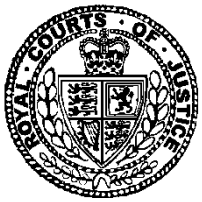

Neutral citation number: [2022] EWHC 3382 (Ch)

No: PT-2022-MAN-000145

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
PROPERTY TRUST AND PROBATE LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street
Manchester M60 9DJ

Wednesday, 30 November 2022

Before:

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

Between:

VISTRA TRUST CORPORATION (UK) LIMITED
(as trustee for the Property Income Trust for Charities)

Claimant

- and -

CDS (SUPERSTORES INTERNATIONAL) LIMITED

Defendant

MS KATHARINE HOLLAND KC (instructed by **Pinsent Masons LLP**) appeared on behalf of the Claimant.

MS STEPHANIE TOZER KC (instructed by **Osborne Clarke LLP**) appeared on behalf of the Defendant.

APPROVED JUDGMENT

JUDGE HODGE KC:

1 This is my extemporary judgment on the first hearing of a Part 8 claim issued on 14 October 2022 by Vistra Trust Corporation (UK) Limited, as trustee of the Property Income Trust for Charities (as claimant) against CDS (Superstores International) Limited (as defendant), and proceeding in the Property Trust and Probate List of the Business and Property Courts in Manchester under Case No: PT-2022-MAN-000145.

2 At this hearing, Ms Katharine Holland KC appears for the claimant and Ms Stephanie Tozer KC appears for the defendant. Both counsel have produced helpful written skeleton arguments dated (in the case of Ms Holland) 23 November 2022 and (in the case of Ms Tozer) 25 November 2022.

3 This is the first hearing of the Part 8 claim; and it is also the return date of an application, issued by the claimant on 10 November 2022, seeking summary judgment under CPR 24 on the grounds that the claimant believes, on the evidence, that the defendant has no real prospect of successfully defending the claim and that the claimant knows of no other reason why the disposal of this claim should await a trial.

4 In support of the claim and Part 24 application there are now no less than three witness statements, dated 13 October, 9 November and 29 November 2022, from Mr Scott Robert Fawcett. He is a director of asset management at Mayfair Capital Investment Limited, which is charged with the management of the assets of the claimant investment fund, including the property the subject of this Part 8 claim, which is a retail superstore trading as 'The Range' and situated at Dennis Road, Widnes. In answer to the claim and application, there are two

witness statements from Mr Michael Cotter, dated 1 and 17 November 2022. Mr Cotter is the financial controller and property manager of the defendant company.

5 The nature of the claim is set out in the details forming part of the Part 8 claim form. It relates to a lease, dated 11 February 2008, of the property which was made between Property Alliance Group Limited (as landlord) and B&Q Plc (as tenant). The original term was for 21 years from and including 11 February 2008, and thus expiring on 11 February 2029; but that fixed term was subject to a tenant's contractual break option, contained within clause 21 of the lease, in the following terms:

> "If the Tenant shall desire to determine the Term on or after 11th February 2023 and shall give to the Landlord not less than 6 calendar months prior notice in writing of its desire then this Lease and everything herein contained shall cease and determine on such date but without prejudice to any claim by either party against the other in respect of any antecedent breach of any covenant or condition herein contained."

I would observe that that tenant's contractual break option is not in any way expressly subject to prior compliance with the tenant's covenants in the lease.

6 On 21 December 2015 the reversion immediately expected upon the determination of the lease became vested in the claimant. By letter dated 10 December 2018 from Birketts LLP, who were then the solicitors acting for B&Q, the claimant was informed that B&Q *"wishes to terminate the Lease on 11 February 2023 in accordance with clause 21 of the Lease"*. That letter was expressed on its face to be sent by special delivery and first-class post. It also stated that Birketts acted for Butler Mason Limited, which was the managing agent with power of attorney for and on behalf of B&Q Plc, the tenant of the premises under the lease dated 11 February 2008. The letter stated that, for the avoidance of doubt, Birketts enclosed a formal break notice and would be grateful if the claimant could acknowledge safe receipt by signing,

dating and returning the duplicate notice enclosed with the letter. Accompanying that letter was the tenant's notice to terminate, which was expressed to be given by Birketts LLP as solicitors and agents acting for and on behalf of the tenant. It was expressly given pursuant to clause 21 of the lease. There is no evidence that, as requested by Birketts, the claimant ever signed any acknowledgment of having received the notice to terminate.

