IN THE COUNTY COURT AT CENTRAL LONDON

Claim No: F10CL196

Courtroom No. 51

Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 31st March 2020

Before:
HIS HONOUR JUDGE HELLMAN

BETWEEN:-

LUPIN LIMITED

Claimant

-and-

(1) 7 – 11 PRINCES GATE LIMITED
(2) PRINCES GATE PARTNERSHIP LLP

Defendants

Mr Stephen Jourdan QC appeared for the Claimant
Mr Philip Rainey QC appeared for the Defendants

Hearing dates: 3rd – 4th February 2020

JUDGMENT

In Court

Introduction

1. This is an unusual case. The Claimant is Lupin Limited ("C"). C is the tenant of Flat 30, a lift shaft ("the Lift Shaft"), and a boxroom ("the Boxroom") (together, "the Flat") in the block of flats at 7 – 11 Princes Gate in Kensington, London SW7 ("the Building"), which is just to the south side of Hyde Park. Flat 30 is the penthouse flat at the top of the Building. The First Defendant, 7 – 11 Princes Gate Limited ("D1"), owns the freehold of the block. The Second Defendant, Princes Gate Partnership LLP ("D2"), is the tenant of the Flat under an overriding lease ("the Overriding Lease").

2. C purported to give notice to D1 and D2 that it was exercising its right under Part I, Chapter II of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") to claim a new lease. C claims that under the 1993 Act D1 and D2 together are its landlord. Alternatively, C claims that D2 is its landlord and D1 is a third party within the meaning of the 1993 Act.

3. D1 and D2 accept that C is entitled to a new lease but assert that C's landlord is D2 alone. They deny that D1 is a landlord or a third party. ("The landlord issue".) This issue is not academic. Upon it turns the question of whether C is able to enforce against D1 a covenant not to build or erect any structure on the roof of the Building. D1 and D2 also deny that the notice purportedly given by C of its claim to exercise its right to acquire a new lease was valid. ("The notice issue".)

4. This is the context within which C has brought a claim under part 8 of the Civil Procedure Rules seeking a declaration that its notice of claim was validly given. In order to determine that issue, I must decide who is the landlord and, if D1 is not a landlord, whether D1 is a third party. This is my judgment.

Agreed facts

5. The facts are agreed. In setting them out, I have drawn on the helpful written summary provided by Stephen Jourdan QC, who appeared for C. Philip Rainey QC appeared for D1 and D2. I am indebted to both counsel for their assistance in navigating what Mr Rainey aptly described as "*this rather abstruse corner of the law*".

6. On 14th September 1989 the then freehold owner of the Building, St Anselm Development Company Ltd ("St Anselm"), granted a lease of the Flat to C ("the Original Lease"). The term was just over 73 years, expiring on 25th December 2062. The premium was £3.95 million, with a ground rent of £5,000 per year, doubling in 2012 and

again in 2037. Clause 2 provided that in consideration of the premium, rent and covenants given by C, St Anselm demised the Flat together with various easements, rights and privileges identified in the First Schedule. They were as follows:

"*1. The right at all times for the purpose of obtaining access to and egress from the Flat to pass and repass over and along and to use the communal parts.*

2. The right of free and uninterrupted passage and running of gas electricity water and soil from and to the Flat in through and along the conduits now or hereafter laid in or upon the Building.

3. The right to subjacent and lateral support and to shelter and protection for the Flat from the remainder of the Building.

4. The right to walk and sit in the Gardens during the hours of daylight.

5. The right of access to and entry upon the remainder of the Building as is necessary for the proper performance of the Lessee's obligations in these presents the Lessee doing no unnecessary damage thereby and making good to the reasonable satisfaction of the Lessor all damage done and (except in cases of emergency) giving not less than forty-eight hours previous notice of each and every intended exercise of such right to the Lessor and to the occupier of each of the flats in the Building to be affected thereby."

7. Under clause 3, C entered into a number of covenants as tenant, including at clause 3(5) to keep the Flat in good and tenantable repair; at clause 3(6) to repaint the interior of the Flat in 1992 and in every fifth year; at clause 3(7) to clean the windows of the Flat (both inside and out) at least once a month; and at clause 3(16), subject to obtaining the Lessor's approval, to execute all works lawfully required to be executed by any governmental, local or other competent authority in respect of the Flat.

8. Under clause 4, St Anselm, "*with the intent to bind itself and its successors in title the persons for the time being entitled to the reversion immediately expectant upon the determination of the Term [ie of the lease] but not to bind itself or incur any liability after it shall have parted with the reversion*", entered into a number of covenants as landlord. These included at clause 4(8): "*Not to build or erect any structure on the roof of the Building*".

9. St Anselm granted C two further leases coterminous with the Original Lease: on 2nd June 1992, a lease of the Lift Shaft, which is structurally separate, and connected accessways on the ground and eighth floors; and on 11th November 1999, a lease of the Boxroom, which is in the basement of the building. I shall refer to these three leases as "the Existing Leases". The Original Lease was varied by deeds dated 2nd June 1992 and 11th November 1999, but the variations are not material.

10. On 13th August 2010, D1 became the registered owner of the freehold to the Building. On 1st September 2010, D1 granted a 999-year lease of its reversionary interest in the Flat, Lift Shaft and Boxroom to D2 – this is the Overriding Lease. D1 and D2 are controlled by the same people, one of the directors of D1 is a director of D2, and D1 is a director of D2. However, they are separate legal entities. The Overriding Lease did not include a covenant in terms of clause 4(8) of the Original Lease, but it did include a grant of all the same easements as those in the First Schedule to the Original Lease.

11. On 11th April 2018, C served a purported notice under section 42 of the 1993 Act ("the April Notice") claiming a new lease of the Flat on D2. C proposed a premium of £3,762,500. Another proposal was that the covenant at clause 4(8) of the Original Lease should be included in the new lease.

