Neutral Citation Number [2024] EWHC 1759 (Ch)

CR 2023 000878

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF MEADOWBROOK MONTESSORI LTD
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 16/07/2024

Before :

ICC JUDGE BARBER

- -

Between :

(1) VANESSA TANFIELD
(As Executor of the estate of Paul Watkins)
(2) VANESSA TANFIELD AND DENTONS & CO
TRUSTEES LTD (As Trustees of 2 SIPPS)

Petitioners

- and –

MEADOWBROOK MONTESSORI LTD

Respondent

- -

Mr Simon Hunter (instructed by **Dickins Hopgood Chidley LLP)** for the **Petitioners**
Ms Rebecca Farrell (instructed by **Moore Barlow LLP**) for the **Respondent**

Hearing date: 15 May 2024

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Approved Judgment

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9 a.m. on 16 July 2024

ICC Judge Barber

1. At a hearing on 15 May 2024, I granted relief from sanctions to the Respondent and ordered that a winding up petition presented by the Petitioners against the Respondent on 20 February 2023 be dismissed, with written reasons to follow. This judgment sets out my reasons for those decisions.

Background

2. In 1989/1990, the late Mr Paul Watkins established a private independent primary school known as Meadowbrook Montessori School ('the School'), run from premises known as Malt Hill, Warfield, Bracknell RG42 6JQ ('the Premises').

3. In July 2015, the Respondent company ('the Company') was incorporated to run the School. The School was the Company's only business. Mr Watkins and a Ms Serena Gunn (who worked at the School) were appointed directors of the Company. The issued share capital of the Company comprised 250 A shares and 250 B shares. Mr Watkins held 250 A shares and Ms Gunn held 250 B shares.

4. By a lease dated 24 November 2016 ('the Lease') made between (1) Mr Paul Watkins and Mr Paul Watkins and Denton & Co Trustees Limited as Trustees of the Dentons Self Invested Personal Pension relating to Mr Paul Watkins (CA22361) and Ms V A Tanfield and Denton & Co Trustees Limited as Trustees of the Dentons Self Invested Personal Pension relating to Ms V A Tanfield (CA22360) ('the Landlord') and (2) the Company ('the Tenant'), the Landlord let the Premises to the Tenant for an initial term of 10 years at a rent of £56,000 per annum payable quarterly in advance on the usual quarter days of 25 March, 24th June, 29th September and 25th December.

5. By 2019, Mr Watkins wanted to step down from running the School via the Company and Mr Steven Byron ('Mr Byron'), a parent at the School, had expressed an interest in taking over from Mr Watkins.

6. On 24 May 2019,

   (i) Ms Gunn stood down as a director;

   (ii) Mr Byron was appointed as a director; and

   (iii) Ms Gunn transferred to Mr Byron her 250 B class shares in the Company.

7. Mr Byron maintains that his appointment as a director and the transfer of shares in his favour in May 2019 was part of a contractually binding agreement reached in May 2019, by which he agreed to purchase the shares in the Company for the sum of £134,257.75 and take over the running of the School. He maintains that, for tax reasons, Mr Watkins was keen to disguise the purchase price for the shares as 'rent arrears' owed by the Company.

8. Mr Byron says that, to this end, a typed document headed 'rent arrears payment agreement', dated 24 May 2019 and stated to be made between (1) Denton & Co Trustees Limited, Mr Watkins and Ms Tanfield (collectively as the landlord) and (2) the Company (as tenant), was prepared ('the typed document'). In its original form, the

typed document provided for 'rent arrears' of £134,257.75 to be payable by the Company in specified instalments commencing on 10 September 2020, provided that the Company had a cash balance average during August 2020 of £30,000 or more and was profitable in the accounting year ending 31 July 2020. Mr Byron maintains that he (on behalf of the Company) and Mr Watkins signed the typed document on or about 24 May 2019.

9. The Petitioners deny that any contractually binding agreement was reached in May 2019, pointing out that two of the four signatories expressly provided for in the typed document (Denton & Co Trustees Limited and Ms Tanfield) had not signed the document in its original form, whether in May 2019 or at any other time. The Petitioners say that Denton & Co Trustees Limited and Ms Tanfield were not prepared to sign the typed document as originally drafted, as they did not agree to the cash balance/profit provisos referred to in [8] above and various other proposed terms. The Petitioners' case is that it was only after the typed document was altered in manuscript (to delete the cash balance/profit proviso and various other terms, all such alterations being initialled by all four signatories) that Denton & Co Trustees Limited and Ms Tanfield agreed to sign it, with a revised date (inserted in manuscript) of 24 February 2020. They say that it was only at that point (ie 24 February 2020) that a contractually binding agreement arose. The Petitioners also deny that the 'rent arrears' referred to in the typed document and in the rent arrears payment agreement dated 24 February 2020 were disguised consideration for the shares.

10. To return to the chronology: on 28 August 2019, Mr Watkins stood down as a director of the Company and was appointed as company secretary instead. On 12 February 2020, Mr Watkins stood down as company secretary.

11. On 24 February 2020, (the date of the rent arrears payment agreement amended in manuscript and signed by all four signatories), Mr Watkins transferred his 250 A shares in the Company to Mr Byron.

12. By 24 February 2020, therefore, Mr Byron was sole director and sole shareholder of the Company.

13. Mr Watkins died in May 2021. Ms Tanfield has since taken out probate in respect of Mr Watkins' estate and is its sole executor and sole beneficiary. Prior to Mr Watkins' death, she had not visited the School.

The statutory demand

14. In October 2022, the Petitioners served a statutory demand dated 3 October 2022 on the Company in the sum of £147,974.30. The debt claimed in the statutory demand was stated to be 'the arrears of rent and interest due to the Creditor in respect of rent due during the period 29 September 2019 and 29 September 2022' under the Lease. A breakdown of the sum said to be due was set out in a schedule annexed to the statutory demand. In addition to sums described as given 'rent quarters', the schedule contained numerous round sums (on various dates running from 10 September 2020 onwards) described as 'arrears due'. The dates that these round sums, described as 'arrears due', were said to fall due, tallied with the dates given in the schedule in the typed document and in the rent arrears payment agreement dated 24 February 2020. The last item on the

schedule to the statutory demand was dated 29 September 2022 and described as 'rent quarter 3'.

The petition

15. On 20 February 2023, the Petitioners presented a winding up petition against the Company in the sum of £167,593.41. The debt claimed in the petition was stated to be 'arrears of rent due to your Petitioners during the period 29 September 2019 and 25 December 2022' under the Lease. A breakdown of the sum said to be due was stated in the petition to be set out in a schedule annexed to it. Somewhat curiously, the schedule stated in the petition to be annexed to it does not appear on court file or in the hearing bundle. Given the description of the debt in the petition itself, however, I consider it legitimate to conclude that the schedule to the petition included the same content as that set out in the schedule to the statutory demand, updated to reflect the fact that, by the time of presentation of the petition on 20 February 2023, a further quarter's rent (25 December 2022) had fallen due.