7 On 26 November 2020, the lease was assigned by B&Q to the defendant; and, on the same day, a licence to assign was entered into between the claimant, B&Q, and the defendant. The transfer is exhibited to the first witness statement of Mr Fawcett and was executed as a deed by Butler Mason Limited as attorney for B&Q Limited. Likewise, the licence to assign was similarly put in evidence, and was also executed as a deed by Butler Mason Limited as attorney for B&Q Limited.

8 On 30 June 2022, the defendant purported to make a tenant's request for a new business tenancy under s.26 of the Landlord and Tenant Act 1954 for a term of 15 years, beginning on 12 February 2023, namely the day after the break date. It is the claimant's case that that request was not a valid request for the purposes of s.26 of the 1954 Act and that the defendant was not entitled to seek a new tenancy under that Act. That is said to be the effect of s.26(4) of the 1954 Act; the effect of a decision of Rattee J, at first instance, in *Garston v Scottish Widows' Fund and Life Assurance Society* [1996] 1 WLR 834, which was approved on appeal by the Court of Appeal at [1998] 1 WLR 1583; and it is also said to follow from s.24(1) of the 1954 Act. It is therefore the claimant's case that the lease will expire by virtue of the break notice on 11 February 2023, whereupon the defendant will be obliged to deliver up possession of the property in accordance with the tenant's covenant to yield up in clause 11.15 of the lease.

9 In correspondence between the claimant's solicitors, Pinsent Masons LLP, and the solicitors then acting for the defendant, Paul Taylor Solicitors, the defendant has disputed the claimant's case that the lease will come to an end on 11 February 2023. As a result, the claimant seeks a declaration from the court that, pursuant to s.26(4) of the 1954 Act, the s.26 request was not a valid request for the purposes of that section as a result of the earlier break notice having been served under the terms of the lease. The claimant also seeks a declaration that the lease will terminate on 11 February 2023 pursuant to the break notice, and that the defendant is thereupon obliged to deliver up vacant possession of the property.

10 The defendant filed an acknowledgment of service on 2 November 2022. In section B the defendant states that it intends to contest the claim and to seek a declaration that the lease will not terminate on 11 February 2023 and that the defendant is entitled to remain in possession of the property thereafter; alternatively, that its s.26(4) request is valid. In section D, the defendant objects to the claimant proceeding under Part 8 on the footing that there is a substantial dispute of fact about whether a valid break notice has been served by the defendant's predecessor so, in accordance with CPR 8.1(2), it is not appropriate for the claimant to make use of the Part 8 procedure.

11 This claim had been preceded by a number of solicitors' letters, through which I have been taken at some length by Ms Holland for the claimant. The correspondence effectively begins with a letter from Pinsent Masons, for the claimant, dated 14 July 2022, to the defendant's then solicitors. By way of background, Pinsent Masons state that, as the defendant is aware, its predecessor in title to the premises, B&Q Limited, had served a valid break notice dated 10 December 2018 to terminate the lease on 11 February 2023, and that the lease was subsequently assigned to the defendant with full knowledge of that break notice. Reference is made to the purported s.26 notice; and the claimant's solicitors assert that that request is

invalid and ineffective on the basis that it is trite law that the service of a break notice by a tenant prohibits a tenant from serving a valid request for a new tenancy pursuant to s.26.

12 In a letter to Paul Taylor Solicitors, for the defendant, dated 24 August 2022, Pinsent Masons state, at numbered paragraph 2, that the claimant's position is that the break notice constituted a 'notice to quit' for the purposes of the 1954 Act and, as a result, prohibited the defendant from serving any notice under s.26 of the 1954 Act. In response, by letter dated 24 August 2022, the defendant's solicitors state:

> "While the break notice was effective to bring to an end the original tenancy ending on the 11 February 2028 the result was to create a new tenancy ending on the 11th February 2023 to which, absent any express exclusion clause in the lease, the Act must clearly apply."

That letter clearly proceeded on the footing that there had been a valid break notice.

13 However, a change of position became evident in a letter from the defendant's solicitors dated 7 October 2022. That letter acknowledges that the break notice is central to the claimant's case and that in order for the claimant to succeed it would need to be unimpeachable. However, there are said to be *"a number of issues, grey areas and uncertainties which raise question marks about its efficacy"*, the claimant's ability to rely on it, or the extent to which it is proper for the claimant to do so. As a result, the solicitors express themselves of the view that it is unlikely to stand up to the sort of scrutiny which it would receive in the course of any proceedings. They proceed to set out those issues. So far as material, they are said to be as follows:

> "a. the break notice was served in the name of B&Q plc but signed by Birketts, the solicitors for Butler & Mason. Are you able please to furnish us with any authority giving Butler & Mason or their solicitors power to sign the notice on behalf of B&Q plc?

b. a duplicate notice was delivered at the same time containing an acknowledgment of service, but this was not signed and returned and no admission was made, leaving a question mark as to its validity."

