Neutral Citation Number: [2024] EWHC 1240 (Ch)

Case No: PT-2022-000667

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

Rolls Building
Fetter Lane
London, EC4A 1NL

24 May 2024

Before :

MRS JUSTICE BACON

- -

Between :

The Tropical Zoo Limited

Claimant

- and -

The Mayor And Burgesses Of The London Borough Of Hounslow

Defendant

- -
- -

Julian Greenhill KC and Ernest Leung (instructed by **Forsters LLP**) for the **Claimant**
Martin Hutchings KC and Daniel Petrides (instructed by **Bevan Brittan LLP**) for the **Defendant**

Hearing dates: 22–25 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 10 am on 24 May 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

MRS JUSTICE BACON:

Introduction

1. This is a dispute about a lease of approximately 25 acres of land currently designated as green belt (**the Site**), which was granted by the defendant council (**LBH**) to the claimant

(**TZL**) in March 2012 for the purposes of use as a centre for education, conservation and leisure including a tropical zoo visitor attraction and associated facilities. The Site lies to the south-west of Faggs Road, East Bedfont, TW14 0LZ, and is near Heathrow airport. The lease included covenants requiring TZL to construct a zoo building and education centre within two years of the grant of the lease.

2. Since taking on the lease TZL has run Hounslow Urban Farm on the Site, with a collection of (currently) around 489 vertebrates, including mammals, birds and reptiles, plus 73 invertebrates. It has not, however, constructed the zoo, or even commenced construction of the proposed zoo building. LBH now seeks the forfeiture of the lease for non-compliance with the relevant covenants. TZL contends that Hounslow has waived its right to forfeit, or alternatively that the court should grant relief from forfeiture.

3. The proceedings were initiated by TZL on 3 August 2022 with a claim for declaratory relief that the lease is not liable to be forfeited, alternatively requesting relief from forfeiture. LBH defends the claim on the basis that it has not waived its right to forfeit, and that the court should not grant relief from forfeiture. LBH has since issued a claim for possession in the County Court at Central London, which has been stayed pending the determination of TZL's claim.

4. While TZL is the tenant under the lease and the claimant in these proceedings, the litigation is in fact being funded and run by a property development company called Canmoor. A subsidiary of Canmoor, Hounslow Ventures Ltd (**HVL**), has entered into a Call Option Agreement with TZL which provides an option for it to purchase TZL's shares, and it is said that the option will be exercised if TZL is successful in this litigation. Canmoor's hope is that it will ultimately be able to exploit the lease in order to use most of the Site for an industrial park serving Heathrow airport. In reality and substance, therefore, this is litigation between Canmoor and LBH.

5. At the trial, Mr Greenhill KC and Mr Leung represented TZL, and Mr Hutchings KC and Mr Petrides represented LBH. I heard submissions from all four counsel, and am very grateful for their assistance.

Witnesses

TZL's witnesses

6. TZL relied on the evidence of two witnesses. Alice Purdy is a shareholder and employee of TZL and has, together with her father Tony Purdy, run TZL since it was incorporated in 2011. She also previously ran a similar operation with her father at Syon Park in Brentford. Her evidence explained the background to the grant of the lease, TZL's efforts since the grant of the lease to secure funding for the construction of the zoo, and its discussions with LBH during that time. She did not, however, have a clear recollection of some of the events many years ago, including the negotiations with various prospective funders which had been primarily conducted by her father. Nor did she have a good understanding of various of the legal documents. It was apparent that since Canmoor has become involved, it has effectively directed the litigation strategy and its solicitors have drafted letters on behalf of TZL. Nevertheless, in relation to the question of why TZL continued to pay rent after service of the s. 146 notices by LBH, I consider that Ms Purdy knew and understood more than she was willing to admit.

7. Andrew Ellis is a director of TZL and has been a minority shareholder since 2016. His role has been to assist TZL in finding external investors to support their business and build the zoo on the Site. Most recently, he has been the primary point of contact between TZL and Canmoor, and he gave evidence as to what he understood to be Canmoor's position in relation to the exercise of the call option and the construction of the zoo if TZL were to prevail in these proceedings. He could not, however, speak for Canmoor and was not authorised to do so. Canmoor could have provided evidence itself in the proceedings, but chose not to do so. Accordingly, while Mr Ellis made repeated comments as to his beliefs as to Canmoor's intentions and financial position, those comments were simply speculation (and perhaps hope) on his part.

8. It is also unfortunate that unredacted versions of the Call Option Agreement, Share Purchase Agreement and subsequent side letter extending the option period were provided by TZL only on the last day of the trial, after the close of the evidence on both sides. The versions of these documents previously provided had redacted all of the figures for the amounts paid by Canmoor or its subsidiaries to TZL and its shareholders, and the amounts to be paid if the call option was exercised. Mr Hutchings noted that if the unredacted documents had been available at the start of the trial, he would have wished to ask Ms Purdy and Mr Ellis questions about those figures and how the sums already paid had been spent. It was very unhelpful for the relevant figures to have been withheld until the last minute, and no explanation was given as to why the unredacted versions of these documents were not provided well before the trial.

LBH's witness

9. LBH relied on the evidence of a single witness, Dawid Miszkurka. Between 2016 and 2023 Mr Miszkurka was an associate director at Avison Young, which is LBH's agent for the Site and was responsible for sending demands for and collecting payments of rent from TZL. Mr Miszkurka was the main point of contact between LBH and Avison Young relating to the property, and his evidence explained the way in which incoming rent payments are dealt with by Avison Young, LBH's instruction in February 2021 not to accept further rent payments from TZL, and Avison Young's handling of rent payments which were subsequently made by TZL. Mr Miszkurka was a patently straightforward and honest witness, whose evidence was clear and reliable.

Factual background

The negotiations for the lease

10. From 1998 until 2012 the Purdys operated an animal rescue centre and zoo in the grounds of Syon Park stately home in Brentford. Their lease for the Syon Park site came to an end in 2012, and the Purdys were therefore looking for a site to relocate the zoo. In 2008, in anticipation of the end of the Syon Park lease, they approached LBH in the hope of finding an alternative site within the borough.

11. The Site was identified as a potentially suitable location in or around 2009. At the time it consisted of parking spaces, an Urban Farm which had become very run-down, and unused greenfield land. The Purdys' ambition was to build an indoor replica of a tropical rainforest on the site, as both an educational centre and leisure attraction.

12. The proposed zoo building required planning permission, which took several years to be approved by LBH. One of the reasons for the delay was that the Site is green belt land, such that the grant of planning permission required the approval of both the Mayor of London and the Secretary of State. Planning permission was eventually granted by LBH on 7 March 2012, permitting the construction of a zoo building and associated facilities (including classrooms and an adventure play area) at the eastern end of the Site.

13. LBH's original proposal was to grant TZL a lease of the site of the zoo building, to enable it to relocate the animals there from the site at Syon Park. Once it became clear, however, that the zoo building would take up to two years to construct, LBH revised its proposal and suggested the grant of a building licence over the site of the proposed zoo building, together with a temporary lease of the Urban Farm site so that TZL could temporarily relocate and house its animals on that site until the zoo building was constructed. Once the zoo building was complete, it was envisaged that the zoo animals would transfer there, and the tropical zoo would then be managed as one operation together with the Urban Farm, with a long lease of both sites.

14. TZL requested instead the grant of an immediate long lease, on the basis that it would need this to secure funding for the zoo building. TZL's note of a meeting with LBH on 13 October 2011 referred to

> "The need for a 125 year lease to be granted now rather than after the zoo is constructed.
>
> [TZL's representative] explained that the funders would not advance money to construct the zoo if they could not have an immediate legal charge on the land. After some discussion [LBH's representative] suggested that this would probably not be a problem if the lease contained a provision for forfeiture if the zoo was not built by a long stop date."

15. Following the meeting TZL wrote to LBH on 17 October 2011 saying that its (unidentified) funders

> "do not want a provision for forfeiture if the Zoo is not built by a longstop date. Even a 'step in' provision … does not appeal to them. They are not happy about the prospect of being forced to build out something that has a questionable re-sale value and they are not equipped to run the Zoo themselves."

16. LBH was, however, insistent that there had to be a provision for forfeiture if the zoo building was not constructed within a certain period. There were some discussions about the length of that period, and the lease ultimately specified a two-year construction period.

17. There were also discussions about the rent payable, with the parties eventually agreeing a two-year rent-free period while the zoo was being constructed, and a gradually increasing turnover rent thereafter, subject to minimum specified amounts. That represented a significant benefit for LBH, which had previously been subsidising the Urban Farm to an amount of approximately £40,000 per annum.

18. The 125-year lease was eventually granted on 7 March 2012, the same day as the grant of planning permission for the zoo.

Terms of the lease

19. Clause 1.1 of the lease includes the following definitions:

> "**'Authorised Use'** means use as a centre for education conservation and leisure including a tropical zoo visitor attraction with associated facilities including a restaurant shop classrooms animal welfare centre and adventure play area;
>
> …
>
> **'Notice'** means written notice and **'Notify' 'Notifies' 'Notified' 'Notifying'** and **'Notification'** are construed accordingly;
>
> …
>
> **'Tenant Covenant'** means a 'tenant covenant' as defined by section 28 Landlord and Tenant (Covenants) Act 1995 and refers to the relevant covenants terms obligations and conditions in this lease and any ancillary documents with which the Tenant undertakes to comply and **'Tenant Covenants'** is construed accordingly;
>
> …
>
> **'Zoo Building'** means the building to be constructed by the Tenant as part of the Tenant's Works on part of the Premises in accordance with the Planning Permission."

20. Clause 3 provides:

> "**3. Tenant's covenants**
>
> 3.1 The Tenant covenants with the Landlord to observe and perform the Tenant Covenants."

21. Clause 5.1.1 sets out the proviso for re-entry for breach of the Tenant Covenants, as follows:

> 5.1.1 If at any time: … (ii) there is any material breach of the Tenant Covenants … the Landlord may (even if the Landlord has waived any previous right of re-entry) re-enter the Premises or any part of them and the Term will then end but without prejudice to any remedy of the Landlord for any breach of covenant."

22. Schedule 2 to the lease is headed "Covenants by the Tenant". It includes the following paragraphs:

> "**9 <u>Remedy breaches</u>**
>
> 9.1 To remedy any breach of a Tenant Covenant Notified by the Landlord to the Tenant as soon as possible and in any event within two months after service of the Notice.

9.2 If the Tenant does not comply with paragraph 9.1 to:

9.2.1 allow the Landlord to enter the Premises to remedy the breach;

9.2.2 pay to the Landlord on demand as a contractual debt all costs and expenses incurred by the Landlord in remedying the breach.

…

13 Use

13.1 Not without the prior written consent of the Landlord to use the Premises except for the Authorised Use.

…

25 Zoo Building

25.1 To complete the construction of the Zoo Building in accordance with the provisions of Schedule 4 of this Lease."

23. Schedule 4 to the lease sets out in detail the covenants regarding the construction of the zoo building by TZL. These include in particular:

"**5. Doing the Works**

5.1 The Tenant shall finish the works within 2 years from the date of this Lease.

…

12. Landlord's step-in rights

12.1 If the Tenant commences the Works but does not finish the Works within 2 years of starting them then the Landlord may:

(b) enter the Premises and complete the Works; and

(c) recover the money it spends in doing so from the Tenant as rent in arrear with interest from the date the Landlord spends the money until the date it is reimbursed in cleared funds.

12.2 The Tenant agrees to the rights of entry referred to in this paragraph 12 and shall not obstruct their exercise."

(Paragraph 12.1 does not appear to have had a subparagraph (a), which is presumed to be a typographical error.)

