Neutral Citation Number: [2023] EWHC 994 (Ch)

Case No: PT-2022-000576

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Property, Trusts and Probate List (ChD)

Rolls Building
Fetter Lane, London, EC4N 1NL

Date: 28 April 2023

Before :

MASTER PESTER

- -

Between :

UNIVERSITY OF THE ARTS LONDON	**Claimant**
- and -	
(1) LEGAL & GENERAL PENSIONS LIMITED	**Defendants**
(2) LEGAL & GENERAL ASSURANCE (PENSIONS MANAGEMENT) LIMITED	

- -

Daniel Shapiro KC and James Sharpe (instructed by **Simmons & Simmons LLP**) for the **Claimant**
John McGhee KC and Joseph Steadman (instructed by **Macfarlanes LLP**) for the **Defendants**

Hearing dates: 30 to 31 January 2023

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APPROVED JUDGMENT

This judgment was handed down by the Master remotely by circulation to the parties or their representatives by email and by release to the National Archives. The date and time for hand-down is deemed to be 4pm on 28 April 2023.

MASTER PESTER:

1. This is my judgment on the Defendants' application, dated 11 August 2022, to strike out parts of the Particulars of Claim (under CPR Part 3, r. 3.4) alternatively for reverse summary judgment on parts of the Claimant's claim (under CPR Part 24, r. 24.2).

Background

2. The Claimant, University of the Arts London ("UAL"), is a higher education corporation specialising in the arts with a number of campuses around London. The Defendants, which I will refer to collectively as "L&G", save where there is a need to distinguish between them, are each private companies which are part of a multi-national financial services and asset management group. As part of this group, L&G act as institutional investors, including in relation to property.

3. During 2010 to 2015, UAL and L&G were involved in a transaction under which two residential student accommodation buildings were to be purpose built for UAL. The first of these is known as "Sketch House" in Finsbury Park, and the second as the "Highline Building" in Elephant and Castle. I will refer to them collectively as "the Properties". The Properties were to be built by a developer, with the freehold to be held by L&G and leased to UAL, which would in turn lease the individual study-bedrooms to students.

4. The landlord in respect of Sketch House is the First Defendant, and the landlord in respect of the Highline Building is the Second Defendant. Two leases for the Properties, which are, for present purposes, in materially identical terms, were

entered into on 3 September 2015 for 25 years ("the Leases"). Pursuant to the Leases, UAL is obliged to pay Rent, a Sinking Fund Contribution and the Service Charge (all as defined in the Leases); and L&G was obliged "to provide or procure the provision of" certain services to UAL. In very broad terms, these services relate to maintenance, cleaning and security. The Leases relate to residential property, and (as I understand it) L&G treated the supplies it made to UAL under the Leases, and therefore the ongoing payment of Rent and Service Charge, as exempt from VAT.

5. L&G delegated its obligation to provide the services to a third party management company, Fresh Student Living Limited ("FSL"). Accordingly, on the same date as the Leases were entered into, the parties also entered into two management agreements with FSL, by which FSL was appointed to provide a wide range of services at the student accommodation ("the Management Agreements"). Under the Management Agreements, sums payable are exclusive of VAT; but that where under the Management Agreements a supply is made that *is* subject to VAT, the person receiving the service (that is, L&G) was to pay VAT to the person making the supply (that is, FSL).

6. For the first two years after grant of the Leases, from September 2015 to September 2017, L&G issued invoices to UAL which charged the sums due for Rent, Sinking Fund and Service Charge pursuant to the Leases exempt from VAT. Apparently, L&G did not seek reimbursement from UAL in relation to any VAT paid by L&G on the sums due to FSL including VAT on the management fees.

7. However, from sometime in November 2017, L&G began charging VAT on the Service Charge contributions. It did this, apparently, without making it clear on the invoices that sums charged included an element in respect of VAT. In fact, the invoices I have seen from this period state that the Service Charge was "Exempt from VAT", and the amount of VAT is stated to be "0.00". UAL paid the amounts stated on the invoice, not having had the change in practice drawn to its attention.

8. As I understand it, UAL only became aware of what had been happening when, by letter dated 17 December 2018, L&G's agent wrote to UAL asserting that an amount of £157,878.33 in respect of VAT paid by L&G relating to the Highline Building had been omitted for the period September 2015 to September 2017, and seeking payment of this amount. A similar letter, of the same date, was sent in relation to Sketch House, asserting that £352,248.63 was due in respect of VAT. Credit notes were issued reversing in full the charges raised for the period to September 2017, but invoices were issued which charged the amount in respect of VAT which L&G now claimed from UAL.

9. UAL responded in early 2019, stating that L&G had no right to charge VAT on the Service Charge, nor did UAL have any obligation to pay such VAT. UAL and L&G therefore disagreed as to whether, under the Leases, in particular, clause 13, L&G was entitled to recover from UAL the VAT element of its payments to FSL. UAL, as a higher education institution, could not recover VAT on the provision of student accommodation.

10. The Leases contain a provision headed "Settlement of Disputes", which is clause 28 in the Highline Building Lease. This provides for the resolution of

disputes between the parties arising out of or in connection with the Leases. Pursuant to clause 28 of the Leases, the parties agreed that a Dispute had arisen and appointed Sam Grodzinski KC as the Expert. However, the parties disagreed as to the precise nature and scope of the question for him to determine.

11. On 1 October 2020, the Expert, having received submissions from the parties, wrote a letter identifying a "primary dispute", concerning the proper interpretation of the Leases and accompanying management agreements and a "secondary dispute", concerning the rectification of the contractual documents. However, the Expert agreed with the parties that it was not necessary for him to resolve "… any such secondary dispute at this stage". Given the likely additional time and costs in resolving the secondary dispute, that is, the need for detailed factual evidence, the Expert explained that it would not be appropriate to resolve such secondary dispute at the same time as the primary dispute.

