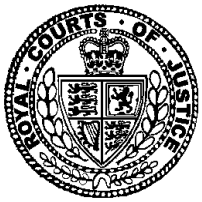

Neutral Citation Number: [2022] EWHC 2671 (Ch)

Case No: BL-2020-MAN-000080

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.

28/10/2022

Before :

MR JUSTICE FANCOURT
Vice-Chancellor of the County Palatine of Lancaster

- -

Between :

ALMA PROPERTY MANAGEMENT LIMITED	**Claimant**
- and -	
(1) RICHARD GEORGE CROMPTON	
(2) JONATHAN EDWARD COOKSON	**Defendants**

- -
- -

Mr Nicholas Trompeter KC (instructed by **Walker Morris LLP**) for the **Claimant**
Mr Adam Rosenthal KC and Mr Mark Galtrey (instructed by **Wedlake Bell LLP**) for the **Defendants**

Hearing dates: 20, 21, 22, 23 September 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 28th October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

The Vice-Chancellor:

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Introduction

1. In this action, the Claimant freeholder claims specific performance of the Defendant lessees' repairing obligations under a lease of the common parts of a tall building known as North Tower, Victoria Bridge Street, Salford M3 5AS ('**the Building**'). Unusually, the Defendants were the receivers of the Building, appointed in 2011 by West Bromwich Commercial Ltd ("**the Lender**") under a charge granted by the Claimant in 2005. The lease was vested in the Defendants in 2013. The charge and so the receivership were discharged in 2016, but the lease remains vested in the Defendants.

2. The real issues in the action are somewhat removed from the issues usually raised by a landlord's claim to enforce a tenant's repairing obligations. They are whether the Claimant is estopped from contending that the Defendants are liable to carry out the works identified in the Particulars of Claim; whether the Defendants were acting as agents of the Claimant when they had the lease vested in them in 2013 and are entitled to be indemnified by the Claimant; and whether the Claimant unreasonably imposed a condition when granting the Defendants licence in November 2020 to assign the lease to a residential tenants' management

company, North Tower Residential Management Limited ("**NTRML**"). There is also the question of whether, in all the circumstances, the court should exercise its discretion to refuse the equitable remedy of specific performance.

3. The arguments raised by Mr Trompeter KC on behalf of the Claimant and Mr Rosenthal KC and Mr Galtrey on behalf of the Defendant raise some subtle and difficult issues. I am grateful to all of them for their arguments, both oral and written, and for the helpful way that the trial was conducted within the shortened time available.

The facts in outline

4. In outline, the undisputed facts are the following.

5. The Building was constructed in the 1960s. It comprises 22 storeys above ground level. It is unknown how and by whom it was occupied before 1999, when Bruntwood Estates Ltd ("**Bruntwood**") had become the owner of the freehold. The common parts lease in issue in this case (which I will refer to as the "**CP Lease**") was granted by Bruntwood to North Tower Management Company Limited ("**NTMC**") on 6 August 1999 for a long term of years. NTMC covenanted to repair not just the demised premises but also the structure and exterior of the whole of the Building.

6. On the same day, Bruntwood granted a lease of the ground floor and residential upper storeys of the Building to Crosby Homes (North West) Limited ("**Crosby**") for an equally long term of years ("**the Residential Headlease**"). Bruntwood also granted at the same time a long headlease of the non-residential parts of the Building to a related company, Bruntwood First Properties Ltd.

7. Also on the same day, NTMC and Crosby entered into a deed of maintenance ("**Deed of Covenant**"), by which NTMC covenanted with Crosby to perform its obligations in the CP Lease, which included an obligation to provide various services ("**the Services**"). These included the repair obligations. Crosby covenanted to reimburse 50.58% of NTMC's relevant expenditure on Services. The remaining 49.42% of the relevant expenditure incurred by NTMC on Services was payable by Bruntwood to NTMC under the terms of the CP Lease.

8. Long leases of most of the individual flats in the residential upper parts were granted by Crosby at premiums during 2000 and 2001. Under the terms of these leases, the lessees covenant to pay Crosby a service charge, part of which relates to Crosby's own expenditure in running the residential floors of the Building and part of which is the money that Crosby is obliged to pay NTMC under the Deed of Covenant.

9. On 14 November 2001, Bruntwood First Properties Ltd granted a 35-year lease of the hotel premises to Scottish & Newcastle plc ("**the Hotel Lease**"), reserving a rack rent and service charge of 47.55% of relevant expenditure on the Building. Thus, the Bruntwood group of companies had substantial income from the lower storeys of the Building from which to pay NTMC its proportion of the cost of the Services. NTMC as CP Lessee had no income from the Building other than reimbursed service charge expenditure.

10. What is unusual about the leasehold structure created is that in the Residential Headlease Bruntwood assumed an obligation to Crosby, and in the Hotel Lease it guaranteed an obligation of Bruntwood First Properties Ltd, to repair and maintain the Building, however Bruntwood itself was not able to recover the costs of the Services. Crosby was liable to pay its share only to NTMC, under the Deed of Covenant.

11. This was evidently deliberate, since the CP Lease, the Residential Headlease and the Deed of Covenant were all made on the same day, as part of a composite transaction. The intention appears to have been that the function of carrying out repairs and charging and recovering service charge was not to be borne by the freeholder but by another company, which would discharge the freeholder's obligations. The freeholder would therefore depend on the CP Lessee to perform its obligation to provide the Services. That would make the reliability of that lessee a matter of some importance to the freeholder, and the CP Lease and the associated Deed of Covenant were essential components of the service charge machinery of the Building.

12. The characteristics of the structure that I have described make it inherently likely that the freeholder would wish to have control of, or at least influence over, NTMC. NTMC was a new company incorporated for the purpose and had no significant assets other than the CP Lease. Its 100 shares were allotted 50/50 to Bruntwood and Crosby, so Crosby too had a measure of influence.

13. On 29 March 2005, the Claimant was registered as freehold proprietor of the Building. Mr Weis, who became a director of the Claimant company in 2014, said that the Claimant is a nominee company controlled by Combined Property Control ("**CPC**"), a firm set up by his father, Aubrey Weis, and that the assets of the Claimant were held on trust for The Helping Foundation.

14. The funding for the acquisition was restructured later in the year: the Claimant took a substantial loan from the Lender, secured by a charge dated 21 December 2005 ("**the Charge**"). Under the terms of the Charge, the Claimant warranted that it was the legal and beneficial owner of the charged property, which included the Building. The Charge therefore must have been granted with the consent of the beneficial owner, and the Claimant cannot contend otherwise in connection with the Lender's rights and the receivership of the freehold of the Building.

15. There was no direct evidence that the Claimant also took an assignment of the headlease of the non-residential parts from Bruntwood First Properties Ltd, but Mr Weis said that the Claimant acquired the freehold because of the income generated by the Hotel Lease, so it is to be inferred that the headlease was acquired together with the freehold.

16. The Claimant as freeholder thereby became liable under the terms of the Residential Headlease and the guarantee of the Hotel Lease to repair the Building; entitled to the benefit of NTMC's covenants in the CP Lease; and liable to pay NTMC 49.42% of the relevant service charge expenditure to NTMC. It was also assumed by the parties to this action that (as one would have expected) the shares in NTMC belonging to Bruntwood were acquired by the Claimant.

17. On 1 September 2009, NTRML (a company owned by the long lessees of individual flats in the residential upper parts of the Building) became the registered proprietor of the Residential Headlease, and in principle became liable to pay NTMC 50.58% of NTMC's relevant service charge expenditure pursuant to the Deed of Covenant. There was no evidence about what happened to Crosby's 50 shares in NTMC.

18. During 2010, the Claimant fell into arrears on payments due under the Charge. On 7 January 2011, the Lender appointed the Defendants joint receivers of the Claimant's interests in the Building and one other property. The Charge post-dated the CP Lease, the Residential Headlease, the commercial headlease and the Hotel Lease and so the receivership property was subject to and with the benefit of those prior estates in the Building.

19. Shortly after the appointment of the Defendants, NTMC was dissolved for failure to file its annual accounts. The reasons why it was allowed to be struck off the Register were not explored and are not clear. At that time there were 4 directors of NTMC, three of whom were also directors of the Claimant.

20. The dissolution caused a potentially serious problem for the Defendants as receivers, which they quickly recognised. Only NTMC had the right to recover service charge from the Claimant (under the terms of the CP Lease) and from NTRML (under the terms of the Deed of Covenant). The Claimant (in receivership) had a liability to NTRML and Premier Inn (which had by then become tenant under the Hotel Lease) to keep the Building in good repair but had no right to recover a contribution from NTRML. Without the benefit of the CP Lease, the value of the freehold of the Building was likely to be seriously impaired.

21. The Defendants took legal advice, which considered and rejected the viability of an application by them to restore NTMC to the Register. A letter was written to the Treasury Solicitor requesting an assignment of the CP Lease to a new company controlled by the Defendants, but the Crown thereupon disclaimed the CP Lease. That meant that, for the time being, the freehold of the Building, of which the Defendants were receivers, was not encumbered by the CP Lease and the common parts were back in the possession of the Claimant.

22. On learning of the disclaimer, the Defendants' lawyers considered other options. It was decided that there should be an application to vest the CP Lease in either a new company, of which the Defendants would be directors, or in the Defendants themselves. An application was first made to vest the CP Lease in a new company but that was delayed. For whatever reason, a second application was then made on 22 March 2013 for an order vesting the CP Lease in the Defendants themselves, as joint LPA receivers of the Building. The evidence in support of this application included a letter of support from the directors of NTRML.

23. When considering their options, the Defendants' solicitors had approached the Lender to seek an indemnity against expenses or liability resulting from their taking control of the CP Lease through a new company. Mr Crompton told me that this was firmly rejected by the Lender, which had a policy of not giving indemnities to receivers. The Defendants decided to proceed anyway with the

second vesting order application and did not apply again for an indemnity from the Lender. Mr Crompton said that it would have been pointless to ask again and frankly accepted that he and Mr Cookson realised that taking the CP Lease in their names exposed them to potential risk. However, he said, the risk was not great because the receivership strategy was to sell the receivership assets, and any purchaser would need to have control of the CP Lease to run the service charge for the Building. The receivers would not sell except on terms that the CP Lease was assigned to the purchaser.

24. On 30 April 2013, DJ Matharu made an order vesting the CP Lease in the Defendants. Thereafter, the Defendants took steps towards carrying out certain repairs to the Building, including instructing Thomasons to do a survey and prepare a specification, but the works were not done. This was because, in 2014, the Defendants determined that the time was right to market the Building for sale, in order to redeem the debt. A sale was soon agreed at a satisfactory price, which reflected the fact that the purchaser would be responsible for any works. The Defendants decided that it was not in the Lender's best interests to proceed with the works, as the Building was soon to be sold. In the event, negotiations for the sale were protracted and the sale fell through almost a year later.

25. The intending purchaser considered that there was a question about whether Crosby's covenant in the Deed of Covenant bound NTRML and had passed to the Defendants and so could be passed to the purchaser. As a result, at the request of the purchaser's solicitors, the Defendants entered into a further deed with NTRML, novating the obligations in the Deed of Covenant and providing for further novation in the event of a transfer of the CP Lease. The Defendants could have waited until completion of the intended sale but were willing to make the new deed in order to fill a perceived gap in the structure.

26. A further sale was then negotiated by the Defendants, but before it could happen the Claimant started a redemption action against the Lender in May 2016. The action provoked settlement negotiations, in the course of which the amount due to the Lender and terms of settlement were agreed. The Defendants were not parties to the eventual settlement and they were not released from any liability that they had incurred as receivers. There was no assignment to the Claimant or anyone else of the CP Lease or the benefit of the deeds of covenant on discharge of the receivership.

27. The Defendants were asked to hand over the keys to the Building, communicate with contractors and suppliers, pass over any funds they held to the Claimant, and instruct tenants who had previously been paying the Defendants to pay Landswood de Coy, the Claimant's managing agents, instead. On 27 September 2016, solicitors for the Lender and solicitors for the Claimant both sought assurances from the Defendants that any rents held by the Defendants would be forwarded to the Claimant, and the Defendants provided the Claimant with rent authority letters, directing future payment to Landswood de Coy. There were also emails sent by Colliers informing suppliers that Landswood de Coy would be dealing with their invoices. Handover meetings between Landswood de Coy and the Defendants' agents, Colliers, took place as a result of which, from 7 October 2016, the Defendants had nothing more to do with the Building or the provision of the Services, which were provided from that date by Landswood de Coy on

behalf of the Claimant. The Defendants were asked to and did sign formal letters on that date acknowledging the termination of the receivership.

28. About ten months later, on 14 August 2017, the Claimant contacted the Defendants seeking to tidy up "some loose ends", viz the CP Lease and the Deed of Covenant. Solicitors were instructed on both sides to progress assigning them to a newly-incorporated group company of CPC, Alma Estates Ltd, but the matter appears to have been lost sight of on both sides when the Defendants' lawyer at Shoosmiths left the firm in June 2018. The CP Lease remained vested in the Defendants. During this time, Landswood de Coy continued to manage the Building on behalf of the Claimant.

29. The condition of the exterior of the Building was poor. Water leaked into some flats. Letters before action started to be sent to Landswood de Coy. Mr Schwab said that he found this irritating, as his firm was trying to address the issue of disrepair and the Defendants were to blame for the poor condition. However, works were still not done.

30. At about this time, in late 2019 or early 2020, the Claimant appeared to have a change of mind about the CP Lease. Mr Weis said that it considered that its interests were better served by leaving the CP Lease vested in the Defendants and requiring them to comply with their repairing obligations. The Defendants were notified of the Claimant's intended claim against them, requiring them to carry out repair works, by letter dated 30 March 2020. This wholly unrealistically gave the Defendants 28 days to provide details of how they were going to carry out the works or repair and maintenance. Between October 2016 and 30 March 2020 there had been no suggestion that the Defendants were expected to repair the Building, provide the Services or otherwise comply with the terms of the CP Lease. It was Landswood de Coy who were managing the Building and providing the Services. They had commissioned tender documentation from Thomasons to carry out works, and Thomasons had delivered a tender appraisal report on 14 November 2019.

31. A claim form was then issued on 28 August 2020. It seeks an order that the Defendants provide the Services in the CP Lease and an order requiring the Defendants to carry out identified works ("the Works"). Before filing a Defence, the Defendants requested consent to assign the CP Lease to NTRML. By letter dated 25 November 2020 the Claimant gave consent to the assignment of the CP Lease to NTRML, but only on condition that the Defendants each entered into authorised guarantee agreements ("**AGAs**"). The Defendants counterclaim a declaration that that condition was unreasonable.

32. In October 2021, without prejudice to the arguments and issues at trial, the parties and NTRML agreed that NTRML would be permitted to proceed to carry out the necessary works of repair to the Building. Since then, NTRML has appointed professionals to re-survey the whole Building in order to prepare a specification for all works currently required, not just the works that Thomasons had previously specified. It has given notice of intention to carry out the work and sent a specification out to tender. The tender returns were expected to be received shortly after the hearing ended.

