Neutral Citation Number: [2019] EWHC 1363 (Ch)

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

Rolls Building,
Fetter Lane,
London EC4A 1NL

Date: 4 June 2019

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Case No: PT-2017-000099

Between :

TFS STORES LIMITED

Claimant

- and –

(1) THE DESIGNER RETAIL OUTLET CENTRES (MANSFIELD) GENERAL PARTNER LIMITED
(2) BRITISH OVERSEAS BANK NOMINEES LIMITED
(3) WGTC NOMINEES LIMITED

Defendants

AND Case No. PT-2018-000035

Between :

(1) BMG (ASHFORD) LIMITED
(2) UK OM (LP2) (GP) LIMITED
(3) UK OM (LP2) LIMITED
(4) THE DESIGNER RETAIL OUTLET CENTRES (YORK) GENERAL PARTNER LIMITED
(5) UK OM (LP3) (GP) LIMITED

(6) UK (OM) LP3) LIMITED

Claimants

-and-

TFS STORES LIMITED

Defendant

- -

- -

Mr Guy Fetherstonhaugh QC and Mr Mark Galtrey (instructed by **Gordons LLP**) for the Claimant in Claim no. PT-2017-000099 and the Defendant in Claim no. Case No. PT-2018-000035

Mr Wayne Clark and Mr Joseph Ollech (instructed by **Shoosmiths LLP**) for the Defendant in Claim No. PT-2017-000099 and the Claimants in Claim no. PT-2018-000035

Hearing date: 13-16 May 2019

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HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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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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HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

His Honour Judge Davis-White QC:

Introduction

1. The question in this case is whether valid agreements have been reached to exclude certain tenancies of six different business premises from the protections of sections 24 to 28 of Part II of the Landlord and Tenant Act 1954 (the "**1954 Act**"). That turns upon whether the procedural requirements of s38A of the 1954 Act (as inserted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (the "**2003 Order**") have been met.

2. By the time of the trial before me, the issues regarding validity had been narrowed to three:

   (1) Whether solicitors for the tenant, in the case of two of the tenancies, had authority in each case to accept service of a Warning Notice under the s38A procedure;

   (2) Whether a particular employee of the tenant who executed statutory declarations in relation to the same two tenancies, purportedly in compliance with the s38A procedure, had authority to do so;

   (3) Whether the relevant statutory declaration was validly completed as regards the description of the tenancy in question in the case of each of the six leases. The relevant wording whose validity is challenged, relates to the commencement date. Two different formulae were used. One in respect of two of the tenancies and one in respect of four of the tenancies.

3. Although raised as issues on the pleadings, it was agreed that I did not need to determine certain issues:

   (1) The Tenant reserved its position for a higher court as regards the question of the validity of service of Warning Notices under the s38A procedure on agents of, rather than directly on, the prospective tenant, accepting that I am bound by authority to the effect that service on an agent will suffice (see *Galinski v McHugh* (1989) 57 P&CR 539 and *Yenula Properties Ltd v Naidu* [2002] L&TR 9).

   (2) In the light of disclosure, subject to (1) and the question of the details of the "commencement date" in the relevant statutory declarations, the Tenant accepted that no issue remained with regard to the validity of the relevant s38A procedure as regards the tenancies other than those of the Bridgend and Mansfield Premises.

   (3) Following cross-examination, the Tenant determined not to pursue further an issue raised on the pleadings, that the statutory declaration regarding the tenancy of the Bridgend Premises was entered into after (rather than before) entry into a

legally binding contract to take a tenancy and that therefore the s38A procedure had not been validly followed. At the commencement of the trial this issue had been limited to the tenancy of the Bridgend Premises.

4. The question of authority raises issues as to whether there was express or implied actual authority or apparent authority in each case and, if not, whether such authority was conferred with retrospective effect by ratification. Finally, and failing all else, there is a question as to whether there is an estoppel by deed (namely through execution of the relevant lease) that the procedure under the 2003 Order was validly followed. As regards the descriptions of the premises in each of the statutory declarations, the issue is one of law. Estoppel by convention arising from the relevant leases has not been relied upon as regards this issue, though in argument I think Mr Clark ultimately accepted that if the estoppel by convention argument was correct it could probably be relied upon to validate any defect in the content of the statutory declarations as well as any want of authority in the person making the same.

5. In the event that I find that the tenancies in question were validly excluded from the protection of Part II of the 1954 Act, the remaining issue is whether, as regards the five leases which (on this basis) are now ended but where the tenant is holding over, the landlord is entitled to double the yearly value of the lands in question during the period of holding over after expiry. Such entitlement is said to arise under the Landlord and Tenant Act 1730.

The Parties

6. TFS Stores Limited ("**TFS**") is or has been the tenant, either the original tenant or by assignment, of leases at the following retail outlet premises of which the current registered landlords (the "**Landlords**") are as shown below:

Date of lease **(Expiry of term)**	**Premises**	**Landlord(s)**
04.11.08	Unit 50A, BMG McArthur Glen Designer Outlet, East Midlands (the "**Mansfield Premises**")	The Designer Retail Outlet Centres (Mansfield) General Partner Limited
26.08.09	Unit 4, Bridgend Designer Outlet (the "**Bridgend Premises**")	(1) British Overseas Bank Nominees Limited (2) WGTC Nominees Limited

Date of lease **(Expiry of term)**	**Premises**	**Landlord(s)**
14.07.17 (31.03.18)	Unit 25, Ashford Designer Outlet, Kimberley Walk, Ashford (the "**Ashford Premises**")	BMG (Ashford) Limited
14.07.17 (31.03.18)	Unit 122, Cheshire Oaks Outlet, Kinsey Road, Wirral CH65 9JJ (the "**Cheshire Oaks Premises**")	(1) UK OM (LP2) (GP) Limited (2) UK OM (LP2) Limited
14.07.17 (31.03.18)	Unit 69, York Designer Outlet, St Nicholas Avenue, York YO19 4TA (the "**York Premises**")	The Designer Retail Outlet Centres (York) General Partner Limited
10.02.15 (09.11.24)	Unit 122 Swindon Designer Outlet, Kemble Drive, Swindon (the "**Swindon Premises**")	(1) UK OM (LP3) (GP) Limited (2) UK (OM) LP3) Limited

7. TFS is a company that was incorporated in January 2009. It trades in fragrance products through about 200 retail stores and has approximately 1,500 staff. Its trading name is "The Fragrance Shop". It is largely the creation of Mr Sanjay Vadera ("**Mr Vadera**"), a director and its Chief Executive Officer. It, with another company, Perfume Point Limited ("**PPL**"), are each owned as to in excess of 75% by Cartoon (Holdings) Limited, which is itself controlled by Mr Vadera. PPL was the predecessor tenant to TFS with regard to the Mansfield and Bridgend Premises, the tenancy since having been assigned to TFS. As I understand matters, it was also the tenant of previous leases of the York, Ashford and Cheshire Oaks Premises.

8. Each of the landlords is a nominee landlord of an investor group which owns designer outlet shopping centres. McArthur Glen (UK) Limited ("**McArthur Glen**") manages these shopping centres on behalf of the landlords. All negotiations for entry into leases of the retail units at the centres which are relevant to the leases before me were conducted on behalf of the landlords by McArthur Glen.

Representation and the evidence

9. Mr Guy Fetherstonhaugh QC, leading Mr Mark Galtrey, appeared for TFS which is the Claimant in Claim no. PT-2017-000099 and the Defendant in Claim no. PT-2018-000035. Mr Wayne Clark, leading Mr Joseph Ollech, appeared for the Landlords, three of whom (the landlords of the Bridgend and Mansfield Premises) are the Defendants in Claim no. PT-2017-000099 and the remainder are the Claimants in claim no. PT-2018-000035. I am grateful to Counsel for their written and oral submissions and to the solicitors for having prepared the bundle in this case.

10. On behalf of TFS I heard oral evidence from:

(1) Mr Vadera. In my assessment, until comparatively recently, Mr Vadera did not really understand or focus on the question of what the protections were under the 1954 Act, whether they were excluded and if so what the overall effect was. I am satisfied that as far as he was concerned, he regarded the question of lease renewal as being almost as certain as night following day and he considered that there was no appreciable risk of new tenancies not being successfully negotiated on expiry of any particular term. His fury when, comparatively recently, that proved not to be the position was increased by his perception that the landlords were seeking to let the premises formerly let to his company to his competitors in the same line of business who would also reap the benefit of any goodwill attaching to the premises in question.

(2) Mr Irvin Capper ("**Mr Capper**"), who has, at various times, been the Head of Property at TFS. He first held that role between about January and March 2013. In his witness statement he said that he then held it between about September 2013 until about October 2015 and thereafter between about September 2017 and June 2018. However, in cross-examination it became clear that there were documents showing him to have held that role outside these periods. I did not regard his mis-recollection on that issue as materially affecting his reliability on the central issues put to him.

(3) Mr David Leonard ("**Mr Leonard**"). He is the current Finance Director of TFS having held that position since August 2014. He is not a director of TFS within the meaning of the Companies Acts. He joined TFS as financial controller in about April 2010 and retained that position until about August 2014, when he took up the position of Finance Director, originally on an interim basis as finance director designate and was then appointed to the permanent position in about August 2016.

(4) Mr Stephen Thompson ("**Mr Thompson**"), currently employed as Retail Operations Director of a related company to TFS, TFS Buying Limited, a position that he has held since January 2019. Prior to that, from June 2018, he held the position of Head of Property and Central Operations. Between 2004 and 2007 he was employed by Perfume Point Limited as Retail Director, though this was not a directorship within the meaning of the Companies Acts. In 2007 he was employed by The Fragrance Shop Limited ("**TFSL**"), following its acquisition by Per Scent Group Limited. In January 2009, TFSL stores were assigned to TFS. Mr Thompson was then made a director, within the

Companies Acts sense, of TFS which position he held until September 2013. All of these companies were, at the relevant times, effectively under the control of Mr Vadera. Mr Thompson executed the statutory declarations regarding the relevant tenancies of the Mansfield and Bridgend Premises and one of the issues is whether he had authority to do so.

(5) Helen Marsh ("**Ms Marsh**"), a solicitor. She is, and has been since February 2015, a partner of, and working in the Commercial Property Law Team at, HRC Law LLP. At the time relevant to events concerning the tenancies of the Mansfield and Bridgend Premises, she was an associate in the firm of Kippax Beaumont Lewis, Solicitors, ("**KBL**") the solicitors acting for Perfume Point Limited. At that time Ms Marsh was acting under the supervision of Ms Debbie Roberts.

11. On behalf of the Landlords I heard oral evidence from:

(1) Helen Hemingray ("**Ms Hemingray**"), currently a partner at Butcher Andrews LLP but between 2006 and February 2018 an employee at Berwin Leighton Paisner (now Bryan Cave Leighton Paisner LLP) ("**BLP**"). She joined that firm as a secondee and qualified in April 2007. BLP was employed by the Landlords of the Mansfield and Bridgend Premises in relation to the relevant grant of tenancies in relation to the same. While at BLP, Ms Hemingray worked under the supervision of Camilla Brignall.

(2) Camilla Brignall ("**Ms Brignall**"), now, and since about August 2015, employed by BPP University Law School as a tutor and centre programme leader. Previously she was employed by BLP as a solicitor in its commercial property team. BLP was exclusively retained in relation to the leasehold management work of the MacArthur Glen Portfolio, encompassing the interests of the Landlords in the six properties with which I am concerned. By 2007, Ms Brignall was the lead non-partner contact for MacArthur Glen and was responsible, among other things, for receiving all new instructions, allocating the instructions within her team and supervising the solicitors who were carrying out the instructions in terms of negotiating and completing the lettings.

12. I also received into evidence, by agreement, the uncontested witness statement of Kate Hurburgh ("**Ms Hurburgh**"). She is a solicitor who qualified in July 2001 and has at all material times been employed by BLP as a solicitor in the commercial property team. She acted for MacArthur Glen in negotiating lettings of the York Premises to PPL in 2005 and of the Ashford Premises and the Cheshire Oaks Premises to PPL in 2006. The tenancies in relation to these Premises were assigned to TFS in 2014. Following the expiry of these leases, further tenancies were negotiated by a Mr James Benedick of BLP, which leases were granted in July 2017 and which are the subject of dispute in the current proceedings before me. Ms Hurburgh's evidence is relevant to a submission on behalf of TFS that the authority of Mr Thompson to make statutory declarations was limited by what occurred in relation to the procedure followed with regard to the leases in 2005 and 2006.