16. The first hearing of the petition was listed for 5 April 2023. Ahead of that hearing, by email dated 29 March 2023 from the Petitioners' solicitors to the court marked 'very urgent', the Petitioners' solicitors wrote as follows:

> 'Dear Sirs,
>
> We act for the Petitioning Creditor in the above matter. The Company is Lessee of school premises (within the district of the Official Receiver in Reading) owned by the Petitioning Creditor who is extremely concerned that once a Winding Up Order is made, the premises will be at severe risk of vandalism as our client has had similar experience with a nearby property. She is extremely keen to ensure that she recovers possession of the premises as soon as possible so that she can arrange to insure and secure the premises urgently.
>
> For that reason our client, who is likely to be the major creditor, wishes to appoint Paul Ellison and David Taylor of KRE Corporate Recovery Limited as joint Liquidators and we have been asked to write to the Court to enquire whether the appointment could be expedited and made immediately upon the Winding Up Order being made so that immediate steps can be made to disclaim the Lease and return the premises to our client.
>
> There are arrears of rent in the sum of £196,375.23 as per the attached statement and, therefore, the Lease can have no premium value.
>
> We appreciate that this is an unusual request, but we hope that in the circumstances, you will be able to accommodate our client's request.
>
> Finally, if this email has been sent to the wrong recipient, would you kindly forward to the appropriate department to deal with.'

17. The email dated 29 March 2023 was copied to Mr Ellison (one of the proposed liquidators) but does not appear to have been copied to the Company (contrary to CPR 39.8) or the Official Receiver. The email appears on court file but was not included in the bundle prepared for the hearing before me.

18. At the first hearing of the petition, which took place on 5 April 2023, Mr Byron appeared in person and addressed the court on behalf of the Company. In broad summary, he told the court that the bulk of the petition debt was disputed, as it represented the purchase price which he had agreed to pay for the Company (£134,257.75), rather than genuine rent arrears properly due under the Lease. He also said that payment of the purchase price was subject to a profit proviso. He said that the Company would be in a position to pay the relatively modest balance of the petition debt, representing real rent arrears, within a reasonable timeframe. He also observed in open court that no proof had ever been provided by the Petitioners of the other sums they claimed to represent rent arrears. This was noted by the Petitioners' solicitor, Mr Owen, in his later witness statement dated 15 June 2023.

19. Having heard from both parties at the hearing on 5 April 2023, ICC Judge Jones directed that the Company by 4pm on 3 May 2023 file and serve any evidence relied upon (a) to dispute any part of the debt and (b) to set out any proposals for repayment within a reasonable timeframe. He also adjourned the petition to 24 May 2023, with costs in the petition. (The sealed order is dated 13 April 2023 for some reason, but it is clear from the court file and the attendance sheet completed by ICC Judge Jones that the order dated 13 April 2023 was in fact made at the first hearing on 5 April 2023).

The purported forfeiture

20. Following the hearing of 5 April 2023, Ms Tanfield of the Petitioners decided that she would like to forfeit the Lease rather than wait for the next hearing. By email dated 12 April 2023, she wrote to Ms Kate Cheesman of Dentons Pension Management Ltd, stating (inter alia):

> 'Hi Kate,
>
> I am forwarding fyi a recent email from my solicitor who is of the view that the best course of action, to allow me to move forward, is to forfeit the lease for non payment of rent. I have spoken to him this morning and have asked him to set the ball rolling to arrange for high court enforcement officers to change the locks….
>
> The winding up petition Hearing will still go ahead on 24th May but this will allow me to go ahead with marketing the school for sale rather than delaying until the end of May.
>
> I hope you are in agreement with this and I anticipate that you will need to sign an instruction form for the high court enforcement officers before they are appointed. I will keep you informed of progress….'

21. Ms Cheesman responded by email the same day, saying:

> 'Hi Vanessa,
>
> Thank you for the update.
>
> I am happy to go down this route.
>
> Kind regards [etc]'

22. Not a word was said to the Company about these plans.

23. On 21 April 2023, ahead of the adjourned hearing of the petition, the Petitioners purported to forfeit the Lease by 'peaceable re-entry'. The Company maintains that the re-entry was unlawful. The Petitioners dispute this.

24. At 7.30am on Friday 21 April 2023, without any prior notification to the Company, Ms Tanfield and a bailiff locked the gates and doors of the school building and prevented staff, pupils and parents from entering the Premises. This occurred on a school day in the second week of term. At the time of the re-entry, the School was providing primary school education to 32 pupils, 8 of whom were children with formal special educational needs. The re-entry caused significant distress and confusion among parents and pupils. It also significantly prejudiced the ability of Year 6 pupils to sit the standard assessment tests ('SATs') in state schools, as the cut-off date for SATs entries in state schools was a week before. The impact of the re-entry has been far-reaching. As at 4 July 2023, 15 of the School's pupils had received no formal education since closure of the School on 21 April 2023. 8 of those children were children with special educational needs. Spaces for children with special educational needs had already been filled in all the local government schools.

25. Mr Byron filed a witness statement dated 3 May 2023 disputing any part of the petition debt relating to the period prior to May 2019 and updating the court on recent events. Paragraph 1(b) of his statement provided:

> 'Meadowbrook Montessori Limited has ceased trading as the Petitioners repossessed the school land and school building on Friday 21 April 2023. The school's only source of income was the parents of the pupils. The parents have all left Meadowbrook Montessori Limited as the school was given no notice of the repossession and was unable to find alternative accommodation.'

26. Shortly before the next hearing on 24 May 2023, the Petitioners filed a 'consent to act' dated 22 May 2023, signed by Mr Paul Ellison, one of the licensed insolvency practitioners whom the Petitioners wished to see appointed as liquidator of the Company: see [16] above.

Subsequent hearings

27. At the hearing on 24 May 2023, Mr Byron represented the Company in person and (in broad summary) told the court what had occurred over the course of the adjournment. The petition was adjourned to 21 June 2023 to allow time for the Company to seek advice, including advice as to whether administration would be appropriate, given that the Company had ceased trading as a result of the re-entry on 21 April 2023.

28. On 21 June 2023, Mr Byron again appeared in person for the Company. Directions were given for the Petitioners to file evidence in reply by 5 July 2023 and the petition was adjourned to a one-hour hearing on a date to be fixed.

29. By the time of the next hearing on 29 November 2023, Mr Byron, who still acted in person at this stage, had filed witness statements dated 20 June 2023 and 4 July 2023 which (among other things) contained assertions (in layman's terms) that the repossession of the Premises had been unlawful and that it had caused the immediate closure of the School run by the Company from the Premises. After preliminary consideration of the terms of the Lease, the court adjourned the petition to a half day hearing for fuller submissions. The court made clear that ahead of the next hearing, the Company should seek specialist legal advice and representation. The court also (i) granted the Company permission to file and serve a supplemental witness statement setting out (and exhibiting any further documents relating to) any grounds of dispute and/or cross-claims relied upon in answer to the petition not less than six weeks ahead of the adjourned hearing; and (ii) granted permission to the Petitioners to file any supplemental evidence in reply not less than three weeks ahead of the adjourned hearing.

30. The adjourned hearing was initially listed for 8 March 2024. Six weeks prior to that date was 26 January 2024. Three weeks prior to 8 March 2024 was 16 February 2024.

31. On 14 February 2024, Ms Tanfield filed her third witness statement, responding to a statement served by the Company shortly before the November hearing.

32. In the event, the hearing originally listed for 8 March 2024 was vacated and relisted due to judicial availability to 15 May 2024.

33. In the run-up to the final hearing, on 3 May 2024 Moore Barlow LLP filed notice of acting for the Company, together with a witness statement of Mr Byron dated 3 May 2024. On 7 May 2024, the Company also filed a relief from sanctions application in respect of the late filing of evidence.

