Case No: HC10C00830

Neutral Citation Number: [2011] EWHC 803 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2011

Before :

MR JUSTICE MORGAN

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BETWEEN:

(1) CROSSCO No. 4 UNLIMITED	**Claimants**
(2) PICCADILLY	
(3) PHILIP NOBLE	
- and -	
(1) JOLAN LIMITED	**Defendants**
(2) JOLAN PICCADILLY LIMITED	
(3) JOHN CORBITT BARNSLEY	
(4) GILL ELIZABETH NOBLE	

CASE NO: HC10C01748
AND BETWEEN:

JOLAN PICCADILLY LIMITED	Claimant
- and –	
PICCADILLY	Defendant

- -
- -

Mr Michael Driscoll QC and Mr Ciaran Keller (instructed by **Pinsent Masons LLP**) for the Claimants in Claim no. HC10C00830 and the Defendant in Claim no.HC10C01748
Mr Romie Tager QC and Mr Justin Kitson (instructed by **Addleshaw Goddard LLP**) for the Defendants in Claim no. HC10C00830 and the Claimant in Claim no. HC10C01748

Hearing dates: 1st to 3rd, 6th to 10th, 13th to 17th, 20th, 21st December 2010, 13th, 14th, 17th to 21st, 24th to 28th, 31st January, 1st to 3rd, 9th to 11th, 14th February 2011

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Judgment

Mr Justice Morgan:

The case in outline

1. There are two sets of proceedings before the court. Both sets of proceedings concern a large building at 19/31 Piccadilly, Manchester ("the building"). The parties fall into two camps. One camp consists of Mr Philip Noble and companies associated with him. These companies are Crossco No. 4 Unlimited and Piccadilly. Crossco No. 4 Unlimited was formerly the freehold owner of the building. It transferred the freehold of the building to Jolan Piccadilly Ltd on 9th April 2009. Piccadilly is the lessee of the building pursuant to a lease granted to it by Crossco No. 4 Unlimited on 27th November 2007, that is, before the transfer of the freehold to Jolan Piccadilly Ltd.

2. The other camp consists of Mrs Gill Noble, Mr Barnsley and companies associated with Gill Noble. She is the sister in law of Philip Noble. Her husband, Michael Noble,

who was Philip's brother, died on 19th April 2006. Mr Barnsley is an accountant and has had various roles relevant to this litigation. They include being an executor of Michael Noble's will; the other executors are Gill Noble and Philip Noble. Mr Barnsley also acted as an adviser to Gill Noble in connection with the negotiations which are described later in this judgment. The companies associated with Gill Noble are Jolan Piccadilly Ltd and Jolan Ltd, which wholly owns Jolan Piccadilly Ltd. On 10th March 2009, Jolan Ltd contracted with Crossco No. 4 Unlimited to acquire the freehold of the building. On 9th April 2009, the freehold was transferred by Crossco No. 4 Unlimited to Jolan Piccadilly Ltd, who is therefore now the landlord of Piccadilly, who holds under the lease of 27th November 2007.

3. The lease dated 27th November 2007 demised the building to Piccadilly for a term of 15 years commencing on 27th November 2007 and expiring on 26th November 2022. Clause 9 of the lease is a landlord's break clause which permits the landlord to determine the lease on 3 month's notice. It is this break clause which has given rise to the two sets of proceedings between the parties. The lessee, Piccadilly, trades from the ground floor of the building, operating an amusement arcade. The lease is within the security of tenure provisions of Part II of the Landlord and Tenant Act 1954 ("the 1954 Act").

4. Subject to arguments which I will consider in due course, the landlord, Jolan Piccadilly Ltd, wishes to carry out an extensive conversion and development of the building. The landlord wishes to convert the ground floor and basement into 3 retail or restaurant units and to convert the upper parts (adding a further floor in the process) into a 157 bedroom Travelodge hotel. The landlord has obtained planning permission for this development. The landlord has pre-let the ground floor and basement units to Waitrose Ltd (Unit 1), Nando's Chickenland Ltd (Unit 2) and Ask Restaurants Ltd (Unit 3). The landlord has pre-let the upper parts to Travelodge Hotels Ltd.

5. The landlord has served a notice on Piccadilly to operate the break clause in the lease and has also served a notice on Piccadilly pursuant to section 25 of the 1954 Act. The landlord opposes the grant of a new tenancy to Piccadilly on the grounds that the landlord intends to redevelop the building and it relies on the ground of opposition in section 30(1)(f) of the 1954 Act. The landlord has brought the first set of proceedings which is before me in order to obtain the termination of the tenancy pursuant to section 29 of the 1954 Act.

6. The landlord contends that the case is a simple one. It says that it has served a valid break notice and a valid section 25 notice. It says that it has the necessary intention to carry out the development. If so, the court can do no other than terminate Piccadilly's tenancy. Piccadilly will be obliged to cease its business on the ground floor and to vacate the building. Piccadilly will be entitled to statutory compensation assessed in accordance with section 37 of the 1954 Act.

7. In relation to the first set of proceedings, the tenant, Piccadilly, contends that the landlord has not proved the necessary intention to develop for the purposes of section 30(1)(f) of the 1954 Act. If the tenant is right about that, then the tenant will be entitled to a new tenancy. The parties are agreed that "the holding" as defined in the 1954 Act extends to the whole building and is not confined to the ground floor from which the tenant trades. Thus, the tenant will be entitled to a new tenancy of the

whole building. The development will not take place, at any rate not at present. The terms of the new tenancy will have to be agreed between the parties or determined by the court. It seems likely that, in such an event, the landlord will ask the court to insert into the new tenancy a redevelopment break clause under which the landlord could in the future seek to determine the term of the new tenancy and seek its termination under the 1954 Act.

8. In addition to the contentions which Piccadilly puts forward as to the landlord's attempt to prove its intention to redevelop the building, Piccadilly and indeed Crossco No. 4 Unlimited and Philip Noble have a much more far reaching case. They say that the rights and obligations of the parties are not to be determined by a simple application of clause 9 of the lease and the provisions of the 1954 Act. They say that clause 9 of the lease should simply not be available to be relied upon by the landlord, at any rate not in relation to the ground floor of the building from which Piccadilly trades. They say that it is necessary to do more than look at the formal conveyancing documents such as the transfer of the freehold and the terms of the lease. It is necessary to consider the events leading up to March and April 2009.

9. The events relied upon by Philip Noble and the companies associated with him involved a very complicated demerger of a large group of companies and of other interests. Those many interests existed under the umbrella of "the Noble Organisation". This grouping was, ultimately, owned by Philip Noble and Gill Noble and their respective family trusts and other interests associated with them. Philip Noble and Gill Noble agreed to split the group, that is, to "demerge". The intended demerger happened. The deal was negotiated over many months and was entered into on 10th March 2009. For most of the period covered by the negotiations, the parties intended that the freehold and the lease of the building would be owned by companies associated with Philip Noble. The two companies concerned with the building, as landlord and as tenant respectively, would ultimately be controlled by the same persons. On 18th February 2009, that intention changed. At a meeting on that date, the future ownership of the building was discussed for about 15 minutes. Those carrying on the negotiations on that date reached a "commercial agreement" that the freehold of the building would be transferred to a company associated with Gill Noble. On 10th March 2009, as I have described, Crossco No. 4 Unlimited, a company associated with Philip Noble, contracted to transfer the freehold of the building to Jolan Ltd, a company associated with Gill Noble. The consideration for the transfer was expressed to be £1 although, as part of the commercial agreement on 18th February 2009, it had been agreed that the amount of value passing between the two sides to the demerger as a result of the transfer of the freehold of the building was some £5 million. There were some communications between the parties between 18th February 2009 and 10th March 2009 as to the future of the building, to which it will be necessary to refer.

10. Philip Noble and the companies associated with him, who are parties to these proceedings, now say that the discussions on 18th February 2009 and the communications between that date and the date of the written contract on 10th March 2009 have given rise to important rights on his side, and obligations on the part of the companies associated with Gill Noble, which prevent the landlord from seeking to operate the break clause in the lease, at any rate in relation to the ground floor of the building. The case is put various ways. It is said that there was a binding contract between the relevant parties, arrived at orally on 18th February 2009, which has that

consequence. It is said that the formal contractual documents ought, if necessary, to be rectified to produce that result. It is said that the equitable principles as to estoppel and constructive trust can be relied upon and the overall result will be that the landlord is not able to rely on the break clause in the way it has sought to do. Philip Noble and the two companies associated with him have brought proceedings in which they advance these claims. I will refer to these proceedings as "the main claim". Gill Noble, Mr Barnsley, Jolan Ltd and Jolan Piccadilly Ltd are Defendants to the main claim. They contend that the main claim fails and should be dismissed and they raise a large number of defences and matters in support of that contention.

11. These proceedings resulted in a trial of 35 days. It is a remarkable fact that a 15 minute discussion on 18th February 2009, followed by a modest number of communications between the parties from 18th February 2009 to 10th March 2009, resulted in a trial of that length in order to determine whether certain discussions gave rise to a contract and whether equity would step in to mitigate the position at law, which would otherwise be produced by reliance on the formal conveyancing documents, i.e. the transfer of the freehold and the lease.

12. In this judgment, I will first seek to describe matters which are not contentious and the express terms of the formal contractual documents. I will then turn to consider the more detailed facts relating to the demerger. Then I will consider the various issues raised by the main claim before considering the separate issues raised in the 1954 Act proceedings. I will refer to Crossco No. 4 Unlimited, Piccadilly and Philip Noble as the Claimants and I will refer to Jolan Ltd, Jolan Piccadilly Ltd, Gill Noble and Mr Barnsley as the Defendants, as that is the position in relation to the main claim. When I come to consider the 1954 Act proceedings, I will refer to Jolan Piccadilly Ltd as the landlord and to Piccadilly as the tenant. The Claimants were represented by Mr Michael Driscoll QC and Mr Ciaran Keller. The Defendants were represented by Mr Romie Tager QC and Mr Justin Kitson.

The building

13. The building has its main frontages to Piccadilly and Oldham Street. At the rear of the building, there is a narrow street known as Back Piccadilly. The main part of the building was constructed in around 1927 for F. W. Woolworth and Co. It was said at the time to be the largest Woolworth store in Europe. The original building was extended east along Piccadilly in the 1960s so as to abut the adjoining building in Piccadilly, which is owned and occupied by NatWest Bank. The original building and the extension remained in use as a Woolworth store until there was a serious fire in 1979. The store was refurbished after the fire but Woolworth moved out and the building changed hands. As explained below, the freehold of the building was acquired by Michael Noble and Philip Noble in 1986. Since then, parts of the building have been put to various uses. The building is constructed on basement, ground and four upper floors, together with attic areas, plant areas and the roof. The ground floor of the building has been, and still is, used as an amusement arcade. The first and second floors were used as a nightclub but have been empty for some time. The third and fourth floors have been used as a snooker hall but the fixtures and fittings have been stripped out and these floors have also been empty for some time. The basement consists of basic storage accommodation. While the ground floor has been used as an amusement arcade, there may have been some limited use of the basement and upper

floors for ancillary storage. The area of the building is approximately 100,000 square feet measured on a gross internal basis.

The freehold

14. Michael Noble and Philip Noble acquired the freehold of the building in 1986. On 19th April 2006, Michael Noble died. Philip Noble, Michael Noble's widow, Gill Noble, and Mr Barnsley were the executors of Michael Noble's will. At some point, the freehold title to the building was vested in Philip Noble, Gill Noble and Mr Barnsley. On 31st October 2007, Philip Noble, Gill Noble and Mr Barnsley transferred the freehold to Crossco No. 4 Unlimited which was duly registered at the Land Registry in relation to the freehold under title number GM449953.

15. On 27th November 2007, Crossco No. 4 Unlimited granted to Golftee GP Ltd an option to acquire the freehold of the building. Golftee GP Ltd was defined in the option agreement as the "Developer". The agreement recited that the Developer wished to apply for planning permission for redevelopment of the building. The option enabled the Developer to buy the freehold of the building during the Option Period at the Purchase Price. The Option Period was the period of three years from the date of the agreement, that is, up to and including 26th November 2010. The Developer was entitled to make an Application for Planning Permission, which was defined to mean planning permission for the Proposed Development. This last phrase was defined to mean the demolition of the existing building and replacement with a new multi-storey building capable of use for offices, retail, banking, restaurant or any commercial use deemed acceptable by any planning authority, together with associated car parking and servicing facilities. Clause 4 of the agreement provided for the initial option period of three years to be extended in certain circumstances by reference to the planning position but the option period could not be extended beyond a Long Stop Date of 31st December 2012. The Purchase Price referred to in the option agreement was the fixed sum of £7,600,000.

16. Also on 27th November 2007, Crossco No. 4 Unlimited granted a lease of the building to Piccadilly. The terms of this lease are at the centre of the current dispute and I will refer to the lease in more detail later in this judgment.

17. On 10th March 2009, Crossco No. 4 Unlimited, as the Seller, contracted to sell the freehold of the building to Jolan Ltd, as the Buyer. The contract was stated to be personal to Jolan Ltd so that Jolan Ltd was not entitled to assign or otherwise deal with the benefit of the contract. The obligation to sell was expressed to come into force on the Effective Date, which was the day following completion of an agreement for the disposal of certain assets which was part of the demerger of the business interests of the Noble Organisation to which I will refer later in this judgment. The property was to be sold for £1. The agreement defined the Occupational Lease as the lease dated 27th November 2008 (*sic*) and made between (1) the Seller and (2) Piccadilly and every document varying or supplemental or collateral to it, and every licence or consent granted under any of them. This definition was plainly intended to refer to the lease dated 27th November 2007. The contract made several references to the Occupational Lease and the Occupational Tenant, i.e. the tenant under that lease. Clauses 13 and 15.1.7 of the contract provided that the property was to be sold subject to the Occupational Lease. Clauses 18, 19 and 20 of the contract dealt with the way in which the rent and service charge due under the Occupational Lease were to be

apportioned and with questions as to any arrears of sums due under the Occupational Lease. Clause 26 of the contract was an "entire agreement" clause. The relevant parts provided:

> "26.1 This Contract and the documents annexed to it constitute the entire agreement and understanding of the parties and supersede any previous agreement between them relating to the subject matter of this Contract.
>
> 26.2 The Buyer acknowledges and agrees that in entering into this Contract, it does not rely on and shall have no remedy in respect of any statement, representation, warranty, collateral agreement or other assurance (whether made negligently or innocently) of any person (whether party to this Contract or not) other than as expressly set out in this Contract or the documents annexed to it or in any written replies which the Seller's Conveyancer has given to any written enquiries raised by the Buyer's Conveyancer before the date of this Contract. Nothing in this clause shall, however, operate to limit or exclude any liability for fraud."

In the event, the freehold was not transferred to Jolan Ltd (as the contract provided) but to a subsidiary company, Jolan Piccadilly Ltd. The transfer was executed by Crossco No. 4 Unlimited on 9th April 2009. The transfer contained additional provisions which included an obligation by the transferee to indemnify the transferor in relation to the Lease Obligations which were defined as the landlord covenants and all terms and conditions contained in the Occupational Lease to be observed and performed by the landlord.

The lease

18. By the lease dated 27th November 2007, Crossco No. 4 Unlimited demised the whole building to Piccadilly for a term of fifteen years commencing on 27th November 2007 and expiring on 26th November 2022, at an initial yearly rent of £278,500, subject to rent review on 27th November 2012 and every subsequent fifth anniversary of such date throughout the term. On review, the rent was to be reviewed, in an upwards direction only, to the market rent, which was more precisely defined in the rent review provisions contained in a schedule to the lease. The lease provided for the lessee to repair the building and to reimburse the lessor's costs of insuring the building.

19. Clause 9 of the lease was headed "LANDLORD'S OPTION TO DETERMINE" and was in these terms:

> "The Landlord may at any time by serving not less than 3 month's previous notice in writing on the Tenant determine this Lease and upon expiry of such period this Lease shall determine but without prejudice to any rights which may have accrued to either party in respect of any antecedent breach of the terms of this Lease".

20. Anyone reading the lease would readily appreciate that the lease contained this provision at clause 9. The cover sheet to the lease states the date of the lease, identifies the parties and refers to the premises as 19-31 Piccadilly. The cover sheet is followed by a contents page which sets out the headings to clauses 1 to 12 of the lease and the four schedules to the lease. The contents page includes this line: "9. Landlord's Option To Determine" and there is then a reference to page 43 of the lease, where clause 9 is set out. The contents page is followed by three pages which, in accordance with the form required by the Land Registry, refer to certain details of the lease. On these pages, paragraph LR6 states that the term for which the property is leased is from and including 27th November 2007 to and including 26th November 2022. Paragraph LR9.3 refers to: "Landlord's contractual rights to acquire this lease" and these words are followed by "Please refer to clause 9". As indicated by the contents page, clause 9 itself appears on page 43 of the lease. Altogether, the lease has 55 pages.

The side letters relating to the building

21. I have referred above to the contract made on 10th March 2009 between Crossco No. 4 Unlimited and Jolan Ltd. In that contract, Jolan Ltd was stated to be a company incorporated and registered in Jersey with company number 102704. This was an accurate reference to the Jersey company, Jolan Ltd, which was the company which was intended to be the contracting party as Buyer.

22. Also on 10th March 2009, a Mr Wooldridge signed a side letter dated 10th March 2009. The side letter stated that Mr Wooldridge was signing on behalf of Jolan Ltd. The heading to the side letter describes Jolan Ltd by reference to company registration number 05625209. This is a UK company registration number. As at 10th March 2009, there did exist a UK company known as Jolan Ltd but that was a different legal entity from the Jersey company, Jolan Ltd. Accordingly, on the face of the documents, the side letter is with the UK company, Jolan Ltd, which was not the Buyer under the contract of 10th March 2009. This discrepancy between the two companies called Jolan Ltd was a mistake. The intention was that both documents should refer to the Jersey company, Jolan Ltd.

23. The heading to the side letter refers to the building as "the Property" and refers to the lease of 27th November 2007, although the date is mis-stated as 27th November 2008. The side letter is in these terms:

> "We Jolan Ltd (CRN05625209) confirm and agree that we shall agree to a reduction of the extent of the demise created by the Lease in the following manner and subject to the following conditions:
>
> 1. To reduce the extent of the demise created by the Lease to the ground floor of the Property together with such additional areas (if any) as you shall reasonably specify;
>
> 2. To effect such reduction by means of a deed of surrender or such other means as you shall reasonably require;

3. Notwithstanding the reduction in the extent of the demise the rent payable under the Lease shall remain at the level passing thereunder at the date at which such reduction takes place;

4. No consideration shall be payable by you to us for such surrender or variation;

5. Neither party shall be released from any existing breaches of the terms of the Lease notwithstanding the surrender or variation of the Lease save that we shall not enforce against you any breach of your obligation under the Lease to maintain and/or repair those parts of the Property which are to be removed from the area demised to you in accordance with the terms of this letter;

We confirm and agree that the terms of this letter will bind our successors in title to our interest under the Lease.

In the event that we dispose of our interest in the Property to which the Lease relates we undertake to procure that they shall issue a letter in the same terms as this letter (mutatis mutandis) simultaneously with the completion of such disposal."

24. As indicated above, the contract dated 10th March 2009 provided for the freehold of the building to be transferred to the Jersey company, Jolan Ltd, but, in the event, the freehold was transferred on 9th April 2009 to a company then known as Crossco (1155) Ltd and now known as Jolan Piccadilly Ltd. Also on 9th April 2009, Mr Wooldridge acting on behalf of Crossco (1155) Ltd, now called Jolan Piccadilly Ltd, signed a further side letter on behalf of Jolan Piccadilly Ltd. This side letter was in the same terms as the side letter signed on 10th March 2009, save that references in the earlier side letter to Jolan Ltd (CRN05625209) were altered to Crossco (1155) Ltd (CRN6855403) and the address of the company was also altered.

The Travelodge agreement

25. On 28th September 2009, Jolan Piccadilly Ltd and Travelodge Hotels Ltd entered into an agreement for lease in relation to a proposed Travelodge hotel. The hotel was to be formed by the conversion of the upper parts of the building. The conversion included the construction of an additional floor on the building. Part of the ground floor was to be used for a hotel entrance and for other means of access and for various ancillary purposes. The agreement for lease was conditional on certain matters. These conditions included a condition as to the obtaining of a satisfactory planning permission to enable the development to be carried out. Another condition required the termination or surrender of the lease dated 27th November 2007, in favour of Piccadilly, in order to facilitate vacant possession of the premises to be demised to Travelodge Hotels Ltd. By clause 2.3(c), in the event that the conditions were not satisfied by the Conditions Long Stop Date (which was 18 months after the date of the agreement), either party was entitled to determine the agreement. (By a deed of variation executed during the course of the trial, on 21st January 2011, Jolan Piccadilly Ltd and Travelodge Hotels Ltd changed the Conditions Long Stop Date to

31st July 2011.) By clause 2.5, Jolan Piccadilly Ltd agreed to use all its reasonable endeavours to satisfy the Conditions as soon as reasonably practicable after the date of the agreement. By clause 3.2, Jolan Piccadilly Ltd agreed to procure that the Development was carried out. The Development was defined by reference to certain Plans and Specifications and also by reference to the Tenant's Requirements Document which was a detailed document setting out all of the requirements of Travelodge Hotels Ltd. The draft lease attached to the agreement for lease provided for the relevant part of the building to be demised for a term of 25 years from a date to be specified in accordance with the detailed provisions of the agreement for lease.

The application for planning permission etc.

26. In October 2009, agents acting for Jolan Piccadilly Ltd applied to Manchester City Council as the local planning authority for planning permission and for conservation area consent in relation to a development of the building. The planning application was supported by a number of documents, one of which set out a detailed description of the background and of the proposed development. That statement described the planning permission which was being sought as permission for a development associated with the creation of a replacement fifth floor, refurbishment of the building and change of use to provide a five storey 157 bed hotel development over the basement and ground floor retail/commercial space, for flexible use within Class A1 (Shops- including food and non-food retail), A2 (Financial& Professional Services), A3 (Restaurants & Cafes), A4 (Drinking Establishments), A5 (Hot Food Takeaway). The statement described the main elements of the proposed scheme as including the refurbishment and change of use of the basement and ground floor to provide some 26,000 square feet of A1, A2, A3, A4 and A5 retail space, split over three units, with associated servicing and goods access. Further, the main elements of the proposed scheme were described as including the erection of a replacement fifth floor and change of use of the upper floors to a 157 bedroom Travelodge hotel and the specific number of bedrooms and other uses on the first to fifth floors of the developed building were described. The application did not envisage the continuation of a use of any part of the ground floor as an amusement arcade.

The break notice and the section 25 notice

27. On 26th October 2009, solicitors acting for Jolan Piccadilly Ltd served on Piccadilly a notice, pursuant to clause 9 of the lease, to determine the same on 4th May 2010. On the same day, the solicitors for Jolan Piccadilly Ltd served on Piccadilly a notice, pursuant to section 25 of the Landlord and Tenant Act 1954, to end Piccadilly's tenancy on 4th May 2010. The section 25 notice stated that the landlord was opposed to the grant of a new tenancy and that the landlord would oppose any application by the tenant for a new tenancy on the ground of opposition stated in section 30 (1)(f) of the 1954 Act.

The 1954 Act proceedings

28. On 17th November 2009, Jolan Piccadilly Ltd brought proceedings against Piccadilly. This claim is one of the two claims before me. In its proceedings, Jolan Piccadilly Ltd claimed the termination of Piccadilly's tenancy pursuant to section 29 of the 1954 Act. Jolan Piccadilly Ltd relied on the section 25 notice it had served on or about 26th October 2009. It stated that it intended to carry out substantial work of demolition and

construction at 19-31 Piccadilly, giving details of the same. It then referred to the planning application it had made, to the agreement for lease to Travelodge Hotels Ltd and it stated that it had the necessary finances to carry out the intended works.

The grant of planning permission

29. On 14th January 2010, Manchester City Council granted planning permission pursuant to the application which had been made. (I was not specifically shown the result of the application for conservation area consent and I assume that such consent was also granted as no one suggested that there was any difficulty in this respect.) The planning permission stated that the proposed development had been changed following the initial application and the permitted development was described in these terms:

> "Demolition and reconstruction of fifth floor roof area to create two storeys of accommodation for proposed hotel at first to sixth floors with accommodation for Class A1 (Shop) Use, Class A2 (Financial and Professional Services) Use, Class A3 (Restaurant and Café) Use or Class A5 (Hot Food Takeaway) Use at ground floor and basement levels and elevational alterations comprising insertion of new windows at 1st to 4th floor levels on Piccadilly and Oldham Street elevations, alterations to rear façade to facilitate hotel use and creation of new ground floor fronting 19-31 Piccadilly Manchester M1 1LS".

30. In the ordinary way, the planning permission was subject to a number of conditions. The second condition required that the approved development was to be carried out in accordance with a number of listed drawings and documents, unless otherwise agreed in writing by the local planning authority.

The main claim

31. On 12th March 2010, a claim form was issued by Crossco No. 4 Unlimited, Piccadilly and Philip Noble against Jolan Ltd, Jolan Piccadilly Ltd, Mr Barnsley and Gill Noble. The claim form was accompanied by Particulars of Claim and the prayer for relief claimed various heads of relief. The Claimants sought a declaration that, by reason of the terms of "the Demerger" including the side letters of 10th March 2009 and 9th April 2009, the Defendants were in breach of contract in seeking to determine Piccadilly's tenancy of the ground floor of the building or, alternatively, were estopped from seeking to determine Piccadilly's tenancy of the ground floor of the building or, in the further alternative, that Jolan Piccadilly Ltd held the freehold interest in the property upon a constructive trust which required it not to seek to determine Piccadilly's tenancy of the ground floor of the building. The prayer for relief further claimed an injunction to restrain Jolan Piccadilly Ltd from taking any further steps to determine Piccadilly's tenancy of the ground floor of the building and an order requiring Jolan Piccadilly Ltd to discontinue the proceedings it had brought under section 29 of the 1954 Act. Further, the Claimants sought an order that Jolan Piccadilly Ltd should transfer its freehold interest in the building back to Crossco No. 4 Unlimited, on such terms as the court might think fit. Yet further, the Claimants sought rectification of the contract dated 10th March 2009 and/or of the transfer dated

9th April 2009, by the inclusion, in either or both of them, of a provision by which it is agreed that the lease should be varied by the deletion of the break clause in clause 9 of the lease. Finally, the Claimants claimed damages for breach of contract and for misrepresentation, together with interest.

The Waitrose agreement

32. On 31st March 2010, Jolan Piccadilly Ltd and Waitrose Ltd entered into an agreement for lease in relation to the proposed retail Unit 1 to be created on the ground floor and basement of the building. The agreement for lease was conditional on certain matters. One of the conditions required the termination or surrender of the lease dated 27th November 2007, in favour of Piccadilly, and indeed the closure of the registered title to that lease and the removal of any associated entries from the register of the freehold title, in order to facilitate vacant possession of the premises to be demised to Waitrose Ltd. By clause 2.3, in the event that the conditions were not satisfied by the Conditions Long Stop Date (which was 24 months after the date of the agreement), either party was entitled to determine the agreement. By clause 2.4, Jolan Piccadilly Ltd agreed to use all its reasonable endeavours to satisfy the Conditions as soon as reasonably practicable after the date of the agreement. By clause 3.2, Jolan Piccadilly Ltd agreed to procure that the Development was carried out. The Development was defined by reference to certain Plans and Specifications. The Plans showed the proposed development of the whole building. The Specifications comprised a detailed specification identifying the specific requirements of Waitrose Ltd. The draft lease attached to the agreement for lease provided for the proposed retail Unit 1 to be demised for a term of 25 years (subject to the lessee's right to break the lease on the 15th anniversary of the commencement of the term) from a date to be specified in accordance with the detailed provisions of the agreement for lease.

The Ask agreement

33. On 13th September 2010, Jolan Piccadilly Ltd and Ask Restaurants Ltd entered into an agreement for lease in relation to the proposed retail Unit 3 to be created on the ground floor and basement of the building. The agreement for lease was conditional on certain matters, one of which was the Landlord's Condition. This condition required the termination or surrender of the lease dated 27th November 2007, in favour of Piccadilly, in order to facilitate vacant possession of the premises to be demised to Ask Restaurants Ltd. By clause 2.3, in the event that this condition was not satisfied by the Landlord's Condition Long Stop Date (which was 18 months after the date of the agreement), either party was entitled to determine the agreement. By clause 2.5, Jolan Piccadilly Ltd agreed to use all its reasonable endeavours to satisfy the Landlord's Condition as soon as reasonably practicable after the date of the agreement. By clause 3.2, Jolan Piccadilly Ltd agreed to procure that the Development was carried out. The Development was defined by reference to certain Plans and Specifications. The Plans showed the proposed development of the whole building. The Specifications comprised a specification identifying the specific requirements of Ask Restaurants Ltd. The draft lease attached to the agreement for lease provided for the proposed retail Unit 3 to be demised for a term of 20 years (subject to the lessee's right to break the lease on the 15th anniversary of the commencement of the term) from a date to be specified in accordance with the detailed provisions of the agreement for lease.

The Nando's agreement

34. On 4th October 2010, Jolan Piccadilly Ltd and Nando's Chickenland Ltd entered into an agreement for lease in relation to the proposed retail Unit 2 to be created on the ground floor and basement of the building. The agreement for lease was conditional on certain matters, one of which was the Landlord's Condition. This condition required the termination or surrender of the lease dated 27th November 2007, in favour of Piccadilly, in order to facilitate vacant possession of the premises to be demised to Nando's Chickenland Ltd. By clause 2.3, in the event that this condition was not satisfied by the Landlord's Condition Long Stop Date (which was 18 months after the date of the agreement), either party was entitled to determine the agreement. By clause 2.5, Jolan Piccadilly Ltd agreed to use all its reasonable endeavours to satisfy the Landlord's Condition as soon as reasonably practicable after the date of the agreement. By clause 3.2, Jolan Piccadilly Ltd agreed to procure that the Development was carried out. The Development was defined by reference to certain Plans and Specifications. The Plans showed the proposed development of the whole building. The Specifications consisted of a single page identifying the specific requirements of Nando's Chickenland Ltd. The draft lease attached to the agreement for lease provided for the proposed retail Unit 2 to be demised for a term of 20 years (subject to the lessee's right to break the lease on the 15th anniversary of the commencement of the term) from a date to be specified in accordance with the detailed provisions of the agreement for lease.

The demerger

35. In outlining the case at the beginning of this judgment, I explained that the contract dated 10th March 2009, by which Crossco No. 4 Unlimited agreed to sell the freehold of the building to Jolan Ltd, was part of a much larger transaction or series of transactions which have been collectively described as the demerger of the companies and entities, together known as the Noble Organisation. The position in relation to the companies and entities in the Noble Organisation before the demerger on 10th March 2009 and the control of those companies and entities is somewhat complicated and, if fully described, would involve a considerable amount of detail. To some extent, the same is true of the arrangements in place after the demerger. I will attempt to describe these matters in a summary way in the expectation this will suffice for present purposes.

36. During Michael's lifetime, Michael Noble and Philip Noble together had substantial interests in a number of companies and partnerships which operated various leisure businesses including adult gaming centres, family entertainment centres, bingo premises, betting premises, bars, nightclubs, restaurants and a bowling alley. The brothers' interests were equal in extent. They were interested either directly or indirectly through family trusts. Some 32% of the equity in the various businesses was owned by family trusts and, in the event of disagreement between the brothers, the trustees of those family trusts had a casting vote. Before Michael's death, Michael Noble and Philip Noble together effectively controlled the Noble Organisation, although neither of them held office as a director of any company in the Noble Organisation.

37. On 19th April 2006, Michael Noble died leaving a widow, Gill Noble. Michael Noble died testate. The executors and trustees of Michael Noble's will were Gill Noble,

Philip Noble and Mr Barnsley although Philip Noble retired as a trustee on 6th November 2008. He remained an executor of Michael Noble's will and the estate has yet to be fully administered.

38. After the death of Michael Noble, control of the Noble Organisation rested with Philip Noble (in his personal capacity and also as executor and, until his retirement as such, as a trustee of the will of Michael Noble) together with Gill Noble and Mr Barnsley as executors and trustees of Michael Noble's will. In this period, neither Philip Noble nor Gill Noble held office as a director of any company in the Noble Organisation, although Mr Barnsley was a director of some of the companies concerned.

39. In addition to the interests described above in the companies and partnerships which operated the various leisure businesses, Michael Noble (until his death) and Philip Noble were equal partners in a number of partnerships that owned a large number of properties. The leisure businesses were run from many, but not all, of these properties. There was a high degree of separation between those involved in running the leisure businesses and those concerned with the ownership of the properties. Those who were concerned with running the leisure businesses were generally referred to as "the Trading Group" and those who were concerned with the ownership of the properties were generally referred to as "the Property Group". Prior to the demerger of the Noble Organisation, the Trading Group was commonly known as "the Noble Group" and the Property Group was known as "Associated Property Investors" or "API".

40. In addition to Philip Noble, Gill Noble and Mr Barnsley, there were executive directors and managers who were employed to run the Trading Group and the Property Group. At the date of the demerger, the directors and managers of the Trading Group were different individuals from the directors and managers of the Property Group. To some extent, the precise demarcation between the activities of the Trading Group and the Property Group was not always well defined.

41. So far as the businesses of the Trading Group were concerned, the key directors and managers at the material times were Mr Imrie, Mr Biesterfield, Mr Gill, Mr Horrocks, Mr Thompson, Mr Blain and Mr Fox. Mr Imrie was the managing director. Mr Biesterfield was the legal and development director. Mr Gill was the finance director between July 2006 and December 2007. After an interval, Mr Gill was replaced by Mr Horrocks from 1st September 2008. Mr Thompson was the property director from January 2007 onwards. Mr Blain was the company secretary of Crossco No. 4 Unlimited and of Piccadilly. Mr Fox was the estates manager.

42. The key directors and managers of the Property Group at the material times were Mr Dalzell, Mr Wooldridge and Mr Wright. Mr Dalzell was the managing director. Mr Wooldridge was the finance director and Mr Wright was the property director.

