Neutral Citation Number: [2021] EWHC 1486 (Ch)

Case No: BL-2020-BRS-000027

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 07/06/2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

MOUNT WELLINGTON MINE LTD **Claimant**

- and -

RENEWABLE ENERGY CO-OPERATIVE LTD **Defendant**

- -
- -

Tim Pullen (instructed by **Direct Access**) for the **Claimant**
Edward Ross (instructed by **Direct Access**) for the **Defendant**

Arbitration claim dealt with on written submissions, without a hearing

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an arbitration claim brought pursuant to section 67 of the Arbitration Act 1996, dealing with an arbitration of disputes arising out of a lease. The present claimant was the respondent in the arbitration and the landlord in relation to the lease. The defendant was the applicant in the arbitration and (claims to be) the tenant under the lease. As will be obvious to anyone familiar with the Arbitration Act 1996, this claim, being brought under section 67, concerns a challenge to the jurisdiction of the arbitrator, rather than in relation to the merits of a substantive arbitration award.

2. The present claim is complicated by the changing sides in the various proceedings that have taken place or are taking place between the parties. To make things simpler, I shall generally refer to the present claimant as MWML and to the present defendant as REC Soc (or sometimes just "the society"), to distinguish it from a previous legal entity which was a limited company of the same name, which I shall call REC Co. The claim form was issued on 22 December 2020, by MWML acting through its director Richard Freeborn. It was supported by a witness statement made by Mr Freeborn dated the same date. It is opposed by the witness statement of Tim Nicholson, director of REC Soc, dated 15 February 2021. Mr Freeborn has made a second witness statement dated 25 April 2021. Each of these witness statements has exhibits.

3. The parties have agreed a bundle, which I have considered, together with written submissions by counsel. In this judgment, I refer from time to time to the page in the bundle where a particular document is to be found, by including it in square brackets. (I mention here that the bundle is not organised chronologically, and apparently does not contain a number of documents which I would have expected it to contain, but I proceed on the basis of what the parties have chosen to put in front of me.) On the proposal and agreement of the parties, the matter was dealt with by me on paper, rather than at an oral hearing. I have not therefore heard any oral evidence.

Background

4. Because this is a challenge to the arbitrator's jurisdiction, I am not deciding any of the underlying facts in dispute. That is for another tribunal (whether the arbitrator or a court) to decide hereafter. I am concerned only with the question of jurisdiction. For present purposes therefore, I need only say the following. MWML was and is the freehold owner of an office building, called the Slinky Building, at the site of Mount Wellington Mine, at Fernsplatt on the outskirts of Truro in Cornwall. There was some kind of agreement between MWML and REC Co, a company limited by guarantee, in early 2012, to grant the latter a lease for a term of 25 years. (REC Co was exempt from using the word "Limited" in its company name.) It was then run by a Mr Abraham Cambridge. The lease was apparently intended to demise the airspace above the building to a height of 600 mm, so that photo-voltaic panels could be placed there, and solar energy collected and exploited.

The lease

5. A copy of the lease document is in evidence, and bears two different dates. The date of 26 January 2021 appears next to the signatures of the director and secretary of REC Co on the signature page, but the date of 18 February 2021 appears in the "Particulars" of the lease at the beginning of the document. I should say that MWML argued in the arbitration that the lease was invalid for numerous defects of form, but the arbitrator held against this submission, and I am not now concerned with that.

6. For present purposes, the relevant clauses of the lease are the following:

> "20 GOVERNING LAW AND JURISDICTION
>
> 20.1. This lease and any dispute or claim arising out of or in connection with it or its subject matter or formation (including noncontractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
>
> 20.2. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this lease or its subject matter or formation (including noncontractual disputes or claims).
>
> […]
>
> 22 DISPUTE RESOLUTION PROCEDURE
>
> Any disputed matter, including any failure to agree on a new basic rent, referred to arbitration under this lease is to be decided by arbitration under Part 1 of the Arbitration Act 1996 by a single arbitrator appointed by the parties to the dispute. If they do not agree on that appointment, the then president of the Royal Institution of Chartered Surveyors may appoint the arbitrator at the request of any party.
>
> […]
>
> 24 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999
>
> A person who is not a party to this lease shall not have any rights under or in connection with it by virtue of the Contracts (Rights of Third Parties) Act 1999."

7. The intended consideration for the lease was apparently a combination of rent payments and free use (but not storage) of the electricity produced by the solar panels. MWML complains in the arbitration that it never received either. It says in evidence in this case that it was willing to allow REC Co to put solar panels on the roof provided that it also occupied offices in the building underneath. It is said that this occurred through a separate arrangement, apparently a sublease with another tenant called Kensa Engineering Ltd, with which again I am not concerned. It is not clear from the papers before me when the installation of panels on the roof took place, though it appears to have been done by December 2011, when REC Co made an application for a 'Feed In Tariff' account to British Gas, and MWML wrote a letter to REC Co. The exact date does not matter for present purposes. But it is said that REC Co needed a *lease* of roof space in order to benefit from the so-called Feed-in Tariff

for electricity supplied to the National Grid. MWML had to persuade its mortgagee to allow the grant of a lease of roof space, but succeeded in doing so.

8. I note in passing that REC Co created a charge in favour of Industrial Common Ownership Fund plc on 6 September 2011, which was registered on 13 September 2011 [274].

The conversion from company to society

9. It then appears that at some point during 2014 REC Co moved out of the offices subleased in the building. MWML ascribes this to its having experienced some financial difficulties. Whether that is correct or not does not matter for present purposes. But the direction of the company seems to have been taken over by a Mr Tim Nicholson, who formed the idea of converting the company into a registered society under the new Co-Operative and Community Benefit Societies Act 2014. REC Co converted from a company limited by guarantee to a co-operative society by special resolution passed on 8 August 2014, under the 2014 Act, section 115 (which came into force on 1 August of that year). The Financial Conduct Authority registered it as a registered society on 29 September 2014. I shall come back to the relevant statutory provisions and the conversion process later. Thereafter, the new registered society (REC Soc) claimed to be the tenant under the disputed lease.

10. Again, I note in passing that the newly registered society created a charge in favour of Co-Operative Loan Fund Ltd on 3 October 2014 [280]-[294], which was registered on 15 October 2014 [279]

11. In May 2015 there was an email correspondence between the parties [63]-[65], in which REC Soc confirmed the details of its conversion from a limited company and sought access to the roof in order to investigate a suggested roof leak. MWML (the lessor) denied receiving any information about the conversion, but in any event claimed that the lease had "expired last October when the company closed". In July and August 2015 there was further email correspondence between the parties [70]-[71], in which REC Soc repeated its view that the lease was still valid and enforceable, but it appears that MWML was maintaining its position to the contrary.