34. At the outset of the hearing on 15 May 2024, the Petitioners by Counsel made clear that they opposed the relief from sanctions application but said that, in the event that such relief was granted, they would not be seeking an adjournment for the filing of reply evidence. The Petitioners' position was that they wanted to bring the proceedings to a conclusion.

Relief from sanctions: principles

35. The principles governing relief from sanctions are well-known and were not in issue. They are addressed in CPR 3.9 and Denton v TH White Ltd [2014] EWCA Civ 90.

36. Under CPR 3.9, on an application for relief, the court will consider 'all the circumstances of the case, so as to enable it to deal justly with the application, including

the need (a) for the litigation to be conducted efficiently and at a proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.'

37. As confirmed in Denton at [24]:

> 'A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".'

Grounds of the application

38. The evidence in support of the application for relief from sanctions was set out in the application notice itself, which bears a statement of truth.

39. In broad summary, the Company's evidence was that as a result of the winding up petition, the Company had been unable to use its own funds in order to instruct solicitors and that Mr Byron had had to raise the funds himself. This process had taken some time and, even after such funds had been raised, the solicitors instructed required further time to read into the papers before assisting him in the preparation of his witness statement.

Relief from sanctions: the Petitioners' submissions

40. The Petitioners argued that any suggestion that the breach was not serious and significant was untenable. Under the court's directions, the Petitioners were to have three weeks to consider the Company's evidence, conduct any necessary investigations, and draft responsive evidence to any cross-claim that was enunciated. Mr Hunter contended that the Petitioners had been 'deprived' of the opportunity to respond to the cross-claim, although he did go on to confirm that the Petitioners were not seeking an adjournment to allow time to file evidence in reply.

41. Mr Hunter submitted that no good reason had been given for the breach. He observed that, whilst Mr Byron was said to have required time to source funds, this had not been set out in any detail in the evidence. He also maintained that Mr Byron had a history of late filings and always went 'to the wire'.

42. Mr Hunter invited the court to note that no reason has been given why Mr Byron could not make an 'in-time' application for an extension of time if he was having difficulty sourcing funds. He also observed that the same firm of solicitors had been assisting Mr Byron on and off since before the forfeiture happened; in light of that, he argued, the firm would not need to as much time to read in.

43. In relation to the third Denton stage, Mr Hunter argued that the Company had raised nothing of import. He reminded the court that in determining a relief from sanctions

application, the court must consider the need to comply with court orders and the need to deal with cases expeditiously and at proportionate cost.

Relief from sanctions: the Company's submissions

44. Ms Farrell accepted that the breach was serious, but submitted that on the facts of this case, the breach was not of great significance. She argued that from the matters addressed at the 29 November 2023 hearing, and the order of that date itself (which by its recitals made express reference to the re-entry having been effected without any formal demand at common-law), the Petitioners had been on notice for some considerable time that the Company's case was that the re-entry was unlawful and that this gave rise to a cross-claim. She contended that Mr Byron's most recent statement did not, on the whole, advance facts which were new or would not be known to the Petitioners anyway. She also submitted that the fact that the Petitioners had not sought an adjournment to allow time to respond to the latest evidence was relevant to the issue of significance. She argued that the impact on the Petitioners was minor but that, even if it was not, that impact was outweighed by the prejudice to the Company if it was denied the opportunity to rely on its evidence.

45. In relation to stage 2 (the reason why the default occurred), Ms Farrell submitted that good reason had been given; the Company had been unable to utilise its own funds for advice in light of the winding up petition and therefore arrangements had to be made which would enable Mr Byron to pay for such advice personally. Time was thereafter required for those solicitors to digest a significant amount of papers that have been generated in the proceedings. She also argued that the reason why no in-time extension application had been made was that the Company's solicitors only came on the record on 3 May; prior to that point, Mr Byron had acted in person.

46. In relation to stage 3 (all the circumstances), Ms Farrell submitted that it is wrong to assume that, even if a breach is serious or significant and there is no good reason for the breach, the application will automatically fail: Denton at [31]. In Denton at [37] the court quoted with apparent approval paragraph 26 of the 18th Implementation Lecture on the Jackson reforms:

> '[the relationship between justice and procedure] has changed not by transforming rules and rule compliance into trip wires. Nor has it changed by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case, we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case'.

47. At [38] in Denton, the court continued:

> 'It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in the Mitchell case: see in

particular para 37. A more nuanced approach is required as we have explained'.

48. Ms Farrell argued that justice was the overwhelming factor in this case. She maintained that the Petitioners' actions, in purportedly forfeiting the Lease after the first hearing of the petition, had prevented the Company from operating from the Premises and from trading at all, thereby causing it to lose revenue streams from which it could otherwise have answered the petition. She submitted that it would be unjust for the Company to be prevented from relying on its late evidence, when Mr Byron personally had taken time to generate the funds to seek legal advice and challenge the lawfulness of the forfeiture on the Company's behalf. She also reminded the court that the Petitioners, who have been represented throughout, had been on notice for months of the basis of the cross-claim. She invited the court to ensure a fair hearing by granting relief from sanctions and permitting the Company to rely upon the late evidence.

Relief from sanctions – discussion and conclusions

49. Having considered with some care the evidence and the submissions of the parties, I conclude that relief from sanctions should be granted.

50. In relation to the first Denton stage: in my judgment, the failure to comply with the November 2023 order was undoubtedly serious. It was also significant, although the ultimate significance of the non-compliance is, in my judgment, tempered to an extent on the facts of this case by the Petitioners' election not to seek an adjournment to allow further time for reply evidence to be filed.

51. Turning next to the second Denton stage (why the breach occurred): I reject Mr Hunter's submission that the evidence in support of the application goes no further than 'mere assertion'. The Company's evidence explains that in light of the winding up petition the Company had no access to its own funds and that accordingly Mr Byron had to raise funds personally to cover the costs of legal advice for the Company. Paragraph 13.5 of Mr Byron's witness statement dated 28 November 2023 had already confirmed that the Company's bank account had been frozen.

52. Whilst, in theory, the Company could have applied for a validation order to allow access to its own funds to cover the costs of instructing solicitors to advise and represent the Company on the issue of the cross-claim, there was no guarantee that any such application would not be opposed by the Petitioners. Moreover, whilst directors acting in person often make applications for validation orders, on present facts, in the context of what was (by then, following the re-entry in April 2023) a non-trading company, articulating a case for a benefit to creditors as a whole (or even an argument that creditors would be no worse off) for the purposes of a validation order application would be extremely difficult without addressing, in overview at least, the merits of the unlawful forfeiture argument; a highly technical area which most lay directors would struggle with, and which was the very reason the Company was seeking formal advice and representation in the first place.

53. It is entirely unsurprising, therefore, to find that Mr Byron was left in the position of having to fund legal advice and representation for the Company himself. That this took time is also unsurprising, given the costs of legal advice in such a technical area (as evidenced by the statement of costs filed subsequently on behalf of the Company) and

the (indisputable) fact that the business for which Mr Byron had worked (the School) had abruptly closed down in April 2023, on no notice, as a result of the purported forfeiture. For Mr Byron to demonstrate to a prospective lender in such circumstances his ability to service any loan would undoubtedly have been a challenge. I was told (on instruction) that ultimately, he had to remortgage his house in order to raise the required funds.

