Case No: K00RL163

IN THE COUNTY COURT AT WREXHAM

Mold Justice Centre
Civic Centre, Mold, CH7 1AE

Date: 8 January 2024

Before:

HIS HONOUR JUDGE KEYSER KC

- -

Between:

MOIRA ROSE GOULDEN	**Claimant**
- and -	
ANDREW JONATHAN MILNE	**Defendant**

- -
- -

Richard Oughton (instructed by **Albinson Napier Ltd**) for the **Claimant**
The Defendant in person

Hearing date: 18 December 2023

- -

Approved Judgment

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. By a Part 8 claim form issued on 2 March 2023, the claimant, Moira Goulden, claims to acquire the freehold estate in Crown House, 24-28 Bodfor Street, Rhyl ("the Premises") pursuant to Part 1 of the Landlord and Tenant Act 1987 ("the 1987 Act"). By an order dated 7 June 2023 District Judge Jones-Evans directed that the issue whether the claimant is entitled to acquire the freehold estate be tried as a preliminary issue. I heard the trial of the preliminary issue on 18 December 2023 and this is my judgment upon it.

2. The Premises are a four-storey building comprising nine residential flats, eight of which are demised on long leases at a peppercorn rent and with a service charge, and two commercial units on the ground floor. The ninth residential flat comes with the freehold.

3. The defendant, Mr Milne, is the freehold owner of the Premises, which he purchased on 1 June 2022 for £40,000. The defendant is a practising solicitor and carries on his business in the name Andrew Milne & Co.

4. The claimant is tenant of Flat 1 at the Premises on a long lease. She commenced these proceedings as the nominated purchaser under the 1987 Act on behalf of herself and other residential tenants at the Premises.

5. The significance of the facts will become clear in the context of the relevant statutory provisions, which I shall set out first. Then I shall identify the issues that fall for determination in the light of the facts and address those issues in turn.

The statutory provisions

6. Section 1 of the 1987 Act provides in relevant part:

> "(1) A landlord shall not make a relevant disposal affecting any premises to which at the time of the disposal this Part applies unless—
>
> (a) he has in accordance with section 5 previously served a notice under that section with respect to the disposal on the qualifying tenants of the flats contained in those premises (being a notice by virtue of which rights of first refusal are conferred on those tenants); and
>
> (b) the disposal is made in accordance with the requirements of sections 6 to 10.
>
> (2) Subject to subsections (3) and (4), this Part applies to premises if—

(a) they consist of the whole or part of a building; and

(b) they contain two or more flats held by qualifying tenants; and

(c) the number of flats held by such tenants exceeds 50 per cent. of the total number of flats contained in the premises.

(3) This Part does not apply to premises falling within subsection (2) if—

(a) any part or parts of the premises is or are occupied or intended to be occupied otherwise than for residential purposes; and

(b) the internal floor area of that part or those parts (taken together) exceeds 50 per cent. of the internal floor area of the premises (taken as a whole);

and for the purposes of this subsection the internal floor area of any common parts shall be disregarded."

Section 60(1) provides that "'common parts', in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it." The expression "qualifying tenants" is defined in section 3, but I need not set out that provision.

7. It is common ground that the former landlord did not, before selling the freehold estate to the defendant, serve a notice pursuant to section 5 of the Act. The first question, therefore, is whether the Premises were ones to which Part 1 of the 1987 Act applied at the time of the sale. If they were, section 11 applies, and it is common ground that, if section 11 applies, section 12B also applies in these proceedings. Section 11 provides in relevant part:

"(1) The following provisions of this Part apply where a landlord has made a relevant disposal affecting premises to which at the time of the disposal this Part applied ('the original disposal'), and either—

(a) no notice was served by the landlord under section 5 with respect to that disposal, or

…

and the premises are still premises to which this Part applies.

(2) In those circumstances the requisite majority of the qualifying tenants of the flats contained in the premises affected by the relevant disposal (the 'constituent flats') have the rights conferred by the following provisions—

…

section 12B (right of qualifying tenants to compel sale, &c. by purchaser), …

…

(3) In those sections the transferee under the original disposal (or, in the case of the surrender of a tenancy, the superior landlord) is referred to as 'the purchaser'.

…"

The expression "the requisite majority of qualifying tenants of the constituent flats" is defined in section 18A(1) to mean "qualifying tenants of constituent flats with more than 50 per cent of the available votes." It is unnecessary for present purposes to set out the remaining provisions of section 18A, which explain how the basic definition is to be applied.

8. Section 12B of the 1987 Act provides in relevant part:

"(1) This section applies where—

…

(b) the original disposal did not consist of entering into a contract.

(2) The requisite majority of qualifying tenants of the constituent flats may serve a notice (a 'purchase notice') on the purchaser requiring him to dispose of the estate or interest that was the subject-matter of the original disposal, on the terms on which it was made (including those relating to the consideration payable), to a person or persons nominated for the purposes of this section by any such majority of qualifying tenants of those flats.

