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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

(1) ODYSSEY PAVILION LLP (IN ADMINISTRATION)
(2) SHERIDAN MILLENNIUM LIMITED

Plaintiffs;

-and-

MARCUS WARD LIMITED

Defendant;

-and-

ANGLO IRISH BANK CORPORATION LIMITED

Third Party.

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GIRVAN LJ

Introduction

[1] The Odyssey Pavilion, Arena and W5 located at Queen's Quay, Belfast represented a landmark development carried out to mark the millennium. The development resulted from a successful bid made to the Millennium Commission for lottery funding. Mr Peter Curistan, chairman of a group of companies called the Sheridan Group, worked in conjunction with the Ulster Museum in successfully developing the bid.

[2] The site of Queen's Quay on which the project was constructed was conveyed by way of a long lease from the Belfast Harbour Commissioners ("the Commissioners") to a new company, Odyssey Trust Company Limited ("OTC"). OTC leased the premises to Odyssey Property Company Limited ("OPC"). In turn OPC granted to the second plaintiff Sheridan Millennium Limited ("SML") two leases for 150 years for that part of the project known as

the Odyssey Pavilion and IMAX Theatre. The leases here dated 17 October 2002 and 10 October 2004 respectively. SML obtained finance for the project from Anglo-Irish Bank Corporation Limited ("the Bank").

The relevant leases and leasehold provisions

[3] By a lease dated 17 June 2003 SML demised to the defendant Marcus Ward Limited ("Marcus Ward") the premises known as Unit 6 in the Odyssey Pavilion for a term of 25 years from 1 November 2000 at an initial rent of £177,848 per annum subject to review every five years.

[4] By a deed of variation dated 28 April 2004 between SML and Marcus Ward the rent in respect of Unit 6 was increased to £300,000 per annum as from the date of the Deed of Variation. That rent was to continue until 1 November 2005 subject to a review in accordance with Part II of the Schedule.

[5] By a lease dated 17 June 2003 SML demised to Marcus Ward the premises known as Unit 7 in the Pavilion for a term of 25 years from 1 August 2003. The rent from 9 March 2004 until the end of the first year was £137,200 for the second year of the term £147,000 for the third year of the term £147,000 for the fourth year of the term £156,800 and for the fifth year £156,800 per annum. As at the expiration of the fifth year of the term and each subsequent period of five years thereafter the rent was subject to review in accordance with the sixth schedule.

[6] By deed of variation dated 28 April 2004 the rent was varied to £250,000 until 1 August 2008 exclusive of outgoings subject to review.

[7] Each of the leases of 17 June 2003 contained covenants to pay the rent and, by way of additional rent, the insurance contribution as fixed, what was called the interim sum and a service charge together with value added tax ("VAT"). Clause 5.8 of the leases provided that Marcus Ward acknowledged the relevant lease had not been entered into in reliance wholly or partly on any statement or representation made by SML.

[8] The lease of Unit 6 provided that SML had a right of re-entry in an event of default (which was defined as including a failure to pay rent or any sum payable by way of additional rent).

[9] By a deed of assignment dated 20 April 2009 in consideration of the sum of £70m paid by Odyssey Pavilion LLP ("OPL") SML assigned to OPL, inter alia, the lessor's interest in Units 6 and 7. By a deed of assignment of the same date SML assigned to OPL all sums due from Marcus Ward to SML before 20 April 2009 which had not been received by SML as cleared funds at least five working days before 20 April 2009 together with all rights to take

any proceedings in the name of SML that might be necessary to obtain payment of the said sums.

[10] Mr John Hanson was appointed as administrator of OPL on 19 May 2009. Mr Hanson is a chartered accountant and licensed insolvency practitioner and a partner in KPMG. He was appointed at the instance of the Bank which was the major secured creditor of OPL. He was appointed as administrator of Capital Homes 11 Limited, the company controlling OPL the shares of which are vested in Mr Curistan. OPL was set up with a view to onward sale to a third party, its creation being a tax saving device to minimise stamp duty land tax.

The issues

[11] It is the plaintiffs' case that Marcus Ward defaulted in the payment of rent, service charges, insurance and electricity charges under the leases. By reason of Marcus Ward's failure to pay rent, service charge, insurance and electricity charges due under the lease of Unit 6 OPL claims that the leases become liable to be forfeited to OPL so that it is entitled to possession of that unit. The claim that, Marcus Ward owes substantial sums for units 6 and 7. In the event of the plaintiffs' claim being successful the precise calculation of the arrears of rent and sums due by way of additional rent and by way of mesne profits after the date of the issue of the writ would have to be a matter for determination and calculation. On the materials presently before the court it would appear that the claims for rent and sums by way of additional rent interest thereon and mesne profit amount to a sum of some £5.8m. The plaintiffs are not asserting a claim to possession in respect of Unit 7 although they claim arrears of rent.

[12] Marcus Ward's defence to the claim can be briefly outlined at this stage although it will be necessary to return in greater detail to the nature of that defence at a later stage.

(a) Mr Curistan is a director of both SML and Marcus Ward and at all material times was the directing mind and controller of both companies.

