



Neutral Citation Number: [2018] EWHC 3430 (Ch)

Case No: HC-2017-002524

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

The Rolls Building
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 14/12/2018

Before :

The Hon. Mr Justice Fancourt

Between :

ALDFORD HOUSE FREEHOLD LIMITED

- and -

(1) GROSVENOR (MAYFAIR) ESTATE

(2) K GROUP HOLDING INC

Claimant

Defendants

Edwin Johnson QC (instructed by **Forsters LLP**) for the **Claimant**
Gemma de Cordova (instructed by **Boodle Hatfield LLP**) for the **First Defendant**
Stephen Jourdan QC and **Thomas Jefferies** (instructed by **Stephenson Harwood LLP**) for
the **Second Defendant**

Hearing dates: 7, 8, 9, 12, 13 November 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Fancourt :

1. This is a claim by Aldford House Freehold Limited (“the Claimant”) to establish its entitlement to acquire the freehold of the building known as Aldford House, Park Street, London W1K 7LG (“the Building”) under Chapter 1 of Part I of the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”). Chapter 1 confers on qualifying tenants the right to acquire the freehold of premises to which it applies. The Claimant is the nominee purchaser of the participating tenants in the Building. The First Defendant owns the freehold and also represents another Grosvenor company that owns a long overriding headlease of the Building. The original headlease of the Building, which expires in 2100, is vested in the Second Defendant. I shall refer to the Defendants as “Grosvenor” and “K Group” respectively.
2. The Building faces Park Lane on an island block, a little to the north of the Dorchester Hotel. It comprises commercial space at basement and ground floor levels and a number of residential flats (or intended residential flats) on the ground to eighth floors. The total number of flats in the Building – in particular whether there are any “flats” within the meaning of Part I of the 1993 Act on the sixth and seventh floors – is one of the principal issues that I have to decide. The Claimant contends that there are twenty-six flats in the Building. The Defendants contend that there are thirty.
3. The Claimant’s claim to the freehold of the Building arises from two notices dated 23 July 2015 (“the relevant date”) served on Grosvenor as “reversioner” pursuant to section 13 of the 1993 Act. The first notice (“the Initial Notice”) was given on the basis that there were on the relevant date twenty-six flats in the Building. The second notice (“the Second Notice”) was given, without prejudice to the validity of the Initial Notice, on the basis that there were on the relevant date thirty flats in the Building. Both notices were signed by a solicitor purportedly on behalf of seventeen participating tenants of flats. On 25 September 2015, Grosvenor gave counter-notices pursuant to section 21 of the 1993 Act in response to the Initial Notice and Second Notice. The first counter-notice stated that the Initial Notice was wrong to state that there were twenty-six flats in the Building and asserted that the correct number was thirty. In other respects, the two counter-notices were substantially identical. They both stated that Grosvenor did not admit that on the relevant date the participating tenants were entitled to acquire the freehold. They both asserted that three of the participating tenants (of Flats 21-23, 44-45 and 51) were not qualifying tenants.
4. It is common ground that the counter-notices were validly given. That means that, by virtue of section 22 of the 1993 Act, the nominee purchaser had to issue an application to the court within a period of two months from the date on which the counter-notices were given in order to preserve the claim of the participating tenants. The claim form in these proceedings was issued by the Claimant on 23 November 2015. It claims a declaration that the participating tenants were on 23 July 2015 (a date referred to therein as “the date of service of their initial notice”) entitled to exercise the right of collective enfranchisement in relation to the Building. The claim form was issued as a Part 8 claim and contained a summary of the grounds on which the Claimant claimed to be entitled to the relief sought. These stated, among other matters, that the Building contained twenty-six flats, all of which were let on long leases, and identified the date of service of the Initial Notice and the counter-notice. It is also stated that Grosvenor claimed that there were four flats on the sixth and seventh floors of the Building but that the Claimant disputed it. The claim form was supported by a witness statement of

Amanda Louise McNeil dated 20 November 2015, which exhibited the documents relied on in support of the Claimant's claim.

5. In due course K Group was added as a defendant to the claim and the County Court gave directions, including the transfer of the claim to the High Court. There was no direction for the parties to exchange statements of case, although by that time both Grosvenor and K Group had filed witness statements on which they intended to rely and the Claimant had provided Further Information in response to Part 18 requests made on behalf of K Group.
6. At both case management conferences and at the pre-trial review, the parties provided a short, agreed list of issues. The list did not identify all the issues on which one or more of the parties now seeks the court's determination. Neither were all those issues adequately defined in the statements of case (such as they were) or in the evidence. There was until shortly before the exchange of skeleton arguments before the trial some confusion about the issues on which argument was to be addressed to the court.
7. As a result, there were several procedural issues and interim applications before me on day 1 of the trial. The applications were by the Claimant for permission to amend the claim form to rely on the Second Notice, if the claim form as it stood did not permit it to do so, and by K Group for permission to adduce further evidence relating to the status of Flat 51 and the amount of internal space in the Building that was neither common parts nor space occupied or intended to be occupied for residential purposes.
8. Apart from these applications, there was also disagreement in the skeleton arguments about whether the Claimant was entitled to argue that overriding underleases of parts of three flats were unlawfully granted by K Group and whether the Defendants were entitled to take points about the validity of the Initial Notice that had not previously appeared on the List of Issues. In the event, all parties agreed at the start of the trial that arguments on these procedural matters could be advanced at the same time as the presentation of the argument on the substantive issues, leaving me to decide the applications and procedural issues at the same time as I addressed the substantive issues in my judgment. For those purposes, it was accepted that I would read the disputed evidence *de bene esse*.
9. Against that brief rehearsal of the background, the issues that were argued before me were the following:
 - (1) Whether there were on the relevant date four, two or no "flats" within the defined meaning of that term in Part I of the 1993 Act on the sixth and seventh floors of the Building.
 - (2) Whether the participating tenants' solicitor, Ms McNeil, had validly been given authority on behalf of three tenants, MBOSE Limited, Rokkibeach Limited and Leclipse Asset Corp, to give the Initial Notice and Second Notice on their behalf.
 - (3) Whether MBOSE Limited, Aweer Property Limited and Kirama Properties Limited, as tenants of Flats 21-23, 44-45 and 51 respectively, were "qualifying tenants" within the

meaning of the 1993 Act, given that they hold their interests under two separate underleases from different landlords. It is in relation to this issue that the dispute about whether the Claimant is entitled to assert that overriding underleases were unlawfully granted arises.

- (4) Whether on the relevant date more than 25% of the internal floor area of the Building comprises space that was neither common parts nor occupied or intended to be occupied for residential purposes. If it did, the collective enfranchisement provisions of the 1993 Act do not apply to the Building at all. It is in relation to this issue that K Group applies to adduce further evidence in relation to floor areas.
- (5) Whether the Initial Notice was invalid if there were on the relevant date more than 26 flats in the Building. It is in this context that the claimant applied to amend the claim form.
- (6) Whether, if MBOSE Limited, Aweer Property Limited and Kirama Properties Limited are not qualifying tenants, the Initial Notice was invalid pursuant to para. 16 of Schedule 3 to the 1993 Act because it was given by fewer than two-thirds of the total number of qualifying tenants of the flats in the Building.

I shall deal with these issues below – to the extent necessary or appropriate to do so – in what appears to be a logical order.

Number of flats in the Building

10. It was not in dispute that there are twenty-six flats in the Building excluding the sixth and seventh floors. Subject to the third issue identified above, it is accepted that the tenant of each of the flats is a qualifying tenant within the meaning of the 1993 Act.
11. Before 2008 there was a single flat on each of the sixth and seventh floors. The underleases of each of these flats had been acquired in 1996 and 1998 respectively by Park Lane Holding Inc (“PLH”), a company in the same ultimate ownership as K Group. In April 2003, planning permission was sought to extend the sixth and seventh floors to create three flats on each floor. This was granted on appeal on 1 December 2004. PLH then negotiated with Grosvenor a licence for alterations. This was not executed until 24 January 2008. The works involved stripping out the existing flats and the construction of new accommodation on the north-east and south-east sides of the Building, above fifth floor level. The east-facing external walls of the old sixth and seventh floor flats were removed, as a result of which the structurally enclosed space on the sixth and seventh floors was very substantially extended, so as to surround the lightwell in the middle of the Building. Mr Kheireddine, a member of the family who own K Group and PLH, said in evidence that the construction work started in around November 2008 and that it was very extensive. He said that the rooms on the Park Street side of the old flats were demolished and all the internal rooms were demolished, but that the façade was left. He accepted that it appeared that the structural work was completed by about 2012.

12. During the course of the works, it was decided to create instead two flats on each of the two floors. Planning permission for this was granted on 29 September 2011. Another planning permission was granted on 26 June 2012 to allow further extension of the space at sixth and seventh floor levels into the lightwell. The windows on the Park Lane façade were replaced pursuant to another planning permission granted on 20 March 2013. These works finished around mid-2013, leaving the new premises as a structurally complete shell.
13. At that time, the existing underleases of the old flats were surrendered by PLH and on 24 July 2013 K Group granted new underleases of each of the four new flats, numbered 61, 62, 71 and 72. Each new underlease was granted to a different corporate tenant. At that time, there was no physical division between the two flats on each floor. The new underleases do, however, contain plans that show that there was to be a dividing wall between them. The plans are marked (with red lines to indicate the extent of the premises demised) in such a way as to exclude the structure of the external walls and this intended dividing wall from the demise. The work to fit out the flats had not been done at this time, on professional advice received by K Group, and still has not been done.
14. In December 2014, various tenants in the Building served purported notices under section 13 of the 1993 Act, claiming to acquire the freehold. These notices are now accepted to have been invalid, but they evidently resulted in K Group seeking legal advice on how best to protect its interests. As a result, dividing walls were erected on the sixth and seventh floors to separate the two flats, and a partition screen was erected on the balconies on the Park Lane side on both levels. Further, work was done to install suspended ceilings and new boarding for the floors. The new dividing walls each had two pairs of large doors in them, intended to facilitate access by builders and others from the northern side to the southern side of the Building in connection with the future fitting out of the premises. These doors were no longer in existence when I inspected the Building on the first day of the trial. The walls had been made complete. However, there are photographs taken shortly after the relevant date showing these pairs of doors. They were not doors of the type that one would expect to see in a residential flat. They were large, flat-panel doors, apparently designed to give a large space through which building materials and equipment could be taken. The doors had key and bolt locks but no door handles. Mr Kheireddine’s evidence is that they were kept locked.
15. Accordingly, on the relevant date, the structural works on the sixth and seventh floor premises had long since been completed and they contained new raised floorboarding and suspended ceilings but no internal walls (other than the dividing wall), pipes, cables or other items of fit-out. The two sets of premises on each floor (as identified in the new underleases) were separated from each other by the dividing wall and the locked pairs of access doors, which were designed to be opened to facilitate work to fit out the flats for occupation. Separate access to each of the intended new flats could be gained via the lifts and staircase in the northern or southern core of the Building.
16. The number of flats in a building is important for the purposes of the 1993 Act. Section 3 (1) of the Act provides:

“Subject to Section 4, this Chapter applies to any premises if-

 - (a) they consist of a self-contained building or part of a building ...;

- (b) they contain two or more flats held by qualifying tenants; and
- (c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.”

17. Section 4 states that Chapter 1 does not apply to premises falling within Section 3(1) in defined circumstances, essentially where over 25% of the internal floor area is commercial space. There is no dispute that, subject to the section 4 point, the requirements of section 3(1) are satisfied in the case of the Building. However, the importance of the number of flats and qualifying tenants does not end there.