43. Throughout the trial, the parties drew a distinction between what was called "Philip's side" and "Gill's side". This distinction, or a similar distinction, began with definitions of these terms which appeared in the Particulars of Claim in the main claim. In that pleading, the Claimants defined "Philip's side" as Philip Noble and the trustees of three settlements (the Philip Noble 1983 & 1987 Settlements and the Muriel Noble 1997 No.2 Settlement). Also in the Particulars of Claim, the Claimants defined "Gill's side" as Gill Noble and Mr Barnsley (as the executors and trustees of the will of Michael Noble) and the trustees of three settlements (the Michael Noble

1983 & 1987 Settlements and the Muriel Noble 1997 No 1 Settlement). Although these two terms were defined, I was far from certain whether the parties strictly adhered to these definitions when referring to "Philip's side" or "Gill's side" in the course of the evidence and of submissions. It seemed to me that in the course of the trial, these terms were being used much more loosely and extended beyond the legal persons referred to in the definitions in the pleadings and so as to embrace the various limited companies which previously existed or which were formed to become associated with Philip Noble and his interests on the one hand and with Gill Noble and her interests on the other. I should also point out at this stage that although the definitions in the pleading referred to specific trusts, I was only able to form a general impression of the legal position in relation to these trusts. I was not shown the trust documents, nor was I taken to any detailed descriptions of the classes of beneficiaries under the trusts nor to the relevant powers and duties. This might have suited the presentation of the claim on behalf of Philip Noble and his group of interests as he wished me to approach the matter on the basis that the only people who needed to discuss and decide on the commercial terms of any deal were himself on the one hand and Mr Barnsley (and possibly also Gill Noble) on the other. This presentation made it unnecessary for me to know any detail as to the underlying trusts. However, the case as presented on behalf of Gill Noble and her group of interests included a submission that neither Mr Barnsley nor Gill Noble had authority to bind the trustees of the various trusts and that those trustees were required to, and indeed sought to, involve themselves in understanding the proposals being made and in making the ultimate decision in relation to the interests held by the trusts. A similar submission might have been made in relation to Philip Noble's authority to bind the various trustees who were referred to in the definition in the pleadings of Philip's side. This point was not explored very thoroughly at the trial and I was left with incomplete information in this respect.

44. I have already referred to Mr Barnsley as an executor and trustee of the will of Michael Noble. Mr Barnsley played an important part in the steps leading up to the demerger of the Noble Organisation and, in particular, took part in the important negotiations on 18th February 2009. The parties disagree as to the precise role played by Mr Barnsley. Philip Noble contends that Mr Barnsley was a tax and financial adviser to both Philip's side and Gill's side in relation to the demerger generally and to the building in particular. It is said that he was regarded by both Philip Noble and Gill Noble as a trusted adviser and was in a special position of trust and confidence so far as both of them were concerned. In response, Gill Noble contends that from July 2008, Mr Barnsley advised only Gill Noble and her children's settlements in relation to the demerger, so that from that date Mr Barnsley was not in any position of trust and confidence in relation to Philip Noble.

45. Having described the various companies, entities and individuals concerned with the Noble Organisation before demerger, it is now helpful to refer to the various companies involved with the ownership of the freehold and leasehold interests in the building as referred to earlier. The relevant companies were Crossco No. 4 Unlimited, Piccadilly, Jolan Ltd and Jolan Piccadilly Ltd.

46. Before the demerger, Crossco No. 4 Unlimited was controlled by Philip's side and Gill's side; after the demerger and at the present time, it is controlled by Philip's side.

Before the demerger, Piccadilly was controlled by Philip's side and Gill's side and after the demerger and at the present time it is controlled by Philip's side.

47. The relevant Jolan Ltd was a Jersey company, incorporated on 25th February 2009. It was formed to take various interests which were to be held on behalf of Gill Noble and her interests upon and after the demerger. There were 5,050,000 issued shares in Jolan Ltd. Of these, at all material times, 2,500,000 shares were held by Capita Nominees Ltd, 2,500,000 were held by Capita Secretaries Ltd, 49,447 were held by the executors of the estate of Michael Noble and 553 were held by another shareholder, about whom I do not have adequate details (and this small shareholding can be disregarded). Pursuant to express declarations of trust dated 25th February 2009, both Capita Nominees Ltd and Capital Secretaries Ltd held their shares in Jolan Ltd as nominees for the executors of the estate of Michael Noble. Thus, Jolan Ltd is effectively owned by those executors. The directors of Jolan Ltd were, and are, Mr Barnsley and Mr Wooldridge.

48. Jolan Piccadilly Ltd was incorporated under the name Crossco (1155) Ltd on 23rd March 2009 and changed its name to its current name on 9th April 2009. This company was set up as a wholly owned subsidiary of Jolan Ltd in order to take the transfer of the freehold of the building. The directors of Jolan Piccadilly Ltd were, and are, Mr Wooldridge, Mr Dalzell and Mr Wright.

49. At the date of the grant of the lease (27th November 2007) the freehold of the building was vested in Crossco No. 4 Unlimited and the lease was granted to Piccadilly. At that point, the same persons controlled the freeholder and the lessee. Following the demerger, the freehold of the building was vested in Jolan Piccadilly Ltd and the lease remained vested in Piccadilly. However, following the demerger, the control of the freeholder and of the lessee was in different hands.

50. Prior to the demerger, the Trading Group and the Property Group were run from adjoining, but separate, offices at 1A Dukesway Court, Team Valley, Gateshead.

51. By 2005, the only business being run by the Noble Organisation from the property was the adult gaming centre on the ground floor, as the nightclub and the snooker hall had previously closed down. Deliberations over the future of the building, and in particular its redevelopment, had been going on for some years before the death of Michael Noble in April 2006. Before 2002, the then investment director of the Trading Group had appointed architects and worked on appraisals of various schemes, including the demolition of the building and its development as a new office block with retail at ground floor level. In July 2002, at the request of Mr Biesterfield, Mr Wright prepared desk top valuations of several redevelopment options, including schemes for refurbishment to provide retail units on the ground floor and offices above, alternatively involving demolition and rebuilding on the site. Mr Wright was responsible, with others, for preparing a number of further appraisals in 2003 and 2004. Following a meeting between Mr Biesterfield, Michael Noble and Philip Noble on 23rd October 2003, Mr Thompson was instructed to investigate the possibility of re-siting the amusement arcade in order to facilitate development of the ground floor for retail use. In July 2005, after consultation with Michael Noble and Philip Noble, it was decided to run an architectural competition to advise on a possible redevelopment of the building. In April 2006, Mr Wright submitted a number of development appraisals for various schemes, all of which involved the demolition of the building

and the closure of the arcade. Following the death of Michael Noble in April 2006, Mr Wright produced a briefing note for a meeting with Philip Noble, setting out options which recommended the re-siting of, or the closing of, the arcade. A further note along these lines was prepared for Philip Noble in June 2006.

52. One of the earlier appraisals involved the development of the building as a hotel, but with the Noble Organisation in occupation of the ground floor. The later appraisals involved a complete demolition of the building. Mr Wright advised Philip Noble that the planning authority would welcome the re-siting of the arcade and the retention of the arcade would have a detrimental effect on the ability to let the upper floors as offices.

53. After Mr Dalzell was appointed managing director of the Property Group in January 2007, there were further discussions between Philip Noble and Mr Dalzell as to the future of the building. They met on a regular basis. Philip's side contend that it was agreed or at least understood during this period that no development would take place which would require the Noble Organisation to give up trading from the ground floor of the property. This is denied by Gill's side. Steps were taken to find suitable alternative premises for the relocation of the amusement arcade. Although one alternative site was actively pursued, in the end that site could not be acquired.

54. In 2007, it was decided by Philip Noble and those representing the estate of Michael Noble, who together owned the freehold of the building, to transfer the freehold to a company which was to be a member of the Trading Group. The building was not the only property to be dealt with in this way. However, the other properties were ultimately transferred to a different company, Crossco No. 3 Unlimited and the building was transferred as the single asset of Crossco No. 4 Unlimited. In connection with this proposed transfer, surveyors and valuers, Colliers CRE were asked to advise on the value of the building. In their written valuation of 3rd October 2007 the building was valued at between £7.6 million and £8.8 million using different assumptions. The report referred to the substantial latent value which would be released, if the ground floor and basement were available for development and split into three retail units, resulting in an increase in the estimated rental value from £331,000 to £500,000 per annum for the ground floor and basement alone.

55. I have already referred to the transfer of the freehold from Philip Noble and the estate of Michael Noble to Crossco No. 4 Unlimited, the grant of the option to Golftee GP Ltd and the grant of the lease to Piccadilly. These matters were carried out with the advice and assistance of solicitors, Dickinson Dees, and accountants, PwC.

56. So far as the Trading Group was concerned, there was some involvement in these arrangements in 2007 on the part of Mr Gill, Mr Blain, Mr Fox and, possibly, Mr Biesterfield. On the Property Group side, there was some involvement in these matters in 2007 on the part of Mr Dalzell, Mr Wooldridge and Mr Wright.

57. The Claimants accept that the existence of the landlord's break clause in the lease was known to Mr Gill, although it is pointed out that Mr Gill left the Noble Organisation on 16th December 2007, not long after the lease was entered into. The Defendants contend that the existence of the break clause in the lease was also known to Mr Blain, Mr Fox and Mr Biesterfield. It is not suggested that Philip Noble was aware in 2007, or at any material time before completion of the demerger, of the existence of

the break clause in the lease. I can now state my findings as to who in the Trading Group knew of the existence of the break clause in the period from 2007 to February 2009.

58. It is accepted that Mr Gill knew that the lease contained a break clause. He executed the lease as a director of the lessor and as a director of the lessee. He was also copied into two emails, both on 15 October 2007, which referred to the break clause. He left the Trading Group on 16th December 2007.

59. Mr Blain executed the lease as secretary on behalf of the lessor and of the lessee. He did not read the lease and was not aware of the existence of the break clause. On 12th December 2007, he received a memorandum from Mr Fox recording "the main terms" of the lease. Mr Fox referred to the term being for 15 years from 27th November 2007 to 26th November 2022 but he did not refer to the break clause. I find that Mr Blain was not aware of the existence of the break clause in the period 2007 to February 2009.

60. Mr Fox was the estates manager in the Trading Group. He was copied into the two emails on 15th October 2007 which referred to the break clause. He was not copied into the answers provided by others to these emails. A copy of the completed lease was sent to him on 28th November 2007. He sent the memorandum referred to above to Mr Blain on 12th December 2007. Mr Fox gave oral evidence that he was not aware that the lease as actually completed contained a break clause. There are two possible explanations as to why his memorandum did not refer to the break clause. One is that the memorandum was prepared for use by the accounts department in connection with the payment of rent and it would not have been material to tell the accounts department about the break clause; accordingly, Mr Fox did not mention the break clause although he must have noticed it in passing. The other explanation was that Mr Fox had not noticed the break clause when he prepared his memorandum. He prepared two other memoranda, dealing with two other properties where leases had just been granted. Neither of those leases contained break clauses. It is therefore possible that when he considered the lease of the building, he was simply looking for the same information as he had referred to in the other two memoranda and that did not include any reference to a break clause. Mr Fox appears to have had some conversation with Mr Biesterfield on or about 16th October 2007 in which Mr Biesterfield told Mr Fox that the lease should not be contracted out of the security of tenure provisions of the 1954 Act. Mr Fox passed this information on to Dickinson Dees. This communication of itself did not directly involve any reference to the break clause. Mr Fox gave oral evidence that he was not aware that the lease as completed contained a break clause. That evidence was not really challenged in cross-examination. I accept his evidence to this effect. In the event, it may not matter if Mr Fox had noticed the break clause in the lease as he obviously paid no attention to it in 2007 or at any time before completion of the demerger. I also note at this point that Mr Fox, as the estates manager, played no part in the demerger negotiations nor any part in the communications between the parties as to the building in the period from 18th February 2009 up to completion of the demerger.

61. Mr Biesterfield was only peripherally involved in the transactions which took place in October and November 2007. I accept his evidence that he was not aware of the existence of the break clause in the period from 2007 to February 2009. There is

nothing in the documents or in the evidence of other witnesses to cast any doubt on his evidence on that point.

62. The Claimants contend that various persons in the Property Group knew in 2007 of the existence of the break clause. In particular it is said that Mr Dalzell, Mr Wright and Mr Wooldridge knew of the break clause in 2007. It is also said that they had not forgotten about the break clause between 2007 and February 2009. There was extensive cross-examination at the trial of these three witnesses with a view to establishing whether, and if so when, prior to February 2009, one or more of them were aware of the existence of the break clause in the lease and whether they had remembered that fact at all times between 2007 and February 2009. In the end, these questions do not seem to me to matter because, by reason of the exchange of e-mails in February 2009, it is clearly established that in February 2009 Mr Dalzell, Mr Wooldridge and Mr Wright were all then aware, if they had previously not been aware or had at one time forgotten, of the existence of the break clause in the lease. I will consider Mr Barnsley's knowledge of the break clause in and after February 2009 later in this judgment.

63. The possibility of a demerger in relation to the Noble Organisation so that the assets of the Noble Organisation were divided between Philip's side and Gill's side was first raised by Philip Noble in early 2008. It was an important feature of the proposed demerger that there should be an equal division of the assets of the Noble Organisation. Each side was regarded as entitled to one half of the total value of the assets. Further, if the demerger produced the result that one side received more than one half of the total value of the assets, this could give rise to a chargeable gain for Capital Gains Tax purposes and everyone wished to avoid that result.

64. By June 2008, as a result of discussions between, principally, Philip Noble, Gill Noble and Mr Barnsley, it was agreed that the demerger would be effected by Philip's side receiving mainly (but not exclusively in that some investment properties from which trading businesses were run were to be included) the assets and businesses of the Trading Group and Gill's side receiving most of the assets and businesses of the Property Group. Although this basis for the demerger appeared relatively straightforward, the mechanics needed to give effect to it were very complex indeed as a result of the nature of the assets concerned, the identity of the entities which owned those assets and the desire to minimise any tax liability which might arise out of the demerger. PwC, who were advising both sides to the proposed demerger, prepared a document called a demerger step plan recording the steps to be taken to achieve the intended result. The version of the step plan dated 7th March 2009 covered 39 principal steps but with many of those steps having multiple sub-steps. In the event, some 200 documents were entered into to effect the demerger but no one single document other than possibly the step plan, recorded all the main terms agreed between the two sides.

65. Because it was considered to be essential to achieve an equal division of assets between the two sides the assets had to be valued. It was agreed that the businesses carried on by the Trading Group would be valued by Close Brothers. These businesses included, of course, the business carried on by Piccadilly from the ground floor of the building.

66. In due course, Close Brothers prepared a lengthy valuation report dated 21st October 2008. The report stated that the valuation of the business in a volatile and falling market was a very challenging exercise with data and views changing on a daily and weekly basis. Close Brothers had adopted an operating model which involved a forecast as to the development of the business in the period 2009-2013. The model forecast performance for seven different divisions within the overall business. One of these divisions was the Arcades Division. The business carried on by Piccadilly from the ground floor of the building was a part of the business of the Arcades Division. There was no separate valuation of the business carried on in the building. The valuation of the business of the Arcades Division was based on management accounts and forecasts for that business and those accounts and forecasts included a contribution made to the business by Piccadilly in relation to its business on the ground floor of the building. Close Brothers were provided by the management of the Trading Group with actual trading figures for 2007 and nine months of 2008 and with trading forecasts for the remainder of 2008 and for the years thereafter up to and including 2013. No consideration was given to any possibility that Piccadilly might discontinue its business from the ground floor of the building, and not relocate that business elsewhere, before 2013.

67. Close Brothers used a number of methods of valuation. The methodologies were described in their report as comparable companies, comparable transactions, sum of the parts analysis, leveraged buyout model and discounted cash flow analysis.

68. The report made a separate adjustment for sums which needed to be spent to remedy dilapidations at the various arcade premises. The report recorded that the forecasts provided by the management included a total of £4.3 million for what was described as "catch-up dilapidations spend". The figure of £4.3 million was to be split 50:50 across the financial years 2009 and 2010. Close Brothers made a negative £ for £ adjustment to the purchase price of £4.3 million. The figure of £4.3 million provided to Close Brothers was broken down, property by property, in a schedule which was supplied to them. The properties listed in the schedule included the building, where the estimated cost of remedying dilapidations was given as £350,000. This schedule of properties also gave some details as to the tenure of the properties. In relation to the building, there was a comment which stated that the building was owned freehold. Of course, the trading entity, Piccadilly, did not own the freehold but the freeholder, Crossco No. 4 Unlimited was controlled by the same people who controlled Piccadilly. Further, at the time the schedule was prepared and at the time of the Close Brothers report, it was intended that, following demerger, the freeholder and the trading entity would both be controlled by Philip's side. The schedule of properties also listed the termination dates of various of the leases on which properties were held. This revealed that the termination dates of some of those leases fell before the expiry of the period for which projected figures had been provided to Close Brothers, i.e. before 2013.

69. The sum of the parts approach involved placing values on the seven divisions, including the Arcades Division. The separate values for the divisions were then added together. Values were expressed by reference to a range of values. In summarising the sum of the parts analysis, the report identified the ranges for the value of the overall business based on the figures for the financial years 2008, 2009 and 2010. The ranges for these three years were £72 million to £87 million, £52 million to £67 million and

£56 million to £77 million respectively. The top and bottom of the range for each division was expressed as "implied" multiples of EBITDA for each division for each of the years 2008, 2009 and 2010. There was considerable variation in the resulting multiples. The multiples were 5.6 (low) and 5.9 (high) for the estimated EBITDA for 2008, 5.6 (low) and 6.4 (high) the estimated EBITDA for 2009 and 5.1 (low) and 5.9 (high) the estimated EBITDA for 2010.

70. The report identified a value for the whole business in a range from £60 million to £70 million. A calculation was carried out to show the "implied" multiple of the EBITDA for the whole business although, as explained, a valuation method using a multiple of EBITDA was only one of a number of different valuation approaches adopted by Close Brothers. There was a considerable variation in the multiples for the financial years 2008, 2009 and 2010.

71. The Close Brothers report discussed the subject of "split areas". The Gambling Act 2005 requires an operator to hold a premises licence for each site. This licence is granted by the local authority. Some operators, including the Noble Organisation, have obtained multiple premises licences by splitting a larger area into a number of smaller areas by using means such as barriers, railings or walls. The smaller premises are then put forward to the local authority and separate premises licences obtained for each. This approach allows the operator to have a greater number of certain gaming machines in the arcade and results in much greater revenue from the arcade. In June 2008, the Gambling Commission had issued a consultation document which discussed the future treatment of split areas and at the time of the Close Brothers report there was uncertainty about future regulation in this respect. The report did not make an adjustment to the valuation to reflect the uncertainty as to future regulation of split areas. However, the report identified this topic as a sensitivity which it would be for the reader of the report to take into account. On a worst case basis, the loss of the ability to have split areas could reduce the group valuation by £32.5 million. I note at this point that the arcade operated from the ground floor of the building had five separate premises licences for five split areas.

72. The Close Brothers report referred to four properties as potential candidates for raising capital by way of sales and leasebacks. One of these properties was the building. The report referred to various valuations of the building from £6.598 million to £7.7 million. The report recorded that management were of the strong view that a sale and leaseback of these four properties would not make commercial sense. Philip Noble told me that this was probably because it would be helpful to keep the properties so that they could be used as security for future borrowings.

73. I heard evidence from Mr Henry Wells of DC Advisory Partners, who were formerly known as Close Brothers. Mr Wells was principally responsible for the Close Brothers report of 21st October 2008. In his witness statement, he stated that the report did not include a specific forecast for the business carried on in the building. He said that if the management of the business had expected that a significant business might be lost within the period to which the forecasts related, he would have expected the management to inform Close Brothers of that fact, so that the information could be taken into account in arriving at the valuation. He said that such information might be taken into account either by adjusting the valuation or by identifying a "sensitivity", leaving it to the parties to discuss how that sensitivity should affect their ultimate agreement.

74. Mr Wells was asked various questions as to whether one could calculate, using the Close Brothers report of 21st October 2008, the value of the overall business of the Trading Group, if one removed from it the arcade business on the ground floor of the building. He was also asked if one could similarly calculate the value of the overall business if one were to reflect the possibility that the arcade business might cease, not immediately, but at certain defined points in the future or, alternatively, at some indefinite point in the future. Mr Wells stated that it would not be safe to make self-contained adjustments to the figures arrived at in the report, for example, reducing the turnover of the overall business by removing the turnover from the building as an adjustment of one element might necessitate adjustments in other respects also and the matter would require detailed work. He also stated that a valuation carried out in February 2009 would not be the same as the valuation which applied as at the date of the report (21st October 2008) because of the significant financial changes which had occurred in the interim period. He also emphasised that if one were advising a buyer as to how much to pay for an individual arcade business carried on at one address the exercise would involve due diligence and would be quite different in character from the exercise Close Brothers had carried out to arrive at a fair value of the overall business for the purposes of a demerger of that business between the existing owners of it.

75. Mr Wells was asked about the significance, or lack of significance, of the length of tenure in relation to the various properties from which the arcade business was operated. He said that Close Brothers did not look at the individual leases to the various properties to assess how many years remained of the lease, or what prospects of renewal there might be. Close Brothers made a working assumption that the business would continue at the various properties. He explained that one would expect there to be some degree of "churn" in relation to properties with some sites being given up and others acquired. Conversely, if there were a lease which was due to expire and this would have a significant effect on the trading forecasts, then Close Brothers would expect to have been told about it.

76. Philip's side and Gill's side took the valuation range identified by Close Brothers of £60 million to £70 million and agreed for the purpose of their subsequent discussions a value of £65 million as the gross value of the whole business. They then agreed a deduction from this gross value of £15 million to reflect the sensitivity in respect of split areas, producing a net value of £50 million. The figures of £65 million and £15 million were discussed and agreed between Philip Noble and Mr Barnsley.

77. In addition to the valuation of the business carried out by Close Brothers, the negotiating parties wished to have a formal valuation in respect of seven particular properties. These seven properties included the building. Mr Wright of the Property Group instructed Colliers CRE to value these properties. They did so in a report dated 13th November 2008 which stated their opinion of market value as at 31st October 2008. The valuers were instructed to value the building on the hypothetical basis that it was let on a new lease to a trading company in the Noble Organisation, assumed to be of strong national covenant status, for a term of 15 years on a full repairing and insuring lease, at a rent which the valuers considered to be the then current market rent. Colliers CRE advised that the then current market rent for the whole of the building was £478,400 per annum and on the assumption of a letting on a 15 year

lease as described above, they valued the freehold at £6 million. Their report stated that the value of the building with vacant possession was £5 million.

78. On 16th December 2008, Mr Wooldridge prepared a document entitled: "Proposed corporate re-structure". He circulated this document to both Philip's side and Gill's side. The document set out to show a comparison of the values of the assets proposed to be transferred to each side. The document showed there was a disparity between the value of the assets to be transferred in this way in that the value of the assets to be transferred to Philip's side exceeded the value of the assets to be transferred to Gill's side by £16 million. The comparison was based on an assumption that the assets to be transferred to Philip's side included the freehold of the building which was given a value of £6 million for the purposes of the comparison.

79. Prior to 18th February 2009, the disparity between the values of the assets being transferred to the two sides, as revealed by the document of 16th December 2008, was to be dealt with by treating Philip's side as indebted to Gill's side in a sum which would ensure that there was equality in value on each side. As at 18th February 2009, the two sides were targeting the end of February 2009 as the date for completion of the demerger. The negotiations for the demerger had been going on for a considerable time prior to February 2009 and, in February 2009, both sides considered it desirable to achieve completion of the demerger without further delay.

80. Prior to 18th February 2009, there had not been a discussion between Philip's side and Gill's side as to the possibility that the freehold of the building might not be vested in Philip's side but instead be transferred to Gill's side. In fact, there had been some internal discussion on Gill's side in January 2009 in relation to that possibility. On 21st January 2009, there were e-mail communications involving Mr Barnsley, Mr Wooldridge and Mr Dalzell which discussed the attitude of the Royal Bank of Scotland ("RBS") to the possibility that the assets of the Property Group, which could form part of the security granted to RBS, might include the freehold of the building at a time when the building was let to the Trading Group. Mr Wooldridge's e-mail of 21st January 2009 to Mr Barnsley and Mr Dalzell referred to it not being in the interests of the Property Group "to amend the lease" and also referred to it costing less "to cancel their lease in the future". Although Mr Wooldridge was cross-examined about the possible significance of this email, I accept his evidence that he could not really recall his thinking at the time. In any event, I do not think that this email is relevant to anything that happened subsequently. On the whole, Mr Dalzell and Mr Wooldridge were not particularly in favour of the suggestion that the freehold of the building be transferred to Gill's side. The focus at that time was on the financial position of one of the companies in the Property Group, Derandd, and its somewhat delicate position with its lender, RBS. Indeed, in the period before the demerger on 10th March 2009, all the parties involved in the demerger were very concerned about the attitude of the banks to the Noble Organisation, questions as to compliance with banking covenants and the loan to value ratios in relation to the securities held by the bank. The then current and the then proposed arrangements with the banks took up a considerable amount of everyone's time and were a matter of very considerable concern. If satisfactory arrangements with the banks could not be made, it was likely that the demerger would not have taken place.

81. By 17th February 2009, a meeting between Philip Noble, Mr Horrocks and Mr Barnsley had been arranged to take place in London on 18th February 2009. On 17th

February 2009, Mr Barnsley spoke to Mr Dalzell and they discussed a suggestion made by Mr Barnsley that the disparity between the value of the assets to be transferred to Philip's side and the value of the assets to be transferred to Gill's side could be reduced by, in particular, the freehold of the building not being vested in Philip's side but being transferred to Gill's side. Later that day, in an e-mail timed at 16:43, Mr Dalzell wrote to Mr Barnsley in these terms:

> "Given this matter some considerable thought today since we spoke earlier this morning and set out below various thoughts.
>
> As you are probably aware we had the Falcombe properties valued by Colliers for ops in November 08, and at that time Piccadilly was valued @ £6m based on an estimated rental value of £478,000pa for the building, also assuming, as usual, our standard fifteen year lease.
>
> The problem is that the internal rent "paid" by ops is much lower at £278,500 pa, and I am not sure of the lease status as to whether there is one or not. At this lower rent this would in November 08 at the same yield have produced a value of £3.6 million. However since then of course yields have moved out further so I would suggest that now off the £478K pa rent you would be looking at between £5.5m and £5.75m, and of the lower **actual** rent of £278K a figure now of £3.3 to £3.4m.
>
> Clearly both of these scenarios are throwing up numbers lower than the £7m you are looking to protect.
>
> The only way it gets anywhere close is if ops pay £478K pa on the whole also based on a 15 year lease. An alternative might be for them to give up 6,000 sq ft of the ground floor, but still pay £278k rent. We could then split the building & this would then allow us to look at doing the Waitrose deal. My concern is that we then take on a potential letting/void risk if we are unable to do a deal with Waitrose so the building will not have the value attributable to it that you are after, with part vacant it is probably worth £4m. You might still consider this a better risk than waiting 5 years to get the cash from ops however, with the upside of eventually letting the other part and upper floors.
>
> We also need to bear in mind the building is in a poor state of repair with all the upper floors unoccupied & the roof not in the best of shape. Tough call, the title deeds give you some security but in my view probably not for sufficient cash, and on what lease & at what rent. At least it will be a discussion point for tomorrow!!!!! Understatement me thinks!!
>
> Hope this makes a modicum of sense but if you want to chat through to clarify please do not hesitate to give me a call on the mobile."

82. Mr Dalzell stated that he did not recall any further conversation with Mr Barnsley on 17th or 18th February 2009, following receipt by Mr Barnsley of this e-mail, although there might have been one. Mr Barnsley thought that he must have spoken to Mr Dalzell again after receiving this email and before the meeting with Philip Noble on 18th February 2009. Mr Barnsley suggested that he would not have been comfortable proposing a transfer of the building to Gill's side at a notional value of £5 million in the light of Mr Dalzell's comments on value as set out in the email. I find that Mr Barnsley could not positively recall any such further conversation; he was merely supposing that it must have happened. It is not necessary to find whether or not such a conversation took place. I find that there was nothing said in any such further conversation which is material to the resolution of any disputed issue in this case.

83. It appears from Mr Dalzell's e-mail of 17th February 2009 that he could see pros and cons in the proposal that the freehold of Piccadilly should be transferred to Gill's side. He referred to a number of possibilities in his e-mail, and one of those possibilities involved the arcade business staying in a part only of the ground floor. That appears from his reference to "doing the Waitrose deal" which he described as involving the arcade business giving up some 6,000 square feet of the ground floor. It also appears from this e-mail that Mr Dalzell thought that the suggestion that the freehold of Piccadilly should be transferred to Gill's side would be controversial at the meeting planned for the following day.

84. Mr Dalzell immediately forwarded a copy of this e-mail to Mr Wooldridge and Mr Wright, for information only. The e-mail which he sent to Mr Wooldridge and Mr Wright again indicated that he expected the meeting arranged for 18th February 2009 to be a very significant meeting and possibly a difficult meeting.

85. Later on 17th February 2009, Mr Horrocks sent to Mr Barnsley and to Philip Noble a brief agenda for the meeting arranged for 18th February 2009. Mr Horrocks invited Mr Barnsley and Philip Noble to add to the agenda as necessary. The draft agenda did not include any reference to the building.

86. On 18th February 2009, Mr Wooldridge had a meeting with Mrs Meikle, the banking partner at the solicitors, Dickinson Dees. Mr Wooldridge and Mrs Meikle were involved in a lengthy telephone conference with RBS. At the end of that conference, Mr Watts who was the corporate partner at Dickinson Dees joined Mrs Meikle and Mr Wooldridge and in a short meeting, of some 10 to 20 minutes, the three of them ran through nine topics of which one was the disparity between the value of the assets to be transferred to Philip's side and the value of the assets to be transferred to Gill's side. In that context, Mr Wooldridge mentioned the possibility of the freehold of the building being transferred to Gill's side. Mr Wooldridge was aware of that possibility because he had been copied in to Mr Dalzell's e-mail of 17th February 2009. There does not appear to have been any discussion of the detail of this proposal at this meeting.

87. At 5 pm or 5.30 pm on 18th February 2009, there was a meeting at Philip Noble's office in London between Philip Noble, Mr Horrocks and Mr Barnsley. They discussed a large number of items in a meeting lasting a couple of hours. No one made any note of what was discussed but the matters discussed were later summarised in an e-mail from Mr Barnsley to a long list of addressees on 20th February 2009 at 15:58. At this meeting, Mr Barnsley raised for the first time, so far as Philip Noble

and Mr Horrocks were concerned, the suggestion that the freehold of the building should be transferred to Gill's side. That suggestion was discussed for about 15 minutes and proved not to be controversial.

88. I heard oral evidence from Philip Noble, Mr Horrocks and Mr Barnsley as to what was discussed at the meeting on 18th February 2009. There was very little difference between the witnesses as to what was said.

89. In his witness statement, Philip Noble gave only brief evidence about the discussion relating to the building at this meeting. He said that the proposal was that the building would go to Gill's side and that the Trading Group would continue to run its business from the ground floor with the upper floors being released to Gill, so that she could redevelop them. The value at which the building would go to Gill's side would be £5 million. The Trading Group would pay for the ground floor the same rent that it currently paid for the whole building.

90. When cross-examined, Philip Noble stated that the proposal was that Gill would have the upper floors for redevelopment and that Philip Noble would keep the ground floor to trade from. He later changed his evidence to refer to the ground floor and basement. He said that he would pay the same rent for the ground floor and basement as he had been paying for the whole building. He did not know if there would be a new lease of the ground floor and basement. He expected that his company would occupy under a lease. He believed that, after the meeting, thought would have to be given to the practicalities of splitting the building and shared exits. The discussion was in very broad terms. Later in his evidence he said that, depending on what Gill's side wanted to do with the upper floors, his side would accommodate that in any way possible. Nothing was said about the duration of the lease of the ground floor and basement; he imagined that if there had been an existing lease, the duration of the lease of the ground floor and basement would have been however long that lease had to run.

91. In his witness statement, Mr Horrocks said that at the meeting, Mr Barnsley proposed certain terms and Philip Noble and Mr Horrocks agreed them without any great need for negotiation or debate. The proposal was that the Trading Group would transfer the building to the Property Group by whatever method proved to be most tax efficient at a commercial value of £5 million. Mr Horrocks did not relate this figure to any vacant possession valuation and Mr Barnsley did not so describe it. The Trading Group could continue to occupy and trade from the ground floor but would release the upper floors to Gill's side for the purpose of redevelopment. Mr Barnsley did not use the words "could continue to occupy etc" but this was implicit in what he said. The Trading Group would pay the same rent for the ground floor as it was paying for the whole building. The Trading Group would co-operate with the Property Group in relation to the redevelopment of the upper floors subject to the protection of the Trading Group's interests. Neither Mr Horrocks nor Philip Noble were familiar with the terms of any lease of the building nor were they even sure that there was a lease. Mr Horrocks stated that he wanted to "sense check" the rent which was discussed.

92. When cross-examined, Mr Horrocks stated that he was not able to recall whether certain details had or had not been discussed in relation to the building. He did not recall whether he had said anything during the discussion about the building. He did not think that the lease was discussed.

93. In his witness statement, Mr Barnsley gave comparatively brief evidence about the meeting. He said that he proposed the Gill's side would take a transfer of the freehold of the building for £5 million. Philip Noble said that the trading company would need a lease of the ground floor and basement and suggested the same rent would be paid for the reduced area. Mr Barnsley agreed that the rent could be sorted out. Philip Noble said that he did not want a lease of anything more than the ground floor and basement because the trading company did not occupy the upper floors and did not want repairing obligations and rates liability for those floors. The discussion was general and did not go into any details as how the mechanics could be achieved. The only terms expressly agreed were that the trading company would pay what they were currently paying and the freehold had a value of £5 million. The parties did not discuss the development of the building in any detail. Philip Noble said that there was demand for a 2 star hotel in that area of Manchester.

94. When cross-examined, Mr Barnsley said that neither he nor Philip Noble were aware at the meeting whether there was an existing lease of the building. The discussion about the building took 10 or 15 minutes. Mr Barnsley did not recall precisely where he had got the figure of £5 million from. At the end of the meeting and as a result of what was said at the meeting, the expectation on both sides was that Philip Noble would remain on the ground floor and in the basement of the building. There was no discussion as to what was to happen about staircases. What was said was that Gill's side would take the freehold and that Philip Noble would get a lease of the ground floor and basement. Philip Noble said he would pay the same rent as he had been paying but at the end of the discussion he said he would want to get the rent checked. There was no discussion about the terms on which Philip Noble would continue to occupy the ground floor and basement. The word "development" was not used as the parties did not talk about the details.

95. I can now make my findings as to what was discussed about the future of the building at the meeting on 18th February 2009.

96. Philip Noble agreed to Mr Barnsley's proposal that the freehold of the building would be transferred to Gill's side. There was no discussion as to the legal steps to be taken to achieve that. Philip Noble and Mr Barnsley agreed that the freehold would be transfered in return for a value shift of £5 million. The parties did not discuss in any detail how that figure of £5 million was derived or how it was to be justified. The fact that the same figure had appeared in the Colliers CRE valuation as a value of the freehold with vacant possession was not referred to.

97. The proposal involved, either expressly or by implication, the arcade business continuing on the ground floor. There was no discussion about what use would be made of the basement but it was contemplated that the basement would be available for use by Philip's side. The proposal involved the upper parts of the building not being occupied by Philip's side so that those parts would be available for Gill's side. There was no discussion as to the precise extent of the ground floor which would be occupied by the arcade business.