12. On 19 January 2021, the Expert circulated to the parties his determination of the primary dispute ("the Determination") by email, writing "… I attach my determination of the dispute." At para. 44 of the Determination, he characterised the primary dispute (meaning the dispute relating to contractual interpretation, rather than rectification) as being

> *"… on a proper interpretation of clause 13.2 of the Lease, is the Management Fee, payable by L&G to FSL under the Management Agreement, a "cost or expense" which UAL is required by the terms of the Lease to "reimburse or indemnify" to L&G? if the answer is yes, then UAL is obliged to reimburse or indemnify L&G for the full amount of the Management Fee, including any part of it which represents VAT."*

13. The Expert's conclusion on the primary dispute was that:

> *"… the Management Fee, payable by L&G to FSL under the Management Agreement, is a cost or expense which UAL is required by the terms of the Lease to reimburse to L&G, so that UAL is obliged to reimburse L&G for the full amount of the Management Fee, including any part of it which represents VAT."* (at para. 92)

14. The Expert also indicated that, insofar as UAL decided that the Expert should go on to determine any dispute regarding rectification of the contracts, it should notify L&G and the Expert within 28 days from the date of his decision, or 16 February 2021. UAL sought an extension to this period to 16 March 2021 from L&G, an extension which L&G agreed.

15. What happened instead was that UAL purported to provide notice of its dissatisfaction with the Determination on 15 March 2021, that is 39 days after UAL received the Determination ("the Notice"). By the Notice, UAL indicated that it intended to refer the entirety of the dispute between the parties to court proceedings. Regarding timing, the Notice states that:

> *"While we recognise that it has now been in excess of 20 Working Days since the parties received the Determination, time is not of the essence in relation to the clauses of the leases referred to above. Further or alternatively, Mr Grodzinski QC has not determined the whole dispute as yet and UAL will require that whole dispute be referred to court proceedings because it is dissatisfied with the Determination as to contractual construction."*

The Statements of Case

16. UAL duly commenced these proceedings, by claim form dated 6 July 2022. Under the heading "Brief details of claim", UAL sought

> *"… declarations as to the proper meaning and effect of provisions in Leases ("the Leases") dated 3 September 2015 of premises at Sketch House … and the Highline Building in connection with VAT or in the alternative rectification of the Leases to correct the parties' common mistake as to the position in respect of VAT; or alternatively rectification of the Leases to*

correct the Claimant's unilateral mistake as to the position in respect of VAT …"

17. UAL's Particulars of Claim make it plain that the two issues in the proceedings are (a) the proper meaning and effect of the Leases ("the Construction Issue") and (b) in the alternative, a claim for rectification, either on the basis of common mistake on the part of the parties, or unilateral mistake on the part of UAL ("the Rectification Issue").

18. In response, L&G filed a full Defence and Counterclaim. By its Counterclaim, L&G claims a declaration that UAL is obliged under the Leases (i) to pay VAT charged on the management fees and/or (ii) to reimburse L&G for any VAT paid on the management fees. In relation to the Construction Issue, UAL says that L&G has adopted a curious and unprincipled position. Paragraph 46 pleads that L&G's case on contractual construction depends on whether the Court finds that (as L&G contends) the Determination is final and binding. If the Determination is final and binding, then L&G admits that UAL's construction of the Leases is valid. On the other hand, if the Court finds that the Determination is not final and binding, then L&G denies UAL's construction, and puts forward a different construction of the Leases (one that accords with the Expert's conclusion).

19. The consequence of that position is set out at paragraph 50 of the Defence in relation to the Rectification Issue. L&G contends that "… on UAL's primary case (and on L&G's case if the Court finds that the Determination is final and binding) the proper meaning and effect of the Leases is consistent with the common intention (and/or UAL's unilateral intention) as alleged by UAL, such that there is no mistake capable of rectification". In other words, L&G says that

(provided the Court holds that the Expert's Determination is final and binding on the parties) UAL's contention with respect to the Construction Issue is correct, and thus there is no basis for rectifying the Leases (as the construction of the leases accords with the parties' intentions) but nevertheless UAL is bound by what would be, on this footing, the Expert's mistaken construction of the Leases.

20. In its Reply, UAL repeats that the Determination is not final and binding. Accordingly, rectification will be unnecessary if UAL succeeds on its primary case on construction that the Leases do not oblige UAL to pay or reimburse or indemnify L&G for any VAT on the management fees; but (on the other hand) rectification will be necessary if the Court concludes (contrary to UAL's case) that L&G's construction of the Leases is correct.

The Strike out/Summary Judgment application

21. L&G submits that under the settlement of disputes provisions in the Leases, the Determination is final and binding. L&G says that the Determination was final and binding on the parties in relation to any issues of construction, unless either party gave notice to the other pursuant to clause 28.8 of the Leases. Clause 28.8 provides that notice "shall" be given "within 20 Working Days after receiving Notice of the Expert's decision". Twenty working days after 19 January 2021 would be 16 February 2021. No such notice was given by either party within 20 working days.

22. L&G submits that the Notice was too late so as to prevent the Determination being final and binding under clause 28.4(d) of the Lease. L&G complains that

UAL's Particulars of Claim, at paragraphs 59 and 60, seek to re-open the Determination and have the construction issue determined by the Court. L&G submits that those paragraphs should be struck out, along with any other paragraphs which include or rely upon a contention that the Determination can be re-opened; alternatively, given that the Determination is final and binding, L&G submits that there is no real prospect of UAL successfully defending L&G's counterclaim on the point.