Part II of the 1954 Act and Contracting Out: the Background

13. Before turning to the evidence, it is convenient to explain the context, history and terms of contracting out of protection under the 1954 Act.

14. Part II of the 1954 Act was considered by the House of Lords in *O'May v C.L.R.P. Limited* [1983] 2 A.C.726. As Lord Wilberforce said, at pg. 747A-D:

> *"The general purpose and policy of the Act of 1954 is clear. It was to provide security of tenure for those tenants who had established themselves in business in leasehold premises so that they could continue to carry on their business there. This objective was identified in the Leasehold Committee Final Report (1950) (Cmd. 7952), as the principal, indeed the only objective then recommended to be achieved by legislation. There was no suggestion, nor did the Act, when enacted, contain any provisions to the effect that business tenants required any greater protection than in fact necessary to enable them to continue their business: no protection, for example, by way of rent control, or other modification of contractual terms."*

15. More recently, in *S Franses Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62, [2019] AC 249, Lord Sumption JSC, summarised the main provisions of Part II of the 1954 Act as follows at paragraph [1]:

> "[1] *Part II of the Landlord and Tenant Act 1954 confers a qualified security of tenure on business tenants. A tenant in occupation of the premises under tenancy for a term of years certain may stay over and request a new tenancy beginning upon its expiry, unless before the tenancy was granted the landlord had served a notice informing the tenant of his rights and the parties then agreed to exclude the relevant provisions of the Act. The tenant may apply to the court under section 24 (1) of the Act for an order granting one. The court is required to make that order unless the landlord makes out one of seven grounds of opposition specified in section 30(1), in which case it is required to refuse one."*

In the case of certain grounds of opposition, which, if made out, result in the court being required to refuse to grant a new tenancy, the tenant is entitled to compensation where the ground of opposition is made out.

16. Returning to *O'May v C.L.R.P. Limited,* Lord Hailsham expressed (at page 740D-F) three propositions derived from Part II of the Act:

> *"(1) It is clear from section 34 that, in contrast to the enactments relating to residential property, Parliament did not intend, apart from certain limitations to protect the tenant from the operation of market forces in the determination of rent; (2) In contrast to the determination of rent, it is the court and not market forces which, with one vital qualification, has an almost complete discretion as to the other terms of the tenancy (which, of course in turn must exercise a decisive influence on the market rent to be ascertained under s34). And (3) in deciding the terms of the new tenancy, as to which its discretion is otherwise not expressly fettered, the court must start by "having regard to" the terms of the current tenancy, which ex hypothesi must either have been originally the subject of agreement between the parties, or themselves the result of a previous determination by the court in earlier proceedings for renewal."*

17. The issues before me primarily concern the procedure to "contract out" of the protections under Part II of the 1954 Act, referred to by Lord Sumption in the passage from his judgment that I have cited above, where he refers to the parties agreeing to exclude the relevant provisions of the Act.

18. By agreement of the parties, I was referred to the House of Commons Regulatory Reform Committee Second Report, Session 2002-03, (HC 182) from December 2002 (the "**SC Report**") and the "*Outcome of the department's consultation on business tenancies reform*" issued by the Department for Transport, Local Government and the Regions dated February 2002 (the "**Outcome Paper**"). I need only refer to the position regarding the "contracting out" issue and not those parts of the documents dealing with changes to the law regarding surrender of business tenancies. The 2003 Order recites that the SC Report was one of the matters that the Secretary of State had regard to before making the Order in draft and laying it before Parliament.

19. Prior to 1969, there was no ability to contract out of the protections conferred by the Act. As the SC Report puts it:

> "*As originally enacted, the Act contained a total ban on any agreement which purported to exclude the tenant's rights under the Act. In a 1969 review of the Act, however, the Law Commission concluded*[1] *that this total prohibition against contracting out discouraged landlords from letting premises on a temporary basis, even where the tenant was willing to accept a tenancy. For example, such a situation may arise when the landlord has obtained possession and seeks to sell, demolish or reconstruct the property, but is not ready to do so immediately. He would be reluctant to let the property on a temporary basis, since the tenant would be able to apply for a new tenancy, and so may prefer to leave the property unoccupied. The Commission therefore recommended that it should be possible to grant a tenancy without rights under the Act, subject to the safeguard that the court sanctioned the agreement in advance.*
>
> *The Act was therefore amended, by the Law of Property Act 1969, to allow the parties to a business lease to make a joint application to the court seeking approval for the grant of a fixed term tenancy in respect of which the tenant's renewal rights will not apply.*"

20. The relevant amendment was contained in s38(4) of the Act.

21. In its 1992 Report, "*Business Tenancies: a periodic review of the Landlord and Tenant Act 1954 Part II*" (Law Comm No. 208) the Law Commission considered the position again. As summarised by the SC Report:

> "*In its 1992 report, the Law Commission concluded that the new provision did not achieve its objective of providing an effective filter to prevent abuse of what is generally assumed to be the landlord's dominant bargaining position. Courts usually approve agreements without any real scrutiny of the circumstances of the application. While recognising the importance of safeguards to ensure that the*

[1] Landlord and Tenant. Report On the Landlord and Tenant Act 1954 Part II (Law Com. No. 17).

> *prospective tenant agrees to contract out only if he understands the nature of the statutory rights he is agreeing to give up, the Law Commission concluded that this objective could be more effectively achieved without the unnecessary formality, delay or expense of a court application.*
>
> *Accordingly, the Law Commission recommended that the parties should be able to opt out of the renewal provisions without court approval. But to be valid the agreement between the parties would have to comply with the following requirements…"*

I need not at this stage go into those requirements, save to say that the current law is modelled on them but with significant variations.

22. As regards the courts usually approving agreements to "contract out" without any real scrutiny, the SC Report cited figures from the Court Service showing that there were then in the region of 54,000 applications each year to exclude security of tenure from business tenancies. The SC Report also cited a Departmental statement, answering a question from the House of Lords Delegated Powers and Regulatory Reform Committee (see Fourth Report Session 2002-03 HL Paper 22), stating that:

> "*The Court Service does not maintain records of how many applications are approved. However, they confirm that the court refuses a negligible proportion of applications, and that these refusals are only where there has been a technical defect in the applications*."

23. On 9 February 2000, the Court of Appeal gave judgment in *Receiver for the Metropolitan Police District v Palacegate Properties Limited* [2001] Ch 131. In that case the landlord and the tenant of commercial premises had applied to the court for authorisation of an agreement to contract out of the security of tenure provisions contained in Part II of the 1954 Act. The draft lease submitted with the application was expressed to be for a term of five years. It did not specify the date of the lease, the date for commencement of the term or the date of the proposed exclusion order. A rent was reserved but there was no express provision for the dates upon which it would be paid. The district judge granted the application. The lease was subsequently executed substantially in the form of the draft, with the blanks filled in. Under the lease as drafted and executed rent was payable by implication of law annually in arrear. However, the parties had agreed that rent should be paid quarterly in advance and that was treated by the appeal court as a term of the lease. In 1998 the tenant served a request for a new tenancy and commenced proceedings for such tenancy accordingly. The landlord began possession proceedings. On the consolidated actions, the judge held that, since the lease was not in the same terms as the draft approved by the district judge, it was not excluded from the security of tenure provisions of the 1954 Act by the order made by the District Judge. The landlord appealed.

24. Pill LJ, with whom Mummery LJ and Sir Ronald Waterhouse agreed, focused on the words of the then Section 38(4) of the 1954 Act, that the court had power, "*on the joint application of the persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain…[to] authorise an agreement*

excluding in relation to that tenancy" (emphasis supplied) the security of tenure provisions of Part II of the 1954 Act.

(1) He accepted the submission of Mr Lewison QC (as he then was) that the purpose of the then section 38(4)(a) was *"to enable the court to satisfy itself that the prospective tenant understands that he is forgoing the protection*" of Part II of the 1954 Act.

(2) He also accepted Mr Lewison's submission that the court hearing the application was neither empowered nor entitled to consider the fairness of the bargain, as such, which the parties proposed to make.

(3) However, he disagreed with Mr Lewison's submission that approval of the agreement to exclude the protection of Part II of the 1954 Act did not require an analysis of the terms of the lease that the court had approved. Approval by the court did not give a:

> " *green light to a landlord to make wholesale changes to the draft tenancy submitted to the court when approval was sought. The words "that tenancy" in section 38(4)(a) require its terms to bear a substantial similarity to that before the court when authority was given. In particular, changes material to the need for protection may nullify the authority granted."*

An example of such a substantial change, given by Pill LJ, was that of a lease contemplating substantial capital expenditure by the tenant where the term was substantially shortened.

(4) In the instant case, the fact that the draft for the court was different from the terms of the lease as agreed, in that the draft inaccurately set out the agreement as to the dates on which rent was payable, did not invalidate the authorised agreement. It would have made no difference even had the agreement as to the dates for payment of rent been reached after the court approval:

> "*The court is concerned with whether the tenant understands he is giving up protection. Whether the rent is payable in advance or in arrears has in present circumstances no bearing whatever upon that function."*

25. From this case, I derive the proposition that the question under the then section 38(4) was whether the lease as entered into bore a substantial similarity to that which the court had approved, such that it could be said that the court had approved contracting out in relation to that tenancy. In determining that question, any difference material to the need for protection might mean that there was not such a substantial similarity and that therefore the tenancy as entered into was a different one to that as approved by the court. This question of "substantial similarity" between the tenancy as approved by the court and the tenancy as entered into would have been fact sensitive. A difference in the length of the term might be material but that would depend on the amount of the difference, in absolute terms, and also other factors such as whether or not the lease contemplated substantial capital expenditure by the tenant.

26. It does not appear to have been argued that the tenancy as approved was substantially different to that as entered into because, for example, the former did not contain either the date of the lease or the date for commencement of the term.

27. In March 2001, the Department of the Environment, Transport and the Regions issued a consultation paper "*Business Tenancies Legislation in England and Wales - Consultation paper*".

28. In February 2002, the Department for Transport, Local Government and the Regions (the "**Department**") published, in the Outcome Paper, the outcome of the Department's March 2001 consultation as referred to above.

29. In December 2002, the SC Report was approved and ordered to be published.

30. By December 2002, the Department's proposals had been refined. "Contracting out" would be permitted without the need for a court application and order. There would be two alternative procedural routes that would have to be followed:

    (1) Normally, at least 14 days before the tenant entered into a tenancy, or, if earlier, at least 14 days before entering into a contractual commitment to take a lease, the landlord would be required to give the tenant notice of the proposal to exclude security of tenure. The notice would contain a prominent "health warning". No statutory declaration by the tenant would be required regarding such notice but the lease would contain a specific reference that advance notice had been given and received, in order to validate the agreement to exclude security of tenure.

    (2) It would be possible to waive the requirement for 14 days' advance notice, but the tenant would have to sign a statutory declaration that he/she had received the notice, read the health warning and accepted its consequences. The lease would contain a specific reference that the advance notice had been received and the statutory declaration had been made in order to validate the agreement to exclude security of tenure.

31. In summary, the SC Report broadly accepted the Department's proposals but with one adjustment, namely that there should be a requirement under the "advance notice" procedure for the tenant to execute not a statutory declaration but a "simple declaration" that he/she had received the notice and accepted the consequences of entering into the agreement to exclude security of tenure. The Department accepted this recommendation. With a change to reflect the suggested adjustment, the Department's proposals were enacted into law by way of amendment to s38 and the insertion of a new s38A in the 1954 Act and the making of the 2003 Order. I will come onto the detail of those provisions shortly.

32. It is however important to note a few points underlying the reasoning as to the detail of the changes.

33. First, the SC Report faces head on the suggestion made by some that easing the process of contracting out would be likely to result in contracting-out leases becoming the norm. The protection for business tenants provided by the Act, it was suggested, would thereby be negated because no landlord would offer a tenancy with security of

tenure. The SC Report rejected this gloomy scenario. It said that it had seen no evidence that the cumbersome nature of a court application deterred landlords from offering leases without security of tenure and therefore did not consider that making the process less cumbersome would necessarily mean that more landlords would take advantage of them:

> "*Indeed, there is now more likely to be some incentive for landlords not to offer contracted-out leases, since a lease with security of tenure would be likely to command a higher rent than one where security is excluded.* ***We do not therefore consider that the proposals would remove necessary protection by negating the purpose of the 1954 Act***."

