Neutral Citation Number: **[2026] EWHC 1201 (TCC)**

Case No: HT-2025-000136

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 21st May 2026

Before :

MR ROGER TER HAAR KC
Sitting as a Deputy High Court Judge

Between:

(1) INTO NOMINEE ONE LIMITED **(2)INTO NOMINEE TWO LIMITED**	**Claimants**

- and –

(1) STUDY GROUP UK LIMITED **(2) DAILY MAIL AND GENERAL TRUST PLC**	**Defendants**

Part 20:

DAILY MAIL AND GENERAL TRUST PLC

Part 20 Claimant

-and-

(1) STUDY GROUP UK LIMITED
(2) STUDY GROUP HOLDINGS UK LIMITED

Part 20 Defendants

Guy Fetherstonhaugh KC and Elizabeth Fitzgerald (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimants**
John de Waal KC and Emma Hynes (instructed by **Mantle Law (UK) LLP**) for the **First Defendants** and **Part 20 Defendants**
Edward Cumming KC and MéabhKirby (instructed by **Slaughter and May**) for the **Second Defendant/Part 20 Claimant**

Hearing dates: 28 and 29 April 2026

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Approved Judgment

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Mr Roger ter Haar KC :

Introduction

1. The primary application before the Court is the Claimants' application against both Defendants for summary judgment in the sum of £9,031,398.47 plus interest.

2. If that application is successful as against the Second Defendant, the Second Defendant seeks relief against the First Defendant/First Part 20 Defendant and the Second Part 20 Defendant.

3. The claim concerns commercial premises in Brighton known as Voyager House. Voyager House ("the Premises") is a purpose-built residential training school, consisting of two separate buildings, linked by a glazed corridor. One building is a five storey building used for the purposes of teaching ("the Academic Block"). The other is a four storey building used for residential accommodation ("the Residential Block").

4. The Claimants ("the Landlord") are the freehold owners of the Premises and the landlord of the First Defendant ("SGUK"), pursuant to a lease made on 18 October 2007 between: (1) Espalier Nominee 1 Limited and Espalier Nominee 2 Limited, as landlord, (2) Study Group International Limited (as SGUK was then known), as Tenant and (3) the Second Defendant ("DMGT"), as Surety.

5. The central issue before me is summarised by SGUK's counsel in their skeleton argument as follows:

> As far as SGUK is aware, this is the first time the Court will consider the interplay between the obligations that arise under a lease and the effect of life-critical defects in buildings, post-Grenfell, effects which (SGUK says) have led to the Building being unsafe and unoccupiable. SGUK says this interplay gives rise to the defence of frustration. At its heart, this matter is a "cladding" case and the outcome will have significant ramifications for building safety law and practice.

6. Thus the central issue is whether the lease by the Landlord to SGUK has been frustrated by reason of cladding defects in the buildings (and/or by legislation passed following the Grenfell Tower disaster).

Summary Judgment: Principles

7. In *Easyair Limited (Trading as OPENAIR) v Opal Telecom Limited* [2009] EWHC 339 (Ch) Lewison J. summarised the principles to be applied by the Court in considering an application for summary judgment:

> 15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2002] 2 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial that is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can

> be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

8. This passage was referred to with approval by the Court of Appeal in *A C Ward & Son Ltd v Catlin (Five) Ltd and others* [2009] EWCA Civ 1098 at paragraph [24].

9. In respect of the application before me, sub-paragraph (vii) of the passage from Lewison J.'s judgment cited above is of particular importance. This aspect of court procedure was discussed very helpfully by Mr Peter MacDonald Eggers QC, sitting as a Deputy Judge of the High Court, in *Adare Finance DAC v Yellowstone Capital Management SA and another* [2020] EWHC 2760 (Comm) at paragraphs [46] to [52]:

> 46. The application for summary judgment is made pursuant to CPR rule 24.2. By CPR rule 24.2(a)(ii) and (b), the Court may grant summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at a trial. This means that in order to avoid summary judgment, the Defendants' defence must have a realistic, and not merely a fanciful, prospect of success (subject to the question whether there is a compelling reason to proceed to trial). The prospect of success may be analysed by scrutiny of the evidence before the Court at the hearing of the application for summary judgment.
>
> 47. At a hearing of a summary judgment application, the Court may determine issues of law or contractual construction which have the potential to dispose of the proceedings.
>
> 48. In *ICI Chemicals & Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725, Moore-Bick, LJ said at para. 12-14 that:
>
> > *"12. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better …*

> *14. Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."*

49. In *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch), at para. 15, Lewison, J summarised the principles governing the Court's approach to an application for summary judgment and relied on Moore-Bick, LJ's judgment.

50. However, in *TFL Management Services Limited v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415; [2014] 1 WLR 2006, at para. 26-27, Floyd, LJ having quoted Lewison, J's approach, made the following additional observation:

> *"The court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action … Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; … Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy …"*

51. The Court must not conduct a *"mini-trial"* and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process (*Global Assets Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 163, para. 27). That said, it is not incumbent on the Court on an application such as this to take at face value statements made in the evidence, if it is clear that they have no substance (*ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, para. 10). If the Court considers that it is appropriate to deal with an issue of law or construction on a summary judgment application, any relevant disputed issues of fact, which cannot be resolved on a summary basis, should be assumed in favour of the person against whom summary judgment is sought (*Daniels v Lloyds Bank Plc* [2018] EWHC 660 (Comm), para. 49(vi)).

> 52. If, on the determination of the point of law or construction (**which might be a point which is well arguable by both parties**), the Court determines that the defendant has no real prospect of successfully defending the claimant's claim and there is no other compelling reason for the disposal of the case at trial, the claimant will be entitled to summary judgment. If, however, the defendant has a real prospect of success or if there is a compelling reason for the matter to proceed to trial, the application for summary judgment should be dismissed.

10. I have added emphasis to the words in parenthesis in paragraph [52] of the above passage.

11. In paragraph [48] of his judgment, Mr MacDonald Eggers referred to the judgment of Moore-Bick L.J. in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725. However, whilst he cited paragraphs [12] and [14] of Moore-Bick L.J.'s judgment, he did not cite paragraph [13]. In full the passage reads as follows:

> "12. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.
>
> 13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.
>
> 14. Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give

> summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

12. Finally I refer to the decision of the Privy Council in *Altimo Holdings and Investment Ltd and others v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 in which Lord Collins of Mapesbury JSC said:

> 81. A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *Hutton (EF) & Co (London) Ltd. v Mofarrij* [1989] 1 WLR 488, 495 (CA); *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [2002] 3 All ER 17, [136].
>
> 82. Because this appeal is concerned with the "necessary or proper party" provision, the question of the merits of the claims is relevant to the question of whether the claim against D1 is "bound to fail" and to the question whether there is a "serious issue to be tried" in relation to the claim against D2. There is no practical difference between the two tests, and they in turn are the same as the test for summary judgment.
>
> 83. What is the position if the viability of the claims depends on a substantial issue of law? Is the court bound to decide it at the stage of the application to set aside service out of the jurisdiction?
>
> 84. The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: e.g. *Lonrho Plc. v. Fayed* [1992] 1 A.C. 448 , 469 (approving *Dyson v Att-Gen* [1911] 1 KB 410, 414: summary procedure "ought not to be applied to an action involving serious investigation of ancient law and questions of general importance ..."); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 741 ("Where the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts"); *Barrett v Enfield London BC* [2001] 2 AC 550, 557 (strike out cases); *Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (U.K.) Ltd*. [1990] 1 WLR 153 (summary judgment). In the context of interlocutory injunctions, in the famous case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407 it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that

> there is a serious question to be tried. It was no part of the court's function "to decide difficult questions of law which call for detailed argument and mature consideration."

The Facts

13. Applying the above principles, I consider the Landlord's application by taking the facts put forward by SGUK at their highest: indeed the Landlord accepts that this is the correct approach.

14. Having recited the evidence before me, I need to examine what evidence may yet become available to the Court which is not presently available.

15. SGUK has placed before the Court a number of expert reports.

16. Firstly, I have a report dated 7 April 2026 from Mr Euan Geddes, an architect.

17. At Section 2.2 of his report, Mr Geddes gives a general description of the Premises:

> 2.2.1 Voyager House is a purpose-built education facility comprising two separate blocks linked by a glazed corridor. It consists of:
>
> (a) An academic block containing teaching spaces and administrative support areas (the "Academic Block"); and
>
> (b) A 4 storey residential block containing 376 ensuite student bedrooms, a cafeteria and associated services facilities (the "Residential Block").
>
> ….
>
> 2.2.4 The maximum height to the top floor of each building is 15.100 metres (Academic Block) and 11.725 metres (Residential Block excluding basement car park). Therefore, both blocks are under 18 metres in height for the purposes of any Building Regulations assessment.
>
> 2.2.5 The Academic Block has a reinforced concrete frame, with the main atrium and exam hall being constructed with a structure steel frame. The Residential Block has a reinforced concrete frame.
>
> **External Wall Cladding**
>
> 2.2.6 The external walls of Voyager House are constructed using infill panels forming the inner leaf consisting of a steel framing system (SFS) with cement particleboard sheathing on the outer face and plasterboard linings internally. The external cladding consists of the following finishes:

(a) Render on expanded polystyrene (EPS) insulation board ("Render Cladding");

(b) Insulated aluminium panels ("Aluminium Cladding");

(c) Terracotta tiling on polystyrene insulation ("Terracotta Cladding"); and

(d) Terracotta tiling as part of a rainscreen cladding system.

18. At Section 1.3 Mr Geddes summarises his views as follows:

1.3.2 Voyager House ("the Property") is a purpose-built residential training school developed for SGUK comprising two separate blocks (an academic block and a residential block) linked by a glazed corridor. SGUK has located a partial copy of the construction contract which confirms that the Property was constructed by Balfour Beatty Construction Limited ("BBCL") under an amended JCT Standard Form of Building Contract with Contractor's Design 1998 Edition and was completed in or around 2007.

1.3.3 During 2021, as part of the necessary wider post-Grenfell audit of residential buildings, SGUK became concerned about the construction of the external walls of the Property. It instructed Bailey Partnership (Consultants) Limited ("Bailey") to undertake an intrusive survey to identify the materials and components used within each of the external wall cladding systems. Bailey carried out inspections between 16 and 25 March 2022 and thereafter issued its 'Investigations Report: external Wall Survey' (the "Bailey Report"). Amongst other things, the Bailey Reports highlights the following:

(a) An absence of effective vertical and horizontal cavity barriers across the external wall system; and

(b) The use of combustible materials in the external wall system, specifically expanded polystyrene (EPS) insulation and cement particleboard sheathing.

