[2021 Gib LR 666]

WEST and HUNTER v. SUNSET CLOSE MANAGEMENT LIMITED

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): November 22nd, 2021

2021/GCA/15

Landlord and Tenant—breach of covenant—alterations to property—enforcement covenant gave management company degree of latitude as to timing of taking legal proceedings to enforce breach of covenant—management company acted reasonably in trying to resolve dispute

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

The respondent 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. By a lease in 1995, the Governor had leased the land to Gibraltar Land (Holdings) Ltd. ("GLH"); in 2002 GLH had leased the land to Souwest Developments Ltd.; and, in 2013, Souwest had assigned the 2002 deed of lease to the respondent. 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 roller blind shutters and the erection of an awning. The works were in contravention of restrictive covenants in the underlease.

The appellants, who owned other properties in the estate, opposed the works.

The power and duty to enforce breaches of covenant by a property owner was vested in the respondent. The underleases provided that the respondent "will enforce insofar as they are legally empowered to do so (if necessary by taking legal proceedings)" the performance and observance of the covenants and conditions. The appellants brought a claim against the respondent for relief for its failure to take enforcement action against the Cabezuttos. The respondent subsequently brought a claim against the Cabezuttos seeking the reinstatement of the property and damages.

In the Supreme Court, Dudley, C.J. rejected the Cabezuttos' defence of estoppel and held that the respondent was entitled to judgment against them. He granted an injunction requiring the removal of the integrated roller blind shutters. In respect of the conservatory, the respondent sought

a mandatory injunction requiring reinstatement but the judge made an award of damages. Neither the Cabezuttos nor the respondent sought to appeal against that decision.

In respect of the appellants' claim against the respondent, the judge's view was that there was no purpose in the appellants persisting with the claim beyond possibly agreeing to a stay once the respondent had itself initiated enforcement proceedings against the Cabezuttos. As to the appellants' pleaded case in relation to the conservatory, the judge held that, given his decision not to grant an injunction against the Cabezuttos, the need for specific performance against the respondent had been taken away. As to the further complaint that there had been a failure by the respondent to enforce certain other covenants, relating to the windows, the judge held that such concerns were minimal and the breach of covenant by the Cabezuttos was limited to the integrated roller blind shutters, which had been successfully enforced by the respondent. As to the complaint with regard to the awning, the judge held that it was inconceivable that the respondent could have succeeded in obtaining equitable relief requiring the removal of the awning. He said that technically the appellants were entitled to the most nominal of damages, fixed at £1.

The appellants raised three grounds of appeal: (i) the judge erred in his approach to an issue of consent by the Crown and GLH ("the upstream consent point"); (ii) the judge erred in his appraisal of whether the respondent had unduly delayed in taking legal proceedings; and (iii) the judge erred in failing to grant relief appropriate to the facts and circumstances. In respect of ground (i), it was submitted that the respondent was required to obtain the consent of the Crown, under the 1995 headlease, and of GLH, under the 2002 deed of lease.

Held, dismissing the appeal:

(1) The upstream consent point failed. It was impossible to see why the respondent was required to obtain the consent of the Crown, under the 1995 headlease, or of GLH, under the 2002 deed of lease. First, the respondent did not at any stage purport to waive the covenants or to grant any consent to the Cabezuttos. On the contrary, the respondent repeatedly and explicitly refused consent. There was therefore nothing for which the Crown's or GLH's consent was needed. Secondly, there was in any event nothing in the structure or wording of the lease arrangements requiring the respondent to seek the consent of GLH or the Crown in a situation such as the present case, let alone to make any such failure actionable at the suit of the appellants. Thirdly, the upstream consent point had not been pleaded and the court would not interfere with the judge's decision that he did not need to determine the point (paras. 35–40).

(2) The judge properly held that it was not unreasonable for the respondent not to have issued proceedings until February 2018. There was no proper basis for the court to interfere with the judge's evaluation. The enforcement covenant conferred on the respondent a degree of latitude as to the timing

of taking legal proceedings (if and when adjudged necessary). The yardstick was reasonableness. It was plain that throughout the respondent took the matter very seriously and did its best to resolve the dispute (paras. 42–47).

