to have repudiated the contract as a whole. Mr Hutchings referred me, by way of helpful guidance, to observations of Etherton LJ (with the agreement of Mummery and Sullivan LJJ) in *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168 at [44] and [65]. In the present case, I am entirely satisfied that the service of the Break Notice or about 16 September 2019 did not clearly show an intention by the Council to abandon and altogether to refuse to perform the Lease. Far from clearly indicating an intention to abandon the Lease, by serving the Break Notice the Council showed a clear intention to implement the contractual procedure for bringing the Lease to an end. If the Council was not entitled to exercise the break clause, then the Break Notice was written in water and was of no effect, but it gave rise to no wider remedy. I also reject Mr Latimer's submission that the service of an invalid break notice constitutes a breach of the landlord's covenant for quiet enjoyment. If invalidly served, it cannot interfere with the lessee's quiet enjoyment of the premises under the Lease.

134. Since I have found that there was no repudiation of the Lease, it is unnecessary for me to consider the interesting question of the effect of the lessee's affirmation of the Lease upon the position of the guarantors. Nor would it be appropriate for me to do so since the issues raised are almost entirely issues of law, rather than fact, and anything I might say would be entirely obiter and difficult to challenge by way of an appeal. I therefore resist the opportunity to say anything about whether: (1) by repudiating a lease, the lessor also repudiates any guarantee covenants contained therein, and (2) whether it is open to a lessee to affirm a lease without also effectively affirming any guarantee covenants it may contain. A decision on Mr Latimer's interesting submissions that a lessor cannot repudiate part of a lease but must repudiate the whole, and that it is open to each of the lessee and its guarantors to elect either to affirm the lease or to accept its repudiation as they see fit, will have to await another day. I should however make it clear that had it been necessary for me to do so, I would have found as a fact that, in their personal capacity as guarantors, neither Mr Baker nor Mr Madani had done anything to affirm the continued existence of their guarantees or the Lease. Pre-action correspondence from Jolliffes affirming the continuing existence of the Lease was expressly written on behalf of Scullindale alone. This finding avoids another potential question as to the effect of affirmation by one, but not both or all, of the guarantors to a lease where there is more than one guarantor.

135. I therefore dismiss Scullindale's counterclaim. Had I upheld the counterclaim, I would have ordered an inquiry as to damages before one of the Business and Property Court District Judges in Manchester. Scullindale may have sustained a loss of profits on the three events scheduled in December 2019 and January and 8 March 2020; but the majority, if not all, of the other 2020 bookings would have been lost to the Coronavirus pandemic in any event. Any that were able to go ahead would probably have done so on a much reduced scale. The fate of the two August 2021 bookings would still have been very much in the hands of the Government roadmap to recovery. It would have been necessary for the court to consider, possibly by reference to Mr Baker's experience of wedding bookings at Hillbark, the extent to which these bookings might have been carried forward to later in 2021 or 2022 and, if so, upon what basis. There is insufficient evidence before the court to undertake that assessment. On any inquiry as to damages, there would also have been the need to avoid any double recovery in terms of lost deposits and loss of profits on the same weddings.

VIII: Conclusion

136. For the reasons I have given, and subject to any further submissions consequent upon the handing down of this reserved judgment, I would declare that: (1) the Lease ended on 22 November 2019 pursuant to clause 9 thereof and the service of the Break Notice by the Council; (2) the Council is entitled to close the leasehold title to the Lease at the Land Registry and to remove any entry to the same from its freehold title; (3) the Council was not in repudiatory, or any, breach of the Lease by its service of the Break Notice, which was valid and effective to determine the Lease on 22 November 2019; and (4) Scullindale was in breach of the Lease in failing to give up vacant possession of Haigh Hall on 22 November 2019 in accordance with the terms of the Lease. I would give judgment for possession of Haigh Hall against Scullindale on a date to be fixed. I would dismiss the Council's claim for mesne profits, damages

for trespass, double value and interest. I would also dismiss the Council's claim against the second and third defendants. I would determine the amount of the payment due from the Council to Scullindale under clause 9.3 in accordance with section 5 of this judgment. I would dismiss the counterclaim.

