Neutral Citation Number: [2022] EWHC 3379 (Ch)

CLAIM No. BL-2021-MAN-000057

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 21 December 2022

Before:

His Honour Judge Pearce

- -

Between:

CUMBRIA ZOO COMPANY LIMITED **Claimant**

- and –

THE ZOO INVESTMENT COMPANY LIMITED **Defendant**

- -
- -

Mr David Hoffman (instructed by **Harrison Drury & Co Limited**) for the **Claimant**

Mr Lawrence McDonald (instructed by **Hamlins LLP**) for the **Defendant**

Hearing dates: 18, 19 and 20 October 2022

- -

JUDGMENT

INTRODUCTION

1. The Claimant is the lessee of two parcels of land adjacent to the A590 at Lindal-in-Furness, Cumbria[1]. Its CEO is Ms Karen Brewer. The Defendant is the landlord of both parcels, the leases in each case having been assigned to it. Ms Janette Kemp is the

[1] Lindal-in-Furness is on the A590 between Ulverston and Barrow-in-Furness. It is very close to Dalton-in-Furness, which is stated at times to be the address. The two parcels are contiguous and, although the issues arising on the leases require separate consideration as a matter of law, the issues that arise are identical.

Managing Director of the Defendant. The land[2] of which the Claimant is currently the lessee has been operated as a zoo since the early 1990s, latterly by the Claimant.

2. By Claim Form issued on 7 June 2021, the Claimant sought declaratory relief to the effect that the Defendant had not validly forfeit either lease following the service of notices pursuant to Section 146 of the Law of Property Act 1925[3] ("Section 146 Notices"), alternatively relief from forfeiture. It further sought injunctive relief preventing the Defendant from re-entering the premises pursuant to a right of re-entry without order of the court damages, interest and other declaratory relief relating its property and rights.

3. The Claimant obtained interim injunctive relief as set out below. On 15 November 2021, His Honour Judge Hodge KC gave directions for a trial of preliminary issues. That trial came before me for three days commencing on 18 October 2022.

4. I note that the claim was issued in the Business List. Notwithstanding the heading that has repeatedly been used in documents filed at court, it has never, as far as I am able to establish, been transferred to the Property Trusts and Probate List.

BACKGROUND

5. The Claimant currently operates the Cumbria Safari Zoo at the land. A zoo was previously operated there under the name the South Lakes Safari Zoo. The South Lakes Safari Zoo was opened by Mr David Rivera (formerly Gill[4]) in around 1993. In around 1997/1998 he incorporated a company, South Lakes Safari Zoo Limited ("SLSZL"), to operate the zoo. In the period prior to the Claimant taking over the operation of the zoo, the land on which the zoo is cited was in part owned by Mr Rivera and in part owned by SLSZL[5].

6. According to Mr Rivera's statement, he decided in 2013 that he no longer wanted to run the zoo. The Claimant disputes that this was the true reason for him wishing to withdraw from the operation of the zoo, asserting rather that his withdrawal from the business was forced by the threat of revocation of SLSZL's zoo licence due to animal welfare concerns, which threat could only be met by Mr Rivera withdrawing from the

---

2 I shall use this term to mean both parcels of land, since for most purposes it is not necessary to distinguish between the parcels.

3 Such a notice will be referred to as a Section 146 Notice. The detail of them is dealt with further below.

4 Mr Rivera changed his surname from Gill in 2017. He gives his reasons at paragraph 8 of his statement. Whilst it would seem that witnesses knew him as Mr Gill and he was generally thus named at trial, it is more appropriate to use his chosen name in the absence of any indication from him that he would prefer to go by the surname Gill.

5 Mr Rivera's statement speaks at paragraph 16 of the Claimant owning land at the zoo. This seems to be an error, conflating the ownership of land by SLSZL with the lease of land to the Claimant).

operation of the zoo. Although the reasons for Mr Rivera and SLSZL ceasing to be involved in the operation of the zoo business are not directly relevant to the issues before me, the contention that Mr Rivera's continued involvement in the zoo threatened the zoo licence is significant for reasons noted below.

7. In any event, Mr Rivera sought a purchaser but had no definite interest for several years. By 2016, he was negotiating with the management team of SLSZL for the sale of the zoo to a new business to be owned and operated by the existing team. The Claimant was incorporated in order to achieve the end of the management team taking over the operation of the zoo. Ms Karen Brewer became its CEO.

8. The negotiations between the Claimant, Mr Rivera and SLSZL led to several agreements (or purported agreements[6]):

    8.1. On 12 January 2017, all three entered into a Services Agreement (the "First Services Agreement") for the management of the zoo. This agreement permitted the Claimant to operate a zoo from the land, allowing it to use assets belonging to the other two parties, subject to various obligations. However, it did not deal with ownership of assets. It referred to rights and obligations of Mr Rivera and SLSZL in respect of the so-called "retained land." This reflected Mr Rivera's wish to continue to occupy land adjacent to the zoo and to hold certain animals there, in particular in an aviary.

    8.2. On 23 January 2017, the same three appear to have signed[7] a further Services Agreement (the "Second Services Agreement"). Like the first, this agreement purports to permit the Claimant to operate a zoo from the land, allowing it to use items belonging to the other two parties, subject to various obligations. However, it also contains a provision purporting to transfer title in animals not covered by any other agreements from Mr Rivera or SLSZL, as the case may be, to the Claimant. The Second Services Agreement also differs from the first in not including the concept of "retained land."

    8.3. On 23 January 2017, SLSZ and the Claimant signed an agreement relating to the loan by the former to the latter of certain animals specified in a schedule to the agreement ("the SLSZL animal loan agreement"). The schedule lists all fish

---

6 The validity of one is in issue.

7 The Defendant's case, as stated at paragraph 6.1 of the Defence is that Mr Rivera did not sign the agreement. Its alternative case at paragraph 6.2 is that, if he did, it is not binding or enforceable by reason of his having signed it by mistake. At paragraph 23 of his witness statement, he appears to acknowledge that he may have signed it. He has never alleged that his signature was a forgery and the case on the Defendant's behalf was defended at trial on the basis that he had signed it. I deal with this further below.

within zoo ponds, together with 12 animals – 2 Andean condors, 5 white rhinoceros, 1 squirrel monkey, 1 ring tailed lemur, 1 white headed lemur, 1 red kangaroo and 1 western grey kangaroo.

8.4. On 23 January 2017, Mr Rivera and the Claimant signed an agreement relating to the loan by the former to the latter of certain animals specified in a schedule to the agreement ("the Rivera animal loan agreement"). There are 6 animals listed in the schedule, a Humboldt penguin, a Chilean flamingo, a turkey vulture, a black vulture, a king vulture and an Andean condor.

8.5. On 23 January 2017, two short term leases were entered into with the Claimant relating to the parts of the land that the zoo occupied and that were owned by SLSZL and Mr Rivera, respectively.

8.6. In early 2017, Mr Rivera, on his own behalf and/or on behalf of SLSZL, agreed with the Claimant that the Claimant would acquire the stock in the zoo shop in exchange for discharging accrued liabilities relating to the zoo. The agreement is evidenced by a series of emails.

8.7. On 2 February 2018, the Claimant and SLSZL entered into a lease ("the SLSZL lease") by which the Claimant became the tenant of the part of the land which comprised the zoo which was owned by SLSZL. This is described as "Land on the North side of the A590 and Land to the West of Milton Terrace, Dalton-in-Furness, Cumbria*"*. The term of the lease was 8 years, expiring on 1 February 2026.

8.8. On 2 February 2018, the Claimant and Mr Rivera entered into a lease ("the Rivera lease") by which the Claimant became the tenant of the balance of the land which comprised the zoo and which was owned by Mr Rivera. This is described as "Land to the East of Broughton Road, Dalton-in-Furness, Cumbria*."* Again, the term of the lease was 8 years, expiring on 1 February 2026.

9. It should be noted that there is a further draft of a services agreement dated 21 February 2018. This is unsigned and no party contends that it is the binding version of the services agreement.

10. The SLSZL Lease and the Rivera Lease are in substantially the same terms.

10.1. Part 4 deals with "*Rights excepted and reserved"* in each case in the following terms:

"*4.1 The Landlord reserves the right to enter the Property:*

(a) *for any other purpose mentioned in or connected with:*

(i) this lease; and

(ii) the Landlord's interest in the Property[8].

4.2 The Reservations may be exercised by the Landlord and by anyone else who is or becomes entitled to exercise them, and by anyone authorised by the Landlord.

4.3 The Tenant shall allow all those entitled to exercise any right to enter the Property, to do so with their workers, contractors, agents and professional advisors, and to enter the Property at any reasonable time (whether or not during usual business hours) and, except in the case of an emergency, after having given reasonable notice (which need not be in writing) to the Tenant…"

10.2. Part 26 deals with "*Use,"* and includes at clause 26.2:

"*The Tenant shall not use the Property for any illegal purpose nor for any purpose or in a manner that would cause loss, damage injury, nuisance or inconvenience to the Landlord, the other tenants or occupiers of the Estate or any owner or occupier of neighbouring property."*

10.3. Part 27 deals with "*Compliance With Laws"* and provides at clause 27.1, amongst other things:

"*The Tenant shall comply with all laws relating to…(b) the use and operation of all Service Media*[9] *and machinery and equipment at or serving the Property whether or not used or operated …"*

11. In 2018, SLSZL went into administration. As part of that process, an inventory was commissioned of the assets at the zoo. The report was prepared by Mr Kay of Robson Kay, Corporate Recovery Agents, and is dated 18 August 2020. It expressly excludes from its ambit shop stock and shop fittings, food stocks, wet stocks, buildings, enclosure and animal equipment. It does not include reference to live animals[10]. It is the Defendant's case that most of the items listed in the inventory belonged to Mr Rivera or SLSZL, of which the Claimant had been permitted the use under the First or Second Services Agreement. The Claimant was provided with a copy of the inventory report. It

---

8 This term is defined by reference to the relevant land in the case of each lease.

9 This term is defined as "*all media for the supply or removal of electricity, gas, water, sewage, energy, telecommunications, date and all other services and utilities and all structure, machinery and equipment ancillary to those media."*

10 Two ornamental rhinoceroses are listed.

was marked up in red to show items which the Claimant contended belonged to it. The Defendant accepts that the Claimant's markings are correct.

12. It is common ground that, on 28 January 2021, SLSZL and Mr Rivera each sold their interest in the freehold land that was the subject of the SLSZL lease and the Rivera lease to the Defendant. There is no dispute that the Defendant is now the Claimant's landlord under the leases.

13. The Defendant also contends that it is the assignee of the rights of Mr Rivera under the either the First or the Second Services Agreement (dependent upon which is the valid agreement) as a result of an assignment dated 28 January 2021.

14. By March 2021, a dispute was arising as to the ownership and whereabouts of certain narrow gauge rolling stock, in particular a narrow gauge steam locomotive known as "Thomas 2." I deal with the detail of these items later, but it is apparent that the Defendant and/or Mr Rivera involved the police in this issue.

15. On 14 April 2021, the Defendant emailed the Claimant in the following substantive terms:

"*Our Solicitor is serving a formal notice on our behalf informing you that we are terminating the Management Services Agreement.*

The termination results from the sale of the 'Thomas 2 steam engine' which was one of the assets loaned to the Cumbria Zoo Company Ltd under the terms of the Agreement and which is now subject to investigation by the Police. As a result we do not believe our assets can safely be left in your care. However and without prejudice to our rights in respect of the Agreement we are prepared to offer you the opportunity to acquire all of the equipment loaned under the terms of the Agreement.

If this offer is of interest we suggest that an independent Valuer is appointed to value all equipment. This to be on the basis that it has all been kept in good repair and remains fit for purpose. Upon receipt of the Valuer's report then either party to have the right to reject the value ascribed to any individual item under which circumstances we will arrange for the item to be removed from the zoo. Payment for any items you may choose to acquire will be due within 7 days of the submission of our invoice.

If you do not wish to avail yourself of this offer or if we fail to hear from you within five working days we will arrange for all equipment covered by the Agreement to be removed from the zoo."

16. There followed exchanges about the Defendant's right to terminate the services agreement, as well as assertions by the Defendant that the zoo was not being properly

run by the Claimant. Ms Kemp set out some of her concerns in a letter to Ms Brewer dated 27 April 2021 and headed "Collection of Property*."* Having dealt with various concerns, the letter goes on

"My previous offers to resolve matters have been rejected and I believe further discussion is now futile. We have therefore arranged for the collection of our property commencing at 9.00am on Thursday of this week[11] *and have informed the Police who will attend should you or your staff attempt to prevent us from so doing. For clarity this is all equipment loaned to you by South Lakes Safari Zoo Company and Mr David Rivera together with any items which you have provided in place of the original equipment. Any items which are not available for collection will be considered to have been illegally removed from the premises and the Police will be informed accordingly.*[12]"

17. Ms Samantha Brewer on behalf of the Claimant replied to Ms Kemp on the same day stating:

"As you have just hung up on my fellow director Anna[13]*, I feel it necessary to expand on the two things you have mentioned relating to the property you are preparing to remove from the premises on Thursday.*

1. Three firearms which were the property of David Gill - as Anna stated, these are not in our possession, Mr Gill's guns were seized in 2016 and we have the documentation to prove so, as explained by Anna.

2. The Robson Kay list contains many items which are the rightful property of Cumbria Zoo Limited and I will state now you will not be taking any items that are ours. The Robson Kay list was corrected by ourselves to FRP when it was put together, and receipts proving ownership of the items incorrectly listed were provided.

As already stated by our CEO and by Anna, we need to understand what items you believe to be yours so we can ascertain if your belief is correct. So far you have neglected to do this, which makes me believe you really don't know what the items are either, which I appreciate must be frustrating for you but you are currently alienating the only people who can probably help clarify the situation. Please provide what you expect to collect on Thursday and, assuming we are in agreement regarding ownership,

---

11 That was a reference to 29 April 2021.

12 This and subsequent passages from emails are reproduced verbatim, with spelling, punctuation and grammar as the original.

13 Presumably, Anna Gillard – she refers to a phone conversation with Ms Kemp on this day at paragraph 5 of her statement.

it will be ready for you on our car park at 9am. We kindly ask you to ensure you have left by 10am as we will need the space to allow our visitors hassle free parking."

18. Ms Kemp replied by email on 28 April 2021, stating, of the items that the Defendant wished to recover:

"*I cannot understand why you are not clear as to what we intend collecting on Thursday. As I have already clearly stated it is all those items listed on the Robson Kay schedule as identified by yourselves as previously being the property of South Lakes Zoo Company and or David Rivera, save for the fridges used to store essential animal supplies and the walkie talkie system (misrepresented as being CZCL property) both considered to be essential for animal safety and welfare. In addition I understand that the six tracked railway carriages have been returned to the site and we will also collect these. We plan to return in two weeks time when we will seek to recover all remaining items thereby allowing you time to purchase essential replacements. Turning to the terms of the Management Service Agreement CZCL were required to replace any broken items on a like for like basis. Accordingly any items which have been purchased by yourselves as replacement for equipment previously provided to you under the Agreement are also considered to be our property. As previously stated any items which are missing will be noted as having been illegally removed and the Police will be notified accordingly. Given that when you assumed the management of the zoo in 2017 CZCL had provided none of the equipment any items which you now claim to be owned will have been subsequently acquired and you will have purchase invoices as proof. However any items purchased as replacements for equipment loaned under the terms of the Agreement should be so identified. David Rivera will be visiting the zoo in the extremely near future, together with the Police, in order to identify any further property originally loaned and no longer on the site. It would simplify matters if you could provide a revised list of which property you believe to be owned by yourselves so that he may at the same time confirm whether or not this accords with his list. It will save further embarrassment if we can agree what is clearly owned by ourselves in advance of our further planned collection. Unfortunately your suggestion that it is only CZCL who can properly tell us what we own is, under the circumstances, a fanciful notion that doesn't deserve serious consideration … Finally I note that you will helpfully have all of our property ready for collection at 9.00am on Thursday. However given the amount of property which requires collection this is likely to take most of the day. We reserve the right to enter all parts of the zoo to identify and collect any items which are not available in the car park*"

19. There followed an email exchange on 28 April 2021 between Ms Kemp and Ms Brewer in which the former asserted that the Defendant intended to attend to collect its property on the following day and the latter said that they would be refused access.

