

ENGLAND AND WALES / JUDGMENT

South Bank Hotel Management Company Limited v Galliard Hotels Limited & Ors

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Neutral Citation Number: [2026] EWCA Civ 56 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND BUSINESS LIST (ChD) Mr Justice Richards

[2024] EWHC 2484 (Ch) Case No: CA-2025-002689 Royal Courts of Justice Strand, London, WC2A 2LL Date: 06/02/2026 Before: LORD JUSTICE NEWEY LADY JUSTICE ASPLIN and LORD JUSTICE MILES

- ----- Between: SOUTH BANK HOTEL MANAGEMENT COMPANY LIMITED

- and -

(1) GALLIARD HOTELS LIMITED

(2) STEPHEN STUART SOLOMON CONWAY

(3) CHRISTOPHER JOHN DUFFY

(4) LODGESHINE LIMITED

(5) GALLIARD HOMES LIMITED Claimant/ Appellant Defendants/ Respondents And between: LODGESHINE LIMITED

- and - SOUTH BANK HOTEL MANAGEMENT COMPANY LIMITED

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- ----- Claimant/ Respondent Defendant/ Appellant James Willan KC and Saaman Pourghadiri (instructed by PCB Byrne LLP) for the Appellant Nicholas Trompeter KC and Simon McLoughlin (instructed by DMH Stallard LLP) for the Respondents Hearing dates: 10-12 December 2025

- ----- Approved Judgment This judgment was handed down remotely at 10.30am on 6 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd Lord Justice Newey: 1. This appeal, from a decision of Richards J (“the Judge”), arises out of the construction of a

hotel to the east side of Waterloo Bridge in London. The appeal raises issues as to whether the appellant, South Bank Hotel Management Company Limited (“South Bank”), has an arguable claim against Mr Stephen Conway, the second defendant to the proceedings which South Bank has brought; whether any such claim is statute- barred; whether South Bank can claim damages from the first defendant to its proceedings, Galliard Hotels Limited (“Hotels”), for breach of leases of rooms at the hotel or whether, as the Judge thought, any such claim is statute-barred; and as to the implications of the fact that a lease and underlease purportedly entered into in respect of an annex to the hotel by (in the case of the lease) Hotels and the fourth such defendant, Lodgeshine Limited (“Lodgeshine”), and (in the case of the underlease) Lodgeshine and South Bank were not executed on behalf of Hotels and Lodgeshine in accordance with section 44 of the Companies Act 2006 (“CA 2006”). Basic facts 2. 3. 4. 5. 6. This section of this judgment is principally derived from the Judge’s judgment ([2024] EWHC 2484 (Ch)) (“the Judgment”). The three corporate defendants to South Bank’s proceedings, namely, Hotels, Lodgeshine and Galliard Homes Limited (“Homes”), all belong to the same group. Mr Conway was a co-founder of the group and is its executive chairman. We were provided by the parties with a group structure chart as at June 2008. It can be seen from this that Hotels and Lodgeshine were both wholly-owned subsidiaries of Homes which was itself wholly owned by Galliard Holdings Limited (“Holdings”). Mr Conway was the sole director of Hotels and Lodgeshine and also one of the directors of Homes and Holdings. There were three further members of Homes’ board and two additional individuals were on Holdings’ board. The Judge recorded that Mr Conway owned 47.68% of the shares in Homes with the other shares being held by members of his family indirectly through a company incorporated in the Isle of Man (paragraph 161 of the Judgment). While the Judge did not spell this out, Mr Conway and his family must have derived these interests via Holdings as the sole shareholder in Homes. By 2004, Hotels was the freehold owner of a site in Addington Street, in London SE1 (“the Site”). At the time, the Site was used as a car park, but planning permission had already been obtained for development. On 7 October 2003, permission had been granted to construct a 300-room hotel with “additional stand alone offices or consultation room”. The Judge said this about that plan in paragraph 37 of the

Judgment:

“The 300 Room Proposal thus included a ‘bolt on’ Annex pulled away at ground level from the proposed Hotel to allow a through access to the GLIH [i.e. ‘General Lying-In Hospital’] service yard. The first and second floors of the Annex would sit over that access way and be identical in height and similar in appearance to the adjacent GLIH. The Annex would have its Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd own entrance from the street and would, in appearance, be a separate building from the main Hotel and, while the Annex and the Hotel abutted each other at the level of the first and second floor, there was no internal access between the two buildings at either such level. Even at the first and second floors where the Annex and Hotel abutted each other, the floor levels and ceiling levels were different The Annex was envisaged to have a separate postal address and would have sewerage connections separate from those of the Hotel.

That said, the basement of the Hotel would extend under the Annex with the result that, if a freehold interest in the Annex was ever disposed of separately from the Hotel, it would be, in the jargon of property lawyers, a 'flying freehold'." 7. 8. 9. On 19 February 2004 Hotels obtained permission for a varied scheme under which the hotel would have 394 rooms. The consent was conditional on the hotel being used only for Class C1 user and the annex being used only for Class B1 or D1 user. Mr Conway had conceived the idea of financing the development of the Site in part by "selling" individual hotel rooms in the hotel. Investors would enter into contracts under which they would make payments to Hotels in exchange for the latter agreeing to grant them leases of rooms in the hotel once it had been built. For the first five years after taking such leases, investors were guaranteed a 6% return on what they had paid. Once these guarantees had expired, investors were to assume the full risk and reward as shareholders in South Bank. Mr Conway's plan involved South Bank, of which he was the sole director until 2015, becoming responsible for management of the hotel. It was to be another wholly owned subsidiary of Homes for five years after the hotel had opened, but investors were then to be issued with one share in the company for every room they held in the hotel with the result that it ceased to be a member of the Galliard group. Further, the freehold was to be transferred to South Bank. 10. The Judge explained as follows in paragraph 4(vi) of the Judgment: "Promotion of this investment to Investors started in 2004. At that time, it was recognised that Investors had a legitimate interest in knowing that, when they signed their Room Contract, there was a binding contract in place for the future transfer of the freehold interest. To that end, on 24 February 2004, Galliard Hotels entered into a freehold sale contract (the 'FSC') with [South Bank] providing for the freehold in the Site to be transferred to [South Bank] for a consideration of £1. At the time of the FSC, [South Bank] was a member of the Galliard group and therefore the FSC was an entirely intra- group arrangement. However, ... the FSC was entered into in contemplation of arrangements which would culminate in [South Bank] leaving the Galliard group and being wholly owned by Investors." Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd 11. 12. 13. 14. Initially, "the focus of Galliard's marketing efforts was on the Rooms with the result that Mr Conway did not consider whether title to the Annex would or would not pass to [South Bank]" (paragraph 52(i) of the Judgment). However, in 2005 the Park Plaza hotel group agreed to become the hotel's operator, "indicated to Mr Conway that ... it would wish to locate certain communal facilities in the Annex", and "came to believe that the Hotel would also benefit from additional conference facilities on the upper floors of the Annex" (paragraphs 103-105). Mr Conway's discussions with Mr Boris Ivesha of Park Plaza "resulted in a change in the way that [he] viewed the Annex" (paragraph 111). The discussions showed Mr Conway that "(i) the Annex now needed to be used as part of the Hotel; (ii) Galliard was being put to expense in consequence; and (iii) Investors would obtain some benefit from that expense" (paragraph 111). As the Judge explained in paragraph 114 of the Judgment, "[t]he proposal to use the Annex as part of the Hotel necessarily required a change of use application to be made to Lambeth since both the 300 Room Permission and the 394 Room Permission were conditional on the Annex being used in Class B1/D1 which was inconsistent with its use as part of the Hotel". In early 2005, Hotels had applied for permission for an amended scheme with 396 hotel rooms and a considerable extension to the basement of the hotel. In September 2007, Hotels applied for retrospective planning permission for a hotel with 398 rooms, the extended basement and the changes which Mr Ivesha had requested (including Class C1 user of the annex). Development of the hotel achieved practical completion on 19 December 2007, but Galliard continued to market rooms until the summer

of 2008 (paragraphs 120 and 355 of the Judgment). The investors were granted leases of their hotel rooms ("Room Leases") between January and July of 2008. By then, what the Judge termed the "Annex Lease Scheme" had been carried into effect. This involved Hotels granting Lodgeshine a 999-year lease of the annex at a peppercorn rent ("the Lease") and Lodgeshine entering into a 15-year underlease with South Bank ("the Underlease"). Under the Underlease, no rent was to be payable for the first five years, but there was then to be rent of £117,382.50 a year, index-linked. The Lease and Underlease were both dated 16 June 2008 and both were registered at HM Land Registry on 7 July 2008. 15. The Judge said this about the implications of the Annex Lease Scheme in paragraph 160 of the Judgment: "Later in this judgment I explain why, at the time of the Annex Lease Scheme, on a true construction of the FSC, [South Bank] had a contractual right to a transfer of the entire freehold interest in the Site, including the Annex. Accordingly, the effect of the Lease was to deprive [South Bank] of its economic interest in the Annex for no valuable consideration. By the Underlease, [South Bank] retained the right to use the Annex, but it had to pay Lodgeshine a market rent in order to do so. The overall result was a transfer of value out of [South Bank] and into Lodgeshine." In paragraph 161, the Judge noted that Mr Conway "did obtain an overall economic benefit" from the Annex Lease Scheme. Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* 16. The Annex Lease Scheme had its origins in a memo which Mr Conway sent to Mr David Philips of Howard Kennedy LLP, with whom he had a longstanding professional relationship, on 2 April 2008. This read as follows: "When we sold the hotel rooms at Addington Street the side access building was always staying out of the equation and was a building worth several hundred thousand pounds for us either to occupy as office or let It transpired that Park Plaza due to the success of the hotel required additional conferencing and meeting facilities and we utilise the adjoining building without any charge whatsoever to the people who had already purchased flats. The hotel now looks as if it will be trading in excess of the rental guarantee payment of the five year period and I wonder whether it is too late to contemplate actually rentalising the annex building back into the Park Plaza lease. Please advise." 17. The Judge found that at the time he approved the Annex Lease Scheme Mr Conway "did not know of the FSC specifically" but he "was aware in general terms that there was a contract that would otherwise operate to transfer the whole title to the Site including the Annex and the Annex Lease was intended to prevent that result" (paragraph 164 of the Judgment). The Judge went on to say the following: "166. 167. In my judgment, Mr Conway concluded that, if the Annex passed to [South Bank], something would have gone wrong at a general level. He had a general conception of the transaction as involving the sale of individual rooms in the Hotel and giving Investors a share in the freehold of the Hotel by virtue of their shared ownership of [South Bank]. That general conception of the transaction did not involve the Annex at all It was reasonable, in 2008, for Mr Conway to believe that there had been a 'mistake' (in the sense he used the word) if the deal that his lawyers had documented in 2004 resulted in [South Bank] obtaining ownership of the Annex. For that view to be reasonable, Mr Conway did not have to go back and perform a careful audit of everything that had been said in 2004 as if he were a lawyer considering a possible claim for rectification of the FSC. Mr Conway's view was reasonable because the deal that had been done in 2004 could be understood, at a high level of generality, as a transaction involving a hotel and a freehold interest in a hotel. In 2004, the Annex, when constructed could not lawfully be used as part of the Hotel and indeed Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* was a separate building from the Hotel. In those circumstances, it was not unreasonable for Mr Conway to conclude that, even

