Claim Nos: COOEX719 & DOOEX057

lN THE COUNTY COURT AT CENTRAL LONDON

BETWEEN:

DUKEMINSTER LIMITED

*Claimant*

-and-

WEST END INVESTMENTS (COWELL GROUP) LIMITED

*Defendant*

JUDGMENT

Corrected for Handing Down

\_Introduction

1. This litigation involves unopposed applications by Dukeminster Limited ("Dukeminster"), the tenant of 6 Upper Grosvenor Street, London WI Cthe building") for a new tenancy pursuant to Part 2 of the Landlord and Tenant Act

1954 ("the Act").

2. There are two Part 8 actions in this litigation pursuant to section 24 of the Act..

(1) Action COOEX719 is the claimant's claim for a new tenancy on the basis that

the defendant's section 25 Notice served on 15 January 2016 was valid. Section

25(1) provides (as relevant):

*The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as "the date of termination"):*

(2) Action DOOEX057 is essentially the same except that it is based on the proposition that the defendant's section 25 Notice was invalid; the foundation of this action being the claimant's section 26 Request for a new tenancy..

3. The first issue for determination, therefore, is whether the section 25 Notice was valid or not. On this issue some others depend; not least of all which of the two concurrent actions is being tried.

4. On this and the other issues I heard evidence from Paul Laurence Wilson, a surveyor and property manager employed by Dukerriinster and Archie Maxwell Avery a director and asset manager on behalf of the defendant. In addition, the parties each

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relied on expert valuation evidence from Mr. Eric Shapiro (claimant) and Kathryn

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Sowter (defendant). Over 3,000 pages of documents were presented as part of the

evidence. I have considered those parts of the documentary material to which I have been specifically referred. I have been assisted by skeleton arguments from counsel Mr.Tanney for the claimant (including a note on s.25 Notices) and Mr.Tager QC for the defendant. I have been able to draw from these documents much of the undisputed factual background as well as the undisputed legal framework. I am

grateful to both counsel for their assistance.

The **Building** & Lease

5. The building comprises a listed end-of-terrace self-contained office building located in Mayfair, close to Grosvenor Square. It comprises a lower ground, and ground to second floors which are used as office accommodation and the third and fourth floors which are to be used as residential accommodation by a director or senior employee of the tenant. The Landlord holds a long lease of the building dated 20/12/06 for a term expiring on 28 September 2131 ("the Headlease"). The Grosvenor Estate is the freeholder of the building.

*f>.* Dukeminster is 'holding over' pursuant to an underlease dated 25/4/67 that was originally granted to Daejan Investments (Grove Hall) Limited ("the Lease"). The Lease is for a term expiring on 25/12/16 and was granted for a premium and with a fixed rent of £1,000 p.a. In 1989 the Lease was assigned to Dukeminster. In 1999

Dukeminster assigned the Lease to its wholly owned subsidiary, Dukeminster (UG).

On 31/3/17 (after the issue of proceedings) Dukeminster (UG) re-assigned the Lease to Dukeminster.

7. Dukeminster is the holding company of a group that invests and trades in property. as well as providing finance and financial services to clients. It belongs to an off­ shore foundation for the benefit of the Shohet family. Directors of Dukeminster are also the directors of each of its subsidiaries, including Dukeminster (UG); they are all members of the Shohet family. At all material times, the directors of Dukeminster (UG) were also directors of Dukeminster.

**The Section 25 Notice**

8. In anticipation of the expiry of the Lease's term, the directors of the Landlord considered its options. Having rejected other options, the defendant instructed its then solicitors, Ingram Winter Green ("IWG") to serve the s.25 notice dated

15/1/16. Mr Sanjay Chandarana was the solicitor at IWG who was responsible for the drafting of the s.25 notice. He carelessly omitted the "UG" from the name of the tenant. The s.25 notice was served under the cover of a letter dated 15/1/16, which also enclosed a s.40 (1) notice ("the s.40 notice"). The s.25 notice stipulated

26/12/16 as its termination date and proposed a new 12-year tenancy without break, at an initial rent of £475,000 p.a., subject to 4-yearly upward only rent reviews. The defendant contends that any reasonable recipient of the 15/1/16 letter and its enclosures would have assumed that the Landlord intended to address the letter and its contents (including the s.25 notice) to its actual tenant, rather than the former tenant (or the tenant's holding company) and thus intended it to be valid. Dukeminster's position is that they believed that the defendant intentionally named the wrong company as the recipient of the s.25 notice and intended it to be invalid for tactical reasons. It is not suggested by either party that at any stage the landlord did not know the correct name of its tenant.

9. Following the receipt of the s. 25 notice, Dukeminster (UG) retained Foot Anstey LLP ("Foot Anstey") to act on their behalf. On 2/12/16 Foot Anstey wrote two letters, one to the Landlord and the other to IWG. An undated s.26 request for a new tenancy ("the s.26 request") was enclosed under the cover of the 2/12/16 lette r to the Landlord. Both letters pointed out that the s.25 notice had not been served

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on Dukeminster (UG) and was invalid, and on that assumption Dukeminster UG was serving a s.26 request. Action COOEX719 is described as "a protective claim" in case (contrary to the claimant's primary case) the s.25 Notice was held to be a valid Notice.

I 0. Attempts made to compromise the issue as to whether this litigation should be proceeding on the basis of a valid or alternatively invalid s.25 Notice were unsuccessful.

11. Following the re-assignment of the Lease by Dukeminster (UG) to Dukeminster on

31/3/17, the claim forms in the s.25 and s.26 proceedings were amended on 7/7/17. Thereafter, Dukeminster (UG) no longer had any interest in these proceedings and had no financial or other interest in the outcome of the issue regarding the validity of the s.25 Notice. The s.25 and s.26 claims have proceeded in parallel as

unopposed applications for the renewal ofDukeminster's tenancy.