98. Philip Noble proposed that he would pay the same rent for the ground floor and basement as the business had been paying for the whole building. However, he later said that he would want to check up the position as to rent.

99. The parties at the meeting did not know whether there was an existing lease of the building. It was expected that Philip's side would occupy the ground floor and basement under a lease but it was not known whether that would be the existing lease or a new lease. The question of the duration of any lease was not considered. No one referred to the fact that the existing lease contained a break clause. Similarly, the other terms of any lease were not considered.

100. Finally, I find that at the meeting on 18th February 2009, there was only a passing reference to a future development of the upper parts of the building.

101. On 19th February 2009, there was a lengthy meeting at PwC's offices in Newcastle. This meeting was attended by a large number of the professional advisers involved in the demerger. Throughout the demerger process, Mr Barnsley had called meetings of this kind "suits meetings" and these meetings were referred to in that way at the trial. At the suits meeting on 19th February 2009 there was no reference to the discussion of the previous day concerning the building. There was also a meeting on 19th February 2009 involving Mr Barnsley and Dickinson Dees but, again, that meeting did not discuss the building. There was however an informal discussion about the building on two occasions on 19th February 2009. Mr Barnsley arrived at the offices of the Property Group in the morning of 19th February 2009 to join Mr Wooldridge and Mr Dalzell and to go with them to the meeting at PwC. When Mr Barnsley, Mr Wooldridge and Mr Dalzell were together in this way, Mr Barnsley told Mr Wooldridge and Mr Dalzell something at least about what had been discussed the previous day with Philip Noble and Mr Horrocks. After the PwC meeting on the 19th February 2009, Mr Barnsley spoke further to Mr Horrocks and Mr Jefferson. This further discussion is referred to in an e-mail from Mr Wooldridge to Mr Wright at 16:33 on 19th February 2009. The e-mail records that Mr Barnsley went through with Mr Horrocks and Mr Jefferson the matters discussed the previous day. The e-mail records that Mr Horrocks nodded his agreement to what was said and was proposing to meet Philip Noble later on 19th February 2009 "to confirm" the arrangements.

102. Following the suits meeting on 19th February 2009, Mr Dalzell went to the offices of the Trading Group and asked Mr Thompson for a copy of the lease. Mr Thompson was able to access a copy of the lease, without any difficulty, in the records of the Trading Group. He gave a copy to Mr Dalzell. During the afternoon of 19th February 2009, Mr Dalzell read the lease and saw the break clause. At that point, at the latest, Mr Dalzell was aware that there was a lease of the building and that it contained a break clause. He had in fact been involved with the grant of the lease in November 2007 and he knew about the break clause at that time. He said in his witness statement that he was not sure before 19th February 2009 whether that lease had continued in force or had been surrendered or varied. I do not think that I need to make any finding about Mr Dalzell's understanding as to the continued operation of 2007 lease and the existence of the break clause in the period before 19th February 2009. Mr Dalzell said that it was likely that he discussed the terms of the lease, including the break clause, with Mr Wooldridge in the afternoon of that day. Mr Dalzell said that he probably took a copy of the lease away with him.

103. Mr Wooldridge's e-mail to Mr Wright on 19th February 2009 at 16:33 refers to a number of matters and in relation to the building it contains the following passage:

> "Piccadilly – freehold to be transferred to Crossco (GN's Limited Partner vehicle) and a value of £5m. We will take an assignment of the existing lease that Crossco No.3 has agreed with Ops at a rent of £278k for ground floor only. Any space not used by Ops will be stripped out in a variation of the lease.
>
> NB. Chris/JB/myself are all aware that (a) existing lease has c30 months until the next rent review (b) has favourable landlord's break for re-development. I imagine that if someone from Ops picks up on these points, we'll concede the development break but not the rent review date. We all assume the Ops won't be able afford (*sic*) a market rent anyway in 30 months time and, if they do, it will provide capital uplift (i.e. win/win for us)."

104. It is clear from Mr Wooldridge's e-mail of 19th February 2009, that he was aware of the existence of a break clause in the lease of the building. He wrote this email after his discussion with Mr Dalzell when the latter told Mr Wooldridge certain things about the lease, a copy of which he had just obtained from Mr Thompson. Mr Wooldridge described the break clause as a "favourable landlord's break". Although he described it as a "break for re-development", the actual break clause was an unqualified one and was not restricted to the case of the landlord intending to redevelop. Of course, if the landlord wished to redevelop, then the unqualified break clause could be relied upon. Mr Wooldridge does not appear to have had a copy of the lease to hand when he wrote his e-mail because he referred to the lessor being Crossco No. 3, when it was in fact Crossco No. 4. Similarly, he stated that there were approximately 30 months until the next rent review whereas the first rent review date was 27th November 2002, which was approximately 45 months from the date of the e-mail. I find that he based his email on his recollection of what Mr Dalzell had told him shortly beforehand and his recollection was not totally accurate.

105. Mr Wooldridge was involved with the transfer of the freehold and the grant of the lease in 2007. At that time, he was aware of the break clause in the lease. He may have been aware of the break clause when he wrote his email of 21st January 2009, to which I have already referred. In any event, it is clear that he was aware of the fact that there was a break clause (although he described it as a "break for re-development") when he wrote his email on 19th February 2009. I do not think that I have to make any more positive findings as to his state of awareness of the break clause before 19th February 2009.

106. It is clear that Mr Wright knew about the break clause when he read Mr Wooldridge's email of 19th February 2009 when he returned to the office on Monday, 23rd February 2009, after a short break on 19th and 20th February 2009. Mr Wright was not surprised to see a reference in this email to the break clause as he had been involved with the grant of the lease in 2007. I do not think that I have to make any more positive findings as to his state of awareness of the break clause before 23rd February 2009.

107. Whilst it is relatively easy to make findings about the knowledge of the break clause on 19th February 2009 in relation to Mr Dalzell and Mr Wooldridge, and on 23rd February 2009 in relation to Mr Wright, there was considerable controversy as to when Mr Barnsley became aware of the break clause. The Claimants naturally rely on

the email sent by Mr Wooldridge on 19th February 2009 at 16:33. That email stated that Mr Dalzell, Mr Wooldridge *and Mr Barnsley* were all aware that the lease had a "favourable landlord's break for re-development". It is accepted that Mr Barnsley had spoken to Mr Dalzell and Mr Wooldridge on 19th February 2009, as I have described. Mr Dalzell told me that he could not recall, one way or the other, any time during that day when the break clause was mentioned to Mr Barnsley. Mr Wooldridge gave evidence to the same effect. He told me that when he wrote his email it might have been only an assumption on his part that Mr Barnsley knew of the break clause. Mr Barnsley was not present at the point in the afternoon when Mr Dalzell told Mr Wooldridge some details about the lease, having obtained a copy of it from Mr Thompson. Accordingly, if Mr Barnsley knew of the break clause by the time that Mr Wooldridge wrote his email, then he must have known about it before 19th February 2009 or it must have been mentioned to him at some earlier point that day.

108. Mr Barnsley dealt with Mr Wooldridge's statement in the email of 19th February 2009 when he prepared his witness statement. He said that he had "no recollection" of being told about the break clause. This statement appears to cover the period from the grant of the lease and includes all of February and March 2009. He said that he could not rule out the possibility that Mr Wooldridge might have mentioned it. That seems to be a reference to the period before the negotiations concerning the building on 18th February 2009. If Mr Wooldridge had mentioned it before those negotiations, Mr Barnsley said that he had not remembered it at the time of the negotiations. In his witness statement, Mr Barnsley explained that he was sure that he only became aware of the break clause at an API meeting on 6th May 2009. He said he vividly recalled being taken aback at that meeting when he discovered the existence of the break clause. This did not jog any memory of having been told about it at an earlier time. In his evidence in chief, he confirmed the accuracy of his witness statement. When cross-examined, he was minded to change the date of the relevant API meeting from the meeting on 6th May 2009 to a meeting on 20th April 2009.

109. Mr Barnsley was cross-examined at length about the time when he became aware of the break clause. A number of suggestions were put to Mr Barnsley. It was suggested that he knew of the break clause before the meeting on the 18th February 2009. Then it was suggested that he was told of the break clause on 19th February 2009. Then it was suggested he was aware of the break clause some time before 10th March 2009. It was also suggested to him that he had decided not to mention the break clause to Philip's side and to postpone discussing the terms of the lease until after the freehold of the building was transferred to Gill' side so that Gill's side would be in a stronger negotiating position at any subsequent negotiation on the terms of a new lease for the ground floor of the building. Mr Barnsley did not accept any of those suggestions. As regards the possibility that Mr Barnsley had been told of the break clause on 19th February 2009, he said that either nothing of the kind was said to him on that day (and Mr Wooldridge's email of 19th February 2009 was wrong on the point) or Mr Wooldridge did say something to Mr Barnsley and he did not take "a blind bit of notice of it".

110. I can now state my findings in relation to Mr Barnsley's awareness of the break clause. It was put to Mr Barnsley that he was deliberately giving untruthful evidence. I reject that suggestion. My assessment was that Mr Barnsley was not trying to mislead me when he described his recollection, or his non-recollection, of these

matters. In relation to the period up to and including 18th February 2009, I am satisfied that Mr Barnsley had no awareness of there being a break clause in the lease, or even if there was a lease of the building. It is not impossible that at some point prior to 18th February 2009, the fact of a lease of the building, containing a break clause, might have been communicated to Mr Barnsley. If so, I am satisfied that he had no thought of the terms of such a lease when he met Philip Noble on 18th February 2009. Having regard to the complexity of the demerger, the number of individual steps to be taken, the range of matters to be negotiated, the fact that Mr Barnsley was an accountant with tax expertise and not a lawyer or a property specialist, I find it unsurprising that any earlier communication to Mr Barnsley that there was a lease of the building, containing a break clause, would not have had any real significance for Mr Barnsley in the context of the negotiations which took place on 18th February 2009 and that earlier communication would not have come back to his mind. When Mr Wooldridge wrote his email on 19th February 2009, he referred to himself, Mr Dalzell and Mr Barnsley all being aware of the existence of the lease, the rent review provisions and the break clause. I can conclude that when Mr Wooldridge wrote that statement, he believed that Mr Barnsley was aware of those three things. The question then becomes: why did Mr Wooldridge think that? The suggested answer is that Mr Barnsley must have been present when Mr Dalzell and Mr Wooldridge mentioned those matters. The difficulty with the suggested answer is that the evidence tended to show that Mr Barnsley was not present when Mr Dalzell and Mr Wooldridge discussed those matters in the afternoon of 19th February 2009, after Mr Dalzell had obtained a copy of the lease. Although all three men were together before the suits meeting earlier that day, Mr Dalzell did not at that time have a copy of the lease and, I find, neither he nor Mr Wooldridge would have known the terms as to rent review. Although the email in question misstates the rent review terms, that is readily understandable on the basis that Mr Wooldridge was mis-remembering the detail of what Mr Dalzell had said to him in the afternoon. Ultimately, there are only two explanations which I am prepared to consider in view of all of the evidence given by Mr Barnsley, Mr Dalzell and Mr Wooldridge. The first is that Mr Wooldridge wrongly included Mr Barnsley in the list of people who knew about the lease, the rent review provisions and the break clause. The second explanation is that the lease and the break clause (possibly even the rent review provisions) were mentioned in the discussion involving all three men before the suits meeting earlier that day. In the event of this second explanation being true, I hold that Mr Barnsley's evidence is truthful when he says that the issue of the break clause did not register with him. I do not find that possibility at all surprising. In view of the many matters which Mr Barnsley was attending to and his particular expertise, the mere fact that he was present when Mr Dalzell or Mr Wooldridge stated that there was a lease of the building and that the lease contained a break clause would not have meant anything very significant to him but might have caused Mr Wooldridge to write in his email that Mr Barnsley was aware of the break clause.

111. On 20th February 2009, Mr Dalzell e-mailed Mr Barnsley and Mr Horrocks in the following terms:

> "Following yesterday's demerger meeting I obtained a copy of the lease from Phil Thompson.

> On checking the documentation the current area demised to ops is the whole building. If the agreement is that ops will just have the ground floor we will need to have a brief deed of variation to attach a new demise plan limiting rights of occupation to the ground floor. We will also need to vary the rights of repair to make the landlord responsible for the external repairs and include a % recovery clause in based on floor area. If ops to occupy just 1 floor this will probably be circa 20% based on the 5 floors.
>
> If you could please consider these points and if all agree I will ask Dickinson Dees to draft the necessary deed of variation for completion along with the rest of the demerger papers.
>
> Look forward to hearing from you with your instructions."

112. Shortly thereafter, Mr Dalzell sent an e-mail to Mr Wooldridge and Mr Wright. This referred to Mr Dalzell and Mr Thompson "going through the file" the previous day. Mr Dalzell asked Mr Wright to investigate the question of the rateable values attributable to the different hereditaments in the building. He referred to the need to establish "the rates liability we will be taking on on the void areas". He also raised the question of repairs and insurance; in the latter respect he referred to "the proposed splits of occupied & vacant".

113. Later on 20th February 2009, Mr Horrocks replied to Mr Dalzell's e-mail of earlier that day. Mr Horrocks sent this e-mail to Mr Barnsley and Mr Thompson also. The e-mail read:

> "I sat down with Ian and Philip last night to look at the use of Piccadilly and we have marked a floor plan for the ground floor which we will need to agree with you. We would not need the upper floors or the basement – I think one of the development plans identified the basement as a potential car park. If we can agree the changes to occupation, and the rent impact, then Phil Thompson can agree the changes with you before we instruct Dickinson Dees. Ian will sign off the final floor plan from our side."

114. The reference to Ian is a reference to Mr Imrie, the managing director of the Trading Group. The email referred to Philip's side not needing the basement. As I have held, the proposal at the meeting on 18th February 2009 was that Philip's side would have the ground floor and basement. The reference to the need to agree "the rent impact" is consistent with what had been said about rent at the meeting on the 18th February 2009 and may also have been appropriate in view of the change of position in relation to the basement.

115. Later on 20th February 2009, Mr Wooldridge sent an e-mail to Mr Wright and Mr Dalzell in these terms:

> "Dave was up earlier with a floor plan for the building. Philip is keen to move one of the staircases to the upper floors (the one right in the middle part of the Piccadilly Square frontage).
>
> However, Dave has suggested that you + Phil T agree what works best for both parties on the demise.
>
> Dave also commented that DHB thinks that a deed of variation to the lease may not work and that a new lease may be required. I played ignorant with Dave and said that was a property legal question that we'd have to refer to DD (I'll leave it to you next week to ensure DD give the right answer). I commented that as a (*sic*) long as a deed of variation was legally binding for both parties then I assumed this would be sufficient."

116. The reference to "Dave" was a reference to Mr Horrocks. The reference to "Philip" was a reference to Philip Noble and "Phil T" was Mr Thompson. "DHB" was Mr Biesterfield, who was the legal director for the trading group. He was well known to all the parties to be very thorough and careful, possibly even pedantic, in dealing with the drafting of documents and matters generally. The reference to Mr Biesterfield is very significant because Gill's side were being told that Mr Biesterfield had been informed of the proposal in relation to the building and had begun to express his views on the way forward legally.

117. Mr Wooldridge's email refers to moving a staircase. The staircase which was referred to was a substantial staircase at ground floor level giving access to the first floor. It was referred to at the trial as "the night club staircase", as the first and second floors had formerly been used as a night club. This matter had not been addressed in the discussion at the meeting on 18th February 2009. If the staircase were to be removed, that would increase the available floor area at ground and first floor levels. There had not been any discussion as to who would bear the cost of removing the staircase and making good.

118. The plan referred to in this email was given to Mr Wooldridge who placed it on Mr Wright's desk. Nothing then happened between the parties in relation to this plan.

119. The plan was originally drawn in December 1989, apparently to show certain works which were envisaged at that point. The plan relates to the ground floor only. A yellow line has been drawn on the plan to indicate the part of the ground floor to be occupied by the arcade business and, thereby, showing the part of the ground floor which would be vacated and available to Gill's side to give access to the upper parts of the building and so as to assist with the development and/or letting of those parts. The parts of the ground floor which were to be given up by the arcade were, first, an area on the right hand side of the Piccadilly frontage, most of which was taken up by a staircase to some of the upper floors, secondly, an area at the rear of the building on the Back Piccadilly frontage which included lifts and an electric substation and, thirdly, another area at the rear of the building giving access to some of the upper floors. The area of the night club staircase was included within the yellow line and was therefore intended to be used by the arcade business.

120. The email did not contain any further information as to why Mr Biesterfield thought that a deed of variation of the lease might not be appropriate and why a new lease might be needed. Mr Wooldridge was an accountant whereas Mr Wright was the property director of the Property Group.

121. Mr Wooldridge was cross-examined about why he was "playing ignorant" on the subject of a deed of variation rather than a new lease. It was suggested to him that he preferred the document to take the form of a deed of variation rather than a new lease because, with a deed of variation, there was a better chance that Philip's side would miss the fact that the existing lease contained a break clause, which would then not be removed in the deed of variation, whereas if there were to be a new lease, the draftsman of the lease would not insert a break clause. I accept that Mr Wooldridge did have a preference for a deed of variation rather than a new lease. In his evidence, he initially stated that he did not recall why that was. Then he said that it may have been due to his misunderstanding as to the need to agree a precise boundary for the demised premises; he suggested that was necessary for a new lease but not for a deed of variation. Later, he suggested that it was because he wanted the benefit of keeping the rent review dates in the existing lease (which were unlikely to be changed by a deed of variation) rather than having a new lease, where the likelihood would be that the initial rent would not be reviewed for a further 5 years. This explanation is supported by the terms of his earlier email of 19th February 2009 where he had stressed the importance of the rent review being, as he wrongly thought, in 30 months time and, to my mind, this is the most likely explanation. I do not accept the suggestion that he preferred a deed of variation because it gave Gill's side a better chance of keeping the benefit of the break clause. That suggestion is undermined by the statement in his email of 19th February 2009 that Gill's side would concede that point if asked to do so. That fact makes it unlikely that Mr Wooldridge would have bothered to go to the trouble of attempting to retain the benefit of the break clause in the way suggested. Further, as at 19th and 20th February 2009, I consider that those representing Gill's side, who knew about the break clause, including Mr Wooldridge, would have thought it very unlikely that the break clause would go undetected by Philip's side. That would particularly be the case when they were told on 20th February 2009 that Mr Biesterfield had become involved in the question of the form of the legal documents to give effect to the matters discussed on 18th February 2009.

122. On 20th February 2009, Mr Barnsley sent an e-mail to a large number of persons at PwC and at Dickinson Dees and also to Mr Jefferson, Mr Dalzell, Mr Horrocks, Mr Wooldridge and Mr Blain. The e-mail began:

> "We have now finalised the commercial agreement between each "side". This note sets out these final changes some of which may affect the documents. I appreciate that the timetable is tight but we would prefer to stick to it if at all possible. The markets are so volatile that delay kills deals."

123. Mr Barnsley's e-mail of 20th February 2009 dealt with thirteen topics in separate numbered paragraphs. The second paragraph dealt with the building where he wrote:

> "Gill's side will now get the freehold in Manchester Piccadilly, with an assignment of the lease to the trading side or a new lease on the same terms and with the existing rent but with Gill

> getting vacant possession of the upper floors. We may have to do the freehold now and follow up later with the lease. I imagine that the property will be ? left in crossco and demerged with Gill's other assets to avoid stamp duty. The value for commercial purposes will be £5m, it may be possible to get a lower value if SDLT is in point."

124. Although it is only the opening words of the email and its second paragraph, which I have quoted above, which are relevant to the building, I will refer to the other parts of the email in view of the submission made by the Claimants that the parties had made an immediate binding contract on all matters discussed at the meeting on 18th February 2009 and referred to in this email.

125. The first paragraph of Mr Barnsley's email referred to the Palatine, a property in Blackpool. The third paragraph referred to a number of features in connection with loan accounts. The fourth paragraph referred to two enterprise zone properties in Scotland; these were referred to as Eurocentral and Europoint. The fifth paragraph referred to the division of the profit on the sale of a property referred to as Clifton. The sixth paragraph referred to the use of proceeds from the recent sale of certain properties being used to buy group trading sites. The seventh paragraph referred to another property called Royal Quays. The eighth paragraph referred to API's lease of office premises at Dukesway. The ninth paragraph referred to certain rights of pre-emption. The tenth paragraph stated that there would not be an option for Gill's side to buy any of the businesses within the trading group. The eleventh paragraph referred to Gill's side co-operating in various respects. The twelfth paragraph provided that each side would bear its own exposure to Stamp Duty Land Tax. The thirteenth paragraph provided for one company to give a rental guarantee for three other companies and certain other supporting provisions were mentioned.

126. Later on 20th February 2009 Mr Dalzell sent an e-mail to Mr Wooldridge and Mr Wright in the following terms:

> "Spoken with Phil T he is calculating rentals for the ground floor. They have not thought through the severe complications of moving a staircase, we need to speak monday before you have any discussions with Phil T please.
>
> If DB has looked at the lease they will not do a simple deed of variation
>
> Spoken to JB and he is suggesting we will probably deal with the lease/demise/rent rejig post demerger."

127. The reference to DB was a reference to Mr Biesterfield and the reference to JB was a reference to Mr Barnsley. The reference to Phil Thompson calculating rentals for the ground floor is consistent with the discussion on 18th February 2009 where Philip Noble said that he wanted Mr Thompson to consider the appropriate rent for the ground floor. Mr Dalzell's evidence, which I accept, was that any deed of variation would not be "simple" because it would have to deal with a number of complications, such as the removal of the nightclub staircase, the question of access to the upper parts and when work could be carried out to the upper parts. I also think it likely that

Mr Dalzell did not at that stage want to be pinned down, as regards access and the detail of the development, because he did not know precisely what his requirements would be when he would come to carry out a development of the upper parts.

128. It seems likely, and Mr Barnsley accepted in evidence, that Mr Dalzell spoke to him before Mr Barnsley sent his own email on 20th February 2009, when he suggested transferring the freehold first and following up later with the lease.

129. On 23rd February 2009, Mr Wright sent an e-mail to Mr Dalzell in these terms:

> "Phil T just been up and said it has been agreed that he and I will meet in Manc this week to agree the demise!? Said you didnt mention it but that I am in Bolton tomorrow for a Dilaps meeting so can meet him there in afternoon.
>
> May as well have a non committal meeting to see what they are after and take a look around at condition at same time."

The reason why Mr Wright would have wanted the meeting to be non-committal was that Gill's side were not yet at a stage where they could commit themselves in respect of the area of the ground floor which they would like to see given up to them. Later that day, Mr Wright sent a second e-mail to Mr Dalzell stating that Mr Thompson had just been told to stand down in relation to a meeting in respect of the building until further notice. Mr Horrocks told me that the reason for the Philip's side not going ahead with the meeting to discuss the extent of the ground floor demise was that they were concerned about the effect of altering the ground floor in relation to the premises licences which they had under the Gambling Act 2005. At that time, there were five "split areas" (as I have already explained) and five licences. Philip's side did not want to jeopardise these licences by agreeing a new ground floor demise with Gill's side before they had discussed the matter with the local authority. They realised that there would not be adequate time to have such discussions with the local authority before the hoped for early completion of the demerger. Accordingly, it emerged by 23rd February 2009 that both sides, for their different reasons, did not wish to come to an agreement at that stage on the extent of the ground floor demise.

130. On 23rd February 2009, Mr Wright from the Property Group sent an e-mail to Mr Fox, the estates manager at the Trading Group, asking for certain information in relation to the building. He asked, in particular, for information as to the rating position and also for a copy of the completed lease including the plans.

131. On or about 23rd February 2009, Mr Brown and Mr Willows, who were property lawyers at Dickinson Dees, became involved in connection with various parts of the demerger concerning dealings with properties, including the proposed transaction in relation to the building. In the early afternoon of 23rd February 2009, Mr Willows e-mailed Mr Brown referring to the deeds held by Dickinson Dees in respect of the building. He referred to the freehold being owned "by Crossco", subject to a lease to Piccadilly. He also referred to the option in favour of Golftee GP Ltd. A little later, the corporate partner of Dickinson Dees e-mailed Mr Brown a copy of Mr Barnsley's earlier e-mail of 20th February 2009 referring to the terms of the commercial agreement.

132. By the middle of the afternoon on 23rd February 2009, Mr Horrocks had had a conversation with Dickinson Dees who had identified two legal issues. Mr Horrocks referred to these issues in an email to Mr Barnsley. One issue concerned the building and the other concerned the Palatine in Blackpool. In relation to the building, there were two points. The first was that Dickinson Dees had advised Mr Horrocks that it was likely that it would be necessary to have a surrender of the existing lease and a grant of a new lease, instead of a variation of the existing lease; Mr Horrocks commented that the SDLT payable in that case might be around £60,000. The second point was expressed as follows:

> "In addition the demise of the ground floor needs to be agreed. Do we undertake to readdress the ground floor demise at some point in future, or do we deal with it now? The added complication of dealing with it now is the possible impact on gaming licences. We need to come up with a form of words to satisfy both properties [*presumably* parties] on this one."

Mr Horrocks asked Mr Barnsley to come back to him on these points.

133. Later on 23rd February 2009, Mr Willows of Dickinson Dees e-mailed Mr Brown of Dickinson Dees with an update in relation to various matters including the building. He referred to the identity of the freeholder and the fact that there was a lease of the whole building to Piccadilly. He said:

> "I understand that we are to transfer the freehold to Gill and vary the existing lease so it is of ground floor only and PwC are checking SDLT implications of the lease variation…"

134. On 24th February 2009, Mr Barnsley replied to Mr Horrocks' e-mail of 23rd February 2009. Mr Barnsley also sent this reply to Mr Wooldridge and Mr Dalzell. He wrote:

> "I think that so far as Manchester is concerned the best course is to get the freehold across and then sort out the lease issues after. I dont understand the demise issues.
>
> On Palatine I thought we were simply going to have a side agreement which is indeed legally unenforceable, and so need not be told to the bank. An executed surrender might have to be. You will need to trust us just as we have to trust you on lots of things. Who is dealing with the charge over Piccadilly?"

135. On 24th February 2009, there was a telephone conference in which Mr Jefferson, Mr Horrocks, Mr Wooldridge and Mr Barnsley, amongst others, participated. There appears to have been a brief reference to the building which referred to the need to remove any security interests in favour of Barclays Bank Plc and also referred to there being a point to be considered in relation to dilapidations.

136. From this point onwards until completion of the demerger on 10th March 2009, Dickinson Dees drafted certain documents including a number of side letters. As already noted, the parties entered into a side letter relating to the building on 10th March 2009. Altogether, the parties entered into 7 separate side letters dealing with 7

separate properties. There is considerable e-mail traffic concerning these side letters. Although those communications are relevant in view of the Claimants' submission that the parties reached a contractually binding agreement on 18th February 2009 on all matters which were then discussed, including these 7 properties, I do not need to recite all of the detail of the relevant history. I will however refer to the relevant communications between 24th February 2009 and 10th March 2009 in so far as they concerned the building.

137. By the end of 25th February 2009, Mr Brown had prepared an early draft of a new lease for the building. He did not circulate that draft to the parties. He told me that the draft he had prepared did not include a landlord's break clause. In an e-mail at the end of 25th February 2009, Mr Brown raised a question as to the SDLT treatment of a variation or a surrender of the existing lease of the building. He stated that he assumed that the new lease of the building would be granted prior to the demerger and there would be a subsequent transfer of the building to Gill's side either by means of a property transfer or a transfer of the ownership of the shares and the registered proprietor. In his e-mail which was sent to Mr Biesterfield, Mr Horrocks, Mr Wooldridge and Mr Barnsley, Mr Brown referred to the option in favour of Golftee GP Ltd. He asked for instructions as to whether the option was to remain in place or should be terminated. The documents do not disclose any answer to that question being given to Mr Brown.

138. Mr Horrocks replied by email to Mr Brown's e-mail and his reply was sent to Mr Biesterfield, Mr Wooldridge and Mr Barnsley. In relation to the building, Mr Horrocks' e-mail said:

> "With regard to Piccadilly I understand that we will probably leave the existing lease in place pre demerger, with a view to agreeing demise etc. after the demerger has completed."

139. On 26th February 2009, Mr Wooldridge sent an e-mail to Mr Barnsley and Mr Horrocks. The subject of the e-mail was "Contracts/letters of intent". The e-mail read:

> "Just took a call from Michael Brown about what issues are to be subject to contract at the demerger date or what issues will be subject to a letter of intent (ultimately legally unenforceable).
>
> As we know, the various issues that will be outstanding are
>
> Palatine surrender
>
> Clifton profit share
>
> API office surrender
>
> EZ ownership re-distribution
>
> Piccadilly lease demise
>
> Welbeck intention to acquire Derandd assets with disposal proceeds

> Michael had a call from DHB on this issue and he was keen to enter into documents that would legally bind API on Palatine & Clifton only.
>
> It would be useful if we could discuss tomorrow what form these documents will take to give some clarity to DDees."

140. The phrase "subject to contract" in this e-mail, read in context, appears to be referring to matters which would be made the subject of a binding contract rather than left without a contract being agreed or, in that sense, "subject to contract". Mr Wooldridge appeared to be saying that the question as to the Piccadilly lease demise would not be made the subject of a binding contract but would be left on terms which were ultimately legally unenforceable. The e-mail also records that Mr Brown had received a call from Mr Biesterfield who wished to have documents legally binding API on Palatine and Clifton only and, therefore, not legally binding in relation to the building.

141. There was a suits meeting on 27th February 2009 and, amongst other topics, those present discussed the building. The discussion appears to have been confined to the intention to obtain a release from Barclays Bank of the property. Another suits meeting on 27th February indicated that the parties were working to completion of the demerger later that week. Mr Harker of Dickinson Dees explained at this meeting that the side letters would not be legally binding on the parties. This meeting referred to the extent of the demise in respect of the building and it was recorded that the demise would be reduced from five floors to one floor.

142. On 27th February 2009, Mr Wooldridge e-mailed Mr Brown of Dickinson Dees and his e-mail was copied to Mr Barnsley, Mr Dalzell, Mr Horrocks and Mr Jefferson. The e-mail was again headed "Contracts/letters of intent". In his e-mail, Mr Wooldridge gave "our instructions" to Dickinson Dees in response to the request for instructions from that firm. The instruction was said to have been agreed by both sides at the demerger meeting that day. The instructions related to the points which were to be "outstanding" and so as to "fall outside the demerger document". The email then listed seven separate matters, including the building. In relation to the building, Mr Wooldridge's e-mail read:

> "Piccadilly lease demise – letter of intent between future landlord (Jolan Limited) and existing tenant that Jolan will agree to a reduction in demise to ground floor property and any further areas (determined by tenant). Once the demise is agreed, the revised rent will be no less that (*sic*) the existing passing rent of £278,500. No discussion of removal of staircases etc… as this will be a separate commercial arrangement that is acceptable to both parties."

143. Mr Wooldridge ended his e-mail by requesting that when Mr Brown had drafted the necessary documents, he should forward them to Mr Wooldridge and to Mr Horrocks.

144. By 3rd March 2009, Mr Willows of Dickinson Dees had prepared a draft contract for the post demerger sale of the freehold of the building. He e-mailed a copy of the contract to Mr Brown.

145. On 3rd March 2009, Mr Brown sent to Mr Biesterfield, Mr Wright, Mr Wooldridge and Mr Horrocks various draft side letters in connection with the proposed demerger. Mr Brown stated that none of the letters were drafted so as to be legally binding as they were "merely meant to be a written record of understandings reached between the various parties on the points covered by these letters." Mr Brown then went on to ask whether it was intended that some of these side letters were to be legally binding and if that was intended he asked for specific instructions. He then described the various side letters and in relation to the building he said:

> "Piccadilly side letter – this is the first draft of this particular side letter which deals with an agreement to accept the surrender or to vary the existing lease of the premises so as to reduce the extent of the demise – please let me know if are any other elements relating to the variation of the demise which should be covered."

The draft side letter which was attached to this e-mail referred to the demise being reduced to the first floor of the property and this was plainly inappropriate.

146. Later on 3rd March 2009 Mr Brown circulated revised drafts of certain side letters following, as he said, comments received from API. The Piccadilly side letter had been revised so that it referred to the ground floor rather than the first floor of the building.

147. On 3rd March 2009, Mr Watts of Dickinson Dees e-mailed Mr Willows and Mr Brown stating that the draft side letter relating to the building named the wrong Jolan Ltd; the intended Jolan Ltd was the Jersey company set up for the purposes of the demerger. Although this was pointed out on the 3rd March 2009, the side letter as signed on 10th March continued to refer to the wrong Jolan Ltd.

148. On 4th March 2009, there was a series of meetings at Dickinson Dees. At some point during the day, Mr Dalzell and Mr Wooldridge discussed various points arising with Mr Biesterfield. In particular, they discussed detailed points as to the terms of the lease in relation to the Palatine. Mr Biesterfield had plainly carefully considered the terms of that lease.

149. Also on 4th March 2009, Mr Brown of Dickinson Dees sent an e-mail to Mr Wooldridge and Mr Wright which was copied to Mr Biesterfield and Mr Horrocks. The e-mail concerned the various draft side letters and, in particular, the changes which Mr Biesterfield wished to make to the drafts. In relation to the draft Palatine side letter, Mr Brown's e-mail recorded that Mr Biesterfield was happy for the majority of the side letter not to be legally binding but he felt that one provision ought to be a legally binding obligation. Similarly, in relation to a draft Clifton side letter, Mr Biesterfield asked for this side letter to be legally binding. As regards the draft Piccadilly side letter, Mr Biesterfield did not request that it be legally binding but that it should be amended so that both parties were to be released from their outstanding obligations under the lease in the event that the lease was surrendered or varied so as to reduce the extent of the demise.

150. On 4th March 2009, Mr Brown of Dickinson Dees sent an e-mail to Mr Wooldridge, Mr Wright, Mr Biesterfield and Mr Horrocks referring to the draft contract for the

transfer of the freehold of the building. In his e-mail he referred to the sale being subject to the lease and referring to the provisions for apportionment of rent and service charge.

151. On 4th March 2009, Mr Barnsley sent an email to Mr Horrocks, amongst others. He referred to "all of david biesterfields interventions" and suggested that in view of these interventions, the demerger was not going to be ready to be completed the following Friday.

152. On 5th March 2009, Mr Brown e-mailed to Mr Dalzell, Mr Biesterfield, Mr Wright, Mr Wooldridge, Mr Horrocks and Mr Barnsley the various draft side letters. Mr Brown commented that the draft Palatine side letter was not to be legally enforceable and the draft Clifton side letter had similarly been drafted so as not to be legally binding. Mr Brown added: "None of the letters currently are". He also referred to the draft Piccadilly side letter which had been amended to refer to the repairing covenant in the lease.