(b) SML intended the units in the Pavilion to be used primarily for food and drink businesses and considered it imperative for the units to be occupied and actively traded to achieve the development and to release the commercial potential of the Pavilion. To facilitate the letting of the other units to third parties SML decided to use connected companies ("Curistan connected companies") to apply for liquor licenses and, if necessary, to have those companies take up occupation of the units and trade them whilst third party tenants were being sought.

(c) In or about late 2000 and early 2001 SML agreed with Marcus Ward "by conduct and/or through them both having a common directing mind" that Marcus Ward would participate in an inter-group strategy in respect of the occupation of units and the promotion of the Pavilion. Until the assignment of the leases of Units 6 and 7 or the sale of shares in Marcus Ward, Marcus Ward was to enter into leases for the premises, arrange and pay for the fitting out of the units and for staff training and would open and trade from Unit 6 and 7. In the event of disposal to a third party Marcus Ward would assign any liquor licenses it held. In consideration of undertaking those various steps Marcus Ward would not be liable for the rent, service charges and charges otherwise payable on foot of the leases in respect of Units 6 and 7.

(d) SML and Marcus Ward acted in accordance with that agreement. Marcus Ward secured a public house licence for Unit 6. It successfully extended it to cover Unit 7. It entered into a Hard Rock Café franchise and incurred considerable expenditure in connection therewith and in respect of the fitting out of Unit 7. It agreed not to object to licensing applications for other tenants of SML. SML instructed managing agents not to pursue Marcus Ward for rent or charges and it instructed its group financial controller Mr Crickard, to prepare the accounts of SML and Marcus Ward on the basis of the agreement. SML paid the services charges in respect of Units 6 and 7 itself.

(e) Further or alternatively, as against SML Marcus Ward relied on an estoppel by representation. It founded its case of estoppel by representation on the conduct of SML essentially as set out in paragraph (d) above and in reliance on the representation by SML that it did not expect payment of rent or a service charge. Marcus Ward took the various outlined steps and thus acted to its detriment.

(f) Marcus Ward also relied on the fact that it gave a guarantee in respect of the liabilities of SML in January 1999 and another guarantee dated 7 September 2006. It agreed to the execution of a consent to a restructuring of Marcus Ward's guarantee of SML in connection with the proposed sale of the Pavilion to a third party.

(g) Marcus Ward also relies on a estoppel by representation against OPL which was formed as a strategy between the Bank and SML for the onward sale of SML's interests in the Pavilion and IMAX lease. OPL continued to forebear to require payment of rent, service charges and other charges under the leases and funded the service charges in respect of Unit 6 and 7.

(h) Marcus Ward also claimed that the Bank was on notice of the equity arising in favour of Marcus Ward by way of estoppel and was bound by it, in particular as regards security held by it in around arrears of rent and other charges allegedly due. The administrator having been appointed by the bank was bound by this equity.

The Evidence of Mr Hanson

[13] Mr Hanson gave evidence that OPL was set up with a view to onwards sale of the Odyssey Pavilion to a third party. When he took over as Administrator a number of units occupied by Curistan connected companies were surrendered to the Administrator _ Bar Budda, Soda Joes, Odyssey Bowl Limited (a bowling alley which had gone into liquidation) and Strike Four Limited (which had also gone into liquidation). When he was appointed units 6 and 7 were operated under the names Laughter Lounge and Rockies respectively. MWL held the lessee's interest under the leases. Rockies was licensed premises. Laugher Lounge was also licensed and was called a Comedy Store. It currently operates as a nightclub. At the time of his appointment there were other units let to third parties not connected with Mr Curistan. The main creditors of OPL were the Bank which was claiming £70m and the Revenue which was claiming £500,000. The Administrator's goal with regard to the Pavilion is to find a purchaser on the open market. He considers it necessary to clarify the position in respect of the leases of units 6 and 7 and where the rent is payable and whether he is entitled to claim possession.

[14] The Administrator's claim is based on the proposition that the amounts claimed are clearly due on foot of the leases as varied. Mr Hanson considered that there were a number of matters revealed by the papers available to him and by his investigations which were inconsistent with the case being put forward on behalf of MWL.

(a) The express terms of the leases were inconsistent with such a case.

(b) The way that VAT was dealt with in respect of unit 7 was inconsistent with the defence. VAT was being accounted for in respect of Rockies since the formation of OPL. This, however, was not the case in relation to unit 6 where nothing was being received by way of income or rent and no VAT was paid or accounted for.

(c) The increase of rents under the two deeds of variation appeared ex facie to boost the capital value of the property and affected the amount of rent payable to OPL.

(d) SML's accounts, for example for the year ended 1 April 2007 on the face of them recorded a rental income from Marcus Ward of £550,000.

(e) Marcus Ward's accounts appeared on the face of them to show rent of £550,000 payable. This was consistent with the entries in SML's accounts and with the leases as varied. If the true understanding was that no rent was payable the Administrator considered that the recorded figure would have been nil.