14 No issue was expressly raised as to the validity of the service of the break notice. Pinsent Masons responded to those queries by letter dated 13 October 2022. That letter includes the following:

> "Vistra's clear position is that the Break Notice served by B&Q Plc is valid. Taking each of the points you have made in turn Vistra's response is as follows:-
>
> a. We enclose copies of the following letters received by Vistra:-
>
> i. Letter from Butler Mason Limited dated 28 September 2016 explaining that they were appointed as asset manager to this property by B&Q Plc and all correspondence should be sent to them [That letter is at p.154 of the hearing bundle and made it clear that Butler Mason Limited 'will be dealing with all matters relating to B&Q's lease of this property, including all payments, lease and property matters'];
>
> ii. Letter from B&Q Plc dated 4 October 2016 further explaining that they had appointed Butler Mason Limited as their asset manager [That letter is at p.155 and states: 'Please note that from 19 September 2016 they will take on overall responsibility for the management of this property portfolio. Please accept this letter as authority to forward all demands for rent, service charge and insurance together with any correspondence and copies of notices directly to their registered office'];
>
> iii. Letter dated 10 July 2018 from Birketts Solicitors who act for B&Q explaining that Butler Mason Limited are B&Q Plc's managing agent with power of attorney [That letter is at p.156 and began: 'We act for Butler Mason Limited which is the managing agent with power of attorney for and on behalf [of] B&Q Plc, the tenant of the above premises under a lease dated 11 February 2018']; and
>
> iv. Letter dated 28 September 2018 again from Birketts Solicitors who again explained that Butler Mason Limited are B&Q Plc's managing agent with power of attorney [That letter is at p.158 and began: 'We act for and on behalf of Butler Mason Limited which in turn is the managing agent with power of attorney for and on behalf of B&Q Plc. As you are aware, B&Q is your current tenant of the above premises under a lease dated 11 February 2008']."

15 Returning to the Pinsent Masons letter dated 13 October 2022, that continues:

> "All these letters pre-date the service of the Break Notice on 10 December 2018 and clearly explain and represent that Mason Butler Limited are authorised by B&Q Plc to deal with this property and Lease on behalf of B&Q Plc.
>
> Further, and perhaps more telling, is the fact that [the defendant] has itself accepted the authority of Butler Masons Limited to deal with this property and Lease on behalf of B&Q Plc as [the defendant] are a party to both the Licence to Assign the Lease dated 26 November 2020 and the Transfer of the Lease also dated 26 November 2020 (where [the defendant] was paid a reverse premium of £960,000 by B&Q Plc to take an assignment of the Lease) with B&Q Plc and both these documents are executed by Butler Masons Limited as attorney for B&Q Plc.
>
> b. The validity of the Break Notice was not conditional upon Vistra acknowledging receipt of the Break Notice and therefore the point you raise is totally irrelevant."

There appears to have been no response to that letter, although it is fair to observe that the claim form was issued on the following day. Thereafter, the defendant appears to have instructed Osborne Clarke LLP to act as its litigation solicitors.

16 I have already mentioned that there are now three witness statements from Mr Fawcett, including one dated 29 November, which is yesterday. Ms Tozer objected to the claimant placing any reliance on this witness statement. The position is that CPR 8.5 contains detailed provisions for the filing and service of written evidence on Part 8 claims. CPR 8.6 provides that no written evidence may be relied on at the hearing of the claim unless (a) it has been served in accordance with rule 8.5, or (b) the court gives permission.

17 When this was pointed out to her, Ms Holland invited the court to give the claimant permission to rely upon Mr Fawcett's third witness statement. In summary, her grounds were that Mr Fawcett's third witness statement responds to a point raised for the first time in Ms Tozer's skeleton argument. That point relates to the service and validity of the break notice itself. It

is perhaps appropriate, at this point, in order to put that issue into context, to refer to certain passages from Mr Cotter's two witness statements.

18 In his first witness statement, at paragraphs 17 through to 21, Mr Cotter relates that he cannot recall how and when he had first become aware that B&Q had purported to serve a break notice on the landlord, although he acknowledges that it was certainly before the defendant completed its assignment from B&Q. As he remembers it, it did not seem very significant, when he first learned of it, because at that time the intention had been that the parties would enter into a deed of variation to bring the lease to an end on the break date and that there would be a reversionary lease after that. The first Mr Cotter heard that the landlord was suggesting that the break was effective, and that it might not proceed with the reversionary lease, was an email he had received from Mr Fawcett on 24 November - and thus two days before the transfer of the lease completed - asking Mr Cotter to speak to Mr Fawcett after he had spoken to B&Q's management company.