12. Both parties accept that the correct approach to the resolution of the s.25 Notice validity issue is an objective one albeit informed by the circumstances affecting the respective parties at the relevant time. Unfortunately, the parties do not agree what that resolution should be. The defendant maintains that the error on the s.25 Notice as to the addressee was no more (or little more) than a typing error and no reasonable person in the position of the board of directors of either Dukeminster or Dukeminster (UG) could reasonably have misunderstood to whom the Notice was

really addressed; the tenant. The claimant submits that this is not the case in the )

present circumstances because, as reasonable recipients, the directors of Dukeminster and Dukeminster (UG) could reasonably and legitimately have taken and did take the s. 25 Notice as a deliberate tactical ploy intended to induce the tenant to give up possession in the face of the unfavourable terms offered without the need for proceedings pursuant to s.30(1)(f) of the Act, and if this tactic failed the defendant could disown its Notice and try another tack. Any accusation that this is what the defendant actually intended has not been pursued, but the submission remains that objectively speaking the then tenant (Dukeminster UG) was reasonab le

in its tactical suspicions.

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13. Mr. Wilson speaks of the concern the claimant had about the defendant's ultimate intentions regarding the building and found the s.25 Notice as addressed, puzzling. In the context of what he considered to be the defendant's development options for the building which he perceived had been under serious investigation for some considerable time, he says that those acting on behalf of the claimant considered that the wrong addressee on the s.25 Notice was deliberate; designed to unsettle and part of the defendant's tactical plan (bullying he thought) to get the tenant out of the building with the minimum financial implications. The puzzlement was derived,

says Mr. Wilson from the following circumstances:

13.1 The defendant/landlord had never had trouble distinguishing the 2 companies

I • before (and had never made any such error before), so there was no basis for an "error" on this occasion;

13.2 Notices had always been addressed and served correctly, where necessary, in the past;

13.3 Rent was routinely demanded from (and paid by) the correct company;

13.4 Dukeminster (UG) was the registered leasehold proprietor and it was assumed that the defendant's solicitor would have double-checked this before the s.25

Notice was sent.

13.5 The defendant did not respond to correspondence (sent many months later) pointing out the "error" but chose to ignore it and proceed, at least in the short term, as if it had not happened.

14. I reject the claimant's submissions on this point and prefer and adopt those of the defendant. I find that the claimant's approach is contrived and the alleged!y confused reaction to receipt of the s.25 Notice was not a reasonable reaction to what was clearly a simple error. I am not satisfied that the mistake was simply a "typo''; but it *was* simply a careless mistake on the part of the responsible solicitor. The same error is replicated in the *sAO* Notice. Both Notices also get the address of the building wrong which further demonstrates an unfortunate level of carelessness without any such error having any impact on the real issues between the parties. There is scant evidence, in my judgment, supporting any proposition to the effect

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that any director or manager of Dukeminster (UG) or Dukeminster (the same people) was nnder any operative misapprehension as to what was intended by the landlord. The fact that this was an error must have been, I find, perfectly obvious to everyone, allowing for a short time (no more than a few days) for reflection. I am prepared to accept that the relationship between the parties by January 2016 had become one steeped in suspicion and a degree of mistrust, and it may well be that the claimant was initially puzzling over how the s.25 "error" could have arisen. I am prepared to accept that those acting for the claimant may, initially have thought the "error" was all part of a greater, sinister plan to oust the tenant or persuade the tenant to vacate. However, I reject the idea that puzzlement was more than transient or was reasonable or reasonably justified in all the circumstances. Any concern on the part of the claimant was the result of unnecessary over-thinking and, I venture, speaks more eloquently of those responsible for the management of the claimant in terms of their unreasonably complicated thinking than it does of the landlord.

15. Furthermore, as Mr. Wilson says in his first witness statement, he was alert to the fact that the s.25 Notice was invalid (as he puts it) due to its being drafted in respect of Dukeminster rather than Dukeminster (UG). He was obviously well aware of the company to whom it should have been addressed. His confusion (or that of the directors) was not about the correct identity of the intended recipient, but rather they confused or puzzled themselves (and perhaps others) by searching for sinister motives on the defendant's part, where none existed. In my judgment a reasonable recipient would have had no reasonable doubt as to how this s.25 Notice was to operate and in respect of which company. The documents (the s.25 Notice and the s.40 Notice) speak loudly and clearly for themselves in everything but the inclusion of "UG" in the name of the actual tenant. If the mistake on the s.25 Notice was a deliberate mistake, it must have involved the collusion of the solicitor responsible for drafting and despatching it, even if this was done "on instructions". This would be extraordinary conduct from a solicitor and unreasonable for the directors to have thought it a plausible possibility. I regret to conclude that if anyone was being "tri cky" abo ut the s.25 Notice it was the claimant given the atmosphere of a de a fening silence from the directors about this problem.

16. I have not heard any evidence from the directors of either Dukeminster or Dukeminster (UG), so there is no material save for the evidence of Mr. Wilson to the effect that any responsible person harboured any reservations, or i ncleed confusion, about the real intended addressee and intended effect of the s.25 Notice. The directors are all highly experienced property professionals according to their own solicitors in a letter dated 1/3/17 and I find that they are exactly that. Mr. Wilson said (and I accept his evidence on this) that it was the directors of Dukeminster and Dukeminster (UG) who devised the strategy (I infer of both companies) to deal with the s.25 Notice, so the absence of any evidence from them is telling in the context of a submission that the s.25 was unclear. Mr. Wilson

himself said that *"I did not consider whether the error in the* s.25 *Notice was*

*) deliberate".* The strategy that the directors devised was to wait until close to the end of 2016 before serving a s.26 Request in order maximise their chances of

achieving a lower interim rent by reason of the s.25 Notice being ineffective.

17. The objective approach to the construction of s.25 Notices was considered, and applied by the Court of Appeal, in *Morrow v Nadeem*1 • In that case it was the landlord's name that was inaccurate, but clearly the principle laid down by the Court of Appeal applies to both the name of the tenant, as well as that of the landlord . At p.l387G-H, Nicholls U said:

'There might perhaps be an exceptional case in whicb, notwithstanding t he inadvertent mis-statement or omission of the name of the l a ndlord, any reasonable tenant would have known that it was a mistake a nd known clearly what was intended".

