



Neutral Citation Number: [2023] EWHC 2804 (Ch)

Case No: PT-2023-BRS-000017

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

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

Date: 10 November 2023

**Before :**

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

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**Between :**

**CHEDINGTON EVENTS LIMITED** **Claimant**  
**- and -**  
**1. NIHAL MOHAMMED KAMAL BRAKE** **Defendants**  
**2. ANDREW YOUNG BRAKE**

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**Niraj Modha (instructed by **Stewarts LLP**) for the **Claimant****  
**The defendants in person**

Hearing dates: 15-19 May 2023  
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**Approved Judgment**

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

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 10 November 2023.

**HHJ Paul Matthews :**

## **INTRODUCTION**

1. This is my judgment on the trial of the issue of quantum of damages in a case of trespass of a rather unusual nature. It follows on from my decision on the question of liability, which was handed down on 25 February 2022, under neutral citation number [2022] EWHC 365 (Ch). The trial which led to that judgment had been held by me in September 2021. Permission to appeal against my judgment on liability was refused by the Court of Appeal on 7 April 2022. The issue of quantum of damages was tried by me in the week of 15 May 2023, when Mr Niraj Modha appeared for the claimant, and the defendants appeared in person (with Mrs Brake, the first defendant, acting as advocate for them both). There were five sessions of half a day each, in line with the recommendations of Mrs Brake’s medical advisers, although some sessions ran over to ensure that there was sufficient cross-examination time. I am sorry that this judgment has been delayed, principally by pressure of other work.

## **BACKGROUND**

### **General**

2. The present claim (both liability and quantum) is only one part of the massive and wide-ranging litigation between the parties. It followed the breakdown in relations in late 2018 between, on the one hand, the defendants, and, on the other, Dr Geoffrey Guy and his companies The Chedington Court Estate Ltd and the present claimant. The latter are collectively referred to as “the Guy Parties”. (I should say that, at the time of the liability trial, the claimant, originally incorporated as Sarafina Properties Ltd, was known as Axnoller Events Ltd, but changed its name subsequently.) Some of the background is set out in the liability judgment, at [4]-[21]. But there are also judgments of mine in other litigation between substantially the same parties which give additional details. I will refer to some of the other litigation later.
3. For present purposes, however, I can summarise the position in this way. The defendants ran a weddings and events business on behalf of the claimant at West Axnoller Farm in Dorset. As additional benefits of their employments, they were able to use the equestrian facilities, particularly a covered arena, for stabling and exercising their horses. They could also stay in the main house (then called Axnoller House) when it was not required for an event. When there was an event, they stayed in a cottage on adjacent land, of which they were two of the three legal owners, and in which the Guy Parties then had no interest. In November 2018 they were dismissed from their positions. However, they refused to leave the house or to remove their horses from the equestrian facility. In particular, the defendants refused to move back to the cottage.

### **This claim**

4. This claim was brought to obtain an order for possession of the house and arena. At a very early stage, in December 2018, the defendants had obtained an interlocutory injunction restraining the claimant from interfering with the defendants' occupation of the property. In effect it excluded the claimant from any use of the house and the arena. That injunction was continued on the return date until 3 March 2022. However, and as recorded in the liability judgment, the claimant was ultimately successful, and obtained an order for possession. The defendants finally left the equestrian arena in March 2022, and the house in April 2022. But, although the trial held by me dealt with the question of liability in principle, the question of quantum of damages for trespass was left over for a further trial. That is the one leading to this judgment.

## **PROCEDURE**

5. By paragraph 25 of and Appendix 3 to his order of 31 March 2021, Marcus Smith J directed the issues which were to be dealt with at what in the order was called the "Main Trial" of this claim. These were issues relating to whether the defendants had any right to continue to occupy the house and arena after November 2018. No issue was at that stage directed as to any relief that might be available to the claimant if it were successful in obtaining an order for possession on the basis that the defendants were trespassers, although the claimant's particulars of claim (as mentioned below) sought damages for such trespass.
6. Marcus Smith J's order had directed that the liability trial begin on 27 April 2021. However, because the defendants' counsel had very recently withdrawn from representing them, the defendants applied for the adjournment of the liability trial. I acceded to that application on 21 April 2021. The liability trial was refixed for September 2021. It was heard as relisted, and I reserved judgment. As I have said, judgment on liability in this claim was handed down on 25 February 2022. And, as I have also said, permission to appeal against the liability judgment was refused on 7 April 2022.
7. In my judgment I held (at [187]) that on 8 November 2018 the defendants were dismissed from their respective employments with effect from 30 November 2018, and they were placed on "garden leave" until then. Written notice was given to them intended (amongst other things) to terminate any licence which they might have in relation to the house and the arena. However, (at [189]) the defendants did not in fact give up occupation of the house or the use of the arena for their horses, and, on 5 December 2018, further notices were served upon them. (They were still occupying the house and the arena at the time of the trial, at the time that the judgment was handed down and indeed at the time that the Court of Appeal refused permission to appeal.) In my judgment I dealt with all the various defences put forward by the defendants, and concluded (at [278]) that all of them failed. Accordingly the claimant's claim to possession was made out. I also held that there was equally no defence to the claim for mesne profits.
8. That left the question of the relief sought by the claimant in respect of the trespass. By paragraph 5 of my order of 27 April 2022, it was provided that:

“The Claimant’s claims at paragraphs 24-24D of the Re-Re-Amended Particulars of Claim dated 20 January 2020 for (1) mesne profits or damages for use and occupation of West Axnoller Farm (2) damages pursuant to the cross-undertakings given to the Court by the defendants on 4 December 2018 and 10 December 2018, and (3) delivery up of the Items (as defined) or damages in respect of the value of the Items (the **Quantum Issues**) shall be determined at a trial on quantum as follows ...”

My order then went on to give directions for the quantum trial. These included directions for the parties to amend the relevant paragraphs of their statements of case in order to provide greater particularity, for costs budgeting, disclosure, witness statements and expert evidence. I will return shortly to the question of exactly what relief is now sought.

### **THE COTTAGE EVICTION**

9. Before I do that, however, it is necessary to mention this. In January 2019, the claimant’s parent company forcibly entered the adjacent cottage and changed the locks whilst the defendants (up till then in possession of the cottage) were occupying the house. It did this in the belief that it had acquired all the beneficial interest in the cottage, and also in the belief that it was entitled to take possession of it. The defendants brought a claim against the parent company for unlawful eviction from the cottage. I gave judgment in that claim on the same day as the liability judgment in this claim, when I held that the eviction claim failed.
10. However, in October 2022, the Court of Appeal reversed my decision, at least in part, and held that the parent company had not been entitled to evict the defendants without a court order. There were then a number of hearings before that court to consider what, if any, relief ought to be granted to the defendants in the circumstances. The hearing of that issue was ultimately adjourned, pending determination of a related appeal by the defendants’ trustees in bankruptcy against an order of mine against them from last November. That appeal was heard in July 2023, and judgment was handed down (allowing the appeal) on 28 July 2023. The question of relief in the Brakes’ own appeal has however still not yet been determined. On 5 October 2023, the Court of Appeal referred the question of relief back to this court, to be dealt with, in Bristol, by a judge other than me.

### **THE PARTIES’ CASES ON RELIEF**

#### **Claimant**

11. I return now to the relief sought by the successful claimant in the present claim. As is apparent from paragraph 5 of my order of 27 April 2022, at an earlier stage in the proceedings, the claimant sought more than just mesne profits or damages for use and occupation of the house and the arena. It also alleged various business losses, physical damage to the property, and sought damages pursuant to the cross undertaking in damages given in relation to the interlocutory injunction which was referred to above, and which had been obtained by the defendants against the claimant.

12. However, before the quantum issues came to trial, the claimant abandoned *all* the pleaded heads of loss *except* mesne profits (or compensation for use and occupation) and interest. The claimant says it did this for pragmatic reasons. This has, of course, considerably narrowed the issues which are before me. Essentially, the claimant's pleaded case now is that mesne profits (or such compensation) are to be calculated at a rate to be assessed for the period of 1263 days for the house and 1218 days for the arena, or alternatively at the pleaded ordinary letting value for the house of £8000 per month and for the arena of £9125 per month. It should be noted that there is no separate claim in respect of value said to have been conferred on the defendants by virtue of the utility services provided to the house and paid for by the claimant.

### **Defendants**

13. At one time the defence and counterclaim denied the claimant's entitlement to mesne profits, but that denial was later withdrawn. Now, the defendants in their defence deny the extent of the loss claimed. They challenge the ordinary letting values claimed for both house and arena by the claimant. In relation to the arena, they plead also that the claimant had no planning permission at the relevant time for its use for commercial purposes, and accordingly it could not have let it commercially. They also plead that the building was unfinished and unsafe, and could not have been let commercially in its then state.
14. In January 2023, some three months after the decision of the Court of Appeal that the eviction from the cottage had been unlawful, the defendants applied for permission to amend their defence to the claim to mesne profits in the present proceedings. On 17 February 2023 I made an order by consent to that effect. The re-re-re-amended defence now says that the defendants

“plead the defence that they made numerous offers to move to the Cottage, including offers in November 2018, early April 2019, September 2020 and April 2021. Had Chedington accepted any of these offers, then the Defendants would have moved to the cottage at on [sic] 8 July 2019 or earlier. Any losses incurred by the Claimant after that date were directly as a result of the actions of its Parent company and at the behest of its controlling heart and mind Dr Guy.”

Although they plead that they would have moved to the cottage, it is to be noted that the defendants do not plead that they would then have vacated the house or the arena.

### **Claimant's reply**

15. By its reply, the claimant *generally* denies the defendant's defences. But the claimant *specifically* denies that the claimant did not have planning permission for commercial use of the arena, or that it was “unfinished and unsafe”. It also specifically denies that there is any defence to the claim to mesne profits in the offers made to move to the cottage, and for good measure denies that the defendants would have moved in any event. At the trial before me, the question was also raised as to whether, notwithstanding my order of 17 February 2023, it was open to the defendants to raise the defence that they

would have moved to the cottage had they been able to. I deal with this question below.