1.3.4 The Bailey Report concluded that the external walls do not … meet the building regulation requirements that were in force at the time of construction.

1.3.5 Following this, BB7 Consulting Limited was instructed by SGUK to undertake further intrusive investigations for the purposes of preparing a fire risk assessment of external walls (FRAEW). BB7 subsequently produced a draft FRAEW Assessment (the "BB7 FRAEW Report").

1.3.6 The BB7 FRAEW Report identifies the following internal and external defects:

(a) External:

(i) The widespread presence of combustible insulation (EPS and XPS) in the external walls;

(ii) The presence of polyisocyanurate (PIR) insulation in the aluminium insulated panels in windows;

(iii) The absence of cavity barriers at compartment floors, walls and around openings in the external walls;

(iv) The absence of cavity barriers at the top of the external walls; and

(v) The absence of intumescent/insulated fire sleeves to the uPVC ducts penetrating the external walls.

(b) Internal:

(i) Inadequate fire stopping to various service penetrations in fire resisting/compartment walls;

(ii) Inadequate fire stopping between door frames and supporting construction;

(iii) Incomplete fire resisting/compartment walls; and

(iv) Defective fire doors.

1.3.7 Following a review of changes in legislation and guidance that had occurred since the BB7 FRAEW Report was issued, BB7 issued a further 'Design Note' dated 26 November 2024 confirming that the recommendations in the BB7 FRAEW Report remained valid.

1.3.8 I am instructed by Mantle Law that during January 2026, and as I am instructed by Mantle Law following a Court application by Into, SGUK arranged a further site inspection to:

(a) Intrusively inspect the external wall cladding to determine the specification of the cladding and fire-stopping materials, as well as the standard of workmanship; and

(b) Non-intrusively inspect the internal fire-stopping and compartmentation to assess the materials used and the standard of workmanship.

1.3.9 The nature and extent of the inspection is described in the document I prepared for SGUK titled 'Intrusive Inspection

> Proposal' dated 6 January 2026 (the 'Diales Intrusive Inspection Proposal'). I was instructed to prepare an inspection methodology to provide a more comprehensive record of the fire safety defects at the Property. I was further instructed to assess whether, in my independent opinion, those fire safety defects could properly be regarded as widespread throughout the Property.
>
> 1.3.10 Following my site inspections in January 2026, I asked SGUK to carry out further limited inspections to establish the presence (or otherwise) of any fire-stopping measures at: (a) ventilation ducts from en-suite bathrooms where they penetrate external walls, and (b) the gap between the top of the prefabricated bathroom pods and the concrete floor slab above.
>
> 1.3.11 For the reasons set out in this briefing note, it is my opinion that there are serious and extensive fire safety defects affecting both the external envelope and the internal elements of the Property. Further intrusive investigations are required in order to establish the full extent of those defects and to inform the scope and design of the remedial works that will ultimately be necessary.

19. Secondly, I have a report also dated from 7 April 2026 from Mr. Tim Baillie, a Chartered Civil Engineer with construction project management experience.

20. He expresses views as to the time that performance of remedial works will take:

> 67. By adopting the aforementioned phasing, I forecast that the remedial works are likely to take between 120 working weeks and 132 working weeks to complete ….
>
> 68. If the works were to commence in June 2026, then I forecast that they would be completed between the end of October 2028 and the beginning of February 2029. However, I understand that SGUK's evidence is that it has no budget to commence works and that it will have to await the outcome of this (and possibly any related litigation) before anyone does so. In my opinion, although my forecast durations are sensitive to external variables such as market conditions and resource availability, it is reasonable (based on what is known as at the date of this note) to use these durations from any projected date when remediation could commence (by someone).

21. Mr Baillie appended a draft programme with this footnote:

> The durations forecast [assume] that reliable and reputable contractors are available in the market and not already engaged on other façade remedial works schemes, when the remedial works are being procured. The preconstruction period would

likely increase if there is an insufficient number of contractors willing to tender for and/or undertake the scheme.

22. Thirdly and finally, I have a Briefing Note also dated 7 April 2026, prepared by Mr. Eoin O'Loughlin, a Chartered Engineer with experience practicing in the field of fire safety engineering for over 15 years. His preliminary conclusions are as follows:

> **External walls – cavity barriers and fire-stopping**
>
> 20.1 Due to the absence of effective vertical and horizontal cavity barriers and/or fire-stopping across the external cladding systems, together with the presence of combustible materials within the external walls, in particular EPS, I conclude that the requirements of Part B4(1) of Schedule 1 to the Building Regulations are not satisfied by the as-built construction.
>
> 20.2 Given the nature of the defects, and as the façades appear to be largely untouched since they were built, I conclude that in general the defects were most likely present at the time of practical completion/handover.
>
> **Internal compartmentation – fire-stopping**
>
> 20.3 Due to the presence of unprotected opening and holes in internal compartmentation, deficiencies in compartmentation detailing (such as junctions between compartment walls and floors) and other compartmentation shortcomings highlighted in the reports referred to within this note, I conclude that the requirements of Part B3(4) of Schedule 1 to the Building Regulations are not satisfied by the as-built construction.
>
> 20.4 Given the nature of the defects, I conclude that a number of these defects were most likely present at the time of practical completion/handover.
>
> **Continued occupation of the building**
>
> 20.5 Due to the abovementioned defects, and considering the high-risk profile of the occupancy type, I am of the independent opinion that this building is not safe to occupy currently.
>
> 20.6 An updated fire strategy for the building could consider mitigation measures for the current defects identified, as part of an alternative performance-based approach in lieu of following contemporary fire safety guidance to satisfying the Building regulations. However, based on the information currently available to me, I do not consider a revised fire strategy could arrive at an outcome of safe occupation without remedial works being carried out in advance.
>
> **Other conclusions**

> 20.8 The requirements in Clauses 9.1.4 and 9.1.5 of the Fire Strategy 2005 to enclose the Residential Block protected corridors and the bedrooms, respectively, in fire-resisting construction are not satisfied by the as-built construction.
>
> 20.9 Further investigations would be required to establish the full extent of the defects with respect to the external wall system and internal compartmentation, and to inform any remedial works to be undertaken to address these.

23. SGUK submitted a witness statement from Stacey Arnell, SGUK's Director of Estates and Commercial Operations. I note the following passages from that statement:

> 10. To market its business, SGUK relies not only on the quality of its teaching but also the standard of its accommodation and facilities. The process of securing international students is competitive and not straightforward. If anything, it is more difficult than a pure UK provider where factors such as geographical proximity to students could be a factor. It requires targeted marketing (aimed at parents who have a choice of many providers around the world) and detailed planning, many months in advance of term commencement. It is imperative that facilities are (or will be) fully operational from a commercial perspective before students take residence in advance of the educational term commencing. As I explain below, re-opening Voyager House (whether on a phased or full opening) would take SGUK around 18 months.
>
> ….
>
> 20. As a new, purpose-built education centre with residential accommodation, SGUK expected Pinnacle to procure construction of Voyager House to meet Building Regulations so that, as a minimum, it would be compliant and safe for the students and fully operational for the Lease term. Based on my experience, compliance with Building Regulations is a condition to any party entering into a lease of a new property of any nature and would have been part of SGUK's commercial decision to enter the Lease on the terms that it did, with onerous repair obligations.
>
> 21. Put another way, SGUK accepted what are onerous Lease terms because it reasonably expected that Voyager House, as a purpose-built and a 'brand new' property, would comply with Building Regulations and be free from the serious inherent safety defects which now render it unsafe to its occupants. I should add that there is nothing to suggest that Espalier Limited Partnership, INTO, Pinnacle or Mr Colin would think otherwise. As far as I can expect, the Agreement for Lease would certainly have included an obligation to meet Building Regulations, and, indeed, both those parties and SGUK would have considered that

condition complied with when Voyager House achieved completion, which would have included sign off from Building Control.

22. SGUK legitimately expected to operate its business from Voyager House without the severity, nature and extent of the fire defects discovered at the Property. I would venture that INTO shared that expectation as it had become SGUK's Landlord of a new purpose-built premises which had just achieved completion and building control sign off. As I discuss below, these defects pose a genuine risk to the safety of students, and SGUK simply would not have entered the Lease had these been known at the time. This is because student safety is a critical factor in any residential teaching facility, but it is especially important at Voyager House as the students, aged 15-17, were relatively young to be living away from their homes and would require additional safeguarding measures compared with students over the age of 18.

….

26. When SGUK entered the Lease, Voyager House was in every respect a new property, designed and constructed specifically as an education centre with residential accommodation. As such, SGUK expected to operate its business for the term of the Lease without interruption or interference, and it did so successfully for about 14 years. However, I am aware that wider economic factors within the education sector, such as Brexit and the global Covid-19 pandemic, had a negative effect.

27. In late 2021, SGUK decided to explore selling the Bellerbys' brand business as a standalone entity, and, in the interim, to mitigate its costs by winding down the Voyager House site. Options in relation to Voyager House (it never being the intention to just leave it empty incurring a cost) included to sell the Lease as part of any business sale, consider alternative uses or sub-let the Property as only student accommodation (subject to planning), to the University of Sussex. I am aware that the business decision at the time expressly included the option for SGUK re-opening Voyager House but re-launched under a different brand to Bellerbys as a multi-articulation higher education college.

28. SGUK started winding down operations in early 2022, with students vacating Voyager House in July 2022. All staff contracts were terminated by August 2022. In parallel, SGUK entered commercial discussions with the University of Sussex, with a letter of intent dated 14 February 2023 confirming interest in sub-letting Voyager House, subject to INTO consent and

> successfully varying the existing planning conditions, which restricted use to a residential teaching facility.
>
> 29. These discussions took place despite the discovery of fire safety defects at Voyager House in April and June 2022. SGUK discovered fire safety defects to the external walls following an intrusive inspection carried out by the Bailey Partnership … and a Fire risk Assessment of the External Walls ("FRAEW") carried out by BB7 …, both of which SGUK commissioned in response to requirements from the insurers of Voyager House, the policy for which was paid for by SGUK but procured by the Landlords under the Lease.
>
> ….