The issues at trial

33. In its skeleton argument, the Claimant conceded its claim for an order in terms requiring the Defendants to provide all the Services under the CP Lease, and pursued only an order requiring the Defendants to carry out the Works. It is common ground that the Works need to be carried out.

34. At my request, Counsel agreed a list of the issues to be decided. There are three groups of issues in their list:

    i) Various issues in connection with the question of whether the AGA condition was a reasonable condition to impose, and if not the effect of imposing it;

    ii) Whether the Claimant is estopped from claiming that the Defendants are liable to carry out the Works;

    iii) Various issues relating to whether, as a matter of discretion, this Court should decline to grant the remedy of specific performance, including the agency and indemnity questions.

35. I propose to deal first with the facts and arguments relating to the estoppel argument, noting that the plea of estoppel in the Defence is that, by reason of a common assumption and a representation of the Claimant and reliance on these by the Defendants:

> "It is therefore unconscionable for the Claimant to seek to enforce the covenants of the [CP Lease] against the Defendants and the Claimant is estopped from doing so."

    It is accordingly not just an allegation of past breach (failure to carry out the Works) but compliance with the covenants now and in future from which the Claimant is alleged to be estopped. The Defendants did not argue that the Claimant was in some way estopped from relying on the actual physical condition of the Building and the need for repairs, just from asserting a liability to comply with the tenant covenants.

36. I will then deal with the issues relating to grant or withholding of specific performance as a matter of discretion, before turning to the primary battleground at trial, which was whether the AGA condition was a reasonable condition to impose in all the circumstances as they were in November 2020 and the effect of doing so.

37. The arguments on these issues raise some novel and interesting issues, not least how the indemnity to which fixed charge receivers are *prima facie* entitled when exercising their powers applies to a case where they have a lease of property vested in them or where they enter into an AGA.

The Witnesses

38. On behalf of Alma, I heard evidence from Mr Sir (Joel) Weis, a director of the Claimant, and Mr Edward Schwab of Landswood de Coy.

39. Neither of their witness statements complied fully with PD 57AC. There was no list of documents to which each witness had been referred during the preparation of his statement, and neither witness gave an indication of how good his memory was of the principal factual issues in the case. The witness statements were, to a significant extent, a commentary on the documents and, in Mr Weis's case, argument on the merits of his company's case.

40. I found Mr Weis to be a knowledgeable but somewhat less than open and frank witness. On a number of occasions he was evasive in his answers to questions, where they touched upon matters that were potentially difficult for Alma's case. He did not give a straight answer to questions about whether NTRML was liable to pay service charge to the Claimant, in particular in relation to the winding up petitions that the Claimant had presented against it, or about whether the Claimant had instructed Landswood de Coy to proceed with certain works to the Building. He said that it was not a mistake that redemption of the Charge occurred without assignment of the CP Lease but did not explain why.

41. Nor was he straightforward about the reason why Alma approached the Defendants in 2017 seeking an assignment of the CP Lease and the benefit of the Deed of Covenant, but then that assignment did not happen. He accepted that Alma Estates Ltd was set up in 2017 to take an assignment of the CP Lease, but was non-committal about whether it was the intention of the Claimant to take control, seeming to imply that assigning the CP Lease to Alma Estates Ltd would not give the Claimant effective control of the Services.

42. He said, with a straight face, that by imposing a condition of AGAs on assignment of the CP Lease to NTRML the Claimant felt that it was helping the Defendants, by not refusing consent outright. When challenged about his reasons for imposing the condition, Mr Weis argued the case on reasonableness rather than doing his best to recall what Alma's thinking was in November 2020. In at least two respects (cost of necessary works and available funds of NTRML), this caused him to advance arguments that were contradicted by the November 2020 decision letter. He did however say, in re-examination, that his reaction to the request for licence to assign the CP Lease was that it was *chutzpah* for the Defendants, who were responsible for the disrepair, to try to pass on the liability to someone else.

43. I am cautious about taking his evidence at face value, particularly that concerning what the Claimant was doing between 2016 and 2020 and the Claimant's motives and the reasons for granting conditional consent.

44. Mr Schwab was more than usually defensive, for a professional witness, and seemed reluctant to accept any proposition that might reflect badly on his management of the Building or detract from the Claimant's arguments that the Defendants were to blame for the condition of the Building and that NTRML was an unsuitable assignee of the CP Lease. He was particularly reticent on the

question of how Landswood de Coy had managed the Services for 4 years without being able to rely on the obligations and rights in the CP Lease, and why he assumed that NTRML knew that the CP Lease remained vested in the Defendants. He seemed keen to criticise NTRML for doing a complete survey of the Building, once it had been agreed that NTRML should proceed to do the necessary work to the structure and exterior of the Building, and to argue that there was reason to believe (owing to the cost of the work) that NTRML would not be able to proceed with all the work in one project. I felt that he was generally an honest witness, but one with a tendency to emphasise matters that he thought served his client's interests.

45. The Defendants both gave evidence and they also called Ms Edwina Forrest, a certified accountant and a director of NTRML since September 2018. None of their witness statements complied with PD 57AC either.

46. I found both of the Defendants to be entirely honest and straightforward witnesses, who – where it was right to do so – made admissions contrary to their interests, without equivocation. They both appeared to have good recollection of events and the reasons for them, though Mr Crompton was little involved after February 2016. I am able to accept their evidence in full, save where it is demonstrated to be in error by the documentary evidence.

47. Ms Forrest was a careful and meticulous witness, who tried hard to answer accurately the questions that were put to her. She intervened, as a flat lessee, in the management of the Building when she became concerned about the management of a previous director of NTRML, a Ms Hartley, through her company, Heart Residential Management Ltd. I found her evidence generally to be reliable and persuasive, subject to one matter, which perhaps was not ultimately very important. She was asked about the solvency of NTRML and some arrears of service charge previously recorded as owing to the Defendants, which had been written out of NTRML's later accounts. When asked whether, if those arrears were still due, NTRML would be balance sheet insolvent, she stubbornly refused to answer, on the basis that the question was hypothetical. I formed the impression that the reason for this was that to give a hypothetical answer offended her sensibilities as an accountant, rather than that she was trying to hide anything, as the answer to the hypothetical question was obvious, based on the facts that she had otherwise confirmed.

The material terms of the CP Lease and Deed of Covenant

48. The CP Lease demised the premises edged red on plans within the deed for a term of 130 years less 10 days from 6 August 1999. These premises included the whole of the roof apart from the external walls, the whole of a sub-basement and basement, other than structural walls, the whole of the tenth floor, substantial parts of the 23rd floor, and otherwise only staircases and small areas (perhaps risers) on the other floors. The demise is stated to exclude external walls and internal load bearing walls, other than their internal plaster finishes. The rent is one peppercorn, if demanded.

49. Clause 3 of the CP Lease is a non-merger provision, so that if NTMC or its successor in title acquired the reversion, the CP Lease would not merge in the reversionary estate. This is said to be in order to secure the continued administration of Bruntwood's estate and the provision of the Services and the repayment of the cost to NTMC. There is a covenant by NTMC to use the demised premises only for those purposes and ancillary purposes.

50. There is a covenant by NTMC to repair the demised premises and all pipes exclusively serving them.

51. NTMC covenants at clause 4.17.1:

> "not to assign sub-let part with the possession or share the occupation of the Premises or any part of them Provided that the Company may with the prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed) assign the whole of the Premises"

52. Clause 6.2 provides:

> "If the Company defaults in the performance of any of the covenants contained in this lease for and relating to the repair of the Premises the Landlord may (but without prejudice to the right of re-entry contained in this lease) enter upon the Premises and repair the same at the expense of the Company in accordance with the covenants and provisions of this lease and the expenses of such repairs shall be repaid by the Company to the Landlord on demand".

53. Clause 6.7 is a proviso that:

> "In the event of the Company failing to carry out any of its obligations under this lease the Landlord shall give the Company 28 days' notice in writing to perform such of those obligations as are specified in the notice and if the Company fails to comply within the time specified the Landlord may at his discretion take all necessary steps to fulfil the obligations referred to in the notice and recover the cost reasonably incurred in so doing from the Company."

A right of entry for the purposes of clauses 6.2 and 6.7 (among others) is reserved as an easement in the Third Schedule and NTMC covenants in para 1 of the Fifth Schedule to allow such entry.

54. By paras 4.4 and 10 of the Sixth Schedule, NTMC was under an obligation to make proper provision for the sums required in each financial year to provide the Services in Part C of that schedule and the additional matters stated in Part D, and Bruntwood agreed to pay 49.42% of such expenditure annually. The Services included repairing the structure and exterior of the Building and the plant, i.e. an obligation going beyond maintenance of the demised premises. Bruntwood was liable to pay in advance 49.42% of such sum as should be reasonably estimated as the necessary expenditure on those matters.

55. The Deed of Covenant was made between Crosby and NTMC on the same day as the CP Lease. By clause 2, NTMC covenanted for itself and its successors in title to comply with all its obligations in the CP Lease and Crosby covenanted for itself and its successors in title to pay 50.58% annually of the expenditure incurred by NTMC under the CP Lease, by way of advance payment based on estimated expenditure and a balancing sum at the end of the accounting year, if needed.

The estoppel arguments

56. The Defendants contend that the Claimant is estopped from asserting that they are now liable to carry out the Works, by way of performing the obligations of the CP Lease. The claim is for an order that the Defendants carry out work set out in a specification at Appendix B to the Amended Particulars of Claim ("**the Works**"). These are repairs to the concrete and associated elements of the facades and the roof of the Building, specified in tender documents issued by Thomasons dated 20 September 2019. That specification and the tender documentation was issued by Thomasons to Landswood de Coy, Alma's managing agents.

57. During the receivership and while the CP Lease was vested in them, the Defendants managed the Building and sought to recover service charge payments from NTRML under the terms of the CP Lease and the Deed of Covenant (ignoring the technicality, never relied on by NTRML, that the Deed of Covenant was made with their predecessor in title). There was criticism from Mr Weis and Mr Schwab of the Defendants' efforts from 2013 to 2016 to recover service charge contributions from NTRML, but such monies as were received were held by the Defendants. Under the terms of the draft deed of settlement provided to the Defendants on 3 June 2016 and the eventually executed deed of settlement between Alma and West Brom (which the Defendants did not see until much later), the receivers were required to pass all such monies to the Claimant's managing agents, who were going to take over management of the Building.

58. The redemption sum agreed in the settlement deed included fees payable to the Defendants to defray their costs of the receivership. Landswood de Coy were appointed by Alma as managing agents for the Building in September 2016 and the Defendants ceased to have anything to do with the service charge and provision of Services to the Building in October 2016. They both said that they believed that their role had ended with the deed of settlement and the termination of the receivership, which was formally evidenced by the letter from Mr Cookson on behalf of the Defendants dated 7 October 2016. From that time (or on their account from 27 September 2016) until March 2020, Landswood de Coy managed the Building and provided some of the Services, but did not carry out the Works.

59. The Defendants accepted that they knew that they had not obtained a settlement with the Claimant and the Lender, and that they had not obtained a release of liability. However, they believed that any continuing duties in relation to the Building had ceased. They assumed that the CP Lease would be dealt with by their lawyers.

60. The alleged estoppel is put, first, on the basis of an estoppel by convention, arising from a common assumption or understanding that, from October 2016 onwards, the Claimant and not the Defendants was to be responsible for providing Services to the Building. The Claimant was accordingly responsible for carrying out any necessary repairs, including the Works. Although these were not specifically identified until 2019, it was known and had been known for years that works of repair were needed.

61. The alternative basis of the defence is an estoppel by representation, arising from the representation implicit in the draft deed of settlement, including in particular clause 3.4, and then the settlement between the Lender and the Claimant (although the Defendants did not see its terms at that time). There were email exchanges on or around 27 September 2016 between solicitors for the Lender, the Claimant and the Defendants, which required the Defendants to forward rents received and to pass over to the Claimant any management funds that they held and notify third parties that thenceforth they should make payment to Landswood de Coy instead of the Defendants. Although some of these emails were sent by the Lender's solicitors, they were clearly to give effect to the terms of settlement that the Claimant had agreed.

62. It is alleged that the Defendants relied on the assumption and representation by complying with the directions and leaving all matters relating to the Services, including the repair of the Building, to Landswood de Coy, and that this was to their detriment because after 2016 the condition of the Building had further deteriorated. The consequence of that is that repairs that are more extensive and more expensive are now required, which would have to be commissioned and funded by the Defendants, subject to their rights of recoupment.