if the legal documents resulted in the Annex being treated as part of the deal, they ought not to have done.” 18. The Judge further found that Mr Conway “both genuinely and reasonably formed the view that Mr Philips had advised that the Annex Lease Scheme was an appropriate way to prevent a ‘mistaken’ transfer of the Annex (again, in Mr Conway’s sense of the word) to [South Bank] from occurring which would not involve Galliard Hotels in a breach of trust or breach of contract” (paragraph 169 of the Judgment). Mr Conway decided not to tell investors about the Annex Lease Scheme, but that was not because he knew that it was wrong but because “he thought that some Investors might make what he regarded to be mischief even though the scheme was proper” (paragraph 172). 19. The Judge arrived at the following conclusions in paragraph 175 of the Judgment: “From the above, I have reached the following factual conclusions as to Mr Conway’s knowledge of, or belief in, the existence of a conflict of interest between [South Bank] and Lodgeshine and between [South Bank] and Mr Conway himself: i) ii) iii) Mr Conway accepted in cross-examination that he realised that he needed to take care to avoid a conflict of interest between [South Bank] and his own personal interests, or between [South Bank] and other companies, such as Lodgeshine, of which he was a director. Mr Conway was an astute businessman. He would have realised that, if one took as a starting point the proposition that [South Bank] was entitled to own a freehold interest in the Annex, the Annex Lease Scheme would have the economic consequences set out in paragraphs 160 and 161 above. However, Mr Conway considered that was not the correct starting point. His view was that to the extent [South Bank] had a contractual entitlement to the Annex, that was a ‘mistake’ in the sense I have explained. Viewed from that perspective, he did not consider that there was any benefit to Lodgeshine (or himself), or any disbenefit to [South Bank], in implementing the Annex Lease Scheme. That was because he considered that the Annex Lease Scheme simply put [South Bank] and the rest of the Galliard group in the position they should have been in from the beginning. Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd iv) v) It was reasonable for Mr Conway to approach matters as set out in paragraph 175.iii) since, having instructed Howard Kennedy in connection with the Annex Lease Scheme, they could be expected to tell him if there was something wrong with that scheme. Mr Conway was fortified in his conclusion that there was no disbenefit to [South Bank] (by reference to what he considered to be the correct starting position) by his perception that Mr Ivesha’s suggestions to increase conferencing facilities would increase [South Bank’s] revenue from Rooms” 20. 21. 22. On 9 April 2014, Hotels transferred the entire freehold interest in the Site to South Bank. Investors had been issued shares in South Bank in the previous month. An investor became a director of the company in April 2015 and two more investors joined the board in November 2017. All three were told of the Annex Lease Scheme in late 2017. On 22 April 2021, Lodgeshine issued proceedings against South Bank for rent that was said to be outstanding under the Underlease. On 25 May 2021, South Bank issued proceedings of its own. It alleged that the Underlease was void and also claimed, among other things, that the Lease was void or voidable; a declaration that Mr Conway was liable to account by reason of breach of fiduciary duty or trust; and compensation/damages from Hotels, Mr Conway, Lodgeshine and Homes. The two sets of proceedings were the subject of an 11-day trial before the Judge in June and July of 2024. So far as material, the Judge rejected South Bank’s claims and ordered it to pay Lodgeshine £1,402,203.03 in respect of arrears of rent under the Underlease. The appeal 23. 24. South Bank now appeals against the Judge’s decision. The issues to which the appeal gives rise can be addressed under the following headings: i) ii) The claim against Mr Conway; The claim for breach of the Room Leases; and iii) The validity of the Lease and Underlease.

The claim against Mr Conway Introductory 25. The Judge concluded that any claim against Mr Conway was statute-barred. South Bank had argued otherwise on, among others, the basis that section 21(1)(b) of the Limitation Act 1980 ("LA 1980") applied, but the Judge did not accept that. Having so decided, the Judge did not consider it necessary to determine whether Mr Conway Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd would have been liable to South Bank had its claim not fallen to be dismissed on limitation grounds. 26. It is South Bank's case on this appeal that, contrary to the Judge's view, section 21(1)

- (b) of LA 1980 is applicable. For their part, the respondents both support the Judge's decision and advance further reasons for upholding the dismissal of the claim against Mr Conway. Section 21 of LA 1980 27. So far as material, section 21 of LA 1980 provides as follows: "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action— (a) (b) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use. ... (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued" Some common ground 28. 29. It is common ground that, as a director of South Bank, Mr Conway is to be regarded as a "trustee" for the purposes of section 21(1)(b) of LA 1980 and that South Bank's property is to be seen as having been in his "possession" for those purposes. That common ground reflects the decision of the Supreme Court in *Burnden Holdings (UK) Ltd v Fielding* [2018] UKSC 14, [2018] AC 857 ("*Burnden (SC)*"). As was noted in that case by Lord Briggs, with whom Lords Kerr, Sumption, Carnwath and Lloyd-Jones agreed, at paragraph 18, section 21 of LA 1980 is "primarily aimed at express trustees", but it is "applicable to company directors by what may fairly be described as a process of analogy". Lord Briggs went on in paragraph 19: "in the context of company property, directors are to be treated as being in possession of the trust property from the outset. It is precisely because, under the typical constitution of an English company, the directors are the fiduciary stewards of the company's property, that they are trustees within the meaning Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* of section 21 at all. Of course, if they have misappropriated the property before action is brought by the company (the beneficiary for this purpose) to recover it they may or may not by that time still be in possession of it. But if their misappropriation of the company's property amounts to a conversion of it to their own use, they will still necessarily have previously received it, by virtue of being the fiduciary stewards of it as directors." 30. It was also not in dispute before us that the word "recover" in section 21(1)(b) of LA 1980 can extend to a claim for equitable compensation in respect of property "converted to [a trustee/director's] use". In *Burnden*, it was argued on behalf of the defendants that "a claim ... for an account of profits or alternatively equitable compensation ... did not fall within section 21(1)(b) at all": see paragraph 13 of *Burnden (SC)*. In the Court

of Appeal, David Richards LJ, with whom Arden and Tomlinson LJ agreed, concluded that equitable compensation was “an appropriate remedy falling within section 21(1)(b), particularly where, as in the case of Mrs Fielding [i.e. one of the defendants], the trustee’s indirect interest in the trust asset has been converted to the use of the trustee”: see *Burnden Holdings (UK) Ltd v Fielding*

[2016] EWCA Civ 557, [2017] 1 WLR 39 (“*Burnden (CA)*”), at paragraph 38. As Lord Briggs recorded in *Burnden (SC)*, at paragraph 13, David Richards LJ’s analysis was not challenged in this respect in the Supreme Court. The Judgment 31. The Judge explained in paragraph 348 of the Judgment that South Bank had put forward an argument to the following effect: “i) ii) [South Bank’s] equitable interest in the freehold (acquired on execution of the FSC) was treated as held by Mr Conway in his capacity as director of [South Bank] and was therefore ‘trust property’ that was previously held by Mr Conway Mr Conway converted that trust property to his use by granting a Lease to Lodgeshine from which Mr Conway would derive an economic benefit given his shareholding interest in Lodgeshine.” 32. The Judge did not agree. He said: “349. ... In his oral submissions on behalf of Galliard, Mr Trompeter KC answered [the argument] by saying that there can have been no ‘conversion’ of the equitable interest in the freehold to Mr Conway’s use in circumstances where [South Bank] has, since 2014, held that very freehold interest. I see the force of that argument. [South Bank’s] complaint is not that it no longer has a freehold interest in the Site but rather that, since that interest is encumbered by the Lease, its interest is less valuable than it would otherwise have Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* 350. been. Moreover, even recognising the extended concept of a claim for ‘recovery’ of trust property set out in paragraph 338.iii) above, I see a real difficulty with the argument that [South Bank] is seeking to ‘recover’ an interest in the freehold when it has held the freehold interest legally and beneficially since 2014. In his reply on behalf of [South Bank], [counsel then appearing for South Bank] did not contradict Mr Trompeter KC’s analysis. He did not, for example, explain how the freehold interest could have been ‘converted’ by virtue of being rendered less valuable. Indeed, beyond the general submission that dealing with an asset in a way inconsistent with the rights of an owner amounted to ‘conversion to own use’, [South Bank] made few submissions on the breadth of the concept Overall, I do not consider that [South Bank] has succeeded in displacing the analysis advanced by Galliard which I have summarised in paragraph 349.” The parties’ positions 33. 34. South Bank submitted that the Judge was mistaken in thinking that the fact that it was the freehold owner of the Site made section 21(1)(b) of LA 1980 inapplicable. It invited us to declare that section 21(1)(b) does apply to its claim against Mr Conway and to remit the proceedings to the Judge for him to determine the merits of that claim. In contrast, the respondents maintained that the Judge was right to conclude that section 21(1)(b) of LA 1980 does not apply both for the reasons which he gave and others. According to the respondents: i) ii) iii) When the Lease was granted, South Bank had no more than a right to seek specific performance of the FSC; Mr Conway did not interfere with that right or, if South Bank is to be seen as having had a

beneficial interest in the Site, with that interest. The grant of the Lease was not a “conversion” of whatever rights South Bank had. It involved the creation of a new interest, not a “conversion” of a pre-existing one; The grant of the Lease was independent of Mr Conway’s deemed custodianship of South Bank’s property. To the extent that he was involved in it, he was acting as a director of Hotels, not South Bank. Any claim must therefore fall within the second of the categories of trustee identified in *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 (“Paragon Finance”); and iv) Any “conversion” was not “to [Mr Conway’s] use”. Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* 35. The respondents further contended that the claim against Mr Conway was anyway ill- founded. In this respect, the respondents said that the Judge ought to have concluded that Mr Conway did not breach his duties as a director of South Bank, that any breach of duty was ratified by Homes and that Mr Conway ought fairly to be excused from any liability pursuant to section 1157 of CA 2006. 36. I find it convenient to address the issues to which the parties’ submissions give rise under the following headings: i) ii) iii) iv) v) South Bank’s rights under the FSC; The claim against Mr Conway; Did the grant of the Lease involve a “conversion” of South Bank’s rights? Is South Bank seeking to “recover trust property”? Does the claim fall within the second Paragon Finance category? vi) Was there any “conversion” “to [Mr Conway’s] use? vii) Ratification; viii) Relief under section 1157 of CA 2006; ix)

Conclusion.

South Bank’s rights under the FSC 37. As already mentioned, on 24 February 2004 Hotels entered into a contract with South Bank (i.e. the FSC) under which it agreed to sell the freehold of the Site to South Bank for £1. Completion was to follow the grant of the last Room Lease, subject to a long-stop date of 31 December 2013.

38. Mr Nicholas Trompeter KC, who appeared for the respondents with Mr Simon McLoughlin, argued that the FSC did not give South Bank a beneficial interest in the freehold of the Site but instead gave it no more than a right to seek specific performance. Mr Trompeter accepted that that right could be protected by a notice at the Land Registry under section 32 of the Land Registration Act 2002 (“LRA 2002”), but he pointed out, citing *Southern Pacific Mortgages Ltd v Scott* [2014] UKSC 52,

[2015] AC 385 (“*Southern Pacific Mortgages*”), that the fact that a contract for the sale of land is specifically enforceable does not mean that the purchaser is able to grant proprietary rights in the subject matter of the contract to a third party. 39. The relevant law is summarised in these terms in *Snell’s Equity*, 35th ed., at paragraph 24-002: “When a specifically enforceable contract for sale has been made, the effect in equity is to divide the beneficial interest in the land between the vendor and the purchaser. The vendor retains the legal estate until the transaction is completed but he holds it until then as a trustee for the purchaser. The trust arises Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* on the

provisional assumption that specific performance of the contract is available and that the contract will in due course be completed. The incidents of the trust are determined by the parties' contractual rights since the trust only exists to give effect to the transaction contemplated in the contract The trust has two main functions. First, as against the vendor, it serves to impose certain duties on him pending completion of the transaction. These duties are imposed by law rather than specified in the contract. Their purpose, nonetheless, is to protect the purchaser's contractual right to have the specific property conveyed to him. The second is its effect as against a third party to the contract. By treating the purchaser's contractual right as an equitable interest in the legal estate, the priority of the purchaser's right to a conveyance of the estate is preserved against the third party. The justification for giving the purchaser these additional rights is that the contract is specifically enforceable. He has a present right to a conveyance of the specific land owned by the vendor." 40. The cases which Snell's Equity cites in support of its analysis include *Lysaght v Edwards* (1876) 2 Ch D 499 and *Rayner v Preston* (1881) 18 Ch D 1. In *Lysaght v Edwards*, Jessel MR explained at 506 that it had been "settled for more than two centuries" that: "the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession". The vendor is thus, Jessel MR said at 510, "a constructive trustee for the purchaser of the estate from the moment the contract is entered into". However, in *Rayner v Preston* Cotton LJ noted at 6 that the vendor is "a trustee in a qualified sense only". In a similar vein, Lord Coleridge CJ commented in *Clarke v Ramuz* [1891] 2 QB 456 at 459 that the vendor's duties are "not exactly the same as in the case of other trustees".