18. Section 13 of the Act provides (so far as material):

“(1) A claim to exercise the right to collective enfranchisement with respect to any premises is made by the giving of notice of the claim under this section.

(2) A notice given under this section (“the initial notice”) –

(a)

(b) must be given by a number of qualifying tenants of flats contained in the premises as at the relevant date which –

(i)

(ii) is not less than one-half of the total number of flats so contained;

(3) The initial notice must-

(a)

(b) contain a statement of the ground on which it is claimed that the specified premises are, on the relevant date, premises to which this Chapter applies;

.....

(e) state the full names of all the qualifying tenants of flats contained in the specified premises and the addresses of their flats, and contain ... in relation to each of those tenants, ... -

(i) such particulars of his lease as is sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of commencement of the term,”.

19. By section 5(1) of the Act, a person is a qualifying tenant of a flat for the purposes of Chapter 1 if he is the tenant of the flat under a long lease, other than certain excluded types of lease. “Long lease” is defined in Section 7 (6) of the Act, which provides:

“ Where in the case of a flat there are at any time two or more separate leases, with the same landlord and the same tenant, and-

- (a) the property comprised in one of those leases consists of either the flat or a part of it (in either case with or without any appurtenant property), and
- (b) the property comprised in every other lease consists of either a part of the flat (with or without any appurtenant property) or appurtenant property only,

then in relation to the property comprised in such of those leases as are long leases, this Chapter shall apply as it would if at that time –

- (i) there were a single lease of the property, and
- (ii) that lease were a long lease;

but this subsection has effect subject to the operation of subsections (3) to (5) in relation to any of the separate leases.”

20. Accordingly, if the Building contains twenty-six flats, the Initial Notice was not valid unless given on behalf of at least thirteen qualifying tenants. If, on the other hand, the Building contains thirty flats, as the Defendants contend, the notices had to be given validly on behalf of at least fifteen qualifying tenants. The Initial Notice and the Second Notice were given purportedly on behalf of seventeen qualifying tenants. The Defendants contend that in the case of three such qualifying tenants the notices were given without authority, and that three of the tenants on whose behalf the notice was given were not as a matter of law qualifying tenants. One tenant MBOSE Limited, falls into both categories.

21. “Flat” is defined in section 101(1) of the 1993 Act for the purposes of Part I as meaning:

“a separate set of premises (whether or not on the same floor) –

- (a) which forms part of a building, and
- (b) which is constructed or adapted for use for the purposes of a dwelling, and
- (c) either the whole or a material part of which lies above or below some other part of the building”.

“Dwelling” is defined by the same subsection as meaning:

“any building or part of a building occupied or intended to be occupied as a separate dwelling”.

22. The matters that are in dispute between the Claimant and the Defendants are whether on the relevant date each of the intended flats numbered 61, 62, 71 and 72 was a separate set of premises, and if so whether it was on that date constructed or adapted for use for the purposes of a dwelling. The first issue turns on the presence of the sets of double doors in the dividing walls between the intended flats on each floor. The second issue turns principally on the extent to which construction of the new flats had progressed by the relevant date.
23. On behalf of K Group, Mr Stephen Jourdan QC (who appeared with Mr Thomas Jefferies) submitted that there were four separate sets of premises on the sixth and seventh floors on the relevant date. The double doors formed part of the dividing wall between the intended flats. Each of the intended flats had its own access from the common parts independently of the others. The double doors had only a limited function, were locked shut and were intended to be removed once the fitting out of the flats was complete. Further, each of the separate areas was separately demised by an underlease containing a covenant not without the landlord's consent to use or occupy the premises otherwise than as a single private residence in one family occupation. The lawful planning use was as four separate flats, and each of the new underleases was in separate ownership.
24. Mr Jourdan referred to Cadogan v McGirk [1996] 4 All ER 643, a case under Chapter 2 of Part I of the 1993 Act (concerned with extension of leases of individual flats), where the issue was whether the tenant of a flat was entitled to a new lease of the flat and a store room on a different floor of the mansion block, which was held under a separate lease. Millett LJ said:

“The first question is whether the store room on the sixth floor forms part of the flat on the second floor. This depends on whether it is part of the same “separate set of premises” (whether or not on the same floor)” (see s.101(1) of the 1993 Act). The words in parenthesis make it clear that maisonettes are included, but they may have a wider effect than this. In my opinion, the word “separate” suggests both “physically separate” or “set apart” and “single” or “regarded as a unit”. The definition is concerned with the physical configuration of the premises. It was conceded by the appellants that the rooms which form part of the flat do not have to be contiguous. Many sets of chambers in the Inns of Court are physically divided by a common staircase and a landing where they would, I think, been regarded as a single “separate set of premises”. The question is one of fact and degree, and must largely be one of impression. The degree of proximity of any part of the premises which is not contiguous is not likely to be decisive.”

It was held that the flat and the store room did not form a single unit and were not “a separate set of premises”. They were not together a single, physically separate unit.

25. In Merie Bin Mahfouz (UK) Limited v Barrie House (Freehold) Limited [2015] L&TR 21, the Upper Tribunal (Lands Chamber) had to consider whether a lease to a telecoms operator of a vault in a basement with some space on the roof for a linked antenna was a “unit” of which the landlord of the block was entitled to a leaseback, on the ground

that it was a “separate set of premises let ... on a business lease”. Despite the physical separation of the parts of the demise, the Upper Tribunal held that the premises were a unit because, both functionally and physically, they operated as a single unit. The constituent parts of the premises were let and operated as one.

26. The facts of this case are very different from the facts of both those cases – instead of the physical separation in those cases, there is contiguity here, with provision for access between the two parts. Nevertheless the test to be applied is the same: is each of the parts of each floor physically separate and to be regarded as a single unit, or is there only one or no unit on each floor. In the Barrie House case, the existence and terms of the lease were held to be material, and here the new underleases support the argument that the two parts of each floor are functionally separate.
27. Mr Edwin Johnson QC for the Claimant argues that because the two demised areas on each floor were interconnected (by the pairs of double doors) they did not constitute separate sets of premises on the relevant date. Given the existence of the dividing wall, he could not rely on any other factual basis for his argument.
28. I consider that each part of each of the floors, as separately demised on the relevant date, is a separate set of premises within the meaning of the definition of “flat”. Each part of each floor was given its separate identity not just by being enclosed by external walls and a dividing wall, but was given functional identity (as well as a precisely defined extent) by the terms of the new underleases. Each demised area was separated from the other by the dividing wall with doors in it. The doors were kept locked. They were there for the purpose only of facilitating the fitting out of the flats at a later time. The doors were not there so that each demised area could be used together with the other demised area, only for passing through one flat into the other. It was intended that, after completion of the fit out, the doors would be removed and the dividing wall fully built. Each demised area was in my judgment a separate set of premises on the relevant date and held as such by different tenants under the terms of the new occupational underleases.
29. The next issue, on which Mr Johnson relied rather more strongly, is whether each of the separate sets of premises (i.e. flats 61, 62, 71 and 72) were on the relevant date “constructed or adapted for use for the purposes of a dwelling”. Mr Johnson submits that each separate area was not on that date constructed or adapted for any use, certainly not for the purposes of a dwelling, because it could not at that time be used as a dwelling. He submits that each separate set of premises (as I have held to have been in existence) was a set of premises newly created, not simply an alteration or extension of the pre-existing flat that had been constructed in the 1930s. In my judgment, that must be right. The original separate sets of premises (flats 60 and 70) were effectively demolished internally, amalgamated into newly-built space and then divided up. Each of flats 61, 62, 71 and 72 was a newly-constructed set of premises as a result of the works carried out on behalf of K Group between around 2008 and 2013. If one then asks: for use for what purposes was each of the new units so constructed, the answer seems to me to be very clear: for use for the purposes of a dwelling. None of the new flats was constructed for use for any other purposes, although the intended purposes have not yet been brought into effect because the flats have not yet been fitted out.
30. Mr Johnson submits that this must lead to the conclusion that the separate sets of premises have not been constructed for use for the purposes of a dwelling, because they

are not yet sufficiently constructed. He relies upon the inability of anyone to dwell in any of the intended new flats, in their condition on the relevant date, and on what Lord Carnwath JSC said at paras [35] – [36] of his judgment in Day v Hosebay Limited [2012] UKSC 41; [2012] 1 WLR 2884, on a question under the Leasehold Reform Act 1967 of whether the properties were houses “reasonably so called” and were “designed or adapted for living in”:

- “35. Once it is accepted that a “literalist” approach to the definition is inappropriate, I find myself drawn back to a reading which records more closely to what I have suggested was in Lord Denning MR’s mind in *Ashbridge* [1965] 1 WLR 1320, that is a simple way of defining the present identity or function of a building as a house, by reference to its current physical character, whether derived from its original design or from subsequent adaptation. Furthermore, I would not give any special weight in that context to the word “adapted”. In ordinary language it means no more than “made suitable”. It is true that the word is applied to the building, rather than its contents, so that a mere change of furniture is not enough. However, the word does not imply any particular degree of structural change. Where a building is in active and settled use for a particular purpose, the likelihood is that it has undergone some physical adaptation to make it suitable for that purpose. That in most cases can be taken as the use for which it is currently “adapted”, and in most cases it will be unnecessary to look further.
36. That interpretation does not of course call into question the actual decision in the *Boss Holdings* [2008] 1 WLR 289. The basis of the decision as I understand it, was that the upper floors, which had been designed or last adapted for residential purposes, and had not been put to any other use, had not lost their identity as such, merely because at the material time they were disused and dilapidated. It was enough that the building was partially “adapted for living in” and it was unnecessary to look beyond that: see para [25]. That reasoning cannot be extended to a building in which the residential use has not merely ceased, but has been wholly replaced by a new, non-residential use.”
31. The words “was or is designed or adapted” are accepted to be synonymous with the words in the 1993 Act, “which is constructed or adapted”. Mr Johnson emphasises Lord Carnwath’s focus on the identity and function of a building, by reference to its current physical character. He says that the new flats on the sixth and seventh floors have no identity or function or physical character as dwellings, or for use for the purposes of a dwelling.