23. L&G's application was not supported by any witness statement. UAL filed two witness statements in response, both from solicitors, one from James Pollock, who has conduct of these proceedings on behalf of UAL, and the other from Katie Hickman, the solicitor who acted for UAL at the time of the referral of the Dispute to the Expert. UAL's position is summarised by Mr Pollock, who makes essentially three points:

(1) There was no final determination of the Dispute between the parties by the Expert because Mr Grodzinski KC did not (and could not) determine the Rectification Issue, so there was in fact no formal obligation upon UAL to issue a Notice under clause 28.8 at all.

(2) In any event, clause 28 is not expressed to be of the essence, nor should it be implied to be of the essence.

(3) Finally, given the matters at issue, including what is described as "the unattractive approach taken by L&G in their Defence" to which I have referred above, the question whether the Determination really is final and

binding should not be decided on a summary application, but should be decided at trial.

24. L&G filed a very short, two page witness statement in reply, from its solicitor, Gideon Sanitt. All this witness statement does is exhibit some further items of correspondence exchanged between the parties and the Expert relating to the Determination.

25. The initial point taken at the hearing before me by UAL was that the evidence in support of the summary judgment application failed to comply with Practice Direction 24, paragraph 2(3), which provides in terms that a party making a summary judgment application must state that it is being made because the applicant believes that the respondent has no real prospect of succeeding on the claim or issue and the applicant knows of no other reason why the disposal of the claim should await trial. I took the view that the right way to deal with that admitted procedural failure on the part of L&G was to require L&G to amend their application notice overnight in order to comply with the requirements of the Practice Direction. UAL sensibly indicated that this was an acceptable way forward.

Clause 28: Settlement of Disputes

26. I turn now to the contractual provisions in the Leases, so far as they are material for this judgment. Clause 28 is headed "Settlement of Disputes". The first sub-clause, clause 28.1 is headed "Preliminary negotiation". This provides that the Parties will attempt in good faith to negotiate a settlement to any claim or dispute between them arising out of or in connection with the Leases. If the

matter is not resolved through negotiations, the Parties may attempt to resolve the dispute through ADR.

27. Clause 28.2(a) is important, and merits being set out in full. It deals with the Appointment of the Expert as follows:

> *"28.2(a) If any dispute or difference as to the construction of this Lease or any matter or thing of whatsoever nature arising hereunder or in connection herewith shall arise between the Tenant and the Landlord including any matter which is not a dispute or difference but which is required under the terms of this Lease to be referred to the Expert for a decision (hereinafter also referred to as a* ***"dispute"*** *or* ***"difference"****) then such dispute or difference shall subject to* ***clause 28.8*** *be referred to and settled by the Expert who shall be an independent person who shall have been qualified in respect of the general subject matter of the dispute or difference for not less than 10 years and who shall be a specialist in relation to such subject matter agreed between the parties …"* (terms in bold in the original)

28. Clause 28.3 deals with the "Powers of the expert", including the power to determine the procedures to be complied with by the Parties. Clause 28.3(c) provides that

> *"the Expert shall not be deemed to be an arbitrator but will render his decision as an expert and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to such Expert or his determination or the procedure by which he renders his determination."*

29. Clause 28.4 deals with the Expert's decision. Clause 28.4(a) provides that the Expert is to "… as soon as possible or in any event within 10 Working Days … [to] give Notice of his decision …". Clause 28.4(b) provides that, if the Expert has not rendered his decision within the prescribed timescale, a new Expert may be appointed at the request of either party in accordance with clause 28.2(a). Clause 28.4(c) provides that the Notice shall include a concise statement by the Expert of the reasons for his decision and a schedule summarising the

documentation, investigations and other evidence considered by the Expert in arriving at his decision.

30. Clause 28.4(d) also merits being set out in full:

> *"28.4(d) Such decision shall forthwith be given effect to by the Parties hereto and shall be final and binding on them unless either Party shall serve a Notice under clause 28.8 in which case the decision shall be binding on the Parties unless and until the proceedings commenced in accordance with clause 28.8 are completed and result in a different award as between the Parties."*

31. Clause 28.5 provides that the decision of the Expert, wherever possible, shall reflect the legal entitlements of the Parties, and where it appears to the Expert impractical to reach a concluded view upon the legal entitlements of the Parties "within the practical constraints of a rapid and economical adjudication process" his decision should represent his fair and commercially reasonable view of the disputed matter.

32. Clause 28.7, headed "Fees and Expenses", deals with payment of the Expert's fees and expenses. Sub-clause 28.7(d) provides that the Expert is to send to the Parties an account of his fees and expenses as soon as the Expert has given his decision accompanied by appropriate invoices, and such invoices are to be paid within 10 working days of receipt. In this case, the Expert did send an invoice, and it has been paid.

33. Clause 28.8, headed "Dissatisfaction with Expert's Decision", provides:

> *"If any Party is dissatisfied with any decision of the Expert that Party shall within 20 Working Days after receiving Notice of the Expert's decision give to the other Party Notice requiring the relevant matter dispute or difference be referred to court proceedings."*

34. Finally, clause 28.9 (headed "No Expert") provides that either Party may give notice to the other within ten Working Days following the appointment of an Expert that the relevant matter, dispute or difference be referred to court proceedings. Thus, either Party may, under this sub-clause, have a change of heart, and insist on the matter being resolved by way of Court proceedings, rather than subject to determination by the Expert.

