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Case No: CH-2024-000064

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

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

Date: 03 December 2024

Before :

MR JUSTICE MILES

- -

Between :

RESTAURANT EC3 LIMITED — **Appellant**

- and -

TAVOR HOLDINGS LIMITED — **Respondent**

- -
- -

Tom Morris (instructed by **Teacher Stern LLP**) for the **Appellant**
Adam Rosenthal KC & Jonathan A Titmuss (instructed by **Memery Crystal**) for the **Respondent**

Hearing date: 27 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 3 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Miles :

Introduction

1. This appeal arises from insolvency proceedings and three orders of ICC Judge Jones ("**the judge**") which culminated in the winding up of the appellant Restaurant EC3 Limited ("**the company**").

2. The petitioning creditor ("**the landlord**") is the respondent to this appeal. It was the registered proprietor of a freehold estate in land which includes 4-5 Castle Court and 38½ Cornhill, Birchin Lane, London EC3V 9DL (the "**premises**").

3. The company was the commercial tenant of the premises pursuant to a lease dated 10 August 2018 for a term of fifteen years from and including 25 December 2017 ("the **Lease**") for an annual rack rent with no premium. The rent payable under the Lease before the events which have given rise to this dispute was £95,000 per annum.

4. On 4 October 2022 the landlord served a statutory demand on the company. The company did not pay all the sums stated in the demand. On 16 October 2022 the landlord re-entered the Premises and changed the locks, on the basis of non-payment which became due on 29 September 2022under the Lease.

5. The company took Part 7 proceedings in the County Court on 22 March 2023 alleging that the landlord's re-entry was unlawful and that the landlord now occupied the premises as a trespasser. It claimed possession of the premises and damages. It contended first that the parties varied the terms of the Lease so that the landlord had waived its right to forfeit the Lease on the date on which it re-entered. Second it said that, as a result of the course of negotiations between the parties, the doctrine of equitable forbearance was engaged so that the landlord was not entitled to re-enter the premises on the date that it did. The company claimed damages of more than £608,699.67 (for loss of profits and other heads) or, alternatively, mesne profits at the daily rate of £260.27. The company sought relief from forfeiture in the alternative.

6. The daily rate of £260.27 is a daily expression of the rent payable by the company to the landlord under the Lease (i.e. £95,000/365).

7. The petition debt was (after some amendments) £290,175,26.

8. In the winding up proceedings the company contended that it had a genuine and substantial set off or cross claim against the petition debt.

9. There was a hearing of the petition on 9 February 2024. By then the company had admitted in the County Court proceedings that it had not itself operated any business in the premises, that business having been carried on by two related companies (Simpsons Tavern Limited and then Simpsons of Cornhill Limited). The judge therefore held that this claim for damages for loss of profits, wages and redundancy costs did not give rise to a genuine dispute.

10. The judge noted however at [11] that the company's claim for mesne profits would, if good, produce a figure of around £170,000, which would reduce the petition debt to around £120,000. The Judge expressed some doubt as to the legal basis of the claim for

mesne profits, and suggested that the landlord would be able to take account of the rent that would have become due from the tenant. He adjourned the hearing of the petition to the next available Wednesday in the general winding up list to enable the company to put in evidence of its ability to pay the sum of £120,000 and to make submissions on the legal basis of the mesne profits claim.

11. The judge's first order (dated 9 February 2024) included the following recitals:

> "**And UPON** the Court requiring further submissions from the Respondent in the event that it seeks to argue as a matter of law that from the claim for mesne profits arising from the alleged unlawful forfeiture, there should not be deducted by set off or cross-claim the rent due under the subsisting lease for the same period as the mesne profits may be awarded (which, if not argued/established as law by the Respondent, results in an undisputed debt to be paid of £290,175.26)
>
> **And UPON** the Court being satisfied that there is in any event an undisputed debt due and owing to the Petitioner of £120,000 odd (at least)
>
> **And UPON** the Court being satisfied that the usual compulsory order for the winding up of the company should be made in the event that the company cannot pay the Petitioner £120,000 subject to any future decision by the Court to adjourn the Petition for payment within a reasonable period of time"

12. The substantive paragraphs of the first order were as follows:

> "2. The Respondent shall, in the event that it seeks to persuade the Court of the matters set out in the sixth recital above, file and serve short written submissions on the point by no later than 4pm on the 12th February 2024.
>
> 3. The Respondent shall, in the event that it seeks an adjournment for time to pay, file and serve evidence, by no later than 4pm on the 12th February 2024, as to its ability to pay the undisputed element of the petition debt (either £120,000 or £290,175.26)."