32. The Boss Holdings case referred to by Lord Carnwath is a reference to Boss Holdings Limited v Grosvenor West End Properties Limited [2008] UKHL 5; [2008] 1 WLR 289. The issue in that case was similarly whether a property was a “house” as defined in the 1967 Act, which included the question of whether it was “designed or adapted for living in”. The House of Lords held that a property that had been designed as a dwelling-house but not adapted for any other use remained designed for living in, even when it was so dilapidated that it could not be inhabited for living purposes on the relevant date. The Court of Appeal in the same case had held that, since the upper floors of the property were so dilapidated, at the relevant time the premises were not designed or adapted for anything. The House of Lords held that that was the wrong approach. Lord Neuberger of Abbotsbury said that the fact that the property had become dilapidated and incapable of beneficial occupation did not detract from the fact that it was designed for living in, when it was first built, and nothing that had happened subsequently had changed that:
- “In my judgment, the words ‘designed or adapted for living in’, as a matter of ordinary English, require one first to consider the property as it was initially built: for what purpose was it originally designed? That is the natural meaning of the word ‘designed’, which is a past participle. Then one goes on to consider whether work has subsequently been done to the property so that the original ‘design’ has been changed; has it been adapted for another purpose, and if so what purpose? When asking either question, one is ultimately concerned to decide whether the purpose for which the property has been designed or adapted, was ‘for living in’.”
33. Mr Jourdan, for K Group, submits that the reasoning in the Boss Holdings case applies equally here, if one substitutes for “designed” the word “constructed” and for the words “for living in” the words “for the purposes of a dwelling”. The fact that the new flats are incapable of being lived in, because they are not fitted out, is immaterial. The new premises exist and were constructed for the purposes of being used as a residential flats, and therefore dwellings, and they have not been adapted for any other purpose. The only permitted use under planning law and under the new underleases was use as for separate dwellings.
34. In my judgment, the statutory definition of “flat” in the 1993 Act, is, like the definition of “house” in the 1967 Act, concerned with the purpose for which premises have been constructed or subsequently adapted. The relevant question is whether they have been constructed or adapted for use for the purposes of a dwelling or for use for some other purposes. If the latter, the separate set of premises so constructed or adapted is not a “flat”. The test is not whether the separate set of premises has reached such an extent of fitting out, or remains in such good condition, that it can actually be used for living, eating and sleeping purposes on the relevant date. The Boss Holdings decision seems to me to be on point in this regard. Each of the four separate sets of premises in existence on the sixth and seventh floors have been constructed for use for residential purposes, even though their current condition precludes actual use for those purposes.
35. Mr Johnson submitted that the analogy with the Boss Holdings case was imprecise because there only part of the house had fallen into dilapidation, whereas here the entirety of each separate set of premises is a shell. Although that may be a factual distinction, it does not seem to me to be a material one. Of course, if the sixth and seventh floors had not yet been constructed so as to create separate sets of premises, there could be no “flats” within the definition. But once the separate sets of premises

exist and are let for residential purposes, they have been constructed for use for the purposes of a dwelling within the meaning of the definition even if they could not actually be used as such on the relevant date. It is the separate set of premises that needs to have been constructed, not an inhabitable dwelling.

36. In my judgment, the judgment of Lord Carnwath in the Hosebay case is consistent with that conclusion. Lord Carnwath was concerned in that case with change of use: the premises were no longer being used for living in because they had been adapted for use for (and were actually used as) commercial purposes. It is in that context that emphasis was placed on “defining the present identity or function of a building” and on “its current physical character”. The explanation of the decision in Boss Holdings shows that it was accepted that the premises had been designed for residential purposes and the fact they were not at the relevant time able to be used as such was immaterial. I would accept Mr Johnson’s argument that the existence or otherwise of a “flat” cannot simply depend on an intention at some point that premises be occupied as a dwelling. However, the question is whether premises have been constructed or adapted for those purposes. If they have been built sufficiently, so that an identifiably separate set of premises exists, the relevant question is: for use for what purposes were they so built? The existence of the new underleases, if not the planning permissions and the works themselves, readily provides the answer. The matter can be tested by asking whether they were constructed or have since been adapted for use for purposes other than the purposes of a dwelling. The answer in this case is clear.
37. That means that on the relevant date there were thirty flats in the Building, which in turn means that the Initial Notice had to be signed on behalf of at least fifteen qualifying tenants and had to identify all the qualifying tenants in the Building. It is common ground that the Initial Notice did not name the qualifying tenants of Flats 61, 62, 71 and 72. It is also common ground in this court that, as a result of the decision of the Court of Appeal in Natt v Osman [2015] 1 WLR 1536, that means that the Initial Notice is void. Accordingly, the claimant must rely on the Second Notice if it is to succeed in its claim. I shall therefore address the issues associated with that question next.

Can the Claimant rely on the Second Notice?

38. The Claimant protested at the Defendants’ reliance at trial on the invalidity of the Initial Notice. It protested because that issue did not previously appear on the agreed List of Issues. However, it is a pure question of law, the answer to which must inevitably follow on the undisputed facts from my decision that there were thirty flats in total in the Building. In those circumstances, it would not be right to prevent the Defendants from taking the point. The point had originally been identified as an issue in Mr Kheireddine’s first witness statement.
39. The Claimant’s riposte was, at first, to apply to seek to amend the claim form to plead reliance on the Second Notice. On reflection, however, Mr Johnson accepted that if the claim form as issued was not the “application” required by the 1993 Act then it would be too late to rectify the position by amending the claim form now. Alternatively, if amending the claim form could rectify the problem, permission to amend should not in principle be granted as it would have the effect of depriving the Defendants of a statutory defence to the claim.
40. The relevant statutory provisions are following:

- “21(1) The reversioner in respect of the specified premises shall give a counter-notice under this section to the nominee purchaser by the date specified in the initial notice in pursuance of Section 13(3)(g).
- (2) The counter-notice must comply with one of the following requirements, namely-
- (a) state that the reversioner admits that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises;
 - (b) state that, for such reasons as are specified in the counter-notice, the reversioner does not admit that the participating tenants were so entitled;
 - (c)

22 (1) Where –

- (a) the reversioner in respect of the specified premises has given the nominee purchaser a counter-notice under section 21 which (whether it complies with the requirement set out in subsection (2)(b) or (c) of that section) contains such a statement as is mentioned in subsection (2)(b) of that section, but
- (b) the court is satisfied, on an application made by the nominee purchaser, that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises,

the court shall by order make a declaration to that effect.

22(2) Any application for an order under subsection (1) must be made not later than the end of the period of two months beginning with the date of the giving of the counter-notice to the nominee purchaser.
.....

29(1) Where, in a case falling within paragraph (a) of subsection (1) of section 22 –

- (a) no application for an order under that subsection is made within the period specified in subsection (2) of that section, or
- (b) such an application is so made but is subsequently withdrawn,

the initial notice shall be deemed to have been withdrawn-

- (i) (if paragraph (a) above applies) at the end of that period, or-

(ii) (if paragraph (b) above applies) on the date of the withdrawal of the application.”

41. In the light of those provisions, the Claimant submits that it is entitled to rely on the Second Notice because an application for an order under section 22(1), namely an order that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the Building, was made within the period of two months starting on 25 September 2015 in the shape of the claim form issued on 23 November 2015.
42. The claim form does not refer to more than one initial notice, but it identified an initial notice by date: 23 July 2015. That is the date on which both the Initial Notice and the Second Notice were given. As previously stated, the grounds of claim in the claim form describe the Building as containing twenty-six flats and state that Grosvenor contends that there are thirty flats in the Building. It also states that Grosvenor contends that because three of the flats did not have qualifying tenants, the number of participating tenants was reduced to fourteen, which is less than one-half of thirty flats, and so the claim was invalid. There is no reference to the Second Notice. The evidence in support of the claim form exhibited the Initial Notice and the counter-notice to the Initial Notice, which made the above points about the validity of the Initial Notice. It did not exhibit the Second Notice and second counter-notice.
43. Mr Johnson submits that, despite the fact that the claim form contained grounds for relief and relies on evidence of the Initial Notice but not the Second Notice, the claim form is nevertheless an “application” within the meaning of section 22(1)(b) of the 1993 Act that fulfils all the statutory requirements. The nominee purchaser, the participating tenants and the specified premises are the same in the case of both notices, and so the claim form is an application made in time by the correct person for a declaration that the correct participating tenants were entitled in relation to the Building. The fact that the claim form as drafted appears to rely on the Initial Notice is immaterial, he suggests.
44. In response, Mr Jourdan stated that it was clear that both Grosvenor and the Claimant took the claim form to be referring only to the Initial Notice. This resulted in the terms of the agreed first Case Summary, produced nearly a year after the relevant event, in which it is stated that the Second Notice was deemed to have been withdrawn. He submitted that an application has to be made in respect of a particular initial notice, not generally; there might be competing groups of tenants seeking to claim at the same time and it is necessary for the reversioner to understand to which notice the claim relates. Further, the number of flats in respect of which notice was given is critical to the establishment of rights and operation of the machinery in the Act, so it was important to be able to identify the initial notice. However, he accepted (rightly, in my view) that a claim form could expressly state that it was served in respect of more than one initial notice. There is no requirement for a separate application for each initial notice relied upon.
45. I consider that Mr Johnson is right in principle in saying that all that section 22 of the Act requires is for an application to be made by the correct person in relation to the premises in question. However, the application must not by its terms exclude reliance on a given initial notice. That is because the application must at least be capable of relating to that notice. If the claim form had expressly said that it was not a claim in relation to the Second Notice, it would not have been an application capable of

preventing the Second Notice from being deemed to be withdrawn. The same result must follow if, in the absence of any such express statement, the claim form is properly to be understood as not being made in relation to the Second Notice or – which would amount to the same thing – as being made only in relation to the Initial Notice.

46. The parties of course knew that the Initial Notice and the Second Notice had been served on the same day, and that two counter-notices from Grosvenor were served simultaneously. The Second Notice was served without prejudice to the first and on the express basis that it applied if Flats 61, 62, 71 and 72 were “flats” within the meaning of the 1993 Act. The participating tenants, the nominee purchaser and Grosvenor (the correct recipient of the notices and the defendant to the application) therefore were aware upon serving the counter-notices that the tenants were intending to rely on whichever notice was valid, depending on the correct answer to the disputed “flats” issue.
47. The grounds of the claim asserted that the seventeen participating tenants, alternatively fourteen tenants (excluding those of flats 21-23, 44-45 and 51), are qualifying tenants and that on that basis the participating tenants had the right to collective enfranchisement. In the case of the Second Notice, however, fourteen qualifying tenants was insufficient to entitle the Claimant to the relief sought, because fourteen is less than one-half of thirty. The grounds of claim expressly refer to Grosvenor’s contention that the lessees of three flats were not qualifying tenants and that therefore (as Grosvenor contended) the number of participating tenants was too few. The answer given in the grounds of claim is that there are 26 flats and seventeen, alternatively fourteen, qualifying tenants, which is more than one-half of 26. The grounds of claim also state that the evidence in support of the claim was contained in Miss McNeil’s witness statement, attached to the claim form. That witness statement said nothing about and did not exhibit the Second Notice. It only referred to and exhibited the Initial Notice.
48. In those circumstances, in my judgment, the claim form does place reliance on the Initial Notice only and is therefore not an “application” within the meaning of section 22 of the 1993 Act as regards the Second Notice. Reliance on fourteen qualifying tenants (in the alternative) as being a sufficient number of qualifying tenants was inconsistent with reliance on the Second Notice. So too was the absence of the Second Notice from the exhibit to the witness statement in support of the claim. The grounds of claim stated that the evidence in support of the claim was contained in that witness statement, but it said nothing about the Second Notice. Had the claim form stated that, in the alternative, the Claimant relied upon the Second Notice and contended that there were at least fifteen qualifying tenants among the participating tenants, that would have been sufficient to prevent the conclusion that the claim form was issued only in relation to the Initial Notice.
49. It may appear to be something of a technicality that no application was made as regards the Second Notice, but the 1993 Act is replete with such technicality. I accept Mr Jourdan’s submission that it may be of importance for the reversioner and other landlords to understand whether an application relates to one or more notices, though in the majority of cases there will be only one initial notice. Nevertheless, it is self-evident that, in setting out the grounds or basis of the claim in the claim form and in the evidence in support of the claim, a claimant will need to identify the initial notice and counter-notice that give rise to the entitlement to make the claim, if the claim is to be

proved. It is an obvious inference that, if the grounds of claim and evidence in support of it refer to one notice but not another, the claim form is not made in relation to that other notice, even if the parties were aware of its existence. The remedy is of course in the hands of the nominee purchaser making the application.