20. Ms Kemp states of 29 April 2021, "*I tried to collect the majority of the assets belonging to the Defendant and by prior agreement with Ms Brewer. On arriving at the site together with removal vans and staff we were refused access. I additionally tried to gain personal access to the Zoo to check the assets but again was refused entry*." This is said to be the first wrongful refusal of access to the premises giving rise to the right to forfeit the leases.

21. On the afternoon of 29 April 2021, Ms Brewer emailed Ms Kemp to states that the Defendant was "*welcome to visit the site any time you wish providing you do give us 24hr notice we will happily arrange."* Ms Kemp replied later the same day "*David Rivera will be accompanied by two police officers tomorrow at 1.30pm to carryout the check required by the officer leading (the) investigation."*

22. On 3 May 2021, Ms Kemp wrote to Ms Brewer in these terms:

    "*I refer to the two Leases under which your Company occupies as Tenant the premises known as South Lakes Safari Zoo.*

    Under the provisions of Clauses 4.3, 4.4 and 4.5 of the Leases the Tenant must allow the Landlord and his appointees access to the premises at all reasonable times having given reasonable notice. Accordingly we would advise you that we have appointed Mr David Rivera as our agent and we require you to grant him access during normal working hours. We are therefore issuing you 'reasonable notice' that he will be attending the premises on either Thursday 6th May or Friday 7th May between the hours of 9.00am and 5.00pm. Please let me know by return if there is any particular time which is more suitable and Mr Rivera will endeavour to attend at this time."

23. Ms Gillard replied to this on behalf of the Claimant:

    "*Can you please also advise whether Mr Gill/Rivera will be accompanied, if so, who by. CZCL Directors will accompany the visit.*

    We would also like confirmation; as we do for every contractor/appointment to site whether person(s) attending have visited another country in the last 14 days. Have had or are suffering from any COVID symptoms now and in the last 14 days. We must also remind that it is a legal requirement to wear a face covering in our indoor areas which will be in this case behind the scenes. We must also ensure social distancing throughout the visit.

We would like to stress how damaging this visit could be to Safari Zoo. We have spent the last 4 years and counting proving to our supporters, followers, suppliers - that Mr Gill/Rivera no longer has any involvement.

We confirm that we are informing Barrow Borough Council of his visit under your instruction.

We must also emphasise the worry we have, that many of our staff members are not comfortable with the idea of Mr Gill/Rivera visiting the site as such it is asked that he does not speak to staff other than those accompanying his visit.

The relevant people will be available on Thursday 6th May between 2-4pm - please confirm at your earliest convenience."

24. Ms Kemp confirmed the attendance for 2pm on Thursday 6 May.

25. In the event, Mr Rivera attended at 9am on 6 May 2022. He does not explain in his statement why he attended at this time rather than 2pm. The Defendant asserts in its Defence that this was because Ms Brewer had publicised details of the arranged visit on a social media website in "*a clear attempt to encourage her supporters to visit the Property at this time to disrupt Mr Gill/Rivera's visit"*; that the Defendant spoke to the police who advised that the visit be brought forward to 9am; that Mr Rivera attended with police at the premises at this time; but that Ms Brewer refused access. The Claimant accepts that Mr Rivera's visit was publicised on social media. It was arranged that Mr Lambert, the Chair of the Claimant, would accompany him and he aimed to arrive for the pre-arranged time of 2pm, but Mr Rivera arrived early at 9am and had left before Mr Lambert arrived. This is said by the Defendant to be the second wrongful refusal of access to the premises giving rise to the right to forfeit the leases.

26. On 17 May 2021, the Defendant served two notices pursuant to Section 146 of the Law of Property Act 1925 on the Claimant, one relating to the SLSZL land and one relating to the Rivera land. They each specified the same breaches of covenant under the lease, namely:

"(*a) In material breach of Clause 4.3 and/or Clause 30.1 of the Lease*

(i) On 27 April 2021, reasonable notice was given by/on behalf of the Landlord requesting access to the Property on 29 April 2021 pursuant to the Landlord's rights under the Lease yet access to the Property was denied by you or your agents; and

(ii) On 4 May 2021, reasonable notice was given by/on behalf of the Landlord requesting access to the Property on 6 May 2021 pursuant to the Landlord's

rights under the Lease yet access to the Property was denied by you or your agents.

(b) In material breach of Clause 26.2 and/or Clause 27.1 of the Lease, you have removed from the Property (or adjoining property through your use of the Property) and sold or otherwise disposed of railway tracks and a turntable which was not your property but belonged to the Landlord or the previous landlord. This removal constitutes a theft contrary to s. 1 of the Theft Act 1968 and/or associated offences. Accordingly, the Property has been used by you for the illegal purposes of theft contrary to s. 1 of the Theft Act 1968 and/or associated offences and/or in a manner that has caused loss and/or damage and/or nuisance and inconvenience to the Landlord and/or you have failed to comply with laws relating to the Property and the use and occupation of the same and/or the use or operation of machinery and equipment at or serving the Property.

(c) In further material breach of Clause 26.2 and/or Clause 27.1 of the Lease, you have removed from the Property (or adjoining property through your use of the Property) and sold or otherwise disposed of a steam engine known as the "Thomas 2" which was not your property but belonged to the Landlord or the previous landlord. This removal constitutes a theft contrary to s. 1 of the Theft Act 1968 and/or associated offences. Accordingly, the Property has been used by you for the illegal purposes of theft contrary to s. 1 of the Theft Act 1968 and/or associated offences and/or in a manner that has caused loss and/or damage and/or nuisance and inconvenience to the Landlord and/or you have failed to comply with laws relating to the Property and the use and occupation of the same and/or the use or operation of machinery and equipment at or serving the Property."

27. On 26 May 2021, the Defendant sent two further Section 146 notices to the Claimant, again one for the SLSZL land and one for the Rivera land. They specified the following alleged breaches of covenant in the leases, again the same in each:

"(a) In material breach of Clause 26.2 and/or Clause 27.1 of the Lease, you have removed from the Property (or adjoining property through your use of the Property) and sold or otherwise disposed of a Sumitomo/JCB 8 tonne excavator which was not your property but belonged to the Landlord or the previous landlord. Further details of this machinery can be found in Schedule 1 of this Notice. This removal constitutes a theft contrary to s. 1 of the Theft Act 1968 and/or associated offences. Accordingly, the Property has been used by you for the illegal purposes of theft contrary to s. 1 of the Theft Act 1968 and/or associated

offences and/or in a manner that has caused loss and/or damage and/or nuisance and inconvenience to the Landlord and/or you have failed to comply with laws relating to the Property and the use and occupation of the same and/or the use or operation of machinery and equipment at or serving the Property.

(b) In further material breach of Clause 26.2 and/or Clause 27.1 of the Lease, you have removed from the Property (or adjoining property through your use of the Property) and sold or otherwise disposed of a number of large ornate wooden tables, a feature wood and glass 'elephant' table and an Indonesian bed which were not your property but belonged to the Landlord or the previous landlord. Further details of this equipment can be found in Schedule 1 of this Notice. This removal constitutes a theft contrary to s. 1 of the Theft Act 1968 and/or associated offences. Accordingly, the Property has been used by you for the illegal purposes of theft contrary to s. 1 of the Theft Act 1968 and/or associated offences and/or in a manner that has caused loss and/or damage and/or nuisance and inconvenience to the Landlord and/or you have failed to comply with laws relating to the Property and the use and occupation of the same and/or the use or operation of machinery and equipment at or serving the Property.

(c) Furthermore, in material breach of Clause 26.2 and/or Clause 27.1 of the Lease, you have removed from the Property (or adjoining property through your use of the Property) and sold or otherwise disposed of a yellow Stanley Compressor which was not your property but belonged to the Landlord or the previous landlord. This removal constitutes a theft contrary to s. 1 of the Theft Act 1968 and/or associated offences. Accordingly, the Property has been used by you for the illegal purposes of theft contrary to s. 1 of the Theft Act 1968 and/or associated offences and/or in a manner that has caused loss and/or damage and/or nuisance and inconvenience to the Landlord and/or you have failed to comply with laws relating to the Property and the use and occupation of the same and/or the use or operation of machinery and equipment at or serving the Property.

Schedule 1 to each of those notices comprised a series of photographs, some of what is described as "*Sumitomo/JCB 8 tonne excavator"* and some of "*large ornate wooden table, a feature wood and glass 'elephant' table and an Indonesian bed*[14]*."*

28. On 7 June 2021, the Defendant re-entered the premises, purportedly exercising its right to do so peaceably having forfeit both of the leases.

[14] The photographs also show some animal carvings, including a fine bird of prey, supporting the conclusion below that a reference to carvings is to wooden animals.

THE LITIGATION

29. The Defendant's action in re-entering the land led to an immediate application (on the same day) for injunctive relief by the Claimant. This was granted by HHJ Eyre QC as he then was, on a without notice basis, requiring the Defendant to restore the Claimant to possession of the premises and forbidding it from interfering with the Claimant's possession (subject to an exception for inspection of the premises). The injunction was renewed by HHJ Eyre QC on similar terms in a hearing on notice on 10 June 2021.

30. The Defendant subsequently served further Section 146 notices dated 18 March 2022. These led to an application to widen the injunctive relief, which I granted on 19 May 2022.

31. In the meantime, HHJ Hodge KC gave directions (later varied by District Judge Woodward on 7 March 2022) for the trial of preliminary issues at a hearing on 29 November 2021. The preliminary issues, as agreed by the parties and directed by HHJ Hodge KC, are as follows:

> *"(a) Whether the Leases of Cumbria Zoo were forfeited by the Landlord's re-entry on 7 June 2021 following the notices served by the Defendant pursuant to Section 146 of the Law of Property Act 1925 (not including the Claimant's claim for relief from forfeiture); and*
>
> *(b) Which of the agreements from January 2017 are the final agreements and which agreements or rights thereunder have been assigned to the Defendant or are otherwise enforceable by the Defendant*."

THE ISSUES

32. The issues for the preliminary trial before me can conveniently be broken down into two groups:

    32.1. Issues relating to the Service Agreement(s);

    32.2. Issues relating to forfeiture.

33. The Service Agreement issues are:

    33.1. Is the Second Services Agreement binding in place of the First Service Agreement?

33.2. Were the rights under the First Services Agreement or (if it is binding and is the proper version of the agreement between the Claimant and Mr Gill) the Second Services Agreement, assigned to the Defendant?

34. The forfeiture issue involves considering the following sub-issues:

34.1. Access on 29 April 2021

(a) Was the Defendant's request for access made for a reasonable time and with reasonable notice?

(b) If so, did the Claimant refuse access to the Defendant for any purpose mentioned in or connected with the lease and the landlord's interest in the property?

(c) If so, was the refusal of access a material breach?

34.2. Access on 6 May 2021

(a) Was the Defendant's request for access made for a reasonable time and with reasonable notice?

(b) If so, did the Claimant refuse access to the Defendant for any purpose mentioned in or connected with the lease and the landlord's interest in the property?

(c) If so, was the refusal of access a material breach?

34.3. Breach of covenant regarding chattels

(a) In respect of each item named in the Notices, was ownership transferred to the Claimant?

(b) In respect of each item named in the Notices in respect of which ownership was not transferred to the Claimant, has the Claimant appropriated the item?

(c) In respect of each item named in the Notices in respect of which ownership was not transferred to the Claimant and which the Claimant appropriated, was the appropriation dishonest?

(d) In respect of any such dishonest appropriation, did it amount to a breach of the covenant against use for an illegal purpose?

(e) Alternatively, in respect of any such appropriation, did it amount to use for a purpose or in a manner that would cause loss or damage to the Defendant?

(f) Alternatively, in respect of any such appropriation, did it amount to a breach of the covenant to comply with all laws relating to the use or operation of all Service Media and machinery and equipment at or serving the property.

(g) Were any breaches under sub-sub-paragraphs (d), (e) or (f) waived by the Defendant?

(h) In respect of any breach under sub-sub-paragraphs (d), (e) or (f) which was not waived, was the breach material?

35. The Section 146 notices identified the following items that it was said had been appropriated by the Claimant:

35.1. In the notices of 17 May 2021:

(a) Railway tracks and a turntable;

(b) A narrow gauge steam engine known as "Thomas 2"

35.2. In the notices of 26 May 2021:

(a) A Sumitomo/JCB 8 tonne excavator.

(b) "*A number of large ornate wooden tables, a feature wood and glass 'elephant' table and an Indonesian bed."* These items are further identified in paragraph 18.11 of the Defence as "*approximately 10 large ornamental wooden tables and an ornate enclosed bed from Indonesia which were used for display purposes and were not part of the shop stock*."

(c) A Stanley compressor.

36. As the hearing progressed, it became apparent that not all of the items specified in the Section 146 Notices were in fact said to be relevant on the forfeiture issue. Those which remain in issue, in respect of which findings are sought, are:

(a) Furniture within the shop;

(b) The Sumitomo excavator;

(c) Thomas 2.

THE TRIAL

37. The following witnesses gave evidence before me:

37.1. For the Claimant:

(a) Karen Brewer, the Chief Executive Officer of the Claimant;

(b) Sarah Swarbrick, a legal executive with Livingston's solicitors who acted for the Claimant, including at the time of execution of the agreements in January 2017.

(c) Stewart Lambert, Chairman of the Claimant;

(d) Paula Mason, the shop manager at the zoo, employed by the Claimant;

(e) Anna Gillard, a director of the Claimant and its health and safety co-ordinator at the zoo;

(f) Samantha Brewer[15], events and marketing manager for the Claimant.

37.2. For the Defendant:

(a) Gavin Clunie, a former employee of the Claimant as assistant animal manager at the zoo;

(b) Janet Kemp, Chief Executive Officer of the Defendant.

38. The Defendant did not rely on the witness statement of Mr Colin Hilton, which it accepted did not contain material relevant to the trial of the preliminary issue.

39. In addition, the Defendant sought to rely on the witness statement of Mr Rivera. This was served in accordance with the directions of Judge Woodward, but in the event, he did not attend to give oral evidence. I was told that he was unable because he was at sea. The Claimant accepts that his statement is admissible pursuant to section 1 of the Civil Evidence Act 1995, albeit with the proviso that his non-attendance is likely to bear on the weight to be attached to the contents of the statement.

40. The preliminary issues turn in part on issues of law and in part on the evidence of witnesses. In the latter regard, this case is bedevilled by the extreme positions that witnesses have taken up in support of the particular cause that they seek to advance. It is apparent that there is bitter dispute between Mr Rivera on the one hand and Ms Brewer on the other. Mr Rivera contends that he has been the subject of a "*vitriolic and largely untruthful press campaign"* which he says was encouraged by Ms Brewer. Ms Brewer accuses Mr Rivera of a mismanagement of the zoo, leading to animal welfare concerns that almost caused it to close.

41. This dispute has drawn in other people who are relevant witnesses. By way of example only:

---

[15] Samantha Brewer's evidence is of limited relevance to the matters before the court, unlike that of her sister, Karen Brewer. For simplicity, when this judgment refers to "Ms Brewer," that is a reference to Karen Brewer. If Samantha Brewer is referred to, she is specifically identified by first name.

41.1. Ms Gillard, a Director of the Claimant and its Health and Safety Co-Ordinator, accepted that she had engaged in posting messages on social media that included making a vile comment about inflicting violence on Ms Kemp. Whilst the comment has the flavour of mere abuse rather than as a serious threat of violence, the fact that Ms Gillard was willing to make such a comment in a public arena suggests that she is not likely to be a dispassionate witness of events of which she testifies. Her attitude to Ms Kemp causes me to be extremely cautious in accepting her objectivity and therefore her reliability on matters in respect of which she gives evidence.

41.2. Ms Kemp, whose evidence is analysed in a different respect below, has repeatedly asserted things to be true or untrue when she cannot in fact know this to be the case because they are outside her knowledge. Indeed she is probably wrong in several respects. Her evidence seems to be heavily flavoured by a desire to paint the Claimant, and in particular Ms Brewer, in as bad as light as possible.

In truth, the dispute between the warring factions appears to have coloured the evidence of nearly all of witnesses to some extent. All save Ms Mason, the Claimant's shop manager, gave the impression at varying times that they were eager to help the party who was calling them.