(3) Any such notice must be served before the end of the period of six months beginning—

(a) …

(b) in any other case, with the date by which—

(i) notices under section 3A of the Landlord and Tenant Act 1985 (duty of new landlord to inform tenants of rights) relating to the original disposal, or

(ii) where that section does not apply, documents of any other description indicating that the original disposal has taken place, and alerting

the tenants to the existence of their rights under this Part and the time within which any such rights must be exercised,

have been served on the requisite majority of qualifying tenants of the constituent flats.

…

(7) Where the property which the purchaser is required to dispose of in pursuance of the purchase notice has since the original disposal increased in monetary value owing to any change in circumstances (other than a change in the value of money), the amount of the consideration payable to the purchaser for the disposal by him of the property in pursuance of the purchase notice shall be the amount that might reasonably have been obtained on a corresponding disposal made on the open market at the time of the original disposal if the change in circumstances had already taken place."

9. Two further provisions of the 1987 Act may be noted. Section 12D provides that the person or persons initially nominated for the purposes of (in this case) section 12B shall be nominated in the notice under that section. (In the present case, the claimant was so nominated.) Section 19 provides:

"(1) The court may, on the application of any person interested, make an order requiring any person who has made default in complying with any duty imposed on him by any provision of this Part to make good the default within such time as is specified in the order.

(2) An application shall not be made under subsection (1) unless—

(a) a notice has been previously served on the person in question requiring him to make good the default, and

(b) more than 14 days have elapsed since the date of service of that notice without his having done so.

(3) The restriction imposed by section 1(1) may be enforced by an injunction granted by the court."

10. I turn to the relevant provisions of the 1985 Act. Section 3 provides in relevant part:

"(1) If the interest of the landlord under a tenancy of premises which consist of or include a dwelling is assigned, the new landlord shall give notice in writing of the assignment, and of his name and address, to the tenant not later than the next day on which rent is payable under the tenancy or, if that

is within two months of the assignment, the end of that period of two months.

…

(3) A person who is the new landlord under a tenancy falling within subsection (1) and who fails, without reasonable excuse to give the notice required by that subsection, commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale."

Section 3A of the 1985 Act provides:

"(1) Where a new landlord is required by section 3(1) to give notice to a tenant of an assignment to him, then if—

(a) the tenant is a qualifying tenant within the meaning of Part I of the Landlord and Tenant Act 1987 (tenants' rights of first refusal), and

(b) the assignment was a relevant disposal within the meaning of that Part affecting premises to which at the time of the disposal that Part applied,

the landlord shall give also notice in writing to the tenant to the following effect.

(2) The notice shall state—

(a) that the disposal to the landlord was one to which Part I of the Landlord and Tenant Act 1987 applied;

(b) that the tenant (together with other qualifying tenants) may have the right under that Part—

(i) to obtain information about the disposal, and

(ii) to acquire the landlord's interest in the whole or part of the premises in which the tenant's flat is situated; and

(c) the time within which any such right must be exercised, and the fact that the time would run from the date of receipt of notice under this section by the requisite majority of qualifying tenants (within the meaning of that Part).

(3) A person who is required to give notice under this section and who fails, without reasonable excuse, to do so within the time allowed for giving notice under section 3(1) commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale."

The Facts

11. The documents and witness statements refer to a good many matters that have no real bearing on the issues that fall to me to determine. I shall restrict this narrative to the important facts, although I have borne in mind the evidence on the other matters.

12. On 27 April 2022 the freehold estate in the Premises was marketed for sale at auction. The defendant was the successful bidder.

13. It is the defendant's case that he sent to each tenant of a residential flat at the Premises a letter dated 25 May 2022 comprising notices under section 3 and section 3A of the 1987 Act. The text of the letter was as follows:

> "I am writing in relation to your lease of the above mentioned property.
>
> I purchased the freehold of the property at auction on 27 April 2022. I am therefore your new landlord. Completion was due today but I have delayed it slightly until 1 June 2022 which is the start of the service charge year.
>
> I notify you under Section 3 of the Landlord and Tenant Act 1985 that my address is [address set out].
>
> The address for service of notices under Section 40 of the Landlord and Tenant Act 1987 is the same.
>
> Please also take notice:-
>
> (a) the disposal to me was one to which Part I of the Landlord and Tenant Act 1987 applied.
>
> (b) that you as tenant (together with other qualifying tenants) may have the right under that Part—(i) to obtain information about the disposal, and (ii) to acquire my interest in the whole or part of the premises in which your flat is situated; and
>
> (c) the time within which any such right must be exercised is 6 months, and please note the fact that the time would run from the date of receipt of this notice under that Part by the requisite majority of qualifying tenants (within the meaning of that Part).
>
> The price paid at auction was £40,000 with a 10% deposit with no prior exchange of contracts.
>
> Please confirm safe receipt."

14. The claimant and those on whose behalf she acts say that they never received this letter and they do not accept that it was ever sent. I address this dispute below.

15. On 1 June 2022 the defendant completed the purchase of the freehold estate in the Premises. (There had been no prior exchange of contracts.)