41. More recently, the implications of a contract for the sale of land were the subject of comment by Lord Walker, with whom Lords Nicholls, Scott and Brown agreed, in *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409. Lord Walker said in paragraph 32: "It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full." 42. The position of the parties to an uncompleted contract for the sale of land was also considered in some detail in

Englewood Properties Ltd v Patel [2005] EWHC 188 (Ch) (“Englewood”), a decision of Lawrence Collins J. Lawrence Collins J said in paragraph 54 that “equity imposes duties on the vendor to protect, pending completion, the interest which the purchaser has acquired under the contract”. He went on: “The preservation may be in a physical sense, so that a vendor may have to keep property in a proper state of cultivation (Earl of Egmont v Smith 6 Ch D 469); or prevent trespassers from removing soil (Clarke v Ramuz [1891] 2 QB 456); or prevent trespassers from damaging the floors: Davron Estates Ltd v Turnshire Ltd 133 NLJ 937. The vendor of a leasehold interest may not take steps which will lead to forfeiture: Dowson v Solomon 1 Dr & Sm 1 and Palmer v Goren (1856) 25 LJ Ch

841. The vendor of a business may not cease to carry it on without consulting the purchaser (Golden Bread Co Ltd v Hemmings [1922] 1 Ch 162), since to do so would destroy the subject-matter of the sale. So also the vendor should not relet the premises without consulting the purchaser (Earl of Egmont v Smith 6 Ch D 469 and Abdulla v Shah [1959] AC 124), since to do so would present the purchaser on completion with property in a legal state different from that which he contracted to buy.” Earlier in his judgment, in paragraph 41(b), Lawrence Collins J had quoted a passage from Heronsgate Enterprises Ltd v Harman (Cheshire) Ltd (21 January 1993, unreported) in which Nicholls V-C had said: “The seller must take care not to damage the property or to prejudice the buyer’s interest in the property of which, on completion, he will become the legal owner.” 43. Southern Pacific Mortgages involved a sale and rent-back transaction. As Lord Collins explained in paragraph 10, one of the questions was “whether the purchasers were in a position at the date of exchange of contracts to confer equitable proprietary rights on the vendors, as opposed to personal rights only”. The vendors argued that they had rights which had priority over charges which the purchasers had granted because “the purchasers had proprietary rights as from exchange of contracts, out of which they could carve the obligation to lease back the properties to the vendors”: see paragraph 27. However, Lord Collins, with whom Baroness Hale and Lords Wilson, Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd Sumption and Reed agreed in this respect, concluded in paragraph 79 that “the vendors acquired no more than personal rights against the purchasers when they agreed to sell their properties on the basis of the purchasers’ promise that they would be entitled to remain in occupation”. 44. Lord Collins arrived at this conclusion on the basis that the position as between the parties to a contract for the sale of land fell to be distinguished from that as between those parties and a third party. Lord Collins noted in paragraph 60 that (as Lawrence Collins J) he had dealt with the effect of cases on the nature of a purchaser’s rights against a vendor in Englewood, and he did not resile from anything he had said in that case. However, he said in paragraph 65 that cases such as Englewood, Lysaght v Edwards and Rayner v Preston were “not ... dealing with the question whether a contract of sale can have a proprietary effect on parties other than the parties to the contract”. He continued: “It is true that the purchaser is given statutory rights to enforce the interests against third parties under a contract of sale by registration: [LRA 2002], sections 15(1)(b), 32, 34(1); Land Charges Act 1972, section 2(1)(4). But it does not

follow that the purchaser has proprietary rights for all purposes. Thus in *Inland Revenue Comrs v G Angus & Co* (1889) 23 QBD 579, 595, Lindley LJ quoted Lord Cottenham LC in *Tasker v Small*

(1837) 3 My & Cr 63, 70, who said that the rule by which a purchaser becomes in equity the owner of the property sold ‘applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others.’” 45. An uncompleted contract for the sale of land does not, therefore, enable the purchaser to grant proprietary rights to third parties. Moreover, the vendor is not subject to all the duties of a conventional trustee. However, it has for centuries been thought appropriate to describe the vendor as a “trustee”, albeit “in a qualified sense only”; the purchaser’s rights are capable of being protected as against third parties through registration; and the vendor is subject to obligations designed to preserve the vendor’s interest pending completion. The upshot, as Lord Walker said in *Jerome v Kelly*, is that “[b]eneficial ownership of the land is in a sense split between the seller and buyer”. That being so, the FSC is to be seen as having conferred a beneficial interest in the Site on South Bank. The claim against Mr Conway 46. The particulars of claim include allegations that, as a director of South Bank, Mr Conway owed, among others, duties to act in good faith to promote the success of the company and to avoid conflicts of interest (paragraph 30) and that in breach of such duties Mr Conway “cause[d] or permit[ted]” the Lease and Underlease and, more specifically, South Bank to enter into the “Annex Lease Scheme” (i.e. the “purported grant of the ... Lease and Underlease”) “despite being consciously aware that absent the Annex Lease Scheme the Annex was ‘due to be transferred’ to [South Bank]” (paragraph 33). The particulars of claim continue as follows in paragraph 33.2: “Further: Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* 33.2.1 Both the Lease and the Underlease preferred the interests of Lodgeshine and the failure to take action against [Hotels] preferred the interests of [Hotels]. Further, Mr Conway so acted while hopelessly conflicted and / or interested and failed even to declare the same. In each case, Mr Conway also preferred his own interests as an ultimate beneficial owner of Lodgeshine and [Hotels] and in each case, acted contrary to the best interests of [South Bank]; ... 33.2.3 In respect of all of the foregoing, Mr Conway ... failed to act in the best interests (and to promote the success) of [South Bank] and to exercise independent judgment, acted for an improper purpose and permitted situations to arise in which he had conflicting interests and owed conflicting duties.” 47. On that basis, Mr Conway is said to be “liable to account to [South Bank] on the footing of wilful default, and further or alternatively to compensate [South Bank] in equity and indemnify it in respect of all losses that it might have suffered by reason of the matters complained of in respect of him”. Elaborating on the claim against Mr Conway at the hearing, Mr James Willan KC, who appeared for South Bank with Mr Saaman Pourghadiri, submitted that it is at least arguable that it was incumbent on Mr Conway to focus on the interests of South Bank as a separate entity rather than those of the group of which it was then part; that Mr Conway did not do so or reach a conclusion as to what was in the individual interests of South

Bank; that, in those circumstances, the question to be asked is whether an intelligent and honest man in the position of a director of South Bank could reasonably have believed that what Mr Conway did and did not do was for the benefit of South Bank; that such a man would not have so concluded; and that Mr Conway put himself in a position where he had a conflict of interest. In the course of his submissions, Mr Willan suggested that matters should be approached on the basis that, wearing a South Bank hat among others, Mr Conway had brought about a composite scheme involving the Lease and Underlease. In that connection, Mr Willan pointed out that the respondents pleaded in their defence that “the Underlease was entered into as part and parcel of the transaction involving both the Lease and the Underlease” and that, by entering into the Underlease, South Bank “expressly or impliedly ... consented to ... the Lease”. Mr Willan argued that Mr Conway promoted this scheme despite knowing that South Bank had a legal right to the annex and, in fact, with a view to taking that right away. An unconflicted director of South Bank, Mr Willan argued, would have thought the Lease plainly contrary to the company’s interests; would have declined to participate in it; and could have protected the company’s position by applying for a notice to be entered at the Land Registry in respect of the FSC or, if needs be, by applying for an injunction to prevent Hotels from entering into the Lease notwithstanding the obligation on a vendor “not [to] relet the premises without consulting the purchaser” and, more generally, to “take care not ... to prejudice the buyer’s interest in the property of which, on completion, he will become the legal owner” (as to which, see paragraph 42 above). Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd 48. One of the cases on which Mr Willan relied in support of his submissions was *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62. In that case, it was contended that the directors of a company (Castleford) had not been acting with a view to the benefit of Castleford when giving a charge. It was argued on behalf of the chargee that it was “sufficient that the directors of Castleford looked to the benefit of the group as a whole”, but Pennycuik J rejected that: see 74. Pennycuik J went on: “Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.” 49. There was some discussion during the hearing as to the significance, if any, of the fact that South Bank was wholly owned by Homes when the Lease and Underlease were granted but was later to be transferred to the investors. In that connection, section 172 of CA 2006 requires a company director to act in the way he considers would be most likely “to promote the success of the company for the benefit of its members as a whole” and, in doing so, to have regard to “the likely consequences of any decision in the long term”. Discussing the implications of that provision, Palmer’s Company Law comments in paragraph 8.2607 that directors “must make decisions that are calculated to be for the long-term benefit of the

members as a whole” and that “promoting sectional interests would be a breach of the duty to promote the success of the company”. In *Gaiman v National Association for Mental Health* [1971] Ch 317 (“Gaiman”), at 330, Megarry J saw “the interests of both present and future members” as “a helpful expression of a human equivalent” of the company with which he was concerned. In *Brady v Brady* [1988] BCLC 20 (“Brady”), Nourse LJ said at 40 that “[t]he interests of a company, an artificial person, cannot be distinguished from the interests of the persons who are interested in it” and that “[w]here a company is both going and solvent, first and foremost come the shareholders, present and no doubt future as well”. After citing both *Gaiman* and *Brady*, Lord Reed said in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2024] AC 211, at paragraph 47, that “[s]o long as a company is financially stable, and is therefore able to pay its creditors in a timely manner, the interests of its shareholders as a whole, understood as a continuing body, can be treated as the company’s interests for the purposes of the directors’ duty to act in its interests”. In the present case, South Bank’s articles of association provided for South Bank to issue shares to the investors once the freehold of the Site had been transferred to it. It was specifically contemplated, therefore, that Homes would cease to be South Bank’s only member and that the various investors would become members. 50. For his part, Mr Trompeter argued that findings of fact made by the Judge render the claim against Mr Conway unsustainable. Mr Trompeter relied particularly on paragraph 175 of the Judgment (quoted in paragraph 19 above). It can be seen, he Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* said, that Mr Conway gave thought to the position of South Bank and concluded that the Lease and Underlease would not be to its disbenefit. 51. However, the Judge explained in paragraph 175 of the Judgment that Mr Conway considered there to be no “disbenefit” to South Bank in implementing the Annex Lease Scheme “by reference to what he considered to be the correct starting position”, which was that “to the extent [South Bank] had a contractual entitlement to the Annex, that was a ‘mistake’”. What Mr Conway meant by a “mistake”, the Judge had said in paragraph 165, was that, “to the extent [South Bank] was to obtain the full economic interest in the Annex, that was both undesirable and at odds with his high- level appreciation of the transaction as it had been structured in 2004”. In the previous paragraph, the Judge had found that Mr Conway “was aware in general terms that there was a contract that would otherwise operate to transfer the whole title to the Site including the Annex and the Annex Lease Scheme was intended to prevent that result”.

52. While, therefore, Mr Conway considered the position of South Bank, he did so on the footing that it was appropriate to remedy the “mistake” he perceived. There is no finding that he believed what he was doing to be in South Bank’s interests and, to the contrary, the Judge explained that the Annex Lease Scheme was intended to prevent South Bank acquiring the annex notwithstanding that there was, to Mr Conway’s knowledge, a contract which would operate to give it the annex. 53. In all the circumstances, it seems to me that the claim against Mr Conway cannot be discounted. On the other hand, we are not in a position to determine for ourselves whether it is well-founded. If the claim is not, as the Judge thought,

statute-barred, the correct course, I think, is to remit the matter to the Judge for him to consider the merits of the claim. Did the grant of the Lease involve a “conversion” of South Bank’s rights?