34. Secondly, the SC Report accepted the Department's position that:

> "*wherever possible, tenants should receive the "health warning" in good time before committing themselves to a contracting out agreement. They would then have time to take a considered view on abandoning renewal rights and the practical opportunity to consider alternative options. The Law Commission's proposals…would not necessarily achieve this. While some tenants would become aware of contracting out proposals by seeing them in a draft lease, in other cases, particularly where the landlord was trying to manipulate the tenant, the tenant would not see the "health warning" until he or she was about to sign the lease. It would then be too late to consider alternative arrangements, as the tenant would have made business arrangements on the assumption that he or she would be occupying the premises concerned*."

35. The requirement of a statutory declaration where the 14 days requirement was to be waived would said the Department:

> "*impose a minor hurdle for the parties, which would have the effect of encouraging use of the 14 day's notice procedure where practicable…. if the landlord wanted to use the alternative procedure when 14 days' notice were feasible, the tenant might well be reluctant to co-operate. The Department notes that the proposed form of notice recommends the tenant to ask the landlord to use the 14 day notice period where this is feasible*".

36. The SC Report concluded, on this matter:

> "*First of all, we agree that it is desirable that a tenant should wherever possible receive advance notice that he is to be asked to accept an agreement which excludes his rights under the Act. We also agree, however, that it is in the tenant's interest that there should also be provision for cases where that advance notice cannot be given. The use of a statutory declaration in these circumstances seems a reasonable response to this situation. Although it may seem unduly burdensome, the proposed procedure is less so than the current requirement for court sanction. Further, the Department's contention that it is its very burdensomeness which ensures the maintenance of necessary protection against abuse of the emergency procedure is persuasive. We are therefore satisfied that the burden on both landlord and tenant is proportionate to the benefit of*

providing a disincentive to waive the 14 days' notice requirement, and of ensuring that the tenant has every chance of appreciating the significance of the agreement that he is entering into."

37. As regards the question of a simple declaration from the tenant in cases where the 14 days' notice procedure was followed, the SC Report concluded that such a simple declaration should be required:

> "*We consider that the requirement for a declaration is necessary to ensure the maintenance of necessary protection for the tenant…..A requirement to sign a declaration that he had read the notice and accepted the consequences of the agreement would help to ensure that its significance was not lost on the tenant."*

38. As the facts of this case show, whatever steps are required to be taken, it is not possible to ensure that an individual will not simply sign a document put in front of him or her without properly reading it or understanding it.

39. Finally, I should note that the SC Report does not in terms discuss the *Palacegate* case or the view expressed by the Department, in the Outcome Paper that:

> "*15. The Department does not see a need to revise its proposals on account of the Palacegate Properties case, which concerned a subsequent change in lease terms. The policy objective is simply to ensure that the tenant is aware of the implications of any proposal to exclude security of tenure. While it considers that tenants would be well advised to reappraise the proposed exclusion of security of tenure in relation to any subsequent changes in the overall package, this is outside the scope of the main policy objective.*"

Contracting out: the legislative requirements

40. Section 38(4) of the Act has been repealed and s38(1) amended. S38(1) now provides:

> ***"38 Restriction on agreements excluding provisions of Part II***
>
> *(1) Any agreement relating to a tenancy to which this Part of this Act applies (whether contained in the instrument creating the tenancy or not) shall be void (except as provided by section 38A of this Act) in so far as it purports to preclude the tenant from making an application or request under this Part of this Act or provides for the termination or the surrender of the tenancy in the event of his making such an application or request or for the imposition of any penalty or disability on the tenant in that event."*

41. Section 38A of the Act applies from 1 June 2004. It provides, so far as material to contracting out:

"*38A. Agreements to exclude the provisions of Part 2*

(1) The persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain which will be a tenancy to which this Part of this Act applies may agree that the provisions of sections 24 to 28 of this Act shall be excluded in relation to that tenancy.

(2) …

(3) An agreement under subsection (1) above shall be void unless—

(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ("the 2003 Order"); and

(b) the requirements specified in Schedule 2 to that Order are met.

(4) ……"

38. Schedule 2 of the 2003 Order expands upon the requirement to serve a notice which, for convenience, I shall refer to as the "**Warning Notice**". It also contains the requirements for the tenant to make one of two forms of declarations.

38. The form of Warning Notice is set out in Schedule 1 to the 2003 Order. It is as follows:

SCHEDULE 1 Form of Notice that Sections 24 to 28 of the Landlord and Tenant Act 1954 are Not to Apply to a Business Tenancy

Article 22(2)

To:. . . . . .
. . . . . .
. . . . . [*Name and address of tenant*]

From. . . . . .
. . . . . .
. . . . . [*Name and address of landlord*]

IMPORTANT NOTICE
You are being offered a lease without security of tenure. Do not commit yourself to the lease unless you have read this message carefully and have discussed it with a professional adviser.
Business tenants normally have security of tenure – the right to stay in their business premises when the lease ends.
If you commit yourself to the lease you will be giving up these important legal rights.
—You will have **no right** to stay in the premises when the lease ends.

—Unless the landlord chooses to offer you another lease, you will need to leave the premises.
—You will be unable to claim compensation for the loss of your business premises, unless the lease specifically gives you this right.
—If the landlord offers you another lease, you will have no right to ask the court to fix the rent.
It is therefore important to get professional advice – from a qualified surveyor, lawyer or accountant – before agreeing to give up these rights.
If you want to ensure that you can stay in the same business premises when the lease ends, you should consult your adviser about another form of lease that does not exclude the protection of the Landlord and Tenant Act 1954.
If you receive this notice at least 14 days before committing yourself to the lease, you will need to sign a simple declaration that you have received this notice and have accepted its consequences, before signing the lease.
But if you do not receive at least 14 days' notice, you will need to sign a "statutory" declaration. To do so, you will need to visit an independent solicitor (or someone else empowered to administer oaths).
Unless there is a special reason for committing yourself to the lease sooner, you may want to ask the landlord to let you have 14 days to consider whether you wish to give up your statutory rights. If you then decide to go ahead with the agreement to exclude the protection of the Landlord and Tenant Act 1954, you would only need to make a simple declaration, and so would not need to make a separate visit to an independent solicitor.

42. The forms of "simple" declaration and of the "statutory declaration" to be made by the tenant are set out in Schedule 2 to the 2003 Order, which also provides the procedure that must be followed in accordance with s38A of the Act. So far as material Schedule 2 provides as follows:

> **"SCHEDULE 2 Requirements for a Valid Agreement that Sections 24 to 28 of the Landlord and Tenant Act 1954 are Not to Apply to a Business Tenancy**
>
> **Article 22(2)**
>
> 1. The following are the requirements referred to in section 38A(3)(b) of the Act.
> 2. Subject to paragraph 4, the notice referred to in section 38A(3)(a) of the Act must be served on the tenant not less than 14 days before the tenant enters into the tenancy to which it applies, or (if earlier) becomes contractually bound to do so.
> 3. If the requirement in paragraph 2 is met, the tenant, or a person duly authorised by him to do so, must, before the tenant enters into the tenancy to which the notice applies, or (if earlier) becomes contractually bound to do so, make a declaration in the form, or substantially in the form, set out in paragraph 7.
> 4. If the requirement in paragraph 2 is not met, the notice referred to in section 38A(3)(a) of the Act must be served on the tenant before the tenant enters into the tenancy to which it applies, or (if earlier) becomes contractually bound to do so, and the tenant, or a person duly authorised

by him to do so, must before that time make a statutory declaration in the form, or substantially in the form, set out in paragraph 8.

5. A reference to the notice and, where paragraph 3 applies, the declaration or, where paragraph 4 applies, the statutory declaration must be contained in or endorsed on the instrument creating the tenancy.
6. The agreement under section 38A(1) of the Act, or a reference to the agreement, must be contained in or endorsed upon the instrument creating the tenancy.
7. The form of declaration referred to in paragraph 3 is as follows:

I. . . . . .(*name of declarant*) of.....(*address*) declare that—

1. (*name of tenant*) propose(s) to enter into a tenancy of premises at.....(*address of premises*) for a term commencing on . . . . . .

2. I/The tenant propose(s) to enter into an agreement with. . . . . (*name of landlord*) that the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 (security of tenure) shall be excluded in relation to the tenancy.
3. The landlord has, not less than 14 days before I/the tenant enter(s) into the tenancy, or (if earlier) become(s) contractually bound to do so served on me/the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. The form of notice set out in that Schedule is reproduced below.
4. I have/The tenant has read the notice referred to in paragraph 3 above and accept(s) the consequences of entering into the agreement referred to in paragraph 2 above.
5. (*as appropriate*) I am duly authorised by the tenant to make this declaration.

DECLARED this. . . . . .day of. . . . . .

To:

. . . . . .
. . . . . .
. . . . . .[*Name and address of tenant*]

From:

. . . . . .
. . . . . .
. . . . . .[*name and address of landlord*]

IMPORTANT NOTICE

You are being offered a lease without security of tenure. Do not commit yourself to the lease unless you have read this message carefully and have discussed it with a professional adviser.

Business tenants normally have security of tenure – the right to stay in their business premises when the lease ends.

If you commit yourself to the lease you will be giving up these important legal rights.

—You will have **no right** to stay in the premises when the lease ends.

—Unless the landlord chooses to offer you another lease, you will need to leave the premises.

—You will be unable to claim compensation for the loss of your business premises, unless the lease specifically gives you this right.

—If the landlord offers you another lease, you will have no right to ask the court to fix the rent.

It is therefore important to get professional advice – from a qualified surveyor, lawyer or accountant – before agreeing to give up these rights.

If you want to ensure that you can stay in the same business premises when the lease ends, you should consult your adviser about another form of lease that does not exclude the protection of the Landlord and Tenant Act 1954.

If you receive this notice at least 14 days before committing yourself to the lease, you will need to sign a simple declaration that you have received this notice and have accepted its consequences, before signing the lease.

But if you do not receive at least 14 days' notice, you will need to sign a "statutory" declaration. To do so, you will need to visit an independent solicitor (or someone else empowered to administer oaths).

Unless there is a special reason for committing yourself to the lease sooner, you may want to ask the landlord to let you have at least 14 days to consider whether you wish to give up your statutory rights. If you then decide to go ahead with the agreement to exclude the protection of the Landlord and Tenant Act 1954, you would only need to make a simple declaration, and so would not need to make a separate visit to an independent solicitor.

8. The form of statutory declaration referred to in paragraph 4 is as follows:—

I. . . . . .(*name of declarant*) of.....(*address*) do solemnly and sincerely declare that—

1. (*name of tenant*) propose(s) to enter into a tenancy of premises at..... (*address of premises*) for a term commencing on. . . . . .
2. I/The tenant propose(s) to enter into an agreement with. . . . . (name of landlord) that the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 (security of tenure) shall be excluded in relation to the tenancy.
3. The landlord has served on me/the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. The form of notice set out in that Schedule is reproduced below.
4. I have/The tenant has read the notice referred to in paragraph 3 above and accept(s) the consequences of entering into the agreement referred to in paragraph 2 above.
5. (*as appropriate*) I am duly authorised by the tenant to make this declaration.

To:. . . . . .[*Name and address of* tenant]

From:. . . . . [*name and address of landlord*]

IMPORTANT NOTICE

You are being offered a lease without security of tenure. Do not commit yourself to the lease unless you have read this message carefully and have discussed it with a professional adviser.

Business tenants normally have security of tenure – the right to stay in their business premises when the lease ends.

If you commit yourself to the lease you will be giving up these important legal rights.

—You will have **no right** to stay in the premises when the lease ends.

—Unless the landlord chooses to offer you another lease, you will

need to leave the premises.

—You will be unable to claim compensation for the loss of your business premises, unless the lease specifically gives you this right.

—If the landlord offers you another lease, you will have no right to ask the court to fix the rent.

It is therefore important to get professional advice – from a qualified surveyor, lawyer or accountant – before agreeing to give up these rights.

If you want to ensure that you can stay in the same business premises when the lease ends, you should consult your adviser about another form of lease that does not exclude the protection of the Landlord and Tenant Act 1954.

If you receive this notice at least 14 days before committing yourself to the lease, you will need to sign a simple declaration that you have received this notice and have accepted its consequences, before signing the lease.

But if you do not receive at least 14 days' notice, you will need to sign a "statutory" declaration. To do so, you will need to visit an independent solicitor (or someone else empowered to administer oaths).

Unless there is a special reason for committing yourself to the lease sooner, you may want to ask the landlord to let you have at least 14 days to consider whether you wish to give up your statutory rights. If you then decide to go ahead with the agreement to exclude the protection of the Landlord and Tenant Act 1954, you would only need to make a simple declaration, and so would not need to make a separate visit to an independent solicitor.