## ISSUES

16. At the pre-trial review held on 22 February 2023 for the quantum trial the question of what issues require to be determined in that trial was considered. Paragraph 5 of my order provided:

“The lists appended to this Order at **Appendix 1** are approved as the List of issues agreed and to be determined at the Quantum Trial.”

17. Appendix 1 to the order provided as follows:

“The parties agree on the following issues in advance of the Quantum Trial:

1. The Defendants were given notice to terminate their bare licence to use Axnoller House on 8<sup>th</sup> November 2018 to take effect on 9<sup>th</sup> November 2018.
2. The Defendants were given notice to terminate their bare licence to use the Arena on 8<sup>th</sup> November 2018 to take effect on 30<sup>th</sup> November 2018.
3. The Defendant continued to occupy Axnoller House and the Arena after 9<sup>th</sup> November 2018.
4. The Defendants vacated the Arena on 10<sup>th</sup> March 2022.

The parties consider that the following issues arise for determination at the Quantum Trial:

1. When did the Defendants give vacant possession of Axnoller House?
2. What is the letting value, or alternatively the value in monetary terms of the benefit received by the Defendants, of: (i) Axnoller House; and (ii) the Arena, following the termination of the Defendants’ licence and up to the date on which the Defendants vacated those premises?
3. Is the Claimant entitled to recover interest on damages, and if so, in what amount?
4. Would the Defendants have moved to the Cottage on 8 July 2019 or earlier, if the Claimant’s parent company had accepted any of the Defendants’ settlement offers?
5. If so, is that a relevant consideration in assessing the Claimant’s claim for mesne profits?
6. Are the Claimant’s losses incurred after 8 July 2019 directly as a result of the actions of the Claimant’s parent company in rejecting offers of

settlement, and what effect if any does this have on the Claimant's damages?"

18. It will be noted that issue 2 refers to the letting value, "alternatively the value in monetary terms of the benefit received by the Defendants..." To the extent that the alternative wording reflects a method of assessing mesne profits, it is consistent with the claimant's pleaded case. But, to the extent that it raises a different cause of action (for example, a claim in unjust enrichment), then it goes beyond that pleaded case. I will come back to that.

### **THE IMPACT OF THE FACT-FINDING IN THE LIABILITY TRIAL**

19. I have already referred to my written judgment in the liability trial, under neutral citation number [2022] EWHC 365 (Ch). That judgment found a large number of facts for the purposes of deciding the issues on liability. If the trial had covered both liability and quantum, the facts found would have been applicable to both parts. But here for convenience the trial was split. It seems to me that the position must in principle nevertheless be the same. Where the facts found for the liability trial are also relevant to matters of quantum, they are facts for that purpose, as part of the same overall claim. I agree that, if the judge purports to decide questions of fact which do not arise at the stage of the preliminary issue, and which have not been the subject of a proper trial process, the position is likely to be different: *Sharn Panesar Ltd v Pistachios in the Park Ltd* [2020] EWHC 194 (QB), [46], [53], [62]. But that is not this case.
20. In addition, where an issue has once been decided between the parties, that issue cannot be reopened in the quantum trial, because there is an issue estoppel between the parties. Even if there is no actual issue estoppel, it may well amount to an abuse of process to seek to relitigate a question already decided. In *BT Pension Scheme Trustees v BT plc* [2011] EWHC 2071 (Ch), the court decided the first four of a list of issues. One was decided following a concession by one of the parties. When the matter was restored to deal with others, that party attempted to raise an issue not on the list, and to resile from the concession made earlier. This was argued by the other party to be impermissible, either because it was *res judicata*, or because it would amount to an abuse of process. Mann J dealt with this matter at a separate hearing, and decided that although there was no *res judicata*, it would indeed be an abuse of process.
21. He said:

"61. I consider that [*Henderson v Henderson* {1843} 3 Hare 100 abuse of process principles] will indeed operate to bar the Secretary of State from taking the conceded point in relation to the guarantee. The doctrine is generally applied in a second case in relation to what ought to have gone in prior litigation, but I do not see why the principle should not be held to apply, if appropriate, to a case where an action is heard in more than one phase, though it will generally be unnecessary to do so because other considerations (such as the state of the pleadings) will usually deal with any problems. The reasoning is closely allied to the reasoning which

prevents him resiling from the concession. If he is not allowed to resile from the concession then this litigation will be pursued in such a way as to prevent him raising the point. At some point the litigation will be finalised without the point having been raised and on the footing of the operation of the concession. In *Henderson v Henderson* terms, it is obvious that the Secretary of State could have raised the point in these proceedings and the contrary was not, and could not reasonably be, contended. The question is whether the Secretary of State should have raised the point before or at the first hearing if it was to be taken. In my view the answer is Yes, for all the reasons appearing in my consideration of the concession. The amendment point was contemplated, and was clearly not sought to be invoked in relation to post-transfer date bulk transfers. That was a conscious decision on which the other parties were entitled to, and did, rely, to their prejudice in the manner referred to above. If the point was going to be taken it ought to have been taken at that point. All parties intended that the list of issues should be conclusive. That means that matters which must have been known to the parties as potential issues, but which were not to be litigated because a position was conceded, should be taken conclusively not to be issues. Once the litigation, based on that position, has started, and a decision issued which depends on it, it becomes too late to raise the point thereafter – it should have been raised before.”

22. A similar view was expressed, albeit more shortly, by Andrew Baker J in *Gruber v AIG Management* [2019] EWHC 1676 (Comm), [11].
23. The claimant relies on a number of factual findings in the liability judgment:
  - (1) The defendants occupied the house and the arena “by way of a bare licence revocable on reasonable notice” (at [242] of the judgment).
  - (2) The bare licence was in fact “determined by reasonable notice” (*ibid*, at [243]).
  - (3) Notice of “one day was reasonable for the sole purpose of determining the licence to stay overnight in the house as a second home” (*ibid*, at [244]).
  - (4) Notice of “three weeks was a reasonable time within which the [defendants] could remove their personal property (including their horses) from West Axnoller Farm (including the house)” (*ibid*, at [244]).
24. In my judgment, all of these findings bind the defendants in the assessment of quantum of damages. In the liability judgment, I also found that:
  - (1) The Hon Saffron Foster, put forward by the defendants as the owner of the claimant at the time of its sale to Dr and Mrs Guy’s company, The Chedington Court Estate Ltd, was in fact the defendants’ nominee, and they, and not her, beneficially owned the claimant.
  - (2) The net proceeds of the sale of the claimant company to the Guys’ company, after deducting outstanding loans, amounted to £3,431,695.61. Of that sum, £340,354.36 went to pay tax, £41,857.56 went to pay professional



fees, £136,530 went to repay the defendants' borrowing from the claimant, and £297,000 was paid out for "gifts" for the defendants themselves. The cash balance paid to the defendants was £2,615,953.69. If the £297,000 be added back, this amounted to £2,912,953.69 entirely at the disposition of the defendants. Out of this sum, they chose to pay £100,000 to Mrs Foster, for which (according to the correspondence) she was very grateful.

25. In addition to matters decided at an earlier stage in this claim, there is also the question of the status of matters decided in other litigation between these parties, or substantially the same parties. This stands on a slightly different footing. A fact decided in another claim is not, without more, a fact for the purposes of this claim, even where the parties are the same. But it can give rise to an issue estoppel. Even where the parties are not the same, such an estoppel is effective as between the parties and their "privies". For this purpose "privies" include those who have "privity of interest" with a party: see *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 924, [22]-[35]. This point was not argued before me, and it is clear that there are difficulties in viewing a shareholder as a "privity" of the company: *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2015] EWHC 1640 (Comm), [145]; *PJSC National Bank Trust & Anor v Mints* [2022] EWHC 871 (Comm), [33](iii). Since I do not consider that it makes any difference in this case, I need not consider it further.

## **EVIDENCE**

### **Witness statements**

26. In the usual way, witness statements of the evidence to be given by witnesses at trial were directed to be served in advance. After the claimant received that of the first defendant, in February 2023, complaint was made (on several occasions) by the claimant that it did not comply with the requirements of CPR PD 57AC. However, the claimant did not issue a formal application to court until 9 May 2023. I directed that the application be dealt with on the first day of the quantum trial, and indeed it was. In the event, the first defendant had submitted a revised witness statement on the business day before the trial began. This dealt with some of the complaints. The remaining points were dealt with at the beginning of the trial, so that the evidence started about 45 minutes later than it was timetabled to do. This loss of time was made up by sitting slightly longer than a half day on the first two days. When I refer in this judgment to the first defendant's witness statement, then, unless expressly stated to the contrary, I mean to refer to it in the later revised form, and as further amended following my order on the first day of the trial.

### **Witnesses**

27. The following witnesses gave evidence before me: Dr Geoffrey Guy (director of the claimant and of its parent company, and shareholder in the parent), Mr Russell Bowyer (director of the claimant and of its parent company, and finance director), the first defendant, and two expert witnesses, Mr Ben Marshall of Woolley & Wallis (for the claimant), and Mr Philip Beattie of Savills (UK) Ltd (for the defendants). In relation to the first defendant, after

she had been cross-examined, I was asked by counsel for the claimant to permit further cross-examination on documents which would be supplied (counsel did not then have them) and which he said went to the first defendant's credibility. I decided that I would need to see the documents in question in order to decide. After I had risen for the day, I was supplied with and considered the relevant documents. I also had the benefit of comments from Mrs Brake by email. In the result, I refused that permission, for reasons given by me (by email) at the time.

28. I give here my impression of the witnesses. I emphasise that I have ignored the fact that I have seen some of these witnesses give evidence before me in other hearings. The circumstances of those other hearings were different, and in particular some of them were conducted remotely by MS Teams, whereas this trial was conducted by personal attendance at court.