54. When the Lease was granted, South Bank had the benefit of the FSC, under which it was entitled to acquire freehold title to the whole of the Site, including the annex, and as a result of which it had a beneficial interest in the Site (see paragraph 45 above). The Lease served to encumber the annex with a 999-year lease. However, the Judge concluded that South Bank’s interest in the Site had not been “converted” within the meaning of section 21(1)(b) of LA 1980 because South Bank has since 2014 held “that very freehold interest”. 55. Challenging that view, Mr Willan cited *Burnden (SC)*. In that case, Lord Briggs explained in paragraph 22 that, on the assumed facts, there had been a conversion as there had been “a taking of the company’s property in defiance of the company’s rights of ownership of it”. Earlier in his judgment, in paragraph 17, Lord Briggs had said this with regard to the purpose of section 21(1)(b) of LA 1980: “The starting point in the construction of section 21(1)(b) is to pay due regard to its purpose. This was laid down, in relation to its predecessor, in *In re Timmis, Nixon v Smith* [1902] 1 Ch 176, 186 by Kekewich J as follows: Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* ‘The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, ie, money of the trust received by him and converted to his own use.’ That this is the purpose of what is now section 21 was confirmed by Chadwick LJ in *[JJ Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162], at para 40.”
56. Mr Willan argued that the Judge’s approach to section 21(1)(b) is flatly contrary to this explanation of the purpose of the provision. If South Bank’s case against Mr Conway is well-founded, he “would come off with something he ought not to have” unless section 21(1)(b) applied. The bundle of rights constituting South Bank’s interest in the freehold of the Annex would in part, so it was said, have been diminished and passed on to Lodgeshine, to the benefit of Mr Conway. While, moreover, the leasehold interest granted by the Lease could be distinguished from the freehold, there could fairly be said to have been “a taking of [South Bank’s] property in defiance of the company’s rights of ownership of it” (to adapt the words of Lord Briggs). South Bank was left with what might be termed (to quote Asplin LJ in argument) a “husk”. 57. I agree. Although a new leasehold interest came into being, it seems to me that property of South Bank (viz. its entitlement to acquire, and beneficial interest in, the freehold of the Annex) was “converted” within the meaning of section 21(1)(b) of LA
1980. The purpose of the provision confirms that it should be capable of applying in this situation, and in my view it is. To adapt the words of Lawrence Collins J in *Englewood* quoted in paragraph 42 above, the grant of the Lease left the Site “in a legal state different from that which [South Bank] had contracted to buy”. Is South Bank seeking to “recover

trust property”? 58. The Judge said in paragraph 349 of the Judgment that he saw “a real difficulty with the argument that [South Bank] is seeking to ‘recover’ an interest in the freehold when it has held the freehold interest legally and beneficially since 2014”. As noted in paragraph 30 above, however, the word “recover” in section 21(1)(b) of LA 1980 can extend to a claim for equitable compensation in respect of property “converted to [a trustee/director’s] use”. That being so, it seems to me that a claim for compensation for loss occasioned by the alleged conversion of South Bank’s rights as regards the freehold of the annex is one to “recover trust property” for the purposes of section 21(1)(b). That conclusion is borne out by section 21(1)(b)’s purpose. Does the claim fall within the second Paragon Finance category? 59. In *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 (“Williams”), the Supreme Court, echoing remarks of Millett LJ in *Paragon Finance*, distinguished between two categories of “constructive trust”. One comprised “persons who have lawfully assumed fiduciary obligations in relation to trust property without a formal appointment” and the other “persons who never assumed and never intended Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets” (in the words of Lord Sumption at paragraph 9). The Supreme Court held by a majority that section 21(1)(b) of LA 1980 did not apply to the latter species of constructive trustee. 60. 61. The Court of Appeal had previously recognised the existence of the distinction discussed in *Williams* in a case on which Mr Trompeter relied, *Gwembe Valley Development Co Ltd v Koshy* (No 3) [2003] EWCA Civ 1048, [2004] 1 BCLC 131 (“Gwembe Valley”). In that case, a company referred to as “GVDC”, of which the defendant, Mr Koshy, was the managing director, acknowledged a debt of US\$5.8 million to a company referred to as “Lasco”, of which Mr Koshy was a director and controlling shareholder, on the basis of advances in Zambian currency totalling K56.4 million. Lasco, had, however, been able to obtain the K56.4 million at a cost of only just over US\$1 million, as a result of a process called “pipeline dismantling”. Mr Koshy was thus able to make a very large profit. The Court of Appeal concluded that the case against Mr Koshy could not be brought within section 21(1)(b) of LA 1980. Notwithstanding the fact that Mr Koshy had been a director of GVDC, any trust imposed on him fell within the second of the classes identified in *Paragon Finance* and later endorsed in *Williams* (“Class 2”). Mummery LJ, giving the judgment of the Court, explained in paragraph 118(ii): “Mr Koshy’s personal liability to account to GVDC for profits made by him from his fiduciary position as a director is not dependent on establishing that he has received any money or other property belonging to GVDC as a result of the misapplication of GVDC’s assets, whether in the form of payments made by GVDC directly to him, or in the form of payments made, via Lasco, indirectly to him. GVDC’s causes of action against Mr Koshy were based on the equitable disabilities or the fiduciary duties to which he was subject as a director of GVDC. As such, he was under a personal liability in equity to account to GVDC for unauthorised profits: either because he was disabled in equity from making an unauthorised personal profit out of the position occupied by him and/or

because he acted in dishonest breach of fiduciary duty by deliberately and secretly doing so. The profits made by him are treated as taken for and on behalf of GVDC, as the person to whom he owed the duty to account. As between him and GVDC, equity prevents Mr Koshy from asserting, in answer to the claim for an account, that he is entitled to retain the profits (if any) made by him for his own benefit.” Thus, as Mummery LJ went on to say in paragraph 119: “Mr Koshy’s liability to account for undisclosed profits, and any constructive trust imposed on those profits, do not depend on any pre-existing responsibility for any property of the company. They arose directly out of the transaction which gave rise to those profits, and the circumstances in which it was Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* made. The fact that Mr Koshy was in a pre-existing fiduciary relationship with the company was not enough, by itself, to bring the case within class 1 [i.e. the other category of constructive trust]” 62. *Gwembe Valley* was the subject of consideration in another case on which Mr Trompeter relied, *First Subsea Ltd v Balltec Ltd* [2017] EWCA Civ 186, [2018] Ch 25 (“*First Subsea*”). Patten LJ, with whom Kitchin and Briggs LJ agreed, said there, in paragraph 59: “The provisions of section 21(1)(b) in respect of the property of the company have no application to cases like the *Gwembe* case where there is no misappropriation or receipt of pre-existing company property but only a breach of duty which gives rise to a constructive trust over (for example) the secret profit. This is because in such cases the director is not a trustee *virtute officii* in respect of the profit. He has no proprietary relationship with what he acquires other than as the recipient of the proceeds of his breach of duty. He is not therefore in the terms of section 21(1)(b) in possession of trust property. But he is at all times a class 1 fiduciary and trustee in respect of the company and its assets so that a breach of his duty towards the company remains a breach of trust within the meaning of section 21 even if it does not involve the misappropriation of company property. He is not in the same position as a stranger to the company or the trust (as in the *Paragon* case) who only becomes a trustee in the limited sense of being required to account for the profits of his fraud on a proprietary basis through the medium of a class 2 constructive trust.”

63. Mr Trompeter argued that South Bank’s claim against Mr Conway falls within Class
2. The claim, he said, does not concern Mr Conway’s custodianship of South Bank assets, but a transaction (*viz.* the grant of the Lease) with which Mr Conway was involved only in a different capacity (*i.e.* as a director of Hotels and Lodgeshire). The position is comparable to that in *Gwembe Valley*, Mr Trompeter submitted: the claim against Mr Conway does not depend on establishing that he received any property belonging to South Bank but is rather founded on what are said to be equitable duties or disabilities to which he was subject as a director of South Bank. In the circumstances, so it was said, section 21(1)(b) of LA 1980 cannot apply. 64. In my view, however, the present case is not analogous to *Gwembe Valley*. The profits for which Mr Koshy was liable had not been part of the property of GVDC of which, as a director, he was treated as a trustee. They became the subject of a constructive trust only because they represented an unauthorised profit. As Patten LJ explained in *First Subsea*, in a case such as *Gwembe Valley*, there is “no misappropriation or receipt of pre-

existing company property but only a breach of duty which gives rise to a constructive trust over (for example) the secret profit”. 65. In contrast, Mr Conway is in the present case alleged to bear responsibility for the reduction to a “husk” of pre-existing property of South Bank, namely, its entitlement to acquire, and beneficial interest in, the freehold of the annex. Moreover, Mr Conway Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd is said to have benefited from such property through his interest in Lodgeshine as a result of that company receiving rights carved out of the property. The claim against Mr Conway is not advanced on the basis that he is liable for a profit in respect of which South Bank could have had no claim but for the rule barring fiduciaries from making unauthorised profits. As Mr Willan stressed, South Bank puts its case on the basis that Mr Conway is answerable in respect of pre-existing property of the company. While the remedies sought in the particulars of claim include an account of profits, that is directed at such property and so meant to provide merely restoration. 66. In the circumstances, I do not consider that the claim against Mr Conway falls within Class 2. Was there any “conversion” “to [Mr Conway’s] use?”

67. Mr Trompeter argued that, even if Mr Conway could be said to have “converted” “trust property”, the “conversion” was not “to his use” within the meaning of section 21(1)(b) of LA 1980. In this respect, Mr Trompeter pointed out that Mr Conway never had, even indirectly, a majority shareholding in Lodgeshine. He had (via Holdings and Homes) only a 47.68% interest and the Judge recorded in paragraph 346 of the Judgment that he had been “referred to no evidence suggesting that Mr Conway was able to control any of the other 52.32%”. Where, Mr Trompeter argued, the question is whether trust property was converted “to [a defendant’s] use” because a benefit accrued to a company in which the defendant had an interest, the answer will turn on whether the defendant had a level of control tantamount to ownership of the assets of the company. That, Mr Trompeter contended, was not the case here. 68. There was reference in this context to *Burnden*. There, it was alleged that a distribution in specie by a company of which the defendants were directors and controlling shareholders in favour of another company in which they had between them a majority interest had been wrongful. It was held that, on the basis of the facts which were to be assumed, section 21(1)(b) of LA 1980 was applicable. It had been argued that the provision could not apply because the defendants had not received the relevant property, but neither the Court of Appeal nor the Supreme Court accepted that. In the Court of Appeal, David Richards LJ, with whom Arden and Tomlinson LJ agreed, observed in paragraph 35 that the defendants’ submission would mean that the effect of section 21(1)(b) could “very easily be avoided by trustees who, whether knowingly or otherwise, transfer trust property in breach of trust for their own benefit” and concluded in paragraph 37: “The significance of control of a company is that it enables the controller to obtain, in a number of ways, the benefit of the assets of the company, or indeed the assets themselves or their proceeds of sale, provided that all statutory and other legal restrictions are observed. If section 21(1)(b) were construed to apply only to those cases where the trustee directly and personally acquires the trust property, its evident purpose would be much constrained and easily avoided. In my

judgment, a construction which includes within its terms a transfer to a company directly or indirectly controlled by the trustee is within the meaning of this provision.” Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* 69. 70. 71. 72. In the Supreme Court, Lord Briggs said in paragraph 22 that, on the assumed facts, there had been a conversion to the defendants’ own use “because of the economic benefit which they stood to derive from being the majority shareholders in the company to which the distribution was made”. Although Lord Briggs spoke of the defendants being “the majority shareholders”, I do not think he was intending to lay down a rule that property cannot be converted “to [a defendant’s] use” through a company unless the defendant is a majority shareholder. His remark simply reflected the facts of the case before him. The defendants were majority shareholders and stood to benefit from being such. Nor would a requirement for a majority shareholding be consistent with the purpose of section 21(1)(b) of LA 1980. As I have mentioned, in *Burnden* (SC) Lord Briggs took as applicable to section 21(1)(b) Kekewich J’s comment that its predecessor “was not intended to protect [a trustee] where, if he pleaded the statute, he would come off with something he ought not to have, i.e., money of the trust received by him and converted to his own use”. On that basis, there is no justification for the imposition of a majority shareholding condition. A trustee with a lesser interest in a company which has benefited from a conversion of trust property can potentially also, as it seems to me, be considered to have “come off with something he ought not to have”. I do not need to express a view on whether either a minority shareholding or control of the company in question can of itself warrant a finding that property was converted “to [a defendant’s] use”. What matters for present purposes is that, in my view, a minority shareholding coupled with control will suffice to establish conversion “to [a defendant’s] use”. It is true that Mr Conway had no more than a 47.68% (indirect) interest in Lodgeshine. Not only, however, were the other shares in Holdings held by members of his family (via an Isle of Man company), but Mr Conway was the sole director of Lodgeshine and, by his own account, controlled Homes, Lodgeshine’s parent. The respondents pleaded in their defence that Mr Conway “controlled [Homes] through his shareholding in [Holdings]”. Further, Mr Conway referred in a witness statement to having “controlled” the board of Homes, to the other directors of that company having been “content to proceed in accordance with [his] recommendations” with regard to the “strategic decision-making for Galliard’s business” and to Homes’ board having “in reality” been content for the Lease and Underlease to be granted “[b]ecause [he] was”. 73. In the circumstances, it appears to me that, if property of South Bank was converted, that was “to [Mr Conway’s] use” within the meaning of section 21(1)(b) of LA 1980. Ratification