153. On 5th March 2009, Mr Wooldridge e-mailed Mr Brown of Dickinson Dees. His e-mail was copied to Mr Dalzell, Mr Biesterfield and Mr Horrocks. Mr Wooldridge stated that Mr Dalzell, Mr Wright and he agreed the draft Piccadilly side letter and the draft contract concerning the transfer of the freehold of the building.

154. On 6th March 2009, Mr Brown recorded in an e-mail to Mr Wooldridge, Mr Wright, Mr Dalzell and Mr Barnsley that Mr Biesterfield wanted an obligation in the Palatine side letter to be legally binding.

155. On 7th March 2009, PwC drew up the Noble Organisation Demerger Step Plan, which ran to more than 200 pages. The plan was addressed to two named companies in the Trading Group, to one named company in the Property Group, to 15 sets of trustees of named settlements at an address of Capita Trustees Ltd, to 3 further sets of trustees of named settlements at a different address of Capita Trustees Ltd and to the Trustees of Mrs Noble's 1997 Settlement No 1, care of Mr Barnsley and to the Trustees of Mrs Noble's 1997 Settlement No 2, care of Mr Philip Noble. Following demerger, Crossco No. 4 Unlimited and Piccadilly were to be owned by Philip's side and Jolan Ltd would be owned by Gill's side. The plan stated the valuation for the building was taken at £5 million and that the consideration passing on the transfer of the freehold of the building would be £1. Two pages of the plan considered the tax consequences of the transfer of the freehold of the building. The plan considered capital gains tax, stamp duty land tax, VAT and inheritance tax. When dealing with the VAT consequences, the plan referred to Jolan Ltd continuing to lease part of the building to a named company in the Trading Group.

156. The demerger was completed on 10th March 2009. Crossco No. 4 Unlimited and Jolan Ltd entered into a binding contract for the sale of the freehold of the building to Jolan Ltd for £1. The UK company known as Jolan Ltd, i.e. not the contracting purchaser of the freehold, signed the Piccadilly side letter in the terms which I have set out earlier in this judgment.

157. The parties signed 6 other side letters in addition to the side letter relating to the building. The other side letters concerned the following properties: the Palatine in Blackpool, Clifton, Royal Quays, 1A Dukesway Court, Europoint and Eurocentral.

158. Following 10th March 2009, Gill's side asked for the transfer of the freehold of the building to be in favour of a UK subsidiary of the Jersey company, Jolan Ltd. This proposal was put to Mr Biesterfield who was prepared to agree to it. An off the shelf company Crossco (1155) Ltd was formed on 23rd March 2009 and the draft transfer was amended so that the property would be transferred to this company. On 9th April 2009, Mr Biesterfield stated that the transferor would only allow completion of the transfer if there was a revised side letter in the name of Crossco (1155) Ltd in the same terms as the original side letter signed by Jolan Ltd on 10th March 2009. Completion of the transfer duly took place on that basis. The transfer was dated 9th April 2009 in favour of Crossco (1155) Ltd, which changed its name, later on 9th April 2009, to Jolan Piccadilly Ltd. Mr Wooldridge signed a side letter on behalf of Crossco (1155) Ltd. This side letter was in the same terms (apart from the change of name) as the earlier side letter of 10th March 2009.

Knowledge of the break clause

159. I will now record my findings as to which representatives of Gill's side and which representatives of Philip's side knew of the existence of the break clause prior to the date of the contract for the transfer of the freehold, 10th March 2009, and, if different, prior to the date of that transfer, 9th April 2009.

160. As to Gill's side, Mr Dalzell and Mr Wooldridge knew of the break clause not later than 19th February 2009. Mr Wright knew of the break clause not later than 23rd February 2009. I have made a detailed finding as to Mr Barnsley's awareness of the break clause as at 19th February 2009. There is no evidence that that awareness altered before 10th March 2009 or before 9th April 2009. There is no suggestion that Gill Noble knew of the break clause before these dates.

161. As to Philip's side, at all times after the grant of the lease in November 2007, a copy of the lease was in the records kept by Philip's side.

162. I have already made my finding that Mr Gill knew of the break clause in November 2007 but he left the Trading Group on 16th December 2007.

163. I find that none of Philip Noble, Mr Imrie, Mr Horrocks, Mr Blain, Mr Thompson knew of the existence of the break clause at any time prior to the demerger.

164. I have already found that Mr Biesterfield did not know about the break clause when the lease was entered into in November 2007. I accept his evidence that he did not know about the existence of the break clause before completion of the demerger on 10th March 2009 or completion of the transfer of the building on 9th April 2009. I find it very surprising that he did not become aware of the terms of the lease and of the break clause in the period before completion of the demerger. I think that Gill's side would not have expected that this would be the case and that he, and everyone else on Philip's side, would remain unaware of the break clause at this stage.

165. I have already made my finding that Mr Fox was told of the existence of the break clause in November 2007. However, he played no part in relation to the demerger and nobody asked him anything about the lease of the building in connection with the demerger.

166. So far, I have considered the knowledge of the individuals on Philip's side. It is also relevant to consider the knowledge of Crossco No. 4 Unlimited. This company is seeking rectification of the transfer of the freehold on the basis that it did not know of the existence of the break clause in the lease when it contracted to transfer the freehold to Jolan Ltd and when it, later, did transfer the freehold to Jolan Piccadilly Ltd. Mr Gill was a director of Crossco No. 4 Unlimited when it granted the lease. His knowledge of the terms of the lease would be attributed to Crossco No. 4 Unlimited at that time. The Claimants submit that the knowledge of Mr Gill ceases to be attributed to the company when he left it in December 2007. The Defendants submit that his knowledge continues to be attributed to the company so that when I later ask myself whether Crossco No. 4 Unlimited knew of the existence of the break clause when it contracted, on 10th March 2009, to transfer the freehold and when it actually transferred it on 9th April 2009, I should hold that it did then know. This difference of approach did not emerge until a late stage in the argument and I heard only brief argument on it.

167. In the case of a natural person, there is authority that a natural person should not be said to have knowledge of a fact that he once knew, if at the time in question he has genuinely forgotten all about it, so that it could not be said to operate on his mind any longer: see In re Montagu's Settlement [1987] Ch 264 at 284E.

168. As to the position in relation to a company, I was shown the decision of Millett J in El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717 where he said at 743b:

> "In my judgment, where the knowledge of a director is attributed to a company, but is not actually imparted to it, the company should not be treated as continuing to possess that knowledge after the director in question has died or left its service. In such circumstances, the company can properly be said to have "lost its memory"."

169. This passage in the judgment of Millett J appears to support the Claimants' submission although Millett J did not elaborate what he meant by knowledge being actually imparted to a company and what precisely that entails.

170. Millett J's statement of the law was referred to by the Court of Appeal in the same case: see [1994] 2 All ER 685. At 697j, Nourse LJ stated that he might be prepared to accept that statement of law, but when he applied it to the facts he reached a different conclusion from the judge. Hoffmann LJ said that once a director's knowledge is attributed to a company, the company continues to be affected by that knowledge for any subsequent stages of the same transaction. Rose LJ's reasoning appears to me to be similar to that of Hoffmann LJ. That approach seems to me to carry the implication that the director's knowledge will not automatically be attributed to the company in relation to a later different transaction.

171. It is pointed out in Bowstead & Reynolds on Agency, 19th ed., that the question of attribution of knowledge where the relevant director has ceased to be a director, or has forgotten the relevant matter, is "seldom addressed specifically". The judgments of the Court of Appeal in the El Ajou case were referred to by Arden LJ in REO v Aberdeen Asset Management [2007] 2 All ER 791 at [50] but the point was not fully argued. The discussion of the point in the Australian authority of Beach Petroleum NL

v Johnson (1993) 115 ALR 411 at para. 576.22.36 is somewhat brief and the decision appears to have turned on the specific facts.

172. Although I would have preferred further argument on this point, I think that I should apply the approach of Hoffmann LJ in the El-Ajou case as best I can to the facts of the present case. In my view, the transaction carried out in March and April 2009 was not the same transaction as the grant of the lease in November 2007. By March and April 2009, Mr Gill had ceased to be a director of Crossco No. 4 Unlimited. As to the possibility that Mr Gill's knowledge in 2007 was imparted to the company, there is a lack of clarity as to what is meant by knowledge being "imparted" for this purpose. In my judgment, that would arise, for example, where director A had passed the information, initially acquired by him, to others within the company so that although director A may have left the company before the time of a later transaction, others within the company continue to know the relevant information and the knowledge of those others is attributed to the company at the time of the later transaction. In my judgment, there is nothing in the present case to show that the knowledge of Mr Gill was imparted to the company. I did not understand it to be argued that Mr Fox's limited involvement in the matter in 2007 was material to the present question.

173. The result of the above discussion is that I hold that Crossco No. 4 Unlimited did not know of the existence of the break clause in the lease in March and April 2009.

What Gill's side thought

174. It is also convenient at this point to record my findings as to what the representatives of Gill's side thought about the awareness of the break clause on the part of the representatives of Philip's side. I think that I can take Mr Dalzell and Mr Wooldridge together for this purpose. I will then separately consider Mr Wright, Mr Barnsley and Gill Noble.

175. Mr Dalzell and Mr Wooldridge were aware in February 2009 that the lease contained a break clause. In his email of 19th February 2009, addressed to Mr Wright, Mr Wooldridge had stated that he imagined that if someone from Philip's side picked up the break clause, Gill's side would concede the break clause. The Claimants contend that Mr Dalzell and/or Mr Wooldridge positively set out to take advantage of Philip's side in this respect and tried to produce a situation where Philip's side would not pick up the existence of the break clause. I do not accept that contention. Both Mr Dalzell and Mr Wooldridge denied the suggestion when it was put to them. To my mind, their denials are persuasive and I accept them. I do not think that the references to preferring a deed of variation to a new lease indicate that they had the alleged motive to place Philip's side off their guard. I regard that preference as explained in other ways. Further, I think it most unlikely that they would have had any expectation that such a strategy would have stood any worthwhile chance of success. They would have expected that the deed of variation would have been drafted and scrutinised by lawyers, including Mr Biesterfield, and that the representatives of Philip's side who dealt with properties would have read the existing lease and any draft deed of variation. The existence of the break clause would have been immediately apparent to anyone who carried out even a cursory examination of the lease. Further, in view of Mr Wooldridge's comment that the point would be immediately conceded if Philip's side so requested, it seems very unlikely that they would have bothered to act in the way alleged.

176. There remains the question of whether Mr Dalzell and Mr Wooldridge knew, or suspected, that Philip's side was unaware of the break clause before completion of the demerger and/or before completion of the transfer of the building. Mr Dalzell told me that if he had thought about it at the time, he would have assumed that Philip's side would have known about the break clause and he certainly would not have thought that it was for him to check whether they knew or not. Mr Wooldridge told me that it did not occur to him that Philip's side had made a mistake regarding the existence of the break clause. He presumed that Mr Biesterfield must have been happy with the property being transferred subject to the existing lease. Given that everyone was thinking in terms of a redevelopment being of the upper floors and that Philip's side wished to give up those floors, the break clause may not have been a relevant consideration for Philip's side.

177. Considering the probabilities of the situation at the time, I find that anyone in the position of Mr Dalzell and Mr Wooldridge would have thought that it was highly likely, perhaps even inevitable, that Philip's side would have been aware of the break clause. They knew that Philip's side had a copy of the lease in their records. Mr Dalzell had had to go to Mr Thompson to get a copy of the lease for Gill's side. They also knew that Philip's side knew that Mr Dalzell had been looking at the lease. The two sides began discussing the question of whether to have a deed of variation or a new lease. That would tend to suggest that Philip's side would be looking at the lease. On 20th February 2009, Gill's side were told that Mr Biesterfield had become involved in connection with the question whether there should be a deed of variation or a new lease. Gill's side were told that Mr Biesterfield had expressed a view to Mr Horrocks on that point. Mr Biesterfield was, and was known to be, a careful and punctilious lawyer. He demonstrated those attributes when he raised points about the lease of the Palatine in the period before completion of the demerger. Mr Biesterfield also asked for the side letter in relation to the building to be amended so that there was to be a release from the repairing covenant. That suggested that Mr Biestefield was aware of the terms of the lease. The fact, known to Gill's side, that Philip's side did not ask for the break clause to be removed is not a particularly strong indicator that Philip's side did not know of the break clause. Both sides understood that they would have to consider in detail the terms of a deed of variation or a new lease. On 23rd February 2009, the parties had effectively decided that the work needed to consider a deed of variation or a new lease would be postponed. It might be said that this decision to postpone consideration of the terms carried with it the risk that Philip's side would not become aware of the break clause. Conversely, the postponement of the consideration of the terms would encourage Gill's side to stop thinking about what the terms might be and not to start speculating about what Philip's side might or might know. Further, the terms of the side letter were compatible with Philip's side being aware of the break clause. The side letter was drafted so as to confer rights on Philip's side alone. The one-sided nature of the arrangement was only balanced up if Gill's side would have the benefit of the break clause, of which Gill's side was aware. Finally, there is nothing inherently surprising in Philip's side being aware of the break clause and not asking for it to be deleted. It must be remembered that before completion of the demerger, both sides expected that Gill's side would take back the upper parts of the building (and the basement) and that Philip's side would continue in occupation of most of the ground floor. No consideration was given by either side to a possible reliance on the break clause to take back the ground floor. It would be perfectly rational for Gill's side to think that

Philip's side knew of the break clause and was unconcerned about it because Philip's side knew that the break clause was needed by Gill's side to enable them to recover the upper parts (and basement) of the building and Gill's side was known not to be contemplating relying on the break clause to take back the ground floor.

178. Having considered the evidence given by Mr Dalzell and Mr Wooldridge as to their state of mind on this question, and the probabilities of the situation, I accept their evidence that they did not know and did not suspect that Philip's side were unaware of the break clause. I find that they did not turn a blind eye to the possibility that Philip's side had missed the break clause. I have applied the concept of "blind eye knowledge" which is explained in the speeches of Lord Hobhouse and Lord Scott in Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2003] AC 469 at [23]-[26] and [112]-[120].

179. As to Mr Wright, he was much less involved in the question of the transfer of the freehold of the building to Gill's side. I accept his evidence that he gave no thought to the question whether Philip's side knew of the break clause in the lease.

180. As to Mr Barnsley, in view of my earlier finding that he was either unaware of the break clause or paid no attention to the break clause before completion of the demerger and/or completion of the transfer of the building, he gave no thought to what Philip's side did or did not know about the break clause. He did not know that Philip's side were unaware of the break clause and he did not turn a blind eye to that question as the question did not occur to him.

181. As to Gill Noble, she was unaware of the break clause and gave no thought to what Philip's side knew of a break clause which she did not herself know about. Accordingly, she did not know that Philip's side were unaware of the break clause and she did not turn a blind eye to that question as the question did not occur to her.

After the demerger

182. I will now describe the events of particular relevance after the completion of the demerger.

183. On 27th March 2009 in an e-mail from Mr Dalzell to King Sturge, surveyors and agents who were advising Jolan Piccadilly Ltd in relation to negotiations with Travelodge Hotels Ltd, Mr Dalzell referred to the fact that Jolan Piccadilly Ltd would be maintaining the rental income from Nobles on the ground floor. This indicates that Mr Dalzell at that time was assuming that Nobles would continue to occupy the ground floor of the building.

184. On 20th April 2009, there was an API meeting attended by Gill Noble, Mr Barnsley and Mr Dalzell amongst others. There is no minute of the meeting. Mr Barnsley said that it was probably at this meeting that he first became aware of the break clause. Even if the existence of the break clause had been communicated to Mr Barnsley earlier, I find that this was the first time that Mr Barnsley became aware of the significance of the break clause. It seems likely that Mr Dalzell explained the relevance of the break clause in connection with a possible development of a part of the ground floor to be let to Waitrose.

185. The next day, 21st April 2009, Mr Barnsley e-mailed Mr Wooldridge and Mr Dalzell in relation to the financing of a development of the building. In his e-mail he asked: "How are we going to manage the dark side?" This was a reference to Philip's side trading in the ground floor of the building. Mr Barnsley indicated that Jolan Piccadilly Ltd would not want to press for a new lease until it had heard from Waitrose. Mr Dalzell replied to Mr Barnsley, the e-mail being copied to Mr Wooldridge, stating that as regards "the dark side" the longer that Jolan Piccadilly left dealing with them the better as the more he would know as to the position "on each deal & what we want to happen". A reference to "each deal" was plainly a reference to a deal with Travelodge and a deal with Waitrose. Mr Dalzell went on to say that until he had planning permission for the Travelodge development he did not know what new demise Jolan Piccadilly Ltd could definitely offer to Piccadilly. He added: "the beauty is we have the break clause which really gives us a fantastic starting point in the negotiations, always nice to have a mallet even if we then don't need to use it!" Mr Barnsley responded to Mr Dalzell, saying: "… we can just terminate the dark side".

186. On 6th May 2009, there was a significant event in relation to the Palatine building in Blackpool. As I consider that this event did affect the attitude of Jolan Piccadilly Ltd to the continued occupation of Piccadilly on the ground floor of the building, it is necessary to explain a little of the background. The property at the Palatine had a long history but it is not necessary to explain the circumstances in which the property was originally acquired by Michael Noble and Philip Noble and occupied by the Trading Group. It was arranged that the freehold of the building would be transferred to Gill's side and a lease would be granted to Philip's side. Pursuant to these arrangements, the freehold of the building was held by Golftee Nominee A Ltd and Golftee Nominee B Ltd, which were, or became, owned by Gill's side. On 10th March 2009, Golftee Nominee A Ltd and Golftee Nominee B Ltd granted a lease of the Palatine to Sun Valley Leisure, a company controlled by Philip's side. The premises were demised for a term commencing on 10th March 2009 and expiring on 23rd June 2019, at an initial yearly rent of £66,500, subject to upwards only rent review on the 24th June 2009 and thereafter every five years during the term. Gill's side would have liked that lease to continue, as its terms were favourable to the landlord. However, as part of the demerger, the lessor had executed in escrow a deed of surrender of the lease and the deed of surrender was the subject of a side letter of 10th March 2009. Under the side letter, the lessee of the Palatine confirmed and agreed that it would not complete the deed of surrender, which had already been executed by the lessor, without first giving to the lessor not less than three months written notice of the lessee's intention to do so. The deed of surrender was intended to provide for the lessee to pay a reverse premium of £300,000 to the lessor, although the deed has been badly drafted in this respect. There was a dispute at the trial as to the understanding of the parties as at the time of the demerger as to the likelihood that the lessee would give three months notice pursuant to the side letter and bring about a surrender of the lease. In summary, it was suggested on behalf of Gill's side that Mr Horrocks had made remarks which tended to reassure Gill's side that it was unlikely that the lessee would give notice to effect a surrender of the lease. Conversely, Philip's side contended that it was always sufficiently clear, or ought to have been sufficiently clear, to Gill's side that there was a real possibility that the lessee would give notice to effect a surrender.

187. In the event, on 6th May 2009, Mr Biesterfield on behalf of the lessee of the Palatine gave three months written notice of the lessee's intention to effect the surrender,

pursuant to the deed of surrender executed in escrow. This notice seemed to have come as a surprise to Gill's side, and as various witnesses told me, Gill's side were extremely annoyed at the service of the notice of 6th May 2009.

188. On 16th June 2009, Mr Wooldridge e-mailed the agents acting for Waitrose, in connection with the possibility of Waitrose occupying a part of the ground floor of the building. Mr Wooldridge referred to the existing lease to Nobles but indicated that Jolan Piccadilly might seek to split the ground floor for retail use, for example, as a supermarket and coffee shop use.

189. On 19th June 2009, Mr Fox prepared a memorandum and sent it to Mr Blain. Mr Fox appears to have done this as a matter of estate management and anticipating that rent demands would be sent to Piccadilly from the new landlord, Jolan Piccadilly Ltd. The memorandum summarised the terms of the current lease of the premises and referred, accurately, to the landlord's option to determine contained in the lease. Mr Fox's memorandum did not make any comment as to the existence of the break clause in the lease.

190. On 22nd June 2009, Mr Dalzell, accompanied by the architects retained by Jolan Piccadilly Ltd in connection with the proposed Travelodge development, met a Mr Roscoe, the regeneration manager of Manchester City Council to discuss a proposed planning application for the Travelodge development. Mr Dalzell appears to have told the City Council that the landlord's ability to deal with the ground floor of the building was very limited in view of the fact that Nobles had a 15 year lease, with 12 to 13 years unexpired. He did not mention the break clause. Mr Roscoe made a number of comments as to the attitude of the City Council to an application for planning permission in relation to a Travelodge development on the upper floors of the building in circumstances where the amusement arcade would remain on the ground floor. For example, Mr Roscoe said the City Council would only consider the hotel use acceptable on the basis that the amusement arcade on the ground floor was taken out and alternative uses were provided at ground floor level. On the basis that the amusement arcade was removed, the hotel development could be supported. Mr Roscoe also expressed a preference for total relocation of Nobles so that a suggestion of a reduced presence of Nobles would only be considered as a last resort. Mr Roscoe's views were very clear that he did not wish to see the amusement arcade use continue in the ground floor of the building. There were references in other documents to a similar attitude being taken by the planning officers at the City Council. The Claimants submitted to me that Mr Roscoe's views were not necessarily to be identified with the views of the planning officers, or of the planning committee. I also record that neither side called an expert witness to give evidence on planning matters.

191. In June 2009, someone on behalf of Philip's side, probably Mr Thompson, delivered a further marked up plan to Gill's side. The evidence about the delivery of this plan was a little vague. However, the fact that a plan was delivered to Gill's side in June 2009 is borne out by an email dated 22nd June 2009 from Mr Thompson to Mr Wright and others. This email was copied to Mr Dalzell. In his email, Mr Thompson asked Mr Wright to forward a new lease in relation to the premises: "using the plan provided a couple of weeks ago as the demise". There had been an earlier plan delivered in February 2009 but the email could not have been referring to the February plan. Mr Dalzell replied to Mr Thompson on 22nd June 2009. He did not question the reference

to a plan having been delivered "a couple of weeks ago". I find that a marked up plan was delivered in June 2009 and the plan in question is the plan produced to me with both yellow and pink markings. The yellow marking seems to be the same as the yellow marking on the February version of the plan, although some broken yellow lines have been removed. The pink markings identified seven areas at ground floor level where further thought needed to be given to how the landlord and the tenant would divide the building and share certain facilities that might need to be shared.

192. In his email of 22nd June 2009, Mr Dalzell stated the landlord could not deal with a new lease until it knew it could develop the upper floors. He suggested that this was "envisaged as part of the demerger deal". He suggested that planning permission would be needed for the removal of the nightclub staircase and other changes to the demise. He proposed a meeting with Mr Thompson.

193. Mr Dalzell met Mr Thompson on 25th June 2009. At the meeting, Mr Dalzell appears to have made much the same points as in his email of 22nd June 2009.

194. On 29th June 2009, Mr Dalzell e-mailed Mr Barnsley setting out his thoughts on the options open to Jolan Piccadilly Ltd. It is clear from the e-mail that Mr Dalzell was actively considering determining the lease of the building and recovering vacant possession of the whole of the building. There were references to the appropriate timing for such a step and whether it should be done in stages, whereby Nobles were granted a lease of the ground floor subject to a break option, which was later exercised. Mr Dalzell wanted to keep the matter under review until he could see how his discussions with Travelodge and Waitrose developed. Mr Dalzell was also contemplating taking advice from a litigation partner and perhaps from Queen's Counsel. He referred to the possibility that Jolan Piccadilly Ltd would have to pay "additional damages", in addition to statutory compensation. There was argument as to whether the word "damages" was to be equated with compensation in circumstances where Jolan Piccadilly had not acted unlawfully or meant damages for unlawful action by Jolan Piccadilly Ltd. It is clear from this email that Mr Dalzell's own preference was to carry out a development and lettings which did not include Nobles being a lessee of any part of the building. Mr Dalzell's consideration of the various options proceeded on the basis that the relationship between the landlord and the tenant were governed by the terms of the lease. As to the side letter in relation to the building, he commented that the side letter did not prevent the landlord relying on the break clause.

195. On 6th July 2009, Mr Thompson e-mailed Mr Dalzell, pressing for a new lease to be entered into. On 9th July 2009, Mr Horrocks spoke to Mr Dalzell regarding a possible new lease at the building. Mr Dalzell appears to have asked Mr Horrocks to be patient on the grounds that Mr Dalzell had a number of significant issues to deal with in respect of the upper floors and wished to resolve the issues before entering into a lease with Nobles.

196. On 20th July 2009, Mr Barnsley e-mailed Mr Horrocks on various matters. In the e-mail, Mr Barnsley was critical of Mr Horrocks; he suggested that Mr Horrocks had not been frank as to the intentions of Philip's side in relation to the Palatine. Mr Horrocks curtly replied that Mr Barnsley's statement was "simply false". On 22nd July 2009, Mr Wooldridge who was copied into these exchanges suggested that Mr

Horrocks had no idea about the "Piccadilly development break" or, if he had, he had no idea what was looming.

197. In August and September 2009, there was a dispute between the parties as to the lessee's entitlement to deduct, from the rent payable to the lessor, the rates it was paying for the vacant upper floors.

198. On 28th September 2009, Jolan Piccadilly Ltd entered into the agreement for lease with Travelodge Hotels Ltd, to which I have earlier referred.

199. On 6th October 2009, Jolan Piccadilly Ltd applied for planning permission for, in summary, the refurbishment of the building, the demolition and reconstruction of the fifth floor and a change of use to retail use on the ground and basement floors, with a five storey hotel development above.

200. On 26th October 2009, Jolan Piccadilly served on Piccadilly a break notice pursuant to clause 9 of the lease and a notice pursuant to section 25 of the Landlord and Tenant Act 1954, to end Piccadilly's tenancy of the building on 4th May 2010.

201. On 3rd November 2009, Philip Noble sent a long e-mail to Gill Noble setting out a history of the matter from his point of view and proposing a meeting with a view to avoiding litigation. Gill Noble replied on 4th November 2009 agreeing to a meeting, referring to a lack of trust between the two sides and complaining about the events in connection with the Palatine.

202. On 9th November 2009, Jolan Piccadilly Ltd issued draft heads of terms to Waitrose Ltd in relation to a proposed letting of the proposed Unit 1 on the ground floor of the building.

203. On 17th November 2009, Jolan Piccadilly Ltd issued a Claim Form against Piccadilly, seeking a termination order pursuant to section 29 of the Landlord and Tenant Act 1954, in respect of the whole of the building.

204. On 18th November 2009, there was a without prejudice meeting between the two sides to which some limited reference was made at the trial.

205. On 23rd November 2009, Mr Wheldale, from the firm of engineers retained by Jolan Piccadilly Ltd, sent an e-mail to HTC Cranes asking for a budget price for a tower crane to be used in connection with the development. Mr Wheldale referred to the tower crane sitting on a base on the existing basement slab and that he would like "as small a hole as possible up through the building". On 26th November 2009, the architect retained by Jolan Piccadilly Ltd e-mailed Mr Wheldale in connection with the proposed siting of the crane referring to it being in Mr Dalzell's interests "to show max disruption at GF level".

206. On 4th December 2009, there was a meeting between the two sides to discuss the methodology for the proposed building works to create a Travelodge hotel at the building. The meeting was attended by Mr Dalzell on behalf of Jolan Piccadilly and also by representatives of its engineers, architects and project managers. On the lessee's side, the meeting was attended by Mr Imrie and Mr Jeal and also by two representatives of the Walsh Group, a firm of consulting engineers, including Mr

Walsh himself. The meeting was a relatively brief one, lasting one hour ten minutes. The architect and the engineer acting for Jolan Piccadilly Ltd explained the proposed scheme. There was some limited discussion of an alternative to a tower crane erected on a foundation at basement level. At the end of the meeting, Mr Dalzell asked the representatives of Nobles to consider what was discussed at the meeting and come back in writing with any alternative proposals. Mr Jeal asked Mr Dalzell if Mr Dalzell would consider any alternative put forward and Mr Dalzell replied that he would look at such proposals.

207. Following the meeting on 4th December 2009, several e-mails were exchanged between Philip Noble and Gill Noble. Then, on 18th December 2009, Philip Noble, Gill Noble and Mr Jefferson met. Mr Jefferson's note of that meeting records Philip Noble as stating that the parties should be exploring the possibility of Nobles continuing to trade on the ground floor of the building while the development of the upper floors was carried out. He expressed the view that this was technically possible from an engineering standpoint. He stated that Mr Dalzell was putting up obstacles in the way of Nobles continuing to trade on the ground floor as Mr Dalzell wanted to remove Nobles from the building. Gill Noble is recorded as stating that there was no master plan to exclude Nobles from the building during the development but that Jolan Piccadilly had been advised that the development could not be achieved with Nobles on the ground floor. Mr Jefferson told Philip Noble that if they vacated the building during the development then Jolan Piccadilly Ltd would try to accommodate them back into the building once the development had been completed. I was told that Mr Jefferson was not authorised to make this statement. This proposal was not, in the event, taken up by Philip Noble.

208. While the e-mail communications were passing between Philip Noble and Gill Noble, there were continuing communications involving Mr Dalzell. On 6th December 2009, Mr Dalzell e-mailed Mr Horrocks and Philip Noble stating that the onus was on Philip Noble's team to present to Gill Noble's team any alternative suggestions as to how the development could be carried out with Nobles remaining on the ground floor of the building. Mr Horrocks said that when Gill Noble's team had sight of these proposals, questions of programming, costs, practicality and health and safety issues might arise. Mr Dalzell stressed that the sooner Philip Noble's side's proposals were made the better.

209. On 8th December 2009, Nobles wrote to Mr Dalzell stating that they were in the process of putting together alternative proposals, as suggested at the meeting on 4th December 2009. Nobles set out a list of seven matters to be addressed and asked for confirmation that this could be considered as a definitive list of matters arising.

210. Mr Dalzell replied on 15th December 2009 stating that he was quite prepared to discuss proposals as to Nobles remaining on the ground floor to see if they could reasonably be accommodated but he expressed his own view that he could not see how this could be achieved, without it having a very substantial effect on cost and the time needed for the development, if it was possible at all. He then added a substantial number of further matters to the list in the letter of 8th December 2009.

211. On 18th December 2009, following the meeting between Philip Noble, Gill Noble and Mr Jefferson, Mr Horrocks e-mailed Mr Jefferson stating that Philip's side could not produce a full report on all the areas raised by Mr Dalzell in his letter of 15th

December 2009 but that they expected to be able to do so by 8th January 2010. He asked for the time limit for filing a Defence to the proceedings brought by Jolan Piccadilly Ltd under the Landlord and Tenant Act 1954 to be extended to 29th January 2010. Mr Dalzell responded to this e-mail on 22nd December 2009. He stated that he could not see how Nobles could remain in occupation of the premises whilst the redevelopment took place. He repeated that he remained willing to look at any proposal from Nobles. But he warned against Nobles incurring costs preparing these proposals in view of the very considerable concerns that Mr Dalzell said he had. He declined to extend the deadline of 8th January 2010 for Noble's Defence to the proceedings under the 1954 Act.

212. On 7th January 2010, solicitors, Pinsent Masons, acting for Piccadilly, Crossco No. 4 Unlimited and Philip Noble and his family interests, wrote to Addleshaw Goddard, solicitors for Jolan Piccadilly Ltd. The letter of 7th January 2010 set out in detail the case that the service of the break notice under the lease was contrary to the arrangements made between the parties at the time of the demerger and was accordingly invalid. Also on 7th January 2010, Piccadilly served its Defence in the proceedings under the 1954 Act. That Defence was stated to be without prejudice to Piccadilly's claim that the purported determination of the lease was in breach of contract and Jolan Piccadilly Ltd was estopped from seeking to determine the lease.

213. From around that time, Philip's side does not seem to have given any priority to the suggestion that it would identify its proposals for remaining on the ground floor of the building during the course of the development. Instead, the parties took up rival positions, with the assistance of their legal advisers. Jolan Piccadilly Ltd contended that it was free to determine the lease and recover vacant possession of the whole of the building. Piccadilly contended that the arrangements made in connection with the demerger meant that Jolan Piccadilly Ltd was not entitled to operate the break clause in the lease or, at least, was not entitled to recover possession of the ground floor of the building.

214. On 14th January 2010, Jolan Piccadilly Ltd obtained planning permission for the development of the upper floors as a Travelodge and for the development of the ground floor and basement as three retail units. Jolan Piccadilly Ltd pursued various negotiations for the letting of the three retail units and does not seem to have postponed, in any way, those negotiations to provide for the possibility that, after all, it might be agreed that Piccadilly could remain on the ground floor of the building or even return to the ground floor of the building after the development of the upper floors had been completed.

215. On their side, Crossco No. 4 Unlimited, Piccadilly and Philip Noble appeared to have used the time to prepare the Claim which was later issued on 12th March 2010. That Claim was supported by a detailed Particulars of Claim which must have taken a considerable time to prepare; as early as 28th January 2010, Pinsent Masons had written to Manchester County Court stating that the Particulars of Claim, in what became the main action, were being settled by leading counsel.

216. On 31st March 2010, Jolan Piccadilly Ltd entered into an agreement to lease Unit 1 on the ground floor and basement of the building to Waitrose Ltd.

217. On 20th April 2010, Mr Walsh of Walsh Associates, an engineer instructed by Philip's side, and who had attended the meeting on 4th December 2009, wrote a detailed letter to Mr Jeal of the Noble Organisation dealing with the matters raised as issues in Mr Dalzell's letter of 15th December 2009 (also sent on 17th December 2009). Mr Walsh advised Mr Jeal in that letter that the developer's scheme was relatively modest, was of a sort routinely implemented in city centre locations, with all the usual site constraints in terms of access, public safety and highway issues, without displacing or closing down ground floor businesses. In relation to the installation of a crane in or on the building, for the purpose of carrying out the development, Mr Walsh expressed the opinion that the more appropriate cranage methodology was the use of roof mounted cranes augmented by cantilever platforms. Mr Walsh's letter dealt in turn with the points raised by Mr Dalzell on 15th December 2009. Although the letter was addressed to Mr Jeal of the Noble Organisation, it was exhibited on the same day to a witness statement of Mr Biesterfield, which was used by Piccadilly in the ongoing litigation between the parties.

218. On 13th September 2010, Jolan Piccadilly Ltd entered into an agreement for lease with Ask Restaurants Ltd in relation to Unit 3 on the ground floor and basement of the building.

219. On 4th October 2010, Jolan Piccadilly Ltd entered into an agreement for lease in favour of Nando's Chickenland Ltd in relation to Unit 2 on the ground floor and basement of the building.

220. On 21st January 2011, Jolan Piccadilly Ltd and Travelodge Hotels Ltd entered into a deed of variation of the agreement for lease dated 28th September 2009 relating to the development of the upper floors of the building. The agreement for lease was varied so that the Conditions Long Stop Date, which had referred to a date eighteen months from and including 28th September 2009, was replaced by the date of 31st July 2011.

Any binding contract?