42. The tendency in this case towards a partisan approach has aggravated the usual difficulty in relying on the oral evidence of witnesses when it is not supported by contemporary documentation. In his oft-cited judgment in Gestmin, Lord Leggatt JSC as he now is, noted amongst other things:

> *"19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*
> *"20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not*

> *see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."*

43. Some aspects of the factual disputes can satisfactorily be resolved by reference to contemporaneous documentation. In other respects, there are gaps in the documentation that lead the court to apply the approach of the Court of Appeal in NatWest Markets Plc v Bilta (UK) Ltd [2021] EWCA Civ 680 at paragraph 51:

> "*[51] Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence, the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness-box, especially when their version of events was challenged in cross-examination.*"

44. However, the Business and Property Courts' ability to deal justly and efficiently with cases has been imperilled by the tendency of witness statements to be used for narrative, commentary and argument. The new Practice Direction 57AC dealing with trial witness statement in the Business and Property Courts, with which practitioners in the Business and Property Courts should by now be very familiar, is intended to assist the courts in dealing this problem. The helpful Statement of Best Practice, which is appended to the Practice Direction, having identified some of the same problems as Lord Leggatt, goes on:

> *"3.6 Trial witness statements should not –*
> *(1) quote at any length from any document to which reference is made,*
> *(2) seek to argue the case, either generally or on particular points,*
> *(3) take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument, or*
> *(4) include commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence (save as set out at paragraph 3.4 above)."*

45. PD57AC expressly refers to the possibility of a witness giving hearsay evidence (see paragraph 2.3(2) of the Appendix), reflecting the general right of a party in a civil case to rely on hearsay evidence pursuant to the Civil Evidence Act 1972. However, such evidence is of course subject to the obligation which arises in respect of all witness

evidence to state the source for matters of information or belief (see paragraph 18.1 of PD32).

46. PD57AC provides for certificates of compliance:

46.1. From the witness stating amongst other things, "*I understand that it is not my function to argue the case, either generally or on particular points…"*

46.2. From the legal representative stating amongst other things:

> *"2. I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to [name of witness].*
> *3. I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC."*

47. Ms Janette Kemp, the Managing Director of the Defendant, signed a witness statement (her third in this litigation) for the purpose of the trial. The certificate of compliance was signed by Ms Kate Andrews, who signed as a partner in Hamlin's solicitors.

48. The statement is littered with comments and expressions of belief many of which can only at best be based on unattributed hearsay. In paragraph 33, under the heading "Reliance on Witness Evidence", Ms Kemp states:

> *"Much of the argument depends upon the differing accounts and interpretations of the parties and it is understandably difficult for the Court to decide which version of events is more accurate. I therefore believe it is relevant to initially consider the consistency, or otherwise, of the accounts being given, how this is supported by the hard written and photographic evidence and how this reflects upon the reliability or otherwise of the main witnesses."*

49. She proceeds over the following 21 paragraphs to scrutinise various documents, carefully explaining to the reader how she says those documents undermine the Claimant's case. The witness clearly wishes the reader to be in no doubt about what she is doing, given that in paragraph 48 she concludes one section of commentary by saying, *"… I submit that the clear written evidence covering a considerable period of time and involving Karen Brewer, her co-directors and other advisers clearly shows that any statement made by them cannot be relied upon as being truthful."*

50. The witness statement thereby flatly contradicts the injunction in paragraph 3.6(4) of the Appendix to the Practice Direction against *"commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence."* Indeed, the statement reads as though the maker (and whoever

certified compliance with the Practice Direction) considered that it was positively desirable to include such commentary.

51. Whilst I have come across failures of compliance with PD57AC, they have mostly been minor in nature, suggesting that lawyers have largely been able to rein in any tendency on the part of their clients to want to comment on the material before the court regardless of whether they have personal knowledge of its contents. However, this witness statement involves gross non-compliance. I have noted the judgment of the Vice Chancellor in Greencastle v Payne [2022] EWHC 438 (IPEC). It is not clear whether he was dealing with a more grossly non-compliant statement than that of Ms Kemp, but I gratefully adopt two features of his judgment:

    51.1. That "*the whole purpose of Practice Direction 57AC is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination*" (paragraph 22 of his judgment). That was only avoided in the case before me by the good sense of counsel in agreeing that I should simply disregard passages of the evidence which contained expressions of belief (save as to the limited extent that the witness' state of mind was relevant), opinion, comment and unattributed hearsay.

    51.2. That it is not for the parties alone to determine how the court deals with non-compliance (see paragraph 34). Mr Hoffman for the Claimant did not seek to argue that it should impose any sanction on the Defendant for example by declining to allow it to rely on the statement. This was seemingly motivated by a concern that the statements relied on by his own client were not entirely compliant (which was true, though the non-compliance was on a different scale to that in Ms Kemp's statement); an (understandable) fear that the issue might waste time in what was already a tight timescale; and a belief that the good sense of his opponent and he could avoid any real unfairness from what had happened (which proved correct).

52. I also bear in mind the judgment of Mellor J in Lifestyle Equities v Royal County of Berkshire Polo Club Ltd [2022] EWHC 1244, in which he cautioned against parties taking minor technical points about compliance with PD57AC, stating at paragraph 98:

    "... in my view PD57AC should not be taken as a weapon with which to fillet from a witness statement either two or three words at various points or essentially insignificant failures to comply with PD57AC in a witness statement. Furthermore, in my view, before an application is brought seeking to strike out passages in a witness

statement based on PD57AC, careful consideration should be given as to proportionality and whether such an application is really necessary. Indeed, in my view, an application is warranted only where there is a substantial breach of PD57AC (as, for example, in Greencastle). If there really is a substantial breach of PD57AC, it should be readily apparent and capable of being dealt with on the papers. That might provide a mechanism for dealing with objections in an efficient and cost-effective manner."

This approach was followed by HHJ Keyser KC in Curtiss v Zurich Insurance [2022] EWHC 1514.

53. With respect, I agree with Mellor J's judgment. The parties should be careful about the proportionality of taking objection to minor non compliance with PD57AC. However, this was not such a case. The non compliance in Ms Kemp's statement was substantial and flagrant.

54. It is not clear how this situation came about. Ms Kemp can only have considered it appropriate to sign this statement if either she had not understood the prohibition on comment, had not read the statement or simply ignored what it said. Having heard her give evidence, I can safely ignore the first possibility. Of the remaining two, neither would cause one to place much reliability on her evidence. Given her answers to questions in evidence, if I had needed to make a finding, I would have concluded that this was a deliberate ignoring of the prohibition. Indeed, having heard Ms Kemp give evidence, I am entirely satisfied that this is not a case where it can be suggested that the legal representative has put words in the mouth of the witness. She was a forceful witness who gave no indication at all that she was influenced by others in what she was saying.

55. As for the certification of compliance by Ms Andrews, the obvious explanations again are that she has not read PD57AC, has not understood it or is deliberately ignoring it. Of course, she did not give evidence before me, and I have no material from which to determine which of the three is correct, but I can safely discount the first, given the unambiguous wording of the Practice Direction.

56. In another case that I have heard recently where questions of non-compliance with PD57AC were raised, counsel suggested that solicitors might feel under pressure to sign certificates of compliance pursuant to PD57AC even where they knew that statements were non-compliant, such pressure arising from the desire of their clients to ensure that they had their day in court. If that is seen by some as a justification for signing statements that certify compliance when there has not been, practitioners need

to be aware of the serious consequences that this may have both for their clients and for themselves. No such justification for non-compliance was proposed here.

57. Had this issue come in front of me at a Pre Trial Review, I would have had little hesitation in prohibiting the Defendant from relying on the statement and considering whether to permit a replacement statement that complied with PD57AC to be served. In the event, there had been no Pre Trial Review (for good reason) and so the issue did not receive judicial attention until trial. It was then too late to put things right in that way. It was not realistic to edit the statement. It follows that there was a significant prospect that the Defendant would have been refused permission to rely on the statement. It might in fact be the case that would have made no difference to the outcome of the case, but it is an indication of the risks that parties take if they do not comply with the Practice Direction.

58. In McKinney Plant & Safety v Construction Industry Training Board [2022] EWHC 2361, Mr Richard Farnhill sitting as a deputy High Court Judge ordered a party whose default in compliance with PD57AC caused additional costs at a Pre Trial Review to pay those costs on the indemnity basis. In this case, it would not appear that any identifiable additional costs have been incurred as a result of non compliance with PD57AC, but I can see little prospect of the court allowing a party who is otherwise the beneficiary of an order of costs to recover the costs of the preparation of a witness statement that is so grossly non-compliant. That is a matter which can be dealt with in this case in due course, as may be necessary.

59. If the threat of sanctions of this kind are not sufficient to deter non-compliance, witnesses, the parties who call them and their legal representatives of parties also need to realise that non-compliance with PD57AC risks undermining the credibility of the witness by exposing them to the kind of forces that Lord Leggatt JSC identified as being liable to cause distortion to witness statements. Thus, even if no sanction is imposed, the non-compliance may weaken the credibility of the witness and thereby undermine the case of the party who calls a witness in such circumstances.

THE CLAIMANT'S CASE

Service Agreements of January 2017 - is the agreement of Second Service Agreement binding in place of the agreement of the First Service Agreement?

60. Ms Brewer's account of the background to the entering into of the Service Agreements in January 2017 is set out at paragraphs 9 and following in her statement. This can be summarised as follows:

60.1. In 2015, the licensing authority for the zoo, Barrow Borough Council ("Barrow BC")*)* were expressing concern about how the zoo was being operated by SLSZL and Mr Rivera.

60.2. In 2016, Mr Rivera and Ms Brewer (who was by then the Chief Executive Officer of SLSZL) had discussions about how control of the zoo could be passed over to others, while Mr Rivera might retain the commercial, money-making, arm of the business.

60.3. The licensing authority imposed a condition requiring Mr Rivera to hand over control over the zoo.

60.4. A handover had not been achieved by November 2016, when the licensing authority made a formal direction requiring hand over.

60.5. A plan was formed to divide the zoo into two parts, a commercial arm and an animal arm, with Mr Rivera retaining control of the commercial arm and the animal arm passing to new control.

60.6. To this end, the Claimant was incorporated, and it registered an interest in applying for the licence.

60.7. In January 2017, a wall was erected in the zoo to separate the area that was to remain under Mr Rivera's control (the retained land referred to above) and the balance of the animals the control of which was to be passed to the Claimant.

60.8. On 12 January 2017, the First Services Agreement was signed, anticipating the division of the zoo between the commercial element controlled by Mr Rivera and the balance controlled by the Claimant.

60.9. On 16 and 17 January 2017, inspectors for Barrow BC attended the zoo with a view to reporting on the Claimant's application[16].

60.10. Following this, in particular at a meeting on 18 January 2017, Barrow BC made it clear that it was not acceptable for Mr Rivera to retain animals on his land and furthermore expressed concern about the extent of Mr Rivera's continued control of the finances of the zoo generally.

60.11. Further discussions then took place between the Claimant and Mr Rivera, including a meeting with solicitors on 23 January 2017, which led to the Second Service Agreements being signed on that day.

---

[16] The report recommended refusal of the application, which was the ultimate decision of Barrow BC albeit that it granted a fresh application for a licence made by the Claimant.

61. The circumstances of the discussions on 23 January 2017, when she says that the Second Service Agreement was signed, are referred to in Ms Brewer's statement at paragraphs 21 and 22. These were expanded upon in oral evidence

    61.1. The meeting took place at the offices of Livingston's Solicitors, who were acting both for the Claimant and for Mr Rivera. Ms Swarbrick represented the Claimant in the discussions and Mr Steve Walker represented Mr Rivera.

    61.2. There were in total seven documents to be signed, two each[17] of the short-term leases, agreements for leases and animal loan agreements, and the solitary services agreement between the Claimant, SLSZL and Mr Rivera.

    61.3. Ms Brewer thought the meeting started at about 10am or 10.30am and that it finished at around 2pm. She separately estimated its length at between 2 and 3 hours.

    61.4. Ms Swarbrick and the representatives of the Claimant were in one room (downstairs) in the building and Mr Rivera and Mr Walker, together with representatives of the bank were in Mr Walker's room, which was upstairs.

    61.5. There came a point, after an hour or so, when she and Ms Swarbrick were taken up to Mr Walker's room. There, they went through the documents one by one, she and Mr Rivera each signing a copy of each document. She said that she read the documents before she signed them, and that Mr Rivera equally had an opportunity to do so.

    61.6. She acknowledged that, as they went though the documents, the question of animal ownership was not to the best of her recollection openly raised and discussed.

62. The evidence of Ms Brewer was supported materially by that of Ms Sarah Swarbrick. She is a Chartered Legal Executive, formerly employed by Livingstons Solicitors. She acted for the Claimant in the dealings in respect of the zoo. Mr Steven Walker of Livingstons represented Mr Rivera and SLSZL in those discussions.

63. It should be noted that the Defendant initially sought to object to the admission of Ms Swarbrick's statement on the grounds that Livingstons had a conflict of interest in representing the Claimant on the one hand and Mr Rivera and SLSZL on the other. This objection was not maintained as a ground for excluding the statement though was said to go to its weight.

---

[17] In each case an agreement between the Claimant and SLSZL and one between the Claimant and Mr Rivera.

64. At paragraph 15 of her statement, Ms Swarbrick says:

"A meeting was held in Steve Walker's office at Ulverston on the 23rd January 2017, present was Steve Walker, David Gill, Karen Brewer, Stewart Lambert, myself, Sue Crowe's, Steve's secretary, for part of the meeting as she was printing the amended agreement out, Simon Reeves and Karina Gallagher from Nat West with whom David Gill and SLSZ had a bank loan. Simon and Karina were present as the bank had significant money to lose if the Zoo closed and although could not formally agree to the buy out, supported it as a means of recovering some/all of their loans."

65. In cross examination, Ms Swarbrick said that her understanding was that that Barrow BC were proposing to close the zoo if Mr Rivera retained control over the animals. Therefore, a revised draft agreement, which was ultimately signed as the Second Services Agreement, was drawn up by Mr Walker. This travelled back and forth and was amended up to and including the day on which it was signed.

66. As to the meeting on 23 January 2017, Ms Swarbrick said that, when she and the Claimant's representatives arrived, a meeting was already taking place between Mr Rivera and representatives of the bank (who had a charge over the assets of Mr Rivera and/or SLSZL). There had then been a period of amending the draft agreements, when Ms Sue Crowe, Mr Walker's secretary had been involved in making the various changes. Ultimately, Mr Rivera and Ms Brewer had each signed the various agreements including the Second Services Agreement in the presence of the others, including Mr Walker and Ms Swarbrick.

67. Ms Swarbrick accepted that there both originals of the agreements and emails/letters relating to the negotiations that were not before the court. She had left Livingston's in 2022, and to the best of her knowledge, the originals were in the strong room at Livingstons' offices in Dalton-in-Furness.

68. The Claimant contrasts with this detailed account of the discussions, the sparse account within Mr Rivera's statement (which of course was not supported by him giving oral evidence and therefore could not be explored or challenged in cross examination). Paragraph 23 of his statement says:

"*I am now aware that a signed copy of the 23rd January 2017 version of the MSA[18] has been produced although I do not accept its validity as I had not seen the amendments made prior to signing, I was literally given the back signature page of the agreement and told to sign which I did on the basis that I believed I was signing a lease agreement*

[18] Management Service Agreement

– not a new MSA. I do recall presenting to the office of Messrs Livingstons, the Solicitors representing both myself and SLSZ Ltd, on the 23 January 2017 for the purpose of signing the Lease agreements and to have been given various pages for signature. I had been told that some amendments had been made to the lease documents in order to satisfy Barrow Council ahead of them granting a Zoo Licence to CZCL. I had not been told of any changes to the MSA and as evidence of this attach at pages 20 - 21 an email dated 3 January 2018 stating that no changes were to be made to the MSA."

