Neutral Citation Number: [2025] EWHC 319 (Ch)

Claim No. BL-2022-001291

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (CH.D)

14 February 2025

Before :

JONATHAN HILLIARD KC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

B E T W E E N:

(1) MR SANJAR MOHAMMED RASUL
(2) WAYSIDE AUTOS LIMITED

Claimants / Respondents

- and -

MR FRANCO LUMBA

Defendant / Applicant

- -

- -

Kamar Uddin (instructed by Philip Smart & Associates solicitors) for the Claimants

Mark Warwick KC (instructed by Judge Sykes Frixou Solicitors) for the Defendant

Hearing date: 20 December 2024

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APPROVED JUDGMENT

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JONATHAN HILLIARD KC sitting as a Deputy Judge of the High Court:

Introduction

1. I have before me an application dated 28 October 2024 by the defendant landlord, Franco Lumba, in respect of the 25 August 2022 order of Mellor J (the **"Mellor Order")**. He is represented by Mr Warwick KC.

2. The matter relates to commercial premises known as the Wayside Service Station, Oxford Road, Tatling End, Gerrards Cross, SL9 7BB, which I shall refer to as **"the Property"**. The application is described in Mr Lumba's skeleton as an enforcement application, necessitated by what he contends are breaches of the undertakings given by the first claimant, Mr Rasul, to the Court under the Mellor Order. As Mr Warwick explained orally, Mr Lumba seeks variation of the Mellor Order, including the discharge of paragraph 1, so to allow him back into occupation of the part of the Property not occupied by the Second Claimant, Wayside Autos Limited (**"Wayside"**).

3. Mr Rasul, who appears before me with Wayside by Mr Uddin, does not accept there are any breaches and contends that there are a number of other reasons why the application should be dismissed, which I shall come onto later.

4. I heard submissions for just over half a day and was provided with a hearing bundle of just under 1000 sides.

5. The procedural backdrop is unusual in some respects, so I shall start by describing it briefly together with the relevant facts.

Background

6. The Property comprises a forecourt large enough for 20 vehicles, a showroom office, a workshop large enough for one vehicle to be worked on, and a small residential flat. The flat is important to the present application. The 2019 decision of the district planning authority, on a certificate of lawfulness of existing use application, records that part of the back section of the two storey building associated with the business can be accessed via a side door leading onto a kitchen area to the left and a stairway directly ahead, and the stairs lead to a first floor containing a toilet separate from the bathroom together with three habitable rooms. I understand from the description that I have just recited and the video that I was shown that it was in fact above the showroom office that is on the ground floor of the two storey building, although an earlier statement of Mr Lumba's suggests that it was above the workshop.

7. Mr Lumba states that when he bought the Property in around 2009 there was a tenant in the flat but that the flat was in a dilapidated state and Mr Lumba knew that it would cost a great deal of money to refurbish it to bring it up to acceptable standards, so he served notice on the then tenant and decided not to rent out the flat for residential use.

8. On 13 August 2015 Mr Lumba granted to Mr Rasul a 10 year lease of the Property at a rent of £66,000 per annum subject to review (**"the Lease"**). There are disputes as to what happened immediately before that, specifically as to whether there was sub-letting consented to by Mr Lumba from the outset.

9. On 15 July 2022 Mr Lumba served a forfeiture notice upon Mr Rasul under section 146 of the Law of Property Act 1925, stating that Mr Rasul had unlawfully sub-let, and on 29 July that year Mr Lumba re-entered the property.

10. Mr Rasul and Wayside applied to the High Court for injunctive relief pending trial of a claim that the forfeiture was unlawful. Mr Rasul contended that Wayside was his sub-tenant and that Mr Lumba consented to the sub-tenancy. Following a 25 August 2022 hearing, the Mellor Order was made in claim number BL-2022-1291. I have the order before me, together with his short written reasons on a point raised following the hearing (the **"Reasons"**), but not his main judgment, a transcript or note of the hearing before him or any submissions that led to the Reasons. I understand that the terms of the Order were different to the ones that the Claimants had applied for.

11. The Reasons explain that the purpose of the order was to preserve the position immediately before the section 146 notice was served, with one gloss. The gloss was that by the time of the hearing a Mr Khudur was in the property and had been for some time. Mr Lumba states that on discovering he was there and having terminated the lease of Mr Rasul, Mr Lumba agreed a temporary arrangement for Mr Khudur to operate the car wash.

12. Given its centrality to the present dispute, I set out the full order, other than the first two recitals, and the Reasons:

> "*AND UPON it being recorded that nothing in this order is intended to interfere, or allow interference with, the operation of the car wash at the Property by Hasan Rawanda Khudur ("Mr Khudur") or the payment of his rent, or licence fees.*
>
> *AND UPON, following the hearing, the parties asking the Court to resolve an issue regarding to [sic] which party Mr Khudur must pay his rent or licence fees pending judgment in the Claimants' action for relief against forfeiture*
>
> *IT IS ORDERED THAT*
>
> 1. *Pending Judgment in the Claimants' action for relief against forfeiture and subject to the First Claimant performing the undertakings set out in the First Schedule hereto, the Defendant must provide to the First Claimant keys to the Property known as the Wayside Service Station, Oxford Road, Tatling End, Gerrards Cross SL9 7BB ("the Property")*
>
> 2. *Pending Judgment in the Claimants' action for relief against forfeiture and subject to the Second Claimant performing the undertakings set out in the Second Schedule hereto, the Defendant give to the Second Claimant keys to the Property and allow it to resume its garage business at the Property.*
>
> 3. *Costs of the Application are costs in the case.*
>
> 4. *Permission to the parties to apply to enforce the terms of this Order, otherwise all further proceedings in this dispute are transferred to the County Court seised of the Claimants' claim for relief from forfeiture.*

5. *This order shall be served by the Claimants upon the Defendant*

...

FIRST SCHEDULE

(1) To pay £17,500 to the Defendant by 4pm on 22 September 2022

(2) Until judgment or further order, to comply with each of the Tenant's covenants in the Lease of the Property, made between the First Claimant and the Defendant, dated 13 August 2015 ("the Lease")

(3) Until trial or further Order:

(a) Not to enter the Property

(b) Not to interfere with the peaceful enjoyment of the Property by Mr Khudur, for the purposes of his car wash business

(4) To issue as soon as possible, in the appropriate County Court, a claim for relief relating to the Lease

(5) To vacate the Property within 14 days, if his claim fails

(6) If the Court later finds that this Order has caused loss to the Defendant and decides that he should be compensated for that loss, the First Claimant will comply with any order the Court may make

SECOND SCHEDULE

(7) Until trial or further order not to interfere with the peaceful enjoyment of the Property by Mr Khudur, for the purposes of his car wash business.

(8) To issue as soon as possible, in the appropriate County Court, a claim for relief relating to the Lease

(9) To vacate the Property within 14 days, if its claim fails

(10) If the Court later finds that this Order has caused loss to the Defendant and decides that he should be compensated for that loss, the Second Claimant will comply with an order the Court may make

REASONS ON THE POINT RAISED FOLLOWING THE HEARING

1. *I indicated in my judgment that the modus operandi pending trial should revert to the position before service of the Defendant's section 146 Notice. Under those arrangements, Mr Khudur was paying rent or licence fee of £6,500 per month to Mr Rasul in respect of the car wash. Under the Lease and following the rent review on 10th March 2020, Mr Rasul has to pay £6,500 a month to the Defendant.*

2. *By contrast, under his licence agreement with the Defendant for the month of August, Mr Khudur pays the Defendant the sum of £10,000 and it was anticipated that would be the monthly rent or fee for Mr Khudur going forward.*

3. *The Defendant raises this point because the evidence indicated there is a dispute as to money between Mr Rasul and Mr Khudur. The Defendant suggests that if Mr Khudur pays his rent or licence fee direct to the Defendant, it will minimise the possibility of conflict at the Property and, in particular, avoid any further*

disruption to the arrangements between the parties pending trial which the Court may not be in a position to address because Mr Khudur is not a party to these proceedings.