13. The matter came back before the judge on 14 February 2024, by which point submissions had been made on the availability of a mesne profits claim. The judge ruled that any claim for mesne profits would be extinguished by the landlord's claim for arrears due under the Lease ([5]-[8] of the judgment from the second hearing). He accordingly held that the petition debt was due in full.

14. The judge's second order recited as follows [83]:

> "**And UPON** the Court determining that:
>
> a) the amended petition debt of £290,175.26 is immediately due and owing to the Petitioner; and

> b) there is no genuine or substantial dispute, set off or cross claim capable of reducing the amounts due to the Petitioner
>
> **And UPON** the Court being satisfied that the usual compulsory order for the winding up of the company should be made in the event that the company cannot pay the Petitioner £290,175.26 within a reasonable period of time
>
> **And UPON** the Court concluding that the evidence provided at this hearing by the company was insufficient to satisfy that the petition debt could and would be paid within a reasonable period of time."

15. The second order ordered that the Petition be adjourned to the ordinary winding up list on 21 February 2024.

16. On 21 February 2024 the judge considered the company's evidence and its request for a seven-day adjournment by the company, which he refused. He concluded that the company had failed to demonstrate that there was a reasonable prospect of its being able to pay the petition debt within a reasonable time. The third order, made that day, wound up the company.

Permission to appeal

17. Each of the three orders was the subject of a separate Appellant's Notice. The three applications for permission to appeal were consolidated by the order of Richard Smith J of 17 April 2024, under appeal reference CH-2024-000064, with that to be the lead appeal. The company has permission to appeal against the second and third orders on a single ground, with the permission of Adam Johnson J granted on 6 June 2024. That ground concerns the judge's legal analysis of the principles applicable to the calculation of mesne profits and his decision to wind up the company. The permission to appeal covers both the second and third orders.

Summary of the appeal

18. The company contends in summary that the judge was wrong at the second hearing to conclude that the company's claim for mesne profits had no value (because there would have to be a deduction to reflect the passing rent the company would have had to pay) and that the petition debt was therefore due in full. It says that that error also infected the third order. Had the judge accepted that the company had a cross-claim for mesne profits which would have reduced the amount of the petition debt to £120,000, his approach would have been different. Instead of considering whether to adjourn the petition on the basis that there was a reasonable prospect of the amended petition debt of over £290,000 being paid in seven days, he would have had to consider the adjournment request against the lesser sum of £120,000.

Authorities

19. Before turning to the arguments of the parties, it is helpful to refer to some of the authorities, which I shall take in date order.

20. One of the paradigm cases where mesne profits are payable is where a tenant wrongfully remains in possession of premises, as a trespasser, after the termination of a lease. The well-known case of *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 ("*Swordheath*"), decided that in such a case the landlord was entitled to damages which would normally be calculated by reference to the ordinary letting value of the premises. The landlord did not have to prove that it would or could have let the premises to someone else had the defendant not remained in occupation. At p. 288 Megaw LJ said:

> "It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of the damages."

21. In a later decision of the Court of Appeal, *Ministry of Defence v Ashman* (1993) 66 P&CR 195, there was a division of opinion about the nature of the remedies available to the claimant. Hoffmann LJ said that a claimant was able to elect between damages for trespass or to waive the tort and claim a restitutionary remedy based on the benefit accruing from the wrongdoing. Lloyd LJ disagreed. He held that damages of trespass were compensatory and that the court should follow the principle in *Swordheath*. Kennedy LJ said that the proper approach was somewhat analogous to quasi-contractual restitution. The court held that the measure of compensation should be by reference to the benefit to the defendant.

22. It was common ground between the parties that, in light of *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 ("*One Step*"), the remedy is properly analysed as compensatory rather than restitutionary and that *Ashman* was therefore of little assistance. I shall return to *One Step* below.