221. The Claimants' case is, first and foremost, that the meeting on 18th February 2009 resulted in a binding contract on all the matters discussed in connection with the demerger. That contract covered a large number of matters but included contractual terms in relation to the building. The Claimants submitted that there were express terms of a binding agreement in relation to the building, as follows: (1) the freehold in the building would be transferred to Gill's side; (2) the freehold would be given a value of £5 million for the purposes of the demerger; (3) Gill's side would have the use of the upper floors of the building; (4) Philip's side would continue to have the use of the ground floor and basement; (5) Philip's side would continue to pay for the part of the building, which they would continue to use, the same rent as they were currently paying for the whole building; and (6) Philip's side would confirm the parts of the ground floor and basement that they wished to continue to use. It was submitted that these express terms, in the factual context, meant that the continued use of the ground floor and basement was not to be subject to any right enjoyed by Gill's side to determine that use at any time on service of 3 months' notice. It was then said that this contract, made on 18th February 2009, took effect from 20th February 2009 as a contract in relation to the ground floor, and excluding the basement; this happened either pursuant to the express term agreed on 18th February 2009 that Philip's side would confirm the part of the ground floor and basement which they wished to

continue to use, alternatively, the contract of 18th February 2009 was varied on 20th February 2009.

222. As I understood it, the Claimants opened their case on the basis that the side letters, of 10th March 2009 and 9th April 2009, in relation to the building were legally binding. In closing, the Claimants focussed only on the side letter of 9th April 2009 and the Claimants appeared to me to accept that the side letter of 10th March 2009, in relation to the building, was not legally binding.

223. In my judgment, the parties did not make a contractually binding agreement on 18th February 2009. There was no overall contract dealing with all of the demerger matters discussed on 18th February 2009 and there was no specific contract dealing with the building on its own. Indeed, the Claimants do not contend that there was a separate contract in relation to the building if I am not prepared to find that there was an overall contract dealing with all the matters discussed on 18th February 2009. I will give my reasons for holding that there was no binding contract in relation to the building arrived at on 18th February 2009 before giving my reasons as to why there was no binding contract on any subject arrived at on that date.

224. On 18th February 2009, the building was only briefly discussed. A brief discussion does not necessarily mean that no contract was arrived at, but this brief discussion did not, even in general principle, settle a large number of matters which were essential to be settled before a binding contract would be made. At that meeting, the parties did not know whether there was an existing lease. They did not agree anything in relation to an existing lease, such as a variation of such a lease. They did not agree upon the grant of a new lease, as they did not know if there was an existing lease. They did not agree on the extent of the premises which would be occupied by Philip's side. It was clear that that extent would not include the upper parts of the building. It was thought that it would include all or part of the basement. It was thought that it would include part, but not all, of the ground floor. The parties knew that they would need to discuss and agree at a later time which part of the ground floor would remain available to Philip's side. They did not agree a formula, which was sufficiently certain to have contractual effect, as to how the extent of the ground floor was to be determined, for example by an independent person or by the court, if the parties could not agree. Thus, the extent of the part of the building which was to be occupied by Philip's side was contractually uncertain. The length of time that Philip's side would be entitled to occupy the relevant part of the building was not even mentioned. If the parties had known at the meeting on 18th February 2009 that there was an existing lease, it might have been possible to infer that they must have contemplated that the duration of the entitlement would be governed by the terms of the existing lease. That result would not have particularly helped Philip's side as the duration of the existing lease was itself governed by the break clause in the lease. Further, the parties did not know whether it would be necessary or appropriate to enter into a new lease of the relevant part of the ground floor and they had not discussed what the term of any such lease might be. In addition, the parties did not agree the rent which would be payable for the relevant part of the building. Philip Noble said that he wanted to have confirmation from Mr Thompson as to whether it was appropriate to continue to pay the existing rent for the relevant part, although Philip Noble indicated at the meeting that he was in principle prepared to pay that rent.

225. In my judgment, the only possible conclusion in relation to the alleged contract, or contractual terms, in relation to the building is that there was no binding agreement in relation to the building. Accordingly, it is not necessary to consider whether any such consensus would have been void by reason of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 or section 38 of the Landlord and Tenant Act 1954. Nor is it necessary to consider the effect, if any, of the entire agreement clause in the contract dated 10th March 2009 for the transfer of the freehold.

226. As I have indicated, the Claimants' case is that a much wider agreement was reached on 18th February 2009. The Claimants accept that prior to that date, the parties had not made any contract in relation to the demerger. Although a large number of matters had been discussed at great length in the period up to 18th February 2009, the Claimants accept that each side was free to withdraw before completion of the demerger. The Claimants are obviously right to accept that there was no contract before 18th February 2009. The demerger was immensely complex. Although the parties had agreed commercial terms on most matters, the steps needed to give effect to those commercial terms were not mere machinery. The documents to give effect to the demerger were critically important because of the different tax consequences of the different ways in which the demerger might be arranged. There were important differences between transferring title to an asset, transferring the shares in a company which owned an asset and extinguishing and creating beneficial interests under trusts which owned shares in a company which owned an asset. Just as all these steps could have different tax consequences, it was important to avoid entering into contractual commitments in relation to the demerger as a whole, or as to parts of it, until all of the tax consequences were understood and the most tax efficient way forward identified. Notwithstanding this acceptance by the Claimants as to the position before 18th February 2009, the Claimants submit, to my mind wholly improbably, that everything changed on 18th February 2009. I do not accept that submission. First, nothing that was said on 18th February 2009 was consistent with any change in the legal position as a result of the meeting. If, as I find, it was the clear intention of the parties, objectively considered, not to enter into a contract relating to the demerger until the whole demerger was carried into effect, then nothing was said which would allow me to find that this objective intention was altered. Further, the allegation of a binding contract cannot survive an attempt to examine the terms of the alleged contract. I have already explained that the alleged contractual terms in relation to the building could not have contractual effect because too many essential matters were not even addressed or were otherwise left to be resolved later. These comments apply to other parts of the alleged overall contract although it is fair to say that the inchoate nature of the arrangement in relation to the building was examined in argument in much more detail as compared with the other matters discussed on 18th February 2009. The Claimants sought to derive some assistance from Mr Barnsley's use of the words: "we have now finalised the commercial agreement between each "side" " in his email of 20th February 2009. The Claimants said that indicates final contractual agreement. In my judgment, it does not. It was perfectly accurate to say that the meeting had settled the commercial terms of the intended demerger but it is also accurate to say that those commercial terms were not contractually binding. Even if one confines oneself to the terms of Mr Barnsley's email, the expressions used and the lack of essential detail are more consistent with the parties having agreed non-contractual heads of terms.

227. The above conclusions are consistent with my findings in relation to the seven side letters which were signed on 10th March 2009 and the many communications between the parties where it was stated that these side letters were not to be legally binding. Although I received submissions to the effect that the side letter of 9th April 2009 was binding and initially the Claimants submitted that the side letter of 10th March 2009, relating to the building, was binding, it is clear, objectively considered that this was not so. If I had held that there was a binding contract in relation to the building on 18th February 2009 and then, later, on 10th March 2009, I found that the parties had recorded one term of that alleged contract in a way which was clearly not binding, the result would be an odd one and I would have to revisit my finding as to the outcome of the discussions on 18th February 2009.

228. In view of my finding that the parties did not make any binding contract at the meeting on 18th February 2009, it is not necessary to consider a host of other points which were debated as to: (1) the authority of Mr Barnsley to bind Gill Noble; (2) the authority of Mr Barnsley to bind the various trustees; (3) section 2 of the Law of Property (Miscellaneous Provisions) Act 1989; (4) section 38 of the 1954 Act; and (5) the effect of the entire agreement clause in the contract to transfer the freehold.

The side letters

229. In their closing submissions, the Claimants contended that the side letter of 9th April 2009 was legally binding. By that stage in the trial, the Claimants appeared to me to accept that the side letter of 10th March 2009 in relation to the building and, indeed, the other side letters of that date were not legally binding.

230. If one considered the terms of the side letters of 10th March 2009 in isolation, there is material on which one might conclude that the side letters were intended to be legally binding. However, the parties' intentions in this respect, objectively considered, are shown by the many communications between them on whether there was an intention to have legally binding side letters. Those communications record that both sides expressly intended, and communicated their intention, that the side letters were not to be legally binding.

231. It is not wholly clear to me why Dickinson Dees, advising both sides in this respect, insisted that the side letters should not be legally binding. There are various possible reasons. There might have been a desire to avoid arguments which might have arisen under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 or a desire to avoid having to comply with section 38A of the Landlord and Tenant Act 1954. There might also have been a recognition that the parties had not had time to settle the detailed terms which should apply and neither side wished in advance to commit itself contractually to some general words which might prove to be inappropriate, or worse. A non-binding side letter using general words would avoid contractual obligation but would indicate what the parties would in the future try to negotiate, although neither side was legally bound to do so. In any case, the common intention not to be bound by the side letters of 10th March 2009 is clearly established. The legal result is that, as intended, the side letters of that date are not contractually binding.

232. The Claimants submit that the side letter of 9th April 2009 is different from the letters of 10th March 2009. It is said that things changed when the demerger was completed

on 10th March 2009. On 9th April 2009, Jolan Ltd wanted to do something which it was not entitled to do, namely, direct a transfer of the freehold to Jolan Piccadilly Ltd. Jolan Ltd asked Crossco No. 4 Unlimited for permission to do this. Crossco No. 4 Unlimited agreed in the side letter of 9th April 2009 which was written in terms which objectively construed evince an intention that the parties will be legally bound. It is said that whatever Dickinson Dees might have said in the period up to 10th March 2009 is not applicable to the side letter of 9th April 2009. I am unable to accept this submission. For the reasons I have given it is clear that the parties did not intend the side letter of 10th March 2009 in relation to the building to be legally binding. The side letter of 9th April 2009 is in the same terms. The only difference is in the identity of the transferee of the freehold. That difference had nothing to do with whether the side letter was binding and carries no implication that the side letter of 9th April 2009 would have a different legal effect from that of 10th March 2009. There is nothing in the period from 10th March 2009 to 9th April 2009 which would allow the court to conclude that the parties had a different intention on 9th April 2009 from their intention on 10th March 2009. I conclude that the side letter of 9th April 2009 was not legally binding.

233. In any event, a finding that the side letter of 9th April 2009 was legally binding might not advance the Claimants' case. That is because there is no express term in the side letter which prevents the freeholder of the building from relying upon and operating the break clause in clause 9 of the lease. If the side letter had been legally binding on the freeholder, it would oblige the freeholder to agree with the lessee a reduction in the extent of the demise, so that the demised premises would no longer be the entire building but would only be the ground floor of the property together with such additional areas, if any, as the lessee should reasonably specify. Whatever was agreed to be the reduced extent of the demise, that property would continue to be held on the terms of the lease and therefore would be subject to the break clause in clause 9 of the lease. Accordingly, a binding side letter would only possibly advance the Claimants' case if it were possible to imply a term into it which could be relied upon by the Claimants or if the contract represented by the side letter could be rectified to include a term favourable to the Claimants. In view of my clear findings as to the side letter of 9th April 2009 not having contractual force, it is not necessary or appropriate to consider arguments as to implied terms or as to rectification of the side letter. It is also not necessary or appropriate to consider whether the side letter of 10th March 2009 would have been binding on the Jersey company, Jolan Ltd, when it referred to the UK company, Jolan Ltd. Further, it is not necessary to consider any possible effect of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 or section 38 of the Landlord and Tenant Act 1954; nor is it necessary to consider the effect, if any, of the entire agreement clause in the contract dated 10th March 2009 for the transfer of the freehold.

Rectification

234. On the basis of my findings thus far, the position can be summarised as follows: (1) Crossco No. 4 Unlimited contracted to transfer the freehold to Jolan Ltd, subject to the lease dated 27th November 2007; (2) at the request of Jolan Ltd, Crossco No. 4 Unlimited transferred the freehold to Jolan Piccadilly Ltd, subject to the lease: (3) Piccadilly is entitled to the benefit of and is subject to the burdens of the lease; (4) the terms set out in the side letter of 9th April 2009 are not binding on Jolan Piccadilly

Ltd; (5) even if the side letter were binding on Jolan Piccadilly Ltd, and even if Piccadilly called upon Jolan Piccadilly Ltd to perform the terms of the side letter, *prima facie* that would leave Piccadilly with a lease of part of the ground floor, on the same terms as the lease dated 27th November 2007; (6) whether or not the side letter is binding on Jolan Piccadilly Ltd, it is open to Jolan Piccadilly Ltd and Piccadilly to discuss the terms on which Piccadilly can continue to occupy the ground floor or part of it; (7) in the absence of any other agreement, Jolan Piccadilly is entitled to serve a notice, pursuant to the break clause, to determine the term of the lease; (8) if a notice is served pursuant to the break clause, Piccadilly is entitled to a continuation tenancy of the building pursuant to the 1954 Act and is entitled to seek a new lease of "the holding" as defined in that Act (the parties are agreed that currently the holding is the whole building).

235. The Claimants, who include Piccadilly, say that Piccadilly did not expect to find itself in the situation described in the last paragraph. It is said that the Claimants made a mistake when Crossco No. 4 Unlimited entered into the contract dated 10th March 2009 to transfer the freehold to Jolan Ltd. They say that Crossco No. 4 Unlimited continued to make a mistake when it transferred the freehold to Jolan Piccadilly Ltd. The relevant mistake was that the Claimants were not aware that the lease dated 27th November 2007 contained a break clause.

236. I have already held that the Claimants did make the mistake identified in the last paragraph. The Claimants do not say that the fact that they made a mistake entitles them to treat the transfer of the freehold as void or to apply to set it aside. There are many examples of cases where one party or even both parties make a mistake about some matter affecting the contract but the law of contract and equity both provide that the contract remains in effect.

237. What the Claimants do say is that they are entitled to seek, and ought to be granted, rectification of the transfer dated 9th April 2009 so that there is written into the transfer a covenant on the part of Jolan Piccadilly Ltd that: "the Transferee covenants with the Transferor and with Piccadilly that the Occupational Lease shall henceforth continue to have effect and be construed as if Clause 9 thereof had been deleted therefrom".

238. The form of the rectification sought is somewhat unusual. The rectification which is sought is designed to change the terms of the lease but the Claimants do not seek rectification of the lease; they seek rectification of the transfer of the freehold. Further, the parties to the transfer were Crossco No. 4 Unlimited and Jolan Piccadilly Ltd but the rectification is sought for the benefit of Piccadilly, the lessee under the lease. Indeed, the form of the rectification sought seeks to confer a benefit on Piccadilly without making Piccadilly a party to the transfer. The form of rectification sought also seems to go further than the Claimants' case would warrant, even if everything else were accepted. The Claimants' case about the parties' intentions is that the transferee of the freehold was to be entitled to take back the upper parts and that Piccadilly would continue in part of the ground floor only. If the transfer were to be rectified in the way sought, Jolan Piccadilly Ltd, the transferee of the freehold, would not be entitled to take back the upper parts unless Piccadilly chose to give them up and there is nothing in the rectification sought which would oblige Piccadilly to do so. In an attempt to answer the last point, the Claimants put forward an alternative form of rectification so that the transfer would contain a covenant pursuant to which

clause 9 would remain in the lease but it could only be operated in relation to the parts of the building which excluded the ground floor. Even that revised formulation has its difficulties. The Claimants' own case was that the transferee of the freehold would be entitled to recover part of the ground floor; the suggested rectification contains no definition of the part of the ground floor where clause 9 could operate and the part of the ground floor where it could not. Further, the Claimants did not make it clear how the operation of clause 9 in relation to part only of the premises demised by the lease would fit in with the lessee's rights to a continuation tenancy and a new lease under the 1954 Act. I suggested in argument that the landlord could not serve a section 25 notice in relation to the whole building because, on this approach, the ground floor would be subject to a term until 2022 and the landlord could not serve a section 25 notice in relation to a part of the building. The Claimants did not seek to persuade me that this suggestion was wrong. These points led to a further suggested form of rectification under which the ability of the transferee of the freehold to operate clause 9 in relation to the whole building would be preserved but would be subject to a pre-condition under which the transferee would be required first to commit itself to grant a new lease of the ground floor to the lessee. This suggestion repeated the difficulty that the extent of the ground floor to be the subject of the new lease was not defined.

239. I mention these points as they were raised in argument but in the end I need not attempt any further to resolve them as, in my judgment, the claim to rectification essentially fails on the findings of fact which I have made.

240. I can accept the first submission made by the Claimants that those making the decision on behalf of Crossco No. 4 Unlimited were not aware that the lease dated 27th November 2007 contained a break clause.

241. Based on the above finding, the Claimants put their case on rectification in one of three ways. Taking them in the order in which they were put in closing submissions, they asserted, first, a unilateral mistake, secondly, a common mistake and thirdly, if different from either of the foregoing, they relied on the decision of the House of Lords in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101.

242. In relation to unilateral mistake, the Claimants submitted that Jolan Piccadilly Ltd, the transferee of the freehold, knew that the Claimants mistakenly believed that the lease did not contain a break clause. If necessary, given that Jolan Piccadilly Ltd was taking the benefit of rights conferred on Jolan Ltd by the earlier contract of 10th March 2009, the Claimants would submit that Jolan Ltd also knew that the Claimants were mistaken in this respect. Given that Jolan Piccadilly Ltd was and is a wholly owned subsidiary of Jolan Ltd, this separate matter might not itself cause any extra difficulty. The Claimants also submitted that given the other side's knowledge of the Claimant's mistake, it would be unconscionable for Jolan Piccadilly Ltd (under the transfer) and/or Jolan Ltd (under the contract) to be able to rely upon the break clause and a court of equity would therefore, by granting the remedy of rectification, impose a covenant which prevented reliance on the break clause, in whole or in part. The Claimants relied on a number of well known authorities as to when a court can order rectification in a case of unilateral mistake and, in particular, on Commission for the New Towns v Cooper (Great Britain) Ltd [1995] Ch 259.

243. It is therefore critical to the Claimants' claim for rectification based on unilateral mistake to show that Jolan Ltd and Jolan Piccadilly Ltd knew that the Claimants were

making a mistake. I have already considered the state of mind of all the relevant persons on the Defendants' side. I have concluded that they did not know that the Claimants were making a mistake. Nor were the relevant persons on the Defendants' side wilfully blind to that possibility.

244. The Claimants cross-examined some of the Defendants' witnesses by asking them whether they thought that someone on Gill' side should in some circumstances or the other have reminded Philip's side of the existence of the break clause. I did not find that questioning to be particularly helpful. The general law recognises that there may be a duty to point out to the other party that it is making a mistake in certain circumstances. In other circumstances, there is no such duty. In the present case, Gill's side did not know that Philip's side were making a mistake. Nor were they wilfully blind as to that possibility. I find that in those circumstances, Gill's side is not under an obligation to raise with Philip's side the question of the break clause. Gill's side are not vulnerable to rectification being ordered against them because they did not raise that question with Philip's side.

245. The simple fact is that the Claimants made their mistake because they did not read the lease in circumstances where it was to be expected that they would and where the Defendants had no reason to think that they had not read the lease and had missed the fact that it contained a break clause. This is not an unprecedented state of affairs, as is demonstrated by the facts of The Nai Genova [1984] 1 LL R 353 at 365-366. Further, it is not unprecedented for rectification to be refused even where one contracting party would have conceded the relevant term if asked by the other party to do so, but the request to concede was never made: see George Wimpey UK Ltd v V. I. Construction Ltd [2005] BLR 135 at [53] per Sedley LJ. Accordingly, the Claimants fail to make out the first way they put their case on rectification.

246. The Claimants say that in the alternative to a claim based on unilateral mistake they can put forward a case of common mistake. They say that when considering the position of Jolan Ltd or Jolan Piccadilly Ltd and when I consider the knowledge of those legal persons, I am not concerned with the state of mind of the directors of the company but with the state of mind of the "decision-takers". Although the directors of Jolan Piccadilly Ltd, Mr Dalzell, Mr Wooldridge and Mr Wright all knew of the existence of the break clause in the lease and, of the two directors of Jolan Ltd (Mr Barnsley and Mr Wooldridge), one of them (Mr Wooldridge) knew of the existence of the break clause, the Claimants submitted that I should have regard only to the state of mind of Mr Barnsley and possibly also of Gill Noble as the "decision-takers" for Jolan Ltd and Jolan Piccadilly Ltd. The Claimants say that their approach is supported by the decision in George Wimpey UK Ltd v V. I. Construction Ltd [2005] BLR 135.

247. In the Wimpey case, the party seeking rectification (Wimpey) had to show that it had made a mistake in relation to the effect of a term in a contract which it had entered into. On the facts, the person negotiating the deal for Wimpey had made such a mistake. However, that person did not himself commit Wimpey to the contract. Instead he reported on the proposed deal to someone more senior in Wimpey. There was no evidence of the state of mind of that more senior person nor as to any report he may have made to the board of Wimpey. The decision to enter into the contract was ultimately taken by the board and there was no evidence as to state of mind of the board members. What the board thought about the legal effect of the contract which it decided to enter into was a matter of speculation and that was not enough for

rectification. It was held that it had not been shown that Wimpey had made a mistake. The earlier decision in London Borough of Barnet v Barnet Football Club Holdings Ltd [2004] EWCA Civ 1191was a similar case.

248. The Claimants' use of the Wimpey case is, in my judgment, not permissible. The Claimants want me to find that Jolan Piccadilly Ltd and Jolan Ltd made a mistake, in common with the Claimants, because they did not know that the lease contained a break clause when the three directors of Jolan Piccadilly Ltd, and one of the two directors of Jolan Ltd, knew full well of the existence of the break clause. The finding in Wimpey that it had not been shown that the persons who committed Wimpey to the contract had made any mistake cannot be turned on its head to support the finding in the present case that Jolan Piccadilly Ltd and Jolan Ltd did not know a relevant fact, when they plainly did know it.

249. Having held that this was not a case of common mistake, it is not necessary to consider whether there was an outward expression of accord nor whether the existence of such an expression of accord is a pre-condition to the entitlement to seek rectification or merely an evidential factor: see Munt v Beasley [2006] EWCA Civ 370 at [36] per Mummery LJ. However, the question of an outward expression of accord is material to the third way in which the Claimants put their case, to which I now turn.

250. The Claimants next submitted that the case fell within the principles as to rectification referred to in the speech of Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 at [48] – [66]. The other members of the House of Lords agreed with the speech of Lord Hoffmann, although his discussion of the claim to rectification in that case was technically obiter, the appeal having been allowed on the question of construction of the agreement without it being rectified.

251. In Chartbrook, Lord Hoffmann considered the claim to rectification on the basis, contrary to the actual result of the case, that the contract when construed meant what Chartbrook contended it objectively meant. In such an event, the other party to the contract, Persimmon, would have been mistaken as to the legal effect of the contract. Persimmon claimed rectification of the contract to accord with its belief as to what the contract meant. It said that there was a common mistake. The trial judge made findings of fact as to the state of mind of the relevant persons at Chartbrook. He held on the facts that those persons did not intend to enter into a contract which had the effect contended for by Persimmon. He refused rectification on the ground of alleged common mistake. He was upheld by the Court of Appeal: see [2008] EWCA Civ 183.

252. In Chartbrook, at [48], Lord Hoffmann directed himself that for rectification for common mistake it must be shown that the parties had a continuing common intention and that there was an outward expression of accord. He adopted the statement of principle to that effect from Swainland Builders Ltd v Freehold Properties Ltd [2002] 2 EGLR 71 at [33]. Lord Hoffmann stated that the House of Lords would not re-examine the judge's findings of fact: see at [56]. He then referred to the submission on behalf of Persimmon that the relevant mistake which was to be shown was not based on a disparity between the actual effect of the contract and what each party subjectively thought was the effect of the contract but rather on a disparity between the actual effect of the contract and some objective statement as to what the parties intended as to the effect of the contract. On this basis the judge's findings as to the

state of mind of the relevant persons at Chartbrook were irrelevant. Instead, the court would look for some objective statement, prior to the contract, which could be relied upon as objectively stating the intentions of the parties. Lord Hoffmann found that a letter in the course of negotiations recorded, objectively speaking, the intended consensus. Where the effect of the final contract differed from the effect of what was expressed in the earlier objective consensus, then the final contract should be rectified so that its effect as rectified accorded with the earlier objective consensus: see [57], [60] and [65] – [66].

253. With considerable diffidence, I feel that I ought to say that I have some difficulty with Lord Hoffmann's description of the principles as to rectification for common mistake. Before Chartbrook reached the House of Lords, the judge and the Court of Appeal proceeded on the basis that an assessment of the relevant common intention involved looking at the subjective intentions of the parties. The trial judge refused rectification because, having regard to the state of mind of the relevant persons at Chartbrook, it had not made any mistake and its intentions were correctly recorded in the contract in its executed form. Even if the letter written before the final contract could have been an outward expression of accord, that did not supply the other necessary ingredient, namely, that both parties were mistaken as to the effect of the contract, and Chartbrook were not mistaken. The law as stated by Lord Hoffmann appears to mean that a court can rectify a contract even though one party to the contract (even the party seeking rectification) fully intended, subjectively, to be bound by that contract, if the court is able to find that the final expression of consensus in the contract as executed differs from an earlier expression of consensus in a communication passing during the negotiations between the parties. Further, on the facts of Chartbrook, rectification was ordered where one party (Persimmon) was subjectively mistaken about the effect of the contract whereas the other party (Chartbrook) was not so mistaken and without it having to be shown that Chartbrook was aware of, and was taking advantage of, Persimmon's mistake. Notwithstanding my difficulties with the reasoning in Chartbrook, neither party in the case before me made any submissions as to its correctness and I will say no more on that subject.

254. I will now attempt to apply the approach in Chartbrook in this case. I am to ask whether the contract as executed in the present case "correctly reflected the prior consensus": see per Lord Hoffmann at [57]. I have therefore to consider whether there was some expression of consensus prior to 10th March 2009 when the parties expressed themselves in a way which was different from the terms of the contract of 10th March 2009 and/or the transfer of 9th April 2009. In my judgment, there was no earlier expression of the consensus of the parties which differed from the terms of the executed documents. The parties did not at any earlier point refer to the existence of the break clause nor to the duration of Piccadilly's entitlement to remain as lessee of the premises. The executed documents are not different from what the parties said and wrote to each other between 18th February 2009 and 10th March 2009 or 9th April 2009; the executed documents faithfully give effect to those communications. The mistake that the Claimants made was that they were unaware of the existence of the break clause. That is no doubt why the Claimants' first two submissions in support of a claim to rectification stressed that mistake on their part. One result of that being the mistake was that there was simply no earlier expression of the parties' consensus which when objectively construed and compared with the terms of the executed

documents shows a disparity between the executed documents and the earlier consensus.

255. For the above reasons, I dismiss the Claimants' claim to rectification of the transfer dated 9th April 2009, which is the only claim to rectification which the Claimants pursued.

Estoppel and constructive trust: the Claimants' submissions

256. At this stage, I will take the topics of estoppel and constructive trust together. Although estoppel and constructive trust are different concepts, the Claimants made their submissions as to the relevant facts in a way which embraced the various kinds of estoppel and constructive trust and it is convenient to record in one place the Claimants' submissions on these matters.

257. In their written closing submissions, the Claimants submitted that Gill's side were estopped from relying upon the break clause to recover possession of the ground floor of the building. The Claimants further submit that, by reason of an estoppel, Gill's side are obliged to allow Piccadilly to have a lease of the area of the ground floor which Piccadilly expected to have. The first of these formulations is expressed negatively and the second is expressed positively.

258. The Claimants relied on the principles as to proprietary estoppel. They said that in the present case, they need to establish and they do establish: (1) a representation or assurance made to the Claimants; (2) reliance by the Claimants on the representation or assurance; and (3) detriment to the Claimants in consequence of their reasonable reliance. The Claimants also submit that the case can equally be analysed as a case of promissory estoppel or estoppel by convention.

259. As to the facts, the Claimants submitted that Gill's side made a representation or gave an assurance to Philip's side that the latter "would be able to continue [the arcade] business on the ground floor of the building without interruption from Gill's side for at least the remainder of the term". The Claimants submitted that Philip's side paid a significant sum for that arcade business on the strength of that representation or assurance. Further or alternatively, Philip's side believed that they "would be able to continue [the arcade] business on the ground floor of the building without interruption from Gill's side for at least the remainder of the term" and that belief was encouraged by Gill's side. Had it not been for that belief, Philip's side would not have transferred the freehold to Gill's side for £5 million or not paid a significant sum for the arcade business and thus they suffered a detriment. Whether or not it is necessary for the Claimants to establish this, they submitted that Gill's side took steps to draw the attention of Philip's side away from the existence of the break clause.

260. In oral closing submissions, the Claimants made a more detailed submission which they said should lead to the court granting the Claimants relief in equity whether pursuant to an estoppel or a constructive trust. That detailed submission repeated the earlier case as to estoppel but also added new matters. I will attempt to summarise that detailed submission.

261. The Claimants referred to the evidence as to the valuation of Arcades Division of the Noble Organisation. They said that this resulted in Philip's side paying several million

pounds for the arcade business on the ground floor of the building. It was submitted that the price paid for this arcade was at least £2 million. The valuation of this arcade assumed an ongoing business and certainly one which would continue beyond 2013.

262. On 18th February 2009, the parties agreed that the freehold would be transferred to Gill's side for £5 million; it was only a coincidence that this figure was the same as an earlier figure identified as the vacant possession value.

263. On that date, both sides contemplated the possibility of a development of the upper floors of the building but not a development of the ground floor. There was no suggestion that the payment to be made by Philip's side for the business on the ground floor should be adjusted downwards to reflect any possibility that this business might have to close in 2009/2010. The parties contemplated that Philip's side would have a lease of the ground floor; this lease would either be the existing lease, as varied, or a new lease. The existing lease continued until 2022 and the expectation must have been that a new lease would also continue until 2022.

264. Philip's side did not know of the existence of the break clause: Gill's side did. Objectively judged, their agreement assumed that the break clause would not be used to obtain vacant possession of the ground floor in order to develop the ground floor. If Philip's side had been aware of the break clause, they would have asked for it to be modified so that it did not apply to the ground floor and Gill's side would have agreed to that. If Gill's side were not prepared to agree to that, then the whole deal would have had to be changed.

265. It was submitted that Gill's side knew that Philip's side had failed to notice the break clause. There was insufficient time to agree the terms of the varied lease or the new lease. The parties assumed that there would be a varied lease or a new lease before any development of the upper floors. The side letter of 10th March 2009 allowed Philip's side to dictate which parts of the ground floor they were to have to carry on their business. Philip's side were content with this side letter because they knew they had an existing lease, although they overlooked the break clause. Gill's side were content with this side letter because they knew they could rely on the break clause. Both sides wanted to reduce the existing demise from the whole building to the ground floor. Neither side appreciated the legal status of the first side letter (i.e. that it was not legally binding). The side letter did not alter the agreement in principle agreed on 18th February 2009.

266. Gill's side now wish to carry out a development of the ground floor; that was against the spirit of the parties' agreement. Gill's side has shown no real interest in giving effect to that agreement. They did not make a genuine attempt to see if there was some way that the arcade business could continue on the ground floor while the upper floors were developed.

267. This is a case of an incomplete agreement, not an agreement expressed to be "subject to contract". Gill's side obtained two benefits under the agreement; first, they obtained the freehold and, secondly, in the overall demerger, they obtained a credit of at least £2 million for the arcade business on the ground floor. Yet, Gill's side now intends to disclaim the burden of the agreement.

268. These facts give the Claimants a good case in estoppel or constructive trust. It is unconscionable for Gill's side to rely on their strict legal rights. It would equitable fraud for Gill's side to rely on the break clause in relation to the ground floor.

269. The court has a wide discretion as to the remedy it can give. First, the court should prevent the effective exercise of the break clause in relation to the ground floor. Secondly, the court can direct the grant of a new lease of the ground floor on terms to be agreed or in default of agreement determined by the court. The Claimants identified the terms which they would be prepared to accept and they were prepared to adopt a co-operative approach to this question. The area of the ground floor to be demised will not be problematical. Gill's side will have rights to carry out their development. The expert evidence has demonstrated that it will be reasonably practicable, without involving much (if any) extra expense, for Gill's side to develop the upper parts and with the arcade continuing to trade on the ground floor.

270. A third possibility is for the court to order Gill's side to transfer the freehold back to Philip's side on payment of £5 million. If Gill's side do not wish to perform the agreement reached on 18th February 2009, then the agreement should be undone.

271. A fourth possibility, which is unattractive to Philip's side, would be for the court to allow Gill's side to recover possession of the ground floor but only if Gill's side pays an appropriate sum by way of compensation. It should be unattractive to the court to allow a party guilty of unconscionable behaviour to buy its way out of its difficulties. If the court were to award compensation in this way it should have three elements; the first is a return of the price paid by Philip's side for the arcade business on the ground floor; the second is 50% of the profit which Gill's side will make from the development; the third is statutory compensation under the 1954 Act.

Proprietary estoppel and constructive trust: the law

272. The parties made detailed submissions as to the legal principles relating to proprietary estoppel and constructive trust. It was recognised that these are different concepts although there is some overlap between them. The degree of similarity and overlap has been referred to in different ways in the various cases. Because some of the many authorities relied upon by the parties dealt with both proprietary estoppel and constructive trust and because one at least of those cases has been analysed as a proprietary estoppel case and later as a case of constructive trust, it is convenient to consider together the principal authorities relied upon.

273. As I will explain, the two cases which are of particular relevance are the decision of the House of Lords in Cobbe v Yeoman's Row Management Ltd [2008] 1 WLR 1752 (to which I will refer as Cobbe) and the decision of the Court of Appeal in Banner Homes Group plc v Luff Developments Ltd [2000] Ch 372 (to which I will refer as Banner Homes). Cobbe is principally relevant in relation to proprietary estoppel but also has something to say about constructive trust; Banner Homes is principally relevant in relation to constructive trust. In addition to these two cases, the parties cited a large number of other authorities and out of deference to their detailed arguments on these authorities, I will refer to a number of the other cases cited.

274. Cobbe was decided by the House of Lords in 2008. This was the first time since Ramsden v Dyson LR 1 HL 129, in 1866, that the principles relating to proprietary

estoppel were considered by the House of Lords. In the period from 1866 to 2008, the doctrine of proprietary estoppel became heavily laden with reported cases and I will refer to comparatively few cases dealing with proprietary estoppel from that period; I will however mention some of the constructive trust cases from that period. I will also refer to some of the authorities which have come after the decision in Cobbe.