4. *I can see the advantage in the arrangement proposed by the Defendant, which is accommodated in the wording of the Order above. However, it is on the basis that, pending judgment in the claim for relief from forfeiture, payments made by Mr Khudur to the Defendant are, to the tune of £6,500, to be treated as having been paid by Mr Rasul in discharge of his obligations to pay £6,500 per month pursuant to the Lease of the Property dated 13th August 2015.*

5. *If there are any difficulties with this arrangement and the direction in the preceding paragraph, they can be raised under the permission to apply which can be done in writing if appropriate.*

END"

13. Therefore, the undertakings included in Mr Rasul's case included:

    (1) complying with the covenants in the Lease,

    (2) not entering the Property, and

    (3) issuing as soon as possible in the County Court a claim for relief relating to the Lease.

14. It was also intended, as set out in the short written reasons I have referred to, that Mr Khudur should pay £6,500 a month to Mr Lumba. I think the reference in paragraph 4 of the Reasons to the arrangement being accommodated in the wording of the Order above is a reference to the first recital recording that nothing in the Order is intended to interfere or allow interference with Mr Khudur's payment of rent or licence fees, which can be read as referring to his intended future payments of his rent or licence fees referred to in paragraph 2 of the Reasons.

15. As apparent from the terms of the order above, it was granted to hold the ring until the "*relief against forfeiture claim*" could be resolved. It gave protection to Mr Rasul, because Mr Lumba gave up the keys, but it gave protection to Mr Lumba, because for example Mr Rasul undertook to comply with the Lease and not to enter the Property, and it was intended that Mr Khudur would pay sums to Mr Lumba. Strictly the County Court claim was as I read it that the forfeiture was unlawful rather than a claim for discretionary relief under section 146, but I do not consider anything turns on this point.

16. Mr Lumba's obligation to hand over the keys and therefore stay out of the Property was expressly stated in paragraph 1 of the Order to be "*subject to*" Mr Rasul performing his obligations under the undertakings. Therefore, it was premised and conditioned on Mr Rasul doing so.

17. The obligations under the Lease include the following:

    (1) Covenants not to assign or sub-let (clause 4.11);

    (2) "*Not to use the whole or any part of the Property: (i) for any illegal or immoral purpose;…or (iii) otherwise than for the Permitted Use*" (clause 4.17(a)), the Permitted Use being a car wash;

    (3) "*Not to allow any person to reside or sleep on the Property*" (clause 4.17(b));

(4) "*Any covenant by the Tenant not to do an act or thing shall be construed as including an obligation not to permit to suffer such act or thing to be done by another person*" (clause 2.9);

(5) "*To repair maintain and keep the Property clean and in good and substantial repair rebuilding and renewing the same or any part of it as necessary and forthwith replace any plate glass or window that becomes cracked or broken*" (clause 4.5(a));

(6) "*(a) To make good with all practicable speed any failure to repair maintain or decorate the Property for which the Tenant is liable and of which the Landlord has given notice in writing starting the necessary work within one month after the Landlord's notice (or sooner if necessary) and then proceeding diligently and without interruption. (b) If the Tenant does not comply with clause 4.8(a): (i) to allow the Landlord to enter the Property and make good any such failure to repair maintain or decorate; and (ii) to pay the reasonable costs of doing so (including reasonable fees) together with interest thereon at the Prescribed Rate from the date of expenditure to the date of payment*" (clause 4.8);

(7) "*To permit the Landlord and all others authorised by it at reasonable hours and on reasonable notice (but in case of emergency at any time without notice) to enter the Property for the purpose of: (a) viewing and recording the condition of the Property…or for any other reasonable purpose connected with the Property*" (clause 4.9);

(8) "*to comply with all requirements under any present or future acts of Parliament, order, byelaw or regulation as to the use or occupation of or otherwise concerning the Property*" (clause 4.22(b));

(9) "*to comply with the provisions and requirements of the Planning Acts and of any planning permissions relating to or affecting the Property ...*" (clause 4.23);

(10) "*To comply with the requirements and recommendations of the fire authority, the insurers of the Property and reasonable requirements of the Landlord in relation to fire precautions affecting the Property*" (clause 4.24);

18. The Lease included at clause 7.1 a landlord's right to forfeit the Lease for any breach of the tenant's covenants.

19. At clause 13 it was stipulated that the provisions of the Landlord and Tenant Act 1954 did not apply to the Lease. Hence, Mr Mr Lumba contends that regardless of the contested forfeiture issues in this case, the Term of the Lease expires on 12 August 2025.

20. Following the Order, the Claimants issued five days later a claim in the Central London County Court, contending that the forfeiture was wrongful. Mr Uddin stated orally that while not currently pleaded in that claim, Mr Rasul intends to contend that he is entitled to extend the Lease for a further 10 years by virtue of a legally binding agreement that he asserts was reached with Mr Lumba to this effect.

21. The parties drew my attention to two Court applications since then before the present one, unusually made to different Courts.

22. The first was made by Mr Rasul by 18 April 2023 application notice to the *High Court* to vary or discharge parts of the Mellor Order, in order to enable Mr Rasul to go into occupation. The principal ground advanced was that, Mr Rasul contended, Mr Khudur was no longer in the property, so there was no reason for Mr Rasul to have to stay out of

it. Mr Lumba contested this, serving a statement from Mr Khudur stating that he was still in occupation.

23. On 3 May 2023, Miles J dismissed the application on its merits.

24. The second was the application made by Mr Rasul on 4 October 2023, this time to the *County Court*, to vary and/or discharge paragraph (3)(a) of the First Schedule to the Mellor Order, which provided that Mr Rasul was not to enter the property. Mr Rasul contended that Mr Khudur's earlier statements had been improperly obtained and that Mr Khudur had ceased to occupy the property. Recorder Lambert KC adjourned the application and gave directions for cross-examination. HHJ Johns KC heard the application, including cross-examination, on 20 June 2024 and gave judgment the following day. I have been provided with a copy. He rejected the contention that Mr Khudur's statements had been falsely prepared. He concluded that Mr Khudur did not appear to be present at the property any more but the carwash business that was run by him was. He concluded that the person running the business seemed to be the person named by Mr Khudur as his business partner, Mr Sayakhan. The Judge noted in the course of his judgment, at [2], that the "*situation has been held by an order of Mellor J, made when this case was in the High Court*".

25. Mr Rasul has appealed the order. He adduces as part of that appeal a witness statement by Mr Sayakhan that states that Mr Sayakhan is employed by Mr Rasul and works at the Property three days a week.

26. The relief from forfeiture proceedings have not yet reached a final hearing. I understand that the parties have agreed directions to trial, and that on 28 October 2024, HHJ Johns KC ordered that there be a directions hearing before him where the court would consider listing for trial and the appropriate directions because he was not content with the directions agreed.

<u>The present application</u>

27. Against that backdrop, the present application before me arises in the following way.

28. Mr Lumba states as follows in his witness statement in support of the application:

    (1) On 14 October 2024, Mr Lumba received a letter dated 9 October from Mr Abiola of the Directorate for Communities- Transport and Regulatory Service from Buckinghamshire Council, which letter notified him of an Emergency Prohibition Order under s.43(5) of the Housing Act 2004 that had been made in relation to the "*Flat at Aron Car Valeting LTD[,] Wayside Service Station…*". I shall term that **"the EPO"**.