24. In paragraph [51] of the passage from the judgment of Mr MacDonald Eggers QC in *Adare Finance* which I have cited above, he said:

> If the Court considers that it is appropriate to deal with an issue of law or construction on a summary judgment application, any relevant disputed issues of fact, which cannot be resolved on a summary basis, should be assumed in favour of the person against whom summary judgment is sought.

25. I have said above that the Landlord accepts that I should apply that approach in respect of its application for summary judgment, whilst reserving its right to challenge the facts put forward by SGUK if this matter proceeds to a full trial. On that basis I accept that the evidence establishes for the purposes of the application before me that:

(1) The Lease was for a period of 25 years, expiring on 6 September 2032;

(2) The original construction works were procured by the Landlord from a third party contractor;

(3) It was always the primary intention of the parties to the Lease that the premises would be used for academic purposes;

(4) The Premises were so used successfully for 14 years;

(5) When constructed and let, neither the Landlord nor SGUK had any reason to suppose that there were serious fire-safety related defects in the Premises;

(6) Between April and June 2022 investigations were carried out. The Bailey Report, dated 29 April 2022, revealed significant defects in the external walls. The BB7 FRAEW Report dated 27 June 2022 identified internal and external defects;

(7) The reports of Messrs Geddes, Baillie and O'Loughlin confirm that there were and are serious defects which render both buildings unsafe to occupy for educational purposes;

(8) Those defects will probably take 2.5 years to remedy, but possibly longer. Such works would, obviously, only take place once tenders have been received and a contractor appointed;

(9) Once the remedial works have been completed, there is likely to be a significant delay before the Premises could be used for academic purposes;

(10) Mr Baillie's report at paragraph 68 states that on his understanding works will not commence before the outcome of this and any related litigation. This is confirmed in paragraph 61 of Mr. Arnell's witness statement, and was confirmed upon instructions by Mr de Waal in the course of the hearing before me;

(11) The premises are unlikely to be useable or used for academic purposes between now and the date of expiry of the lease in September 2032.

26. I will return below to discuss the evidence given by Mr. Arnell in paragraphs 20 to 22 of the "common purpose" of the Lease.

27. In my judgment there is unlikely to be any evidence becoming available between now and the conclusion of a full trial in this matter which would significantly add to the body of knowledge before the Court so as to improve the chances of success of SGUK's case as to frustration: as set out above, remedial works are unlikely to commence before any such trial, so that this will not be one of those cases where what is discovered during the course of such works adds to the information available to the Court.

28. It is, of course, possible that further expert evidence might become available, but the picture already painted by the expert evidence before me shows premises which will probably be unfit for their intended purposes between now and the end of the Lease.

29. I will return below to some documentation which appears not to be presently available to SGUK and which is not before me.

Frustration: General Principles

30. In *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C. 696, Lord Radcliffe said at pages 728 to 729:

> …. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.
>
> There is, however, no uncertainty as to the materials upon which the court must proceed. "The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred" (*Denny, Mott & Dickson Ltd v James B. Fraser & Co. Ltd.*, *per* Lord Wright). In the nature of

> things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

31. In *J. Lauritzen A.S. v Wijsmuller B.C. (The "Super Servant Two")* [1990] 1 Lloyd's Rep. 1 at page 8, Bingham L.J. said:

> Certain propositions, established by the highest authority, are not open to question:
>
> 1. The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises (*Hirji Mulji v Cheong Yue Steamship Co, Ltd.* (sub nom. *Dharsi Nanji v Cheong Yue Steamship Co. Ltd.*), (1926) 24 Ll. Rep. 209 at 213, col. 2); [1926] A.C. 497 at p. 510; *Denny Mott and Dickson Ltd. v James B. Fraser & Co. Ltd.*, [1944] A.C. 265 at p. 275; *Joseph Constantine Steamship Line Ltd, v Imperial Smelting Corporation Ltd,*, (1941) 70 Ll. L. Rep. 1 at p.12, col 2; [1942] A.C. at p. 171). The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances (*Hirji Mulji*, sup., at p.213, col. 2; p. 510; *Joseph Constantine Steamship Line Ltd.* (sup.) at p. 18, col. 2; p. 23, col. 1; pp. 183, 193; *National Carriers Ltd. v Panalpina (Northern) Ltd.* [1981] A.C. 675 at p. 701.
>
> 2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended (*Bank Line Ltd v Arthur Capel & Co.*, [1919] A.C. 435 at p. 459; *Davis Contractors Ltd.* sup., at pp. 715, 727; *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema)*, [1981] 2 Lloyd's Rep. 239 at p. 253, col. 2; [1982] A.C. 724 at 752).
>
> 3. Frustration brings the contract to an end forthwith, without more and automatically (*Hirji Mulji*, sup. at pp. 211, 212; pp 505, 509; *Maritime National Fish Ltd. v. Ocean trawlers Ltd.* (1935) 51 Ll.L.Rep. 299 at p. 303; [1935] A.C. 524 at p. 527; *Joseph Constantine Steamship Line Ltd.* sup. at pp. 9,

> 11, 12, 20, 25; pp. 163, 170, 171, 187, 200; *Denny Mott & Dickson Ltd*. sup. at p. 274).
>
> 4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it (*Hirji Mulji*, sup. at p. 213; p 510; *Maritime National Fish Ltd. v. Ocean trawlers Ltd.* sup. at p. 303; p. 530; *Joseph Constantine Steamship Line Ltd.* sup. at p. 12; p. 170; *Denny Mott & Dickson Ltd*. sup. at p. 274; *Davis Contractors Ltd.* sup. at p. 728). A frustrating event must be some outside event or extraneous change of situation (*Paul Wilson & Co. A/S v Partenreederi Hannah Blumenthal (The Hannah Blumenthal)*, [1982] 1 Lloyd's Rep. 103 at p. 112; [1983] 1 A.C. 854 at p. 909.
>
> 5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it (*Bank Line Ltd.* sup., at p. 12; p. 171; *Davis Contractors Ltd.* sup., at p. 729; *The Hannah Blumenthal,* [1982] 1 Lloyd's Rep. 582 at p. 592; [1983] 1 Lloyd's Rep. 103 at p. 112; [1983] 1 A.C. 854 at pp. 882,, 909).

32. Point 4 in that passage from the judgment of Bingham L.J. is reflected in a short passage in the judgment of Christopher Clarke L.J. in *Armchair Answercall Ltd v People in Mind Ltd.* [2016] EWCA Civ 1039 at paragraph [51]:

> Frustration, if it occurs, is a definite event. Whether any given event is a frustrating event is, once the facts said to constitute the event have been determined, a question of law. If it was, the fact that the parties did not immediately treat it as such does not alter the position. What the parties did or did not do after the event may, however, be a pointer to whether the event was in truth a frustrating one. In this respect it is a striking fact, as the judge observed, that AA did not treat the contract as frustrated until some five months after 5 October 2011 ….

33. In the same case, at paragraphs [29] and [30], the learned judge said:

> 29. [The judge at first instance] referred also to the observation of Lord Roskill in *Pioneer Shipping v BTP Tioxide Limited* [1982] AC 724 that the doctrine of frustration *"is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains"* and to the five propositions identified by Lord Bingham in *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 of which the last two are:
>
> > *"(4) The essence of frustration was that it should not be due to the act or election of the party seeking to rely on it ...A frustrating event must be some outside event or extraneous change of situation…*

> *(5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it".*

30. As the judge also observed "an event that is actually foreseen cannot ordinarily found a claim of frustration". On this topic it is material to note that in *Edwinton Commercial Corp v Tsavliris (Worldwide Salvage & Towage) Ltd* [2007] EWCA Civ. 547 this Court approved the following passage in Chitty (now at 23-060):

> *"Event foreseeable but not foreseen. When the event was foreseeable but not foreseen by the parties, it is less likely that the doctrine of frustration will be held to be inapplicable. Much turns on the extent to which the event was foreseeable. The issue which the court must consider is whether or not one or other party has assumed the risk of the occurrence of the event. The degree of foreseeability required to exclude the doctrine of frustration is, however, a high one: " 'foreseeability' will support the inference of risk-assumption only where the supervening event is one which any person of ordinary intelligence would regard as likely to occur, or…the contingency must be 'one which the parties could reasonably be thought to* have foreseen as a real possibility.' "

34. What was there said in paragraph [30] is reflected in the decision of Coulson J. in *Gold Group Properties Ltd. v BDW Trading Ltd.* [2010] EWHC 323 at paragraph [78] where he said:

> It is, in my judgment, quite impossible to argue that the contract was frustrated in circumstances where the allegedly frustrating event was both foreseen by and dealt with expressly by the terms of the contract between the parties.

35. When English lawyers are asked to consider the English law on frustration, reference is very often made to the judgment of Rix L.J. in *Edwinton Commercial Corp & Anor v Tsavliris Russ (Worldwide Salvage & Towage) Ltd. ("The Sea Angel")* [2007] EWCA Civ 547; [2007] 1 CLC 876:

> 110. In the course of the parties' submissions we heard much to the effect that such and such a factor "excluded" or "precluded" the doctrine of frustration, or made it "inapplicable"; or, on the other side, that such and such a factor was critical or at least amounted to a prima facie rule. I am not much attracted by that approach, for I do not believe that it is supported by a fair reading of the authorities as a whole. Of course, the doctrine needs an overall test, such as that provided by Lord Radcliffe, if it is not to descend into a morass of quasi-discretionary decisions. Moreover, in any particular case, it may be possible to detect

one, or perhaps more, particular factors which have driven the result there. However, the cases demonstrate to my mind that their circumstances can be so various as to defy rule making.

111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

112. What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.

113. Mr Hamblen submitted that whereas the demands of justice play an underlying role, they should not be overstated. He referred the court to *Chitty* at para 23-008 ("But this appeal to

> the demands of justice should not be taken to suggest that the court has a broad absolving power whenever a change of circumstances causes hardship to one of the contracting parties…Such a test is too wide, and gives too much discretion to the court"). I respectfully agree. Mr Hamblen also referred to *Treitel* at para 16-009 ("The "theory" does not, in other words, supersede the rules which determine the circumstances in which the doctrine of frustration operates"). I would again respectfully agree, as long as it is not sought to apply those rules as though they are expected to lead one automatically, and without an exercise of judgment, to a determined answer without consideration of the demands of justice.