The arbitration

12. The arbitration was originally commenced by an application by REC Soc to the RICS for the appointment of an arbitrator dated 19 August 2016, but not apparently sent until 19 September 2016. It states the dispute between the parties as follows [255]:

> "The respondent [MWML] disputes the validity of a roof lease between the parties for the following reasons: (1) because the applicant [REC Soc] vacated office premises that were subject to a separate lease and (2) because the applicant converted from a company to a co-operative society. They also allege that the applicant damaged the roof of the building during the installation of the solar photovoltaic (PV) system. The respondent applied to British Gas to transfer the feed in tariff account from the applicant to the respondent and has refused access for the applicant to read the meter connected to the solar photovoltaic system."

13. Although there is no formal document recording this in the bundle, it is clear from the award on jurisdiction, and other documents, that Mr A P Harris of HNG Chartered Surveyors was appointed arbitrator. He must have written to the parties on 11 October 2016 (though again I have not seen this) because the next day MWML replied in a letter dated 12 October 2016, which is in the bundle [193]. In that letter, MWML asserted that there *had* been a roof lease, but that it was forfeited when the limited company "closed on 17 November 2014". On the other hand, the registered society was "a different body corporate" and had "never legally held a lease".

First forfeiture

14. It appears from an email dated 10 December 2016 [75] that a notice of forfeiture was originally served by MWML on 1 November 2014 (though again there is no copy in the bundle). It further appears from an email dated 11 April 2017 [88] that a claim was issued for relief from forfeiture from the County Court at Truro, under case reference D00TR037 (though there are no pleadings in the bundle), and that these proceedings were then ongoing, but that MWML had served another notice under section 146 of the Law of Property Act 1925 (also not in the bundle), which the defendant was saying was defective. On 20 April 2017 "Renewable Energy Co-Operative Limited" obtained relief from forfeiture from the court [49].

15. On 21 April 2017 REC Soc by email asked the claimant for access to the building to inspect the service media on the roof. MWML replied on 24 April 2017 to say that it owned no such media and

> "therefore, the lease does not provide the tenant with any rights to connect to any service media, or inspect it."

It also asked REC Soc

> "to confirm your agreement the lease does not provide the tenant with any rights to ever set foot inside any buildings on site" [68].

Second forfeiture

16. On 23 May 2017 MWML served a further section 146 notice on REC Soc [51]-[55]. This was addressed to "THE LESSEE of the property (the Airspace immediately above the Slinky Building…" and complained of a number of breaches of the lease. The letter serving the notice was addressed to Mr Nicholson and his colleague Stuart Major at "Renewable Energy Cooperative Ltd" [225]. From a letter dated 12 June 2017 [72] sent by MWML to the same addressees, it is clear that there had been intervening correspondence (which I have not seen) about a possible appointment of an expert, seemingly to decide whether the PV equipment met the terms of the lease.

17. There were further emails between the parties on 31 July 2017 [66]. The registered society informed MWML that British Gas (as the energy company taking the feed from the solar PV system) had reviewed the position and concluded that the lease was valid, and asked for access to read the meter. MWML simply replied:

> "Hi Tim, Thanks for your email. Cheers, Richard."

18. On 9 August 2017 REC Soc made a second claim for relief from forfeiture, again in the County Court at Truro, under case reference D00TR240 [13]-[24]. MWML filed a defence and counterclaim in that claim on 18 December 2017 [214]-[223], and REC Soc filed a reply and defence to counterclaim on 15 January 2018 [312]-[320]. There is also in the bundle a copy of MWML's expert report dated 10 May 2018 [296]-[311]. However, these proceedings did not continue to judgment. MWML made a CPR Part 36 offer on 16 August 2018 [183]-[186], which was clarified in email correspondence on 28 August 2018 [188]-[189], and accepted by REC Soc on 6 September 2018 [190], [192]. I shall need to return to this later.

Dispute as to jurisdiction

19. On 24 February 2020 REC Soc sent an email to the arbitrator regarding further issues which might be dealt with in the arbitration [105]-[106], [261]-[262]. It was clear that there were issue between the parties as to what was and what was not within the arbitrator's jurisdiction. It appears that the arbitrator asked MWML to provide points of claim in relation to the questions of jurisdiction. These were provided on 13 August 2020 [108]-[132]. REC Soc served points of reply on jurisdiction on 3 September 2020 [133]-[149]. Finally, MWML served its written response on 17 September 2020 [150]-[161].

20. The jurisdiction points taken before the arbitrator by MWML were as follows:

    1. The lease was not a valid deed;

    2. The registered society not a party to the lease;

    3. The registered society had already aborted the arbitration;

    4. All matters raised by the registered society had already been settled by a Part 36 offer;

    5. MWML was not in a position to grant access to the premises and its electricity supplies, because they belonged to others;

    6. The arbitrator had no power to determine true construction of, and to rectify, the lease.

21. Before going on to deal with the arbitrator's decision and the substance of the claim, I will simply note in passing that no argument appears to have been made about jurisdiction based on the effect of clauses 20 and 22 of the lease. Clause 20.2 constituted an irrevocable submission to the exclusive jurisdiction of the courts of England and Wales to settle any dispute or claim that arose out of or in connection with the lease. On the face of it, this means that any dispute should have gone to court.

22. Clause 22 dealt with arbitration. The parties appear to have treated this as itself a conclusive submission to arbitrate any disputes arising. That is not however what it says. It says

> "Any disputed matter … referred to arbitration under this lease is to be decided by arbitration under Part 1 of the Arbitration Act 1996 by a single arbitrator appointed by the parties…"

On the face of it, therefore, the clause only applies to a dispute that has *otherwise been agreed* to be arbitrated, and does not itself constitute an agreement to arbitrate anything. Instead, the exclusive jurisdiction clause appears to give jurisdiction to the courts.

23. But, as I say, the parties have not so treated this clause. In particular, MWML reacted to the request for arbitration as if it too was bound by the clause, subject only to such disputes about jurisdiction as it might choose to put forward. Those arguments did not include whether clause 22 amounted to an arbitration clause at all. Accordingly, that objection (if it is indeed a valid objection, which I do not need to decide) has been waived, and it is too late for MWML to raise it now: *cf* Arbitration Act 1996, s 31(1).

Decision on jurisdiction: this claim

24. The arbitrator published his award on jurisdiction on 26 November 2020 [163]-[180]. This found in favour of REC Soc on all points. MWML was dissatisfied with this award, and, as I have said, issued this claim on 22 December 2020 to challenge it. In the claim form, MWML does not repeat all the jurisdictional challenges put to the arbitrator. Instead, it says that the arbitrator's decision that he had jurisdiction was wrong on three separate grounds. These were:

> "(i) [REC Soc] was not a party to the lease dated 18 February 2012.
>
> (ii) the Arbitrator was not entitled to determine the matters which [REC Soc] had requested he determine because he was prohibited from doing so because they had been compromised and/or by the doctrine of res judicata or the rule in Henderson v Henderson (1843) 67 ER 313.
>
> (iii) further issues he was asked to determine by [REC Soc] in an email dated 24 February 2020 were not within the scope of the application or reference made by [REC Soc] on 19 August 2016."