This emphasises that the Court must focus on objectivity and the tenant's objective understanding in all the circumstances.

18. In *Bridgers* & *anr v Stanforrf-* the tenant was a company, Bridgers Limited: yet the s.25 notice named Hamptons Ltd as the tenant. Hamptons and Bridgers were co­ subsidiaries of Abaca Investments pic, with the evidence indicating that Bridgers was dormant, its business being conducted by Hamptons. At first instance, the judge had applied the *Morrow v Nadeem* test, holding:

I [ l986]1 WLR 1381

2 [ 1991J 2 EGLR 265

"This is not a case of a notice being given to the wrong company or tenant, there never was any doubt as to the identity of the intended recipient of the notice but merely as to the name under which they chose to be known at the date of service of the notice. I do not regard the use of the name Hamptons and not Bridgers as directing the notice to the wrong recipient but even if I did take that view I would regard it as full square within the words of Lord Justice Nicholls."

In theCA, Lloyd U applied the same test, but distinguished the facts on the ground that, in *Morrow v Nadeem* the mis-statement of the landlord's name was material and could have had serious consequences for the tenant (e.g. by giving counter­ notice to the wrong person). Lloyd U regarded the reasonable recipient of the notice in the *Bridgers* case as one who would treat the s.25 notice as intended to be addressed to the actual tenant, Bridgers, notwithstanding the way it was in fact addressed in the notice. Nourse U concurred, relying not only on the Nichols U judgment, but also on earlier authorities, which included *Carradine Properties*

*Limited v Aslam3* in which Goulding J said4 :

"Iwould put the test generally applicable as being this: "Is the notice quite clear to a reasonable tenant reading it? Is it plain that he cannot be misled by it?'"'.

19. The approach for all such cases was laid down in *Mannai Investment Co Limited v Eagle Star Life Assurance Co LimitecP* which again stressed the objective approach that enables the Court to deal with an obvious mistake by what has been referred to as 'corrective interpretation'6 • That case involved a notice triggering a break clause which had simulated the wrong date of termination. For the majority, Lord Steyn said7 :

"The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering the question that the notices must be construed taking into account the relevant objective contextual scene ...... Thirdly, the enquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind."

' [ 1976]1 WLR 442

'-144 G-H

'[1997j AC 749

*r,* See *Cherry Tree Investments Limited v Landmain Limited* (2013] Ch 305 at [62].

7 7670-76RC

At p. 768 D-E he added:

"It is important not to lose sight of the purpose of a notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right rese r ved. Tha t purpo e must be rel evant to the construction and validity of the n otice. Prime facie one would expect that if a notice unambiguously convey. " decision to terminate a Court *may* nowadays ignore immaterial err rs which would nol have misled a reasona ble recipient."

In the present case, the s.25 notice served the purpose of notifying the tenant that the Landlord was bringing its tenancy to an end under s.25 of the Act, but was not objecting to a renewed tenancy in principle. It was accompanied by the s.40 Notice (for the purposes of a mutual exchange of relevant information), which was only consistent with the Landlord requiring access to information from the claimant­ tenant in order to progress the agreeing of terms for a new tenancy.

20. Lord Hoffmann discussed mistakes about names or descriptions or dates in general terms at pp. 774D-775H. At p. 780D-G. He adopted with approval Goulding J's test in *Carradine Properties.*

21. The third member of the majority, Lord Clyde cited with approval8 the observation of Slade U in *Delta Vale Properties Limited v Knowles9 :*

"In my judgment, notices to complete served under condition 23, if they are to be valid, must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate".

Lord Clyde went on to state 10:

"The standard of reference is that of the reasonable man exercising his common sense in the context and in the circumstances of the particular case. It *is* not an absolute clarity or an absolute absence of any possible ambiguity which is desiderated. To demand a perfect precision in matters which are not within the formal requirements of the relevant power would in my view impose an unduly high standard in the framing of notices such as those in issue here. While careless drafting is certainly to be discouraged the evident intention of a notice should not in matters of this kind be rejected in preference for a technical precision."

s 782 A-C

*'* [1990)1 WLR 445 at 454

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10 782 C-D

22. The approach of the majority in *Mannai* was considered and applied by the CA in *Lay v Ackerman* 11 in respect of a statutory counter-notice served under the Leasehold Reform, Housing and Urban Development Act 1993, which had wrongly

identified the Landlord . Neuberger U said:

"........... The correct approach on the basis of the decision and reasoning in *Mannai* is as follows. One must first consider whether there was a mistake in the information contained in the notice (as there was as to the date in *Mannai,* and there was as to the landlord, in the present case). lf there was such a mistake, one must then consider how, in the light of the mistake, a reasonable person in the position of the recipient would have understood the notice in the circumstances of the particular case. Finally one must consider whether, as a result, the notice would have been understood as conveying the information required by the contractual, statutory or common law provision pursuant to which it was served."

fn this case, there was a mistake in the naming of the addressee of the s.25 Notice:

*it* was addressed to Dukeminster rather than Dukeminster (UG).

23. Both companies have the same directors, who objectively must, in my judgment, be taken to have known that the tenant was Dukeminster (UG). So how, in the light of the mistake, would a reasonable person in the position of the recipient have understood the s.25 Notice in these circumstances? The 'recipient' was the board of directors of Dukeminster, who were also the directors of Dukeminster (UG), so actual knowledge of the Notice was highly likely on the part of the directors both companies. Self-evidently the Notice had the purpose of triggering the s.24 process by means of s.25 and it was served in conjunction with a further Notice requiring the provision of information under s.40. It was and can only have been targeted at the tenant of the building however unfavourable the defendant's proposed terms might have seemed.

24. A reasonable recipient of the s.25 Notice on the facts in this case (there being two closely linked and managed companies), I find, would immediately and clearly have understood the intended addressee of the Notice (the then actual tenant) and its effect on the lease of the building.