12. On 15th June 2018, D2 served a purported counter-notice admitting the claim to a new lease made by the April Notice. D2 proposed a premium of £12.5 million. D2 also proposed that the new lease should not contain the covenant at clause 4(8) of the Original Lease.

13. On 19th October 2018, having decided that D1 should be a party to the new lease, C served two purported notices on D1 and D2. The first notice ("the First Notice") identified D1 and D2 as together the landlord. The second notice ("the Second Notice") identified D1 as the landlord and D2 as a third party. The notices were otherwise in substantially the same terms as the April Notice. The covering letter said that it was C's primary contention that the First Notice was valid, but that if it was not, C reserved the right to rely on either of the other two notices.

14. On 12th December 2018, D1 and D2 served purported counter-notices. They accepted that C had a right to a new lease under the April Notice but not under the First or Second Notices. Their primary position was based upon section 42(6) of the 1993 Act. This provides that where a notice has been given under section 42, no subsequent notice may be given with respect to the same flat so long as the earlier notice continues in force. D1 and D2 submitted that the April Notice continued in force, and that therefore the First and Second Notices were invalid.

15. Further or alternatively, D1 and D2 relied upon section 42(7) of the 1993 Act. This provides that where a notice has been withdrawn, or is deemed to be withdrawn, under section 42, no subsequent notice may be given with respect to the same flat within the period of 12 months beginning with the date of the withdrawal or deemed withdrawal. D1 and D2 submitted that C, by serving the First and Second Notices and asserting in the covering letter for both notices (both covering letters also dated 19th October 2018) that

the April Notice was invalid, withdrew the April Notice and therefore could not serve another notice until 19th October 2019. The First and Second Notices were therefore invalid.

16. Finally, D1 and D2 relied upon the definition of "the landlord" in section 40 of the 1993 Act, which will be considered further below. They submitted that the First Notice was invalid because D1 was not a landlord within the meaning of that section.

17. On 27th December 2018, C issued its claim. The relief sought in the details of claim was a declaration that the First Notice was validly given; alternatively a declaration that the Second Notice was validly given; alternatively (and as a last resort) a declaration that the April Notice was validly given.

18. On 17th January 2019, D1 and D2 filed an acknowledgment of service. They sought declarations that the First and Second Notices were not validly given, and that the April Notice was deemed to be withdrawn on 19th October 2018. They also sought declarations under section 46(1) of the 1993 Act that C had no right on 19th October 2018 to acquire a new lease as claimed in the First and Second Notices. Section 46(1) provides that where the landlord has given the tenant a counter-notice, and the court is satisfied that, on an application made by the landlord, the tenant had no right under Chapter II of the 1993 Act, which contains all the provisions of that Act with which this claim is concerned, to acquire a new lease of his flat, the court shall by order make a declaration to that effect. It is common ground that, for purposes of section 46(1), the acknowledgment of service counted as such an application.

19. On 16th November 2018, C applied to the First-tier Tribunal under section 48 of the 1993 Act for a determination of the terms of acquisition. Section 48 provides that where the landlord has given the tenant a counter-notice, but any of the terms of the acquisition remain in dispute two months later, a leasehold valuation tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute. The action has been stayed by agreement until the Court determines the present action. As Mr Jourdan submits, until the action has been decided, it will remain unclear whether C is entitled to rely on any, and if so, which, of the section 42 notices, and therefore whether the section 48 application can proceed, and, if it does, whether D1 is a proper party to it.

The statutory framework

20. Chapter II of the 1993 Act, as section 39(1) explains, has effect for the purpose of conferring on the tenant of a flat the right to acquire a new lease of the flat on payment of

a premium. As Baroness Hale explained in Majorstake Ltd -v Curtis [2008] 1 AC 787 HL(E) at paras 37 – 38, the 1993 Act:

"*... was designed to give long leaseholders of flats rights as close as possible to those of freeholders, at a price approximating to the market price, though subject to some statutory assumptions [para 37] ... The purpose of granting the right to buy a new lease was to support the value of the old [para 38]*."

21. Section 39(2) provides that the tenant must, on the relevant date, have been for the last two years a qualifying tenant of the flat. Section 39(3) defines a "qualifying tenant" by reference to sections 5 and 7. For present purposes, suffice it to say that a person is a qualifying tenant if he is a tenant of the flat under a long lease, eg a lease granted for a term of years certain exceeding 21 years. Section 39(8) provides that the "relevant date" means the date on which notice of the claim is given to the landlord under section 42.

22. Section 40(1) provides that "the landlord" in relation to the lease held by a qualifying tenant means the person who is the owner of the interest in the flat which for the time being: (a) is an interest in reversion expectant (whether immediately or not) on the termination of the tenant's lease, and (b) is either a freehold interest or a leasehold interest whose duration is such as to enable that person to grant a new lease of that flat in accordance with Chapter II, and is not itself expectant (whether immediately or not) on an interest which fulfils those conditions. Thus, as clarified by section 40(2), the landlord within the meaning of section 40 need not be the immediate landlord.

23. Section 42(1) provides that a claim by a qualifying tenant of a flat to exercise the right to acquire a new lease of the flat is made by the giving of notice of the claim. Section 42(2) provides that notice must be given to the landlord and to any third party to the tenant's lease. I have already mentioned section 42(6) and 42(7).

24. Section 45(1) provides for the giving of a counter-notice by the landlord. Section 45(2) provides this must state that the landlord admits that the tenant had on the relevant date the right to acquire the new lease of his flat; or alternatively state that, for such reasons as are specified in the counter-notice, the landlord does not admit that the tenant had such a right on that date. I have already mentioned section 46(1).

25. Section 56(1) provides that where a qualifying tenant of a flat has a right to acquire a new lease and gives notice of his claim in accordance with section 42, then, except as provided by Chapter II, the landlord shall be bound to grant the tenant, and the tenant shall be bound to accept, in substitution for the existing lease and on payment of a

prescribed premium, a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease.