19 Mr Cotter relates that he had started to get concerned that things were not progressing as they should when he had been advised of 'radio silence' by his solicitors, Paul Taylor, a few days earlier. Mr Cotter relates that although he had been a little concerned in the days leading up to 24 November 2020, because Paul Taylor had advised that there was radio silence from the other side, it was not until he had received an email from Mr Fawcett on that day, asking him to call him once he had spoken to B&Q's managing agent, that Mr Cotter realised that the deal might not go through as they had discussed.

20 Mr Cotter does not recall discussing the precise legal mechanics during his call with the managing agent, but he did understand that the claimant was now saying that the defendant could only have until 11 February 2023, and not the 15 years they had originally discussed.

Mr Cotter states that to say that he *"was surprised is an understatement"* because up until that point, all negotiations had clearly been on the basis that the lease would not terminate on the break date. That was precisely the purpose of the deed of variation. The claimant's lawyers have never explained to the defendant why they suddenly concluded that a valid break notice had been served, and that the lease would terminate on the break date, when this had not been their position previously. The defendant completed its assignment on 26 November 2020 and began fitting out the unit the following day. It has traded from the premises since 26 February 2021, and the defendant wishes to continue doing so.

21 It is clear from that witness evidence that Mr Cotter, and the defendant, were aware of the break notice prior to the defendant's completion of the assignment of the lease to itself from B&Q. It is also clear, from the emails exhibited to Mr Fawcett's first witness statement, that the claimant's solicitors had informed B&Q's solicitors, Birketts, that the claimant had entered into an agreement with a third party to take a new lease of the unit after the expiry of the current lease following service of the break notice. Birketts were invited to make the defendant aware of this, and to make it clear that the claimant would not be offering the defendant a reversionary lease. That instruction was contained within an email of 25 November at 8.15 a.m. on the day before the assignment completed. Later that morning, at 9.28 a.m., Birketts responded stating that the prospective assignee, i.e. the defendant, was aware of the claimant's agreement with the third party.

22 In his second witness statement, at paragraph 10, Mr Cotter states that, to the best of his recollection, and having refreshed his memory from his solicitors' file of papers, the first time the defendant was provided with a copy of the break notice was on 25 November 2020, which was the day before completion. He continues:

> "We have never acknowledged that the break notice was valid, was validly served, or been provided with any evidence that this was the case."

That is the first reference to any issue concerning service of the break notice. It does not include any positive assertion that the break notice had not been validly served.

23 At paragraph 13, Mr Cotter raises, again apparently for the first time, a reference to the results of searches of the Companies House database for B&Q. He states that he notes that the break notice was served on behalf of 'B&Q plc', with no gaps between B, the ampersand, and Q, whereas the correct name for B&Q at the date of the break notice was B & Q Plc (with gaps between the B, the ampersand, and the Q); and that this was later changed to the name given in the break notice on 6 November 2019. Mr Cotter exhibits copies of the relevant entries from the Companies House database for B&Q, and also a number of search results within the Companies House database for other companies which have, or have had, similar names to 'B&Q'.

24 It was only in Ms Tozer's skeleton argument, at paragraph 14(a), that Ms Tozer first raised any issue as to how the alleged break notice had in fact been served. The point she made was that clause 16 of the lease made it clear that unless the claimant acknowledged receipt - which it is common ground on the evidence that it has not done - then the break notice would be valid only if it had been sent by special delivery. Ms Tozer made the point that the claimant has not made any assertion that the break notice was sent by special delivery; and there is no evidence before the court that this was the case, other than a reference on the relevant letterhead. For this reason, she submits that there can be no question of judgment being given in the claimant's favour at this stage.

25 At paragraph 14(b) of her skeleton, Ms Tozer made the point that, equally importantly, the claimant has failed to provide any proper answer to the defendant's question about whether Birketts had in fact been authorised to serve the alleged break notice on behalf of B&Q Plc. The claimant has not provided the power of attorney so the court could not determine whether serving a notice to terminate the existing lease was within the scope of Butler Mason Limited's authority or not. Her submission is that the claimant's assertion that this should be assumed in its favour, so that summary judgment should be given on its claim, is somewhat bold in the face of the defendant's challenge. Nor has any evidence been produced to show that any power of attorney was in existence as at December 2018. It is in order to address those points that Mr Fawcett's third witness statement was served yesterday evening. Ms Tozer apparently only received it whilst she was travelling by train from London to Manchester.