Estoppel: the facts

63. The facts that I find relating to the alleged common assumption or understanding and representation are as follows:

    i) Colliers on behalf of the Defendant receivers had acted as managing agents for the Building from 2011 until about 27 September 2016.

    ii) Alma decided in about May 2016 that, rather than submit to a sale by the Defendants, it would redeem the Lender's charge. I find that Mr Weis, an experienced property investor and manager, knew that redemption would terminate the receivership and give Alma back effective control of the Building, free from any involvement of the Defendants, whose role would end with the redemption of the Charge.

    iii) The Defendants, as experienced receivers of property assets, also knew that redemption would end the receivership and their role as agents of the Claimant. They also knew that the CP Lease was vested in them.

    iv) Mr Weis did not focus on the detailed machinery for taking back control and so did not focus on the CP Lease. He said in cross-examination that, when the Charge was redeemed, it had not been a mistake that the CP Lease was not transferred into the Claimant's control. He did not explain why the

CP Lease had been left with the Receivers, and so why it was not a mistake. I reject his evidence in that regard. It was clearly an oversight at the time. The email of 14 August 2017 is consistent only with the transfer of the CP Lease having been overlooked. There was good reason to take control of the CP Lease, which was an essential part of the machinery to manage the Building, unless (perhaps) Alma was intending shortly after redemption to seek to enforce it against the Defendants. This did not happen.

v) Mr Weis was not aware of the fact that the CP Lease had been left with the Defendants until after Mr Schwab had taken legal advice about the leasehold structure of the Building in early 2017, when he was informed of the problem of managing without the CP Lease. I find that it is likely that Mr Schwab mentioned this to Mr Weis or Mr Stone some time after March 2017.

vi) It was intended by the Claimant that Landswood de Coy would take over the role of managing agents from Colliers. There was no exception to this that was identified at the time, nor was there intended to be any exception.

vii) Following the instruction of Landswood de Coy, the actions of the Defendants to comply with the requests in email dated 27 September 2016, and the handover meetings, the Claimant, acting by Mr Weis, understood that it, through Landswood de Coy, would solely manage the Building and provide all the Services from that time, including carrying out any necessary repairs to the Building. The Claimant also understood that the Defendants and Colliers would neither manage the Building nor provide the Services from that time.

viii) The Defendants, not having been parties to or given a copy of the actual deed of settlement, did not focus on the need to deal with the CP Lease. I accept their evidence that they assumed that such matters had been taken care of at the time of the redemption, or would be so taken care of after redemption. Had they asked themselves the question, they would have realised that they had not signed a deed of assignment of the CP Lease, but they did not in fact focus on this matter. What they understood was that, from 7 October 2016 at the latest, Landswood de Coy on behalf of the Claimant would be responsible going forwards for the management and provision of the Services to the Building. Mr Cookson was asked to sign and did sign the letter dated 7 October 2016 stating that the receivership was at an end. It is understandable that they believed, as I find that they did, that they would have no further responsibility or involvement.

ix) Nothing was directly said by anyone on behalf of the Claimant to the Defendants to encourage this assumption, but what was written by the Claimant's and Lender's solicitors to the Defendants and the handover meetings between Mr Schwab, acting as managing agent of Alma, and Colliers, were consistent only with the Claimant taking over responsibility for the Services and the Defendants' responsibilities ending. The email from the Claimant's solicitor to the Defendants' solicitor dated 27 September 2016 requesting that any rents received up to the date of redemption be handed over to the Claimant was consistent with that and

amounted to an indication that the Defendants' role as managers of the Building was at an end.

x) Neither the assumption about the change in management and responsibility nor the representation in the emails of 27 September 2016 were about whether the CP Lease remained vested in the Defendants or whether the Defendants remained liable on the covenants in the CP Lease. The assumption and representation were to the effect only that the Defendants' responsibility to manage the Building (and so necessarily providing the Services, including carrying out repairs) had come to an end, and that Landswood de Coy, on behalf of the Claimant, would be responsible going forwards.

xi) The Defendants knew that the Claimant assumed that it was responsible for the Services going forwards. Mr Cookson said that he signed the rent authority letter as requested and was informed about the handover by Colliers to Landswood de Coy and therefore believed that the Defendants were no longer *required* to continue to provide the Services. There was therefore reliance by Mr Cookson, on behalf of both Defendants (Mr Crompton no longer being routinely involved by that time), on the indication that they were no longer required to provide the Services. That is not, however, the same as an understanding or belief that they were no longer the lessees under the CP Lease. There was no assumption or shared understanding to that effect, as both Mr Crompton and Mr Cookson acknowledged. Neither did the communications contain a representation about whether the CP Lease was vested in the Defendants or that particular works would be done by the Claimant (the Works had not yet been specified).

xii) The Defendants received the email dated 14 August 2017 suggesting that some loose ends, including the CP Lease and the Deed of Covenant, should be addressed. What it said was entirely consistent with the previous assumption and representation, because it implied that the assignment of the CP Lease and Deed of Covenant were matters that had previously been overlooked. The letter did not negate the assumption and representation that the Defendants were not required to continue to manage the Building merely because it alluded to the CP Lease needing to be dealt with.

xiii) From October 2017, if not before, the Defendants were aware that the CP Lease had not been assigned to the Claimant. The email led to negotiations for the transfer of those interests to Alma Estates Ltd. Solicitors were acted on both sides.

xiv) If the Defendants had thought about it, they would have been aware that an assignment had not been executed between October 2017 and March 2020, but they did not think about it. Mr Cookson said that they assumed that their solicitors were dealing with it and left it to them. It is unclear why the assignment did not happen, but the departure of a solicitor at Shoosmiths dealing with the Defendants' receivership affairs in June 2018 is probably the reason, as there was no further communication on this matter between her replacement and the Claimant or the Defendants thereafter.

xv) Whatever the reason, there was no indication at any stage between 2017 and 2020 that the Defendants should perform the Services. During that time Landswood de Coy continued to perform that role and instructed Thomasons to prepare a specification and go out to tender for the Works.

xvi) I find that only at a later time, when the Claimant or its managing agent started to receive threats of claims for disrepair, and when the extent of necessary works had been identified by Thomasons, did Mr Weis become persuaded that the CP Lease might, to the Claimant's advantage, be left where it was rather than being brought back into the CPC group.

xvii) It was for that reason, I find, that the Claimant decided in March 2020 to try to hold the Defendants to their strict liability and, if necessary, sue the Defendants to enforce the repairing obligations of the CP Lease.

xviii) It is not in dispute that the condition of the Building must have deteriorated between 2016 and 2020, such that the cost of the necessary works to the structure and exterior would have increased to some extent, and with it the cost of the necessary works, but the degree of increase is not known.

Estoppel: the law

64. As regards estoppel by convention, the parties were agreed that the applicable law should be taken from the recent decision of the Supreme Court in Tinkler v Revenue and Customs Commissioners [2022] AC 886, per Lord Burrows JSC at [45] to [53], where the requirements of an estoppel by convention were set out and explained. Lord Burrows' judgment was agreed by Lord Hodge DPSC, Lady Arden and Lady Rose JJSC and Lord Briggs gave a concurring judgment.

65. Lord Burrows first referred to a judgment of Briggs J in Revenue and Customs Cmnrs v Benchdollar Ltd [2009] EWHC 1310 (Ch); [2010] 1 All ER 174, in which he said:

> "In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings . . . are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

66. The "*Benchdollar*" principles were later held to have omitted an important aspect of the first principle, which is the requirement for the conduct relied upon as giving rise to the assumption to have "crossed the line" between the parties. In Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd [2010] Pens LR 411, Briggs J accepted the submission of counsel that, by reference to a decision of the Court of Appeal known as The August Leonhardt [1985] 2 Lloyds Rep 28, his first principle should be amended to include that "the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred" (at para 137). In Blindley Heath Investments Ltd v Bass [2015] EWCA Civ 1023; [2017] Ch 389 at [92], the Court of Appeal again reiterated the importance of something "crossing the line". Lord Burrows explained the point further:

> "**51** It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for Cs reliance on the common assumption.
>
> **52** It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on Ds affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from *Spencer Bower, The Law Relating to Estoppel by Representation*, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:
>
> > "In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their common view (as opposed to each, keeping his own counsel, being responsible for his own view)."
>
> For a similar statement, using the same wording of Cs reliance on "the subscription" of D to the common assumption, see the present edition of that work, *Spencer Bower, Reliance-Based Estoppel*, 5th ed (2017), para 8.26. But this is not to suggest that C must be relying *solely* on D's affirmation of, or subscription to, the common assumption as opposed to C relying on its own mistaken assumption. It is sufficient that, as D intended or expected, D's affirmation of, or subscription to, the common assumption strengthened, or influenced, C in thereafter relying on the common assumption".

67. As for estoppel by representation, the principles are well-known and not disputed in this case, and they can be summarised briefly as: (1) the making of a representation of fact (2) that is clear and unambiguous (3) that was liable to induce the party to whom it was made to alter their position or rely on it and (4) did induce that party to alter their position or rely on it (5) to the detriment of that party (6) which is materially inconsistent with the later position being taken by the party who made the representation.

Estoppel: analysis

68. There was no common assumption or understanding about the CP Lease having become vested in the Claimant and not remaining vested in the Defendants. Mr Weis did not think about that at all. From some time after March 2017, he knew that the CP Lease remained vested in the Defendants. But there was a common understanding that, as from October 2016, the Defendants were not to be responsible for provision of Services to the Building, including repairs, and that the Claimant would take over that responsibility.

69. That understanding "crossed the line" from the Claimant to the Defendants because of the handover meetings between Colliers and Mr Schwab and the communications between the parties' respective solicitors, seeking to give effect to the settlement that ended the receivership. It also crossed the line by the conduct of the Claimant's agents, in that the functions that the Defendants were previously carrying out, through Colliers, were now being carried out by Mr Schwab. The Claimant's communications and actions, by their agents, brought home – and were intended to bring home – to the Defendants that their role in relation to rent and Services of the Building was at an end. The Claimant meant the Defendants to understand and respect the fact that Mr Schwab on its behalf was taking over.

70. That common assumption was not removed but reinforced by the email dated 14 August 2017. The loose end of the CP Lease and Deed of Covenant was consistent with the prior assumption that the Defendants' responsibility to provide the Services under the terms of the CP Lease was at an end.

71. Although the Defendants had their own understanding that their role as receivers and as managers of the Building ended on redemption of the Charge and that the Claimant then had control of the Building, that understanding was reinforced by the communications, the handover procedure and the conduct of Landswood de Coy, which conveyed to the Defendants that the Claimant saw matters the same way. The Defendants would inevitably have been – and I find that they were – influenced partly by the conduct of the Claimant's solicitors and agents to believe that they would no longer be responsible to provide the Services at the Building. I find that the Defendants did rely on the Claimant's conduct and therefore on the Claimant's understanding of what was to happen with regard to provision of Services from October 2016.

72. Two questions remain to be addressed. First, did the Defendants rely on the common understanding to their detriment and was the detriment sufficiently substantial to support the pleaded estoppel? Second, if so, what is it that the Claimant is estopped from denying, and does this extend to liability of the

Defendants, as lessees under the CP Lease, to comply with its terms in 2022 and hereafter?

73. The only detriment alleged by the Defendants is not progressing the assignment of the CP Lease from October 2016 and not doing the necessary repair work to the exterior of the Building at an earlier time.

74. Failure to progress the assignment of the CP Lease could only be detrimental reliance if, absent the common understanding or representation, the Defendants would have progressed it and obtained an assignment. But there was no evidence that the Defendants would have pursued the assignment but for the understanding or representation. If anything, these would have drawn attention to the need for an assignment, rather than the opposite: there was no understanding or representation to the effect that an assignment of the CP Lease was unnecessary. The matter was simply overlooked on both sides. When both sides became aware, in or before August 2017, of the fact that the CP Lease had not been assigned, it still was not assigned, even though it was recognised that it should be. There is therefore no causative link between the common understanding about who would manage the building and provide the Services and the non-assignment of the CP Lease.

75. As for not progressing the work to the exterior of the Building, the Defendants knew that the Charge was to be redeemed, upon execution of the deed of settlement with the Lender, and they understood that that meant the end of the receivership. They also knew that the CP Lease was vested in them. They expected that to be sorted out. I cannot accept that the Defendants would have promptly set about incurring substantial expenditure on repairs when they knew the receivership was at an end and expected something to be done about the CP Lease. However, as time went by, and the Defendants were reminded that the CP Lease was still vested in them, they would also have relied, and did as I have found rely, on the common understanding that it was no longer their responsibility to provide the Services. I accept, therefore, that the Defendants did no works of repair partly in reliance on the common understanding and the representation, so there is a sufficient causative link.

76. But what is the detriment that the Defendants suffered as a result? Instead of complying with the CP Lease and doing some works of repair between 2016 and 2020, they are now being required to do the Works in 2022. The detriment cannot be liability under the tenant covenants of the CP Lease going forwards: it is not alleged that the Claimant is estopped from contending that the Defendants are the CP Lessees and bound by the tenant covenants. Mr Rosenthal emphasised in closing submissions that the estoppel relates only to liability to carry out the Works.

77. The extent of the Works is likely to be greater than the repair work needed in 2016 and so the cost will have increased, but the Works are not ultimately funded by the Defendants. The Defendants are entitled to recoup from the Claimant and NTRML the whole of the cost. That cost will include administrative and management costs of the Defendants in commissioning the Works and recovering the contributions. There is no suggestion that the Claimant cannot or will not pay, and it is the Defendants' own case on the unreasonableness of the AGA condition

that NTRML would itself be able to pay for its proportion of the cost of the Works by recovering contributions from flat lessees.

78. Although the Claimant would in my judgment be estopped from alleging that the Defendants were in breach of covenant by not performing the repairing obligations of the CP Lease between October 2016 and about August 2020, they are not estopped from asserting that the CP Lease is vested in the Defendants or from seeking to hold them to the tenant covenants of the CP Lease going forwards. As things stand, those covenants include an obligation to provide the Services, which includes an obligation to repair the Building.

79. There is, in my judgment, no sufficient detriment incurred by the Defendants in reliance on the common understanding and representation in 2016 to preclude the Claimant from saying that the Defendants must now carry out the Works (in their more extensive and expensive form). There was no evidence that administration of the Works contract would now be significantly more onerous for the Defendants as a result of the Works being more extensive. In any event, the cost, including administrative costs, will be recouped by the Defendants. Were the Defendants now liable to fund the more expensive Works themselves or for whatever reason unable to recoup the cost from the Claimant and NTRML the position might be different and the estoppel as to the Works could have had continuing effect. But there is no such detriment in this case.

80. Mr Trompeter also submitted that an estoppel by convention can only have effect while the common understanding lasts and "does not apply to future dealings", in the words of the President of the Upper Tribunal (Lands Chamber) in Tingdene Holiday Parks Ltd v Cox [2011] UKUT 310 (LC). Mr Trompeter suggested that the common assumption and therefore the estoppel ended when the letter of March 2020 calling on the Defendants to comply with their obligations was written.

81. I do not consider that the President was deciding a general proposition of law in that case, as it appears to have been conceded that the estoppel asserted in relation to the past could not apply to future service charge years. In principle, if future events are separate transactions or dealings, it is easy to see that a common understanding, once ended, cannot create an estoppel in relation to them. However, if the future dealings arise from a relationship or engagement already established and shaped by the common understanding, the position may be different. The answer to the question is likely to depend on the character of the assumption or understanding that was shared and the nature of the detriment incurred by the defendant in reliance on it.

82. However, I agree that on the facts of this case there was no sufficient common understanding about future liability under the tenant covenants of the CP Lease to preclude the Claimant from giving a reasonable period of notice to resume its right to hold the Defendants to their future obligations.

83. I therefore conclude that although there was a common understanding between 2016 and 2020 and a representation made on behalf of the Claimant in 2016, which resulted in the Defendants not managing the Building or carrying out the Works during that period, there was no sufficient detrimental reliance by the

Defendants to prevent the Claimant, after a reasonable period of notice, from alleging that the Defendants are obliged to repair the Building by carrying out the Works.

Discretion to refuse specific performance

Conduct of Claimant

84. Under this heading, it is convenient to deal first with the Defendants' argument that the Claimant's conduct disentitles it to specific performance. The Defendants had wished to rely on an allegation that the Claimant did not come to equity with clean hands because it had deliberately caused or allowed NTMC to be struck off the Register, in an attempt to obstruct the receivership of the Building. I ruled on day 1 of the trial that the Defendants could not pursue any specific allegation of wrongdoing of this kind because it had not been pleaded. All that had been pleaded was that NTMC and the Claimant had common directors, that the Claimant held 50% of the shares in NTMC and that the Claimant *could have prevented* the striking off. It was never explained how the Claimant itself, as opposed to the individual directors of NTMC, could have prevented the striking off.