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declaration Act 1835.

DECLARED at. . . . . .this. . . . . day of. . . . . .

Before me

(*signature of person before whom declaration is made*)

A commissioner for oaths *or* A solicitor empowered to administer oaths or (*as appropriate*)

Contracting out in relation to tenancies of the Mansfield and Bridgend Premises in 2007/8

43. As is clear on the face of things, but as all the witnesses for the Landlord confirm, the relevant paper files for BLP were destroyed some time ago. A search has been undertaken of BLP's servers and electronic files and this has resulted in the location and collation of some of the correspondence and documentation for each transaction but all the documents that would have formed the complete transactional file have not been located.

44. So far as KBL is concerned, the evidence does not in terms deal with the documents available. However, I assume that disclosure has taken place and that the documents in evidence represent the entirety of available documents and that accordingly some of the contemporaneous documents are missing. Somewhat surprisingly TFS relied upon the evidence of Ms Marsh regarding KBL's involvement in the process but, as she explains in her witness statement, she was away on maternity leave between about mid-October 2007 and May 2008. The period during which relevant matters took place with regard to the leases of the Mansfield and Bridgend Premises that are in issue before me fell within this period. As Ms Marsh says in her witness statement, she is therefore unable to comment on what in fact occurred regarding the exchange of Agreements for Leases or whether the contracting out procedure was correctly followed. Evidence from the person(s) at KBL who were involved at the time with the relevant matters was not called.

(1) Tenancy of the Bridgend Premises: the transactional documents

45. The relevant events, for present purposes, span the period between May 2007, when heads of terms were agreed, and August 2009 when the relevant lease was granted. An agreement for a lease was signed in November 2007.

46. The heads of terms are dated 31 May 2007. The heads of terms ("**HOTs**") are, as I understand it, drafted by McArthur Glen (or on its behalf). There is room for signature by the parties but the version in evidence is unsigned and the evidence was that they were rarely, if ever, signed.

47. The HOTs are headed "Confidential and subject to contract and board approval".

(1) The term is described as being "*10 Years, commencing on the handover date for the Tenant to commence fitting out of the unit. The lease will be excluded from the provisions of sections 24-28 of the Landlord and Tenant Act 1954.*

(2) Having dealt with the quantum of rent, the HOTs provide that "*Rent payment will commence to be payable from the later of the 1st September 2007 or three weeks after handover date. For the avoidance of doubt service and promotion charges will commence on the access date.*"

(3) The permitted use is described as the retail sale at discounted prices of multi-branded perfumes together with toiletries, cosmetics, body care products, handmade greeting cards… haircare and other ancillary items bearing agreed

brand names. Such brand names are specified with an ability in the tenant to add additional brands with the prior written consent of the landlord. The landlord is not to permit another retailer to enter the centre to operate a multi-branded fragrance offer without the prior written consent of the tenant. The landlord is also not to permit any existing tenant within the centre not currently having the right to sell personal fragrance under the terms of its lease to commence sale of perfumes (subject to a limited exception where the lease in question requires the landlord to act reasonably in considering a request from the tenant for consent to do the same and refusal of consent would be unreasonable.)

(4) Under the heading "Contacts", a number of contacts are given including (but not limited to) the following. The tenant's solicitors are given as KBL, contact name Helen Marsh. The tenants contact is given as being PPL, with the contact name as Steve Thompson. The tenant's agent's contact is given as Donaldsons LLP, the contact name being Matthew Illingworth. The landlord's solicitor is given as BLP, contact name Chris Cann. The landlord's representative is given as McArthurGlen UK Ltd, contact name Adrian Nelson.

48. The warning notice, given under the 2003 Order is in the correct form.

49. The statutory declaration, subject to the question of the commencement date, is in the correct form and made by Mr Thompson on 9 November 2007. So far as the commencement date is concerned the statutory declaration identifies that the proposal is to enter into a tenancy of premises at the relevant Bridgend address for a term commencing on "the Access Date under the Agreement for Lease pursuant to which the tenancy of the premises will be entered into".

50. The Agreement for Lease is dated 9 November 2007. There are two counterparts. One is signed on behalf of the tenant, PPL, by Mr Vadera and also by him on behalf of the guarantor, another company. The other counterpart is executed by the landlord.

51. Under the Agreement for Lease, the "Access Date" is defined as being 12 November 2007. It is upon the latest of the Access Date and the grant of the landlord's approval of and the obtaining of the requisite consents for works to be carried out by the tenant, that the tenant is required to proceed to carry out and complete the tenant's works to the landlord's reasonable satisfaction in accordance with a "tenant's handbook". The tenant's works are to be completed, at least in the first instance, within four weeks after the Access Date.

52. From the Access Date to the date of the grant of the lease (being defined as the "Licence Period"), the tenant is given the right to occupy the premises as licensee for the purposes of carrying out its obligations to carry out and complete the tenant's works, to occupy use and trade from the premises as licensee for the purpose permitted by the lease on and after completion of the tenants works and to store within the premises stock and merchandise to carry out staff training in readiness opening the premises for trade. The agreement is stated as not operating as a lease and that during the Licence Period occupation by the tenant is to be by way of licence only and the tenant is not to have nor to be entitled to any estate, right or interest in the premises.

53. The Agreement for Lease contains a clause that the landlord will grant and the tenant will accept the grant of the relevant lease within 15 working days after the earlier of the day when the landlord has notified the tenant that the tenant's works have been completed in accordance with the agreement and the giving of notice by the landlord to the tenant expiring at any time on after the Access Date requiring the tenant to take up the lease even if the tenant's works shall not then have been completed. The lease is to be in the form annexed to the agreement with the term to commence on the Access Date.

54. The Lease dated 26 August 2009 is again formed of two counterpart leases. Clause 9 of the lease contains the agreements to exclude the protections of sections 24-28 of the 1954 Act. That clause confirms that before the tenant became contractually bound to enter into the lease (a) the landlord served a notice on the tenant on 8 November 2007 in relation to the tenancy created by the lease in a form complying with the requirements of the 2003 Order, as the tenant acknowledges and (b) on 9 November 2007 the tenant, or a person authorised by it, made a statutory declaration in the form complying with the requirements of schedule two of the 2003 Order and finally that the parties have duly carried out the requirements of the 2003 Order to render valid the agreement to exclude the protection of the 1954 Act.

55. The term of the Lease is expressed as being for 10 years commencing on 12 November 2007 and expiring on 11 November 2017.

56. The identity of the landlords who enter the Lease is different to the landlord as hitherto described. Prior to the Lease, the landlord was identified as being BMG (Bridgend) Limited. In the Lease the landlords have become Henderson UK OM (LP1) (GP) Limited and Henderson UK OM (LP1) Limited. The leases are signed by Mr Vadera and his brother on behalf of the tenant and the guarantor.

(2) Tenancy of the Mansfield Premises: the transactional documents

57. The relevant tenancy of the Mansfield Premises follows much the same format as the tenancy of the Bridgend Premises, the two being negotiated in tandem. The relevant events, for present purposes, span the period between May 2007, when heads of terms were agreed, and November 2008 when the relevant lease was granted. An agreement for a lease was signed in November 2007.

58. There are two HOTs, one dated 21 May 2007, the other dated 31 May 2007. There is room for signature by the parties but the version in evidence is not signed and, as I have said, the evidence was that they were rarely, if ever, signed. A key difference between the two is that the tenant's solicitors change from Wacks Caller (first HOTs) to KBL (2nd HOTs).

59. The second HOTs are headed "Confidential and subject to contract and board approval". Subject to the "contact" point below, the provisions below mirror those in the Bridgend HOTs.

(1) The term is described as being "*10 Years, commencing on the handover date for the Tenant to commence fitting out of the unit. The lease will be excluded from the provisions of sections 24-28 of the Landlord and Tenant Act 1954.*

(2) Having dealt with the quantum of rent, the HOTs provide that "*Rent payment will commence to be payable from the later of the 1st September 2007 or three weeks after handover date. For the avoidance of doubt service and promotion charges will commence on the access date.*"

(3) The permitted use is described as the retail sale at discounted prices of multi-branded perfumes together with toiletries, cosmetics, body care products, handmade greeting cards… haircare and other ancillary items bearing agreed brand names. Such brand names are specified with an ability in the Tenants to add additional brands with the prior written consent of the landlord. The landlord is not to permit another retailer to enter the centre to operate a multi-branded fragrance offer without the prior written consent of the tenant. The landlord is also not to permit any existing tenant within the centre not currently having the right to sell personal fragrance under the terms of its lease to commence sale of perfumes (subject to a limited exception where the lease in question requires the landlord to act reasonably in considering a request from the tenant for consent to do the same and refusal of consent would be unreasonable.)

(4) Under the heading "Contacts", a number of contacts are given including (but not limited to) the following. The tenant's solicitors are given as KBL, contact name Helen Marsh. The tenant's contact is given as being PPL, with the contact name as Steve Thompson. The tenant's agent's contact is given as Donaldsons LLP, the contact name being Matthew Illingworth. The landlord's solicitor is given as BLP, contact name Chris Cann. There are no contact details for the landlord's representative and my suspicion is that the document in evidence is not complete. The 1st HOTs did include such details which are also in the Bridgend HOTs.

60. The warning notice, given under the 2003 Order is in the correct form.

61. The statutory declaration, subject to the question of the commencement date, is in the correct form and made by Mr Thompson on 1 November 2007. So far as the commencement date is concerned the statutory declaration identifies that the proposal is to enter into a tenancy of premises at the relevant address of the Mansfield Premises for a term commencing on "the Access Date under the Agreement for Lease pursuant to which the tenancy of the premises will be entered into".

62. The Agreement for Lease is dated 12 November 2007. There are two counterparts. One is signed on the half of the tenant, PPL, by Mr Vipul Vadera, Mr Vadera's brother and also by him on behalf of the guarantor, another company. The other counterpart is executed by the landlord. So far as relevant the terms below mirror those in the Agreement for Lease in relation to the Bridgend Premises.

63. Under the Agreement for Lease, the "Access Date" is defined as being 5 November 2007. It is upon the latest of the Access Date and the grant of the landlord's approval of and the obtaining of the requisite consents for works to be carried out by the tenant, that the tenant is required to proceed to carry out and complete the tenant's works to the landlord's reasonable satisfaction in accordance with a "tenant's handbook". The

tenant's works are to be completed, at least in the first instance on or before 3 December 2007.

64. From the Access Date to the date of the grant of the lease (being defined as the "Licence Period"), the tenant is given the right to occupy the premises as licensee for the purposes of carrying out its obligations to carry out and complete the tenant's works, to occupy use and trade from the premises as licensee for the purpose permitted by the lease on and after completion of the tenants works and to store within the premises stock and merchandise to carry out staff training in readiness opening the premises for trade. The agreement is stated as not operating as a lease and that during the Licence Period occupation by the tenant is to be by way of licence only and the tenant is not to have nor to be entitled to any estate, right or interest in the premises.

65. The Agreement for Lease contains a clause that the landlord will grant and the tenant will accept the grant of the relevant lease within 15 working days after the earlier of the day when the landlord has notified the tenants that the tenant's works have been completed in accordance with the agreement and the giving of notice by the landlord to the tenant expiring at any time on after the Access Date requiring the tenant to take up a lease even if the tenant's works shall not then have been completed. The lease is to be in the form annexed to the agreement with the term to commence on the Access Date.

66. The Lease dated 4 November 2008 is again formed of two counterpart leases. The clauses below mirror those in the lease of the Bridgend Premises, save for the dates. Clause 9 of the lease contains the agreement to exclude the protections of sections 24-28 of the 1954 Act. That clause confirms that before the tenant became contractually bound to enter into the lease (a) the landlord served a notice on the tenant on 31 October 2007 in relation to the tenancy created by the lease in a form complying with the requirements of the 2003 Order, as the tenant acknowledges and (b) on 1 November 2007 the tenant, or a person authorised by it, made a statutory declaration in the form complying with the requirements of schedule 2 of the 2003 Order and finally that the parties have duly carried out the requirements of the 2003 Order to render valid the agreement to exclude the protection of the 1954 Act.

67. The term of the Lease is expressed as being for 10 years commencing on 5 November 2007 and expiring on 4 November 2017.

(3) The contemporaneous written communications

68. The contemporaneous documents, such as are available, show, among other things, the following circumstances in which the documents that I have referred to came to be executed.