26. Section 57(1) provides that subject to the provisions of Chapter II (and in particular to the provisions as to rent and duration contained in section 56(1)), the new lease to be granted under section 56 shall be on the same terms as the existing lease, as they apply on the relevant date, but with such modifications as may be required or appropriate to take account, among other things, of the omission from the new lease of property included in the existing lease but not comprised in the flat.

27. Section 57(3) provides that subject to various exceptions which are not presently material, provision shall be made by the terms of the new lease or by any agreement collateral thereto for the continuance, with any suitable adaptations, of any agreement collateral to the existing lease.

28. Section 57(9) provides in material part that where any person is a third party to the existing lease, then (subject to any agreement between him and the landlord and the tenant) he shall be made a party to the new lease or (as the case may be) to an agreement collateral thereto, and shall accordingly join in its execution; but that nothing in the section has effect so as to require the new lease or any such collateral agreement to provide for him to discharge any function at any time after the date of the existing lease.

29. Section 57(10) provides that where the third party is in accordance with section 57(9) to discharge any function down to the term date of the existing lease, but it is necessary or expedient in connection with the proper enjoyment by the tenant of the property demised by the new lease for provision to be made for the continued discharge of that function after that date, the new lease or an agreement collateral thereto shall make provision for that function to be discharged after that date (whether by the third party or by some other person).

30. Section 62 deals with the interpretation of Chapter II. Section 62(1) provides, among other things, that in the Chapter: "the existing lease", in relation to a claim made by a tenant, means the lease in relation to which the claim is made; and "third party", in relation to a lease, means any person who is a party to the lease apart from the tenant under the lease and his immediate landlord. Section 62(2) provides in material part that, subject to various immaterial exceptions, references in the Chapter to a flat include any garage, outhouse, garden, yard and appurtenances belonging to, or usually enjoyed with, the flat and let to the tenant with the flat on the relevant date.

31. Section 101 deals with the general interpretation of Part I of the 1993 Act, including Chapter II. Section 104(1) provides in material part that where two or more persons jointly constitute the landlord in relation to a lease of a flat, any reference to the landlord is (unless the context otherwise requires) a reference to both or all of the persons who jointly constitute the landlord.

The landlord issue

32. Mr Jourdan formulated the issue thus. Should D1, the freeholder, be party to the new lease in order to enter into the covenants contained in the Original Lease relating to the Building, in particular the covenant at clause 4(8) not to build on the roof? Either because D1 and D2, as the tenant under the overriding lease, together comprise "the landlord", or alternatively because D1 is a "third party" for purposes of the 1993 Act?

33. C's case crystallized into 3 submissions:

(1) D1 is included in "the landlord" because it retains the reversion in respect of the Building other than the Flat ("Submission 1"). (As stated in Megarry & Wade, The Law of Real Property 9th Edition at para 8-008: "*A reversion is such part of a grantor's interest as is not disposed of by the grant*".);

(2) D1 is included in "the landlord" because only it has an estate in the roof and the roof is subject to the clause 4(8) covenant which is an "appurtenance" of the Flat let with the Flat ("Submission 2"); and

(3) D1 is a "third party" because it is a "party to the lease" as it is bound by the clause 4(8) covenant, but not as an immediate landlord" ("Submission 3").

I shall consider each submission in turn.

Submission 1

34. Submission 1 falls to be considered in the context of the Law of Property Act 1925 ("the 1925 Act"). This is because the Original Lease was granted before 1st January 1996 and is therefore not a "new tenancy" for purposes of the Landlord and Tenant (Covenants) Act 1995.

35. Section 140 deals with the apportionment of conditions on severance. Section 140(1) provides:

"*Notwithstanding the severance … of the reversionary estate in any land comprised in a lease, … every … condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary … in like manner as if the land comprised in each severed part … had alone originally been comprised in the lease.*"

36. Section 141 provides that the rent and benefit of the lessee's covenants having reference to the subject matter of the lease shall run with the reversion.

37. Section 142 provides that the obligation of the lessor's covenants with reference to the subject matter of the lease shall run with the reversion. The phrase "*with reference to the subject-matter of the lease*" is a more modern equivalent to the phrase "*which touch and concern the land*". Specifically, section 142(1) provides:

"*The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.*"

38. The policy behind sections 141 and 142 was explained by Lord Templeman in City of London Corporation -v- Fell [1994] 1 AC 458 HL(E) at 464 H to 465 B:

"*Common law, and statute following the common law, were faced with the problem of rendering effective the obligations under a lease which might endure for a period of 999 years or more beyond the control of any covenantor. The solution was to annex to the term and the reversion the benefit and burden of covenants which touch and concern the land. The covenants having been annexed, every legal owner of the term granted by the lease and every legal owner of the reversion from time to time holds his estate with the benefit of and subject to the covenants which touch and concern the land. The system of leasehold tenure requires that the obligations in the lease shall be enforceable throughout the term, whether those obligations are affirmative or negative. The owner of a reversion must be able to enforce the positive covenants to pay rent and keep in repair against an assignee who in turn must be able to enforce any positive covenants entered into by the original landlord.*"

39. Mr Jourdan submitted that when the Overriding Lease was granted, D1 retained the reversionary estate in respect of the Building other than the Flat. In the language of Megarry & Wade at para 19-066, there was a severance of the reversion of the land. The covenants therefore had to be apportioned under section 140 of the 1925 Act. Those

relating to the Building other than the Flat, including clause 4(8) were apportioned to D1. Therefore, D1 is the only person who satisfies the 1993 Act section 40(1) definition of "the landlord" in relation to those covenants: namely, that D1 has an interest in reversion expectant on the termination of the Original Lease which is such as to enable D1 to grant a new lease of that flat in accordance with Chapter II, ie one which, as section 57 of the 1993 Act provides, is on the same terms as the existing lease, subject to minor and immaterial exceptions.