16. On 31 August 2022 the present defendant, Mr Milne, commenced a Part 7 claim against the present claimant, Ms Goulden, claiming £66,100 for arrears of service charges under her long lease. Those proceedings are currently subject of what has been described to me as an "informal stay" pending the outcome of this case. Mr Milne's contention is that the residential tenants at the Premises had not been paying the service charges for several years, with the result that the Premises had fallen into disrepair, and that it was Ms Goulden who was (so to speak) the ringleader of the default. He says that he believed that, if she paid up, the other tenants would do so as well.

17. On 7 December 2022 solicitors acting for the claimant and for a purported requisite majority of qualifying tenants served on the defendant a notice under section 12B of the 1987 Act. The notice, which was dated 5 December 2022, was signed by Sarah Napier, a solicitor, of "Albinson Napier & Co", and stated that it was given on behalf of the following tenants (whom I shall call "the purchasing tenants"):

- The claimant: Flat 1
- Timothy Adewale Adetunji: Flat 2
- Timothy Adewale Adetunji: Flat 3
- Bryn Humphreys: Flat 6
- Peter Harding: Flat 8.

18. The defendant accepts that he was served with the notice but he denies its validity and contends (i) that it was served out of time, (ii) that it was not served on behalf of a requisite majority of qualifying tenants and (iii) that it was in some way invalidated by the allegedly incorrect description of the solicitors' firm on the notice.

19. The defendant served a counter-notice dated 3 January 2023. This is a remarkable, 11-page document, to which mere paraphrase or selected passages cannot do justice. It is, however, necessary to make the attempt, because both the relevant and the wholly irrelevant parts of the counter-notice have some bearing on a determination of the issues. The counter-notice was addressed to Albinson Napier Ltd. The main body of the counter-notice was divided into sections marked A to T. They included the following matters.

Section A: This began, "On receipt of your not validly signed and purported Notice giving fake details …" It went on to say that the defendant had been assured that the former landlord had served the notice required by section 1 of the 1987 Act. It said that, if the tenants brought proceedings pursuant to the section 12B notice, the defendant would join the former landlords and their professional advisers: "This means that your four customers can expect to be ordered to pay their costs as well at the end of the trial."

Section B: This stated reliance on the notice in the letter dated 25 May 2022 and asserted that the section 12B notice was therefore out of time, having been served more than six months later.

Section C: This stated that Part I of the 1987 Act did not apply to the Premises, "because less than 50% of Crown House is in residential use." The defendant explained how he arrived at that conclusion. Here, I mention two particular things in the section, as follows:

> "9. The sellers served notices, and I reflected this in the Section 3 Notices which I served, solely out of an abundance of caution, because we have an extremely professional fail safe approach, but it was never necessary to serve any such notices because less than 50% of Crown House is in residential use."

And, after setting out the reasons for his conclusion that less than 50% of the Premises was in residential use:

> "It is clear from this that there was never any basis for your Notice dated 5 December 2022 and you have acted both maliciously and dishonestly in serving it. I formally accuse you and your four customers of fraud. I claim damages for fraud for the costs of investigation of your Notice dated 5 December 2022 and the preparation and service of this Counter Notice. I have also ceased to progress various matters at Crown House and claim damages of £10,000 a month from your company and each of your four customers from 5 December 2022. You should take this as a formal Claim against you and I require the name and address of your professional indemnity insurers by return and your policy number. Please agree to pay me damages by 5pm on 31 January 2023 failing which Court proceedings will be issued against you and your four customers without any further notice."

(I ought to mention that no agreement to pay damages was forthcoming and that no proceedings were commenced.)

Section D: This said that efforts to locate Timothy Adewale Adetunji had been fruitless and continued, "This would suggest that no one of that name exists or the person lives overseas and has given a fake address in the UK or even a fake name. … I do not accept that Timothy Adewale Adetunji exists and so, therefore, I do not accept that he is a qualifying tenant for any purpose." A request was made for documentary proof of Mr Adetunji's attendance. (I ought to mention that Mr Adetunji gave evidence before me, when his identity was not challenged.)

Section E: This contended that the leaseholder of Flats 2 and 3 was not a qualifying tenant because he was renting the flats out and so was "operating a business".

Section F: This alleged that the leaseholder of Flat 2 was not a qualifying tenant because the flat was "being used for business purposes for dealing in drugs".

Section G: This noted that the section 12B notice did not give the full names of two of the four purchasing tenants (Mr Humphreys and Mr Harding) and said:

> "25. … This makes me believe that they are not genuinely your customers and you did not do valid client take up procedures for them because you would then have become aware of their real names.

> 26. Due to the likelihood that they would be sued for damages as a result of your fake Notice, I consider it much more likely that they refused to authorise service of the Notice in their names and so you gave names which were not their full names in your Notice to try to obscure this.
>
> …
>
> 28. This is an additional event of fraud by you in relation to your Notice dated 5 December 2022."