(3) In respect of relief, the appellants' complaint was tantamount to asserting that the respondent should have taken and pursued costly enforcement proceedings in relation to other minor changes made by the Cabezuttos to their property (installing pivoting windows, external mosquito screens and reattaching an awning). It was said that relief should have been granted to the appellants in respect of this alleged enforcement failing by the respondent. The judge had found that the concerns about the windows (save as to the roller blind shutters) were so minor that in the context of legal proceedings they were to be disregarded, and that there was no conceivable basis on which equitable relief could have been granted in respect of the awning, as there had previously been an awning at the Cabezuttos' property for a considerable time without objection, and many other properties also had awnings. The appellants' present complaint that the respondent should have taken and pursued costly enforcement proceedings in those respects against the Cabezuttos, which would have been doomed to failure, was highly unattractive and not legally sustainable. It could not be reasonable to require a management company to pursue enforcement by taking legal proceedings which could not succeed or could not achieve an effective or meaningful remedy. In the language of the underlease, taking such proceedings could properly be assessed not to be "necessary." The law did not exist, in a context such as the present, to support trifling claims. The judge was entirely justified in his decision to decline to grant any declaratory relief that the respondent had been in breach of its enforcement obligations (paras. 48–54).

Cases cited:

(1) *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, referred to.
(2) *Finch* v. *Underwood* (1876), 2 Ch. D. 310, referred to.
(3) *Mortimer* v. *Bailey*, [2004] EWCA Civ 1514; [2005] 1 EGLR 75; [2005] P. & C.R. 9; [2005] BLR 85, referred to.

P. Aslett with *K. Navas* (instructed by Kenneth Navas Barristers & Solicitors) for the claimants;
G. Stagnetto, *Q.C.* with *K. Power* (instructed by TSN) for the defendant.

1 **DAVIS, J.A.:**

Introduction

The principal issue on this appeal, brought by the claimants in the proceedings ("the appellants"), concerns the effect of an enforcement covenant on the part of a management company, the defendant in the proceedings ("the respondent"), when applied to the facts and circumstances of the case.

2 Dudley, C.J., after a trial in the Supreme Court, dismissed the claim, save for an award of £1 nominal damages for a particular breach of covenant (reported at 2021 Gib LR 222). The appellants appeal against the dismissal of the claim. There is also, notwithstanding the nominal nature of the award against it, a cross-appeal by the respondent.

Background

3 The background is set out very fully and with exemplary clarity in the judgment below.

4 By a lease dated October 16th, 1995 ("the headlease"), the Governor of Gibraltar leased an area of land known as Crown Property 1231 to Gibraltar Land (Holdings) Ltd. ("GLH"), a H.M. Government of Gibraltar company. The term was 150 years from April 1st, 1995. In due course GLH leased to Souwest Developments Ltd. ("Souwest") land on which an estate had been developed by Souwest, known as Sunset Close, Windmill Hill Road. The estate comprised 20 town houses, 5 apartments and 1 detached house. The deed of lease was dated August 20th, 2002 and was for a term of 140 years.

5 Souwest in turn demised the individual residential units by underleases having a term of 99 years computed from August 20th, 2002. Substantial premiums were paid.

6 The first appellant, Dr. West, acquired town house no. 6 on the estate by a deed of underlease dated November 6th, 2002. The second appellant, Ms. Hunter, purchased the remainder of the 99-year underlease for town house no. 7 on February 1st, 2017. Also involved in the proceedings below were a couple, Mr. and Mrs. Cabezutto, who had acquired the remainder of the 99-year underlease in respect of town house no. 16 on March 3rd, 2003. Subsequently, Souwest assigned the deed of lease of August 20th, 2002 to the respondent by deed of assignment dated January 16th, 2013. The respondent, which thus now was also the lessor, was and is the management company of the estate. Each owner of a property on the estate was entitled to be a member of the respondent, having one vote for each property.