*Claimant's witnesses*

29. Dr Guy was a precise and businesslike witness, with ready answers, whether they favoured his side or not. He did not attempt to go beyond what he knew, and he accepted correction where necessary. In my opinion he was clearly telling the truth. Mr Bowyer was also businesslike, straightforward and clear, though somewhat low-key and sometimes slightly defensive. There were one or two mistakes in his evidence, but overall I accept him also as a truthful witness.

*The first defendant*

30. The first defendant was very good at details, although sometimes very complex in explanation. She was convinced very strongly of the rightness of her case, and spoke very fast and very passionately. She put the best spin on her own side's words and actions, and the worst on the claimant's. But (with a few exceptions) she did not prevaricate or waste time. I was a little surprised that she still insisted in cross-examination that, when the claimant was sold to the Guys' company, it was Saffron Foster that was the solicitor's client rather than (as I have held) the defendants themselves as beneficial owners. She also insisted that the defendants could not have moved anywhere else in the spring of 2019, which I do not accept. There are a couple of other similar examples.
31. An issue was also raised as to the evidence which she gave about her address. On the first day of the quantum trial, the first defendant said that the defendants did not have a permanent address, but she had redirected their mail to North Dibberford Farm, Beaminster, Dorset (the home of their friend Ms Maslin). On day 3, in cross-examination, she said that their place of residence as of that date was Parshalls Farm, Ilminster, in south Somerset (the home of the second defendant's sister). When she was asked why she was paying council tax to Mendip District Council, a local authority in east Somerset, she said it was "somewhere we stay occasionally". The claimant applied to recall the first defendant, but I ruled that it was not sufficiently important to justify taking up further time in what was already a tight timetable. In her evidence to the Employment Tribunal on 6 June 2023, she said that they were then staying at Parshalls Farm ("because it is closer to the Tribunal"), but that they were

also the tenants of a property at 3 Church Walk, Leigh on Mendip, east Somerset.

32. On 23 June the claimant's solicitors wrote to the court submitting that this was relevant to the first defendant's credibility in the present matter. On 6 July 2023 she was invited to comment. She replied the same day by email, saying that there was nothing inconsistent or contradictory in her evidence to the Tribunal, and that they were due to move out of the Church Walk property by 7 August.
33. On any view this is all highly unsatisfactory. At best this evidence is highly misleading. The first defendant could easily have been upfront about the house in Leigh-on-Mendip from the outset. But she was not, and the existence of the other property was not revealed until the first defendant was confronted with her payments of council tax. Even then she did not say where the property was, or explain that the defendants were tenants of it. Even without this episode, and basing myself simply on her other evidence in this case, I exercise a significant degree of caution in relation to the first defendant's evidence generally, and, as will be seen, I do not accept some of it. Where it conflicts with the evidence of others, notably Dr Guy and Mr Bowyer, I prefer their evidence to hers.

*Expert witnesses*

34. As for the expert witnesses, each of them produced an expert report, and they jointly produced a further report after meeting. Mr Marshall was a slow-speaking and careful witness, who accepted correction and gave his evidence in a clear and straightforward way. Mr Beattie was a more lively witness, quicker to respond, but again accepting correction. It was unfortunate that his instructions (given to him by the first defendant in a single telephone call) were not recorded in writing. It was equally unfortunate that his notes of these (verbal) instructions had not been made available. Nor had he stated in his report that he had complied with CPR Part 35. These things made his report less robust, and thus less valuable to the court. He had also valued the property at the wrong date originally, though this was corrected by the time of the joint meeting of experts. Both experts were however professional, and trying to assist the court. I will have to deal with their very different approaches to the valuation exercise later in this judgment.
35. I record here that I received correspondence from the parties after Mr Marshall had given evidence for the first time about an error in his evidence relating to his previous involvement in disputes between the parties – or related parties – over this property. On the following day, Mr Marshall was recalled and was cross-examined on a second witness statement made earlier the same day for the purpose of correcting his mistake. It was put to him that he had deliberately told untruths. He denied it and sought to explain his position. For present purposes it is unnecessary to discuss the details, which do not concern the substance of his expert evidence. Having seen and heard Mr Marshall, I am satisfied that any mistake that he made was an honest one, and that he was trying to assist, and not to mislead, the court. I do not consider that this

episode affects his credibility as a witness, but I have exercised caution in case there were any other errors.

## **FACTS FOUND**

### **The land of the claimant occupied by the defendants**

#### *As claimed*

36. The Claim Form as issued in December 2018 stated that the claim was for possession of “West Axnoller Farm”. Paragraph 3 of the Particulars of Claim stated that the claimant was the freehold owner of “West Axnoller Farm”, which was defined for the purposes of the statement of case as “the Land”, and paragraph 4 stated that the claimant was entitled to possession of it.

37. Paragraph 5 stated:

“The Land comprises a commercial wedding venue known as Axnoller House (‘Axnoller House’), together with an indoor covered arena (‘the Arena’) which itself contains temporary stables (‘the Stables’), outbuildings, a party barn, and two detached houses which are let out for the purposes of the Claimant’s business (together ‘the Remainder of the Land’).”

38. After pleading the service of various notices to quit (“NTQs”), paragraph 23 said:

“The Defendants have demonstrated an intention not to vacate Axnoller House or the Land following service of the NTQs. In the circumstances, the Defendants’ continued occupation of the Land is without the licence or consent of the Claimant.”

39. By the time of the trial, the prayer sought the following relief:

- “1. Possession of the Land forthwith;
2. A declaration that the Defendants are trespassers on the Land;
3. Damages for use and occupation or mesne profits.”

40. In the liability judgment, I stated (at [278], set out later in this judgment) that the claim for possession “to the whole of West Axnoller Farm” succeeded. My order of 3 March 2022 at paragraph 1 accordingly provided that:

“The Defendants shall forthwith give to the Claimant possession of West Axnoller Farm, Beaminster DT8 3SH (**West Axnoller Farm**), title to which is registered at Land Registry with number DT327772, and the extent of which is approximately shown edged in red in the filed plan attached to this order at Appendix 1.”

#### *The reality*

41. In fact, however, although the defendants roamed widely over the whole property during the time that they were trespassers, they did not exclude the claimant from the *whole* of West Axnoller Farm. They occupied the house personally, as a family home with the first defendant's son, and certainly excluded the claimant from that. They did not permit access to the house even for routine inspection and maintenance by third party contractors. Their horses occupied stables in the covered arena. Therefore, as a result of the injunction of December 2018, continued thereafter, it was in practice impossible for the claimant to make any use of the arena until the injunction was discharged in March 2022. During that time the arena was capable of being, and was, occupied as an indoor riding arena. The defendants also occupied a portacabin belonging to the claimant, next to the arena, to house the groom who looked after their horses. So, the claimant was physically excluded from that too.
42. In practice, however, on the evidence before me, the defendants excluded the claimant not only from the house itself, and the arena and portacabin, but from areas of land immediately outside the house which were used with it. This included a lawn, a terrace, a gravel path and car-parking area and a bridle path. These were previously, and (but for the defendants' trespass) would have been, used for the purposes of the wedding and events business which the claimant carried on. In particular, the lawn in front of the house would have been used for the wedding ceremony. The defendants relied on the terms of the injunction to "warn off" the claimant from use of these immediately adjacent areas. To avoid confrontations, the claimant sensibly did not attempt to use them. But it continued to maintain them at its expense, in order to maintain the "look" of the whole property for its business. I find that this amounted in practice to exclusion of the claimant from those areas. The defendants also occupied part of an isolation barn which had been converted by the defendants (without permission) into a garage. This excluded the claimant from that part. The defendants did not exclude the claimant from other parts of West Axnoller Farm, including the party barn and the other two holiday houses.

### **Vacant possession of the house**

#### *The defendants' view*

43. The first factual issue listed in the Annex to my order of 22 February 2023 is the question of when the defendants gave vacant possession of Axnoller House. The first defendant's witness statement does not say expressly when this was, though she, of all people, will have known it. There is an oblique reference in that statement to the defendants' "stay" in the house "between 1 December 2018 and 21 April 2022", but that is all. For present purposes I will treat this as the defendants' claim to have vacated on 21 April 2022.

#### *The claimant's view*

44. Dr Guy's statement said (at [36]) that the defendants vacated on 24 April 2022. But he obviously had no first-hand knowledge, and this will therefore be his own inference from other events. In my judgment given on 18 May 2022

on consequential matters following the hand-down of the liability judgment ([2022] EWHC 1162 (Ch)), I said this:

“5. ... I understand that the Brakes vacated the House on Sunday 24 April 2022, some hours before the High Court enforcement officers were due to attend to execute the writ ... ”

But that was not a finding on evidence to determine an issue before the court. There was no such issue. It was just what I was told by way of information.

### *The evidence*

45. The evidence before me established that the claimant had arranged for the possession order to be executed at 11 am on Monday 25 April 2022. On Friday, 22 April 2022 the claimant’s solicitors emailed the defendants asking for confirmation that they had already vacated the house or that they would have done so by that time. The defendants responded to other points in that email, but not this one. They were chased on this point. In an email sent on Sunday 24 April 2022, timed at 12:50, the first defendant said “We will leave Axnoller House by 11 am on Monday”.
46. At 22:53 the same evening, the first defendant emailed the claimant’s solicitors again to say that there had been a leak in the pipework above the ceiling of the second bedroom. The ceiling in that room had partially come down. They said that they had “cleared as best we can”. It did not however say that they had by then vacated the property. Nor did they tender the keys or other means of access. They say that the keys were left in the front door when they left, a point which the claimant does not accept. When the court enforcement officers attended the next day, the defendants were not there. There is therefore no objective evidence as to when exactly the defendants permanently left the house with no intention to return.