(f) The Statement of Affairs of OPL filed by Mr Holmes listed various assets of the company and their estimated realisable value. The Administrator considered that this showed amongst outstanding monies due from SML and other rental debtors monies due from Marcus Ward Limited. In the Schedule to the Statement amongst the aged debtors as at 19 May 2010 the sum of £39,166.64 was shown as due and recoverable in respect of unit 6 occupied as Laughter Lounge. Mr Hanson considered that this was inconsistent with the proposition that no money was due from Marcus Ward. He did accept that the statement of affairs showed nothing due in respect of unit 7 which was operated under the name Rockies. In relation to service charges of £20,369 was shown as due by Marcus Ward trading as Laughter Lounge i.e. in respect of unit 6. £54,576.03 was shown as due in respect of Marcus Ward but was funded by the landlord SML.

(g) Mr Hanson also referred to the management accounts of OPL. The amalgam of rental income referred to showed rental income from unit 6 of £30,083.31 and from unit 7 £194,630.05.

(h) Mr Hanson also referred to some documents coming from Mr Holmes one being a document entitled information re OPL provided 21 May. It recorded Mr Holmes as saying that he was unaware of any formal agreement in respect of SML for the non-payment of rent by Sheridan related units. Mr Holmes said in the document:

> "This appears to have been de facto agreement acceptable to the bank in the circumstances of the development of Odyssey Pavilion. Currently service charges, insurance and electricity on Sheridan units is paid up-to-date no consideration passed in connection with these arrangements."

Mr Hanson also referred to invoices emanating from Lisneys the agents for SML. The evidence seen by Mr Hanson was that there may have been some small amounts paid in terms of the service charges but generally no payment was made. The existence of the invoice suggested to Mr Hanson that if there was no obligation to pay rent, service charge or utilities he would not have expected to see those documents at all. The evidence indicated that SML was meeting its obligations to the head landlord but was not collecting the rent from the sub-tenants.

(i) Mr Hanson also referred to a document dated 10 March 2009 (Commercial Property Standard Inquiries 2) prepared in connection with the anticipated onward sale of the Pavilion. That document was signed by Mr Holmes. In Section 2 under the heading "Current Tenancies" to the inquiry in paragraph 4.3 ("Please supply details of any informal arrangements with any tenants that are not disclosed by the tenancy document supplied") the answer given was "none". To the inquiry in paragraph 4.4 "Has there been any waiver of any of the terms of any of the tenancy documents?" the answer given was none save as disclosed in documentation provided. In paragraph 5(2) which sought details of any rent concessions, deferments, abatements etc. the answer given was "See documents supplied". A similar response was given in paragraph 5(3) in respect of a request for a schedule of rent arrears and a record of rent payments over the last three years. The schedule showed rent of £20,000 from Unit 6 and £185,000 from Unit 7. Mr Hanson considered that if no rent was due the figures shown should have been nil.

[15] Mr Hanson stated that he had discussions with Mr Curistan about his role and actions as administrator. Mr Curistan produced no documentation or correspondence to support his case on the issue of rent and service charge in respect of the Curistan controlled units. He represented that the rent would be paid as from 1 August 2010, the start of the next quarter and offered vacant possession on a sale to a third party. An e-mail was sent to Mr Curistan referring to the agreement to pay rent from 1 August 2010. Mr Curistan never challenged that. Subsequently he took a different line and refused to accept the need to pay rent even from 1 August 2010.

The evidence of Mr Holmes

[16] Mr Holmes who formerly worked as a civil servant joined SML in 2000 and was a director until 2007. He then became Chief Executive of the Sheridan Group. He subsequently became a part-time consultant.

[17] He described the circumstances of the setting up of OPL, a complex corporate structure devised by accountants with a view to avoiding stamp duty. It was effectively to be controlled by Mr Curistan in the short term time but it was confidently expected that it would be taken over by a third party purchaser, initially anticipated to be PNB.

[18] He described the early days of the Pavilion with Warner Village being the first anchor tenant which came in in 2001 and took over the running of the cinema. When development work began in earnest it was felt that to maximise the development and sale potential of the Pavilion it would be necessary to acquire a number of licenses for the sale of alcohol. A number of Sheridan companies were involved in applications. A franchise agreement with Hard Rock Café was achieved and it was anticipated that it would become the anchor of the other licensed units. While other tenants were obviously needed to fill the units there were none forthcoming. The only plausible thing to do was for Curistan companies to try to create animation in the Pavilion by going into the units until tenants could be found. In the meantime the Curistan companies would apply for licenses and get the units up and running as viable unit. For this purpose they needed leases of units to show title. They would have to prove need in the licensing court and a proper title. The idea was that the Curistan company which took a lease of a relevant unit would be operated and run with a view to early transfer on to an incoming third party tenant by way of take over of the company. Mr Holmes did not think that thought was given to transfer by way of assignment of the leases. The leases of the units recorded a rent but the rent was not invoiced. Rent was not required and was effectively forgiven. In relation to service charges invoices were raised and actually paid by SML. Mr Holmes was not present at any meeting where these rent arrangements were agreed. He described it as "an organic process". He could not point to a discussion at which it was agreed. Mr Curistan was the directing mind of SML and of Marcus Ward Limited the tenant of Units 6 and 7. Mr Holmes considered that the Bank was aware of the arrangement. It received accounts which showed non-receipt of the rent. In the case of units which were initially occupied and developed by Curistan Company and then taken over by a third party the incoming tenant took over with no rent outstanding. Mr Holmes considered that it was clear that SML had no expectation of a claim to arrears. When SML changed its seat of operation to Cyprus for tax reasons Mr Holmes thought the new Cypriot directors were clearly made aware that there were no arrears of rent due as between SML and Curistan related tenant companies. Lisneys the managing agents were made aware that there was to be no collection of rent from the Curistan tenant companies. He was not clear if this was a result of a verbal or written instruction, probably the former.