    A copy of the EPO was exhibited to his statement. It states among other things that the Council was satisfied that a Category 1 hazard exists in the flat on the premises that involves an imminent risk of serious harm to the health and safety of any of the occupiers of the premises. It went on to say that the terms of the order prohibit the use of the dwelling for residential purposes.

    The EPO referred to two hazards, a fire hazard and an electrical hazard. It stated that the deficiency giving rise to the former was as follows:

    > "*Inadequate Fire detection and Alarm system. A fire panel had been installed in the property, but it had not yet been powered or commissioned, rendering it non-functional. This posed significant risk, as there was no operational smoke*

alarms installed to serve the flat, leaving any occupants without any early warning system in case of fire."

It stated that the deficiency giving rise to the latter was as follows:

"*Several instances of exposed live electrical wiring and fittings were observed throughout the flat. This poses potential danger of electrocution.*"

The EPO went on to identify the remedial work that would be necessary to deal with that.

I shall return to the EPO below. Mr Warwick contended that the company referred to in the EPO, Aron Car Valeting Ltd, was linked to Mr Rasul, and Mr Uddin confirmed that it was Mr Rasul's company.

(2) The EPO was sent by Mr Lumba's solicitors to Mr Rasul's then solicitors the next day, stating that Mr Lumba intended to inspect the Property on 21 October.

(3) Mr Lumba spoke to Mr Abiola, who told him that he had attended the Property with border Force Immigration Offices and Police Officers from Thames Valley Police, and the property was being illegally used to house a number of people as a house in multiple occupation, and that some of the people present were arrested and taken away by the police and immigration officers.

(4) Mr Lumba's solicitors wrote again to Mr Rasul's on 18 October to convey what Mr Abiola had said. Mr Rasul was asked to disclose all written communications that he or his agents had had with the local authority, border force or police in relation to the EPO. A warning was given that an application may be made to discharge the Mellor Order.

(5) On 21 October, Mr Lumba states that he attended at the Property with a view to carrying out an inspection in accordance with the Lease. He stated in the first witness statement that he made in support of the present application that Mr Rasul's staff denied him entry and whilst at the Property he spoke to Mr Rasul who told him that he was not entitled to inspect so he left without inspecting. In his second witness statement for the application, he added that he saw Mr Sayakhan at the Property who also told him he was not permitted to inspect.

(6) Later the same day, Mr Lumba's solicitors wrote to Mr Rasul's stating an application would be made in respect of the Mellor Order.

(7) Mr Lumba also states that he has found out that there was an application in or around 2019 for a certificate of lawful use in respect of the flat as an independent dwelling, and that in the notice refusing to grant a certificate, South Bucks District Council stated that there were already other people staying there. He has enclosed a copy of the decision letter. The letter stated that the applicant was Mr Rasul and that the application stated that part of the building associated with the car wash was being used as a dwelling comprising of two bedrooms proposed to be three bedrooms, and the decision notice states that on a site visit in July 2018, it was observed that there were four beds in one room.

(8) Mr Lumba also states that he has discovered through a search of Thames Valley Police's website that Thames Valley Police immigration officers had raided the Property in June 2022 while it was occupied by Mr Rasul. He exhibits a copy of a screenshot of their website posting showing a photograph of officers outside what he

contends is the the site, accompanied by an entry about the photograph which states (among other things) "*NH and immigration visited car washes today. This resulted in two locations being identified employment offences [sic] which will result in fines of £80K*".

29. Therefore Mr Lumba states that the EPO and the circumstances leading to it involved grave breaches of the various tenant covenants in the Lease, including at clause 4.17, a covenant not to allow any person to reside or sleep on the Property. He contends that the EPO and what has given rise to it imperil Mr Lumba's lending arrangements and also his insurance. Mr Lumba has submitted among other things a written communication from his mortgage company stating their concern about the situation and a copy of the mortgage document showing that among things that he must comply with his building insurance obligations. Mr Lumba contends that a breach of this obligation to insure is an event of default which could lead to repayment, and his insurance policy sets out use, gas and electrical certification obligations that he states that he is concerned that he has been put in breach of.

30. I pause there to expand briefly on the statutory context behind the EPO:

    (1) A category 1 hazard is the most serious category of hazard. If a local housing authority considers that a category 1 hazard exists on any *residential* premises, they must take the appropriate enforcement action in relation to it, which means one of a number of courses of action, including the making of an EPO under section 43: section 5. Residential premises are defined as a dwelling, a house in multiple occupation (**"HMO"**), an unoccupied HMO accommodation or any common parts of a building containing one or more flats: section 1(4).

    (2) An EPO can only be made if the local housing authority considers that the hazard involves an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises: section 43(1)(b).

    (3) Such an order is an order imposing with immediate effect such prohibitions on the use of any premises as are specified in the order: section 43(2).

    (4) An emergency prohibition order may impose such prohibitions on the use of any premises as comply with sections 20(3) and (4), and any such prohibition may prohibit use of any specified premises or part of those premises, either for all purposes or for any particular purpose except to the extent to which the use of the premises or part is approved by the authority: section 22(4).

    (5) A person commits an offence if, knowing the prohibition order has become operative, he uses the premises in contravention of the order or permits the premises so to be used: section 32(1).

    (6) The prohibition order will be a local land charge on the local land charges register held by the council: section 37(1).

    (7) A relevant person may appeal to the appropriate tribunal against an emergency prohibition order: section 45(2). A relevant person includes an owner or occupier of the whole or part of the premises: paragraph 16(1) of Schedule 2, section 45(7). The period specified in the EPO for an appeal is 28 days from the date on which the order was made.

(8) Where the whole or part of the premises in respect of which a prohibition order has become operative forms part of the subject matter of a lease, the landlord or tenant may apply to the appropriate tribunal for an order determining or varying the lease, and on such application the tribunal may make an order determining or varying the lease if it considers appropriate to do so: section 34(1) to (3).

31. Mr Rasul states as follows in his witness statement, combined with his skeleton:

(1) The Mellor Order prevents him entering the Property.

(2) He applied to Court previously so that he could see whether covenants were being breached. Specifically he stated in his application to Miles J among other things that he understood that there were unknown people who had entered part of the building.

(3) Mr Lumba's application should have been made to the County Court because the application for relief from forfeiture was being dealt with there.

(4) As he had been prevented from attending the property, he does not have first hand knowledge of what is going on at the premises and whether there are breach of the covenants.

(5) Mr Lumba has been at the property trying to evict Mr Rasul's sub-tenant, Wayside, and they had to call the police. Mr Lumba came once and sent other people twice. The first time he came was on 21 October and then he sent people on 22 October and a week later and on all three occasions he was threatening Wayside and asking them to leave despite the Mellor Order. Mr Lumba was therefore in breach of paragraph 2 of the Mellor Order as he was interfering with Wayside's business on the premises.

32. In response to my question as to what, if anything, Mr Rasul submitted should be done to deal with the issues in the EPO, Mr Uddin submitted that Mr Rasul should be able to obtain his own report as to the state of the flat.

33. Mr Uddin made an oral application before me to adduce a short witness statement from Mr Sayakhan which had been served on Mr Lumba's solicitors 3 days earlier. In that statement, Mr Sayakhan states:

(1) On 14 October 2024, the Police, an immigration officer and someone from the local council arrived and gave a notice relating to electrical safety but that no notice about HMO or illegal immigrants being or living at the premises was mentioned or served.

(2) On 8 December, four people came into the service station and started to break the windows and doors, and told Mr Sayakhan's other work colleagues and him to leave, stating that they were told to come down by Mr Lumba and they wanted the staff to leave or they would hurt them. Mr Sayakhan states that he was hit with a baseball bat and the police were called. He exhibits a copy of the EPO. There is also a reference to a video exhibit, which I was told by Mr Uddin showed individuals sitting in a police car, but it was common ground between the parties that I did not need to see that video and it was not placed before me.