54. Inability to pay for legal advice and representation, however, is not, of itself, regarded as a good reason for a delay in complying with a procedural deadline or court order: R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633. Moreover, being a litigant in person is not of itself considered a good reason for failing to comply with court orders: Elliott v Stobart Group Ltd [2015] EWCA Civ 449.

55. In light of such caselaw, it seems to me that it is not open to this court to conclude, on the evidence before it, that the Company has shown 'good reason' for its breach of the November 2023 order.

56. I turn finally to stage 3 of the Denton test (all the circumstances). In this regard I remind myself of the guidance given in Denton that it is wrong to assume that, even if a breach is serious or significant and there is no good reason for the breach, the application will automatically fail.

57. I accept that the court must consider the need to comply with court orders and the need to deal with cases expeditiously and proportionate costs. I also accept that the Company has filed some witness statements at the eleventh hour in the past and that that is a factor which the court must take into account when considering stage 3 of the Denton test.

58. In the circumstances of this case overall, however, in my judgment it would be manifestly unjust and disproportionate to the breach in question to deny the Company the relief sought.

59. By the time of the hearing in May 2024, the Petitioners, who have been legally represented throughout, had been fully aware of the basis of the cross-claim argument (unlawful re-entry due to want of formal demand at common law) for over 5 months. Mr Byron had made reference to his belief that the re-entry had been unlawful in his earlier witness statements. It had then been flagged at the hearing in November 2023 and was set out, in terms, in a recital to the order made that day.

60. The issue whether the re-entry was unlawful (or more accurately, in the context of winding up proceedings, whether it was properly arguable that it was unlawful) involved consideration of the Lease (which was already in evidence) and legal submissions. Some aspects of quantum had already been addressed in earlier witness statements filed in the proceedings. In relation to loss of revenue, for example, Mr Byron had by his statement dated 28 November 2023 already made reference to the sum lost in school fees for the term in which the re-entry occurred. The standard termly fees charged by the School in recent years were in any event published information, readily available on the internet. While other aspects of quantum and certain updating facts were addressed in the latest evidence (served on 3 May 2024, 12 days ahead of the hearing on 15 May), the Petitioners by their skeleton argument and by Counsel at the outset of the hearing made clear that they did not seek an adjournment to allow time for the filing of evidence in reply. The Petitioners were then given several further

express opportunities at the hearing to apply for an adjournment if they wished, with a view to filing evidence in reply, and declined all such invitations through their Counsel. It is in my judgment legitimate to conclude in all the circumstances that no material aspects of the quantum evidence came as a surprise to the Petitioners or were matters that the Petitioners considered themselves able to undermine or refute by way of evidence in reply.

61. I also take into account the serious potential consequences of denying the Company the opportunity to give its best evidence on the cross-claim. As a portion of the petition debt is admitted to be due, the Company's cross-claim is its primary defence to the petition.

62. I also take into account the highly unusual circumstances of this case. The Petitioners' actions, in purportedly forfeiting the Lease by physical re-entry without notice, after the first hearing of the petition at which it was directed that the Company be given an opportunity to file evidence in answer to the petition, caused an immediate cesser of trading and a loss of access to revenue streams which (subject to appropriate s127 relief, as a trading company) the Company could otherwise have employed in answering the petition and paying off the (relatively modest) undisputed part of the debt with a view to carrying on in business. Whilst I entirely accept Mr Hunter's argument that the court should not proceed on the basis that the forfeiture has already been *found* to be unlawful, for reasons addressed in a later section of this judgment, the Company has demonstrated a strongly arguable case that the forfeiture *was* unlawful and that it has caused loss to the Company considerably in excess of the petition debt. To shut out the Company from presenting its best evidence in such circumstances would in my judgment be wholly unjust and disproportionate to the breach in issue.

63. For all these reasons, I shall grant relief from sanctions.

64. I turn next to consider the petition.

The petition: principles

65. The principles to be applied were largely common ground.

66. The court will dismiss a winding up petition where the petition debt is the subject of a bona fide dispute on substantial grounds. It is an abuse of process to present a winding up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute on substantial grounds as to whether that money is owed: Re a Company (No 0012209 of 1991) [1992] BCLC 865.

67. The practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amounts will suffice. As put by Hildyard J in Coilcolour v Camtrex [2015] EWHC 3202 at [35]:

> 'The court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a "cloud of objections" contrived to justify factual enquiry and suggest that in all fairness cross examination is necessary will not do'.

68. A dispute will not be 'substantial' if it really has no rational prospects of success: In Re a Company (No 0012209 of 1991) 1992 BCLC 865.

69. The court will usually dismiss a petition where there is a strongly arguable cross-claim in a sum equalling or exceeding the petition debt: see generally Coilcolour v Camtrex [2015] EWHC 3202, in particular at [31]-[35]; Re Portman Provincial Cinemas Ltd [1999] 1 WLR 157.

70. In LDX International Group LLP v Misra Ventures Ltd [2018] EWHC 275 (Ch), (a case involving an application to set aside a statutory demand but in context equally applicable here), David Stone (sitting as a judge of the High Court) set out certain propositions which could be drawn from the authorities, including (at 22(c)) that:

> 'It is incumbent on the recipient of the statutory demand to demonstrate, with evidence, that the cross-claim is genuine and serious … Bare assertions will not suffice: there is a minimum evidential threshold: Re a Company, at paragraph 33'.

71. I also remind myself of the guidance given in Poperly v Poperly [2004] EWCA Civ 463 at [66] per Jonathan Parker LJ (citing Re Bayoil [1999] 1 WLR 147) in support of the proposition that delay in putting forward a cross-claim may lead to an inference that it is not put forward in good faith.

The petition: the parties' respective positions

72. On behalf of the Company, Ms Farrell invited the Court to dismiss the petition. She maintained that:

(1) the petition debt was the subject of a bona fide dispute on substantial grounds;

(2) the Company had a strongly arguable cross-claim in a sum equalling or exceeding the petition debt, for unlawful forfeiture of the Premises and unlawful retention/disposal of property belonging to the Company which had been stored on the Premises at the time of the unlawful forfeiture; and

(3) the court's powers to wind up a company were discretionary and in light of the Petitioners' conduct, the court should decline to exercise its discretion in favour of a winding up order.

73. On behalf of the Petitioners, Mr Hunter invited the court to make a winding up order. He submitted that the Company had not demonstrated a bona fide dispute on substantial grounds going to the whole of the petition debt. This was on the basis that, even if the challenged historic arrears (which Mr Byron maintained were a fiction designed to disguise the purchase price for the shares) were put to one side, Mr Byron had admitted in his evidence that approximately £41,000 of the petition debt represented actual rent arrears which were due for payment.

74. Mr Hunter further submitted that the Company had not demonstrated a strongly arguable cross-claim based on unlawful forfeiture of the Lease and retention/disposal of Company property in a sum equalling or exceeding the petition debt. He also

observed that the re-entry had occurred in April 2023 and that the Company had done nothing about pursuing a cross-claim since.

Is the petition debt the subject of a bona fide dispute on substantial grounds?

75. In light of Mr Byron's acceptance in his evidence that approximately £41,000 of the petition debt represents genuine rent arrears that were due and owing at the date of presentation, this aspect of the Company's case is largely academic.