26 In his third witness statement, Mr Fawcett asserts that the break notice was served by special delivery by B&Q's lawyers, Birketts, and was received by the claimant at its registered office address. Mr Fawcett says that this was communicated to him by email from B&Q's agent, Howard Cooke, in an email to him dated 10 December 2018 enclosing the break notice; and by Barry Gowdy, who was a director of the claimant, in an email to Mr Fawcett dated 13 December 2018. He says that there was no contractual need to acknowledge receipt of the break notice. At all times, the claimant is said to have accepted the validity of the break notice.

27 Ms Tozer points out that the emails which Mr Fawcett exhibits merely state, in the case of the email from B&Q's agent, *"break notice for the units that will no doubt reach you eventually but I thought I would get you a copy now"*. Ms Tozer also points out that the other email, from a director of the claimant to Mr Fawcett, merely states:

> *"Please see attached scanned copy letter and documents from Birketts. Please advise if you wish me to sign and return the duplicate notice."*

I accept Ms Tozer's submission that all of this adds nothing of any real evidential weight to the evidence that is already before the court as to whether the notice was served by special delivery. I could, therefore, see no reason why the claimant should not be allowed to rely on that evidence.

28 The other element of the new evidence to be found in Mr Fawcett's third witness statement is the fact that, following service of the break notice, negotiations with B&Q had continued, and draft heads of terms had been circulated by B&Q's agents, dated 15 April 2019. Mr Fawcett points out that paragraph 8 of those heads of terms states that:

> "The existing lease is at a passing rent of £748,858 per annum, expiring on 11 February 2028 with a tenant's break notice, which has already been exercised, so expiry is 11 February 2023."

29 Those heads of terms had been produced by Savills, who were B&Q's agents, on Savills' notepaper, and had been forwarded to Mr Fawcett by the claimant's agent, Jones Lang LaSalle, acting by Mark Rudman. I could see no reason why that evidence should not be admitted at this late stage. I can see no proper basis upon which the defendant would need to respond to that evidence; and it adds very little to the evidence that is already before the court. It is evidence that the former tenant, B&Q, and its agents, regarded the break notice as having already been exercised; but it is no evidence that that position had been accepted by the claimant.

30 In short, I allowed Ms Holland to rely upon that evidence for three reasons: First, because it seemed to me that the assertion that there had been no valid service of the break notice, on the validity of which the defendant's s.26 request (which has given rise to this litigation) is

founded, was only advanced for the first time in Ms Tozer's skeleton argument, which was exchanged last Friday (25 November). Since then, there has been further activity in this litigation, in the form of an application by the defendant to exclude certain passages from Mr Fawcett's second witness statement, which has resulted in a hearing which, I am told, lasted three hours before HHJ Bever only yesterday. In those circumstances, I could understand why Mr Fawcett's third witness statement has been produced so late.

31 Secondly, it seemed to me to add very little to the evidence that was already before the court, for the reasons that Ms Tozer has advanced to me.

32 Thirdly, it seemed to me that there was very little, if any, evidence that the defendant could have adduced by way of response. The whole thrust of Ms Tozer's submissions is that this is not an appropriate case for summary judgment because the matter needs disclosure since the relevant events took place at a time when the defendant had no involvement with the property. That is why, Ms Tozer says, disclosure is required from the claimant, and possibly also third party disclosure from B&Q, their solicitors, Birketts, and their managing agents, Butler Mason Limited.

33 In those circumstances, I allowed the claimant to rely upon this further evidence, and refused Ms Tozer's application for an adjournment for the defendant to put in evidence in rebuttal. I should make it clear, however, that I would have decided this claim, and this application, in precisely the same way even if I had not had regard to Mr Fawcett's third witness statement.

34 In her skeleton argument on behalf of the defendant, Ms Tozer concedes that if, as she asserts, the alleged break notice was not effective, then the existing lease will not come to an end on 11 February and therefore the s.26 request dated 30 June 2022 must be invalid because the lease will remain 'on foot' beyond the date from which a new tenancy was requested.

However, Ms Tozer submits that if the break notice was effective, then her s.26 request would be valid, or at least that she has a case suitable for trial that that is the case.

35 Before turning to Ms Tozer's submissions, however, I remind myself that this is an application for summary judgment. Ms Tozer referred me to the law governing such applications, as summarised by Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]. The correct approach on applications for summary judgment is as follows:

(i) The court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success.