34. Mr Warwick did not object to point (1) being adduced in evidence but contended that point (2) should not be, as Mr Lumba had not had a chance to respond to it.

35. I consider that the witness statement should be admitted. It was served 3 days before the hearing, which- while close to the hearing- did give Mr Lumba some chance to respond

to it, and is of potential relevance to the matters in issue. However, in my judgment it does not affect the result I reach, for the reasons set out below.

36. Mr Uddin also made an oral application to adduce four short clips of CCTV taken of Mr Lumba visiting the premises on 21 October that had been sent by Mr Rasul's representatives to Mr Lumba's solicitors two days before the hearing and referred to in Mr Uddin's skeleton, albeit with reference to an incorrect date of 31 October. Mr Warwick did not resist the application, and I determined that they should be admitted, given their potential relevance, Mr Warwick's stance and that they had been a provided to Mr Lumba's solicitors two days before the hearing. Mr Warwick conditioned his stance on the admission of a short video taken by Lumba on his mobile phone on 21 October at the premises. Mr Uddin did not resist this and I determined that it should be admitted for the same reason.

37. Turning to the legal arguments, Mr Lumba contends:

    (1) The application is within the terms of paragraph 4 of the order or failing that the relief sought can be granted under CPR rule 3.1(7), which provides that:

        "*A power of the court to make an order includes a power to vary or revoke the order.*"

    (2) Paragraph 4 of the Mellor Order contains a general liberty to apply that is therefore intended to allow an interim injunction to be revisited before the High Court when there is a material change in circumstances, it being clear from *Tibbles v SIG plc* [2012] EWCA Civ 518 at [40] that this would be the effect of ordinary liberty to apply wording. Put another way, the permission to apply to enforce is intended to allow an applicant to seek to apply to the High Court to hold the respondent to the Mellor Order *or* to vary it. That, Mr Lumba, contends, is consistent with the fifth paragraph of the Reasons.

    (3) The reference to transferring further proceedings is intended to deal with transferring the resolution of the underlying substantive issues like whether the lease was validly forfeited.

    (4) Mr Rasul's breaches have imperilled Mr Lumba's freehold interest, so paragraph 1 of the Mellor Order should be removed. That is the paragraph requiring Mr Lumba to give Mr Rasul the keys to the premises subject to Mr Rasual complying with his undertakings. Mr Lumba contends that this removal of paragraph 1 should be twinned with an order requiring Mr Rasul to permit Mr Lumba's re-entry and an order (rather than just an undertaking) barring Mr Rasul from entering the premises. Mr Lumba states that he does not intend to disturb the use by Wayside of the car wash, so that paragraph 2 of the Mellor Order can remain intact, and that if Wayside is paying rent or another fee, that can be ordered to be paid to Mr Lumba in an analogous manner to the direction made by Mellor J following the hearing.

    (5) It is only by going back into occupation of the Property that the situation created by the EPO can be resolved.

    (6) He relies on the fact that there are only 8 months left on the Lease to contend that there would be limited prejudice to Mr Rasul in allowing Mr Lumba to re-entry, compared to the financial risk that Mr Lumba is presently bearing as a result of Mr Rasul's actions that he alleges have left to the EPO.

38. Mr Rasul contends:

(1) It is not clear what Mr Lumba is asking for in his application notice when he seeks an order "*to enforce the Mellor Order permitting the Claimants to re-enter*". Mr Warwick clarified orally that the reference to "*Claimants*" should be to Mr Lumba.

(2) Mr Lumba has a right to inspect the Property and did so on 21 October. I should note that in response Mr Warwick contended that Mr Lumba had not been able to inspect the flat.

(3) Given that the Mellor Order only gives permission to apply to *enforce* the terms of the order, at best Mr Lumba can apply to the High Court to enforce paragraph 2 of the First Schedule to the Order (by which Mr Rasual undertakes to comply with his obligations under the lease) and that would be subject in any event to a section 146 notice having been served specifying the alleged fresh breaches. Had he done that Mr Rasul would have been able to serve a counter-notice and reply addressing any allegations of breach set out in the section 146 notice.

(4) Mr Lumba has not established that there are any breaches of the covenants in the Lease by Mr Rasul, and the EPO does not amount to proof of that.

(5) Further, it was Mr Lumba who was in the wrong given the people that he had sent to the site and his conduct while there.

<u>My analysis</u>

39. Given the EPO and that Mr Rasul has so far not taken any obvious steps to deal with it, I can understand why Mr Lumba has made an application to Court.

40. I consider that there should be an inspection of the flat to get to the bottom of the state of it and what has gone on there.

41. However, in my judgment, I should not discharge paragraph 1 of the Mellor Order at present.

42. The starting point is to analyse the Mellor Order, and in particular the meaning and effect of paragraph 4. In doing so, I bear in mind the following:

(1) The sole question for the Court is what the order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction: see *Pan Petroleum AJE Ltd v Yinka Folawigo Petroleum Co Ltd & Ors* [2017] EWCA Civ 1525 at [41].

(2) The words are to be given their natural and ordinary meaning and construed in context, including their historical context and with regard to the object of the order: *ibid*.

(3) The reasons given by the Court in its judgment for making the order are an overt and authoritative statement of the circumstances which it regarded as relevant, so they are always admissible to construe the order: *Banca Generali S.P.A. v CFE (Suisse) SA and another* [2023] EWC 323 (Ch) at [20], relying on Lord Sumption's judgment in *Sans Souci Ltd v VRL Services Ltd (Jamaica)* [2012] UKC 6 at [13]. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supported to resolve: *Sans Souci* at [13]. However, it does not follow from the fact that a judgment is admissible to construe an order that it will necessarily be of much assistance. There is a world of

difference between using a Court's reasons to interpret the language of its order, and using it to contradict that language: *Sans Souci* at [16].

(i) Paragraph 4 of the Mellor Order

43. In my judgment the wording up to the comma- "*Permission to the parties to apply to enforce the terms of this Order*" – is intended to make clear that the transfer of all further proceedings in the dispute to the *County Court* soon to be seised of the claim dealing with the purported forfeiture was not intended to prevent applications being made back to the *High Court* to enforce the order. It was making clear that the fact that the main proceedings were taking place in one Court- the County Court- did not stop enforcement of the High Court interim injunction being sought in the High Court. There may well be perceived advantages to High Court enforcement, so one can see the sense in that.

44. Therefore, enforcement applications could be made back to the High Court.

45. "*Otherwise*" naturally means "in all other respects", as in "he had a sore throat, but was otherwise healthy", and should be given its natural meaning.

46. Therefore, the parties could make enforcement applications to the High Court, but subject to that all further applications are transferred to the County Court.

47. I consider that by "*dispute*", the Judge meant claim number BL-2022-00129. A fresh claim launched in the future after the Mellor Order under a fresh claim number cannot be transferred by the Mellor Order as it does not exist at the time of such Order. Nor can it refer to the substantive claim relating to the effect and consequences of purported forfeiture itself as the Court to which further proceedings are transferred under the order is "*the County Court seised of the Claimants' claim for relief from forfeiture*". Therefore, I do not accept Mr Warwick's submission that what was being transferred was simply the underlying substantive claim relating to the purported forfeiture.

48. The natural meaning of "*further proceedings*" are any other steps taken between the commencement of the proceedings and their conclusion. Therefore, it most obviously covers further applications.

49. The next question is what that is covered by an application to "*enforce the terms of this Order*".

50. In my judgment, an application to enforce the terms of the Order is an application to hold the parties to the Order. Seeking to enforce an order is seeking to compel a party to adhere to the terms of the order.