36. I was also referred to the judgment of Cooke J. in the same (*"Sea Angel"*) proceedings (Cooke J. was considering an application for summary judgment – the Court of Appeal judgment referred to above was on an appeal from the decision at trial) in which he said, at [2004] EWHC 387 (Comm) at paragraph [40]:

> I turn, therefore, to the question of construction and allocation of risk in the sub-charter. The claimants say that the object of the doctrine of the frustration is to find a satisfactory way of allocating the risk of supervening events, but that there is nothing to prevent the parties from making their own provisions for this purpose. That is accepted by the defendants. The parties can provide that the risk of supervening events shall be borne by one of them in its entirety, or can apportion the risk between them. The claimants say that there may be an express provision which covers this, or that the position can arise by implication from the other terms of the contract. The defendants accept the former but say that the latter is a rare case, maintaining that, if a party is to be held to have accepted a particular risk, that must first appear clearly from the overall terms of the contract. It is suggested by the claimants that a contract cannot generally be frustrated by foreseen or foreseeable events. A war, however, may be a foreseeable event, but that does not mean a war cannot frustrate a contract which makes no provision for what is to occur should that eventuality take place. Whether or not the parties can here be said to have foreseen the KPT acting in the way it did is a matter of fact and not one which, in my judgment, can be established one way or the other on the written evidence adduced for the purposes of summary judgment applications. A more detailed inquiry would be required than is possible at this stage of the proceedings.

And at paragraph [51] he said:

> As is plain from decisions such as the Nema and the Evia (No. 2) questions of frustration turn on issues of fact and evidence.

> They are, by their very nature, not readily susceptible to determination on applications for summary judgment …

The application of the doctrine of frustration to leases

37. It was for a long time thought that the doctrine of frustration could not apply to leases. It is now clear that the doctrine does apply to leases.

38. Before that position became clear, it had already been decided agreements for lease could be held to be frustrated. This appears firstly from the decision of the House of Lords in a Scottish case, *Denny, Mott & Dickson v James B. Fraser & Co. Ltd* [1944] A.C. 265. In that case a contract for the supply of timber provided that *"to enable the aforesaid trading agreement to be carried out"* the buyer should let a timber yard to the seller *"during the period of the aforesaid trading agreement"*. That agreement was one of indefinite duration. It specified a commencement date in 1929, but no expiry date: it merely provided for termination by notice, the periods of notice being one year if given by the seller and three years if given by the buyer. A government Order made during the Second World War prohibited trading in timber. It was held that the agreement for the lease of the yard was discharged, as also was an associated option to purchase land.

39. In *Rom Securities Ltd. v. Rogers (Holdings) Ltd.* (1967) 205 E G. 427 Goff J. was faced with an agreement for a lease entered into on the unexpressed assumption that planning permission would be granted whereas in the event it was refused. Goff J. analysed the case upon the basis of an implied term, holding that the agreement was discharged under an implied term that the agreement would be discharged if planning permission was refused. In *National Carriers Ltd. v Panalpina (Northern) Ltd* [1981] A.C. 675 (to which I refer more extensively below) at page 705A, Lord Simon of Glaisdale said that he regarded *Rom Securities* as a case of frustration.

40. Both Parties referred me to *Cricklewood Property and Investment Trust Ltd. v Leighton's Investment Trust Ltd.* [1945] A.C. 221. As set out in the head note, the facts of that case were that by a building lease dated May 12, 1936, certain land, forming part of a building estate, was demised to lessees for a term of ninety-nine years, to be used by them as sites on which they covenanted to erect a number of shops within a time limit. So far as concerned each of the sites in question in the case, the reserved rent was a peppercorn until the expiration of one year from notification by the lessors that erection of a shop thereon might proceed, under the terms of a town planning scheme then in force, and thereafter £35 yearly. Notification having been given in respect of the sites, the lessors claimed payment of the ground rents. The lessees repudiated liability on the ground that the obligation to pay rent had been excused or discharged by frustration, since war-time restrictions placed by the Government on building had made it impossible to erect the shops.

41. The House of Lords held unanimously that even if the doctrine of frustration could apply to a lease, the circumstances did not justify such application; the lease had not been determined by frustration and the liability for rent continued.

42. Two of their Lordships (Viscount Simon L.C. and Lord Wright) said that the doctrine of frustration may in certain circumstances apply to a lease.

43. In his speech, Viscount Simon said, at page 229:

> Where the lease is a simple lease for years at a rent, and the tenant, on condition that the rent is paid, is free during the terms to use the land as he likes, it is very difficult to imagine an event which could prematurely determine the lease by frustration – though I am not prepared to deny the possibility, if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. The lease, it is true, is of the "site", but it seems to be not inconceivable that, within the meaning of the document the "site" might cease to exist. If, however, the lease is expressed to be for the purpose of building, or the like, and if the lessee is bound to the lessor to use the land for such purpose with the result that at the end of the term the lessor would acquire the benefit of this development, I find it less difficult to imagine how frustration might arise. Suppose, for example, that legislation were subsequently passed which permanently prohibited private building in the area or dedicated it as an open space for ever, why should this not bring to an end the currency of a building lease, the object of which is to provide for the erection on the area, for the combined advantage of the lessee and lessor, of buildings which it would now be unlawful to construct?

And at pages 231 to 232:

> …. The occasions, however, on which frustration terminates a lease must be exceedingly rare.
>
> So much for the abstract and theoretical question. But there remains the practical issue whether what is proved to have happened in the present case could be enough to constitute frustration of such a lease. I do not agree with Asquith J. that the orders requiring a suspension of building are sufficient to strike at the root of the arrangement. The lease at the time had more than ninety years to run, and though we do not know how long the present war, and the emergency regulations which have been made necessary by it, are going to last, the length of the interruption so caused is presumably a small fraction of the whole term. Frustration, where it exists, does not work suspension but brings the whole arrangement to an end forthwith. Here, the lease itself contemplates that rent may be payable although no building is going on, and I cannot regard the interruption which has arisen as such as to destroy the identity of the arrangement or to make it unreasonable to carry out the lease according to its terms as soon as the interruption in building is over …

44. In his speech, Lord Wright said at page 239:

> In England, since *Paradine v Jane* and earlier, the law has been that in general the tenant's covenant to pay rent or repair or deliver up in repair are not affected by casualties which interfere with his enjoyment of the demised land. The lessor as a general rule gives no warranty in these respects in favour of the tenant. The tenant must perform his covenants even though the demised house is destroyed by fire (*Monk v Cooper*), quite irrespective of what covenants as to repairs there may be (*Lofft v. Dennis*), or whether the loss of enjoyment is due to the landlord's failure to fulfil his obligation to repair (*Hart v. Rogers*). In that latter case the tenant would have his cross-claim against the landlord for damages. On the same principle it has been held that a covenant in a mining lease to raise and pay for a certain amount of coal is not affected if it turns out that the mine was so exhausted that there were not any coals left in it (*Bute v Thompson*). These and many similar authorities show that by English law the lessee's covenants are generally absolute.

That passage might have been thought to indicate that in Lord Wright's view frustration would be inapplicable to leases. However, at page 241 he said:

> It is true that there is no reported case in which the rule has been applied and that it could be applied only in rare and exceptional cases. But the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula. I am not therefore prepared to state as a universal principle that it can in no circumstance be applied to a lease. Let me suggest a single instance, which might some day prove to be of not merely theoretical interest. Let me put the case of a building lease for a term of ninety-nine years, and let it be supposed that a public body acting under statutory authority, soon after the lease was executed prohibited building on that site for an indefinite time, the end of which, if it ever came, could not be foreseen. In effect that would be a prohibition total for all practical purposes both in extent and time, which would override and control both lessor and lessee. Would in that event the lessee continue bound to pay under the lease the yearly rent for ninety-nine years, or would the relationship of landlord and tenant be dissolved by operation of law in respect of that site? As a matter of general principle I would say that the lease was avoided and the term came to an end. But I abstain from further discussion of the point.

45. The issue as to whether the doctrine of frustration could apply to leases was finally resolved by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675 to which I have already referred briefly.

46. In that case a warehouse was demised to the defendants for a period of 10 years from January 1, 1974. By the lease, the defendants covenanted, inter alia, not to use it otherwise than for the purpose of a warehouse without the plaintiffs' consent. The only vehicular access to the warehouse was by a street which the local authority closed on May 16, 1979, because of the dangerous condition of a derelict Victorian warehouse

opposite to that demised to the defendants. In the events that subsequently happened, the period between the closure of the street and its reopening after demolition of the Victorian warehouse was likely to be about 20 months. During that period, the warehouse was rendered useless for the defendants' purposes. In an action by the plaintiffs for recovery of unpaid rent, the defendants claimed that the lease had been frustrated by the events that had happened.

47. The majority of the House held that the doctrine of frustration could apply to a lease.

48. At pages 697G to 698B, Lord Wilberforce said

> So the position is that the parties to the lease contemplated, when Kingston Street was first closed, that the closure would probably last for a year or a little longer. In fact it seems likely to have lasted for just over 18 months. Assuming that the street is reopened in January 1981, the lease will have three more years to run.
>
> My Lords, no doubt, even with this limited interruption the appellant's business will have been severely dislocated. It will have had to move goods from the warehouse before the closure and to acquire alternative accommodation. After reopening the reverse process must take place. But this does not approach the gravity of a frustrating event. Out of 10 years it will have lost under two years of use: there will be nearly three years left after the interruption has ceased. This is a case, similar to others, where the likely continuance of the term after the interruption makes it impossible for the lessee to contend that the lease has been brought to an end. The obligation to pay rent under the lease is unconditional, with a sole exception for the case of fire, as to which the lease provides for a suspension of the obligation. No provision is made for suspension in any other case: the obligation remains…

49. I note the emphasis here upon the almost unconditional nature of the obligation to pay rent, reflecting the passage from the speech of Lord Wright in *Cricklewood* to which I have referred at paragraph 44 above.

50. In the speech of Lord Simon of Glaisdale he referred to three questions:

> The appeal raises three questions: (1) Is the doctrine of frustration inherently incapable of application to a lease? (2) If not inherently and generally inapplicable to leases, is the doctrine of frustration capable of applying to this lease in particular? (3) If yes, have the appellants demonstrated a triable issue that this lease has been discharged by frustration?