Section H: This said that Dominos, the commercial lessee of part of the ground floor was threatening to sue over disrepairs. The text said that any disrepairs were due to the non-payment of service charges, and that the defendant intended to "join the four tenants into any Court proceedings brought by Dominos and the tenants can decide if they wish to pay a substantial six figure sum to address Domino's complaints. If they do not want to, they must then pay to mount their defence of the proceedings to the end of the trial and be prepared to pay any Judgment if they are unsuccessful."

Section I: This referred to the use of the name "Albinson Napier & Co" under Ms Napier's signature on the section 12B notice. It said, "This is a lie. Albinson Napier & Co is not the name of a firm of solicitors. It is not the name of your firm. It is also not a trading name of your business given on your letterhead or a trading name of your business registered with your own regulator or the Law Society." The point, apparently, was that the firm's entry on the Law Society website showed only the corporate name Albinson Napier Ltd and no trading name.

Section J: This focused on the name of the signatory, Sarah Jane Napier, which was said to be "fake", on the grounds that the Law Society's website showed no solicitor of that name at the firm. (I ought to record that Ms Napier gave evidence before me and was not challenged as to her identity. My understanding is that she was formerly known by a different name.)

Section K: This restated and expanded the allegation that both the individual solicitor's name and the firm's name were "fake". It advised the purchasing tenants "to seek independent legal advice and ask genuine solicitors to provide [an explanation as to] why two sets of fake details were given." It went on to suggest that the firm had given "fake identities" because it was in "very serious financial difficulties" and was attempting to "operate under the radar." The section ended:

> "49. It is disgusting that you were insolvent, because you were incapable of managing your own affairs, but you used fake identities to harass me with a fake Notice just so you could milk your client of £10,000 for completely worthless work.
>
> 50. Your gross professional misconduct is above the evidential threshold for prosecution before the Solicitors Disciplinary Tribunal. … An expert has examined all the documents and has identified 37 separate charges to make against you. The expert has recently dealt successfully with one of the largest cases to ever be referred to the Solicitors Disciplinary Tribunal. Virtually

> 100% of prosecutions are successful. Your misconduct is particularly blatant and persistent. I require you to show cause by 5 pm on 31 January 2023 why I should not make Application to the Solicitors Disciplinary Tribunal against your Company and both Mr Napiers without any further notice or warning.
>
> 51. I also require you to self report all these matters immediately to the Solicitors Regulation Authority and provide me with a copy of your Self Report."

(I ought to record two matters. First, the firm did not comply with the defendant's requirements but he did not take the threatened action. Second, the defendant was asked at trial who the "expert" mentioned in paragraph 50 of the notice was. Initially he claimed to be entitled to refuse to answer on grounds of privilege. When I rejected the claim of privilege and asked him to answer, he declined to do so.)

Section L: This alleged that the solicitors' failure to provide correct corporate information was a criminal offence.

Section M: This asserted a claim jointly and severally against the firm and the purchasing tenants. It said that the claim was, "[s]o far", in excess of £40,000 and it asked for the firm's insurance details, threatening to apply to the Solicitors Disciplinary Tribunal for both senior partners in the firm to be suspended from practice until the details were provided.

Section N: This was broadly a re-hash of the point about the solicitor's and the firm's names, with the added allegation that they were operating without insurance. Paragraph 58 said:

> "It is important for the four individuals you claim to represent to understand that they were not represented by solicitors, or even by an individual solicitor, in the giving of the fake notice dated 5 December 2022. They have none of the protections of a solicitor giving and signing the fake Notice dated 5 December 2022. The Notice lacks any legal validity and the position is just the same as though it had been signed by fake 'Solicitors' called 'Freddy the Gerbil' and a fake individual 'solicitor' called 'Billy the Guinea Pig'."

Section O: This alleged that, as a result of work he had done since acquiring the freehold, the defendant now valued his interest at £285,000. (I note that in paragraph 49 of his witness statement dated 1 December 2023 he values his interest at £407,880.)

Section P: This "rejected" the section 12B notice, for reasons already stated.

Section Q: This is adequately explained by its heading: "Notice Is Fraud".

Section R: This said that, if court proceedings were commenced pursuant to the section 12B notice, security for costs was required from Mr Adetunji "on the grounds that he is a foreign national who lives overseas." The amount of security required, which was said to represent "the costs to the end of trial", was "£300,000 plus VAT." (In evidence

before me, the defendant said that this was a typographical error and should have read, "£30,000 plus VAT". However, having regard to the tenor and tone of the counter-notice as a whole, I reject that evidence. I do not believe that there was any error. Needless to say, no security for costs was given and the defendant did not make an application in that regard, as he threatened to do.)

Section S asserted a claim for costs against the firm and the purchasing tenants.

Section T asserted a claim for damages against the firm and the purchasing tenants.

20. For the claimant, Mr Oughton submitted that the counter-notice was an attempt to intimidate the purchasing tenants and to obscure the true issues. I regard the submission as well-founded. The terms of the counter-notice would, to say the least, have been inappropriate coming from anyone. Coming from a practising solicitor, they are disgraceful and inexcusable.

21. On 12 January 2023 a default notice (dated 11 January 2023) under section 19 of the 1987 Act was served on the defendant on behalf of the purchasing tenants.