51. Accordingly, it is common ground between the parties that I have jurisdiction to make orders reflecting Mr Rasul's undertakings in Schedule 1, such as to provide access to Mr Lumba on reasonable notice.

52. However, it is important to look at paragraph 1 closely. The obligation on Mr Lumba to hand over the keys to Mr Rasul and thereby stay out of the Property is expressly made dependent by paragraph 1 on Mr Rasul complying with his undertaking. That is the function that the words "*subject to*" are fulfilling.

53. Therefore, it follows that if Mr Rasul is not complying with his undertaking, the basis for Mr Lumba to allow Mr Rasul to have the keys fall away, and Mr Lumba should have them back.

54. Unless one interprets the order in this way, the words "*subject to*" are being read down and one is reading the obligation on Mr Lumba to hand over the keys and the obligation on Mr Rasul to perform the undertakings as independent obligations that could have been contained in separate parts of the order. That is not what the order provides.

55. Accordingly, I consider that enforcing the terms of the order includes an order requiring Mr Rasul to hand back the keys to Mr Lumba if Mr Rasul has failed to perform his undertakings. That is holding the parties to the terms of the Order, because the Order provides that Mr Rasul is only to have the keys if he performs his undertakings.

56. In my judgment, that is the natural reading of the words used in the order.

57. This also avoids the oddity that where the tenant breaches the order, the landlord can bring contempt proceedings before the High Court to enforce the breach of the tenant's undertakings, but cannot take the most obvious step, which will be the proportionate step in many cases, of seeking to have paragraph 1 discharged by the High Court on the ground that the basis for handing over the keys has fallen away.

58. I do not read the order as requiring that *any* breach of Mr Rasul's undertakings leads to the Court having to conclude that the keys be handed back to Mr Lumba, and Mr Warwick did not contend for such an interpretation. For example, paying rent a day late or some other minor breach should not have this result. Any application to enforce the terms of the order where there is an allegation of breach of the order can properly be met in appropriate circumstances by a request to vary the order in some respect or otherwise excuse a breach, and I consider the High Court could deal with such a request in those circumstances. That is part and parcel of the High Court deciding and being able to decide the enforcement application. Similarly, I consider that the Court is able to conclude that it should not enforce the terms of the order in such a situation. It is not obliged to enforce the order,

59. That is a different matter from a freestanding application to vary the order or discharge an undertaking without alleging any breach of the terms of the order. I do not consider that a simple application for a variation of the order on the basis that there has been a change of circumstances falls within the concept of enforcing the terms of the order because that is not an application to seek to hold the other party to the terms of the order or even dealing with the consequences of a breach of the terms of the order.

60. Given Mr Warwick's submissions, I have asked myself whether the reference to applying "*to enforce the terms of the Order*" could be read as a general permission to apply back to Court in respect of the Order. However, most importantly, that is not the literal or natural meaning of the language used, and I do not consider that I should assume that the Judge made an error in the words that he chose. No one suggested that he did or that I should apply the slip rule, for example. On the contrary, the concept of enforcing the terms of an order is one that the Judge would obviously have been extremely familiar with. I also note that a typical Tomlin order excepts from the stay of proceedings applications brought for purpose of enforcing the terms of an agreement, so the core meaning of applying to enforce the terms of a document is clear and familiar more generally for that reason too. Further, I can see that the Judge may have wanted to mark out the ability to use High Court enforcement routes in respect of the Order, I can

understand why the Judge would have wished the County Court to be able to deal with variation of the Order rather than the parties having to dip out of the County Court claim to apply back to the High Court on that, and I note that none of the parties suggested to the Judge at the time that the Order contained any erroneous or loose language.

61. Therefore, taking the present case, to the extent that the application is put as a fallback by Mr Lumba on the basis of a change of circumstances that fall short of contending that the Court should go as far as finding that Mr Rasul has breached his undertakings, in my judgment that does not fall within paragraph 4. So allegations that there is a material change of circumstances by reason of the risk posed by the EPO to Mr Lumba's interest in the Property and that there is a serious *chance* that there has been a breach so as to shift where the balance of convenience lies do not of themselves engage paragraph 4.

62. This gives effect to the words after the comma in paragraph 4, because applications to vary the terms of the Mellor Order are obvious examples of "*further proceedings in this dispute*" which have been transferred to the County Court. One can see the sense in the County Court dealing with any applications to vary the Mellor Order or discharge an undertaking given under the Mellor Order because it is the Court seised of the claim dealing with the purported forfeiture, and the Mellor Order is an injunction intended to hold the ring while that claim is proceeding. The County Court has and will be case-managing the unlawful forfeiture claim, and any further modifications of the Order are most naturally dealt with as part of that.

63. Mr Warwick accepted that the consequence of his construction was that any application for variation of the order or discharge of an undertaking would have to be made in the High Court. That would be a surprising outcome in light of the matters in the last paragraph. Aside from dealing with the procedural steps to trial, dealing with how the ring should continue to be held until then is an obvious task that one expect the County Court to be seised of, and it would be surprising if the parties had to go back to the transferring Court- the High Court- to vary in any way, no matter how minor, the terms of the Mellor Order.

64. I have taken into account when construing paragraph 4 the reference in paragraph 5 of the Reasons to there being permission to apply back if there are any difficulties with the arrangement of Mr Khudur paying Mr Lumba direct rather than continuing to pay Mr Rasul or with the direction given by the Court in paragraph 4 of the *Reasons* that any such payments by Mr Khudur to Mr Lumba be treated as discharging Mr Rasul's obligations to Mr Lumba. Specifically, the Court states that "*[i]f there are any difficulties with this arrangement and the direction in the preceding paragraph, they can be raised under the permission to apply which can be done in writing if appropriate*". The natural meaning of the reference to *the* permission to apply is that it refers to the permission to apply to enforce the terms of the order at paragraph 4. Mr Warwick argues that means that I should read paragraph 4 of the Order as meaning an application to apply to hold a party to the terms of the order *or* to vary the order. I do not consider that is correct, for the following reasons taken together:

    (1) That is not the natural meaning of paragraph 4 and would be a very strained reading of the words used in paragraph 4 indeed.

    (2) While paragraph 5 of the Reasons is admissible in construing the order, I consider that I should be reluctant to use it to contradict the plain meaning of paragraph 4, all the more so in circumstances where no-one has suggested that the Judge made an

error in the wording used in paragraph 4 and in any event there is a logic to the words he used, for the reasons set out above.

(3) Paragraph 5 of the Reasons can be given meaning on my reading of paragraph 4 above. The most obvious difficulty that could arise with the arrangement and the direction is where Mr Lumba alleges that Mr Rasul owes him rent because Mr Khudur has not been paying at least £6,500 a month for whatever reason, and Mr Rasul disputes that. On my reading of paragraph 4, an application to seek to enforce against Mr Rasul, and any request by Mr Rasul in response to vary the Order could be dealt with under paragraph 4. None of that requires one to read paragraph 5 of the Reasons as allowing any application to be made under paragraph 4 that seeks variation of the Order.

65. Finally, even if, contrary to that, paragraph 4 is intended to catch a simple application to vary the Mellor Order, I would not on the facts consider it appropriate to discharge paragraph 1, for the reasons set out at the end of my judgment. Therefore, on the facts, as I explain below, in my judgment this question of construction does not affect the result.

(ii) CPR rule 3.1(7)

66. CPR rule 3.1(7) provides that the Court who makes the order can vary it. Here that is the High Court.

67. This includes, in the case of an interim injunction, allowing the order to be varied where there is a material change in circumstances: *Tibbles v SIG plc* [2012] EWCA Civ 518 at [39(2)].