69. The Claimant draws attention to documentation supporting its case that it was necessary for the animals to be transferred to the Claimant so as to avoid the closure of the zoo, in particular:

69.1. The report of 19 January 2017, following the visit over the previous two days records that the terms of the agreement between the Claimant and Mr Rivera/SLSZL were discussed at length by the inspectors and the representatives of the Claimant. The report records the inspectors' concern that "*the legal arrangements that have been put in place could give the owner a degree of control over the management of the animal collection that will not permit completely independent decision to be made by the applicant and may lead to conflict and/or affect the applicant's ability to comply with the SSSMZP*[19] *at all times."*

69.2. The report from the inspectors is followed by a report to the licensing Committee of Barrow BC which appears to refer to historic matters, but in any event is highly critical of Mr Rivera and his operation of SLSZL. In particular the following is stated:

"With CZCL[20]*, whilst there are still some deficiencies, the inspectors noted a genuine attempt to improve, within the constraints placed upon them by the old operator, and the new recently signed contracts.*

Within the TA[21]*, however, the fact that the operator did not attend, and later when asked if he had further comments to make, replied that he did not, shows a callous disregard for the welfare of the animals within this area.*

---

19 A reference to Secretary of State's Standards of Modern Zoo Practice, a guide published by DEFRA.

20 The Claimant.

21 A reference to the Tambopata Aviary, part of the retained land that was to remain in the control of Mr Rivera.

Many of the welfare issues noted by the inspection team can clearly be put down to poor management…

The level of husbandry, overcrowding, poor hygiene, rodent problems, lack of veterinary care have all meant that these animals are likely to suffer. A number of these animals have died directly from the problems stated about, and in the inspectors' opinion will have suffered unnecessarily in their deaths.

The causes of these deaths can be laid either directly or indirectly upon the modus operandi of SLSZ[22], under the direction of DG[23]. The way these animals have been housed, treated and looked after is typical of the poor levels of management that the inspection team have found when the zoo was under SLSZ management, and can without any doubt lay the entire blame at his door.

It is the inspector's view that the Local Authority should consider prosecuting DG under section 4 of the Animal Welfare Act for allowing these animals to suffer (and some of them to die), and be likely to suffer. The conditions that these animals are being maintained in, is quite frankly appalling and shocking, and has led directly to the death of a number of them. It falls far below the standards required under the SSSMZP, and is indicative of the lack of suitability for DG to hold a zoo license.

Improvement was required immediately within this area, and the inspectors considered recommending a Zoo closure Direction Order, so that the LA could facilitate immediate improvements in the welfare of these animals. However, after the Inspectors had a conversation with CZCL, the area and the animals were handed back from SLSZ to CZCL with immediate effect. CZCL then sent in their veterinary consultant JC[24], who drew up an emergency Welfare Audit, and CZCL began to address the issues."

70. Further, the Claimant points to two documents in which Mr Rivera appears to accept the transfer of ownership of animals:

70.1. In an email to Ms Brewer dated 22 January 2017 (which is relevant to issues relating to stock as well as the issue as to the January 2017 agreement), Mr Gill said:

"*Firstly I am not taking any zoo animals whatsoever now.*

22 The Defendant.
23 David Gill/Rivera.
24 Probably Jonathan Cracknell, who was advising the Claimant.

Secondly I already stated that all SLSZ assets that are off the site right now will transfer to my ownership in return for the stock. The only things still to go is the large iguana[25] *from in the barn."*

70.2. The deed of assignment from Mr Rivera to the Defendant, dated 28 January 2021, refers to the assignment of two agreements of 23 January 2017, those being what are termed in this judgment the Rivera Animals Loan Agreement and the Second Services Agreement. Thus Mr Rivera himself has acknowledged, through signing that assignment, that he had entered into the Second Services Agreement.

71. More generally, Mr Rivera's communications at around the time of the Second Services Agreement are consistent with him wishing to move on from his connection with the zoo. By way of example in an email dated 17 January 2017 to Ms Brewer, discussing the creditors of the zoo, the liability to whom he was seeking the Claimant to take over, he says, "*It is up to you but I would like to move on this immediately to prevent any further issues arising that could get in the way of this total take over of the business … let me know asap as I wish to remove myself from the business totally as soon as possible so I can relax and remove the stress and tension that has plagued my life for far too long*."

72. Thus the Claimant contends that the Second Services Agreement was an obvious consequence of the position that Barrow BC, rightly or wrongly, was taking about Mr Rivera's continued involvement with the zoo. The evidence is clear that it was necessary to renegotiate the services agreement; such renegotiation took place with parties having the benefit of legal advice; and the parties signed the Second Services Agreement in consequence. If Mr Rivera did not appreciate its contents (which the Claimant says is implausible in any event), he has only himself to blame for not reading it properly and raising objection to the terms.

Service Agreements of 2017 - Were the rights under the First Service Agreement or (if it is binding and is the proper version of the agreement between the Claimant and Mr Rivera) the Second Service Agreement, assigned to the Defendant?

73. In summary, the Claimant contends that:

73.1. The assignment agreement between Mr Rivera and the Defendant dated 28 January 2021 purports to assign the Second Services Agreement. Accordingly, if the First Services Agreement is binding, it has not been

[25] As is noted later in this judgment, there were a number of wooden models of animals at the zoo. This is a reference to one of those, rather than a live iguana.

assigned to the Defendant and the Defendant has no standing to sue upon the First Services Agreement on this alternative ground.

73.2. In any event, clause 8 of the First Services Agreement provides, "*save as expressly provided for in this Agreement, neither party shall assign, novate, sub-contract or otherwise dispose of any or all of its rights and obligations under this Agreement without the prior written consent of the other party."* The Claimant has not given such consent, so the purported assignment is not valid, and the Defendant has no standing to sue upon the First Services Agreement.

73.3. If, as the Claimant contends, the parties are bound by the Second Services Agreement, clause 9 of that agreement is in the same terms as clause 8 of the First Services Agreement. Again, given the absence of consent from the Claimant, the purported assignment is not valid, and the Defendant has no standing to sue upon the Second Services Agreement.

74. As the Claimant acknowledges in its skeleton argument, the true effect of a clause prohibiting assignment of contractual rights is not entirely clear, especially as between assignor and assignee. However, as between assignee and third party, the simple point is expressed at paragraph 22-44 of Chitty on Contracts:

"If rights arising under a contract are declared by the contract to be incapable of assignment, a purported assignment will be invalid as against the debtor. In the leading case of Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85 the benefits of building contracts were purportedly assigned by lessees of the properties on which the building work was being carried out to assignees of the leases. Under the building contracts there was to be no assignment of the contract by either party without the other's consent. No such consent for the assignments was obtained. It was held by the House of Lords that, on the true construction of the prohibition clause, the assignment of the benefit of the contract, rather than merely vicarious performance, was barred; and that no distinction was here being drawn by the parties between barring an assignment of the right to future performance, as opposed to the fruits, of the contract nor between barring an assignment of unaccrued, as opposed to accrued, causes of action. Moreover there was no reason of public policy not to give effect to the prohibition clause, the legitimate commercial purpose of which was to ensure that the original parties to the contract were not brought into direct contractual relations with third parties."

75. The Claimant contends that the effect of the prohibition on assignment without the consent of the Claimant in the Second Services Agreement[26] is that the Defendant is not entitled to the benefit of the services agreement (be it the first or the second) and that therefore in so far as any arguments turn on the Defendant's purported rights under the relevant service agreement, the claim cannot succeed since such rights have not been assigned.

Access on 29 April 2021

76. The Claimant's case is that the request for access made by the letter of 27 April 2021 was made expressly for the purpose of removing items of personal property. However, the right of access of the landlord or its agents under the lease is restricted to purposes *"mentioned in or connected with the lease and the Landlord's interest"* in the land which is the subject of the lease. Accordingly the Defendant had no right of access under the lease and the refusal of access cannot amount to a breach of the lease.

77. In the alternative, the Claimant contends that the Defendant's arrival at the zoo, as it as said in closing submission, "*mob handed"* to remove items was not, the Claimant says, a request of access at a reasonable time and with reasonable notice.

78. Finally, the Claimant would say that the breach in refusing access was not a material breach because:

    78.1. It did not relate to the lease itself; and

    78.2. In any event the Claimant put any breach right by allowing access on 21 May 2022.

Access on 6 May 2021

79. As to access on 6 May 2021, the Claimant points to the fact that access was agreed for 2pm on 6 May 2021, for which purpose the Claimant's chair, Mr Lambert, attended the premises. However, Mr Rivera, acting as the Defendant's representative arrived earlier than had been arranged and sought access immediately.

80. Mr Lambert's uncontroverted evidence (which I accept) was that Ms Brewer contacted him to say that Mr Rivera had arrived at about 9am on 6 May 2021. He messaged Mr Rivera at 10.33 am to say that he would be at the zoo in an hour and arrived there at 11.30am. According to Ms Brewer, Mr Rivera had left by the time Mr Lambert arrived.

81. The Claimant contends that there was no breach of the terms of the leases in not allowing access where a time was agreed for the visit, the Defendant's representative

[26] Or indeed the First Services Agreement, if that is the true contract between Claimant and Mr Rivera/SLSZL.

arrived at an earlier time, and he left before it was possible for the Claimant's representative to arrive. Given the history of the relationship between the Claimant and Mr Rivera, it was reasonable to refuse access until Mr Lambert attended.

82. Again the Claimant would say that the breach in refusing access was not a material breach. The Claimant offered access at a particular time, but the Defendant attended at a different time, and in any event, Claimant put any breach right by allowing access on 21 May 2022.

Breach of covenant regarding chattels

83. The Claimant acknowledges that different issues arise as between the various chattels. As to the furniture within the shop, the Claimant accepts that it has disposed of these items but says that they were part of the shop stock which were transferred to it. On the other hand, it admits that the Sumitomo excavator and Thomas 2 were not assets transferred to it, but denies having disposed of them, saying that both were taken by Mr Rivera.

84. As to the shop stock, it is common ground that the parties agreed that this would be transferred to the Claimant, in exchange for the Claimant meeting certain debts of the zoo. The agreement is evidenced by the email of 22 January 2017 from Mr Rivera to Ms Brewer referred to above. Mr Rivera deals with the agreement at paragraph 32 of his statement. He confirms the agreement to transfer the shop stock in exchange for the Claimant meeting outstanding debts. He says that what was transferred was "*gift shop stock (by which I mean sellable items and not for example display units).*"

85. The issue however is whether the items that the Defendant now contends have been converted by the Claimant fell within the ambit of that agreement. The Claimant accepts that shop fittings were not included in the agreement to transfer ownership referred to above. However, it asserts that the items of furniture referred to by the Defendant were in fact part of the shop stock. Although they may have been used to display other items, they were in fact themselves always intended for sale. The Claimant therefore acquired title to them and was entitled to sell them.

86. The Claimant relies in support of this on the evidence of Ms Brewer at paragraph 15 of her first witness statement (adopted for the purpose of the trial in her oral evidence) and in particular by Ms Mason, the Claimant's shop manager. Ms Mason's evidence is particularly striking. She has worked in the zoo shop since 2008. She says that there were several items in the shop that arrived in two shipments that Mr Rivera had ordered

from Bali in 2013 and 2015. These included various carvings[27] and other furniture including a bed, tables, stools, jewellery and canoes. Some of these remain stowed away; some are still on display in the entrance hall to the zoo; but some were in the shop and were sold.

87. Of the items in the shop, Ms Mason says in her statement, "*All stock, including that from the Bali shipments had a price on and was displayed as for sale in 2015 and throughout their time on the shop floor. This never changed until each item was sold and remains the case for the small number of items still on display in the shop*." In support of this, she referred to various photographs. In cross examination, she was taken to the photographs and maintained her case that they showed price tags on the items. She said that these photographs had been taken at around the time the items were delivered to the zoo, at a time when Mr Rivera was still involved in its operation.

88. The Claimant's case in respect of the Sumitomo excavator is far from clear. In opening written submissions, it placed reliance on the following:

    88.1. Ms Brewer's evidence, supported by an email of 1 June 2021, that Marsh Plant Hire had removed an 8 tonne excavator to Mr Rivera's own premises.

    88.2. Mr Rivera's statement in the email of 22 January 2017 referred to above that "*all SLSZ Ltd assets that are off the site right now will transfer to my ownership in return for the stock."*

    88.3. An invoice dated 4 November 2020 from P V Dobson to the Claimant for a mini digger evidencing the purchase by the Claimant of a digger after it took over the operation of the zoo.

89. The Claimant used this material in support of its case that the Sumitomo excavator of which the Defendant spoke had not been left at the zoo when Mr Rivera/SLSZL had vacated it in 2017 and that the Claimant had therefore needed to buy its own excavator.

90. But at the start of the trial, the Claimant produced a letter from Mr Raymond Robinson of T K Robinson & Sons Ltd dated 16 October 2022, which states:

    "*We write to confirm that in August 201 8 we were asked to recover an inoperative 1990 Sumitomo Excavator from South Lakes Safari Zoo to our yard at Greaves, Old Hutton, after inspection the machine was found to have a defective hydraulic pump and metal filings were found in the oil, causing the spools to cease up making the machine inoperable. Due to the excavators age, condition and the fact it was a grey import with no CE mark meaning it hadn't been type approved, it was therefore unfeasible to repair*

[27] Presumably of animals – see above.

the machine. After consultation with Stuart Lambert (Chair) it was decided the machine would be sold scrap and the money raised was used to buy other items the zoo needed such as; loader bucket, diesel pressure washer, reel of 2" hose, utility vehicle and ropes. This was carried out in late 2018."

91. The Defendant initially raised a question about the admissibility of the document. Whilst the Claimant purported to be disclosing the document as part of its continuing duty of disclosure, the Defendant pointed out the reality that this was witness statement masquerading as disclosure. The objection was however not raised with any great enthusiasm, not least because the Defendant also wished to rely on late produced documents. In the event, there was no prejudice at all to the Defendant in the document being admitted (whatever its evidential status), because it in fact assists the Defendant in the light of what Mr Lambert said about it.

92. Ms Brewer was cross examined about the letter and said that she knew nothing of it. In his cross examination, Mr Lambert said that he had asked Mr Robinson to write a letter (though he had not dictated the contents). He confirmed that the letter as referring to the Sumitomo digger, his recollection being that Mr Rivera had owned the digger and had left it on site. Since this was not an item that Mr Rivera had asserted to be his, he took it that ownership had transferred to the Claimant. He described it as having been painted blue and being left outside the office at the zoo because it had broken down there.

93. I turn to the position as regards the railway and rolling stock. It is common ground that there is a train track with rolling stock at the zoo. As I have noted above, the allegation about the removal of railway tracks is not pursued in this hearing, but the allegation as to the appropriation of the steam locomotive called Thomas 2 is pursued.

94. In order to understand the position it is important to distinguish between four trains to which reference is made in documents:

    (a) A blue narrow gauge steam locomotive known as Thomas 2;

    (b) A red narrow gauge steam locomotive known as Gillaura;

    (c) A yellow diesel narrow gauge steam locomotive;

    (d) A land train, that is to say a road vehicle made up to look like a train.

95. The first of these, Thomas 2, has on the Defendant's case been appropriated by the Claimant. The Claimant accepts that it has sold the second, Gillaura, for £13,500. The sale is evidenced in the bundle. The Defendant makes no allegation of impropriety on the part of the Claimant in respect of Gillaura. It is unnecessary for me to make any

findings in respect of title to that item for the purpose of this trial, though the situation in respect of Gillaura is potentially confusing to the issue with Thomas 2.

96. The last two, the diesel locomotive and the land train remain on the site. Save for the possibility that reference to these trains has been confused with Thomas 2, they are of no relevance to the issues between the parties. – in her evidence, Ms Brewer accepted that title was not with the Claimant but rather had passed from SLSZL to the Defendant.

97. The Claimant's case is that, in January 2017, Thomas 2 was in Mr Rivera's possession and Gillaura was in the control of the Claimant, albeit that it was not physically on the site. The Claimant accepts that Mr Rivera wished to retain ownership of Thomas 2.

98. The Claimant relies on Mr Rivera's email of 17 January 2017, where, having referred to an expectation that the Claimant will take responsibility for various debts, he says, "*clearly you then can reinstate the railway but I will be keeping the Blue Steam loco."* It argues that the following can be drawn from that email:

    (a) That Mr Rivera intended to retain ownership of Thomas 2;

    (b) That Thomas 2 was then in his possession;

    (c) That title in the remainder of the railway (including presumably Gillaura) was to pass to the Claimant.

99. In both her witness statement and her oral evidence, Ms Brewer asserted that the trains known as Thomas 2 had not been on site when the Claimant took over the operation of the zoo and that the Claimant had not sold it. She says that the Claimant had always been clear in its account that it had sold the locomotive Gillaura. She understood that, though Mr Rivera had bought Gillaura, it was the Claimant's to sell.

100. I should note in passing that, as obvious as it might seem to fans of the works of the late Reverend Wilbert Audrey that a blue steam engine would be called Thomas, Ms Brewer says that she had not known the blue train by this name. This has seemingly led to some doubt in her mind as to whether the train she is referring to is the same as that referred to by the Defendant, as can be seen from paragraph 29 of her statement.