24. The provisions for rent are summarised in Schedule 5 as follows:

Year of Term	Turnover Percentage (%)	Minimum Rent (£)
1 & 2	nil	nil
3 & 4	0.5%	7,500
5 & 6	1.5%	10,000
7 & 8	2.0%	10,000
9 & 10	3.0%	15,000
11 & 12	3.5%	15,000
13 & 14	4.0%	20,000
15 & 16	4.5%	20,000
17 onwards	5%	30,000

Attempts to fund the zoo building

25. Pending the construction of the zoo building, TZL moved its animals, birds, reptiles, fish and insects to the Urban Farm, which it has since operated as family visitor attraction. The intention was, however, for the tropical animals ultimately to be relocated in the zoo building when constructed.

26. At the time of the initial negotiations between TZL and LBH as to the terms of the lease, TZL had a potential investor who had indicated interest in investing up to £2m for the construction of the zoo building. On 19 January 2012, two months before the lease was granted, TZL informed LBH in an email that work on the construction of the new zoo building was scheduled to begin eight weeks after the lease had been signed.

    Unfortunately, by the time the lease was granted the investor had withdrawn from the project, and TZL therefore had to seek alternative funding.

27. By March 2014, the long-stop date in the lease, TZL had still not secured funding and had therefore not commenced work on the zoo building. On 31 July 2014 the Purdys had a meeting with LBH at which they were told that they were in breach of their lease obligations and that the council was looking at the development or sale of some of its green belt sites to meet a large deficit. An email from Ms Purdy to an LBH representative, describing the meeting, recorded that

> "We were told by Mr Borrell [the LBH Asset Manager] that the council have 50 million (?) deficit and they are looking to property to fill most of it. And they have been looking at another green belt site for development/sale … the main focus was that we were in breach of our lease by not having the building up within 2 years and implied that even if we managed to get £2 million tomorrow it would only go some way towards us being allowed to build The Tropical Zoo but extensive negotiations would have to be had.

> We did explain the previous meetings we had … that the council wanted to help us by giving us more time to raise the money and to complete the building. He said, the council has changed a lot in 2 years."

28. An internal LBH email on 7 August 2014 noted that TZL was currently making a significant loss and was in breach of the lease conditions:

> "… they have not constructed the Tropical Zoo in accordance with the planning permission by the deadline as the investors pulled out some time ago. The site will cost £2.4m to build and we are not reassured that, based on conversations, they will get this investment in the near future, if ever. …
>
> … we do have some major concerns that their existing business model is not financially viable and would pose a risk to the council in the longterm."

29. It is apparent that LBH was, around that time, pushing TZL for a business plan for the zoo in order to inform the council's decision-making. On 17 September 2014 Ms Purdy sent LBH a business plan which had been prepared with the assistance of external consultants. LBH's internal emails show that it was concerned about "the lack of detail regarding the raising of finance and timetable … we still have no idea when and if they will get the finance in place to build the Tropical Zoo in accordance with their commitment under the lease."

30. Around the same time LBH received a proposal for a rival children's attraction including a small petting zoo, operated by Hobblers Heath, which it went on to approve. Internal LBH emails recorded that the Hobblers Heath proposal would bring significant investment into the borough, would employ around 180 staff, had committed funds in place, and was overall a solid proposal which was well received. By contrast, while LBH continued its dialogue with TZL as to the proposed source of funding for the zoo building, LBH was clearly frustrated that TZL had failed to provide a proper business case for the funding of the zoo, or any timescales for the project. LBH therefore started to consider the possibility of forfeiture proceedings to terminate the lease of the Site to TZL.

31. By late 2014 it appears that TZL proposed constructing a safari park and golf course on the site, as an enabling project to fund the zoo building. This was discussed at a meeting with LBH in February 2015. The council remained concerned about the lack of detail regarding the financial support for this proposal, and on 22 July 2015 Mr Borrell emailed the Purdys in the following terms:

> "Thank you for meeting … in February to discuss the potential plans for the Urban Farm and your safari proposal. As highlighted at the meeting the plans, whilst ambitious, lacked detail/ a thorough and viable business plan which provided reassurance of funding to develop the above site/ Tropical Zoo in accordance with your lease commitments.
>
> I have been asked to request that you now provide … your detailed businessplan for the development of the Tropical Zoo and the above site in accordance with your lease commitments. Considering the time that the Council has already given you to do this I must now ask that this is provided by 16th August 2015."

32. The safari park proposal was not, however, pursued by TZL. Instead Ms Purdy replied on 28 July 2015 reporting that "as of last week we have signed 2 investors to build our Tropical Zoo rescue centre". Those investors were Mr Ellis and a business partner. LBH then asked to be sent a revised business case for the proposed investment. By 21 September 2015 nothing had been provided, and LBH sent an email to TZL saying:

> "The Council has a long outstanding request to be provided with business plan for The Tropical Zoo's future before meeting with Alice and Tony and perhaps now yourself?
>
> The reason for this as you may be aware is that The Tropical Zoo Limited is in breach of its lease covenants. The Council has held back from enforcing the lease covenants to allow Alice and Tony Purdy the opportunity to put forwards a business plan that sets out a viable future for the site that will enable the Council to take an informed view. For the avoidance of doubt the up to date business plan will require evidenced details of the funding package for the delayed development of the zoo building as well as predicted turnover figures."

33. Ms Purdy forwarded this request to Mr Ellis with the comment that "under normal circumstances the Council would not be entitled to insist on seeing a business plan but, since we are seriously in breach of our lease covenants, we really cannot refuse to produce one. Personally, I believe the Council will terminate our lease if we do refuse."

34. On 16 October 2015 a one-page document entitled "Funding Strategy" was provided to LBH. It stated that the current quote for constructing and fitting out the zoo was £2.766m including VAT, plus an allowance for contingencies, making a total funding requirement of £3m; that the entire funding was to be provided by way of a 15-year loan from two investors led by Mr Ellis; and that the funding would be drawn down in instalments as the construction work progressed.

35. This proposal proceeded as far as a detailed planning meeting with LBH on 27 October 2015, and then (yet again) went no further. As Mr Ellis explained when cross-examined about this, the reason for his withdrawal as an investor was that he was concerned about the commercial viability of the project. Instead, he acquired a 10% shareholding of TZL and became one of its directors, with his role as described above being to seek to negotiate alternative outside investment.

36. The next potential investor was Steve Sampson, one of the founders of Paradise Wildlife Park in Hertfordshire. He appears to have been introduced by Mr Ellis in 2016, and his proposal was a leisure development on the Site. Since that proposal differed from the zoo building for which planning permission had been obtained, TZL would have had to submit a new planning application for the development.

37. This proposal was discussed with LBH at a meeting on 2 March 2017, and a proposed timetable for the application was sent by Mr Sampson to LBH the following week. On 15 March 2017 LBH wrote to TZL repeating that it remained in breach of its lease obligations, and stating that:

> "We are prepared to offer a 6 month period for you to prepare and submit a planning application to progress this development but this must be

> accompanied by a comprehensive business plan detailing how this building will be financed. Failure to undertake and submit these documents within the agreed timescales will be deemed as failure to comply with the terms of your lease and forfeiture proceedings will be commenced."

38. Although Mr Sampson told LBH on 18 March 2017 that he was TZL's new business partner and shareholder, and that "the ink is still drying on the contract and transfer of shares", Mr Sampson did not, in fact, ever conclude an agreement with TZL, and did not become a shareholder of TZL. Instead, it appears that by the autumn of 2017 he had fallen out with the Purdys and had withdrawn from the project.

39. In November 2017 TZL put forward a further proposal, for a specialist sports medicine centre to be constructed on the Site by the OASG group, with an undertaking to commit £3m funding to build the zoo and relocate the Urban Farm to be integrated with the zoo. There was a meeting between TZL and LBH on 14 November 2017 to discuss that proposal. It was attended by Mr and Ms Purdy, Mr Ellis and TZL's architect Peter Fennell (although Mr Ellis said, in his oral evidence, that he was asked to leave the meeting). Later that day Mr Fennell sent the Purdys a draft of an email for them to send LBH, attaching the detailed OASG proposal, recording the discussion at the meeting, and making further comments regarding the proposal. Ms Purdy forwarded the email to LBH the next day.

40. TZL has subsequently claimed that at the 14 November meeting LBH told it that it should not build the zoo, and Ms Purdy repeated that claim in her oral evidence. That claim is, however, squarely contradicted by the terms of the TZL's 15 November email, in which TZL explicitly thanked LBH for its "continuing support for the work of the Urban Farm and the 'act local, think global' vision it offers together with Tropical Zoo," and set out the funding which OASG proposed to commit for the purposes of the zoo building. While the email recorded that there had been discussion at the meeting regarding LBH's proposals to de-designate the Site from the green belt, and to reallocate the surplus land on the Site for airport or light industrial uses, nothing in the

    email suggested that LBH had indicated that it did not want the zoo to be built. What LBH in fact appears to have said, as recorded in the email, was that it was "against any form of development funding UF:TZ's [the Urban Farm/Tropical Zoo's] capital needs" – i.e. it did not support TZL developing the land itself (or with a third party) to fund the zoo.

41. It is also clear from the email that TZL was seeking to persuade LBH to reconsider that position, commenting that "we hope that the attached proposal will encourage elected members to consider the wide range of benefits that could flow from that approach in the form on offer from OASG group". LBH apparently did not change its position and the OASG proposal then lapsed. Early the following year there was a further attempt with a different developer, Abernile Limited. That proposal likewise did not gain any traction with LBH.

42. It is common ground that throughout this period LBH continued to accept rent from TZL. TZL contended that between May 2018 and October 2020 LBH made no further demands for the zoo to be built. It is correct to say that the materials before the court do not show a direct request by LBH for the zoo to be built, during that time. It is, however, apparent from email exchanges between LBH and TZL that LBH made several attempts to arrange

a meeting with TZL in April 2019, to discuss TZL's "current plans and the future of the Urban Farm". TZL made various excuses seeking to defer the meeting, saying that it would get back in touch with LBH to arrange a date. It appears that TZL did not do so, and the meeting did not happen. An internal email from Ms Purdy to Mr Andrews on 23 April 2019 forwarded the correspondence from LBH and commented:

> "This was last correspondence from council … we didn't respond to … (as far as i can tell) … Canmoore said not to respond yet
>
> …
> I was just wondering should w[e] ignore or send something saying we cantmake it"

43. It is apparent from this email that the Purdys, on the instructions of Canmoor, were deliberately seeking to avoid a discussion with LBH as to their plans for the Site.

The Canmoor Call Option Agreement

44. In July 2019 the Purdys were invited to attend a public consultation on LBH's West of Borough strategy. That consultation set out LBH's proposal to redevelop the Site for the purposes of an airport business park, albeit retaining the Urban Farm in its current location. The consultation appears to have encouraged TZL to renew its attempts to obtain LBH's consent to private development on the Site, and Canmoor then came on the scene, introduced by Mr Ellis. On 12 January 2020 Canmoor made an offer to purchase the freehold estate in the Site for £30m plus overage, which was rejected by LBH. The offer was repeated a year later and rejected again.

45. On 31 January 2020 TZL entered into the Call Option Agreement with HVL, a subsidiary of Canmoor Hounslow Ltd, a company in the Canmoor group. The call option gives HVL the option to purchase the entirety of the shareholding in TZL at any time during a 4 year option period, running from the date of the agreement. That period

    was extended by two years in a side-letter dated 26 June 2023, such that it will now expire on 31 January 2026. The Call Option Agreement is accompanied by a Share Purchase Agreement and Zoo Management Agreement.