25. These grounds are amplified in the witness statements of Mr Freeborn, on behalf of MWML, and argued by the written submissions on its behalf settled by Mr Pullen. In those written submissions, the first ground is separated out into four different points. The first relates to the conversion of the company to a registered society, the second relates to the registration of the lease at HM Land Registry, the third relates to estoppel, and the fourth relates to admissions. In effect, therefore, there are a total of six points which have been argued before me. These therefore are:

(1) The effect of conversion from a company to a registered society;

(2) The effect of registration of the lease;

(3) Estoppel;

(4) Admissions;

(5) *Res judicata*/*Henderson v Henderson*;

(6) The scope of the arbitration.

The law

26. It will be convenient if I first set out the relevant law. So far as material, the Arbitration Act 1996 provides as follows:

> **"30.— Competence of tribunal to rule on its own jurisdiction.**
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
>
> (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.
>
> **31.— Objection to substantive jurisdiction of tribunal.**
>
> (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.
>
> (2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.
>
> (3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.
>
> (4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—
>
> (a) rule on the matter in an award as to jurisdiction, or
>
> (b) deal with the objection in its award on the merits.
>
> If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

[…]

67.— Challenging the award: substantive jurisdiction.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section."

27. Next, there is the Co-operative and Community Benefit Societies Act 2014. So far as relevant, this provides as follows:

"109 Amalgamation of societies

(1) Any two or more registered societies may, by special resolution of each of them, become amalgamated together as one society.

(2) The amalgamation may involve the dissolution, or division of the funds, of any of the societies.

(3) On the amalgamation, the property of each of the societies vests in the amalgamated society without the need for any form of conveyance other than that contained in the special resolution.

(4) Section 111 contains provisions about special resolutions under this section.

(5) The amalgamation does not prejudice any right of a creditor of any of the societies.

[…]

112 Conversion of society into a company, amalgamation with a company etc

(1) A registered society may by special resolution determine to—

(a) convert itself into a company,

(b) amalgamate with a company, or

(c) transfer its engagements to a company.

In this section 'company' means a company under the Companies Acts.

(2) A registered society's registration under this Act becomes void and (subject to section 126) must be cancelled by the FCA if the society—

(a) is registered as a company,

(b) amalgamates with a company, or

(c) transfers all its engagements to a company.

(3) Section 113 contains provisions about special resolutions under this section.

(4) Section 114 contains further provisions about the conversion of a society into a company.

(5) An amalgamation or transfer of engagements does not prejudice any right of a creditor of the society.

[…]

114 Conversion of society into a company: supplementary

(1) This section applies in relation to the conversion of a society into a company under section 112.

(2) Where—

(a) a special resolution for converting a registered society into a company contains the particulars required by the Companies Acts to be contained in a company's memorandum of association, and

(b) the FCA has registered a copy of it,

a copy of it under the FCA's stamp and seal has the same effect as a memorandum of association duly authenticated under the Companies Acts.

(3) Registration of a registered society as a company does not affect—

(a) any right or claim for the time being subsisting against the society, or

(b) any penalty for the time being incurred by the society.

(4) For the purpose of enforcing any such right, claim or penalty, the society may be sued and proceeded against in the same way as if it had not become registered as a company.

(5) Any such right or claim, and the liability to any such penalty, has priority as against the company's property over all other rights or claim against, or liabilities of, the company.

115 Conversion of company into a registered society

(1) A company registered under the Companies Acts may by special resolution determine to convert itself into a registered society.

(2) The resolution must—

(a) be accompanied by a copy of the society's rules, and

(b) appoint 3 members of the company ("the appointed members") to perform the functions mentioned in subsections (3) and (4).

(3) The appointed members and the company's secretary (or, if it has no secretary, a director of the company) must sign the rules.

(4) The resolution must provide either—

(a) that the appointed members are authorised to accept any alterations to the rules made by the FCA without further consulting the company, or

(b) that the appointed members must lay any such alterations before the company in general meeting for acceptance.

(5) A copy of the special resolution and the society's rules must be sent to the FCA.

(6) On registering the society under this Act, the FCA must (in addition to giving it an acknowledgement of registration under section 3) give it a certificate similarly sealed or signed that the society's rules have been registered.

(7) The name under which the company is registered as a registered society must not include the word 'company'.

(8) A copy of the special resolution and the FCA's certificate must be sent to the registrar of companies, for registration by the registrar.

(9) The conversion takes effect on the registrar registering the resolution and certificate.

> (10) On the conversion taking effect, the company's registration under the Companies Acts becomes void and the registrar must cancel the registration.
>
> […]
>
> **117 Conversion of company into a society: no effect on liabilities**
>
> (1) Registration of a company as a registered society does not affect—
>
> (a) any right or claim for the time being subsisting against the company, or
>
> (b) any penalty for the time being incurred by the company.
>
> (2) For the purpose of enforcing any such right, claim or penalty, the company may be sued and proceeded against in the same way as if it had not been registered as a society.
>
> (3) Any such right or claim, and the liability to any such penalty, has priority as against the society's property over all other rights or claims against, or liabilities of, the society."

The 'conversion' point

28. The first point is the so-called 'conversion' point. MWML says that when the original limited company, Renewable Energy Cooperative, was converted into a registered society under the 2014 Act, it became a different legal entity, and, without any express assignment by the company to the society, the *society* (the present defendant) was never entitled to exercise any rights granted to the *company* under the lease. Hence the arbitrator has no jurisdiction in the dispute between MWML and *the defendant*. REC Soc accepts that there never was any such express assignment of the lease. But it says that there was no need for this, because the society is *the same legal person* as the original company, merely clothed in a different legal regime.

29. In support of its contention that the company and the society are two different legal persons, MWML makes a number of arguments. The first of these is that there is no provision in the 2014 Act for the transfer of property and assets from a private limited company to a registered society, or *vice versa*, on the conversion of the one into the other. But there *is* a provision dealing with the vesting of property and assets in the case where there is an *amalgamation* of two registered societies, in section 109: see section 109(3). MWML says this is deliberate. It says that, for example,

> "a converting company may not wish to transfer all of the company's property to the new registered society. It is a simple matter to assign property that they do wish to stay with the registered society. Indeed, there is no reason why this could not have been done here."

30. I do not accept this argument. The reason that it is necessary to provide expressly in section 109 for the vesting of the property of the two societies on an amalgamation is that there are *two* societies which become *one*. That is not this case, where *one* company becomes *one* society. Moreover, the argument that the converting company may not wish to transfer all of the company's property to the new registered society

proves too much. That could also be true of two amalgamating societies, and yet for which situation legislative provision is expressly made.

