[2021 Gib LR 222]

WEST and HUNTER v. SUNSET CLOSE MANAGEMENT LIMITED

SUNSET CLOSE MANAGEMENT LIMITED v. P. CABEZUTTO and S. CABEZUTTO

SUPREME COURT (Dudley, C.J.): May 4th, 2021

2021/GSC/09

Landlord and Tenant—breach of covenant—alterations to property—court has discretion to award damages in lieu of injunction—appropriate in respect of construction of conservatory in breach of covenant where management company sought equitable relief, not of own volition, but because required to do so by other residents; works caused no financial loss to management company and no aesthetic impact on estate; and very similar conservatory constructed on neighbouring property without enforcement measures

Proceedings were commenced in respect of building works in breach of covenant.

Sunset Close Management Ltd. ("SCM") provided management company services to the owners of properties in an estate situated at Sunset Close and was the landlord of all lessees of properties within the estate. Mr. and Mrs. Cabezutto were the leasehold owners of a town house in the estate. They carried out certain works to their property, including the construction of a conservatory at the rear of the property, the installation of new windows with integrated shutters and the erection of an awning. The works were in contravention of restrictive covenants in the underlease. Two property owners in the estate, Dr. West and Ms. Hunter, opposed the works.

The power and duty to enforce breaches of covenant by a property owner was vested in SCM. Dr. West and Ms. Hunter brought a claim against SCM for relief for SCM's failure to take enforcement action against the Cabezuttos and in respect of SCM's permitting the Cabezuttos to carry out certain works in breach of restrictive covenants.

SCM brought a claim against the Cabezuttos seeking the demolition of the conservatory and the reinstatement of the property; the removal or disablement of integrated shutters to the newly installed windows; an injunction preventing the Cabezuttos from undertaking works; and damages. The Cabezuttos claimed that SCM was estopped from bringing the claim

because the chairman of SCM, Mr. Cano, had represented to the Cabezuttos that Dr. West had consented to the conservatory works and there was no impediment to the works.

The Cabezuttos counterclaimed against SCM, stating that SCM had failed to take enforcement action for breach of covenant against other underlessees. Works undertaken in various other properties in the estate included window alterations or erection of glass screens; installation of air conditioning; erection of awnings or pergolas; affixing of ironmongery and/or gates; erection of an extension whereby a terrace was enclosed within a property and an additional floor constructed on top (legal proceedings were commenced in respect of the extension, which were settled before trial); and enclosing by the owners of house no. 19 of parking spaces to create a garage and the construction of a conservatory at the rear. House no. 19 was beside the Cabezuttos' property and the conservatory built on it was essentially the same as the conservatory works undertaken by the Cabezzutos, with both facing onto a sheer cliff face and not visible from within the estate.

Held, ruling as follows:

(1) The covenants were absolute covenants, SCM was under a positive obligation to enforce any breaches and it was not open to SCM to license an underlessee to carry out works or to waive a breach by an underlessee (para. 84).

(2) In respect of whether Mr. Cano made the representation alleged by the Cabezuttos, upon which the Cabezuttos contended SCM was estopped from enforcing the covenants, in the circumstances the court preferred the evidence of Mr. and Mrs. Cano that he did not. It followed that the Cabezuttos' defence of estoppel failed and SCM was entitled to judgment (paras. 86–90).

(3) SCM advanced no substantive defence to the counterclaim in respect of works undertaken by other underlessees in the estate. The Cabezuttos were entitled to judgment on their counterclaim and to damages (para. 91).

(4) The court's power to award damages in lieu of an injunction involved an exercise of discretion. The *prima facie* position was that an injunction should be granted, so the legal burden was on the defendant to show why it should not. The application of the four tests set out in *Shelfer* v. *City of London Electric Lighting Co. (No. 1)* as to when damages were to be awarded in substitution for an injunction—namely (i) if the injury to the plaintiff's legal rights was small; (ii) was capable of being estimated in money; (iii) could be adequately compensated by a small money payment; and (iv) the case was one in which it would be oppressive to the defendant to grant an injunction—must not fetter the exercise of the court's discretion. In the absence of additional relevant circumstances, it would normally be right to refuse an injunction if the tests were satisfied. The fact that the tests were not all satisfied would not mean than an injunction should be granted (paras. 92–95).

(5) In respect of the conservatory, balancing the factors to be considered as part of the *Shelfer* test as well as the broader circumstances, the court was satisfied that the Cabezuttos had discharged the legal burden to show that an injunction should not be granted. A very significant factor was that SCM sought equitable relief not because it wanted to but because it had to. SCM had sought to accommodate the Cabezuttos' desire to construct the conservatory. It was evident from the expert evidence that infringement of SCM's legal rights was capable of being estimated in money and that, in the absence of any actual financial loss, the breach could be compensated by way of nominal damages. The Cabezuttos had undertaken the construction works in the knowledge that they were in breach of covenant and in the absence of a waiver or other representation by SCM allowing them to do so which, applying the *Shelfer* test, disentitled them from asking that damages be assessed in substitution for an injunction. The court also took into account that the Cabezuttos embarked upon the construction of the conservatory in exasperation at what they perceived to be special adverse treatment by SCM; the conservatory works caused no financial loss to SCM and had no aesthetic impact on the estate; there was a historic, near identical conservatory in the neighbouring property in respect of which no waiver or consent was granted and no enforcement steps taken; an enforcement action by SCM in relation to major works to another town house was compromised on terms which evidently allowed the works to remain; and the Cabezuttos undertook to pay SCM's costs of the action irrespective of the outcome. In the exercise of its discretion, the court would substitute an injunction with an award of damages (paras. 97–101).

(6) In respect of the windows, having found that the integrated shutters amounted to a breach of covenant and the Cabezuttos not resisting, the court would grant the injunctive relief sought by SCM (para. 102).

(7) The breaches of covenant in the claim and counterclaim having been established, SCM and the Cabezuttos were (no loss having been proved) each entitled to nominal damages as against the other, which were fixed at £5 and set off against each other (para. 103).

(8) In respect of the claim by Dr. West and Ms. Hunter against SCM, given the court's finding that in relation to the front façade windows the Cabezuttos' breach of covenant was limited to the integrated shutters, SCM had done what was required of it under the enforcement covenant and the claim for specific performance in respect of the windows failed. As regarded the awning, SCM could not have succeeded in obtaining equitable relief requiring its removal, as such structures had been in place for a long time. Dr. West and Ms. Hunter could not properly seek to have SCM enforce the covenant in this respect and technically they were entitled to the most nominal of damages, fixed at £1. Dr. West and Ms. Hunter had been entitled to seek to ensure that, to the extent identified, SCM complied with its enforcement obligations as against the Cabezuttos. However, once SCM issued proceedings, there was no purpose in Dr. West and Ms. Hunter

persisting with their claim. SCM having taken the necessary enforcement action against the Cabezuttos, it followed that other than the £1 award in relation to the awning, the claim by Dr. West and Ms. Hunter failed and would be dismissed (paras. 107–110).

Cases cited:
(1) *Coventry* v. *Lawrence*, [2014] UKSC 13; [2014] 1 A.C. 822; [2014] 2 W.L.R. 433; [2014] 2 All E.R. 622; [2014] BLR 271; [2014] PTSR 384; (2014), 152 Con LR 1, considered.
(2) *Duval* v. *11–14 Randolf Crescent Ltd.*, [2020] UKSC 18; [2020] A.C. 845; [2020] 2 W.L.R. 1167; [2020] 4 All E.R. 537; [2020] HLR 31, considered.
(3) *German* v. *Chapman* (1877), 7 Ch. D. 271; 1877 G. 112, considered.
(4) *Roper* v. *Williams* (1822), T. & R. 18, considered.
(5) *Shelfer* v. *City of London Electric Lighting Co. (No. 1)*, [1895] 1 Ch. 287, followed.

P. Aslett and *K. Navas* (instructed by Kenneth Navas Barristers & Solicitors) for West and Hunter;
D. Feetham, *Q.C.* and *D. Martinez* (instructed by Hassans) for P.A. Cabezutto and S.A. Cabezutto;
G. Stagnetto, *Q.C.* and *K. Power* (instructed by TSN) for Sunset Close Management Ltd.

1 **DUDLEY, C.J.:** This is a conjoined judgment in respect of two distinct actions, which in view of the close factual nexus between them, I ordered should be tried together, although strictly the evidence advanced in each action needs to be considered distinctly.

2 Sunset Close Management Ltd. ("SCM"), the defendant in action 001 and claimant in action 006 provides management company services to its members who are the owners of residential units at an estate situate at Sunset Close, Windmill Hill Road ("the estate"). SCM is also, by virtue of an assignment of the headlease in its favour, the landlord of all lessees of properties within the estate. The title documents describe the estate as consisting of 20 town houses, 5 apartments and 1 detached house. Although there is some technical dispute as to what constitutes a town house for the purposes of planning provisions, the relevant underleases define a "Town House" as "any one of the twenty dwelling houses within the property."

3 The claimants in action 001, Dr. Julian West ("JW") and Ms. Eileen Hunter ("EH") are each leaseholders of a town house, JW is the owner of no. 6 and EW of no. 7. The defendants and counterclaimants in action 006, Mr. Peter Cabezutto and Mrs. Sabrina Cabezutto (together "the Cabezuttos" and distinctly "PC" and "SC") are the leasehold owners of town house no. 16 ("the property") and it is certain works carried out by them to the property that has led to the present litigation.

4 In brief, by their claim issued on January 23rd, 2018, JW and EH seek relief against SCM for what they say is SCM's failure to take and pursue enforcement action against and permitting the Cabezuttos to erect a conservatory on the rear of the property and to carry out further works in breach of certain restrictive covenants. In turn SCM, by its claim issued on February 15th, 2018 against the Cabezuttos, seeks the demolition of the conservatory and the reinstatement of the property to the same specifications as previously existed; the removal or disablement of integrated shutters to (at least at the time) newly installed windows; an injunction preventing the Cabezuttos from undertaking any such works; and damages.

The leasehold arrangements and relevant provisions

5 By a lease dated October 16th, 1995 ("the headlease"), the Governor of Gibraltar demised 110,000m^2 of land comprising Crown property 1231 to Gibraltar Land (Holdings) Ltd. (a H.M. Government of Gibraltar company), for a term of 150 years from April 1st, 1995, the demised premises to be used for mixed residential, commercial and sports hall purposes. At para. 4 of the fifth schedule the headlease imposes an obligation on the part of Gibraltar Land (Holdings) Ltd. not to "make any external internal or structural alterations to the demised premises nor to erect any other buildings thereon except with the prior written consent of [the Crown] . . ."