7 Central to these proceedings is the fact that the covenants contained in each underlease for each property on the estate were in identical terms.

8 For present purposes, the material covenants in the underleases are these:

(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 para. 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 "Restrictive and other covenants" provides:

> "The Lessee shall not build set up or maintain or suffer to be built set 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]."

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 of Apartment." ["The enforcement covenant."]

9 The dispute that was to arise originated in the desire of the Cabezuttos to make alterations to their town house. They lodged planning applications in January 2016. The proposed works at the time included, among other things, a new balcony, the construction of a conservatory at the rear of their property by way of extension, alterations to an external wall and various internal alterations.

10 Correspondence with the respondent ensued. The respondent made clear that by reason of the covenants in the respective underleases it was not in a position to consent. Various proposals, however, were made. These included the obtaining of consent from all the other underlessees. In addition the Cabezuttos, through their then lawyers, sought consent for their proposed works from Land Property Services Ltd. ("LPS"), the property advisers to the Government of Gibraltar. By email dated April 20th, 2016, LPS said that there was no objection on the part of the Crown to the proposed works, subject to approval being given by the management company and subject to compliance with all planning conditions. Following that, the Cabezuttos reapplied to the respondent. There was an amount of correspondence. On June 28th, 2016, the respondent then wrote

to all property owners on the estate to ascertain if they consented to the proposed works which, of course, potentially involved a departure from the covenants contained in the Cabezuttos' underlease.

11 On August 8th, 2016, the respondent emailed the Cabezuttos' lawyers, informing them that 25 out of the 26 underlessees had consented but one (Dr. West) had objected.

12 In the meantime the Cabezuttos had obtained planning permission. Matters did not resolve themselves, however. To the contrary, lawyers instructed by Dr. West, in direct correspondence with the lawyers for the Cabezuttos, made clear that he did not consent. The lawyers for the Cabezuttos then sought to argue, among other things, that majority consent of the other underlessees might suffice. For its part, the respondent made clear in correspondence that, given the circumstances, it did not consent to the proposed works. Nevertheless, it (by its management committee) sought to persuade Dr. West to reconsider his objection. One concern raised was that in the past other underlessees had performed works without the formal consent of all the other property owners and that, if there were court proceedings, there was "an obvious litigation risk" (and hence costs risk). Another concern raised was "the interest of preserving an amicable environment amongst neighbours."

13 Dr. West maintained his objection, pointing to the terms of the underleases. He requested the respondent to "strictly enforce (if necessary by taking legal proceedings)" the observance of the relevant covenants. There matters stood by the end of 2016.

14 On February 1st, 2017, Ms. Hunter was assigned the remainder of the 99-year leasehold interest in town house no. 7. On March 1st, 2017, she gave written notice of her own objection to the proposals of the Cabezuttos.

15 In the meantime, exploration of what the judge called a "workaround" continued. But during March 2017, Dr. West made clear that he maintained the position that consent was to be refused. He expressed concern as to the structural integrity of the building if the works were undertaken.

16 In the event, various works (seemingly at that time internal) were commenced by the Cabezuttos at their property in March 2017. This gave rise to yet more correspondence. On April 7th, 2017, the respondent's lawyers reiterated to the Cabezuttos' lawyers that the respondent did not consent to the works. As for Dr. West, his then lawyers wrote both to the respondent and to Mr. Cabezutto on April 21st, 2017, threatening proceedings for injunctive relief. In response, on April 27th, 2017, the Cabezuttos' lawyers indicated that the works were internal and not structural or were confined to the rear of the property (the balcony was not being pursued) and that others in the past had undertaken works of such a kind at various properties on the estate. Correspondence continued.

17 In around mid-June 2017, the respondent was made aware that, seemingly contrary to what it had been told in correspondence, works of a structural kind involving the erection of a conservatory at the rear of the Cabezuttos' property had started. Photographs were sent to the respondent. Its lawyers wrote on June 29th, 2017 to the lawyers for the Cabezuttos, saying that such works had to cease and the property had to be reinstated otherwise the respondent would take all necessary steps to enforce the covenants. In response, the Cabezuttos' lawyers now claimed that consent for such works had been given by a committee member earlier in the year. A further response added that the Cabezutto family needed to return to their home, that "if all works ceased now, our clients' home would be uninhabitable" and that it was proposed to finish the works to enable the family to move back in.