[19] A liquor licence was obtained for Units 6 and 7. Marcus Ward had to be the controlling entity of the relevant unit and be seen to be such for

licensing purposes. Under a management agreement dated 17 August 2007 between Marcus Ward Limited and Rockies Sports Bar Limited and Jim Graves, Rockies Bar as the service provider agreed to provide the services described in the schedule. Mr Holmes said that the agreement provided for the payment by Rockies Bar of a fee but the agreement provided for the payment of what was described as a rent of £185,000 per annum payable monthly in advance. This money was effectively paid to the credit of SML. The plaintiff relied on that to support his case that effectively Marcus Ward Limited was paying a rent which went to reduce SML's debt to the bank and Mr Hanson considered this was inconsistent with the proposition that no rent was to be paid. Laughter Lounge which operated unit 6 did not enter into such a management agreement though it had been contemplated that it would.

[20] Mr Holmes also referred to correspondence between Mr Curistan and the Bank dealing with the Bank's proposal to facilitate the disposal to a third party of the interests in Odyssey Pavilion currently owned by SML and dealing with Mr Curistan's exit from the project. The letter of 13 January 2009 in paragraph 4 proposed that at or before completion date if required by the bank vacant possession was to be provided on the units described as Curistan connected units in the Pavilion (in the correspondence those were defined as Units 2, 4, 4A, 10 and any units where, following due diligence, the Bank was not satisfied that there was an occupational lease in place on terms acceptable to the Bank or the party had commercial connection with Mr Curistan. Clause 6 provided that all rent on units excluding Curistan connected units and service charge arrears on those units including Curistan connected units were up-to-date. Because units 6 and 7 were not clearly within the definition of Curistan connected units that letter did not constitute a clear recognition that the Bank recognised that rent for units 6 and 7 had been waived. A later letter from the Bank of 14 September 2009 when it was contemplated PND would be taking over the project in paragraph 6 envisaged that Mr Curistan would procure that the lease between Marcus Ward and OPL in respect of Units 6 and 7 would be surrendered. Clause 8 again envisaged that all rents would be discharged except in relation to Curistan connected units (defined again as Units 2, 10, 4A, 4 and 1A.)

[21] Mr Holmes drew attention to a memorandum of 4 September 2009 in which the Bank recorded that "there are currently a number of units controlled/ traded by Mr Curistan. To date relevant income services charges, electricity and water rates have never been paid by Mr Curistan in relation to these units." Thus, he asserted, this was a clear recognition by the Bank that it was aware that there was a rent free arrangement between Marcus Ward Limited and SML.

[22] It was Mr Holmes understanding and interpretation of the arrangement between SML and MW that would only come to end after

disposal of the property to an unconnected third party. The creation of OPL and its taking over of the lessor's rights did not constitute such a terminating event. If the ultimate anticipated but unrealised deal with PNB had gone ahead the Sheridan units would have been vacated and rent would have ceased.

[23] In cross-examination Mr Holmes accepted the importance of proper recording keeping in company governance. The Sheridan Group comprised about 20 companies 13 or 14 of which were active. He and Mr Curistan were working directors while Mr Holmes stood down in 2007. Mr Curistan was very much the boss. It was Mr Holmes' task to draw up necessary resolutions and to keep proper records. He kept a day book. Mr Curistan occasionally kept a record of relevant events but not routinely. He carried a lot in his head. Mr Holmes stated that he was not privy to decision-making in 1999 to 2000.

[24] Mr Holmes could not recall any specific discussions about how the arrangement in respect of the forgiveness of rent or the writing off the rent arrears in respect of units 6 and 7. Around 2003 to 2004 he gathered from a general talk in the office that such an arrangement existed. He never raised any point about this being unusual. He "swam with it". He could point to nothing that proved such an arrangement as such. He said when a company, Utopian, was considering a take over he was not informed of the arrangement nor would it have been clear from the accounts. He accepted that OTC was not informed of the arrangement.