50. Although what the parties thought subsequently does not affect the answer to the question (absent the assertion of a change of position or detrimental reliance), the parties were in my judgment right to state, at paragraph 8 of the first case summary, that the Claimant has not made an application to the court in relation to the Second Notice and that, if it was validly given, it is deemed withdrawn under section 29 of the 1993 Act. The deemed withdrawal took effect on 25 November 2015.
51. For these reasons, there is no valid initial notice on which the Claimant can rely and its claim must be dismissed.
52. In case I am later held to have been wrong on either of the two issues that I have decided so far, I shall make the necessary factual findings and procedural rulings relating to the remaining issues and give brief reasons for my conclusions on them, so far as it is appropriate to do so.

Authority to give the Initial Notice

53. Ms McNeil signed the Initial Notice and Second Notice on behalf of each of the participating tenants. The details of each qualifying tenant in the Building were set out on a separate page in the schedule to each notice, and at the foot of each page relating to the interest of a participating tenant the words “Signed for and on behalf of and with the authority of the tenant” appear, followed by the name of the tenant and below that the signature of Ms McNeil. Grosvenor and K Group required the Claimant to prove that Ms McNeil held valid authority to sign on behalf of each of the participating tenants.
54. As a result of Further Information given and documents disclosed voluntarily by the Claimant, the remaining challenge is confined to the cases of MBOSE Limited (Flat 21-23), Rokkibeach Limited (Flat 53) and Leclipse Asset Corp (Flat 32). Each of these offshore companies has a board of (offshore) corporate directors. In the cases of MBOSE and Rokkibeach, the issue is whether individuals were properly authorised by the corporate directors to give authority to Ms McNeil on behalf of the principal companies. In the case of Rokkibeach, there is also an issue as to whether any such authority was duly given. In the case of Leclipse, the only remaining issue relates to ratification of the signature of Ms McNeil purportedly on behalf of that company, for it is now accepted that Ms McNeil did not have valid authority at the time when she signed on behalf of Leclipse.
55. It is necessary to address the cases of each of the tenants separately.

(1) MBOSE Limited

56. MBOSE Limited is a British Virgin Islands registered company with two Jersey registered corporate directors: FGD 1 Limited and FGD 2 Limited. On 19 June 2015, a board meeting of MBOSE was held in Jersey, at which Christian Falle and Alistair Rothwell represented the corporate directors. The minutes of the meeting record that

following legal advice a director of the Claimant had suggested that MBOSE's directors give express power to him and Ms McNeil to sign any notice on behalf of MBOSE. They also state that a letter of authority to that effect was tabled, and that it was resolved that the delegation of power was approved, the letter of authority was approved and that any two representatives of any one director of MBOSE were authorised to execute the letter of authority on behalf MBOSE. The letter of authority is signed by Mr Folle and Mr Rothwell and states;

“I MBOSE Limited of Flat 21-23, Alford House, Park Street, London W1K 7LG, a qualifying and participating tenant, hereby authorise Amanda McNeil, of Howard Kennedy LLP solicitors, and K Mikailian, director of Mikailian and Co Limited, director of Aldford House Freehold Limited, individually, to sign on my behalf any initial notice to exercise the right to collective enfranchisement with respect to Alford House, Park Street, London, W1K 7LG, to be served upon Grosvenor (Mayfair) Estate, Grosvenor West End Properties and K Group Holdings Inc. and any other interested party.”

57. The matter in dispute is whether Mr Falle and Mr Rothwell had validly been given authority by FGD1 and FGD2 to act on behalf of those companies as directors of MBOSE, and in particular for the purpose of conferring authority on a solicitor to sign the Initial Notice for MBOSE. That is agreed to be a question of Jersey law. The Claimant and K Group each instructed an expert Jersey lawyer to provide a report to the court. The two lawyers prepared a joint statement. Mr Kelleher, a partner in Carey Olsen, considered that Mr Falle and Mr Rothwell had implied authority by virtue of their appointment as directors of the corporate directors of MBOSE, and by virtue of the nature of the services carried out by such corporate directors; alternatively, that authority was expressly conferred by board resolutions of the corporate directors dated 31 May 2013. Ms Langlois, a Jersey Advocate and an English Barrister, considers that only the boards of the corporate directors as a whole had authority to act as directors of MBOSE, not individual directors of the corporate directors; and that the 31 May 2013 resolution only conferred on individual directors the power to authorise certain financial transactions, but not the power to represent the corporate directors generally at board meetings of client companies (such as MBOSE). Neither of the experts suggests that the law as to the authority of directors or the interpretation of corporate documents is any different in Jersey from the law of England and Wales.
58. The Claimant accepted in argument that the issue turns on the true meaning and effect of the resolution of 31 May 2013, but it argued that this had to be interpreted in the factual context of the type of companies that the corporate directors were and the nature of the regulated activities that they carried on in Jersey. As to this, FDG1 and FDG2 are part of a group of companies in the business of providing financial services that include the services of corporate directors. The group is the Fairway Trust Limited group. The company of that name is the affiliation leader in connection with trust company business carried on in Jersey by the group, which is regulated under the Financial Services (Jersey) Law 1998. “Financial service business” as defined by that law includes (but is not limited to) the provision of company administration services, including acting as director or alternate director of a company. Mr Kelleher was asked to assume that FDG1 and FDG2 only carried on such business, but there is no evidence

to substantiate this. However, Mr Kelleher's evidence is that Fairway's affiliates are licenced only for such work (para 54 of his report). He also says (para 57) that it is quite usual for such a group to offer corporate directorship services via one or more companies established solely for that purpose. K Group submits that, regardless of that contention, it must be the case that each of the corporate directors in fact has to transact business involving its own affairs, as distinct from the affairs of the group's clients.

59. The minutes of the board meeting of FGD1 Limited on 31 May 2013 are in the following terms so far as material (it was agreed that there were identical minutes for a similar meeting of the board of FGD2 Limited)

“Adoption of Fairway Trust Limited Authorised Signatory List

The chairman tabled the Authorised Signatory List (**Signatory List**) of Fairway Trust Limited (**FTL**), it was noted that FTL is the affiliation leader of the Fairway trust company business affiliation and the sole shareholder of the Company.

The Chairman proposed that the Company adopt the Signatory List of FTL, as amended from time to time, for the purposes of authorising future financial transactions.

IT WAS RESOLVED that the Signatory List of FTL, as amended from time to time, would be adopted by the Company with immediate effect.”

60. At the time, Mr Rothwell was an “A” signatory on the FTL List and Mr Falle (not being at that time a director) was a “B” signatory. The FTL List specified which number and which categories of signature were required for transactions up to or above specified values. In April 2014, an amended FTL List was adopted. By this time Mr Falle had become a director of Fairway Trust Limited and was identified on the new List as an “A” signatory.
61. Mr Johnson on behalf of the Claimant submits that, properly interpreted, the resolution of 31 May 2013 confers on the authorised signatories on the FTL List power to authorise transactions on behalf of FGD1 Limited generally, in accordance with the limits stated on the FTL List. Mr Jourdan for K Group submitted that the articles of association of MBOSE Limited do expressly permit a corporate director to appoint any person its representative for the purpose of representing the corporate director at meetings of the board of client companies or with respect to the signing of written consents. He points out that there is no such resolution of FGD1 appointing Mr Falle or Mr Rothwell to represent FGD1 at board meetings of MBOSE, or to sign written consents for MBOSE. He submits that the authority conferred by the 31 May 2013 resolution gives authority to act on behalf of FGD1 in financial transactions and not to act on behalf of FGD1 at board meetings of MBOSE, or otherwise to give consent on behalf of MBOSE. Alternatively, he submits that the giving of the Initial Notice was not a financial transaction within the meaning of the resolution.
62. In my judgment, given the nature and the extent of FGD1's regulated business and the nature of the Fairway group of companies, the resolution of 31 May 2013 must have been intended to give the individuals on the FTL List authority to act on behalf of FGD1

in connection with its business affairs generally, and not only on a more limited basis. I cannot interpret the resolution as relating only to a small category of business matters personal to FGD1 itself and not to its business of acting on behalf of client companies. However, the resolution adopts the FTL List; it does not say that the signatories on the FTL List are authorised to act generally on behalf of FGD1. The List is concerned with transactions of varying values, as reflected in the Chairman's proposal on 31 May 2013 that it be adopted for the purpose of authorising future financial transactions. That proposal is not to be understood as restricting the resolution to financial transactions according to anyone's notion of what a "financial transaction" was; rather, it meant that the financial limits of authority stated on the FTL List would apply also in relation to FGD1, according to the value of any transaction. So two "A" signatories would have authority in relation to transactions without any limit.

63. I therefore reject K Group's argument that no authority was conferred by the 31 May 2013 resolution for identified individuals to act on behalf of FGD1 as a director of client companies, including MBOSE Limited. I also reject the argument that authority was confined to "financial transactions" that do not include the conferring of authority to serve the Initial Notice or Second Notice. The same conclusions follow in relation to FGD 2. In my judgment, Ms McNeil was therefore given valid authority to sign the Initial Notice and Second Notice of behalf of MBOSE pursuant to the board resolution dated 19 June 2015 and the letter of authority signed pursuant to it.

(2) Rokkibeach Limited

64. Rokkibeach Limited (tenant of Flat 53) is a Bahamian company with two Bahamian corporate directors: Carnoustie Limited and Morfontaine Limited. On 26 June 2015, Marvin Taylor and Dana Munnings on behalf of Carnoustie and Morfontaine signed a resolution of Rokkibeach Limited, purporting to be a resolution in writing of the directors of that company made pursuant to its articles of association. The relevant part of the document reads as following,

"...noted that Aravind Gupta, beneficial owner of the Company, has requested the Director to issue a Power of Attorney in favour of Ken Mikailian and Amanda McNeil.

RESOLVED that a Power of Attorney be issued in favour of Ken Mikailian and Amanda McNeil to expire on 26 June 2016 in order for them to sign on the behalf of the company any initial notice to exercise the right to collective enfranchisement with respect to Alford House, Park Street, London W1K 7LG and that any two authorised signatories of the directors be and are hereby authorised to sign the Power of Attorney a copy of which is attached hereto and forms a part of this resolution.

It is confirmed that company has the requisite power to grant a Power of Attorney."

65. No power of attorney was attached to the minutes or has subsequently been disclosed.

66. The claimant also disclosed a written resolution of Rokkibeach dated 13 November 2015, again signed on behalf of each of its corporate directors by Ms Munning and Mr Taylor. The relevant part of the minutes reads:

“...NOTED THAT during a review of the records of Rokkibeach Limited the decision of the directors made on 30 June 2015 in respect of the undermentioned transaction had not been recorded by a formal resolution accordingly;

RESOLVED to confirm and ratify:

The decision made on 30 June 2015 to provide Amanda McNeil of Howard Kennedy LLP and Ken Mikailian director of Mikailian authority to sign on behalf of the company in respect of any initial notice to exercise the right to collective enfranchisement with respect to Aldford House, Park Street, London, W1K 7LG. A copy of this attached hereto and forms part of this resolution.”

67. K Group made a request for further information in relation to the Claimant’s case on the authority of Ms McNeil to sign the Initial Notice on behalf of Rokkibeach. The reply stated that the company resolution incorrectly recorded that a power of attorney had been issued, whereas the directors of the company only issued an authorisation, and annexed a note dated 29 April 2016 correcting the error in the written resolution. The attached note of the directors states:

“Noted that during a review of the records of the Director of the Company the decision made on 26 June 2015 in respect of issuing a Power of Attorney to Ken Mikailian and Amanda McNeil had been incorrectly recorded as a Power of Attorney, and in fact was simply an authorisation to Mr Mikailian and Ms McNeil to sign an initial notice to exercise the right to collective enfranchisement, with respect of Alford House, Park Street London, W1K 7LG”.