46. Pursuant to the Call Option Agreement:

    i) an Exclusivity Payment in the sum of £100,000 was made by HVL to TZL's shareholders on 25 March 2019;

    ii) an option fee in the sum of £1.4m was paid to the shareholders of TZL in five equal instalments of £280,000 each on the date of the agreement and each annual anniversary, with the last instalment paid on the fourth anniversary i.e. 31 January 2024. The June 2023 side-letter provides for a further £50,000 to be paid in consideration of the extension of the option period, if the option is not exercised by 31 January 2025.

    iii) if the option is exercised, the buyer and sellers are required to enter into the Share Purchase Agreement and the Zoo Management Agreement, and the buyer is required to pay to the sellers the balance of the option fee if not already paid, and

the completion payment calculated in accordance with the terms of the Share Purchase Agreement;

iv) the option will lapse if not exercised before the expiry of the option period.

47. The Share Purchase Agreement provides that:

i) the share purchase price is set at £3m;

ii) the completion payment made to the sellers comprises the share purchase price minus the Zoo Operating Payment, minus the Zoo Building Fund if construction of the zoo building is required by the council. The June 2023 side-letter provides that the completion price is to be further reduced by (1) an amount equal to the total of any outstanding debts owed by TZL at the time of completion; and (2) the sum of £50,000 paid to extend the option agreement, if the buyer has not exercised the option by 31 January 2025;

iii) the Zoo Operating Payment is made up of five equal instalments of £100,000, payable to the sellers on each anniversary of the completion date, starting on the first anniversary;

iv) the Zoo Building Fund is specified to be an amount which HVL reasonably estimates as being the total cost of constructing the zoo building, capped at £2.5m. If construction of the zoo building is required, that sum is to be paid into a separate bank account and drawn down in stages as and when required to pay for the costs of construction of the zoo building.

48. The effect of the provisions of the Share Purchase Agreement is that if the zoo is required to be built, the share purchase price is likely to be set off completely against the Zoo Operating Payment and the Zoo Building Fund, together with any outstanding debts owed by TZL, with the result that no further completion payment will be due to the sellers.

49. The Zoo Management Agreement provides for the zoo to be run by a separate zoo management company, whose shareholders and directors are Ms Purdy and her father, in consideration for that company retaining the profits derived from operating the zoo.

50. Canmoor's expressed intention is to use the parts of the Site not occupied by the Urban Farm (and the zoo building if built) for development purposes related to the airport business park proposed by LBH. That is a purpose which is not currently permitted under the authorised user clause of the lease. Canmoor will, therefore, only be able to pursue its development plans if it can negotiate an amendment to the authorised use clause with LBH, or if LBH agrees to sell it the freehold of the relevant part of the Site. As set out above, Canmoor's purchase offers have so far been rejected by LBH, and LBH's position has always been, and remains, that it has no intention of modifying the user clause in the lease.

The paragraph 9.1 and s. 146 notices

51. On 6 November 2020 LBH served a notice on TZL under Schedule 2, paragraph 9.1 of the lease (**paragraph 9.1**), referring to TZL's obligations under Schedules 2 and 4 of the lease to complete the construction of the zoo building within two years from the date of

the lease. In circumstances where TZL had neither started nor completed the zoo building, LBH gave notice of a breach of a Tenant Covenant, and required TZL to remedy that breach in accordance with paragraph 9.1 (i.e. within the two-month period specified in that paragraph).

52. No further steps were taken by TZL to progress the building of the zoo, and the twomonth period under the paragraph 9.1 notice expired on 6 January 2021. Accordingly, on 16 February 2021 LBH served a notice under s. 146(1) of the Law of Property Act 1925 (**s. 146**) stating that TZL was in breach of its covenant under paragraph 9.1, requiring TZL to remedy that breach "within a reasonable time", and notifying TZL that if it failed to comply with the notice within a reasonable time, LBH intended to reenter the premises pursuant to clause 5.1.1 of the lease and claim damages for the breach of covenant.

53. A further s. 146 notice was served by LBH on 26 April 2021, based on other breaches of Schedules 2 and 4 of the lease, but that is no longer relied upon in these proceedings.

Rent payments following service of the s. 146 notices

54. On 16 February 2021, the date of the first s. 146 notice, LBH emailed Avison Young, its rent collection agent, to instruct it not to demand or accept rent from TZL:

> "Please note that we have served a s. 146 notice on the Urban Farm and we must not demand or accept rent for the next two years minimum and possibly longer. As this is possibly the most important matter we are dealing with at the moment can we make absolutely certain that this is actioned."

55. A further email was sent later on the same day, repeating the point. No further demands for rent were made by Avison Young thereafter. TZL nevertheless continued to pay rent by making bank transfers to Avison Young's client account at NatWest, until the end of 2022. It is common ground that all but three of those payments were promptly returned to TZL, and Ms Purdy accepted in cross-examination that she knew that the payments were being returned because they were not being accepted by LBH.

56. When asked in cross-examination why TZL continued to pay rent despite its payments being returned, Ms Purdy's answers were very evasive, insisting that TZL had paid rent because TZL did "not want to be in more trouble" by not paying its rent, and that it would "help us look like we were doing the right thing. That is what I was told." Both she and Mr Ellis denied that the rent payments were a legal tactic.

57. I do not accept TZL's evidence on that point. A letter sent from TZL to LBH in response to the first s. 146 notice stated that, among other things, "Since the grant of the Lease and until today's date (a period of almost 10 years), your client has demanded and accepted rent and waived its right to forfeit." The letter was dated 2 February 2021, which must have been a typographical error; it seems likely from the letter's contents that it was sent very shortly after service of the notice on 16 February 2021. It is apparent from the legal content of the letter that it was drafted by solicitors, most likely the solicitors for Canmoor. It was, however, signed by Mr Purdy and must have had input from one or both of Mr and Ms Purdy, since it referred to matters which would have been outside the knowledge of Canmoor (such as a meeting between the Purdys and LBH in 2017, and the number of animals on the Site).

58. TZL was therefore, in my judgment, fully aware that if LBH continued to accept rent payments after services of the s. 146 notice, that would strengthen TZL's case on waiver of the right to forfeit. That was clearly what the Purdys had been told by Canmoor's solicitors: the point was set out from the outset in TZL's response to the first s. 146 notice, and that is undoubtedly why TZL continued to make rental payments despite the return of those payments by LBH.

59. Three payments of rent were mistakenly not returned to TZL immediately: two payments totalling £5000 on 18 March 2021, and a payment of £3750 on 23 September 2022. As to these:

    i) The March 2021 payments were made up of a payment of £1250 of rent arrears, which had accrued prior to 6 January 2021, and a payment of £3750 of rent due for the next quarter. Avison Young asked NatWest to provide it with the account details for the £1250 payment, so that the payment could be returned. NatWest provided a sort code and account number, and a payment of the total sum of £5000 was made to that account on 19 March 2021. (It appears that Avison Young did not separately ask for the account details for the £3750, presumably assuming that they were the same as for the other payment made on the same day.) Avison Young then reported to LBH that the payments had been returned. A letter from TZL to LBH dated 26 April 2021 (but not received until 13 May 2021) then asserted that LBH had accepted the March rent payment, thereby waiving any right to forfeit. LBH's solicitors, Bevan Brittan, replied on 21 May 2021 stating that the payment had been returned, and on 21 June 2021 a further letter was sent providing an extract from the relevant bank statement showing the incoming and outgoing amounts. On 19 October 2021 TZL wrote to LBH stating that it had no record of the return of the £5000 sum. Avison Young then investigated the matter. On 4 November 2021 it discovered that NatWest had provided the incorrect account details. Bevan Brittan wrote to TZL to explain this

    > on 9 November 2021 and on the same day a refund of £5000 was made to TZL using the correct account details.

    ii) Following receipt of the September 2022 payment, NatWest was asked to provide the payer's account details so that the payment could be returned. It provided those details on 28 September 2022. On 30 September 2022 the repayment was authorised and an accountant at Avison Young was instructed to make the repayment. Unfortunately, that employee then left the company without processing the payment, and the employee in the credit control team at Avison Young who had originally instructed the repayment was on sick leave due to Covid, and was not aware that the repayment had not been processed. The error was discovered on 19 November 2022 and the payment was returned to TZL on 2 December 2022.

July 2022 meeting with Canmoor

60. On 7 July 2022 there was a meeting between Canmoor and its funders and LBH, to discuss whether a resolution of the dispute could be reached without litigation. It appears that the purpose of the meeting, from the perspective of Canmoor and its funders, was to ascertain if there was a possibility of a "negotiated deal which shared the upside", i.e. shared the profit to be made from development of the Site.

61. LBH's position, as recorded in its internal note of that meeting, was that the first s. 146 notice had been served in a final attempt to get TZL to comply with its lease obligations and construct the zoo building by March 2023. If the zoo building was not constructed by then, LBH would seek forfeiture. In that event, LBH would wish to support the Urban Farm by granting a new lease "which meets their current needs".

62. Canmoor's position was that the obligation to build the zoo had expired and could not be revisited, and that the s. 146 notice was invalid because rent had been accepted. As to the willingness of TZL or Canmoor to build the zoo, LBH's note recorded that:

> "There was no intention by the Urban farm to build the Zoo buildings as they did not have the funds. I asked if Canmoor would do so on their behalf and they responded … we won't spend £3m without certainty as to our position with regard to developing the surplus land."

Procedural background

63. No agreement was reached between Canmoor and LBH. Accordingly, TZL issued its claim on 3 August 2022, seeking declarations that it was not in breach of Schedule 2, paragraph 9 of the lease or the Schedule 4 covenants, or alternatively that LBH had waived any right to forfeit for breach of Schedule 2 paragraph 9 or the Schedule 4 covenants. In the alternative TZL sought relief from forfeiture of the lease. The claim was served on LBH on 8 August 2022.

64. LBH filed a defence on 26 August 2022, maintaining that it intended to forfeit the lease on 26 April 2023, two years after service of the second s. 146 notice, unless TZL had remedied its breaches of covenant by completing the zoo building by then.

65. TZL's reply dated 6 December 2022 reiterated the contention that LBH had waived its right to forfeit, referring additionally to the September 2022 rent payment which was not promptly returned to TZL. An amended defence and reply were served on 27 February 2024 and 7 March 2024 respectively, addressing the March 2021 and September 2022 rent payments.

66. On 16 May 2023 LBH issued a claim for possession of the Site in the County Court at Central London, claiming forfeiture of the lease together with damages for TZL's failure to build the zoo building. That claim has been stayed by consent pending determination of these proceedings.

Issues

67. The disputed issues have significantly narrowed during the course of the proceedings, and indeed during the course of the trial. The issues that remain for determination are as follows:

    i) In assessing which covenants have been breached by TZL, does paragraph 9.1 constitute a freestanding tenant covenant as defined in the lease, material breach of which triggers a right of re-entry and forfeiture under clause 5.1.1?

    ii) Did LBH waive the right to forfeit the lease? That raises two sub-issues:

a) Does clause 5.1.1 of the lease exclude the operation of the common law doctrine of waiver in relation to the lease?

b) If not, did the delays in returning the rent payments made by TZL in March 2021 and September 2022 amount to waiver of the right to forfeit, in relation to the paragraph 9.1 breach?

iii) Should the court grant relief from forfeiture, and if so on what terms?

Breaches of the lease: paragraph 9.1

The parties' submissions

68. It is not disputed that TZL breached its obligation under Schedules 2 and 4 of the lease to construct the zoo building within two years of grant of the lease. It is also not disputed that since that obligation was a covenant to carry out an act within a specified period of time, the breach was a "once and for all" breach of covenant rather than a continuing breach. Waiver of the right to forfeit in respect of a "once and for all" breach is irrevocable and does not revive on each day that the breach subsists: *First Penthouse v Channel Hotels* [2003] EWHC 2713 (Ch), §30 and on appeal [2004] EWCA Civ 1072, §17.