76. In my judgment, however, the Company *has* demonstrated that the balance of the petition debt (ie all bar the admitted sum of approximately £41,000) is the subject of a bona fide dispute on substantial grounds.

77. Mr Byron's evidence was that the sum of £134,257.75 referred to in the rent arrears payment agreement did not represent rent arrears at all, but instead represented the purchase price payable by him for the shares in the Company. His evidence was that Mr Watkins wanted the purchase price of £134,257.75 described and characterised as 'rent arrears' for tax purposes, so that he and Ms Tanfield could obtain a fiscal advantage. I pause here to note that Capital Gains Tax would ordinarily be payable on any gain made on a sale of shares.

78. By their evidence, the Petitioners deny that the purchase price for the shares was disguised as rent arrears of £134,257.75. It is notable, however, that they have adduced no contemporaneous documentary evidence as to what the purchase price for the shares actually was, if it was not the sum of £134,25.75 referred to in the rent arrears payment agreement. No written agreement recording the terms of the business transfer was produced in evidence. The closest Ms Tanfield comes to an explanation is at paragraph 5 of her witness statement dated 3 July 2023, when she states:

> 'When the Company was transferred to Mr Byron, it was transferred to him with its existing financial liabilities, which included rent arrears accrued in relation to the Premises. At the time of sale, taking into account sums due up to 31 July 2019, these stood at £134,257.75'.

79. Ms Tanfield then refers in her witness statement to the rent arrears payment agreement dated 24 February 2020. That agreement, however, makes no reference whatsoever to a sale of the business or a transfer of the shares in the Company to Mr Byron. The agreement itself also reads rather oddly in certain respects. On the Petitioners' case, it was amended and signed off on 24 February 2020, yet it provides:

> 'The arrears will be £134,257.75 on 31 July 2019 calculated as £56,000.00 for each calendar year, beginning on 1 August 2016 and calculated to 29 September 2019, equalling £168,000.00, plus £8515.46 for the period 1 August 2016 to 29 September 2016, total £176,515.46; less payments made of £42,257.71 ….'

80. If these figures are to be believed, they would mean that by 2019, the Company, over a period when Mr Watkins was at the helm, had paid less than one of three years' rent since taking on the Lease in 2016.

81. In the context of the winding up proceedings, Mr Byron has on more than one occasion, both in his submissions to the court at the first hearing in April 2023, and since then in his evidence, called upon the Petitioners to provide evidence of the alleged historic rent arrears of £134,257.75. The Petitioners have filed countless witness statements and yet have not adduced in evidence any contemporaneous documentation (such as correspondence, or historic rent account statements) serving to demonstrate how the rent arrears are said to have mounted *from 1 August 2016 to 31 July 2019*. They simply rely upon the rent arrears payment agreement (as amended in manuscript and re-dated 24 February 2020) and various rent schedules put together *since* 31 July 2019; schedules which, I note, are of themselves not altogether consistent. The rent arrears statement annexed to the statutory demand, for example, has an opening balance as at 29 September 2019 (Rent Quarter 3) of '-£14,000'. The rent arrears statement exhibited to Ms Tanfield's third witness statement, however, starts with a 'balance brought forward', as at 31 July 2019, of '-£134,257.73', which then rises to '-£148,257.73' as at 29 September 2019.

82. Also of significance in my judgment is the timing of the typed document and the rent arrears payment agreement dated 24 February 2020 when compared to the various steps taken to shift control and ownership of the Company over to Mr Byron. The date on the original typed document was 24 May 2019, the date that Mr Byron became a director, Ms Gunn resigned as a director and Ms Gunn transferred her 250 B shares to Mr Byron. The date of the rent arrears payment agreement in its amended form was 24 February 2020, the date that Mr Watkins transferred his 250 A shares to Mr Byron.

83. I also note that the rent arrears of £134,257.75 said have been mounting up since the first year of the Lease (dated 24 November 2016, with a term/rent commencement date of 1 August 2016) are not reflected in the Company's professionally prepared accounts for the year ended 31 July 2018, as filed at Companies House; accounts which, whilst not in the hearing bundle, are a matter of public record. The Company's accounts for the year ended 31 July 2018, prepared by KFS Accountants Limited, show creditors of £63,751, made up largely by 'trade creditors' of £36,680 and 'directors' loan accounts' of £25,325, together with one or two smaller sums. It is only in the accounts for the year ended 31 July 2019 (again prepared by KFS Accountants Limited) that the 'creditors' figure changes from a (slightly adjusted) figure of £62,015 for the year ending 2018 to £205,833 for the year ending 2019; a difference of roughly £143,000.

84. These factors do in my judgment lend considerable support to Mr Byron's contention that all is not what it seems with the rent arrears said to make up the petition debt. In my judgment the Company has demonstrated a strongly arguable case that the bulk of the petition debt (ie all bar approximately £41,000 of the same) does not in truth represent rent arrears payable by the Company but rather the purchase price payable by Mr Byron for the shares in the Company, disguised as rent arrears with a view to Mr Watkins and possibly others avoiding or reducing what would otherwise be the fiscal consequences of a share sale. The validity/enforceability of the rent arrears payment agreement in such circumstances raises complex issues of both fact and law (including, potentially, consideration of the impact of Part 18 of the Companies Act 2006), rendering it plainly unsuitable for disposal by way of winding up proceedings.

The cross-claim

85. I turn next to the cross-claim.

86. In my judgment the Company has raised a strongly arguable case that the purported forfeiture of the Lease by physical re-entry on 21 April 2023 was unlawful, on the grounds that no formal demand at common law was made for rent prior to re-entry and the Lease did not dispense with the need for a formal demand.

87. As explained in Woodfall at 7.110:

> '17.110: At common law, in the absence of agreement, a formal demand must be made for the rent before a forfeiture may take place. In certain cases the need for a formal demand may be dispensed with by the Common Law Procedure Act 1852. However, the need for a formal demand may also be dispensed with by agreement. Thus the proviso for re-entry may provide that the landlord may re-enter for non-payment of rent "without any demand". In modern leases the proviso for re-entry almost invariably does, by express words, dispense with the necessity of a formal demand of the rent, e.g. where it says: "although no formal demand shall have been made thereof", or "whether formally demanded or not" or "whether lawfully demanded or not", or words to that effect. Otherwise, the common-law requirements of formal demand have to be complied with'

88. It was conceded by the Petitioners that the 1852 Act is not of any relevant application in this case.

89. The rules of prior demand at common law are set out at Woodfall paragraph 17.120. This provides as follows:

> 'Unless there are express words in the lease or agreement dispensing with a formal demand of the rent, or the case falls within section 210 [of the 1852 Act], no entry or ejectment can be maintained for non-payment of rent without a previous formal demand made according to the strict rules of the common law. The rules are:
>
> 1. The demand must be made by the landlord or by his agent duly authorised in that behalf;
>
> 2. It must be made on the very last day to save the forfeiture. Therefore, if the proviso for re-entry is on non-payment of rent for 30 days after it becomes due, the demand must be made on the thirtieth day after the rent became due (exclusive of the day on which it became due), and not on any other day before or afterwards;
>
> 3. It must be made a convenient time before and at sunset. It must be continued actively or constructively until sunset;
>
> 4. It must be made at the proper place. Therefore, if the lease specifies the place at which the rent is to be paid, the demand must be made there and not elsewhere. But if no place is so

> appointed, the demand must be made upon the land, and at the most notorious place on it. Therefore, if there is a dwelling-house on the land the demand must be made at the front door; but it is not necessary to enter the house, although the door is open. If the premises consist of a wood only, the demand must be made at the gate of the wood, or at some highway leading through it, or other most notorious place. If one place is as notorious as another, the lessor may elect to demand the rent at whichever he wishes. Such demand must actually be made even if there is no person present on behalf of the tenant to answer it. Or it may be made on a sub-tenant;
>
> 5. The demand must be made of the precise sum then payable, and not one penny more or less. If the rent is payable quarterly, and more than one quarter is due, only the last quarter's rent should be demanded, and not the previous arrears, otherwise the demand will be altogether bad.'