[25] Mr Holmes was challenged in relation to the contents of the deed of assignment of the rent arrears between SML and OPL. The recitals noted that "there are sums which are due from the tenants under the occupational tenancies but which have not been recovered by the seller." The deed assigned the arrears of rent as defined under the occupational tenancies (which were listed in the Schedule). These included the lease to Marcus Ward in respect of units 6 and 7. If there was no rent due it was suggested to Mr Holmes that it should not appear in the schedule at all. Mr Holmes was also challenged as to the contents of a letter of 19 January 2006 from SML's solicitors to OTC's solicitors. This letter related to the calculation of the rent fixing percentage under the leases. In it SML's solicitors asserted that they wished to have the deeds of variation approved by the Trust as they currently stood because "the Sheridan companies are currently paying the rents as per the deeds of variation and they would not wish this to have to change or varied further." Mr Holmes stated that the letter was incorrect and Carson and McDowell their solicitors must have been wrongly instructed. He also asserted that incorrect information had got into a letter of 24 September 2008 from Comerton and Hill. It was misleading to claim ongoing payment of rent. The Commercial Property Standard Inquiry prepared on 10 March 2009 in anticipation of being provided to a would-be buyer of the Pavilion stated

that there were no informal arrangements with any tenant not disclosed in the tenancy documents. Mr Holmes accepted it was wrong to answer the question whether there had been any waiver of any tenancy terms "none save as disclosed in documentation." The details of rent in the schedule to the document were also wrong to suggest a rent of £200,000 for Unit 6 and £185,000 for Unit 7.

[26] Mr Holmes also accepted that in discussion with representatives of the administrator he stated that he understood that the non-payment of rent had arisen through custom and that the arrangement was to come to an end on completion of the sale. In his own document supplied to the administrator by way of information he stated:

> "I am unaware of any formal agreement between Sheridan on non-payment of rent by Sheridan related units. This appears to have been a de facto agreement acceptable to the bank in the circumstances of the development of Odyssey Pavilion. Currently services charges, insurance and interest on Sheridan units is paid up to date. No consideration passed in connection with the arrangements."

Mr Holmes said that he had not appreciated the legal meaning of consideration in saying that. He did not know how he got the information about the service charge wrong.

[27] Mr Holmes recognised that SML had been severely criticised by BDO and Deloittes when investigating its operations in connection with a development opportunity. The criticism related to its corporate governance. He said that SML disputed the criticism.

The Evidence of Mr Crickard

[28] Mr Crickard gave evidence of joining SML Group as group financial adviser in 2002. He had responsibility for statutory accounts controlling cash flow and treasury management. He was responsibility for management accounts and controlling balance sheets. When he joined he was given a handover by Mr Turkington the former Finance Director but nothing was said about financial arrangements involving the rents payable to SML. He said that over time and in a series of discussions it was made clear that Curistan related companies did not pay rent or service charge. He understood this arose out of the need to have units operating to stimulate interest and to seek third party tenants. Initially for management account purposes he regarded rents for Units 6 and 7 as a liability but Mr Curistan told him to disregard them. In the SML accounts rents invoiced to third parties net of VAT and rents for Curistan connected companies were included

together in the sum of turnover. Provision for the non-payment of the rent free related tenants was made in the exceptional item as "doubtful debts". In the Marcus Ward accounts rent was shown as a cost to the company. Thus in SML's accounts unpaid rent was shown as a doubtful debt and in the MWL accounts as a liability. In relation to service charges SML funded them by paying directly to the superior landlord and the amounts were off-set against service costs incurred in the Curistan company accounts. In relation to VAT returns for SML they were supplied taking account of information supplied by Lisneys. VAT on rent was involved by Lisneys. The amount due for Rockies was treated as rent for VAT purposes and MWL was responsible for rates. Mr Curistan accepted that the VAT authorities were being told rents were being invoiced.

[29] In cross-examination Mr Crickard accepted that Mr Curistan never sat down with him to explain details of the rent arrangements in respect of Units 6 and 7. He accepted that the debt was irrecoverable it would be written off in the accounts and if there was no liability it would not appear at all in the accounts. This was not reflected in the management accounts.

[30] He accepted that he had a hand in the preparation of the statement of affairs which he recognised was an important document. The schedule of age debtors showed rent due in the sum of £39,166.64 in respect of Unit 6 Laughter Lounge and recoverable in full. He could not explain why the entry was made. If as Mr Curistan contended no rent was due for Units 6 and 7 it should not have appeared as a recoverable debt**.**

The Evidence of Mr Curistan

[31] Mr Curistan in evidence described how he had started professional life as a chartered accountant in 1980 then moving into business and in 2004 and 2005 he won an award as Entrepreneurial Man of the Year awarded by the Institute of Directors. He operates, owns and controls a number of companies in the Sheridan Group. He was involved in projects in Dublin and in Dublin Road, Belfast including a multi-storey car park in Marcus Ward Street the name of which provided inspiration for the name of the defendant company. He became interested in developing the Odyssey complex and millennium project which was one of ten landmark millennium project in the United Kingdom.

[32] The project at the Odyssey involved a science centre (W5), an arena for large scale performances and the Pavilion which was intended to be "the glue" in the project. Mr Curistan role concentrated on the Pavilion. He operated through the medium of SML which was intended to be a property-investment company rather than a trading company. The Bank as the funding bank became deeply involved. By 1998/1999 SML was starting to formulate the mix of tenants in the units in the Pavilion. They managed to

find a tenant for the cinema complex, Warner Village Limited whose interest was subsequently transferred to Village Theatres Limited.