101. Ms Gillard's witness statement sets out the following history in relation to Gillaura:

    101.1. The locomotive had been green at one stage but was later painted red.

    101.2. In January 2017, then the Claimant took over operation of the zoo, the locomotive was at the premises of Denver Light Railway, a business based in Bloxwich.

101.3. In Autumn 2019, it was returned to the zoo but was still not operable.

101.4. The locomotive was then transported to a business called Old Hall Farm for further mechanical work.

101.5. The Claimant instructed Old Hall Farm to sell the locomotive, which it eventually did.

102. She commented of Mr Clunie's evidence (which is summarised below) that, if he had been involved in loading a locomotive for removal from the site, it would have been Gillaura, not Thomas 2.

103. Mr Lambert's understanding, as stated in his witness statement and repeated in cross explanation, was that Mr Rivera had removed Thomas 2 from the zoo before the Claimant took over running the business. His "*understanding"* was that Gillaura had been purchased to replace it.

104. Mr Lambert was asked about a note of a telephone conversation between him and a Mr Stephen Minion[28]. The conversation is said to be recorded in an "attendance note" dated 25 March 2021. According to the note, Mr Lambert said that Mr Rivera had taken the blue engine, but Mr Minion "*pointed out that this was the green engine and the blue engine had been left at the Zoo together with the carriages."* Mr Minion then "*explained that we had repeatedly asked the whereabouts of the engine and the carriages but that Karen Brewer and her lawyer were refusing to answer*." Mr Lambert "*said that he now recalled that the engine had been sent back to the manufacturer to have the boiler checked. In regard to the carriages he said that these were definitely still at the zoo.*" Mr Lambert said that the blue engine was the one taken by Mr Lambert and the green engine was the locomotive known as Gillaura.

105. Mr Lambert's attention was drawn to a photograph of a blue train which he accepted was Thomas 2 that had been taken at the zoo and was seemingly posted on social media on 30 October 2017. The photograph shows a child next to the train, apparently in a Halloween outfit, which would of course match the time of year. Mr Lambert thought this photograph had been taken a year or two earlier and was part of the zoo's collection of photographs used for marketing purposes.

106. In an email of 26 March 2021 (MB1927), Ms Swarbrick said, "*when my clients took on the Leases there were originally 3 trains on site. There was an original "gilaura" as set out above Mr Riviera removed this, it is believed to his farm. There was also a diesel train with 6 carriages and a road train with 3 carriages. These are still on site*

[28] Mr Minion is Ms Kemp's husband.

and available for inspection." The inconsistency between this account and that of other witnesses for the Claimant as to which train was taken by Mr Rivera was not explored in cross examination.

107. Turning from the question of appropriation and the alleged dishonesty, the Claimant contends that, even if the Defendant were to make out its allegations in this regard, it fails in showing that this amounted to a breach of the covenant, whether on the grounds of use for an illegal purpose, use for a purpose or in a manner that would cause loss or damage to the Defendant or failure to comply with all laws relating to the use or operation of all Service Media and machinery and equipment at or serving the property.

108. The Claimant argues that the reference to "*use"* in clauses 26 and 27 connotes some systematic or regular conduct, not a one off act such as theft.

109. Even if such breaches were established at least initially raised an argument as to waiver of the breaches. The waiver argument was based on the contention that the breaches occurred before the Defendant became landlord of the premises.

110. In supplemental short written submissions, the Claimant accepted that the Section 23(3) of the Landlord and Tenant (Covenants) Act 1995 provides:

> *"Where as a result of an assignment a person becomes, by virtue of this Act, entitled to a right of re-entry contained in a tenancy, that right shall be exercisable in relation to any breach of a covenant of the tenancy occurring before the assignment as in relation to one occurring thereafter, unless by reason of any waiver or release it was not so exercisable immediately before the assignment."*

111. Thus, the Claimant concedes that the mere fact that the alleged breaches occurred before the purchase of the land by the Defendant would not of itself found waiver.

112. The written submissions[29] from counsel go on:

> "*The Defendant's case on the train is that it was on site in 2020, and I think the Claimant has to accept that if that is made out we have no evidence of a waiver or release (our case is this is not correct on the facts). I was not able to ask* [Mr Rivera] *about whether he knew about the excavator being disposed of and so whether any breach was waived by acceptance of rent thereafter. Rent was paid in 2020 (see the Claimant's accounts p 1336) which may found a waiver of breach and the Claimant refers to the inventory which listed neither the steam train nor the excavator as demonstrating that the Landlord had knowledge of what was on site at that time. The Claimant doesn't put the point any higher than that."*

113. Finally, the Claimant says that breaches that may be established and were not waived may not be material breaches sufficient to justify the invocation of the forfeiture clause.

---

[29] They are included here so that any other court considering this issue has a note of what was communicated to me in a document that was not field during the trial.

114. The Claimant rightly accepts that it would be difficult to argue that conduct which amounts to the criminal offence of theft is not, if it constitutes a breach of the lease, a material breach. However, in so far as the appropriation is not dishonest, the Claimant argues that the removal of items which SLSZL and/or Mr Rivera had all but abandoned at the site and where ownership was confused would not amount to a material breach.

DEFENDANT'S CASE

Service Agreements of January 2017 - is the agreement of Second Service Agreement binding in place of the agreement of the First Service Agreement?

115. As I have noted above, the position taken by the Defendant in the Defence is that Mr Rivera did not sign the agreement of 23 January 2017 (see paragraph 6.1) with a secondary position that, if he did sign it, it is not "*valid, binding or enforceable because he did so by mistake, without knowledge or understanding of its meaning or effect*" (paragraph 6.2). Paragraph 23 of his witness statement appears impliedly to accept that he either did or may have signed the Second Services Agreement, but again raises the question as to whether he realised that what he was signing was a variation to the services agreement, rather than an agreement relating to a lease.

116. The core part of the Defendant's case is that, if Mr Rivera signed the Second Services Agreement, he did so in ignorance of its effect of transferring the ownership of animals to the Claimant and without intending that object to come about. In support of the contention that Mr Rivera either did not sign the agreement or, if he did, did not realise its true effect, the Defendant relies on the following:

    116.1. The absence at any point in the documentation of an indication that Barrow BC objected to Mr Rivera retaining ownership of animals. Indeed, Ms Brewer accepted that the Second Services Agreement was the only document in which there was reference to a transfer of ownership in animals to the Claimant;

    116.2. The acceptance by the Claimant's witnesses, Ms Brewer and Ms Swarbrick, that, as far as they recall, the question of animal ownership was not discussed at the meeting on 23 January 2017;

    116.3. An email from Mr Walker to Mr Rivera dated 3 January 2018, to which is attached the First Services Agreement. The email describes that agreement as having been "*prepared in a way which would satisfy the Council and its inspectors"* and that "*The Council would have refused a licence had it been anything other than an irrevocable handover of the zoo to a new operator*."

Thus, Mr Walker speaks as though the First Services Agreement was the result of redrafting to meet the concerns of Barrow BC and that it was this version that the parties had agreed upon. If the Defendant's lawyer thought this, the Defendant's own asserted belief as the position must be more credible.

116.4. An email to Mr Rivera from Jeanette Moralee at Livingstons on 4 January 2018. This is again based on the assumption that the First Services Agreement is the agreement in force between the parties[30].

116.5. The reference to not being able to sell, lease, rent, loan or gift and asset including the animals in the email from Mr Rivera to Ms Kemp dated 26 February 2021. This is consistent with the belief that the First Services Agreement is in force but is inconsistent with the terms of the Second Services Agreement.

116.6. The statement in report to the Licensing Regulatory Sub-Committee dated 29 April 2021: "*In summary the animals in the zoo belong to [the Defendant], or are on loan from other* collections*, but are managed on a day to day basis by [the Claimant]. They cannot leave the zoo without prior permission of [the Defendant]."* It is unclear from where the authors of the report obtained this information, but it is obviously possible that they were told it by a representative of the Claimant during an inspection. Regardless of its source, the Defendant says that this statement is only consistent with there being a general belief that Mr Rivera had retained title to the animals when the Claimant took over the zoo, then later assigned them to the Defendant.

117. Having advanced the argument that, in signing the Second Services Agreement, Mr Rivera believed that he was signing a different document than that which he in fact signed, the Defendant contends that the Second Services Agreement is void for mistake. The nature of the mistake relied on is *Non Est Factum.*

118. The doctrine of *Non Est Factum* is conveniently defined in Chitty on Contracts at paragraph 5-409:

"*The general rule is that a person is estopped by his or her deed, and although there is no such estoppel in the case of ordinary signed documents, a party of full age and understanding is normally bound by his signature to a document, whether he reads or*

[30] Paragraphs 2.7 and 5.3.2 of the First Services Agreement contain the material as to which Ms Moralee speaks in the second page of the email, whereas the Second Services Agreement does not contain paragraphs with that numbering.

understands it or not. If, however, a party has been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him. The deed or writing is completely void in whosesoever hands it may come."

The authors of Chitty go on in that paragraph to point out that most cases where the doctrine has succeeded involve allegations of fraud, but that the doctrine is not limited to such circumstances:

"*The "key elements" for a successful plea of non est factum have been summarised thus:*

(a) the belief of the signer that the person is signing a document of one character or effect whereas its character and effect were quite different;

(b) the need for some sort of disability which gives rise to that state of mind;

(c) the plea cannot be invoked by someone who does not take the trouble to find out at least the general effect of the document (Yedina v Yedin [2017] EWHC 3319 (Ch) at [262] (Mann J))."

The Defendant contends that these elements are not a prescriptive list of requirements such that all three are required for the defence to be open. Rather they are an aid to determining whether the document can be said to be that of the signatory to it.

119. The Defendant argues that this is not a case where the mind of Mr Rivera can be said to have gone with his signature. He simply did not realise he was signing a services or management agreement rather than a lease. As Mr McDonald put it in closing submissions, this was not truly his document.

Service Agreements of 2017 - Were the rights under the First Service Agreement or (if it is binding and is the proper version of the agreement between the Claimant and Mr Rivera) the Second Service Agreement, assigned to the Defendant?

120. The Defendant contends that, which ever is the true service agreement of January 2017, the assignment of 28 January 2021 was clearly intended to assign the benefit of whatever agreement the Defendant had with the Defendant and was effective to do so. Thus it does not matter for the purpose of this argument whether the true agreement was the First Services Agreement or the Second Services Agreement.

121. As to the question of the prohibition on assignment, the Defendant contends that the prohibition on assignment could only ever be relevant as between the Defendant and the Claimant – it cannot affect the rights of Mr Rivera as assignor and the Defendant as

assignee. Further, since the services agreement (whichever is valid) is clearly intended to benefit the holder of the reversion in the lease, the services agreement on its true construction cannot prohibit assignment of the benefit of the services agreement to a third party to whom the interest in land which is the subject of the leases to which the services agreement relates has been conveyed.

Forfeiture - Access on 29 April 2021

122. The Defendant contends that there was a clear refusal of access on this date as the Claimant's own evidence confirms, even though notice had been given. Such a breach is bound to be material and the only issue is whether the Claimant should have relief from forfeiture, which is not a matter for this hearing.

123. As to the argument that the lease did not permit access for the purpose of inspecting or removing chattels, the Defendant contends that this is to interpret the phrase contained in the lease for which the right is reserved, "*The landlord's interest in the Property,"* too narrowly. The chattels of which the Defendant was seeking inspection/recovery were dealt with in the relevant services agreement which itself was an agreement the purpose of which was to permit the efficient use of the land by the Claimant. As Mr MacDonald put it in closing submissions, "*It is hard to imagine something more fundamental to the landlord's interest in the property than inspecting the chattels lent to the tenant for the purpose of using the property."*

124. If the court is against the Defendant on this argument, it contends in the alternative that, when Ms Kemp, having attended at the zoo, was refused access for the purpose of removing chattels, she reframed her request as one for inspection of the items.

Forfeiture - Access on 6 May 2021

125. The Defendant acknowledges that its representative attended earlier than the agreed time but says that this was a consequence of the Claimant's postings on social media which rendered it inappropriate for Mr Rivera to attend at the time that had been publicised, a view which the police appear to have held. There was no reason why the Claimant could not have permitted access when Mr Rivera attended.

Forfeiture - Breach of covenant regarding chattels

126. As to the items of furniture, the Defendant contends that these were shop fittings that did not fall within the category of shop stock the ownership of which was transferred to the Claimant. It contended that the photographs did not in fact show price tags on the items. It was not however able to meet Ms Mason's evidence that these items had always been for sale, even when Mr Rivera operated the zoo.

127. The Defendant relies on the witness statement of Mr Rivera in support of the contention that a Sumitomo excavator was left at the zoo when the business was passed to the Claimant in 2017. Since the excavator was not referred to in the inventory of assets taken in 2020, the Defendant's case in opening submissions was that the court can infer that the Claimant has disposed of it. However, in light of the letter from T K Robinson & Sons Ltd, the Defendant says that it is now absolutely clear that the Claimant has disposed of it. Since it was not an asset the ownership of which passed to the Claimant, the Defendant says that this disposal was unauthorised. As part of a pattern of such disposals, which the Claimant is now denying, the Defendant says that this was obviously dishonest.

128. Turning to the railway and rolling stock, it is common ground that parts of the railway track have been lifted since the Claimant has taken over operation of the zoo. Whilst that was initially the subject of the Section 146 notices, and the Defendant has not abandoned the argument that parts of the track were appropriated by being removed, it accepts that this may have been after the service of the Section 146 Notices and therefore not relevant to the issues before the court.

129. The Defendant's case in respect of the steam engine, Thomas 2, is the subject of large parts of Ms Kemp's witness statement. Sadly, it is mostly hearsay and/or mere commentary and of little weight. However, she has two things of relevance to state:

130. First, that "*following completion of an initial police investigation, the Claimant finally concede that they had sold the Thomas 2 engine and had received the proceeds of sale."* She refers to an email from DC Taylor in support of this assertion. The email is dated 11 August 2021 and states among other things *"I have tried to call you this morning, however upon my return from being off I can see the file has now been reviewed by my supervisor and unfortunately, the decision was made to take no further action in relation to the matter. This was on the grounds that in interview Anna stated that they did not know it was not their property to sell and produced documentation that assisted in their defence. As they have stated this they have not sold the train dishonestly as they believed it was theirs to sell the points to prove for the offence have not been met and therefore is no longer a criminal offence. The train has been sold that is made out but now the matter is civil and is to be dealt with in a civil court if you wish to pursue the matter further*."

131. The second point of potential relevance in the statement of Ms Kemp is her communications with Mr Andrew Walton of Denver Light Railway on 26 March 2021. It seems that Mr Walton spoke to the police.

131.1. At 20.10 he sent an email to Ms Kemp, apparently attaching two photographs and stating, "*Here are a couple of photos of the blue steam loco and the yellow diesel both taken when we* delivered *them to the zoo.*" The "blue steam loco" clearly could be a reference to Thomas 2. Other material in the bundle shows that the diesel locomotive that is still at the zoo is blue.

131.2. Ms Kemp responded with thanks, saying that steam engine had "*gone"* and that "*they took is upon themselves to sell something that clearly did not belong to them."* This is consistent with an assertion by Ms Kemp that she understood that the Claimant had sold the blue steam engine.

131.3. At 20.29, Mr Walton replied as follows:

"*Ah thats a shame after all the work we put in sorting and building 2 coaches and overhauling the diesel and getting steam loco for david it was hard to see it not looked after the driver and chap that looked after the railway was a star if he had a problem he rang and i always helped him either advice posting parts as well he left as he could see what was going on*

The last parts we sent up we could not get payment out of them and it wasn't that much we have wrote it off now

When the diesel broke in 2019 we gave them a quote to sort it out as they decided against it and it went to John Fowler Engineering at Bouth to fix The were instructed to sell steam loco to pay for diesel repairs Thats what happened

Alex at John Fowler was approached last year as they were selling the complete railway diesel and coaches as well not sure if that sold

I dont think any of us have had the beast dealings with them"

132. Mr Rivera's evidence about Thomas 2 is characteristically unclear. He recalls buying it for £27,000. He says that "*believed this was one of the items referred as 'two engines' in the Robson & Kay report, the other being a narrow gauge 'diesel engine' painted yellow…I was misled because the list I was shown said there was two locomotives and as far as I was concerned three should have been two locomotives there, but when the investment company wen, there was not two locomotives on site, there was only on locomotive and one land train tractor – not a locomotive – which was incorrectly identified as locomotive."*

133. I suspect that what Mr Rivera means by this is that, when he and SLSZL vacated the site, they had left two locomotives, the yellow diesel and the Thomas 2, as well as the

land train. When he read the Robson Kay report in August 2020, he had not realised that Thomas 2 was by then no longer on the site, because the report referred to "*two engines*" meaning the yellow diesel and the land train whereas at the time he had taken this to be a reference to the yellow diesel and Thomas 2. If that was what he meant, it was of course not possible for him to be cross examined and I have no material on which to weight the evidence. I have already recorded a concern as to his accuracy on other issues. A further concern as to his accuracy and reliability arises here because he does not deal with the train Gillaura, even though the Claimant had (perhaps rather confusingly) referred to that train in the letter from its solicitor dated 26 March 2021, well before Mr Rivera signed his statement.