40. Mr Rainey submitted that the grant of easements to D2 in the Overriding Lease was a transfer of the reversionary interest in the easements which are found in the Original Lease. He further submitted that even if C was right and D1 remained entitled to the reversion to the easements on expiry of the Original Lease, the covenant at clause 4(8) did not fall to be apportioned to the reversion to the easements under section 140 of the 1925 Act. The application of section 140 could not in principle result in that apportionment because, in the language of Megarry & Wade at para 19-065, this was a severance of the estate, not the land, and in such cases covenants run with the immediate reversion. Even if it section 140 could in principle result in that apportionment, it would not do so in practice because clause 4(8) did not "touch and concern" those easements.

41. Moreover, Mr Rainey submitted, given that para 5 of the First Schedule gave C the right to enter any flat in the Building to satisfy his repairing obligations under the Original Lease, Mr Jourdan's analysis would have the surprising consequence that every tenant who obtained a new lease, including a lease extension, which post-dated the Original Lease, was part of "the landlord" for the purposes of section 40 of the 1993 Act. This was because, on expiry of the Original Lease, they will have their flat free of C's easement. That was in itself a reason for supposing that Mr Jourdan's analysis was not correct.

42. The parties' rival submissions focused on two cases in particular: Martyn v Williams (1857) 1 H & N 817, upon which Mr Rainey relied, and Cardwell v Walker [2003] EWHC 3117; [2004] P & CR 9, upon which Mr Jourdan relied. I was also referred to Nevill Long & Co (Boards) Ltd v Firmenich & Co (1984) 47 P & CR 59 CA and Epron International v Wachell 8th May 2001, unreported, ChD. All four cases dealt with the severance of a reversion as it affects easements, or other incorporeal hereditaments, and covenants.

43. Martyn v Williams was an application for arrest of judgment following the trial of an action for breach of covenant at the Cornwall Assizes. It was heard by a three-judge court: Pollock CB, Martin B and Watson B. This was a decision at first instance, there being no mention of an appeal, and has the status of a judgment of the High Court.

44. The landowners granted the defendant a 21-year right to dig for and take china clay from their land and the defendant covenanted with the landowners to deliver up the works built on the land in a state of repair at the end of the lease. Before the lease expired the landowners conveyed their estate to the plaintiff. The works were not in repair. The plaintiff brought an action for breach of covenant and obtained judgment.

45. The defendant applied to arrest the judgment. He argued that the covenant upon which the plaintiff sued was not transferable and that only the grantor of the 21-year right could sue upon it. This was a novel point. Martin B gave the judgment of the court. He decided the point based upon the construction of the statute on which it depended, namely 32 Hen 8, c 34, as the court thought the better opinion was that covenants did not run with the reversion at common law. As Rattee J explained in Epron International v Wachell at page 10, 32 Hen 8, c 34 was the Grantees of Reversions Act 1540, the predecessor to sections 140 through 142 of the 1925 Act.

46. The statute provided in material part that grantees or assignees of lands, tenements or other hereditaments, or any reversion of the same, should enjoy the same remedy by action against lessees for not performing covenants contained in their leases as the lessors themselves might have had.

47. Martin B held that it was clearly established by the decided cases that the right to dig for clay was an incorporeal hereditament, which was a species of tenement. He held – and this was the *ratio* of the case – that the conveyance or assignment of the land to the plaintiff during the term of the incorporeal hereditament was an assignment of the reversion to the hereditament within the meaning of the statute:

"*There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease.*"

48. Martin B considered what the position would have been if the defendant had derived his right to dig for and remove china clay not from the landowners, but from a person, say AB, to whom they had granted that right in fee simple. If AB had assigned his right, say to CD, could CD have maintained an action for breach of covenant against the defendant? The judge held that this would depend on two points: whether the covenant touched and concerned the thing demised and whether it was by law capable of being assigned with the reversion. Both points were satisfied.

"*If, therefore, there had been an estate in fee of the right or interest created by the indenture mentioned in the declaration, and the owner in fee of the right had demised it for twenty-one*

years, and there had been a covenant such as that secondly declared on, we should have been of opinion that the assignee of the reversion could have sued upon it for a breach committed in his own time."

49. The hypothetical example given by Martin B was not part of the ratio as he did not expressly or impliedly treat its resolution as a necessary step in deciding the issue which was actually before the court. For the meaning of ratio, see R (Al-Skeini) v Defence Secretary [2007] QB 140, EWCA at para 145 per Brooke LJ. However Mr Jourdan accepted that the hypothetical example was correctly decided.

50. Mr Rainey relied on the hypothetical example as authority for the proposition that the lease of an easement is like a normal lease in possession. He asked rhetorically: if there can be a sub-demise of an easement, why can there not be an overriding lease of one in exactly the same way? That is, he submitted, what happened in the present case. On his analysis, AB was analogous to D1 and CD was analogous to D2. If CD could have maintained an action for breach of covenant against the defendant, then the defendant could, if the facts so permitted, have maintained an action for breach of covenant against CD. CD, not AB, would have been the appropriate defendant to such an action. By parity of reasoning, the appropriate defendant to an action for breach of a covenant which touched and concerned the thing demised brought by C would be D2 and not D1.

51. This analysis depends upon the right to dig china clay being analogous to an easement. In both Nevill Long and Epron International v Wachell the court accepted that it was, notwithstanding, as Mr Jourdan pointed out, that the right was not in fact an easement but a profit a prendre (a right to take something off another's land).