69. By email dated 12 October 2007 from Ms Withnell of KBL to Ms Brignall of BLP, it was intimated that the prospective tenant wished to take occupation of the Mansfield Premises the following week (week commencing 15 October) and of the Bridgend Premises the week after (week commencing 22 October). Ms Brignall wrote by email of 15 October 2007, seeking the comments of McArthur Glen with regard to a number of terms of the proposed lease.

70. By email dated 29 October 2007, Ms Roberts of KBL wrote to Mr Thompson with a number of points that had not been accepted by the landlord's lawyer. She asked for Mr Thompson to consider the points and to telephone her to confirm that he was happy to proceed or whether he wanted her to take the above issues any further with the landlord. She also asked him to confirm that he was happy with the formula for calculating the turnover rent contained in the draft lease.

71. By email dated 29 October 2007 Mr Thompson wrote to Mr Nelson of MacArthur Glen setting out the "*points outstanding as per Mansfield*" by reference to an appended email from Ms Roberts and asking if the two of them could "*put our heads together and agree*". Mr Nelson replied by email of 30 October 2007 agreeing or proposing various matters. Mr Thompson replied by email shortly thereafter saying that he was happy with Mr Nelson's position and asking Ms Roberts, who was copied in on the email, whether, on the basis that there was agreement as set out in the emails, it would be possible to go for signing up and exchange the following Thursday (which was in fact 1 November 2007) as he was back in Manchester then.

72. By email dated 30 October 2007, Ms Roberts of KBL wrote to Ms Brignall of BLP, including the emails that I have referred to and saying that she would telephone to discuss and hopefully finalise the lease.

73. By letter dated 31 October 2007, sent by guaranteed overnight delivery, Miss Brignall sent to Ms Roberts, as regards the Mansfield Premises, the warning notice and the engrossed counterpart agreement for lease to be signed by Ms Roberts' client in readiness for exchange. She said that she looked forward to hearing from her with the sworn statutory declaration and, if appropriate, client authority letter. As I have said, service of the warning notice on this day is recorded in the lease of the Mansfield Premises.

74. On 1 November 2007 Mr Thompson made the statutory declaration in respect of the proposed tenancy of the Mansfield Premises.

75. By email dated 1 November 2007, Ms Roberts confirmed to Ms Brignall that she was now holding the signed agreement and statutory declaration (clearly in respect of the proposed tenancy of the Mansfield Premises). She said her clients needed access from Monday (which would have been 5 November 2017) and needed to exchange on Bridgend the following week (which would have been 12 November) with access the following Monday week (which would have been 19 November). Ms Brignall replied on the same day asking if a copy of the statutory declaration and client authority letter (if appropriate) could be emailed or faxed to her colleague, Ms Hemingray, so that she would be in a position to contact Ms Roberts to exchange once BLP had the Landlord's part of the document.

76. By email dated 2 November 2007, Ms Roberts attached a scanned copy of the signed statutory declaration of her client to Ms Hemingray of BLP and confirmed that she was holding the signed Agreement. She understood from Ms Brignall that BLP expected to be in a position to exchange on Monday the following week (which would have been the 5th November). In fact, exchange took place the Monday after that on the 12 November though the contemporaneous documents available do not explain

this and this is an example of a clear gap in the availability of written communications.

77. By email dated 7 November 2007, Ms Hemingray of BPL asked Ms Roberts of KBL to confirm that she could accept service of the statutory declaration by email on behalf of her client. This was clearly a mistaken reference to the warning notice. Ms Roberts of KBL confirmed by email of 8 November 2007 that she could accept service of "the notice" on behalf of her client and that her client would make the statutory declaration that day. This is clearly a reference to the proposed tenancy of the Bridgend Premises.

78. By email dated 8 November 2007, Ms Hemingray of BLP wrote to Ms Roberts of KBL enclosing a counterpart lease, statutory declaration and notice with regard to the Bridgend Premises. She referred to the attached notice stating that sections 24 to 28 of the 1954 Act were not to apply to the lease to be granted. She referred to the attached statutory declaration and ask for the name and address of the declarant to be inserted and then to for the statutory declaration to be sworn. Finally, she attached the agreement for lease and lease for engrossment and for signature by the tenant in readiness for exchange. She referred to the fact that she would be out of the office on Monday but said that she would let Ms Roberts know the following day who it was who would be dealing with the matter in her absence. As I have said, the Lease of the Bridgend Premises records that the warning notice was served on this day.

79. The statutory declaration in respect of the proposed tenancy of the Bridgend Premises was made by Mr Thompson on 9 November 2007. The Agreement for Lease in respect of the Bridgend Premises was exchanged on Friday 9 November 2007, as evidenced both by the counterpart documents being dated that day but also by a manuscript note on the Landlord's signed counterpart recording "2.05pm Formula B Helen Hemingway/Debbie Roberts". The contemporaneous documents available do not explain why exchange was brought forward, nor is there available any letters of the sort there are regarding the Mansfield Premises, recording the exchange and sending the relevant documents to the solicitors acting for the other party.

80. The Agreement for Lease in respect of the Mansfield Premises was entered into by exchange on Monday 12 November 2007. By letter dated 12 November 2007 Ms Roberts of KBL wrote further to the exchange of agreements regarding the Mansfield Premises that day and enclosed the agreement for lease together with the statutory declaration. By letter of the same date a Ms Nottingham of BLP sent a letter enclosing the Landlords signed part of the agreement for lease.

81. As regards the entry into the relevant leases of the Bridgend and Mansfield Premises, there is little contemporaneous documentation available to explain the delay. There appear to be no communications in the evidence directly relating to the grant of the lease of the Bridgend Premises in August 2009, though, as I explain, a change in the landlord is referred to in late 2008.

82. As regards the Mansfield Premises, a letter from Helen Marsh of KBL to Ms Brignall at BLP dated 8 October 2008 refers back to a letter of Ms Roberts dated 19 December 2007 (not in evidence) sending BLP the tenant's signed lease ready for completion. In the letter, Ms Marsh notes that KBL have heard nothing further in respect of the

Mansfield matter since the earlier date and wonders whether the position is the same as Bridgend, namely that the identity of the landlord has changed, and a new engrossed lease is required. There is no explanation in the evidence before me why the Bridgend Lease was in fact only granted at the end of August 2009.

83. An email of 24 October 2008 from Ms Marsh to Ms Brignall records that the landlord of the Mansfield Premises has not changed, that BLP should be holding the counterpart signed by the tenant and asking Ms Brignall to date and complete the lease on her return on 4 November. The lease is then sent by Ms Brignall to Ms Marsh under cover of a letter dated 5 November referring to "completion yesterday".

84. Meanwhile, procedures at PPL were changing, By letter dated 3 July 2009 on PPL headed notepaper, Mr Vadera, as CEO, signed a general letter addressed to "Dear Sirs" asking for the letter to be accepted as authority for KBM to receive notices on behalf of PPL in relation to the exclusion of the protection under Part II of the 1954 Act and further confirming that Ms Marsh and Ms Withnell, both of KBL, had authority to sign declarations or to swear to statutory declarations on behalf of PPL in relation to exclusion of the protection under Part II of the 1954 Act.

85. Ms Marsh explains in her witness statement that initially the usual procedure was for Mr Thompson to attend KBL's offices in Bolton to sign the statutory declarations himself in front of a visiting independent solicitor, but this became inconvenient. To avoid the need for his attendance a "standing authority" was put in place, the first of which was the letter of 3 July 2009 that I have just referred to. I accept her evidence on this point. A further example is a letter dated 19 July 2012 to similar effect in relation to TFS.

(4) The Oral evidence

86. Ms Marsh's evidence was clear, and I accept it in its entirety. Prior to solicitor involvement, the heads of terms would be negotiated by TFS's property manager (at the time relevant to the proposed leases of the Bridgend and Mansfield Premises, Mr Thompson) with assistance from Mr Illingworth. When presented to KBL the HOTs would already contain (among other things) the agreed principle of the 1954 Act status of the proposed tenancy.

87. Ms Marsh's job was to act on the instructions of the property manager so as to bring to fruition the agreement outlined in the HOTs, including its relevant 1954 Act status as shown in the HOTs.

88. She understood Mr Vadera's role to be significant in the sense that "*nothing gets off the ground without* [Mr Vadera] *initially agreeing to proceed with the deal*". However, notwithstanding that, she has only had very limited contact with Mr Vadera during the time that she has handled about 500 transactions for TFS whilst at KBL and HRC. That limited contact was of the order of a couple of emails or telephone conversations in an average 12-month period, generally when a particularly unusual question arose. The 1954 Act status of a proposed tenancy was not an unusual matter.

89. Generally, she would speak with the property manager from time to time at several points during the negotiation of terms of the lease and agreement for a lease. In their absence she would usually speak to the finance director. If there was something

which she regarded as being unusual she would normally speak to the property manager or the finance director. Given the nature of the property manager's role she considered that they were fully authorised to give her instructions as needed in order to carry out work on completing leases on behalf of MSFS and she did not have to double check the position. Certain financial points might be taken by her to the Finance Director, for example financial provisions within the leases regarding turnover.

90. She did not feel it necessary to explain in detail the significance of contracting out of the 1954 Act protections. Mr Illingworth and the relevant property managers were professionals. Her assessment was that they knew perfectly well the significance of the 1954 Act position as recorded in HOTs. She assumed in any event that the 1954 Act is something that must have been discussed earlier than her first involvement in transactions on behalf of TFS/PPL, between Debbie Roberts (of KBL) and PPL/TFS.

91. Her usual practice, when the legal documents (draft lease/draft agreement for lease) had been agreed in principle was to make and provide to the property manager of TFS/PPL a lease report, with an advice on the main terms of the proposed lease, a draft lease and agreement for lease so that those documents could be executed.

92. As regards warning notices and statutory notices, as I have explained, originally Mr Thompson would come into KBL's offices to make any statutory (or ordinary) declaration under the s38A procedure but this became inconvenient and instead a series of letters were executed by TFS/PPL giving a "standing authority" to KBL to accept service of warning notices but, more crucially, authorising them to execute relevant declarations. That however was not the practice at the time of the entry into the agreement for leases for the Mansfield and Bridgend Premises that I am dealing with.

93. In short, Ms Marsh's evidence was that the terms of her retainer were to ensure (among other things) that the leases of the Mansfield and Bridgend premises were, as the HOTs provide, validly excluded from the protections of the 1954 Act. No-one ever suggested that KBL did not have authority to receive Warning Notices on behalf of PPL/TFS. It was accepted practice in relation to TFS/PPL practice that KBL could accept such notices. She did not recall any circumstances in which she had ever written to solicitors acting for landlords saying that KBL did not have authority to accept Warning Notices on behalf of TFS/PPL.

94. The evidence of Mr Capper and Mr Leonard did not assist much with regard to the issues that I have to decide regarding the relevant tenancies of the Mansfield and Bridgend Premises: essentially, they were brought into TFS/PPL later or were not involved in the relevant transactions. Further, the internal procedures regarding entering into leases obviously evolved over time. However, they both confirmed the ongoing pivotal role of Mr Vadera in "having the say" as to whether a particular property transaction did or did not go ahead.

95. Mr Thompson was however involved at the time as property manager. As with Ms Marsh, some of the detail was unable to be recalled after the passage of time but, as with Ms Marsh, I found his evidence to be truthful and fairly reliable. He too confirmed the pivotal role of Mr Vadera. Ultimately, it would be for Mr Vadera to

decide whether a particular property transaction would go ahead. Once Mr Vadera had agreed that the deal should, progress then, at the relevant time of the Mansfield and Bridgend tenancies, it was Mr Thompson who would have responsibility or implementing the strategy that Mr Vadera had agreed and bringing the deal to completion. That would involve instructing solicitors.

96. Although the procedure had changed over time, at the time of the Mansfield and Bridgend tenancies the position was that there was a management team comprising Mr Thompson and Mr Vadera and others. Following agreement of HOTs the matter would be taken to the management team for approval by Mr Vadera. Mr Thompson would tend to prepare a deal summary and it was primarily the commercial aspects of the new lease that would be considered, such as location, rent, the width of the brands that could be sold and so on. In his witness statement Mr Thompson thought that HOTs were made available to the management team but in oral evidence clarified that the actual HOTs may not have been. I accept that the evidence of Mr Vadera that they probably were not shown to him at the meeting but that the management team really relied upon Mr Thompson's deal summary and any explanation/description of the proposed transaction put forward by him.