275. Ramsden v Dyson (1866) LR 1 HL 129 is a leading case in the development of the principle of equity which has been given the name of proprietary estoppel. As it happens, the House of Lords (with Lord Kingsdown dissenting) held, on the facts, that a right in equity was not established. The speeches contain three statements of the relevant principle of equity. The first is in the speech of Lord Cranworth LC, at 140-141. That statement refers to (1) a party carrying out works on the land of another but mistakenly believing that he (the party carrying out the works) owns the land in question and to (2) the other's awareness of the mistake and of the works. A further passage in the speech of Lord Cranworth, at 145-146, refers to the case where a person is asked to rely upon the honour of another to perform a promise. It was said that an express reference to relying on honour had the effect that it "excludes the jurisdiction of Courts of equity no less than of Courts of law". The second statement of the principle of equity is in the speech of Lord Wensleydale at page 168; he described the principle in essentially the same terms as those of the Lord Chancellor. He also referred, at page 170, to parties relying upon the honour of one of them to perform a promise. Reliance on honour "cannot amount to more" and did not give rise to an equity. The third statement as to the relevant principle of equity is in the dissenting speech of Lord Kingsdown at 170-171. This statement has been frequently quoted and I need not set it out in full. Lord Kingsdown referred to the equity arising in, for example, a case where a party had created or encouraged an expectation that another would have "a certain interest in land" and that expectation had been relied upon. This statement is wider than the two other statements referred to, which were confined to a somewhat narrower class of case. In particular, a case involving an expectation of the grant of a future interest, which expectation is encouraged by the owner of the land, goes beyond a case where there is a mistaken belief as to a present interest in the land. However, Lord Kingsdown's statement of the principle has been treated in later cases as being accurate and reliable, it being said that Lord Kingsdown's dissent was essentially on the application of the principle to the facts. He would have held, on the facts, that an equity had been established.

276. In support of their case of constructive trust, the Claimants relied on Bannister v Bannister [1948] 2 All ER 133. There, the Defendant owned two adjoining cottages and sold both of them to the Plaintiff, at less than their vacant possession value, subject to an express term that the Defendant would be allowed to live in one of the cottages for the rest of her life. Subsequently, the Plaintiff claimed possession from the Defendant, asserting that she had had a tenancy at will only, which the Plaintiff had determined. The county court judge decided that the Plaintiff held one cottage on a constructive trust for the Defendant, who had a life interest in it. The Plaintiff appealed. The Court of Appeal construed the express agreement as an agreement that the Defendant should have a life interest in the relevant cottage. The Plaintiff relied on the fact that the agreement was neither in writing nor evidenced in writing and contended that there could not be a constructive trust for the purposes of section 53(2) of the Law of Property Act 1925 because he had not committed any fraud when he took the conveyance of the two cottages. That being the issue before the Court of

Appeal, it had no difficulty in holding that the relevant conduct which gave rise to a constructive trust was not the Plaintiff's conduct when he took the conveyance but his later conduct when he set up the apparent absolute nature of the conveyance to defeat the beneficial interest which, it had been agreed, would be conferred on the Defendant. The court stated that it was sufficient for a constructive trust that the bargain included a stipulation under which some "sufficiently defined beneficial interest in the property" was to be conferred. In that respect, this decision is wholly in accordance with the later decision in Cobbe as to the need for certainty as to the interest to be recognised by way of a constructive trust (or a proprietary estoppel). Bannister v Bannister was followed in Binions v Evans [1972] Ch 359, which was a similar case. Both these cases were in turn followed by Dillon J in Lyus v Prowsa Ltd [1982] 1 WLR 1044.

277. Pallant v Morgan [1953] Ch 43 has given its name to what has been called " a Pallant v Morgan equity". In that case, the agents of two neighbouring landowners agreed in an auction room, immediately before an auction sale of certain land, that the plaintiff's agent should refrain from bidding and that the defendant, if his agent was successful, would divide the land according to a formula agreed between the agents. The formula left certain matters to be agreed later. Pursuant to this arrangement, the plaintiff's agent refrained from bidding and the defendant's agent became the successful bidder. The parties failed to agree on the matters left outstanding before the auction. The defendant wished to retain the land free of any interest in the plaintiff. The plaintiff sued for specific performance of the agreement made between the agents. Specific performance was refused as the agreement before the auction was not sufficiently certain to be contractually enforceable. Nonetheless, Harman J held that the defendant was not entitled to retain the property as that would amount to a fraud on his part, having regard to the agreement prior to the auction. The court held that the proper inference from the facts was that the defendant's agent made his successful bid on behalf of both sides and the property was held on trust for the plaintiff and the defendant jointly.

278. In the course of his judgment in Pallant v Morgan, Harman J considered the earlier decision in Chattock v Muller (1878) 8 Ch D 177. In that case, there were somewhat similar facts as to an agreement between two parties, who were potential bidders for the same land at an auction, for one of them to acquire the whole of the land which would then be divided between them. The property in question was not sold at the auction but the defendant acquired it by agreement after the auction. It was argued before Malins V-C that the arrangement between the parties to divide the land between them was uncertain and could not be enforced against the defendant. In his judgment, Malins V-C regarded the defendant as buying partly for himself and partly as agent for the plaintiff. Accordingly, when the defendant asserted he beneficially owned all of the land which he had purchased, "this was a flagrant breach of duty, which in this court has always been considered as a fraud…". In this way, the defendant held part of the land on trust for the plaintiff. The trust arose out of the agency agreement between them. The suggested uncertainty could be resolved by an inquiry in chambers as to what land should be conveyed to the plaintiff to give effect to the parties' agreement. Malins V-C indicated that if it turned out that the arrangement was too uncertain to be enforced in accordance with its terms, the uncertainty might be considered to operate against the defendant rather than against the plaintiff. He said that he would not " … be going too far if I compelled the

defendant to give the whole estate to the plaintiff at the price given for it, rather than that he should succeed in retaining it on account of any uncertainty as to the part which the plaintiff is entitled to have." This approach might be justified on the ground that the defendant as a fiduciary was not to profit from his fiduciary position. In Pallant v Morgan itself, Harman J was not prepared to go so far as to order the defendant to give the whole estate to the plaintiff and he held that the property should be held for the plaintiff and defendant jointly. The trust in Pallant v Morgan also appears to have arisen out of the relationship of agency between the parties.

279. The Claimants heavily relied on Holiday Inns Inc v Broadhead (1974) 232 EG 951, a decision of Goff J. That was a case where Mr Broadhead had, with the benefit of considerable support provided by Holiday Inns Inc, obtained planning permission for a hotel development on a site which he had an option to acquire and which was later acquired by a company controlled by him. On the facts, he had no real chance of securing this planning permission without the support of Holiday Inns Inc. They provided their support because they believed that they had a gentleman's agreement with Mr Broadhead that he would lease the site to them and that the agreement would be honoured by him. Mr Broadhead did not honour the gentleman's agreement but instead his company entered into a head lease with another company controlled by him and that company granted an underlease to a rival hotelier. Goff J held that Holiday Inns had a right in equity binding on Mr Broadhead and his companies, but not on the rival hotelier who was the underlessee of the site. He held that the equity should take effect pursuant to a trust of the freehold, subject to the lease, under which Holiday Inn and Mr Broadhead's company were to hold equal shares. Goff J referred to several cases dealing with proprietary estoppel although he also referred to Pallant v Morgan [1953] Ch 43, particularly when deciding upon the extent of the equity in favour of Holiday Inns Inc. Holiday Inns has been extensively analysed in Banner Homes Group plc v Luff Developments Ltd [2000] Ch 372 at 389 - 393 and in Cobbe per Lord Scott at [24] and [31] and per Lord Walker at [77] – [78] and it would not be useful for me to add to those analyses. In Banner it was regarded as a case of proprietary estoppel (see at 397H – 398A) while in Cobbe it was described by Lord Scott and Lord Walker as a case of a joint venture giving rise to a constructive trust. It may well be the case that if one applied the principles relating to proprietary estoppel as laid down in Cobbe, Holiday Inns Inc would not have been able to establish the benefit of a proprietary estoppel because Holiday Inns Inc knew that they did not have the benefit of a legally binding agreement with Mr Broadhead.

280. Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note) (1979) [1982] QB 133, a decision of Oliver J, is a very well known case which appeared to emphasise the question of unconscionability in determining whether the facts of a particular case gave rise to an equity, pursuant to the principles relating to proprietary estoppel. The litigation in that case concerned two properties, both held on leases containing an option for the lessee to renew the lease. The options were not registered under the Land Charges Act 1925, it being wrongly believed that they were not registrable. The result of non-registration was the landlords, who were successors in title to the grantor of the options, were not bound by the options. The lessees contended that the landlords were subject to a proprietary estoppel which prevented them asserting that they were not bound by the options. On the facts, one lessee succeeded and the other failed. The parties agreed a statement of principle based on the speech of Lord Kingsdown in Ramsden v Dyson: see [1982] QB 133 at 144A – B. The parties

disagreed as to whether it was essential for the lessees to show that at the relevant time (i.e when the landlord's conduct allegedly created or encouraged the lessees to believe that they had the benefit of the options and when the lessees acted to their detriment) the landlord knew of the true legal position as to the options. Oliver J did not accept that this knowledge on the part of the landlord was an essential pre-condition to the establishment of an equity. He said at 151 H – 152A that he should adopt a very much broader approach in order to ascertain whether it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment.

281. In Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] AC 114, representatives of the government of Hong Kong and a group of companies entered into negotiations for the exchange of properties. They reached an agreement in principle which was expressed to be "subject to contract". For some years, the parties acted upon the agreement in principle but later the group of companies resiled from it. The government asserted a proprietary estoppel to prevent the group so resiling. The Privy Council rejected the government's case. It was held that the express agreement that the terms agreed in principle were "subject to contract" meant that the government could not show that the group of companies had created or encouraged an expectation, on the part of the government, that the group would not resile from the agreement in principle, nor could the government show that it had relied upon any such expectation. Although the government had hoped that the group would not withdraw from the agreement in principle and had acted to its detriment to the knowledge of the group, that did not suffice to raise an equity in its favour: see at 124C – D.

282. Questions as to the boundaries between proprietary estoppel and constructive trust were considered in Yaxley v Gotts [2000] Ch 162. There, Mr Yaxley orally agreed with Mr Gotts senior that Mr Gotts senior would buy a particular property, that Mr Yaxley would carry out works to convert the property into flats and perform other services, in return for which Mr Gotts senior would grant to Mr Yaxley a lease of the ground floor, to be converted by Mr Yaxley into two flats. The property was in fact acquired by Mr Gotts' son, rather than Mr Gotts senior but the son knew of the arrangement with Mr Yaxley. Mr Yaxley performed his side of the bargain. Mr Gotts' son declined to grant Mr Yaxley a lease of the ground floor. The county court judge held that Mr Yaxley was entitled to an equity in the property and ordered Mr Gotts' son to grant Mr Yaxley a 99 year lease of the ground floor. The judge did not refer to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (which renders void an oral agreement for the disposition of an interest in land) nor to section 2(5) which provides that section 2 does not affect the creation or operation of resulting, implied or constructive trusts. Mr Gotts' son appealed. On the appeal, it was argued that the oral agreement was void pursuant to section 2 of the 1989 Act, that section 2(5) did not provide for the operation of a proprietary estoppel and that it was not open to a party to an oral agreement to rely on an estoppel to render the agreement enforceable contrary to the intended operation of section 2. The appellant did not contest the judge's finding that, apart from the operation of section 2, the facts would have given rise to an equity pursuant to a proprietary estoppel. The judgments of the Court of Appeal are primarily concerned with section 2 of the 1989 Act. Robert Walker LJ held that the facts which the county court judge had held to have given rise to an equity pursuant to a proprietary estoppel equally gave rise to an interest under a

constructive trust: see at 177 F – G. On this basis, section 2(5), properly construed, allowed the court to give effect to such a constructive trust. Clarke LJ agreed that the facts entitled Mr Yaxley to a lease of the ground floor under a constructive trust: see at 181E – F. Robert Walker and Clarke LJJ were more tentative as to how section 2 would apply where the facts gave rise to an equity arising under a proprietary estoppel but did not give rise to a constructive trust. The third member of the court, Beldam LJ, held that nothing in section 2 prevented a party establishing an equity pursuant to a proprietary estoppel: see at 193D. He held that the facts justified a finding of an interest under a constructive trust and, equally, an equity by way of a proprietary estoppel. There was no dispute in that case as to whether there could be a constructive trust under which the beneficiary held a derivative interest rather than a joint beneficial interest with the legal owner.

283. In Banner Homes, the plaintiff and the first defendant were both potential purchasers of a site which they proposed to acquire and develop together through a joint venture company. The first defendant subsequently decided to proceed without the plaintiff's participation, effecting its purchase of the site through the second defendant, its wholly owned subsidiary. The plaintiff claimed to be entitled to an interest in the property either pursuant to a contract or by way of a constructive trust over half the shares in the second defendant. The trial judge, Blackburne J, held that the first defendant led the plaintiff to understand that it intended to enter into a joint venture but subsequently had second thoughts, which it kept to itself for fear that the plaintiff, if alerted, might make a rival bid. He found that no contract was concluded and rejected the claim in equity on the ground that it sought to turn an arrangement or understanding, which was implicitly qualified by the right of either side to withdraw, into an unqualified undertaking. The plaintiff appealed in relation to the claim in equity. The appeal was allowed. The only reasoned judgment was given by Chadwick LJ, with whom Evans and Stuart-Smith LJJ agreed.

284. Chadwick LJ considered the authorities in detail. In particular, he analysed Chattock v Muller (1878) 8 Ch D 177, Pallant v Morgan [1953] Ch 43, Holiday Inns Inc v Broadhead per Megarry J, 19 December 1969 and per Goff J, (1974) 232 EG 951 and other decisions at first instance. In one of those decisions, Island Holdings Ltd v Birchington Engineering Co Ltd Goulding J, 7 July 1981, unreported, the judge memorably said:

> "I am well aware that among the siren songs with which hard cases tempt judges onto the fatal coasts of bad law one of the most seductive is the song whose words tell of unjust enrichment and whose music is the plaintive melody of constructive trust."

285. At the end of a comprehensive review of the authorities, Chadwick LJ said at 397E – 399D:

> It is important, however, to identify the features which will give rise to a *Pallant v. Morgan* equity and to define its scope; while keeping in mind that it is undesirable to attempt anything in the nature of an exhaustive classification. As Millett J. pointed out in *Lonrho Plc. v. Fayed (No. 2)* [1992] 1 W.L.R. 1, 9B, in a reference to the work of distinguished Australian commentators, equity must retain its "inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction." Equity must never be deterred by the absence of a precise analogy, provided that the principle

invoked is sound. Mindful of this caution, it is, nevertheless, possible to advance the following propositions.

(1) A *Pallant v. Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one party to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it. Where the arrangement or understanding is reached in relation to property already owned by one of the parties, he may (if the arrangement is of sufficient certainty to be enforced specifically) thereby constitute himself trustee on the basis that "equity looks on that as done which ought to be done;" or an equity may arise under the principles developed in the proprietary estoppel cases. As I have sought to point out, the concepts of constructive trust and proprietary estoppel have much in common in this area. *Holiday Inns Inc. v. Broadhead* , 232 E.G. 951 may, perhaps, best be regarded as a proprietary estoppel case; although it might be said that the arrangement or understanding, made at the time when only the five acre site was owned by the defendant, did, in fact, precede the defendant's acquisition of the option over the 15-acre site.

(2) It is unnecessary that the arrangement or understanding should be contractually enforceable. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any need to invoke the *Pallant v. Morgan* equity; equity can act through the remedy of specific performance and will recognise the existence of a corresponding trust. On its facts *Chattock v. Muller* ,8 Ch.D. 177 is, perhaps, best regarded as a specific performance case. In particular, it is no bar to a *Pallant v. Morgan* equity that the pre-acquisition arrangement is too uncertain to be enforced as a contract - see *Pallant v. Morgan* [1953] Ch. 43 itself, and *Time Products Ltd. v. Combined English Stores Group Ltd.* , 2 December 1974 - nor that it is plainly not intended to have contractual effect - see *Island Holdings Ltd. v. Birchington Engineering Co Ltd.* , 7 July 1981.

(3) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ("the acquiring party") will take steps to acquire the relevant property; and that, if he does so, the other party ("the non-acquiring party") will obtain some interest in that property. Further, it is necessary that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, perhaps more accurately, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding.

(4) It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it. *Pallant v. Morgan* [1953] Ch. 43 itself provides an illustration of this principle. There was nothing inequitable in allowing the defendant to retain for himself the lot (lot 15) in respect to which the plaintiff's agent had no instructions to bid. In many cases the advantage/detriment will be

> found in the agreement of the non-acquiring party to keep out of the market. That will usually be both to the advantage of the acquiring party - in that he can bid without competition from the non-acquiring party - and to the detriment of the non-acquiring party - in that he loses the opportunity to acquire the property for himself. But there may be advantage to the one without corresponding detriment to the other. Again, *Pallant v. Morgan* provides an illustration. The plaintiff's agreement (through his agent) to keep out of the bidding gave an advantage to the defendant"in that he was able to obtain the property for a lower price than would otherwise have been possible; but the failure of the plaintiff's agent to bid did not, in fact, cause detriment to the plaintiff because, on the facts, the agent's instructions would not have permitted him to outbid the defendant. Nevertheless, the equity was invoked.
>
> (5) That leads, I think, to the further conclusions: (i) that although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that although there will usually be advantage to the one and correlative disadvantage to the other, the existence of both advantage and detriment is not essential - either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted. Those circumstances may arise where the non-acquiring party was never "in the market" for the whole of the property to be acquired; but (on the faith of an arrangement or understanding that he shall have a part of that property) provides support in relation to the acquisition of the whole which is of advantage to the acquiring party. They may arise where the assistance provided to the acquiring party (in pursuance of the arrangement or understanding) involves no detriment to the non-acquiring party; or where the non-acquiring party acts to his detriment (in pursuance of the arrangement or understanding) without the acquiring party obtaining any advantage therefrom.

286. Banner Homes was distinguished by the Court of Appeal in London & Regional Investments Ltd v TBI plc [2002] EWCA Civ 355. Simplifying the facts, TBI and London and Regional ("L&R") entered into a written agreement for the sale of certain shares. By the agreement, TBI agreed with L&R that they would both use reasonable endeavours to agree the terms of a joint venture regarding land at two airports, having regard to the principles set out in a note in an agreed form. The relevant note was headed: "Principles for Joint Venture" and "SUBJECT TO CONTRACT". The principles provided for land owned by a subsidiary of TBI or land subject to an option in favour of TBI to be transferred to a joint venture company, to be incorporated. Later, TBI changed its mind and did not wish to continue with any possible joint venture with L&R. L&R brought proceedings alleging, amongst other things, that in equity it had rights in relation to the land in question either pursuant to a proprietary estoppel or under a constructive trust. The deputy High Court judge gave summary judgment dismissing the claim. The Court of Appeal dismissed L&R's appeal. Banner Homes was distinguished on the ground that it, and the principal cases referred to in it, were not concerned with cases which were expressly agreed to be "subject to contract" although it was accepted that they were "no contract" cases: see per Mummery LJ at [47]. Further, Banner Homes was not a case where the person, sought to be held liable as a constructive trustee, has an existing entitlement to the land in question and where the claimed agreement to dispose of it was too uncertain and

vague to be enforced: see per Mummery LJ at [48]. Further, there was nothing unconscionable, whether for the purpose of proprietary estoppel or constructive trust, in withdrawing from subject to contract negotiations: see per Mummery LJ at [42] and [48].

287. The Defendants relied on Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd [2005] 2 P&CR 105 (Lewison J) and [2005] EWCA Civ 45 (Court of Appeal). In that case, Targetfollow (Birmingham) Ltd ("TBL") was a subsidiary company of Targetfollow Ltd ("TGL"). TBL was incorporated specifically to acquire a lease of an office building from Birmingham City Council at a substantial premium with a view to developing the property. In the event, TBL did not have the funds to complete the purchase and the funds were provided by TGL, by entering into loan notes in favour of Kilcarne Holdings Ltd ("Kilcarne"), secured by a charge over the assets of TGL and a profit share by reference to the value of the property. After completion, TGL refinanced its borrowings and repaid Kilcarne in part. Kilcarne brought proceedings against TBL and TGL and alleged, amongst other things, that there was an agreement for a joint venture with TBL and/or an equity had arisen in Kilcarne's favour. TBL argued that all discussions had been expressly or impliedly "subject to contract" and that no concluded joint venture agreement had been made. The trial judge (Lewison J) held that there was no concluded joint venture agreement; further, any such agreement would potentially be a contract for the disposition of an interest in land and section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 had not been complied with. As to the claims in equity, it was held that a Pallant v Morgan equity had not arisen; the existence of the complex network of contracts between the parties precluded, or rendered unnecessary, the intervention of equity; further, there was no proprietary estoppel.

288. In relation to the claimed Pallant v Morgan equity, Lewison J directed himself by reference to the decisions in Banner Homes and London & Regional Investments Ltd v TBI plc. He accepted a submission for TGL and TBL that in so far as the bargain between the parties was intended to be legally binding and create rights and obligations, it was recorded in the legal documents which the parties executed. There was no claim for rectification of those documents. On that basis, there was no equity in existence which supplemented those legal rights and obligations. In case he was wrong in that conclusion, Lewison J considered the other arguments as to the claim in equity. He held it was a "no contract" rather than a "subject to contract" case. He held the case did not involve a pre-acquisition arrangement. He held that Kilcarne had not relied on an alleged belief that a joint venture agreement would be or had been made; it relied upon the legal documents which had been executed. Further, Kilcarne had not suffered detriment in its dealings with TGL and TBL. Kilcarne had advanced monies on terms which were very favourable to it. Thus, no Pallant v Morgan equity arose. As to the claim in proprietary estoppel, the only expectation could have been that Kilcarne would acquire rights if, but only if, the parties were able to conclude a future agreement as a result of intended negotiations.

289. Kilcarne appealed to the Court of Appeal. The neutral citation of the decision of the Court of Appeal is [2005] EWCA Civ 1355. The appellant's case was, first, that the judge should have found the existence of a common intention constructive trust and the principles laid down in Gissing v Gissing [1971] AC 886 were relied upon and, secondly, that the judge should have upheld the claim to a Pallant v Morgan equity.

The Court of Appeal held that there was no common intention of the kind alleged. As to the second way of putting the appellant's case, the court accepted a submission from counsel for the respondent that the relevant principle required, first, that there be an arrangement or understanding between the parties that A will acquire the property and that if he does so B will obtain some interest in it; and, secondly, that B must act in reliance on that arrangement or understanding. It was held that the case failed on the facts at the first hurdle; there was no such arrangement or understanding.

290. I now turn to Cobbe v Yeoman's Row Management Ltd [2008] 1 WLR 1752 itself. In Cobbe, detailed speeches were given by Lord Scott and Lord Walker. Lords Hoffmann and Mance agreed with Lord Scott; Lord Brown agreed with both Lord Scott and Lord Walker. This decision is plainly of great importance in the present case and needs to be considered in detail.

291. At [2], Lord Scott described the essence of the problem in that case. In summary, A as the owner of land with potential for residential development entered into negotiations with B for the sale of the land to B. A and B reached an oral "agreement in principle" on the core terms of the sale but no written contract, not even a draft contract for discussion, was produced. There remained terms to be agreed. Pursuant to the agreement in principle, B made and prosecuted an application for planning permission for the development. B spent a considerable amount of time and money in that connection. Planning permission was granted. A then sought to renegotiate the core financial terms of the sale. The question was what relief should be granted to B, as all their Lordships considered that B should be entitled to something. At [3], Lord Scott identified six claims that needed to be addressed, or at least considered. They were: (1) proprietary estoppel; (2) constructive trust; (3) unjust enrichment; (4) quantum meruit; (5) restitution; and (6) damages for deceit (although this had not been claimed). Lord Scott stressed that (1) and (2) were claims to a proprietary interest whereas (3) – (6) were not.

292. At [14] – [17], Lord Scott considered proprietary estoppel. He said at [16]:

> My Lords, unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a "proprietary estoppel equity" as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.

293. At [17], Lord Scott quoted with approval the remarks of Deane J in Muschinski v Dodds (1985) 160 CLR 583, in particular, at 615-616:

> "The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate

> processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundations of such principles … Under the law of this country- as, I venture to think, under the present law of England - proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' … and 'the formless void' of individual moral opinion …"

294. Lord Scott then turned to consider the authorities relied upon by Mr Cobbe. At [18], Lord Scott quoted the passage from the judgment of Oliver J in Taylors Fashions, to which I have referred. He stressed the reference to "a certain interest". He said that Mr Cobbe's expectation was dependent upon the conclusion of a successful negotiation and that was not an expectation of an interest having any comparable certainty to the claims in the Taylors Fashions case. At [19], Lord Scott quoted from Lord Kingsdown in Ramsden v Dyson at page 170 and said that Lord Kingsdown was referring to an agreement that was complete, with no uncertainty as to its terms. At [20], Lord Scott said that Mr Cobbe's expectation was "the wrong sort of expectation".

295. Lord Scott then considered Plimmer v Wellington Corporation (1884) 9 App Cas 699 and Inwards v Baker [1965] 2 QB 29. In both these cases, an equity was found to exist in favour of a person who had built on the land of another. Those cases were distinguished on the ground that Mr Cobbe's expectation was contingent on the course of further contractual negotiations and the conclusion of a formal written agreement. He said that Crabb v Arun District Council [1976] Ch 197 was similarly of no assistance.

296. At [23], Lord Scott referred to "the line of cases in which a claimant has expended money on land on the basis of an informal or incomplete agreement and in the expectation that, in due course, a binding agreement would be forthcoming". He distinguished Laird v Birkenhead Railway Co (1859) Johns 500 on the ground that the agreement in principle in favour of Mr Cobbe was "inchoate" and it was not a case where the court could fill in the gaps in a contractual agreement.

297. At [24], Lord Scott considered Holiday Inns Inc v Broadhead (1974) 232 EG 951 in detail. He said that was not a case of proprietary estoppel but a case where the court would impose, or recognise, a constructive trust over the property. In that case, a third party had acquired rights over the property which overrode the Plaintiff's claim to an equity in the property and whether an order would otherwise have been made that the Plaintiff was entitled to a lease on the agreed terms was an open question. Lord Scott said that the terms of the intended lease were agreed. The case was essentially one involving a joint venture.

298. At [25], Lord Scott analysed the decision of the Privy Council in Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] AC 114 where the parties had agreed terms which were expressed to be "subject to contract" and no equity arose. Lord Scott said that was because the expectation that a party would acquire an interest was entirely under the control of the other party to the negotiations and such expectation was speculative. At [27], Lord Scott pointed out that Mr Cobbe, being an experienced property developer, was well aware that his agreement in

principle was not legally enforceable, even though the words "subject to contract" had not been expressly applied to it. As to the other party to the transaction, he regarded her as bound "in honour" but that that was an acknowledgment that she was not legally bound.

299. At [28], Lord Scott held that there was no proprietary estoppel in that case. He added:

> Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so.

300. At [29], Lord Scott referred to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and to section 2(5) which made an exception for resulting, implied or constructive trusts. He said that proprietary estoppel did not have the benefit of that subsection. His view was that proprietary estoppel could not be prayed in aid in order to render enforceable an agreement that statute has declared to be void. Equity could not contradict the statute.

301. At [30] – [37], Lord Scott discussed the possibility of a constructive trust. His opening remarks at [30] were:

> It is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust but it is possible to recognise particular factual circumstances that will do so and also to recognise other factual circumstances that will not. A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint venturers. This would be either an implied trust or a constructive trust arising from the circumstances and if, as would be likely from the facts as described, the joint venturers have not agreed and cannot agree about what is to be done with the land, the land would have to be resold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of sale divided equally between the joint venturers.

302. Lord Scott then considered Pallant v Morgan [1953] Ch 43, Holiday Inns Inc v Broadhead 232 EG 951 ("a straightforward recognition of a constructive trust arising out of a failed joint venture and … nothing to do with proprietary estoppel"), Banner Homes Group plc v Luff Developments Ltd [2000] Ch 372, Time Products Ltd v Combined English Stores Group Ltd, Oliver J, 2 December 1974, unreported, London & Regional Investments Ltd v TBI plc [2002] EWCA Civ 355, Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd [2005] 2 P&CR 105 (Lewison J) and [2005] EWCA Civ 45 (Court of Appeal), in some of which cases a constructive trust had been declared to exist, and he did not indicate any disapproval of the decisions in those cases. Lord Scott stressed the difference between the case of an arrangement

under which the property was later acquired and a case where one party already owned property and then made a non-binding arrangement with another under which arrangement, if it had been performed, the other would have acquired rights in the future.

303. At [37], Lord Scott gave five reasons why it was not appropriate for the court to hold that Mr Cobbe had acquired a beneficial interest in the property even though the other party's behaviour was unconscionable. These reasons were, in summary: (1) the other party owned the property in question before Mr Cobbe came on the scene; (2) the agreement in principle was known by both sides to be legally unenforceable; (3) "that an unenforceable promise to perform a legally unenforceable agreement – which is what an agreement "binding in honour" comes to – can give no greater advantage than the unenforceable agreement"; (4) that Mr Cobbe's expectation was speculative and contingent on the other party's decisions regarding the incomplete agreement; and (5) Mr Cobbe never expected to acquire an interest in the property otherwise than under a legally enforceable contract.

304. Finally, at [39] – [44], Lord Scott explained why Mr Cobbe was entitled to an *in personam* remedy which took the form of a sum of money assessed on a *quantum meruit* basis.

305. At [46], Lord Walker began his speech as follows:

> My Lords, equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions.

He then referred to Dean J in *Muschinski v Dodds* (1985) 160 CLR 583 at 615-616, to which I have already referred.

306. At [47] – [48], Lord Walker referred to the attempts by text book writers to unify and synthesise the principles as to proprietary estoppel, derived from the many authorities on the subject. He suggested that these attempts had "their dangers". He then addressed a large number of authorities, not all of which it is necessary for me to mention.

307. At [52] – [53], Lord Walker referred to "the great case" of Ramsden v Dyson (1866) LR 1 HL 129 and he drew specific attention to the comments of Lord Cranworth and Lord Wensleydale to matters resting on honour only. He said:

> These may be the first references to the notion that an arrangement which is expressly and deliberately acknowledged to be a "gentleman's agreement" may not be capable of giving rise to an estoppel.

I note that Lord Walker only went so far as to say that such arrangements "may not" give rise to an estoppel. Later, at [64], Lord Walker stated that Lord Kingsdown's approach to the relevant principle was not different from the approach of the other members of the House as Lord Kingsdown found that the tenant in that case believed

(wrongly) that he had a legal right to a long lease and Lord Kingsdown regarded that fact as critically important.

308. At [58] - [59], Lord Walker referred to Taylors Fashions and at [59] stated that Oliver J's remarks in that case were "emphatically not a licence for abandoning careful analysis for unprincipled and subjective judicial opinion".

309. After referring to further authorities, Lord Walker indicated at [65] and [66] that it was not enough that there was a hope or even a confident expectation that the person who had given assurances would eventually do the proper thing. At [66] – [68], Lord Walker contrasted the approach which it might be permissible to adopt in domestic cases as distinct from commercial cases.

310. At [71], Lord Walker commented that the fact that Mr Cobbe thought that he had a commitment binding in honour from the other side only served to show that Mr Cobbe knew that the other side was not legally bound.

311. At [77] – [78], Lord Walker analysed the decision in Holiday Inns Inc v Broadhead (1974) 232 EG 951. He stated that Holiday Inns was a case where one joint venturer permitted another to acquire legal rights (an option to purchase a site) in the belief that the property would be used for the joint venture. Analysed that way, that case was akin to Pallant v Morgan [1953] Ch 43.

312. At [79], Lord Walker analysed the "difficult case" of Crabb v Arun District Council [1976] Ch 179 and treated the unequivocal conduct of the parties as putting the matter beyond the stage of negotiation.

313. At [81], Lord Walker said:

> In my opinion none of these cases casts any doubt on the general principle laid down by this House in *Ramsden v Dyson* LR 1 HL 129, that conscious reliance on honour alone will not give rise to an estoppel. Nor do they cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.

314. At [85], Lord Walker added, in relation to the trial judge and the Court of Appeal in that case:

> But I have after anxious consideration reached the clear conclusion that they stretched the boundaries of the doctrine of equitable estoppel too far in granting relief going well beyond the restitutionary relief to which I would hold Mr Cobbe to be entitled. In my opinion the Court of Appeal's decision, if it were to stand, would tend to introduce considerable uncertainty into commercial negotiations, and not only in the field of property development (compare *Baird Textile Holdings Ltd v Marks & Spencer plc* [2002] 1 All ER (Comm) 737 which the editors of *Meagher, Gummow & Lehane*,4th ed (2003), para 17-050 contrast with recent developments in Australia). Equity has some important functions in regulating commercial life, but those functions must be kept within proper bounds: see generally Sir Peter Millett, "Equity's Place in the Law of

Commerce" (1998) 114 LQR 214.

315. Lord Walker then considered the detailed facts and suggested that they called for "rigorous and even sceptical examination". At [91], he held that Mr Cobbe's case failed:

> "on the simple but fundamental point that, as persons experienced in the property world, both parties knew that there was no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability – that is, liability in equity as well as at law, to echo the words of Lord Cranworth LC in Ramsden v Dyson (1866) LR 1 HL 129 at 145-146 … "

316. At [93], Lord Walker stated that Mr Cobbe could not get any further assistance from the doctrine of constructive trusts and he did not feel it necessary to consider the issue on section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

317. Not long after the decision of the House of Lords in Cobbe, the House of Lords was again called upon to consider the principles relating to proprietary estoppel, this time in Thorner v Major [2009] 1 WLR 776. This second decision of the House of Lords is much less relevant to the case before me although it does contain some comments on the earlier decision in Cobbe and some other relevant general statements.

318. Thorner v Major was a claim to a proprietary estoppel in relation to a farm. The background to the dispute was familial or domestic and not commercial. All five members of the House delivered judgments, although the principal speeches were those of Lord Walker and Lord Neuberger. The other three members of the House (Lords Hoffmann, Scott and Rodger) agreed with both Lord Walker and Lord Neuberger.

319. The issues in Thorner v Major were, first, as to the character or quality of the representation or assurance relied upon to found the claim to a proprietary estoppel and, secondly, whether the claim must fail if the land to which the assurance relates has been inadequately identified or has undergone a change in the period between the assurance and its repudiation. In relation to the second issue, reliance was placed on statements in Cobbe as to the need for certainty. It was held that those statements did not raise any barrier to the recognition of an equity pursuant to a proprietary estoppel on the facts of Thorner v Major.

320. In Thorner v Major, at [20], Lord Scott expressed a preference for keeping proprietary estoppel and constructive trust as separate and distinct remedies. In his view, a distinction should be made between cases involving an unconditional assurance (to be analysed as a proprietary estoppel) and cases of assurances as to future benefits, where the assurances were qualified on account of unforeseen future events (to be dealt with by way of a remedial constructive trust).

321. At [92] – [100], Lord Neuberger analysed and explained the reasoning in Cobbe. In that case, there was not even an agreement to agree; the parties had intentionally and consciously not entered into a contract. At [96], he stated that the relevant law had been analysed in a case where the relationship of the parties was entirely arm's length

and commercial; that was "very different" from the background in Thorner v Major. He added at [98]:

> It would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case. Concentrating on the perceived morality of the parties' behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in *Cobbe's* case [2008] 1 WLR 1752. However, it is equally true that focussing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity.