69. It is also now common ground that LBH continued to accept rent from TZL after that breach and thereby waived its right of forfeiture in respect of that breach. (I do not, therefore, need to consider the further question addressed in submissions by Mr Leung, of whether LBH also waived its right of forfeiture in that regard by serving the paragraph 9.1 notice.) Accordingly, unless clause 5.1.1 entitles LBH to forfeit the lease for a breach notwithstanding waiver in relation to that very breach (which is addressed further below), LBH cannot rely on TZL's initial failure to construct the zoo building as a basis for forfeiture under clause 5.1.1.

70. LBH therefore relies on TZL's failure to comply with the paragraph 9.1 notice served in November 2020 as a separate and freestanding breach of the tenant covenants, giving rise to a further and separate right of forfeiture under clause 5.1.1. LBH contends that a material breach of a notice to remedy served under paragraph 9.1 will give rise to a right of forfeiture in the same way as any other breach of a tenant covenant in the lease.

71. TZL accepts that it is possible to read paragraph 9.1 in the way contended for by LBH. It says, however, that the better construction of the paragraph is that it does not create a freestanding obligation, but merely specifies the precondition to the landlord's step-in rights under clause 9.2. That interpretation would, in TZL's submission, be more consistent with business common sense and the objective commercial purpose of the clause.

The approach to contractual construction

72. The approach which the court should take to the construction of paragraph 9.1 was not in dispute. The relevant principles are authoritatively set out by Lord Hodge in *Wood v Capita Insurance Services* [2017] UKSC 24, [2017] AC 1173, §§10–13, referring to the approach set out in *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. More recently, those principles

were summarised and applied by Lord Hamblen in *Sara & Hossein v Blacks* [2023] UKSC 2, [2023] 1 WLR 575. For the purposes of the present case, the following summary suffices:

i) The contract must be interpreted objectively by considering the language used and asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the parties to mean.

ii) That process of interpretation is a unitary exercise which must have regard to the contract as a whole and all the relevant surrounding circumstances. The weight to be given to the language used and the wider context, respectively, will depend on the nature of the contract and the formality, complexity and quality of the drafting.

iii) If there are rival constructions, the court can give weight to the implications of those constructions by considering which is more consistent with business common sense. But the purpose of construction remains one of ascertaining objectively what the parties meant, rather than rewriting the contract on the basis of what the parties might reasonably have agreed.

iv) The correct approach is an iterative process by which each suggested interpretation is checked against the provisions of the contract, and the implications and commercial consequences of rival constructions are investigated.

Background to the lease negotiations

73. In the present case, the lease was negotiated between LBH and TZL over a period of several years, with the specific terms of the lease passing through multiple iterations as the draft was amended by LBH and TZL. On LBH's side, the amendments were addressed by a commercial property solicitor in LBH's property planning and contracts team. TZL's side of the negotiations was carried out through TZL's company secretary Chris Andrews. It is apparent from the chain of correspondence before the court that there were detailed amendments to the terms of the lease on both sides, with careful thought given by both parties to how the lease would work. That included consideration of the forfeiture and step-in provisions in the lease.

Language and format of paragraph 9.1

74. As LBH rightly submits, paragraph 9.1 is clearly drafted as a freestanding and unqualified obligation to remedy any breach notified by the landlord within the specified period. That obligation is, both by its language and by the format of paragraph 9, separate to the paragraph 9.2 obligation to permit the landlord to exercise its step-in rights (and to pay the landlord's costs of doing so) if the tenant does not comply with paragraph 9.1. There is no ambiguity in either the drafting or the format of the paragraph.

75. TZL's contention that paragraph 9.1 should not be read as a freestanding obligation, but should instead be read as nothing more than a precondition for the exercise of the paragraph 9.2 step-in rights, cannot be reconciled with the language and format of paragraph 9 as drafted. Rather, TZL's construction would require paragraph 9 to be written in a substantively different way, as follows:

> "If the Landlord Notifies a breach of a Tenant Covenant to the Tenant, and if the Tenant does not remedy that breach as soon as possible and in any event within two months after service of the Notice, to:
>
> 1. allow the Landlord to enter the Premises to remedy the breach;
>
> 2. pay to the Landlord on demand as a contractual debt all costs and expenses incurred by the Landlord in remedying the breach."

76. On that basis, the tenant's *only* obligations would be to permit the landlord to enter the premises to remedy the breach, and to pay the landlord's expenses of doing so. The tenant would on that formulation not be required to do anything at all following service of the notice. Paragraph 9.1 is conspicuously not drafted in that way. Nor do I accept Mr Greenhill's submission that all that would be required in order to turn paragraph 9 into a provision with the effect set out above would be to insert the word "and" between paragraphs 9.1 and 9.2. Even with that addition, paragraph 9.1 would still set out a distinct obligation to remedy the breach, which is absent from the formulation proposed by TZL.

77. The important and relevant point is therefore that the clear wording of paragraph 9 sets out two explicit and distinct obligations, namely (i) the obligation in paragraph 9.1 to remedy the breach of covenant notified by the landlord within the specified period of time, and (ii) if that obligation is not complied with, the obligation in paragraph 9.2 to

    allow the landlord to enter to remedy and to pay the landlord's expenses of doing so. TZL's interpretation entirely removes the first of those obligations.

Contractual context

78. Paragraph 9 is contained in Schedule 2 which is entitled "Covenants by the Tenant". The default assumption must therefore be, absent very clear language to the contrary, that a tenant obligation set out in Schedule 2 is indeed a tenant covenant as defined in clause 1.1, giving rise to the consequences for breach of covenant which are set out in the other provisions of the lease. Nothing in paragraph 9.1, however, states or even suggests that the obligation set out in that paragraph is not to be regarded as a tenant covenant as defined in clause 1.1 of the lease.

79. Nor is there any other provision of the lease which suggests that paragraph 9.1 is not to be regarded as a separate tenant covenant within the meaning of clause 1.1 of the lease. Notably, while TZL pleaded (and initially pursued at trial) a submission that paragraph 9 does not apply at all to the obligation in Schedules 2 and 4 to complete the zoo building, given the step-in right in paragraph 12 of Schedule 4, Mr Greenhill abandoned that argument in his closing submissions. He was correct to do so: paragraph 12 of Schedule 4 provides a specific right for the landlord to step in and complete the works if started by the tenant, but there is nothing in the lease to suggest that that provision should operate so as to exclude the operation of the wider provisions of paragraph 9 of the lease, or indeed any other remedy under the lease for breach of covenant.

Commercial context

80. I do not accept TZL's submission that to give paragraph 9.1 its natural and ordinary meaning would lead to an uncommercial and nonsensical result. It is common ground that the clause is a variant on what is commonly referred to as a *Jervis v Harris* clause, following the judgment of the Court of Appeal in *Jervis v Harris* [1996] Ch 195. That case concerned a clause of the lease authorising the landlord to give notice to the tenant of any defects or want of repair, following which the tenant was required to make good those defects within three months. If the tenant failed to do so, the landlord was entitled to enter the premises to carry out the work needed to remedy the defects, at the tenant's expense. The judgment of Millett LJ (with which Otton LJ and Sir Stephen Brown agreed) explicitly contemplated that, in the alternative to the landlord exercising the right to step in and carry out the repairs itself, breach of the covenant to repair on notice might give rise to either a claim for damages for breach of covenant or proceedings for forfeiture of the lease, albeit that (under the Leasehold Property (Repairs) Act 1938) forfeiture would have required the leave of the court: p. 203G–H. As Millett LJ noted, similar clauses have been a standard feature of leases since at least the 19th century. The typical notice period given under a *Jervis v Harris* clause is two or three months.

81. Mr Greenhill conceded that if paragraph 9.1 had been limited to the breach of a repairing covenant, as in a standard *Jervis v Harris* clause, it might have had the effect of giving rise to an alternative remedy of forfeiture if the tenant failed to carry out the repairs within the prescribed period. He submitted, however, that the position in the present case is different, since paragraph 9.1 is not limited to a breach of a repairing covenant but extends to *any* breach of a tenant covenant under the lease.

82. It is difficult to see why that should give rise to a difference in interpretation of the clause. As with the clause considered in *Jervis v Harris* itself (and any clause based on that model), paragraph 9.1 sets out a clear primary obligation on the tenant to remedy the identified breach. While paragraph 9.2 provides a remedy in the landlord's right to step in and carry out the repairs itself, nothing in paragraph 9 (or any other provision of the lease) indicates that the normal remedies of damages or forfeiture are excluded, such that the landlord's step-in right is the *only* remedy for breach of the paragraph 9.1 obligation to remedy on notice.

83. Mr Greenhill said that by contrast with a repairing covenant which is the focus of a typical *Jervis v Harris* clause, there are breaches of tenant covenants under the present lease which would be difficult or impossible to remedy within two months – including most obviously the Schedule 4 obligations to complete the zoo building within two years from the date of the lease. It cannot, he said, have been intended in that context that failure to remedy any and all tenant covenants within two months following a paragraph 9.1 notice would give rise to a right of forfeiture.

84. As Mr Hutchings pointed out, however, there will be many cases where the repairs notified under a standard *Jervis v Harris* clause will be very extensive and incapable of remedy within the two- or three-month notice period typically provided by such a clause. That does not mean that a right of forfeiture cannot arise under such a clause. Rather, the period of time reasonably necessary to remedy the breach in question will be reflected in the time period permitted for remedying the breach prior to forfeiture, required by s. 146. Section 146(1) prevents enforcement of a right of re-entry or forfeiture under the lease

until the landlord has (among other things) served a notice on the tenant specifying the breach complained of, requiring the tenant to remedy the breach (if it is capable of remedy), and giving the tenant a reasonable period of time thereafter to do so.

85. It follows that a paragraph 9.1 notice does not in itself give an immediately enforceable right of forfeiture if the notified breach is not remedied within two months, if a reasonable period for remedying the breach (if capable of remedy) is longer than that period. Rather, an enforceable right of forfeiture only arises once the reasonable period of time under the s. 146 notice has expired. Even then, forfeiture of the lease will be subject to any application by the tenant for relief from forfeiture. In that context, I do not consider that the time limit specified in paragraph 9.1 can be regarded as having an unduly onerous effect.

Commercial implications

86. Mr Greenhill is undoubtedly correct to say that if the landlord has waived the right of forfeiture for breach of a tenant covenant under the lease (for example by accepting rent), the effect of paragraph 9.1 is to give the landlord a second bite of the cherry, allowing it to revive a right of forfeiture by the expedient of serving a paragraph 9.1 notice to remedy the previous breach.

87. There is, however, nothing particularly unusual or uncommercial about that consequence. That was also the effect of the clause in *Jervis v Harris* itself (which was in turn, as the court there noted, a standard clause in a lease agreement) and, as Mr Greenhill acknowledged, might well have been the effect of paragraph 9.1 in the present case if it had been limited to breach of a repairing covenant. Mr Greenhill did

not offer any principled reason why the court should give effect to a renewed right of forfeiture arising from a standard *Jervis v Harris* clause which addresses a breach of a repairing covenant, but should not give effect to a renewed forfeiture right arising from a similar clause which addresses breaches of other tenant covenants under the lease.

Conclusion on paragraph 9.1

88. LBH's interpretation of paragraph 9.1 is therefore, in my judgment, the only interpretation that is consistent with the plain and natural wording of the clause, and its contractual context. It is also consistent with the commercial context, and I do not consider that its implications are unduly onerous or unusual. TZL's interpretation is, by contrast, entirely inconsistent with the language of the clause and the wider provisions of the lease. My conclusion is therefore that LBH's interpretation is correct. The consequence is that TZL's failure to comply with the paragraph 9.1 notice served by LBH in November 2020 entitled LBH to take steps to forfeit the lease pursuant to clause 5.1.1.

Waiver of forfeiture

The parties' submissions

89. The next question is whether LBH lost its right to forfeit for breach of paragraph 9.1 by acts of waiver following the expiry of the two-month notice period, i.e. 6 January 2021. As set out above, that question raises two issues.