97. I accept the somewhat surprising evidence of Mr Thompson that he was aware that the protection of the 1954 Act was excluded but that he did not fully understand what that meant. I also find that there was some discussion between him and Mr Illingworth about this sometime in 2005 to 2008. I am sure that Mr Illingworth explained at the time the broad effect of the 1954 Act protection and the effect of contracting out of the same but find that Mr Thompson did not really have a very clear understanding or retain one. In part I find that that was because it was not an important point. I suspect the landlord was only prepared to contract on the basis that the protection of the 1954 Act was excluded, the commercial availability of the site was key, and Mr Thompson and Mr Vadera did not really consider there to be a real risk that at the end of the term a new term would be successfully negotiated. I find that, like Mr Vadera, Mr Thompson seems to have understood that the end result was that the leases might, not would, be renewed on new terms but that commercially there was every likelihood that they would be so renewed. The absence of understanding on the part of Mr Thompson about the protection of the 1954 Act that might otherwise be available and that was being given up, is something that I find to be established even though Mr Thompson executed formal statutory declarations which themselves had the terms of the Warning Notices set out above his signature. At the end of the day, however clearly documents are drafted and however formal the execution process, there will always be some people that will simply sign on the dotted line in the belief that it is simply "another …hoop to jump through". In his witness statement he said in terms that he could not say that he did need Mr Vadera's authority to execute statutory declarations.

98. So far as Mr Vadera is concerned, his oral evidence confirmed that once he had given the go ahead on a particular property deal it was for the property manager to proceed with the matter and bring it to completion, he, Vadera then signing the final binding documents. Mr Vadera left the detail to the property manager.

99. As regards the instruction of solicitors Mr Thompson was understandably unsure as to precisely what had happened in 2007/8. Having heard his oral evidence I find that in

substance he instructed the solicitors to proceed with bringing the proposed transaction set out in the HOTs to completion.

100. There is one further point I should deal with. In relation to an earlier agreement to grant a tenancy of the York Premises through McArthur Glen in about 2005, the individual dealing with the matter at BPL for the landlords was Ms Hurburgh. As she explains in her witness statement, though the position is evidenced in documents in any event, in October 2005 she sought from Ms Marsh some comfort that Mr Thompson was indeed authorised to make the relevant statutory declaration under the s38A procedure on behalf of the landlord. There had been a letter of authority signed by Mr Howie, finance director or PPL. Ms Marsh's response was, perhaps understandably testy, to the effect that the landlords had been provided with a letter on PPL's headed notepaper signed on behalf of the company and that the declaration also confirmed the authority of the maker to make the declaration in question *"...how could my client possibly argue that it did not intend to make the Declaration?*". However, a further letter of authority was provided signed by Mr Vadera. As regards the later transactions whereby PPL agreed to take tenancies of the Ashford and Cheshire Oaks premises (in July and October 2006) a similar course seems to have been followed and again Ms Hurburgh at BLP was acting for the landlords.

101. In the surrounding correspondence, and indeed from the oral evidence, there is no suggestion that these express authorities (which were obviously limited to the specific transaction in hand) were doing anything other than confirming the existing authority and that it was being produced as evidence of such authority as required by the landlord's solicitor. However, as a matter of fact, I reject any suggestion that at the time this was taken as being the procedure that PPL/TFS or Mr Vadera required to be followed in the future if authority was to be conferred on Mr Thompson to execute a statutory declaration in relation to the s38A procedure. Mr Thompson says in his witness statement that he has been unable to find an equivalent authority in relation to the tenancies of the Mansfield and Bridgend Premises that I am dealing with. He goes onto say: "*Therefore I understand I was authorised in respect of the leases being agreed at the time for Cheshire Oaks and Ashford only*". I accept that no written express authority was conferred by the written authorities in 2005 and 2006 in relation to the proposed tenancies of the York, Cheshire Oaks and Ashford Premises. Mr Thompson does not however suggest that thereafter he was constrained in signing statutory declarations without an express authorisation in writing in respect of each statutory declaration (or each proposed tenancy) thereafter. Indeed, he says that he cannot be clear what the process was at the time of the execution of the statutory declarations for the Mansfield and Bridgend tenancies. Considering both the oral and written evidence, it is clear to me that he had authority to bring the relevant deals to completion in line with the heads of terms and to do anything necessary in that respect, which included giving instructions to the solicitors.

102. For the landlords, I also heard evidence from Ms Hemingray, during the relevant time at BLP and Ms Brignall, also at BLP, at the relevant time. Again, I accept their evidence. Both accepted that it was difficult now to be sure of precisely what had happened back in 2007 given the passage of time and gaps in the contemporaneous documentation.

103. Ms Hemingray took over the matter at BLP after the Warning Notices were served. She could not recall whether she made enquiries about Mr Thompson's authority to sign the statutory declarations in question. Whatever Ms Hurburgh's approach, Ms Hemingray says that the practice at the time, so far as she was concerned, was not to make further enquiries about authority to execute a statutory declaration in circumstances where the person in question was a senior person within the organisation (as opposed to its solicitor or a junior employee). This position as to then general practice was confirmed by Ms Brignall and I accept that evidence. Mr Thompson was of course a senior person within PPL and of course was the tenant's nominated representative on both sets of HOTs and the person giving instructions to its solicitors (as would have been clear from emails going to BLP). I find that Ms Hemingray did not make further enquiry. To ask the solicitor whether the person was in fact authorised would have made little sense, given that that was implicit in the solicitor providing a statutory declaration executed by the person in question, unless better written evidence of authority was requested (as Ms Hurburgh did). As there is no evidence of such written authority being requested or provided, and given the evidence as to general practice at BLP, I consider that on the balance of probabilities BLP simply accepted that Mr Thompson had authority without enquiring further. I do not suggest there was anything wrong in such a course.

104. Ms Brignall was dealing with the position before she handed things over to Ms Hemingray. Her evidence regarding service of the relevant Warning Notices was that she thinks she would have confirmed with KBL that they had authority to accept service of the same. Given the clear evidence that this was done as regards the Bridgend tenancy I am satisfied on the basis of Ms Brignall's oral evidence taken with the documentary evidence that she did confirm with KBL that they had authority to accept service of the Warning Notice as regards the Mansfield tenancy also.

(5) Authority: conclusions

105. I am entirely satisfied that there was actual authority given to KBL to accept service of the relevant Warning Notices. This flowed from their instructions to bring to completion a transaction reflecting the HOTs (as amplified by any further instructions received in relation to specific points of detail arising in the course of negotiations of fuller terms to give effect to the HOTs). This can be analysed as express authority to accept service of the Warning Notices as part of the authority to do everything necessary to bring the matter to completion or as implied authority, incidental to the express authority, to bring the matter to such completion.

106. In this respect I was referred by Mr Clark to a number of cases including *Strove v Harrington* [1988] Ch 390; *Westway Homes Ltd v Moores* (1992) 63 P&CR 480; *Yenuila Properties v Naidu* [2003] L&R 9; and *Batt Cables plc v Spencer Business Parks Ltd* [2010] SLT 860. I accept his submission that they support the conclusion that I have reached. In my judgment it is not necessary to distinguish express from implied actual authority in this respect.

107. I accept the submission of Mr Fetherstonhaugh that the fact that the agent thinks that he or she has authority is not of itself enough. However, where the agent is an experienced solicitor, as Ms Roberts was, the fact that she considered that she had authority (as she expressly stated with regard to receipt of the Warning Notice

regarding Mansfield) is a probative piece of evidence to weigh in the balance. No evidence was called from her by TFS to gainsay that that was her belief at the time or to suggest that it had no, or insufficient, basis. I also accept the submission of Mr Fetherstonhaugh that it is necessary to identify and consider the relationship between principal and alleged agent to decide whether or not on the facts express or implied authority is made out. As I have said, I am satisfied that carrying out that exercise such actual authority to receive Warning Notices is clearly established in this case.

108. If necessary, I would also hold that there was apparent authority in KBL to accept service of the Warning Notices in question as follows. KBL was instructed in the process of completing the legal formalities and bringing the transaction to completion. As such, it was held out as having authority to make representations as to the extent of its authority and, I would add, the authority of Mr Thompson to execute the statutory demand which I consider that it implicitly did by providing the same to the landlord's solicitors as a valid statutory declaration executed pursuant to the s38A procedure. I accept the submission of Mr Clark that this analysis is supported by the cases of *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Limited* [1985] 2 Lloyds Rep 36; *United Bank of Kuwait v Hammoud* [1988] 1 WLR 1051; *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyds Rep 194 and *Kelly v Fraser* [2013] 1 AC 450. I am also satisfied that reliance on such apparent authority, by entering into the agreements for lease without more, is also made out. I also accept the submission of Mr Clark that to hold otherwise would mean that solicitors who made representations that they had authority to accept service (whether or notices of proceedings) would not be capable of being relied on without some further evidence of authority from the client, which would be a great change in the manner in which matters customarily proceed at present.

109. Carrying out the same analytical exercise, I am also wholly satisfied that Mr Thompson had actual authority to execute the statutory declaration, again whether viewed from the perspective of express or implied authority. The key points are that he was the retail director (although not a statutory director) and the point of contact at PPL, charged with dealing with the position, both in the HOTs and then as confirmed when Mr Vadera gave the go ahead to the transaction. There is no evidence that Mr Vadera limited Mr Thompson's general authority or that the execution of a statutory declaration was something that Mr Thompson was in terms not authorised to do. Mr Vadera expected everything to be in place for him to sign the agreement for a lease and, when it came to it, the lease and that all steps to enable execution of the agreement and the lease by him (or by his brother, with Mr Vadera's express authority) were to have been taken and put in place so that such execution by him could go ahead.

110. I also consider that Mr Thompson had apparent authority to execute the statutory declaration and that KBL had authority (both actual and apparent) to represent that he did, which representation they made by providing the relevant statutory declarations. Again, the landlord clearly acted on such apparent authority by proceeding to execute the agreements for leases without more.

111. Finally, I have dealt with the issue of whether Mr Thompson's authority was limited because of the express written authorities conferred in 2005-6 as regards the tenancies of the Ashford, York and Cheshire Oak Premises. As I have found, those express

authorities merely confirmed an existing authority and did not limit, expressly or impliedly, the authority of Mr Thompson as regards the Bridgend and Mansfield tenancies. Further, and in any event, I accept the submission of Mr Clark that, even if the earlier authorities did so limit Mr Thompson's authority, that fact would not be imputed via BLP to the other landlords so as to prevent reliance by them on the apparent authority of KBL to make representations about Mr Thompson's authority or to rely upon the apparent authority of Mr Thompson given his role in the transaction as held out by PPL. BPL would have been acting for different principals (the landlords) on each transaction (see generally *El Ajou v Dollar Land Holdings plc* [1994] 2 ALL ER 685).

Ratification and estoppel

112. It follows that I need not consider ratification and estoppel in light of my decision that the solicitors, KBL, were authorised to accept service of the Warning Notices and Mr Thompson was authorised to make the statutory declarations.

113. However, I briefly indicate my conclusions on these points in case this case goes further.

114. As regards ratification, the Landlords rely on ratification which is said to have come about by way of the execution of the Leases in question. For TFS it was submitted that (1) ratification of the receipt of service of the Warning Notices was not possible because there was no relevant act of the Solicitors which could be ratified, rather the act (service) was one by the Landlords; (2) ratification would have come to late because at the time that ratification had occurred TFS was already contractually obliged to take the tenancy and at the stage the Agreement for lease was entered into TFS had not been validly served nor had Mr Thompson validly made the relevant statutory declaration on behalf of TFS; (3) the requirements for ratification were not met.

115. In my judgment, in relation to service of the Warning Notice, the relevant "act" which would be ratified would be accepting service and/or representing that they were authorised to do so. I consider there was therefore an act by the solicitors in relation to the Warning Notice which was capable of being ratified.