74. Mr Trompeter submitted that, supposing Mr Conway to have committed any breach of his duties to South Bank, his conduct had been ratified pursuant to the “Duomatic principle”. 75. The Duomatic principle takes its name from the decision of Buckley J in *In re Duomatic Ltd* [1969] 2 Ch 365. In that case, Buckley J said at 373: Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* “where it can be shown that all shareholders who have a right to attend and vote at a general meeting

of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in a general meeting would be.” More recently, Neuberger J summarised the principle in these terms in *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch) at paragraph 122: “The essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.” 76. In *Re Tulsense Ltd* [2010] EWHC 244 (Ch), [2010] 2 BCLC 525 (“Tulsense”), I said in paragraph 41: “... I do not accept that a shareholder’s mere internal decision can of itself constitute assent for Duomatic purposes. I was not referred to any authority in which it had been decided that a mere internal decision would suffice. Further, for a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough would, as it seems to me, give rise to unacceptable uncertainty and, potentially, provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; in either event, it is desirable that past decisions should be objectively verifiable. In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the Duomatic principle.” 77. The Court of Appeal endorsed that view in *Schofield v Schofield* [2011] EWCA Civ 154, [2011] 2 BCLC 319 (“Schofield”). The question in that case was whether the Duomatic principle applied on the basis that an individual had agreed to treat a meeting as valid and effective even though the required period of notice had not been given. Quoting with approval paragraph 41 of my judgment in *Tulsense*, Etherton LJ, with whom Maurice Kay and Thomas LJ agreed, said in paragraph 32 that agreement “could be express or by implication, verbal or by conduct, given at the time or later, but nothing short of unqualified agreement, objectively established, will suffice”. Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* 78. Amongst the cases to which Etherton LJ referred in *Schofield* was *Re Bailey, Hay & Co Ltd* [1971] 1 WLR 1357, on which Mr Trompeter relied. In that case, Brightman J held that a resolution to wind up a company was effective even though due notice of the meeting at which it was passed had not been given. He said at 1366-1367: “I consider that on the particular facts of this case all the corporators ought to be treated as having assented on December 9, 1965, to the company being wound up on that day Admittedly three of the five corporators did not vote in favour of the resolution, but they undoubtedly suffered it to be passed with knowledge of their power to stop it. The true quality of the acts of such corporators on December 9 is not to be judged exclusively by reference to what they did or did not do on that day, but is also to be judged in the light of what they did and did not do thereafter. What these corporators did and did not do after

December 9, 1965 down to December 10, 1969, when they swore their affidavits disclosing this defence, points, in my view, to one conclusion only. The conclusion is that they outwardly accepted the resolution to wind up as decisively as if they had positively voted in favour of it. If corporators attend a meeting without protest, stand by without protest while their fellow- members purport to pass a resolution, permit all persons concerned to act for years on the basis that that resolution was duly passed and rule their own conduct on the basis that the resolution is an established fact, I think it is idle for them to contend that they did not assent to the purported resolution” (emphasis added). 79. 80. Brightman J thus found on the facts that the corporators had “outwardly accepted the resolution to wind up as decisively as if they had positively voted in favour of it”. That being so, the decision is consistent with the need for “unqualified agreement, objectively established” recognised in Schofield. Even were that not so, Schofield would, of course, be the binding authority. During the period in which Mr Conway would have committed any breach of his duties to South Bank, that company was wholly owned by Homes. The Duomatic principle cannot, therefore, apply unless Homes approved of what was done. However, there is no evidence that Homes’ board ever as such considered the Lease or Underlease. To the contrary, as I have mentioned, Mr Conway explained that none of the other directors of Homes was involved in the strategic decision-making and that the board was “content for those leases to be granted” “[b]ecause [he] was”. In any event, the Judge made a factual finding in paragraph 177 of the Judgment that “there was no such outward manifestation beyond the silence that Mr Conway describes”. That, it seems to me, is fatal to the contention that there was ratification. 81. Arguing otherwise, Mr Trompeter referred to Ciban Management Corp v Citco (BVI) Ltd [2020] UKPC 21, [2021] AC 122 (“Ciban”). In that case, which involved rather unusual facts, a company referred to as “Spectacular” was held to have conferred ostensible authority on a Mr Costa to issue powers of attorney as a result of conduct Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd on the part of its ultimate owner, a Mr Byington. In deciding that Mr Byington’s conduct could be attributed to Spectacular, the Privy Council relied on the Duomatic principle. Lord Burrows, giving the judgment of the Board, observed in paragraph 37 that, “[a]pplying the Duomatic principle to our case, Spectacular would have been bound had the sole shareholder, Mr Byington, consented to Mr Costa’s having authority to give instructions”. He went on in paragraph 38: “The question therefore becomes whether one can apply the Duomatic principle of informal unanimous shareholder consent to ostensible authority. As a matter of principle, there seems no reason why not. If actual authority can be conferred informally by unanimous shareholder consent the same should apply to ostensible authority. So here Mr Byington’s informal consent to the representation by conduct, that Mr Costa had authority to instruct TCCL (and Citco BVI) in relation to the fifth POA, binds Spectacular.” 82. Having noted in paragraph 41 that a “recognised qualification” to the Duomatic principle is that it “does not apply where the shareholder(s) did not consent to the relevant act”, Lord Burrows said in paragraph 42: “In the present case, it might be suggested that the single shareholder (Mr Byington) was not aware of, and therefore could not have consented to, Mr Costa’s giving instructions for the fifth POA. However, Mr

Byington had set up a mode of operation on which Citco BVI and TCCL reasonably relied. The very concept of ostensible authority means that Mr Byington should not be allowed to deny that he consented to the giving of authority to Mr Costa. By operating as he did, so as to keep his connection with Spectacular out of the picture, he was taking the risk that Mr Costa might betray him.”

83. Mr Trompeter relied on Ciban as a case in which the Duomatic principle was held to apply even though the shareholder had not known about the conduct at issue. However, Lord Burrows did not dissent from the “recognised qualification” to the Duomatic principle requiring shareholders to have consented to the relevant act. The principle was nevertheless held to apply in Ciban because what was at issue was ostensible authority. As Lord Burrows said, the “very concept of ostensible authority” meant that “Mr Byington should not be allowed to deny that he consented to the giving of authority to Mr Costa”. After all, Mr Byington had knowingly given Mr Costa actual authority to give instructions in relation to previous powers of attorney and, through that conduct, represented that Mr Costa had authority of this kind. 84. 85. The present case is not comparable. In particular, no question as to ostensible authority arose. I do not therefore see Ciban as helping Mr Trompeter. In short, I do not consider any breach of duty on Mr Conway’s part to have been ratified. Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd Relief under section 1157 of CA 2006 86. Section 1157 of CA 2006 empowers the Court to relieve a company director of liability for a breach of duty if it considers that the director acted honestly and reasonably and ought fairly to be excused. Mr Trompeter argued that Mr Conway should be relieved of any liability under this provision. I do not think, however, that we are in a position to decide whether there should be such relief. The question should, as it seems to me, be remitted to the Judge.

Conclusion

87. In my view, South Bank has an arguable claim against Mr Conway to which section 21(1)(b) of LA 1980 applies. The case should, I think, be remitted to the Judge for him to determine that claim on its merits and to decide whether, supposing it to be well-founded, relief should be granted under section 1157 of CA 2006. The claim for breach of the Room Leases The Room Leases 88. The parties to each Room Lease were Hotels (termed “the Landlord”), the relevant investor(s) (termed “the Tenant”) and South Bank (termed “the Company”). Under a Room Lease, Hotels demised to the investor(s) a room in the hotel with appurtenant rights. The Room Leases further provided, in clause 8, for South Bank to be appointed by the investors to find occupiers for the rooms, with permission to appoint a hotel operator to carry out its obligations. 89. Clause 9 of each Room Lease is in the following terms: “The Landlord hereby grants to the Company the right to utilise the Common Parts in conjunction with its appointment by the Tenant in clause 8 hereof for the purpose for which they are properly appointed.” 90. The expression “Common Parts” is defined to include: “(iv) the communal facilities within the Building and the Estate

- (v) all other parts of the Building and the Estate as are for the time being not comprised or intended in due course to be comprised in any lease granted or to be granted by the Landlord”. “Building” is stated to refer to “the hotel apartment block to be known as The Addington Street Apart Hotel London SE1 registered with the title number TGL221719” and “Estate” is said to mean “the Building is situated and all amenity areas forming part thereof”. As the Judge observed in paragraph 366 of the Judgment, “[o]bviously some words are missing from that definition”. 91. The Judge concluded that the “Common Parts” included the annex, expressing the view in paragraph 374 of the Judgment that “the Annex (which, at the time of the Room Leases would objectively have been understood to include conferencing Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd facilities) falls squarely within the scope of limb (iv) on the basis of being ‘communal facilities within the Building and the Estate’”. The respondents have not disputed that finding in this Court. It is also common ground (as it was before the Judge) that clause 9 of the Room Leases did not permit or authorise a charge to be imposed for South Bank’s “right to utilise the Common Parts”. The parties’ positions 92. 93. South Bank claims to be entitled to damages for breach of clause 9 of the Room Leases. The particulars of claim allege that Hotels “first breached clause 9 ... by granting the Lease with the effect that [it] could not give [South Bank] use of the Annex” and that clause 9 “was a continuing obligation and was breached by [Hotels] on a continuing basis”. South Bank accepts that section 8 of LA 1980 prevents it from recovering damages insofar as its claim accrued more than 12 years before it issued proceedings, but it maintains that the claim is not otherwise statute-barred and that it is entitled to be compensated by Hotels to the extent that it has been obliged to pay for use of the annex subsequently. Hotels, on the other hand, contends that clause 9 did not impose any contractual obligation on it but merely involved the immediate grant of a right over land. Supposing that to be wrong, the obligation arising from clause 9 was not a continuing one and, in any event, there was no continuing breach of it. Further, South Bank did not suffer any loss as a result of any breach of clause 9. The Judgment 94. The Judge was not persuaded that clause 9 did not impose a contractual obligation on Hotels and was prepared to accept that the obligation was a continuing one. However, he did not consider there to have been continuing breach. He said in paragraph 383 of the Judgment: “Right at the heart of the Room Lease Claim is the proposition that Galliard Hotels’ grant of the Lease was a breach of Clause 9 because it meant that Galliard Hotels could no longer give the use of the Annex that it had promised. However, if that assertion is correct, Galliard Hotels did nothing further to aggravate the situation after granting the Lease. Nor, after the Lease was granted was the situation more acute. On [South Bank’s] formulation, two years after the Lease was granted, and without any additional action on its part, Galliard Hotels was just as incapable of giving [South Bank] the use of the Annex as it was on the day the Lease was granted. I regard that as inconsistent with an assertion of a ‘continuing breach’ of Clause 9.” 95. Drawing a contrast with a repairing covenant, the Judge said in paragraph 384 of the

Judgment:

"If a tenant who has agreed to a repairing covenant allows a property to fall into disrepair it can quite sensibly be said that each day that passes (i) involves a new breach consisting of the Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd tenant's failure to take the action required and (ii) which breach makes the problem more acute. As I have explained, neither statement is true of the breach of Clause 9 said to consist of Galliard Hotels' grant of the Lease." 96. Noting that Hotels argued that, "if grant of the Lease was a breach it did not cause [South Bank] any loss since the Lease itself did not result in [South Bank] losing any 'right to utilise' the Annex for no payment", the Judge said in paragraph 386 of the Judgment that he considered the argument "to be instructive and to support [his] conclusion in paragraph 383". He went on: "The grant of the Lease was not of itself injurious to [South Bank's] interests: conceptually even after granting the Lease, Galliard Hotels could have requested Lodgeshine not to complain of [South Bank's] continuing use of the Annex or to grant [South Bank] a licence. The real substance of [South Bank's] complaint is that, following grant of the Underlease, it had to pay to use the Annex. That injury, if it was one, was crystallised once and for all when the Underlease was granted since the obligation to pay was constituted by the Underlease." Authorities 97. In *Bell v Peter Browne & Co* [1990] 2 QB 495, Nicholls LJ distinguished at 501 between the "normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due under the contract" and "exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation". In a case of the former kind, Nicholls LJ explained, "there is a single breach of contract" and "[a] remediable breach is just as much a breach of contract when it occurs as an irremediable breach, although the practical consequences are likely to be less serious if the breach comes to light in time to take remedial action". In contrast, where there is a continuing contractual obligation "the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach". Nicholls LJ gave the "usual form of repairing clause in a tenancy agreement" as a "familiar example". He said of that: "Non-repair for six years does not result in the repairing obligation becoming statute-barred while the tenancy still subsists. The obligation of the tenant or the landlord to keep the property in repair is broken afresh every day the property is out of repair, as Bramwell B. observed in *Spoor v. Green* (1874) L. R. 9 Ex. 99, 111." 98. In *Spoor v Green* (1874) LR 9 Ex 99, to which Nicholls LJ referred, Bramwell B said at 111: "In the case of a covenant to repair, the breach is continuing, because the covenant is broken afresh every day the premises are out of repair, and when an action is brought for breach of Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd such a covenant, the plaintiff does not recover the value of the repairs, because he may recover again if the want of repair still continues." Such a breach was to be distinguished from one of covenant for title which, Bramwell B observed, "is not what is called a continuing breach, any more than not paying money is called a continuing breach", where "[t]he covenant remains broken indeed, but broken once for all". 99. In a similar vein, McGregor on Damages, 22nd. ed., distinguishes between the covenant for "good right to convey" and that for "quiet enjoyment". McGregor explains in paragraph 28-017 that breach of the former "is single, entire and complete upon the execution of the conveyance" whereas "[t]he second covenant operates prospectively and there is no breach until some disturbance of the buyer's enjoyment of the land takes place; and it is a continuing covenant upon which damages may be recovered from time to time as they

accrue".