18 The respondent on July 14th, 2017 then wrote to all underlessees, informing them that the conservatory works had been started (and possibly completed). A meeting, styled a "special informative meeting," of the estate property owners was held on July 20th, 2017. It is evident from the notes of that meeting that there was a very full discussion of the situation. As the judge found, the overwhelming view expressed was not to take legal action but to explore other avenues before resorting to litigation. At all events, the works to the property of the Cabezuttos were completed by the end of August 2017. So far as the conservatory itself was concerned, the unchallenged evidence was that it was not visible from the rest of the estate.

19 Correspondence and discussions continued. Dr. West continued to require enforcement of the covenants, in particular maintaining his objection to the conservatory works. Objection was also raised to new windows with integrated roller blind shutters. The respondent, which by now had instructed new solicitors, again warned the Cabezuttos that, unless there was reinstatement, the respondent would be forced to take proceedings. Indeed, on advice, it was decided to convene an EGM of the respondent to consider this option. Dr. West protested to the respondent that such a course was unnecessary. But that objection was rejected: it was said that expensive litigation was not to be undertaken without the sanction of the members.

20 The EGM was held on November 22nd, 2017. There is a detailed minute of the meeting, signed by the chairman on December 6th, 2017. One resolution on the agenda was to consider, and if thought fit approve, the institution of legal proceedings against the Cabezuttos. Matters were very fully discussed. At this meeting Dr. West made clear his opposition to the works undertaken and his view as to the need for enforcement. Most present indicated a preparedness to waive their rights. However, in the light of Dr. West's maintained objection, when the resolution was put to the vote of those present 14 voted in favour and 4 abstained. Dr. West, very oddly

on the face of it, was not one of the 14: he was later to say that he objected to the suggestion that the respondent was to bear the costs of the proceedings.

21 On December 12th, 2017, the lawyers acting for Dr. West (and also Ms. Hunter) wrote demanding that the respondent commence proceedings within seven days. The respondent's lawyers refused to accede to what they called the "ridiculous time scales suggested."

22 Thereafter, the respondent's lawyers wrote again to the Cabezuttos' lawyers requiring reinstatement. On January 23rd, 2018, Dr. West and Ms. Hunter issued their claim against the respondent. For its part, the respondent issued its claim against the Cabezuttos on February 15th, 2018. That claim focused on the conservatory and roller blind shutters. An attempt at a mediated solution failed. The two actions were combined and in due course came on for trial together before the Chief Justice. In the meantime, the respondent had proposed that the appellants stay their claim pending the action of the respondent against the Cabezuttos. This proposal was not adopted by the appellants.

The judgment below

23 At the trial, the Cabezuttos raised a defence of estoppel, based on what a committee member had allegedly said to them in an informal discussion. That was rejected by the judge on the facts. A counterclaim was also raised by the Cabezuttos as to past breaches by other underlessees for which there had been no enforcement proceedings undertaken by the respondent. That is not now material for present purposes.

24 The defence of estoppel having failed, the judge held that the respondent was entitled to judgment against the Cabezuttos. He granted (without opposition) an injunction requiring the removal of the integrated roller blind shutters. The question then was as to the remedy with regards to the conservatory. The respondent had sought a mandatory injunction requiring reinstatement. The judge, however, in the exercise of his discretion and following a thorough review of the principles to be extracted from the authorities, decided in the circumstances of this case not to award an injunction but to substitute an award of damages.