68. In opening, the Claimant submitted that the issue to be decided was whether Mr Taylor and Ms Munnings had authority to represent the corporate directors of Rokkibeach in making the relevant board resolutions of Rokkibeach, and if so whether there was a valid resolution on 26 or 30 June 2015 conferring authority on Ms McNeil to sign the Initial Notice on behalf of Rokkibeach. The Claimant accepted that there was no power of attorney but submitted that nevertheless it was tolerably clear that the directors intended to confer such authority on Mr Mikailian and Ms McNeil. The Claimant pointed to the following paragraphs in the joint statement of the Bahamian law experts, Mr Paton and Mr Sands:

“Munnings and Taylor had the requisite authority to sign the 26 June Resolution being a Resolution in writing of the directors of the Company.” (para 33)

“That the 26 June Resolution does evidence an intention on behalf of the beneficial owner of Company to issue a Power of Attorney in favour of Mr Mikailian and Ms McNeil” (para 36)

Accordingly, the Claimant submits, the issue is whether the 26 June resolution of Rokkibeach had effect to confer the requisite authority, or, alternatively, whether there is sufficient evidence that a resolution to the same effect was validly made on 30 June, even though no document of such a date has been provided.

69. In the course of argument, I asked Mr Johnson why there might have been a new resolution on 30 June and whether there were any documents dated around or between the two dates that cast any light on that question. His initial answer was that there were no documents and that the position was unclear and could not be taken further than the factual case set out in the Claimant's Further Information. This was to the effect that the decision to issue a power of attorney was amended on 30 June 2015, resulting in Ms McNeil being given authority to sign the notices, with a ratification resolution then being passed on 13 November 2015.
70. At the start of the next day of the hearing, Mr Johnson asked me to look at a further clip of documents on the basis of which he wished to amend his initial answer and provide a fuller and more accurate answer. The documents were email exchanges between Société Générale Private Banking (Bahamas) Limited, Mr Mikailian and Ms McNeil dated between 24 and 29 June 2015, with attached documents. Mr Jourdan objected to my admitting the further documents in evidence, on the basis that they were being sought to be introduced far too late. I decided to read them *de bene esse* and consider in my judgment whether to admit them in evidence.
71. The new documents show that there was no power of attorney executed, but that there was a document (undated) purporting to be made by Rokkibeach, acting by its corporate directors, authorising Ms McNeil and Mr Mikailian to sign any initial notice relating to the Building. The last sentence of this document refers to its being a power of attorney, though in form it is not such a power. The document was signed on behalf of the corporate directors by Mr Taylor and Ms Munnings and sent to Ms McNeil on 26 June. Ms McNeil replied on 29 June pointing out that the document was fine as an authority but that it was not a power of attorney, and she suggested that the final sentence should therefore be deleted. On 29 June, Société Générale sent an amended, signed version of the authority document omitting the last sentence. Those new documents make sense of the note of the directors dated 29 April 2016 but do not wholly explain the reference in the resolution dated 13 November 2015 to a decision of Rokkibeach's directors made on 30 June 2015.
72. The nature of the Defendants' challenge in respect of the authority of MBOSE, Rokkibeach and Leclipse has always been to put the Claimant to formal proof of the existence of authority to act on behalf of those tenants. The Claimant's case on authority has been based on information pleaded in the Further Information and on documents disclosed in evidence. The Defendants have not sought to challenge the evidence thus provided but only to argue, as a matter of fact and law, that the documents disclosed did not prove the necessary authority. Although it is inexplicable that the Claimant did not produce the new documents earlier, given the factual inconsistencies revealed by the documents that had been disclosed, the new documents appear to be genuine and do make sense of and are consistent with the previously disclosed documents. They do not resolve the issue of authority but do enable the court to approach it with more certainty about the underlying facts. The Defendants have not identified any specific prejudice arising from the late production of the new documents, though they are

understandably frustrated by their late emergence. In those circumstances, I will give the Claimant permission to rely upon the new documents.

73. As a result of the late disclosure, it is tolerably clear that on 26 June there was a document of authority produced, in conformity with the Rökkibeach resolution of that date, which was sent to Ms McNeil. A further amended version was then sent on 29 June. The question remains, however, whether Mr Taylor and Ms Munnings had the authority of Carnoustie and Morfontaine to confer authority on Ms McNeil to act on behalf of Rökkibeach in that way.
74. As to this, the Claimant relies upon resolutions of the boards of directors of Carnoustie and Morfontaine made on 19 June 2015. The relevant part of the minutes of the resolution of Carnoustie Limited reads as follows (it is common ground that an identical document exists for Morfontaine):

“The Chairman informed the meeting that the Authorised Signatory List of Société Générale Private Banking (Bahamas) Ltd (SGPBB) dated 19 June, 2015 is confirmed as the Authorised Signatories of the Company and is hereby accepted with immediate effect.

On motion duly made, seconded and carried, it was:

Resolved That the Authorised Signatories List of Société Générale Private Banking (Bahamas) Ltd (SGPBB) dated 19 June, 2015 be confirmed as the Authorised Signatories of the Company until such time as the appointment is cancelled by further Resolution of the Directors and that all previous authorised signatory lists of the Company be and they are hereby cancelled with immediate effect.”

75. The List referred to bears the same date as the resolution. It starts with the following words:

“The following is the list of persons who are authorised to sign on behalf of Société Générale Private Banking (Bahamas) Ltd. (“SGPBB”), either acting in its own capacity or in its capacity as trustee of third party account(s) with effect from 19th June 2015.”

There then follow requirements in relation to the number and level of signatories for transactions of different values. Under the heading “Legal Agreements”, the List then states:

“All legal agreements must be signed by two (2) signatories of which one must be a category A signatory.”

There is then a list containing three named category A signatories, eight named category B signatories and nine named category C signatories. Mr Taylor is a category B signatory and Ms Munnings a category C signatory.

76. Mr Jourdan submitted that, there being no suggestion that relevant Bahamas law is any different from English common law, the parties and the court were not bound by the agreement of the experts that Mr Taylor and Ms Munnings had the requisite authority to sign the 26 June resolution. He submitted that, as a matter of interpretation of the 19 June 2015 resolutions of the corporate directors, it was not just the names of the signatories on the Société Générale List that were confirmed but all the terms of the List, including its first paragraph relating to the acts for which authority was conferred; and that accordingly the resolution only gave the signatories authority to sign on behalf of Carnoustie and Morfontaine, not to transact business; that it conferred no authority on the signatories to act on behalf of the corporate directors as directors of another company, and that in any event, since the attempt to confer authority on Mr Mikailian and Ms McNeil was a legal agreement, one of the signatories had to be a category A signatory.
77. The resolutions of Carnoustie and Morfontaine are not to adopt the Société Générale List as such, but to confirm the List “as the Authorised Signatories of the Company”. The resolution is susceptible to two interpretations: one, that the List applies to Carnoustie and Morfontaine in the same way that it applies to Société Générale; the other that the names (or the names and authority levels) of the signatories identified in List are to be the signatories authorised (to that extent) on behalf of Carnoustie and Morfontaine. The Bahamian law experts have specifically addressed the issue and conclude that the resolution is apt to confer general authority on the signatories on the List. Nevertheless, neither of them appears to have addressed the question of whether the adoption of the signatories incorporates the level of authority accorded to each and the requirements of the List for a given level of authority for particular transactions. Mr Paton concluded that the authority conferred is general and not limited to the corporate directors acting in their own capacity or as trustee of third party accounts, but nevertheless he has not addressed the question of the authority levels. Mr Sands refers to the relevant authority levels as set out in the List but concludes that the 19 June resolutions of the corporate directors are sufficient to confer authority to execute documents on their behalf, but no greater authority.
78. Accordingly, it seems to me that neither of the experts has fully addressed the important question of interpretation of the effect of the 19 June 2015 resolutions, and in those circumstances I should not treat myself as bound by their briefly expressed conclusion in their joint report.
79. It is inherently unlikely that Carnoustie and Morfontaine intended to confer authority on individuals by reference to a list of signatories divided into three different categories without regard to the different levels of authority conferred by those categories. If the directors had intended to authorise each of the named signatories without distinction between them, they would not have done so by reference to the Société Générale List which creates different levels of authority. Or, alternatively, they would have used the List but indicated that each of the signatories had equal authority. By confirming the List as the authorised signatories of the companies, the directors must have intended to incorporate its terms as to the levels of their authority as well as the identity of the signatories themselves. It does not make commercial sense, in the context of offshore trust and corporate business, for two category C signatories, who had no authority to act together under the terms of the List, to have been given unlimited authority to act on behalf of Carnoustie and Morfontaine. However, I consider that the first paragraph

of the List is specific to Société Générale Private Banking (Bahamas) Limited's business. On the true interpretation of the resolutions of 19 June 2015, this paragraph is not incorporated and does not apply, by way of restriction, in relation to the different businesses carried on by Carnoustie and Morfontaine.

80. At the relevant time, Mr Taylor was a category B signatory and Ms Munnings a category C signatory. Accordingly, under the terms of the resolution, they did not have authority to enter into transactions valued in excess of US\$1 million, legal agreements or facility letters, which each require a category A signatory. However, the 26 June 2015 resolution of Rokkibeach did no more than confer authority on Mr Mikailian and Ms McNeil to sign an initial notice relating to collective enfranchisement on behalf of Rokkibeach. Although the conferring of authority has legal effect, it is not in my view properly to be characterised as a transaction or a legal agreement within the meaning of the List. Nor is it a facility letter. The making of an agreement between the participating tenants to buy or finance the acquisition of the freehold, or the agreement of a retainer for solicitors to act for Rokkibeach, would have been a legal agreement, but merely conferring authority on the Claimant's director and solicitor to sign a notice is neither a transaction nor a legal agreement within the meaning of the List.
81. Accordingly, in my judgment, the 26 June resolution of Rokkibeach, the associated letter of authority and the revised letter of authority were validly signed by Mr Taylor and Ms Munnings on behalf of the corporate directors and therefore authority to sign on behalf of Rokkibeach was validly conferred on Ms McNeil.

(3) Leclipse Asset Corp

82. Leclipse Asset Corp (Flat 32) is a company incorporated in the British Virgin Islands and has three Panamanian corporate directors: Madeleine Investments SA, Hitchcock Investments SA and Donat Investments SA.
83. On 20 July 2015, the board of directors of Leclipse purported to make a resolution to sign a proxy authorising Ms McNeil and Mr Mikailian to sign any initial notice on behalf of that company. The corporate directors were represented at the board meeting by a Ms Kelly and a Mr Sims. The proxy was then signed on behalf of Leclipse's secretary, Buchanan Limited, and on behalf of the president of the company, Brennan Limited.
84. Whether Ms Kelly and Mr Sims had authority to act on behalf of the corporate directors of Leclipse is agreed to be a matter of Panamanian law. The experts on Panamanian law, Ms Marengo and Ms Real, agree that under Panamanian law Ms Kelly and Mr Sims did not have the requisite authority. However, they also agree that, as a matter of Panamanian law, retrospective ratification is effective to validate a resolution such as that purportedly made on 20 July 2015. On or about 2 May 2018, each of the corporate directors of Leclipse purported to ratify the acts of Ms Kelly and Mr Sims on 20 July 2015.
85. The Claimant contends that the next question is whether ratification of the resolution of Leclipse was valid and effective under BVI law. This is agreed to be the same in this respect as English law. K Group submits that the relevant question is not one of the internal functioning of the BVI company, Leclipse, but one of interpretation of the 1993 Act. That is because, as Mr Jourdan explained, even if the subsequent ratification made

the resolution a valid resolution of Leclipse with retrospective effect, the important question is whether the Initial Notice was validly given on 23 July 2015 on behalf of Leclipse. The Defendants submit that, as a matter of interpretation of the 1993 Act, an initial notice must be either valid or invalid on the date on which it is given and cannot subsequently become valid because of something done at a later time.