[33] Obtaining liquor licenses for units was a necessary part of the marketing and developing strategy and the aim was to obtain 4-5 liquor licenses. This had to be done initially by means of application by Curistan connected companies. What was needed was to get the licensed operations up and running to increase footfall into the Pavilion. A key part of the stratagem was to acquire a Hard Rock Café franchise for units taken by Marcus Ward. A license was a pre-requisite to that and the unit had to be fitted out up to the necessary high standards for the franchise.

[34] Mr Curistan decided that while the units were owned and controlled by connected companies rent would not be demanded of the tenant company or paid. He said that the features of the arrangement were discussed with other executive directors of SML (at the time Mr Allard and Mr Healy) and its financial advisors. Mr Holmes when he became involved was aware of the arrangement. The accountants would have known of the set up. He asserted that the bank was also aware of the arrangement. The forbearance was to last until the relevant unit could be disposed of. The preference was if possible to dispose of the unit before fit out but if not the unit would be fitted out and operated with the benefit of any liquor licence obtained. SML paid the ground rent to the lessor and it met the service charges. When SML changed its operation and tax seat to Cyprus the new Cypriot directors were brought up to date on the arrangements. The letting agents (originally Irish Estates and then Lisneys) were told that the Curistan companies did not pay rent and Mr Crickard was aware of the rent set up and drew accounts accordingly. Mr Curistan recalled no direct conversation with him about it. The Bank never pressed SML to collect rents from the Curistan connected tenants and as far as Mr Curistan was concerned the Bank was fully aware of and in agreement with the arrangement.

[35] Following the transfer to OPL and the commencement of the administration the arrangement continued as before. It was Mr Curistan's clear understanding and belief that when a purchaser was found vacant possession of Units 6 and 7 would be given with no rent being payable in the meantime. He accepted in cross-examination that if rent is owed as claimed MWL is insolvent.

[36] In relation to the rent free arrangements Mr Curistan said that he was acting both for MWL and for SML. He said the arrangement existed from the beginning. The goals were set in early 2000 the aim being to find third party tenants as soon as possible. The official opening of the Pavilion was on 2 December 2000 with practical completion around March 2001. He thought Marcus Ward opened the first unit around May 2001, that being the Hard Rock Café. The cinema opened on 1 May. In 2000 to 2002 the Curistan units

comprised number 6 (Hard Rock Café), number 1 which became Precious and then Box, Unit 1A (Soda Joes) and Unit 10 Bar Seven. When the rent free arrangements were made there was no written note made. That would, Mr Curistan considered have been "unreal, unnatural, unnecessary". Mr Curistan was at the time the sole director of the companies. At a later stage his wife became a shareholder in SML and in the case of MWL part of his shareholding was transferred to his daughter in 2009.

[37] When the liquor licenses were applied for the licencing courts were not informed of the arrangement or policy of about non-payment of rent. In relation to the letter of 19 January 2006 in which the solicitors asserted rents were paid Mr Curistan said that that was wrong and was not sure if Rosemary Carson the sister who wrote the letter was aware of the arrangement. Mr Curistan was referred to the terms of the head lease which obliged SML to create leases in a form satisfactory to the head landlord. The leases had to reserve a market rent. Mr Curistan did not consider the arrangements amounted to a waiver of rent and did not think it should have been brought to the attention of the head landlord. He did not apply to OTC and could not support the suggestion that OTC was fully aware of the arrangement which was a point wrongly made in a letter of 7 December 2005 by SML's solicitors. Challenged about the agreement document of 20 April 2009 Mr Curistan said he did not read the documents and was misled and deceived by the Bank.

[38] There would have been a significant disadvantage in using SML as the occupier of units because that would have given rise to tax problems.

[39] Mr Curistan stated that shareholder meetings did take place in SML and the other Curistan companies and board meetings for formal steps were conducted. In the case of the third party leases there were rent free periods up to a maximum period of six months with rent reflecting the fitting out costs and making provision for capital costs contributions. Such arrangements did not apply the Curistan companies. Mr Curistan was clear that the triggering of events for the end of the suspension of rent were to be (a) the disposal of SML; and (b) the disposal or assignment of a Curistan unit to a third party. By way of example he cited Bar Buddha which during the ownership by a Curistan company paid no rent. When a third party took over rent was collected by Lisneys. A Curistan company then had to take it over again when rent again ceased to be payable.

Conclusions on the contractual issue

[40] I conclude from the evidence that there were no directors or shareholders meetings of either SML or Marcus Ward at which any discussions took place to authorise or approve a contractual arrangement between SML and Marcus Ward for the suspension, waiver or forgiveness of

rent in exchange for MWL taking on development and management responsibilities in respect of units 6 or 7. No resolution was passed by either company to authorise such an arrangement and no director's meeting took place to authorise such a transaction.

[41] Mr Curistan never formulated in any written document the terms of any such arrangement.

[42] Whatever arrangement emerged was the product of the internal thought processes of Mr Curistan. There was never anything in the nature of negotiations or discussions to specify the exact nature of the arrangement, the period during which it was to operate, when it was to be open to re-negotiation or as to the precise circumstances in which it was to terminate.