II [2005] L EGLR l39

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25. It follows that the other parallel action is based on a s.26 request that is a nullity *and* those proceedings (DOOEX057) must be dismissed. The date for the commencement of interim rent (which is essentially what this issue is all about) is, therefore, 26

December 2016.

Terms of **the** New Lease

26. I now turn to the other issues in the remaining action which are these: (1) what the duration of the new tenancy should be;

(2) whether the new tenancy should be subject to a break clause; (3) what other terms should the new tenancy include; and

(4) what should be the rent payable under the new tenancy (and thus, the interim rent in this case)?

27. Sections 33, 34(1), (3) and 35(1) of the Act apply.

*33. Where on an application under this Part of this Act the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in ull the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fifteen years, and shall begin on the coming to an end of the current tenancy.*

*34(l)The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a wilLing lessor, there being disregarded (not applicable) ...*

*(3)Where the rent is determined by the court the court may, if it thinks fit, further determine that the terms of the tenancy shall include such provision for varying the rent as may be specified in the determination.*

*35(1) The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder) including, where different persons own interests which fulfil the conditions specified in section 44(1) of this Act in different parts of it, terms as to the apportionment of the rent, shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances.*

Summary of Conclusions

28 [n my judgment the terms of the new lease should be as follows:

28.1 A term of 10 years, -*.*1*.:* :11

28.2 Rent review (upwards and downwards) after 5 years.

28.3 No break clause.

28.4 Rent on 100% prime rate basis being£84.00 per square foot 12 (valued 3 months from the date of these proceedings) on the basis of the agreed square footage set out in paragraph 2.3.2 of the experts' Joint Statement as discounted in accordance with the oral evidence of Ms. Sowter.

29. The application of s.35 of the Act is subject to the authoritative guidance of *0 'May v City of London Real Property Co 13•* There were two leading speeches, those of Lords Hailsham and Wilberforce. Lord Hailsham said 14

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"Despite the fact that the phrase e having regard to' ] has only just been used by the draftsman of section 34 i\_n an almost mandatory sense, 1 do not in any way suggest that the Court is intended, or should in any way attempt to bind U1e partie to the terms of the cu.rrent tenancy in any permanentrm. But *l*

do be lieve that the Court must begin by considering the terms of the current te na n y that tbe burden of persuading the Court to impose a change in those terms against the will of eilher party must rest on the party proposing the change, and that the change proposed must i n the circumstance of the case, be fair and reasonable......

12 Subject to paragraph 52 below.

1' [1983]2AC726

1 740 F-G and 741 C-E

A further point which was canvassed in argument and with which I agree, is that the discretion of the Court to accept or reject terms not in the current lease is not limited to the security of tenure of the tenant even in the extended sense referred to by Denning U in *Gold v Brighton Corporation* [1956] 1

WLR 1291. There must, in my view, be a good reason based in the absence of agreement on essential fairness for the Court to impose a new term not in the current lease by either party on the other against his will. Any other conclusion would in my view be inconsistent with the terms of the section. But, subject to this, the discretion of the Court is of the widest possible kind , having regard to the almost infinitely varying circumstances of individual leases, properties, businesses and parties involved in business tenancies all over the country."

30. Lord Wilberforce said 15:

"I accept therefore the landlord's contention that, in principle, tenants are not to be protected from market forces; as regards rent, indeed this is expressly laid down in s.34 ..... The same underlying principle ought to be applied to the determination of other terms in the new lease, subject, however, to the guidelines laid down in section 35- as to which see below".

He later said in relation to s.3516

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"This section contains mandatory guideline or direction to "have regard to" the terms of the current tenancy and to all relevant circumstances. The words "have regard to" are elastic: they compel something between an obligation to reproduce existing terms and an unfettered right to substitute others. They impose an onus upon a party seeking to introduce new, or substituted, or modified terms, to justify the change, with the reasons appearing sufficient to the Court (see *Gold v Brighton Corporation* [ 1956]

1 WLR 1291, 1294- on "strong and cogent evidence" *per* Denning U,

*Cardshops Limited v Davies* [1971] 1 WLR 591, 596 *per* Widgery LJ)."

"If such reasons are shown, then the Court, applying the words "all relevant circumstances", may consider giving effect to them: there is certainly no intention shown to freeze, or in the metaphor used by learned counsel, to "petrify" the terms of the lease. In some cases, especially where the lease is an old one, many of its terms may be out of date, or unsuitable in relation to the new term to be granted. If so or for other good reasons shown, the Court has power to order a modification by changing an existing term or introducing a new one (e.g. a break clause, cf. *Adams v Green* (1978) 247

E.G. 49). Before doing so it will consider any objections by the tenant, and

where there is an insoluble conflict, will decide according to fairness and justice .....".

*15* 747 C-D

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" 747 E-H

Term

J l. I will return to the expert evidence in a little more detail in the context of valuation in due course. However, as a general observation and conclusion, I prefer and accept the evidence of Ms. Sowter in all respects unless the contrary appears below.

32. The claimant seeks a 5 year term; the defendant has offered 12. Neither option strikes me as being very typical. I do not get the impression from Ms. Sowter's report (or from her oral evidence) that she is supporting the 12 year option with any great vigour or enthusiasm but I accept her conclusion that the 5 year option is "not particularly common" and would be unusual where a self-contained, period, prestige building such as this was available on the market to be utilised as a corporate headquarters. The original tenancy is of no assistance being for a term of

51 years. Section 33 of the Act permits a maximum of 15 years. Whilst comparators constitute only one of the factors to be considered in this context, I note that several of the comparators used by Ms. Sowter (some more "comparative" than others when it comes to the nature of the buildings and location) are concerned with 10 year terms. In all the circumstances, in my judgment, a 10 year term appropriately and reasonably balances the interests of landlord and tenant and is consistent with several of the examples Ms. Sowter produces as comparators albeit mainly for the purposes of valuation (for example, the 2 open market lettings at 24 Grosvenor Hill and 69 Grosvenor Street).