100. We were also taken to *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, [2024] AC 595 ("Jalla"), which involved a claim for nuisance. In that case, there had been an oil spill off the coast of Nigeria but oil was said still to be present on the claimants' land. The Supreme Court held that there was no continuing nuisance because "[t]he leak was a one-off event or an isolated escape" and, "outside the claimants' land, there was no repeated activity by the defendants or an ongoing state of affairs for which the defendants were responsible that was causing continuing undue interference with the use and enjoyment of the claimants' land" (paragraph 37, per Lord Burrows). That situation could be contrasted with that in *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, where the roots of a tree on the pavement adjoining a block of flats had caused cracks but the highway authority refused to remove it. There, Lord Burrows explained in paragraph 38, "there was an ongoing state of affairs outside the claimant's land, constituted by the living tree and its roots, for which the defendant was responsible and which, by further abstraction of water through the encroachment of the roots, caused continuing undue interference with the use and enjoyment of the claimant's land". 101. Lord Burrows said this about continuing nuisances in paragraph 26: "In principle, and in general terms, a continuing nuisance is one where, outside the claimant's land and usually on the defendant's land, there is repeated activity by the defendant or an ongoing state of affairs for which the defendant is responsible which causes continuing undue interference with the use and enjoyment of the claimant's land. For a continuing nuisance, the interference may be similar on each occasion but the important point is that it is continuing day after day or on another regular basis. So, for example, smoke, noise, smells, vibrations and, as in *Fearn* [2024] AC 1, overlooking are continuing nuisances where those interferences are continuing on a regular basis. The cause of action therefore accrues afresh on a continuing basis." 102. Lord Burrows added in paragraph 31: Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* "a continuing nuisance is in principle no different from any other continuing tort or civil wrong. So, for example, in *Coventry v Apsley* (1691) 2 Salk 420 the tort of false imprisonment (trespass to the person), which is actionable per se, was continuing so that there was a continuing cause of action for as long as the false imprisonment carried on (i e for as long as there was the repetition of the imprisoning conduct)." 103. The position of a servient owner in relation to a right of way is also noteworthy. As was pointed out on behalf of Hotels, the servient owner is not obliged to maintain or repair the route of a right of way: see *Gale on Easements*, 22nd. ed., at paragraph 9- 111(2). On the other hand, "[w]here ... the landlord grants a right of way to a tenant, he may be under a duty to secure that the right of way remains unobstructed, and may therefore be liable for breach of covenant if he fails to take steps to prevent his other tenants from blocking the way": *Woodfall: Landlord and Tenant*, at paragraph 11.291; see also *Gale on Easements*, at paragraph 14-36. Discussion

104. Mr McLoughlin, who presented this part of the case for the respondents, submitted that clause 9 of the Room Leases did not impose any obligation on Hotels. Stressing the words “grants ... the right”, he said that clause 9 simply effected a grant and involved no promise as to the future. Possibly, South Bank might have advanced a case for breach of covenant against derogation from grant or for quiet enjoyment, but it had not done so. The claim for breach of clause 9 therefore fell to be dismissed for this reason as well as those given by the Judge, Mr McLoughlin maintained. 105. 106. Like the Judge, however, I have not been persuaded. Clause 9 forms part of contractual document to which both Hotels and South Bank were parties. By clause 9, Hotels gave South Bank a “right to utilise” areas of which it was the owner. True it is that the clause uses the word “grant”, but I do not see why that should have precluded South Bank from complaining of breach of the provision in the event of Hotels failing to honour that right. As I see it, Hotels undertook a contractual obligation to permit South Bank, free of charge, to utilise the “Common Parts” and, if it did not do so, South Bank was entitled to allege breach of clause 9 without also, or alternatively, invoking derogation from grant or breach of covenant for quiet enjoyment. I also agree with the Judge that clause 9 imposed a continuing obligation. The provision was not a “normal” one requiring something to be done at or by a particular time. South Bank was clearly intended to be able to continue to use the “Common Parts” throughout the term of the Room Leases. Hotels could not satisfy clause 9 by affording South Bank access to the “Common Parts” only on the day the Lease was entered into or, indeed, for any period short of the term of the Lease. Hotels had to let South Bank utilise the “Common Parts” on an enduring basis.
107. However, I take a different view from the Judge on whether there was continuing breach. It seems to me that this is a case in which “the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach” (to use the words of Nicholls LJ in *Bell v Peter Browne & Co*). It was incumbent on Hotels to allow South Bank to continue to use the “Common Parts” every day and it committed repeated breaches as South Bank was not afforded that right.
108. As I have mentioned, the Judge drew an analogy with a repairing covenant. If, however, he thought that breach of such a covenant is continuing only if it “makes the problem more acute”, he was mistaken. As Bramwell B said in *Spoor v Green*, “the covenant is broken afresh every day the premises are out of repair”. There is no requirement that things should be getting worse.
109. An analogy can also, as it seems to me, be drawn with a covenant for quiet enjoyment. As McGregor on Damages notes, such a covenant is “a continuing covenant upon which damages may be recovered from time to time as they accrue”. 110. The Judge commented that “[r]ight at the heart of the Room Lease Claim is the proposition that Galliard Hotels’ grant of the Lease was a breach of Clause 9 because it meant that Galliard Hotels could no longer give the use of the Annex that it had promised”. For his part, Mr McLoughlin pointed

out that the particulars of claim allege that Hotels breached clause 9 “by granting the Lease”. However, the particulars of claim go on to assert that clause 9 “was a continuing contractual obligation and was breached ... on a continuing basis”. In his oral submissions, Mr Pourghadiri, presenting South Bank’s arguments on this part of the case, spoke of the grant of the Lease having been “the cause of the breach”. At any rate, I do not think South Bank can fairly be understood to have alleged only a once-for-all breach of clause 9 at the date of the Lease.

111. Mr McLoughlin sought support for his submissions in Jalla. Citing, among others, paragraph 26 of Lord Burrows’ judgment, Mr McLoughlin said that the decision shows that a continuing breach requires some sort of repeated activity, continuing day after day or on another regular basis. He reinforced the point by quoting the passage in which Lord Burrows observed that “a continuing nuisance is in principle no different from any other continuing tort or civil wrong”. 112. 113. In my view, however, Jalla is not of assistance. It was concerned with when a nuisance is to be regarded as continuing, not with when a continuing contractual obligation gives rise to continuing breach. A continuing state of affairs can constitute a continuing breach of a repairing covenant without any repeated activity. Likewise, no repeated activity was needed for there to be continuing breach of clause 9. In fact, Lord Burrows did not say that even continuing nuisance always requires repeated activity. He also referred to “an ongoing state of affairs for which the defendant is responsible”. I think it plain, too, that, if South Bank has become liable to pay rent for use of the annex, it has suffered loss as a result of Hotels’ breach of clause 9. The simple fact is that South Bank would have had to pay rent to secure something that Hotels had promised to provide rent-free on a continuing basis. On the face of it, Hotels will have continued to incur liability even after it had transferred the freehold to South Bank: after all, (a) there was no provision in the Room Leases for Hotels’ obligation under clause 9 to come to an end at that point, (b) nor would the obligation appear to have ceased pursuant to the Landlord and Tenant (Covenants) Act 1995 and (c) South Bank would still have had to pay rent to obtain the use of the annex. Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd The validity of the Lease and Underlease 114. 115. 116. The Lease and Underlease were both stated to be signed as a deed by each of the parties to them “acting by two directors or a director and a secretary”. A Mr Angus, who was at the time the company secretary of Hotels, Lodgeshine and South Bank, signed the Lease on behalf of the first two and the Underlease on behalf of the latter two. In each case, it appeared that Mr Conway, who was then the sole director of all three companies, had also signed. It has transpired, however, that in every instance it was Mr Conway’s personal assistant, a Ms Akers, who wrote “S Conway” and that Mr Conway did not himself sign either the Lease or the Underlease. The Judge noted in paragraph 391 of the Judgment that Mr Conway “frequently asked Ms Akers to sign documents by writing his name on them because [he] felt that he did not have time to do so”. The Judge considered that Ms Akers “signed both the Lease and the Underlease genuinely believing she had Mr Conway’s authority to do so” although no power of attorney had been executed in her favour: see

paragraph 393. The Judge explained in paragraph 395 of the Judgment that Mr Conway “accepted in cross-examination that he realised that anyone at HM Land Registry who saw those documents would think that ‘S Conway’ had signed the document himself rather than asking someone to write that signature for him”. The Judge went on in paragraph 396: “However, Mr Conway did not know precisely what steps needed to be taken validly to execute documents as deeds at the relevant time. That conclusion follows from (i) Mr Conway’s lack of knowledge of legal matters, (ii) his oral evidence to the effect that he had not been given advice by Howard Kennedy as to how precisely he needed to go about executing the documents they sent to him and (iii) his general aversion to getting to the bottom of points of detail associated with his many property transactions. He did not, therefore, realise that by asking Ms Akers to sign documents in his name he, or companies of which he was a director, might not validly be executing those documents. At no point while he was a director of Galliard Hotels or Lodgeshine has either company sought to disavow their respective obligations under the Lease and Underlease in reliance on the proposition that either document had been invalidly executed. I infer that Mr Conway genuinely thought the Lease and Underlease were validly executed.” The statutory framework 117. Section 52 of the Law of Property Act 1925 (“LPA 1925”) provides that “[a]ll conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed”. By section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989, an instrument “shall not be a deed unless ... it is validly executed as a deed ... by [the person making it] or a person authorised to execute it in the name or on behalf of that person”. By section 36AA of the Companies Act 1985 (“CA 1985”), a document “is validly executed by a company as a deed for the purpose of section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989, if and only if (a) it is duly executed by the company, and (b) it Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd is delivered as a deed”. With regard to the former requirement, section 44 of CA 2006 provides, so far as material, as follows: “(1) Under the law of England and Wales or Northern Ireland a document is executed by a company— (a) by the affixing of its common seal, or (b) by signature in accordance with the following provisions. (2) A document is validly executed by a company if it is signed on behalf of the company— (a) by two authorised signatories, or (b) by a director of the company in the presence of a witness who attests the signature. (3) The following are ‘authorised signatories’ for the purposes of subsection (2)— (4) (5) (a) every director of the company, and (b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company. A document signed in accordance with subsection (2) and expressed, in whatever words, to be executed by the company has the same effect as if executed under the common seal of the company. In favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2). A ‘purchaser’ means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.” 118. Section 47 of CA 2006 deals with execution by attorney. It reads: “(1) Under the law of England and Wales or Northern Ireland

a company may, by instrument executed as a deed, empower a person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf. (2) A deed or other document so executed, whether in the United Kingdom or elsewhere, has effect as if Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* executed by the company.” 119. Section 44(5) of CA 2006 reflected section 36A(6) of CA 1985, which had provided: “In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company, and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, to have been delivered upon its being executed. A ‘purchaser’ means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.” 120. Section 36A was inserted into CA 1985 by the Companies Act 1989. The section stated that a company need not have a company seal and provided for signatures by a director and the secretary, or by two directors, and expressed (in whatever form of words) to be executed by the company, to have the same effect as execution under such a seal.