At pages 700F to 701B he said in respect of the first question:

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract

> makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.
>
> Whether the doctrine can apply to a lease is of more than academic interest, considerable though that is. In the *Cricklewood Property* case [1945] A.C. 221, 229 Viscount Simon L.C., who favoured the extension of the doctrine to leaseholds, nevertheless considered it likely to be limited to cases where "some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea." But I think this puts the matter too catastrophically, even in the case of a long lease. There are several places on the coast of England where sea erosion has undermined a cliff causing property on top of the cliff to be totally lost for occupation: obviously occupation of a dwelling house is something significantly different in nature from its aqualung contemplation after it has suffered a sea change. And in the case of a short lease something other than such natural disaster – the sort of occurrence, for example, that has been held to be the frustrating event in a charterparty – might in practice have a similar effect on parties to a lease. Take the case of a demise-chartered oil tanker lying alongside an oil storage tank leased for a similar term, and an explosion destroying both together.
>
> The question is entirely open in your Lordships' House, as was recognised in the *Cricklewood Property* case. In my view a lease is not inherently unsusceptible to the application of the doctrine of frustration.

51. In this passage I note:

    (1) The requirement that the contract must make no sufficient provision for the relevant event;

    (2) That the time for consideration of what the parties could or should have contemplated is judged at the date of execution of the contract; and

    (3) That the test is whether the supervening event "so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances".

52. In respect of the second question, Lord Simon said at page 706C-F:

> Counsel for the appellants claimed that this was a "commercial lease", a class at any rate to which the doctrine of frustration is applicable. In a sense every lease is commercial in so far as it is a matter of business between landlord and tenant. On the other hand, a lease and its subject matter may be more or less closely connected with commerce, trade or industry. The answer which I ventured to propose to the first issue facing your Lordships indicates my view that there is no class of lease to which the doctrine is inherently inapplicable. But, as with any other agreement, the terms and subject matter of a lease will affect the circumstances in which it might be frustrated. The more commercial the character of an agreement, the more various are the circumstances in which it is liable to frustration.
>
> In a lease, as in a licence or a demise charter, the length of the unexpired term will be a potent factor. So too, as the American cases show, will be any stipulations about, particular restrictions on, user….

53. In this passage I note:

(1) That the more commercial the character of an agreement, the more various are the circumstances in which it is liable to frustration;

(2) That the length of the unexpired term is a potent factor; and

(3) That any stipulations about, particularly restrictions on, user are relevant.

54. At page 707B-F Lord Simon pulled together those strands in their application to the facts of that case:

> The appellants were undoubtedly put to considerable expense and inconvenience. But that is not enough. Whenever the performance of a contract is interrupted by a supervening event, the initial judgment is quantitative – what relation does the likely period of interruption bear to the outstanding period for performance? But this must ultimately be translated into qualitative terms: in the light of the quantitative computation and of all other relevant factors (from which I would not entirely exclude executed performance) would outstanding performance in accordance with the literal terms of the contract differ so significantly from what the parties reasonably contemplated at the time of execution that it would be unjust to insist on compliance with those literal terms? In the instant case, at the most favourable to the appellants' contention, they could, at the time when the road was closed, look forward to pristine enjoyment of the warehouse for about two thirds of the remaining currency of the lease. The interruption would be only one sixth of the total term. Judging by the drastic increase in rent under the rent review clause (more than doubled), it seems likely that the appellants' occupation towards the end of the first

> quinquennium must have been on terms very favourable to them. The parties can hardly have contemplated that the expressly-provided-for fire risk was the only possible source of interruption of the business of the warehouse – some possible interruption from some cause or other cannot have been beyond the reasonable contemplation of the parties. Weighing all the relevant factors, I do not think that the appellants have demonstrated a triable issue that the closure of the road so significantly changed the nature of the outstanding rights and obligations under the lease from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations.

55. In that case, as in the application before me, the application was for summary judgment for recovery of rent. In that respect, I note the following passage in the speech of Lord Roskill at page 715B:

> If a defence of frustration be plainly unarguable, it will always be open to the master or judge in chambers so to hold and to give summary judgment for the lessors on the ground that the lessees have failed to show any arguable defence. I respectfully agree with Viscount Simon L.C. and Lord Wright in the *Cricklewood* case that the cases in which the doctrine will be able to be successfully invoked are likely to be rare, most frequently though not necessarily exclusively where the alleged frustrating event is of a catastrophic character ….

56. I was not referred to any other appellate authority on the doctrine of frustration as it refers to leases. However, I was referred to two first instance cases, one of which did go to the Court of Appeal without issues of frustration as such being argued.

57. The first case (which did not go to the Court of Appeal) was *Canary Wharf (BP4) T1 Ltd. v. European Medicines Agency* [2019] EWHC 335 (Ch.); [2019] L. & T. R. 14. In that case Marcus Smith J. held that a lease of premises in London held by the European Medicines Agency and used as its headquarters was not frustrated on the United Kingdom's withdrawal from the European Union by supervening illegality or failure of a common purpose.

58. At paragraphs [25] to [27] the learned judge discussed the juridical basis for the doctrine of frustration. He identified five possible bases. The fourth of those bases he described as the "Construction of the contract theory". In respect of that theory, he said:

> More to the point, even a sophisticated contract which, on its face, *appears* to make provision for all subsequent vicissitudes may find itself defeated by the truly unforeseen.

That sentence referred to a footnote in which the judge said:

> This is why the operation of the doctrine is so difficult as a matter of practice. Contracts, these days, seek to anticipate everything

> and one factor a court must bear in mind is that the contract – on its true construction – has provided for the risks to fall according to that construction. But, like the implied term theory, it would be an error to assume that every contract precisely allocates the risks arising out of every future eventuality. The weakness of the construction approach is that it assumes – wrongly – that construction or interpretation of the contract can resolve every problem.

59. In respect of the fifth possible theory, he stated as follows:

> *Performance rendered radically different by fundamental change in circumstances*. Lord Radcliffe's dictum, quoted in paragraph 22 above, is said to encapsulate this theory, which has found favour in the recent case law. In *Panalpina*, Lord Roskill said this:
>
> > "What is sometimes called the construction theory has found greater favour. But, my Lords, if I may respectfully say so, I think the most satisfactory explanation of the doctrine is that given by Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council*, [1956] 1 AC 696, 728. There must have been by reason of some supervening event some such fundamental change of circumstances as to enable the court to say: "this was not the bargain which these parties made and their bargain must be treated as at an end" – a view which Lord Radcliffe himself tersely summarised in a quotation of five words from the *Aeneid*: *"non haec in foedera veni"*. Since in such a case the crucial question must be answered as one of law…by reference to the particular contract which the parties made and to the particular facts of the case in question, there is, I venture to think, little difference between Lord Radcliffe's view and the so-called construction theory."
>
> In many cases, Lord Roskill may be right: in many cases, there may be little difference in outcome between the construction of the contract theory and the "performance is radically different" test. But there is, in my judgment, a very material difference in how these two theories work in their application. Under the former, the true construction of the contract resolves all; the latter theory recognises the importance of the true construction of the contract, but also recognises that even construction has its limits when faced with extreme and unforeseeable supervening events.

60. The judge then commented at paragraph [27]:

> As I have noted, certainly since *Panalpina*, the prevailing wisdom is that the fifth approach that I have described best encapsulates the essence of the doctrine of frustration. Whether a contract is frustrated depends upon a consideration of the

> nature of the bargain of the parties when considered in the light of the supervening event said to frustrate that bargain. Only if the supervening event renders the performance of the bargain "radically different", when compared to the considerations in play at the conclusion of the contract, will the contract be frustrated.

61. At paragraphs [29] to [33] he considered the application of the approach set out in Rix L. J.'s judgment in *The Sea Angel*:

> 29. In some cases – the vast majority, for frustration is a doctrine not easily invoked – the construction of the contract will resolve the issue between the parties, including whether a subsequent "unforeseen" event has allocated a risk to one party (by requiring that party to perform in more onerous circumstances) or to the other party (by an interpretation bringing the contract to an end because of those onerous circumstances). But that is not so much the end of the doctrine of frustration, as its beginning. Fundamentally, when one seeks to describe what a party promised, one does not recite the individual terms and conditions, but has regard to something much more elemental, that cannot necessarily be captured in the precise terms used by the parties in their contract, but which requires reference to what I will term the parties' "common purpose".
>
> 30. CW contended for an approach to the doctrine of frustration which equated "common purpose" with contractual construction. In other words, CW contended for the construction of the contract theory described in paragraph 26(4) above. That, as I have noted, is not the approach that has found most favour since (at least) *Panalpina*. Moreover, I do not consider that it is an approach that is open to me to take (even if I were inclined to do so). In *Edwinton Commercial Corporation v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd, The "Sea Angel"*, Rix LJ said this:
>
> > "In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances."
>
> 31. Rix LJ identified various factors relevant to be taken into account when considering circumstances as at the time of the contract. These were:

> (1) The terms of the contract itself.
>
> (2) Its matrix or context.
>
> (3) The parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, at any rate so far as these can be ascribed mutually and objectively.
>
> 32. The first two factors can readily be mapped to a constructionist or interpretative approach: the first factor refers to the terms of the contract, the second to the matrix of fact. Both factors are therefore consistent with the construction of contract theory of frustration. The third factor, however, does not fit within the maxims of construction and is not consistent with the construction theory of frustration. For example, mutual expectations/assumptions/contemplations might very well arise out of the previous negotiations of the parties and their declarations of subjective intent, matters which are *not* to be taken into account when interpreting a contract. Yet they are, pace Rix LJ, relevant in the case of frustration.
>
> 33. Although I am conscious that one should not read the dicta of judges – however eminent – as if they were the words of a statute, nevertheless it seems to me that, by his third factor, Rix LJ has encapsulated the difference between the construction theory of frustration and the "radically different" theory of frustration.

62. It seems to me that a court will only need to consider factor (3) in a case where there is evidence before that court as to the parties' knowledge, expectations, assumptions and contemplations which go outside the already somewhat wide range of material which a court can take into consideration when construing the contract in accordance with *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (No. 1)* [1988] 1 W.L.R. 896 and the other well known authorities which have been handed down since then.