23. *Inverugie Investments Ltd v Hackett* [1995] 1 W.L.R. 713 was a decision of the Privy Council. That was a case where the defendant was the freeholder owner of a hotel. It had let 30 apartments in the hotel to the plaintiff. The defendants wrongly ejected the plaintiff from the use of the apartments and thereafter used them as part of the hotel; more than 15 years later the plaintiff recovered possession of the apartments and sued for damages in respect of trespass by the defendant. The defendants argued that the damages should be assessed by it taking account of the occupancy rates for the rooms. The plaintiff argued that the defendants were liable to pay the plaintiff at a going rate for the use of the apartments for 365 days a year. The Privy Council found in favour of the plaintiff. Lord Lloyd of Berwick referred to a number of cases about damages for trespass, including *Swordheath*, and said:

> "It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the "loss" which the plaintiff has suffered. As the Earl of Halsbury L.C. pointed out in *Mediana (Owners of Steamship) v. Comet (Owners of*

> *Lightship)* [1900] A.C. 113, 117, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.
>
> In *Stoke-on-Trent City Council v. W. & J. Wass Ltd*. [1988] 1 W.L.R. 1406 Nicholls L.J. called the underlying principle in these cases the "user principle." The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both."

24. At page 719 Lord Lloyd said that the final question was what, if any, deduction should be set off against the reasonable rental value of 30 apartments. The plaintiff conceded that the defendants were entitled to set off for the sums which would have been payable under the lease (had it continued). These included ground rent and sums payable for the costs of maintaining and refurbishing the common areas.

25. The parties before me agreed that the parts of the judgment concerning deductions went by concession and were not the subject of argument. I agree but also note that the case was argued by eminent counsel and that the board included a number of eminent judges, including Lord Browne-Wilkinson, who had extensive experience of property law.

26. In *Smith v Khan* [2018] EWCA Civ 1137, the Court of Appeal considered a case where a tenant of residential premises had been wrongly evicted and awarded damages. Patten LJ said at [45]:

> "But, in the case of unlawful eviction, damages for trespass must compensate the tenant not merely for the letting value of the property of which he has been deprived but also for the anxiety, inconvenience and mental stress involved in the loss of what was the tenant's home. A summary of recent County Court decisions indicate awards ranging between £100 and £300 per night. Judge Owen accepted that the District Judge had been wrong to place the reliance she did on the decision in *Wallace* and that although each case inevitably turns on its own facts, her award of £40 per night was considerably out of line with what might be called the current tariff for this kind of award. The judge held that the correct figure was £130 per night."

27. In *One-Step* the Supreme Court was concerned with contractual damages for breach of a restrictive covenant. Lord Reid JSC (giving the majority judgment) undertook a wide ranging review of various aspects of the law of damages, including some tort cases. As much of the argument before me turned on this judgment I shall set out a number of passages at length.

28. At [25] to [30] he said:

> "*(i) User damages in tort*
>
> 25 In tort, although damages may in some circumstances be awarded for punitive purposes, the general principle is that damages are compensatory. As Lord Blackburn said in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39:
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> > "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."
>
> 26 Lord Blackburn's principle can readily be applied in situations where some tangible loss has been sustained: for example, where real property has been damaged or taken by a trespasser (as in the *Livingstone* case itself), or where goods have been converted. Its application is less obvious in situations where there has been an invasion of rights to tangible moveable or immoveable property, but there has been no pecuniary loss or physical damage to the property in question. Nevertheless, where a trespasser has made valuable use of someone else's land, without causing any diminution in its value, the landowner has been held to be entitled to damages measured as what a reasonable person would have paid for the right of user: see, for example, *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538. A similar approach has been adopted in cases of detinue, such as *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246. Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights.
>
> 27 The basis of the award of damages in cases of this kind was considered by Lord Shaw of Dunfermline in *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18; 31 RPC 104. The case concerned the sale of machines which infringed the pursuers' patent. The issue in dispute was whether the pursuers were entitled to recover damages for sales which had been made by the defenders in a territory where the pursuers could not themselves have traded, and which, moreover, the defenders would have made even if the machines had not incorporated the infringing part. It was held that they were so entitled. Lord Shaw contrasted the principle underlying the assessment of "damages in general", whether in contract or in tort, which he described as the principle of "restoration" as he defined it, with a second principle of "price or hire", applicable

not only to patent cases but "wherever an abstraction or invasion of property has occurred": 1914 SC (HL) 18, 29-31. As he explained, this distinction was relevant to the case before him, since the restoration principle could not support a claim by a patentee relating to a section of trade in which, it was argued, "he can have sustained no damage, because he would never have sold his patented articles within that section": p 30.