52. In Nevill Long, in which the judgment of the Court of Appeal was given by Fox LJ, a freeholder, who owned 3 adjoining plots of land, demised plots 1 and 2 to the two plaintiff companies. Both plots had a right of way over plot 3. The freeholder sold plot 3 to the defendant company. M, the company which owned the plaintiffs, subsequently acquired the freehold reversion to the leases. The case concerned Part II of the Landlord and Tenant Act 1954 ("the 1954 Act"), which contained provisions broadly analogous to Chapter II of the 1993 Act but in relation to business premises. It was common ground that, pursuant to section 140 of the 1925 Act, the reversion to the freehold was severed. The defendant argued that, applying section 140, following severance of the reversion the right of way was to be treated as if it had originally been a separate lease and that the defendant as sole landlord was therefore entitled to give notice of its termination under the 1954 Act.

53. The court, both at first instance and on appeal, rejected this analysis. Each lease comprised both a plot of land and a right of way over plot 3. For purposes of a notice of termination, "the landlord" comprised both the defendant as owner of the servient tenement and M as the owner of the reversion to the leases (although if the tenancy were so brought to an end, a new tenancy could be granted under the 1954 Act including in each case the right of way). Fox LJ stated at 67:

"*In that connection it seems to us that the wide meaning of reversion adopted by the court in Martyn v. Williams in relation to incorporeal hereditaments would be appropriate here in relation to the right of way*."

54. Fox LJ then stated that there was a wider aspect to the whole matter, namely the policy considerations underpinning the applicable statutory provisions. As to section 140 of the 1925 Act, he wrote:

"*The purpose of section 140 of the 1925 Act is to apportion conditions and rights of re-entry on severance and not to create new rights. It is not a general deeming provision that, where there has been a severance of the reversion, the severed part was the only part originally comprised in the lease. We see no reason to suppose that it was intended to have the effect of removing protective statutory rights of the tenant who would not normally even be a party to the severance.*" [Emphasis added.]

55. In Epron International v Wachell, in which judgment was given by Rattee J, there was an estate on which sat two buildings: the Grange, which was divided into 14 residential units, and the Park, which was divided into 33 residential units. The original freeholder, F, transferred freehold title to the estate to S, who in turn transferred the freehold title to the Park to FC ("the Transfer") but retained the freehold title to the Grange. The claimant, C, was the successor in title to FC and the principal defendant, D1, was the successor in title to S.

56. The Transfer contained a covenant by FC to maintain and repair the common parts situated in the Park which were used by the lessees of the Grange, who enjoyed easements over them, subject to S and its successors in title making a proportionate contribution, which as at the date of trial was 30 per cent, to the cost of maintenance and repair. The lessees of the Grange had covenanted in their respective leases to pay that contribution, but there was no privity of contract or estate between C and the lessees of the Grange.

57. Rattee J accepted C's submission, made in reliance on Nevill Long, that on the transfer of the Park to FC, there was a severance on the reversion to the lease of each flat in the Grange, as between S in respect of the flat itself, and FC in respect of the easements over

the Park, with the result that the benefit of the covenant to pay part of the costs of maintaining the park remained annexed to the reversion to the Park expectant on the termination of the easements over it, and was now enforceable by C as owner of that reversion. See the transcript at pages 11 – 12. He noted at page 8 of the transcript that this submission had the merit that it left in place the original scheme reflected in the leases of the units in The Grange and The Park, namely that the lessee of each should contribute a percentage of the lessor's costs of maintaining the estate as a whole undisturbed by the dealings of the reversion to those leases.

58. In so finding, the judge rejected D1's submission, made in reliance on Martyn v Williams (the ratio not the hypothetical example), that the owner of freehold land cannot grant easements over that land by a lease within sections 140 and 141 of the 1925 Act. He held at page 11 of the transcript that, besides being inconsistent with section 41 of the Settled Land 1925, D1's submission mischaracterised Martyn v Williams as interpreted by the Court of Appeal in Nevill Long:

> "*Indeed … the Court of Appeal relied upon Martyn v Williams in support of its conclusion that the owner of plot 3, the servient tenement over which the easement existed in the tenants of plots 1 and 2, was entitled to a reversion expectant on the expiry of the term of the easements.*"

59. In Cardwell v Walker, in which the judge was Neuberger J (as he then was), the claimants were tenants of holiday bungalows occupied under long leases granted by W. The "easements and rights" granted to the tenants under the leases included the right to run electricity through wires etc which were then situated in any part of the "estate" ("the easement"). The "estate" was not defined, but was accepted as denoting the land on which the bungalows were situated ("the site") and a piece of adjoining land ("the adjoining land"), also owned by W, which abutted an electricity power supply point ("the sub-station"). The bungalows were supplied with electricity from the sub-station, through wires which ran under the adjoining land, and the tenants paid W for their respective supplies. W and the tenants agreed that card-operated electricity metres would be installed in the cottages, with cards, also described in the judgment as tokens, being available for sale at all reasonable times on site.

60. W sold the site (but not the adjoining land) to H by a transfer granting the same easement in respect of electricity over the adjoining land as the easements granted by the leases of the bungalows and two years later sold the adjoining land to IW. A dispute arose between IW and the tenants over the electricity supply. IW severely curtailed the times at which the tokens were on sale. The claimants brought a successful action in the County Court against IW and his brother, JW, through whom he ran his business. The District

Judge held that IW was under an obligation to make the tokens available for purchase on site between 9 am and 5 pm every day of the week.

61. The defendants appealed. They accepted that the adjoining land remained subject to the easement in favour of the tenants and that the easement became binding on IW when he purchased the adjoining land. Neuberger J said that those concessions were correct. However the defendants challenged the finding that IW was obliged to provide the claimants with tokens. This was because, subject to one or two anomalous exceptions, an easement cannot impose on the owner of servient land an obligation to do anything.

62. The claimants relied on the fact that the easement arose out of a landlord and tenant relationship, so there was nothing wrong with IW having a positive obligation. Neuberger J held that their reliance was well founded. Where a covenant "touches and concerns the land", a successor in title of a landlord will be bound by a positive covenant, just as much as a negative covenant, entered into with a tenant (or vice versa). That was the common law principle, and was supported by section 142 of the 1925 Act. Having considered Nevill Long, Neuberger J concluded that on the sale of the site to H there was a severance of the reversion. It followed that the property law relationship between IW and the tenants involved a reversion in the landlord and tenant sense.