63. It seems to me that that is exactly where Marcus Smith J. eventually ended up on the material before him. In respect of foreseeability, he said at paragraphs [211] to [213]:

> 211. The foreseeability of the frustrating event is relevant only insofar as it informs the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk. If a future event is sufficiently foreseeable that it *should* have informed the manner in which the parties framed their agreement (particularly so far as the risk allocation provisions were concerned), then (to put it no higher than this) a court will be inclined to consider that the parties *will* have framed their agreement taking this factor into account. Foreseeability is, thus, no more than a factor to be taken into account. There will, no doubt, be many cases where something can be foreseen as a

> theoretical possibility, but where neither party can be criticised for failing to take it into account.
>
> 212. The court must also beware of framing questions of foreseeability too closely to the exact, specific, nature of the supervening event that ultimately occurred. I remind myself that the test for frustration is whether the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. What "the circumstances" are (or what the "frustrating" event is) will, in most cases, be capable of being framed in a number of ways. Here, the EMA defines the change in circumstance rendering the Lease frustrated as the United Kingdom's withdrawal from the European Union. But that is simply one definition of several possible ones. It might equally be said that the change in circumstance is the EMA's involuntary need to leave the Premises due to circumstances beyond its control.
>
> 213. I shall return to this question in due course: my purpose in raising it now is simply to observe that foreseeability is something of a slippery concept, that needs careful handling.

64. I agree with the comment that *"if a future event is sufficiently foreseeable that it should have informed the manner in which the parties framed their agreement (particularly so far as the risk allocation provisions were concerned), then (to put it no higher than this) a court will be inclined to consider that the parties will have framed their agreement taking this factor into account.*"

65. At paragraphs [235] to [238] and [244] the learned judge concluded:

> 235. I turn to the question of whether – without default of either the EMA or CW – the Lease has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the Lease.
>
> 236. Plainly, the changes described in paragraph 234(1) and (2) above – whilst adverse to the EMA and a consequence of the United Kingdom's withdrawal from the European Union – are insufficiently fundamental to render the EMA's performance under the Lease something "radically different". Equally, as I say in paragraph 234(3) above, whilst the departure of the EMA from London was compelled by the 2018 Regulation, I have concluded that the 2018 Regulation was not actuated by any legal necessity arising out of the EMA's capacity (or incapacity) to act in the territory of a third country.
>
> 237. The question is whether there can be said to be a common purpose as between the EMA and CW, at the time of the Agreements, going beyond what was agreed upon in the Lease,

> which has been rendered radically different by supervening events.
>
> 238. I approach this question in the following way:
>
> (1) First, I consider what the parties actually provided for, in terms of risk allocation, in the Lease. As I have described, the parties' actual agreement and how they allocated risks under it, can be of great significance when considering whether the contract has been frustrated. That is particularly so, where the contract is a sophisticated one, appearing to make provision for all subsequent contingencies or vicissitudes that may arise in the future.
>
> (2) Secondly, I consider the question of common purpose. One consequence of the "radically different" test for frustration is that, unlike with the construction of the contract theory, the construction of the contract does not – in all cases – determine whether the contract has been frustrated. The "radically different" test recognises that even a sophisticated contract may find itself defeated by the truly unforeseen, and that it is the frustration of the parties' "common purpose" that is determinative. I explain why, in this case, I have concluded that that there was no "common purpose" beyond the purpose arising out of the Lease itself.
>
> ….
>
> 244. I have held that it is possible – notwithstanding the true construction of a contract – for that contract nevertheless to be discharged if the common purpose of the bargain (which I have found to be something beyond the true construction of the contract) is frustrated. In this case, I find no common purpose beyond the purpose to be derived from a construction of the Lease. This is not a case like *Krell v. Henry* where the parties had a common purpose going beyond their agreement, which was thwarted. The parties approached the Agreements as counterparties, and they bargained hard – if amicably – to get what they wanted.

66. I consider below whether there is here any evidence taking this case outside a consideration of the Lease itself construed in the usual way.

67. The other first instance case placed before me was the decision of Master Dagnall in *Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd.* [2021] EWHC 1013 (QB). In that case the Court had to consider the doctrine of frustration in the context of restrictions on the use of leased property as a result of the Covid-19 Pandemic. The learned Master considered the doctrine of frustration at paragraphs [194] to [210]. In the event it appears that the suggestion that the leases under consideration had been frustrated was not energetically pursued by any of the tenants and, in any event, he decided, applying *Panalpina*, that the "radically different" test was not satisfied.

68. This judgment, together with another decision by a Deputy High Court Judge, were considered by the Court of Appeal in *Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd.* [2022] EWCA Civ. 1021. In that Court there were no arguments advanced as to frustration.

69. The result of this review of authority is that there are really only two decisions as to the application of the doctrine of frustration to leases – *Panalpina* and *Canary Wharf.* In no case has the doctrine of frustration been successfully invoked in respect of a lease, in contrast to agreements for a lease where there are two such examples of successful application of the doctrine - *Denny, Mott & Dickson v James B. Fraser & Co. Ltd* and *Rom Securities*.

70. I was also referred to academic textbooks. I found the analysis in Treitel, *Frustration and Force Majeure*, 4th edition (2021) very helpful.

71. At paragraph 11-013 of Treitel it is said:

> **Parties assume the risk of changing circumstances over a long term**. Parties to long-term transactions must necessarily envisage the possibility that circumstances may change, perhaps quite radically, during the agreed term of the contract. For this reason the doctrine of discharge will not often apply to such a transaction; its nature gives rise to an interference that the parties agreed to take the risk of changes in circumstances which may alter the relative values of performance and counter-performance, and so make the transaction less favourable to one party (and correspondingly more favourable to the other) than it was, or appeared to be, when it was concluded. This argument applies with particular force to long leases of land, for the simple reason that their specified duration is likely to exceed that of other long-term transactions which can plausibly be imagined…. The length of the term not only makes it reasonable to assume that the parties take the risk of changes of circumstances. It also increases the possibility that such changes may be only temporary and that the extent of interference with one party's performance, or with the purpose for which the premises were to be used, may not be sufficiently serious (on the "proportionality test" …) to bring about discharge ….

72. At paragraph 11-014 of Treitel it is said:

> **Covenants to repair or to insure.** Frustration may be excluded by an express provision in the contract for the supervening event. This limitation on the scope of the doctrine of frustration is more fully discussed in Ch. 12; reference to one illustration of it has been made in para. 11-006, where it was suggested that one reason why hire-purchase contracts are not in practice frustrated by the destruction of their subject-matter is that this eventuality is normally covered in provisions in the contract with regard to insurance. A similar point can be made with regard to leases of land, which commonly contain covenants to "repair" and to keep

> the premises insured. We saw in Ch. 2 that a covenant to "repair" might, on its true construction, cover the precise contingency of the destruction of the premises and oblige the covenantor, in that event, to rebuild them. A covenant to keep the premises insured might have a similar practical effect since by statute "any person … interested" may require money received under the insurance policy to be laid out towards reinstating the premises; and under this statutory provision a claim that the money shall be so laid out can be made by a tenant under this landlord's insurance, and by a landlord under his tenant's insurance. The effect of the covenant will therefore be to exclude frustration, even if destruction of the premises might, had there been no such covenant, have frustrated the contract. Covenants to repair and to keep the premises insured will of course deal only with this one possible cause of frustration. They have no direct bearing on events such as requisition or legislative prohibition of the intended use of the premises as grounds of frustration. They will be relevant to such grounds only in that they may support the argument that parties who have expressly dealt with one possible cause of frustration should have foreseen, and provided for, others as well.

The Agreement for Lease

73. The Parties were agreed that I can and should take into account an Agreement for Lease dated 13 August 2004.

74. As summarised by counsel for the Landlord, that Agreement:

a) required the Tenant's approval to (i) the form of the Building Contract; (ii) the Building Contractor; (iii) any amendments to the defects liability period; and (iv) the Building Consultants (see generally the defined terms in clause 1.1);

b) provided for the Tenant's Surveyor to enter the Premises to inspect the state and progress of the building works ("the Works"), and to give notice to the Landlord specifying any respects in which it considered that the Works were not being or had not been carried out in accordance with the Agreement, in which case the Landlord was to procure that the Employer's Agent should have regard to the matters specified in such notice (clause 6);

c) involved the Tenant in the issuing of a certificate of Practical Completion (clause 7);

d) allowed the Tenant to specify within the defects liability period any defects in the Works requiring making good (clause 9.1);

e) required the Landlord to procure deeds of warranty from the Building Contractor and Consultants for the Works for the Tenant in the form of agreed drafts (clause 9.2).

75. Clause 1.6 of the Agreement provided:

> This Agreement contains the whole agreement between the parties hereto relating to the matters herein provided for and supersedes previous agreements between the parties hereto (if any) relating thereto.

76. Clause 9 is, in my judgment, important. It provided:

> **DEFECTS AND DUTY OF CARE**
>
> 9.1 The Landlord will procure that the Building Contractor fulfils its obligations under the Building Contract to make good any defects in the Works within the defects liability period under the Building Contract and which shall have been specified in a written notice from the Tenant to the Landlord given not less than 10 working days prior to the expiry of the defects liability period stipulated in the Building Contract (time being of the essence) and the Tenant will permit the Landlord and all persons authorised by the Landlord to enter the Premises upon reasonable prior notice for such purpose.
>
> 9.2 The Landlord will obtain from the Building Contractor [and] each of the Consultants (and will use all reasonable endeavours to obtain from the Principal Sub-Contractors) and will hand over to the Tenant either before or as soon as reasonably practicable after the Date of Practical Completion deeds of warranty. In the case of the Building Contractor and the Consultants the deeds of warranty shall be in the forms of the drafts attached thereto at Appendix 7 duly signed as deeds by such parties **PROVIDED THAT** such drafts shall be amended in any respects which may be:
>
> 9.2.1 reasonably required by the professional indemnity insurers of any such parties and
>
> 9.2.2 approved by the Tenant (such approval not to be unreasonably withheld or delayed)
>
> and in the case of any Principal Sub-Contractor the deeds of warranty shall be in such form as the Landlord can reasonably procure
>
> 9.3 After the expiration of the defects liability period referred to in Clause 9.1 (and subject to the Landlord having complied with its obligations in Clauses 9.1 and 9.2) the Landlord shall have no further liability to the Tenant for its obligations to carry out the Works in accordance with this Agreement.

77. The copy of the Agreement before me does not include Appendix 7 so I do not have details of the draft deeds of warranty, and no concluded deeds of warranty were placed

before me – I was told by Mr de Waal that SGUK does not have copies of any such deeds.