31. Further still, MWML does not explain how a converting company is able expressly to transfer its assets, to the extent that it wishes to do so, to a registered society. According to MWML, this is "a simple matter". But it is not simple at all. The problem is that, at the time that the converting company is still able to transfer its assets, according to the claimant's argument the registered society *ex hypothesi* does not yet exist. The converting company ceases to be a registered company *at the same moment* that the registered society is registered: see section 115(9), (10). There are two possible ways of looking at these provisions. One would be to say that there is only one legal person throughout (as REC Soc says), which converts from one legal regime to another, on the registration of the resolution to convert. However, if there are two separate legal persons (as MWML says), then one of them ceases to exist at the same moment that the other comes into existence. Yet, so far as I can see from the legislation, if there are two legal persons, there cannot be a moment in time when the converting company and the registered society *both* exist. The criticism of the so-called 'Copenhagen' theory of quantum mechanics embodied in the idea of Schrödinger's cat, by which (according to that theory) in the experimental circumstances postulated the unfortunate cat is simultaneously alive and dead, seems equally applicable here.

32. So the *inter vivos* assignment suggested by MWML as a "simple matter" is in fact impossible. On the one hand, you cannot assign to a not (yet) existent person. On the other hand, you cannot assign to anyone once you are dead. If MWML is right, and the company ceases to exist whilst still owning assets, those assets will pass to the Crown as *bona vacantia*: Companies Act 2006, s 1012. It will take some time, and considerable expense, including liaison with the Government Legal Department, and an application to the court, before the assets can be retrieved by a 'successor'. It is impossible to believe that Parliament intended all this to happen where a limited company converted itself into a registered society. It is frankly much easier to believe that this is simply a change of *status*, of the legal regime under which an already existing legal person, created and recognised by English law, is governed. In my judgment it is much more akin to the change of status of a company under section 89 of the Companies Act 2006, where, by re-registration, a private company becomes a public company, or *vice versa*, or a limited becomes an unlimited company, or *vice versa*. There is no statutory provision in such a case for the assignment of rights and liabilities. The legal regime changes, but the person remains the same. So do the assets and liabilities.

33. The consequence is that, in my judgment, when a limited company converts to a registered society, or a registered society converts to a company, the assets and liabilities which attached to the entity before the process takes place continue to attach to the entity when the process is ended. The argument which MWML makes against this is the existence of the provisions in the 2014 Act relating to the enforcement of debts and liabilities of the original entity against the entity ultimately created by the process of conversion. But these are put in terms of the original creditor not being *prejudiced* by the conversion of the original entity into the new entity. There is no express provision, for example, that the debt or liability of the original entity *is* the debt or liability of the new entity. In my judgment, that is because it is not necessary.

The converted entity remains the debtor. All that these provisions achieve is to ensure that a creditor or potential creditor is not placed in any worse position by the conversion process, and is still able to employ any means to recover the debt or liability that was appropriate against the *original* entity against the new one, even though the legal regime that governs that entity has now changed.

Caselaw authority

34. The views expressed above were reached without consideration of any authority. Indeed, the parties said there was none on the point. Yet when reading a practitioners' note which had been supplied with the bundle, I saw a reference to a decision of Farwell J in 1940. Although it had not been referred to in the written submissions of the parties, I looked at the full decision. It seemed to me to be relevant to this question, and I therefore invited the parties to let me have any written submissions they wished in relation to this decision. Both parties responded to this invitation, and I have read and taken into account their submissions.

35. In *Re London Housing Society's Trust Deeds* [1940] Ch 777, a society had been registered in 1910 under the Industrial and Provident Societies Act 1893. In 1935 the society had established trust funds to provide pensions for its staff. Clause 11 of the principal trust deed provided that:

> "If the society shall at any time give to the trustees notice in writing that the society does not intend to make any further contributions to the fund or an order shall be made or any effective resolution passed for the dissolution of the society, the fund shall be realized and shall be distributed amongst such of the then employees of the society and such past employees and such dependants of past employees and in such proportions as shall be determined to be just and equitable by an arbitrator to be appointed by a unanimous resolution of the trustees, and if such appointment is not made within three months after the giving of such notice or the making or passing of such order or resolution as aforesaid, then the majority of the trustees may request the President for the time being of Law Society to appoint him accordingly."

36. In 1939 the society passed a special resolution under section 54 of the 1893 Act to convert the society into a limited company under the Companies Acts. That section provided:

> "(1.) A registered society may by special resolution determine to convert itself into a company under the Companies Acts, or to amalgamate with or transfer its engagements to any such company.
>
> (2.) If a special resolution for converting a registered society into a company contains the particulars by the Companies Acts required to be contained in the memorandum of association of a company, and a copy thereof has been registered at the central office, a copy of such resolution under the seal or stamp of the central office shall have the same effect as a memorandum of association duly signed and attested under the said Act.
>
> (3.) If a registered society is registered as, or amalgamates with, or transfers all its engagements to, a company, the registry of such society under this Act shall

> thereupon become void, and the same shall be cancelled by the Chief Registrar or by the Assistant Registrar for Scotland or Ireland under his direction; but the registration of a society as a company shall not affect any right or claim for the time being subsisting against such society, or any penalty for the time being incurred by such society; and, for the purpose of enforcing any such right, claim, or penalty, the society may be sued and proceeded against in the same manner as if it had not become registered as a company; and every such right or claim, or the liability to such penalty, shall have priority, as against the property of such company, over all other rights or claims against or liabilities of such company."

37. It will be seen that that section contains provisions corresponding in substance to those in sections 112 and 114 of the 2014 Act. Although the judge did not set out its terms verbatim, he also referred (at 782) to section 58 of the 1893 Act, in these terms:

> "It provides the ways in which a registered society may be dissolved; first, by an order to wind up or a resolution for winding up; or secondly, by the consent of three-fourths of the members, testified by their signatures to an instrument of dissolution. So far as the dissolution of the society is concerned, it is a totally different process which requires different machinery to bring about from the conversion of a registered society into a company, which is provided for by s. 54."

Sections 119 and 123 of the 2014 Act make provision corresponding to that in section 58 of the 1893 Act. Limited companies are of course subject to dissolution in the well-known ways provided for by the Companies Act 2006. The point to make is that, either way, dissolution is, as Farwell J said, a quite different process compared to conversion.