90. On behalf of the Petitioners, without prejudice to whatever arguments the Petitioners might wish to make in another place, Mr Hunter accepted for current purposes that if the Petitioners were required to comply with the rules set out at Woodfall at 17.120 (para [89] above), there is a sufficiently arguable case that they did not.

91. The requirements of formal demand at common law must be seen in context. As explained in Woodfall at 17.057 (with emphasis added):

> 'Forfeiture is a unilateral remedy available to the reversioner or reservor of the right to forfeit only. It is subject to numerous statutory restrictions and in particular to waiver and the tenant's right to apply for relief. *Forfeiture is in the nature of a penalty and it has been said that the courts always lean against a forfeiture*'.

92. The cases of Goodright d. Walter v Davids (1778) cowp. 803, 805, per Lord Mansfield CJ and David Blackstone v Burnetts [1973] 1 WLR 1487 are cited in support of the italicised proposition set out in [91] above. As put by Swanwick J in the David Blackstone case at 1496: 'The basic principle is that the court leans against forfeitures.'.

93. It was common ground that if a landlord purportedly forfeits by re-entry before a right to forfeit has yet arisen, the tenant may seek damages for wrongful forfeiture: Woodfall at 17.063; South Tottenham Land Securities v R & A Millett (Shops) [1983] 2 EGLR 122 (first instance); [1984] 1 All ER 614 (CA).

94. On behalf of the Petitioners, Mr Hunter argued that the need for formal demand at common law had been dispensed with by agreement in this case. In this regard he took the court to the following provisions in the Lease:

(1) Clause 1

> 'Rent: £56,000 a year or such other amount as may become payable following a review of the annual rent pursuant to the

provisions of this lease or any interim rent payable under the Landlord and Tenant Act 1954'

(2) Clause 5

'5. Tenant's payments to the Landlord

5.1 The Tenant must pay to the Landlord

5.1.1 the Rent in advance and in equal instalments on the Rent Payment Days; 5.1.2 the Insurance Costs within seven days of the Landlord's written demand (including any demand received after the end of the term but relating to a period within the term); 5.1.3 all other payments due to the Landlord on demand'…

5.3 All payments must be made in cleared funds by the due date…'

(3) Clause 19

'19. Forfeiture

The Landlord is entitled to re-enter the Property and forfeit this lease immediately if:

19.1 the Rent or any other payment under this lease is more than 14 days overdue

19.2 the Tenant is in breach of any of its obligations in this lease

19.3 an Event of Insolvency occurs in relation to the Tenant or the Guarantor

19.4 the Tenant or Guarantor is struck off the register of companies'

(4) Clause 22

'Miscellaneous

22.1 Notices

22.1.1 Section 196 of the Law of Property Act 1925 applies to all notices served under this lease but its provisions are extended so that any notice or demand in connection with this lease may be sent by first-class post and if sent from within the UK properly stamped and correctly addressed will be conclusively treated as having been delivered two working days after posting'

95. Mr Hunter confirmed that the Petitioners only rely on the non-payment of rent limb of the forfeiture clause set out in Clause 19 at 19.1. This accords with Ms Tanfield's email

dated 12 April 2023 to Ms Cheesman of Dentons in the run-up to re-entry: see [20] above.

96. It will be noted that Clause 19.1 does not contain any of the phrases conventionally employed to dispense with the need for formal demand at common law, as listed in Woodfall (see [87] above) and other texts, such as Megarry & Wade, to which I was referred.

97. Mr Hunter submitted that whilst such conventional phrases may suffice, they are not necessary. He maintained that the question for the court was: have the parties, by the agreed terms of this lease, dispensed with the requirement for formal notice?

98. In this regard Mr Hunter relied heavily on the case of Phillips v Bridge (1873-4) LR 9 CP 48, a case in which the court proceeded on the basis that formal demand had been dispensed with. He argued that the clause in Phillips was in 'equivalent terms' to that in the Lease.

99. I reject that submission. The wording in Phillips was as follows (with emphasis added):

> '… and this agreement is entered into upon the express condition that, if the said John Bridge shall make default in payment of the said rent, or any part thereof, within 21 days after the same shall become due, *being demanded*, become bankrupt, or on breach of any or either of the foregoing stipulations by all on the part of the said John Bridge, it shall be lawful for the said E. Phillips, *without giving any notice to quit, and without any other warrant, authority, or proceedings*, to re-enter and resume possession of the said rooms, and to put out and expel the said John Bridge therefrom; but without prejudice to the rights or remedies of the said E Phillips for any such non-payment or breach…'

100. In Phillips, a quarter's rent had fallen due and was demanded before expiry of the 21 days and not paid. Without any further demand being made after the 21 days had expired, forfeiture proceedings were issued. The question before the court was not whether formal demand at common law was required, but rather, whether the clause required a demand after the 21-day period had expired. Nonetheless, the court did proceed on the basis that the need for a formal demand had been dispensed with.

101. A brief comparison of the proviso in Phillips and the proviso in the Lease confirms that the two are entirely different. The proviso in Phillips requires a demand after the expiry of a 21-day period of grace and, (subject to such demand being made), expressly states that the landlord may then re-enter 'without giving any notice to quit, and without any other warrant, authority, or proceedings'. In my judgment this is a world away from a proviso for forfeiture which makes no mention of a demand and does not expressly dispense with any other formalities.

102. I also note that the editors of Woodfall disagree with the dictum in Phillips to the effect that the mere insertion of the words 'being demanded' is equivalent to express words substituting any demand for the formal demand: See Woodfall at 17.110 footnote 8. The reasoning of the editors of Woodfall (with which I respectfully agree) is that the

dictum is opposed to the opinion of the majority of the court in Doe d Scholefield v Alexander (1814) 2 M & S 525 and also to the maxim *expressio eorum quae tacite insunt nihil operatur* (the expression of those things which are tacitly implied/understood can avail nothing).

103. I would add that the words 'being demanded' that were treated in Phillips as of significance are simply not to be found in the Lease in the present case.

104. Mr Hunter argued that the word 'immediately' in clause 19 of the Lease performs the same function. He argued that 'the only way to give proper meaning to that word is to take it on its face – the landlord is entitled in that very moment where rent was more than 14 days overdue to re-enter and forfeit.'. He argued that if the Lease requires (by non-exclusion of the common law rules on notice) notice to be given in the manner required by the common law, the landlord's rights of re-entry would not be 'immediate'.