137. For followers of Wigan Warriors, I would adjudge the final score to be in the order of 20 - 6 to the Council. (Followers of Warrington Wolves may have reason to recall that score.) For followers of the Latics (Wigan Athletic FC to the incognisant) the score is probably in the order of 4-1 to the Council. That will have to be factored in to any award of costs, as will the terms of clause 4.14(i) as regards the costs of determining the clause 9.3 termination payment. It will also be necessary to bear in mind (to the extent that this claim may have increased the costs of this litigation) that I have dismissed the claim against Mr Baker and Mr Madani. Mr Latimer submitted that their personal guarantees had always been largely academic. Had Scullindale prevailed, then there would have been nothing for the guarantors to pay. Although the Council has won, they are the paying party under clause 9.3 of the Lease in a multi-million pound sum. Any costs, yearly value or mesne profits due to the Council would always have fallen to be set-off against this termination payment. Mr Latimer says that either the Council did not appreciate this, or the personal guarantors were joined for tactical purposes, to try to exert some pressure upon Mr Madani and Mr Baker. The personal guarantee claim was, in the final analysis, a waste of the court's time. As at present advised, and subject to submissions in response from Mr Hutchings, I am inclined to agree with Mr Latimer (although I recognise that the Council may possibly have been concerned about any potential future abuse of process argument had they refrained from joining the guarantors to the proceedings).

138. I will adjourn the trial for submissions on the terms of the final order, including the date on which any order for possession should take effect and costs, and also any application for permission to appeal. I will extend the time both for appealing, and for any application for permission to appeal, until 21 days after the adjourned hearing. I would invite both counsel to attempt to agree a draft order to give effect to the terms of this judgment and then to liaise with the list office in Manchester as to a suitable date and time estimate for any necessary further hearing.

139. I would invite the parties to consider whether the terms of this judgment may assist them in coming to some form of sensible accommodation over the future of Haigh Hall. The world has changed considerably since the Cabinet first resolved to determine the Lease on 29 August 2019. The Covid pandemic means that the Council will have to pay Scullindale over a million pounds more than Haigh Hall is presently worth when it comes to vacate the property. Scullindale has delivered a first-class hotel and wedding and events venue in an appropriately, and splendidly, restored and refurbished Grade II* listed building. It has become clear during the course of this trial, that there are tensions between the ability to operate the Hall successfully and profitably and maintaining unrestricted public access to its grounds which IHL and the Council will need to address but which they are likely to find difficult to resolve. Even at this late hour, the Council may feel that permitting Haigh Hall Hotel Limited to operate the hotel business and act as a buffer between itself and the public, but with more clearly defined, but restricted, rights of public access, may prove to be a sensible, and more cost-effective, way forward. If the parties so wish, I am prepared to allow them time for negotiations in advance of the next hearing.

[i] The late Sir Jeremiah Harman was the subject of a critical obituary in "*The Times"* newspaper on 13 March 2021, which was compounded by an unfortunate *"tribute"* on the day of his funeral (23 March 2021). An appropriate counterweight to these reports was supplied by the Treasurer of Lincoln's Inn (David Richards LJ) in his funeral address at Chelsea Old Church. As the junior member of Jerry's chambers at 9 Old Square for the final two years he was in practice before his elevation to the Chancery Bench, it is appropriate to record that Jerry was a good lawyer, possessed of a fine commercial nous and a great understanding of financial matters. Although at times he could be intemperate and he found it difficult to resist headline-grabbing comments, he was capable of generating a high standard of debate in court and he relished, and respected, advocates who stood up to him. At a time when Oxbridge still dominated the High Court Bench, Jerry had not studied at any university. At the retrial of the case that proved to be Jerry's nemesis, the new trial judge arrived at the same ultimate disposal (which was affirmed by the Court of Appeal). Jerry loved Lincoln's Inn and gave generously of his time to it, serving as Treasurer in the year 2000. By common consent, he was a very fine Treasurer who was regarded by many members of staff as the very best Treasurer they ever served.