63. As to whether the covenant touched and concerned the land, "the land" in this case was the right to passage of electricity along wires under the servient land. The easement, especially given the wide definition of "land" in section 205 of the 1925 Act, was land for this purpose. Neuberger J concluded that the positive obligation to supply tokens did "touch and concern" the right to the passage of electricity under the adjoining land. It was a transaction whose sole purpose was to enable the tenants to enjoy the easement.

64. As to whether the obligation to provide tokens ran with the site or the adjoining land, the responsibility for the supply of electricity was connected with ownership of the adjoining land, not with ownership of the site: it was in the control of IW not H. There was nothing in section 140 of the 1925 Act to indicate a contrary conclusion.

65. Neuberger J stated at para 55:

"*Standing back, I believe that … the claimants' case … can be supported by an analogy. Lettings of parts of buildings (e.g. a suite in an office block or a flat in a block of flats) routinely include rights of way over the common parts and covenants by landlords to clean and repair those common parts. Nobody can doubt that those positive obligations can be enforced against a successor in title of the landlord. It would be surprising if, by selling off, or even letting off, the common parts to a different person from the person to whom the landlord sells the freehold of the suites or flats, the landlord could render those obligations unenforceable. Assuming that the*

obligations would remain enforceable if the reversion in such a case was severed, it seems to me to follow that the claimants' … argument is correct."

66. Mr Jourdan submitted that just as the adjoining land remained subject to the easement in favour of the tenants, so too the Building remained subject to the easements in favour of C. Just as the easement became binding on IW when he purchased the adjoining land, so too the easement became binding on D1 when it purchased the freehold to the Building. IW retained the reversionary estate in respect of the estate other than the site, to which the easement in favour of the tenants was apportioned. The covenant was directly enforceable by the tenants against IW as it touched and concerned the easement. In the same way, Mr Jourdan submitted, the covenant in clause 4(8) was directly enforceable by C against D1: it touched and concerned the easement at para 5 of the First Schedule to the Original Lease as C might need to have access to the roof of the Building in order to carry out a repairing covenant under the Original Lease. He relied upon Easterby v Sampson (1830) 130 ER 1429, in which Alexander C B cited with approval the judgment of Lord Ellenborough in The Mayor of Congleton v Pattison (10 East, 135) to the effect that a covenant will touch and concern the land if it affected its nature, quality or value, independently of collateral circumstances, or if it affected the mode of enjoying it.

67. For the covenant to be directly enforceable against IW, it was necessary that it could be said sufficiently to touch and concern the land as to bind a successor in title to the original owner of the adjoining land. There was no requirement that the land which it touched and concerned should be an easement. In the present case, Mr Jourdan submitted, the covenant in clause 4(8) touched and concerned the Building irrespective of the existence of any easements. It nonetheless fell to be apportioned under section 142 of the 1925 Act to the reversion to the Building immediately expectant upon the termination of the Original Lease as the Building would then revert to D1 free of that covenant.

68. I am bound by Cardwell v Walker whereas I am not bound by the hypothetical example in Martyn v Williams. I cannot see that the ratio of Cardwell conflicts with the ratio of Martyn, and the ratio of Martyn was not interpreted in that way in Nevill Long or Epron International v Wachell. If there were a conflict then I would follow Cardwell: I find its reasoning wholly persuasive, the case is more recent, and Neuberger J, who was an expert in this area of the law, was a particularly distinguished judge who went on to become President of the Supreme Court.

69. I note Mr Rainey's submission that, on Mr Jourdan's case, the tenant of every lease entered into after the Original Lease would be part of "the landlord", but even if this submission were well founded, it would not entitle me to disregard Cardwell.

70. Applying Cardwell, as freeholder of the Building, D1 is the owner of the reversion expectant upon the termination of the easements over the Building granted by the Original Lease. It follows that D1 as owner of the reversion expectant upon the termination of the easements over the Building and D2 as owner of the reversion expectant upon the termination of the Original Lease of the Flat itself were together "the landlord" for purposes of giving notice under the 1993 Act. Submission 1 therefore succeeds.

71. I need not decide whether the covenant at clause 4(8) of the Original Lease touches and concerns the easement at para 5 of the First Schedule, although I am not satisfied that it does. (Eg I am not satisfied that para 5 gives C a right of access to the roof as I cannot presently foresee any circumstances in which C would require such access in order to comply with its repairing covenants under the Original Lease.) As D1 is the owner of the reversion expectant upon the termination of the easement, D1 is part of "the landlord" irrespective of the covenant in clause 4(8). If I am wrong, and D1 is not the owner of the said reversion, then D1 is not part of "the landlord" even if clause 4(8) does touch and concern the easement.

72. However, I accept Mr Jourdan's further submission that the covenant in clause 4(8) should be apportioned to the reversion to the Building simply because it touches and concerns the Building. That is a second, independent, reason why D1 is part of "the landlord". This finding gives effect to the policy behind the 1993 Act that in general a new lease under section 56 shall be on the same terms as the existing lease. The intention of the legislature would be defeated if a landlord could evade an inconvenient covenant by the simple expedient of giving an overriding lease of the flat which benefited from the covenant to another vehicle which the landlord owned and controlled. Whether by accident or design, if Mr Rainey's analysis were correct, that would be the outcome in the present case.