105. I do not accept Mr Hunter's argument on this point. At common law the landlord is required to make formal demand *on the very last day to save the forfeiture*: Woodfall at 17.120, quoted at [89] above. That is *not* inconsistent with an entitlement to forfeit 'immediately', *once that day has passed.*

106. Moreover, given the positioning of the term 'immediately' within clause 19, it would operate in relation to clause 19.2 as well as clause 19.1. In submissions Mr Hunter accepted that the term would have to be construed in the same way for both sub-clauses. Yet the right to forfeit for breaches falling within 19.2 is clearly tempered by the requirements of s146 LPA 1925; just as, one might say, the right to forfeit for non-payment of rent under clause 19.1 is clearly tempered by the requirements of a formal demand at common law, unless the same is excluded by agreement.

107. In short, I do not accept that the term 'immediately' in clause 19, whether considered together with clause 22 (as addressed below) or independently of it, can operate in the way that Mr Hunter suggests.

108. In relation to clause 22, Mr Hunter argued that a provision which provides that 'any notice or demand' may be sent in the manner therein set out was 'contrary to the common law rules on demands' and that the parties should therefore be taken to have agreed that the common-law rules do not apply.

109. He maintained that this second point (ie clause 22) is 'particularly clear when taken alongside the first' (ie the use of 'immediately' in clause 19). He submitted that the parties have agreed that notices and demands are to be served in a particular manner which is not that required by the common-law. They have also agreed that on a failure to pay rent for 14 days the landlord may re-enter immediately. Taken together, he argues, or even taken separately, he submits, these provisions exclude the common-law rules.

110. I have already highlighted the shortcomings of Mr Hunter's reliance on the word 'immediately' as employed in clause 19: see [105] above.

111. In my judgment, Mr Hunter's submissions on clause 22.1 take him no further forward. In my judgment, considered within the context of the Lease as a whole and the provisions of section 196 LPA 1925 to which it refers, the most assured construction of

clause 22.1 is that it replaces the requirement of registered post in s196(4) with ordinary first-class post and introduces a conclusive 'deemed service' provision which, unlike s.196(4), includes post returned undelivered. I do not read clause 22.1 as amounting to an agreement by the parties to dispense with demand at common law. In my judgment it had a far more modest function than that.

112. I am fortified in my construction by the positioning of clause 22.1 within the context of the Lease as a whole. It appears under the heading 'miscellaneous' and is in a separate section of the Lease to that relating to forfeiture. I also note that the Lease carries a 'contents' page which, inter alia, records only clause 19 as the provision relating to forfeiture.

113. Moreover, even if, contrary to my conclusions, there would in theory be scope for doubt on the construction and impact of clause 22, I remind myself of the guidance given in Woodfall at 17.066 (with emphasis added):

> 'Provisos for re-entry in leases are conditions annexed to the term, and are to be construed like other contracts, according to the intent of the parties to be collected from the words used, and not with the strictness of conditions at common law. However, "it ought clearly to appear that the condition was meant to include and did incorporate the covenant on the breach whereof the right to re-enter is claimed; but that the question whether the covenant itself is broken (having once ascertained that the condition for re-entry applies to and includes it) is to be determined by reference to the rules which prevail in construing ordinary contracts between party and party". Thus the construction of a covenant is the same whether the remedy sought for its breach is merely damages or also includes recovery of possession.
>
> *It has been said, however, that in cases of doubt stipulations for re-entry are to be construed against landlords*. It is considered that this approach is incorrect insofar as it suggests a different construction of the covenant alleged to have been broken, although correct insofar as it applies to the forfeiture clause itself.'

114. The authorities cited in support of the italicised proposition above are Doe d. Abdy v Stevens (1873) 3 B & Ad 299 per Tenterden CJ at 303 and Creery v Summersell and Flowerdew & Co [1949] 1 Ch 751, in the latter of which (Creery), Harman J said at 759:

> 'Covenants of this sort which may work a forfeiture have always been strictly construed against the lessor, and that rule I propose to follow'.

115. On the same theme, Ms Farrell also referred me to the case of Phillips v Bridge per Keating J at 54:

> 'Now, the common law right of the tenant was this, that the landlord could not re-enter without a demand of the rent accompanied by certain very onerous formalities. That being so, the proviso must be read as favourably for the tenant as its words will reasonably admit of'.

116. Applying this approach, in my judgment the Company has, at the very least, a strongly arguable case that, as a matter of construction, the Lease does *not* dispense with the need for a formal demand at common law.

117. I would add that even if, contrary to my conclusions, clause 22.1 *did* operate so as to replace the requirements of a formal demand at common law with a written demand sent by first class post, the Company would still have a strongly arguable case that the forfeiture was unlawful, as (i) *no such written demand was sent in respect of the rent falling due on 25 March 2023 prior to re-entry on 21 April 2023* and (ii) in my judgment, for the reasons explored in paragraph [118] below, the Company has a strongly arguable case that the Petitioners *waived* any right to forfeit they may otherwise have had in respect of *earlier* quarters *by presentation and service of the petition*, rendering any written demands sent in respect of earlier (pre-25 March 2023) rental quarters academic for present purposes.

118. In relation to waiver of any right to forfeit for non-payment of the September 2022 quarter (and pre-September 2022 quarters) by presentation and service of the petition for rent arrears which *included the December 2022 quarter*, I take into account well-established caselaw in support of the proposition that if a landlord, knowing of a breach, demands of the tenant rent falling due after that breach, he or she may be taken to have communicated to the tenant an unequivocal recognition of the subsistence of the lease and thereby to have waived the right to forfeit in respect of the earlier breach: see by way of example Expert Clothing Service Sales Ltd v Hillgate House Ltd 1986 1 Ch 340. I would add that this is also consistent with the requirement, when making a formal demand at common law for non-payment of rent prior to re-entry, to demand simply the last quarter due, regardless of how many quarters are outstanding at the time of the demand: see Woodfall at para [17.120 (5)], addressed at [89] above. In relation to waiver of any right to forfeit for non-payment of the *December 2022 quarter* by presentation and service of the petition, it is in my judgment of significance that (i) rent is payable in advance under the terms of the Lease (ii) the whole of the December 2022 quarter is included in the petition (presented on 20 February 2023) without any apportionment (iii) the petition makes no reference to the Lease having been terminated or the lessors having elected to terminate and that (iv) at no point does the petition move from the language of 'rent' to the language of 'mesne profits' in respect of any of the sums claimed to be due. Taking all such matters into account, in my judgment it is on the evidence before this court strongly arguable that the Petitioners have by presentation and service of the petition waived any right to forfeit by physical re-entry for non-payment of rent in respect of any unpaid quarters up to and including that due on 25 December 2022.

119. Whilst the next quarter's rent (25 March 2023) fell due post-presentation/service of the petition (and so is not affected by the waiver argument addressed above), for the reasons already explored, in my judgment the Company has raised a strongly arguable case that the purported forfeiture of the Lease for non payment of rent by physical re-entry on 21

April 2023 was unlawful for want of formal demand at common law (and, even on the Petitioners' case, for want of any demand at all under clause 22.1 – see [117(i)] above).

120. I turn next to quantum.

Quantum

121. It was common ground that if unlawful forfeiture was made out, the Company would be entitled to pursue the Petitioners for damages for unlawful forfeiture: South Tottenham Land v R & A Millett (Shops) [1983] 2 EGLR 122 (first instance) and [1984] 1 All ER 614 (CA).

122. Where a claimant has been altogether deprived of his land due to a trespass, damages will include but are not limited to the value of his interest in the land: Clerk & Lindsell, paragraph 18-65.