38. In *Re London Housing Society's Trust Deeds* the questions arose whether the trustees of the pension funds continued to hold those funds on the same trusts and for the same objects as before, and whether the employees of the company were entitled to benefit under the trust deeds executed by the society. Farwell J, in an *ex tempore* judgment, held that the answer to both questions was Yes. He said this (at 782-84):

> "In my judgment, the position comes to this. Nothing has been done which brings into play, according to its terms, the provisions of clause 11 of the trust deed. There has been no notice given by the society such as is contemplated in the first part of the clause, nor has there been an order or effective resolution passed for the dissolution of the society. What has been done is something which is not under s. 58, the dissolution section of the Act, but under s. 54, which is not a dissolution section at all. but is the section which enables a registered society to go through a form of conversion and come out at the other end, after the operation is over, a limited company. But the liabilities which the registered society may have incurred before the operation takes place are to be in no way prejudiced by that change. The society is to remain liable for those liabilities, and such claims are to have priority against the property of the company over all other rights or claims against or liabilities of the company. It is quite clear, therefore, that the Legislature, in passing this legislation providing for a conversion in this way, was not treating the registered society as having determined altogether for all purposes, but was treating the act which was done as being in the true sense of the word a conversion and not a dissolution. In my judgment there is nothing in the

> trust deed itself which brings to an end the trusts provided by that deed, and the trustees hold the funds, so far as the deed itself is concerned, on trust for the employees and ex-employees of the society. What are the trustees to do now that the society has ceased as a society and there has come into life a company which is the society in another form? In my judgment the answer must be that the trustees hold the trust funds in their hands on exactly the same trusts as they held them before. The beneficiaries, the persons who are entitled to the benefit of the fund, or may be benefited by the fund, are precisely the same persons, I do not mean individually, but they are precisely the same class of persons as the class of persons before - that is to say, persons who were employees or ex-employees of the society and are now employees or ex-employees of the society in its new form as a limited company. It is no doubt true to say that the registered society and the limited company are, in one sense of the word, separate legal entities, but I think that that fact does not really alter the position that, although in law they may be separate entities, they are in substance and in truth exactly the same thing with a different structure and a different machinery. I think that that is what Buckley L.J. is referring to at the end of his judgment in *Blythe v. Birtley* [at 238]: 'Sect. 71 simply meant to provide that they might change their legal structure, but the new entity existing under the new legal structure was to be a reproduction of the previous entity with different machinery for its government.' I think that what Buckley L.J. is there saying is that, although in law there may have to be recognized the fact that strictly they were two entities, the new entity under the new legal structure is a reproduction of that which existed before, namely, the society.
>
> In my judgment the only practical way of dealing with a question of this sort, having regard to the terms of the Act and the express provision in the Act for enabling a registered society to convert itself into a limited company, is to treat for this purpose the two things, the registered society and the limited company, as the same thing in different costume. The registered society, the employees of the society, and the objects of the trusts, are, as it were, carried on, and continued in the same form as before except that the entity which employs them has a different name and a different structure from that which the society had: But in truth and in substance the society and the company are the same thing and, therefore, the trustees, if they continue to apply the trust funds for the benefit of the persons for whom they would have employed them had the registered society remained, will not be committing any breach of trust. They will in fact be carrying out the purpose of the trust and the reason for which it was established."

39. Towards the end of that extract, Farwell J refers to the decision of the Court of Appeal in *Blyth v Birtley* [1910] 1 Ch 228, and in particular a comment in the judgment of Buckley LJ (later Lord Wrenbury). I should make clear that *Blyth v Birtley* was actually a case about a friendly society rather than a registered society. However, like Farwell J, I cannot see that that makes any difference. The relevant legislation (the Friendly Societies Act 1896, section 71) provided for a friendly society by special resolution to convert itself into a limited company, just like section 54 of the 1894 Act and now section 112 of the 2014 Act in relation to a registered society. So, the comment of Buckley LJ was in point, even if not actually binding upon Farwell J.

40. MWML submits that the decision of Farwell J recognises that the society and the company are two different legal entities. I agree that the judge in that case uses expressions such as "in law they may be separate entities", and "strictly they were two entities". But I read those expressions as meaning that a company and a registered society are two different legal regimes, not that a company or society converted under the 1893 Act is a new legal person, distinct from the pre-conversion legal person. This is confirmed by the fact that Farwell J goes on to say that the converted society (now a limited company) is "the same thing in different costume", and "the society and the company are the same thing". Moreover, he expressly accepts (at 782, 783) that the employees of the society are now employees of the company, though the legislation makes no provision for such a transfer, and the report of the case does not refer to any novation of contracts between the relevant parties. In my judgment, the explanation for this is that, since "the society and the company are the same thing", the employees continued to be employed by the same employer.

41. Of course, the *London Housing Society* case dealt with the conversion of a registered society into a limited company. The present case, on the other hand, deals with the conversion of a limited company into a registered society. It will be seen that the 2014 Act deals with both possibilities. But it will also be seen that there is no significant difference in the legislative treatment between the conversion in one direction and in the other. Thus, if Farwell J is right in his approach to the conversion of a registered society into a limited company, in treating the latter as the *alter ego* of the former, and in law "exactly the same thing with a different structure", there is no proper basis for not doing the same thing when the conversion is in the opposite direction. Indeed, although the parties in the case before me differed as to what the decision actually meant, they agreed that it was applicable equally to the case of a conversion in the opposite direction (and relied on it accordingly). Accordingly, I treat the decision of Farwell J as supporting the decision to which I had already independently come.

The registration point

42. I turn to the second point. This is the effect of registration at HM Land Registry of the lease in the name of the defendant registered society. According to the arbitrator's award, the lease was so registered on 8 May 2014. However, there was no first-hand evidence before me of the register (for example, office copy entries) or of the conveyancing or other process by which REC Soc became registered as the proprietor of the lease. But MWML accepted that, by virtue of section 58 of the Land Registration Act 2002, the legal estate in the lease vested in REC Soc even if it would not otherwise do so. The arbitrator treated this as conclusive.

43. MWML's argument is that the vesting of the lease in REC Soc

> "cannot override the proper construction of the arbitration clause. That must require the party to either be an assignee or the party or same legal entity that actually entered into the lease."

I agree that there is no evidence of any express assignment of the lease from REC Co to REC Soc. (Indeed, I have explained why I think such an assignment could never have occurred.) But I have held that REC Soc *is* the same legal person who entered into the lease, even though now governed by a different legal regime. That person

therefore is a party to and still owns the lease. In my judgment there is therefore nothing in this point.

44. However, even if REC Soc were not the same legal person as entered into the lease, the lease would still be vested in it by virtue of section 58 of the 2002 Act. And, by virtue of the doctrine of privity of estate, REC Soc would have succeeded to the rights of the original tenant against the landlord, including those relating to the resolution of disputes and arising under the arbitration clause. So there would still be nothing in it.

The estoppel point

45. The third point is that MWML is 'estopped' from asserting that REC Soc was not the tenant under the lease. In view of my decisions on the first two points, this does not arise. But I will deal with it nonetheless. First of all, there is a minor problem of nomenclature. MWML's submissions refer to the doctrine of 'proprietary estoppel'. But this is not the doctrine engaged by REC Soc. *Estoppel* is a principle of the common law of evidence and procedure which prevents a party in certain circumstances from asserting a fact and adducing evidence in support of the allegation. It has nothing necessarily to do with property rights. *Proprietary* estoppel on the other hand is a principle of substantive obligations/property law in equity (not at common law), whereby in certain circumstances a person may be held to have acquired an equitable *property* right as against another person.