At [99], he suggested that section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 did not have any impact on a claim to a proprietary estoppel "without any contractual connection".

322. I was referred to the decision of Patten J (as he then was) in Benedetti v Sawiris [2009] EWHC 1330 (Ch). That case involved a complicated commercial transaction and the judge delivered a very lengthy judgment dealing with the many points arising. On the judge's detailed findings of fact, a claim to rights in equity under a constructive trust fell away and did not strictly need to be considered. However, at [504] – [526], the judge dealt with the claim in order to explain that he considered that the claim had never been viable. The judge referred to Pallant v Morgan, and quoted extensively from Banner Homes Group plc v Luff Developments Ltd [2000] Ch 373, London & Regional Investments Ltd v TBI plc [2002] EWCA Civ 355, Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd [2005] 2 P&CR 105, [2005] EWCA Civ 45. At [514], Patten J said that "there was much to be said for the view that those who enter into contractual negotiations with knowledge of the risks they run if no contract is entered into should be left to bear the consequences of that failure".

323. Patten J then considered the decision in Cobbe. Having reviewed the authorities, the judge then gave brief reasons for holding that, even if he had found certain facts in Mr Benedetti's favour, he would not have found that there had been an equity arising under a constructive trust. In summary, he held that the parties had entered into a contractual agreement, which deliberately did not include a term dealing with a certain matter which was alleged to have been understood between the parties. The agreement was conclusive of the parties' rights and obligations.

324. Cobbe was applied by the Privy Council in Capron v Government of Turks and Caicos Islands [2010] UKPC 2. It was held that, at its highest, the appellant's expectation in that case could only have been that a contract, the exact terms of which remained to be settled, would be entered into at some future unspecified date. This closely mirrored the situation in Cobbe itself and was fatal to the claim based on proprietary estoppel. At [39] – [40], Lord Kerr, giving the judgment of the Privy Council, followed Lord Walker in Cobbe in holding that unconscionable behaviour could not stand alone as the basis for finding a proprietary estoppel and could not fill such gap as existed in the proof of the other essential ingredients of that doctrine.

325. The Claimants referred me to the decision of the New South Wales Court of Appeal in Delaforce v Simpson-Cook [2010] NSWCA 84. In that case, the essential requirements for a proprietary estoppel were established and the principal matters considered by the court related to the extent of the relief to be granted to the party

who had established the equity in her favour. The court impressively considered a large number of authorities including the principal English cases. As my decision in this case does not, in the event, require me to determine the extent of any equity, I need not consider this decision further. For the same reason, it is not necessary to discuss the decision of the Privy Council in Henry v Henry [2010] 1 All ER 988, dealing with a similar topic.

326. The status of Banner Homes following the decision in Cobbe was considered in Clarke v Corless [2010] EWCA Civ 338. There, the Claimants and the Defendants and another, who were the owners of three neighbouring properties, reached an informal agreement or understanding that they would like to acquire a piece of adjoining land. There was no agreement as to whether title would be transferred to a company in which they would have shares or whether there would be some other form of common ownership. The Defendants then acquired the adjoining land without involving the Claimants. The Claimants claimed that the Defendants held the land on a constructive trust, under which the Claimants had an interest in the land. The Claimants relied on Banner Homes. The only reasoned judgment in the Court of Appeal was given by Patten LJ (with whom Thomas LJ and Sir Andrew Morritt C agreed). Patten LJ quoted a lengthy passage from Banner Homes at 397 – 399. At [38], he stated that the decision in Cobbe did not cast any doubt on the authority of Banner Homes: "where the arrangements were not and were never intended or expected to be incorporated into a contract". At [41] he said:

> "The question in every case must be whether the agreement made or the words used were reasonably relied upon by the Claimants as an assurance that they would obtain an interest in the property. The court has therefore to concentrate on the quality of the assurance given and whether the Claimants' reliance on it was therefore reasonable: see Lord Diplock's speech in *Gissing v Gissing* [1971] AC 886 at p 905."

327. Patten LJ then stated that the question whether to form a management company or have some other form of co-ownership was a matter of detail which did not go to the central issue of whether the land could be held by one resident to the exclusion of the others. At [44], he stated that the informal nature of the agreement was not inconsistent with it being binding in conscience. He held that the Claimants would succeed in establishing a constructive trust if they could show that they had relied upon the agreement or understanding up until the time when the Defendants acquired the land. The trial judge had held that the Claimants had not so relied and this decision was upheld.

328. Cobbe was next considered by the Court of Appeal in Herbert v Doyle [2010] EWCA Civ 1095. In that case, the trial judge had held that the parties had reached an agreement which provided for the grant or transfer of various interests in land. The parties intended that agreement to be binding on them and to be relied upon. The agreement did not comply with section 2 of the 1989 Act. However, the judge held that the agreement gave rise to rights in equity under a constructive trust. The principal ground of appeal was that the agreement lacked certainty in various respects. The appellant relied on the statements of principle in Cobbe.

329. In the Court of Appeal, the principal judgment was given by Arden LJ. At [42], she noted that it was common ground that the case did not involve a joint venture as in Pallant v Morgan. She analysed the decision in Cobbe in detail. At [57], she said:

> In my judgment, there is a common thread running through the speeches of Lord Scott and Lord Walker. Applying what Lord Walker said in relation to proprietary estoppel also to constructive trust, that common thread is that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act.

330. At [71] – [72], Arden LJ gave her reasons for concluding that there would have been a valid contract, but for section 2 of the 1989 Act. As the principal ground of appeal was that the agreement lacked certainty, her analysis that there would have been a sufficiently clear and certain contract, but for the operation of section 2 of the 1989 Act, resulted in the rejection of that argument.

331. On a separate point as to whether the interest which was claimed in equity could exist under a constructive trust, Arden LJ said at [74] that there was no requirement for the interest taken by each party to be a joint interest or an interest intended to be enjoyed jointly. The other members of the court agreed with the judgment of Arden LJ.

Promissory estoppel

332. The law as to promissory estoppel is conveniently set out in Snell's Equity, 32nd ed., at paras. 12-009 – 12-015. The essential principle can be summarised as follows: where by his words or conduct one party to a transaction ("D") freely makes to the other ("C") a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by C to have that effect, and, before it is withdrawn, C acts upon it, altering his position so that it would be inequitable to permit D to withdraw the promise or assurance, D will not be permitted to act inconsistently with it. C must also show that the promise or assurance was intended to be binding in the sense that (judged on an objective basis) it was intended to affect the legal relationship between the parties and that D either knew or could have reasonably foreseen that C would act on it. C's conduct need not derive its origin solely from the D's promise or assurance. The principal issue is whether D's promise or assurance had a sufficiently material influence on C's conduct to make it inequitable for D to depart from it.

Estoppel by convention

333. The law as to estoppel by convention is conveniently set out in Chitty on Contracts, 30th ed., Vol. 1, paras. 3-107 – 3-114. The essential principle can be summarised as follows: estoppel by convention may arise where both parties to a transaction act on an assumed state of facts or law, the assumption being either shared by both or made

by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it. Such an estoppel is different from promissory estoppel in that it does not depend on any promise or assurance. It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party. The assumption ressembles the promise or assurance required to give rise to a promissory estoppel, or the representation needed for estoppel by representation, to the extent that it must be unambiguous and unequivocal. To give rise to an estoppel by convention, the mistaken assumption of the party claiming the benefit of the estoppel must have been shared or acquiesced in by the party alleged to be estopped. Both parties must have conducted themselves on the basis of such a shared assumption. The estoppel requires communications to pass across the line between the parties. It is not enough that each of the two parties acts on an assumption not communicated to the other. Such communication may be effected by the conduct of one party, known to the other.

334. The requirement of a communication crossing the line was stated in K. Lokumal & Sons Ltd v Lotte Shipping Co Pty Ltd (The August Leonhardt) [1985] 2 Ll R 28. In that case no estoppel arose where each party spontaneously made a different mistake and there was no subsequent conduct by the party alleged to be estopped from which any acquiescence in the other party's mistaken assumption could be inferred. This requirement is also established by the decision of the House of Lords in Republic of India v India Steamship Co Ltd (No.2) [1998] AC 878 at 913 E-F, per Lord Steyn.

Estoppel: reasoning and conclusions

335. The Claimants submit that there was a representation or an assurance from Gill's side as to the entitlement of Philip's side to continue to occupy the ground floor. If there had been a representation or assurance, but merely in those terms, that would not of itself advance the Claimants' case. After all, there is no dispute that, following demerger, Philip's side had a legal right to continue to occupy the ground floor under the existing lease. The Claimants have to go further in relation to an alleged representation or assurance. They need to submit, and they do submit, that there was a representation or assurance that Philip's side could remain on the ground floor for the remainder of the length of the term of the existing lease and without the break clause. This representation or assurance is said to have been communicated either expressly or by implication in the discussion which took place on 18th February 2009 and/or in the communications between the parties between 18th February 2009 and 10th March 2009. Further, the Claimants stress the fact that Philip's side were giving value, as part of the demerger, for the business on the ground floor of the building; that value was based on trading results and trading forecasts and the value given by Philip's side, whatever precisely it was, was not appropriate if Piccadilly's tenure on the ground floor was going to be short-lived, possibly as short as 3 months.

336. I will first consider whether there was an express representation or assurance of the kind alleged at the meeting on 18th February 2009 or in the communications from that date up to 10th March 2009. I have set out my detailed findings as to what was said at the meeting on 18th February 2009. The arrangement discussed appeared to involve Philip's side continuing to trade from most of the ground floor (at that stage, together with the basement). However, the duration of any entitlement to continue was not

discussed. The parties did not know whether there was an existing lease and they did not know the length of the remaining term of any existing lease. They did not know that the existing lease contained a break clause. I am not able to find that anything that was said amounted to an express representation or assurance that Philip's side could remain on the ground floor for the remainder of the length of the term of the existing lease and without the break clause.

337. I have set out in detail the communications between the parties between 18th February 2009 and 10th March 2009. Those communications are open to two interpretations. One is that Gill's side indicated to Philip's side that Philip's side could have a lease in the same terms as the existing lease, save that the premises demised by the lease would be reduced in extent to part of the ground floor only. The other interpretation is that Gill's side indicated to Philip's side that Gill's side was prepared, following the demerger, to negotiate with Philip's side the terms of a new lease. Neither of these interpretations of the communications amounts to a representation or assurance that Philip's side could remain on the ground floor for the remainder of the length of the term of the existing lease and without the break clause. The difficulty for Philip's side was that they, by mistake, had overlooked the existence of the break clause in the existing lease but that was not as a result of any representation from Gill's side that the existing lease did not have a break clause nor was there anything amounting to an assurance from Gill's side that they would not seek to rely upon the break clause.

338. I will next consider whether the discussion on 18th February 2009 and/or the communications between 18th February 2009 and 10th March 2009 amounted to an implied representation or assurance that Philip's side could remain on the ground floor for the remainder of the length of the term of the existing lease and without the break clause. I have referred to what was said at the meeting and to the two possible interpretations of the communications thereafter. In my judgment, there is no basis for holding that the statements made by Gill's side carried with them an implied representation or assurance from Gill's side to that effect. As before, Philip's side mistakenly believed that they had a lease without a break clause but that was not the result of anything from Gill's side.

339. The Claimants also say that the agreed value shift for the purposes of the demerger, to reflect the fact that Philip's side was acquiring a business, which included the business in the building, carried with it an implied representation or assurance that the business would be able to continue in the building for some period or other. Philip's side would contend that the relevant period is the remainder of the term of the existing lease but, of course, not subject to the break clause.

340. The Claimants submit that the way in which the valuation of the overall business was arrived at by Close Brothers supports the Claimants' contention. They say that Close Brothers would probably not have arrived at the same valuation if they have been told that there was a significant risk that at some indefinite time in the future the carrying on of the business at the building might cease without being relocated. I accept that it is probable that the Close Brothers valuation would have been lower by an amount that, on the evidence, I am not able to quantify. However, that does not seem to me to be enough to support a finding that Gill's side, by agreeing on values by reference to the Close Brothers valuation, were representing to Philip's side that Philip's side had, or would be given, an entitlement to occupy the ground floor for any particular period of time.

341. It will be remembered that Mr Wells gave evidence that the Close Brothers valuation did not have regard to the period of the leases of the various properties. If one were to investigate what Close Brothers were told about the tenure in relation to the building, it would emerge that the schedule of properties given to Close Brothers stated that the building was held on a freehold and not on a lease. In my judgment, Philip's side cannot argue that negotiations as to price based on the Close Brothers report amounted to an implied representation by Gill's side that Philip's side would have a freehold tenure of the building. If that is so, then I do not see how such negotiations could be said to amount to a representation by Gill's side that Philip's side would enjoy any specific period of tenure following demerger.

342. I have also held that the actual discussions between the parties from 18th February 2009 to 10th March 2009 did not expressly or by implication involve a representation or assurance of the kind alleged. In those circumstances, in my judgment, the way in which the parties negotiated the value of the overall business, which included the business carried on at the building, did not involve any such representation or assurance, expressly or by implication.

343. I accept that Philip's side mistakenly overlooked the break clause in the lease and they believed that they had an existing lease with a number of years still to run. I also accept that if Philip's side had realised the true position, they would not have agreed to do the demerger deal in the way in which it was done. However, that does not amount to an implied representation or assurance from Gill's side that the mistaken belief of Philip's side, which as I have held, Gill's side did not know about, was a justified belief.

344. The above findings prevent the Claimants succeeding in relation to the alleged promissory estoppel.

345. The Claimants' case as to proprietary estoppel set out to prove, as a first step, that Gill's side made a representation or assurance that Philip's side could remain on the ground floor for the remainder of the length of the term of the existing lease and without the break clause. For the reasons I have given, the Claimants have not established that first step. Equally, Philip's side did not rely on a representation or assurance from Gill's side; they relied on their own mistaken belief as to the terms of the existing lease.

346. In the course of oral closing submissions, the Claimants made a wider submission as to a proprietary estoppel or a constructive trust. This wider submission was not necessarily dependent on the court finding that there was a representation or assurance but more on the contention that Gill's side were aware of the mistake being made by Philip's side and took advantage of that mistake by taking a transfer of the freehold and benefiting from the value shift on the demerger, on the basis that Philip's side was acquiring a business which could be operated from the building for many years into the future. That was said to be unconscionable behaviour or equitable fraud.

347. In my judgment, this last way of putting the Claimants' case fails because I have held that Gill's side did not know that Philip's side was mistaken about the break clause in the lease.

348. The Claimants also submitted that the case could be analysed as one where Gill's side were to take a transfer of the freehold of the building and Philip's side were to have a lease of most of the ground floor of the building and that lease would not be a short term interest, such as a lease subject to a 3 month break clause. In a case where Gill's side has taken the transfer of the freehold, the Claimants say that it would be unjust to allow Gill's side to keep the freehold and not to respect the expectation of Philip's side that there would be a deed of variation or a new lease which would give them more than a short term lease.

349. In my judgment, this is not a case of an expectation created or encouraged by Gill's side that Philip's side would, as a result of a deed of variation or the grant of a new lease, end up with a lease which was more than a short term lease. Philip's side believed, wrongly, that they already had something which was more than a short term lease. As to any future deed of variation or new lease, Philip's side knew that they had no legal entitlement to such a deed of variation or new lease. On 23rd February 2009, the parties deliberately agreed that they would not have further negotiations about the deed of variation or a new lease. Philip's side did not want to settle the extent of the ground floor until they were clear as to the effect of a revised demise on the premises licences for "split areas". Further, the side letter which allowed Philip's side to give up part of the building, to avoid liability for the empty parts of the building, was clearly expressed to be something which was not legally binding. In my judgment, and in accordance with the decision in Cobbe, Philip's side cannot say that they have a right in equity to a deed of variation or a new lease, without a break clause, when it was expressly agreed between the parties that the terms of a deed of variation or a new lease depended upon the outcome of future negotiations.

350. The Claimants stressed the email from Mr Barnsley of 24th February 2009, when he said that Philip's side would have to trust Gill's side. The Claimants also made a much wider submission based on the nature of the underlying transaction and the circumstances in which it was being carried out. They submitted that the whole demerger transaction was not to be considered as an arms-length commercial transaction. It is said that it was essentially a family matter, dividing up jointly owned assets and it was appreciated by both sides that the transaction fundamentally depended upon each side trusting the other and behaving in a trustworthy way. It is said that the non-arms-length character of the transaction is shown by the fact that the two sides did not have independent legal advice but both sides relied on common advisers, such as Dickinson Dees, PwC, Close Brothers and Colliers CRE.

351. I accept that the demerger transaction was not a totally arms-length commercial transaction. However, there were clearly two sides with different and competing interests. Each side was entitled to protect its own interests and expect the other to look after itself. I do not think that the family connections and the use of one set of advisers ultimately changed the nature of the duties owed by one side to the other side. In particular, I do not think that one side owed fiduciary obligations to the other. It was suggested during the cross-examination of some of the witnesses that Mr Barnsley might have owed fiduciary obligations, or some other duty, to Philip Noble. It was also suggested in the course of the evidence that, prior to demerger, while a company was owned jointly by Gill's side and by Philip's side, a director of such a company owed duties to the ultimate shareholders; if that proposition were correct, it would be said that, for example, Mr Dalzell owed a duty to Philip Noble.

352. As to these suggestions, I do not think that the Claimants have established that Mr Barnsley owed fiduciary duties to Philip Noble. I find that in the negotiations which had to take place between the two sides and, in particular, the negotiations on 18th February 2009, Philip Noble appreciated that Mr Barnsley was there to represent the interests of Gill Noble and he owed no responsibility to look after the interests of Philip Noble. As to the suggestion, for example, that Mr Dalzell was acting for Philip Noble in some way, I did not understand this submission to be pursued, as it seemed to the Claimants that it caused them a possible difficulty in relation to an argument that Mr Dalzell's knowledge should be attributed to Philip Noble, something which the Claimants resisted.

353. As regards the submission that the parties were expected to trust each other, I do not think that Gill's side behaved in an untrustworthy or tricky way prior to the demerger. Gill's side behaved properly in proposing the terms which were agreed in principle on 18th February 2009. I do not think that Gill's side caused Philip's side to make a mistake about the break clause in the lease. I do not think that Gill's side set out to trap Philip's side in that respect. I do not think that Gill's side ought to have reminded Philip's side of the break clause in circumstances where Gill's side had no reason to think that Philip's side was making a mistake. Accordingly, whatever was called for in relation to trustworthy behaviour from Gill's side, I find that Gill's side are not at fault in any such respect.

354. It is also important to stress that any question of trust in relation to the parties' dealings prior to the demerger does not seem to me to apply to the position after the demerger is completed. After the demerger, the parties are at arms length and are subject to the legal and equitable obligations they have previously undertaken or which are imposed upon them. Conversely, each party is entitled to enjoy the rights which it has acquired. If it should emerge that Gill's side has the benefit of the freehold subject only to the terms of the lease dated 27th November 2007, then Gill's side will be entitled at law and in equity to assert its rights even though it now emerges that Philip's side made a mistake in overlooking the break clause in the lease.

355. The Claimants would submit that a fair resolution of this dispute would be that Gill's side keeps the freehold, that Philip's side has a lease of the ground floor, of the kind that they mistakenly believed that they had, and that Gill's side is able to carry out a development of the upper parts. After all, Mr Wooldridge thought on 19th February 2009 that if Philip's side had asked for Gill's side to concede the break clause in relation to the ground floor, then it would have been conceded. It seems to me that it would be unhelpful for me to make comments on the fairness of the result produced by applying established principles of law and equity to the facts which I have found. The Claimants have failed to establish a proprietary estoppel which would enable me to impose that solution on an unwilling party. Cobbe makes it clear that a court should only act on established equitable principle and must not seek to give effect to its own notions of fairness and justice or its subjective view as to which side "ought to win".

356. So far I have considered the Claimants' submissions as to proprietary estoppel and promissory estoppel. The Claimants' submissions invited me to make findings that Gill's side had made a relevant representation or assurance to Philip's side. Their submissions also invited me to hold that Gill's side knew of the mistake being made by Philip's side in overlooking the break clause. I have not been prepared to make

those findings of fact and, largely in consequence, the claim to a proprietary or promissory estoppel has failed.

357. I now need to deal with the claim to an estoppel by convention. The Claimants did not really develop any separate case in relation to this estoppel; they were content to submit that the promises or assurances which they said they were given could give rise to a proprietary estoppel or a promissory estoppel or, in addition, an estoppel by convention. In the same way as I have held that there was no proprietary or promissory estoppel based on a promise or assurance, it follows that I am unable to accept that any such promise or assurance gave rise to an estoppel by convention.

358. However, for completeness I ought to deal with one matter which emerged from the evidence as to what the parties expected in February and March 2009 as to the scope of any development which Gill's side would wish to carry out in relation to this building and to consider whether there was any common assumption which could give rise to an estoppel by convention, which might have the effect of limiting the ability of Gill's side to carry out the development which is now proposed.

359. In February and March 2009, the parties did not discuss with each other in much detail what Gill's side hoped to do with the upper parts and when any development would be carried out. Both parties contemplated that Philip's side would give up some part of the ground floor to facilitate a development of the upper parts but, as explained, they agreed to defer further discussion and agreement as to what would happen in that respect. The evidence at the trial did reveal, however, that there was some element of common assumption. Philip's side assumed that any development would leave Philip's side in occupation of most of the ground floor. Gill's side expected that they would put together a proposed development of the upper parts which would require them to have some part of the ground floor and that they would talk to Philip's side and agree something appropriate to enable them to develop the upper parts. The question then is: did that area of common assumption or approach create an estoppel by convention of some kind?

360. Estoppel by convention is concerned with an assumption as to fact or law. It can be said that the state of mind of Gill's side at any particular time is a matter of fact. It can then be argued that there was a common assumption in February and March 2009, that the state of mind of Gill's side at that time was that Gill's side did not expect, or intend, to carry out a development of the ground floor. If those submissions were well founded, they would not advance the matter very much. Gill's side is not seeking to resile from the assumed fact as to their state of mind at that time. What Gill's side has now done is to form an intention to carry out a development which does involve the ground floor. It does not seem to me that binding Gill's side to accept that they did not have such an intention in February or March 2009 gets the Claimants anywhere. The Claimants can only prevent Gill's side from giving effect to the intention, which Gill's side has more recently formed, if Gill's side is prevented by contract, or by a proprietary or promissory estoppel, from so acting. An estoppel by convention, where the assumed fact is as to Gill's state of mind at a date in the past, will not do.

361. Standing back, the position is a simple one. The parties were content for the freehold to be transferred to Gill's side and for the question of the lease of the ground floor to be considered later, with neither party binding itself in relation to future negotiations as to the lease. Philip's side were content to proceed in that way because they believed

they had a satisfactory lease of the whole building. They were mistaken about the lease because, in fact, it was subject to a three month break clause. That mistake was not attributable to any representation or assurance from Gill's side. Gill's side did not cause Philip's side to make this mistake. Gill's side did not even know that Philip's side was making this mistake. Gill's side did not commit itself by a promise or assurance about their future conduct as to any negotiations about a deed of variation or a new lease, nor as to the extent of any development. Philip's side did not rely on any such promise or assurance; they relied on their mistaken belief as to their rights under the existing lease. There is nothing there to raise an equity against Gill's side.

Constructive trust: reasoning and conclusions

362. It remains to consider the separate case put forward by the Claimant to an equity under a constructive trust. The equity which is claimed is not a share of the freehold pursuant to a common intention constructive trust of the kind considered in Gissing v Gissing [1971] AC 886 and Lloyds Bank v Rossett [1991] 1 AC 107 at 132. Instead, it is said that the equity is an equitable right to have a lease of the ground floor of the building for the term of the existing lease and on the terms of that lease, but without the break clause. It is submitted that in giving effect to this equity, the court can determine precisely which part of the ground floor is to be included in the demise; it is said that this is a matter of detail or mechanics. The Claimants rely on Yaxley v Gotts [2000] Ch 162, and possibly also Herbert v Doyle [2010] EWCA Civ 1095, as showing that it is possible to have what is, in effect, an equitable lease binding on a freeholder pursuant to a constructive trust.

363. The Claimants rely on Banner Homes. They submit, I think correctly, that that decision is still good law after Cobbe. In Cobbe, it was pointed out that the facts of Cobbe did not involve an arrangement which was entered into before the asset in dispute was acquired. Banner Homes was distinguished on that ground but was not the subject of any adverse comment. Since Cobbe, the Court of Appeal has held that Banner Homes still correctly states the law: see Clarke v Corless [2010] EWCA Civ 338.

364. The Claimants submit, again I think correctly, that because both Cobbe and Banner Homes are good law, there can be an important difference between a case of a pre-acquisition arrangement and a post-acquisition arrangement. With a case of a pre-acquisition arrangement, an equity can be established even where all parties know that they have not entered into a binding contract before the asset is acquired. Conversely, where the arrangement relates to an asset which one party already owns and which is to be the subject of future negotiations for the grant of rights in the asset to another, that other cannot say that he has relied upon the expectation of the negotiations producing rights in the future, because he is taken to know that he has no present legal or equitable rights and that the future grant of rights is speculative and contingent on the other party being prepared to grant such rights. There does therefore appear to be a different approach to the position of a party who knows he has not got the benefit of a binding contract depending on whether the non-contractual arrangement is made before the asset is acquired, or afterwards. It is not necessary for me to explore in more detail why there should be this distinction, and why it should be treated as so important, but I think that it really arises out of the reaction which a court of equity is likely to have in a case where one party to a non-binding arrangement has used that arrangement to secure a benefit which was intended to be shared with another and

then the acquiring party claims the benefit for himself, to the exclusion of the other. Indeed, in Pallant v Morgan and Banner Homes, the pre-acquisition arrangement amounted to an agency relationship or something closely akin to it. Nonetheless, the court can only impose a constructive trust in this class of case where the behaviour of the party who asserts that he is free of any obligation to the other party is unconscionable behaviour.

365. The Claimants also emphasise that, in one respect at least, the present case is stronger than other cases of non-binding pre-acquisition arrangements. In this case, Gill's side made the non-binding arrangement and then acquired the freehold of the building, not from a third party (as in Banner Homes and many of the other cases) but from the other party to the arrangement, Philip's side.

366. In these circumstances, it seems to me that the approach I should adopt is: (1) not to find against the Claimants just because they knew in the period from 18th February 2009 to 10th March 2009 that the arrangement they had made as to a deed of variation or a new lease of most of the ground floor was not contractually binding; nor (2) to find for the Claimants just because Gill's side acquired the freehold after the non-binding arrangement was made. Instead, I should consider all factors which appear to be relevant to determine whether it is unconscionable, in accordance with the principles in Banner Homes, for Gill to assert ownership of the freehold but without giving to Philip's side what Philip's side thought they already had and would continue to have, namely, a lease of most of the ground floor (at least) on the terms of the existing lease but without there being a break clause, which Philip's side did not know about.

367. In considering whether, in accordance with established equitable principles, the conduct of Gill's side should be regarded as unconscionable, many of the matters which I considered when dealing with the claim to rectification and the claim to a proprietary estoppel are again relevant. This is unsurprising. A claim to rectification for unilateral mistake and proprietary estoppel both involve consideration of whether the relevant conduct was unconscionable.

368. In connection with the alleged constructive trust, the following factors seem to me to be important:

(1) Philip's side made a unilateral mistake about the terms of the existing lease;

(2) the mistake was not induced by any representation or assurance from Gill's side;

(3) the mistake was not caused, or contributed to, by Gill's side;

(4) Gill's side did not know that Philip's side was making a mistake;

(5) Philip's side knew that they did not have a binding agreement for a deed of variation or a new lease;

(6) Philip's side did not rely upon the prospect of there being a binding agreement for a deed of variation or a new lease;

(7) Philip's side relied upon the existing lease but in the mistaken belief that the existing lease was not subject to a break clause.

369. When considering a possible argument as to estoppel by convention, I referred to the fact that there was some element of common assumption in this case, namely, that in February and March 2009, both parties expected that any future development by Gill's side would be restricted to a development of the upper parts of the building. I have therefore considered whether it might have been argued that a constructive trust arose in the present case whereby, in some way or other, Gill's side would be prevented from relying upon the break clause in the lease to recover possession of the ground floor of the building for the purposes of redevelopment. In my judgment, there was no constructive trust which operated in that way. First of all, the way in which I have described the submission is not an assertion of a constructive trust but is really an assertion of an estoppel; I have already explained why I think that there was no estoppel of that kind. Secondly, the parties did not discuss in any detail what the extent of any future development might be; Philip's side did not rely upon any such discussion or any promise or representation about the extent of such a development, because there was no such promise or representation. What Philip's side relied upon was its belief as to its rights under its existing lease. Philip's side mistakenly overlooked the break clause in that lease but that mistake was not attributable to the conduct of Gill's side and Gill's side did not even appreciate that Philip's side was making a mistake.

370. In my judgment, it is not unconscionable for Gill's side, following demerger, to assert the existence of their freehold title and to rely upon the terms of the existing lease. It does not seem to me to matter that the parties did not in fact, after 9th April 2009, pursue negotiations as to a deed of variation or a new lease in relation to most of the ground floor of the building. If there had been such negotiations, Gill's side would have been entitled to insist upon the break clause remaining in the varied lease, or in the new lease, relating to the ground floor, as Gill's side had not bound itself by a contract or an estoppel or a trust to act otherwise.

Self dealing

371. I have now dealt with all the claims in equity which have been put forward by the Claimants. I have held that they have failed to establish those claims on the facts of the case. That means that it is unnecessary for me to deal with a point which was raised by the Defendants, to the effect that Philip Noble as one of the executors of the estate of Michael Noble, was guilty of self dealing when he and companies and interests associated with him took benefits under the demerger. However, I ought to notice the point and briefly explain my reaction to it.

372. The Defendants submitted that this breach of the self dealing rule should be taken into account when considering the overall equities of the situation and when I came to consider the various claims in equity put forward by companies associated with Philip Noble I should refuse equitable relief because of Philip Noble's breach of the self dealing rule.

373. This submission did not really appear until the Defendants served their written closing submissions, although there was some reference to a similar topic earlier in the trial. The allegation of self dealing has not been pleaded and, even when the above

submission was made, there was no application to amend the pleadings to take this point. The fact that the matter has not been pleaded is important, in my view. There are many matters which are not clear, both as to the precise scope of the allegation and as to the underlying facts. Is the allegation confined to Philip Noble's position as an executor or does it extend to other trust obligations? As to the underlying facts, were the various assets acquired by Philip Noble and companies associated with him the subject of that executorship when the demerger was completed or were they held by the trustees under the will? This question is important because Philip Noble was not then a trustee (having resigned) although he remained an executor. What assets in particular are in issue?

374. The Claimants also submit that there is a short and complete answer to the point. Clause 18 of Michael Noble's will allows self dealing in certain circumstances and it is submitted that all the relevant circumstances exist.

375. Further, if there were a breach of the self dealing rule, it is far from obvious that the right response of the court should be to refuse to grant equitable relief to Philip Noble and his associates, if the court felt that everything else pointed in favour of the grant of that relief. The self dealing rule is for the protection of the beneficiaries under the will not for the protection of the Defendants who, on the hypothetical basis that the equitable claims were otherwise good claims, should be made the subject of equitable relief. If the point had been pleaded then it occurred to me that the court might want to know what would have happened if the demerger would otherwise have involved a breach of the self dealing rule, what would the attitude of the adult beneficiaries have been and how would one protect the interests of the minor beneficiaries.

376. As I have said I do not need to decide anything in relation to the self dealing point but I will record that I would not have allowed the point to become a live point in these proceedings in the absence of an application by the Defendants to amend their pleadings. If such an application had been made, it would have had to be considered in the ordinary way, but no such application was ever made.

The 1954 Act proceedings

377. The result of the above reasoning is that Piccadilly is the lessee of the building on the terms of the lease dated 27th November 2007. That lease is subject to a break clause. Jolan Piccadilly Ltd has served a notice pursuant to the break clause and a notice under section 25 of the 1954 Act. It has also applied, pursuant to section 29(2) of the 1954 Act, for an order for the termination of Piccadilly's tenancy of the building without the grant of a new tenancy. In those proceedings, I have to decide whether at the date of the trial, Jolan Piccadilly Ltd has established the ground of opposition set out in section 30(1)(f) of the 1954 Act, which ground was stated in the section 25 notice which has been served. In the remainder of this judgment, I will refer to Jolan Piccadilly Ltd as "the landlord" and to Piccadilly as "the tenant".

378. The parties have agreed nearly everything as to how the 1954 Act applies in the present case. It is agreed that the lease created a tenancy within Part II of the 1954 Act. It is also agreed that "the holding" as defined in section 23(3) of the 1954 Act is the whole building and not just the ground floor of the building. It is agreed that, if I reject the Claimants' case as to a binding contract, rectification and the other equitable claims (as I have now done), the landlord has served a valid section 25 notice and has

made an in time application under section 29(2). It is agreed that it is open to the landlord to seek to establish the ground of opposition in section 30(1)(f). If that ground of opposition is established, then the court must make an order for the termination of the current tenancy without the grant of a new tenancy: section 29(4)(a). If that ground of opposition is not established, then the court must make an order for the grant of a new tenancy and an order for the termination of the current tenancy immediately before the commencement of the new tenancy: section 29(4)(b). It is also agreed that if the court makes an order for the termination of the current tenancy under section 29(4)(a), the tenant is entitled to compensation in accordance with section 37 and that the conditions referred to in section 37(2) and (3) are satisfied so that the tenant will, on quitting the holding, be entitled to recover compensation in a sum which is twice the rateable value of the holding.

379. The parties are not agreed as to whether the landlord has, at the trial, established the ground of opposition in section 30(1)(f) of the 1954 Act. Section 30(1)(f) is in these terms:

> "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

380. The tenant accepts that the scheme of development for which planning permission has been granted amounts to a sufficiently substantial development so as to satisfy that requirement in section 30(1)(f). The tenant also accepts that the landlord could not reasonably carry out that scheme without obtaining possession of the holding. Although the tenant initially contended otherwise, during the course of the trial, the tenant accepted that it could not bring itself within section 31A of the 1954 Act. The only point which requires to be decided is whether the landlord has established that it intends to carry out that scheme.