(ii) A 'realistic' defence is one that carries some degree of conviction, i.e., one that is more than merely arguable.

(iii) In reaching its conclusion, the court must not conduct a 'mini-trial'.

(iv) That, however, does not mean that the court must take at face value, and without analysis, everything that a defendant says in its statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

(v) In reaching its conclusion, however, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should not be decided without the fuller investigation into the facts at trial than

is possible or permissible on an application for summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case might add to, or alter, the evidence available to any trial judge, and so affect the outcome of the case.

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

36 At the end of oral submissions this morning, I referred both counsel to observations I have recently made in *The Metropolitan Borough Council of Sefton v Allenbuild Limited* [2022] EWHC 1443 (TCC). At [87], I fully accepted that in reaching its conclusion on an application for summary judgment, the court must take into account not only the evidence actually placed before it on that application but also the evidence that could reasonably be expected to be

available at trial. However, I went on to hold that a defendant must lay a sufficient evidential foundation for any submission that more evidence could reasonably be expected to be available at trial. A defendant should identify the nature of such evidence, and should explain why it was not presently available to be placed before the court. It was just not good enough for a defendant to express the unparticularised hope (like Mr Micawber in *David Copperfield*) that something might 'turn up'. I said that the fifth of the principles expounded by Lewison J in *Easyair* should not be seen as an endorsement of such Micawberism. In that case, I held that the defendant had laid no such evidential foundation, nor had the defendant persuaded me that there was any need, or any proper basis, for adjourning the summary judgment application. By way of example, the defendant had pointed to no difficulties in adducing any evidence from the solicitors who had represented it in the adjudication proceedings. In that case, pursuant to the overriding objective, and in the interests of proportionality, and the saving of the time and costs of a further hearing, involving further recourse to the court's scarce resources, justice to both parties had dictated that I should finally determine the summary judgment application at that hearing.

37 In response to that, Ms Tozer took me to passages at paragraph 24.2.5 of the current (2022) edition of Volume 1 of *Civil Procedure*, at pages 797-8. There it is emphasised that the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success, and that there is no other reason for a trial. If an applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospects of success, or some other reason for a trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief. In determining that question, the court must bear in mind that the respondent's case must carry some degree of conviction. The court is not required to accept, without analysis, anything that may be said

by a party in their statements before the court. In evaluating the prospects of the success of a claim or a defence, judges are not required to abandon their critical faculties; but the proper disposal of an issue under Part 24 does not involve the judge in conducting a mini-trial, so the court hearing a Part 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible, and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, and not the judge hearing an interim application, unless there is some inherent improbability in what is being asserted, or some extraneous evidence which would contradict it. When deciding whether the respondent has some real prospect of success, the court should not apply the standard which would be applicable at trial, namely the balance of probabilities, on the evidence presented on an application for summary judgment; the court should also consider the evidence that could be reasonably expected to be available at trial.

38 Ms Tozer, in her skeleton argument and her oral submissions, takes a number of points on the validity of the break notice. Her first point is that the break notice was given on 10 December 2018, to expire on 11 February 2023; that was some four years and two months before the expiry of the break notice. Ms Tozer submits that that was too long before the break date. She submits that a break notice should be given a reasonable time before the break date. She points out that in the present case the break date was the first occasion on which the rent for the premises was to be reviewed, on an upwards only basis, to the open market rent for the demised premises. Previous rent reviews had been to a predetermined rental level. She submits that the question of whether the break notice was served prematurely is a matter which requires the context of the lease to be weighed in order to determine what the parties objectively should be taken to have intended as to when the break notice might be served.

39 Ms Tozer has referred me to the decision of His Honour Judge Thomas, sitting as a judge of the Chancery Division, in *Multon v Cordell* [1986] 1 EGLR 44. That case involved an option for the renewal of a lease for a further term of 21 years after the expiry of the existing term of 35 years. It was not concerned with a tenant's break notice. The issue was whether a request to exercise the option, made as early as January 1981, was valid when the original term was only due to expire in 1984. The option in question provided that the landlord would, on the written request of the tenant, made three months before the expiration of the term thereby created, and if there should not, at the time of such request, be any existing breach or non-observance of any of the covenants on the part of the tenant, grant a new lease of the demised premises for a further term of 21 years from the expiration of the term, at the same rent, and containing the like covenants and provisos as were therein contained.