46. In the present case, what REC Soc argued was that the letter of 23 May 2017, attaching a further section 146 notice, amounted to representations that REC Soc had an interest in the lease, on which it was entitled to and did rely to its detriment. I do not accept this. I agree that REC Soc took proceedings for relief from forfeiture on the basis of this notice. If it mattered, this *might* amount to reliance on a representation. However, it is not necessary to decide that, because there must be first of all an appropriate representation. At the time of the letter and notice, the parties were in dispute as to whether REC Soc was a party to the lease or not. The notice was carefully addressed to "the lessee" and not to any particular person by name. It was sent to the registered office of the original lessee, REC Co. I accept that the letter itself was addressed to Mr Nicholson and Mr Major, and that Mr Nicholson had not been an officer of the original lessee, whereas Mr Major had been. But that is equivocal, and in context I do not think that an objective bystander could have thought that this letter and notice taken together were asserting unequivocally that *REC Soc* was the lessee or otherwise had an interest in the lease. So, the estoppel point fails at the first hurdle.

The admission point

47. The next point is based on what happened in the second proceedings for relief from forfeiture, no D00TR0240 (which were settled when a Part 36 offer was accepted). REC Soc says that in those proceedings MWML *admitted* that, in the first relief from forfeiture proceedings (no D00TR037), the judge found that the lease was subsisting as between the parties to that litigation. MWML on the other hand denies that the judge found that a lease subsisted between the parties. In the second proceedings, REC Soc pleaded (at paragraph 8 of the particulars of claim) that in the earlier proceedings the judge "found that the lease was subsisting as between the claimant and defendant", and went on to set out or summarise the terms of the order. At

paragraph 3 of MWML's defence to that claim, it pleaded "paragraph 8 of the particulars of claim is admitted". So REC Soc is right to say that the point was admitted.

48. In any event, however, and going beneath the surface of the admission, the judge's order of 20 April 2017 declared that any purported exercise of a right of re-entry or forfeiture of the lease was void, ordered that relief from forfeiture was granted without condition, and ordered that MWML should pay REC Soc's costs. That declaration and those orders, taken together, are in my judgment consistent only with the continued subsistence of the lease between the parties, and completely inconsistent with its non-subsistence. So, the admission by MWML was completely justified.

49. I also note that, in the second claim for relief from forfeiture, REC Soc pleaded at paragraph 1 of the particulars of claim of August 2017 that the lease of 2012 was made between "the claimant and the defendant". But, long before that date, the limited company that had entered into the lease had converted into a registered society. So the pleading was that the *registered society* was a party to the lease. Yet by paragraph 1 of the defence, MWML *admitted* paragraph 1 of the particulars of claim. And paragraph 2 stated that:

> "Save that the said lease was entered into whilst [REC Soc] was a private limited company, no admissions are made to paragraphs 5, 6 and 7 of the particulars of claim."

On its face, therefore, MWML was admitting that the entity which had entered into the lease was the same entity that was now claiming relief from forfeiture, and that only the legal regime governing it had changed. That simply confirms the conclusion to which I had already come.

Res judicata/Henderson v Henderson

50. The fifth point relates to the doctrines of *res judicata* and *Henderson v Henderson*, which apply to arbitrations as they do to litigation: *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 642-43. As it is put in *Foskett on Compromise*, 9th ed, (to which MWML referred me), at [6.01],

> "An impeached compromise represents the end of the dispute or disputes from which it arose. Any issues of fact or law that may have formed the subject matter of the original dispute are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action."

But this does not answer the all-important question, as to exactly what was *the dispute* which was compromised. That is a fact-sensitive question.

51. The second relief from forfeiture proceedings were settled by the acceptance by REC Soc of a Part 36 offer on 6 September 2018. MWML submits (as it submitted to the arbitrator) that the dispute between the parties had been settled, and that therefore the arbitrator had no jurisdiction to deal with the arbitration. It says that

> "63. … all the issues that [REC Soc] here seeks to ask the Arbitrator to determine were factual issues which formed part of and were within the compromised relief from forfeiture action and the settlement of it on 6 September 2018. This includes most of the issues in the original reference to arbitration on 19 August 2018 [255], and the other issues that [REC Soc] has asked the Arbitrator to determine in its email dated 20 February 2020 [261-263]."

52. REC Soc on the other hand submits that the only issue that was determined by the court was the question of relief from forfeiture, because the arbitrator had no jurisdiction to deal with that, and so the matter had to be ventilated in court proceedings. Accordingly, all the other issues between the parties were left untouched, and the arbitration concerning them could continue.

53. The second claim for relief from forfeiture comprised exactly that. The claim form itself said "[REC Soc] seeks relief from that forfeiture so that the lease can continue." The particulars of claim set out the details of the lease, the section 146 notice, and the alleged breaches of covenant. The prayer claimed "Relief from forfeiture on such terms as the court shall deem just and equitable". The defendant to those proceedings (MWML, the lessor) served a defence and counterclaim. That defence dealt mainly with the allegations contained in the claim itself. The counterclaim then repeated all those allegations, and pleaded the proviso for re-entry in the lease and the section 146 notice, together with an alleged failure by the tenant to comply with the requirements of the notice.

54. However, MWML thereafter made a formal offer under Part 36, which was expressed to be a defendant's part 36 offer to settle the whole of the claim and counterclaim. The details of the offer are out as follows:

> "[MWML] consents to an order granting [REC Soc] relief from forfeiture and accordingly the lease dated 18 February 2012 shall continue under its full original terms and [MWML]'s section 146 notice dated 23 May 2017 is set aside".

It was made express that the offer took into account the whole of the counterclaim.

55. REC Soc sought clarification of the Part 36 offer, in an email of 16 August 2018. On 28 August 2018, MWML replied to this email. In part, it said this:

> "Our Part 36 offer is for the lease to continue precisely under its original terms, all of which were chosen by you, and with which you were happy out [sic] the outset of the lease in 2012; it is not an offer to renegotiate any of those terms.
>
> You have chosen for your claim to be limited to relief from forfeiture and your legal costs – and nothing else.
>
> Your claim does not include any of the elements you list in your points 3, 4 and 5 above – or anything else.
>
> The Court is very strictly limited to granting you only what you choose to claim for, which is relief from forfeiture and your legal costs – and nothing else.

> Our Part 36 offer consents to an order granting you relief from forfeiture and your legal costs, which meets your claim in full – and nothing else."

Having received that clarification, the offer was accepted by Mr Nicholson on behalf of REC Soc by email dated 6 September 2018, attaching a copy of the notice of acceptance dated 5 September 2018.