6 The estate was developed by Souwest Developments Ltd. ("Souwest") and on completion of the construction, by a deed of lease dated August 20th, 2002, Gibraltar Land (Holdings) Ltd. demised the land on which the estate is situate to Souwest for a term of 140 years. At para. 4 of the fifth schedule, the lease imposes an obligation on the part of Souwest not to "make any external internal or structural alterations to the demised premises nor to erect any other buildings thereon except with the prior written consent" of Gibraltar Land (Holdings) Ltd.

7 Souwest in turn demised the individual residential units, with underlessees paying substantial premiums for a term of 99 years computed from August 20th, 2002. By a deed of underlease dated November 6th, 2002, Souwest demised the property known as town house no. 6 of the estate to JW. On March 3rd, 2003, the underlease dated September 4th, 2002, demising town house no. 16 to Aram Services Ltd. was assigned to the Cabezuttos. On February 1st, 2017, EH purchased the remainder of a 99 year underlease of town house no. 7. The covenants and conditions in the underleases held by JW, EH, the Cabezuttos and all other underlessees are identical. The underleases are evidently valuable assets capable of being assigned for profit.

8 By deed of assignment dated January 16th, 2013 between Souwest and SCM, Souwest assigned the residue of the term of its August 20th, 2002

lease to SCM, thereby making SCM both lessor and management company.

9 For the purposes of both of these actions, the relevant clauses in the underleases are the following. Other restrictive covenants could properly be engaged but for the purposes of the issues before me, reliance upon them is unnecessary.

(i) Paragraph 22 of part 1 of the sixth schedule, which sets out the "covenants and conditions entered into and undertaken by . . . Lessee[s] with respect to the Lessor and the Management Company," and which at [22] provides:

> "The Lessee shall not make any alteration or addition affecting the external elevation or structure of the Premises or make any structural or external alterations or change the existing design elevation or appearance of the external decorative scheme of the Premises."

(ii) Paragraph 13 of the tenth schedule of the underlease, which contains the "Restrictive and other covenants," provides:

> "The Lessees shall not build set up or maintain or suffer to be built up or maintained on or in the Premises any building or erection other than or in addition to the structure now forming part thereof or make any alteration in the plan or elevation of the Premises or in the service or matters relating thereto or make or maintain or suffer to be made or maintained any addition thereto either in height or projection or place or attach or maintain any structure whatsoever on or to any part of the Premises or make or suffer to be made any material change or addition whatsoever in or to the use of the Premises or any Town House/Apartment erection forming part of the [estate]."

(iii) All underleases are in like terms with the power and duty to enforce breaches by a property owner being vested in the lessor and management company, with cl. 5 providing:

> "The Lessor and the Management Company respectively covenant with the Lessee that they will enforce insofar as they are legally empowered to do so (if necessary by taking legal proceedings) the performance and observance by any owner of a Town House or Apartment or the Detached House of the covenants and conditions contained in the lease or leases relating to such Town House or Apartment." ["The enforcement covenant."]

The trial

10 The following gave oral evidence in action 001. On the claimants' behalf, both JW and EH themselves and Mr. Simon Heather, who is a valuation surveyor called as an expert witness. On SCM's behalf, Mr.

Derek Cano, who is the chairman of SCM, gave evidence, as did Mr. David Wahnon who has, since June 2004, been a member of the SCM committee. Other committee members/directors of SCM had made witness statements for the purposes of both actions but they did not testify in 001 and in respect of that action I place no reliance upon their evidence. SCM also called Ms. Josiane Richardson who is a chartered surveyor, who gave expert evidence.

11 In action 006, oral evidence was given for SCM by Mr. and Mrs. Cano, as did Mr. Wahnon, Mr. Michael Gil and Mr. Xavier Vasquez. Mr. Gil was a member of the SCM committee between June 2004 to December 2005 and June 2014 to April 2018 when he did not stand for re-election. Mr. Vasquez is and has been a member of the SCM committee since June 2004, his witness statement confirmed aspects of Mr. Cano's evidence and in the event he was not cross-examined. The experts in action 006, namely Ms. Josiane Richardson and Mr. Mark Francis, were essentially in agreement, with Ms. Richardson only being cross-examined in action 001.

12 Despite the overall number of witnesses of fact called, there is fundamentally only one material dispute of fact which arises, and then only in action 006 (albeit with implications for action 001), and which relates to the question of whether an estoppel operates as between SCM and the Cabezuttos. As put in the Cabezuttos defence at para. 50:

> "[Mr. Cano] then represented to the [Cabezuttos] that [JW] had consented to the Conservatory Works and there was no longer any impediment to the [Cabezuttos] undertaking the same as long as they did not do any works to the balcony at the front . . ."

Nonetheless, it is necessary to set out the evidence in some detail because it provides the essential backdrop against which to understand whether the representation was made; whether JW and EH were justified in instituting proceedings; and also in relation to the relief that may flow from the determinations in the two actions.

The factual matrix

13 On or about January 19th, 2016, the Cabezuttos applied to the Development and Planning Commission ("the DPC") for certain proposed alterations to the property. One application was a joint application with the leasehold owner of No. 17 to form a new balcony. A second application was solely by the Cabezuttos for internal alternations and an extension. The extension involved the construction of a conservatory at the rear of the property and alterations to an external wall leading from the kitchen of the property to the conservatory and which included the installation of a new lintel allowing for a larger opening from the kitchen to the patio area which was to be enclosed by the conservatory ("the conservatory works").

14 According to Mr. Cano's evidence-in-chief in both actions, and not in issue, certain members of the SMC Committee (but not Mr. Cano) held a meeting with the Cabezuttos on January 26th, 2016, in the lift room at the Tower, Sunset Close to inform them of the issues which arose in connection with the applications to the DPC and to explain why SMC was not in a position to consent. That meeting was followed by letters dated January 27th, 2016 addressed to the DPC, and copied to the applicants, by which SCM objected to both applications on the basis that the works proposed would contravene the underleases and SCM's lease. This subject to the comment: "Please note that such matters have been discussed with the applicant and we understand that the applicant is currently looking into this."

15 By letter also dated January 27th, 2016, SCM informed PC that although broadly sympathetic it could not consent to the works, as doing so would involve a breach of the underlease and headlease and went on to state that the following conditions would have to be met so as to allow SCM to consider the matter further:

"(a) Both you and Mr Rodriguez will need to seek permission from the Lessor to be able to carry out the proposed works.

(b) Both you and Mr Rodriguez will need to seek (at your cost) legal advice on how to amend your respective Sub Leases, to allow these particular works to proceed.

(c) Once the above has been achieved you will need to seek the consent of the Sub Lease holders for both proposed structures (balcony and conservatory). The Management Company can assist you on this point and would write, once the above conditions are met, to all the owners of Sunset Close advising them of your proposals, enclosing copies of plans and requesting that any objections be registered with the Management Company in writing, stating the reason(s) for any objection, within 21 days of the notice being served.

(d) The Management Company would then be in a position to receive your formal application for consideration.

(e) Once written consent has been given by the Management Company for the works to go ahead, together with any conditions that may be considered necessary, you would be able to proceed with your application to the Development and Planning Commission (DPC) for Outline Planning Permission and Building Permit. It is important to note that without the Management Company's consent the DPC may not be in a position to grant you Planning Permission if such works remain in direct contravention of the Terms and Conditions of both the

> Head and Sub Leases. Equally important to note is that the Estate's Insurance will not cover any premises, under the Estate's Building Insurance Policy, that has undergone works without the consent of the Management Company and without Planning Permission (this would include House No. 17)."

The letter then goes on to state:

> "In view of the foregoing, you will understand that the Management Company presently has no option but to object to such works proceeding until the matter has been regularized, as previously stated . . ."

16 No doubt acting in line with the statement that PC should seek the consent of Gibraltar Land Holdings Ltd., the Cabezuttos' then lawyers Messrs. Ullger Chambers, sought consent from Land Property Services Ltd. ("LPS"), who are property advisers to and work exclusively for H.M. Government of Gibraltar, who by email dated April 20th, 2016, from their Mr. Mark Hook, stated:

> "On the basis that planning approval has been granted on this matter, there is no objection to the proposed works on the part of the Crown, subject to approval being granted by the Management Company for the estate. This is also further subject to all conditions set out in the planning approval being met as part of the works."

With the benefit of that conditional consent, Ullger Chambers emailed Mr. Xavier Vasquez (then chairman of the SCM committee) asking that the Cabezuttos' request be reconsidered. There followed communications between SCM committee members and also between SCM and Ullger Chambers and, in the event, on June 28th, 2016, SCM wrote to all property owners in the estate in relation to the proposal for the works to 16 and 17 Sunset Close, stating that the committee had no objection to the proposed works, indicating where the plans could be viewed and seeking consent on an "opt out" basis.

17 By July 15th, 2016, the position had evolved and SCM wrote to the underlessees to the effect that it had been advised (presumably by its then lawyers Messrs. Attias & Levy) that the procedure it had initiated had to be formalized and it specifically sought confirmation from each leaseholder as to whether it consented to and waived any covenant for the purposes of the works or, alternatively, did not approve the proposed works. On August 8th, 2016, SCM emailed Ullger Chambers informing them that, of the 26 underlessees, 25 had given their consent, and that JW was the only one that had objected. That in the event that the Cabezuttos persuaded JW to consent to the works, SCM would then advise the Cabezuttos and Mr. Rodriguez of its own conditions. In subsequent communications with Ullger Chambers, SCM persisted in what, for reasons I shall turn to, was a

misguided view, that the unanimous consent of underlessees would in turn allow it to consent to the proposed works.

18 The Cabezuttos obtained a planning permit and an approval notice in respect of both sets of works but, for present purposes, that relating to the internal alterations and the building of the conservatory was issued on July 7th, 2016, with SCM being provided a copy on September 7th, 2016.

19 On September 21st, 2016, Attias & Levy wrote to Ullger Chambers, expressing the view that SCM's ability to waive the prohibitions to be found at para. 22 of the sixth schedule and para. 13 of the tenth schedule was constrained by cl. 5 with the letter concluding in the following unambiguous terms:

> "With the above in mind and as we are sure you can appreciate, our Client cannot waive the above prohibitions and agree to the proposed works without agreement from all the leasehold owners. For the avoidance of doubt, we would also like to point out that our Client cannot force a leasehold owner to consent.
>
> Our client does not consent to the proposed works of your client."