85. There was no other allegation of unclean hands pursued by the Defendants in their closing submissions. What Mr Rosenthal submitted was that the directors of the Claimant were "instrumental" in the circumstances that led to the striking off of NTMC, and that the Claimant, as a 50% shareholder, could have influenced NTMC's conduct at the time. The Defendants as receivers were left in a position where they had to do something, and the vesting order (and so liability under the tenant covenants of the CP Lease) was the result. That being so, the Defendants submit, the Court should decline to enforce the repairing obligations against the Defendants.

86. Whatever the directors of NTMC (3 of whom were also directors of the Claimant) might have done to rescue that company, I cannot see how the Claimant itself can be said to have been involved in such matters, so as to justify the Court refusing specific performance on that basis. The Defendants are not able to pursue an allegation of moral or legal wrongdoing. The inaction of NTMC's directors is not to be attributed to the Claimant, and as a 50% shareholder the Claimant did not have control of NTMC. The status of the Claimant as freeholder of the Building and landlord under the CP Lease is a separate matter, not a question of its "conduct", and I will consider those aspects in due course. There is, however, no good reason to refuse specific performance on grounds of the Claimant's conduct.

Approach to enforcing tenant's repairing obligations

87. Turning to the nature of the obligation sought to be enforced, the Defendants submit that it is settled law that a tenant's repairing obligations will only rarely be enforced specifically, and will not be enforced where the loss to the landlord is merely financial or if the landlord has other adequate remedies. It was indeed, prior to Rainbow Estates Ltd v Tokenhold Ltd [1999] Ch 64, settled law that a tenant's repairing obligations should not be enforced specifically, but that

decision, which still remains the leading decision on the subject, has altered the way that courts now approach enforcement of tenants' repairing liabilities.

88. In that case, Mr Lawrence Collins QC, as he then was, explained why various historic justifications for not ordering specific performance of a tenant's repairing obligations had little traction in modern times, subject to adequate definition of the works to be done and damages not being an adequate remedy for the landlord. The Deputy Judge held that, in principle, a remedy of specific performance should be available, in the modern law of landlord and tenant, in appropriate circumstances, where it is the appropriate remedy, and subject always to the need to avoid injustice or oppression:

> "Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy. This will be particularly important if there is substantial difficulty in the way of the landlord effecting repairs: the landlord may not have a right of access to the property to effect necessary repairs, since (in the absence of contrary agreement) a landlord has no right to enter the premises, and the condition of the premises may be deteriorating." (p.73).

89. The Deputy Judge further directed himself that specific performance should not be granted if the effect would be to cause the same mischief against which the Leasehold Property Repairs Act 1938 was enacted, namely the oppression of tenants by speculative property owners. He concluded:

> "It follows that not only is there a need for great caution in granting the remedy against a tenant, but also that it will be a rare case in which the remedy of specific performance will be the appropriate one: in the case of commercial leases, the landlord will normally have the right to forfeit or to enter and do the repairs at the expense of the tenant; in residential leases, the landlord will normally have the right to forfeit in appropriate cases." (pp. 73-4)

In that case, the Deputy Judge ordered specific performance because there was serious disrepair and no adequate alternative remedy for the landlord, the lease not containing a proviso for re-entry or a right to enter to do the work.

Arguments why specific performance should be refused

90. In view of the principles established in the Rainbow Estates case, and with regard to other matters, the following reasons are relied on by the Defendants in this case for the Claimant being left to other remedies and specific performance being refused, in the court's discretion:

    i) The Claimant can itself carry out the Works and recover NTRML's contribution to the cost, so it has an appropriate alternative remedy in its hands.

ii) The Claimant is liable to pay roughly half the cost of the Works in any event, therefore it is more appropriate for it to have charge of the Works.

iii) The Claimant, by trying to enforce the Defendants' obligations, is only seeking to avoid the administrative responsibility and initial cost of funding the Works, so the reasons for specific performance are not to ensure that the Works are done but to put the Claimant in a better financial position.

iv) The Defendants became CP Lessees in the course of their duties as receivers of the Building, acting within the scope of their powers, and were therefore deemed to have been acting as agents for the Claimant in taking on the responsibility of the CP Lease. It would therefore be wrong for the deemed principal to seek to enforce the obligation against its agent.

v) That is particularly so as the Defendants are entitled to be indemnified against liability under the CP Lease and the Deed of Covenant, because the liabilities were incurred by receivers in the exercise of powers as agents for the Claimant.

Finally, and separately, the Defendants contend that they are entitled now to assign the CP Lease to NTRML because the Claimant consented to the assignment and the condition of the Defendants entering into guarantees that it sought to impose was unreasonable in the circumstances. They therefore argue that on that basis too specific performance should not be granted against them and NTRML should be left to carry out the repairs.

91. I will consider the five arguments on discretion first and then address separately the question of whether the condition on assignment was unreasonable. The first three of the discretion arguments can be addressed together.

More appropriate for the Claimant to do the Works

92. Under the leasehold structure created in 1999/2000, the freeholder is liable under the Residential Headlease and the Hotel Lease to repair the structure and exterior of the Building; it therefore necessarily has the right to do so, as against those lessees. As against NTMC and now the Defendants, the Claimant has the right under clause 6.2, upon default by the CP Lessee, to enter upon the demised premises and carry out repairs to those premises, recovering the cost in full from the CP Lessee. That right relates only to the premises demised by the CP Lease, which does not include the facades or main structure of the Building. Under clause 6.7, however, upon default by the CP Lessee of any of its obligations under the CP Lease, the Claimant has the right on 28 days' notice to fulfil any such obligation and recover the cost from the CP Lessee. Those obligations would include providing the Services and administering the service charge in accordance with the Sixth Schedule to the CP Lease. However, clause 6.7 does not give the Claimant the power to exercise rights conferred by the Deed of Covenant or by the further deed made between NTRML and the Defendants dated 26 January 2015.

93. There is no doubt therefore that the Claimant has the right as against all interested parties to do the Works and to step into the shoes of the Defendants under the

Sixth Schedule to the CP Lease to provide the Services, including carrying out repairs, but it could only seek to recover NTRML's contribution to the costs on the basis of an argument that it was subrogated to the Defendants' rights of recoupment, its performance having discharged the co-extensive liability of the Defendants. In practical terms, however, between October 2016 and March 2020 the Claimant, through Landswood de Coy, had been seeking (indeed bringing legal proceedings to enforce) payment of NTRML's proportion of expenditure and no objection had been raised by NTRML that it did not have title to do so. On the basis of the evidence that I heard, it is clear that NTRML will not refuse to contribute its share of the costs of the Works, whether they are carried out by the Claimant or the Defendants or by it.

94. The Claimant can say that the purpose of the leasehold structure was so that the freeholder did not have to do this and the CP Lessee would do so in its place. However, that objection is no different from any lease in which the obligation to repair the property is imposed by agreement on the tenant rather than the landlord but the landlord has a right to perform if the tenant defaults. The important point is that the Claimant has the ability itself to do the Works and recover that part of the cost for which it is not ultimately liable.

95. The fact that roughly half the cost falls to the Claimant is a further reason in favour of leaving the Claimant to its alternative remedy. As to whether it is seeking to put itself into a better financial position rather than secure the completion of the Works, I consider that it is seeking to do both. I find that the Claimant does not wish to have to fund the Works initially, while the contributions to their cost are collected from NTRML and the flat lessees, or bear any shortfall. It is therefore convenient for it if the Defendants can be forced to discharge that burden. But I find that the Claimant also has a justified concern that the Works should be done, preferably without delay. Unfortunately, bringing a claim for specific performance has only created further delay. If the Claimant, Landswood de Coy and Thomasons had pursued their original plan to do the Works, in 2020, supported by NTRML, instead of bringing this claim, the Works would by now have been completed.

Relationship of principal and agent

96. A more significant factor, in my judgment, is the fourth and fifth arguments advanced by the Defendants. They became the CP Lessees while they were acting as receivers for the Building. Under the terms of the Charge, the Defendants were to act as agents of the Claimant, not as agents of the Lender. If the Defendants were acting within their powers as receivers, the CP Lease is not property that should remain with the Defendants. Their role as receivers ended on redemption of the Charge, in which circumstances, subject to being indemnified against their costs and fees, they were required in equity to account to the Claimant for any assets they held, which included the CP Lease.

97. The first issue raised by the Claimant in this regard is whether the vesting order was obtained in the exercise of the Defendants' powers as receivers. Mr Trompeter submitted that the Defendants were not so acting, primarily on the basis that the CP Lease was not receivership property: only the freehold of the

Building was subject to the Charge. The acquisition of different property could not therefore be within the scope of their powers.

98. While it is true that the CP Lease itself was not charged to the Lender, the freehold of the Building was charged, and upon disclaimer of the CP Lease the common parts of the Building were held in possession by the Claimant. The receivers had been appointed over the freehold and therefore their interest at that stage included the common parts previously let to NTMC. Their primary duty to the Lender was to preserve that property and seek to realise it, in order to discharge the secured debt. Subject to that overriding duty, the Defendants as agents for the Claimant were obliged to account to the Claimant for their management of the Building.

99. The sui generis nature of a fixed receiver's agency was addressed by the Court of Appeal in Silven Properties Ltd v Royal Bank of Scotland plc [2004] 1 WLR 1997. The issue in that case was whether the wider management duties imposed on a receiver meant that he, unlike a mortgagee, owned the mortgagor a duty to select the best time to sell a charged property. Lightman J, giving the judgment of the Court, explained that a receiver had a duty to be active in protecting and preserving the value of the receivership property. He explained that the agency relationship between the mortgagor and the receiver was no ordinary agency, since the receiver's primary duty is owed to the mortgagee. He identified at [27] some peculiar incidents of the receiver's agency, including that the equitable duty owed by a receiver to a mortgagor (Medforth v Blake [200] Ch 86) is of a class character, owed to all those interested in the equity of redemption, and that the principal remedy of the class is to require the receiver to account for what he had or ought to have received. The receiver does not manage the mortgagor's property for the benefit of the mortgagor but manages the security for the benefit of the mortgagee, and the powers of management are ancillary to that duty.

100. At [28], Lightman J said:

> "In the context of a relationship such as the present, which is no ordinary agency and is primarily a device to protect the mortgagee, general agency principles are of limited assistance in identifying the duties owed by the receiver to the mortgagor: see *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301, 1305B-D (Hoffmann J) and *Gomba Holdings UK Ltd v Minories Finance Ltd* [1988] 1 WLR 1231, 1233D-H (Fox LJ). The core duty of the receiver to the mortgagor subsists but (for example) the mortgagor has no unrestricted right of access to receivership documents…"

At [26], after quoting from an article written by Mr Peter Millett, Lightman J said: "But this agency of the receivers is a real one, even though it has some peculiar incidents …".

101. The deemed relationship of agency between the Claimant and the Defendants as receivers is therefore not a normal agency, but a relationship in which the receivers are deemed to be managing on behalf of the Claimant rather than on behalf of the Lender, in order to discharge their principal duty to the Lender. Subject to that duty, the Defendants owed the Claimant the same fiduciary duty that the Lender does, in selling the Building, and an equitable duty to account to

the Claimant (as the owner of the equity of redemption) on termination of the receivership.

102. Without the CP Lease, the leasehold structure of the Building was compromised. The right to operate the service charge regime and recover 100% of the cost of the Services, including 50.58% from the Residential Headlessee, depended on its existence. It was therefore in the interests of the Lender and the Claimant, as owner of the equity of redemption, to restore or replace the CP Lease. The Defendants' lawyer advised that "The benefit of seeking restoration of [NTMC] is that it is cleaner on sale to have the original management companies in place".

103. On advice, the Defendants ruled out some options, including restoration of NTMC, and considered others, deciding to apply for a vesting order. They understood that this would result in the CP Lease vesting in themselves personally (i.e. in their names) and create personal liability under the tenant covenants. But that does not mean that they were acting in a personal capacity and not as receivers in seeking and obtaining the vesting order. On the contrary, in my judgment it is self-evident that, unless it was in excess of powers that the Defendants had as receivers, the vesting of the CP Lease in them was done in the course of and for the purposes of the receivership, not for the benefit of the Defendants. Mr Crompton himself explained that he sought a vesting order in the Defendants personally because their appointment as receivers was personal.

104. In cross-examination, Mr Trompeter got Mr Crompton to agree that the receivers were seeking a vesting order to carry out the repairs to the Building. Repair was indeed one of the issues that the Defendants had to address, in order to preserve the value of the Building (though in the event they decided that it was a better strategy to sell at a price that reflected the purchaser's need to do the repairs). But acceptance that doing repairs was a reason to seek a vesting order does not mean that the CP Lease was obtained for that reason alone. Mr Trompeter's question was not an open one, asking why a vesting order was sought, but a closed question by reference to what had been said in the witness statement of a solicitor in support of the application for a vesting order.

105. Mr Trompeter accepted, in closing submissions, that after the disclaimer an essential part of the machinery for managing the Building was missing and that something needed to be done by the Defendants if it was to be effectively managed. The Defendants' advice, prior to applying for the vesting order, was that they would get themselves released from personal liability, on sale of the Building, by ensuring that the maintenance obligations were transferred to an entity that would be responsible for management going forwards.

106. As to whether the Defendants had power as receivers to have a disclaimed lease of part of the receivership property vested in them, Mr Trompeter submitted as follows. Under c.15(4) of the Lender's general mortgage conditions, incorporated in the Charge, there was no power to act in relation to a lease of the common parts of the Building, as opposed to the freehold of the Building, therefore the Defendants were acting outside the scope of their authority and not as the Claimant's agent. C. 15(4) provides:

> "Every Receiver shall (subject to any restrictions in the instrument appointing him but notwithstanding any winding-up, dissolution, death or mental incapacity of a Security Provider) have and be entitled to exercise, in relation to any asset which is secured in favour of the Lender in respect of which he was appointed, and as varied and extended by the provisions of any Security Document (in the name of or on behalf of a Security Provider or in his own name and, in each case, at the cost of a Security Provider):
>
> (i) all the powers conferred by the Law of Property Act 1925 on mortgagors and on mortgagees in possession and on receivers appointed under that Act;
> (ii) where a Security Provider is a body corporate, all the powers of an administrative receiver set out in Schedule 1 to the Insolvency Act 1986 (whether or not the Receiver is an administrative receiver);
> (iii) all the powers and rights of an absolute owner and power to do or omit to do anything which a Security Provider itself could do or omit to do; and
>
> (iv) the power to do all things (including bringing or defending proceedings in the name or on behalf of a Security Provider) which seem to the Receiver to be incidental or conducive to:
>
> (a) any of the functions, powers, authorities or discretions conferred on or vested in him …."
>
> (emphasis added)
>
> .

107. Schedule 1 to the Insolvency Act 1986 ("the 1986 Act") includes the following powers deemed to be conferred by debenture on the administrative receiver of a company:

> "17 Power to grant or accept a surrender of a lease or tenancy of any of the property of a company, and to take a lease or tenancy of any property required or convenient for the business of the company."