121. Wording comparable to that in section 44(5) of CA 2006 (and, previously, section 36A(6) of CA 1985) was already to be found in section 74(1) of LPA 1925. That reads: “In favour of a purchaser an instrument shall be deemed to have been duly executed by a corporation aggregate if a seal purporting to be the corporation’s seal purports to be affixed to the instrument in the presence of and attested by— (a) (b) two members of the board of directors, council or other governing body of the corporation, or one such member and the clerk, secretary or other permanent officer of the corporation or his deputy.” “Purchaser” is for relevant purposes defined in section 205 of LPA 1925 as “a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property”. 122. Section 74(1) of LPA 1925 replaced section 73(1) of the Law of Property Act 1922 (“LPA 1922”). As originally enacted, that was in these terms: “A corporation aggregate may execute a deed by having their seal affixed thereto in the presence of and attested by their clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation; and where the seal of the corporation is affixed to a deed, then, if the requirements of this subsection have been complied with, the deed shall be deemed to have Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* been executed in the presence of the proper persons, and to have taken effect accordingly.” Paragraph 9 of the Third Schedule to the Law of Property (Amendment) Act 1924 subsequently provided for section 73(1) of LPA 1922 to “take effect in favour of a purchaser”. 123. In *Longman v Viscount Chelsea* (1989) 58 P&CR 189, Nourse LJ, with whom Kerr and Taylor LJ agreed, observed at 199 that the “sole purpose of section 74(1) [of LPA 1925] was to make it unnecessary for a purchaser to require proof of the corporation’s formal compliance with the provisions of its memorandum and articles of association or its charter”. The Law Commission noted in paragraph 5.26 of its 1996

consultation document on “The execution of deeds and documents by or on behalf of bodies corporate” that the apparent intention of section 36A(6) of CA 1985 was “to extend the protection available for a purchaser under section 74(1) of the Law of Property Act to the situation where a company takes advantage of section 36A(4) of the Companies Act to execute without using a seal”. The Judgment 124. The Judge observed in paragraph 414 of the Judgment that the Lease and Underlease “were not ‘signed by’ Mr Conway acting on behalf of the companies concerned”. However, he concluded in paragraph 431 that section 44(5) of CA 2006 “operates (i) to treat the Lease as duly executed in favour of Lodgeshine and (ii) to treat the Underlease as duly executed in favour of [South Bank]”. He had previously concluded, in paragraph 429, that “Mr Conway’s knowledge that he had not himself signed the Lease and the Underlease does not prevent either Lodgeshine or [South Bank] from being ‘purchasers’ in ‘good faith’ for the purposes of s44(5) of CA 2006”. In that respect, the Judge had found in paragraph 421 that Mr Conway “genuinely believed that both the Lease and the Underlease had been validly executed”. Further, the Judge rejected an argument that section 44(5) could not operate to validate the Underlease when the “purchaser”, South Bank, was disputing validity. Addressing that contention in paragraph 430, the Judge said: “In its written closing submissions, [South Bank] made a separate point to the effect that s44(5) is expressed to apply ‘in favour’ of a ‘purchaser’. It argued that due execution of the Underlease did [South Bank] no ‘favour’ at all since [South Bank] would prefer to be released from the obligations contained in the Underlease. However, nothing was said on this point in oral closings and ... I proceed on the basis that this point is not strenuously being pursued. In any event, in my judgment s44(5) is capable of applying ‘in favour of’ [South Bank]. Clearly, there has been a change in the management of [South Bank] since the date of the Underlease with the present management wanting the Underlease to be set aside. However, at the time of the Underlease, [South Bank] was under different management which positively sought registration of the Underlease as a legal interest in land in reliance on the proposition that it had been validly executed as a deed.” Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd 125. Earlier in the Judgment, the Judge had rejected a submission that it was not open to South Bank to advance its arguments as against Lodgeshine since a tenant is estopped from disputing the landlord’s title: see paragraphs 398 and 399 of the Judgment. The parties’ positions 126. 127. South Bank contends that the Lease and Underlease did not take effect as deeds, with the result that the documents did not create legal leasehold interests and the records in respect of them at the Land Registry should be rectified. According to South Bank, section 44(5) of CA 2006 is inapplicable both because (a) (as regards the Underlease) section 44(5) operates only “in favour of a purchaser” and, here, the “purchaser” (viz. South Bank) has no wish to rely on it and (b) (as regards both the Lease and the Underlease) neither “purchaser” was “in good faith” since Mr Conway knew that that he had not signed them. In contrast, the respondents endorsed the Judge’s reasons for holding that section 44(5) of CA 2006 applied. They also argued that, even if that provision was not applicable, (a) South Bank was estopped from disputing the validity of the Lease and Underlease, (b) the Lease and Underlease would anyway have taken effect in equity and (c) no order for

rectification of the register should be made. Citing paragraph 430 of the Judgment (quoted in paragraph 124 above), the respondents submitted, too, that South Bank effectively abandoned before the Judge the contention that the words “[i]n favour of a purchaser” in section 44(5) mean that Lodgeshine is precluded from invoking the subsection in relation to the Underlease. That being so, the respondents maintained, South Bank cannot raise the argument in this Court. Section 44(5) of CA 2006 128. The first question which arises in relation to section 44(5) of CA 2006 relates to the significance of its reference to “[i]n favour of a purchaser”.

129. As I have said, the respondents denied that it is open to South Bank to argue that these words prevent Lodgeshine from relying on section 44(5) of CA 2006 before this Court as regards the Underlease. I do not agree. It can be seen from paragraph 430 of the Judgment that South Bank raised the point in its written closing submissions. While it is evident from that paragraph that nothing was said on the subject in the oral closing submissions, (a) the time available for those submissions was limited, (b) the Judge himself proceeded on the basis that the point was “not strenuously being pursued”, not that it had been abandoned, (c) the Judge addressed the merits of the issue and (d) there is no suggestion that the respondents have suffered any prejudice as a result of South Bank’s failure to press the matter before the Judge 130. Turning to the substance of the question, Mr Trompeter argued that section 44(5) of CA 2006 does not give a purchaser a choice but rather operates automatically wherever the circumstances specified in the subsection exist. If, therefore, a document “purports to be signed in accordance with subsection (2)”, it is immediately and for all purposes “deemed to have been duly executed”. In such a case, a purchaser cannot disavow the document as not having been so signed and the counterparty can correspondingly rely on section 44(5). The purpose of the subsection, Mr Trompeter said, is to allow purchasers to rely on documents apparently executed by companies Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd and so to achieve certainty. That purpose would not be served by allowing a purchaser to decide whether or not, at a time of its choosing, to disclaim the relevant document.
131. However, these submissions do not sit comfortably with the wording of section 44(5) of CA 2006. That expressly states that a document is to be deemed to have been duly executed “[i]n favour of a purchaser”. The deeming is not unqualified, but only “[i]n favour of a purchaser”. Nor does the subsection simply say that the deeming occurs wherever a document purports to have been signed in accordance with section 44(2) by a counterparty of a purchaser: the deeming is to apply “[i]n favour of a purchaser”. It is also noteworthy that section 44(5) requires a “purchaser in good faith” so there can be no question of a counterparty being able to rely on the subsection against a purchaser who was not “in good faith”. That, perhaps, confirms that the subsection confers a privilege on purchasers who satisfy certain conditions rather than specifying circumstances in which there will be an automatic deeming on which any party can rely. The fact that Parliament chose to amend section 73 of LPA 1922 to specify that it should “take effect in favour of a purchaser” tends in the same

direction. 132. 133. 134. In the present case, far from relying on section 44(5) of CA 2006, South Bank wished to deny that the Underlease had been validly executed. The Judge nevertheless considered the subsection to be applicable. On that basis, the deeming for which the subsection provides would operate in favour of Lodgeshine and fly in the face of the wishes of the purchaser, namely, South Bank. In my view, that result would not be consistent with the terms of section 44(5). In short, it seems to me that no one but a purchaser can invoke the subsection and so that Lodgeshine could not avail itself of the provision when South Bank had no wish to do so. The next question is whether the purchasers as regards the Lease and Underlease (Lodgeshine and South Bank respectively) were “in good faith” within the meaning of section 44(5) of CA 2006. The Judge answered that question in the affirmative, and Mr Trompeter supported that conclusion. In contrast, Mr Willan argued that the subsection cannot apply where the purchaser had notice of the fact vitiating due execution or, at all events, where the purchaser actually knew that it had not been signed as it purported to be. There appears to be no direct authority on the meaning of “good faith” for the purposes of section 44(5) of CA 2006. However, we were referred to two authorities in which the meaning of “good faith” has been considered in other contexts. The earliest of these was *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48. That case concerned paragraph 4(1) of schedule 3 to the Leasehold Reform Act 1967, which provided: “Where a tenant makes a claim to acquire the freehold or an extended lease of any property, then during the currency of the claim no proceedings to enforce any right of re-entry or forfeiture terminating the tenancy shall be brought in any court without the leave of that court, and leave shall not be granted unless the court is satisfied that the claim was not made in good faith” Lord Denning MR said at 55: Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* “How then are we to decide whether the tenant’s claim to buy the freehold is made in good faith, or not? The words ‘in good faith’ are often used in statutes but rarely defined. A good instance is the Larceny Act 1916, which speaks of ‘a claim of right made in good faith,’ but does not tell us what ‘good faith’ means. Other instances come readily to mind. The Limitation Act 1939, section 26, speaks of cases when a right of action is concealed by ‘fraud,’ but does not define what is meant by ‘fraud’ in this context. It is left to the courts to work it out from case to case: see *Applegate v. Moss* [1971] 1 Q. B. 406. In all such cases, when a word or phrase goes undefined, the judges have to work out for themselves the meaning of it, doing the best they can to interpret the will of the legislature in regard to it. That is the principle I stated in *Seaford Court Estates v. Asher* [1949] 2 K. B. 481, 499. To my mind, under this statute a claim is made ‘in good faith’ when it is made honestly and with no ulterior motive. It must be made by the tenant honestly in the belief that he has a lawful right to acquire the freehold or an extended lease, and it must be made without any ulterior motive, such as to avoid the just consequences of his own misdeeds or failures. If the landlord asserts that the tenant’s claim is not made in good faith, the burden is on the landlord to satisfy the court that the tenant, in making the claim, was acting dishonestly or with an ulterior motive.” 135. That decision was one of those cited by Plowman J in *Smith v Morrison* [1974] 1 WLR 659. In that case, there was an issue as to whether a company which had

contracted to buy a farm had applied for a search of the register “in good faith” within the meaning of rule 2 of the Land Registration (Official Searches) Rules 1969. Plowman J concluded at 676 that “if a purchaser acts honestly he is acting ‘in good faith’ within the meaning of rule 2 of the rules of 1969”.

136. We were taken, too, to *Midland Bank Trust Co v Green* [1981] AC 513. Lord Wilberforce there said this at 528: “My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience and the composite expression was used to epitomise the circumstances in which equity would or rather would not do so. I think that it would generally be true to say that the words ‘in good faith’ related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the Conveyancing Act 1882, section 3. But ... it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* regulated by statute, the requirement of good faith became obsolete. Equity still retained its interest in and power over the purchaser’s conscience. The classic judgment of James L. J. in *Pilcher v. Rawlins* (1872) L. R. 7 Ch. App. 259, 269 is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. And there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into (see *Berwick & Co. v. Price* [1905] 1 Ch. 632, 639; *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231, 256; *Oliver v. Hinton* [1899] 2 Ch. 264, 273).”
137. *Morris v Kanssen* [1946] AC 459 is also, as it seems to me, of some interest. In that case, a director, Mr Morris, argued that he was entitled to treat shares as having been validly allotted to him on the basis of the “internal management rule” which Lord Simonds considered to be accurately summarised as “persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular”: see 474. The contention was rejected. Lord Simonds noted at 475 that the maxim “omnia praesumuntur rite esse acta” was a “fundamental” maxim of the law and had many applications. However, Mr Morris “was himself purporting to act on behalf of the company in a transaction in which he had no authority” and so could not say that he was entitled to assume that all was in order: see 476. Lord Simonds had said at 475: “It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his