[43] The evidence (for example, the way accounts were drawn, the way in which VAT was dealt within the VAT returns, the context of the correspondence referred to above and the information provided to the head landlord) points to the conclusion that Mr Curistan did not have a precise and detailed framework in mind or in place. The way in which the rent increases were fixed, the information provided to the Administrator, the statement of affairs and what was provided to the licensing courts, all point to a set up between SML and Marcus Ward relating to the rent due under the leases as varied which was imprecisely understood and formulated by Mr Curistan and the companies.

[44] The separate corporate entities and SML and MWL in law were corporate and distinct from the incorporator and controlling shareholder and director. For a valid and enforceable contract to come into existence it would have been necessary for these two entities to manifest a consensus ad idem on the terms to govern a variation of their contractual obligations arising under the leases. Normally these would be manifested by corporate decisions on the part of each company properly recorded by the relevant corporate organs. In the context of such an arrangement the Board of Directors would have been the appropriate corporate organ in each company to consider the terms of the contract and to authorise the relevant company to offer or accept the relevant terms.

[45] The internal thinking of Mr Curistan, unrecorded, unminuted and unsanctioned by an appropriate corporate authorisation did not form and could not form the basis of a contract in law. The position is thus stated in Rolfe v Rolfe [2010] EWHC 244:

> "I do not accept that a shareholder's mere internal decision can of itself constitute assent for Duomatic purposes. I was not referred to any authorities in which it has been decided that a mere internal

> decision would suffice. Further, a mere internal decision unaccompanied by outward manifestation or acquiescence to be enough would, as it seems to me, give rise to unacceptable uncertainty and potentially provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; and in either event, it is desirable that past decisions should be objectively verifiable. In my judgment there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other context for example when determining whether a contract has been performed. An objective approach must I think also have a role with the duomatic principle."

[46] The contractual position as between SML and MWL was fixed by the terms of the leases as varied by the rental increase agreements. To show that that contractual position has been varied or modified the defendant must prove that there was a separate binding contractual arrangement whereby, for good consideration, one party was released from its contractual obligation. For the reasons indicated I find no such agreement contractually modifying the covenants in the leases as varied.

[47] On Mr Curistan's evidence he mentally decided that rent would not be demanded or paid when a unit was let to a Curistan connected company. This, he asserted, happened as early as between January and March 2000. Such an arrangement, understanding or policy decision was at the time unsupported by any consideration from a Curistan connected company. It represented a policy decision which if it was to have contractual effect required some form or corporate formalisation in the context of the individual leases of units. Such an arrangement was inconsistent with the leases as entered into.

The estoppel issue

[48] Mr Shaw QC on behalf of the plaintiffs argued that the defendants reliance on a promissory estoppel was also a legal nonsense. He contended that for an estoppel to arise there had to be a clear and unequivocal promise or representation shown to have been made by A to B intended to effect legal relations between the parties with B relying on the promise or assurance. The actions of B must render it inequitable to withdraw the promise. Such a promise or representation must be established by objective evidence in the same way as a contractual offer and acceptance must be proved (*Chitty on Contracts Vol 1 paragraph 3.086*). There were no written representations in this instance. The objective documentations showed no intention to alter the legal relationship between the parties. Marcus Ward could not show that it came

to equity with clean hands. All the legal documentation governing its occupation of units 6 and 7 were at odds with what it contended to be the true arrangement between the plaintiffs and Marcus Ward. It misled Odyssey Property Company and it was not candid with the licensing court. If there was an estoppel it could only be a temporary and terminable one in accordance with the terms of the assurance or on the giving of a reasonable period of notice.

[49] By way of an additional argument counsel contended that the termination of an estoppel permits a landlord to claim arrears which accrued during the period in which the estoppel was effective. He relied on a passage in *Wilkin on the Law of Waiver Variation and Estoppel (2002)* at paragraph 8.72.

[50] Even if there were an estoppel Mr Shaw argued that it was not one that could last permanently and it came to an end no later than:

(i) when the shares were transferred to the daughter of Mr Curistan in 2009;

(ii) when OPL took the landlord's interest in the Pavilion in April 2009;

(iii) the appointment of the administrator on 19 May 2010;

(iv) the letter of 28 June 2010 from the solicitors referred to in the first affidavit at page 187 and 188 in core bundle 2.1; or

(v) the issue of proceedings on 6 August 2010.

[51] A variation of the contractual rights and obligations which is not contractually binding, for example for want of consideration, may nevertheless have certain legal effects. A waiver of rights may have contractual force by virtue of a binding agreement, but it may alternatively in the absence of contractual force arise from what can be termed as forbearance (see *Chitty on Contract Vol 1 paragraph 3.081*). The effect of a forbearance of that kind is that it does not irrevocably alter the rights of the parties under the original contract. The party granting the forbearance can generally retract it on the giving of reasonable notice. An act of forbearance may become irretrievable as a result of subsequent events. Thus, for example if a buyer indicates that he is willing to accept goods of a different quality from those contracted for and the seller in reliance on that assurance so conducts himself as to put it out of his power to supply goods of the contractual quality within the contract period the buyer cannot rely on the contractual term (see Toepfer v Warinco AG [1978] 2 Ll Rep 569 at 576).