108. Mr Trompeter's argument is, first, that the powers described in c.15(4) are only exercisable "in relation to" an asset secured by the Charge, in respect of which the receiver was appointed, and that the Defendants were appointed over the freehold held by the Claimant, not the CP Lease. Accordingly, he says, applying for and obtaining a vesting of other property, namely the CP Lease, was done in relation to that property, not in relation to the freehold of the Building, and so was not within the scope of the Defendants' authority as receivers. Second, in case that is wrong, he argues that the powers in Schedule 1 to the Insolvency Act 1986 did not confer on the Defendants power to obtain a vesting order, as opposed to power to take a lease or tenancy; and the Claimant had no business for which it

could be convenient to take a lease or tenancy of property because it filed dormant accounts. Third, the power in c.15(4)(iv) to do things incidental or conducive to other powers cannot apply if those other powers are not exercisable in relation to the charged property.

109. I am not persuaded by these arguments.

110. First, assuming that the Defendants had the necessary power, the obtaining of a lease of part of the charged property, which is needed to manage the charged property, is clearly something done "in relation to" that property. Although it creates (or revives) a distinct property interest, it is an interest carved out of the freehold interest and contains obligations relating to the maintenance and repair of the Building as between the freehold owner and the CP Lessee. It was revived for the purpose of protecting the value of the freehold that was charged to the Lender. The power to take a vesting of the CP Lease was exercised in relation to the CP Lease but it was also exercised in relation to the property that was charged to the Lender. The fact that the asset was previously (before the dissolution) owned by a different person does not seem to me to affect the analysis.

111. Second, I consider that applying for and obtaining an order vesting a lease in the Defendants is "tak[ing] a lease or tenancy of any property" within the meaning of para 17 of Schedule 1 to the 1986 Act. The fact that a lease is vested by order of the court is no material distinction, certainly where the vesting occurs because the receivers applied for the order. There is nothing in the language of para 17 to restrict the power to one that authorises entry into a new contract of lease. That would preclude a receiver from taking an assignment of a lease or tenancy. The powers in Schedule 1 are intended to be very broad and there is no warrant for a restrictive interpretation of para 17.

112. As for the argument that the CP Lease was not "required or convenient for the business of the company" within the meaning of para 17, the Claimant (I was told) holds property as nominee for The Helping Foundation. It is (or was) able to file dormant accounts because it holds property assets and does not itself engage in significant accounting transactions, within the meaning of s.1169 of the Companies Act 2006. Its business, in ordinary parlance and as a matter of common sense, is to hold valuable property assets. A "business", in para 17, does not have to be a trading business, though I accept that in most cases in which para 17 applies under the 1986 Act the debenture will have been granted by a trading business. The powers conferred by the Charge are, however, given to a fixed charge receiver appointed under the Charge whether or not the receiver is an administrative receiver and are intended to apply in such circumstances. It would therefore be wrong to interpret c.15(4) as conferring powers that could only be exercised if the Claimant had an active business rather than a property holding business. Taking a vesting of the CP Lease to preserve the value of the freehold of the Building was, in my judgment, taking a lease that was required or convenient for the business of the Claimant.

113. The artificiality of the argument of the Claimant that taking a vesting order was not within the power of the Defendants as receivers is demonstrated by their acceptance that the Defendants would have had the power to create a new common parts lease. The Claimant's suggested conclusion, namely that the

Defendants were acting outside the scope of their authority, would also be extraordinary if the common parts, including the roof, happened to become the key to a profitable re-development of the Building. The Defendants would not have been able to maintain that they acquired the CP Lease on their own account and set about ransoming the Claimant's development.

114. For these reasons, I conclude that the Defendants are right in their argument that the vesting order was obtained and the CP Lease was vested in them in exercise of their powers as receivers of the Building. That means that, in principle, the Defendants were acting as agent for the Claimant and the CP Lease fell within the scope of the Defendants' obligations to account to the Claimant at the end of the receivership. The CP Lease, which was an important asset relating to the Building, was not something that the receivers were entitled to retain for their own benefit.

Indemnity

115. The next issue is whether the Defendants are entitled to be indemnified against liability under the CP Lease. It follows from the previous point, in my judgment, that in principle they are. Although the tri-partite relationship between borrower, lender and receiver means that there is no 'pure' relationship of agency between borrower and receiver, the powers of the receiver are nevertheless exercised as agent for the borrower and the agency is a true agency: see per Lightman J in the Silven Properties case. A receiver is entitled to be indemnified by the borrower against expenses and liabilities properly incurred in the course of the receivership.

116. The Claimant's argument to the contrary, once its argument that the Defendants were not acting in exercise of receivers' powers is rejected, depends on s.37 of the 1986 Act, the side note to which is "Liability for contracts, etc.". It provides:

> "(1) A receiver or manager appointed under powers contained in an instrument (other than an administrative receiver) is, to the same extent as if he had been appointed by order of the court—
>
> (a) personally liable on any contract entered into by him in the performance of his functions (except in so far as the contract otherwise provides) and on any contract of employment adopted by him in the performance of those functions, and
>
> (b) entitled in respect of that liability to indemnity out of the assets.
>
> (2) For the purposes of subsection (1)(a), the receiver or manager is not to be taken to have adopted a contract of employment by reason of anything done or omitted to be done within 14 days after his appointment.
>
> (3) Subsection (1) does not limit any right to indemnity which the receiver or manager would have apart from it, nor limit his liability on contracts entered into without authority, nor confer any right to indemnity in respect of that liability.
>
> (4) Where at any time the receiver or manager so appointed vacates office—

> (a) his remuneration and any expenses properly incurred by him, and
> (b) any indemnity to which he is entitled out of the assets of the company,
> shall be charged on and paid out of any property of the company which is in his custody or under his control at that time in priority to any charge or other security held by the person by or on whose behalf he was appointed."

117. Mr Trompeter submitted that under s.37(1)(b) a receiver is only entitled to an indemnity in relation to liability for contracts, and that, by reason of the vesting of the CP Lease in the Defendants pursuant to a court order, there was no contractual liability, only a liability on the tenant covenants by virtue of the term of years being vested in the Defendants.

118. Regardless of whether liability under a tenant covenant is to be equated with liability on a contract for the purposes of s.37, the argument is beside the point. S.37 does not limit the extent of a fixed charge receiver's right to be indemnified by the chargor. It makes a receiver personally liable on a contract that he enters into, or an employment contract that he adopts, and provides in that regard a right to be paid and indemnified out of receivership assets in priority to the chargee. Subsection (3) makes clear that these provisions are not a statement of the full extent of a receiver's right to be indemnified. The effect of the section is that a receiver cannot argue that his disclosed principal, not he, is liable under contracts that he makes or adopts, but in return for that personal liability he is given a priority indemnity that can be enforced against receivership property.

119. Apart from s.37, a fixed charge receiver who acts as agent for the mortgagor is entitled to be indemnified by the mortgagor against expenses and liabilities that he incurs in the proper exercise of his powers as receiver. The fact that the Defendants are the registered proprietors of the CP Lease and liable to account to the Claimant does not mean that the Defendants are not entitled to an indemnity. Mr Trompeter submitted that any indemnity would only be for expenses or losses up to the time of their discharge as receivers, and so would (if he was wrong on his other arguments) include any expenses or losses up to October 2016 but nothing thereafter. I am unable to see why that is so if the later liabilities accrued by reason of acts properly done by the receivers as such. The liability of the Defendants for the performance of the tenant covenants of the CP Lease resulted from the vesting of the CP Lease in them on 30 April 2013, whereupon they became contingently liable for the tenant's obligations for the residue of the term, subject to any further assignment or early termination. The Defendants did nothing active to retain the CP Lease after October 2016, nor did they resist returning it to the Claimant. On the contrary, they instructed their solicitors to do so.

120. Mr Trompeter argued that, nevertheless, the Claimant could not be liable to indemnify the Defendants against losses that they caused by acting negligently or in default of their obligations. That is doubtless correct in principle, but the indemnity in this case would be against liability under the tenant covenants. If the Claimant obtained an order requiring the Defendants specifically to carry out the Works, the indemnity would be against the expense of performance, since the

Defendants would have no choice but to perform. The liability arises from the fact that the CP Lease is vested in them and the order for specific performance.

121. If it were proved that the expense was materially increased by the Defendants' culpable default as CP Lessee since April 2013 there might be no right to an indemnity to that extent. But since the Claimant and its managing agents failed to carry out any of the Works between 2016 and 2020, and they are estopped from blaming the Defendants for such failure, that appears to be a difficult case to establish on the facts, however much Mr Weis and Mr Schwab criticised the Defendants for the disrepair. Moreover, the Defendants could not be negligent and in breach of duty to the Claimant by failing to repair to the extent that they were performing their overriding duty to the Lender to realise the security to repay the debt. Their decision to market the Building at what they considered to be a good time and leave the purchaser to repair it cannot be impugned as a breach of duty.

122. Then it was argued by Mr Trompeter that for each day after the claim form was issued that the Defendants do not carry out the Works, there is a new liability for breach of covenant, and this liability accrues after the end of the receivership, so the Defendants cannot claim an indemnity. I accept that at some point, probably at or about the time of issue of the claim form, the estoppel ceased to have effect and so the Defendants could be liable in damages for loss caused day by day by the disrepair. But this is of no materiality. The question at issue is whether the Defendants would be entitled to be indemnified against the expense of carrying out the Works, i.e. performing the obligations in the CP Lease, not against liability in damages for failure to do so. It is therefore unnecessary to decide whether the Defendants would also be entitled to be indemnified against that liability.

123. In my judgment, the Defendants would be entitled to be indemnified by the Claimant were they now compelled to incur expenditure to carry out the Works. The Defendants are not refusing to account to the Claimant, rather it is the Claimant that, for whatever reasons, is turning its back on the CP Lease. There is no principle that a receiver who vacates office cannot claim an indemnity against expenses incurred after vacating office where the liability arises from something done in exercise of his powers as receiver. Any costs incurred by the Defendants in repairing the Building in 2022, at the suit of the Claimant, would be sufficiently caused by the fact that the CP Lease was vested in them as receivers in 2013, and they would be entitled to be indemnified by the Claimant against such costs.

Conclusion on specific performance

124. In view of my conclusions above on agency, indemnity and alternative remedy, it is inappropriate to order specific performance of the repairing obligations in the CP Lease against the Defendants. The appropriate remedy, if the Claimant does not require the CP Lease and the Deed of Covenant to be transferred to it, is for the Claimant to exercise the rights that it has to carry out the Works, or alternatively to consent to the CP Lease being assigned to NTRML so that NTRML may do so. In so far as it suffers any loss in consequence, damages are an adequate remedy. There was no suggestion by Mr Weis that the Claimant,

through the CPC Group, was unable to pay for the Works to be done or that the Defendants could not pay damages.

125. The fact that the Claimant's predecessor in title created the CP Lease so that it would not be in that position and the Defendants' liability, as things stand, to perform the tenant covenants are not, in my judgment, sufficient to outweigh the strong reasons for refusing specific performance. In those circumstances, it would be wrong in principle, and unfair in practice, for the Defendants, who as against the Claimant are entitled to have nothing more to do with the Building, to be ordered to repair it.

126. I accordingly exercise my discretion to refuse the relief sought by the Claimant.

Unreasonable condition on right to assign CP Lease

127. The Defendants further submit that specific performance should not be ordered against them because the condition subject to which consent to assign to NTRML was given is unreasonable. They argue that they are therefore entitled now lawfully to assign the CP Lease to NTRML, so that ordering specific performance would be pointless and wrong in principle, and they seek a declaration by way of counterclaim that they are now entitled to assign the CP Lease without the Claimant's consent.

Factual background to conditional consent to assign

128. The facts leading to the conditional grant of consent on 25 November 2020 are the following.

129. On 28 August 2020, the Claimant issued and served the claim form on the Defendants. Before then, after receiving the letter of claim in June 2020, the Defendants' then solicitors, Shoosmiths, had suggested to the Claimant that the CP Lease should be assigned to the Claimant or to NTRML.

130. On 30 September 2020, Wedlake Bell responded to the claim form on behalf of the Defendants, indicating an intention to defend it in full. They stated that the claim should never have been brought and that it was clearly an oversight that the CP Lease had been left with the Defendants. The letter stated that the Defendants had reached agreement with NTRML to assign the CP Lease, attaching an email from Ms Forrest confirming that the directors of NTRML resolved at a board meeting on 14 September 2020 to take an assignment of the Deed of Covenant, having taken legal advice. The letter asked for the Claimant's consent to assign, pursuant to clause 4.17.1 of the CP Lease.

131. On 5 October 2020, Walker Morris replied, asking among other things for a formal application for consent to assign the CP Lease, and also for evidence that NTRML agreed that the application should be made and confirmed that it would carry out the Works.

132. By reply, Wedlake Bell asked for a stay of the proceedings while a consensual resolution was sought and provided confirmation signed by Ms Forrest, as director of NTRML, that it would carry out the Works. She also confirmed that NTRML had resolved to take an assignment of the CP Lease as well as both deeds of covenant. Walker Morris did not agree to a stay and asserted that the Claimant would be entitled to refuse consent to assign the CP Lease owing to the existing breaches of covenant and the issued claim.

133. On 27 October 2020, Wedlake Bell wrote again to Walker Morris asking formally for the Claimant to grant licence to assign the CP Lease to NTRML. The letter emphasised that NTRML was "ready and willing" to carry out the Works that were the subject matter of the claim, and that it was aware of the claim, and said:

> "You are aware of course that the rent is a peppercorn (if demanded). Hence the question of [NTRML's] financial status is largely irrelevant as it has the contractual right to recover the whole of its expenditure (as set out in your Particulars of Claim – paragraph 10(c)). The Company has been in existence since 2000 and files dormant accounts. It has share capital of £96 represented by cash at bank."

It was, I infer, this letter that Mr Weis considered to show *chutzpah* on the part of the Defendants.

134. On 9 November 2020, Walker Morris replied, expressing concern that the application to assign the CP Lease was being used by the Defendants as a means of avoiding their obligations, and suggesting (wrongly) that there was no evidence that NTRML intended to do the Works (they had recently been provided with confirmation from a director of NTRML that it would carry out the Works). The letter asked for various categories of further information (mainly about NTRML) to be supplied and sought answers to questions. These included how NTRML was going to fund the Works, given that no estimate of the costs of Services had been served for the current financial year and that some tenants might be unwilling to pay their contributions.

135. Wedlake Bell replied on 17 November 2020 pointing out (correctly) that some of the information requested had already been provided. They provided confirmation from NTRML's directors that once the CP Lease was assigned they would contact Thomasons and that NTRML would fund the Works in accordance with the service charge provisions of the CP Lease, by demanding payment from the Claimant and from its residential lessees. The letter also stated that NTRML's financial reserves had recently been increased by £122,815 as a result of the sale of a flat. It confirmed that NTRML had sufficient funds to be able to make up any initial shortfall arising from late payers of service charge, and that on completion of the assignment NTRML would agree with its members the way to proceed to fund the Works. It explained at some length why no advance service charge had been demanded for the 2020 year, namely that until March 2020 the Claimant had assumed responsibility for administering the Services in the Building and had demanded no advance service charge.