90. The first is the construction of clause 5.1.1. As to that:

i) LBH's position is that clause 5.1.1 provides a complete answer to TZL's contention that the right of forfeiture has been waived by LBH, on the basis that the effect of the clause is that the right of forfeiture in clause 5.1.1 is contracted out of the law of waiver. LBH relies in this regard on the fact that the clause provides that if there is any material breach of the tenant covenants "the Landlord may (even if the Landlord has waived any previous right of re-entry) re-enter the Premises or any part of them and the Term will then end …" LBH argues that the parenthesis has the effect that an act that would otherwise amount to waiver does not prevent forfeiture of the lease pursuant to this clause.

ii) TZL disputes this submission on two bases: first, it says that this is not the correct interpretation of clause 5.1.1 as a matter of construction; second, it says that a clause purporting to oust the common law doctrine of waiver could be of no legal effect as a matter of law.

91. The second issue is whether, if clause 5.1.1 does *not* have the meaning contended for by LBH, the delays in returning TZL's March 2021 and September 2022 rent payments amounted to waiver by LBH of its rights to forfeit the lease. As to that:

i) TZL's submission is that the delays in returning those rent payments did indeed amount to acts of waiver, with the result that LBH is no longer able to seek forfeiture under clause 5.1.1.

ii) LBH's submission is essentially threefold: first that its agent Avison Young did not have actual or ostensible authority to waive any right of forfeiture; second,

that the delays in returning the March and September payments cannot be regarded as the acceptance of rent by LBH; and third, that in any event any acceptance of rent during the lifetime of a s. 146 notice should not be treated as waiver of the right to forfeit.

Waiver of forfeiture generally

92. Before considering the various issues set out above in relation to waiver in the present case, it is convenient to set out the general legal principles governing the doctrine of waiver from forfeiture. The starting point is that waiver of a right of forfeiture of a lease will occur when two conditions are satisfied: first, the landlord must know the facts giving rise to a right of forfeiture; secondly, with that knowledge, the landlord must do some "unequivocal act" which affirms the continuation of the lease: *Matthews v Smallwood* [1910] 1 Ch 77, 786.

93. The assessment of whether there is an unequivocal act of waiver is an objective question, and the subjective motive or intention of the landlord is irrelevant, as is the tenant's understanding of the legal consequences of the act: *Central Estates (Belgravia) v Woolgar (No. 2)* [1972] 1 WLR 1048, 1054.

94. Where a landlord accepts rent which accrues due after the date on which the landlord had knowledge of a breach of covenant, that will amount to waiver of the right to forfeit for that breach, even if the acceptance of rent by the landlord is accidental: *Woolgar*, p. 1054; *Greenwich LBC v Discreet Selling Estates* (1991) 61 P &CR 405, p. 409.

95. In such a case, the acceptance of rent is "all that counts", whatever the particular circumstances. Where, however, the alleged act of waiver is something else, the court will look at all the circumstances of the case, to determine whether the act relied on is so unequivocal that it can only be regarded as consistent with the continued existence of the lease: *Faiz v Burnley BC* [2021] EWCA Civ 55, [2021] Ch 303, §16; *Expert Clothing v Hillgate* [1986] Ch 340, p. 360.

96. LBH reserves its right to argue in a higher court that this principle should be reconsidered. For the purposes of the proceedings in this court, however, LBH accepts that this authority is binding and should be applied, subject to its argument as to the effect of the first s. 146 notice.

The construction of clause 5.1.1

97. There is, in my judgment, no doubt whatsoever as to the correct construction of clause 5.1.1, and in particular the parenthesis in that clause. The clause provides a right of reentry and forfeiture if there is a material breach of the tenant covenants, and specifies (in the parenthesis) that this right will arise "even if the landlord has waived any previous right of re-entry". This recognises that breaches of the tenant covenants may arise in multiple ways, giving rise to multiple successive rights of re-entry. In that context, the parenthesis confirms that a waiver of an earlier right of re-entry will not prevent re-entry and forfeiture in relation to a later breach of covenant by the tenant.

98. The suggestion that the parenthesis serves to exclude the common law of waiver in relation to the clause 5.1.1 right of forfeiture is irreconcilable with the language of the clause. Far from contracting out of the common law doctrine of waiver, as LBH submits, the parenthesis expressly recognises that waiver may have occurred in relation to a previous right of re-entry. There is no possible basis upon which the parenthesis in clause 5.1.1 can be construed as acknowledging the existence of a prior waiver at the same time as excluding the operation of waiver of forfeiture altogether.

99. Mr Petrides argued that if the parenthesis in clause 5.1.1 is read as saying nothing more than that a previous waiver will not prevent re-entry and forfeiture in relation to a later breach of covenant, then that would simply state the law and would therefore be otiose. That is because under s. 148(1) of the Law of Property Act 1925 the waiver of the benefit of any covenant or condition in a lease is not deemed to extend to any other breach of covenant or condition, save that to which the waiver specifically relates. Mr Petrides argued that the court should lean against a construction which would render the parenthesis redundant in that way.

100. There is nothing new in the proposition that the court should strive, where possible, to give meaning to contractual provisions, rather than construing them in a way which would render them entirely redundant. It is important, however, not to overstate this proposition as a canon of construction, since it is commonplace for contracts to include provisions from an abundance of caution which may not, strictly speaking, be necessary. As Lord Neuberger MR remarked in *Macquarie International Investments v Glencore UK* [2010] EWCA Civ 697, §82, "it is scarcely surprising that cautious lawyers, with their clients' (and their own) interests to protect in an ever faster changing and more Litigious environment, should adopt a belt and braces approach." The Master of the Rolls went on at §83 to cite with approval the remarks of Lord Hoffmann, in among others *Beaufort Developments v Gilbert-Ash* [1999] 1 AC 266, 274, describing the argument of

redundancy as "seldom … entirely secure", because of "a lawyer's desire to make sure that every conceivable point has been covered".

101. There is therefore no presumption, as such, against redundancy. Rather, the fact that a particular interpretation would mean that a particular contractual provision is superfluous or repetitive is merely one factor to weigh in the balance when considering the contract as a whole and in context.

102. The high point of LBH's submissions was the analysis of Moore-Bick LJ in *Dŵr Cymru Cyfyngedig (Welsh Water) v Corus* [2007] EWCA Civ 285, of a clause which was headed "Renewal Clause", and which provided that on the expiry of the agreement in question the predecessor in title to Corus would "continue to have the right" to be supplied water for the purposes associated with iron and/or steel production or processing at the relevant works, the terms of such supply to be agreed at the time. Moore-Bick LJ held that this clause was intended to have contractual effect, rejecting the argument of Welsh Water that it conferred no contractual rights on Corus at all. His reasoning at §13 made clear that he reached this conclusion for a number of reasons, including the fact that it was "it is unusual for parties to include in the operative part of a formal agreement of this kind a whole clause which is not intended to have contractual effect of any kind", the language of the clause which was "redolent of obligation", and the fact that the clause was explicitly described as a "renewal clause". As he noted at §14, the question was ultimately "a short question of construction".

103. The present case is, however, very far from the situation described in the *Corus* case. Clause 5.1.1 as a whole undoubtedly does have contractual effect, conferring upon LBH a right of re-entry if there is a material breach of the tenant covenants. The only dispute is as to the wording of the parenthesis in that clause. What that parenthesis does, as set out above, is to confirm that an earlier waiver will not exclude a subsequent right of re-entry on a later breach. Mr Petrides is right to say that, strictly speaking, it was not necessary for this to be spelled out in the lease in the light of the provisions of s. 148(1). I do not, however, think it surprising that the parties should have done so, particularly in the context of discussions where LBH was insisting upon the importance of a right of forfeiture. Moreover, I certainly do not think that any inclination that the court may have to avoid redundancy should be pushed so far as to adopt an interpretation of the parenthesis which, as I have already found, is wholly inconsistent with the language of that provision.

104. It is therefore not necessary to reach any conclusion as to TZL's alternative submission, namely that it is not possible for parties to contract out of the principle of waiver. Suffice it to say that the authorities before me do not establish any such broad and general proposition. TZL relied, primarily, on the Privy Council decision in *R v Paulson* [1921] 1 AC 271, which held that a clause providing that no waiver should take effect unless expressed in writing did not prevent waiver of forfeiture arising from the acceptance of rent by the landlord with full knowledge of the breach of covenant. The Privy Council made clear, however, that it was not stating a general proposition, but rather addressing the particular facts of the case, commenting at p. 286 that "many cases may occur to which the clause as to waiver would be applicable; their Lordships think that it is not applicable in the present case under all its circumstances".

105. More recently, in *Tele2 International Card Company v Post Office* [2009] EWCA Civ 9, the Court of Appeal considered a different type of clause, which provided that no "delay, neglect or forbearance" in enforcing any provision of the agreement should be deemed

to be a waiver. The court concluded at §56 that the clause did not exclude an election to abandon the right to terminate, since "[t]he general law demands that a party which has a contractual right to terminate a contract must elect whether or not to do so. This clause does not attempt to say that the doctrine of election does not apply – even assuming that any contractual provision could exclude the operation of the doctrine." The court thereby conspicuously did not reach its conclusion on the basis that any contractual exclusion of the doctrine of waiver would be legally ineffective, but rather found that the specific clause in question did not have that effect.

106. Set against these is the decision of the High Court of Australia in *Owendale Pty v Anthony* (1967) 117 CLR 539, which gave effect to a clause providing that the acceptance of rent would not prevent the determination of the lease on grounds (very similar to the facts of the present case) that the tenant had breached a covenant requiring it to build a hotel on the land within a specified period of time. At p. 609, Owen J considered there to be:

> "no good reason why the parties to a lease should not validly incorporate such a clause in their agreement and if they do so, that seems to me to be a very relevant fact to be borne in mind when it is claimed by a lessee who has committed a breach of covenant that by accepting rent his lessor has made an election to keep the lease on foot".

107. He distinguished the decision in *Paulson* as turning on a different waiver exclusion, which he understood to have been analysed as addressing the situation where the waiver was by words alone rather than by acceptance of rent. The reasoning in *Owendale* was followed by the New Zealand Supreme Court in *Inner City Businessmen's Club v James Kirkpatrick* [1975] 2 NZLR 636.

108. While of course not binding on this court, the analysis in *Owendale* seems to me to carry some force. It indicates, at the very least, that rather than seeking to make generalisations about the contractual exclusion of waiver, it is necessary to consider the terms of the specific contractual provision relied upon. That underscores the undesirability of attempting to express any conclusion on an abstract and hypothetical basis.

The scope of Avison Young's authority

109. It follows from my conclusion as to the construction of clause 5.1.1 that it is necessary to consider whether the circumstances of the March 2021 and September 2022 payments did indeed, as TZL contends, lead to a waiver of LBH's right of forfeiture pursuant to that clause, on the basis that the rent payments were accepted by LBH.

110. The first question, in that regard, is the scope of the authority of LBH's rent collection agent Avison Young. The issue arises because, as set out at §§54.–59. above, LBH's repeated and strict instructions were that Avison Young was not to demand or accept rent for at least the next two years. The delays by Avison Young in repaying the March 2021 and September 2022 rent payments to TZL were therefore contrary to the express instructions given to Avison Young by LBH, and were not known to LBH.

111. *Emmet & Farrand on Title* states at §26.705: "To make acceptance of rent by the *agent* of the lessor a waiver, where it is not shown that the lessor has allowed it with knowledge of the breach, it would have to be shown that the agent had authority not only to receive the rent but to grant a new lease".