33. In the absence of agreement between the parties, the duration of the new tenancy has to be such *"as may be determined by the Court to be reasonable in all the circumstances".* That requires it to be reasonable both from the perspective of the Landlord, as well as that of the claimant. The defendant holds the Lease (and any renewed lease) as part of its commercial property portfolio, which makes its requirement for a longer term appropriate and reasonable. The claimant finds itself in a position of some uncertainty following the chairman's death in April 2018; but unfortunate though this is, it is a matter that only relates to this particular tenant and has no bearing on the position of the building in the market or on what is objective!y speaking reasonable in all the circumstances. Even ifthe chairman's death is to be considered amongst "all the circumstances", it does not weigh with any great effect

in the balance of all the other features of the building and its location. ff in 5 years· time the claimant wishes to relocate it will have little difficulty in assigning its tenancy. The redevelopment of the former US Embassy nearby (as to which see further below) will have been completed or will be on the point of completion, and

Upper Grosvenor Street will be a more attractive location than it is at present.

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34. The claimant further submits that the appropriate term is 5 years on the grounds that this best suits the claimant's business interests, and because there is a lack of evidence to the effect that the defendant is prejudiced by the shorter term . The landlord, it is submitted, is compensated by the inevitable increase in rent that would apply to the shorter term and was itself contemplating either a 5 or 10 year term . The fact that either period was in the contemplation of the defendant shows, so the submission goes, that it was a matter of commercial indifference to the defendant whether the lease was to be for 5 or 10 years. In these circumstance, the claimant's commercial preference and interests should prevail. I am also reminded that in this respect it is for the Court to decide this issue within the framework of section 33 of the Act and in this context market forces represent only one factor of many that may inform the Court as to the appropriate term.

35. The problem with this submission is that I have little, if any, evidence about what the claimant's intentions or business interests actually are. rt is very difficult to assess how those interests might best be protected when the information is so sparse.

I infer from Mr.Wilson's evidence that the claimant's devotion to this building largely derives from the personal preferences of the late chairman, and since his death earlier in 2018 the claimant wishes to keep its options as open as possible. This is easy enough to understand but rather overlooks the fact that these proceedings have been in progress for 18 months during which time the late chairman and all the other directors have remained intriguingly silent about their intentions and how their interests will be best served by a shorter new tenancy than that proposed by the defendant. There is some evidence that the claimant had been investigating the possibility of purchasing the freehold of a townhouse in Mayfair and indeed was investigating the market generally for alternative options, but nothing that sheds any light on why their business interests would be better served by such a move. It is possible to speculate that the claimant may have thought it

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|  | better *to* clown-size given that the building is at present under-occupied (although the search for a similar freehold rather contradicts this possibility), and, or alternatively, that escaping from adjacent redevelopment works could have been advantageous. This sort of speculation is no substitute for evidence. On the other hand there is evidence from Mr. Wilson from which I infer that the occupation of a  Georgian, listed, end-of-terrace townhouse on Upper Grosvenor Street is a prestige |  |
| address valued by the claimant and given the length of the claimant's occupation |
| (25 years) was clearly perceived by the directors as an address of value for the  claimant's businesses. It remains obscure, given the lack of evidence, why 5 years |
| as opposed to some other period less than 10 years (or less even than 5 years) is |
| regarded by the claimant as being in its best commercial interests. I can only |
| speculate that there may be some 5 year plan for the claimant, but what it is, I cannot |
| say. |
| 36. | I am prepared to accept that Mr.Avery's disclosed correspondence (for example, |
|  | the email to Marcus Cooper of 10/12/15) is indicative of the defendant's willingness |
|  | to remain open-minded about the length of the new term, but in the end there is |
|  | nothing I have seen in the evidence that suggests that a departure from what I take |
|  | as the defendant's now default position, namely, a 10 year lease, would be justified. |
|  | The current lease for a period of 51 years is of little assistance and the parties have |
|  | proceeded on the basis that the new lease should be either 5 or 10 years. |
|  | Accordingly, bearing in mind that there is and will be no prohibition against the |
|  | assignment of the lease of the whole building, I can see no reason to depart from | , ·) |
|  | what I have described loosely as the market norm and, therefore, make provision |  |
|  | for a new lease of 10 years. This is, in my judgment, reasonable in all the |  |
|  | circumstances. |  |

Rent Review Clause

37. There is no rent review clause in the current lease. Such a clause is only contended for in the event that I decide (as I have) that the term of the new lease should be 10 years. The defendant contends for an upwards only rent review clause, the claimant for upwards and downwards clause in accordance with the state of the market at the time of the review (the 5th anniversary of the new lease). The claimant submits that a review based on market values that may be up or down is inherently fair and

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reasonable. Upwards only, is, it is submitted, inherently unfair and the up or down option is consistent with the majority of previous decisions cited by Mr. Tanney in paragraph 41 of his skeleton argument. In the absence of some special reason or evidence affecting a particular property or the landlord's capital investment, the up or down option is the more appropriate in this case. The submission is that there is no evidence pointing towards any circumstances that might displace the inherent fairness of allowing the market to govern the rent on review, in a way that could yield a higher or lower figure (or make no change at all).

There is no doubt that by far the most common rent review clause only permits a review upwards, if at all (such that if the market has not changed or rental values have fallen the rent remains the same). It is of interest that of the cases cited, all but one of the decisions made by a Court has not followed this mostly commonly adopted option. Judges appear to have been more prepared to buck the trend and order reviews upwards or downwards according to the state of the market at the time of the review. The defendant submits that there is no reason for this Court to buck the commercial trend and a reasonable landlord would be expected to require an upwards only review; the risk of market movements falling squarely on the shoulders of the tenant. It is pointed out that in the expert evidence the 2 comparators used where terms were negotiated as Open Market Lettings both resulted in upwards only rent review clauses being agreed. Therefore, there is

nothing unfair in an upwards only clause.