### *Conclusion*

47. There is no rule that a trespassing occupier’s liability for mesne profits continues until the occupier actually notifies the owner that the occupier has left the premises: *Merton LBC v Jones* [2008] EWCA Civ 660, [23]-[28]. It is instead simply a question of fact as to exactly when the occupier gave up possession to the owner. That depends on the evidence. Here the defendants did not at any time indicate that they had left, much less that they were giving up the possibility of returning to the house. There is a dispute as to whether they retained (rather than gave up) the keys to the house. They certainly did not deliver them to any representative of the claimant. Ultimately, there is no positive evidence from the defendants as to when in fact they finally left the property with no intention to return, except the oblique reference to a “stay” to 21 April. Nevertheless, it is clear from the defendants’ own email that they were still at the house on 24 April, so that does not help them. The only definitive point is the attendance of the court enforcement officers on 25 April, to find the house empty. In all the circumstances, I find on the evidence that the defendants did not give vacant possession of the house until then, that is at 11 am on Monday, 25 April 2022. Of course, the actual claim made is for

mesne profits until 24 April 2022, so that controls the amount of any award that can be made.

### **Services**

48. Before dealing directly with the question of letting value, I need first to deal with a few other factual matters. The first of these is the question of the services which were provided to those parts of West Axnoller Farm occupied by the defendants and from which the claimant was excluded. During the time of the occupation of the house and arena by the defendants, services of water, drainage, sewerage, space and water heating, and electricity were provided to the house at the entire cost of the claimant. In relation to heating (both space and water), this was because there was a central boiler serving all the properties. In relation to water, there was a single supply to the whole of West Axnoller Farm. In relation to electricity, there was a supply to the house, and a separate supply to the arena, the party barn and the rental houses. But for a period during the time of the defendants' trespass, the party barn supply also came from the house. In addition, the claimant maintained the grounds, including the immediate surroundings of the house, which also benefited the defendants. The claimant also paid council tax for the house for about a year of the defendants' trespass.
49. However, as mentioned elsewhere in this judgment, the defendants refused to permit access to the house for any maintenance. The defendants paid nothing for any of these services. There are invoices in the bundle dealing with the supply of at least some of the utility services. I was also referred to accounting documents dealing with turnover, which also showed the cost of utilities. But the problem is that it is impossible, on the material before me, to identify those utility services consumed or enjoyed by the defendants, as distinct from those consumed or enjoyed by the claimant. I am therefore unable to find the cost or value of the former. In addition, the claimant controlled the supply of heat to the house. The defendants could not turn it down or off. There is no evidence to show how much heat, for example, the defendants would have consumed if they had controlled (and had to pay for) it.

### **The Arena**

50. The next question relates to the arena. The defendants assert that the arena had no planning permission for commercial purposes, and moreover was "unfinished and unsafe", indeed in effect unlettable. Accordingly, they argue that this must affect the ordinary letting value. The burden of proving a thing generally lies on the person who so asserts: *Robins v National Trust Company Ltd* [1927] AC 515, 520; *Re W-A (Children: Foreign Conviction)* [2022] EWCA Civ 1118, [46]. On the evidence before me, the defendants have not discharged this burden. My reasons follow.

#### *Planning permission*

51. So far as relates to planning permission, the land concerned had always been used for commercial purposes, and non-domestic rates were paid in respect of it. On the material before me, no other permission was required for the use and

training of horses there. Mr Beattie, the defendants' expert valuer, does not mention the need for planning permission in relation to the arena (though he does for the house). Mr Marshall, the claimant's valuation expert, said in his report that he did not consider himself a planning expert. However, within his experience he was satisfied that that the planning uses would allow the facility to be used in connection with equestrian commercial use. Moreover, even were that not so, the arena was constructed (by the defendants themselves) more than 10 years previously, under a planning permission granted in 2009. It is therefore too late now to take enforcement action in relation to it: Town and Country Planning Act 1990, s 171B. In the present case, therefore, I find that planning law considerations are irrelevant to the question of letting value. So far as the condition of the arena is concerned, the claimant intended to refurbish the arena in 2018, and in fact did so within 5 or 6 weeks after possession of the arena was regained in March 2022. Since June 2022, it has produced an income of more than £5,000 per month.

### *The stables*

52. The defendants also argue that the stables which were located in the arena belonged to them, and that therefore their value should be disregarded in calculating the letting value. The claimant says (correctly) that this is not a pleaded allegation. So it is irrelevant. But in any event the allegation is not made out. The claimant says that the stables did not belong to the defendants. The position is that, in July 2015, the defendants fixed the stables to the arena structure, as an improvement to it, and apparently so as to become part of it. So, from that point on, the claimant (then called Sarafina Properties Ltd) probably owned them as part of the realty. But, even if that were wrong, and they had belonged personally to the defendants, they would now belong to the defendants' trustee in bankruptcy. So, they did not belong to the defendants at the relevant time. I further find that the claimant under Dr Guy intended in any event in 2018 to replace the stables with new ones, which had already been acquired by the time of the defendants' dismissal, and which were delivered by the end of November 2018. In addition, I find that they would have been installed within a few weeks, had the defendants not excluded the claimant from the arena.

## **Letting value**

### *Preliminary points*

53. I now turn to the question of letting value. The claimant in fact "seeks compensation by reference to the value of the benefit the [defendants] enjoyed from their unlawful (and exclusive) occupation of the House and the Arena ..." (see the written opening submissions, [31]). But in addition it states the case for compensation by reference to the ordinary letting value of the property (*ibid*, [33]). It also makes a further alternative case for so-called "negotiating damages" (formerly called "*Wrotham Park*" damages), that is, the notional fee which the claimant "would have obtained if there had been a hypothetical negotiation at the outset of the period of trespass" (*ibid*, [34]).



54. The house was previously let out at the rate of £3,000 per weekend, fully furnished. As I have said, the arena after the defendants left (and once refurbished) has produced an income of more than £5,000 per month. The claimant asked me to take account, not only of the letting values of the properties concerned, but also of the benefits accruing to the defendants by virtue of the supply of utility services (electricity, gas, water, drainage and sewerage) to them. In fact, neither expert in assessing the letting value took into account any such benefits. Mr Beattie said in evidence that he accepted that the claimant had paid for the utilities, and also that this was a benefit to the defendants, but that that would not affect the ordinary rent. Instead, either there would be an arrangement for the tenant to pay what the utility meters showed, or there would be an agreed service charge.

*Experts' agreement*

55. The two valuation experts agreed on a number of matters. In relation to the house, they agreed that it had a gross internal area of 613 m<sup>2</sup>. They also agreed on the valuation dates, the immateriality of furnishings in the house, and the need for an increase in letting value from November 2021. However, the experts took different approaches to the valuation exercise. Mr Marshall took into account the value of areas immediately outside the house which in his view formed part of the amenity value of the house. Mr Beattie did not, though in the joint statement he agreed that the defendants "may have used" the Western Terrace. He said that he was not asked to value the isolation barn. Mr Beattie estimated the ordinary letting value of the house, and then applied a discount of 50% across the board, to reflect the loss of amenity caused by the proximity of the house to a wedding/party venue. Mr Marshall approached the question of valuation by first estimating the value of the benefit of the occupation to the defendants. He then applied no discount across the board. Instead, he adjusted his valuation to take account of weddings that actually took place in the trespass period. Mr Beattie said that this was not how rent would be calculated in real market conditions.
56. In relation to the arena, the experts agreed that it had a gross internal area of 2883 m<sup>2</sup>. But there were differences on a number of matters, including (i) alleged non-compliance with a planning drawing, (ii) the alleged absence of a building control sign-off, (iii) the use of the arena, whether as an equestrian facility or as storage, (iv) the relevance of a lack of 'turnout' (an external area for horses to exercise in), (v) the relevance of the ownership of the stables (which they agreed were an integral part of the arena), and (vi) the dates of occupation by the defendants.

*The house*

57. So far as the house is concerned, I have already held that the defendants in effect excluded the claimant from occupation, not only of the house, but also of the immediately surrounding amenity land. In my judgment, in considering letting value, this land must be taken into account. Mr Marshall did so. Mr Beattie did not. His evidence was that he proceeded on the basis that the claimant (and therefore wedding guests) had full access to these areas, and that the defendants did not. Those were no doubt his instructions from the

defendants, but it means that he has inadvertently valued the house on a (slightly) false basis. He did accept that, if the defendants had some use of those grounds, even if not exclusive, that would have value.

58. On the question of how to deal with the proximity of the house to the wedding/party venue, I agree with Mr Beattie that the ordinary letting value would be agreed in advance, and cannot depend on a retrospective view of how many weddings there were. However, in my judgment his 50% discount across the board is excessive. These are my reasons. The problems presented by the weddings are twofold. First, there is extra traffic (vehicular and pedestrian) in the vicinity of the house, and so the rural peace will be to some extent disturbed during the days of the wedding. Secondly, there will be disturbed nights when noisy parties take place, perhaps late into the night. The second is more serious than the first, but will probably take place on fewer days. The question is how to assess the disadvantage of renting a house next to a wedding venue.
59. The *scale* of the disadvantage is informed by the number of weddings that take place. There were 22 weddings over the trespass period from November 2019 to April 2022: none in 2018, 12 in 2019, none in 2020 (because of Covid-19), nine in 2021 and one in 2022. So, the most in any one year was 12. On the evidence, each wedding would have lasted up to 5 days. That would mean up to 60 days of increased traffic in 2019, and up to 45 days in 2021. A smaller number of days than this would also involve noise disturbance at night. 60 days is about two months, or one sixth of a year, and 45 days is about six weeks, or just under one ninth of a year. In either case, that leaves most of the year without any disturbance from this quarter at all, and an even greater part of the year without the noise disturbance from late night parties.
60. Next, there is the question of who would want to rent such a property. As the expert evidence suggested, one candidate would be a person who wishes to occupy a large country property, but who cannot afford, or simply does not wish to pay, the full open market rent for one without the reduction occasioned by (in this case) the wedding venue disadvantage. Nevertheless, even such a person renting a country property of this quality must have a certain level of income, even to pay the reduced rent. He or she will probably be absent from time to time during the year, perhaps staying at a property elsewhere (*eg* in London), or going away on holiday or visiting friends. That may in itself eliminate part of the disturbance problem for the tenant. Neither expert put forward any comparables to show how this would affect the rent. So it is something of an open question.
61. Mr Beattie said that “valuation is an art, and not a science”, and, later on,
- “My 50%, that is my feeling is an expert and valuer of 35 years’ experience, I felt that was the right number. 40% originally, I went back and re-looked at it and then got to 50%. That is my opinion.”