123. One method of quantifying the damages is by reference to a hypothetical negotiation between the parties, the damages being fixed in accordance with the price the defendant would have had to pay to do the acts complained of had he negotiated for permission to do them: Clerk & Lindsell, paragraph 18-65; Bocardo SA v Star Energy UK Onshore Ltd [2010] UKSC 35.

124. Exemplary damages may also be awarded where the wrongdoers' conduct has been calculated to make a profit exceeding the compensation payable to the claimant. This latter category 'is not confined to moneymaking in the strict sense'. It 'extends to cases in which the defendant is seeking to gain at the expense of the claimant some object - perhaps some property which he covets - which either he could not obtain at all or could not obtain except at a price greater than what he wants to put down': Rookes v Barnard [1964] AC 1129 at 1227; Drane v Evangelou [1978] 1 WLR 455.

125. On present facts, if the re-entry was unlawful, it would follow that the Petitioners have been trespassing for over a year.

126. The heads of loss relied upon by the Company in relation to its cross-claim for general damages were (in summary) as follows:

(1) school fees for the summer term April to July 2023: £120,000: Witness statement of Mr Byron dated 28 November 2023, para [9];

(2) school fees in the same or substantially the same amount (ie £120,0000) for the autumn term 2023 (September to December 2023), spring term 2024 (January to March 2024) and summer term 2024 (April to July 2024), all of which were payable in advance;

(3) additional fees chargeable for special needs pupils;

(4) the rental value of the Premises: £56,000 as per the Lease;

(5) school fee arrears due from one of the parents, Mr Paul Knights: £105,812.11; and

(6) a claim for conversion in respect of the contents of the Premises owned by the Company at the time of re-entry, including school furniture and equipment, seized by

the Petitioners' agents and variously either wrongfully sold or wrongfully retained by the Petitioners acting by their agents thereafter: unquantified but including laptops estimated to be worth £10,000.

127. In my judgment the Company has raised a strongly arguable cross-claim for general damages for unlawful forfeiture in a sum comprising heads (1), (2), (4) and (6) above, a total of at least £546,000. This comprises 4 x £120,000 under heads (1) and (2), £56,000 under head (4) and at least £10,000 under head (6). For reasons which I shall come onto, the Company has also demonstrated a properly arguable claim for exemplary damages as well.

128. Dealing first with general damages: in relation to the school fees referred to in head (1) above, whilst these had fallen due at the commencement of the term and were payable in advance, they had not been collected in prior to re-entry on 21 April 2023 and the closure of the School rendered them irrecoverable. In my judgment the head 1 term fees are a strongly arguable head of loss for the Company arising as a result of the purported forfeiture. No parent could be expected to pay school fees in advance for a term's education that the School was no longer in a position to provide. The underlying contract between the School/Company and each set of parents would plainly be frustrated as a result of the sudden closure of the School arising as a result of the re-entry. Even if the contract was not frustrated, any claim for that term's fees would readily be met by a cross claim/set-off for breach of contract in the same or larger sum than the fees claimed.

129. In relation to the school fees referred to in head (2) above, I reject Mr Hunter's argument that these fees should not be taken into account because the quantum of these fees was not specifically addressed in the evidence. The court has before it evidence (in the form of Mr Byron's witness statement dated 28 November 2023) confirming what the school fees were for the summer term April to July 2023 and in my judgment, in the absence of any evidence suggesting the contrary, may legitimately infer that school fees for the terms referred to in (2) were in the same or substantially the same amounts.

130. I also reject Mr Hunter's argument that (1) and (2) were not heads of loss arising from the re-entry but from presentation of the petition, which had resulted in the freezing of the Company's bank account. The freezing of the Company's bank account did not of itself impact on the Company's *entitlement* to such school fees; it was the re-entry that closed the School. Prior to re-entry, it would clearly have been open to the Company (at that stage a trading concern providing a valuable service to the community) to seek s127 relief with a view to paying off the relatively modest undisputed part of the petition debt and continuing in business.

131. I also reject Mr Hunter's attempts to argue that the Company was about to fail anyway. This was not supported by the evidence. The fact that in May 2023, the court granted an adjournment of the petition in order to allow the Company time to explore its options, including if appropriate the seeking of advice as to whether it should appoint administrators, must be seen in the context of what had just occurred; the Company had suddenly ceased trading as a result of the re-entry. It was entirely understandable that in the light of recent events, the Company would wish to explore its options, including, but not limited to, seeking advice on whether it should appoint administrators. I also observe that one of the objectives which may be pursued in administration is the rescue of the business of the company as a going concern. In the event, having taken advice,

the Company decided not to appoint administrators. This point takes the Petitioners nowhere on quantum.

132. In relation to head (4), the Lease is in evidence and of itself supports a rental value of (at least) £56,000 per annum for the Premises.

133. In relation to head (6), whilst there was scant evidence on the value of the contents of the School overall at the time of re-entry, the evidence did confirm that such contents included school laptops with an estimated value of at least £10,000.

134. Head (3) was not addressed at all in the evidence, even in generic terms or by reference to previous years, and so must be left out of account for present purposes.

135. I am also unpersuaded (in the context of these proceedings and on the evidence before this court) that any account should be taken of head (5) when calculating the quantum of the Company's cross-claim for current purposes. School fee arrears for past terms which a pupil has actually enjoyed at the School would remain collectible by the Company even in liquidation. In my judgment they do not qualify as a loss for current purposes. They plainly fall into a different category to the school fees addressed in head (1), which relate to a term's education that the School could no longer provide as a result of the re-entry.

136. I turn next to exemplary damages. Ms Farrell submitted that on the facts of this case, the Company had a properly arguable cross-claim for exemplary damages, in addition to its claim for general damages.

137. I accept that submission. Notwithstanding Ms Tanfield's protestations to the contrary in her witness evidence, in my judgment the email sent by the Petitioners to the court dated 29 March 2023, the email dated 12 April 2023 sent by Ms Tanfield to Dentons and the consent to act filed on 22 May 2023, as addressed at [16], [17], [20], and [26] above, do strongly support the Company's case that the Petitioners (more particularly Ms Tanfield, as ultimate sole beneficiary) wanted to rid themselves of the Lease as quickly and as cheaply as possible with a view to selling the Premises for personal gain. In this regard I remind myself that exemplary damages may be awarded in 'cases in which the defendant is seeking to gain at the expense of the claimant some object - perhaps some property which he covets - which either he could not obtain at all or could not obtain except at a price greater than what he wants to put down': Rookes v Barnard [1964] AC 1129 at 1227; Drane v Evangelou [1978] 1 WLR 455.

138. For the sake of completeness, I would add that the fact that the Company has not yet issued proceedings in respect of its cross-claim is readily explained by the circumstances in which it arose, during the course of the winding up proceedings. It does not in my judgment lead to an inference that the cross-claim is not put forward in good faith.

Conclusions

139. For the reasons which I have given, in my judgment the Company has demonstrated (1) bona fide substantial grounds for disputing all bar c£41,000 of the petition debt and (2) a strongly arguable cross-claim, with real prospects of success, in a sum of at least

£546,000 in general damages (and potentially exemplary damages on top of that); overall, a sum very comfortably exceeding the petition debt in its entirety.

140. In the exercise of this court's discretion, I have therefore dismissed the petition.

141. I shall hear submissions on costs and any related matters on the handing down of this judgment.

ICC Judge Barber