25 The judge gave a number of reasons for so doing. First, the Cabezuttos had acted out of exasperation, perceiving special adverse treatment of them by the respondent, as compared to others in the past, forced upon it by Dr. West's "dogmatic stance," as the judge put it (2021 Gib LR 222, at para. 100). Secondly, the conservatory works had (as found) caused no financial loss; and the conservatory's physical location was such, as the experts all had agreed in their evidence, as to have no aesthetic impact whatsoever on the estate. Thirdly, in the past a similar conservatory had been built at another property on the estate with no enforcement action taken; and, in

another case, proceedings had been compromised on terms permitting major works to remain. Fourthly, the respondent was seeking restorative relief because it was required to and not because it wanted to. Finally, the Cabezuttos had previously given an undertaking to pay the respondent's costs, irrespective of the outcome.

26 Neither the Cabezuttos nor the respondent have sought to appeal from the decision in that action.

27 Turning to the claim by the appellants against the respondent, the judge expressed his view, in the penultimate paragraph of his judgment (*ibid.*, at para. 110), that there was "no purpose in [the appellants] persisting with their claim beyond possibly agreeing to a stay," once the respondent had itself initiated enforcement proceedings against the Cabezuttos.

28 As to the appellants' pleaded case in relation to the conservatory, the judge inevitably held that, given his decision not to grant an injunction against the Cabezuttos, the need for specific performance against the respondent had been taken away. As to their further complaint that there had been a failure by the respondent to enforce certain other covenants, relating to the windows, the judge held that such concerns were minimal and the breach of covenant by the Cabezuttos was limited to the integrated roller blind shutters to the windows, and that had been successfully enforced by the respondent. As to a complaint with regard to an awning put up at the Cabezuttos' property (to which I also will need to come later) the judge held that (*ibid.*, at para. 109), for the reasons he gave, "it is inconceivable that [the respondent] could have succeeded in obtaining equitable relief requiring its removal." As he found, such a structure had previously been in place for a long time; Dr. West had "evidently acquiesced"; and Ms. Hunter herself had an "offending pergola" at her own property (albeit since removed by Ms. Hunter). He said (*ibid.*) "Technically, they are entitled to the most nominal of damages, which I fix at £1."

29 Finally, as to the complaint that the respondent had unreasonably delayed in bringing the enforcement proceedings, the judge's evaluation was this (*ibid.*, at para. 110):

> "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 . . ."

Grounds of appeal

30 On behalf of the appellants, Mr. Aslett (appearing with Mr. Navas) in essence advanced three heads of appeal.

(1) The judge erred in his approach to an issue of consent by the Crown and GLH ("the upstream consent" point).

(2) The judge erred in his appraisal of whether the respondent had unduly delayed in taking legal proceedings.

(3) The judge erred in failing to grant relief appropriate to the facts and circumstances.

In oral argument, Mr. Aslett dealt with these grounds in a different order. But I think it convenient to take them in that order.

Disposal of appeal

31 Enforcement covenants of this nature have an important role to play where (as here) there is no building or letting scheme in terms entitling or enabling one property owner to bring proceedings directly against another property owner for breach of covenant. The means of securing compliance

ordinarily is via the lessor or management company on which the right to enforce is conferred.

32 This can give rise to a delicate position, both in the drafting of a suitable enforcement covenant and in giving effect to such a covenant where a breach by a lessee is identified. An over-strict approach to any breach of any covenant by a lessee could result, at the behest of just one single-minded lessee, in discord and conflict between other lessees in a building or estate and could lead to costly and upsetting litigation. On the other hand, prospective lessees will wish to know where they stand before acquiring a lease: and they may legitimately rely on the existence of the enforcement covenant, not only in circumstances of (say) unauthorized alterations which may affect the structure or integrity or appearance of a building but also in other circumstances. To some extent, a well-drawn lease may anticipate the potential differences in the importance attaching to covenants: for example, by qualifying some covenants by adding a proviso to the effect "without the consent of the landlord, such consent not to be unreasonably withheld" and by leaving other covenants as absolute covenants. An example of the considerations that can arise in this kind of context can be found in the arguments and decision in the case of *Duval* v. *11–13 Randolph Crescent Ltd.* (1).