39. Section 34(1) of the Act requires the Court to set a rent at a level which *' · ... having regard to the terms of the tenancy ..., the holding might reasonably be expected to be let in the open market by a willing lessor ...* ". Subsection 34(3) also applies to the effect that provision can be made to vary the rent. I do not read sections 34(1) and (3) as giving primacy to market forces in determining what type of rent review clause should be adopted (if any). Whilst common commercial practice, as illustrated by comparators, is an important factor, it does not play a conclusive part in the section 34(1) process. Section 34(1) concerns the rent at which a willing lessor might reasonably be expected to let in the open market, not the rent review terms on which a willing lessor would be prepared to proceed; though it is more than possible that the latter would inform the former such that the rent would be

different depending on what type of review clause (if any) was adopted. When the Court has regard to *the terms of the tenancy* it is the terms, including the rent review clause, that have to be considered in the round.

40. There is no evidence from which I can conclude in this case that there would not be a willing lessor for a lease with a both upwards and downwards review clause. Stripped to its essentials the defendant's submission is that because upwards only reviews are the most commonly encountered and negotiated rent review clauses, and are required by reasonable landlords, *therefore,* that result is fair and the allocation of risk to the tenant in a changing market must also be fair. In my judgment there is no *"therefore"* about it. That is not to say that upwards review is always "unfair", merely that in this instance I can see no compelling reason to depart from what, in my judgment, inherent fairness dictates.

41. In all the circumstances, in my judgment, the appropriate and inherently fair and reasonable rent review clause is an upwards or downwards ("both ways") clause to account for market changes in either direction on the 5th anniversary of the new lease.

Break Clause

42. The claimant seeks the incorporation of a break clause in the new lease to be exercisable in the event that the occupation of the building becomes intolerable and the claimant is not able to have Quiet Enjoyment in the event that adjacent redevelopment works prove unbearable. It is submitted on behalf of the claimant that if the defendant's position on the redevelopment is right, to the effect that all will be well and intrusion minimised by careful adherence to common regulatory standards, then the defendant has nothing to fear; the precondition to invoke the break clause will not arise and the defendant's position is safeguarded. I do not accept this as a viable approach which seems similar to the idea that an injunction can safely be granted irrespective of a triable issue where there is no risk of a breach. There is no binding authority to assist in this context but I proceed on the analogous

basis of a landlord's redevelopment break clause *(Adams v Green 17 .* It is logical to

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apply the same test namely:

42.1 Whether there is a real possibility that the event will occur that is described as the precondition of the exercise of the rights under break clause - that is, is there a real possibility that the claimant will be deprived of its Quiet Enjoyment due to the intrusion of neighbouring redevelopment work during the term of the lease;

42.2 If there is such a real possibility, on whom should the burden of the event fall?

43. A "real possibility" in my judgment, is a prospect that is more than a fanciful

f ' conjecture, so the threshold is not a high one. I accept that in a case such as this, if such a real possibility exists then the burden of the consequences should fall on the landlord whose capital interest in the building is unlikely to be affected in the medium or long term. However, in my judgment the claimant's fear of intrusion to the extent that it is deprived of its Quiet Enjoyment is unwarranted, speculative and,

in the technical sense, fanciful.

44. In my judgment the insertion of the break clause sought by the claimant is neither reasonable nor appropriate. The grounds on which such provision is sought are based on the submission that adjacent to the building, the former United States embassy is to be redeveloped as a luxury hotel. This project will take several years (and however long the project is anticipated to last- currently about 5 years - it is bound to overrun) and is extensive and radical. It is likely to be intrusive, noisy and cause significant vibration, dirt and dust to the extent that the building may become unusable. These anticipated problems will be aggravated by building project road traffic and building contractors and their employees populating the area outside the building to the detriment of its occupiers. This much I derive from the evidence of Mr. Wilson and Mr. Shapiro. Their fears, I find, are exaggerated and unfounded.

45. I do not doubt that the redevelopment of the former embassy into a hotel, including as it will the addition of significant, deep basement enlargements (4 storeys, approximately 30 metres deep), is a radical project that will have a short-term

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negative impact on properties in the immediate vicinity, including the building, in some of the ways anticipated by the claimant; albeit in my judgment to a much lesser extent than is feared. It will be no less irksome for the residential occupants of houses in, for example, Blackburne's Mews and no doubt many others. However,

[ reject the contention that there is any realistic likelihood of the building being rendered uninhabitable or its occupation intolerable as a result of the redevelopment. The submission that there is such a real possibility displays the same type of unjustified overreaction as the claimant demonstrated in another context, namely, in considering the possibility that the landlord had deliberately misaddressed the s.25 Notice for strange, and I find, inarticulate tactical reasons.

45.1 There is no evidence that the developer of the former embassy will not adhere to its public law obligations, including compliance with Westminster City Council's Code of Construction Practice. This is a sophisticated Code and covers in detail the mitigation of adverse development effects including traffic flow and regulation; noise; vibration; dust; and air pollution. There is an immense amount of documentation concerning the former embassy redevelopment and its impact on the locality of the building and Grosvenor Square, but it suffices to note that the entire process will be regulated and controlled in considerable detail by the local authority across the whole range of concerns the claimant has. There is no evidence from which a conclusion could be drawn to the effect that the project will be monitored and controlled in any less efficient manner than any other major redevelopment project in Westminster. The inconvenience caused will be minimised to a point that will preserve the claimant's Quiet Enjoyment of the building. The former embassy will be encased in what will amount to a temporary "sarcophagus"-like structure (although not made of stone but "Monarflex" encased scaffolding) behind which the bulk of the noisy and dirty works will be undertaken. The former embassy itself is a Grade II listed building and the programme of works proposed will have to cater for the preservation of the exterior whilst radical interior structural reconfiguration takes place. Non-percussive methods are anticipated for the major demolition aspects of the work in order to reduce noise and vibration as well as with a view to protecting the fa<;ade of the former

embassy. Mr. Avery describes the results of his meetings with the personnel responsible for the Site Environment Plan and I accept his evidence.