112. The cited authority for that proposition is the early 19th century case of *Nash v Birch* (1836) 150 ER 490, concerning facts not dissimilar to those of the present case, in which a lease of a house was granted on condition that the lessee erect a shop-front and carry out other repairs to the house within a specified period, with a provision for forfeiture of that did not occur. The specified period under the lease expired without the shop-front having been erected, the lessor sought forfeiture, and the question arose as to whether forfeiture had been waived by the fact that the lessor's son, acting for his father, had demanded rent from the lessee. Parke B held that:

> "The whole turns on the point, whether the son had authority to waive the forfeiture. It seems to me, that the son had probably an authority to receive the rent, but not to grant a new lease, by waiving the forfeiture of the former one. If it had been proved that the father had had notice of the alterations, and he had still allowed the son to receive the rent, the forfeiture might have been waived. But that was not proved, and the question of waiver does not distinctly arise in this case. If it had, the authorities cited shew that this was a lease voidable at the election of the landlord. Then I think that an absolute, unqualified demand of the rent, by a person having sufficient authority, would have amounted to a waiver of the forfeiture …"

113. TZL contended that this authority had been overtaken by *Woolgar*, where waiver of forfeiture of a lease occurred by the demand and acceptance of rent by the landlords' agents as a result of a clerical error. The judgment of Lord Denning MR in the *Woolgar* case noted, however, that the agents had full authority to manage the relevant properties on behalf of the landlord. In *Mardorf Peach v Attica Sea Carriers Corporation of Liberia* [1977] AC 850 Lord Fraser considered that the extended authority of the agents in *Woolgar* distinguished that situation from that of a bank which had authority only to receive hire payments under a charterparty, and which did not have authority to waive the rights of the owners of the vessel. The bank's receipt of a late payment therefore did not waive the owners' right to withdraw their services under the charterparty on the basis that the hire payment was late (p. 886B–D). Lord Wilberforce and Lord Salmon similarly emphasised that the bankers had no authority to make commercial decisions on behalf of the owners, as to the continuance of the charterparty (pp. 871F–G and 880C).

114. That reasoning was applied by Mummery J in the case of *John Lewis Properties v Viscount Chelsea* [1993] 2 EGLR 77, in a dispute concerning the lease of the Peter Jones department store building in Sloane Square, where a question again arose as to whether forfeiture had been waived by the acceptance of rent. Citing both *Woolgar* and *Mardorf*, one of the reasons given for the conclusion that the Cadogan Estate did not accept the disputed rental payments was that those payments were made to its bankers, and there was no evidence that the bank had any authority to make business decisions on behalf of the Estate.

115. There is no doubt, on the basis of these authorities, that an agent with actual or ostensible authority to make decisions as to the continuation of a lease following a breach of covenant may waive forfeiture by accepting rent, even if the agent has been instructed not to do so, and even if the acceptance of rent is accidental, such as the result of a clerical error on the part of an employee of the agent. In such a case the agent's acceptance of rent will be regarded as acceptance of rent by the landlord. A landlord will not, however, be regarded as having accepted rent and thereby waiving the right to forfeit, solely on the

ground that a payment of rent has been accepted by the landlord's bank or other agent, where that agent has the authority to demand and/or collect rent but does not have any wider authority to make commercial decisions on behalf of the landlord.

116. Mr Greenhill argued that it is sufficient for waiver that the agent has actual or ostensible authority to collect and receive rent payments. But that submission is flatly contradicted by the reasoning set out in the *Mardorf* and *John Lewis* cases. In both cases the bankers had authority to receive the disputed hire or rent payments, but that was not sufficient for the courts to find that the landlords had waived their rights of withdrawal or forfeiture.

117. Mr Greenhill also relied on the statement by Lewison LJ in *Faiz v Burnley*, §16, that where the alleged act of waiver is the acceptance of rent accruing due after the date of knowledge of the breach, the acceptance of rent "is all that counts"; and it is only where the alleged act of waiver is something else that the court may look at all the circumstances of the case. That statement was, however, addressing an acceptance of rent by the landlord. It was not addressing the question raised here, which is the circumstances in which the acceptance of rent by the landlord's agent may be regarded as the acceptance of rent by the landlord.

118. It is, therefore, necessary to consider the scope of Avison Young's authority in the present case. In the initial years following grant of the lease, rent demands were made by LBH itself. Then on 16 December 2014 TZL was informed by LBH that:

> "with effect from 1st April 2015, the property management treasury function will be outsourced by the London Borough of Hounslow to our appointed managing agents, GVA Grimley Ltd. This means that rents and other payments which become due on the March/April 2015 quarter day (depending on your lease terms) will therefore be demanded, and collected, by GVA Grimley Ltd direct."

119. On 1 February 2019 GVA was acquired by Avison Young. TZL was informed of this in an email on 23 August 2019, which confirmed that future correspondence including invoices, application for payment and statements of account would be issued under the name of Avison Young.

120. The same email also stated "Please find attached from your Property Managing Agent GVA, your latest request for charges due or a credit note". TZL suggested, on that basis, that Avison Young held itself out as performing a broader role than that of simply collecting and demanding rent. I do not accept that submission. TZL had been clearly informed that Avison Young's role was a "treasury function" and that it would be demanding and collecting rent on behalf of LBH. It was apparent from the 23 August 2019 email that the document attached was either a request for payment or a credit note. Nothing in that email suggested that Avison Young's role had changed following its acquisition of GVA.

121. Mr Miszkurka's evidence also confirmed that Avison Young performed a treasury function, rather than a property management function in relation to the Site. In that capacity, Avison Young sent out rent demands and dealt with queries which arose in relation to payments of rent. Mr Miszkurka was not challenged on that description in his cross-examination. There is no evidence that Avison Young was ever involved in the

discussions between LBH and TZL as regards the breaches of the lease covenant, and the paragraph 9.1 and s. 146 notices were served on TZL by LBH, not Avison Young.

122. There is therefore, on the materials before the court, nothing to suggest that Avison Young had either actual or ostensible authority to make any commercial decisions about the lease on behalf of LBH. Its role was clearly limited to that of a "treasury function", as it was put in the December 2014 email and by Mr Miszkurka. The fact that the March 2021 and September 2022 rent payments were received by Avison Young and not immediately returned to TZL does not, therefore, in itself establish that those rental payments were accepted by LBH.

The delays in returning the March 2021 and September 2022 payments

123. The conclusion above as to the limited authority of Avison Young is not, however, the end of the matter if it can be said that LBH must nevertheless be regarded as having accepted the March 2021 and September 2022 payments, given the effluxion of time between the receipt of those payments by Avison Young and the return of the payments to TZL.

124. In that regard, TZL refers to the objective assessment required, and relies on the comment of Lord Wilberforce in *Mardorf*, p. 871D that:

> "All that is needed to establish waiver, in this sense, of the committed breach of contract, is evidence, clear and unequivocal, that such acceptance has taken place, or, after the late payment has been tendered, such a delay in refusing it as might reasonably cause the charterers to believe that it has been accepted."

125. Lord Salmon, similarly, said at p. 880D that:

> "If the bank had kept the payment for an unreasonable time, the charterers might well have been led to believe that the owners had accepted payment.
> This would have amounted to a waiver of their right to withdraw the vessel.
> But nothing of the kind happened in the present case."

126. In *Mardorf* the late hire payment was rejected by the owners immediately and the payment was returned on the day after it was received by the owners' bank. In the subsequent *John Lewis* case, the disputed rent payments were not returned immediately, but were returned following delays of between two weeks and almost seven weeks. Mummery J said in that case, referring to *Mardorf*, that the delays were John Lewis' strongest point, though he eventually decided after "considerable hesitation" that the conduct of the Cadogan Estate did not, objectively considered, give John Lewis any ground for supposing that the rent had in fact been accepted. That was, in particular, because of the fact that the Estate had written to tell John Lewis that because of the breach of covenant, matters were in the hands of the Estate's solicitors, and rent would be neither demanded nor accepted.

127. TZL contended that the present case fell the wrong side of the line, due to the combination of long delays in returning the payments (almost eight months in the case of the March 2021 payments, and over two months for the September 2022 payment) and the fact that, by contrast with the *John Lewis* case, LBH had not written to TZL to inform it that it

would not be demanding or accepting rent payments. Mr Greenhill said that what was relevant was what TZL knew, and from its perspective the rent was not returned until November. TZL was therefore, in Mr Greenhill's submission, entitled to believe that the March 2021 and September 2022 rent payments had been accepted by LBH, and the delay therefore amounted to acceptance by LBH.

128. I do not accept that submission. The comments of Buckley LJ in *Woolgar* make clear that the assessment of whether the landlord has by some unequivocal act waived forfeiture of the lease cannot be assessed by reference to the subjective understanding of the tenant, in the same way that the landlord's subjective motive or intent is also irrelevant. Rather, the court is required to carry out an objective assessment of the landlord's conduct, and the effect which that conduct might reasonably have produced on the tenant.

129. In the case of the March 2021 payments, the day after the payments were received Avison Young returned the total sum to the account number provided by NatWest. While that turned out to have been the wrong account, viewed objectively Avison Young promptly rejected and did not retain the payments. This was therefore not on any basis a situation in which there was a delay in refusing the payments, as posited by

    Lords Wilberforce and Salmon in *Mardorf*, and as found to be the case on the facts in *John Lewis*.

130. While, in the event, TZL did not receive its repayment until some months later, the reason for that is not that the payments were retained (whether mistakenly or otherwise) but that the repayments were made to the wrong account number. The fact that Avison Young missed a potential opportunity to correct the mistake, in that it only asked NatWest for the return account details for the first of the two March 2021 payments, and not for the second payment (which was the critical payment, for the purposes of any waiver analysis), does not change that analysis. Whatever the cause of the mistake, while it led to a delay in TZL receiving a refund, Avison Young's conduct did not involve the retention of the payments; still less was there any retention of the payments by LBH.

131. Avison Young's subsequent conduct likewise made clear to TZL that it was no longer accepting rent. A payment of £3750 on 14 April 2021 was returned two days later, and a payment of the same amount on 5 May 2021 was returned on 14 May 2021. Payments in July and October 2021, and January, April and July 2022 were likewise promptly returned. All of these payments were returned to the correct TZL accounts. Meanwhile, as set out at §59. above, LBH's solicitors wrote to TZL in May and June 2021 stating that the March payments had been returned. TZL could not reasonably have been in any doubt as to LBH's position, even if it had not by then received the March repayment. Nor was it in fact in any doubt on this point: Ms Purdy confirmed that she knew that the payments were being returned because they were not accepted by LBH.

132. I do not, in these circumstances, place any weight on the fact that LBH did not, prior to receipt of the March 2021 payments, inform TZL that it (or Avison Young) would no longer be demanding or accepting rent. The landlord's definition of its position was relevant in *John Lewis* because in that case the Cadogan Estate had indeed retained rental payments for various periods of time, after those payments had been credited to its account. Acceptance of rent might therefore, as Mummery J recognised, have been implied from the delays, if not set against the clear statements from the Cadogan Estate that rent would not be demanded or accepted. In the present case, however, Avison Young

unambiguously rejected the payment, and reinforced that by its rejection of the TZL's subsequent attempted payments. That conduct left no scope for any inference of acceptance.

133. The March 2021 payments cannot therefore, in my judgment, be regarded as having been accepted by LBH.

134. As regards the September 2022 payments, the position is akin to that of the *John Lewis* case, in that the rent payments were retained by Avison Young for over two months, but LBH/Avison Young's conduct had by then made clear to TZL that its rental payments were not being accepted by LBH. LBH had, in addition, filed its defence in these proceedings in August 2022, maintaining that it intended to forfeit the lease.

135. TZL's continued remittal of rent payments was, in those circumstances, purely a tactic to attempt to engineer a situation of waiver of forfeiture. There is nothing which, objectively, had indicated to TZL that LBH was still accepting payments of rent; nor was there anything which might have given TZL reason to believe that the delayed return of the September 2022 rent payment represented a change of heart on the part of

LBH by way of a decision to affirm the continuation of the lease. On the contrary, any such suggestion would have been entirely inconsistent with LBH's position as clearly set out in its defence filed a month earlier.