73. This leaves Mr Rainey's interesting submission that as a result of my ruling "the landlord" includes every tenant of the Building who has obtained a lease after the date of the Original Lease. This point was not raised in the counter-notice, but for the first time in Mr Rainey's skeleton argument. No application was made to amend the counter-notice to include the point. Even then, the submission was put forward to defeat C's case that "the landlord" included D1, rather than to advance the positive case that "the landlord" also included the tenants. The submission was highly contentious, and to rule on it I would have to consider a number of points which were not explored in argument. Suffice it to say, it is not presently clear to me that any of the flats are subject to the easement contended for. (Eg I cannot presently foresee any circumstances in which C would need

to enter any of them in order to comply with its repairing covenants under the Original Lease.) All things considered, the submission was raised too late, and I shall proceed on the assumption made by C's notice and D1 and D2's counter-notice that "the landlord" does not include any other tenants.

Submission 2

74. In Cadogan v McGirk [1996] 4 All ER 643 CA, Millett LJ considered the meaning of "appurtenances" in the 1993 Act. As noted above, under section 62(2) of the 1993 Act, a flat includes any appurtenances belonging to and usually enjoyed with the flat and let to the tenant with the flat on the relevant date. But "appurtenances" is not defined in the 1993 Act. Millett J stated at 647 e – h:

"*It is clear that a tenant who obtains a new lease of his flat is entitled to exercise the rights of passage over the common parts and to use the lift and to enjoy the other easements and advantages to which he was formerly entitled. This is not dealt with expressly in Chapter II of the Act, and there was some discussion before us whether such rights are 'appurtenances' of the flat and so within the extended definition of the flat in section 62(2), or come within section 57(1) which entitles the tenant to a new lease 'on the same terms as those of the existing lease'. In the absence of any indication to the contrary, I would have expected them to be treated as 'appurtenances'; the expression 'the terms of the lease' would ordinarily refer to the covenants and conditions of the lease rather than the extent of the demise. But section 57(1) provides for the terms of the existing lease to be modified (inter alia) to exclude from the new lease property included in the existing lease but not forming part of the flat. This is an indication that the expression 'terms of the existing lease' may need to be given a wider interpretation than would be usual. It is not, however, necessary to decide the point, and I prefer to leave it open for decision in a case where it is material to the result.*"

75. Millet LJ contrasts "*easements and advantages*", which in the absence of any indication to the contrary he would expect to be treated as appurtenances, with the "*covenants and conditions*" of the lease, which he would normally expect to be classed as among the terms of the lease. Under this scheme, clause 4(8) must be one or the other: it cannot be both. Given the terms of section 57(1), "*terms of the existing lease*" may need to be given a wider interpretation than usual, so as to include things that would otherwise have been classed as appurtenances. Thus "*appurtenances*" may need to be given a correspondingly narrower interpretation. On this analysis, a term of the lease which is also an easement would be classed as an appurtenance, eg the easements granted in the First Schedule to the Original Lease. An appurtenance would be considered as part of the Flat rather than one of the terms on which the Flat is let.

76. I agree with Mr Rainey that as clause 4(8) is a covenant it falls to be treated as a term or condition of the lease rather than as an appurtenance. The purpose of section 62(2) is to set out what is included in the definition of the flat. In this context, an appurtenance, and hence an easement or advantage, is something positive: something which can be used or enjoyed. To say that the definition of the flat includes an agreement by the landlord not to build on the roof, when the roof does not even form part of the demised property, would be read the section in a strained and unnatural way.

77. Mr Jourdan sought to get around this difficulty by submitting that clause 4(8) was a restrictive covenant, and that a restrictive covenant is in the nature of a negative easement such as a right to light and therefore should be treated as an appurtenance. He relied upon In Re Nisbett and Potts' Contract [1906] 1 Ch 386 CA. Collins MR, with whom the other members of the Court agreed, stated at 402 and 404:

"*It seems to me, therefore, that the principal question before us is whether or not Sir George Jessel was right in the view that he took in London and South Western Ry. Co. v. Gomm 20 Ch D 562, that an obligation created by a restrictive covenant is in the nature of a negative easement, creating a paramount right in the person entitled to it over the land to which it relates.*

. . . . .

… it seems to me that the law is clearly established in accordance with Sir George Jessel's view of the subject, and consequently that in this case the burden of the restrictive covenant did remain imposed on the land so as to be binding upon any person who could not shew that he had bought for value and without notice."

78. Mr Jourdan also relied upon Reid v Bickerstaff [1909] 2 Ch 305 CA, in which Cozens Hardy MR stated at 320 that where a restrictive covenant is annexed to land, the benefit of the covenant passes to the purchaser whether he knew of it or not and is in the nature of an easement attached to his property as the dominant tenement.

79. Mr Rainey submitted that a restrictive covenant is not really an easement. As stated in Megarry and Wade at para 26-043:

"*… although restrictive covenants have some elements in common with easements … they are a fundamentally different kind of interest. Easements may exist at law as well as in equity, and they may be acquired by prescription (i.e. long enjoyment). Neither of these characteristics apply to restrictive covenants.*"

It would follow that the authorities which Mr Jourdan relied on are best understood as comparing restrictive covenants to easements by analogy.

80. I am not persuaded by Mr Jourdan's submission. It doesn't matter whether a restrictive covenant is an actual easement or only analogous to one. As I have already stated, in section 62(2) "appurtenances" are something positive. The easements and advantages which they consist of do not include negative easements. That is sufficient to dispose of Submission 2.

81. There is another point. The restrictive covenant in clause 4(8) is only enforceable against a purchaser or lessee of the Building if it is protected by registration on the land register. If it is thus protected, then it is enforceable against D1 irrespective of whether it is an appurtenance within the meaning of section 62(2). Although the determination of this point does not impact on whether D1 forms part of "the landlord" it is highly relevant to whether D1 is a "third party".

82. When D1 purchased the freehold of the Building, the statute applicable to the registration of clause 4(8) was the Land Registration Act 1925 ("the LRA 1925"). The Landlord and Tenant (Covenants) Act 1995 was not engaged because the burden of the Original Lease was not a new tenancy. The LRA 1925 has since been superseded by the Land Registration Act 2002 ("the 2002 Act"), which governs registrations taking place on or after 13th October 2003.