45.2 Party Wall Awards will have to be agreed or resolved before the anticipated start date for the works in the autumn of 2018. These cannot fail to include mechanisms to regulate noise and vibration and to monitor adverse consequences to properties such as the building. I accept Mr. A very's evidence about this, and also to the effect that the defendant itself has a close interest in ensuring that a monitoring mechanism is in place to stop works if and when breaches of agreed standards (in respect of noise, vibration, and dirt) are other than occasional or incidental. There is no evidence that any of the residential occupiers nearby have sought compensation for being excluded from their properties or otherwise for anticipated inconvenience.

45.3 Significant and radical redevelopment happens routinely across central London. There is no evidence that any projects on a similar scale have rendered occupation of properties in a similar situation to this building intolerable due to developers' failure to adhere to local authority regulatory requirements or otherwise.

45.4 The period over which outside development works will have their greatest impact is likely to be about 21/2 years (even assuming, reasonably, that the project overruns) based on the timeline included as part of the transport plan.

45.5 A break clause of the type envisaged by the claimant is not congruent with the terms of the current tenancy.

45.6 If the envisaged break clause were to be included in the terms of the new lease , the uncertainty from the defendant's viewpoint would be bound have a significant upwards impact on the rent valuation even if Ms. Sowter's evidence about doubling the rent (in line with serviced offices) puts it too high.

45.7 I am not satisfied that this departure from the scheme of the current tenancy has been adequately supported by evidence, particularly as to how a "rolling'' break clause would be enforced. It could not be invoked simply on the subjective conclusions or judgment of the claimant (although such is not now

the claimant's position). In the schedule to the s.26 request the following proposal is put forward: "... *break notice operable in the event that the Property is affected by the works to the adjacent American Embassy building so as to make it impossible for the Tenant to have quiet enjoyment of the Property".* If invoking the break clause is intended to be linked to monitored noise and vibration levels, no scheme has been suggested. In the end, as submitted on behalf of the defendant, this proposal is an invitation to future litigation, and whilst, if otherwise appropriate, this would not be a bar to the inclusion of such a clause, *it* is difficult to see how such objective monitoring would differ from that which will be in place pursuant to the Westminster Code and the expected Party Wall Awards. The type of break clause proposed is not reasonable and in my judgment it is unnecessary.

46. I will consider the impact (if any) of this redevelopment project on the issue of valuation in due course.

**Rent**

47. The parties are agreed that, under s.34 of the Act, the Court must determine the open market rent of the building on the basis of it being let with vacant possession.

None of the 'disregards' in s.34(1) are relevant to the experts' valuations.

48. The approach of each expert to the new rent is entirely different. Mr. Shapiro's main report is dated 21 November 2017. In outline, he maintains that the building stands distinctively alone in the market (and not in a good way) given its position next to a major, intrusive redevelopment site; the prohibition on subletting, the limited user rights for the 2 residential flats (restricted to licensed occupation by senior employees of officers of the claimant) and the building's wholly un-refurbished condition. It is his opinion that the building would be unlettable on the open market in current local conditions. For the purpose of this statutory process Mr. Shapiro maintains that the only prospect of letting the unlettable would be by offering a highly competitive, low rent; to entice would-be tenants to overlook the many drawbacks of assuming occupation of the building in its current condition and location. As a result, he takes as a "marker" or starting point by way of initial comparison, 9, Upper Grosvenor Street (in the same row of Georgian townhouses

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as the building) whilst making it clear this is, not so much a comparator, as the only viable starting point or "marker". In the context of the rent, significant discounts would have to be applied in order to encourage a notional willing, prospective tenant on the open market. From this starting point Mr. Shapiro, in his Report, makes what he says are appropriate but substantial discounts in order to reach his final opinion reflected in the additional schedule dated 25 June 2018 replacing the figures in paragraph 9 of his first Report. For the commercial parts of the building he reaches a figure of £37.31 per square foot (at prime 100% for 10 years). For the residential parts of the building (the 2 flats) he adopts a different approach and values the flats by comparison to what would be obtainable on the open market for assured shorthold tenancies in similar mixed-use buildings in the locality. Without replicating Mr. Shapiro's final schedule here, and subject to the additional discounting he engages in *to* reflect the different potential uses of different parts of the building (e.g. vaults and kitchen), tabulated in the joint statement at 2.3.2, he arrives at an annual rent of £126,520.00 for a 10 year term.

49. Whilst recognising that, in a theoretical sense, every letting is a comparator, Mr.

Shapiro does not recognise the value of the several specific comparators offered by Ms. Sowter because of the compromised circumstances facing any willing prospective tenant of this building. His approach does not, in my judgment, take any sufficient account of the environmental safeguards that are to be put in place once the embassy development project commences such as those canvassed in the evidence of Mr. Avery. I reject Mr. Shapiro's approach. In my judgment, Mr. Shapiro's approach is too impressionistic; it fails to acknowledge the usefulness of what I consider to be the usefulness of the Sowter comparables. I am sure Mr. Shapiro appreciates that comparators are part of the analogous reasoning process, but in adopting a dismissive approach to them in this case I conclude he has gone too far. His discounting by something of the order of 55% to account for what he perceives to be the many disadvantages affecting this building (not least of all its unmodernised condition) from his adjusted figure of £87.80 per square foot (based on his "marker" of 9, Upper Grosvenor Street) takes impressionism close to pure guesswork. He is not able to point to a single example (even as an illustrative "marker") of any letting that has benefitted from the type or extent of discounting that he has applied in the present case due to adjacent or nearby, radical

reconstruction works. Such evidence as there is about this (by way of indicative or general illustration) comes from 73 Brook Street, where it is apparent that radical, directly adjacent, rebuilding works appear to have had no effect on valuation.