Applicable legal principles

(1) Strike out/summary judgment

35. CPR r. 3.4(2) allows the court to strike out a statement of case which discloses no reasonable grounds for bringing or defending a claim or which is an abuse of process. The test is similar, but not identical to, that for summary judgment, where the court will not grant summary judgment, here in favour of the Defendants, unless the claim has no real prospect of success. Authoritative guidance, which has subsequently been followed on many occasions as well as being approved by the Court of Appeal, as to the meaning of a "real" prospect of success was given in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at [15]. Lewison J, as he then was, made the following points:

> *"(i) The court must consider whether the claimant (or defendant) has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *(ii) "A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
>
> *(iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;*
>
> *(iv) This does not mean that the court must take at face value and without analysis everything that a claimant [or defendant] says in his statements*

before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA Civ 550;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 3;

(vii) On the other hand it is not uncommon for an application under CPR Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for a proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemical & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

36. It might be felt that there is a tension between paragraphs (vi), which is that although a case may turn out at trial not to be "really complicated", it does not follow that it should be decided without the fuller investigation into the facts which is possible at trial, and (vii), which says that if the court is satisfied that it has before it all the evidence necessary for the proper determination and that

the parties have had an adequate opportunity to address it in argument, the court should "grasp the nettle" and decide it. This tension is more apparent than real. On a summary procedure, it is not part of a court's function to decide either conflicts of the evidence on the witness statements or difficult questions of law which call for detailed argument and undue consideration: see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, at p. 407. But, on the other hand, where the legal principles are clear and it is not a developing area of law, where neither side is suggesting that further factual evidence will emerge that will or may shed light on the issues between the parties, and there has been a proper opportunity to make full submissions at the summary judgment stage, the court should indeed "grasp the nettle" and decide matters.

37. In *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793, at [38], the Court of Appeal said this regarding the overlap between an application for summary judgment, and one for strike out:

> *"[I]n a case of this kind, CPR rr. 3.4(2) and 24.2 should be taken together and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of case discloses no reasonable grounds for bringing a claim and should be struck out. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91. In essence, the court is determining whether or not the claim is "bound to fail": see Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804, paras 80 and 82. …"*

(2) Principles of construction

38. No one suggested to me that this is a developing area of law. The principles of contractual interpretation are not in doubt. When construing a contract, the task for the court is to ascertain the objective meaning of the language which the parties have chosen to express their agreement: *Wood v Capita Insurance*

Services Ltd [2017] AC 1173, at [10]. The core principle is that a contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean: *FCA v Arch Insurance (UK) Ltd* [2021] AC 649, at [47].

39. Further, L&G stressed that if the parties have used unambiguous language, the court must apply this: see *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, at [23].

40. UAL, for its part, submitted that a lease is to be construed applying the same principles as any contract. Again, this is uncontroversial.

(3) Whether time is of the essence

41. Where the parties disagreed was the correct approach to stipulations as to time, and in particular, in what circumstance would a stipulation as to time be treated as being "of the essence". Section 41 of the Law of Property Act 1925 provides as follows:

> *"Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."*

42. Lewison, *the Interpretation of Contracts* (7th ed, 2020), at 15.39 describes the starting point in this way:

> *"In general, the parties are free to stipulate whether or not stipulations as to time in a contract must be strictly complied with. They are also by and large free to prescribe the consequences of a failure to take some step within a timetable expressed in the contract. Thus a failure to comply with a time limit may itself entitle the other party to treat the contract as at an*

> *end, or it may deprive the party in default of some right or advantage which would otherwise have accrued to him."*

43. Counsel for UAL stressed that there were specific presumptions as to the effect of time stipulations or timetables in contracts, and whether these were seen as mandatory or simply indicative. UAL contends that the presumptions differ and are in opposite directions, depending on whether one is dealing with a mercantile or non-mercantile contract. A lease, even between commercial parties, is a non-mercantile contract. Lewison, at 15.42, puts the matter this way:

> *"Time stipulations are not of the essence in a non-mercantile contract unless the contract expressly so provides; or the nature of the contract or the surrounding circumstances show that time should be taken to be of the essence. In mercantile contracts, however, time will usually be of the essence of time stipulations."*

44. Contracts commonly provide a timetable governing how a party may exercise their contractual rights, whether that is a claim to enforce warranties under share purchase agreements or to effect a rent increase under a lease. Whether compliance with stipulations as to time in a contract is "of the essence of the contract" is a matter of construction. The House of Lords in *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904 considered the position when dealing with a rent review provision. As Lord Diplock explained, the issue in the case was "whether a failure to keep strictly to the time-table laid down in the review clause deprives the landlord of his right to have the rent reviewed and consequently of his right to receive an increased rent during the period that will elapse until the next review date" (at p. 923). Lord Diplock held that "in the absence of any contra-indication in the express words of the lease or in the interrelation of the rent review clause itself and other clauses or surrounding circumstances the presumption is that the time-table specified in a rent review

clause for completion of the various steps for determining the rent payable in respect of the period following the review date is not of the essence of the contract. …" (at p. 930G).

45. However, it is also clear that, even in the context of rent review clauses, the use of the words "time to be of the essence" is not essential. See *Drebbond Ltd v Horsham District Council* (1979) 37 P&CR 237, where the rent review clause in question provided that the landlord was entitled to serve notice requiring the rent to be revised, and that if no agreement was reached between the parties' surveyors within three months after that notice then the amount of the reviewed rent shall "if the landlord shall so require by notice in writing given to the tenant within three months thereafter but not otherwise" be referred to an arbitrator for determination. In that case, Megarry VC held that the use of the words "but not otherwise" showed that the time limit meant what it said, and was to be obligatory and not merely indicative.

46. Thus, even when dealing with rent review provisions, the presumption may be defeated if the parties have expressed themselves clearly: see, for another example, *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] Ch 306. The clause at issue in the *Starmark* case provided that if the lessees should fail to serve a counter-notice within the period of one month from the receipt of a rent notice from the landlord "they shall be deemed to have agreed to pay the increased rent specified in the rent notice". Arden LJ indicated that the natural meaning of the word "deem" was to introduce a conclusive state of affairs.