I am not bound by Mr Beattie’s opinion. In light of the fact that for the majority of the year there will be no disturbance, his figure seems excessive to me. In my judgment, such a tenant would not require a discount of as much as

one half of the open market rent in order to be attracted to the property. In my judgment, a discount of 25% on the ordinary letting value without any disturbance would be a sufficient inducement to a tenant to take the property, and I shall proceed on that basis.

*The arena*

62. In relation to the arena, there are several points to consider. The first is alleged non-compliance with planning regulations. Mr Beattie's oral evidence at the trial was that the drawing attached to the planning application made in 2009 by the defendants showed "a barn with enclosed sides on all four walls, and that was not what I saw in 2015." There was also no building control sign-off. I cannot see, and Mr Beattie did not explain, why that should reduce the letting value. In Mr Marshall's view any lack of a building control sign-off made no difference. I prefer Mr Marshall's more pragmatic view. But in any event the matter is concluded by the fact that it is now too late for the enforcement of any planning regulation to take place: Town and Country Planning Act 1990, s 171B; see [51] above.
63. This leads to the question of the use of the arena, whether as an equestrian facility or as storage. Mr Beattie valued the arena as covered storage because as an arena it was incomplete, without a building control sign-off, and with an open gable and no lighting. Mr Marshall valued it as an equestrian facility because that was the use that the defendants made of it, and in his view there were no planning impediments. I prefer Mr Marshall's view. It was an equestrian facility, even if incomplete during the trespass period. And, as I have found, the claimant wished to refurbish and complete it, and was ready to do so when the defendants' trespass prevented that. So, Mr Beattie has valued the arena on the wrong basis.
64. Next there is the relevance of a lack of turnout space. This lack was agreed by the experts. Mr Beattie considered that Mr Marshall's comparable properties were insufficiently close because they all included turnout space. In cross-examination Mr Marshall agreed that turnout space had a cost, and that he had already valued the arena on the basis that the defendants had turnout space, but that he did not reduce the valuation when he found out that they did not. When challenged on that point, Mr Marshall's answer was that he considered that the lack of turnout would not be an issue for competition horses, since they would usually be exercised in the arena. When it was put to him that unbroken horses could only be put in turnout, he appeared to acquiesce.
65. On the material before me, I am satisfied that turnout space has a cost, and its availability in conjunction with an arena confers a benefit on some horses but not all. The absence of turnout therefore renders an arena less versatile, and therefore less attractive, than one which has it, and, all other things being equal, I would expect it therefore to be less expensive. Accordingly, Mr Marshall's valuation is to that extent too high. However, the only figure put on this excess was in a question to Mr Marshall, which he said he would have to check. There is therefore no positive evidence on what the difference might be.

66. The question of the ownership of the stables has already been dealt with. In my judgment they did not belong to the defendants but to the claimant as part of the realty. Even if they did not belong to the claimant for that reason, they did not belong to the defendants, because they were personal assets, therefore falling into the defendants' bankruptcies. But, for the reasons already given (at [52]), the arena should be valued with the benefit of the stables.
67. The final point is the dates of occupation of the arena by the defendants. Mr Beattie proceeded on the basis that their occupation began on 1 December 2018, whereas Mr Marshall proceeded on the basis that it began on 9 November 2018. In my judgment, Mr Beattie is right. In the liability judgment, at [244], I held that the defendants' licence *to stay at the house between weddings* had been determined by notice taking effect on 9 November 2018. However, in relation to their licence to use of other parts of West Axnoller Farm, it had been determined by notice taking effect on 30 November 2018. Thus, the first day of trespass in relation to the arena was 1 December 2018. It is common ground that the defendants gave up possession of the arena on 10 March 2022.

*Letting values found*

68. Accordingly, I turn to the question of letting values to be attributed to (i) the house (and adjoining ambient land and garage) and (ii) the arena (and adjoining portacabin). In the usual way, both experts found and relied on comparable properties. Of course, no two properties are exactly alike. For one thing, the location of each property is itself unique. And there will almost always be other features of difference too. The comparison is where the skill and experience of the surveyor come in. He or she makes allowances considered appropriate for the material differences between the properties, bearing in mind also the actual conditions of the market and the exigencies of potential tenants or purchasers.
69. **The house:** I deal first with the house. In relation to this, Mr Marshall in his original report assessed the letting value at £5.50 per m<sup>2</sup> (or £3,371) per calendar month, or £40,452 per annum, equating to £111 per day. That included the value of the amenity land and the garage, but with a reduction (*ie* rent-free) for the days of wedding disturbance. In his original report, Mr Beattie valued the house (without the amenity land or the garage) at £60,000 per annum, but discounted by 50% to £30,000 per annum to take account of the wedding venue disturbance element. In the experts' joint statement, they agreed that furnishings were irrelevant to letting value, and that the provision of services was to be dealt with separately, and not as part of that value. They also agreed that there should be a rent review as at the third anniversary of the term (which I calculate as 9 November 2021 for the house). In the joint statement, both experts agreed that the defendants "may have used the Western Terrace", that is, part of what I have described as the amenity land. Mr Beattie's valuation was revised to £48,000 per annum until the rent review and £60,000 per annum thereafter, subject (as before) to a 50% discount. In the same joint statement, Mr Marshall's revised valuation was £4,000 pcm (£48,000 pa) until the rent review, and £5,000 pcm (£60,000 pa) thereafter, with rent-free periods for the weddings.

70. Notwithstanding that the experts originally differed on the inclusion of the amenity land and garage, it is striking that they both come to similar “raw” letting values of £4,000 pcm and £5,000 pcm before and after the notional rent review date. In the circumstances, I accept these figures. But, as set out above, I discount them by 25% to take account of the wedding venue disturbance element. I therefore find that the ordinary letting value of the house was £3,000 pcm (£36,000 pa or £98.63 per day) from 8 November 2018 to 9 November 2021, and £3,750 pcm (£45,000 pa or £123.29 per day) from 9 November 2021 until 24 April 2022. That is 1096 days at £98.63 per day, making £108,098.48, and 167 days at £123.29 per day, making £20,589.43. On this basis, the total mesne profits for the house would therefore be £128,687.91.
71. **The arena:** Secondly, I deal with the arena. Mr Marshall in his original report concentrated on turnkey letting rates for individual horses. He considered £56 per horse per week to be appropriate, giving a rental valuation of £35,000 pa (or £95.89 per day). In his original report, Mr Beattie took the view that the arena was no better than covered storage valued at £8 per square foot, equating to approximately £25,000 pa. He said in particular that there was no ancillary accommodation for someone to stay whilst working there. However, this ignores the portacabin which was in fact occupied by the defendants’ groom during the time of the trespass. Mr Beattie said that he did not see the portacabin. In their joint statement, the size of the arena and the dates of occupation were agreed by the experts, as was the fact that there was no turnout space.
72. In my judgment (as I have said above), this should be valued on the basis of an equestrian facility and not merely as covered storage. As I have said, I do not consider that the potential planning problems argued for by the defendants make any significant difference to the letting value of an equestrian facility, and nor do I consider that the value of the stables ought to be excluded. But the lack of turnout is a (modest) disadvantage which must be taken into account. I therefore find that the letting values of the arena amounted to £33,000 pa, or £90.41 per day (rather than the £35,000 suggested by Mr Marshall). Given that there were 1196 days of exclusionary trespass by the defendants, that makes £108,130.36.
73. Putting together the two sums for the house and the arena, I find that the ordinary letting value of the two parts of the property for the period of the trespass amounts to £236,818.27. I deal further below with the alternative formulation of the claim for the value of the utility services provided.

#### **Move to cottage 8 July 2019 or earlier?**

74. The next question is whether the defendants would have moved to the cottage on 8 July 2019, or earlier, if the claimant’s parent company (The Chedington Court Estate Ltd) had accepted any of the defendants’ settlement offers, “including offers in November 2018, early April 2019, September 2020 and April 2021”, concerning the cottage. It was after all that parent company which dispossessed the defendants of the cottage. The first defendant in her witness statement said (at [46]) that they would have moved to the cottage, at

the latest, by 8 July 2019. She accepts that in November 2018 both she (email 9 November 2018) and her solicitors (letter 21 November 2018) had said that the cottage was “not fit for habitation currently, particularly given Mrs Brake’s physical state of health and the on-set of winter”. So they did not move there when the licences were terminated, even though they had previously stayed there at weekends when the house was let.

75. Curiously, during her cross-examination, the first defendant was asked what would have happened if, contrary to the fact, the defendants *had* left the house after being dismissed. She replied that they *would* at that stage have gone to the cottage, and put their horses with their friend, Jabeena Maslin, who lived a few miles away:

“If Dr Guy had done the civilised thing and terminated our employments lawfully and treated us properly, we would have moved to the cottage and we would have then had our horses at Jabeena’s, because they have experienced grooms who could look after them, and we could just go and ride. But Dr Guy didn’t behave in a civilised fashion so far as we’re concerned, and he put a gun to our head, and when you put a gun to someone’s head things happen”.