56. In submitting that the compromise of the forfeiture proceedings compromised the whole underlying dispute between the parties, including that the subject of the arbitration, MWML relies in particular on the decision of Proudman J in *Ovlas Trading SA v Strand (London) Ltd* [2009] EWHC 1564 (Ch). In that case Ovlas purchased the share capital of another company (GAL), which had a subsidiary trading company (GHAL). Arising out of the acquisition, there were two claims brought by the claimants against the defendants. One was a claim by Ovlas, GAL and GHAL against the defendants for dishonestly misappropriating funds of GAL and GHAL before the acquisition took place. A Part 36 offer was made and accepted in relation to that claim, and the defendants paid the sums claimed in full, with interest and costs. The second claim was brought by the claimants against the defendants for damages arising from a conspiracy to injure by unlawful means, namely misrepresentations made in the course of negotiations to sell and purchase.

57. Subsequently, the claimant sought permission to amend the second claim, thereby bringing in factual allegations made in the first, compromised claim. The main purpose of the amendment was to recast the particulars of loss and damage, that is, the difference between the price paid and the true value of the companies. The defendants objected, both as a matter of discretion because of lateness, prejudice to them and other matters, and also because they said it would be an abuse of the process to allow a party to settle a claim and then reintroduce factual elements from that compromised claim into another.

58. Proudman J held that the defendants were right on both arguments. I am not concerned with the first of them. As to the second, abuse of process, she said this:

> "48. First, there is the public interest in encouraging compromise of disputes without the need to invoke the Court process. Secondly, there is the private interest in bringing litigation to a final conclusion without fear of subsequent harassment through successive claims. That policy applies equally whether the underlying facts of the claim are re-litigated after a settlement for the purpose of proving liability or merely for the purpose of proving the measure and quantification of loss. I note the following passages from *Johnson v. Gore Wood*. First, at 32-33, Lord Bingham:
>
> > 'An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first. Often, indeed, that outcome would make a second action the more harassing.'
>
> Secondly, at 59, Lord Millett:

> 'Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remains outstanding.'

> 49. It seems to me that the Defendants' position falls squarely within the mischief addressed by Lord Bingham and Lord Millett in the passages I have cited, notwithstanding that this is not precisely a *Henderson v. Henderson* type of case. That it does is emphasised by the wholesale incorporation of the Claimant's pleadings in the misappropriation action into the new para.37.1.6. It cannot be right that Mr. Aziz and Mr. Noak should have settled the misappropriation action only a few days before this present application to amend was made, in circumstances where all the same facts and matters relating to their conduct would be brought back by incorporation into the present proceedings. What the Claimant has done is simply to move the underlying factual issues from one set of proceedings over to the other after purporting to dispose of the misappropriation action by compromise.
>
> […]
>
> 54. I postulate the situation where, instead of separate proceedings – and these proceedings were always, as I understand, intended to be tried together – the Claimant had brought a single action covering the claims in both. The effect of what actually happened, translated to that situation, is that the claim for breach of fiduciary duty would have been struck through as a result of the settlement, together with all the facts and matters relied on to support it. I say that is what actually happened because the misappropriation action disappeared entirely with all its pleaded facts. Pursuing the analogy, the Claimant's present claim is to amend to restore those facts and matters to the pleading. It seems to me that it would have been for the Claimant, as part of the settlement, to insist on those matters remaining in the pleading but, on the hypothesis I am considering, it did not do so."

59. I should say that the decision of Proudman J was taken to the Court of Appeal, where permission to appeal was refused on the discretionary grounds, so that the abuse of process question strictly did not arise: [2009] EWCA Civ 250. But the three judges in that court took different stances on that question. Stanley Burnton LJ ([28]) doubted that the judge's decision on that point had been right:

> "I have my doubts as to whether it was correct as a matter of law, given that no attempt was made to plead a cause of action arising from the alleged misappropriations, but to rely on them only as factual matters relevant to the value of GHAL."

Sedley LJ ([30]) said that he did not share that doubt. Unfortunately for first instance judges like me, the third judge, Pill LJ, said ([35]) that it was unnecessary to consider the matter. Accordingly, the decision of Proudman J on abuse of process remains intact, although subject to the doubt raised by one of three appellate judges.

60. MWML in the present case says that the issues in the arbitration which were also factual issues within the compromised claim for relief from forfeiture in summary were:

1. Whether REC Soc was a party to the lease;

2. The issue over access to the meter and whether MWML refused access to read it;

3. The location of the inverter;

4. The electricity supply to the solar PV system;

5. Whether under the lease REC Soc had permission for the inverter to be installed where it was;

6. Whether the inverter had failed;

7. If so, what was the cause of the failure;

8. Whether REC Soc was entitled to use the electricity supply in the building;

9. What service media in the building belonged to MWML;

10. Whether the electricity supply to the solar PV system had been altered.

Items 1 and 2 were in the original arbitration reference. The remainder arise out of the email request dated 20 February 2020.

61. REC Soc says that the present is a unique situation. Normally the parties would pursue either arbitration or litigation. The only reason that, having commenced an arbitration, REC Soc resorted to the court was that the arbitrator had no jurisdiction to grant relief from forfeiture of the lease. I accept that, but it does not follow that the principles of *res judicata* and *Henderson v Henderson* cannot apply from one form of dispute resolution to the other. I accept that *Fidelitas* is about applying those principles to successive arbitrations, but I am in no doubt that they can also apply as between a court decision and an arbitration.

62. REC Soc refers to the decision of Leggatt J, as he then was, in *Marathon Asset Management LLP v Seddon* [2016] EWHC 2615 (Comm), where a claim was brought against multiple defendants, but subsequently settled in relation to part of that claim, including the whole of the claim against the fifth and sixth defendants. The question was how far that settlement affected a counterclaim brought by the sixth defendant (which was owned by the fifth defendant) against the claimant. The sixth defendant said that the effect was that the claimant had no real prospect of successfully defending the counterclaim, and applied for summary judgment. That application failed.

63. Leggatt J said:

> "16. I do not accept Mr Griffiths' submission that the usual effect of an agreement to settle a particular claim is to prevent a party to the settlement from thereafter relying on factual allegations which formed part of that claim in

> support or defence of some other claim. In my view, it all depends on the precise terms and context of the agreement. Thus, I do not consider that any assistance can be derived from the case of *Cornhill Insurance plc v Barclay* (6 October 1992) CA, which turned on the proper construction of the terms of compromise which the parties had agreed in that case, interpreted in the light of the relevant factual background. The same applies to *Ovlas SA v Strand (London) Ltd* [2009] EWHC 1564 (Ch), on which Mr Griffiths also relied, where it was held that renewing allegations made in earlier proceedings which had been dismissed by consent would in the circumstances amount to an abuse of process. No issue of abuse of process arises in the present case as the settlement concluded by acceptance of the defendants' Part 36 offer has not been embodied in an order or judgment of the court."