381. There was no real dispute as to what is meant by the word "intends" in section 30(1)(f). The law is conveniently summarised in Woodfall's Landlord and Tenant, looseleaf edition, vol. 2 at paragraphs 22.106 – 22.109.2. The following passages from Woodfall are of particular relevance:

> "It is not sufficient for the landlord merely to assert that he "intends" since he may change his mind once he gets possession. An intention connotes that the landlord does more than merely contemplate; it connotes a state of affairs that he decides, so far [a]s in him lies, to bring about, and which, in point of possibility he has a reasonable prospect of being able to bring about, by his own act of volition; the landlord does not "intend" if he has too many hurdles to overcome or too little control of events. The intention must be genuine and not colourable; it must be firm and settled, not likely to be changed. It must have moved out of the zone of contemplation – the sphere of the tentative, the provisional and the exploratory – and have moved into the valley of decision. Thus, the landlord's intention is composed of two main ingredients: a fixed and settled desire to do that which he says he intends to do and a reasonable

prospect of being able to bring about the desired result." [paragraph 22.106]

"The word "intends" is not to be equated with the words "is ready and able" so as to impose on the landlord the onus of proving that he has not only finally determined the course proposed but has also taken all necessary steps for the satisfaction of any requisite conditions to which the course proposed is subject. It is sufficient that there is a reasonable prospect that he will be able to bring about that which he says he intends. A "reasonable prospect" of obtaining planning permission is not the same as having to show that it is more likely than not that planning permission will be granted. In this context, a "reasonable prospect" means no more than "a real chance". A "reasonable prospect" is one which is strong enough to be acted on by a reasonable landlord rather than one which should be treated as merely fanciful or which should sensibly be ignored. There must not be so many obstructions yet to be surmounted that he cannot truly be said to "intend" it. That is the true relevance of ability in relation to intention. Whether the nature and extent of the obstructions prevent the landlord from having the requisite intention is a question of fact and degree. So where the landlord's scheme depended on finding a developer to develop other land owned by the landlord, and no developer had been found, the landlord did not have the necessary intention for the purposes of this ground. It is often convenient to consider the question of practical possibility under the two headings of legal ability to carry out the work, and practical ability to carry out the work. However the two headings are both part of a single aspect of intention: namely whether the landlord has a reasonable prospect of being able to implement his desire." [paragraph 22.109]

"If it is proved that it is impossible to carry out the intention (e.g. because he cannot obtain the necessary finance) then it would seem that he must fail. However, the landlord may be able to satisfy the court that he has a reasonable prospect of raising any necessary finance even in the absence of a detailed financial plan." [paragraph 22.109.2]

382. The intention which must be proven is the intention of the landlord. I was not shown any minute of any board meeting of the landlord, which contained a resolution by the board to carry out the above scheme. The directors of the landlord are Mr Dalzell, Mr Wooldridge and Mr Wright and each of them gave evidence. I have examined the witness statements of these three directors. Rather curiously, to my mind, the directors did not say in express terms, certainly not in clear terms, that the board of the landlord had decided to carry out the above scheme. However, Mr Dalzell's first witness statement proceeds on the basis that the development will be carried out. For example in paragraph 149 of that witness statement, he says that: "the development will be financed in one of two ways" and he then explains those two ways. Paragraph 24 of Mr Dalzell's third witness statement is in terms which deny the suggestion from Philip's side that the landlord does not intend to carry out the above scheme. Neither Mr Wooldridge nor Mr Wright in their witness statements made an explicit statement that the landlord had decided to carry out the above scheme. The witness statement from Mr Barnsley, who is not a director of the landlord, did not contain any relevant

statement as to any decision on the part of the landlord. Paragraphs 31 and 33 of Gill Noble's first witness statement contain a clear statement that she will fund the development. She also explained in paragraph 31 that she wanted the development to be carried out in the interests of the beneficial owners of the shares in Jolan Ltd, which wholly owns the landlord. In her second witness statement, she gave more information about the relevant beneficial interests and confirmed her desire to see the development carried out, funded by a family trust company.

383. I have referred to the evidence in chief which was tendered on this point because I found it curious that this evidence did not contain an explicit statement that the landlord had decided to carry out the above scheme. However, this evidence does not stand alone. I also have the evidence as to what the landlord has done and the contractual commitments it has taken on.

384. Following the demerger, the landlord has actively pursued various prospects of pre-letting the parts of a completed development. It then entered into agreements for lease with Travelodge, Waitrose, Ask and Nando's on 28th September 2009, 31st March 2010, 13th September 2010 and 4th October 2010, respectively. In each of those agreements, the landlord has contracted to use all its reasonable endeavours to bring about the termination or surrender of the lease dated 27th November 2007. The landlord has no means of procuring a surrender of that lease, without the agreement of the tenant. Therefore the only means whereby the landlord can procure the termination of the lease is by relying on section 30(1)(f) to obtain a termination order under section 29(2) of the 1954 Act. To rely on section 30(1)(f), the landlord must show that it intends to carry out the development. Accordingly, the contractual obligations which the landlord has entered into are powerful evidence that the landlord does intend to do the development. Further, it would not be consistent with those contractual obligations for the landlord to change its mind and to decide that it no longer wished to do the development. Yet further, as soon as the landlord does bring about a termination of the lease, the relevant conditions in the agreements for lease are met and the landlord is under an unconditional obligation to carry out the development. The combined effect of these four agreements for lease is that the landlord must carry out the whole scheme and not just the development of the upper floors. The landlord confirmed at the trial that if it were prevented from developing the ground floor into 3 retail or restaurant units, it would not develop the upper parts alone. The landlord has also applied for and obtained planning permission for the development. It has also assembled a professional team to advise on and assist with the development although that team is not currently active by reason of the dispute between the parties. All of the above is strong evidence that the landlord has a settled intention, unlikely to be changed, to carry out the development.

385. The Claimants say that the matter is not as simple as presented above. The Claimants make two basic points. Both points relate to the information previously given to Gill Noble. The first point concerns the information she was given as to the cost of the development. The second point concerns the information she was given as to the need to recover possession of the ground floor, to enable the landlord to carry out a development of the upper parts. I think that in order to reflect my understanding of how the Claimants sought to put their case, I need further to sub-divide these two points. As I understand it, the Claimants say, that in relation to each point, it is relevant to consider the position of Gill Noble as (they would say) the ultimate

decision maker on behalf of the landlord and, separately, as the potential funder of the development.

386. The first point concerns the information Gill Noble was given as to the cost of the development. The Claimants say that Gill Noble was given certain figures as to the likely cost of the development. It is said that it is likely that the costs will be higher than she had been told. Higher costs will mean that the development will be less profitable, although the Claimants accept that the development will still be profitable. I am then asked to determine a realistic figure for the likely costs of the development and the resulting profit of the development. I am next asked to assess Gill Noble's likely reaction to my findings and then hold that she will probably change her mind about the landlord doing the development. It is then said that my conclusion should be that the landlord does not at present "intend" to do the development because Gill Noble is likely to cause the landlord to change its mind.

387. The other way in which the first point is said to be relevant is in relation to the role of Gill Noble as funder of the development. As before, the Claimants say that the court should determine a realistic figure for the cost of the development which will be greater than any figure previously given to Gill Noble. This greater figure will mean that the family trust will have to find more money to fund the development and, further, the development will become less attractive, because it will be less profitable. The Claimants then submit that I should assess the likely reaction of Gill Noble or of the family trust to my determination that the development will be less profitable than they previously thought and the costs they will have to fund will be higher. It is said that when I carry out that assessment, I will reach the conclusion that Gill Noble and/or the family trust are likely to decide not to fund the development. This will mean that the development will not be funded from that source and there is no other source of funds which has been identified in the evidence. The result will be that the landlord will be unable to obtain funding for the development and will be unable to carry it out. If necessary, the Claimants submit that the landlord does not have a "reasonable prospect", in that it does not have a "real chance", of obtaining funding for the development.

388. The second point concerns the information Gill Noble was given as to the need to recover possession of the ground floor, to enable the landlord to carry out a development of the upper parts. The Claimants say that Gill Noble decided that the landlord should carry out the proposed scheme, involving a development of the upper floors and a development of the ground floor, which would result in the tenant having to give up possession of the ground floor, because she had been told that it was not possible to carry out the development of the upper parts without recovering possession of the ground floor. The Claimants say that Gill Noble was misled in this respect. The Claimants say that I should find that it is, in fact, possible to develop the upper parts as a Travelodge, while the tenant continues to trade from most of the ground floor. I am next asked to assess Gill Noble's likely reaction to my findings and then hold that she will probably change her mind about the landlord doing the development. It is then said that I should conclude that the landlord does not at present "intend" to do the development because Gill Noble is likely to cause the landlord to change its mind.

389. The other way in which the second point is said to be relevant is in relation to the role of Gill Noble as funder of the development. As before, the Claimants submit that I

should assess the likely reaction of Gill Noble or of the family trust to my determination that it is possible to develop the upper parts as a Travelodge, while the tenant continues to trade from most of the ground floor. It is said that when I carry out that assessment, I will reach the conclusion that Gill Noble and/or the family trust are likely to decide not to fund the development. This will mean that the development will not be funded from that source and there is no other source of funds which has been identified in the evidence. The result will be that the landlord will be unable to obtain funding for the development and will be unable to carry it out. If necessary, the Claimants submit that the landlord does not have a "reasonable prospect", in that it does not have a "real chance", of obtaining funding for the development.

390. These arguments on behalf of the Claimants are very sophisticated. They all have a feature which is very unusual. They all involve the possibility of the court making findings which differ from the information previously given to one of the litigants and then predicting the reaction of the litigant to those findings and concluding that the attitude of the litigant expressed in evidence to the court will be reversed as a result of the litigant considering the findings of the court.

391. I will begin by considering the two points in so far as they concern the position of Gill Noble as a decision maker on behalf of the landlord. I first need to assess the extent to which Gill Noble was, and is, involved in making decisions on behalf of the landlord. In cross-examination she was asked whether the decision to serve a break notice on the tenant was her decision. She replied that she had been involved in the decision but she did not put herself forward as the only, or the ultimate, decision maker. At the end of her evidence, I asked her about the extent of her involvement with relevant matters. I asked her whether the decision to carry out the development was for her to make. She said that the other persons involved did ask her if she was happy to carry out the development. She would be asked, not because she would be funding the development, but because she was "part of it" and her opinion was sought. Mr Dalzell stressed in his evidence that he was not a shareholder in Jolan Ltd and the relevant decisions were for the shareholders, not for him. While this is correct, that way of putting it understates the influence which Mr Dalzell did exercise, and will continue to exercise, in relation to the decisions made by the landlord. It was clear from Gill Noble's evidence taken as a whole that she has relied, and will continue to rely, almost totally on the advice she has received, and will receive, from Mr Dalzell and from Mr Barnsley. There were many matters of detail which would be important for any proper decision making and which Gill Noble did not profess to know about, as she left those matters to others. Nonetheless, if she were to form her own view, as to whether to proceed with the development, and if she were to express that view then that view would be relevant to the landlord's decision whether to proceed with the development. Gill Noble expects, and is expected, to participate in such a decision as to the development. However, she would rely heavily on the views of Mr Dalzell and Mr Barnsley.

392. The Claimants referred to the various figures as to costs which were used by the landlord at different stages in working up the scheme of development. In April 2009, Mr Dalzell obtained from Mr Cooper, a quantity surveyor who has been engaged in relation to this project, some indicative figures for building costs in relation to the Travelodge hotel. Mr Cooper calculated a cost at £40,000 a room for a 157 room hotel, producing a cost of £6,280,000. It was recognised that this cost projection was a

rough, even crude, estimate but it was used to give Mr Dalzell an idea of the building costs involved. Later in April 2009, Mr Cooper marginally revised his figures and added an element for fees. In October 2009, Mr Cooper asked a firm of contractors, Marshall Construction, for their view as to the likely cost of creating a Travelodge on the upper floors. They provided their assessment in early December 2009. I will refer to this further below. Over a period from May 2009 to August 2010, Mr Dalzell prepared a number of appraisals to show the value of the completed development and the expected profit from a development. I was shown appraisals dated 5th May 2009, 9th July 2009, 7th October 2009, 7th December 2009 and 11th August 2010. In the first four of these appraisals the land value is taken at £3 million; in the last of these appraisals, the land value is taken at £5 million. In the last appraisal, the value of the completed development is shown as £20.85 million. The building costs are taken at £7,351,801. To this figure are added fees and other costs, including a fee to Travelodge and compensation under the 1954 Act. The gross development costs are shown as approximately £15.7 million producing a development profit of approximately £5.15 million.

393. The Claimants say that if I take the last appraisal and significantly increase the building costs, then the resulting profit will be significantly reduced. At the end of the trial, the Claimants did not go so far as to say that the development would make a loss but did submit that the profit would be reduced to a point where the landlord should reconsider whether the development remained worthwhile. The Claimants then made their case as to the figure which they said was a more realistic estimate for building costs.

394. Before I follow the Claimants down the path of considering the evidence as to costs, I need to express some caution about the appraisals I have been shown. It is true that they were prepared by Mr Dalzell on behalf of the landlord and the Claimants are entitled to refer to them in order to try to make their case. However, appraisals of this kind can be produced to show a great range of figures and a court needs to be careful before altering one part of an appraisal and coming up with a resulting recalculation. The Claimants focussed on the last appraisal prepared by Mr Dalzell. That took the land value at £5 million but the earlier appraisals took the land value at £3 million. If an appraisal of this kind were to be carried out by a valuer, the valuer would need to consider the existing value of the site. A change from £5 million to £3 million obviously makes a considerable difference to the resulting profit. No evidence was called by either side to help me with an expert view as to the land value at the present time. I was also told that whatever figure for building costs was used, there would be considerable capital allowances which could be claimed. There was no detail to back up this assertion but it was not contradicted. No figure was placed on the allowances available. No evidence was given as to whether, if a valuer were to carry out a development appraisal, tax allowances should be deducted from building costs.

395. I heard evidence from Mr Cooper who gave Mr Dalzell a rough estimate in April 2009. He explained that, in October 2009, he asked a firm of builders, Marshall Construction, to cost the proposed work. He knew that firm well and respected their abilities. They were on the Travelodge list of approved contractors and had experience of building Travelodge hotels. Marshall Construction provided what they called a contract sum analysis in early December 2009. This showed the costs for the Travelodge part of the development as £6,085,420. This did not include the sum of

£422,000 which the landlord has contracted to pay Travelodge for fixtures and fittings; nor did it include any cost for cathodic protection of the existing steelwork. After the Claimants had served expert evidence from Mr Hill, which contained a detailed breakdown of projected building costs, Mr Cooper was asked to carry out his own assessment. He put forward figures for building costs of £7,524,508, which represented some £6.8 million for the Travelodge works and some £730,000 for the ground floor and basement. Mr Cooper also explained how this project would be carried forward. It would be put out to tender on a design and build basis. He gave evidence as to the current state of the construction industry. He said that contractors could be expected to bid very competitively when tendering for this project. He would expect Marshall Construction to tender at a level similar to the figures they provided in December 2009, at any rate for the Travelodge part of the works.

396. I heard expert evidence from two witnesses in relation to the projected building costs. The landlord called Mr Hooper, who is an Associate Director of Wakemans; Mr Hooper is very experienced in relation to the matters he gave evidence about but he is not a chartered surveyor. The tenant called Mr Hill, a partner of EC Harris LLP; Mr Hill is a chartered quantity surveyor. The written evidence provided by these witnesses was extensive and they were cross-examined at considerable length.

397. The figures put forward by the two costs experts moved around somewhat as they met and discussed their rival positions and, to some extent, moved closer together. The essential differences between them appear from a joint statement they prepared on 24th January 2011 together with a Scott schedule which contained about 450 separate items, and a reworking of one part of that schedule which sought to set out some of the differences between the parties. I intend to refer to those documents as the source of the figures as to costs put forward by the experts. In their written closing submissions, the parties identified various figures as to costs which it was said should be derived from the evidence. The parties seemed to me to be using different figures from each other and from the documents to which I have referred. Neither side asked me to make precise findings as to the projected costs of the scheme and, accordingly, I need not further explore where the figures used in the closing submissions came from. However, I do need to refer to the figures in the documents to which I have referred to show the degree of difference between the parties.

398. The two costs experts went about their task in different ways. Mr Hooper based his estimates on a cost per bedroom basis for the hotel and a costs per floor area basis for the shell and core restaurant/retail units. He reviewed Wakemans' database for the actual construction costs for 42 Travelodge conversion projects and identified 4 projects in particular with a similar scope of works. He then applied the information from those 4 projects in order to assess an estimate of cost per bedroom. He then adjusted the cost per bedroom to reflect the specific circumstances of the building in question. His figures were a prediction of the price which he expected would be tendered by a design and build contractor. In this way, he showed the workings which produced a cost of £6,941,470 for the hotel element of the scheme. This figure was £44,213 per bedroom. He added £809,024 for the 3 ground floor/basement units to produce a total estimated cost of £7,750,494. To his estimated figures, there should be added £422,000, which the landlord had agreed to pay Travelodge as a contribution for fixtures and fittings. With that addition, Mr Hooper's figure would be £8,172,494.

399. Mr Hill's approach was to measure the quantities from the drawings and to use other available information to arrive at an estimate of the quantities of the necessary work. He then applied rates to those quantities. The rates were derived from projects of a similar nature to predict the figure that would be arrived at as a result of a tender for the scheme. Mr Hill showed his resulting estimate as a figure per square foot. He did not regard an assessment based on a rate per bedroom as helpful. In the second joint statement, Mr Hill's figures were: £8,967,689 for the hotel and £1,034,051 for the 3 ground floor/basement units. That totalled £10,001,740 and adding the payment to Travelodge of £422,000 the result is £10,423,740.

400. The most up to date analysis of the Scott schedule, showing further concessions and changes made by the two experts, showed a reduction in Mr Hill's figures from £10,001,740 to £9,335,792 which, together with the sum of £422,000 becomes £9,777,792. That analysis also shows figures for Mr Hooper which total £8,093,918 which together with the sum of £422,000 becomes £8,515,918. Mr Hooper produced these figures in response to Mr Hill's measured quantities and rates method but Mr Hooper explained that he adhered to his own lower figures based on the rate per bedroom derived from other Travelodge data, as I have already described.

401. All of these figures produced by the experts are higher than the figures used in the appraisals and higher, it seems, than the figures put to Gill Noble in the past.

402. Although the costs experts were cross-examined in detail by reference to a Scott schedule containing some 450 items, neither side in their closing submissions suggested that I should even attempt to make findings on the differences between the experts. I will however make some general comments on the expert evidence.

403. Mr Hill's method was meticulous and he spent some weeks arriving at his figures. If I were to make findings as to the likely cost of the development, I think that I would probably prefer to adopt a method using measured quantities and rates rather than to use a rate per bedroom based on other buildings, which are different to a greater or lesser extent, and then to try to make adjustments to bridge the gap of the extent to which the buildings were different. I would be interested in using the experience derived from other buildings as a cross check of the answer produced by the preferred method.

404. In relation to the views of the two experts on the items in the Scott schedule, each expert found himself on weak ground to some extent in relation to some of the items. The extent of the weak ground varied considerably. Some items involved modest sums while others were said to cost substantial sums. If I were to make detailed findings, I feel sure that I would have reduced Mr Hill's figures somewhat and increased Mr Hooper's figures somewhat. As I am not invited to make more precise findings, I do not think that it would be particularly accurate, in the absence of precise reasoned findings, for me to indicate where in the range between the experts the final decision might come.

405. Having made those remarks, I remind myself of what it is the Claimants submit that I should do next. They say that I should predict Gill Noble's reaction to the above findings, or even more precise findings, and then consider whether she would be likely to cause the landlord to change its mind about doing the development.

406. There are a number of points to make in relation to the exercise which the Claimants say that I should undertake.

407. The first point is that I doubt if the landlord would attach central importance to any findings I might make, based on the expert evidence as to costs. It is clear on the evidence that contractors are bidding keenly for work when it is put out to tender. I find that the landlord would certainly proceed to tender the scheme and see what figures were then produced. I expect that Marshall Construction will be on the tender list. Mr Cooper has given evidence that he expects that Marshall Construction will tender at the level of their figures provided in December 2009. I feel sure that the landlord will give a lot of weight to that view. Thus any findings I might make as to costs would not change anything very much. The landlord would go out to tender and see what that produced. I do not think that I can confidently predict what the tender figures will be. I have a strong suspicion that they will not be as high as the figures spoken to by the expert witnesses as to costs. Even if they were as high as Mr Hooper's figures, a professionally carried out appraisal would probably show a profit. The same would probably apply even if the figures were as high as Mr Hill's figures.

408. The second point to consider arises from the fact that the landlord has contracted under four agreements for lease to use all its reasonable endeavours to secure the termination of the existing lease. The Claimants would no doubt say that the landlord has performed that obligation by bringing the 1954 proceedings and submitting to the court that it has established its ground of opposition. The Claimants would say that if the court finds against the landlord, by accepting the tenant's submission on this point (based on the court's present prediction as to what might happen in the future), then the landlord would not be in breach of contract. That submission may be right. However, in making my assessment of what the landlord is likely to do in the future following this judgment, I need to bear in mind that the landlord would be unlikely to make a decision which would expose it to the risk of a claim that, by making that decision, it was failing to use its reasonable endeavours and, in any case, I find that such a decision would cause it considerable reputational damage.

409. The third point is to recall that the possibility of developing this building has been under consideration for many years. It is plain that the landlord regards the development of this building as highly desirable. The landlord has worked up a scheme, obtained planning permission and agreed four pre-letting agreements. The scheme now has considerable momentum. The landlord has fought this litigation, which has been hard fought and at times bitter, to get its way. If I find that the only thing which stands in the way of the landlord doing the development is the landlord continuing to intend to do it, I think that it would take a great deal to persuade the landlord not to go ahead. I am not predicting that the landlord would act irrationally or foolishly from a financial point of view but, nonetheless, the momentum of the proposed development is driving it powerfully forward.

410. Gill Noble was cross-examined as to the attitude she had adopted to the estimated costs of the development and how she might react to a finding by the court that the figures she had been given were too low and higher figures were more appropriate. She expressed considerable confidence in the figures which had been provided to her. She was cross-examined, in particular, as to her reaction if it were held that a proper estimate for the costs would be £12 million, or £4 million or £5 million more than the figures she had been given. She accepted that she would be concerned if the court

held that the figures she had been given were £5 million too low. She would want to discuss that with Mr Dalzell. She agreed that the family trust had agreed to provide funding for the development. It was expected that the costs would be in a sum of the order of £7.5 million. When re-examined, she was asked whether she would still want the development to go ahead even if she had been misled by Mr Barnsley or Mr Dalzell in the various ways that had been suggested to her in the course of her cross-examination. The various figures which had been provided by the professionals involved in the development and the expert witnesses were put to her and she stated that she had more faith in the witnesses to be called on her side as compared with the expert to be called by the Claimants.

411. In my judgment, having considered the evidence I have been given and the various points arising, I am not persuaded that the landlord's otherwise settled intention to do the development is likely to change for any reasons connected with the likely cost of the scheme. Indeed, I am able to find that it is improbable that the landlord will change its firm settled intention to carry out the proposed scheme. I should add that although I have considered in detail the Claimants' argument which involved me in attempting to assess what the landlord's attitude might be following the landlord studying the findings made in this judgment, I am sceptical as to whether the landlord's approach is the correct one in the first place. In my judgment, there is much to be said for the view that I should confine myself to assessing the genuineness of the evidence given by the landlord at the trial. In this case, the landlord has given reliable evidence that it has made up its mind and that its mind is settled and that is so notwithstanding all the matters raised by the tenant as to the difficulties which might lie ahead. The landlord is well aware of what the tenant says the difficulties are and that awareness has not altered its intention. I incline to the view that the court should act on that evidence and hold that the landlord's intention is settled and the ground of opposition is thereby established, without attempting to make predictions about future changes of mind based on the way in which the court expresses its findings of fact on certain matters. As it is, I have followed through the steps urged on me by the Claimants but I am not able to accept the result for which they have contended.

412. It is next useful to consider the evidence I heard as to the cost of the scheme and its relevance to the question of funding from Gill Noble's family trust. It seems to be accepted by the Claimants that, at the lowest, the landlord has a reasonable prospect of obtaining funding from that source for the costs that have so far been identified in relation to the scheme. I do not think that Gill Noble would participate in a decision to carry on with the scheme, notwithstanding the points made about the likely costs involved, and then in her role as funder of the scheme, decide not to fund the scheme which the landlord has decided to continue with. In addition to the points I have considered above as to the landlord's desire to continue with the scheme, there is a separate point which would be relevant to the attitude of the funder. The last appraisal carried out by Mr Dalzell showed the value of the completed development as £20.85 million. The freehold of the building is not charged to a bank, or anyone else, so that there will be adequate security for repayment of the funds which will be needed to complete the development. Although Gill Noble gave evidence that she did not know what was proposed in relation to security for repayment, she said that the question of security was for the professionals to discuss. It seems to me to be likely that the funder will wish to have security for repayment but such security is available. Accordingly, I find that the landlord has at the lowest a reasonable prospect of

obtaining funding for the costs of the scheme, notwithstanding the many points which have been raised as to precisely what those costs might turn out to be. In those circumstances, it is not necessary to consider whether and when the landlord would seek bank funding, instead of funding from Gill Noble's family trust, and whether and when bank funding might be available.

413. The Claimants' second point as to intention concerned the information which Gill Noble had been given as to the impossibility of carrying out a development of the upper parts while the tenant continued to trade from the ground floor of the building.

414. Gill Noble confirmed that she had been advised that it was necessary to recover possession of the ground floor of the building in order to carry out a development of the upper parts as a Travelodge. Mr Dalzell said in his witness statement that the development of the upper parts could not take place without obtaining possession of the ground floor. Mr Barnsley said in his witness statement that it would be impossible to develop the upper parts with a ground floor tenant in occupation. He added that, in any event, the landlord wanted to develop the ground floor to maximise the rental income from the building.

415. The tenant now says that it has become clear in the course of the trial, with the assistance of the expert evidence from engineers and project managers that it is possible to develop the upper parts as a Travelodge, while the tenant continues in occupation of the ground floor. The tenant submits that in the light of that fact which has now emerged, Gill Noble should think again about whether the landlord should proceed with the development and, if and when she does think again, she will decide to allow the tenant to remain on the ground floor. The tenant then submits that this will produce the result that the landlord will not want to develop the ground floor and in view of the clear statement made by the landlord's leading counsel at the trial that the landlord did not want to do a development restricted to a Travelodge on the upper parts of the building, the result would logically follow that the landlord would not want to carry out any part of the current scheme. Accordingly, the landlord's declared intention to carry out the scheme is likely to change, the landlord has failed to prove the necessary intention and has failed to establish its ground of opposition.

416. The tenant relies on certain answers which Gill Noble gave when she was cross-examined. She was asked for her reaction to any subsequent finding by the court that it would be possible for the tenant to remain in the ground floor while the upper parts were developed as a Travelodge. She replied that she did not think that could be done. She was asked whether she would allow the tenant to remain on the ground floor if the court held that was possible during the development of the upper parts. She replied: "Well, if that is what the judge had decided, yes, I would". If one reads the relevant question and answer literally, she appeared to be saying that she would permit the tenant to remain on the ground floor if the court held that this would be possible while the upper parts were developed. However, before I conclude that that has become her position, I need to consider this answer in connection with other answers which she gave on this matter. She later answered a question about allowing the tenant to remain, if the cost of the works would be increased as a result of the tenant's occupation, by saying that she would have to think about what her reaction might be and that she really did not know. She was asked for her reaction if she found that she had been mis-informed, by Mr Barnsley and Mr Dalzell, about the tenant's ability to remain in the ground floor during the development of the upper parts and

she replied that she did not think that she had been but, if so, she would have to think about it. Later still when she was asked about whether she would agree to allow the tenant to remain on the ground floor while the upper parts were developed she repeated that she would have to think about it. At the end of her evidence, I asked her if she had any settled position about allowing the tenant to remain on the ground floor while the upper parts were developed, if it turned out that that was possible. Her reply was again that she would have to think about it. She did not know whether the landlord was free to agree to that in view of the various agreements for lease which had been entered into. In the light of her evidence as a whole, I conclude that when she said that she would allow the tenant to remain, in view of the court's decision, she was accepting that she would allow the tenant to remain on the ground floor if the court decided that had to be the case. Accordingly, I find that she has not agreed to the tenant remaining in the ground floor if the court finds that it is possible for the tenant so to remain while the upper parts are developed as a Travelodge.

417. There is, in any event, an obvious flaw in the tenant's reasoning. Even if the evidence suggested that Gill Noble might think again about allowing the tenant to remain on the ground floor while the upper parts were developed as a Travelodge, part of the tenant's submission is to the effect that the landlord has declared its intention not to do the Travelodge development on its own. Thus if one combines the various parts of the tenant's submission I am being asked to find that the landlord is likely to change its intention to carry out the development because it will instead decide to allow the tenant to stay in the ground floor and at the same time it will decide not to do the Travelodge development. I do not think that anything in Gill Noble's evidence supports the idea that a *volte face* on that scale on the landlord's part is likely to happen. Further, there is nothing in the history of the matter which suggests that the landlord is likely to give up its present scheme of development.

418. Indeed, another part of the tenant's submissions, which criticise the landlord for acting in the way it did, makes a powerful case for holding that from an early point the landlord was not interested in allowing the tenant to remain on the ground floor and the landlord was determined to get the tenant out of the whole building come what may. The tenant submits that shortly after the demerger, the landlord decided not to honour the expectation of Philip's side to be able to continue to trade from the ground floor. The tenant submits that this decision was not because possession of the ground floor was needed to redevelop the upper parts. The decision was made because the landlord considered it would be more profitable to develop the whole building with retaurant/retail use on the ground floor. The tenant further submits that the landlord made no attempt to see if there was a way in which the building could be developed while the tenant continued in occupation of the ground floor. The tenant also submits that since the landlord served its break notice on 26th October 2009 it has been determined to recover possession of the ground floor from the tenant and although it attended a meeting on 4th December 2009 to discuss ways in which the tenant might remain on the ground floor, the landlord was never genuinely interested in that possibility and simply pretended it was.

419. Those submissions by the tenant, developed at length with copious references to the documents and the evidence, make it very difficult to understand the submission which I am now considering that Gill Noble, after all that has happened, is now

agreeable to letting the tenant remain on the ground floor, to not developing the ground floor and, indeed, to not developing the upper parts as a Travelodge.

420. Of course, the landlord might say that it wishes to put its argument in the alternative. It might want to say: either the landlord was implacably opposed to allowing the tenant to remain or, alternatively, Gill Noble is now ready to allow the tenant to remain. That is not so far how the argument has been put.

421. In any event, I find that for a considerable time the landlord has had a firm settled intention to recover possession of the ground floor and to carry out its proposed scheme. I find that the landlord did persuade itself that it needed the ground floor to carry out the development of the upper parts. It was convenient for the landlord to persuade itself of that because it enabled the landlord to present itself in a more favourable light to the tenant. However, the landlord was not ready to be persuaded by the tenant that the parties could live together, with the landlord developing the upper parts and the tenant remaining on the ground floor. The landlord wanted to show, and set out to show, that the tenant had to leave. If it is now revealed by the expert evidence at the trial that the tenant could remain on the ground floor while the upper parts are developed as a Travelodge, I see no reason to think that the landlord will change its mind and after all allow the tenant to stay. I find that Gill Noble's attitude is the same as the attitude of Mr Dalzell and Mr Barnsley in this respect. I find that her answers in cross-examination about not knowing what she would do were her way of avoiding an embarrassing question. It is probably true that Mr Dalzell was quite clear in his mind from an early stage following the demerger that it was desirable to get the tenant out and it took time before Gill Noble also formed that view. It may be that Gill Noble initially thought that the tenant could stay. Then she may have thought that it might be possible for the tenant to vacate during the works and then return. But as time went by, Gill Noble participated in decisions by the landlord by which the landlord committed itself more and more to a development which meant that the tenant had to go. The landlord obtained planning permission for a development which did not include an arcade. The landlord pre-let the three units on the ground floor and basement.

422. In addition, this trial has taken place. The relationship between Philip Noble and Gill Noble was not previously a close one. In these proceedings, Philip Noble has said that Gill Noble and the rest of Gill's side have behaved unconscionably and have been guilty of equitable fraud. This case has been strenuously resisted. The case has been hard fought. Gill's side have succeeded on the issues which have been argued. The only thing which stands in the way of the landlord doing the development is the landlord continuing with its decision to carry out the proposed scheme. I see no prospect of the landlord acting in any other way.

423. In addition to the above considerations, some of the matters which I referred to when I held that the landlord would continue to intend to carry out the proposed scheme, notwithstanding the uncertainty as to cost, apply in relation to the present point also.

424. In view of the above conclusion, I do not think it is necessary to describe in detail the technical evidence from the engineers and project managers. I will assume that it is physically possible to carry out a development of the upper parts as a Travelodge while the tenant remains in the ground floor. It is also right that the landlord has not done very much to call evidence as to what the consequences would be, in terms of

time and cost, if it were to try to develop the upper parts while the tenant remained on the ground floor. The landlord's evidence was prepared in an attempt to show that it would be impossible for the tenant to remain and did not really try to measure the extra time and the extra cost which would be involved if the tenant did remain.

425. Notwithstanding the fact that the landlord's evidence has not addressed in much detail the question of whether extra time and cost would result from the tenant remaining, I think that I am able to hold that the presence of the tenant would complicate the development of the upper parts. If the tenant remains on the ground floor and if it is possible to erect a tower crane in one of the ways identified by the tenant's engineer, Mr Walsh, one would want to consider the desirability from the landlord's point of view of adopting one method or another. The tenant's presence also complicates matters such as getting materials into the building, storing materials in the building, waterproofing the ground floor while work is being done above and completing the development after the crane has been removed. If the landlord was determined to allow the tenant to remain, these complications could be addressed and the extra time and cost considered. In the present case, as I have held, the landlord has a firm settled intention to recover possession from the tenant. The fact that it would be complicated to allow the tenant to remain only makes it less likely that the landlord will now change its mind.

426. In view of my finding that the landlord has a firm settled intention unlikely to be changed to carry out the proposed scheme, notwithstanding the evidence which has emerged from the engineers and project managers and in view of my earlier findings as to Gill Noble's attitude to funding the development, there is no separate point as to funding that needs to be considered in relation to the second question.

427. Finally, on the question of intention, the tenant submitted that Gill Noble had been misled about the events concerning the Palatine as a result of which she regarded the tenant in a bad light. It was submitted that if she had known what were said to be the true facts about the Palatine, she would revise her attitude to the tenant and allow the tenant to remain on the ground floor. I can deal with this submission shortly. I do not intend to make findings about the whole sub-plot represented by the Palatine. I do not think there is any reality in the submission that Gill Noble now intends to view matters differently and to cause the landlord to agree to the tenant remaining on the ground floor.

The overall result

428. I find that the landlord has served a valid notice under the break clause in the lease and a valid notice under section 25 of the 1954 Act. The landlord is not bound by any contract or estoppel or trust which prevents it serving and relying on those notices. The Claimants are not entitled to any of the relief which they claimed in the main claim. It follows that I will dismiss the main claim.

429. I find that the landlord has established the ground of opposition in section 30(1)(f) of the 1954 Act. It follows that I will make a termination order under section 29(2) of the 1954 Act.