136. By letter dated 25 November 2020 ("the Decision Letter"), the Claimant gave its consent to the assignment of the CP Lease to NTRML "subject to the condition

that each of your clients enters into an authorised guarantee agreement. This consent should be documented by way of a formal licence to assign containing those AGAs" ("the Condition"). The letter then set out in some detail what was called a summary of the Claimant's "rationale" in reaching its conclusion. To avoid lengthening this judgment further, the full text of the letter is annexed rather than set out here.

Reasons given for the Condition

137. In making his submissions on why the Condition was a reasonable condition, Mr Trompeter helpfully categorised the rationale advanced by the Claimant in the following way, which Mr Rosenthal equally helpfully agreed could be taken as an accurate working summary:

    a) The Claimant had already started proceedings for specific performance;

    b) There was an immediate need for the Works to be done and delay would be bad;

    c) The cost of the Works was between £240,000 and £350,000, inc. VAT, and NTRML had limited assets;

    d) If NTRML became the CP Lessee, the Works would have to be postponed, as NTRML had not served any estimates of expenditure on the lessees or collected any funds in advance, and had no other source of funding;

    e) Further works needed later would be likely to cost a lot more, bringing the total cost up to about £1 million;

    f) The covenant of NTRML was not strong enough generally for it to be an acceptable assignee of the CP Lease without fortification from the AGAs.

138. What is important is that the Claimant expressly stated in the Decision Letter that it inferred that NTRML was prepared to ring fence the £122,815 for payments towards the cost of the Works, as and when falling due, and that therefore NTRML had in hand, before any work started, enough to pay between one-third and one-half of the likely cost of the Works. The Claimant also knew, because Wedlake Bell had spelled it out, that NTRML considered that the full cost of the Works was recoverable from the Claimant and the residential lessees, under the service charge machinery of the CP Lease and the Deed of Covenant. (The Claimant raised an issue about that, which I will address later, but Mr Weis confirmed that he knew that NTRML had a right to recover funds from the lessees, if they would pay them.) But the Claimant considered that the £122,815 was not a sufficient capital base to embark on and fund the Works.

139. Since the Decision Letter made explicit the reasons that had led the Claimant to give consent subject to the Condition, it was surprising that Mr Weis, in his witness statement, revisited these matters at considerable length. That is

particularly so as consent was given to the assignment, albeit subject to the Condition, not refused. Mr Weis states in para 43 of his witness statement that instructions for the Decision Letter were given "following careful consideration". He refers in his statement to the content of the Defence and Counterclaim, which asserted that the Claimant acted unreasonably, and he states: "Contrary to that I maintain that it was a reasonable decision for the following reasons…" What then follows is 15 separately numbered paragraphs which, as the prefatory words indicate, mainly argue the case on behalf of the Claimant. This is not the purpose of a witness statement, as PD 57AC makes explicitly clear.

140. It would be legitimate for Mr Weis to say that, in fact, there was another consideration at the time that was omitted from the Decision Letter, since s.1 of the Landlord and Tenant Act 1988 does not require reasons for the imposition of a condition to be stated in a letter giving consent to an assignment of a lease. In his witness statement, he raises 3 further concerns. He also raises in his witness statement arguments that are inconsistent with the terms of the Decision Letter. These were that there was no confirmation that the £122,815 was an asset of NTRML or going to be put towards the cost of the Works, and that the estimated cost of the totality of works likely to be required in due course to the Building was significantly higher than £5 million.

141. The three new concerns, stated in Mr Weis's witness statement, are:

    a) NTRML owed a debt in excess of £300,000 to the Defendants, which meant that it was technically insolvent;

    b) There were allegations of embezzlement of funds made against a previous director of NTRML and at one time a winding up petition was issued against it by the Claimant for debts owed in relation to insurance rent;

    c) NTRML also owed about £46,600 in arrears of service charge to the Claimant, arising from Landswood de Coy's management of the Building and NTRML's informal agreement to pay that firm rather than the CP Lessee.

142. There was no evidence to suggest that these matters were considered by Mr Weis or others on behalf of the Claimant at the time when the Decision Letter was prepared. The first is clearly a construct that has emerged on analysis of documents after the issue of the claim, and is an artificial argument that depends on the Defendants notionally seeking to pursue claims under the Deed of Covenant for advance payment of service charge, when they no longer had any concern to provide the Services at the Building and any sums recovered would have to be handed over to Landswood de Coy in any event. The second had no continuing relevance (so far as the delinquent director is concerned), as Ms Forrest explained, because it related to a particular ex-director and ex-lessee of a flat in the Building who had long since departed. The alleged arrears of service charge were not true arrears because NTRML had no legal liability to pay the Claimant, but the Claimant must have been aware that it had previously issued a winding up petition. I will return to these points briefly later, when considering in overall terms whether the Condition was a reasonable condition to impose.

Relevant legislative provisions

143. Section 1 of the Landlord and Tenant Act 1988 is, so far as material, in the following terms:

> "(1) This section applies in any case where—
> (a) a tenancy includes a covenant on the part of the tenant not to enter into one or more of the following transactions, that is—
> (i) assigning,
> (ii) underletting,
> (iii) charging, or
> (iv) parting with the possession of,
> the premises comprised in the tenancy or any part of the premises without the consent of the landlord or some other person, but
> (b) the covenant is subject to the qualification that the consent is not to be unreasonably withheld (whether or not it is also subject to any other qualification).
>
> (2) In this section and section 2 of this Act—
> (a) references to a proposed transaction are to any assignment, underletting, charging or parting with possession to which the covenant relates, and
> (b) references to the person who may consent to such a transaction are to the person who under the covenant may consent to the tenant entering into the proposed transaction.
>
> (3) Where there is served on the person who may consent to a proposed transaction a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time—
> (a) to give consent, except in a case where it is reasonable not to give consent,
> (b) to serve on the tenant written notice of his decision whether or not to give consent specifying in addition—
> (i) if the consent is given subject to conditions, the conditions,
> (ii) if the consent is withheld, the reasons for withholding it.
>
> (4) Giving consent subject to any condition that is not a reasonable condition does not satisfy the duty under subsection (3)(a) above.
>
> ….
>
> (6) It is for the person who owed any duty under subsection (3) above—
> (a) …
> (b) if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,

> (c) if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable, and …."

144. Section 16 of the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act") provides, so far as material:

> "(1) Where on an assignment a tenant is to any extent released from a tenant covenant of a tenancy by virtue of this Act ("the relevant covenant"), nothing in this Act (and in particular section 25) shall preclude him from entering into an authorised guarantee agreement with respect to the performance of that covenant by the assignee.
>
> (2) For the purposes of this section an agreement is an authorised guarantee agreement if—
> (a) under it the tenant guarantees the performance of the relevant covenant to any extent by the assignee; and
> (b) it is entered into in the circumstances set out in subsection (3); and
> (c) its provisions conform with subsections (4) and (5).
>
> (3) Those circumstances are as follows—
> (a) by virtue of a covenant against assignment (whether absolute or qualified) the assignment cannot be effected without the consent of the landlord under the tenancy or some other person;
> (b) any such consent is given subject to a condition (lawfully imposed) that the tenant is to enter into an agreement guaranteeing the performance of the covenant by the assignee; and
> (c) the agreement is entered into by the tenant in pursuance of that condition.
>
> (4) An agreement is not an authorised guarantee agreement to the extent that it purports—
> (a) to impose on the tenant any requirement to guarantee in any way the performance of the relevant covenant by any person other than the assignee; or
> (b) to impose on the tenant any liability, restriction or other requirement (of whatever nature) in relation to any time after the assignee is released from that covenant by virtue of this Act.
>
> (5) Subject to subsection (4), an authorised guarantee agreement may—
> (a) impose on the tenant any liability as sole or principal debtor in respect of any obligation owed by the assignee under the relevant covenant;
> (b) impose on the tenant liabilities as guarantor in respect of the assignee's performance of that covenant which are no more onerous than those to which he would be subject in the event of his being liable as sole or principal debtor in respect of any obligation owed by the assignee under that covenant;

> (c) require the tenant, in the event of the tenancy assigned by him being disclaimed, to enter into a new tenancy of the premises comprised in the assignment—
>
> (i) whose term expires not later than the term of the tenancy assigned by the tenant, and
>
> (ii) whose tenant covenants are no more onerous than those of that tenancy;
>
> (d) make provision incidental or supplementary to any provision made by virtue of any of paragraphs (a) to (c)."

Legal issues

145. It is common ground that, in view of s.1(6)(b) of the 1988 Act, the onus lies on the Claimant to prove that the Condition was a reasonable condition, and that the applicable test is whether it is a condition that *a reasonable landlord* would impose, even if not every reasonable landlord would have done so.

146. It was also common ground, by closing submissions, that s.1(3)(b)(i) of the 1988 Act does not require a landlord to state reasons for a condition imposed on the giving of consent, and that in consequence it is not the case that the landlord, in seeking to discharge the onus under s.1(6)(b), is confined to reasons that were given at the time.

147. The only question is whether, objectively, the condition was a reasonable one, in the sense identified in [136] above. Any reasons or knowledge that the landlord actually had at the time may be taken into account in deciding whether the condition was reasonable, but matters that were not known to the landlord at the time cannot be taken into account. The position (save on where the burden of proof lies) is essentially as it was in connection with unreasonable refusal of consent to assign before the 1988 Act came into force, namely that the landlord could rely on matters that actually affected its decision whether or not they were stated at the time.

148. If the Condition was not a reasonable condition then the landlord has not discharged – and, in other words, is therefore in breach of – the duty in s.1(3)(a) to give consent except in a case where it is reasonable not to do so.

149. Mr Trompeter argued that, if the condition was unreasonable, the terms of s.1(4) did not preclude the Claimant from seeking to prove that it was reasonable in the circumstances to refuse consent to the assignment, even though the Claimant did not refuse consent. I disagree. As a matter of construction of section 1, if an unreasonable condition has been imposed when giving consent, the landlord is in breach of the duty to give consent. Since consent was given (conditionally) and not refused, there were no reasons stated, under s.1(3)(b)(ii), for refusing consent. The suggestion that, having given consent subject to an unreasonable condition, a landlord is then entitled to argue that it was reasonable to withhold consent, when it was not withheld and no reasons for refusing consent have been stated, is nonsensical and contrary to principle. Once a decision on the application for consent has been communicated, no question of whether a different decision

could reasonably have been made, or made later, arises: Go West Ltd v Spigarolo [2003] QB 1140 at [40]-[43].

150. The Claimant gave consent by the letter dated 25 November 2020. The only question is whether the Condition was reasonable. If it was not, the Claimant was in breach of its duty to give consent, and accordingly the Defendants are entitled without that consent to assign the CP Lease to NTRML, in the same way that they would be so entitled if consent had been unreasonably refused.

151. Mr Trompeter's next argument was of a similar kind to the previous one. He suggested that it would have been reasonable in this case for the Claimant to have refused consent, for some of the reasons advanced to justify giving consent subject to the Condition. If, as he submitted was the case, it would plainly have been reasonable to refuse consent for those reasons, then it necessarily must have been reasonable to do something more favourable to the Defendants, viz to give consent subject to the Condition.

152. I reject that argument too. It requires an inquiry into an issue that is not a live issue, with no reasons having been given for refusal in compliance with the requirements of the 1988 Act. Moreover, it does not follow that if there was a good reason to withhold consent, giving consent subject to a condition must be reasonable.

153. The *non sequitur* is illustrated by the facts of this case. The first two reasons (in summary) why the Condition was imposed were that the Claimant had already started specific enforcement proceedings against the Defendants and that assigning the CP Lease would have put an end to the proceedings, thereby causing prejudicial delay. That might have been a good reason to refuse consent, depending on the urgency with which performance was required, the stage the proceedings had reached and the length of likely delay before the assignee could perform. Whether it would have been a good reason does not fall to be determined in this claim because the Claimant granted consent. But the requirement that a person unconnected with the assignee should provide financial security would not address the issue of prejudicial delay, only the financial underpinning of the assignee's obligations. To take another example, if an assignee was considered by the landlord to be an unsuitable person to be the tenant of its property, for reasons other than its financial status, that might be a good reason to refuse consent, but it would not – or at least not necessarily – be a good reason to require the assignor, who was unconnected with the assignee, to make an AGA as a condition of giving consent to the assignment.

154. Having given consent to the assignment of the CP Lease to NTRML, the Claimant cannot, in justifying the Condition, rely on matters relating to the identity or character of NTRML, or to the consequences of assignment away from the Defendants, or of assignment to NTRML, that are not connected to the terms of the Condition. The Claimant is entitled to argue, and ultimately does in substance contend, that the Condition was reasonable because, without the guarantees of NTRML's obligations, that company was not of a sufficient financial standing for the Claimant to be confident that it could perform its obligations under the CP Lease. Whether that contention is sufficient to justify the Condition on the

particular facts of this case is another matter and I will return to it, because it is at the heart of this dispute.

The Claimant's reasons for requiring the AGAs

155. Before doing so, it is convenient to return to the Claimant's "rationale" for the Condition, summarised in [137] above, and then to address the three further factors that Mr Weis on behalf of the Claimant sought to rely on.

156. *The first reason* given for the Condition was the existence of the claim for specific performance. This fact was relied on in connection with urgent need for works to be done by the Defendants, who were strictly in breach of covenant by November 2020, though as I have indicated, the Claimant would have been estopped from asserting a breach of covenant between October 2016 and a reasonable time after March 2020. The first reason is closely connected to *the second reason*: the immediate need for the Works and the prejudice that would be caused by delay. There can be no dispute that the Claimant had a legitimate interest in the long delayed Works being done by someone.

157. If there was any reason to believe that AGAs of the Defendants might ensure that the Works were done quicker, the Condition might have been reasonable on that account. However, the risk of delay would not have been overcome in any way by the existence of AGAs. The CP Lease would still have been assigned to NTRML, which would (on the basis of evidence that I have heard) have proceeded as soon as it reasonably could to do the Works, though doubtless this would have taken a little time to prepare. It was in the interests of all its shareholders, as lessees of flats in the residential upper parts, to proceed with the Works. As the Claimant acknowledged at the time of the Decision Letter, NTRML had available over £122,000 to start to pay for the Works.

158. Crucially, the Defendants would have had no further connection with NTRML as from the date of the assignment, other than as guarantors. It could not therefore reasonably have been thought that the Defendants would cause NTRML to perform more quickly than otherwise might be the case, or that the Defendants would provide money to the directors: the Defendants would have had nothing more to do with the Building or NTRML. Mr Weis sought to justify the guarantees during his cross-examination on the basis that: "if you have a financially capable entity that you can sue, then you are in a far better position to dictate timing". But he was unable to explain how having an "unconnected" guarantee from the Defendants would impact on the speed with which NTRML would carry out the Works.