33 It was at the core of Mr. Aslett's arguments that the relevant covenants by the underlessees in question—that is, as contained in para. 22 of Part 1 of the sixth schedule and para. 13 of the tenth schedule—were drafted in absolute terms; and so, for example, the lessor had no entitlement conferred by the underlease to consent to otherwise unauthorized works. He is correct in that. Further, he stressed that the obligation on the part of the lessor management company as set out in cl. 5 of the underlease is mandatory. The wording does not say "may" or "will use reasonable endeavours." It says "will," if necessary by taking legal proceedings. And that, he submitted, given the circumstances, was precisely the situation here: necessitating the taking of legal enforcement action which, he says, the respondent wrongfully did not take.

34 Having reflected on the decision of the judge and on the detailed arguments, written and oral, presented to this court I am left in no doubt that this appeal must fail.

35 I can take the point about upstream consent relatively shortly. Indeed, although advanced at some length and with seeming enthusiasm in the written arguments of the appellants, it played altogether a lesser role in the oral arguments, Mr. Aslett perhaps foreseeing the formidable difficulties in his way on this issue.

36 In my opinion, the argument fails at every level.

37 It was submitted that the consent of the Crown, under the headlease dated October 16th, 1995, and of GLH, under the deed of lease dated August 20th, 2002, was required by the respondent. But as I see it, it is impossible to see why the respondent was required to obtain any such consent.

38 The short point is that the respondent at no stage purported to waive the covenants or to grant any consent to the Cabezuttos. On the contrary, the respondent repeatedly and explicitly *refused* consent. So there on any view was nothing for which the Crown's or GLH's consent was needed by it. When this rather obvious point was put to Mr. Aslett, he could give no convincing answer.

39 Secondly, there is in any event nothing in the structure or wording of the lease arrangements requiring the respondent (which of course was not itself making any alterations to any property) to seek the consent of either GLH or the Crown in a situation such as this, let alone to make any such failure actionable at the suit of the appellants. I need not go into detail as to the precise wording of the relevant paragraphs in the lease arrangements since, when these paragraphs were put to counsel in argument, Mr. Aslett (as did Mr. Stagnetto, Q.C., appearing with Ms. Power for the respondent) agreed that that was so.

40 Thirdly, whilst the point about upstream consent had to an extent featured at the trial below, it had never been pleaded. The judge in terms decided that, as it had not been pleaded, he did not need to determine the issue of whether LPS had (on the approach made to it by the Cabezuttos' agents) validly given consent on behalf both of the Crown and of GLH. I would not be prepared to interfere with the judge's ruling on this: the point indeed had not been pleaded and he, as trial judge, was entitled to conclude that that was fatal. I might add that the judge in any event had indicated his finding that LPS had in fact consented both on behalf of the Crown and on behalf of GLH; and I was not much impressed by Mr. Aslett's legalistic quibbles to the contrary with regard to that finding. And if the complaint is as to the lack of evidence to support such a finding then that can be attributed to the very failure to plead the point.

41 The second ground was in truth the major point raised on this appeal.

42 Mr. Aslett, focusing on the absolute nature of the covenants in the underlease not to alter and emphasizing the mandatory nature of the enforcement covenant on the part of the respondent, submitted that the respondent breached such enforcement covenant. But it is a feature of this covenant that the enforcement obligation is qualified by the words "(if necessary by taking legal proceedings)." That connotes that enforcement may take a form other than by taking legal proceedings: and one such form could be that of persuasion or dissuasion, including by sending letters from

solicitors. That wording also connotes that legal proceedings, if to be taken, must be adjudged to be necessary. It follows that, on its true interpretation, this covenant conferred on the respondent a degree of latitude as to the timing of taking legal proceedings (if and when adjudged necessary). Mr. Aslett rightly accepted that to be so. He further accepted that the yardstick here was reasonableness, and moreover reasonableness by reference to the *Wednesbury* standard. But his argument was that, on the facts, no reasonable management company could have refrained from taking proceedings by July 2017.

43 In this regard, he pointed to the inconclusive correspondence in 2016 and the failure on the part of the Cabezuttos to give any undertakings. He particularly stressed the information made known to the respondent in June 2017 (most notably through the photographs plainly showing major structural alterations at the rear of the property) as well as the constant urgings of Dr. West for the need to take enforcement action against the Cabezuttos.