116. In relation to the question of retrospective ratification, I accept the submission of Mr Clark that the usual rule is that ratification can and will have retrospective effect *(Koenigsblatt v Sweet* [1923] Ch 314). There are however circumstances in which retrospective ratification will not be permitted (*Presentaciones Musicales SA v Secunda* [1994] Ch 271). Mr Fetherstonhaugh understandably relied upon the words of one of the Judges (the different law reports attribute the words to different judges) in *Bird v Brown* (1850) 4 Exch. 786 that the doctrine of ratification:

> "*must be taken with the qualification, that the act of ratification must be taken at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratified".*

117. However, *Presentaciones* would itself have been decided differently if the *Bird v Brown* dictum apples with full effect in all circumstances. In *Presentaciones*, ratification of proceedings was accepted as having retrospective effect even though at the time of ratification the limitation period had expired, and the ratifying party would not itself then have been able to issue the proceedings. Dillon LJ (with whom Nolan LJ agreed) appears to have decided the case on the basis that the unauthorised act of the agent (issue of the writ) was not itself a nullity. It might be said that the making of a statutory declaration is not a nullity. This also follows the analysis of Roch LJ at page 285F. In any event, Dillon LJ said that the line between cases where retrospective ratification was possible and those where it was not is one that is "not easy to discern". Another analysis (though Dillon LJ considered that it did not answer all the case law), was that of Roch LJ that there is another exception to the general rule that retrospective ratification is possible, which is one where third-party property rights are adversely affected. Certainly, they are not in this case. The ratification only affects the rights of the ratifying party in removing the protection that it would otherwise have. In any event, whatever the principle underlying the case of *Ainsworth v Creeke* (1869) L.R. 4 C.P. 476 (see discussion of Dillon LJ in the *Palacegate Properties* case) I am unable to identify any policy reason relating to the 2003 Order and the procedure laid down by it that would militate against retrospective ratification being permitted.

118. That leaves the question of what is required for ratification to take place. The general principles are helpfully set out in the judgment of Gloster J (as she then was) in *SEB Trygg Holding Aktiebolag v Manches* [2005] 2 LLR 129 at paragraph 97, a case which subsequently went on appeal but where the appeal decision did not affect Gloster J's formulation. I need not set out the full passage.

119. I now turn to the relevant facts. The Landlord relies upon execution of the Leases in question containing the provisions I have cited earlier, that relevant Warning Notices were served, statutory declarations made and the procedure in the 2003 Order properly followed.

120. As regards such execution Mr Vadera's evidence, which I accept, was that he executed the Leases but that in doing so he was concerned about the commercial aspects of the lease (in terms of rent and term). As I understood his evidence he really did not (at the relevant time) understand the ramifications of the 1954 Act in any detail and was really relying on being able to renew because of the good relations with the landlord and the good track record of his company(ies). He seems to have assumed that the lease would come to an end at the end of the term as set out in the relevant leases but to have believed that there would be no practical difficulty in negotiating a renewal. I accept his evidence that, at the relevant time of execution of each of the leases of the Bridgend and Mansfield Premises, he had no real concept of contracting out of the 1954 Act protection; that he did not understand at the time of execution that the Lease in question was contracted out of any relevant protection; and that he did not read or have any understanding that the Leases were recording an agreement that protection of the 1954 Act was excluded or that some form of procedure had been validly followed. Further, he did not understand that there was any question as to the authority of persons who had received the Warning Notice or executed the statutory declaration. In those circumstances it seems to me that there are difficulties in the submissions that Mr Vadera can be taken to have approved the

procedure for validly contracting out and that he can be taken to have known the material facts when he ratified. Mr Clark submits that the landlords get home on ratification on the first point because in signing a document Mr Vadera is taken to have agreed to all of its terms (*Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyds Rep 353) and on the second point because Mr Vadera was on notice of the opposition because of what the lease said and could have found out about the absence of authority (see *Ing Re (UK) Limited v R&V Versicherung AG* [2006] EWHC 1544 at paras [153] to [156]). However, I would not have been satisfied that ratification was made out in the circumstances of this case. I accept the submissions of Mr Fetherstonhaugh as regards these cases. Put briefly, *Agip* is primarily about rectification of an agreement and simply says that because a person signing a document prima facie agrees to the terms of it a case for rectification, based on a contradictory common intention to that set out in the document, requires cogent proof. In my judgment, actual assent to what is being ratified must clearly be made out (express or implied) and it is not here. Secondly, full knowledge of the material circumstances is a factual question, and I do not find to be established here (see Gloster LJ at paragraph [133] of the *SEB Trygg* case).

121. I would also not have been satisfied that estoppel by deed was made out in the current circumstances.

122. As regards the basic principles I was referred to *Carpenter v Buller* (1840) 8 M&W 209 at 212 and *Prime Sight Ltd v Laverello* [2013] UKPC 22; [2014] AC 436. Paragraphs [45], [46].

123. In my judgment, the effect of the landlords' argument would be to negate the effect of the s38A procedure. Schedule 2 of the 2003 Order requires that the relevant Warning Notice and declaration procedure is followed and that the giving of the same and the making of the same is recorded in the document granting the tenancy, either by being endorsed on the same (which Counsel informed me meant prior to its execution) or by being included in the same. In my judgment to hold that such provision would in effect estop the tenant from taking any point about the validity of the Warning Notice or Statutory declaration would in fact remove a key protection that the 2003 Order is supposed to confer. Mr Clark submitted that the device could not be used fraudulently to assert things had happened when they had not. It seems to me that either that means that the estoppel would not operate at all or, if it did, that there would still be the potential for a significant number of cases for the estoppel to operate when the actual conditions of the service of the Warning Notice and making of the relevant declaration had not been properly followed. In my judgment the matter falls within the principle set out in *Kok Hoomg v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1016. The policy underlying the 2003 Order is one that must be given effect to in the interests of prospective tenants generally despite any rules of evidence as between themselves that the parties in any particular case may otherwise have created by their conduct or otherwise.

Terms of the statutory declarations

124. TFS asserts that the statutory declarations regarding each of the six tenancies in question are defective and indeed do not comply with the prescribed procedure. It is

said that this is because they fail to specify the commencement date of the term of the proposed tenancy correctly.

125. Clause 1 of the prescribed form of statutory declaration is, as I have said, in the following terms:

> "1. . . . . .*(name of tenant) propose(s) to enter into a tenancy of premises at*. . . . . .*(address of premises) for a term commencing on*. . . . . ."

126. As regards the statutory declarations relating to the Bridgend and Mansfield tenancies, the word used in relation to term were as follows:

> "*for a term commencing on the Access Date under the Agreement for Lease pursuant to which the tenancy of the premises will be entered into*".

In the case of the Mansfield Premises, the lease was dated 4 November 2008. The Access Date was 5 November 2007 and that was expressed to be the commencement date under the lease. As regards the Bridgend tenancy the Access Date was 12 November 2007, but the lease was only entered into on 26 August 2009.

127. Mr Fetherstonhaugh submits that in these circumstances, although the period of the tenancy is calculated from the Access Date in terms of calculating the end point of the term, the actual term can only commence with the grant of the lease see e.g. *Bradshaw v Pawley* [1980] 1 WLR 10 and "*Woodfall: Landlord and Tenant*" paragraph 5.069 which says:

> "*A lease operates as a grant only from the time of its execution, and acts or omissions of the tenant before that date are not normally breaches of covenant, although committed after the date from which the term is expressed to run of the deed. But the duration of the term is to be computed from the day mentioned in the lease for that purpose. So a lease may commence at one day in point of computation, and at another in point of interest.*
> *The law may be summarised as follows:*
>
> 1. *The term created will be a term which commences on the date when the lease is executed, and not the earlier date;*
> 2. *No act or omission prior to the date on which the lease is executed will normally constitute a breach of the obligations of the lease;*
> 3. *These principles do not prevent the parties from defining the expiration of the term by reference to a date prior to that of the execution of the lease, or from making contractual provisions which take effect by reference to such a date, as by defining the period for the operation of a break clause or an increase in rent;*
> 4. *There is nothing in these principles to prevent the lease from creating obligations in respect of any period prior to the execution of the lease;*

> 5. *Whether in fact any such obligations have been created depends on the construction of the lease; and there is nothing which requires the lease to be construed in such a way as to avoid, if possible, the creation of such obligations."*

128. As regards the leases of the other Premises the relevant wording is:

(1) In the case of the Swindon Premises:

"*for a term commencing on a date to be agreed between the parties*"

(2) In the case of the York Premises, the Ashford Premises, and the Cheshire Oak Premises

"*for a term commencing on the date on which the tenancy is granted*"

129. As regards these formulations, Mr Fetherstonhaugh accepts and adopts the written submission of Mr Clark that the purpose of specifying the date is to ensure that the tenant is aware of the commencement date of the term that it is taking. However, he submits that the formulations in this case are worthless and tells no-one anything about the actual start date.

130. In my judgment, to determine what is required by the statutory declaration and what will amount to a statutory declaration "substantially" in the prescribed form, it is necessary to identify the purpose of the provision in question.

131. As regards the Bridgend statutory declaration formulation, it might be said that "commencement date" is ambiguous. As the *Woodfall* passage that I have cited makes clear, as a matter of language "commencement date" is sometimes used in the sense of the date that the tenancy commences (the commencement date "in point of interest") and in some cases it is used in the sense of the date from which its end is computed (the commencement date "in point of computation").

132. As regards the language of the statutory declarations for the remaining Premises (leaving aside Mansfield), it might be said that the formulations are accurate but that they do not provide a means of knowing what calendar date is involved. Mr Fetherstonhaugh accepted that a formula or a defined term may suffice but that the formula had to be one that, once applied, results in ascertainment of a fixed calendar date.

133. I have come to the conclusion that the formulae in question do not invalidate the statutory declarations. That is because, in my judgment, the purpose of clause 1 in the statutory declaration is to identify the tenancy in respect of which the Warning Notice has been given so that the tenant confirms, by the statutory declaration, that he or she understands that that proposed tenancy will be excluded from the protection of the 1954 Act.

134. This fits with the purpose of the procedure both as explained by the documents leading to the genesis of the 2003 Order in its current form and which is otherwise

inherent in the 2003 procedure. It also fits with the concept that the relevant prospective tenancy has to be identified and a usual way of identifying a tenancy would be by reference to the parties, the date and the premises. Without a date of the lease (because it is not then executed) commencement of the term is a useful proxy. It seems to me that using as the commencement date the date when the interest under the lease commences or the date from which the term is calculated are both adequate identifying badges of the prospective tenancy and whether or not one is formally correct and the other is not, use of the one that is not formally correct (if that is the position) would still involve the statutory declaration being "substantially" in the form of that set out in the 2003 Order.

135. I should add, that I can see there may well be circumstances where the leaving blank of the commencement date on the statutory declaration would not necessarily prevent the statutory declaration being "substantially" in the form set out in the 2003 Order. In my judgment, although the "commencement date" has not been left blank in the case of the prospective Tenancies of the tenancies other than of the Bridgend Premises and the Mansfield Premises, that does not prevent the statutory declarations meeting the requirements of the 2003 Order.

136. Mr Fetherstonhaugh submitted that it is a key fact for the prospective tenant to know, at the time he or she executes the statutory declaration, the date when the tenancy will commence (in terms of interest). He gave as an example, the scenario considered in the case of the tenancy of the Bridgend Premises. I suggested to him that if that were right one would also need to be sure that the tenant understood the expiry date. He submitted that the procedural protection might be inadequate but that the commencement date was in any event an important fact. However, there is no hint in the lead up in the papers which identified the problem with the court application route that this was a purpose behind the proposed changes and it remains difficult to see why the date of grant of the interest is so key. The point is highlighted by the fact that the Warning Notice does have to identify the commencement date.

137. As Mr Fetherstonhaugh accepted, the logical conclusions of his submissions are that (1) the procedure has become more onerous than the previous court application route in the sense that the position reflected by the *Palacegate* Properties case, where no commencement date etc. was specified in the draft lease approved by the Court as part of the contracting out process, would no longer be a situation in which contracting out was possible. Thus, the contracting out process, rather than being easier would in fact be less flexible and may be more difficult; (2) the aim of encouraging prospective tenants to receive early Warning Notices and to make declarations earlier rather than later would be discouraged (though it is fair to point out that any declaration could be made late but it might have to be made very late). This on the basis that the answer to point (1) was, it was submitted, that declarations could be made very late in the day when the commencement date was known; (3) there may be cases where the commencement date (or grant) could only be guessed at and would almost invariably be wrong: for example in the Bridgend case the lease had to be granted within a 15 day window of relevant works being completed. If on the other hand such formula was effective for the purposes of the 2003 Order then it becomes difficult to sustain the argument that on such facts the tenant necessarily knows the date of the grant of the Lease in such cases. Indeed, Mr Fetherstonhaugh's general submission was that in cases where the date of grant of the lease could not be correctly ascertained in

advance but an agreement for a lease had been entered into, then the agreement for a lease would not be specifically enforceable because it would not be possible to grant a contracted-out tenancy and the parties would have to "start again" in terms of following the s38A procedure afresh and entering into new contractual documentation. This seems to me a recipe for confusion, uncertainty and the frustration of perfectly sensible commercial arrangements entered into between prospective landlords and tenants. It also seems to me a situation where, if this is indeed the position, commercial parties might well with justification say that the "law is an ass". I do not consider that this does represent the law.