22. As I have said, these proceedings were commenced on 1 March 2023. It is unnecessary here to record the procedural history thereafter.

The issues for determination

23. In view of the common ground between the parties, and in the light of the submissions that were made to me at trial, the following questions fall to be answered.

    1) Did Part I of the 1987 Act apply to the Premises? This question has to be answered in respect of two different times, namely the date of the sale to the defendant and the date of the service of the purchase notice. However, it is not suggested that the answers differ on the facts of this particular case. The application of Part I of the 1987 Act turns on section 1(3). If Part I did not apply, that is an end of the matter.

    2) Was the purchase notice served by the requisite majority of qualifying tenants?

    3) Was the purchase notice served within the specified time limit?

Did Part I of the 1987 Act apply to the Premises?

24. It is, at first sight, a little surprising that this matter is in issue. The letter dated 25 May 2022, which the defendant claims to have sent to each residential tenant at the Premises, asserted in terms: "the disposal to me was one to which Part I of the Landlord and Tenant Act 1987 applied." In paragraph 51 of his witness statement dated 1 December 2023 the defendant asserted: "The sellers were required to serve notices under the Landlord & Tenant Act offering first refusal to the long leaseholders before entering the property at auction." In paragraph 52 he stated that, before spending any money on the Premises after he had purchased them, he specifically sought and obtained confirmation from the sellers' solicitors that notices had been served and that the long leaseholders had not reserved their rights by replying to the notices. In paragraph 57

he stated that, after receiving the purchase notice, he contacted the selling agent and received confirmation: "We did serve notices", and "We know the law." The defendant gave oral evidence to the same effect. Paragraphs 60 to 63 of the witness statement complain that the sellers and their agent deliberately sought to obtain an inflated price for the Premises by not serving the notices and by lying about the matter.

25. However, the defendant's contention is that Part I of the 1987 Act did not apply to the Premises, because the case falls within section 1(3): (a) parts of the Premises are occupied otherwise than for residential purposes, and (b) the internal floor area of those parts (taken together) exceeds 50% of the internal floor area of the premises (taken as a whole). Indeed, in paragraph 16 of his counter-notice he asserted: "No honest person standing outside Crown House looking at the non-residential ground floor and six first floor windows in the side street denoting the non-residential element of the first floor could ever claim that it has over 50% residential use."

26. In principle, the exercise required for the purposes of section 1(3) is straightforward.

    i. One calculates the total internal floor area of the premises, excluding the internal area of any common parts as defined. (Let this be "Area A".)

    ii. One calculates the combined internal floor area of all parts of the premises that are occupied or intended to be occupied otherwise than for residential purposes, again excluding the internal area of any common parts as defined. (Let this be "Area B".)

    iii. If Area B exceeds 50% of Area A, Part I of the 1987 Act does not apply.

27. Pursuant to case management directions, Ms Hannah James, a chartered building surveyor, of Hannah James Associates Ltd, was appointed as a single joint expert to measure the Premises and opine as to whether the requirements of section 1(3)(b) were satisfied. She produced a report dated 6 December 2023. No written questions were put to her. (The defendant told me that Ms James had been unwell in the period between the production of her report and the trial.) No request was made that she attend court to be cross-examined.

28. A summary of Ms James's calculations is as follows.

- The total internal area of the Premises is 1518.2m².
- The sum of the internal areas of communal areas, storage areas, commercial areas and residential areas is 1446.9m².
- The difference between those two figures (71.3m²) represents the thickness of the internal walls, which is included in the figure for the total internal area.
- The total internal area of communal and storage areas is 330.4m². Of this, 262.9m² represents what have been referred to as storage areas: 212.7m² for a storage area on the first floor, and 50.2m² for a storage area on the third floor.
- The total internal area of the Premises (1518.2m²) less the total internal area of communal and storage areas (330.4 m²) is 1187.8m².

- The total internal area of those parts in commercial use is 412.3m² (including internal walls).

- The total internal area of those parts in residential use (i.e. the flats) is 704.2m² (including internal walls).

29. Ms James recorded some limitations of her report. In particular, she had not been able to gain access to several areas, "including the ground floor commercial areas, Flat 4 and the storage area on the third floor." She recorded that 50.2 m² of usable loft space on the third floor was accessible only via an access hatch in Flat 4 and that it had not been possible to confirm whether Flat 4 had an internal staircase to that area; therefore she had deemed the area to be non-residential, though if there were an internal staircase from Flat 4 it would be reasonable to treat it as residential. As for Flat 4 itself, Ms James was satisfied that access to the flat would be unlikely to alter her assumed calculations. Regarding the storage area on the first floor, she opined that, because of its size, regular access by those storing items there would be significant and disruptive to residents, though if the storage were not accessed (i.e. regularly) less disruption would be caused.