134. However, the Defendant also called Mr Clunie, who worked at the zoo from 2001 to 2012 and again for a period from 2017. He says the following in respect of trains at the zoo:

"*At some point during the late summer of 2019, during my daily routine, I was asked by the Maintenance manager Ian Watson to assist in loading the steam engine onto pallets. Myself and several others from the Maintenance and keeping team gave assistance with this task. The train was then lifted and taken by forklift truck to be loaded into a van. At the time there was no discussion as to why or where the train was going, but there had been discussions in a previous management meeting regarding much needed repairs needed to all of the zoo's miniature railway engines, the park held two at this time. My assumption was that it was simply going for repair and would be returned at a future date. The steam engine was blue and black in colour and a nameplate on the side read, to the best of my recollection, 'Leviathan' or something very similar.*

14. At a later date that summer the yellow engine, also known as the 'Diesel engine' began running again after repairs, however there was no sign of the steam engines return. I do understand that these engines can cost in excess of £40,000 and repairs would be costly - this combined with my knowledge of how little the park was making financially led me to start believing that it was not going to be returned. This I assumed was due to the zoo's inability to pay for its repair and the engineer holding the train until payment was made. By this point I had witnessed many similar incidents to this, be it contractors or suppliers to the park not being paid and subsequent sanctions being put on the park by them.

15. Since leaving the zoo I have been informed by the new owner Janette Kemp, that the steam engine had in fact been sold and was not sent for repairs. I do not have any

other information regarding who the engine was sold to, or the decisions made regarding the sale at the time. I can however confirm that the decision was not made at senior management level, therefore, this must have been a decision made by the board of directors alone. It is my belief that Karen Brewer as CEO and majority shareholder within the company, would have made the decision regarding this sale. I was not aware of this decision at all, and nor did I have reason to suspect the trains had actually been sold…

I am not so certain about my recollection of the dates about matters that I mention in this witness statement but I am certain about the facts contained within it…"

135. Mr Clunie also recalled an occasion when he was discussing with Mr Brewer, Mr Ian Watson and others the potential sale of the land train. Mr Clunie said that he did not think that Mr Gill had consented to this, and he recalled Ms Brewer replying, "*it doesn't matter what we do as long as its all back in nine years time*."

136. Mr Clunie expressed several concerns about how the zoo was being run by the Claimant when he worked there, and his witness statement does not give the impression that he is a dispassionate witness as to what was going on at the zoo. However, his account was not shaken by cross examination. He said that he recalled the locomotive Gillaura, which he said was green – he did not recall it ever having been painted red. However, he was certain that the train which he had assisted in lifting was a blue train and that it was not going to Mr Rivera's farm. When questioned about the date on which this had occurred, he says that the blue train was still present at the zoo when he took over an educational role there in 2019 because he was in the habit of talking school children on it for a short while. He thought it had happened in spring or early summer.

137. The Defendant contends that this is powerful evidence that Thomas 2 had remained on the site after the Claimant took over the operation of the zoo and that employees of the Claimant had subsequently been involved in disposing of it. Their denial of this now is good ground for the court to conclude that they are lying and that the reason for this is to cover up their earlier dishonesty in disposing of something when they knew they were not allowed to.

138. To the argument that the theft alleged on the part of the Claimant is not "*use"* of the property within clause 26 and 27 of the lease, the Defendant counters that it was the Claimant, as the occupier of the zoo, which had the opportunity to appropriate items that had ben left there. No third party could have done this because they simply would not have had the necessary access to the zoo.

139. As to waiver, **t**he Defendant rejects the Claimant's argument waiver relying on a successor landlord's statutory right to rely on breaches that its predecessor could have relied on and stating that there is no evidence of waiver.

140. Finally, on the issue of materiality, the Defendant draws my attention to the passage on this issue in Lewison on Interpretation of Contracts at paragraph 17-118. One could not categorise actions which amount to the dishonest appropriation of property as anything other than material breaches.

DISCUSSION

Service Agreements of January 2017 - is the agreement of Second Service Agreement binding in place of the agreement of the First Service Agreement?

141. For the purpose of this analysis, I accept the submissions of law advanced by the Defendant based on the passages from Chitty cited above. Whilst there might be some scope for arguing that all three of the "key elements" referred to are necessary for the success of the pleas, it is not necessary for the purpose of this case to decide whether that is so.

142. First, and for the avoidance of doubt, I am satisfied from the signature on the document itself and the evidence of Ms Brewer and Ms Swarbrick that Mr Rivera in fact signed the Second Services Agreement. As I have noted, this has not seriously been in dispute and indeed Mr Rivera appears to accept that he did at paragraph 23 of his statement.

143. Turing to the question as to whether the agreement is binding, it is clear from some of the material referred to above that there was uncertainty about the ownership of the animals following the Claimant obtaining a licence to run the zoo. As early as January 2018, Mr Walker and Ms Moralee from Livingstons were communicating in terms that indicated a belief that the Second Services Agreement was the final terms of the agreement between them. Later, the stance taken by Mr Rivera himself is that this was the agreement that bound the parties and the terms of the Inspection Report in 2021 are consistent with at least some people involved with the Claimant believing that Mr Rivera had retained ownership of the animals and passed it to the Defendant.

144. In the case of Mr Walker and Ms Moralee, the error may well be attributed to the fact that they simply referred to the wrong version of the agreement when advising Mr Rivera in January 2018. Whilst Mr Walker probably had close involvement in the drafting of the agreements, it is unsurprising that, one year on, he might not remember the final terms of the agreement that was signed last and might rely on the earlier signed agreement a copy of which was in front of him.

145. The later uncertainty as to the true terms of ownership of the animals may be attributable at least in part to the fact that, on any version of events, Mr Rivera and SLSZL retained title to some animals, as evidenced by the Rivera Animals Loan Agreement and the SLSZL Animals Loan Agreement. That said, some of the documents reflect the belief that Mr Rivera and/or SLSZL had retained ownership of considerably more animals than those referred to in the loan agreements.

146. Mr Rivera's own position on what was agreed might be the consequence of his having misremembered the outcome of the discussions and might have been influenced to a greater or lesser extent by a subsequent regret as to what had been necessary to secure the survival of the zoo by distancing himself from it.

147. Against this however must be weighed first the difficult position that both Mr Rivera and the Claimant undoubtedly faced in January 2017:

    147.1. It is clear that Barrow Council was objecting to Mr Rivera's involvement in the operation of the zoo, and it was concerned that the proposed terms left him with too much control.

    147.2. Mr Rivera expressed the desire to put his dispute with the zoo behind him, in particular in the emails referred to at paragraphs 70 and 71 above..

    147.3. The contemporaneous documents clearly show that the parties were eager to reach a satisfactory conclusion, albeit that they needed to reassure Barrow BC as to its terms.

148. Further, I bear in mind the evidence of Ms Brewer and Ms Swarbrick as to the meeting on 23 January 2017 and the negotiations that preceded it. They gave a clear account of circumstances in which it is difficult to believe that Mr Rivera could not have known what he was signing:

    148.1. He was represented by a lawyer;

    148.2. Drafts of the agreement were going backwards and forwards between the parties;

    148.3. There was a lengthy meeting on 23 January 2017 in which the parties, lawyers and Mr Rivera's bankers were present;

    148.4. Ms Brewer had the opportunity to read the documents before she signed them and ask any relevant questions;

    148.5. As far as she was aware, Mr Rivera equally had the opportunity.

149. Although I have expressed some doubts about the objectivity brought to their evidence in this case by most of the witnesses, including Ms Brewer, I have no hesitation in accepting her account of the meeting on 23 January 2017. In particular:

    149.1. Her evidence gave the kind of detail which is consistent with a good recollection of what happened, without evidence of embellishment.

    149.2. Whilst she obviously had some difficulty in believing that Mr Rivera may not have understood what he was signing at that meeting, she confined her evidence to what had happened and what she did rather than speculating on what was in Mr Rivera's mind.

    149.3. Her account was supported by Ms Swarbrick, whose evidence generally was straightforward.

    149.4. Her account is consistent with contemporary evidence of the need for action to be taken quickly to deal with Barrow BC's concerns about the operation of the zoo.

150. In respect of Ms Swarbrick, whilst she too showed a tendency to try to advance her former client's case, for example, speculating that Mr Rivera "*must have known"* that he was being presented with a revised agreement on 23 January 2017, I saw nothing to cause me to doubt the reliability of her evidence on this issue. The Defendant criticised her for giving evidence in the case at all, suggesting she was in breach of a duty of confidence owed to Mr Rivera. I am unconvinced that she did owe such a duty, though as Mr McDonald said, that in truth is an issue of another day. Even if she did, I do not consider that to undermine her reliability on the issue upon which she gave evidence.

151. Moreover one must look at the document itself:

    151.1. It bears on its face the new date and therefore is obviously a different document to that signed 11 days earlier.

    151.2. It is headed "*services agreement for the management of South Lakes Safari Zoo*." No one with any knowledge of legal documents at all could mistake it for a lease.

    151.3. The terms of clause 2.5 as to the transfers of ownership in animals is clear on the face of the document.

    151.4. Perhaps most significantly, given that Mr Rivera says at paragraph 23 of his statement that he only read "*the back signature page of the agreement"*, that

page itself bears as a description of the document, the phrase "*Management and Services Agreement*."

152. Having regard to this evidence, I have no hesitation in concluding that it is more likely than not that Mr Rivera read the Second Services Agreement and therefore knew the nature of the document that he was signing at the time. Even if he did not realise the true effect of clause 2.5 on the ownership of animals (as to which I have considerable doubt), the defence of *Non Est Factum* is not available to him. In the terms put by the Defendant, this was indeed Mr Rivera's document, in that he knew the nature of what he was signing.

153. If I were wrong on the issue as to whether Mr Rivera in fact read the agreement, I would nevertheless have concluded that the defence of *Non Est Factum* is not available to him given that:

153.1. He had every opportunity to read the document before he signed it;

153.2. The document identified its nature on its face and on the page he signed;

153.3. He was at that time represented by a solicitor who was present when he signed it;

153.4. There are no grounds for concluding that the Claimant or anyone acting for it was responsible for his being misled into signing it.[31]

154. Clause 19 of the Second Services Agreement, headed "*Entire Agreement"* provides, "*This Agreement, the schedules and the documents annexed to it or otherwise referred to in it constitutes the entire agreement between the parties and supersedes and extinguishes all previous Agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter*." The consequence of my conclusion that the Second Services Agreement binds Mr Rivera is that this clause operates to discharge the First Services Agreement as regards future performance from the date of the Second Service Agreement and the parties are limited to their rights under the later agreement.

[31] Of course, he could have been misled into signing it by someone advising him. I have no material from which to conclude that this was so, and it is inherently unlikely, but given that privilege has not been waived and I have not seen the material provided to Mr Rivera by his own advisors, I cannot make a finding on the issue. However, being misled by one's own advisors would not itself found the defence in any event.

Service Agreements of 2017 - Were the rights under the First Service Agreement or (if it is binding and is the proper version of the agreement between the Claimant and Mr Rivera) the Second Service Agreement, assigned to the Defendant?

155. Having found that the First Services Agreement was discharged by reason of the execution of the Second Services Agreement, it is not necessary for me to consider whether the assignment of 28 January 2021 applies to the earlier contract, though given its express terms I have some difficulty in thinking that it could do so.

156. On the second issue, namely the prohibition on assignment, in my judgment the terms of clause 9 of the Second Services Agreement are clear and unambiguous – the Claimant's consent to assignment is required. Whilst it might be possible to imply an obligation on the Claimant not unreasonably to refuse such consent, its consent has never in fact been sought and that could not avail the Defendant here. Accordingly, I conclude that the benefits of the Second Services Agreement have not been assigned to the Defendant. It follows that it is not open to the Defendant to argue that its rights as against the Claimant arise from that agreement.

157. It must follow from this that the Defendant's purported termination of the Second Services Agreement is of no effect since the Defendant does not have the benefits of the rights under that agreement. The Defendant purchased the chattels subject to the Claimant's rights under the agreement and therefore until it is lawfully terminated, as between the Claimant and the Defendant, the Claimant must be entitled to the continued use of the chattels.

Forfeiture - Access on 29 April 2021

(a) Was the Defendant's request for access made for a reasonable time and with reasonable notice?

158. The Defendant's request was made at a reasonable time and with reasonable notice. Those requirements do not govern the nature of the access required, merely the notice. Whilst it might be possible at the extreme to conceive of case where notice was inadequate because of the nature of the access that was sought, I do not see that this is the case here.

(b) If so, did the Claimant refuse access to the Defendant for any purpose mentioned in or connected with the lease and the landlord's interest in the property?

159. The access initially sought by the Defendant for 29 April 2021 was clearly for the purpose of the collection of chattels. In my judgment, there is no basis for interpreting the term "*the landlord's interest in the Property"* to encompass the inspection and/or

removal of chattels on the property which the previous landlord had left with the tenant for its use pursuant to the Second Services Agreement. The chattels are not part of "*The landlord's interest in the Property*" where "*the Property"* is defined as the land itself.

160. It follows that the purpose for which access was sought was an activity which goes beyond that for which the right of access is granted in the lease. I have no hesitation in concluding that the refusal of access for such a purpose was not a breach of the lease.

161. The Defendant's alternative argument, that the request for access was reframed when Ms Kemp was at the door of the zoo to a request simply to inspect the chattels, is equally incapable of amounting to a breach of the lease because the lease no more grants a right of access for this purpose than it grants such a right to remove chattels.

162. In any event, given an attendance with a number of people and vehicles intended to remove the chattels, I would doubt that the announcement of the changed purpose of the visit, namely to inspect the chattels rather than remove them, could amount to the giving of "reasonable notice" – the tenant was entitled the opportunity to consider the purpose for which access was sought and a late change of the stated purpose was clearly capable of giving rise to the suspicion that, were access to be granted, it might be abused. In the event, it is not necessary to determine this issue, given my finding that the stated purpose of inspection of chattels was not one for which the lease gave a right of access.

(c) If so, was the refusal of access a material breach?

163. Given my findings on the question of any breach of the lease, this issue falls away. It is neither necessary nor desirable to determine it on a hypothetical basis that there was a breach of the lease, where the breach is argued on alternative bases, but I have found no breach on any basis.

Forfeiture - Access on 6 May 2021

(a) Was the Defendant's request for access made for a reasonable time and with reasonable notice?

164. The Defendant's original request for access (which of course was agreed) was made for a reasonable time and with reasonable notice. The Claimant does not dispute this.

165. However the subsequent request, made by turning up at 9am rather than the agreed time of 2pm was not on reasonable notice. The Claimant had made arrangements for Mr Lambert to attend so as to meet Mr Rivera. On any version of events, the relationship between Mr Rivera and the Claimant was troubled. Indeed, on Mr Rivera's own

evidence, the behaviour of Ms Brewer in encouraging a "*vitriolic and largely untruthful press campaign"* had caused him to change his name, not least because of the effect of this campaign on his wife and children. On the other hand, on the Claimant's case, Mr Rivera had nearly been the cause of the zoo closing because of the neglect of animals under his stewardship. Given how high temperatures appear to have run (I have noted above the apparent threat of violence made by Ms Gillard and directed at Ms Kemp), it can hardly have been surprising that either side would have been careful in who it chose to effect a visit. Indeed, I have sympathy with the Claimant's position that it was provocative for Mr Rivera to have been selected by the Defendant for this purpose. In any event, I accept that the Claimant's wish for Mr Lambert to be present was a reasonable attempt to diffuse rather than aggravate the tensions between the parties and was eminently reasonable.