47. I was taken, by Counsel for L&G, to various cases involving claims to enforce warranties under share purchase agreements: see *Laminates Acquisition Co v*

BTR Australia Ltd [2004] 1 All ER (Comm) 737 and *Zayo Group International Ltd v Ainger* [2017] EWHC 2542 (Comm). In the former case, Cooke J pointed out, at [29], that "… Notice clauses of this kind are usually inserted for a purpose, to give some certainty to the party to be notified and a failure to observe terms can rarely be dismissed as a technicality …"

48. Gross J's observation is of course correct as a matter of general principle. However, it seems to me important to stress that comparatively little benefit is obtained from citing authorities in rather different commercial contexts. What is always crucial is focussing on the actual words used in the actual contract being construed. In any event, a share purchase agreement is a mercantile agreement, while a lease is not.

49. Therefore, although the reference to general principles gives some indication of what the court should be looking at, the real issue in this case is trying to apply the words which the parties have actually used in this particular contract being considered by the court. The task for the court is working out what the parties intended the consequences to be of a failure to comply with the time limit set out in clause 28.8.

Discussion and analysis

50. Although there were differences in emphasis in the way in which the parties framed the issues, the parties agree that there are essentially three questions for me to determine on the summary judgment application:

(1) Was there a final determination of the Dispute, so that the period of 20 working days started running in the first place?

(2) If the answer to (1) above is "yes", what is the consequence of UAL failing to give notice within that 20 day working period?

(3) Is there nevertheless a compelling reason why the Court should not determine those issues now, but leave the matter to the trial judge?

Issue 1: was there a final determination of the Dispute?

51. UAL submits that there has been no final determination of the Dispute as the Expert did not and could not in any event determine the Rectification Issue. As there is no determination of the Dispute which is final and binding, there was no requirement for UAL to issue a notice pursuant to clause 28.8 of the Lease. Only part of the dispute – the Construction Issue – has been subject to an Expert determination, but there had been no final determination of the Dispute. Although the parties appear to have overlooked this at the time when the Expert was first appointed, as a matter of law, an expert appointed by the parties has no power to determine claims for rectification. The position may be contrasted with that of an arbitrator, who pursuant to s. 48 of the Arbitration Act 1996 is granted "the same powers as the court – (c) to order the rectification, setting aside or cancellation of a deed or other document".

52. UAL submits that the issue may be resolved by a straightforward application of the words of clause 28.2. The dispute or difference that arose between the parties, and which was referred to the Expert for determination, clearly comprised both the Construction Issue and the Rectification Issue. In his Determination, the Expert indicated that:

> *"21. At the time, I also noted that there was a dispute as to the correct formulation of the dispute between the parties. I referred to the primary dispute being one concerning the proper interpretation of the Leases and the Management Agreements and whether, pursuant to that interpretation, UAL was obliged to pay or reimburse amounts equal to the VAT which FSL had charged under the Management Agreements. But I decided that I would not seek to resolve the parties' competing formulations at that stage, and that it would be appropriate to address the nature of the dispute once I had received the parties' submissions. I have addressed the nature of the primary dispute in more detail in Part 5 below.*
>
> *22. I also noted that depending on how I resolved the primary dispute between the parties, it might become necessary to determine a secondary dispute about whether any of the contractual documents should be rectified. In summary, that is because UAL contends that if it were required to reimburse L&G for the VAT element of the Management Fee gross payments, there would have been a mistake in the contracts, because UAL would end up making a loss on the letting of the student rooms, and this was never the parties' intention: see UAL's letter of 13.11.19 at paragraph 2. However I agreed with the parties that it was not necessary or appropriate to determine any rectification dispute now, given the likely time and costs in doing so. The parties' submissions at this stage have accordingly been confined to the primary issue of contractual interpretation, and have not addressed the secondary issue of rectification."*

53. UAL therefore submits that, on any view, only part of the Dispute, namely the Construction Issue, was ever determined by the Expert. Accordingly, it follows that there has been no final determination of the Dispute as the Expert did not (and, as a matter of law, could not) determine the Rectification Issue. There was therefore no requirement for UAL to issue a notice pursuant to clause 28.8 of the Leases.

54. I have no hesitation in rejecting this submission, which seems to me plainly wrong. My reasons are as follows:

(1) The starting point is the actual wording in clause 28.2, the key part of which provides that "such dispute or difference shall … be referred to and settled by the Expert …". The question is not simply what is the dispute or

difference between the parties, but what was the dispute or difference which the Expert was required to settle. UAL's submissions involve an artificial reading of what the Expert was being asked to do. Whilst in a broad sense the dispute which arose between the parties concerned whether, under the Leases, L&G was entitled to recover from UAL the VAT elements of its payments to FSL, the Expert, with the approval of the parties, properly recognised that such dispute involved two questions: a Construction Issue, and a Rectification Issue. The Expert, again with the concurrence of the parties, proceeded to give his decision on the Construction Issue, and thereby settled that dispute.

(2) This is reflected in the Expert's Determination, at paragraph 92, where the Expert wrote that

> *"Insofar as UAL decides, in light of this decision, that I should go on to determine (under clause 28 of the Lease) any dispute concerning the rectification of the contracts, I direct that UAL should notify that position to L&G and to me within 28 days from the date of this decision. Insofar necessary, further direction can then be given for the resolution of any rectification dispute."*

That plainly reflects the fact that what the Expert was doing was proceeding on the basis that the only "dispute or difference" that had actually been referred to him to be settled was the Construction Dispute.

(3) It is now common ground between the parties that the Expert had no power to determine the Rectification Issue in any event: see *Persimmon Homes Ltd v Woodford Land Ltd* [2011] EWHC 3109 (Ch), at [21] – [22]. Rectification is a remedy which only the court can grant, and it is always discretionary in nature. The parties appear to have overlooked this point at the time when

the Expert was first appointed, as there is no inkling in any of the correspondence passing between the parties and the Expert in 2020 that they realised that this might be the case. As the Expert could never have determined the Rectification Issue, it would follow from UAL's submissions that the Expert could never determine what UAL says is "the dispute" between the parties, and time could never have begun running for the purposes of clause 28.8. That would be a surprising conclusion to reach.