own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.” 138. Section 44(5) of CA 2006 has a somewhat similar purpose. The purpose of section 74(1) of LPA 1925 was (in the words of Nourse LJ in *Longman v Viscount Chelsea*) “to make it unnecessary for a purchaser to require proof of the corporation’s formal compliance with the provisions of its memorandum and articles of association or its charter” and section 36A(6) of CA 1985, which section 44(5) of CA 2006 reflects, was evidently designed “to extend the protection available for a purchaser under section 74(1) of the Law of Property Act to the situation where a company takes advantage of section 36A(4) of the Companies Act to execute without using a seal” (to quote the Law Commission). What, therefore, is contemplated is a situation in which a document appears to have been duly signed on behalf of a corporate counterparty of a purchaser. I do not think Parliament will have intended that a purchaser should be able to use either section 36A(6) of CA 1985 or section 44(5) of CA 2006 to validate its own failure to satisfy the requirements of section 36A or section 44 (as the case may be). More specifically, I do not think a purchaser who knows that a document was not in fact signed on its behalf by “two authorised Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* 139. 140. 141. signatories” or “a director of the company in the presence of a witness who attests the signature” can take advantage of section 44(5) even if that might appear to be so objectively. Such a purchaser is not, in my view, to be considered to be “in good faith” within the meaning of section 44(5). The position is somewhat comparable to that in *Morris v Kanssen*. It seems to me that a purchaser will also be unable to avail itself of section 44(5) of CA 2006 if it knows that a document purportedly signed on behalf of a corporate counterparty was not in fact signed by “two authorised signatories” or “a director of the company in the presence of a witness who attests the signature”. Section 44(5) is meant to protect purchasers who do not know that the position is otherwise than it purports to be. I cannot see why it should extend to a case in which a purchaser knows that the appearance does not correspond to the reality. A purchaser who is aware of such a discrepancy is not, in my view, to be considered “in good faith”. Just as a purchaser who knows that a document has not been signed on its own behalf by “two authorised signatories” or “a director of the company in the presence of a witness who attests the signature” cannot rely on section 44(5), so, in my view, will a purchaser who has actual knowledge that a document has not been signed on a counterparty’s behalf by “two authorised signatories” or “a director of the company in the presence of a witness who attests the signature” be unable to invoke section 44(5). In the circumstances of this case, I do not need to arrive at a concluded view on whether mere notice short of actual knowledge that a document had not been signed on behalf of a corporate counterparty in accordance with section 44(2) of CA 2006 would prevent a purchaser from relying on section 44(5). The fact that the words “in good faith” traditionally “related to the existence of notice” (as Lord Wilberforce said in *Midland Bank Trust Co v Green*) might suggest that that is so. However, I doubt whether it is. As Nourse J explained in *Longman v Viscount Chelsea*, section 74(1) of LPA 1925 was intended to relieve purchasers of the need to make inquiries, and the same must be true of section 44(5). The objective would be undermined if constructive notice of a

deficiency sufficed to preclude reliance on section 44(5). In the present case, Mr Conway, by whom the Lease and Underlease were purportedly signed on behalf of Hotels, Lodgeshine and South Bank, knew that he had not in fact signed either document. Since Mr Conway was the sole director of all three companies, his knowledge is to be attributed to them. That being so, each purchaser (viz. Lodgeshine as regards the Lease and South Bank as regards the Underlease) is to be taken to have known that, contrary to what appeared to be the case, they had not been signed by any director. If it matters, knowledge that the documents had not been signed by a director is also to be attributed to the counterparties (viz. Hotels as regards the Lease and Lodgeshine as regards the Underlease). It follows, as it seems to me, that section 44(5) of CA 2006 cannot apply in relation to either the Lease or the Underlease. Each party to each document (and, in particular, the purchasers) knew that appearance did not match the reality since neither document had been signed by any director. Estoppel 142. There is a long-established principle that a tenant is estopped from disputing his landlord's title: see e.g. *Woodfall: Landlord and Tenant*, at paragraph 1.037. A similar principle applies in relation to landlords. Noting, among other things, that "[i]t is a Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* general rule that a man is estopped by his own deed", *Woodfall* explains at paragraph 1.035 that a landlord can be "estopped by the lease from denying that he had any estate in the land at the time the lease was executed by him, or that he had the right to dispose of the possession during the term thereby expressed to be granted". In that connection, *Woodfall* observes that estoppel by representation and estoppel by grant can both be relevant. As regards the latter, *Woodfall* states in paragraph 1.035: "In such a case the landlord will be estopped only from denying that he had no title at all. It appears that if he had some title (but title insufficient to support the lease purported to be granted) this kind of estoppel will not apply, and the tenant will acquire a legal estate but one which does not exceed that of the landlord."

143. One of the cases to which we referred in this context was *Cuthbertson v Irving* (1859) 4 H&N 742. There, Martin B, giving the judgment of the Court of Exchequer, said at 754-755 (in a passage quoted with approval by Lord Collins in *Southern Pacific Mortgages*, at paragraph 71): "when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words a tenant cannot deny his landlord's title, nor can the lessor dispute the validity of the lease". 144. These principles were discussed rather more recently in *First National Bank plc v Thompson* [1996] Ch 231 ("*First National Bank*"). In that case, the defendant had executed a legal charge in favour of a bank. At the time, he was neither the registered proprietor of the property nor entitled to be, but he was so registered later. The Court of Appeal held that the bank had acquired a legal mortgage by estoppel when the charge was purportedly executed and that a registrable charge had come into being when the defendant obtained the legal estate. Millett LJ, with whom Ward LJ agreed, described the relevant estoppel at 237 as "the product of the fundamental principle of the common law which precludes a grantor from disputing the validity or effect of his own grant". He went on to explain on the same

page: “The common rule that a mortgagor cannot dispute the title of his mortgagee was recognised in *Right d. Jefferys v. Bucknell*

- (1831) 2 B. & Ad. 278, and the similar rule that a lessor cannot dispute the title of his own lessee has an equally long history. Neither depends on what has sometimes been called ‘the technical doctrine of estoppel,’ that is to say, estoppel by representation, but on the refusal of the common law to permit the grantor of a legal estate to deny that he had the legal title.” At 239, Millett LJ said that, in the absence of “an express recital or other clear and unequivocal representation of the grantor’s title”, “the grantor was estopped only from denying that he had a legal title”. He continued: “Had the estoppel been based on some implied representation by conduct, one would have expected the grantor to be Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* estopped from denying that he had a title sufficient to support the grant. But this was not the case. No title by estoppel could arise if the grantor had any present legal estate in the property, even if it was insufficient to support the grant. In such a case the grantee obtained an estate in interest and not by estoppel but it could not exceed the estate of his grantor.”
145. Mr Trompeter also cited *Monroe v Kerry* (1710) 1 Bro PC 67. In that case, the defendant had demised land to the plaintiff for the natural lives of the latter, his wife and son, from a date a few days later. In response to a claim for rent, the plaintiff insisted that the lease was void since “a lease for lives ... could not be granted without livery and seisin, or lease and release, or bargain and sale” and “a lease of a freehold ... to commence in futuro ... was ... contrary to the known and settled rules of law”: see 68. However, the House of Lords decided the case in favour of the defendant, who had contended that “this being an action of covenant upon a deed or indenture, under the hand and seal of the plaintiff, and the title of the land not being in question, he was estopped from saying the lease was not a good lease; for, let the lease be what it would, whether for lives or at will, the covenant was good; and if otherwise, the tenant might enjoy the land, and yet the landlord have no remedy for his rent.”: see 69.
146. Mr Trompeter further relied on *Taylor v Needham* (1810) 2 Taunt 278 as authority for the proposition that an assignee is bound by an estoppel which bound his assignor. Lord Mansfield CJ said in *Taylor v Needham* at 282-283: “Then the question comes, whether the assignee of the lease may be allowed to controvert the title of the lessor, when the lessee, under whom he derives, could not controvert the title of the lessor; so that the assignee should have a better right than he from whom he derives it. Exclusive of all the dicta, it would be a very odd thing in the law of any country, if A. could take, by any form of conveyance, a greater or better right than he had who conveys it to him; it would be contrary to all principle. But it does not rest merely on the general principle; for if you look into all the books upon estoppel, you find it laid down, that parties and privies are estopped, and he who takes an estate under a deed, is privy in estate, and therefore never can be in a better situation than he from whom he takes it.”

147. Mr Trompeter argued that the principles discussed in these cases mean that (a) South Bank, as purported underlessee, is estopped from denying the validity of the Underlease and (b) Hotels was estopped from denying the validity of its grant in favour of Lodgeshine pursuant to the Lease and, having acquired the freehold from Hotels, South Bank is also so estopped.
148. I do not agree. The authorities show that the parties to a lease can be estopped from denying the landlord's title. However, South Bank is challenging the validity of the Lease and Underlease on a different basis. It is true that its attack on the Lease, if well-founded, would have the consequence that Lodgeshine had no title when the Underlease was purportedly granted, but that is not the ground on which South Bank is disputing the effectiveness of the Underlease. Its contention is that, regardless of Judgment Approved by the court for handing down. *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* 149. 150. 151. whether Lodgeshine was in a position to enter into the Underlease, it did not in fact do so since the document was not validly executed. Likewise, South Bank does not contend that Hotels lacked title to grant the Lease but rather that the document was not duly executed. There could be circumstances in which estoppel by representation could serve to bar one or both parties to a purported lease from denying that there was proper execution. However, the respondents do not suggest that any relevant estoppel by representation arose in the present case. They pin their colours to the estoppel discussed in paragraphs 142-145 above. In my view, however, that estoppel does not prevent a party to a purported lease from denying due execution. A tenant cannot deny the validity of the document on the basis that the landlord lacked title and, similarly, a landlord cannot maintain that the document was ineffective because he had no title. It by no means follows, though, that a party to a purported lease is barred from maintaining that the document was not duly executed. In *First National Bank*, Millett LJ referred to the "fundamental principle ... which precludes a grantor from disputing the validity or effect of his own grant". However, *First National Bank* was a case in which a mortgagor had lacked title, not one in which there was an issue as to execution. Moreover, what Millett LJ went on to discuss were the principles relating to denial of title.
152. Nor, as it seems to me, does *Monroe v Kerry* assist the respondents. I do not find the decision all that easy to interpret: the report is a short one and there have long since ceased to be requirements for "livery and seisin". However, the case appears to have been decided on the basis that the covenant to pay rent, contained in "a deed or indenture ... under the hand and seal of the plaintiff", was "good" even if the lease failed to take effect according to its terms given the absence of "livery and seisin, or lease and release, or bargain and sale". I do not think the case establishes that a party to a purported lease cannot dispute its execution.

153. As Mr Willan pointed out, the respondents' contentions have a "bootstraps" flavour. It is suggested that the parties to the Lease and Underlease are estopped from denying their validity because the parties to leases are so precluded. On South Bank's case, however, the want of due execution meant that the Lease and Underlease were ineffective and so Hotels, Lodgeshine and South Bank were never in fact parties to any lease or underlease.
154. A further point is that, if the parties to a purported lease were (as Mr Trompeter submitted) estopped from denying the document's validity, the statutory requirements relating to execution would be seriously undermined. Parliament has chosen to require certain leases to be made by deed and explained how a deed is to be executed. Were, however, Mr Trompeter's contentions correct, a party to a purported lease could shut out any challenge to its execution by invoking estoppel. 155. In the circumstances, I agree with the Judge that South Bank is not estopped from denying the due execution of either the Lease or the Underlease. Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd 156. I also see considerable force in the contention that, even supposing that Hotels had been estopped from denying that the Lease was duly executed, South Bank was not so estopped. As Mr Willan pointed out, South Bank had already contracted to buy the freehold by the time the Lease was purportedly executed. It is by no means obvious that, in those circumstances, South Bank could be affected by any estoppel arising from the purported grant. Other matters
157. Mr Trompeter argued that, even if, contrary to his submissions, section 44(5) of CA 2006 did not apply and South Bank was not estopped from denying due execution, (a) the Lease and Underlease will have taken effect in equity in accordance with the principle established in *Walsh v Lonsdale* (1882) 212 Ch D 9 and (b) it would not be appropriate to order rectification of the register pursuant to schedule 4 to the Land Registration Act 2002. Mr Willan disagreed, but also suggested that these issues are not apt for determination by this Court. 158. I agree that we are not in a position to decide these points. They were not explored at great length before us. Further, and more importantly, the conclusions which the Judge had arrived at on other matters meant that he did not need to address these questions or to make findings as to all the relevant facts.

Conclusion

159. It is not in dispute that the Lease and Underlease were not executed in accordance with section 44 of CA 2006, and it seems to me that section 44(5) is not applicable and that South Bank is not estopped from denying due execution. There remain, however, to be considered the respondents' contentions that the Lease and Underlease nevertheless took effect in equity and that the register should not be rectified. In my view, the issues which arise in relation to those contentions should be remitted to the Judge. Overall conclusion 160. I would allow the appeal. In my view, South Bank has an arguable claim against Mr Conway to which section 21(1)(b) of LA 1980 applies and which, therefore, is not statute-barred; Hotels is liable to pay damages to South Bank for breach of clause 9 of the Room Leases; section

44(5) of CA 2006 is not applicable in relation to the Lease and Underlease; and South Bank is not estopped from denying that the Lease and Underlease were duly executed. I would accordingly set aside paragraphs 1, 3 and 6 of the order made by the Judge on 12 November 2024 (stamped 21 November 2024); revisit the Judge's orders as to costs; and remit the matter to the Judge for him: i) ii) iii) to determine the claim against Mr Conway on its merits and to decide whether, supposing it to be well-founded, relief should be granted under section 1157 of CA 2006; to assess the damages for which Hotels is liable; and to determine whether the Lease and Underlease took effect in equity and whether the register should be rectified. Judgment Approved by the court for handing down. South Bank Hotel Management Company Ltd v Galliard Hotels Ltd Lady Justice Asplin: 161. I agree. Lord Justice Miles: 162. I also agree. 45

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