83. Section 19(2) of the LRA 1925 provides in material part that a lease made by the registered proprietor shall be treated as a registered disposition.

84. Section 20(1) of the LRA 1925 provides that the registered disposition of freehold land, including the grant of a lease, for valuable consideration, confers on the transferee or grantee a title subject: (a) to the incumbrances and other entries, if any, appearing on the register; and (b) unless the contrary is expressed on the register, to any overriding interests affecting the estate created or transferred.

85. Section 50(1) of the LRA 1925 provides for the registration of restrictive covenants relating to buildings, but excludes restrictive covenants between a lessor and a lessee.

86. In Oceanic Village Ltd v United Attractions Ltd [2000] Ch 234, Neuberger J held at 250 G – 251 B that where a restrictive covenant was not registrable and was not an overriding interest then it was not binding on a grantee of freehold land who had actual or constructive notice of it as that would have been inconsistent with section 20(1) of the LRA 1925. However, he went on to state obiter at 251 G – 252 B that a tenant under a lease of more than 21 years could protect his rights by registering not the covenant but the lease:

> "In this connection, it should be explained that the reason why covenantees who are tenants under leases of more than 21 years may have such protection in some cases arises from the fact that leases of more than 21 years (unlike leases of less than 21 years) have to be noted in the charges register of the landlord's title pursuant to rules 7(b) and 188 of the Land Registration Rules 1925 (S.R. & O. 1925 No. 1093 (L. 28)); accordingly, at least where the land burdened by the covenant is included in the same title as the land demised by the lease, the effect of section 20(1)(a) would seem to be that a tenant under such a lease could enforce such a covenant against the proprietor for the time being of the burdened land. However, where the burdened land is held by the landlord under a different title from the demised land, the position of a tenant holding the demised land under a lease for more than 21 years would seem to be the same as that of a tenant under a lease of less than 21 years."

87. Rule 188 of the Land Registration Rules 1925 ("the 1925 Rules") provides that the notice in the register shall give the term, which must be for more than 21 years, and may include such other short particulars as can be conveniently entered.

88. In my judgment, the mere fact of registration of the lease will not be sufficient to protect the lessee's right to enforce the restrictive covenant. For that to happen, the restrictive covenant must be mentioned in the short particulars entered on the register. Otherwise a prospective purchaser would not have real and effective notice that the restrictive covenant existed. This analysis is not inconsistent with section 50(1) of the LRA. It is the lease not the restrictive covenant that would be registered, and the restrictive covenant would merely be mentioned as one of the particulars of the lease. I do not read Oceanic Village Ltd as authority to the contrary.

89. Section 29(1) of the 2002 Act provides that if a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition has the effect of postponing (ie giving priority) to the interest under the disposition any interest affecting the estate immediately before the disposition any interest whose priority is not protected at the time of registration. Section 29(2) provides in material part that the priority of an interest is protected if the interest is a registered charge or the subject of a notice in the register.

90. Section 33 of the 2002 Act provides in material part that no notice may be entered in the register in respect of a restrictive covenant between a lessor and a lessee so far as relating to the demised premises. By necessary implication, notice may be entered if the restrictive covenant does not relate to the demised premises.

91. Schedule 12 para 2(1) of the 2002 Act provides that the 2002 Act applies to notices entered under the 1925 Act as it applies to notices entered under the 2002 Act.

92. Rule 84 of the Land Registration Rules 2003 ("the 2003 Rules"), which were promulgated under the 2002 Act, provides that in the case of a notice other than a unilateral notice (ie a notice from a third party) the entry must give details of the interest protected. It follows that a notice given under the 2003 Rules will not be effective to protect a restrictive covenant unless it mentions that there is a restrictive covenant. I do not take Rule 84 to provide that notice given under the 1925 Rules will become retrospectively invalid unless it satisfies the requirements of the 2003 Rules.

93. In the present case, when D1 purchased the Building, the Original Lease was already registered against the freehold title. But in my judgment that was not sufficient to protect C's right to enforce clause 4(8) against D1 as the particulars of the lease entered in the register did not include the restrictive covenant.

Submission 3

94. Mr Jourdan submitted that if the court holds that D1 is not one of the persons who comprise "the landlord" but is bound by clause 4(8) as a restrictive covenant, D1 should be held to be a third party, ie a party to the Original Lease. He submitted that, construing section 57(1) of the 1993 Act as the legislature must have intended, a party to the lease was someone, other than the landlord or the tenant, who was bound by the lease. This was the only basis on which it was suggested that D1 could be bound by the lease but not be part of "the landlord". As I have found in the immediately preceding paragraphs of this judgment that D1 is not bound by clause 4(8) as a restrictive covenant under the law relating to restrictive covenants, that is sufficient to dispose of Submission 3.

The notice issue

95. This issue is quite straightforward. Under section 42 of the 1993 Act, notice must be given to the landlord and to any third party to the tenant's lease. There is no requirement that, if "the landlord" and "the third party" consist of more than one person, they are served with a joint notice rather than separate notices, or that the notices are issued or served on the same date.

96. In the present case, "the landlord" consists of D1 and D2. The April Notice was a valid notice to D2 and the First Notice was a valid notice to D1. The April Notice was not withdrawn by the covering letter for the First Notice, because the letter expressly reserved the right to rely on the April Notice.

97. The time for D1 and D2 to give a counter-notice ran from the date specified in the First Notice. Thus the First Notice had the effect of extending the time given in the April Notice for D2 to give a counter-notice.

Summary

98. The issues before the Court are resolved thus:

(1) "The landlord" consists of D1 and D2. D1 is not a "third party".

(2) C has given valid notice to D1 and D2.

99. I shall hear the parties as to costs.

Dated 31st March 2020

HHJ HELLMAN