86. There are in my judgment conceptually two separate questions. First, as a matter of BVI Law (which is the same as English Law), can a BVI company ratify the giving of a notice on its behalf with retrospective effect? If so, second, as a matter of English law, can an initial notice given under section 13 of the 1993 Act be ratified in that way?
87. If the purported giving of an initial notice under the 1993 Act was an act that could subsequently be ratified by a principal, the effect would be that, from the date of service of the notice until the act of ratification, the notice was not given on behalf of the principal, but that, with effect from the act of ratification, it would then be deemed always to have been so given. Depending on the numbers of participating tenants, a notice that was invalid when given would then become valid. That involves a degree of rewriting of history, but as a general principle of the law of agency this is permissible where no prejudice is caused to any third party by the later ratification.
88. The scheme of the 1993 Act operates by creating a timetable for establishing and enforcing rights that runs from the date of giving the initial notice. Its essential steps are the following (with references to the relevant sections of the 1993 Act):
- (1) By section 13(3)(g), the initial notice must specify the date by which the reversioner must respond by giving a counter-notice. That date must not be less than two months after the date of giving the initial notice: section 13(5).
 - (2) The counter-notice must be given by the date specified in the initial notice: section 21(1).
 - (3) If no such counter-notice is given, the nominee purchaser may apply within at most a further six months for an order determining the terms on which he is to acquire the specified premises: section 25(1),(4). If such an application is not made within that time, the initial notice is deemed to have been withdrawn: section 29(3).
 - (4) If the reversioner's counter-notice disputes the entitlement of the participating tenants to acquire the freehold, the nominee purchaser must apply to the court no later than two months after the date of giving the counter-notice: section 22(2). If no such application is made in time, the initial notice is deemed to have been withdrawn: section 29(1).
 - (5) Where the reversioner gives a counter-notice admitting the participating tenants' right, there is a period of two months beginning with the date on which the counter-notice is given for the parties to seek to agree the terms of acquisition: section 24(1).
 - (6) After that time, either the nominee purchaser or the reversioner may apply to the First-tier Tribunal to determine any matters in dispute. Such an application must be made no later than six months calculated from the date on which the counter-

notice was given: section 24(2). If no such application is made in time, the initial notice is deemed to have been withdrawn: section 29(2).

(7) If the parties agree the terms of acquisition (or they are determined by the Tribunal) but no contract has been entered into within a period of two months thereafter, either party may apply to the court for appropriate relief, but any such application must be made no later than the end of a further period of two months: section 24(5). If no such application is made in time, the initial notice is deemed to have been withdrawn: section 29(3).

89. It can be seen that all the steps in the timetable are triggered by giving the initial notice. The parties' rights depend on whether a valid counter-notice is given within the period specified in the initial notice, and if so what the counter-notice says and what is done in response to it. None of these consequences follow the giving of an invalid initial notice.
90. Further, the giving of the initial notice (if valid) has significant proprietary consequences. Unlike under the 1967 Act, it does not create a deemed contract for the disposal of the freehold, but the initial notice is registrable at the Land Registry as if it were an estate contract: section 97(1). While the notice so registered continues in force, the freehold owner must not make any disposal severing his interest or granting any lease that would (if granted before the initial notice) have fallen within the participating tenants' rights of acquisition: section 19(1). No other relevant landlord may grant such a lease: *ibid*. The service of an initial notice causes the suspension of the operation of any contract relating to the disposal by the freeholder or another relevant landlord of any interest in the specified premises: section 19(4). Further, once an initial notice is given, there are restrictions on the ability of a landlord to terminate the lease of a participating tenant: Schedule 3, paras 5-7. The lease of any participating tenant's flat cannot thereafter terminate by effluxion of time. .
91. In Natt v Osman [2015] 1 WLR 1536, Sir Terence Etherton C. had to consider the policy of the 1993 Act as regards non-compliance with its requirements, and observed that the approach of the courts:
- “... is consistent with the policy of providing certainty in relation to the existence, acquisition and transfer of property interests. It is to be borne in mind that in that connection that service of a section 13 notice has important property consequences.”
92. The Defendants submit, in short, that the scheme of Chapter 1 of Part I of the 1993 Act drives one to the conclusion that an initial notice must be valid when given and cannot subsequently become valid with retrospective effect. Apart from the scheme of the Act, such an argument derives support from a number of authorities on the validity at common law of ratification of notices to quit and other notices in relation to property, where the notice in question has to be given a particular or minimum period of time before its effective date.
93. In Doe d. Mann v Walters (1830) 10 B & C 626, a landlord was held unable in law to ratify the giving of a common law notice to quit. Littledale J. said:

“as to the notice to quit, I am of opinion that, if Grylls had not authority to give such notice at the time when it was given, or at least when the half-year mentioned in it began to run, no subsequent recognition of his authority would make it valid. I think that the ratification of the act on the day after the notice was given, or after the half-year began to run, would not be sufficient; because, in that case, the tenant would not have six months’ notice, the notice being valid only from the time when it becomes the notice of the landlord.”

94. Parke J. agreed:

“now if Grylls had not authority to give the notice at the time when it began to operate as a notice, it seems to me that it was insufficient, and that the lessor of the plaintiff would not be entitled to recover.”

95. A line of similar cases, beginning with Bird v Brown (1850) 4 Exch. 786, was considered by Dillon LJ. in Presentaciones Musicales S.A. v Secunda [1994] Ch 271. In one of the cases, Ainsworth v Creeke (1868) LR 4 CP 476, Brett J. identified a rule as follows:

“This case comes within the rule that a person cannot effectually ratify an act at a time when he could not do the act himself”.

96. On the basis of this and other authorities, Dillon LJ. concluded that the principal must be lawfully entitled to perform the act at the time of the purported ratification of the agent’s unauthorised act. If by the time of the purported ratification it is too late lawfully to do the act in question, ratification cannot validate the unauthorised act.

97. Mr Johnson sought to distinguish the Doe v Walters line of authority on the basis that a notice such as a notice to quit is time critical and cannot be ratified after the critical period of time has started to run. He submitted that an initial notice starts time limits running but is distinct from a notice to quit or break notice that has to be validly given by a certain time. Further, he argued that ratification of an initial notice was not objectionable on the basis that it interfered with third party rights.

98. I consider that the whole structure of Chapter 1 of Part I of the 1993 Act is inconsistent with the idea of an invalid initial notice subsequently becoming valid by ratification. An initial notice has immediate proprietary effect and specified time limits run from the giving of the notice. The initial notice has to be given at least two months before the date specified in it for service of a counter-notice. The rule identified by Brett J. is directly in point: after the minimum period of two months has started, the participating tenants could not serve a valid initial notice specifying the same date for service of a counter-notice. Even if the purported ratification had come shortly after the date of giving the initial notice, it would therefore have been too late to validate the notice at common law.

99. In my judgment, however, the requirements of the 1993 Act go further: an initial notice is either valid or invalid when it is given. The Act specifies that the notice is only valid if given by a requisite number of qualifying tenants. If the notice is not so given because

of want of authority, the notice is not given in accordance with the Act and so does not have the specified statutory consequences.

100. Accordingly, the ratification in 2018 of the acts of Ms Kelly and Mr Sims, even if otherwise effective under BVI law (which it appears to me that it is not, on the basis of the common law rule identified above), cannot be relied on to render valid an initial notice under the 1993 Act that was invalid when given.
101. In summary, for all the reasons given above I conclude that the Initial Notice and Second Notice were given on behalf of MBOSE and Rokkibeach but were not given on behalf of Leclipse. There were therefore only sixteen, not seventeen, participating tenants who gave the Initial Notice and the Second Notice.

The overriding underleases

102. The next issue, which again does not strictly arise in view of my decision on the number of flats and the deemed withdrawal of the Second Notice, is whether MBOSE Limited, Aweer Limited and Kirama Properties Limited are “qualifying tenants” of their flats. I will consider the factual and procedural questions relating to this issue in case either of the above decisions is reversed on appeal.
103. Each of these three tenants holds two separate underleases of part of their flats. I shall refer to them in this section of the judgment as the “split reversion flats”. Until April 2015, K Group was the immediate landlord under both underleases of each split reversion flat and so section 7(6) of the 1993 Act made the underlessees the qualifying tenants of their flats, notwithstanding that there was no single lease of each flat. But on 29 April 2015, overriding underleases of part of each split reversion flat granted by K Group to PLH were completed by registration at the Land Registry. The effect (deliberately so) was that there were then different landlords of the two underleases in the case of each of the split reversion flats (PLH became the immediate landlord of that part of each flat comprised in the overriding underlease), so that section 7(6) no longer applied and the underlessees were not qualifying tenants.
104. That means that, if K Group’s objective was achieved, there would be only thirteen qualifying tenants among the sixteen participating tenants, which is less than one-half of the thirty flats contained in the Building. The Claimant’s claim therefore would fail for that reason too.
105. The Claimant does not, however, accept that K Group’s objective was achieved. It maintains that MBOSE, Aweer and Kirama were qualifying tenants on the relevant date. Although the Claimant has always asserted in its claim form and its further information that MBOSE, Aweer and Kirama were qualifying tenants, it had not in doing so engaged with the Defendants’ case that those tenants held two separate leases of part of their split reversion flats from *different* landlords and so section 7(6) of the 1993 Act did not apply. As is now clear, the Claimant only disputes the Defendants’ case in that regard by seeking to raise the argument that the overriding underleases were granted unlawfully by K Group to PLH and that accordingly the Defendants cannot rely on them to assert that MBOSE, Aweer and Kirama were not qualifying tenants. This is an argument that was raised for the first time in these proceedings in Mr Johnson’s note to the court for the hearing of the pre-trial review on 28 September 2018.