76. To me, this evidence suggests two things. The first is that the defendants *could* have moved into and lived in the cottage from November, notwithstanding the contemporary email and letter referred to. The second is that, because they say they acted as they did in response to Dr Guy’s behaviour, the defendants in resisting the vacation of the house were simply being difficult. There was in fact no objection of substance.
77. The latter view is also supported by the first defendant’s evidence that, after they were dismissed, she and her husband were “treated like lepers by the employees” of the Guy parties, and “made to feel as uncomfortable as possible”. (I note in passing that the claimant’s case on this is that its employees were told to keep their distance from the defendants, so as not to provoke them.) They complain of the installation of security cameras “which were designed to monitor our movements at all times”, the changing of the locks in the stables, and the employment of security guards, amongst other things. These allegations are not made the subject of any defence or counterclaim. It is therefore unnecessary for me to decide on the truth or otherwise of them. However, they nevertheless support the view that the defendants thought they were remaining in the house in rather difficult circumstances. Yet they could, at any time before the middle of January 2019, have moved to the cottage of which they were legal co-owners with Mrs Brehme, as they were invited to do, without any obstacle by the claimant. This suggests that the defendants had some other objective in view in remaining in the house, rather than moving.

*Offer in November 2018*

78. The defendants’ defence refers to an offer to move to the cottage in November 2018, where the defendants had stayed many times before when the house was

let. As I have said, on 21 November 2018, the defendants’ solicitors wrote to the claimant’s solicitors, stating that the cottage was uninhabitable, but adding:

“We presume that to facilitate a rapid resolution to the issue of occupation, your client is prepared to fund the works required to bring that property up to the required standard? Please confirm. In doing so, our client would also expect your client to remove all cameras currently trained on their property or which will monitor their movements to and fro.”

Given that the defendants claimed to be both legal and beneficial owners of the cottage, and were at that time in possession of it, it is hardly surprising that this offer was not taken up by the claimant. There was no obligation on the claimant to improve the defendants’ property as part of mitigating its loss caused by the defendants’ trespass on the claimant’s property. And, as I have said, at that stage the claimant’s parent company was doing nothing to prevent a move to the cottage.

79. The present claim, dealing with possession of the house, began on 19 November 2018. These are the only proceedings brought by the Guy Parties against the defendants. All the other proceedings between the parties have been brought by the defendants against the Guy Parties. The Insolvency proceedings were begun on 12 February 2019. The Eviction claim, concerning the cottage, was launched on 3 April 2019. As I understand the matter, by this time the employment claims by the defendants against the Guy Parties had also been started. Both sides were professionally represented in all these cases. So, in early April 2019, the parties were knee-deep in heavy and expensive litigation against each other, and on several fronts simultaneously.

*Offer in April 2019*

80. On 8 April 2019, the defendants by their solicitors offered to vacate the house and move to the cottage on 8 July 2019. This appears to be the main offer on which the defendants rely. The letter was headed “Without prejudice save as to costs”, but both sides referred to this letter without objection. The letter was written *only* with reference to the Possession claim, and the offer to settle applied therefore only to that claim. All the other litigation referred to above, brought by the defendants, would continue unabated.
81. Moreover, the offer contained in the letter was conditional on certain matters. Those conditions included (i) the termination of the “licence” dated 15 January 2019 granted by the defendants’ then trustee in bankruptcy, Duncan Swift, to The Chedington Court Estate Ltd (the claimant’s parent company) to occupy the cottage, (ii) facility in the meantime for the defendants to retrieve their possessions and their horses from wherever they might be on the property, and (iii) the Guy Parties to bear the costs of the hearings of 5 March and 20 March 2019. It also provided (iv) that, once the Swift licence had been determined, the defendants would move temporarily to the cottage for certain wedding weekends before 8 July. They would finally move out and take their horses by 8 July.

82. The evidence of Dr Guy at trial (which I accept) was that he regarded the offer by the defendants to move to the cottage as disingenuous. The defendants had earlier declared that they lived in both properties. Their pleadings in the possession action claimed that they had indefinite rights to remain in the house. They had previously complained that the cottage was uninhabitable, and no work had been done on it since. Accordingly, Dr Guy feared that, if the defendants were once allowed back into the cottage, they would simply occupy both properties. And there would still have to be litigation to decide who owned the cottage (as opposed to whether the eviction had been lawful). This offer would not settle that, or indeed any of the other litigation between the two sides.
83. Moreover, the defendants had by the end of February 2019 emptied the house of most of the furniture which would be needed to use it for weddings. So, the claimant would have had to spend time and money to furnish the house again. The first scheduled wedding was 23 March, so by the time the offer was made it was in any event too late for the claimant to refurnish it. Accordingly, the offer made by the defendants in their solicitors' letter of 8 April 2019 was not accepted. In the circumstances I regard that as a reasonable response on the part of the claimant.
84. I also bear in mind that I have found that, at about that time, and contrary to what the court had been told at a hearing on 20 March 2019, the defendants had over £2.3 million remaining in the bank, out of nearly £3 million originally at their disposal: see the liability judgment at [119]-[124], [149]. In cross-examination the first defendant asserted that the true balance as at 8 April 2019 was £1.8 million, not £2.3 million, but that in any event it would have been impossible in practice to move anywhere at that time except to the cottage. Having checked the relevant bank statement, I find that the second defendant's bank account had over £2.2 million as late as 8 March 2019, though by 8 April 2019 (the date of the offer letter), the balance stood at about £1.97 million.
85. But, in any event, I do not accept that it would have been impossible in practice for the defendants to move anywhere except the cottage within the three months of the offer letter that they put forward. They had been dismissed in November 2018, when they had over £2.3 million in their hands and at their immediate disposition. Even if it had taken several months to find and complete the purchase of a suitable property, that could have been done by July 2019. Even if that were not so, they could have rented a property (as in fact they did once they were finally evicted from the house) until their own was ready. Why, I ask myself rhetorically, would they instead suggest that they move to the – tiny, unsuitable and uncomfortable – cottage, which obviously could not accommodate their horses, and which would – according to the first defendant herself – require works to be done to bring it up to standard, when they could immediately afford somewhere much bigger and more suitable for their needs, away from the properties in dispute, where they were being treated (as they allege) “like lepers”, unless for tactical reasons?
86. The first defendant was asked several times in cross-examination whether she accepted that the defendants *could* have moved elsewhere. At first, she



insisted that (despite all the money that they then had) they had *nowhere else to go to* than the cottage. Then she answered a different question, that is, whether they *should* have moved elsewhere: “We shouldn’t have had even to think about it.” Eventually she accepted that “Well, I could [have moved elsewhere], but I don’t accept we could have moved to a hotel”, and finally also that “hypothetically” they had the money to buy somewhere else. In my judgment, at this time the defendants were looking, not for a solution to the particular problem, but instead for a better negotiating position for the whole litigation between them and the Guy Parties. And that better position would come from occupying *both* properties simultaneously.

87. Overall, I do not accept that the defendants in making their offer of April 2019 were serious about vacating the house. Having once retaken possession of the cottage, I am satisfied that they intended to find an excuse not to comply with their offer and move out of the house, so as to put more pressure on the Guy Parties. Accordingly, I am not satisfied that the defendants would have moved out of the house on the basis of this offer, even if the cottage *had* been made available to them. Although I do not rely on them in this connection, this chimes with my findings of fact in the Eviction claim, where I found (at [49]) that the defendants “stayed overnight at the cottage, not when they *wanted to*, but only when they absolutely *had to*,” and (at [60]) that the defendants “hated having to stay in the cottage for weddings.”

*Further offers to move*

88. As noted above, two further offers are pleaded by the defendants, namely those of September 2020 and April 2021. But the issue as recorded in the order of the court is whether the defendants “would have moved to the Cottage *on 8 July 2019 or earlier*, if the Claimant’s parent company had accepted any of the Defendants’ settlement offers” (emphasis supplied). And the matter was argued before me on that basis. It is obvious that the defendants could not have moved to the cottage by July 2019 as a result of an offer made in September 2020 or April 2021. So, these offers are irrelevant to the issue. But, in case I am wrong about that, I find the following facts nonetheless.
89. On 11 September 2020, the defendants by their solicitors made another offer in a letter headed “Without prejudice save as to costs”. This offer was as follows:

“The Brakes are prepared to move out of Axnoller House on or before 28 November 2020 on the following basis:

a) your client withdraws its financial claim as well as agreeing that no future claims can be made that relate to our clients’ occupation of Axnoller House up to the date that they vacate and agrees to pay all costs occasioned by the House Possession Proceedings and your client’s wrongful attempts to evict our clients;

b) your client agrees, as it initially proposed, that our clients move back to the Cottage;

c) your client immediately removes from the Cottage its security guards and surveillance equipment and returns the Cottage to the state it was in on 17 January 2019;

d) between acceptance of this offer and November 28, your client allows our clients the unfettered access to the Cottage to enable them to ensure that it is fit for habitation;

e) your client refrains from interfering with our clients' possessions at the Cottage and leave them in situ in the Cottage for our clients to reclaim;

f) the Injunction dated 10 December 2018 made by District Judge Davis, currently protecting our clients' occupation of Axnoller House and the indoor arena will remain in place until our clients have moved to the Cottage on or before 28 November 2020."

90. Acceptance of this offer would have involved the claimant in giving up its claims to mesne profits as well as paying all the defendants' costs of the Possession claim. That is not a mitigation of loss, but the abandonment of it. It would also have involved allowing the defendants to occupy the cottage whilst still being in possession of the house (rent-free). There is no basis for supposing that the desire of the defendants to exercise the maximum pressure on the claimant in negotiating a settlement of the whole litigation had altered. As a result, I find that this is simply a re-run of the offer made in April 2019, and that the defendants once in occupation of the cottage would have sought to find an excuse to remain in the house as well. I am therefore not satisfied that the defendants once in occupation of the cottage would have vacated the house.
91. Although the defence refers to an offer made in April 2021, I have not been able to find this. But in any event the position is *a fortiori* that in September 2020. You cannot do a thing by July 2019 as a result of an offer in April 2021.