In further exchanges between Ullger Chambers and Attias & Levy in September and October, Ullger Chambers sought to rely upon SCM's articles of association to argue that it could consent on the basis of a majority decision by its members. In so far as it related to giving consent for the works, SCM's position as conveyed by Attias & Levy was unequivocal and its letters dated September 30th, 2016 and October 27th, 2016 both concluded: "Our client does not consent to the proposed works of your client." Also, by email dated September 30th, 2016, no doubt having been instructed to do so by SCM, Attias & Levy informed JW that SCM was enforcing the terms of the underleases and "opposed and [had] not provided its consent to the carrying out of the proposed works."

20 Earlier, during July and August 2016, there were also email exchanges between JW and Mr. Vasquez in relation to the proposed works. But by letter dated November 7th, 2016 from Mr. Wahnon, SCM asked JW to reconsider his objection. The basis for the request was that the legal advice that SCM had received was to the effect that, because in the early years when SCM was controlled by the developer, permission for works had been given without proper consent by underlessees, in the event that there were court proceedings there was "an obvious litigation risk"; and that in an effort to reach an agreement the Cabezuttos had offered not to proceed with the works to the front of the property and only undertake the conservatory works, which were not visible. The letter then concluded:

> "It is therefore the view of the Management Committee that given the risk of any legal action and in the interest of preserving an amicable

environment amongst neighbours, that you kindly reconsider your position so that we do not risk the fruits of the community's efforts over the past decade and incur huge legal costs, as we have been advised that litigation may well run into the tens of thousands of pounds (in the region of around £50,000). This could result in an increase in service charges, or in the Management Company having to require a surcharge from its members.

The Management Committee appeals to you to reconsider your position in the light of this additional information and get in touch with us as a matter of urgency."

21 On November 11th, 2016, JW replied making the legitimate point that underlessees are obliged to comply with the covenants in the underlease and SCM obliged to enforce their observance. In attached documents he also formally requested that SCM "strictly enforce (if necessary by taking legal proceedings in a pre-emptive or timely manner)" the observance of the relevant covenants. Also, in an attached document, he set out his objections to the conservatory works and other proposed works to the property as follows:

"1. The proposed construction works appears to involve the removal of a vital load bearing section of the external rear wall of the property. In which case, the load supported by that wall section will be transferred to two adjacent support pillars, thereby increasing their loading to a level for which they were not designed.

2. The proposed construction works involve the insertion of a lintel, which is needed to replace the removed real wall section, and this could result in damage to the two adjacent support pillars thereby reducing their load bearing capacity.

3. The proposed construction works involves the removal and repositioning of substantial sections of internal walls, which may also have a load bearing function.

4. The proposed construction works involve the removal of a wall section that is attached to a load bearing inner support pillar, which is liable to be damaged or removed during these works, thereby reducing its load bearing capacity.

5. The location of the conservatory at the first storey level poses problems with cleaning the glass, in particular that of the roof. For health and safety reasons this could require the erection of scaffolding at regular intervals, which would be a nuisance to other residents.

6. The accumulation of seagull faeces on the roof of the conservatory could create a health hazard for residents facilitating the contraction of various zoonotic diseases.
7. The addition of a fixed construction such as a conservatory, creates an undesirable precedent for further constructions of this type on other properties where it would be more prominent.
8. These works are so extensive that there could be unforeseen consequences, such as significant damage being caused to neighbouring properties. The apartments located directly and below this property are particularly vulnerable in this respect.
9. If these works are carried out regardless of the consequences, as happened with the unlawful extension of house 13 in 2009, they are very likely to be irreversible. For more details this case, see item 4 of the Minutes for the Committee's meeting on 10th November 2009."

22 JW's concerns in relation to the integrity of the structure must presumably have been other than in relation to his own personal safety, given that JW's property is not part of the same physical structure as that in which the property is situate.

23 In relation to JW's suggestion of issuing pre-emptive legal proceedings, and SCM's financial ability to have funded these, when cross-examined Mr. Wahnon's evidence was that at the time there were some £60,000 to £70,000 available in SCM's "sinking fund." The self-evident point is that (albeit to the detriment of other expenditure in maintenance of the estate) SCM had funds with which to embark upon any such litigation.

24 Mr. Cano's assessment of the period between April and September 2016 was that SCM "embarked on a process to determine whether the lessees of the Estate would consent to the proposed [works] and thereby agree to a waiver of the covenants in the underleases in that regard." It is accurate to say that that remained the approach into November and beyond.

25 Apparent from email exchanges between JW and Mr. Wahnon on November 17th, 2016 that they met with lawyers at Attias & Levy the previous day, and that JW having had the opportunity to review the terms of his mortgage he was more amenable to a work around, as he put it:

> "As far as I can tell there would seem to be no impediment, apart from a bank fee, to registering amended covenants that would allow the addition of a conservatory to a balcony on the rock facing façade of the rear building. In view of this, and the problem that the proposed alternative solution is likely to be ineffective, it is suggested that this route should be pursued."

For his part, in his reply Mr. Wahnon made the point that what was intended was to proceed with a temporary measure that would allow the works to proceed and which would then "be followed by the more permanent solution [JW] was advocating." And that he would be providing JW with a "wishlist" of the procedures that would need to be followed by the Cabezuttos. The list of the conditions proposed by SCM was provided to JW and copied to Attias & Levy on November 21st, 2016. JW commented on these proposals and his comments were passed on to Attias & Levy.

26 On December 12th, 2016, Mr. Cano replaced Mr. Vasquez as Chairman of SCM.

27 It is not in dispute that on January 5th, 2017, PC and Mr. Wahnon met by chance outside Sacarello's coffee shop in Irish Town. Also not in dispute that Mr. Wahnon indicated to PC that it appeared that JW was coming round to a position which would allow the works to proceed. Similarly, on or about February 7th, 2017, and again by chance, PC on this occasion met with Mr. Gil when the latter was outside his home walking a dog. Not in issue that they discussed the conservatory works and when cross-examined and re-examined Mr. Gil very fairly accepted that he may have said words to the effect that JW was a difficult person and that although they would have to wait, it seemed as though JW was coming round to not opposing the conservatory works.

28 That matters, albeit slowly, appeared to be progressing in a way which could have allowed the works to proceed without dispute, is apparent from the fact that on January 24th, 2017, Mr. Wahnon emailed JW attaching a waiver letter drafted by Attias & Levy, although JW replied indicating his reluctance to sign a general waiver.

29 On February 1st, 2017, EH was assigned and acquired the remainder of the 99-year leasehold interest in town house no. 7 and by letter to SCM dated March 1st, 2017, she gave notice of her objection to the "proposals for alterations to other properties in the estate."

30 From late February through March 2017, SCM was evidently content for JW to engage with Attias & Levy in finding a workaround which would satisfy JW and allow SCM to consent to the works proposed by the Cabezuttos. Attias & Levy suggested proceeding by way of a very specific written waiver as an interim solution which would allow the works to proceed, with any necessary amendment to the deeds following thereafter. Although the emails suggest that JW may have been more amenable to such an approach when he met with lawyers at Attias & Levy, in an email to them of February 25th, 2017 he said:

> "It seems to me that the Management Company is now working exclusively for the benefit of a single individual, who wishes to ignore

> the covenants which he is contractually obliged to comply. As he is requesting an indulgence in this respect, surely he should bear all the costs thereof himself. Consequently, in my opinion, the most effective and economical procedure at this stage would be to 'stonewall' him. This simple technique of failing to respond is often surprisingly effective."

31 SCM's concerns at the time can be discerned from Attias & Levy's reply to the "stonewalling" suggestion when, in an email dated February 26th, 2017, they said:

> "The other point that you make—stonewalling Mr Cabezutto as a way ahead may lead to his proceeding to do the works without the management company's consent and it would then be up to the management company to seek an injunction to stop him, which for the reasons that I advised you at the meeting has its difficulties.
>
> This could result in the management company being unsuccessful in its application and being ordered to pay Cabezuttos costs as well as its own, thus incurring a very substantial liability which all the underlessees including yourself would have to discharge by way of service charges surcharged for this purpose. You may recall that David advised that the management company's previous lawyer gave similar advice in relation to a previous case raising the same issues.
>
> It is not that the management company is being ran for the benefit of one person, rather it is trying to avoid going down the route of fighting a potentially unsuccessful case and facing the unfortunate consequences and liabilities that would flow from it.
>
> This is as explained to you at the meeting that we had, and I believe from what you said that you understood the difficulties and agreed to follow the suggested route of allowing the works to proceed subject to the consent of the management company and on strict conditions. Not what we would ideally want, but we thought that it is the best action in the circumstances."

32 Any optimism that SCM may have had at finding a solution that satisfied both JW and the Cabezuttos must have dissipated by the end of March 2017 when JW provided Attias & Levy "Skeleton Arguments in relation to works at 17 Sunset Close." This document, *inter alia*, set out JW's concerns in relation to the structural integrity of the building in the context of seismic activity and Gibraltar's geographical location and in an accompanying letter he stated:

> "In my opinion, now is perhaps the time to play 'hard ball' by making it quite clear that he has no prospect of receiving the Management Company's consent, and that if he does breach any the covenants by

> proceeding without consent, then he would immediately become the subject of an injunction. However, as the proposed works could cause irreparable damage to the back building, if there is any chance of this happening, the Management Company should seriously consider the possibility of applying for a pre-emptive injunction. As he is taking legal advice, I would be surprised if he were to proceed without consent, and I would not expect that he would be advised by his lawyer to take this matter to court."

33 On March 28th, 2018, JW brought to SCM's attention the fact that works were being undertaken in the Cabezuttos' property, whilst an email from Attias & Levy to JW the same day suggests that they had met and that JW's position may have become more nuanced:

> "At our meeting of today and on discussing the proposed works to Mr Cabezutto's property, am I correct in understanding that you wouldn't object to the construction of a conservatory but do object to the removal of structural walls/columns. My apologies if I misunderstood."

JW explained his position in an email later that day, as follows:

> "As explained in our previous communication, in my opinion the attachment of a conservatory to the dwelling would require an additional covenant. If this was the only issue then I would not insist on an injunction, provided that the rest of the works complied with the covenants. However, I do not expect this to be the case and, in any case, consider that interim injunction would be advisable. This could then be retracted should he did agree to the compromise. As undue delay is usually fatal, and the works are currently progressing, there is no time left available for negotiation beforehand."