40 The judge held that the option clause contemplated that the request should be made a reasonably short time before the Christmas of 1983, especially in view of the proviso in the clause that there must be no breach or non-observance of covenants at the date of the request. Since the request had been made nearly three years before Christmas 1983, the judge held that it had not been made at a reasonable time and was, therefore, invalid. The judge's reasons are set out at page 45 between letters B and D. The judge held that in specifying a period of three months before the expiration of the term of 35 years, the clause was specifying a brief period before the expiration of that term; and this suggested to him that the request must be made within a reasonably short time before Christmas 1983. He also noted that the clause provided that breaches or non-observance of the tenant's covenants were to be considered at the time the request was made. It seemed to him that it must have been in the contemplation of the parties, when the lease was executed, that consideration of whether or not there were breaches of covenants should be as late in the term of years as was reasonably possible; in

other words, that there should not be a long interval between the request and the end of the term.

41 I have no doubt that in the particular context of that lease, and dealing with a tenant's option to renew rather than a tenant's option to break, the decision of the judge was entirely correct; but this case is, as Ms Holland submits, clearly distinguishable. This is an option to determine the lease, and not an option to require a new term. There is no significance in the date of exercise of the break, as there was with the date of the exercise of the option to renew in *Multon v Cordell*. When one is concerned with whether a lease is going to be brought to an end, there is advantage to both landlord and tenant in knowing as soon as possible whether the lease is going to come to an end prematurely, and in advance of its contractual expiry date, by the exercise of an earlier tenant's break clause.

42 Further, the clause in the present case is very differently worded to that in *Multon v Cordell*. Rather than referring to a written request made three months before the expiration of the term, clause 21 provides that if the tenant shall desire to determine the term on or after 11 February 2023, and shall give to the landlord not less than six calendar months' prior notice in writing of its desire, then the lease, and everything therein contained, shall cease and determine. The break notice has to be exercised not less than six calendar months prior to the break date, but there is no provision for any maximum period of notice; and I see no reason to imply any term that the notice is to be given only a reasonable time before a date six months before 11 February 2023.

43 In my judgment, there is no real prospect of the defendant succeeding at trial in an argument that the break notice is invalid because it was given prematurely. Ms Tozer submitted that at the time of the grant of the lease, the original parties could not possibly have intended that

a valid break notice could be served years ahead of the break date since there would be a very real risk that one party or the other would forget, due to changes in personnel or otherwise, that this had occurred, leading to injustice or potential hardship. In my judgment, it achieves certainty, and avoids any risk of forgetting about the need to exercise the break clause, to construe it as being exercisable at any time at least six months before the break date. In the present case, it was exercised soon after the immediately preceding rent review date; and I can see nothing wrong with that.

44 Ms Tozer's next point related to the fact that the break notice had been given by Birketts on behalf of B&Q, acting on the instructions of the managing agents. She submitted that there was no evidence of the terms, or scope, of the power of attorney pursuant to which Butler Mason had been acting as managing agent for B&Q Plc. I am entirely satisfied, on the documents that are before the court, that Birketts, acting as solicitors for Butler Mason, who had been invested with the powers of management of the property, had full authority from B&Q to give the break notice on their part. B&Q themselves had described Butler Mason's role as that of asset manager taking on overall responsibility for the management of this portfolio property; that was in their letter to the claimant of 4 October 2016. I am entirely satisfied that there can be no issue as to the authority of Birketts to have given the break notice on behalf of B&Q.

45 The next point is whether a reasonable recipient of the notice would have been in any doubt that it was given on behalf of B&Q Plc. The doubt is said to arise from the fact that in the Birketts letter, and also in the notice to terminate itself, the tenant is described as B&Q Plc (without any gaps between the B, the ampersand, and the Q) whereas at the time the notice was given, the correct name of the tenant was B & Q Plc (with gaps between the B, the ampersand, and the Q). I am in no doubt whatsoever that anyone reading this notice would

have entertained no doubt that it was being given on behalf of B&Q as the tenant of the lease. The notice is expressed to be given on behalf of the tenant of the premises under the lease dated 11 February 2008. When one looks to the lease itself, there is no consistency as to how the tenant's name appears: On the front sheet, there are gaps between the B, the ampersand, and the Q; but in the description of the tenant, in the prescribed clauses at LR3, there are no such gaps. When one goes to the parties clause, there are such gaps; but when one goes to the provisions as to service in clause 16.1.2.1, again there are no gaps between the B, the ampersand, and the Q. Thus there is no internal consistency in the lease itself as to how the tenant's name appears. I have no doubt whatsoever that the reasonable recipient of the break notice, and its accompanying letter, would have taken the view that it was being given on behalf of the tenant under the lease.