68. However, in my judgment, for the reasons set out above, here the High Court was only seeking to retain the ability to deal with enforcement of the Order. Therefore, I do not consider that it intended through the Order to retain the ability to vary under CPR rule 3.1(7) unless it was part and parcel of dealing with an enforcement application.

69. Further, even if, contrary to that, the High Court does as a matter of jurisdiction retain that power, I would not on the facts consider it appropriate to discharge paragraph 1, for the reasons set out at the end of my judgment.

70. Therefore, on the facts, as I explain below, in my judgment the presence of the rule 3.1(7) jurisdiction does not in my judgment affect the result.

71. Finally, I should deal with the argument raised by Mr Warwick in his skeleton that Mr Rasul cannot object to Mr Lumba bringing a variation application before the High Court because Mr Rasul brought its penultimate application before Miles J. Mr Warwick contends that the principle is that a party cannot adopt inconsistent positions. However, I do not accept that. The case he provides in support of that proposition- *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320- is about not running inconsistent cases *at the same time*. Mr Rasual is not doing that here. The fact he brought an application in the High Court in April 2023 does not prevent him running his submission now 20 months later. In any event, I do not consider that such conduct can confer a greater jurisdiction on the High Court than it would otherwise have.

72. I turn next to the application of the law to the facts of the present case.

(iii) Application of the law to the facts of the present case

73. The key basis of the application, as Mr Lumba explains in [30] of his first witness statement for the application (his sixth witness statement in the proceedings), is that it is clear that Mr Rasul is in breach of the undertakings that he gave to Mellor J. Therefore, Mr Warwick puts the application as an "enforcement" application in his skeleton.

74. In my judgment, there is cause for concern that Mr Rasul has not complied with his covenants in important respects.

75. First, it is common ground that Mr Rasul has staff on the site. The EPO suggests that the site has been visited by one or more official bodies (be it the Council, or otherwise) because the EPO details the state of the fire protection and electrical system in the flat. Therefore, even without getting into the evidence put forward by Mr Lumba that Mr Abiola said that people had been arrested and taken away by the Police and Immigration Officers, there appears to have been an a visit to the flat by an official body.

76. Given Mr Rasul has staff on the site, I would expect him to have dealt with that visit in his evidence or have his staff do so. Instead, he contends in his statement that his inability to re-enter the property under the Mellor Order means that he does not have first-hand knowledge of what is going on at the Property and whether there is breach of the covenants.

77. In my judgment, that statement overlooks the fact that he appears to have staff on the site, and in any event that he has an obligation to comply with the covenants, so he needs to inform himself of what is going on at the Property to do so.

78. Mr Sayakhan's recent statement does not deal with any visit to the flat by the official bodies, so it does not plug this gap. It just deals with the handing over to Mr Sayakhan of the EPO on 14 October 2024.

79. Second, having been served with a notice such as the EPO, which- whether Mr Rasul agrees with the contents of the EPO or not- states that there are serious hazards at the flat and is premised on it having been used as residential premises, I would expect Mr Rasul to have sought to investigate it himself as a matter of priority given his obligations under the Lease, even putting to one side any potential dangers to his staff.

80. However, I have not seen any evidence that he has so investigated. Rather, he states that he has no first hand knowledge of what is going on at the Property and when I asked what Mr Rasul intended to do in light of the EPO, Mr Uddin took instructions and explained that Mr Rasual intends to obtain a report from someone qualified to look into it. Therefore, I have no evidence to suggest that the matter has yet been looked into properly by Mr Rasul through his staff, over two months after the EPO.

81. At present these both suggest a concerning attitude on the part of Mr Rasul to meeting his obligations under the Lease, on which depends under the Mellor Order Mr Lumba's obligations to hand over the keys to him. I can understand Mr Lumba's stated concerns about this.

82. Therefore, I consider that it is important that there is a proper inspection of that flat, any deficiencies put right, and that there be no future reoccurrence. That is both Mr Lumba's entitlement under the Lease and his stated reasons for seeking the relief he does for Mr Rasul to hand over the keys to him, namely to sort out the problem that has arisen and ensure that it does not happen again.

83. It is important for me to reiterate that Mr Rasul is required under the Lease to permit Mr Lumba entry to the Property on reasonable notice for the purposes in clause 4.9. Mr Uddin accepted on Mr Rasul's behalf that 1 day's notice would be reasonable notice. I make no finding about whether less would be sufficient.

84. I note that clause 4.9 requires Mr Rasul to permit entry not just to Mr Lumba but to all others authorised by him, so that would allow Mr Lumba to require entry (whether with Mr Lumba not) to those he considers necessary to be able to form a proper view on that, whether an electrician, builder or otherwise. Further, there is no limit set out in clause 4.9 on the number of times that Mr Lumba may require entry for the purposes in clause 4.9. When he is given entry, it must be to all parts of the Property that Mr Lumba requires.

85. Moreover and in any event, under clause 4.8 Mr Lumba is able to give Mr Rasul notice of any failure to repair maintain or decorate and require work to be started within a month or sooner if necessary and if Mr Rasul does not comply then under clause 4.8 he must allow Mr Lumba to enter to make good any such failure and pay the reasonable costs of Mr Lumba doing so. I return below to what the repair obligations are.

86. In my judgment, all of the above should be uncontroversial. I appreciate that Mr Rasul has alleged that Mr Lumba has improperly been taking action against his staff when he and those acting for him have approached the Property. I am not in a position at present to make any findings on whether that has occurred or not. However, I make clear to Mr Lumba the seriousness with which the Court would view such conduct if proved. Therefore, I would hope that there will not be any such issues.

87. If the steps above showed serious breaches had occurred, then the matter could be restored with clear evidence that would allow the Court to conclude with more certainty that there had been serious breaches, including with any further evidence from Mr Abiola. The Court might well, without tying its hands, decide in that situation that Mr Rasul should have to give the keys back to Mr Lumba.

88. Further, if- despite my words above about the importance of inspection- Mr Lumba was not allowed to inspect the flat promptly after this judgment, then I would expect the Court to view Mr Rasul's conduct in that regard very seriously.

89. However, the question is whether the above is adequate or whether I should conclude now that there have been breaches of the Lease by Mr Rasul, and breaches sufficient to merit the discharge of paragraph 1.

90. While Mr Warwick made convincing submissions about the cause for concern as to whether there were breaches and Mr Rasul's attitude to the EPO and took me through a number of the tenant's covenants under the Lease, there was- perfectly consistently with this being a relatively short interlocutory application- not a detailed analysis of what each individual alleged breach might be, backed where appropriate by case-law or statutory references.

91. I divide the possible breaches into four.

92. The first is the obligation not to allow any person to reside or sleep on the Property under clause 4.17(b) of the Lease, the allied obligation under clause 4.17(a)(iii) not to use the Property other than as a carwash, the obligation under clause 4.23 to comply with the requirements of the relevant planning legislation and the obligation under clause 4.17(a)(i) not to use the Property for any illegal or immoral purposes. Mr Warwick submitted in the course of going through the tenant's covenants under the Lease that the

obligation under clause 2.9 not to permit an act to be done by another means that it is sufficient that the tenant has knowledge that someone is carrying out an act contrary to the terms of the lease and does not do enough to stop it.

93. In my judgment, on the relatively limited evidence I have before me, a significant concern has been raised as to whether there was at the time of the EPO use of the flat for residential purposes, for the following reasons taken together:

    (1) The 2019 certificate of lawfulness of existing use application that states that it was made by Mr Rasul is premised on the flat already being used as a dwelling. While that is five years ago now, that is evidence that, contrary to what he implies through his evidence, Mr Rasul has used the flat for residential purposes in the past.