106. Whether the Claimant was entitled to rely on that argument was not resolved at the pre-trial review. Although Counsel's recollections of what happened on that occasion differ, it is evident that the issue could not have been discussed, even if it was referred to by Mr Johnson. If it had been discussed, the dispute about its legitimacy as an issue for resolution at trial would have been clear and would have been addressed by Marcus Smith J on that occasion. Instead, what has happened is evidently that the Defendants, believing that the Claimant needed to make an application to raise the new argument, assumed that the Claimant was not pursuing it, and the Claimant, believing that it was entitled to rely on the argument without applying for permission, assumed that it would be able to do so. As a result, no application was made by the Defendants to adduce evidence on the question of whether the grant of the overriding underleases to PLH was unlawful, though it seems that the Claimant expected K Group to do. It was only shortly before exchange of skeleton arguments for trial, when Mr Jourdan and Mr Johnson sensibly had a conversation about the issues to be addressed in them, that it became clear to the Defendants that the Claimant was intending to pursue the argument and correspondingly clear to the Claimant that the Defendants would oppose the attempt to do so.
107. It is of course regrettable that such a state of uncertainty should arise at the start of a trial, when there have been two case management conferences and a pre-trial review hearing. Part of the reason may be that the claim was issued and proceeded as a Part 8 claim and so there were no full statements of case. With the considerable benefit of hindsight, it would perhaps have been better if full statements of case had been directed at an earlier stage. However, as Mr Jourdan rightly observes, there are nevertheless some statements of case within the meaning of the Civil Procedure Rules, namely the claim form and the further information provided by the Claimant about its case. Even if there had been full particulars of claim, a defence and a reply, these would not without amendment have included the facts in respect of an issue that was only raised a month before the trial. Another reason, I suspect, why the matter was not clarified before the trial is that both parties appeared to me to be content to engage in a tactical battle, each seeking to wrongfoot the other, rather than putting all their cards on the table and cooperating to ensure that all relevant issues were fairly tried. The issue concerning section 4(1) of the 1993 Act to which I will turn next is another example of this. It was evident at the trial that there is by now a substantial degree of bad feeling between K Group on one side and the Claimant and/or some of the participating tenants on the other side.
108. The question that I must decide is whether the Claimant is right in its argument that it is entitled to pursue the unlawfulness issue at trial without seeking to amend its statements of case or obtain directions for further evidence in relation to the issue. For this purpose, it is necessary to summarise (in general terms only) the relevant provisions of Part I of the Landlord and Tenant Act 1987, in which context the allegation of unlawfulness arises, so that the issues to which the allegation gives rise can be properly understood.
109. Under Part I of the 1987 Act, a landlord of a building or part of a building to which Part I applies is not entitled to make a "relevant disposal" of any estate or interest in such premises without first offering the estate or interest to the qualifying tenants of flats contained in the premises. The Act therefore effectively confers on the qualifying tenants a right of pre-emption to acquire on the same terms the interest intended to be

disposed of to a third party. The 1987 Act does not apply to a building or part of a building where the majority of the internal floor area is used or intended to be used otherwise than for residential purposes, where it contains fewer than two flats held by qualifying tenants or where qualifying tenants hold fifty percent or less of the total number of flats in it. A qualifying tenant for the purposes of the 1987 Act includes a long residential lessee, provided that the lessee does not own three or more flats in the building or part of a building and provided that the lessee's landlord is not a qualifying tenant. A relevant disposal is a disposal of any estate or interest in the premises apart from (a) the grant of a tenancy of a single flat and (b) certain other excluded disposals specified in the Act. Of these excluded disposals, the most commonly encountered and the one material to this case is the disposal by a body corporate to a company that has been an associated company of that body corporate for at least two years.

110. Where the landlord of the qualifying tenants proposes to make a relevant disposal within the meaning of Part I of the 1987 Act, he must first serve a notice on the qualifying tenants under section 5 of the Act, giving the requisite majority of qualifying tenants the opportunity to acquire the estate or interest to be disposed of. Failure to comply with that duty has two main consequences for the landlord. First, unless he had a reasonable excuse for making the relevant disposal without complying with section 5, he has committed a criminal offence. Section 10A contains the relevant statutory provisions in this regard: it was introduced by way of amendment in 1996 to give Part I of the Act teeth that it lacked as originally enacted. Second, the qualifying tenants are entitled to acquire the interest unlawfully disposed of, and the Act contains machinery to enable them to acquire information about the disposal and then enforce their rights against the disponent. Section 10A(5) of the Act expressly provides, however, that nothing in section 10A affects the validity of the disposal. So, despite the unlawfulness of a disposal in breach of the terms of Part I of the Act, the disposal is nevertheless valid. Instead of treating the disposal as invalid, the Act provides different sanctions: punishment for the landlord and the means for the qualifying tenants to undo the effect of the disposal by pursuing against the disponent rights of acquisition that the Act separately confers on them.
111. There is no doubt that the Building is premises to which Part I of the 1987 Act applies. Thus, any disposal by the landlord of the qualifying tenants would be a relevant disposal unless it was the grant of a tenancy of a flat or fell within one of the classes of excluded disposal. It is common ground that prior to the grant of the overriding leases K Group was the landlord of the qualifying tenants in relation to the whole of the Building for the purposes of Part I of the 1987 Act.
112. Against that background, it can be seen that the Claimant's argument that K Group unlawfully granted the overriding underleases to PLH in 2015 necessarily involves at least the following factual issues, namely whether:
 - (1) the premises demised by each of the overriding underleases consists of a single flat;
 - (2) K Group served notices on the qualifying tenants (or a sufficient number of them) pursuant to section 5 of the 1987 Act;
 - (3) PLH was on the date of grant of the overriding underleases a company that had been an associated company of K Group for at least two years.

113. The burden of proving that PLH was an associated company of K Group would as a matter of law fall on the Defendants, being reliance on an exception to what in law otherwise is a relevant disposal. The allegation of unlawfulness also potentially raises a further factual question, namely whether Grosvenor were aware of or involved in the allegedly unlawful conduct. That would be important because Grosvenor might be in a different position from K Group, so far as entitlement to rely on the existence of the overriding underleases is concerned. To succeed in its argument, the Claimant would need to establish that both Grosvenor and K Group as headlessee are prevented from relying on the existence of the overriding underleases.
114. Any allegation by the Claimant that K Group unlawfully granted the overriding underleases is a serious matter. It involves alleging that K Group committed a crime. It also raises new factual issues. Had the claim been a Part 7 claim with full statements of case, the Claimant would certainly have been required to plead its case alleging the unlawful disposals, by way of amendment to its pleaded case. As a consequence of the amendment, the Defendants would have been entitled to amend their defences (e.g. to plead that PLH was an associated company or that Grosvenor had no prior knowledge of the overriding underleases). There would (if permission to amend were granted) inevitably have had to be permission for any party to adduce evidence on the new issues arising from the amendments.
115. In my judgment, the position was not fundamentally different because this claim was a Part 8 claim. The claim form itself pleads (in the grounds of claim) that the tenants of the split reversion flats are qualifying tenants notwithstanding the grant of the overriding underleases, but it does not plead that the Defendants are not permitted to rely on the existence of the overriding underleases because they were unlawfully granted. Had an application been made to the Judge at the pre-trial review to rely on the new argument of unlawfulness and had he been willing to give permission at that stage, he would at least have required the Claimant to provide full written particulars of the basis of the allegation, and would have directed K Group and Grosvenor to provide particulars of any response. He might have gone further and required a formal amendment to the claim form or Further Information. There would inevitably have been a direction for exchange of further evidence of fact relating to that issue.
116. Instead, the question of whether the Claimants were entitled to rely on alleged unlawfulness of the overriding underleases was still live at the start of the trial. It was not resolved at that stage, by agreement of the parties, but left for determination in this judgment, together with the substantive issues and arguments arising from it. Mr Kheireddine, who had only been directed to attend to be cross-examined on a limited issue of his intention as regards the future use of flats 61, 62, 71 and 72, was not cross-examined about the service of section 5 notices or about whether PLH had been an associated company of K Group for a period of two years before April 2015. As a result of Mr Johnson's closing arguments on the issue, which emphasised that there had been no relevant evidence on the issue from Mr Kheireddine, K Group then belatedly sought to adduce a fifth witness statement of Mr Kheireddine to deal with the corporate relationship between PLH and K Group. This was proffered at the start of Mr Jourdan's closing submissions. The witness statement contains only a bare assertion about ownership of PLH, in three lines of text, and there was no accompanying disclosure of the underlying corporate documents. This was wholly unsatisfactory as a basis on

which to determine whether the overriding underleases were an excluded disposal and so not a relevant disposal under Part I of the 1987 Act.

117. In my judgment, the Claimant should have applied for permission to raise and rely on the new allegation of unlawfulness if it wished to pursue it at trial. It was a new allegation not previously identified or raised in the parties' cases or in their List of Issues. It was a serious allegation and needed to be put on a proper footing, not squeezed into the trial through the back door. It should have been obvious that there would be likely to be further evidence relating to the issue. The Claimant may have expected that K Group would provide its evidence in any event. It probably believed that PLH had been an associated company for the necessary period of time, on the basis that K Group - being well-advised at that time - would have ensured that the overriding underleases were granted to an associated company. But K Group was not bound to address in evidence an issue that had not yet been properly raised, and the responsibility lay on the Claimant to apply for permission if it wished to pursue it.
118. Since no such application has been made – the Claimant instead asserted its entitlement to pursue the argument – the issue is not before me for determination. Had an application been made at trial for permission to rely on the argument, I would have refused it on the basis that it gives rise to the issues of fact previously identified, which could not in fairness to all parties be determined without an adjournment for further evidence and/or disclosure. K Group and Grosvenor were entitled not to prepare evidence and disclose documents on the issue until it had been properly raised. The fact that K Group later sought to adduce inadequate evidence on the issue at a very late stage does not detract from that proposition, but rather illustrates the importance of orderly preparation for the trial of serious allegations.
119. Although I listened to interesting arguments on whether unlawfulness, if established, prevented K Group or Grosvenor from relying on the existence of the overriding underleases or entitled the Claimant to treat the tenants of the split reversion flats as qualifying tenants, I do not propose to express any conclusion on these questions. In view of the decision that I have reached on other issues, there may well be a further attempt by the participating tenants to claim the freehold of the Building at a future time, and the issue of whether MBOSE, Aweer and Kirama are qualifying tenants may be determinative of a future claim. It would in those circumstances be wrong for me to reach a conclusion based on the inadequate evidence produced or to express a view on the substantive arguments that I have heard without proper and complete factual findings having been made.

Number of qualifying tenants

120. K Group also advanced a further argument that, because the Initial Notice and the Second Notice were signed by three non-qualifying tenants, neither notice would be valid unless the total number of participating tenants who were qualifying tenants is not less than two-thirds of the total number of qualifying tenants of flats in the Building: para 16 of Schedule 3 to the 1993 Act. This provides:

“(1) It is hereby declared that, where at the relevant date any of the persons by whom the initial notice is given --

(a) is not a qualifying tenant of a flat contained in the specified premises, or

(b) is such a qualifying tenant but is prohibited from participating in the giving of the notice by virtue of Part I of this Schedule, or

(c) (if it is claimed in the notice that he satisfies the residence condition) does not satisfy that condition,

the notice shall not be invalidated on that account, so long as the notice was in fact properly given by a sufficient number of qualifying tenants of flats contained in the premises as at the relevant date, and not less than one-half of the qualifying tenants by whom it was so given then satisfied the residence condition.

(2) For the purposes of sub-paragraph (1) a sufficient number is a number which --

(a) is not less than two-thirds of the total number of qualifying tenants of flats contained in the specified premises as at the relevant date, and

(b) is not less than one-half of the total number of flats so contained.”

121. If K Group is correct in its argument, this paragraph would have required the signatures of at least eighteen qualifying tenants because the Initial Notice and Second Notice were each signed on behalf of MBOSE, Aweer and Kirama, who were not qualifying tenants.
122. The failure to amend paragraph 16 does appear likely to be a case in which the Parliamentary draftsman has nodded. The following points are relevant. Before the amendment of the 1993 Act by the Commonhold and Leasehold Reform Act 2002 (which removed the two-thirds of qualifying tenants threshold and the residence condition), paragraph 16 of Schedule 3 did no more than provide, in effect, that inclusion of non-qualifying tenants (or non-resident qualifying tenants) as participating tenants did not matter provided that the numerical threshold of participating tenants and resident tenants was otherwise achieved. In other words, para 16 imposed no more onerous condition than otherwise existed in the Act. That paragraph was probably only enacted to make it clear that an initial notice was not automatically invalid if given by (among others) a non-qualifying tenant (or a qualifying tenant who wrongly asserted that he satisfied the residence condition), an argument that might otherwise have been regarded as available as a matter of interpretation of section 13 of the Act. Having relaxed the requirements for collective enfranchisement by (amongst other changes) removing the higher two-thirds threshold and the residence condition, it is most improbable that the draftsman of the 2002 Act intended - by leaving paragraph 16 unchanged - to impose for the first time a higher threshold than would otherwise exist just because the initial notice was signed by someone who was not a qualifying tenant. Introducing such a requirement in that way does not appear to have any rational foundation. Further, paragraph 16, on its most natural reading, requires satisfaction of the abolished residence condition by half the qualifying tenants in the event of a non-qualifying or a prohibited tenant signing the initial notice.
123. Since the Claimant has not achieved the smaller target of fifteen qualifying tenants giving the Initial Notice and the Second Notice, and in view of my disposal of the claim on other issues, it is unnecessary for me to reach a decision on this point.