On March 29th, Attias & Levy emailed JW, making the point that they had met with him out of courtesy, and that they did not act for him but for SCM.

34 Notwithstanding the email of March 29th, 2017 from Attias & Levy to JW, email communications between them continued with Attias & Levy inquiring whether JW would object to the construction of the conservatory if there were to be no removal of any structural walls or columns. The stance taken by JW is apparent from his email of April 5th, 2017 to Attias & Levy in which he expressed the view that there was "no alternative to an immediate application for an injunction."

35 No doubt as a consequence of works having started, on April 7th, 2017, Attias & Levy wrote to Ullger Chambers reiterating that the proposed works were prohibited by the underleases and that SCM did not consent to these being undertaken.

36 On April 21st, 2017, Kenneth Navas Barristers & Solicitors ("KNBS") wrote distinct letters on behalf of JW to both SCM and PC. In

those letters it sought confirmation by April 25th, 2017, that the unauthorized works being undertaken by the Cabezuttos had ceased and the property restored to its previous state, failing which it threatened the addressees with court proceedings for injunctive relief. In cross-examination, JW surprisingly asserted that the letter to the Cabezuttos had been sent by KNBS without his instructions as he had previously accepted the advice of Mr. Daswani (who as I understood it he had instructed previously) that he had no cause of action against the Cabezuttos.

37 Ullger Chambers replied on April 25th, 2017 stating that the works that had been undertaken were internal, not structural and therefore did not contravene the covenants and in relation to the conservatory works that no structural works were required and that PC had previously been informed by two SCM committee members that JW had no objection and consented to the installation of roof and glass curtains. KNBS's reply was unequivocal: "our client has never agreed to the . . . [roof and glass curtains]. In any event, he objects to those changes being made and demands that all work cease forthwith."

38 On April 27th, 2017, Attias & Levy again wrote to Ullger Chambers, repeating that the Cabezuttos did not have consent to undertake the works that appeared to have commenced, that these were to cease immediately and the property restored to its original state. On the same day Ullger Chambers replied by email, stating:

> "We are instructed to confirm our client has not commenced the works to enclose the rear terrace. Our client is carrying out works to his house which are internal and not of a structural nature which therefore do not require your client's permission."

Further exchanges took place on April 28th, 2017, with Ullger Chambers stating that as SCM was aware the works to the balcony at the front of the Cabezuttos' property was not proceeding. That the Cabezuttos wished to glass curtain and roof the back terrace in the same way as their neighbour had done and making the point that works had been undertaken in other properties, without consent or even planning permission. An almost immediate reply by Attias & Levy made clear that enclosing the terrace was not permitted by the underlease. To this Ullger Chambers replied: "Understood. Our client however has not carried out his wishes at this stage and still hopes resolution can be found." On May 3rd, 2017, Attias & Levy again wrote to Ullger Chambers on the following terms: "We have been informed by [SCM] that your client has laid a concrete flooring to his terrace. Could you please confirm the purpose for carrying out these works."

The meeting in Mr. Cano's home and the alleged representation

39 In claim 006, the Cabezuttos' pleaded case is that on or about May 8th, 2017, the Cabezuttos met with Mr. Cano at Mr. Cano's home. It is not in dispute that Mrs. Cano was also present. According to the Cabezuttos, Mr. Cano, *qua* chair of SCM, had actual or ostensible authority to speak to the Cabezuttos on behalf of SCM and at para. 50 of the defence and counterclaim the estoppel allegation is particularized as follows:

> "(d) . . . Mr Cano repeated that the only impediment to the Conservatory Works had been Mr West. He then represented to the Defendants that Dr West had consented to the Conservatory Works and there was no longer any impediment to the Defendants undertaking the same as long as they did not do any works to the balcony at the front ('the Representation') the Defendants responded that this was acceptable to them. The Second Defendant also asked whether there was anything in writing on behalf of Dr West stating that he did not object to the Conservatory Works as long as they did not do the works to balcony at the front. Mr Cano replied 'Yes there is an email.'
>
> (e) Mr Cano intended that the Representation be relied upon by the Defendants and was relied upon by the Defendants who commenced the Conservatory Works thereby incurring expense and altering their position to their detriment.
>
> (f) In the circumstances, it is inequitable for the Claimant to go back on its representation and seek the Orders it seeks in these proceedings and/or the Claimant is estopped from seeking that relief and enforcing the Covenants against the Defendants."

For its part SCM denies that Mr. Cano made those or any other representations at that meeting.

40 It is not in dispute that what led to that meeting was that a few days earlier Mrs. Cano met SC within the estate's common area. As put by Mrs. Cano, they had been neighbours for some 16 years and enjoyed good neighbourly relations. That when they met SC was quite upset at the difficulties that she and her husband were encountering in relation to the then proposed works; that SC was distressed at the fact that they had moved out of the property and the works could not progress and was concerned that there was personal animosity on the part of some neighbours towards them. According to Mrs. Cano, when she got home she told her husband, who was willing to invite the Cabezuttos to their home to explain why SCM was unable to consent to the works and to allay concerns they might have in relation to SC's perception that neighbours had ill feelings towards them.

41 According to PC's evidence-in-chief, the meeting at/visit to Mr. and Mrs. Cano's home (depending upon the perspective) took place on May

9th, 2017, although in cross-examination he was somewhat ambiguous as to the date and he conceded that it could have taken place on or around May 4th, 2017. From WhatsApp exchanges between Mr. Cano and PC in the afternoon and evening of May 6th, 2017, arranging a subsequent meeting with committee members at the Sunset Close lift room, for Tuesday at 7:30 p.m. (which would have been May 9th, 2017) it is apparent that the meeting at/visit to Mr. and Mrs. Cano's home took place before May 6th, 2017.

42 It was PC's evidence that at that meeting with the committee they discussed the conservatory works but that there was no discussion in relation to the windows to the front of the house as the decision to change these came later when, in the course of the internal works, they were advised that they were in a very poor condition. That it was his clear recollection that Mr. Cano had said that JW had accepted that they could carry out the conservatory works so long as they did not carry out any works to the balcony at the front of the property. That Mr. Cano had said that there was correspondence from JW confirming the position and that they asked Mr. Cano to provide them with a copy of the correspondence from JW. When cross-examined, PC said, and I accept, that it was a difficult time both for him and his wife because at the time his father was terminally ill and it is not in dispute that Mr. Cabezutto senior passed away on May 31st, 2017. Against that backdrop, it was PC's evidence that being told by Mr. Cano that Mr. West did not object to the conservatory works was the most positive news that they had had for some time. In the context of his being professionally involved in the construction industry and property development business, PC's evidence was that following the alleged representation by Mr. Cano, he called his foreman and instructed him to knock down what I understood to be the external wall and start work on the conservatory. It was also his evidence that no such works had been undertaken before the meeting and that they were only undertaken as a consequence of what he was told by Mr. Cano.

43 In relation to the conversation had at Mr. and Mrs. Cano's home, SC's evidence was in line with that of PC. It was also her evidence that when she met Mrs. Cano some days earlier she had not been given any indication that they would get an invite to her home and that, therefore, when the invite came she did not understand the meeting to be informal, but rather a meeting with a committee member. Also according to SC, that as they were leaving Mr. and Mrs. Cano's home, she had said that it was a pity that there was no written confirmation from JW that they could undertake the conservatory works provided that they did not do the works to the front of the property, and that to her surprise Mr. Cano said that there was an email from JW to that effect, to which she replied that it would be very useful if they could have a copy.

44 On the factual issue of whether Mr. Cano made the representation, his and Mrs. Cano's evidence is diametrically different to the Cabezuttos. Mr. Cano's evidence as set out in his witness statement at paras. 39 and 40 and which version of events is supported by Mrs. Cano is as follows:

> "39. When at my house, the Cabezuttos explained the position they found themselves in in respect of their on-going works and as a result of the decision communicated to them by the Claimant. In response, I again explained the reasons for the Claimant objecting to the works and also referred to the objections received from Dr West in this regard as a result of the restrictions contained in the underleases. I also took the opportunity to reassure the Second Defendant that her concern about neighbours being against them was, in my view, unfounded.
>
> 40. The Cabezuttos then informed me that it was their understanding that the Claimant had received a letter from Dr West approving the works in question subject to conditions, and requested a copy of his communication. I informed them that my understanding was that there had been some communications between Dr West and/or Dr West's lawyer and the Claimant's lawyers at the time regarding the Unauthorised Works, but that I was unsure of the precise nature or content of the same or whether a communication of the exact nature alleged by the Cabezuttos from Dr West in fact existed. I advised the Cabezuttos that I was aware that certain representations had been made by Dr West through his lawyer which were subsequently withdrawn, but that I was not aware of their exact nature. I then suggested that it would be best for the Cabezuttos to meet with the full Committee on a formal basis to discuss the communications they referred to in order to establish whether the alleged communication did in fact exist. This was agreed to by the Cabezuttos."

What is common ground is that one upshot of the meeting at Mr. and Mrs. Cano's home is that the Cabezuttos were invited to attend a meeting with the Committee at the Sunset Close lift room on May 9th, 2017.

45 Between the meeting held in Mr. and Mrs. Cano's home and the meeting in the lift room, on May 8th, 2017 Attias & Levy, by way of reply to an earlier letter, wrote to KNBS stating that SCM had not consented to either the conservatory works or the construction of the front porch. And in relation to the conservatory works, they stated that they had received confirmation from the Cabezuttos' lawyers that no such works had been undertaken and that they had been informed that the screed to the terrace area was laid to receive floor tiles.

46 It is not in dispute that present at the May 9th, 2017 meeting were Mr. Cano, Mr. Roy Clinton, Mr. Gil and Mr. Vasquez, all on behalf of SCM,

and the Cabezuttos. According to Mr. Cano, this was a formal meeting at which SCM provided the Cabezuttos with a summary of their efforts to find an amicable solution and touched upon JW's objections and the restrictions imposed by the underlease. Also according to Mr. Cano, the Cabezuttos requested a copy of a letter from JW in which subject to certain conditions he purportedly did not object to the conservatory works and that the position adopted at the meeting by those representing SCM was that they were happy to provide it, so long as there were "no legal issues with that disclosure." For the purposes of action 006, Mr. Gil and Mr. Vasquez in their evidence-in-chief adopted Mr. Cano's evidence as to what took place at that meeting.