46 Ms Tozer's next point was that there is no evidence of proper service of the break notice in accordance with the provisions of the lease. She points to clause 16.1, which provides that a notice under the lease must be in writing and, unless the receiving party or its authorised agent acknowledges receipt, is valid if (and only if) it is given by hand or sent by special delivery post or recorded delivery. Ms Tozer points to the fact that there is no evidence that the notice was sent by special delivery beyond the fact that that is stated on the face of the notice. Ms Tozer makes the valid point that Mr Fawcett's third witness statement does not provide any documentary evidence in support of his assertion (at paragraph 10.3) that the break notice was served by special delivery by B&Q's lawyers, Birketts, and received by Vistra at its registered office address. However, the notice was, on its face, headed 'By Special Delivery' as well as 'First Class Post'. The break notice was clearly treated by the former tenant, B&Q Plc, as having been effective, as evidenced by the heads of terms for the B&Q surrender prepared by B&Q's own agents, Savills. The defendant's former solicitors had proceeded upon the footing that the break notice had been validly served. As they stated

in their letter of 24 August, the break notice was effective to bring to an end the original tenancy; and it was on that footing that the s.26 request had been served which has led to the present claim.

47 In my judgment, and against that background, to raise a triable issue as to the proper service of the break notice, it was incumbent upon the defendant to point to some credible evidence to contradict the statement on the face of the Birketts' covering letter that it had been sent by special delivery. There is no reason to question the validity of that statement made in a letter dated as long ago as 10 December 2018. In my judgment, the defendant has not raised a triable issue on that point.

48 Ms Tozer also submitted that anything may have happened between 2018 and 2020 that could have led to the break notice being withdrawn, or being treated as being of no effect. The fact, however, is that at the time it took the assignment, the defendant was aware that the claimant was asserting that there had been a valid break notice. The claimant's solicitors invited Birketts to make it clear to the defendant that the claimant had entered into an agreement with a third party to take a new lease of the unit following the expiry of the current lease after service of the break notice; and Birketts assured the claimant's solicitors that the defendant, as the prospective assignee, was aware of the claimant's agreement with that third party. In those circumstances, I am satisfied that it is mere speculation to suggest that the break notice had in any way been withdrawn or suspended. Ms Tozer makes the point that she only needs to succeed on any one of those arguments; but I am satisfied that she has not raised a triable issue as to any of them.

49 Finally, Ms Tozer accepts that if the alleged break notice was ineffective, then the s.26 request was invalid. However, she submits that if it was effective, then it does not follow that the s.26

request was invalid. Her argument is that s.26(4) of the Landlord and Tenant Act only precludes a tenant from serving a request where 'the tenant' has already given notice to quit. She submits that the natural meaning of those words is that a tenant is precluded from serving a s.26 request where it itself has already served a break notice. She submits that there is nothing on the face of the provision to suggest that it is intended to apply where a break notice has been served by a predecessor of the tenant making the s.26 request. In that regard, she points to provisions in the Landlord and Tenant Act 1927 which distinguish between the present tenant and its predecessors in title.

50 I cannot accept that submission. Section 26(4) provides that a tenant's request for a new tenancy shall not be made if the tenant has already given notice to quit. I see no reason for restricting that section to a notice to quit given by the same tenant as the tenant who makes the request for a new tenancy. Section 26(4) does not provide that a tenant's request for a new tenancy shall not be made if **that** tenant has already given notice to quit. If Ms Tozer were right, then if a tenant were to serve a contractual break notice, and then assign to a successor, that successor could serve a s.26 request. That seems to me to run counter to any sensible reading of the section; and also to run counter to the reasoning of the first instance judge, Rattee J, in *Garston v Scottish Widows*, which was expressly accepted by Nourse LJ (with the agreement of Mummery LJ and Sir John Vinelott) on appeal.

51 I accept Ms Holland's submissions that that does not represent the law. Once a tenant has served a contractual break notice, then any tenant of those premises is precluded from making a request for a new tenancy. Moreover, if, as in the present case, a request for a new tenancy were made to commence on the day immediately after the break date, then that would not comply with the requirements of s.26(2) because of the proviso to that subsection, as it has

been construed in *Garston v Scottish Widows*. That date would be earlier than the date when the current tenancy would otherwise come to an end by fluxion of time.

52 So, for all of those reasons, and despite Ms Tozer's valiant submissions to the contrary, I am entirely satisfied that the defendant has no real prospect of successfully defending this claim; and there is no suggestion that there is any other reason why the claim should proceed to a trial. I therefore grant the claimant's application. That concludes this extemporary judgment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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