(4) Moreover, if UAL's submissions on this point were correct, there would be no possibility for the Expert's decision ever to become binding on the parties. That would be a bizarre and uncommercial conclusion to reach. It is no part of my task to determine whether the Expert's determination is correct, or not. However, the Expert's written determination extends over 28 pages, and 93 paragraphs. It represents a detailed and considered legal ruling on the issues of construction. Whilst I have not been told how much obtaining the Expert's Opinion cost the parties, I would confidently expect it not to have come cheaply. The suggestion that in those circumstances the Expert's determination could never have had, or was never intended to have, any legal effect on the parties' positions is a startling one, and I reject it.

(5) Thus, the only Dispute which the Expert had been required to settle, with the concurrence of the parties, was the Construction Issue. There is no reason not to treat the Expert's determination as a "decision" of the Expert under clause 28.4(d) and clause 28.8.

(6) Whilst I do not place a great deal of weight on this final point, I do note that if UAL were correct on its submissions on this point, there was no

requirement for UAL to issue a notice pursuant to clause 28.8 of the Lease at all. However, UAL did proceed to issue a notice, by its letter of 15 March 2021.

55. Finally, I take into account that if the Expert's determination of the Construction Issue were held not to have been a "decision" for the purposes of clause 28, certain odd consequences would follow. For example, the Expert would not be entitled to his fees pursuant to clause 28.7(d), since he would not have given a "decision". I agree with L&G that it is even difficult to see how a right to his fees could ever arise in the circumstances, as he could never determine the "dispute" in the broad sense contended for by UAL. However, the Expert did provide an invoice, and his fees have been paid.

56. Accordingly, I find on Issue 1 for L&G. The running of the notice period began on 19 January 2021 when the Expert gave notice of his decision.

Issue 2: Is time of the essence in clause 28?

57. Clause 28.8 does not expressly state that time is of the essence. UAL points out that there are provisions in the Leases where time is expressly stated ***not*** to be of the essence: see clause 5.5(j) (which deals with review or determination of the Service Charge and Sinking Fund Contribution), which is repeated in clause 5.6(j); and likewise in the unnumbered clause in Schedule 8, after clause 13.7 (dealing with the determination of open market rent for the further lease). In contrast, clause 44.7 states that time is of the essence where the tenant is exercising an option to renew, by giving notice to the landlord, and clause 45.3 provides time is of the essence where a severance notice is to be served by the

tenant confirming that it wishes to change management companies. UAL submits that the absence of the wording "time being of the essence" in clause 28.8 is a strong pointer that the parties did not, after all, intend time to be of the essence in clause 28.8.

58. Furthermore, UAL says that clause 28.8 does not set out the consequences of failure to serve a notice in time. It is submitted that if time had been intended to be of the essence, then one would expect the parties to have carefully timetabled the subsequent procedural steps to be followed. UAL relied in this context on the decision in *Trustees of Henry Smith's Charity v AWADA Trading and Promotion Services Ltd* (1983) 46 P&CR 74, a decision of the Court of Appeal. That was a case dealing with a rent review provision. The Court of Appeal (Sir John Donaldson MR, Griffiths and Slade LJJ) held that where the parties had set out a timetable and had also stated the consequences of the failure to follow the timetable, the ordinary presumption against time being of the essence was rebutted. In that case, the key operative clause was as follows:

> *"If on the expiration of two months from the date of service of such counter-notice the landlords and the tenant shall not have agreed in writing an amount to be treated as the market rent and the landlords shall not have applied for the appointment of a surveyor in accordance with paragraph 6 of this schedule the amount stated in such counter-notice shall be deemed to be the market rent."*

59. Lastly, it is said on behalf of UAL that there has been "no detriment" to L&G as a result of a modest delay in serving the notice and no evidence has been provided by L&G evidencing any detriment or why time is of the essence.

60. The key points seem to me as follows:

(1) If the parties have used unambiguous language, then I should apply that language. The court has no discretion to relieve parties of their contract and the principle that the court enforces contracts should be applied.

(2) Clause 28 must be read as a whole. Although it is true that clause 28.8 does not specify any consequences for failure to serve the Notice within the specified period (20 Working Days), the consequences for a failure to serve the Notice on time are spelled out clearly in clause 28.4. The decision is expressly stated to be final and binding on the Parties, unless the Notice under clause 28.8 is served, in which case the decision shall be binding on the Parties (but not final).

(3) The difference between the decision being "final and binding" and being simply "binding" is again set out clearly in clause 28.4. If the decision is "final and binding", the parties can no longer challenge it. If, however, the decision is merely "binding", then the decision binds the parties "unless and until the proceedings commenced in accordance with clause 28.8 are completed and result in a different award as between the Parties". The use of the word "award" is not accurate; what is really meant is "judgment", but this is not a point of any substance.

(4) The fact that the parties have not set out any timetable for commencing the proceedings contemplated by clause 28.8 does not, in my view, matter. This is because even if the Notice is validly served on the counterparty pursuant to clause 28.8, it becomes binding. At that point, the other party is entitled to continue relying on the decision, and can itself commence proceedings: for example, for a declaration as to rights. In the present case, had UAL

served a compliant Notice, whilst the Expert's decision would not be "final and binding", it would be "binding". L&G could, for example, validly charge VAT on Management Services, unless and until UAL successfully brought proceedings to a conclusion in its favour. In that way, commercial certainty is achieved.