47 The Cabezuttos for their part did not make any reference to this meeting in their evidence-in-chief. When cross-examined, PC's and SC's evidence was that the meeting had been arranged so that SCM could provide them with JW's email. According to SC, in the event when they got there they were told that SCM had received advice from its lawyers to the effect that it should not release a copy and, as there was nothing else to talk about, they got up and left.

48 Following the meeting in the lift room, on May 10th, 2017, Ullger Chambers emailed Attias & Levy on the following terms:

> "Following the informative meeting between our respective clients yesterday evening, we would be grateful if you could email to us by return a copy of the letter/email from [JW] he was only objecting to the part of the front of the property and not objecting to the enclosure of the terrace at the rear."

On May 11th, 2017, Ullger Chambers again emailed Attias & Levy pressing for a copy of the letter from JW, but of significance when contrasted to the case now being advanced, they stated:

> "We have been told many times that the only objector was [JW] and yet our client is now told that [JW] sent a letter some time ago giving approval. Indeed it was for this reason the Committee Members approached our client and told him he could go ahead in January, the time when he did commence with the works.
>
> Despite the denial received of the above in your emails to us, Mr Michael Gil has in front of many witnesses admitted to our client that he did indeed tell him he could go ahead. This was at the meeting held this week."

49 In or around mid-June, SCM was made aware that works relating to the erection of a conservatory at the rear of the Cabezuttos' property had commenced. Those reports were confirmed and on June 23rd, 2017 Attias & Levy emailed Ullger Chambers seeking confirmation that the Cabezuttos

had not and did not intend to commence works to construct a conservatory. On June 27th, 2017, KNBS wrote to Attias & Levy stating that external works had commenced in the Cabezuttos' property and sought confirmation that SCM would "proceed with enforcement of the breach of covenant." By letter dated June 29th, 2017 from Attias & Levy to Ullger Chambers, the Cabezuttos were informed that the works had to cease immediately and the property reinstated to its former condition, failing which SCM would take all necessary steps to enforce the covenants contained in the underlease.

50 Ullger Chambers' reply by email on the same day made reference to PC's conversations with Mr. Wahnon and Mr. Gil in January and February, respectively, on the following terms:

> "Our client has instructed us to inform you that at the beginning of January this year, Mr Wahnon, Committee Member congratulated our client whilst walking down Irish Town on permission having been granted for our client to commence the works.
>
> On or about the 7th February 2017 our client was approached by Mr Michael Gil congratulating him on permission having been given to continue with the works for the extension."

The email, which also made reference to JW's purported consent to the conservatory works and SCM's failure to provide the Cabezuttos with JW's email, did not mention the alleged representation by Mr. Cano which is now relied upon.

51 On July 3rd, 2017, KNBS emailed Attias & Levy urging SCM to take immediate action to prevent the works from progressing and ensure restoration of the property to its previous state. On that same day Ullger Chambers provided a more substantive response which was on the following terms:

> "As your clients are aware, our client has only just lost his father and is currently residing in his late father's home. He needs to get back to his own home with his wife and 3 children.
>
> If all works ceased now, our client's home would be uninhabitable.
>
> Our client cannot wait and must put his house into a state where he and his family can move back in.
>
> Our client therefore proposes to finish sufficient work to enable him to move back into his home and thereafter meet with your clients to discuss the rest.
>
> If your clients can make Thursday the 13th July at any time to meet, our client would be very grateful."

52 The upshot of these events was that on July 14th, 2017, SCM wrote to all its members/the underlessees, informing them that the conservatory works had been started and possibly completed; it set out the prohibitions contained in the underlease; the risks and costs involved in seeking injunctive relief; its inability to resolve the matter through waiver letters because an underlessee had not agreed to it, and consequently calling (what has subsequently been described as) a special informative meeting to be held on July 20th, 2017, at which to canvass their opinion.

53 On July 18th, 2017, before the meeting, EH emailed Mr. Cano, informing him that she objected to the breaches of covenants; that she considered the use of waivers as unacceptable and expressing the opinion that SCM should seek injunctive relief requiring the reinstatement of the property.

54 According to Mr. Cano, whose evidence in this regard is not in dispute, at the special informative meeting, the overwhelming view of the members was not to take legal action but to explore other avenues before resorting to litigation.

55 By the end of August 2017, the works to the property had been completed, including the new windows to the front with integrated mosquito nets and shutters, which also feature in these actions.

56 In August 2017, JW also raised concerns in relation to the planning application process, suggesting that the plans submitted were misleading because they showed the property as part of a three storey residential building instead of a five storey building and asserting that consequently the planning permission granted for the conservatory was rendered "invalid *ab initio*." SCM in turn conveyed those concerns to the town planner at the Development and Planning Commission. By September 2017, SCM had changed lawyers and had instructed TSN. On September 15th, 2017, KNBS wrote to TSN asserting that there had been certain breaches of covenants in the underlease governing the relationship between SCM and the Cabezuttos and requiring SCM to enforce those covenants and the breaches made good, failing which proceedings would be issued against it. On September 19th, 2017, TSN wrote to Ullger Chambers asserting that the Cabezuttos had undertaken and completed the conservatory works without consent; that they had also installed new windows with integrated shutters which were not in keeping with the other residential units; that an EGM was to be convened but also putting the Cabezuttos on notice that there appeared to be no chance of obtaining a waiver from all leaseholders and that unless the Cabezuttos were to reinstate their property and thereby remedy the breaches of covenant, SCM would be forced to take action against the Cabezuttos.

57 On October 2nd, 2017, KNBS wrote to TSN questioning the need for an EGM to commence enforcement proceedings and seeking a "short and very clear timetable" to which SCM was intending to work to and that, failing a reply by October 6th, 2017, KNBS would start preparing JW's court application.

58 TSN replied on October 5th, 2017, stating that they had written to Ullger Chambers and explaining the need for an EGM. SCM's primary concerns were possibly encapsulated in the first substantive paragraph of the letter:

> "The members of the Management Company do not accept that convening an EGM is unnecessary. Many of them are unhappy to proceed with what is likely to culminate in an application to Court for injunctive relief which will be an expensive process, without the sanction of the members of the Management Company."

KNBS replied on October 12th, 2017, expressing the opinion that in view of SCM's historic approach to the issue they thought it unlikely that SCM would be taking enforcement action and that they were "now instructed to commence preparations for formal proceedings to be issued."

59 In the event, the extraordinary general meeting was held on November 22nd, 2017, and of relevance the second item in the agenda:

> "To consider and, if thought fit, approve by Ordinary Resolution sanction for the Management Council to institute legal proceedings against Mr & Mrs Cabezutto in respect of unauthorised works undertaken by Mr & Mrs Cabezutto at town house no. 16 (the Property). The legal proceedings will be issued to require them to reinstate the Property. All costs incurred in respect of the legal proceedings will be met by the Company."

The minutes of the meeting signed by Mr. Cano on December 6th, 2017 reflect that JW confirmed that he would not waive his rights and would institute proceedings against SCM should it not enforce the covenants, if necessary by instituting proceedings against the Cabezuttos; that JW raised his concerns in relation to the planning process and structural and health and safety issues; that he had no complaint against the "Council of Management" in respect of earlier decisions allowing other leaseholders to alter their properties and that "he was simply not prepared to ignore the works undertaken by Mr & Mrs Cabezutto primarily because of Mr Cabezutto's background as a property developer." The minutes also reflect that although it was apparent that most of the members present were prepared to waive their rights and allow the conservatory works to remain, that when it became apparent that a conciliatory approach was not possible and the resolution was put to the vote, four members abstained and 14 voted in favour "with most of those so voting explaining that they thought that

they were being forced to vote in this manner as a result of Dr West's refusal to waive his rights" and his threat of legal action against SCM. Curiously, JW voted against the resolution.

60 The basis for what at first glance was a surprising opposition by JW to the resolution was foreshadowed in an email from him to the members of SCM dated November 19th, 2017 to which he attached a discussion paper in which he took objection to that part of the resolution which provided that "All costs incurred in respect of the legal proceedings will be met by [SCM]" which he understood to include the Cabezuttos' costs. JW's evidence in relation to the absence of any such explanation in the minutes was that he was not given an opportunity to speak to this. In relation to the reference in the minutes to his not objecting to earlier works and a generic commendation of the Council of Management for their good work, JW's explanation was that he was being polite and that the great majority of the works undertaken by underlessees had taken place before they had assumed control of SCM.

61 On December 12th, 2017, KNBS wrote to TSN informing them that they were also instructed by EH, whose complaint against SCM mirrored JW's. The letter demanded that SCM commence proceedings within seven days of the letter, failing which JW and EH would be issuing proceedings. A reminder followed on December 20th, 2017 with KNBS stating that they were now instructed to "immediately commence proceedings" and asking whether TSN were instructed to accept service. TSN's email reply which followed within 15 minutes was on the following unequivocal terms:

> "I have instructions from the Management Company to institute enforcement proceedings against Mr & Mrs Cabezutto but we will progress at our pace and not on the ridiculous time scales suggested by your clients.
>
> If this is not acceptable to your clients, then so be it and yes I am instructed to accept service but we will inform the Court that your clients' actions are an abuse of process and we will seek to recover costs."

KNBS replied very shortly thereafter, complaining that the matter had now been ongoing for eight months, expressing dissatisfaction at the absence of a timeline in which proceedings against the Cabezuttos would be instituted and stated that JW and EH would issue proceedings against SCM. TSN in turn replied stating that they had written to the Cabezuttos requesting that they reinstate the property, and that in the absence of a positive response by January 5th, 2018, TSN was instructed to issue proceedings against them. By email dated December 21st, 2017, KNBS indicated their clients were prepared to wait until the new year before considering "formal action."

62 On December 20th, TSN wrote a lengthy detailed letter to the Cabezuttos setting out the background; the alleged breaches of covenants

and the communications conveying SCM's objection to the works. It also required confirmation by January 5th, 2018 that the conservatory works would be demolished and the property reinstated and the integrated shutters to the (then) newly installed windows removed. It went on to state, that in the absence of such confirmation and an acceptable timetable, proceedings would be instituted without further notice seeking the demolition of the works and reinstatement and costs. In the absence of a reply from the Cabezuttos, a reminder then followed on January 12th, 2018.

63 On January 23rd, 2018, JW and EH issued their claim 001 against SCM. For its part, SCM issued its claim 006 against the Cabezuttos on February 15th, 2018.