### **Relevance to mesne profits**

92. I have proceeded on the basis that moving to the cottage can be relevant only if the defendants then vacated both the house and the arena. In fact, the defendants do not actually plead that they would have vacated the house. So, as the claimant says, strictly it is not an answer to the claim for mesne profits. Moreover, it is clear on the evidence (not least that of the first defendant) that there was no room for their horses at the cottage. However, the defendants argued the point, and in circumstances where they are lay people and the point was argued (so that the claimant is not prejudiced) I will proceed to consider the matter on the basis that they had so pleaded.
93. As I have said, the offer of 21 November 2018 was conditional on certain things. These included the claimant's spending money on works to the cottage of which were the defendants were legal co-owners with Mrs Brehme, and of which they claimed to be beneficial owners, and also on removing security cameras. The offer of 8 April 2019 was conditional on the termination of the licence granted by Mr Swift and on the claimant's paying costs for earlier

hearings, amongst other things. The offer of 11 September 2020 was conditional on the claimant's abandoning its money claims, amongst other things. In my judgment, the claimant was not obliged to accept any of these things as a part of mitigating its loss.

### **Causation of losses after 8 July 2019**

94. On the facts found by me, the losses caused to the claimant by the trespass of the defendants in the house and arena were the result of the actions of the defendants themselves, and not of those of the claimant. Moreover, they were not caused by the actions of the claimant's parent company either. This is because, although the parent company was (as held by the Court of Appeal) wrong to have evicted the defendants from the cottage in January 2019, the defendants would as a matter of fact not have vacated the house and arena in any event, even if the cottage *had* been available to them.

### **LAW**

#### **Mesne profits**

95. There was little, if any, difference between the parties on the concept of mesne profits. In my judgment given on 18 May 2022 on consequential matters following the hand-down of the liability judgment ([2022] EWHC 1162 (Ch)), I said this:

“58. In my judgment, the law is that mesne profits are damages, but, in the absence of special circumstances, they are measured by reference to the benefit obtained by the trespasser rather than by reference to the actual loss suffered by the claimant. Hence Megaw LJ's reference in *Swordheath Properties v Tabet* [1979] 1 WLR 285, CA] to the ordinary letting value of the premises, without the need for evidence to show that they could or would have been otherwise let, and whether or not the letting would have resulted in any actual profit to the landlord.”

96. The parties appear to have accepted this approach in argument. But the claimant also referred me to more recent cases than *Swordheath Properties v Tabet*, and I should specifically mention some of them. These include *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713, PC, *Morris-Garner v One Step (Support) Ltd* [2019] AC 649, SC, and *Wigan Borough Council v Scullindale Global Ltd* [2021] EWHC 779 (Ch). In the first of these cases (*Inverugie*), the long leaseholder of a number of apartments in a hotel in The Bahamas was dispossessed by the reversioner, and it was over 15 years before he obtained an order for possession of them. In the meantime the reversioner let the apartments to holiday companies, with an occupancy rate of about 35%. The question was accordingly what was the measure of his damages claim. The Court of Appeal of The Bahamas, differing from the judge at first instance, held that the trespassing reversioner should pay a reasonable rent for the apartments over that time.

97. The Judicial Committee of the Privy Council dismissed an appeal by the trespasser. Lord Lloyd of Berwick, giving the opinion of the Board, said (at 717F-G, 718B-C):

“The cases ... establish, beyond any doubt, that a person who lets out goods on hire, or the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself.”

[ ... ]

In *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 Nicholls LJ called the underlying principle in these cases the ‘user principle.’ The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.

[ ... ]

In the present case the defendants have had the use of all 30 apartments for 15½ years. Applying the user principle, they must pay the going rate, even though they have been unable to derive actual benefit from all the apartments for all the time. The fact that the defendants are hotel operators does not take the case out of the ordinary rule. The plaintiff is not asking for an account of profits. The chance of making a profit from the use of the apartments is not the correct test for arriving at a reasonable rent.”

98. In the second case (*Morris-Garner v One Step (Support) Ltd*), the appellant had entered into non-compete and non-solicitation agreements upon selling her shares in the respondent to the other shareholder. However, she had then launched a competitor business. The question was accordingly not one of trespass to land, but instead of breach of contract, and in particular the measure of damages for such breach. The judge at first instance decided that an award of so-called *Wrotham Park* damages (from *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798) was appropriate, and the Court of Appeal dismissed an appeal from that decision. The Supreme Court preferred to refer to *Wrotham Park* damages as “negotiating damages”, after Neuberger LJ in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [22]. “Negotiating damages” are the price that would be negotiated between the parties for the purchase of the right to do what would otherwise be prohibited. The Supreme Court held that this was not a case for negotiating damages, but instead for damages that were strictly compensatory.

99. Lord Reed (with whom Lady Hale and Lords Wilson and Carnwath agreed) examined the cases on negotiating damages in some detail. He pointed out that the exercise of calculating what would be the appropriate fee for the hypothetical release of the claimant's rights was artificial in a situation

“where any reasonable person in the claimant's position would have been unwilling to grant a release” (at [75]).

He further said (at [76]) that it was

“not surprising that damages for breach of contract are generally assessed differently from damages for the invasion of a proprietary right, since the rights and obligations in question are generally of a different character”.

100. Lord Reed concluded:

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

[ ... ]

(10) Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.”

101. So, the decision in *Morris-Garner* was not about damages for trespass to land or mesne profits. In fact, neither *Swordheath Properties v Tabet* nor *Inverugie Investments Ltd v Hackett* was mentioned. The judgment of Lord Reed touched on damages for trespass to land (at [95](1), cited above) but left them largely alone, concentrating instead on compensatory damages for breach of contract (which, after all, was that case).
102. In the third case, *Wigan Borough Council v Scullindale Global Ltd*, the landlord granted to the tenant the long lease of a property intended to be redeveloped as a hotel. The lease contained a break clause operative in certain circumstances. The landlord operated the break clause, but the tenant remained

in occupation. The court held that the lease had been terminated, and the tenant was therefore a trespasser. The court then had to consider the question of damages for trespass.

103. HHJ Hodge QC said:

“124. ... I accept that the amount of the mesne profits for which a tenant who holds over after the termination of his tenancy is liable is an amount equivalent to the ordinary letting value of the property in question; and that this is so even if the landlord would not have let the property during the period of trespass. However, in a case where the landlord would not have let the property, he has suffered no actual loss so the liability of the former tenant to pay mesne profits is in the nature of restitution for unjust enrichment; and the value of the occupation to the former tenant may therefore be taken into account. On the unusual facts of the present case, I am satisfied that whether mesne profits fall to be assessed by reference to the loss which has been caused to the Council, or restitution of the value of the benefit which Scullindale has received from its continuing possession of the premises, the end result is that the Council should be entitled to recover nothing by way of mesne profits.

125. [Counsel for the tenant] submitted that nothing should be payable for mesne profits and that the amount of mesne profits should therefore be assessed as nil. Since Scullindale had remained in possession after the break date, the Council had not had the burden of maintenance, insurance or any of the other liabilities that can come with an ageing building, and it had not incurred any potential liability for business rates. There is no evidence that the Council could have relet the property. It had taken the better part of two years, between 2014 and 2016, to negotiate the lease to Scullindale. Even if a potential lessee had come forward, the Council would have been into the first lockdown in March 2020 before there was any realistic prospect of a new lease being signed. The reality is that no lessee would have taken the hotel in 2020; nor was it even clear, until early 2021, that vaccines might be capable of working on a mass scale to bring down Covid infections. Even now, lockdown measures are not expected to be entirely lifted until June 2021. Likewise, it cannot be said that Scullindale has enjoyed any windfall benefit. It has endured several months of lockdown restrictions of varying severity and its wedding business had ended when the break notice was publicised. I accept these submissions, which are entirely borne out by the evidence.

126. [Counsel for the landlord] emphasised that a trespasser should not be able to use another person's land without paying compensation, and that mesne profits are payable even if the landowner would not have relet the premises. However, I do not accept that mesne profits are payable if the premises are effectively unlettable and the trespasser makes no profit from them because they are incapable of beneficial occupation. In my judgment, mesne profits are awarded on either a compensatory or a restitutionary basis and not as a matter of legal right simply by virtue of legal ownership.

127. On the issue of rental value and mesne profits, both valuers accepted that even if Scullindale had vacated Haigh Hall on the termination date of 22 November 2019, there would have been no realistic prospect of achieving a re-letting of that property before the effect of the Coronavirus pandemic on the hospitality sector had become apparent, and the first national lockdown had been introduced, in March 2020. Both valuers agreed that the pandemic had had a significant impact on the ability of the Hotel to operate since the first lockdown in March 2020 and that market sentiment is weaker after the pandemic. Both valuers also agreed ‘that post Covid-19 ... the business is likely to be loss making’. Whilst (as Mr Elliott states at paragraph 13.10 of his principal report) there may be ‘a wall of money keen to invest’ in the hotel sector, I find that from March 2020, and continuing up to the present time, Haigh Hall would have been viewed, in the short-term, and for the immediate future, as a liability rather than as an asset. I am satisfied that it would have generated no immediate rental income for the Council and no immediate profit for any hypothetical hotel or events operator. Even before the pandemic, Haigh Hall Hotel Limited had made a loss for the financial year ended 30 June 2019 of £5,156; and even with no business rates to pay since March 2020 and Government grants of £42,342, the loss for the following financial year increased to £89,106.

128. The reality is that the Council has suffered no financial loss, and Scullindale has derived no financial benefit, from its continued possession of Haigh Hall since 22 November 2019. That is entirely the effect of matters consequent upon the global pandemic which were entirely outside the parties’ own control and were extraneous to their continuing, enforced relationship. In these unusual, indeed unprecedented, circumstances, I would award the Council nothing by way of mesne profits.”