50. Ms. Sowter 's opinion, on the other hand, is grounded by her reference to a number of comparative lettings and she reaches her figure of £84.00 per square foot (prime lOO% with discounted rates for different parts of the property as retlected in the table in paragraph 2.3.2 of the Joint Statement), having made suitable adjustments to reflect the differences between the subject building in this action and the others to which she makes reference in her Report. She reaches an annual rent figure of

£297,500.00. I accept her opinion that, notwithstanding the adjacent building works, the building remains a prestige option in a highly prestigious location that would attract competitive interest from professional organisations looking for single unit headquarters even if a degree of internal refurbishment is required. With its address, its listed status and corner, end-of-terrace location, I accept it is a building that would attract considerable interest on the open market. I accept her evidence that professional organisations, firms or companies would be looking for a long-term solution and would also have in mind that after the former embassy is reconfigured as an hotel, this part of Grosvenor Square is likely to be more attractive than it is at the moment. In other words, I accept her evidence that the rebuilding works will, when completed, in the medium term, improve the area and this likely improvement is something that a willing lessee would be prepared to balance against short term inconvenience. I accept the defendant's submission that the type of tenant in the market for this building would be most unlikely to want to sublet it in part. I am satisfied that Ms. Sowter has properly and reasonably allowed for the inevitable differences that exist between the comparators she has used to reach her

opinion (the initial ones are listed in paragraph 2.4.3 of the Joint Statement), and the building in issue in this action. The details of these are not challenged by Mr. Shapiro because his approach, in principle, is entirely different and he regards this as a '·no realistic comparator" case. I accept Ms. Sowter's evidence to the effect that the absence of any example of any sort where a substantial rent discount has been agreed or awarded where the subject property is adjacent to significant building works, is a telling factor in the defendant's favour in this process. I also accept her cone!usion that no security issues arise due to residential occupation of the upper

floors by senior personnel of any tenant. She has reasonably accounted for the limitations that are in place with regard to sub-letting in this building. f accept Ms.Sowter's evidence with regard to the percentages applicable to the sub-prime areas of the building and their use as set out in the "Defendant" column of the table at paragraph 2.3.2 of the Joint Statement, as I do her approach to the valuation of the residential floors of the building which, in my judgment, is more in line with common market practice than that adopted by Mr. Shapiro. I am not persuaded that her approach is particularly idiosyncratic to the Grosvenor Estate, nor that there is any reason to depart from this common valuation practice.

51. Ms. Sowter's two supplemental reports produce further examples by way of comparators. I accept the defendant's submission that these are intended to be additional examples to underpin the conclusions she reached in her first Report and do not reflect a new approach or a new basis for her valuation. I allowed this evidence to be admitted late in the day. I am confident that Mr. Shapiro, with all his considerable experience, had more than sufficient time to deal with these 2 additional reports. However, given his distinctive approach to valuation in this case, it is not surprising that he decided it was not necessary for him to do so. It is because of what I have called his distinctive approach (which I have rejected) that it is not necessary for me to go through all the comparators utilised by Ms. Sowter in any of her 3 reports in order to draw out by way of analogy those aspects of the examples that demonstrate similarities with the subject building and making allowances for those aspects that demonstrate differences. Nonetheless, I am satisfied that Ms. Sowter in making reference, in particular, to two new open market lettings (24, Grosvenor Hill and 69, Grosvenor Street) together with the nearby *9,* Upper Grosvenor Street (Mr. Shapiro's "marker") has properly accounted for the several differences that there are between those properties and the subject building; whether

those differences are reflected in their size, state of refurbishment, location or lease terms. Because the dispute between the experts has been one of principle and approach, it suffices for me to reinforce the fact that I accept Ms. Sowter's approach and, accordingly, her conclusions as to valuation in their entirety, subject to the qualification below.

52. The qualification arises out of Ms. Sowter's allowance of a 3 month fitting-out period derived from the two new, open market letting examples. This can be seen by way of illustration at paragraph 9.6.6 of her first Report. The point is made in paragraphs 64, 65 and 66 of Mr. Tanney's skeleton argument. It is accepted that Ms. Sowter has correctly amortised the rent free periods to the claimant's benefit arising from the new open market letting examples up to a point, but she "stops short" of amortising the first 3 months ofthe rent free periods that reflect the market standard fitting out period. In my judgment and in line with the (non-binding) decision of HHJ Bailey at this court in *HMV Music Ltd v Mount Eden Land Ltd* [CLCC 17 January 2012] the reasonable approach is to amortise the whole of the rent-free periods including the 3 month fitting out periods. Ms. Sowter's valuation needs to be reassessed in the light of this conclusion which, in my judgment is more consistent with the requirements of s.34 of the Act. It would be disappointing if this could not be achieved by agreement.

53. The rent in the new lease should, therefore, be configured in accordance to the "Defendant" column in the table in the Joint Statement using Ms. Sowter's prime rate valuation of £84.00per square foot discounted appropriately as that column specifies for sub-prime areas within the building and subject to my conclusion in paragraph 52 above which may demand a slight readjustment.

Other disputed terms of the new lease

54. I was informed at the conclusion of the trial that other remaining disputed terms in ·

the new lease had been the subject of agreement as the trial had progressed. I will

hear further submissions if I have misunderstood this indication.

55. Both experts are agreed that none of the above previously disputed terms has any impact on the rent.

Interim rent

56. Ms. Sowter has expressed the opinion in Section 15 of her first Report that the issue regarding the validity of the s.25 notice has no impact on the assessment of the interim rent. Mr Shapiro says nothing about the interim rent. Accordingly, the rent determined under s.24 of the Act as above, is ordered to be paid as the interim rent.

There is no evidence that the conditions set out in s.24C (3) of the Act are satisfied. Accordingly, as provided by s.24C (2) the interim rent should be the same as the s.34 rent.



57. In the light of the above:

(1) There will be a declaration that the s.25 notice was valid, and that accordingly: (a) the s.26 claim stands dismissed, and (b) the interim rent is payable from 26/12/16;

(2) The new lease should not contain a break clause;

(3) The new lease will provide for an "upwards and downwards" rent review after 5 years.

(4) The new lease should be for a term of 10 years;

(5) The rent under the new tenancy will be £297,500.00 per annum (reduced to

£290,062.50 to account for my conclusion in paragraph 52 above) with interim rent payable at the same rate.

58. I will hear further submissions, *if* necessary, on amortisation or other issues should my conclusions prove insufficient for the parties to put a new lease into effect by agreement.

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