64. So, in the present case I must look at the precise terms and context of the agreement to settle the relief from forfeiture claim. The claim itself was, as I have said, issued in August 2017, when the arbitrator had been appointed the previous year to deal with the original issues between the parties. I have already referred to the terms of the claim. The only relief sought in the claim was relief against forfeiture and costs. The claim was issued in the County Court at Truro because the arbitrator had no power to deal with it. The claim did not ask the court to decide any of the issues then before the arbitrator. There was for example no claim for a declaration that REC Soc was a party to the lease, or for damages for breach of a claimed right of access to read the meter, or anything of that kind. (Nor, indeed, was there any claim in relation to any of the issues which REC Soc sought by email of 24 February 2020 to add to the arbitration.) The Part 36 offer by MWML was to consent to an order granting relief from forfeiture so that the lease continued despite the section 146 notice of 23 May 2017. The clarificatory email of 28 August 2018 made clear that the offer was restricted to relief from forfeiture and costs, and did not cover anything else. Indeed, the point was (somewhat gratingly) repeated several times in that email, and could not have been clearer.

65. Nevertheless, MWML says that the words in the clarificatory email "the lease dated 18th February 2012 shall continue under its full original terms" mean that all the earlier issues were decided and were now "buried beneath the surface of the compromise". MWML says that if REC Soc wanted the arbitrator to continue to deal with them then it should have reserved the right to do so, as explained in *Ovlas*. But REC Soc did not do so.

66. In my judgment, it is impossible to argue that the offer made and accepted in August and September 2018 was one to settle *any* issue between the parties *except* that of forfeiture of the lease. All the other issues between the parties were left untouched. Indeed, the issues formulated in the email request of 20 February 2020 could not have been settled in any event, because they had not yet been formally raised. To the extent that factual allegations which were relevant to the issues between the parties were also made or repeated in the relief from forfeiture claim, they were for the purposes of explaining the context in which the claim for relief from forfeiture arose, and not for the purpose of being decided by the court. Such issues were issues in the arbitration, and the court was not being asked to decide them. Nor was it *necessary* for the court to decide them in order to decide whether to grant relief from forfeiture. Accordingly, they were not compromised by the Part 36 offer and acceptance.

67. As Leggatt J said in the *Marathon* case, having reached his conclusion that the compromise did not affect the counterclaim,

> "22. This conclusion is confirmed by the statements in the offer letter that the offer 'does not concern the Counterclaim or the Misuse Claim' and that 'the offer contained in this letter does not relate to those matters'. Those statements would be seriously misleading if acceptance of the offer was intended to have the effect of annihilating Marathon's defence to the counterclaim on the issue of liability, leaving only quantum to be assessed. Had that been the intended effect of the offer, it would very much have concerned the counterclaim."

68. So too in the present case. In the clarificatory email of 28 August 2018, MWML was at pains to emphasise the limited nature of the compromise being offered:

> "Our Part 36 offer consents to an order granting you relief from forfeiture and your legal costs, which meets your claim in full – and nothing else."

For MWML now to submit that the compromise *also* settled issues raised in the arbitration is not only wrong, but borders on sharp practice. I therefore hold that the arbitrator was right to hold that he retained jurisdiction notwithstanding the compromise of the relief from forfeiture claim.

69. Finally, there is a point taken on the *Henderson v Henderson* jurisdiction. MWML said that "even if the underlying issues were not caught by the [abuse of process principle], [REC Soc] here could and should have sought to have them determined in the [relief from forfeiture claim] by amending" it. I reject this submission. REC Soc had *already* raised the original issues in the arbitration. The claim for relief from forfeiture could not be included in the arbitration, because the arbitrator had no power to deal with it. To say that REC Soc should have sought to include the arbitration issues in the *later* claim for relief from forfeiture, and now cannot continue with the arbitration because it did not do so, would be to stand the principle in *Henderson v Henderson* on its head.

The scope of the arbitration

70. The sixth and last point is the scope of the arbitration. MWML says that the matters raised in MWML's email of 24 February 2020 (items 3-10 in paragraph [59] above) are not within the scope of the arbitration, because they were not raised at the time of the original reference to the arbitrator in 2017. Therefore, MWML says, the arbitrator has no jurisdiction to deal with them. It relies on paragraphs 5-027 and 5-028 of *Russell on Arbitration*, 24th edition. The former paragraph makes clear that "the tribunal will have jurisdiction to decide only those matters actually referred". The latter paragraph makes clear that

> "whether a particular matter is within the reference will be determined as a matter of construction of the notice of arbitration giving the words their natural meaning in the context in which they were used and applying an objective test".

71. The terms of the reference to arbitration were set out earlier, in paragraph 12. I will not repeat them here. They do not contain any general words such as "all disputes between the parties", or "all future disputes". (This differentiates the present case

factually from cases such as *Harper Versicherungs AG v Indemnity Marine Insurance Co Ltd* [2006] EWHC 1500 (Comm) and *J v G* [2018] EWHC 203 (Comm), on which REC Soc relies.) Instead, the reference refers specifically to the issue of validity of the lease, the issue of damage to the roof of the building, and the issue of refusal of access to read the meter connected to the solar PV system. REC Soc says that

> "the disputes as to the (i) location of the inverter and (b) electricity supply to the solar PV system are part of the general matrix of fact about the validity of the lease".

72. REC Soc relies upon the decision in *Bond v Mackay* [2018] EWHC 2475 (TCC) as justifying the proposition that a broad view should be taken of the scope of a reference. I accept that a broad view can be taken where appropriate. The question is whether it is appropriate in the present case. REC Soc says that the issues about the location of the inverter and electricity supply to the PV system have only arisen since the original reference to arbitration, because they have been raised by MWML only in its defence in the relief from forfeiture claim.

73. I do not accept this. Indeed, I have some difficulty in understanding why REC Soc would wish to make this submission, because in my judgment it cuts across its primary submission relating to the effect of the compromise of the relief from forfeiture proceedings. But, in any event, I do not consider that the pleading by MWML in relation to the inverter and the electricity supply had anything to do with the validity of the lease. On the contrary, these matters were put forward to support the allegations of breaches of covenant. I quite understand that it is wasteful of resources to have to commence another arbitration rather than add matters to an existing arbitration. But it is still necessary that there should be a sufficient reference to encompass the new issues. In my judgment, the original reference in this case does not extend to the matters which REC Soc wished to raise in the email of 24 February 2020.

Conclusion

74. My conclusion is that the arbitrator has jurisdiction to deal with the original issues referred to arbitration, but not with the subsequent issues. In the first instance, I will deal with consequential matters on paper. The parties have agreed that I should receive written submissions from each party (copied to the other side) by 4 PM on Friday, 25 June 2021, and written submissions in reply (copied to the other side) by 4 PM on Wednesday 30 June 2021. I will then determine any such consequential matters.