64 On February 21st, 2018, TSN served SCM's defence in claim 001 and on February 23rd, 2018, TSN wrote to KNBS and made the following proposal:

> "As you will note from the contents of the Defence filed in the above proceedings, our Clients have now filed and served a claim against Mr and Mrs Cabezutto in respect of the breaches of covenant committed by them at No. 16 Sunset Close, Windmill Hill Road, Gibraltar. In the interests of costs and given that the claim filed by our Clients goes to the crux of your Client's claim against ours, we have been instructed to write to you and invite you to agree to stay these proceedings pending the outcome of the claim filed by our Clients against Mr and Mrs Cabezutto."

That proposal was not acceded to.

65 Subsequent attempts at achieving resolution through mediation or a three-way settlement did not prosper. Indeed, during the course of the hearing, counsel for the Cabezuttos made an open offer. The terms of that offer, and of an undertaking given to SCM as to costs, are set out at para. 14 of the Cabezuttos' closing arguments:

> "The Defendants also made an offer to settle the claim in open court where they offered to pay £180,000 to the Claimant Management Company to cover its own costs and any costs or damages that may be awarded in the West/Hunter action in exchange for a licence/ permission for the Conservatory Work. The Defendants made it expressly clear that they would be willing to execute a supplemental deed to their underlease that would clarify that the licence would be limited to the works already carried out and would not impact the enforceability of the covenants going forwards (a matter which appeared to be of much concern to Dr West when he was liaising with the Claimant and its previous lawyer in 2017 . . .) Furthermore, the Defendants again agreed to disable the shutters on the Western façade of the Property. The Claimant has confirmed that it did not feel able

to settle this claim without the agreement of Dr West and Ms Hunter and that such agreement was not forthcoming. The Defendants have, through their Counsel, also undertaken to pay the Claimant's costs (win or lose) in this claim so that the shareholders (i.e. tenants and Defendants neighbours) are not out of pocket through the Claimant needing to make a call on the estate's sinking fund due to this claim."

The Cabezuttos' counterclaim

66 By their Part 20 claim, the Cabezuttos averred that SCM had failed to take enforcement action for breach of covenant against other underlessees as it was taking against them and sought an order for specific performance of the enforcement covenants so that SCM if necessary issue proceedings against underlessees who have undertaken works in breach of covenant and in the alternative sought damages. During the course of the hearing, Mr. Feetham made it clear that the Cabezuttos no longer sought specific performance but limited their claim to damages and a defence of set-off whilst submitting that the counterclaim was relevant to the relief that should be granted as against the Cabezuttos if SCM's claim prospered.

67 There is little, if any dispute between the Cabezuttos and SCM. In an email dated March 16th, 2018, TSN, without making any admission that the works constituted breaches of covenant or an admission of fault on the part of SCM, and as part of its duty of disclosure, provided a full list of works undertaken in various properties within the estate. Apart from the works the subject of these proceedings, the email identified the following:

(i) window alterations or erection of glass screens to 5 properties;

(ii) installation of air conditioning to 12 properties (including the Cabezuttos);

(iii) erection of an awning or pergola to 13 properties (including the Cabezuttos); and

(iv) affixing of ironmongery and/or gates to 5 properties.

68 Of greater significance (albeit partly for different reasons) were works carried out to properties number 13 and 19. The nature of the works and the circumstances surrounding these are succinctly set out in TSN's email, as follows:

"House number 13 . . .

An extension to this property was erected whereby the owners closed the terrace within the property and built an additional floor on top of this.

The works undertaken by [the owners] were opposed by [SCM] from the outset and the objections to the works raised by SCM were

> communicated to [the owners] as soon as [SCM] became aware of their proposals in or around March 2006.
>
> Despite the warnings and objections issued by [SCM] in this regard [the owners] proceeded to build the extension to their property in or around March 2009 and legal proceedings were commenced against them seeking injunctive relief on 17th January 2009. The matter was subsequently settled before reaching trial."

It is evident from the evidence and photographic evidence, not least as this property fronts the estate and lies on Windmill Hill Road, that the settlement did not lead to the removal of the offending works and reinstatement of the property.

> "House number 19 . . .
>
> [The owners] enclosed two parking spaces at the rear of their property thereby creating a garage. Such works were undertaken after [the owners] purchased an additional small piece of land behind their property adjacent to their parking spaces from [SCM] The extra land purchased by [the owners] was additional to the property demised to them in their underlease and in exchange for the consideration received by [SCM] in this regard [the owners] were permitted to enclose their two parking spaces at the rear of their property thereby creating a lock-up garage.
>
> [The owners] also built a conservatory at the rear of their property. [SCM] understands that the garage and conservatory at number 19 were constructed in or around April, 2003 but the construction of the conservatory was only brought to [SCM's] attention on or around 2008 as it was not visible from the Estate.
>
> No objections to or complaint regarding the works undertaken by [the owners] have been received by [SCM] from any residential unit owner at Sunset Close."

69 House No. 19 is beside the property, and the conservatory built on it is essentially the same as the conservatory works undertaken by the Cabezuttos, with both facing onto a sheer cliff face and not visible from within the estate.

Expert evidence

70 Expert evidence has been relied upon in both actions. In action 006 this was in the form of reports by Mr. Mark Francis for the Cabezuttos and Ms. Josiane Richardson for SCM, although Ms. Richardson testified in action 001, as did Mr. Simon Heather, who gave expert evidence on behalf of JW and EH. Mr. Francis is a director of Land Property Management Ltd., trading *inter alia* as "BFA Valuers." He is a member of the Royal

Institute of Chartered Surveyors and as at January 2020, when he provided his report, he had 16 years 9 months experience as a professional certified valuer in Gibraltar. Ms. Richardson qualified as a chartered surveyor in 2003. She subsequently worked in Madrid and London; since 2014 she has served as a member of the RICS World European Board and has since 2008 practised in Gibraltar, and is employed by and is a director of Richardsons Chartered Surveyors Estate Agents & Valuers which was founded by her parents. Mr. Simon Heather has been a member of the RICS since 1993 and currently heads the professional services department of the Manchester office of Sanderson Weatherall which is described by Mr. Heather (and I accept) as a "leading independent firm of UK Chartered Surveyors." Mr. Heather has previously provided expert valuation evidence before the courts and tribunals in the United Kingdom as well as for the purposes of mediations and arbitrations. This however, was the first time Mr. Heather had given opinion evidence in relation to the Gibraltar property market.

71 In relation to the impact if any that the conservatory works has had upon the aesthetics of the estate the three experts are *ad idem*. As Ms. Richardson puts it at para. 19.2 of her report:

> "Both these conservatories [House No. 19 and the property] can only be seen by leaning out of the balconies from the immediate neighbouring properties. There is therefore no evidence for argument that the 'aesthetic integrity of Sunset Close has been diminished', given that these alterations have no visible aesthetic impact on the estate, simply because they are not visible."

For his part, Mr. Heather, when questioned as to any diminution in value caused by the aesthetic impact caused by the conservatory works, made reference to it being visible only by hanging over a cliff and, when taken to photographs of the conservatory works taken by JW, made the comment that whoever took them was a braver man than he, as he was seriously worried about his welfare when trying to take photographs.

72 Albeit only relevant for the purposes of action 006, in which his evidence was not challenged, it is Mr. Francis' opinion that the conservatory works should not lead to any increased costs to SCM in terms of insurance or maintenance and that it does not impact upon the use and enjoyment of common areas, services and amenities or to the right to light of other underlessees. Ms. Richardson and Mr. Francis are essentially agreed that the works undertaken by the Cabezuttos have not resulted in any diminution in value to the estate.

73 In action 001, Ms. Richardson and Mr. Heather prepared a statement of agreed facts dated September 30th, 2019, the disagreement between them is to be found at paras. 7 and 8:

"7. ***The Financial devaluation of the development as a whole***

Both valuers are in broad agreement that the value of the development as a whole is extremely difficult to determine on an informal basis, although they both consider the notional figure is likely to lie within the range of £19,000,000 to £21,000,000.

Mr Heather is of the view that there is a devaluation of the development as a result of the Management Company's failure to enforce, although he does not see this devaluation as being any more than 1% of the notional value of the entire estate. On this basis, Mr Heather considers the overall devaluation is likely to be in the order of £200,000 (two hundred thousand pounds).

Ms Richardson is of the view that there is no devaluation of the development which can with certainty be related to the Management Company's failure to enforce the breach on the basis that there is no comparable evidence showing a decrease in property values.

8. ***The Financial devaluation of each of the Claimants' Properties (6 & 7 Sunset Close)***

Both valuers are in agreement that the value of each of the Claimants' Properties, assuming no breach, is likely to be fairly represented at a figure of between £754,000 (seven hundred and fifty four thousand) and a maximum value of £815,000 (eight hundred and fifteen thousand pounds).

Mr Heather considers the devaluation of each of the Claimants properties, as a result of the failure to enforce and subsequent 'disorder' that has arisen would also be 1% of the otherwise market value of the premises. If the 'no breach' valuation is taken as £815,000 for each, the devaluation for both would be £8,150 (eight thousand one hundred and fifty thousand pounds) each. Mr Heather considers that the reduction is unlikely to be related to the diminution in the aesthetic integrity of the estate, but more because of the 'loss of order' and exposure the future uncertainty and cost risk—as explained with his report.

Taking the best available comparable into account, Ms Richardson is of the view that number 6 is worth circa £770,000 and number 7 is worth circa £754,000 as at the date of this Statement. Although Ms Richardson agrees that there has indeed been a 'loss of order' in the estate, she believes that this has not so far resulted in a loss in value of the two properties in question or in fact the estate as a whole."

74 Mr. Heather's contention is that although any reduction in value which could be attributed to the aesthetic impact of the works to the property is negligible, as set out at para. 13.17 of his report, the works—

> "have set off a chain reaction of events that will, ultimately, lead to a diminution in value for the [Cabezuttos] and the wider estate. Essentially this relates to the 'loss of order' within the Estate and the resultant uncertainty this would create to all the Estate occupiers and potential future purchasers."

In his analysis, Mr. Heather also factors in the cost of litigation to SCM and the potential need for this to be met through increased service charges, with this then resulting in a reduction in the capital value of underleases. Premised upon that analysis he assesses the devaluation as at 1% of the value of each of the premises belonging to JW and EH and ascribing a value of £815,000 to each property he calculates the loss suffered by each claimant in action 001 at £8,150.