166. In those circumstances, whatever the rights and wrongs of the Claimant announcing the visit of Mr Rivera on social media (and I confess to a concern that this may indeed have been an attempt to orchestrate opposition to Mr Rivera and possibly by association the Defendant, though it is a peripheral issue to that which is before the court and is not something on which I have sufficiently compelling evidence to make a finding against the Claimant), I do not see how it can be considered unreasonable to have required Mr Rivera to wait until Mr Lambert arrived to facilitate the access.

167. It follows that the Defendant's request for access was not on reasonable notice and is incapable of being a breach of the terms of the leases.

(b) If so, did the Claimant refuse access to the Defendant for any purpose mentioned in or connected with the lease and the landlord's interest in the property?

168. The stated purpose of the Defendant seeking access by its letter of 3 May 2021 was pursuant to clause 4.3, 4.4 and 4.5 of the leases. Notwithstanding the previous request for access for purposes other than those envisaged by the right in the lease and the arguably provocative behaviour of the Defendant in appointing Mr Rivera to exercise the right, I am not persuaded that the purpose was anything other than that permitted in part 4 of the lease.

(c) If so, was the refusal of access a material breach?

169. For the reasons identified above, I am satisfied that the Claimant was not in breach of the lease in refusing access on the morning of 6 May 2021 since access was not sought on reasonable notice.

170. Further, even if the Claimant's intention in posting on social media had been to encourage opposition to the visit, I do not consider that this in and of itself could be treated as a refusal of access at the appointed time in the afternoon of that day. Whilst it might be possible to argue that a situation where Mr Rivera had felt unable to try to exercise his access because of the presence of objectors was fuelled by the desire of the tenant to prevent access[32], in my judgment the mere threat of such a situation could not amount to an implicit refusal of access.

171. Accordingly, I am not satisfied that there was any breach of the covenant as to the granting of access on 6 May 2021.

172. Again, if I were wrong on the issue of whether the Claimant's actions amounted to a breach of the lease, I decline to consider whether it would have been a material breach. The issue of materiality can only be assessed on the basis of findings as to what amounted to a breach. Such the detail of any such findings is hypothetical, it is not desirable for me to deal with the issue.

Breach of covenant regarding chattels

173. To reiterate, the chattels named in the Notices that are relevant to the allegation of a breach of covenant are:

    (a) Furniture within the shop;

    (b) The Sumitomo excavator;

    (c) Thomas 2.

(a) In respect of each item named in the Notices, was ownership transferred to the Claimant?

174. As identified above, this aspect to the case relates to three classes of chattels:

    (d) Furniture within the shop;

    (e) The Sumitomo excavator;

    (f) Thomas 2.

175. I have no hesitation in accepting Ms Mason's evidence that these items were sold as part of the stock of the shop and that the had always been intended for sale, even when Mr Rivera operated the zoo. I found her evidence to be clear and compelling (in a case where that cannot be said of most witnesses). I accept her evidence that the photographs attached to the Section 146 Notice dated from the time that Mr Rivera

[32] Mr Rivera does not say this was the case in his witness statement, though the Defendant would appear eager for the court to draw that conclusion.

operated the zoo. Further, I accept her evidence that they show price tags on at least some of the items of furniture – these are apparent on larger scale photographs in the main bundle.

176. It follows that ownership in these items was transferred to the Claimant and any subsequent disposal did not amount to an appropriation of another's property.

177. My conclusion on Ms Mason's evidence is significant for another reason. If, as I accept to be the case, she is correct about these items being for sale in the shop, when Mr Rivera was still operating the zoo, Mr Rivera is correspondingly wrong when he asserts at paragraphs 29, 31 and 32 of his statement that the items were not transferred to the Claimant as part of the shop stock. Given that negotiations for the transfer of the zoo business appear to have taken place in the pressured situation of its threatened closure, it is easy to see that those involved in the negotiations may not have been clear as to which items were transferred and which were not. Further, given that it was some time after the transfer of the business that question of who owned which items came to the fore, it quite possible that memories will have become hazy.

178. But there is an alternative explanation. The tendency that I have already noted for witnesses in this case to show partisanship whether in favour of the party who called them and against the other party inevitably raises the possibility that witnesses are asserting things that paint the other side in a bad light without necessarily having an independent recollection of what happened. Having not heard from Mr Rivera, I am not in a position to say whether his error in this respect is deliberate, reflecting dishonesty on his part, or is a consequence of his having misremembered or been confused about what had been agreed. However, his unreliability on this issue casts doubt on his reliability on other matters of which he speaks, in particular in relation to the steam locomotive, Thomas 2.

179. My concerns about his reliability are greater still in light of my finding above that it is more probable than not that he understood the Second Services Agreement when he signed it. Whether or not he is being dishonest now in saying that he had not understood it, I am satisfied that his account of what happened in January 2017 when the Second Services Agreement was signed is inaccurate.

180. Turning to the Sumitomo/JCB excavator, what has happened is less than clear, though some of the material before the court is of assistance in coming to findings on the balance of probabilities. The photographs attached to the Section 146 notices show a

large yellow digger. I note that schedule 3 to the First Services[33] Agreement lists a yellow digger as an asset of SLSZL. Assuming for the present purposes that those are one and the same digger and are the Sumitomo digger referred to by the Defendant, it does not seem likely that the blue digger to which Mr Lambert was referring in his witness statement can have been the yellow digger to which the Defendant is referring. Of course the digger could have been resprayed but that would have been an event of some note and no witness even hints at that having occurred.

181. Even if it were a reference to the same digger, the schedule to First Services Agreement would support the argument that ownership was intended to pass from Mr Rivera/SLSZL to the Claimant. On the other hand, the Second Services Agreement positively asserts that material, plant and equipment were or might be left by SLSZL at the zoo at the date of the signature of the agreement and does not purport to transfer ownership to the Claimant. Thus, if the digger was on the site at the time of the Claimant taking over the operation of the zoo, there is no material to support the conclusion that title passed to the Claimant.

182. Were the Defendant's case reliant upon the untested evidence of Mr Rivera alone, I would have been unconvinced that his recollection could be relied upon in support of the assertion that a Sumitomo excavator had been left on site in 2017. I have referred above to his unreliability on the issue of the status of items left in the shop. I do not find the little that he has to say about the Sumitomo excavator to be particularly convincing.

183. However, the document from T K Robinson & Sons Ltd provides substantial corroborative evidence that such an excavator was removed from the site in 2018. If the document from T K Robinson & Sons Ltd had been materially supportive of the Claimant's case, I would have been cautious in placing reliance on it, because I agree that in such a guise it is simply an attempt to introduce material through a document that ought really to have been the subject of a witness statement, allowing for cross examination. However, since the document positively assists the Defendant, I can place weight on it as hearsay evidence relied on by the Claimant and indeed asserted to be true by it which in fact is supportive of the Defendant's case on a material issue. That said, in accepting the document as having evidential value at all, I am bound to place weight on all of the document, including that part which relates to the condition of the excavator in 2018. That is less helpful to the Defendant on the issue of dishonesty dealt with below.

---

[33] The Second Services Agreement does not contain a corresponding schedule and does not purport to define what is retained by SLSZL.

184. The Claimant's evidence that an excavator was scrapped in 2016 does not dissuade me from this conclusion. The evidence to this effect is not particularly compelling and, in any event, could refer to a different excavator. Equally, the Claimant's subsequent purchase of an excavator in 2020 is of course not at all inconsistent with an excavator having been left on site in 2017 but subsequently having been disposed of because it was inoperable and only of scrap value.

185. Equally, the email of 22 January 2017 from Mr Rivera does not undermine this case. The reference in that email to "*assets that are off the site right now*" cannot be taken as indication that there were no chattels belonging to SLSZL or Mr Rivera still left on the site, in particular in light of the reference to items belonging to SLSZL in both the First Services Agreement and the Second Services Agreement.

186. I conclude from the evidence before the court:

(a) A Sumitomo excavator was left on the site when SLSZL/Mr Rivera vacated the site in 2017.

(b) Title in the excavator did not pass to the Claimant.

(c) The Claimant subsequently disposed of the same excavator in the circumstances referred to in the document of 16 October 2022.

187. The Claimant does not assert that ownership in Thomas 2 transferred to it and the Defendant denies that it was transferred. In those circumstances I accept that ownership did not transfer to the Claimant.

(b) In respect of each item named in the Notices in respect of which ownership was not transferred to the Claimant, has the Claimant appropriated the item?

188. As regards the furniture, since title passed to the Claimant, no question of appropriation arises. Had I been wrong about title passing, sale by the Claimant would have amounted to appropriation.

189. In the case of the excavator, I have indicated that I am satisfied that it was disposed of by the Claimant in the circumstances referred to in the letter of 16 October 2022 from TK Robinson & Sons Ltd. Since title in the excavator remained with either SLSZL or Mr Rivera (probably the former), the Claimant's act in scrapping the excavator and not accounting to the true owner for the proceeds was an act of appropriation.

190. As regards Thomas 2, the evidence is even less clear, though again ultimately parts of the evidence allow me to come to firm conclusions.

191. I deal first of all with the note from Mr Minion. He did not give a witness statement and there is no admissible material from which to verify the content of the note. Save in so far as the contents of the note are accepted by Mr Lambert, I have no evidence to confirm its accuracy and place no weight on it.

192. As with Mr Minion, so with Mr Walton of Denver Light Railway - the Defendant has not obtained a witness statement or called him to give evidence. Again this is unfortunate. It would appear that Mr Walton has some knowledge of the Claimant's dealings with steam locomotives, yet there is no clear account from him that could be an analysed or tested. Whilst the sequence of emails would appear to indicate that he is talking of the Claimant having instructed John Fowler Engineering to sell Thomas 2, it is not made expressly clear that this is the locomotive he is speaking of, nor do we know whether this account comes from his own knowledge or is hearsay and, if the latter, what reliability could be placed on the source of the hearsay. Yet again I must disregard what may be potentially relevant material because of the failure of the Defendant to put that material before the court in admissible form.

193. In similar fashion, the material from the police is unhelpful. Whether it can truly be said to be "*unfortunate"* that the police stopped using their resources to investigate the dispute between these parties, as stated by DC Taylor in her email of 11 August 2021, is a matter for others but it is clear that police investigation is of potential relevance to this case. What is deeply unfortunate is that neither party has produced a copy of the interview nor has the "*documentation that assisted*" in the Claimant's defence been identified. It is not entirely clear who the interviewed person referred, to as Anna, in fact is. It may be Anna Gillard who would seem to have some relevant evidence, though I am not sure that this is so, and this was not put to her. Further, I do not know what the person called Anna actually said in interview. Whilst one might think it unlikely that there would have been confusion as to which locomotive was being discussed, I have already noted some ambiguity in the Claimant's evidence as to which locomotive was which. It is at least possible that similar confusion arose in the interview.

194. It follows that, without sight of the record of interview, I can place no reliance on it. I understand from Ms Kemp that the police may have resumed their investigation of the alleged offence. I must express my dismay that there may be other proceedings relating to some of the same issues raised in this case, which may lead to inconsistent findings because of the failure to adduce potentially relevant evidence in this case. There is of course a delicacy about using material from sources such as police investigations. But I can see no reason why the interview could not have been obtained and disclosed in

these proceedings, even it required an order of the court. In the event, given the lack of clarity on what was said and by whom, I must in fairness to the Claimant disregard this material.

195. It is unfortunate that the Defendant has spent so much time and money preparing a witness statement from Ms Kemp containing material which is largely inadmissible and of no assistance, when it could have spent much less time and money obtaining statements from others whom it would appear may have had material things to say.

196. Ms Lambert's evidence about Thomas 2 was entirely based on hearsay and does not assist me. Mr Rivera's evidence is to the effect that Thomas 2 was left at the zoo. He doubtless would have been asked about the Claimant's case that the locomotive had been removed from the site to his farm, had he attended to give evidence. In the event, I did not have the benefit of hearing from him on this. Given my doubt about his evidence on other issues, I would in any event have been looking for other sources to corroborate his account of what happened to Thomas 2.

197. On the material summarised thus far, the Defendant's case was unlikely to have been sufficient to persuade me that Thomas 2 had been left at the zoo. But I found Mr Clunie's evidence to be persuasive. Whilst he appears to have some loyalty to Mr Rivera, I did not get the sense that he was simply saying what suited the Defendant's case. Rather, he came over as a witness who genuinely trying to assist in his recollection of matters. The fact that he recalled the train being called Leviathan and did not refer to it as Thomas 2 suggests that he is not simply parroting what others have asked him to say but rather is speaking in his own words. If he were simply trying to help the Defendant's case without regard to the truth of what he is saying, it is unlikely that he would have introduced the detail that he knew the train as Leviathan, since this was only likely to complicate the Defendant's case that he was speaking about Thomas 2. In the event, whilst he is the only person to have called the train by the name Leviathan, there is no suggestion that there was any other blue train on the site and therefore it is probably the same train as that known as Thomas 2.

198. The additional detail given by Mr Clunie in the course of cross examination about the blue train being present when took up the educational role was convincing. It is exactly the kind of detail that may come to mind when a witness is being pushed on whether they are accurately recalling a date or event.

199. I should add that I found Mr Clunie's evidence about the alleged conversation with Ms Brewer relating to the land train to be far less convincing. Whilst I accept that Ms Brewer probably said something about certain matters not being a problem until the end

of the lease, the suggestion that she would have said that they did not have to be troubled by matter for 9 years in 2019 is inconsistent with the actual length of the lease (which expires in 2026, as Mr Clunie acknowledged in cross examination that he knew at the time that the conversation is said to have taken place) and leads me to the conclusion that he probably misunderstood what she said.

200. Whilst the oral evidence of the Claimant's witnesses was not shaken by cross examination, there is clearly some confusion on the Claimant's side as to what happened to the train, as shown by the inconsistency between Ms Swarbrick's email and the case now advanced by the Claimant.

201. Certainly, for all the criticism that may be made of the conduct of some of the Claimant's witnesses, none appeared to me obviously to be lying in their evidence. Lying is of course a common enough act and I bear in mind that the standard of proof which I apply to my findings is the balance of probabilities. Like other serious allegations, it is often said that lying is the kind of serious behaviour that the court should only find to have occurred on compelling evidence. But as Morgan J said in Group Seven Ltd & Anor v Nasir [2017] EWHC 2466 (Ch) when considering the relevance of the seriousness of the allegation to the assessment of witness:

> "*The standard of proof is the civil standard, that is the allegations require to be proved on the balance of probabilities. It must be proved that the fact which is in issue more probably occurred than it did not occur. While it is obviously right to consider the inherent probability, or the inherent improbability, of an event in considering whether it has been proved on the balance of probabilities, there is no necessary connection between seriousness and inherent improbability.*"

202. I have considered whether, if Mr Clunie's evidence is to be preferred, this is consistent only with the Claimant's witnesses having lied or whether there could be an alternative explanation for their being mistaken. The Defendant has very much pinned its colours to the mast of the Claimant's witnesses having lied and it is perfectly possible to see that this may have happened, presumably out of a desire to cover up their wrongful action in selling the train, whether or not was a dishonest act at the time (as to which see below). But it can be seen that Ms Kemp has pursued the allegation that Thomas 2 was stolen in a forceful fashion, managing to get the police involved. Such an approach might cause a person to react defensively by lying to cover their previous behaviour; but it might also cause them to assert something in their defence which they believe to be true with greater force than is justified by the strength of their belief. Such explanations have a tendency to take on a life of their own since, once stated, people can find it difficult to back down by admitting that they may be mistaken on the issue.

Furthermore, where there are, as here, bitterly opposed camps, there is a tendency for people to believe that what people from their camp say must be right and the opposing camp must be correspondingly wrong.