28 Lord Shaw described the second principle as follows, in a passage at p 31 subsequently quoted by Brightman J in the *Wrotham Park Estate* case [1974] 1WLR 798, 813:

> "It is at this stage of the case, however, that a second principle comes into play. It is not exactly the principle of restoration, either directly or expressed through compensation, but it is the principle underlying price or hire. It plainly extends - and I am inclined to think not infrequently extends - to patent cases. But, indeed, it is not confined to them. For wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire."

He illustrated this by the example of the liveryman's horse, also at p 31:

> "If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.'"

Lord Shaw also endorsed the view expressed by Fletcher Moulton LJ in *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157, 165 that, even if it was not the claimant's practice to grant licences, "it would be right for the court to consider what would have been the price at which - although no price was actually quoted- could have reasonably been charged for that permission, and estimate the damage in that way".

29 The approach adopted in these cases was described by Nicholls LJ in *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 as the "user principle". He summarised it as follows, at p 1416:

> "It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for

> the wrongful use he has made of the other's property. The law has reached this conclusion by giving to the concept of loss or damage in such a case a wider meaning than merely financial loss calculated by comparing the property owner's financial position after the wrongdoing with what it would have been had the wrongdoing never occurred. Furthermore, in such a case it is no answer for the wrongdoer to show that the property owner would probably not have used the property himself had the wrongdoer not done so. In *The Mediana* [1900] AC 113, 117, Earl of Halsbury LC made the famous observation that a defendant who had deprived the plaintiff of one of the chairs in his room for 12 months could not diminish the damages by showing that the plaintiff did not usually sit upon that chair or that there were plenty of other chairs in the room."

> 30 In these cases, the courts have treated user damages as providing compensation for loss, albeit not loss of a conventional kind. Where property is damaged, the loss suffered can be measured in terms of the cost of repair or the diminution in value, and damages can be assessed accordingly. Where on the other hand an unlawful use is made of property, and the right to control such use is a valuable asset, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In such circumstances, the person who makes wrongful use of the property prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss. Put shortly, he takes something for nothing, for which the owner was entitled to require payment."

29. At [95] Lord Reed said:

> "(1) Damages assessed by reference to the value of the use wrongfully made of property (sometimes termed "user damages") are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass). The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment."

Summary of the parties' submissions

30. The company argued in outline as follows:

i) The starting point is to assume that the landlord has unlawfully re-entered and has therefore been a trespasser since October 2022. The company is therefore entitled to damages for trespass.

ii) The Lease gave the company a valuable right against everyone, including the landlord, and the company has been deprived of its valuable right of possession. That is a right of exclusive possession. The landlord has taken something for nothing.

iii) The company is therefore entitled to require payment, measured as a reasonable notional rent. That is reasonably measured by reference to the rent payable under the Lease. This measure accords with the principles set out in *One-Step*. The landlord is required to pay that much as the price or fee for wrongfully taking possession.

iv) There should be no deduction of the amount of rent that would have been payable by the company under the Lease. That would lead to damages of nil, which would undervalue the economic value of the Lease to the company (and the use wrongly made by the landlord).

v) Though the amounts that would have been payable under the lease were deducted from the reasonable notional rent in *Inverugie*, the point went by concession and is not binding.

vi) In *Smith v Khan* (another case of a trespassing landlord) the court did not consider any deduction was needed for the rent the tenant would have had to pay under the lease. This is therefore a Court of Appeal authority in favour of the company's position.

vii) If a notional deduction of the rent that would have been payable were required, damages would be nominal. Lessors would be able to evict lessees unlawfully without the sanction of damages. It would be a right without a remedy.

viii) The deduction of rent from the damages is also contrary to the principle that rent is suspended by the entry of the lessor (see Woodfall's Landlord and Tenant para 7.138).