159. The inevitable consequence of assignment of the CP Lease, with or without the Defendants' guarantees, would be that the existing claim could not be pursued: NTRML and no longer the Defendants were the person entitled to possession and able to do the Works. If NTRML did not comply within a reasonable time, the Claimant would have had to start new proceedings against it, and claim damages from the Defendants. The suggestion that the ability to sue the Defendants for damages would speed up the whole process was thoroughly implausible.

160. Two possible answers to this dilemma were suggested, both involving propositions of law.

161. The first, suggested by Mr Weis and then adopted by Mr Trompeter in closing submissions, was that the terms of the AGA would enable the Claimant to seek specific relief against the Defendants, because an AGA could impose on them primary liability for the obligations in the CP Lease. It is true that, pursuant to s.16(5) of the 1995 Act, an AGA *may* impose a liability under a tenant covenant as sole or principal debtor and require the guarantor to enter into a new lease if there is a disclaimer of the assignee's interest. It is also true that these are often (but not invariably) seen in practice, as components of AGAs. However, the 1995 Act does not *require* an AGA to have these additional components. A valid AGA may comprise only a traditional guarantee of the assignee's performance of the tenant covenants.

162. In giving consent to the assignment subject to the Condition, Walker Morris did not specify that the AGAs must contain any additional components. They specified only that the Defendants had to enter into an AGA contained in the licence to assign: see at [136] above. In those circumstances, I do not consider that the Claimant is entitled to require the Defendants to make AGAs containing these additional components. The 1988 Act places on the landlord the duty to specify, when giving consent, any conditions subject to which consent is granted. The landlord is therefore required to state exactly what the condition is. There is no machinery for deciding how a stated condition shall be carried into effect, and the only alternative is that it can be carried into effect in whatever way the landlord pleases. In my judgment, the preferable answer, which better fits the language of the 1995 Act, is that the condition must be specified precisely in the letter giving consent and that the landlord is not later entitled to specify a different requirement.

163. Even if the Defendants had been required to enter into an AGA that imposed liability as primary obligor, it is unclear how that would have provided more reassurance to the Claimant that NTRML would promptly carry out the Works. It would mean only that, on default by NTRML, the Claimant could have *sought* specific performance against the Defendants too, but the Court would not grant such an order unless satisfied that the Defendants had it within their power to perform the Works. As from the date of the assignment, they did not. As guarantors, the Defendants would be entitled to seek an order against NTRML to save them harmless by performing the Works itself, but that merely replicates the relief that the Claimant would seek against NTRML.

164. The second possible answer advanced by Mr Trompeter as to how an unconnected guarantee could secure earlier completion of the Works was that there was authority to that effect. He referred to the decision of the Court of Appeal in Orlando Investments Ltd v Grosvenor Estate Belgravia (1989) 59 P&CR 21. In that case, consent to assignment of a lease was held not to have been unreasonably withheld where the landlord refused consent except on the basis of covenants to do identified work within a specified time and the assignee providing security of £500,000 for performance of its obligations. The covenants were required to be given by the assignee company and its principal shareholder, and the security was to be in the form of a performance bond or deposit in the joint names of the

landlord's agents and the assignee. The case was decided under the pre-1988 law and so the issue was whether consent had been unreasonably withheld.

165. The trial judge had concluded that concern about the assignee being willing and having the funds to do the repairs had influenced and justified the landlord in refusing consent. The burden lay (then) on the tenant to prove that reasonable landlords would have given consent to the assignment without those requirements. The Court of Appeal held that the refusal to give consent without the requirements was reasonable because there was legitimate concern not just about whether the assignee could afford to do the works but whether it was willing to do them. The landlord was entitled to be provided with comfort that the proposed assignee would remedy the disrepair.

166. That decision therefore does not provide a sound basis for arguing that the Condition was reasonable. The security sought in Orlando Investments case was to address the apparent disinclination of the assignee himself to comply with the repairing covenants, as well as doubts about his financial ability to pay. The assignee was otherwise an unsuitable assignee. The conditions in that case involved the controlling shareholder of the assignee making a guarantee and a fund of money accessible to the landlord being provided as security. In this case, the provision of guarantees from the Defendants would do nothing to ensure that the Works are done more promptly, or provide ready funds with which to do the Works. The guarantees would only provide the Claimant with a financial remedy for losses caused by NTRML's failure to do the Works.

167. I therefore reject the argument that provision of AGAs could reasonably have been seen as likely to overcome or at least lessen the risk of delay to the Works.

168. *The fourth reason* given by the Claimant for the Condition is closely related, namely that the Works would have to be postponed, since NTRML had not served any estimate of expenditure on the lessees or collected any funds in advance, and had no other source of funding. But that, if true, was a consequence that flowed from the grant of consent to the proposed assignment, not from the absence of guarantees from the Defendants. There was no reasonable prospect of the Defendants providing NTRML with interim funding to enable it to start the Works before it had sufficient monies in hand from lessees or the Claimant. Further, the reason does not properly take into account that NTRML had over £122,000 in hand, so there was no reason to delay the start of the Works until service charge demands had been made and funds obtained from the lessees.

169. What is apparent from the reasons already addressed is that the Claimant is relying on reasons for the Condition that might have justified refusing consent to the assignment outright (though I do not decide that hypothetical question), but are not good reasons for granting consent subject to the Condition. For reasons that I have already given, it is not possible for the Claimant to argue that the Condition was justified because consent could have been refused.

170. *The third reason* and *the fifth reason* are very similar. They concern the ability of NTRML to fund the Works. They are that the cost of the Works was between £240,000 and £350,000 inc. VAT, and NTRML had limited assets, and that

further works would later be needed, which could bring the total cost up to about £1 million.

171. Mr Weis in his evidence emphasised that NTRML filed dormant company accounts and only had share capital of £96. Both these matters had been properly disclosed by Wedlake Bell when applying for consent, and they opined that NTRML's financial status was largely irrelevant, given that it had the right to recoup all its expenditure from the Claimant and the lessees. In fact, the Decision Letter made nothing of NTRML's dormant company accounts and sought instead to provide different reasons why, despite the float of £122,815, the cost of the Works was not something that NTRML could fund.

172. These reasons were, first, that the Defendants had failed to demand advance service charge at or before the start of the service charge year on 24 June 2020 and so no funds could be collected from NTRML (and in turn by it from the lessees) until after the year end; second, that there was a technical glitch in the ability of NTRML to charge its lessees as service charge the cost of Services provided by the CP Lessee; and third, given historic disrepair and complaints from lessees, it was "entirely possible" that individual lessees might be difficult about paying their contributions.

173. In my judgment, as reasons for imposing the Condition, as distinct from possible reasons for refusing consent, these reasons do not stand up to analysis. A reasonable landlord would not have imposed the Condition for any of those reasons.

174. It would have been self-evident to a reasonable landlord that, if the CP Lease was assigned, the assignee would not immediately be able to carry out the Works in any event. (This is illustrated by what NTRML in fact did from October 2021, when it was agreed without prejudice to the issues in this claim that it could seek to do the Works.) Any assignee would have had to appoint consultants and satisfy itself as to the extent of the Works, then finalise tender documentation and go out to tender. NTRML was in fact expecting to receive tenders from contractors on the last day of the trial, a little short of one year following its involvement with the Works. NTRML had significant funds in hand and would have prepared service charge demands within weeks or months of any assignment.

175. Although the service charge years ran from 5 June, according to the CP Lease, they had in fact, for many years before 2020, been run without objection on the basis of calendar years. I find that if unconditional consent to assign had been given in November 2020, NTRML could and would have sent out service charge demands for the start of the new calendar year. But even if it chose to abide by the strict service charge year dates, the demands would have been sent before June 2021, and so the on account payments would have started to be made from 24 June 2021. In addition, NTRML could have demanded actual expenditure incurred before then as part of the final accounts for the previous year. Given the float of £122,815 and the inevitable delay in starting the Works, the absence of any earlier service charge demand was of no materiality.

176. The technical glitch that is referred to in the Decision Letter is that part of the service charge payable by each lessee of a flat in the Building is a proportion of

the service charge payable by the Residential Headlessee to the CP Lessee. This liability was established, as between NTMC and Crosby, by the Deed of Covenant. The lessees are liable to contribute to expenditure described as being that incurred in the provision of services by the tenant under the CP Lease "and payable by the Landlord pursuant to the Deed of Maintenance". The Deed of Maintenance is the Deed of Covenant, as I have defined it. Before the proposed sale of the Building by the Defendants as receivers, no one had ever considered that the Deed of Covenant needed to be novated as between NTRML, as assignee of the Residential Headlease, and the successor in title of NTML as CP Lessee. The intending purchaser required a deed to be made between the Defendants and NTRML. There was no evidence that any lessee had ever refused to pay service charge on the basis that it was not payable by NTRML "pursuant to the Deed of Maintenance" or that anyone other than the intending purchaser of the freehold of the Building had ever identified the issue. In those circumstances, the point – raised as a concern about the ability of NTRML to recover services charges from its own shareholders – is entirely theoretical and unrealistic. No reasonable landlord would have relied on this concern as a reason for the Condition.

177. As for the risk of lessees not paying service charge contributions as a protest against the condition of the Building, this had some factual basis for it in the history of non-performance of the repairing obligations of the Building, for which NTMC, the Receivers and the Claimant all share responsibility at various times. However, despite Mr Weis's repeated emphasising of this practical concern, it was no more than speculation in November 2020. In my judgment, there was no basis for a reasonable apprehension that difficulty or delay in recovering contributions from some lessees would be so significant as to prevent NTRML from carrying out the Works.

178. The relevant facts in this regard are that Claimant, through Landswood de Coy, had been seeking to manage the Building as proxy for the CP Lessee, from October 2016 to March 2020, recovering contributions from NTRML "pursuant to the Deed of Maintenance", even though the Claimant had no right to payments from NTRML at all. Even so, the arrears from NTRML, of which Mr Weis complained, were limited to £46,600 of service charge. The Claimant had previously issued a petition to wind up NTRML based on an alleged debt, for which there was no legal foundation; but these "arrears" must have been paid by NTRML, otherwise those arrears "due" to the Claimant would still have existed as at November 2020. No mention of any arrears is made in the Decision Letter.

179. The true position as at November 2020 was provided by Ms Forrest in her evidence. She said that from September 2018 (when she became a director of NTRML) until the trial, there were possibly 5 lessees who withheld service charge (out of 96 residential lessees whose leases are noted in the schedule to NTRML's registered title). Withholding of service charge on such a scale would clearly not prevent NTRML from proceeding with the Works. There was no basis in November 2020 for a reasonable apprehension by the Claimant that monies would be withheld on such a scale that NTRML would find it impossible to proceed. In any event, the AGAs of the Defendants would have made no practical difference to the ability of NTRML to proceed with the Works.

180. The prospect of further monies having to be spent by NTRML to do further works to the Building in future years is of no consequence for the ability of NTRML to carry out the Works reasonably promptly, or a reason in itself for imposing the Condition. Costs for any appropriate works in future were recoverable under the CP Lease from the Claimant and under the residential leases from the lessees of the flats. That was the means of payment for Services established by the leasehold structure, so it cannot be a reasonable basis on which to require a guarantee of the CP Lessee's obligations generally.

181. *The sixth reason* for the Condition advanced by the Claimant in the Decision Letter was that the covenant of NTRML was not strong enough generally for it to be an acceptable assignee of the CP Lease without fortification from the AGAs. This raises an important question: what degree of covenant strength, if any, was the Claimant entitled to expect from an assignee of the CP Lease, given the leasehold structure that was created in the Building? It was certainly entitled to be satisfied that NTRML would comply with its obligations because the CP Lease was created for a particular purpose, and the Claimant had a real interest in performance of those obligations. The original CP Lessee, NTMC, was a company owned by the Residential Headlessee and the freeholder equally, but it was only capitalised to the extent of £100 and did not otherwise trade or hold significant assets. It was therefore dependent for funding on Bruntwood and Crosby paying their contributions. Crosby in turn would recover its service charge liability from the flat lessees.

182. Mr Rosenthal submitted that the Claimant was "not entitled to be satisfied about the financial strength of NTRML". By that, I understood him to mean that the Defendants did not have to satisfy the Claimant that NTRML had sufficient financial resources without regard to its putative rights under the CP Lease and under the flat leases to recover the cost of Services. If that is what he meant then I consider that any reasonable landlord would have regard to the structure of the leasehold interests in the Building and the CP Lessee's rights to recoup all its expenditure. They would therefore not expect an assignee of the CP Lease to demonstrate that they could independently fund the cost of the Services. But they would expect the CP Lessee to be able to fund its operational expenses and administer the service charge machinery, and to do that it would need some resources other than its right to be recoup.

183. Accordingly, if Mr Rosenthal meant that the Claimant was not entitled to have regard to NTRML's financial standing at all, I disagree. Most reasonable landlords would have wanted to be satisfied that the assignee was a viable company and would be able to carry out its functions. To do that effectively and in compliance with its obligations in the CP Lease, it would need some money available to fund some expenditure on an interim basis and cover any temporary shortfall, as well as to instruct solicitors to recover arrears, and similar matters. That is particularly so because the difference between the original CP Lessee, NTMC, Alma Estates Ltd (to which the Claimant was apparently prepared to have the CP Lease assigned in 2017) and NTRML was that the Claimant would have no involvement in or any control over the business of NTRML, which was wholly owned by the flat lessees.

184. Mr Weis said, when pressed about his reasons for concern about NTRML, that it might not have been aware of the full costs of the Works, and that "without having it properly costed up they would have no idea of the sums that they are going to need to invest". It is a small but telling point that Mr Weis saw the role of NTRML as if it were an investor in the Building, not a management company controlled by the lessees, whose expenditure on the Building was to be wholly recouped from others. In my judgment, any reasonable landlord would have had regard to both the nature of the proposed assignee, as a lessees' management company, and the fact that the landlord was dependent on the ability of that company in practice to perform its obligations. It would also have regard to the fact that ultimately the CP Lessee should recoup 100% of its expenditure on the Services.

185. The fact that NTRML had previously filed dormant company accounts is in my judgment wholly irrelevant. Any funds it received from lessees by way of service charge under the flat leases would be fixed with the statutory trust in s.42 of the Landlord and Tenant Act 1987 and so would not be treated as its assets in its accounts, just as the freehold of the Building held on trust for The Helping Foundation was not shown as an asset in the Claimant's dormant company accounts. If NTRML's only asset was the Residential Headlease, there would be unlikely to be any significant accounting transaction in the course of NTRML's normal business that would require it to file fuller accounts. The sale of the flat in 2020 that gave rise to a receipt of £122,815 would have been such a transaction, but this would not have given rise to accounts filed before November 2020.