138. In my judgment, as regards the Bridgend tenancy (1) the ambiguity in "commencement date" is such that either the date of grant or the date for calculating the commencement of the term is adequate because the purpose of giving the commencement date is to identify the proposed tenancy in question; (2) If I am wrong about this, then the giving of the "incorrect" date means that the statutory declaration is still "substantially" in the form prescribed.

139. As regards the other prospective tenancies, the same were adequately identified by the declarations in question, taken as a whole, and the commencement date given was not inaccurate. Accordingly, the declaration was "substantially" in the correct form.

140. Accordingly, I consider that the declarations met the requirements of the 2003 Order.

141. It also follows that I consider that all the relevant Tenancies were contracted out and will grant appropriate declaratory relief accordingly.

Double Value

142. Section 1 of the Landlord and Tenant Act 1730 (the "**1730 Act**") provides that a landlord is entitled to double the annual value of the premises from a tenant "wilfully" holding over after the landlord has demanded, in writing, possession of the premises. It is in the following terms:

> *1. Persons holding over Lands, &c., after Expiration of Leases, to pay double the yearly Value.*
>
> *In case any Tenant or Tenants for any Term of Life, Lives or Years, or other Person or Persons, who are or shall come into Possession of any Lands, Tenements or Hereditaments, by, from or under, or by Collusion with such Tenant or Tenants, shall wilfully hold over any Lands, Tenements or Hereditaments, after the Determination of such Term or Terms, and after Demand made, and Notice in Writing given, for delivering the Possession thereof, by his or their Landlords or Lessors, or the Person or Persons to whom the Remainder or Reversion of such Lands, Tenements or Hereditaments shall belong, his or their Agent or Agents thereunto lawfully authorized; then and in such Case such Person or Persons so holding over, shall, for and during the Time he, she and they shall so hold over, or keep the Person or Persons intitled, out of Possession of the said Lands, Tenements, and Hereditaments, as aforesaid, pay to the Person or Persons so kept out of Possession, their Executors, Administrators or Assigns, at the Rate of double the yearly Value of the Lands, Tenements and*

> *Hereditaments so detained, for so long time as the same are detained, to be recovered in any of his Majesty's Courts of Record, by Action of Debt…*

143. The section is penal and to be construed strictly (see e.g. *Robinson v Learoyd (1840) 7 M. & W. 48, 54)*.

144. There was a dispute before me as to (a) the meaning to be ascribed to the word "wilfully" and (b) the provision being penal, whether service of a notice has to be by way of personal service on the tenant so that service of an agent will not suffice.

145. As regards "wilful", Mr Clark submitted that the term encompasses anything that it is done deliberately rather than accidentally or done without thought on the spur of the moment, relying on the interpretation of the term "wilful" in, for example, *R v Senior* [1899] 1 QB 283 at 290-1 (dealing with s1 Prevention of Cruelty to Children Act, 1894) and *Smith v Weymiss Coal Co. Limited* (1927) 21 BWCC 483 at 490-492 (dealing with s1 Workmen's Compensation Act, 1906).

146. Mr Fetherstonhaugh, on the other hand, submits that the holding over has to be more than mere being "deliberate". Something more is required, namely an intention to stay on knowing that there is no right to do so. Thus, in *French v Elliott* [1960] 1 WLR 40, Paull J put the matter as follows:

> *"It has been held that "wilfully" means "contumaceously," but I can see no reason why the old English word "wilfully" does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumaceous tenant. It deals only with the moment of time when the tenancy comes to an end. At that moment of time a tenant may say: "I shall stay on. I think I have a right to do so." His staying on is not wilful. On the other hand, a tenant may say: "I will stay on, although I know I have no right to do so." That is wilful, and well illustrates the now sometimes forgotten distinction between "I shall" and the insistent "I will."*

147. In my judgment, Mr Fetherstonhaugh is undoubtedly correct on this point. If in the context of the 1730 Act "wilful" meant deliberate or something more than "on the spur of the moment" it is difficult to see that there would be many cases when an action for double value on a holding over (assuming the conditions of the Act where otherwise met) would not succeed.

148. This interpretation is also confirmed by the decision of the Court of Exchequer in *Hirst v Horn* (1840) 6 M & W 392. The Court was moved for a rule directing a new trial. The original trial had resulted in a verdict in favour of the landlord on the direction of the Judge to the jury at the York Assizes (Coleridge J). The claim had been in debt for double value of the lands said to have been wrongfully held over by the defendants. The defendants were two brothers, tenants of a farm, who effectively held over after service of a notice to quit. Part of the defence was that the notice to quit was invalid because the custom of the country in that part of Yorkshire (Huddersfield) was that the times of holding were different to that on the basis of

which the notice to quit had been given, such that the notice was invalid. Such custom was found not to apply to the farm in question. Lord Abinger CJ said:

> "…*if a man holds over under a supposition that he has a right, that is a different case; but here we must assume that it was clear the defendants had none, and that the tenancy began on the 1st of July. This is the ordinary form of notice, which has been adopted in order to prevent the tenant from turning round and setting up a different commencement of the tenancy; and we must suppose the tenant knew the time of its expiration as well as the landlord, and that the custom did not apply.*"

Similarly, Parke B said:

> "…*all that can be said on that point is, that if there be a real doubt as to the period of the expiration of the tenancy, an argument may be drawn from the uncertainty of the notice, to shew that the holding over was not wilful. If there were a reasonable doubt, and the defendant bonâ fide acted on it, that would be a fair question to be left to the jury. But here the only mode of raising any doubt was by a reference to the custom of the country; but that clearly did not apply, nor raise any fair claim to hold over on the ground of right. There was, therefore, no misdirection, nor was the verdict wrong.*"

149. As regards the question of personal service, other than that the section was "penal" Mr Fetherstonhaugh was unable to point me to any authority supporting the view that the usual rule, in the landlord and tenant field, that service on an agent suffices (see e.g. *Galinski v McHugh* (1988) 57 P & CR 359 at 363, referring to *Townsend Carriers Ltd v Pfizer Ltd* (1976) 33 P & C.R. 261 at 365). The relevance of the "penal nature" of the provision is that the statute will be construed strictly but, in my judgement, it does not displace the usual rule as to service.

150. I take limited support for this view from the passage in "*Woodfall on Landlord and Tenant*" paragraph 19.018 which says:

> "*Where the tenancy was only from year to year, the usual written notice to quit is a sufficient demand and notice to satisfy the statute, and no further demand or notice need be made after the tenancy has ceased. But the notice must amount to a valid and binding notice to quit.*"

The authority relied upon for this proposition (*Johnstone v Hudlestone* (1825) 4 Barnewall and Cresswell 922*)* does not consider the point I am considering and deals with the position of a tenant's notice to quit and the application of s18 of the Distress for Rent Act 1737 (dealing with double value after a tenant's notice to quit) but the general thrust of the judgment is that a valid notice to quit will suffice to trigger liability under the 1730 Act (or the 1737 Act) and that nothing more is needed. There is no general requirement that such a notice must be served personally.

151. As regards holding over the circumstances are these.

152. On 13 October 2013, MacArthur Glen informed TFS (through Mr Capper) that a decision had been taken not to renew the relevant leases of the Bridgend Premises

(due to expire on 11 November 2017) and Mansfield Premises (due to expire on 4 November 2017). This was confirmed by email on the same day.

153. As is clear from his evidence and the contemporaneous documents, this came as a great shock to Mr Vadera who had never before had any issue from the landlord regarding negotiation of a new term on expiry of a previous lease of such outlets. On 14 November 2017, Mr Vadera e-mailed Mr Houlston to ask him how much he had known about McArthur Glen wanting the Bridgend and Mansfield Premises, why he had not mentioned that the leases came to an end in November and how were relations left between him (Mr Houlston) and Mr Haynes of McArthur Glen.

154. There then followed various attempts on the part of TFS to seek to negotiate with McArthur Glen to stay on. These were to no avail.

155. Gordons LLP were instructed on behalf of TFS. By letter dated 25 October 2017, that is before expiry of any of the leases that I am concerned with, they wrote what was effectively a letter before action asserting that the leases of the Bridgend, Mansfield, York, Ashford, and Cheshire Oaks Premises each had the benefit of protection under Part II of the 1954 Act. The relevant statutory procedure to contract out, it was said, had not been followed. A 3-page appendix was included giving details of the alleged flaws in the procedure with regard to each tenancy in question. It is clear from the letter that a great concern of TFS (and by implication Mr Vadera, as he confirmed in evidence to me was in fact the case) was that by then it had become apparent that MacArthur Glen were proposing to let the outlets in question to a business, The Perfume Shop, in direct competition with TF and that there was an intention to grant that business exclusivity, so that there would be no room for TFS to operate elsewhere within the outlets and that the Perfume Store would benefit from any goodwill attaching to the outlets then leased by TFS. In addition to the claim for protection under the 1954 Act, the letter asserted breach of competition law and a private claim by TFS in that respect as well as the threat of a report to the Competition and Markets Authority so that it could take enforcement action.

156. I am invited, on behalf of the Landlords, to find that (a) Mr Vadera well knew that TFS had entered into tenancies that were contracted out and what that entailed (he asserted, in effect, that he did not understand that that was even possibly the position until 2017); (b) he knew that the claim that the procedures had not been followed was false and simply a device to buy time.

157. As regards Mr Vadera's knowledge, and if he had it when he acquired it, that the tenancies in question were (at least on their face) excluded or intended to be excluded from the protection of the 1954 Act and what that signified, there is a potential conflict of evidence between some of TFS's witnesses and Mr Vadera. Further, there is some force in the point raised by the Landlords that it is unrealistic to suppose that Mr Vadera, a commercially experienced businessman with a very hands on approach to running his companies, and who had executed various leases, excluded from protection, and tenancies at will over approximately 12 years (from 2005 to 2017), did not understand that the leases in question were not protected under the 1954 Act and that, unless there was a successful negotiation of a new tenancy, TFS, in each case, would have to vacate at the end of the defined term. Indeed, this view gains some support from Mr Vadera's evidence as to his belief that in practice new leases

would be negotiated at the end of the term and that therefore he did not consider there to be a risk that occupation would continue under a new tenancy.

158. However, I do not consider that it is necessary to resolve this issue. Once solicitors were involved and gave their advice, which is supported by the pleadings settled in this case by leading and junior counsel (in the case of the first set of proceedings commenced by TFS, settled by Mr Fancourt QC as he then was and Mr Galtrey), I am unable on the evidence to come to the conclusion (which I am invited to by Mr Clark) that "his solicitors came up with technicalities in the contracting out process…and could not have had any faith in the arguments over agency". In short, I do not know what went on behind the veil of legal professional privilege but must assume that the case as asserted and brought was properly so brought. I have no, or no sufficient, evidence to support the conclusion that Mr Vadera caused TFS to advance its case other than bona fide. Mr Clark asserts that because the relevant persons whose authority in question were all TFS's own solicitors and management team the case cannot properly and bona fide have been advanced but those points would have been as obvious to the lawyers acting for him on the case advanced before me.

159. Accordingly, I find that the holding over has not been "wilful" within the meaning of the 1730 Act and that the Landlord is not entitled to double value.

160. In those circumstances, it is unnecessary for me to deal with the service point, other than to say that it is accepted that service was on TFS's solicitors but that in light of my decision as to the law on this point, such service would in my judgment have been valid for the purposes of the 1730 Act. I should also add that it was accepted that had I decided in favour of the landlord on all the above points under the 1730 Act there would have had to be an inquiry as to what the double value was in each case.

Conclusion

161. The relevant tenancies do not have the protection of the 1954 Act, but there is no liability to pay double value in respect of holding over.

162. I invite the parties to agree a form of order to give effect to this judgment, or so much of an order as they are able. If an agreed form of order cannot be put before me before 4pm on Friday 7 June 2019 that deals with all outstanding points then there will need to be a further hearing. In such event, that hearing can be by telephone and the following directions will apply. By 4pm on Monday 10 June 2019, the parties should lodge (in London and Leeds) an agreed time estimate and dates of availability for the 3-month period commencing on 17 June 2019. Skeleton arguments and draft form of order showing the rival wordings sought by the parties should be filed and lodged not less than two clear days before such resumed hearing. I will extend the time for filing a notice of appeal to 21 days after such hearing (which period may be varied by further order) and adjourn all unresolved consequential matters to such hearing.