31. The landlord argued in outline as follows:

i) It is not accepted that the landlord wrongfully evicted the company. But for present purposes this is to be assumed.

ii) Damages for trespass are compensatory. Though there was a period when some courts referred to mesne profits as restitutionary, *One-Step* has put the analysis beyond doubt.

iii) The user principle is concerned with compensating the claimant for the loss of its valuable asset, including the right to require payment for use.

iv) In the present case the company's right to occupation of the land (including as against the landlord) arises under the Lease. Proper compensation for the landlord's trespass requires a deduction of the rent that would have been payable under the Lease.

v) Though the point went by concession in *Inverugie*, it remains telling that deductions were made in that case of the amounts payable that would have been payable by the plaintiff under the lease of the apartments, including ground rents.

vi) Damages measured by reference to a notional rent payable by the landlord with no deduction would overcompensate the company and amount to a windfall.

vii) In *Smith v Khan* there was no argument about any deductions of the kind in issue here. The reasonable rate selected in that case was based on a series of cases which had reached something akin to a tariff for wrongful eviction of residential tenants, and it took account of anxiety, mental stress and disruption involved in the loss of a tenant's home.

viii) The company would be compensated for the loss of an asset which would only have had any value had it continued to pay the rent.

ix) As to the suggestion that there would be a right without a remedy there are several answers. This is an unusual case in which (as it turned out) the tenant did not carry on any business from the Premises and therefore cannot claim for business disruption. There are other remedies available to commercial tenants, including injunctions. Moreover it would be open to a tenant to show that the open market rental value of their property was higher than that reserved under their lease and they would be entitled to claim the difference as mesne profits.

Analysis and conclusions on the measure of damages

32. I have reached the conclusion that the judge was correct to conclude that on the facts alleged by the company there was no substantial claim for mesne profits.

33. *One-Stop* shows that damages for trespass are compensatory. Suggestions in cases such as *Ministry of Defence v Ashman* that the claimant was entitled to a restitutionary remedy must be regarded as wrong.

34. *One-Stop* explains that in cases of wrongful use of valuable property rights the court may assess the loss to the claimant by requiring the payment of a reasonable price or fee for that use. Lord Reed has explained that the right to control such use is a valuable asset. Damages are paid to compensate the owner for the loss of the right to obtain the economic value of the use.

35. The law compensates for the loss suffered, but no more. In a case where the owner is freeholder or long leaseholder for a premium, the loss is likely to be measured as the open market rent for the use of the land. The owner (the freeholder or long leaseholder) owns the land and is entitled to decide whether to use it or rent it out. A trespasser on the land interferes with this right and must pay.

36. In the case of a lease for a rack rent (as in the present case) the tenant is entitled to exclusive possession of the land in return for rent. The two are interdependent. If the tenant did not continue to pay the rent it would lose its right to occupy the land as against the landlord (leaving aside issues of relief from forfeiture etc). In order to place a reasonable economic value on the rights which have been invaded, it seems to me that one must take account of the cost to the company of maintaining those rights. It is asserting a continuing right of possession against the landlord. That continuing right depends on the continued payment of rent, and to assess the economic value of the right, one must assume that it would have had to continue paying rent. Otherwise, in my judgment, the company would be overcompensated. It would be receiving a price for the loss of an ownership right which it would only have enjoyed by continuing to pay the rent.

37. This approach appears to me to place a reasonable value on the economic rights of the company as "owner" of the land. Its continuing ownership rights arise only under the lease and it is a precondition of those rights that it pays a continuing rent. The economic rights cannot be valued for the purposes of damages by crediting it with a reasonable fee payable by the landlord as trespasser while disregarding what it would have cost the company to continue to have the benefit of those rights.

38. Some support for this conclusion is given by the *Inverugie* case. There were experienced counsel on both sides and the board of the Privy Council do not appear to have regarded the concession as surprising. It appears to me that this was because it accorded with the principles set out above.

39. I agree with the landlord that *Smith v Khan* throws no light on this case. For the reasons given by Patten LJ in [45] of that case, there may well be a different approach in residential cases and nothing I say here should be taken to apply to them.

40. I am unable to accept the company's argument that there would be an infringement of a right without a remedy. There may be cases with a fact pattern similar to this one but where the open market rental value of property exceeds the passing rent under the lease. Mesne profits would be payable for the difference. Moreover in many if not most commercial leases the tenant is able to claim damages for loss of business and disruption. This is perhaps an unusual case in that no such losses were suffered by the tenant. The court also has power to grant an injunction to prevent an unlawful eviction.

41. The principle that rent is suspended by the entry of the lessor is not relevant here. There is no claim for the rent as such. The present question is different. It is whether, in assessing damages for trespass, a notional deduction is required of the rent that would have been payable.