    (2) The evidence given by Mr Lumba and his solicitor Mr Price of what Mr Abiola has said about the use of the property.

    (3) The fact that the EPO is premised on the local housing authority considering that the flat constitutes residential premises at the time of the EPO.

    (4) The absence of any explanation from Mr Rasul in his witness evidence about how he understands the flat to have been used by those on the site or as what enquiries he has made about that or about the initial inspection of the flat that led to the EPO.

94. Further, given Mr Rasul appears, not least through adducing Mr Sayakhan's witness statement in his appeal against the order of HHJ Johns KC, that Mr Rasul's staff work on the site, one would expect that Mr Rasul would be aware of what was going on at the site, including any significant residential use.

95. However:

    (1) There is no witness statement from Mr Abiola or anything in writing from him about this, so that the evidence given is hearsay evidence.

    (2) The evidence of Mr Lumba's solicitor, Mr Price, is that Mr Abiola stated that the local authority had a real concern that the premises were being used as an unlawful HMO and were still investigating. Mr Lumba goes further, in stating that Mr Abiola told him that the Property *was* being used to house a number of people as an HMO, but there is no further direct evidence before me to that effect.

    (3) I have not heard orally from any of those involved, whether Mr Lumba, Mr Rasul, Mr Sayakhan or otherwise, including hearing from Mr Rasul about the precise operation of the site, who works at the site, on what terms, his level of oversight and so forth.

    (4) In my judgment Mr Lumba does not appear to have given completely accurate written evidence about his entry onto the Property on 21 October. The CCTV shows him in the office and on the site more generally. That is not mentioned in his statements. Accordingly, I consider that I should not accept without reservation at this stage his account of what he was told by Mr Abiola, particularly to the extent it goes beyond what Mr Price mentions in his statement. Moreover, Mr Lumba does not deal in this reply statement with Mr Rasul's allegations that Mr Lumba sent people on two occasions to the Property, and that they made threats to seek to have Wayside leave. While this does not go directly to Mr Rasul's breaches, given the severity of this allegation I would have expected Mr Lumba to deal with this, not least because if true this would amount to a breach of paragraph 2 of the Mellor Order.

96. Therefore, in my judgment I do not have the material before me to reach a final conclusion as to whether there has been a breach in this regard by Mr Rasul, and it would not be appropriate for me to do so at this stage.

97. Further, there is not sufficient evidence to form firm conclusions about the scale of any recent breach. There is some hearsay evidence of it being used at the time of the EPO as a HMO, which suggests multiple families using the premises and a serious breach, but there is nothing more than the hearsay evidence by way of direct evidence of how the flat was used at the time of the EPO coupled with historical evidence of the position at 2019.

98. The second area of possible breach is the repairing obligation. Mr Lumba himself states that the Property was in a dilapidated state unfit for residential use at the time of the his acquisition of the Property in 2009 and would have cost a very significant amount to put in a proper state so he left it as it was. I did not receive any substantive submissions on the repairing obligations, beyond Mr Warwick submitting briefly in oral submission while taking me through the Lease that even if the Property was initially out of repair, there was nevertheless an obligation to repair and keep it in good and substantial repair, (in response to my question) that this included putting it in a better state than at the start and that he recalled there was a case from around a quarter of a century ago supporting that proposition. However, he did not provide me with a citation.

99. I take first the fire risk mentioned in the EPO, namely that the fire panel installed had not yet been powered or commissioned. I do not have evidence before me of the likely state of the flat at the time of construction or the precise state of the flat at the time of acquisition or inception of the Lease compared to now to judge whether and if so by how much its condition has deteriorated. Nor am I able to identify the case from 25 years ago that Mr Warwick had in mind. A covenant to keep in repair does requires *putting* into repair, although this does not apply if the property is in no worse physical condition than that in which it was when constructed, because in that situation there will be no disrepair to cause the obligation to put into repair to bite. However, as I say, I did not receive any detailed submissions on the case-law or its application here, and Mr Lumba has not dealt with the extent to which the Property was in a better state at some earlier stage insofar as fire risk detection and prevention was concerned. Rather his evidence is simply that the flat was in a bad state when he bought it.

100. Further, I do not have the benefit of any present inspection before me other than the general comments in the EPO.

101. Therefore, I do not consider it appropriate, possible or necessary to reach firm and reliable conclusions on whether there has been a breach and if so its scale at this stage. The latter is important to whether there should be discharge of paragraph 1 of the Order.

102. In my judgment, similar points run in respect of the electrical hazards reported by the EPO, namely that there were several instances of exposed live electrical wiring and fittings. I have little evidence in respect of this and if so how much if any deterioration there has been, which is important to whether there should be a discharge of paragraph 1 of the Order. For example, I do not know the precise state it was in at the time that Mr Lumba purchased it given that Mr Lumba states it was not fit for residential use when he bought it, or whether there has been deterioration and if so by how much. Similarly, I do not have before me an inspection that sets out the current state of the wiring in any detail.

103. The third area of possible breaches arises from the reliance of Mr Lumba in his evidence and submissions on the fire and electrical hazards identified in the EPO. The Housing

Act 2004 was not included in the authorities bundle, but I have considered its provisions, some of which are referred to in the EPO itself, and set out the general structure of the legislation earlier on in this judgment. I was taken by Mr Warwick in the course of going through the tenant's covenants and in his skeleton to the covenant under clause 4.22(b) to comply with all statutory requirements concerning the Property and the covenant under clause 4.24 to comply with all requirements and recommendations of the fire authority, the insurers of the Property and reasonable requirements of the landlord in relation to fire precautions affecting the Property.

104. In respect of clause 4.22(b), no specific statutory requirements have been identified by Mr Lumba. The stated effect of the EPO is to "prohibit the use [of the flat at the Property] as a residential and sleeping accommodation by any person". That is what is prohibited pursuant to section 43(2) of the Act. The EPO states, as it is required to by section 44(2), the nature of the hazard, the deficiency giving rise to the hazard and the any remedial action which the authority considers would if taken result in the authority revoking the order. That is why fire and electrical hazards and the remedial work that could be done to remove those risks are mentioned in the EPO. I do not read the EPO as itself imposing a requirement to carry out those works, and it was not submitted to me that it did. Nor were any other specific statutory requirements identified by Mr Lumba that were contended to be relevant.

105. As for the covenant to comply with all requirements and recommendations of the fire authority, the insurers of the Property and reasonable requirements of the landlord in relation to fire precautions affecting the Property, I was not specifically addressed on whether a particular breach was alleged in this regard and if so what it was and the reasons for it. Therefore, equally it was not specifically addressed by Mr Uddin and I do not consider that I can or should make any final finding on this, particularly on an interlocutory application. I note that the EPO states that the fire and rescue authority agreed with the local authority's decision to take emergency measures. However, (i) the EPO comes from Buckinghamshire Council, rather than the fire authority, and (ii) the works set out are those works that have been identified as works to be done if the prohibition on using the Property for "residential and sleeping accommodation", which is a purpose expressly prohibited under the Lease.

106. The analysis of the second and third heads above brings out the importance of there being a specific identification of the alleged breaches and why they are said to arise, and the analysis of all three heads demonstrates the limits of the evidence that there is before me on the present interlocutory application. Therefore, as stated above and as I return below, it is open to Mr Lumba to obtain further evidence through inspection or otherwise and restoring the matter to the High Court if he considers that he has stronger evidence at that point of one or more breaches.

107. Finally, there was a debate before me as to what happened when Mr Lumba attended the property on 21 October. That is relevant to whether there was a breach of clause 4.9 of the Lease. That clause is set out at paragraph 17(7) above. In short, whatever the precise details of what occurred that morning, in my judgment the important thing is that an inspection takes place.