44 At some stages, Mr. Aslett's arguments seemed to be predicated on the proposition that, acting reasonably, the respondent not only should have issued proceedings at that time but also should have applied for an interim—and if need be mandatory—injunction, and that the court would have granted such interim relief if so sought. I do not accept that. By this time, most of work had been done. Further, the Cabezuttos had indicated a defence. Proceedings, and an application for an interim injunction, would have been costly and by no means assured of success. Further, if an interim injunction were to be sought, there was the cross-undertaking in damages to be considered. Moreover, while of course this court cannot predict what a judge would have done if presented with an application for an interim injunction, in my view it would, putting it at its lowest, have been entirely reasonable to assess any such application for interim relief (let alone for an interim mandatory injunction) as not by any means assured of success. It is also to be borne in mind that the absence of an application for an interim injunction would in any event not necessarily have disentitled the respondent ultimately from obtaining the necessary restorative relief by way of final injunction at trial: see, for example, *Mortimer* v. *Bailey* (3) ([2004] EWCA Civ 1514, at paras. 30 and 37 of the judgment of Peter Gibson, L.J., and at para. 43 of the judgment of Jacob, L.J.).

45 There is also nothing to suggest that issuing proceedings at that time would of itself have deterred the Cabezuttos. In fact, by August 2017 the works were mainly completed. In my opinion, viewing matters in the round, it was not unreasonable for the respondent to continue to seek to persuade, through lawyers' correspondence, the Cabezuttos to restore their property and, at the same time, to gather the views of the other underlessees as to the position and as to the need for and consent to litigation. It is plain

that the respondent throughout was taking the matter very seriously; and, as the judge found, was doing its best to try and resolve the dispute.

46 It is in fact, in my view, a point of the strongest comment that when, at trial, the Chief Justice declined to grant a final mandatory injunction against the Cabezuttos with regard to the conservatory he did so for reasons entirely other than any delay in issuing proceedings on the part of the respondent or any failure by it to seek an interim injunction.

47 Accordingly, in my judgment it was properly held that it was not unreasonable for the respondent to refrain from issuing proceedings in June/July 2017 and not unreasonable for it not to issue proceeding until February 2018. That was, in substance, the evaluation of the trial judge; and I do not accept the submission that that was an erroneous conclusion, not open to the judge on the evidence. There is no proper basis for an appellate court interfering with his evaluation.

48 The final point relates to the relief to be granted. In this respect, at first sight, and indeed at second sight, it is hard not to identify with the judge's evident bemusement that the appellants carried on with their claim against the respondent even after the respondent itself had issued enforcement proceedings against the Cabezuttos. If anything, my own bemusement increased, not decreased, in the light of the oral arguments advanced to us.

49 Without question, the primary complaint against the Cabezuttos related to the conservatory. That point was ultimately pursued against them by the respondent (the judge, as I have said, at trial granting damages in lieu of an injunction). In addition, the claim in respect of the integrated roller blind shutters was (successfully) pursued against the Cabezuttos. But no further claims by the respondent were advanced against them. What, in summary, is said by the appellants is that they were justified in continuing their own claim against the respondent by reason of the respondent failing, in alleged breach of cl. 5 of the underlease, to pursue proceedings against the Cabezuttos for other changes to their property made by their works: in particular, by inserting pivoting windows (along with the roller blind shutters); by putting in external mosquito screens giving (when drawn down) a "grey appearance," as it was said, to the front windows; and by reattaching an awning in place of a previously removed awning. It is said that relief should at least have been granted to the appellants in respect of this alleged enforcement failing by the respondent.

50 The judge had found that the concerns as to the mosquito screens and windows (save as to the roller blind shutters) were "so minor that in the context of legal proceedings they are to be disregarded." As to the awning at the Cabezuttos' property, one had previously been there for a considerable period of time (without objection); many other properties had long had awnings or pergolas (without objection), and there was "no conceivable

basis," as the judge put it, on which equitable relief could have been granted in favour of the respondent requiring the Cabezuttos to remove the awning.