136. I do not, therefore, consider that the delay in returning the September 2022 payment can be regarded as an acceptance of rent by LBH.

The s. 146 argument

137. LBH's final argument is that the acceptance of rent during the lifetime of a s. 146 notice should not, in any event, be treated as waiver of the right to forfeit. LBH does not rely on any domestic authority in support of this proposition. Instead it relies on the judgment of the New Zealand Court of Appeal in *McDrury v Luporini* [2000] 1 NZLR 652, a case concerning a failure to apply the required quantity of fertiliser to the demised land. Following the breach, the landlord had served a notice under s. 118(1) of the New Zealand Property Law Act 1952 (the equivalent to s. 146(1)). The question arose as to whether acceptance of rent both before the service of the statutory notice, and during the period of the running of that notice, amounted to waiver of forfeiture.

138. Tipping J held that it did not, on the grounds that no election was possible until the lessor had an unconditional right to forfeit; and no unconditional right to forfeit accrued until the s. 118 statutory notice had been served and had expired without compliance. The acceptance of rent before service of the statutory notice and pending the expiry of that notice could not, therefore, be regarded as an election not to exercise the contingent right of forfeiture (§§44–46). The judge continued (at §§47–8) that:

> "the lessee knows full well, following service of a statutory notice, that the lessor is complaining of a breach and giving the lessee a chance to remedy it. The lessee cannot reasonably assert that the lessor's acceptance of rent shows an unequivocal intention not to forfeit. The very purpose of serving the notice is to give a right to forfeit on non-fulfilment. The lessor should not be put in the position of having to decline to accept rent during the currency of the

> notice because the rent may never be forthcoming if the lessee fails to comply and the lease is forfeited. The lessee gets the benefit of the continuation of the lease during the notice period and should be obliged to pay rent in the ordinary way for that benefit. It is hardly logical in such circumstances to hold that the lessor has lost the right to forfeit by accepting what the lessee is obliged to pay for the extra time which the statute allows for the lessee to remedy the breach. To argue that the receipt of rent during the running of the notice could amount to waiver would also, in our view, be contrary to the general scheme of the notice provisions …
>
> In the period following their becoming aware of the breach, lessors should be entitled to a reasonable period to assess their options. The simple act of accepting rent during that period should not inevitably be construed as leading to an estoppel against issuing a notice."

139. The proposition set out in that judgment was, however, rejected by Lightman J in *First Penthouse v Channel Hotels* [2003] EWHC 2713 (Ch), §30. After addressing a question (not now disputed in this case) of whether the relevant breach of covenant was

a "once and for all" breach or a continuing breach of covenant, the judge commented that:

> "At one stage CHAPS contended that for there to be a waiver of the right to forfeit there must be at the date of the acts of waiver not merely a right to forfeit, but the right must be enforceable and accordingly any necessary notice served under s. 146 of the Law of Property Act must have been served and expired. In my judgment there is no need for service or expiration of such notice. It is sufficient that the right to forfeit has arisen."

140. Mr Hutchings said that this comment was sparsely reasoned, and that I should in any event decline to follow it in the light of the analysis in *McDrury*. I do not agree. The premise of the analysis in *McDrury* is the proposition apparently put in *First Penthouse*, namely that no waiver can occur until there is an enforceable right to forfeit, which requires that any necessary notice under s. 146 has been served and expired. That proposition does not represent the law in this jurisdiction, as is clear from *Woolgar*. Lightman J was therefore right to reject the argument put to him.

141. In his closing submissions, Mr Hutchings accepted that the premise of the analysis in *McDrury* was not open to him in this court, in the light of *Woolgar*. He nevertheless contended that the court should follow the point at §47 of *McDrury* that, following service of a statutory notice, and during the reasonable period of time permitted by that notice, the tenant cannot assert that the acceptance of rent shows an unequivocal intention not to forfeit. That point, he said, did not arise in *Woolgar* because in that case the breach was the keeping of a brothel, which was an irremediable breach in relation to which s. 146 did not require any time to remedy; the right to forfeit therefore crystallised as soon as the s. 146 notice was served.

142. Mr Hutchings' submissions on this point were attractively put, but I do not accept them, for two main reasons. The first is that it is not possible to disentangle §47 of *McDrury* from the analysis which precedes it. As I have said, the premise of the analysis is the proposition that no election can be made and therefore no waiver can occur until there is

a right to forfeit, which does not arise until non-fulfilment of the requirements of the statutory notice. That premise permeates the discussion at §§47–8 of the judgment. No separate and alternative point can be extracted from that as regards the effect of a statutory notice on the legal effect of an acceptance of rent.

143. Secondly, and in any event, the point which Mr Hutchings sought to extract (while disavowing reliance on the remainder of the analysis) was that the prior service of a statutory notice meant that the acceptance of rent could not be regarded as an unequivocal intention not to forfeit. Even that more limited proposition is, however, not open to this court, because it is established that the acceptance of rent by the landlord is an unequivocal act that will amount to waiver, whatever the circumstances. That is the basis of the comment in *Faiz v Burnley* that where the alleged act of waiver is the acceptance of rent, "that is all that counts": see §95. above.

144. Ultimately, however it is put, I do not consider that it is open to this court to adopt any part of the approach taken at §§44–8 of the *McDrury* case. The service of the first s. 146 notice by LBH did not, therefore, *a priori* prevent a subsequent acceptance of rent from being regarded as a waiver of forfeiture. In the event, however, that does not matter, because for the reasons set out above I have found that there was not on the facts any acceptance of rent by LBH.

Conclusion on waiver

145. The conclusion on the waiver issue is therefore that LBH did not accept the March 2021 and September 2022 rent payments. Those payments therefore did not give rise to any waiver of forfeiture. LBH is, accordingly, entitled to claim forfeiture of the lease.

Relief from forfeiture

The parties' submissions

146. The remaining issue is therefore whether the court should grant relief from forfeiture. TZL's position on this point changed during the course of the trial. At the outset of the trial, TZL's primary position was that the court should grant relief from forfeiture, on terms which no longer required the zoo building to be built. In the alternative, if the court were to require the zoo building to be built as a condition of relief, TZL said that it would be put in funds to construct the building through the exercise by HVL of the call option under the Call Option Agreement. By the end of the trial TZL no longer pursued its primary submission, and therefore sought relief only on the basis that it would commit to building the zoo building.

147. LBH's position is that it will consent to relief from forfeiture, conditional on completion of the zoo building, if TZL is genuinely getting on with the works, and shows that it has the funds to complete the building shortly thereafter. That was the position set out in LBH's defence, and remains its position. TZL has not, however, commenced the works and LBH says that there is insufficient evidence of its ability to fund the zoo, even if HVL were to exercise the call option. LBH also said that the failure to construct the zoo should be regarded as a wilful breach of TZL's covenants. On those grounds, LBH says that TZL should now forfeit the lease. If, however, the court does grant relief from forfeiture, LBH says that this should only be on strict conditions as to the exercise of the call option and construction of the zoo building within specified periods of time.

The law on relief from forfeiture

148. Section 146(2) of the Law of Property Act 1925 provides:

> "… the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit."

149. Relief from forfeiture is therefore discretionary, and the court must have regard to the individual circumstances of each case. But the discretion to grant relief is circumscribed by established principle and is not simply to be exercised in a way that the court considers fair on the particular facts: *Eastaugh v Crisp* [2007] EWCA Civ 638, §17.

150. The basic rule is that forfeiture will not generally be allowed to operate more severely than as security for performance of the tenant's covenants, and should not permit the landlord to take disproportionate advantage of a minor breach. Accordingly, tenants are generally relieved from forfeiture if they remedy the breach which led to the forfeiture, with appropriate terms as to costs: *Hyman v Rose* [1912] AC 623, p. 681; *Freifeld v West Kensington Court* [2015] EWCA Civ 806, §43; *Croydon LBC v Kalonga* [2022] UKSC 7, [2023] AC 1, §3. In the words of Lord Wilberforce in *Shiloh Spinners v Harding* [1973] AC 691, p. 723:

> "… it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result."

151. Where forfeiture is claimed for non-payment of rent, the court will invariably make it a condition of relief that the arrears are paid within a specified period of time: *Eastaugh v Crisp*, §17. In the cases of other breaches of covenant, it is usual for relief to be granted on terms that the tenant should remedy the breach, and the court is entitled to refuse relief if there is insufficient evidence of the tenant's financial ability to do so: *Darlington BC v Denmark Chemists* [1993] ECLR 62. There is, however, no invariable rule, and in an appropriate case the court may relieve a tenant from forfeiture without requiring the breach to be remedied. The paradigm example is a case such as *Associated British Ports v CH Bailey* [1990] 2 AC 703, where the covenant being breached no longer serves any practical or commercial purpose.

152. If the breach is wilful, that is a relevant consideration, and the court should not in exercising its discretion encourage a belief that parties to a lease can simply ignore their obligations. That does not, however, mean that the court is required to find exceptional circumstances before granting relief in such a case: *Southern Depot v British Railways Board* [1990] 2 ECLR 39, 44.

Nature and importance of the breach of covenant

153. The starting point is to consider the nature and importance of the breach of covenant. In this case, it is undoubtedly the case that the construction of the zoo building was a fundamental basis on which the lease was granted to TZL in the terms ultimately agreed. As set out above, the Purdys' approach to LBH was to find a new site to relocate the zoo which they had operated at Syon Park, and the grant of an immediate long lease was specifically requested by TZL on the basis that this was required to secure funding for the zoo building.

154. The conditionality of the lease on the construction of the zoo building, as set out in Schedule 4 of the lease, was the reason why the lease could not be granted until planning permission had been obtained, and why the rent was calculated primarily on the basis of turnover albeit subject to a minimum annual amount. That is also why the lease specified a two-year construction period, and why the minimum annual rent was not set to increase after the 17th year of the lease term (i.e. from 2029 onwards): by that

    time, if the zoo had been built according to the provisions of Schedule 4, it must have been assumed that 5% of turnover would exceed the minimum rent of £30,000 per annum.

155. The importance of the construction of the zoo building as the basis for the grant of the lease is no doubt why, by the time of closing submissions, TZL no longer pursued a submission that the court should grant relief from forfeiture without requiring construction of the zoo as a condition of that relief. TZL's position was, therefore, that it would not resist an order that was conditional on exercise by HVL of the call option within seven days of the order; and that once that option was exercised TZL could and would build the zoo within a reasonable period of time ordered by the court. That was the basis on which TZL submitted that relief from forfeiture should be granted.

156. It is therefore necessary to consider whether the evidence supports TZL's submission. I will first consider the position of TZL itself, before turning to Canmoor's position.

TZL's ability to fund the zoo building

157. As it currently stands, TZL is balance-sheet insolvent, with net liabilities of over £200k. It is apparent from its most recent statutory accounts (to the end of the 2022 financial year) that it is only able to continue trading on the basis of a large shareholder loan by Mr Purdy. It therefore plainly lacks the financial means to build the zoo. It has, indeed, never had the means to do so: it was always clear, at the time of grant of the lease, that construction of the zoo would be dependent on outside investment. Canmoor repeated this in its meeting with LBH on 7 July 2022, at which (according to LBH's notes of the meeting, set out at §62. above) Canmoor stated that TZL had no intention to build the zoo buildings, as it did not have the funds. I also note, in this regard, that although the Call Option Agreement provided for payment of an option fee in tranches totalling £1.4m, that sum was paid to the shareholders of TZL rather than to TZL itself, and there is no suggestion that any of that sum will be made available for the purposes of the funding of the zoo building. (As noted above, the late disclosure of the redacted parts of the Call Option Agreement and Share Purchase Agreement meant that it was not possible for Ms Purdy and Mr Ellis to be cross-examined about this payment.)