30. Ms James's conclusion was as follows:

> "84. As instructed, disregarding common areas (including storage areas to 1st and 3rd floor) gives a total internal floor area of 1187.8m². The % of these as residential areas (704m²) is 59.28%.
>
> 85. And so therefore the internal area of the premises as flats does exceed 50% of the sum of the whole internal areas of the premises and the requirements of section 1(3)(b) are satisfied.
>
> [And from Appendix C]
>
> This leaves a balancing figure of 6% which is explained through the measure of internal walls. This 6% does not affect the outcome in respect of section 11. And so therefore the internal areas of the premises as flats does exceed 50% of the sum of the whole internal areas of the premises and the requirements of section 1(3)(b) are satisfied."

31. The defendant submitted that Ms James had made errors of method and had thereby been led to a false conclusion. In particular:

1) He submitted that the residential area ought to have been reduced by the removal of the area occupied by the internal walls. In this regard he proposed a reduction of 5%, bringing the residential area (excluding common parts) to 668.99m².

2) He submitted that a further 7m² should be deducted from the residential area, because Ms James had wrongly treated a small common area outside Flat 8 as residential. This deduction would bring the total residential area (excluding common parts) to 661.99m².

3) More importantly, he submitted that the so-called storage areas on the first and third floors should not be treated as communal areas but rather as areas occupied or intended to be occupied for non-residential purposes, namely as storage facilities. The sum of these areas is 262.9m².

32. The defendant offered his own calculation, which purported to show that an area in excess of 50% of the total internal area was occupied or intended to be occupied for non-residential purposes. I did not find his calculation pellucid. In my view, if the defendant's factual premises are used for the purposes of the statutory test, the available evidence is to the following effect.

- The total internal area of the Premises, excluding the internal walls, is 1446.9 m².
- However, the internal floor area of any common parts is to be disregarded for the purposes of section 1(3) of the 1987 Act. The internal area of the common parts is 67.5m².[1] This area is to be disregarded for the purposes of section 1(3) of the 1987 Act. Therefore, for the purposes of section 1(3), "the internal floor area of the premises (taken as a whole)" is 1379.4m².
- The total internal floor area of those parts occupied or intended to be occupied otherwise than for residential purposes, disregarding the common parts, is the sum of the internal area of the parts in commercial use (412.3m²) and the internal area of the so-called storage areas on the first and third floors (262.9m²). This is 675.2m².
- This means that any parts of the Premises that are occupied or intended to be occupied otherwise than for residential purposes represent 48.9% of the internal floor area of the Premises taken as a whole.
- If the area adjacent to Flat 8 is to be treated not as residential but as common parts, the calculations are altered only slightly. For the purposes of section 1(3), the internal floor area of the premises (taken as a whole) is reduced to 1372.4m². This results in the area occupied or intended to be occupied otherwise than for residential purposes increasing to 49.2%.
- Therefore section 1(3) of the 1987 Act does not take the Premises outside the application of Part I.

33. However, I am not persuaded that the facts relied on by the defendant are correct in any event.

a) He seeks to remove all internal walls from the calculation. The removal of the internal walls from the internal area is presumably justified on the basis that they are part of the structure. However, there is very limited evidence on this point. Such evidence as there is from Ms James tends to show that the internal walls on the ground floor are thicker than those on the upper floors. This suggests the possibility that the internal walls on the upper floors and in the flats are not, or are not all, structural. It also suggests the possibility that the

[1] This represents Ms James' figure of 330.4m² minus the sum of the areas of the two storage areas.

reduction in the area of the non-residential parts will, for the purposes of section 1(3), be proportionately greater than the reduction in the area of other parts.

b) The defendant's reliance on the so-called storage areas on the first floor and the third floor, for the purposes of section 1(3)(a), rests principally on his own assertion of his intentions. For reasons I have indicated, such an assertion must be viewed with circumspection. There is evidence that a former occupier of one of the commercial units had left large amounts of what amounts to discarded materials or leftovers in the area on the first floor, all of which appears to have been abandoned for many years. This evidence might suggest that the area on the first floor was either annexed to the commercial unit—which has not been suggested—or a communal facility for tenants at the Premises. For reasons indicated by Ms James the use of the area for commercial storage facilities does not appear to be very obviously viable, and there is no evidence that the defendant has taken steps to implement any such user. As for the area on the third floor, I am not satisfied that this area, which is referred to by Ms James as loft space, is truly a potential storage area in respect either of access or of space, at least otherwise than for occasional use by the tenants of units at the Premises (in which case it would constitute common parts). I bear in mind, too, that the defendant did not seek to cross-examine Ms James as to the feasibility of his alleged purposes.

34. For these reasons, I reject the defendant's contention that Part I of the 1987 Act did not apply to the Premises.

<u>Was the purchase notice served by the requisite majority?</u>

35. It is common ground that the requirement of a "requisite majority of qualifying tenants" requires, in the present case, five votes and that (subject to any dispute as to his identity, as to which see below) Mr Adetunji, as the tenant under long leases of two flats, is to be counted twice: section 3(2) and section 18A of the 1987 Act.