(5) It is also worth highlighting the fact that the opening words of clause 28.4(d), when referring to the Expert's decision are "Such decision shall forthwith be given effect to by the parties thereto …". Those words do import a real sense that the parties must as soon as reasonably possible comply with the decision. If one party disagrees with the decision, and wishes to challenge it by way of proceedings, then it must serve the Notice specified in clause 28.8, within the specified time period.

(6) Commercial common sense also supports the view that the parties would wish to resolve any dispute between themselves as quickly as possible. In other words, the parties, as commercially sophisticated contracting entities, would want to have commercial certainty in their relationship. That this view is the right one is supported by the fact that, under clause 28.4(a), the Expert is mandated to give a decision "as soon as practicable or in any event within 10 Working Days after the date of his appointment". In the event, the parties agreed to extend that deadline, with the concurrence of the Expert. However, it does emphasise the importance the parties attached to resolving a Dispute quickly.

(7) If UAL were correct, and time was not of the essence in clause 28.8, then that would in effect change the meaning of clause 28(4)(d) so that it read something along the lines of:

> *"Such decision shall forthwith be given effect to by the parties hereto and … shall be binding on the parties unless and until … proceedings are completed and result in a different award as between the Parties."*

That would in effect involve the words of clause 28.4(d) being rewritten in an impermissible way, by removing the reference to the service of a Notice pursuant to clause 28.8, which sub-clause contains the time limit.

(8) Perhaps the strongest point in favour of UAL's suggested construction that time for serving the Notice in clause 28.8 is not of the essence is that the parties have, elsewhere in the Leases, on two occasions used the expression "time being of the essence" and, on three occasions, "time is not of the essence". The point can legitimately be made, if time was to be of the essence, why was that phrase not used in clause 28.8, given that the drafters were obviously familiar with the expression. However, Counsel for UAL recognised that the use of the words "time to be of the essence" is not mandatory, if it otherwise appears from the context as a whole or all the circumstances that that was the intention of the parties: see *United Scientific v Burnley*, at p. 930 (per Lord Diplock), and p. 959 and p. 962 (per Lord Fraser); see also *Drebbond v Horsham District Council* (1979) 37 P&CR 237, per Megarry V-C.

(9) In any event, it is noticeable that clause 28.8 does not state either "time being of the essence" or "time is not of the essence"; so it could be said that, rather

than being a pointer in UAL's favour, the point is at most neutral. Moreover, there are numerous other time expressions used in the Leases where neither the expressions "time being of the essence" nor "time is not of the essence" are used. In some of the provisions where time is not expressed to be of the essence, the consequence of a failure to comply with the time limit has a consequence clearly stated. One example is clause 21.2, dealing with the service of a notice on the Landlord requiring the Landlord to replace the existing sub-contractor where there has been a serious breach by the Landlord in relation to the provisions of the Services. Such a Notice may not be served unless the Tenant has given not less than 70 Working Days prior written notice. I accept the submission made by L&G, that in the Leases one does not always find the expression "time being of the essence" even when the parties required a time limit to be strictly complied with.

(10) In this case, the strongest indication that the parties intended clause 28.8 to mean what it says is that they clearly set out, in clause 28.4(d), what the consequences of a failure to serve a timely Notice would be.

(11) Finally, I do not consider that the issue as to whether time is of the essence in clause 28 depends on there being evidence from the parties seeking to establish detriment. L&G does not need to show any detriment as a result of "the modest delay" on the part of UAL in serving the Notice. One simply needs to construe clause 28 and the Leases as a whole.

61. I therefore also find on Issue 2 for L&G. The time limit specified in clause 28.8 was of the essence and was to be strictly complied with.

Issue 3: is there nonetheless a compelling reason why the matter should be determined at trial?

62. UAL had a final point to make, which was that even were I to hold that UAL had no real prospect of succeeding on Issue 1 and 2, nevertheless I should not grant summary judgment on L&G's application because there was "some other compelling reason" why the case should go to trial. In this case, the parties agree that the court cannot determine one way or the other UAL's alternative claim to have the Leases rectified. Whatever my decision on L&G's summary judgment application, the Court will still be faced with a trial of UAL's claim for rectification.

63. I agree that, as part of any claim to rectification, the court will itself have to construe the Leases to determine their correct meaning before it will be in a position to decide whether the Leases did reflect the parties' true intentions. Even though the Determination is final and binding on the parties as a matter of contract, it does not bind the Court.

64. There is very little reported authority as to what constitutes a "compelling reason" why the matter or issue should be disposed of at trial. The notes to the White Book, Vol. 1, at paragraph 24.2 provide only very limited assistance as to what may amount to a compelling reason. The notes refer to *Miles v Bull (No. 1)* [1969] 1 QB 258 where the claimant's claim was described as being "devious and crafty" and not "plain and straightforward". However, *Miles v Bull* was a pre-CPR authority, decided on differing wording from that found in CPR Part 24. The use of the word "compelling" can also be said to have narrowed the circumstances in which it is right to refuse to grant summary judgment. In any

event, if the applicant's case can truly be described as devious then it would be unlikely that the applicant would be able to show that the respondent had no real prospect of success.

65. There may be cases where the existence of points of law provides a compelling reason why a case should go to trial, if the point of law cannot properly be described as being "short", or where there are conflicting authorities, although in that situation, probably the respondent again could submit that they had a real prospect of succeeding at trial. Perhaps a compelling reason could be shown if there are extraneous circumstances, such as a court holding that the conduct of the applicant is an abuse, or that the respondent's ability to defend the application has been impaired in some way or other, which might leave the court with a sense that a fuller investigation at trial is needed in the interests of justice.