[52] Equity concentrates not on the intention of the party granting the forbearance but on the conduct of that party and on its effect on the position

of the other party. In Hughes v Metropolitan Railway [1887] 2 AC 439 the landlord, having given the tenant six months notice requiring him to do repairs, during that period entered into negotiations for the purchase of the lease leading the tenant to believe that the repairing obligation was being suspended. When the negotiations broke down the landlord immediately sought to forfeit the lease but the claim was rejected. It was held that if one party leads the other to suppose that the strict rights arising under the contract will not be in force but will be kept in suspense or held in abeyance the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings that had taken place between the parties.

[53] For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties. There must be a promise or representation by one party that he will not enforce against the other his strict legal rights arising out of the relationship. The promise may be implied (as in Hughes v Metropolitan Railway). The implication must fairly arise from the course of conduct between the parties. *Chitty in Vol 1 Contract at paragraph 3.090* states that:

> "There is some support for the view that the promise must have the same degree of certainty as would be needed to give it contractual effect if it were supported by consideration."

The tentative way in Chitty expresses that proposition suggests that the point is not entirely free from argument. The purpose of the requirement is to prevent a party being able to rely on some indulgence or concession arising from a failure by the representor to insist on strict performance of the contract. There must be an intention on the part of the representor to be distilled from the object evidence that the representee would rely on the representation. There must of course be reliance in fact. Even if the requirements are satisfied the representor may be able to go back on his representation if it would not be inequitable for him to do so.

[54] The equitable doctrine generally does not extinguish but only suspends rights. The general rule is that in equity the effect of a representation is to give the court a discretion to give such relief as is just and equitable. The doctrine may some times have an extinctive effect. If it would be too late to restore the representee to his original position equity may refuse the representor relief (see Nippon Yusen Kischa v Pacifica Navegacion SA [1980] 2 Ll Rep 245). The passage in *Wilkin on the Law of Waiver, Variation and Estoppel* relied on by Mr Shaw ends with the following statement:

> "It follows that to establish a permanent defence to the claim for arrears, the promisee would have to

> demonstrate the irreversible or significant change of position necessary to give the equitable doctrine permanent effect."

[55] If one leaves aside the internal thought processes of Mr Curistan and concentrates on the objective analysis of the evidence as it would have been perceived as between SML and Marcus the objective view of what transpired between the companies indicates that SML never sought rent from Marcus Ward in respect of Units 6 or 7 and Marcus Ward never proffered or paid it against that background. The subsequent arrangements in relation to Rockie's Bar viewed objectively cannot be interpreted as giving rise to evidence of payment of a rent by Marcus Ward as such to SML. The sum described as rent was payable to and received by Marcus Ward and collected by Lisneys as part of the income of the unit which was then accounted for to the Bank. The non-collection and the non-payment of rent under the leases occurred in circumstances of Marcus Ward being induced to fit out and operate the units with a view to onward transmission to a third party purchaser. The financial affairs of SML and Marcus Ward were organised in a way that reflected the suspension of rent pending a third party taking over the units as a going concern. The financial arrangements of both SML and MWL could and would have been differently organised if rent was to be demanded, paid and expected. Marcus Ward was run and organised and thus carried out its operations in the light of the fact that rent was not being sought or expected by SML. There was precision in the arrangement in the sense that so long as MWL and SML were run as part of an interlinked common group of companies it was evident that the rent would not be sought or paid. As each rental period passed with the rent suspended being neither demanded or paid Marcus Ward's business operation was run on the assumption that payment of the rent would not be expected and would not be sought retrospectively. These factors would render it inequitable for SML to retrospectively seek to recover the arrears which were treated as not due and owing. The original financial structure and operation of Marcus Ward in the light of the representation that the rent was not due demonstrates a significant reliance and change of position so far as Marcus Ward's organisation of its business affairs was concerned sufficient to give the estoppel permanent effect in respect of the arrears of rent up to the point when it could properly be said that the representation could not longer be treated as having continuing effect.

[56] The restructuring of the corporate structure in respect of the operation of the Pavilion with the establishment of OPL meant that SML's role changed radically in the context of the Pavilion. Viewed objectively MWL could no longer assume that SML's representations made while the relationship of SML and MWL was that of closely connected companies in a closely knit group organising its financial affairs on a common basis in the light of the previous representations. Although, because the potential deal with a third

party fell through, OPL remained controlled in the initial stages by Mr Curistan but this was to be on a temporary basis pending the finding of a purchaser. The creation of OPL created a wholly changed dynamic in the relationship with Marcus Ward. I conclude that as from April 2009 Marcus Ward could not reasonably assume that the previous arrangements remained in place and as from that date it was not inequitable for OPL and SML, in the light of the new structure, to rely on the contractual terms of the leases which remained in place and effective as contracts. Accordingly, I conclude that the plaintiffs are entitled to recover rent on foot of the leases as from April 2009.

[57] The parties were agreed that, depending on the conclusions reached by the court on the issues raised in the substantive hearing, a separate remedies hearing would be necessary and, accordingly, it will be necessary to re-list the matter at a time convenient to the parties to fix the quantum of outstanding rent from the date specified and to deal with the question of the plaintiffs' claim to forfeiture of the lease.