42. For these reasons the appeal against the judge's second order is dismissed.

The decision to wind up

43. For the above reasons, the appeal must be dismissed. I shall however address the position on the basis that this is wrong. The assumption of this part of the judgment is

that the judge should have held that the undisputed part of the petition debt was about £120,000 rather than about £290,000.

44. I have set out the three relevant hearings and orders above. As explained there, by the first order the company was permitted to file a witness statement addressing its ability to pay the undisputed element of the debt (then stated to be £120,000).

45. On 13 February 2024 the company served a first witness statement of Mr Sarvindra Singh, its sole director and ultimate owner. At para 13 he said this:

> "Therefore the parent company alone could pay the Petition Debt. However, given the substantial sum, the Respondent asks the Court for 8 weeks to pay the Petition debt so that it can assess whether the funds should be obtained from the parent company or other group companies and ensure that the company or companies that are providing the funds are left with sufficient funds to continue to operate. If the Petition Debt is to be paid from Snowville's portfolio, then 8 weeks will also be necessary in order to liquidate those assets."

46. Though described as the parent company, it turned out that Snowville UK Ltd was a company also ultimately owned by Mr Singh but was not a parent of the company.

47. This statement, served shortly before the second hearing (of 14 February 2024) showed that the company did not have the means to pay even £120,000. An adjournment was sought for the matter to be assessed. It would also take eight weeks to raise £120,000 from Snowville.

48. At the second hearing the judge decided that the undisputed debt was £290,000.

49. The company then served the second witness statement of Mr Singh dated 20 February 2024. He asked for seven days "to pay the petition debt so that Snowville U.K. Limited can consider liquidating their assets to pay the Petition Debt".

50. As already explained, at the third hearing (on 21 February 2024) the judge refused this adjournment and wound up the company.

51. The company submitted (assuming that judge was wrong about the measure of mesne profits) that the erroneous conclusion in the second order that the uncontested petition debt being £290,000 infected the remaining proceedings. From then on the company's evidence was directed to the issue whether it could have raised £290,000 rather than the much lower figure of £120,000. That rendered the process unfair. Moreover when it came to the third hearing the judge improperly exercised his discretion because he erred in principle about the measure of the petition debt and took into account an irrelevant factor (namely the inability of the company to pay £290,000). The company submitted that the second and third orders should be set aside and that the petition should be remitted to the winding up court for determination. The company said (and this calculation was not disputed) that, with the passage of time and the continuing wrongful occupation by the landlord, the undisputed petition debt would now be about £90,000.

52. The landlord submitted that the judge's decision to refuse a further adjournment at the third hearing was a discretionary case management decision which could not be impugned. Alternatively, if the court was persuaded that the third order was flawed, this court should exercise the powers of an appellate court to confirm the order. There is no evidence before the court even now that the company can pay even the sum of £90,000.

53. My conclusions are as follows. Assuming the judge was wrong about the calculation of damages for trespass, the question at the third hearing would have been whether the court should allow the company a reasonable time to pay £120,000 rather than £290,000. I agree with the submission of the company that the judge's decision at the second hearing about mesne profits affected the proceedings thereafter and the exercise of the judge's discretion at the third hearing. I agree that (on this assumption) the exercise of discretion would have proceeded on an erroneous basis.

54. I should therefore consider the exercise of the discretion myself. The court only grants adjournments of otherwise valid winding up petitions where there is evidence giving reasonable grounds for thinking that the company will be able to pay within such time. To my mind there was nothing in the evidence served by the company to justify the conclusion that the company could have raised even the lower sum of £120,000 within a reasonable time. The first witness statement of Mr Singh asked for eight weeks to assess whether other companies in which he was interested should provide the money (presumably as a loan). According to that evidence it would take eight weeks to raise the funds to pay £120,000. There was nothing in the second witness statement to suggest that a decision could be made or funds could be raised more quickly than the timeframe set out in the first statement. I reach that conclusion even though the second witness statement was concerned with the greater sum of £290,000. Essentially the second witness statement did not advance things materially beyond the first. For these reasons, re-exercising the discretion on the correct basis, I would have reached the same case management decision as the judge, namely, that there was no proper basis for an adjournment of the petition on 21 February 2024. I would not therefore have set aside the third order.

Conclusion

55. The appeal is dismissed.