75 For her part, Ms. Richardson is of the opinion that if the conflict between SCM and leaseholders is not resolved and there continue to be related litigation costs, that in the future this could have a negative impact upon property values in the estate. However, her primary point is that having undertaken an analysis of transactions for the sale and purchase of underleases in the estate since 2001, cross-referenced with works carried out to other properties, she can find no evidence of property values decreasing as a result of any alteration works carried out since 2001.

76 During the examination-in-chief and cross-examination of both experts they also expressed their opinions in relation to a "recent" sale which had taken place after the reports were prepared. As I understood it, that property is located in the front row of the estate facing onto Windmill Hill Road and according to Mr. Heather (and I accept) very similar and not materially different in size to JW's and EH's property. That property sold for £710,000 which contrasts with the £815,000 value which Mr. Heather attributes to some "front row" properties. Although very properly not dogmatic in his analysis, and conceding that he was unable to say that that apparent reduction in value was attributable to the "loss of order," he opined that it could be a factor and that his previous assessment that the properties have depreciated in value by 1% could be reviewed, in the sense that it is a minimum of 1%, but could well be more.

77 Crucial to an assessment of what appears to be a dramatic reduction in the value of properties within the estate must be the value originally attributed to these by the experts. It is instructive that in the statement of agreed facts, whilst Mr. Heather valued JW's and EH's properties at £815,000, for her part, Ms. Richardson valued at £770,000 and £754,000, respectively. From the perspective of Ms. Richardson's valuations, a sale at £710,000 is not as stark a reduction. Moreover, account also needs to be taken of the fact that, in undertaking the various valuations, the experts did not inspect the interior of any of the properties, and even though that property was sold below the value that Ms. Richardson attributes to JW's

and EH's properties, it is but one single transaction, and there is a total absence of evidence as to the state of that property or the circumstances surrounding its sale. I therefore draw no inference from that "recent" sale.

78 Ms. Richardson has extensive experience and understanding of the Gibraltar market, whilst (despite his undeniable expertise) this was Mr. Heather's first venture in the valuation of Gibraltar properties. On balance, I prefer and accept Ms. Richardson's expert opinion. I therefore find that properties in the estate have not been devalued by any "loss of order" brought about by works to the property.

The windows and awning

79 The issue of the new windows to the front of the property was first raised by SCM on September 19th, 2017, with the complaint in that regard limited to the fact that the windows have integrated shutters. And in that regard, the equitable relief sought by SCM is limited to the integrated shutters and their removal or the disabling of their mechanism so that they may not be used.

80 In contrast action 001, JW's and EH's complaint in relation to the works carried out by the Cabezuttos to the front of the property is more extensive, and is pleaded at para. 4.6 of their particulars of claim, as follows:

> "additional works (in further breach) to the frontage of [the property] had also been carried out, namely the replacement of the original white aluminium sliding patio doors and windows by grey PVC pivoted ones with boxed roller shutters, and the placement of an awning."

It is also not in issue that the windows installed by the Cabezuttos are in fact white and not grey. Although according to JW's evidence they have been fitted with a mosquito screen "that when lowered without the shutters, gave the white PVC doors and windows a markedly grey appearance."

81 It was Ms. Richardson's evidence that when the roller shutters in the offending windows are retracted, they are almost identical to those fitted in a neighbouring property. Although I may lack an aesthetic eye and I am therefore loath to rely upon my own assessment, a photograph at vol. 5, tab 37, p. 143 of the trial bundle produced by KNBS, which shows the west elevation of the property and the neighbouring property, evidences that with the roller shutters raised, the differences between the windows fitted in the property and what I understand to be original windows in the neighbouring property are negligible. It is only when external louvre shutters are open and the roller shutters are down, that the aesthetics of the building are possibly affected. In my judgment it is only the integrated roller blind feature that can properly amount to a breach of covenant, whilst the other concerns raised by JW and EH as regards the windows are so minor, that in the context of legal proceedings they are to be disregarded.

82 It is not in dispute that awnings or pergolas had previously, and for some time, been fitted or erected in 13 properties including the Cabezuttos' and somewhat ironically also EH's. The position taken by SCM is that erection of the Cabezuttos awning does not amount to a breach of covenant in that it had (in consultation with the Government's Building Control Department) agreed to permit the installation of both pergolas and retractable awnings. Cross-examined by Mr. Feetham, Mr. Cano accepted that to that extent SCM had actively engaged in breaching the covenants. In those circumstances there could be no conceivable basis upon which equitable relief could be granted in favour of SCM requiring the Cabezuttos to remove the awning. In my judgment, very properly no claim was advanced by SCM in that regard.

The law

83 In action 006, Mr. Feetham properly acknowledged that following the United Kingdom Supreme Court decision in *Duval* v. *11–14 Randolph Crescent Ltd.* (2) (delivered after both these actions were instituted) various defences which had been pleaded could not prosper. The issue in *Duval* was succinctly summarized by Lord Kitchin, J.S.C. ([2020] UKSC 18, at para. 1):

> "1. The issue to which this appeal gives rise is whether the landlord of a block of flats is entitled, without breach of covenant, to grant a licence to a lessee to carry out work which, but for the licence, would breach a covenant in the lease of his or her flat, where the leases of the other flats require the landlord to enforce such covenants at the request and cost of any one of the other lessees."

At its simplest, the answer to that question was held to be that the landlord was not entitled to consent to such works.

84 In the context of both these actions, the inescapable conclusion is that the covenants at para. 22 of the sixth schedule and para. 13 of the tenth schedule are absolute covenants; that by virtue of cl. 5, SCM is under a positive obligation to enforce any breaches; and that it is not open to SCM to license an underlessee to carry out works or to waive a beach by an underlessee.

85 There is merit in Ms. Richardson's opinion that residential property is an asset that, in a properly regulated way, should be allowed to be altered and upgraded in order that it can remain relevant in the market place and retain value. But without deciding the point, because it is not an issue in this case and consequently has not been argued, that cannot, as was proposed in SCM's letter of January 27th, 2016, be achieved by a management company/lessor agreeing to amend a specific underlease so as to allow an underlessee to carry out works which would otherwise breach

a covenant. In my view, this would amount to a breach of the management company's/lessor's enforcement covenant with other underlessees. What would be required would be an amendment of all underleases in an estate or of course primary legislation regulating a process allowing for works which would otherwise be prohibited by covenants.

Action 006 estoppel

86 It is a feature of both cases that there is no dispute that the conservatory works are in breach of covenant and that, despite the relatively extensive volume of evidence relied upon, there is fundamentally only one factual dispute and which strictly only arises in action 006. Namely, whether Mr. Cano made the representation alleged by the Cabezuttos, and it is premised upon that, that the Cabezuttos' contend that SCM is estopped from enforcing the covenants.

87 The only people present when the alleged representation was made were the Cabezuttos and Mr. and Mrs. Cano, with the evidence of each couple diametrically opposed. Particularly in those circumstances, when assessing the credibility of witnesses, there can be no surer guide than to assess that evidence against objective facts, such as documentary evidence, whilst having regard to the likely motivation of the parties.

88 Although Mr. Cano invited the Cabezuttos, that meeting came about because Mrs. Cano had met SC and seen that she was upset. On its face, a meeting arising from neighbourly concern would be an unlikely setting for a representation that the conservatory works could proceed to have been made. Making any such representation is also incongruent with the Cabezuttos thereafter being invited to a "formal" meeting with the SCM committee whilst SC's explanation that the purpose of that meeting was merely to provide her with a copy of a letter from JW does not make sense, because a meeting was evidently not necessary for that to happen. Moreover, whilst from SCM's perspective obtaining JW's agreement was a pre-requisite, it is also evident that, as set out in the letter of January 27th, 2016, SCM required further conditions to be met before formal consent could have been given.

89 All that said, the most significant evidence undermining the Cabezuttos' contention is to be found in various emails from Ullger Chambers to Attias & Levy. In its email of May 10th, which followed the meeting in the lift room, it is striking that no reference is made to the alleged representation. Moreover, in the emails of May 11th, 2017 and June 29th, 2017, not only is no reference made to the alleged representation but, rather, reliance is placed upon alleged representations by Mr. Gil and Mr. Wahnon, which in the case as now pleaded it is accepted were not made. Moreover, it is difficult to understand how the Cabezuttos could reconcile

the implicit assertion in the alleged representation that JW did not object to the works, with KNBS's letter of April 25th, 2017.

90 In the circumstances, on balance I prefer Mr. and Mrs. Cano's evidence and without any hesitation I find as fact that Mr. Cano did not make the representation alleged by the Cabezuttos. It follows that the Cabezuttos' defence of estoppel fails and SCM is entitled to judgment.

Action 006—the counterclaim

91 SCM advances no substantive defence to the counterclaim in respect of works undertaken by other underlessees in the estate. Not least given that the Cabezuttos do not seek equitable relief, it is unnecessary to condescend upon the individual works save that whilst some of the pleaded breaches, such as the alteration of bathroom windows to an "open outward" are so *de minimis* such that they do not amount to a breach of covenant, other works such as the building of a house extension or the building of a conservatory almost identical to that built in the property clearly do. As I understood Mr. Stagnetto's closing submissions, he relied upon the Cabezuttos' acquiescence to those works. Had the Cabezuttos persisted with their claim for specific performance, their historic acquiescence to the works would have defeated their claim for equitable relief, but parties' cases are defined by the pleadings and, acquiescence not having been pleaded, cannot be relied upon as a defence. The Cabezuttos are therefore entitled to judgment on their counterclaim and to damages.

Injunctive relief—the applicable principles

92 The authorities relied upon stretch back to *Roper* v. *Williams* (4), in which in an action for an injunction to restrain a breach of covenant, the Lord Chancellor [Eldon] said (T. & R. at 22):

> "Having long lived in *Gower Street*, I have often been in the habit of illustrating my view of such cases by reference to the stipulations contained in the Duke of *Bedford's* leases. In the lease of every house on the east side of that street is contained a covenant that there shall be no erection behind them exceeding a certain height. The landlord in such a case is stipulating not only for his own benefit but for the benefit of all the tenants in that neighbourhood. If therefore the landlord in some particular instances lets loose some of his tenants, he cannot come into equity to restrain others from infringing the covenant to whom he has not given such a licence."

93 That proposition did not last the test of time. In *German* v. *Chapman* (3), the judgment in *Roper* v. *Williams* was distinguished and the principle reformulated. James, L.J. put it as follows (7 Ch. D. at 279):

> ". . . [I]f there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighbourhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the Court for the purpose merely of harassing and annoying some particular man where the Court could see he was not doing it *bonâ fide* for the purpose of effecting the object for which the covenant was originally entered into."