104. *Inverurie* was not cited, and there are one or two comments of the learned judge in the extract set out above with which I would very respectfully disagree. Nevertheless, in the “unusual, indeed unprecedented, circumstances” of that case it can be seen why he decided to assess the damages at nil. In my judgment the facts of that case are indeed very unusual, and the decision must be taken to turn on those facts, which are very different from the facts of the present case. Nothing in that case derogates from the traditional test for mesne profits, which (as the judge rightly said, at [124]) is the “amount equivalent to the ordinary letting value of the property in question”. The unusual feature of that case was what the evidence showed that ordinary letting value to be.
105. As stated above, the claimant in its written opening submissions (at [31]) primarily claims compensation by reference to the benefit conferred on the defendants, and only in the alternative to compensation by reference to the ordinary letting value. Here, there is no pleading of any separate claim in unjust enrichment. The claim to assess the benefit conferred upon the defendants appears to be simply a way of measuring compensation to the claimant for being kept out of the use of its land. If it were otherwise, it could not succeed on this pleaded case. But, in *Morris-Garner*, referring to “user damages” (*ie*, in this context, mesne profits) Lord Reed said this:

“79. ... since the assessment of damages in the property cases was based on the value of the right to control the use of the property as it had been wrongfully used, there is a sense in which it can be said that the damages in those cases ‘may be measured by reference to the benefit gained by the wrongdoer from the breach’, provided the ‘benefit’ is taken to be the objective value of the wrongful use. The same can be said of the *Wrotham Park* line of cases, subject to the same proviso, and subject also to the role of equitable considerations in the making of awards under Lord Cairns’ Act. The courts did not, however, adopt a benefits-based approach, but conceived of the awards as compensating for loss.”

106. So, in effect, for present purposes (in calculating mesne profits) they are the same measure. The ‘benefit’ is the objective value of *the wrongful use*. Accordingly, I do not need to take the question the value of benefits conferred on the defendants any further. But, in any case, as I have already held, I am unable on the material before me to assess the cost to the claimant (or the value to the defendants) of the utility services to be attributed to the defendants’ wrongful occupation.

107. A question was also raised whether, as a matter of law, the defendants could plead that they would have moved to the cottage as a defence to a claim for mesne profits. In its reply at [83](3), the claimant says:

“The Claimant’s claim is in trespass. It is no defence to such a claim, which is founded on strict liability, that the Defendants could or would have occupied alternative property...”

108. I accept this proposition, so far as it goes. Liability for trespass attaches where the defendant expressly or negligently trespasses on the claimant’s land. But I do not accept that the question whether the defendants could or would have occupied alternative property is entirely irrelevant. At least in principle, it seems to me that it may be relevant to the question of causation of loss. I therefore turn to consider this question.

### **The new defence**

109. The question here is whether, notwithstanding my order of 17 February 2023, it is open to the defendants to raise the defence that they would have moved to the cottage had they been able to. In the liability judgment, after considering all the matters then raised on the pleadings between the parties (which did not include this defence) I said this:

“278. The result is that all the defences put forward by the Brakes to the claim for possession fail, and that AEL’s claim for possession to the whole of West Axnoller Farm succeeds. There is equally no defence to the claim for mesne profits. The counterclaim fails. ... ”

110. The claimant said in pre-trial written submissions (at [52]) that, in light of that conclusion, it was not open to the defendants to seek to defend the claim to mesne profits. This was put on the basis that, if the parent company of the claimant had made the cottage available, the defendants would have vacated



the house, and therefore there could be no liability to mesne profits owed to the claimant. The claimant said that it was open to the defendants in these proceedings to challenge only the *amount* of compensation payable, and not whether there was liability at all. If the defendants wished to seek compensation from the claimant's parent company for their eviction from the cottage, which (they would say) meant that they incurred a liability to the claimant for trespass, then that would have to be pleaded and proved in other proceedings, against the parent company (which was and is not a party to this claim). Any liability there might be in this regard would not be the liability of the claimant.

111. In oral argument, the claimant however accepted that the defendants could raise the argument that any losses suffered by the claimant by reason of their trespass were not *caused* by the defendants. This seems right to me. Trespass lies without proof of damage caused. The liability judgment held that there was trespass, but not what damage had been thereby caused. That was for the second stage of the split trial. The defendants for their part accepted that questions of *liability* could not be re-opened, but said that questions of *loss* were at large, and that the point that they were seeking to make went simply to causation of loss. If they were right, although there was liability in principle, there were no losses for which they were liable to compensate the claimant. I accept that it is open to the defendants to show, if they can, that the trespass did not cause the damage complained of by the claimant.
112. But in my judgment the defendants have two problems. The first is that they plead in paragraph 84(1) of the defence that "the losses [*ie* of the claimant] are not caused by the defendants occupation [of the house] but by the claimant's occupation of the cottage". This is not made out on the facts. It is the claimant's parent company, not the claimant, that was in occupation of the cottage. On the facts, the defendants cannot rely on *the claimant's* own actions as causing its losses. Instead, they rely on the actions of a different legal person, The Chedington Court Estate Ltd, to justify not moving to the cottage. Second, they have to show not only that they would have moved to the cottage if it had been available to them, *but also that they would have vacated the house*. On the second point, as I have already concluded, the defence is not made out on the facts. So the defendants' argument avails them nothing.
113. The first point is perhaps more interesting. If the claimant had been the parent company of, and had thereby controlled, The Chedington Court Estate Ltd, there might have been an argument that, indirectly at least, the claimant could have procured the latter to make the cottage available, and so (if the law so allowed) should bear some responsibility for the fact that the defendants were unable to move to the cottage. But the position is the wrong way round. The Chedington Court Estate Ltd controls the claimant. So the claimant could not prevent the parent company from doing what it did. If in fact there is liability to the defendants for the actions of the parent, that liability lies *with the parent*, and not with its subsidiary, which is a separate legal person, with its own creditors and debtors: *Salomon v Salomon & Co Ltd* [1897] AC 22, HL. Going further down the same road, you cannot execute on assets owned by the subsidiary for a judgment debt owed by the parent, because the parent does not

own the assets of the subsidiary: *Macaura v Northern Assurance Co Ltd* [1925] AC 619, HL. So too, in my judgment, you cannot rely on the parent company's actions to show that the loss of the subsidiary was caused not by you but by the subsidiary. The consequence is that the defendants' argument that the claimant is the author of its own misfortune is misconceived, and the defendants cannot rely on it.

## **Interest**

### *Argument*

114. The claimant claims interest on damages awarded, in accordance with section 35A of the Senior Courts Act 1981 and the CPR, rules 16.4(1)(b) and (2)(a): see paragraph 24D of the particulars of claim. The defendants however do not plead to this paragraph. Accordingly, CPR rule 16.5(5) applies. This provides that "a defendant who fails to deal with an allegation shall be taken to admit that allegation". Strictly, therefore, the claim to interest is admitted and there is nothing to argue about. I will not therefore spend time on this, beyond reminding myself that the award of interest is intended to represent the additional loss caused by the time during which the claimant has been kept out of money compensation assessed for the loss suffered: *London, Chatham and Dover Railway Co v South Eastern Railway Co*. [1893] AC 429, 437; *Prudential Assurance Co Ltd v HMRC* [2019] AC 219, [73]. In other words, it more justly calculates the compensation needed to reflect the fact that it was not possible to assess the loss immediately on the damage being suffered. It is not perfect, but it is the closest thing available to the court in the circumstances.

### *Decision*

115. Although the award of interest is a matter of discretion by the court, to be determined judicially, I am satisfied that in the present case it is entirely appropriate. This is not a case where the defendants excluded the claimant without themselves being able to make use of the property, or they excluded it by accident. They had the benefit of the use of the property from almost the end of 2018 to the spring of 2022, during which they had no need to pay for anywhere else to live or indeed for the utilities needed to run it. The evidence is that they drove, walked and rode horses over it as they wished. They deliberately deprived the claimant of the use of the house and the arena during the same time. Lastly, the defendants kept the claimant at bay during this time by obtaining repeated adjournments of the trial, eventually making an entirely unsuccessful case to remain, buttressed by what I found to be "a web of lies" at trial: see my judgment on consequential matters following the liability judgment at [2022] EWHC 1162 (Ch), [40]. This in my judgment is a clear case for interest to be awarded as sought.
116. The rate of interest on judgment debts is prescribed by section 17(1) of the Judgments Act 1838. The current rate is 8% per annum. That is therefore the rate which will apply to damages awarded from the date of judgment. The rate of interest to be awarded from the date on which the cause of action accrued up to the date of judgment is a matter for the discretion of the court. The

claimant asks for the same rate, on the basis that, if the defendants had not put forward a false case the claimant would have had judgment in the County Court on 17 January 2019, when the judgment debt rate of 8% per annum would have started to run. I accept that submission, and will order that interest will run from that date at 8% per annum. Prior to that date, interest will run from 9 November 2018 in relation to damages in respect of the house and from 1 December 2018 in relation to damages in respect of the arena, at the lower rate of 3% per annum.

### **Conclusion**

117. For the reasons given above, I find that the damages to be awarded to the claimant in respect of the defendant's trespass amount to £236,818.27, plus interest to be calculated as set out in the previous paragraph. I should be grateful to receive a draft minute of order to give effect to this judgment.

### **Postscript**

118. After I had circulated the draft of this judgment to the parties, the first defendant pointed out that a sentence which I had originally included at the end of paragraph 32 was mistaken in saying that the second defendant's sister had paid the rent on the property in Leigh on Mendip up to December 2023. In fact, she paid the rent up to December 2022. I have therefore removed this sentence from the paragraph. The first defendant says that she sees this as my continuing "to look for reasons to mistrust my evidence". However, this was a simple misreading on my part. She also says that I had no basis for the statement at the beginning of paragraph 33 that "this is all highly unsatisfactory". But what was unsatisfactory (as indeed I have said) was the first defendant's failure to be upfront about the house in Leigh on Mendip from the outset. The mistake about the date to which rent was paid makes no difference to that.