36. It follows that the claimant, Mr Harding, Mr Humphreys and Mr Adetunji constitute a requisite majority.

37. The defendant sought to challenge this conclusion on a number of grounds.

38. First, as he stated in his counter-notice and repeated to me in his oral opening submissions at trial, the defendant did not accept that there was any such person as Mr Adetunji. I find that there is such a person, that he is the long leaseholder of two flats at the Premises, that he instructed Albinson Napier to give the purchase notice on his behalf, and that he gave evidence to me at trial. The defendant did not seek to challenge Mr Adetunji's identity in cross-examination. In his closing submissions he did not abandon his earlier submission but he did not say anything further about it.

39. Second, the defendant did not accept that Mr Humphreys and Mr Harding had given instructions for the service of the purchase notice. Mr Harding gave oral evidence that he had given such instructions; that evidence was not challenged in cross-examination. Mr Humphreys provided a witness statement dated 13 December 2023; the statement did not directly address the matter of instructions, and Mr Humphreys did not attend at trial to give evidence. The defendant submitted that the weight of the evidence showed

that Mr Humphreys had not authorised the use of his name on the purchase notice: he had not directly addressed the question in his witness statement; he had not attended court—the defendant said that this was because, as a professional person, Mr Humphreys would be aware of the consequences of giving evidence (though he did not actually say what consequences he had in mind); and in a client questionnaire from Albinson Napier he had replied "No" to the question whether he would be willing to contribute financially to the acquisition of the freehold. However, I am satisfied that Mr Humphreys did give authority to be named as one of the purchasing tenants. First, the claimant's evidence, which I accept, was that both Mr Harding and Mr Humphreys instructed Albinson Napier: witness statement dated 22 February 2023, paragraph 11. Second, in the absence of good evidence to the contrary, it is to be inferred that the solicitors who purported to act for those gentlemen had instructions so to act. Third, I gave permission to the claimant to call Ms Napier at trial to produce a Participation Agreement signed by Mr Humphreys and dated 5 December 2022. Ms Napier confirmed that she had made a specific point of clarifying and obtaining Mr Humphreys' instructions after his response to the client questionnaire and that the Participation Agreement had also been executed by the claimant, Mr Harding and Mr Adetunji. The Participation Agreement confirms the nomination of the claimant as the nominated person and authorises her to act as such in order to acquire the freehold estate in the Premises, in which each was to have a beneficial interest in accordance with stated proportions (Mr Humphreys' proportion being nominal).

40. Third, the defendant submitted that Flat 2 did not count, because it was being used for business purposes. That submission is without merit. The sub-letting of a flat as an investment property does not disqualify the leaseholder from being a qualifying tenant: cf. section 3(1), (4) of the 1987 Act. If the contention is, rather, that a drug-dealing business was being carried on from Flat 2, there is nothing in the point. The evidence is that Mr Adetunji sub-lets his two flats for residential purposes. In December 2022 Flat 2 was occupied by a sub-tenant on an assured sub-tenancy. Subsequently the flat became empty for a period and was broken into; those who entered have been referred to as "squatters", but there is no good evidence that they actually took up residence there. Anyway, there is nothing to indicate that Mr Adetunji ceased to be a qualifying tenant.

41. Fourth, the defendant submitted that the section 12B notice was void because the solicitors' trading name was not shown on it. This submission, insofar as it is intelligible, is plainly without merit. The requirement is that the requisite majority of qualifying tenants serve a notice. They could do so by themselves or by an agent. They did so by an agent. There is no basis for saying that the validity of the notice is affected by the fact that it refers to Albinson Napier & Co rather than Albinson Napier Ltd.

<u>Was the purchase notice served in time?</u>

42. If as he claims the defendant sent a valid notice under section 3 and section 3A of the 1985 Act by letter dated 25 May 2022 by first class post on that date, the purchase notice served on 7 December 2022 was out of time, because it was required to be served within 6 months of the section 3 and section 3A notice (section 12B(3)(b) of the 1987 Act) and would have had to be served before the end of November 2022.

43. This raises two questions: (1) Did the defendant send the notices as alleged? (2) If he did, were the notices valid?

Did the defendant serve the notices?

44. The defendant says that he sent the letter of 25 May 2022 to each of the purchasing tenants at the address shown for him or her at HM Land Registry. In the cases of Mr Adetunji and Mr Humphreys, this was their home address.[2] In the case of the claimant, the address was Flat 1, which was not her home and which was empty in May 2022 after the death of the previous sub-tenant. In the case of Mr Harding, the address was a former home address but was not where he was then living. The claimant, Mr Adetunji and Mr Harding gave evidence that they never received the letter. Mr Humphreys' statement dated 13 December 2023 stated that he never received it. It would be unsurprising that Mr Harding did not receive the letter. It would be difficult to draw conclusions from the fact, as I accept it to be, that the claimant did not receive the letter: the flats at the Premises do not have letterboxes, and mail is left on the communal staircase to be collected by residents; and at the time Flat 1 was unoccupied and an estate agent was making irregular visits only to show prospective purchasers or tenants around. Limited weight can be put on Mr Humphreys' statement, because he did not attend at trial to confirm his statement and it has not been possible to explore the reliability of the system of mail collection. More surprising is the fact, which I accept, that Mr Adetunji did not receive the letter allegedly sent to him at his London address. Despite the not uncommon protestations of litigants and witnesses, post that is correctly addressed is usually delivered and received. It is also somewhat surprising, though by no means as significant, that Mr Adetunji did not receive the letter sent to Flat 2, where the same sub-tenant had been in occupation since 2014.