108. As to precisely what happened, I agree that Mr Lumba's witness evidence was inaccurate in stating that when he arrived to inspect the Property Mr Rasul's staff denied him entry and that Mr Sayakhan did not permit him to inspect. The video clips show that he was for example able to enter the office, having apparently been directed inside the building by a

member of staff on the forecourt, and that Mr Lumba was on the site more generally, as he appears to have entered through the carwash. His statements do not mention any of that. However, nor did the video evidence show Mr Lumba inspecting the flat, which is the key part of the Property that Mr Lumba would have needed to inspect, and I do not consider that I can infer from the clips that he did. Two of the clips produced by Mr Rasul showed Mr Lumba walking through what I understand to be the showroom office and then back again. Mr Uddin submitted that I should infer that he went up the stairs to the flat and looked at the flat. However, Mr Lumba's video clip appeared to show the same incident from the perspective of his phone and showed that when he went through the showroom office, it was to see Mr Sayakhan and ask him for access to the flat, before returning through the showroom office, rather than having walked up any stairs to the flat. Further, Mr Rasul's statement did not mention Mr Lumba inspecting the flat. Rather he couched the visit on the 21st as being to try to cause Wayside to leave the Property. I also note that I have not seen any evidence that the 15 October 2024 letter from Mr Lumba's solicitors asking to inspect on 21 October was responded to or the letter of 21 October stating that access had not been granted was rejected in correspondence either.

109. Therefore, on what I have before me I do not conclude positively that proper access to the flat has yet been given.

110. However, nor, in my judgment, is the evidence sufficiently clear to allow or make it appropriate for a definitive conclusion to be formed either way at this stage on whether there has been a breach of clause 4.9 of the Lease. First, Mr Lumba's account in his statement of the visit was not entirely accurate, as set out above. Second, the video evidence only appears to show part of the visit. Third, it does not allow the vast majority of the dialogue to be heard. Fourth, the Claimants' video clips showing Mr Lumba entering the showroom office bear a time of around 7:20am rather than the 10am that Mr Lumba asked to visit at. I have no specific evidence as to whether the time on the video is correct or not. It appears to be daylight from the clips, which suggests a later time, but nothing beyond that and it is therefore unclear what time Mr Lumba was in fact visiting the property. Fifth, more generally I have no witness evidence taking me through the video clips and what specifically happened during them. Sixth, I have not heard any cross-examination on the point. Therefore, there is a dispute of fact here in a situation where there were inaccuracies in Mr Lumba's statements and late but incomplete video evidence adduced by Mr Rasul and then by Mr Lumba in response.

111. Moreover, in any case, even if there was a breach in this regard, I would not presently discharge paragraph 1 of the Mellor Order, having regard to the factors set out at paragraph 122 below and that I would expect Mr Rasul to allow Mr Lumba to inspect the flat now given what I have said above about the requirement to inspect and its importance. Rather, whatever happened on 21 October I consider the appropriate course to be for an inspection to take place promptly to get to the bottom of the matter.

112. Drawing together my conclusions, in my judgment, I do not consider that the Court is presently in a position on the basis of the present material and on this interlocutory application to conclude that there *have* been breaches that would merit the discharge of paragraph 1.

113. To the extent that Mr Lumba's submissions are going further and asking me to discharge paragraph 1 of the Mellor Order because of a *concern* that there are breaches of the undertakings whether or not I find that there are such breaches, I do not consider that I should take that course.

114. I have explained above in my analysis of paragraph 4 of the Mellor Order and CPR rule 3.1(7) that I do not consider that I should grant such an application in the absence of concluding that there are breaches of the undertakings sufficient to merit a discharge.

115. Further and in any event, I do not consider that such an application should be granted even if there is no requirement to show such a breach, for the reasons set out below.

116. Mr Lumba's application is an application relating to an interim injunction seeking various injunctions, including that Mr Lumba be permitted to re-enter.

117. The starting point is that the correct test to apply in determining whether to *grant* an interim injunction is the *American Cyanamid* test, namely whether there is a serious issue to be tried, where the balance of convenience lies and whether it is just and convenient to grant an injunction.

118. The orders sought are, as Mr Uddin submits, mandatory injunctions to hand back the keys that (at the lowest) may effectively dispose of part of the claim for relief from forfeiture, as Mr Rasul may choose not to fight to go back into the Premises in circumstances where Mr Lumba has gone back in there, the Lease expires (subject to any renewal argument) in August 2025 and the trial of the relief claim is not expected to be heard before then. Whether or not Mr Rasul chooses to maintain the element of his claim relating to damages, he may not continue the element seeking to be put back into the Property. Those factors should be taken into account when considering the balance of convenience.

119. There is, as underlies the Mellor Order, a serious issue to be tried on the action for relief for forfeiture. Equally, Mr Lumba's case that he has validly forfeited the lease already gives rise to a serious issue to be tried. It is not possible to go further than that on merits on what little I have before me on that.

120. Therefore, in my judgment the real question is where the balance of convenience lies.

121. I have taken into account in that regard all the points advanced by Mr Lumba, including the risk to his mortgage by reason of the EPO, quite apart from that the importance its own right that the matters in the EPO are dealt with as promptly and decisively as possible, and the risk of a future breach of the covenants by Mr Rasul given the past residential use referred to the 2019 certificate of lawfulness of use material.

122. However, in my judgment that would be outweighed by the following taken together:

(1) There is an alternative course that can be taken, namely first inspecting the Property to seek to get more detail on what has happened and not happened, as detailed above, and then if necessary returning to Court with greater specification of the alleged breaches and further evidence, or taking steps to redress the hazards identified in the EPO in the manner suggested in it.

(2) The Mellor Order is in place and it reflects the fact that allowing Mr Lumba to re-enter is a serious course, not to be taken lightly. If the original forfeiture was invalid, then the Court will in substance be allowing Mr Lumba to re-enter on the ground of Mr Rasul's breaches without going through the section 146 requirements. That is something the Court can do, because the Court would simply be using its injunctive powers to return Mr Lumba to the position that he was in immediately before the Mellor Order. However, in deciding whether to use CPR rule 3.1(7), I take into account the possibility that the possibility that the original forfeiture was invalid.

(3) The fact that discharging paragraph 1 of the Order may dispose in practice of Mr Rasul's claim to be put back into the Property.

(4) My conclusions above about the limits of the findings that it is appropriate to make at this stage about whether there have been any breaches and their severity.

Conclusion

123. Drawing the threads together, in my judgment the basis for paragraph 1 of the Mellor Order has not yet been shown to fall away entirely, and in any event I do not consider that I should use CPR rule 3.1(7) or paragraph 4 to discharge the key part of the Order.

124. However it is important that the concerns raised by the EPO are got to the bottom of as soon as possible. Therefore it is important that the flat is in the first instance inspected as soon as possible, and that the Court re-emphasise the importance of access being given so as to facilitate that. Further, Mr Rasul is himself able to have those operating at the site to undertake an inspection themselves.

125. If specific breaches can be shown following such an inspection or the compilation of other evidence, then it is open to Mr Lumba to seek to restore the matter and seek to discharge paragraph 1 of the Mellor Order. However, I emphasise the importance of setting out clearly what the specific breaches are and the reasoning for this.

126. While I am therefore not willing to grant the relief that Mr Lumba seeks, the Court shares the concern stated on his behalf by Mr Warwick as to the attitude of Mr Rasul to date to the EPO, and I have not accepted Mr Rasul's submission that inspection has yet been given. Further, I consider that there should have been a response to the 15 October letter and 18 October 2024 e-mail about the EPO and inspection. Therefore, I can understand why the application was brought given the EPO and the foregoing.