94 Mr. Stagnetto, for his part, placed particular reliance upon the four-limbed "working rule" formulated by Smith, L.J. in *Shelfer* v. *City of London Electric Lighting Co. (No. 1)* (5) as to when damages are to be awarded in substitution for an injunction ([1985] 1 Ch. at 322–323):

> "(1.) If the injury to the plaintiff's legal rights is small,
>
> (2.) And is one which is capable of being estimated in money,
>
> (3.) And is one which can be adequately compensated by a small money payment,
>
> (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction:—
>
> then damages in substitution for an injunction may be given."

Smith, L.J. then also went on to state (*ibid.*, at 323):

> "There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction."

95 *Shelfer* and subsequent cases in which there were differing approaches to its application, now need to be seen in light of the United Kingdom Supreme Court judgments in *Coventry* v. *Lawrence* (1) ([2014] UKSC 13). Although a case involving the tort of nuisance, the following statements of principle to be found in the principal judgment, delivered by Lord Neuberger, P., are apposite to the exercise of the court's discretion when granting injunctive relief:

(i) At para. 119 (*ibid.*), that an almost mechanical application of the four tests in *Shelfer* and the requirement for "very exceptional circumstances" before awarding damages, was wrong in principle.

(ii) At para. 120 (*ibid.*):

> "120. The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in *Regan* and *Watson*. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in *Jaggard* [1995] 1 WLR 269, 288, where he said:
>
> > 'Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way But it does not follow that it would be wrong to exercise it differently.'"

(iii) At para. 121 (*ibid.*), that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not.

(iv) At para. 123 (*ibid.*), Lord Neuberger modified the application of the *Shelfer* test on the following terms:

> "First, the application of the four tests must not be such as 'to be a fetter on the exercise of the court's discretion.' Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted."

For their part Lord Sumption and Lord Clarke (*ibid.*, at paras. 161 and 171 respectively), expressed the view that *Shelfer* was out of date and should not be followed slavishly.

The exercise of discretion

The conservatory

96 Albeit mindful of the caveats, I start my analysis from the perspective of the *Shelfer* test.

97 It is a striking feature of this case that SCM sought to accommodate the Cabezuttos' desire to build the conservatory and apparent from the tenor of the evidence given on behalf of SCM, and indeed confirmed by

Mr. Stagnetto in exchanges with me during closing submissions, that SCM seeks equitable relief because it has to and not because it wants to. That to my mind serves to illustrate that even from SCM's perspective, the injury to its legal rights is small.

98 Evident from the extensive expert evidence before me that infringement of SCM's legal rights is capable of being estimated in money, in making that assessment it must be of no consequence that it does not in fact result in any actual financial loss. It follows that the third test is also satisfied in that in the absence of loss, the breach can be compensated by way of nominal damages.

99 Viewed narrowly from the perspective of the fourth limb in *Shelfer* (5), namely whether the grant of an injunction requiring the Cabezuttos to demolish the conservatory and reinstate the property would be oppressive, and adopting the analysis of Smith, L.J. ([1895] 1 Ch. at 322 and 323), it is evident that the Cabezuttos, having been fully aware that the construction of the conservatory was in breach of covenants in their underlease and that they undertook the works in the absence of a waiver or other representation by SCM allowing them to do so, that applying the *Shelfer* test and adopting the language, "disentitled [themselves] from asking that damages may be assessed in substitution for an injunction."

100 But enjoined by *Lawrence* (1) to a more expansive approach when determining the exercise of my discretion, beyond the application of the *Shelfer* test*,* I also take account of the following circumstances:

(i) In my judgment, and albeit by way of excuse rather than justification, the Cabezuttos embarked upon the construction of the conservatory out of exasperation at what they reasonably perceived to be special adverse treatment by SCM which had been forced upon it by JW's dogmatic stance. This at a time and in circumstances in which their emotions were heightened because Mr. Cabezutto senior was terminally ill, with this contributing to their rash behaviour.

(ii) Beyond the fact that the conservatory works have caused no financial loss to SCM, its physical location is such that it has no aesthetic impact whatsoever upon the estate.

(iii) There is a historic, near identical conservatory in the neighbouring property in respect of which no waiver or consent was granted and in relation to which no steps were taken to enforce the covenants.

(iv) An enforcement action by SCM (even if at the time controlled by the developers) in relation to major works to a detached town house fronting onto Windmill Hill was compromised on terms which evidently allowed the works to remain.

(v) Very significantly, as I have said earlier, SCM seeks the relief because it is required to and not because it wants to.

(vi) The Cabezuttos have given an undertaking to pay SCM's costs of the action irrespective of the outcome.

101 Balancing the factors to be considered as part of the *Shelfer* test but also the broader circumstances, I am satisfied that the Cabezuttos have discharged the legal burden to show that an injunction should not be granted and in the exercise of my discretion I shall substitute the injunction with an award of damages.

The windows

102 In relation to the windows the Cabezuttos' position is succinctly set out at para. 92 of Mr. Feetham's written closing submissions:

> "the windows are a non-issue in this claim. In their Particulars of Claim, the Claimant seeks an order for the Defendants to remove the integrated shutters forming part of the newly installed windows or 'otherwise adapt the windows in a manner that the deployment of the integrated shutters is permanently disabled.' The Defendants have agreed, without any concession on liability, to this relief both before the hearing and as part of the open offer which was made during the proceedings."

Having found that the integrated shutters amount to a breach of covenant and the Cabezuttos not resisting, I shall grant the injunctive relief sought by SCM.

Action 006 relief on the claim and counterclaim

103 The breaches of covenant in both the claim and counterclaim having been established and consequently of the infringement of respective legal rights of the parties to this action, it follows that SCM and the Cabezuttos are (no loss having been proved) each entitled to nominal damages as against the other, which I fix at £5 and set off against each other.

Action 001

104 During the course of the trial, two additional issues were relied upon in support of JW's and EH's position, namely "upstream consent" and the sufficiency of the planning permission granted in respect of the conservatory works.

105 As regards "upstream consent," it is evident from the LPS email of April 20th, 2016 that consent was given on behalf of "the Crown." The email does not make clear if the Crown in that context is a reference to consent under either or both the headlease in favour of Gibraltar Land

(Holdings) Ltd. or under the August 20th, 2002 demise by Gibraltar Land (Holdings) Ltd. in favour of Souwest. Because LPS works for H.M. Government of Gibraltar, the consent must have been given on behalf of the Crown in right of H.M. Government of Gibraltar, which includes H.E. The Governor (see s.2(2) of the Crown Proceedings Act). But Gibraltar Land (Holdings) Ltd. being an H.M. Government of Gibraltar company, it is I think implicit that consent was also given on its behalf. In any event the issue does not require determination because it did not form part of JW's and EH's pleaded case.

106 Similarly the concerns raised in relation to the planning process are not pleaded, although evidence was advanced in relation to the representations made by JW in that regard, including his writing to the Minister with responsibility for the relevant government department and replies from her officials, including a memorandum from a structural engineer. In the event the building control officer issued a certificate of fitness on August 7th, 2017 and, in the context of these proceedings, I cannot look behind its validity.

107 Turning to the pleaded case, in relation to the conservatory works (possibly subject to whether the enforcement obligation on the part of SCM may extend to appealing my decision not to grant injunctive relief in action 006) it is acknowledged by Mr. Aslett that the need for specific performance or an injunction has fallen away in action 001. However, it is submitted that despite JW and EH making clear in their particulars of claim that there were further breaches by the Cabezuttos in relation to the front elevation, SCM has not brought a claim against the Cabezuttos in relation to all of these breaches and that therefore it is in continuing breach of the enforcement covenant.

108 Given my finding that in relation to front façade windows, the breach of covenant by the Cabezuttos is limited to the integrated shutters and does not extend to other aspects of the windows. SCM has therefore done what was required of it under the enforcement covenant and JW's and EH's claim for specific performance in respect of the windows fails.

109 As regards the awning, for the reasons I have previously given it is inconceivable that SCM could have succeeded in obtaining equitable relief requiring its removal. JW and EH cannot properly seek to have SCM enforce the covenant because it is evident that these structures have been in place for a long time and that therefore JW has evidently acquiesced, as did EH's predecessors in title who also had an offending pergola, albeit now removed by EH. Technically, they are entitled to the most nominal of damages, which I fix at £1.

110 I am loath to levy criticism upon the directors or committee members of SCM. Whilst evidently a corporate entity with distinct legal personality,

the members of SCM are the underlessees, as are its committee members and directors and its primary purpose to manage the estate for the benefit of all the underlessees. In those circumstances it is not surprising that they did their best to try to resolve the dispute with the Cabezuttos (which was undoubtedly exacerbated by what was a contractually legitimate stance taken by JW) in a way that would avoid litigation, whilst trying to maintain good neighbourly relations and avoiding if possible the cost of litigation. In my judgment, these were legitimate considerations. In my judgment, although the enforcement covenant imposes an obligation upon SCM to enforce the restrictive covenants, it is implicit in "*if necessary* by taking legal proceedings" [emphasis added] that SCM must have space, for it to exercise its own judgment as to when it considers it necessary to institute proceedings. That said, there can be no doubt that JW and EH were entitled to seek to ensure that to the extent that I have previously identified, SCM complied with its enforcement obligations as against the Cabezuttos. Whether or not JW voting against the December 6th, 2017 resolution amounted to a contradiction or whether possibly on a very narrow construction he did not want to agree to any concession in relation to costs is of no significance. Similarly, and the issue does not fall for determination in this action, it is of no consequence that JW threatened to take and may have taken direct action against the Cabezuttos but then failed to do so, because he was properly entitled to call upon SCM to do so. It may have even been sensible to have desisted from issuing proceedings when informed by TSN that they were instructed to do so, but it cannot be said that it was wrong for JW and EH to seek to ensure that their contractual rights were protected. However, once SCM has issued proceedings, there was no purpose in JW and EH persisting with their claim beyond possibly agreeing to a stay which could if necessary have been lifted in the event that SCM did not prosecute its claim against the Cabezuttos. SCM having taken the necessary enforcement action against the Cabezuttos, it follows that other than for the £1 award in relation to the awning, the claim by JW and EH fails and is dismissed.

111 Orders accordingly in each action, and I shall hear the parties in action 001 as to costs.

Orders accordingly.