78. This is unfortunate, but in my judgment the structure of the Agreement is clear:

(1) The Landlord has an obligation under Clause 4 to carry out the Landlord's Works, which are the works of constructing the major part of the Premises, in a good and workmanlike manner using good quality new materials (Clause 4.2.2) and in conformity with the appropriate British Standards, the CDM Regulations and good building practice (Clause 4.2.3);

(2) In general terms it is expected that the Landlord's liabilities cease upon the expiration of the defects liability period;

(3) At that stage, the Tenant will be left to rely upon the deeds of warranty and thereby look to the Building Contractor, the Consultants and (subject to qualifications) to the Principal Sub-Contractors to put right any defects which have not been put right before the expiration of the defects liability period.

79. The expectation that deeds of warranty will be in place is consistent with the usual understanding in arrangements of this type that there may be latent defects in the built structure(s) which had not become manifest and/or had not been identified by the end of the defects liability period.

The Lease

80. The contractual term is 25 years commencing on and including 7 September 2007. The Lease has the protection of Part II of the Landlord and Tenant Act 1954.

81. Clause 2 of the Lease sets out the reddendum, which requires the rent to be paid quarterly in advance on the usual quarter days "*without any deduction whatsoever*".

82. Clause 3.1 provides that the Tenant is obliged to pay the rents reserved "*without exercising or seeking to exercise any right of set-off*".

83. Clause 3.22 of the Lease is concerned with the Permitted Use:

> Not without the consent in writing of the Landlord (not to be unreasonably withheld or delayed) to use the Demised Premises or any part thereof or suffer the same to be used otherwise than as an educational facility with ancillary residential catering and office accommodation.

84. The Lease is a full tenant's repairing lease, and clause 3.7 provides:

> To keep the Demised Premises in good and substantial repair and condition and whenever necessary to rebuild reconstruct renew or replace the whole of the Demised Premises or any part thereof (except only damage by risks against which the Landlord has insured save where the insurance monies are irrecoverable in

> consequence of any act or default of the Tenant) and to renew and replace from time to time all landlord's fixtures and fitting and appurtenances in the Demised Premises which may become or be beyond repair at any time during or at the expiration or sooner determination of the Term …

85. Clause 3.13 contemplates that there may be wants of repair or defects in the Premises by reason of which the Landlord might incur liability to a third party, and obliges the Tenant to take all reasonably necessary steps in such circumstances to minimise consequential disrepair.

86. By clause 3.15 the Tenant is required to comply with statutory requirements:

> 3.15.1 To execute all such works and do all such things as under or by virtue of any Act or Acts of Parliament and all other applicable laws of the United Kingdom and elsewhere (including without limitation directives or other law of the European Union or the European Community) now or hereafter to be passed and all orders bye-laws rules and regulations made thereunder (including without limitation the Factories Act 1961 the Offices Shops and Railway Premises Act 1963 the Fire Precautions Act 1971 (and any requirement of a Fire Certificate issued pursuant thereto whether issued to the Landlord the Tenant or any sub-tenant) the Fire Precautions (Workplace) Regulations 1997 (as amended) the Health and Safety at Work etc. Act 1974 the Control of Pollution Act 1974 the Environmental Protection Act 1990 the Environment Act 1995 the CDM Regulations and the Gas Safety (Installation and Use) Regulations 1998) are or shall be directed or necessary to be executed or done upon or in respect of the Demised Premises or any part thereof or in respect of the user thereof by the owner lessee tenant or occupier thereof.
>
> ….
>
> 3.15.3 To comply with all requirements of the competent fire authority and the insurers of the Demised Premises in relation to fire precautions affecting the Demised Premises and to supply and equip and keep the Demised Premises supplied and equipped with such fire alarm smoke detection and smoke ventilation systems and such fire fighting appliances as are necessary to so comply and to keep all such systems and appliances unobstructed and open to inspection and properly maintained.

87. Clause 1.8 makes it clear that references to Acts of Parliament or statutory instruments include any for the time being in force amending or replacing the same.

88. Clause 5.2 requires the Landlord to insure the Premises against loss or damage caused by Insured Risks. The Insured Risks are defined in Clause 5.1 as meaning (commas added by me):

> Fire, terrorism, lightning, explosion, impact, storm, tempest, flood, bursting and overflowing of water tanks apparatus or pipes, impact from aircraft and other aerial devices and any particle dropped therefrom, subsidence, heave, landslip,

> earthquake, riot, civil commotion, strikes, locked-out workers and malicious persons, and such other risks as the Landlord shall in its reasonable discretion determine.

89. In general terms, Clause 5.3.2 requires the Landlord to rebuild or reinstate the Demised Premises in the event of damage to or destruction by any of the Insured Risks.

90. Clause 5.3.3.1 requires the Tenant:

> To comply with all requirements of the Landlord's insurers in respect of the Demised Premises and not to do or permit to be done in or upon the Demised Premises or any part thereof anything which may increase the premium for any policy for the insurance of the Demised Premises or any other premises or which shall invalidate or prejudice the renewal of any such policy of insurance or which may be prejudicial in any way to any claim which may fall to be made thereunder.

91. In general terms, Clause 5.4 suspends the Tenant's obligation to pay rent if there is damage to the Demised Premises as a result of Insured risks making those premises to be unfit for occupation or use by the Tenant until reinstatement or rebuilding has taken place.

92. Clause 6.5 provides:

> The Landlord gives no warranty express or implied that the use of the Demised Premises or any part thereof for any specific purpose is authorised under the Planning Acts or otherwise or that the Demised Premises or any part thereof are suitable for the purposes of the Tenant or for any purpose.

Frustration of Common Purpose

93. In paragraph 20 of its Defence, SGUK pleads as follows:

> It is the First Defendant's primary case that the common purpose of the Lease was for user of the Building in accordance with its C2 use class and structure, that is as a residential school or college. At the discovery of defects and, consequently, the seriousness of the threat to life safety, the ability to use … the Building became radically different from the bargain of Claimant and the First Defendant. These defects existed before the commencement of the Lease and were inherent in the fabric of the Building: remediation of fundamental defects critical to life safety (not repair) was always required but neither party had known. It was the discovery of the built-in defects which changed the fundamental nature of the parties' bargain. Even if

> remediation were commenced immediately, the Building would not be occupiable for several years, depriving the First Defendant of a very substantial period of use of the building. Accordingly, the parties' common purpose in entering into the Lease was frustrated.

94. I do not have before me any witness evidence from anyone involved in the original negotiations for the Agreement for Lease and the Lease itself. I do have evidence from Mr Arnell at paragraphs 20 to 22 of his witness statement, which I have quoted at paragraph 23 above. I have no difficulty in accepting that evidence for the purpose of the summary judgment application before me, subject to an important caveat.

95. I have set out at paragraph 25 above what the evidence establishes for the purposes of the application before me.

96. In considering this application, I have to consider whether I have all the evidence, or substantially all of the evidence, necessary for me to reach conclusions as to whether the Lease was frustrated.

97. I am conscious of the clear guidance in the authorities that I am not to conduct a mini-trial. I do not think there is a risk of doing so here where I am accepting SGUK's evidence, subject, as I have said, to an important caveat which I discuss below.

98. I also have to consider whether there is further evidence to assist SGUK which might emerge hereafter. Two categories of such evidence were suggested, both of which I have mentioned above.

99. First, there is the possibility of further expert evidence. As to that, I have set out my views at paragraphs 27 and 28 above.

100. The second category of evidence where further material may become available relates to the missing Appendix 7 and the concluded deeds of warranty to which I have referred at paragraph 77 above. However, as I have said at paragraph 78 above, it seems to me that the structure of the Agreement for Lease is clear.

101. In those circumstances, I do not consider that any doubts about, or lack of information in respect of, the factual position should prevent me from reaching a conclusion on the Landlord's application.

102. I accept and follow the view of Mr. MacDonald Eggers in paragraph [52] of his judgment in *Adare* which I have set out at paragraph 9 above, that:

> If, on the determination of the point of law or construction (**which might be a point which is well arguable by both parties**), the Court determines that the defendant has no real prospect of successfully defending the claimant's claim and there is no other compelling reason for the disposal of the case at trial, the claimant will be entitled to summary judgment

103. I have referred at paragraph 32 above to Christopher Clarke L.J.'s statement in paragraph [51] of his judgment in *Armchair Answercall* that:

> Whether any given event is a frustrating event is, once the facts said to constitute the event have been determined, a question of law.

104. I have also referred in paragraph 55 above to the passage from the speech of Lord Roskill in *Panalpina* which accepts that summary judgment in claims where the issue of frustration is raised is open to a court in appropriate cases.

105. Following the guidance in the authorities, particularly the judgment of Rix L.J. in *The Sea Angel* and of Marcus Smith J. in *Canary Wharf*, I start by considering the two relevant agreements, the Agreement for Lease and the Lease itself.

106. I accept that the authorities on frustration indicate that in determining whether there was a common purpose between landlord and tenant, the Court is entitled to look at evidence going more widely than would be appropriate to consider in a conventional exercise of construction of an agreement.

107. I am doubtful whether in construing the Lease I would ordinarily be assisted by consideration of the terms of the Agreement for Lease. However I accept Mr de Waal's submission that in seeking to determine any common purpose behind the Lease I can and should consider the effect of the Agreement for Lease.

108. In my judgment, doing so does not assist SGUK. I accept the pleaded purpose of the Lease which I have set out above, but in my judgment as a statement of common purpose it does not go far enough. This is why I referred above to a caveat.

109. The issue before me is whether there was a common expectation that the Premises as designed and constructed would be defect-free or might contain defects to a certain extent or but no further, or of a certain type but no others.

110. It is quite clear that the Parties did not assume that the Premises would be defect-free. On the contrary, the Agreement provided for a defects liability period during which manifest defects would be remedied. Nor did the Parties assume that after the defects liability period had expired there would be no latent defects: to the contrary, Clause 9.3 of the Agreement excuses the Landlord from further liability after the expiration of the defects liability period, which must be a reflection of an acceptance that there was a possibility of defects emerging. Similarly, as I have said at paragraph 79 above, the expectation that deeds of warranty will be in place is consistent with the usual understanding in arrangements of this type that there may be latent defects in the built structure(s) which had not become manifest and/or had not been identified by the end of the defects liability period.