45. Having considered the totality of the evidence, I do not believe the defendant's claim that he sent the letter dated 25 May 2022. First, I do not consider him to be an honest or credible man. His counter-notice, which I have discussed at some length, is redolent of bad faith. For his own ends, he is willing to resort to intimidatory and threatening language, advancing allegations that he cannot possibly believe to be justified. I have mentioned, also, his claim to have received advice from an expert regarding disciplinary infractions by the claimant's solicitors[3]. I regard that claim to have been untrue, both because the defendant has failed to identify anything that would have led a competent expert to give such advice and because of his refusal to name the expert after I had ruled that he could not assert privilege in the name. In short, on a contested issue on which the defendant's interests turn, I should be reluctant to accept his evidence unless it were supported by documentary or other evidence. Second, the defendant, though repeatedly insisting that he was keen to ensure that he was acting properly and compliantly with all legislation before taking any steps with regard to the Premises, and though a practising solicitor, did not send any letters by a "signed for" service and has no documentary record of posting. Third, the evidence of Mr Adetunji, whom I regarded as an honest witness, tends to indicate that it is improbable that the letter was sent to him; and, if it was not sent to him, it is unlikely it was sent to the others. Fourth, the letter of 25 May 2022 looks like a later concoction designed specifically for the purpose of raising a time-limit objection to the purchase notice. The defendant's case is that, although he did not believe Part I of the 1987 Act to apply, he sent the letter as a belt-

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[2] The evidence is actually that the letter for Flat 3 was sent to Mr Adetunji at his London address but the letter for Flat 2 was sent to Flat 2 instead. Anyway, one letter is said to have gone to Mr Adetunji's home.

[3] The counter-notice does not literally say that the defendant received advice, merely that an expert considered the matter. The implication is clear, however, and is confirmed by the assertion of privilege during cross-examination. As the defendant refused to identify the expert, I suppose it is possible that he is purporting to be his own expert.

and-braces measure to address the possibility that he was wrong. However, if he were that mindful of the possible legal ramifications of his purchase, he would in all likelihood have waited until he had actually completed the purchase before sending the letter. He would not have sent it prematurely. (See below.) The very date of the document gives grounds for suspicion.

46. In view of my finding of fact in respect of this question and the answer I give, below, to the second question, it is unnecessary for me to consider whether, if the letter of 25 May 2022 was sent by first class post to the addresses mentioned by the defendant, the required notice was "given" to the respective tenants.

Were the notices (if given) valid?

47. The six-month period under section 12B(3) of the 1987 Act begins on the date by which notices under section 3A of the 1985 Act have been given to the requisite majority of qualifying tenants of the constituent flats. A notice under section 3A of the 1985 Act is a notice required if three conditions are satisfied: (i) the new landlord is required to give a notice of assignment under section 3; (ii) the tenant is a qualifying tenant; (iii) the assignment is a relevant disposal. The relevant provisions are set out above.

48. In my judgment, it is clear that the notices under sections 3 and 3A can only be given by a person who has already taken an assignment of the former landlord's interest. Section 3(1) applies where the landlord's interest "is assigned", not where it is to be assigned. The obligation under section 3(1) rests on the "new landlord", not the intended or prospective assignee, and is an obligation to "give notice … of the assignment", which can only be done if there has been an assignment. The creation of a criminal offence by section 3(3) can make sense only if an assignment has taken place. In the interests of brevity I have not set out the provisions of section 3(3A) and (3B) concerning liability under the tenancy, but I note that these impose for a specified period some continuing liability on "the old landlord", who is "[t]he person who was the landlord under the tenancy immediately before the assignment", "in like manner as if the interest assigned were still vested in him"—which confirms that the reference to an assignment is to one that has occurred. This is also obvious from section 3A, where for example the use of the past tense in subsections (1)(b) and (2)(a) is clear. More generally, the whole point of the provisions is to place obligations on the person who has become the new landlord, not on someone who will (or may) become so at some indefinite time in the future.

49. The notice comprised in the letter of 25 May 2022 was purportedly given before completion of the purchase of the freehold estate. Therefore it was given, if at all, before there had been an assignment and was not capable of being a valid notice under section 3A of the 1985 Act.[4]

Conclusion on time limits

50. I hold that the purchase notice was sent within the prescribed time.

[4] As the letter was purportedly sent before completion, it is unnecessary to consider the question whether registration of title would be necessary before it could be said that the freehold estate had been assigned.

Conclusion

51. On the preliminary issue whether the claimant is entitled to acquire the freehold estate in the Premises pursuant to the purchase notice dated 5 December 2022, I hold that she is so entitled.

52. I shall refer this judgment, and in particular the matters set out in paragraph 19, to the Solicitors Regulation Authority for consideration and, if appropriate, investigation.