203. One way to assess this issue is to try to avoid using the hindsight that is so dominant in Ms Kemp's explanation of what has happened here and instead try to look at matters as they unfolded. If Mr Clunie's evidence as to the removal of Thomas 2 in 2019 is correct, this was over two years after Mr Rivera had ceased to be involved in the zoo. The evidence is that he had wanted nothing to do with the business and whilst he remained the owner of some of the land occupied by the zoo, it would seem that he had limited contact with the zoo. He had undoubtedly passed title in some items to the Claimant. In respect of others, most obviously Gillaura, it would appear that he simply expressed no intention to retrieve them. In those circumstances it is plausible that the Claimant's employees may have come to the view that what had been left behind was theirs to sell. Of course, Ms Kemp might have remembered that the First Services Agreement listed some items the ownership of which was retained by Mr Rivera or SLSZL. But going back to that document would not assist because it did not list the train and looking at the Second Services Agreement would be no greater aid to knowing the items in respect of which SLSZL and/or Mr Rivera purported to have retained ownership. She would therefore have been reliant on her memory, with the possible assistance of emails had she searched through them. Looking at the email communication in 2017, the reference to Mr Rivera retaining title is a single line in one email, that of 17 January 2017. The email of 22 January 2017 might suggest that the only chattel on the site that he wished to retain ownership of was the large iguana and the First Services Agreement lists several items but not the train. Whilst the issue as to Mr Rivera retaining the title to the blue train is clearly in focus now, I do not see that it would have had any great significance in 2019 at a time when he had been away from the operation of the zoo for over two years and was not seeking the return of the train.

204. In those circumstances, it is plausible that the Claimant's employees and officers, including Ms Brewer, may have assumed that Thomas 2 was the something that the Claimant was entitled to sell. It is inherently far less likely that Ms Brewer would simply have sold the train knowing that she was not entitled to than that she would have sold it believing that ownership had passed to the Claimant. I have rejected as unreliable above the part of Mr Clunie's evidence that might suggest her mindset was not to care about the items left by SLSZL and/or Mr Rivera at the zoo on the basis that the lease had a prolonged period to run.

205. None of this, of course, would explain why witnesses are now denying that the Claimant disposed of Thomas 2 and instead saying that they simply disposed of Gillaura. It is difficult to believe that this could be a simple error on their part. The error by three of the witnesses, Ms Brewer, Mr Lambert and Ms Gillard to whether the Claimant in fact sold Thomas 2 could hardly be explained as a misremembering of what occurred if one supposes, as seems to me to be possible, that they had previously misremembered whether they were entitled to sell Thomas 2. It is highly likely that, once they each realised (or remembered as the case may be) that title to Thomas 2 had remained with Mr Rivera, they would instantly have realised that the Claimant had acted wrongly in selling the train.

206. I remind myself that, when witnesses lie about their actions, this may be motivated by a desire to cover up conduct which does not necessarily equate to that conduct itself being dishonest. This is a particularly striking point in a context where the Defendant made various allegations of the unlawful removal of property by the Claimant, most of which are not pursued and some of which have been shown not to be correct. If one looks through the correspondence between the Claimant and the Defendant in April 2021 when these matters came to a head, it is striking that the allegations about Thomas 2 are simply one part (I accept a significant part) of a larger picture in which the Defendant is accusing the Claimant of a variety of unlawful acts and criticising its management of the zoo generally. When one bears in mind the generally good impression that the witnesses for the Claimant gave here and also the inherent likelihood of selling Thomas 2 when the Claimant realised that this was not permitted, the possibility that any lies reflect a desire to cover up actions that were not dishonest at the time is more plausible here than might often be the case.

207. There is no clear assistance from the documents as to where the truth lies here. Ultimately, I am influenced by the inherent probabilities as well as the persuasiveness of the oral evidence, especially that of Mr Clunie as well as my impression of the Claimant's witnesses. Having weighed these factors, and bearing in mind that the Defendant who asserts the dishonest appropriation of Thomas 2 to prove that on the balance of probabilities, I conclude as follows:

    (a) Mr Rivera did not take Thomas 2 off the site but rather it remained with the Claimant until at least 2019;

    (b) In or around 2019, the Claimant sold Thomas 2;

    (c) It the time of selling Thomas 2, in so far as the Claimant's officers addressed their minds to the issue, they believed that the Claimant was entitled to do so;

(d) In subsequently saying that the Claimant had not sold Thomas 2, the Claimant's witnesses have probably lied, the purpose of which lies are to cover up their conduct in selling Thomas 2 when they should not have done so, albeit that they had at the time of the sale probably believed they were entitled to do so.

208. Accordingly, I find that the Claimant appropriated Thomas 2 by selling it without the consent of SLSZL and/or Mr Rivera and without accounting to him for the proceeds of sale.

209. Yet again it might be that evidence from the police file and/or from Mr Minion could have put a different gloss on the accounts given by the Claimant's witnesses and strengthened the argument that they have deliberately lied to this court. But again I am deprived of the opportunity to make that assessment by the failure of the Defendant to bring before the court the relevant material.

(c) In respect of each item named in the Notices in respect of which ownership was not transferred to the Claimant and which the Claimant appropriated, was the appropriation dishonest?

210. In considering this issue, it is appropriate for me to look at both items that I have held that the Claimant has appropriated in order to decide whether either was dishonest. Whilst the dishonesty alleged in respect of the two acts of appropriation requires separate consideration, it may be that the Claimant's behaviour shows a pattern that would persuade the court that, whilst taken individually neither act was dishonesty, taken cumulatively, one or both acts were dishonest.

211. It is also necessary to consider whether any dishonesty that might be established is capable of being attributed to the Claimant, since the Defendant puts its case on the basis that it is the Claimant's state of mind that matters to the allegation of breach of the terms of the lease.

212. My reasoning on the previous issue in relation to Thomas 2 involved weighing the Claimant's explanation of what happened to the train in the balance of whether the Claimant had appropriated it. If the Claimant's witnesses are wrongly stating that the locomotive had been removed from the premises by Mr Rivera prior to January 2017, is this a lie to cover up the subsequent dishonest disposal of the train by the Claimant? For reasons that I have stated above, I do not consider this to be probable in the case of Thomas 2.

213. The same arguments apply with similar force to the Sumitomo excavator. In some ways, the Defendant's case in this regard is stronger because a "yellow dumper,"

presumably the Sumitomo excavator, was expressly mentioned as an item of which SLSZL retained ownership in Schedule 3 to the First Services Agreement. However I would not have expected anyone in the Claimant company to have had this in the forefront of their minds when dealing with the excavator in August 2018. The document from T K Robinson & Son Ltd of 16 October 2022 is to the effect that the excavator was unrepairable. I accept this to have been the case. I would not have expected someone in the position of the directors or employees of the Claimant to consider that they must check the ownership before selling an item that had been left at the zoo some 18 months earlier and that now was only of scrap value.

214. Looking at the entirety of the evidence but considering the case separately in respect of each of the items that were on my finding appropriated I am not persuaded that the Defendant is able to prove dishonesty on the part of anyone at the Claimant in respect of the disposal of these items.

215. However, I should be clear that, had I been so persuaded, I would not have been deterred from making the finding and relying on it for the purpose of the Defendant's argument as to forfeiture by the fact that there is no conviction for a criminal offence. Evidence of a criminal conviction may greatly have helped the Defendant to prove its case; but I see no basis for thinking that a conviction for theft, rather than the putative underlying conduct and state of mind is a pre-requisite for the landlord relying on the theft for its case on forfeiture.

216. For the sake of completeness, had I found that Mr Lambert, Ms Gillard and/or Ms Brewer had been dishonest in being party to the disposal of any of the items alleged to have been appropriated, that would have been sufficient identification with the Claimant itself to merit a finding that the Claimant had been dishonest in that appropriation.

217. I should add that, were I to be wrong in my conclusion on ownership of the furniture, I would have no hesitation in concluding that it was not dishonest for the Claimant to have sold these items. The evidence of Ms Mason that the Claimant was entitled to sell the items was clear. It convincingly disposes of any finding of corporate dishonesty based on her state of mind (as to which in any event there must be some doubt given her role in the company). Nothing in the evidence even begins to persuade me that Ms Brewer or Mr Lambert were dishonest in respect of disposing of these items. It is not even clear to me that they played any part in their disposal (or the decision to dispose of them), still less that they did so with the requisite state of mind.

(d) In respect of any such dishonest appropriation, did it amount to a breach of the covenant against use for an illegal purpose and/or use for a purpose or in a manner that would cause loss or damage to the Defendant and/or a breach of the covenant to comply with all laws relating to the use or operation of all Service Media and machinery and equipment at or serving the property?

218. Given my findings on the issue of dishonesty, this issue falls away in respect of both the Sumitomo excavator and Thomas 2. Had it been necessary to make a finding on it, I would have preferred the Claimant's argument that individual acts of theft even by a tenant do not amount to "*use"* of the property. The position might have been different were the finding that theft formed part of a plan to harm the landlord, in which case the acts might have been capable of amounting to breach.

(e) In respect of any such dishonest appropriation, did it amount to use for a purpose or in a manner that would cause loss or damage to the Defendant?

219. Given my finding as to the appropriation the Sumitomo excavator and Thomas 2, it remains in issue whether the appropriation of either item amounted to such use. Again, I fail to see that one off acts of appropriation (in particular, where, as here, they are not dishonest) have the necessary quality of regularity or system to fall within the natural meaning of the word "*use."* I agree, the word "*use"* clearly connotes some continuous conduct. Disposing of property which one considers to be one's own on two occasions does not have that quality.

(f) In respect of any such dishonest appropriation, did it amount to a breach of the covenant to comply with all laws relating to the use or operation of all Service Media and machinery and equipment at or serving the property?

220. I do not see that the Claimant's conduct could amount to a breach of the leases in this sense. By disposing of property which one is not allowed to dispose of, one is not failing to comply with "*all laws relating to its use or operation."*

(g) Were any breaches waived by the Defendant?

221. Having regard to the terms of section 23(3) of the Landlord and Tenant (Covenants) Act 1995, I am satisfied that it is in principle open to the Defendant to rely on any breach of covenant that its predecessors, SLSZL and/or Mr Rivera, could have relied on. Further, I am not satisfied that the Claimant is able to show waiver of any breach that may have occurred. Whilst it is true that there was material on which the Claimant could have cross examined Mr Rivera (had he give evidence), which might have

founded such an argument, there is simply insufficient from the material before the court to draw an inference of waiver.

(h) In respect of any breach that was not waived, was the breach material?

222. I agree with the concession of the Claimant that, had I found there to have been dishonest appropriation of any item and had that appropriation amounted to a breach of covenant, it would be difficult to characterise the breach as anything other than material. But it must be borne in mind that the act of disposing of the property does not affect any of the substantive rights under the leases, nor does it alter the value of the property that is the subject of those leases. In light of this and given my findings that the reality was that Mr Rivera and SLSZL had left behind the Sumitomo excavator and Thomas 2 and had expressed little interest in them and the Claimant had then disposed of them in a mistaken belief as to its entitlement to do so, I conclude that any breach of a covenant of the lease in respect of the disposal of items left at the zoo by SLSZL and/or Mr Rivera of which they retained title that was not dishonest is not a material breach, such as to justify forfeiture.

CONCLUSION

223. For these reasons, I answer the questions raised as follows:

223.1. The Service Agreement issues:

(a) Is the Second Services Agreement of binding in place of the First Service Agreement? **Yes**

(b) Were the rights under the First Services Agreement or (if it is binding and is the proper version of the agreement between the Claimant and Mr Gill) the Second Services Agreement, assigned to the Defendant? **No**

223.2. The forfeiture issues:

(a) Access on 29 April 2021

Was the Defendant's request for access made for a reasonable time and with reasonable notice? **Yes**

If so, did the Claimant refuse access to the Defendant for any purpose mentioned in or connected with the lease and the landlord's interest in the property? **No.**

If so, was the refusal of access a material breach? **Not applicable**

(b) Access on 6 May 2021

Was the Defendant's request for access made for a reasonable time and with reasonable notice? **No**

If so, did the Claimant refuse access to the Defendant for any purpose mentioned in or connected with the lease and the landlord's interest in the property? **Not applicable**

If so, was the refusal of access a material breach? **Not applicable**

(c) Breach of covenant regarding chattels

In respect of each item named in the Notices, was ownership transferred to the Claimant? **Shop stock – yes; Sumitomo excavator – no; Thomas 2 - no**

In respect of each item named in the Notices in respect of which ownership was not transferred to the Claimant, has the Claimant appropriated the item? **Shop stock – not applicable; Sumitomo excavator – yes; Thomas 2 - yes**

In respect of each item named in the Notices in respect of which ownership was not transferred to the Claimant and which the Claimant appropriated, was the appropriation dishonest? **Shop stock – not applicable; Sumitomo excavator – no; Thomas 2 - no**

In respect of any such dishonest appropriation, did it amount to a breach of the covenant against use for an illegal purpose? **Sumitomo excavator – not applicable; Thomas 2 – not applicable**

Alternatively, in respect of any such appropriation, did it amount to use for a purpose or in a manner that would cause loss or damage to the Defendant? **Sumitomo excavator – no; Thomas 2 – no**

Alternatively, in respect of any such appropriation, did it amount to a breach of the covenant to comply with all laws relating to the use or operation of all Service Media and machinery and equipment at or serving the property? **Sumitomo excavator – no; Thomas 2 – no**

Were any breaches under sub-sub-paragraphs (d), (e) or (f) waived by the Defendant? **Sumitomo excavator – not applicable; Thomas 2 – not applicable**

In respect of any breach under sub-sub-paragraphs (d), (e) or (f) which was not waived, was the breach material? **Sumitomo excavator – not applicable; Thomas 2 – not applicable**

224. I wish to add two points.

225. First, it is of course not for me to determine how the police deal with any material in their possession and whether they prosecute anyone for theft. They almost certainly have additional material that I do not have and which may paint the conduct of the Claimant's directors and/or employees in a different light. But I should point out that, even if the police have more compelling evidence than I do that representatives of the Claimant have lied about disposing of the train, that would not necessarily prove that the original sale of the train was dishonest. Given the confused state of affairs when the allegation of theft was made and denied in April 2021, it is likely to be difficult for any tribunal to be persuaded beyond reasonable doubt that there was dishonesty at the time of the sale unless there is clear evidence that one or more employees or directors of the Claimant had in the forefront of their minds at the time of the sale that title to the train had not passed to them.

226. Moreover, I should comment that, whilst I accepted Mr Clunie's evidence about the removal of Thomas 2 in or around 2019 and consequently found the Claimant's witness evidence on whether they did so to be untrue, I did so applying the balance of probabilities. It is unlikely that the evidence before the court would have persuaded me to the criminal standard.

227. Second, I finish this judgment with a plea to the parties and others involved in the case to try to bridge their remaining differences without the expense of further litigation. The court is of course here to determine and give effect to their rights and if it is impossible for them to agree an appropriate resolution of issues it will of course perform that task. It may appear to be parties, when allegations of dishonesty and theft are being made, that they will not be able to resolve matters other than through court hearings.

228. But any observer of this dispute cannot fail to be horrified by the course of this litigation. Large amounts of time and money, which could be put to the cause of animal welfare, are instead being spent on the pursuit of obscure legal argument, seemingly motivated by bad feeling between various people. The parties may each think that they are the only people capable of running a zoo properly but where the regulators appear to think that either is capable of doing so, the dispute over which should run this

particular zoo seems a remarkably pointless battle and a waste of precious resources on both sides.

229. Added to the unnecessary waste of time and cost is the human price of this kind of dispute. I have commented above on the foul terms in which one of the witnesses in this case has spoken of another on social media. More generally, whatever the rights and wrongs of his position, I have no doubt that Mr Rivera has been badly bruised by the dispute. I am sure that others have been too. If this litigation proceeds, those involved are only likely to be more severely affected by it.

230. In the case of TMO Renewables v Yeo [2022] EWCA Civ 1409, Asplin LJ had this to say in a context where a party had declined to engaged in mediation because it considered it to be "*expensive waste of time"*:

"40… this case was ideally suited to mediation, especially in the light of the fact that reputations were at stake, the defendants contended that the claim was deeply flawed and the claimant was open to discussing the provision of additional information about its claim. Rather than being an expensive waste of time, it would have forced both sides to take a more realistic approach to the litigation. It would have been likely to have saved much of the very considerable amount of time and costs which were ultimately expended. In the end, the negative attitude towards an attempt at negotiated dispute resolution which was adopted, cost everyone dear. In future, both parties and their advisers should approach the possibility of mediation in a more positive light.

231. When this case next comes before me, I expect to hear each of the parties' realistic proposals for attempting to negotiate settlement of outstanding issues. The carrot I offer to the parties is the peace of mind and saving in cost that would come with a negotiated settlement. The stick is that any party who is not willing to engage in this process risks finding themselves subject to an adverse costs order. As the recent decision in Moradi v The Home Office [2022] EWHC 3125 demonstrates, the court will not hesitate to penalise even a successful party who unreasonably declines to engage in negotiation.