111. Thus, it is impossible to conclude that the Parties had a joint expectation that the Premises once let would be defect-free, or contain defects to a certain extent but no further, or contain defects of a certain type but no others.

112. Is it possible to say that the Parties had a joint expectation that the Premises would be defect-free to a certain extent but no further? This seems to me to be conceptually very difficult when there are no objective criteria by which it could be ascertained what that limit would be.

113. Further, in the context of the doctrine of frustration, an argument of "so far, but no further" is a difficult basis for the application of that doctrine. In Lord Radcliffe's statement of the doctrine in *Davis Contractors v Fareham UDC* which I have set out at paragraph 30 above the requirement is that the *"performance called for would render it a thing radically different from that which was undertaken by the contract"* and that *"there must be ... such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for"*.

114. Applying that dictum, it seems to me that it would be a very rare case where the existence of some defects would not, but others would, frustrate an Agreement for Lease.

115. Thus, in my judgment the Agreement for Lease does not enable SGUK to satisfy the Court of what it needs to establish as being at least arguable, namely that there was a common understanding of the Parties that the building did not contain defects or did not contain life safety critical defects.

116. Further, it seems to me that what the Parties would have understood was that in the first instance allocation of the risk of having to remedy defects would be dealt with in the Agreement for Lease, but also, secondly, that the allocation of the risk of having to remedy defects during the period of the Lease would be dealt with in the Lease in the usual way.

117. Accordingly, I now turn to the Lease itself.

118. Two provisions in particular are of importance.

119. The repairing covenant is Clause 3.7 which requires SGUK *"whenever necessary to rebuild reconstruct renew or replace the whole of the Demised Premises"*.

120. I emphasise that the obligation includes an obligation *"to rebuild ... the whole of the Demised Premises..."*. This is an unlimited obligation except for a carve-out in respect of damage by Insured Risks.

121. Thus, on its face, the Tenant has a very wide obligation. If circumstances arise where the whole of the Premises has to be rebuilt, it is obvious that this will take a substantial period of time during which the Tenant will not have or may not have the use of the Premises.

122. On its face, the Tenant's obligation is capable of extending to including an obligation to remedy latent defects in the Premises, including defects which are so extensive or of such a nature as to require rebuilding of the whole of the Premises.

123. Mr. de Waal sought to persuade me that the scope of that obligation must be read in the light of the Agreement for Lease. As to that, firstly, it seems to me that the words of Clause 3.7 are clear on their face, and, secondly, on my construction of the Agreement for Lease, reference to that Agreement hinders rather than assists SGUK.

124. It also seems to me that the carve-out for Insured Risks is illuminating: it and the other provisions as to Insured Risks (e.g. as to suspension of rent) show that the Parties have expressly turned their minds to the sort of situation referred to in the authorities as the

types of event which might trigger the doctrine of frustration – subsidence, landslip etc) and have agreed that insofar as insurance is available, the consequence of such events will be borne by insurers.

125. Once such events as the Insured Risks have been carved out for separate treatment, a significant remaining category of defects requiring remedy will be latent defects arising out of the original design and/or construction of the Premises, some of which may be life safety critical and others of which may not be.

126. The second provision of the Lease which seems to me to be of importance is Clause 6.5. This makes it clear that the Landlord gives no warranty that the Premises are suitable for the purposes of the Tenant or any purpose.

127. Again, Mr de Waal attempted to persuade me that the scope of this provision should be read in the light of the Agreement for Lease and the common purpose. However, in my view Clause 6.5 is clear as excluding the Landlord being bound by any implicit agreement as to the Premises being fit for SGUK's educational purposes.

128. The authorities are clear that the doctrine of frustration cannot be invoked where the event relied upon was actually foreseen by the Parties – see the passages cited at paragraphs 33 and 34 above.

129. Further, I have accepted at paragraph 64 above Marcus Smith J.'s comment:

> If a future event is sufficiently foreseeable that it *should* have informed the manner in which the parties framed their agreement (particularly so far as the risk allocation provisions were concerned), then (to put it no higher than this) a court will be inclined to consider that the parties *will* have framed their agreement taking this factor into account.

130. For the above reasons this appears to me to be a case where the Parties have allocated the relevant risk and either took into account or should have taken into account that there could be fire safety defects in the Premises of sufficient seriousness that the Premises might need to be rebuilt or remedied so as to prevent their use for SGUK's educational purposes.

131. In reaching that conclusion, I have been assisted by, and agree with, the late Professor Treitel's analysis which I have set out at paragraph 72 above.

132. For these reasons I hold that the Lease was not discharged on the basis that the Parties' common purpose in entering into the Lease was frustrated.

133. For completeness, I should note that SGUK contends that summary judgment should not be granted in a case where what is involved is deciding "a controversial question of law in a developing area" – see the passage from the decision of the Privy Council in *Altimo Holdings* referred to at paragraph 12 above. In my view, this case does not involve any points of novel or developing law. On the contrary, it involves the application of well established principles, albeit to an area of concern which has grown in economic significance to numerous parties following the Grenfell Tower disaster.

134. Having come to that conclusion, I do not need to decide the point raised by the Landlord that discovery of defects is not the type of supervening event which triggers application of the doctrine of frustration – see in particular the passage from the judgment of Christopher Clarke L.J. in *Armchair Answercall* cited at paragraph 32 above.

Frustration by reason of changes of legislation

135. In paragraph 21 of its Defence, SGUK pleads:

> Alternatively to that primary case, the First Defendant relies on changes of legislation requiring remediation of dangerous buildings following the Grenfell Tower fire.
>
> a. On 16 May 2022, the Fire Safety Act 2021 came into force, amending the Regulatory Reform (Fire safety) Order 2005 ("RRO"). By Section 1A of the RRO, responsibility for the structure, external walls and fire doors of the building became expressly the responsibility of the responsible Person, here the first Defendant.
>
> b. Further, in June 2022:
>
> i. Part 5 of the Building Safety Act 2022 came into force. By that Part, interested persons, including anyone with a legal or equitable interest in any part of the building) could seek a remediation order against a relevant landlord (which included the First defendant) for relevant defects (including fire and structural defects) in relevant buildings (including those over 11 metres). Thereby, residents of the Building, with licences to occupy had recourse to require the First Defendant to remediate; and
>
> ii. Statutory guidance Approved Document B volume 2 (2019) was re-amended. This provided, inter alia, that external wall surfaces and, separately, any insulation products incorporated into façade systems of residential buildings over 11 metres must meet Euroclass A2-s1, d0 or better. By reason of the extensive fire safety defects, the Building's external facades do not meet those classifications and/or has not been and cannot be proven to meet those classifications and/or cannot be shown to be compliant with the Building Regulations in any other way,
>
> and as a result of those changes, taken separately or together, the Building was not compliant with the Building Regulations and required extensive remediation for occupation.

136. In the course of oral submissions, I asked Mr de Waal to explain this part of SGUK's case (Transcript Day 2 page 71):

> [Myself]: … But as I read it, all those points on fire safety, et cetera, would have applied under the old building regulations, and therefore nothing in the legislation, the Building Safety Act or the other statutory provisions you refer to, have actually changed the crucial point, which is that you've always been supposed to build a building so that it's safe. And the old building regulations apply and would produce the same result, even if there had been no new legislation. What do you say about that? And perhaps, it seems to me in a way, what you have to show is that the new legislation was a radical change in the landscape which couldn't have been foreseen.
>
> MR DE WAAL: Well, it certainly couldn't have been – Grenfell and what followed certainly couldn't have been foreseen. But, as I understand it, and your Lordship is, of course, much more familiar with these issues than I am, and I very much take your Lordship's point that building regulations predating the two Acts could have been brought into play to require the buildings to be fire safe, and so on. But as I understand it, the point is simply that the Acts focused people's attention on these issues and brought them into focus in a way that hadn't been focused before, therefore, the kind of investigation and remediation that is now required would not have been required or would not have occurred had it not been for these Acts coming into force.

He then referred to the pleaded case which I have set out above.

137. In my judgment, for SGUK to succeed in this way of putting the frustration case, it would need to show an arguable case that there had been changes introduced by legislation which either changed SGUK's relationship with the Landlord or caused SGUK to be unable to use the Premises as intended.

138. SGUK does not put forward an arguable case to establish either way of putting the case. Before the legislative changes remedial works to deal with the fire safety issues were necessary if the Premises were to be used for educational purposes. Whilst as a matter of generality the legislative provisions relied upon have had a significant impact, they have not changed that fundamental point as far as SGUK is concerned.

139. Accordingly I reject this alternative way of putting the frustration case.

Frustration: Conclusions

140. For the above reasons, I consider that this is a case where the application for summary judgment turns upon points of law which I can and should determine, as I have done.

141. As I have said at the beginning of this judgment, the Landlord seeks summary judgment in the sum of £9,031,398.47. However the Particulars of Claim claims only £1,257,077.40.

142. The Landlord has an application to amend in order to increase its claim. I will deal with that application as part of the consequential matters to be dealt with following handing down of this judgment. Until then the amount of the judgment in the Landlord's favour will remain undetermined.

DMGT's Claim

143. In the skeleton argument submitted by DMGT's counsel it is submitted at paragraph 14:

> At this hearing, DMGT therefore seeks an order, if and insofar as the Landlords' Summary Judgment Application is successful, that:
>
> 14.1 Judgment be entered upon in favour of DMGT upon its additional claims.
>
> 14.2 Each of (i) Study Group, and (ii) Holdings shall indemnify DMGT in respect of all sums that DMGT is liable to pay to the Landlords pursuant to any order for summary judgment.
>
> 14.3 Study Group and Holdings shall pay to DMGT such sums as it might be ordered to pay, and pay, to the Landlords pursuant to the Summary Judgment Order, together with interest from the date of the order until payment, within 7 days.
>
> 14.4 Study Group and Holdings shall pay (i) DMGT's costs of the claim and the additional claims, including the costs of the Landlords' application for summary judgment and DMGT's Application, such costs to be assessed if not agreed, and (ii) an appropriate sum on account of that liability within 7 days.

144. Before me, Mr Cumming K.C. for DMGT supported SGUK's resistance to the Landlord's application for summary judgment, but accepted that if SGUK were to be held liable for summary judgment, the Landlord's claim against DMGT would also succeed.

145. In that event DMGT claims the relief set out above, and SGUK did not resist that claim.