186. *Mr Weis's additional reasons*. Of the 3 additional reasons that Mr Weis was anxious to stress in his oral evidence, only the outstanding insurance rent and the previous winding up petition were ones that Mr Weis knew about and may have considered when giving instructions to send the Decision Letter. Yet they did not figure in the Decision Letter. I therefore conclude that any reasonable landlord, who like the Claimant would have sought legal advice in these circumstances, would have concluded, as the Claimant apparently did, that these were not themselves reasons in November 2020 to require the assignors to enter into an AGA.

Provisional conclusion on reasonableness

187. There are further reasons advanced by the Defendants as to why the Condition was unreasonable, which arise from the decision that I reached on the Defendants' entitlement to be indemnified by the Claimant. In case I am later considered to have been wrong to reach those conclusions, I leave those reasons to one side in now reaching a provisional conclusion about whether a reasonable landlord would have required AGAs when granting licence to assign the CP Lease to NTRML. I will return to the significance of the indemnity thereafter.

188. The burden on the Claimant will be satisfied if I am persuaded that a reasonable landlord in the position of the Claimant could have required the Defendants to make AGAs in respect of NTRML's liability as assignee. The purpose of such an "unconnected" guarantee in simple form is to provide the Claimant with a remedy in case of loss caused by failure of NTRML to perform its obligations. Those obligations were substantial and important for the benefit of all stakeholders in the Building, of which the Claimant was one, but they did not

involve payment of money to the Claimant. They did, however, involve potentially very expensive and complex matters relating to repair of the Building, which was in substantial disrepair. The obligations to which NTRML would become subject could last for many years.

189. The Claimant has a genuine interest in performance of the tenant covenants in the CP Lease. Any assignee of the CP Lease would need some financial resources in order to be able to perform the covenants, though ultimately the cost of so doing was recoverable in full. There might however be a shortfall, and some funds in advance of recoupment would be needed. NTRML had substantial funds available, in the first instance to make payments towards the cost of the Works and then, if that cost was recouped in full, to use for other expenditure and costs of running the Building.

190. If there were a real risk of NTRML failing to perform its obligations in future then there was a risk of financial loss to the Claimant, though the Claimant retained "step in" rights under clauses 6.2 and 6.7. If NTRML failed as a lessees' management company, the losses could be substantial because then the Claimant, in exercising those rights, might not be able to recoup 50.58% of its expenditure. Although there was no reason to anticipate failure at the outset in carrying out the Works, that could change over a period of many years. NTRML did not have a good track record of financial control and had failed to meet obligations within the recent past, though the board of management was different in 2020.

191. Bearing in mind all these considerations, and notwithstanding that I have rejected many of the specific reasons for the Condition advanced by the Claimant in the Decision Letter, I conclude that the Claimant has sufficiently proved that a reasonable landlord could require a guarantee of the liability of NTRML. I do not need to be satisfied that such a requirement is the correct conclusion, only that it is one that a reasonable landlord might reach.

192. The basis for such a requirement is that the covenant of NTRML is not strong enough generally for a landlord to be satisfied that there was no real risk of failure to perform. Although the original leasehold structure created in 1999/2000 had a near shell company as the CP Lessee, it was a company owned jointly by the predecessor of the Claimant and the Residential Headlessee. The Claimant has no influence over NTRML, which is controlled by the flat lessees and whose function is dependent on continuing support from those lessees. The Claimant is therefore at greater risk of financial loss as a result of failure by such a company to perform the tenant covenants, and performance is of real importance to the value of the Building, in which the landlord has a large stake.

193. It is, in short, impossible to conclude that no reasonable landlord would require a guarantee for the liability of such a company, given the importance of the CP Lease.

<u>Conclusion taking into account the Defendants' entitlement to an indemnity</u>

194. That being so, I must finally address whether the Condition is unreasonable because of the facts that the Defendants obtained the CP Lease as agent for the

Claimant, still hold it on behalf of the Claimant and are entitled to be indemnified by the Claimant against liability under it.

195. The Defendants submitted that the Condition was unreasonable because:

i) The Defendants took the CP Lease for the benefit of the Claimant as well as the Lender and so it is wrong in principle that the Claimant should be able to seek to perpetuate their liability in that way;

ii) The Claimants are seeking to obtain a disproportionate additional benefit by the Condition, namely the financial backing of two individuals for the liabilities of a corporate lessee, when there had not previously been any such benefit;

iii) If the Defendants were required to enter into AGAs pursuant to the terms of the CP Lease, they would be entitled in principle to be indemnified by the Claimant against liability under the AGAs and so the Condition was pointless.

196. I do not agree with the Defendants that if they submitted to the Condition and entered into AGAs they would be entitled to be indemnified by the Claimant against future liability under the AGAs. The AGA would be a distinct contract of guarantee made by the Defendants long after they ceased to be receivers. The AGA would not be a contract entered into in the performance of a receiver's functions, within the meaning of s.37(1)(a) of the 1986 Act, nor otherwise a liability incurred by them in exercise of their powers as receivers. It would be a contract entered into voluntarily because the Defendants wished to assign the CP Lease and terminate their liability as lessees.

197. Mr Rosenthal submitted that it would be artificial to distinguish between liability as CP Lessee and liability under the AGA, since the liability under the AGA derives from the terms of the alienation covenant in the CP Lease, by which the Defendants are bound, and amounts in reality to the same thing. In my view, that is not right, for two reasons.

198. First, the scheme of the 1995 Act does distinguish between a tenant's liability as tenant – which is capable of continuing for the whole term of the tenancy or terminating on assignment – and a more limited liability under an AGA when the guarantor has been released from liability under the tenant covenants under s.5(2) of that Act. The latter lasts only while the immediate assignee is liable. It is true that liability under the AGA is still in relation to the assignee's performance of the tenant covenants of the tenancy, but it is designedly a separate contractual liability, even if the AGA imposes liability as sole or principal debtor.

199. Second, in this case at least, liability under the AGA is not the consequence of having assumed liability as tenant under the CP Lease. The alienation covenant does not include any agreement under s.19(1A) of the Landlord and Tenant Act 1927 that the landlord may require the tenant to enter into an AGA on any assignment. Liability under the AGA is only the consequence of a reasonable condition (if that is what it is) and the Defendants choosing to assign the CP Lease.

200. However, the consequence that the Defendants would *not* be entitled to be indemnified by the Claimant if they assigned the CP Lease and entered into an AGA seems to me to answer the question of whether, in the circumstances of this case, it is a reasonable condition to impose. As CP Lessees, the Defendants are liable under the tenant covenants but entitled to be indemnified by the Claimant. The primary liability as between them is that of the Claimant, for whose benefit the Defendants hold the CP Lease. In imposing the Condition, the Claimant is therefore seeking to gain a benefit that it does not currently enjoy, at the expense of the Defendants.

201. In Mount Eden Land Ltd v Straudley Investments Ltd (1997) 74 P&CR 306, the Court of Appeal added to the six well-known propositions in International Drilling Fluids Ltd v Louisville Investments [1986] Ch 513 relating to granting or refusing licence to assign two further propositions:

> "(1) It will normally be reasonable for a landlord to refuse consent or impose a condition if this is necessary to prevent his contractual rights under the head lease from being prejudiced by the proposed assignment or sublease.
> (2) It will not normally be reasonable for a landlord to seek to impose a condition which is designed to increase or enhance the rights that he enjoys under the headlease."

The Defendants rely on the second principle and submit that the Claimant is seeking to increase or enhance its own rights, which in other circumstances they would not have enjoyed.

202. In my judgment, the Defendants' argument is plainly right if, as I have held, the Defendants are entitled to be indemnified by the Claimant while they are CP Lessees. The Condition is unreasonable because it serves to improve the Claimant's position at the expense of the Defendants. Although in principle it may be reasonable for the Claimant to seek a guarantee of the putative liability of NTRML, it is not reasonable to require the Defendants to be that guarantor.

203. As the Condition is unreasonable, the Defendants are therefore entitled to assign the CP Lease to NTRML without the Claimant's consent. I do not decide – because it has not arisen and may not arise – what the rights and duties of the Defendants would be if the Claimant changed its mind about taking control of the CP Lease.

APPENDIX

WALKER MORRIS

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25 November 2020

Dear Sirs

Our Client: Alma Property Management Limited
Application to Assign the Lease dated 6 August 1999 made between (1) Bruntwood Estates Limited and (2) North Tower Management Company Limited (the "Common Parts Lease")
SUBJECT TO FORMAL LICENCE

We refer to your clients' application for licence to assign the Common Parts Lease, made by letter dated 27 October 2020.

Firstly our client has significant concerns that your client in making this application is simply attempting to foist its obligations and responsibilities onto a third party that appears on face value to be ill-equipped financially to satisfy those obligations. Our client has had no choice but to issue legal proceedings regarding the on-going default and those works which are the subject matter of the proceedings are substantial in cost and must be completed as a matter of urgency. The application for licence is only delaying the undertaking and completion of those works and instead of your clients focusing on the matter in hand, they appear intent instead of seeking to further avoid their obligations.

Moreover, a Landlord is entitled to object to an assignment where it reasonably considers that the proposed assignee is not able to discharge the tenant's obligations upon assignment. Your clients tendered the works required some five years ago and according to those estimates (adjusted for inflation) the total overall liability at this juncture may well be approaching £1million. It is well established that a landlord is generally entitled to reject an assignment to a non-trading shell company of relatively little substance where there are significant liabilities falling to be discharged.

However in an effort to reach an accommodation, our client will give its consent to the proposed assignment to North Tower Residents Management Limited ("NTRM") subject to the condition that each of your clients enters into an authorised guarantee agreement. This consent should be documented by way of a formal licence to assign containing those AGAs.

Our client's rationale in coming to this conclusion may be summarised as follows:

1. Our client has already sued yours for specific performance of the repairing obligations in the common parts lease, in relation to the works there identified. There is an immediate need for those works to be executed, and it follows that any delay in their execution is a factor to be taken into account when considering whether (or on what terms) licence to assign should be granted;

2. Our client has reason to believe that the remedial works immediately required are likely to cost between £240,000 and £350,000 including VAT;

3. Our client has considered what funds will be available to NRTM to carry out those works, and the extent to which its available sources of finance are likely to cause delays in the execution of the above works;

4. As part of that consideration our client has considered what funds are currently held by NTRM and available to discharge the cost of the works as and when falling due. You have told us (i) that NTRM has an issued share capital of £96 which is represented by cash at bank (see your letter of 27 October), and (ii) that NTRM has received net funds of £122,815 following the sale of a flat (see your letter dated 17 November 2020). Although you have not said so in terms, we infer that NTRM will be prepared to ring-fence these sums for the payment of the cost of the works as and when falling due. On this basis it would seem that NTRM has the resources to pay something between one-third and one-half of the likely cost of the works now needed. Our client takes the view that this is not of itself a sufficient capital base to pay for the works required immediately and certainly will not cover the comprehensive repairs required as evidenced by the quotes your clients have obtained;

5. Our client's consideration has therefore turned to whether, if it became tenant under the common parts lease, NTRM would be able to raise funds from any other source so as to enable it to pay for the cost of the works as and when they fall due. In this regard we have advised our client as follows:

    - The common parts lease contains provisions by which the landlord is required to pay a "provisional" service charge by 4 equal payments on the usual quarter days. But if your clients had wanted to operate those provisions in relation to the cost of the works they would have needed to serve a "reasonable and proper estimate" of its anticipated costs in good time before 24 June 2020. But as your letter of 17 November acknowledges, no estimate was served – so that our client has no contractual obligation to make any contribution towards any works executed in the current service charge year until after the service charge accounts have been finalised.

    - The leases of individual flats also contain service charge provisions, but we have advised our client that there are real doubts about NTRM's ability to collect advance contributions towards the cost of the works under these leases. These doubts arise partly because, as with the common parts lease, the right to advance payments is contingent upon the service of an estimate (or in the case of these leases a "certificate") either before or shortly after the relevant service charge period starts. But we have also drawn to our client's attention the fact that these leases identify Building Charge Expenditure by reference to sums "payable pursuant to the Deed of Maintenance", so that there must be real doubt whether the cost of the works (if incurred after NTRM has become tenant under the common parts lease) would be a proper head of service charge expenditure under the flat leases. Equally given the historic disrepair and complaints received, it is entirely possible that the individual flat owners may seek to be difficult in paying over their contributions (whatever their legal position) thus delaying the collection of those contributions.

6. In your letter of 17 November you assert that our client is in some way responsible for the fact that no service charge estimates were served prior to 24 June 2020. It seems to us (and, more importantly, to our client) that this is a hopeless point, bearing in mind the fact that your client has been on notice of our client's intention to bring the Claim since March 2020.

7. Our client notes that your clients have not identified any other source of finance.

8. Taking the above factors into account it seems to our client that there is a very real risk that NTRM does not have sufficient funds to "prime the pump" – ie it has insufficient funds to be able to go ahead with the works shortly after becoming tenant under the common parts lease and would therefore need to postpone commencement of the works. indefinitely

9. Our client is also mindful of the fact that other major works will probably need to be undertaken within the next 5-10 years. Your clients may recall commissioning surveys in 2016, and commissioning tender quotes from three contractors at £608,787, £612,754 and £798,529. Those tender estimates related to works which are rather more extensive than those which are the subject-matter of our client's claim against yours, and the reason for this is that the current proceedings have been limited to the works that need to be done with a degree of urgency. What is clear is that even if your clients (or their successors in title) comply with a decree of specific performance in relation to the works then there will still be substantial works which based on the above estimates are likely with indexation to cost several hundreds of thousands of pounds – the total overall liability at this juncture may well run to approaching £1million. In paragraph 5 above we have identified doubts about the recoverability of repair costs from the residential tenants in the event that NTRM becomes the tenant under the common parts lease, and these doubts apply with equal force to the cost of these future works.

10. With the above factors in mind our client takes the view that NTRM's covenant strength is not such as to make it an acceptable assignee, and can only proceed on the basis of fortification by the provision of an AGA by the proposed assignors (ie your clients).

In your letter of 17 November you draw attention to the fact that our client has provided some services, and it is accepted that our client has indeed made arrangements for such matters as snow clearance, pest control and minor repairs. The reason it made those arrangements was because your clients were in default of their contractual duties and there were basic services that needed to be provided for the benefit of our client's own tenants (and in particular the lessee of the hotel). It is also correct that our client has collected contributions towards these costs – and towards "sinking funds". If the tenant under the common parts lease (whoever that is) confirms its intention to comply with its obligations under that lease then then practical need for our client step in will have come to an end, and in those circumstances our client would be willing to transfer the sinking funds which have accumulated. But the size of these funds (£2,650 in relation to the building, and £2,900 in relation to the car park) reflects the limited nature of our client's involvement. These sums are not sufficiently large to have any effect on our client's thought processes as outlined above, but have been taken into account.

Yours faithfully,

Walker Morris LLP

Walker Morris LLP