51 Given all these findings, the appellants' present complaint is tantamount to asserting that the respondent should have taken and pursued costly enforcement proceedings in those respects against the Cabezuttos even though, in those respects, they would in practice have been doomed to failure. That, to say the least of it, is highly unattractive; and in any event is not legally sustainable. It cannot be reasonable to require a management company to pursue enforcement by taking legal proceedings which cannot succeed or cannot achieve an effective or meaningful remedy; put another way, in the language of this underlease, taking such proceedings could properly be assessed not to be "necessary."

52 If it be necessary to add a further objection to this ground, one can be found in the pleaded case. We were taken to the amended particulars of claim. It is true that there is reference not just to the conservatory and awning but to "other works." But the mosquito screens are not specifically mentioned in the pleadings at all, even if they had some mention in the evidence; and I would query, in any event, if the asserted fact that, when they were pulled down, a grey appearance was given to the windows could be a breach of covenant at all. As to the pivoting windows, that point too, in my opinion, was not sufficiently pleaded as a relevant breach requiring enforcement, and, as Mr. Stagnetto told us, was not an issue explored in evidence.

53 The law does not exist, in a context such as the present, to support trifling claims (as the judge had held them to be). As Mr. Stagnetto stated to us, virtually the whole trial was about the conservatory (and to some extent the roller blinds). Mr. Aslett hopefully sought to rely on the case of *Finch* v. *Underwood* (2). I need not consider whether or not that case might be decided differently today. It is sufficient to say that the context of that case (an entitlement to renew a lease subject, as a condition precedent, to compliance with a repairing covenant) was quite different from the present context.

54 Although Mr. Aslett insisted that the judge should nevertheless at least have granted a declaration to the effect that the respondent had been in breach of its enforcement obligations, for the reasons given there was no obligation on the judge to grant any declaration; and he was entirely justified, in his discretion, in declining to grant any declaratory relief in this regard.

Conclusion on appeal

55 I would reject all grounds of appeal advanced and would dismiss the appeal.

The cross-appeal

56 The cross-appeal relates to an award of just £1 in damages, relates to an issue which cannot sensibly have an impact on the costs in respect of the trial and raises no point of principle. I therefore propose to deal with it very shortly.

57 In para. 4.6 of the amended particulars of claim, it had been alleged that additional work to the frontage had been carried out by the Cabezuttos, in further breach, and specific reference was made (amongst others) to the placement of the awning. As I have said, the judge had held that it was "inconceivable," given the background, that the respondent could have obtained relief requiring its removal. So there can, on this finding, be no valid complaint of breach of covenant against the respondent for not taking enforcement proceedings in this regard. The judge nevertheless awarded £1, as the "most nominal of damages." As I read the particulars of claim, however, no claim for damages for breach of covenant on the part of the respondent was being sought in this particular respect or, if it was, it was in far too obscure language. Certainly the language of para. 5 of the amended particulars of claim relating to breach on the part of the respondent (see, for example, paras. 5.1 and 5.4) is unspecific as to the precise "further" or "other" works on which reliance was being placed. Further, even if the previous awning had been tolerated in the past by the respondent (or its predecessor)—and there was evidence that 13 other properties on the estate also had or have pergolas or awnings—one gets no sense from the pleaded case of damages being sought in that regard by the appellants from the respondent for past or historic breaches of the enforcement covenant (which perhaps seems to have been the basis for the award made by the judge).

58 I do not wish to say more on this point. I would allow the cross-appeal.

Overall conclusion

59 I thus would dismiss the appeal and allow the cross-appeal. If my Lords agree with these conclusions, presumably the parties can agree any consequential matters and the appropriate minute of order. Rather unsatisfactorily, the costs of the proceedings below have not yet, it appears, been the subject of a court order; so the question of how those costs are to be dealt with should be restored for determination by the Chief Justice.

60 **ELIAS, J.A.:** I agree.

61 **KAY, P.:** I also agree.

Appeal dismissed.