Internal floor space

124. A further issue originally raised by the Second Defendant was whether Chapter 1 of Part I of the 1993 Act applied to the Building at all.
125. Section 4 of the 1993 Act, to which I referred in para 15 above, excludes certain premises to which Chapter 1 of Part I of the Act would otherwise apply. Section 4 provides (so far as material):
- “(1) This Chapter does not apply to premises falling within section 3(1) if –
- (a) any part or parts of the premises is or are neither –
 - (i) occupied, or intended to be occupied, for residential purposes, nor
 - (ii) comprised in any common parts of the premises; and
 - (b) the internal floor area of that part or of those parts (taken together) exceeds 25 per cent. of the internal floor area of the premises (taken as a whole).
- (2)
- (3) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded....”
126. Since I have held that there are thirty flats in the Building, it follows that the whole of the sixth and seventh floors (other than the common parts) are intended to be occupied for residential purposes. It is also common ground, on the basis of that conclusion, that the amount of the internal floor area of the Building that is neither (i) occupied or intended to be occupied for residential purposes nor (ii) comprised in any common parts is less than 25 per cent. of the whole, and so the Building is not excluded from the enfranchisement provisions of the 1993 Act by virtue of section 4.
127. Had I held that there were no flats on the sixth and seventh floors, there would have been a further issue about whether those parts were nevertheless intended to be occupied for residential purposes, and depending on the answer to that question yet further issues about whether the threshold of 25 per cent. in section 4(1) of the Act was exceeded. In case it later becomes of importance, I will address briefly the first issue because it appears to me to be determinative in any event of the question of whether section 4(1) of the Act applies in this case.
128. The Defendants argued that the sixth and seventh floors were not intended to be occupied for residential purposes. They contended that a conclusion that there were no flats on those floors necessarily led to the conclusion that those floors were not intended to be occupied for residential purposes. The Claimant argued that the question in section 4(1)(a)(i) is quite distinct from the question of whether a separate set of premises was constructed or adapted for use for the purposes of a dwelling, and that given the existence of the new underleases of intended flats 61, 62, 71 and 72 the answer to the distinct question was self-evident. The answer was that these premises, even if not yet “flats” within the meaning of Part I of the 1993 Act, were nevertheless premises

intended to be occupied for residential purposes (in future). In this respect, they pointed to the clear evidence of Mr Kheireddine that K Group, in cooperation with the new underlessees of the four intended flats, were going to proceed to fit out the flats for residential use.

129. In most cases, parts of premises that are occupied or intended to be occupied for residential purposes within the meaning of section 4(1)(a)(i) will be so occupied (or intended to be occupied) because they are flats. However, that does not mean that only flats within the meaning of Part I of the Act can be intended to be so occupied. Had the draftsman of the Act intended the two matters to be synonymous he could and would have referred simply to “flats” in section 4(1)(a)(i). The essential distinction raised by section 4(1) is between residential space and non-residential space (excluding the common parts). Thus, it is not a surprising conclusion to reach that floors of a residential block that are being rebuilt as new flats but are not yet completed, such as to be capable of occupation, are nevertheless premises that are intended to be occupied for residential purposes, rather than floors occupied or intended to be occupied for non-residential purposes. The distinction between the separate tests has the following consequence where flats are in course of construction: the number of qualifying tenants in the building or part of a building is determined without counting any tenants of the intended flats, but in determining whether or not Chapter 1 of Part I applies to the self-contained building or part of a building at all such premises are treated as residential parts.
130. Had I decided that the premises on the sixth and seventh floors were not flats, this could only have been on the basis of the existence on the relevant date of the sets of internal connecting doors on each floor, or the extent to which the fitting out of the flats had proceeded by the relevant date, or both. In my judgment, neither the existence of the doors nor the need to fit out the flats before they could be used means that the space is not premises intended to be occupied for residential purposes, within the meaning of section 4(1)(a)(i) of the Act. Planning permission for such use and underleases permitting only that use had been granted. Mr Kheireddine’s evidence was, unsurprisingly, that the four new flats were intended to be fitted out and used for residential purposes, even though that had not yet happened.
131. It is clear that the areas comprised in the new underleases of flats 61, 62, 71 and 72 were intended to be occupied for residential purposes. That being so, it is common ground that the non-residential parts of the premises do not exceed the 25 per cent. threshold in section 4(1). Accordingly, even if there were no “flats” on the sixth and seventh floors of the Building, I would have held that Chapter 1 of Part I of the 1993 Act was not prevented from applying to the Building by reason of section 4(1).
132. In those circumstances, it is not necessary to decide the issue of whether the nominee purchaser or the reversioner bears the burden of proof under section 4(1) or whether that burden, wherever it lies, has been discharged if the sixth and seventh floors are not parts of the premises intended to be occupied for residential purposes. The issue of the burden of proof is a question of law and turns on the true construction of the 1993 Act.
133. Had the factual issue been live, I would have refused permission to the Second Defendant to rely on the further evidence annexed to Mr Kheireddine’s fourth witness statement and Mr Bambury’s eighth witness statement. My reasons, briefly, are the following.

134. The evidence relating to this issue filed in accordance with the rules and the court's directions was exiguous, consisting of one assertion in Mr Kheireddine's first witness statement:
- “of the ten floors the basement, part ground, sixth and seventh floors would be non-residential, representing well over 25 percent of the floor area excluding common parts”.
135. This is mere assertion, not evidence capable of proving the issue in accordance with the formula contained in section 4(1) of the Act. The formula is not straightforward in its application. Although the issue was identified at the outset of the proceedings, neither party has sought to adduce the type of evidence (professionally prepared measurement surveys) that is usually needed to determine it, or other credible evidence capable of proving the matter one way or the other.
136. It appears that, as a result of a comment made by Mr Johnson at the pre-trial review, K Group had second thoughts about whether it could safely rely on the burden of proof being on the Claimant or on the mere assertion of Mr Kheireddine. Over three weeks later, exactly fourteen days before the start of the trial, it issued an application for permission to rely on a further witness statement of Mr Kheireddine that exhibited a report prepared by Smith Baxter in July 2013. This was prepared for the purposes of a dispute about service charge proportions in the Building. It reviewed the residential service charge apportionment in the light of the construction of the new flats on the sixth and seventh floors. As something of an afterthought, the report ventured the opinion that the proportion of service charge payable by the commercial unit could be reduced to 19.98 percent (based on the current floor area).
137. Four days later, K Group issued a further application, seeking to rely on a further witness statement of Mr Bambury, its solicitor, which exhibited two measurement surveys from 2006, one carried out on behalf of a different nominee purchaser and one on behalf of K Group. One survey concluded that the proportion of the non-residential areas would be 24.31%; the other about 25.5%. But those surveys were carried out before the works of construction on the 6th and 7th floors. Mr Jourdan submits that all three reports are admissible without a direction for expert evidence because they were not prepared for the purposes of these proceedings: see Mondial Assistance (UK) Limited v The Bridge Water Properties Limited [2016] EWHC 3494 (Ch). However, regardless of that, the Claimant objected to permission being given at trial to rely on further evidence on this issue. These are my reasons for upholding that objection.
138. First, although the section 4(1) issue was identified as an issue at the outset of the proceedings, neither party had sought to adduce any relevant evidence capable of proving the respective internal floor areas one way or the other. It is an obvious inference that each party was content to fight the issue, if it became material, on the basis of where the burden of proof lies. This issue was vigorously contested before me. Had either party been determined to prove by evidence the true proportionate floor areas it would have sought to adduce evidence on the issue earlier in the proceedings.
139. Second, the parties prepared for the trial on the basis that only limited cross-examination of the witnesses would be permitted. At the pre-trial review on 28 September 2018, it was ordered that Mr Kheireddine alone attend trial to be cross-examined, and that such cross-examination be limited to the question of whether K

Group intended that the 6th and 7th floors of the Building be occupied for residential purposes. Were the actual, proportionate floor areas of the Building to be an issue at trial, the Claimant might have needed to cross-examine Mr Kheireddine about other parts of the Building but the court's directions did not permit it to do so.

140. Third, the applications to rely on further evidence were made late. There was no attempt to have the applications heard before the start of the trial. Had K Group been given permission before trial, fairness would have required that the Claimant be given an opportunity to adduce evidence on the issue too. But granting K Group permission at trial would have meant that the trial would have had to be adjourned to give the Claimant that opportunity. To adjourn the trial for those purposes would have been wholly contrary to the overriding objective.
141. Fourth, the issue is one on which the input of surveyors would be required. Surveys would need to be based on the actual condition of the Building on the relevant date. If the parties' surveyors could not reach agreement, there would have been needed a direction for expert evidence limited to that issue. Instead of proceeding in that way, K Group seeks to rely on historic documents, one produced for a different purpose and the others produced nearly nine years before the relevant date, at a time when the Building contained materially different floor areas. Reliance on these documents alone would require the parties, as a matter of legal submission, to try to extrapolate from them certain facts and conclusions about the floor areas following the structural changes to the Building completed in about 2013. That is a most unsatisfactory basis on which to attempt to resolve a factual issue such as the internal measurements and proportionate floor areas of the Building.
142. Fifth, no proper explanation is given by Mr Kheireddine or Mr Bambury for the lateness of the applications. Instead, Mr Bambury seeks to characterise the application as being a consequence of the Claimant seeking to take the section 4(1) point at a late stage. That is in my judgment a mischaracterisation. The point was taken in paragraph 3(g) of Mr Kheireddine's first witness statement dated 14 April 2016 and was included in the List of Issues for the case management conferences in February and October 2017. I accept Mr Bambury's explanation that he had not previously seen the expert reports from the 2006 proceedings, but the landlord at the time was K Group and Mr Kheireddine would therefore have been aware of these reports previously.
143. For all these reasons, there was no proper justification for permitting new evidence on the section 4(1) issue at a very late stage, nor could the admission of such evidence at trial have been fair to the Claimant.

Summary of conclusions

144. In the light of all the issues that I have determined, the position is that:

(1) the Initial Notice was invalid because it did not include the details of the qualifying tenants of the underleases of flats 61, 62, 71 and 72 as required by section 13 of the 1993 Act;

(2) the Second Notice, if valid, was deemed withdrawn on 25 November 2015 because no application capable of relating to that notice was made to the court before that date;

(3) accordingly, there is no valid application on the basis of which the court can make the declaration that the Claimant seeks;

(4) the Initial Notice and the Second Notice were not given on behalf of Leclipse Asset Corp;

(5) even if the Second Notice was not deemed withdrawn, it was not signed on behalf of the requisite number of 15 qualifying tenants because (a) it was not given by Leclipse and (b) MBOSE, Aweer and Kirama were not qualifying tenants.

145. I therefore dismiss the Claimant's claim.