66. In this case, of course, it is a feature of a rectification claim that the court must, as a preliminary step, decide what the document actually means on its true construction before going on to decide whether it ought to be rectified. As I understood UAL's submission, it was to the effect that it was "simply inappropriate" for the court to determine on a summary judgment application whether the Determination was binding in circumstances where the matter would be going to trial on the rectification issue in any event. It followed that, because the court will have to consider the question of the construction of the Leases in any event, and therefore no court time will be saved, the court should refuse to grant summary judgment, even though I am of the view that UAL has no real prospect of succeeding on Issues 1 and 2.

67. I had some difficulty in following this submission. I do not accept that no court time will be saved. I accept that the trial judge hearing the rectification claim will necessarily need to determine whether the Leases should be rectified in the way contended for by UAL. However, much of the existing statements of case are taken up by submissions relating to whether the Determination is, or is not, binding on the parties. In my view, UAL has no real prospect of showing otherwise at trial and there is no reason not to decide that issue now. Indeed, considerable judicial time has already been allocated to hearing the parties' submissions on the point. It would be wrong if, having formed a clear view that the Determination was binding on the parties, the court refused to decide the matter and allowed that issue to be in effect re-argued at trial.

68. In oral submissions, UAL developed a further point. It was said that L&G had taken an unattractive approach in its Defence, and therefore this justified the Court in not entering summary judgment. As set out above, L&G's Defence, at paragraph 46, pleads that if the Court finds that the Determination is final and binding, then L&G will say that the Expert's decision was wrong, and that UAL's construction of the Leases is right; but if the Determination is not final and binding on UAL, then L&G will say that UAL's construction of the Leases is not right, and that the Leases do permit L&G to recover the VAT payable by it on the Management Fees.

69. The position adopted by L&G does appear, at first sight, surprising. Moreover, L&G submits that a surprising consequence inevitably flows from that. If the Determination is binding on the parties, and if L&G is now entitled to say that nonetheless the Expert is wrong, and that UAL's position on construction was

right all along, then it is said that there is nothing to rectify, and no basis for a rectification claim. Yet, the Expert's determination would nonetheless be binding on the parties.

70. L&G submits that there is nothing underhand about such an approach, as they have at all times been transparent about what they say are the consequences flowing from their Defence and the summary judgment application. Moreover, L&G says that its approach is supported by *Woodford Land Ltd v Persimmon Homes Ltd* [2011] EWHC 984 (Ch). In that case, the question of the true meaning of a provision in the contract between the parties had been referred to an expert (Mr John Male QC) who had determined it in favour of Persimmon. Henderson J found that, although neither side had come to court expecting to argue the question of construction, because it had already been determined by Mr Male in a manner which was contractually binding on them, Mr Male's determination did not and could not bind the court. Henderson J decided the construction question in favour of Woodford, and therefore in the opposite way from Mr Male. The result was that the rectification claim then had to be dismissed, even though the Judge held that if he had been wrong on the question of construction, the rectification claim would have succeeded. As Henderson J concluded "… the action must be dismissed, because on its true construction the Agreement already means what Woodford says it ought to mean …" (at [83]).

71. I have been informed by Counsel for L&G (who happens to have been the same Counsel who was on the losing side in *Woodford v Persimmon*) that the case went on appeal. As I understand it, Woodford wished to argue that the court was bound to deal with the rectification claim on the footing that Mr Male's

determination on the rectification claim was correct, alternatively, that the equitable remedy of rectification could and should be granted in the particular circumstances of the case. The matter was fully argued on appeal, but before the Court of Appeal could hand down judgment, the parties settled their dispute.

72. In closing submissions before me, Counsel for L&G clarified that L&G agreed with both the result and the reasoning of the Expert. If that is indeed so, it is surprising to read in L&G's Defence, paragraph 53, under the heading "Rectification", that:

> *"on UAL's primary case (and on L&G's case if the Court find that the Determination is final and binding) the proper meaning and effect of the Leases is consistent with the common intention (and/or UAL's unilateral intention) as alleged by UAL, such that there is no mistake capable of rectification …"*

73. It is at first blush difficult to see how L&G can, on the one hand, indicate that it accepts both the reasoning and conclusion of the Expert, only to turn around and submit in a document supported by a statement of truth that, provided that the Court finds that the Determination is final and binding, it wishes to contend that UAL's construction was correct all along, and there is therefore nothing to rectify. It is trite law that a party cannot approbate and reprobate on the same issue.

74. Nevertheless, I do not think that, given that I have found clearly that the Determination is binding on the parties, I should refuse summary judgment because of what appears at first sight to be a surprising approach adopted in L&G's Defence and Counterclaim. In other words, I do not accept that UAL has demonstrated that there is some other compelling reason not to determine the question of whether the Determination is binding now, at this stage, if I am

otherwise of the view that UAL has no real prospect of succeeding on its claim that the Determination is not binding. However, UAL may wish to consider whether to press L&G to confirm what its true position on the construction of the Leases is.

75. Further, it seems to me that, on its rectification claim, it is open to UAL to argue that *Woodford v Persimmon* was wrongly decided and that the approach of Henderson J should not be followed. After all, even though (as I have found) the parties are bound, as a result of the Determination, to a meaning of the Leases as found by the Expert, the Court may still decide that the Leases are to be rectified to reflect the common subjective intentions of the parties, or on the basis of UAL's unilateral mistake: see *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2020] Ch 365, CA.

Conclusion

76. In the circumstances, L&G is entitled to summary judgment on its application. That means that certain identified paragraphs of the Particulars of Claim should be struck out. However, that does not mean that UAL cannot argue at trial that it is entitled to rectification of the Leases, nor submit that the approach of Henderson J in *Woodford v Persimmon* should not be followed.

77. I shall hear submissions on the precise form of order and any consequential matters, if this cannot be agreed by the parties in light of my judgment, on a date to be fixed, which should not be more than 28 days from the date when this judgment is formally handed down.