158. It is also apparent, from the history of TZL's subsequent attempts to secure third party funding, that no commercial investor has ever been willing to invest in the zoo as a selfsufficient commercial venture. As Mr Ellis acknowledged in his evidence, although he was put forward as a potential investor in 2015, he did not then proceed to invest in the project because he was concerned about its commercial viability. Canmoor made the same point in a letter sent to LBH after the July 2022 meeting, which stated robustly that there was "no commercial rationale" for the zoo building. That is no doubt also why TZL has been unable to obtain funding from other investors on a standalone basis.

159. I do not, therefore, consider that TZL's breach can be described as wilful. There is no evidence that TZL has ever had access to funds that would enable it to build the zoo within the conditions of the lease. It is, however, fair to say that since at least 2017, once TZL ascertained that LBH was considering de-designation of the Site from the green belt, TZL does not appear to have made any attempt to seek investment or fundraising on a basis that would fall within the user covenant in the lease. Rather, it has put forward a succession of proposals involving development on the Site outside the terms of the lease, and has sought to persuade LBH to agree those proposals.

The evidence as to Canmoor's position

160. Canmoor's position from the outset of its involvement with TZL was the same as that of other potential developers: that it would only fund the zoo building if it was permitted to develop the surplus land on the Site, requiring a change of the user covenant in the lease. Mr Greenhill's submission was that, contrary to that position, HVL will now fund the zoo without agreement on Canmoor's development plans, if construction of the zoo building is required by the court as a condition of the grant of relief.

161. The evidential basis for that change of position is, however, sparse in the extreme. All that has been provided by HVL/Canmoor is the minutes of a meeting of the board of directors of HVL on 22 March 2024, at which it was noted that:

> "(a) the Call Option remains effective and capable of being exercised by the Company;
>
> (b) the Company had access to sufficient funds to effect the Call Option Exercise and to meet the costs of the construction of the Zoo Building by TZL."

The minutes then record a unanimous resolution that:

> "in the event that the outcome of the Litigation is that the Court determines the Council has not waived the right to forfeit the Lease and that it is appropriate to grant Relief from Forfeiture and it is a condition of the grant of Relief from Forfeiture that TZL builds or commences work on the Zoo Building within a set timeframe:
>
> (a) to approve the Call Option Exercise; and
>
> (b) to approve the undertaking by the Company of the Zoo Building Construction Arrangements."

162. The "Zoo Building Construction Arrangements" are defined earlier in the minutes as being "the procurement by the Company of such works as required by the Court towards the construction of the Zoo Building by TZL within such period as required by the Court as a condition of Relief from Forfeiture".

163. As Mr Hutchings pointed out, while the minutes thereby "approve" the exercise of the call option and the undertaking by HVL of the works required by the court for the construction of the zoo building by TZL, what is missing is any explanation of where the money is to come from. HVL itself does not appear to have sufficient assets to be able to fund the construction of the zoo: its most recent statutory accounts show net assets of £1,488,387, of which only £269,218 consists of cash at the bank. The minutes record opaquely that HVL has "access to sufficient funds", but no further detail is provided.

164. In addition, even if HVL is now provided with funds for the construction of the zoo building, the Share Purchase Agreement caps the funding obligation at £2.5m. There is no evidence before the court as to the current likely cost of constructing the zoo, but the historic estimates indicate that £2.5m is a significant underestimate of what will be required. The August 2014 internal LBH email cited at §28. above indicated an estimated cost in the region of £2.4m. By the time of the Funding Strategy document provided by TZL in October 2015, the estimate had increased to over £2.7m, plus an allowance for contingencies, giving a total of £3m. That was the figure quoted by Canmoor in its July 2022 meeting with LBH. The construction cost will, however, inevitably have increased since 2015, most likely by a significant amount, and there is no explanation of how the shortfall is to be funded.

165. Conspicuously, none of the board of directors of HVL, or any other representative of HVL or the Canmoor group, has provided any witness evidence to the court to explain these matters. Mr Ellis said that HVL's representatives had indicated to him that they would, if necessary, support TZL financially with constructing the zoo building. On that basis he maintained that HVL would indeed provide the financial support needed to complete the zoo building. Mr Ellis is not, however, a representative of either HVL or Canmoor. He was not able to provide any evidence as to the thinking behind the resolution, or the information on which it was based, or why HVL/Canmoor purports to have changed its position since the July 2022 meeting with LBH. Nor was he able to provide any explanation of where the money was going to come from, or the state of HVL or Canmoor's finances, other than commenting in vague terms that Canmoor was a "very wealthy company". Absent any evidence from HVL or Canmoor itself, therefore, Mr Ellis' comments can be regarded as no more than optimistic surmise.

166. As to the £2.5m cap on the Zoo Building Fund in the Share Purchase Agreement, Mr Ellis said that this was Canmoor's "rough estimate" on the basis of Canmoor's knowledge of other developments and previous conversations with builders, but confirmed that he had not seen anything in writing, and he had no further details as to the basis of that estimate. He was therefore unable to justify the figure as against the previous £3m estimate, other than saying that Canmoor considered that to be a high quote. Again, there is no evidence from HVL or Canmoor on this point, so Mr Ellis' comments cannot be verified.

167. At best, therefore, even if HVL is put in funds (whether by Canmoor or from any other source) to enable it to provide finance to the extent set out in the Share Purchase

Agreement, there is no evidence as to whether this will be sufficient to build the zoo to the specification required by the lease, namely the specification set out in the planning permission granted to TZL. Nor is there any evidence that if there is a shortfall once the £2.5m maximum in the Zoo Building Fund has been exhausted, which seems almost inevitable given the estimates previously obtained, further funding will be forthcoming to enable the project to be completed.

168. Mr Greenhill argued that Canmoor could put in more money and "surely would do so". If that is the case, Canmoor could have given evidence to that effect, but it has not done so. In fact, the evidence which is before the court makes clear that Canmoor has no inherent interest in the completion and operation of the zoo, which it considers to be a project without any commercial rationale. Its only interest is in the development value of the remaining parts of the Site, and its proposals to fund the zoo building are solely directed at achieving its development interests. I do not, therefore, consider that I can make any assumptions as to Canmoor's willingness to commit additional funds to the zoo, without concrete evidence from Canmoor in that regard.

Overall assessment of the position of TZL and Canmoor

169. This is, therefore, a case where TZL has been in breach of covenant for many years, and has consistently failed to secure finance for the building of the zoo within the terms of its lease. Until very shortly before the hearing, Canmoor's position was that it would not fund the construction of the zoo without development rights on the surplus land on the Site. It is now said by TZL that Canmoor has had a change of heart, and will now agree to fund the building (through HVL) even without any agreement from LBH as to development rights on the remaining land. There is, however, conspicuously no evidence of this provided by HVL or Canmoor themselves, other than a board minute which provides no evidence of funding sources or HVL/Canmoor's intentions in that regard; nor is there even any evidence of the current cost of complying with a requirement to build the zoo, against which an assessment of the viability of any funding proposals could be made; nor any explanation of what will happen in the likely event of the £2.5m figure in the Share Purchase Agreement proving insufficient.

170. It is of course not necessary, when granting relief from forfeiture conditional on the remedying of the relevant breach, for the court to conclude that there is a probability that the breach will indeed be remedied. As the authorities make clear, the forfeiture provision stands as security for that result: if the condition is not fulfilled, then the lease will be forfeit. The court should, however, ask itself whether there is a real likelihood, or real prospect, of the conditions being met. The court's discretion to order relief from forfeiture plainly should not be exercised on the basis of conditions which have no real prospect of being met.

171. In assessing whether there is a real likelihood or real prospect of the conditions being met, the court can and indeed must consider carefully the evidence before it. Where a tenant has consistently proven unable to fulfil a particular covenant, but comes to the court asserting that it is able to do so as a condition of grant of relief from forfeiture, the *Darlington* case makes clear that the court is entitled to scrutinise the evidential basis for that claim.

172. On the evidence before me, I am not persuaded that there is a real likelihood that TZL will be able to build the zoo, if construction of the building were to be ordered as a

condition of the grant of relief. On the contrary, for the reasons set out above, the assertion that HVL or Canmoor will make sufficient funds available is in my judgment speculative and unsupported by any concrete evidence. No other source of funds has been identified, and TZL no longer suggests that the court should grant relief without a requirement for the zoo to be built. There is therefore, in my judgment, an insufficient basis for this court to exercise its discretion to grant relief from forfeiture.

The windfall argument

173. TZL's skeleton argument for the trial contended that refusal of relief would give LBH a huge advantage in the form of the return of a site which is of considerable development value. By contrast, it was said, TZL had invested considerable funds from the "meagre resources at its disposal" in improving the Urban Farm, and would lose its only valuable asset in the form of its remaining 112-year term under the lease. That, TZL contended, would be a disproportionate windfall to LBH.

174. Once the unredacted versions of the Call Option Agreement and the Share Purchase Agreement were (belatedly) provided, however, any argument as to the loss to TZL from forfeiture rapidly evaporated. Under those agreements, as set out above, TZL and its shareholders have already received payments totalling £1.5m. The effect of the Share Purchase Agreement is that, as matters currently stand, no further completion payment is likely to be payable for the purchase of TZL's shares if the zoo is built (see §48. above). There is no evidence from TZL as to any significant further expected value in the lease to TZL, if relief from forfeiture is granted.

175. The real value in the lease lies, rather, in the value to HVL/Canmoor under the Call Option Agreement. That is why the proceedings are being funded by Canmoor and why, as I have already said, in reality this litigation is between Canmoor and LBH rather than between TZL and LBH. Mr Ellis effectively conceded that point, in a revealing exchange in his cross-examination by Mr Hutchings:

> "Q. Can I suggest … that what Canmoor are trying to do in these proceedings is to force the council's hand, are they not? A. They are not trying to force the council's hand.
> Q. That is the only rational conclusion. What they are trying to do is to get the lease [to] remain in position with an order that says that the building does not have to be built. That is the case that is being put?
> A. Yes.
> Q. In order to force the council's hand to deal with them either by selling them the land or allowing them to develop the business park. That is really what these proceedings are about, is it not?
> A. Yes."

176. While there is no doubt that the court should, in considering relief from forfeiture, be astute to guard against a disproportionate loss to the tenant, particularly from a minor breach of covenant, the court is not required to protect the interests of third parties seeking to use the remaining term of the lease as a bargaining chip in negotiations with the landlord for development rights over the site.

Conclusion on relief from forfeiture

177. In conclusion, for the reasons set out above, I do not consider it appropriate to grant relief from forfeiture.

178. Mr Greenhill submitted that the result of this would be to shut down the Urban Farm. It is important to record that this is not LBH's position. On the contrary, Mr Hutchings emphasised in his closing submissions that LBH was and has always been a supporter of the Urban Farm, and had previously had a good relationship with the Purdys. While he could not, obviously, give any guarantees, he had specific instructions to say that LBH would actively want to reach a solution that allowed the continuation of the Urban Farm as part of its present site under any new lease arrangements. That position is consistent with the material before the court, and in particular LBH's note of its July 2022 meeting with Canmoor, which records LBH as having said that in the event of forfeiture it would seek to support the Urban Farm by granting a new lease which meets its current needs.

Overall conclusions

179. My conclusions are therefore that:

i) Schedule 2, paragraph 9.1 of the lease constitutes a freestanding tenant covenant, material breach of which triggers a right of re-entry and forfeiture under clause 5.1.1. TZL materially breached that covenant by failing to comply with the paragraph 9.1 notice served on 6 November 2020.

ii) Clause 5.1.1 of the lease does not exclude the operation of the common law of waiver in relation to the lease.

iii) The delays in returning the March 2021 and September 2022 rent payments to TZL did not, however, constitute the acceptance of rent by LBH, and LBH did not thereby waive its right of forfeiture. iv) Relief from forfeiture is refused.