Neutral Citation Number: [2025] EWHC 16 (Ch)

Case No: PT-2023-001162

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch D)

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

Date: 7 January 2025

Before:

DEPUTY MASTER FRANCIS

- -

Between:

SBP 2 S.À.R.L	**Claimant**
- and –	
2 SOUTHBANK TENANT LIMITED	**Defendant**

- -
- -

Zia Bhaloo KC and **Simon Johnson** (instructed by **Ashurst LLP**) for the **Claimant**
James Ballance and **Andrew Myers**, solicitor advocate, (instructed by **Stephenson Harwood LLP**), for the **Defendants**

Hearing dates: 26 / 27 November 2024

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 7 January 2025 by circulation to the parties' representatives by e-mail and by release to the National Archives

Deputy Master Francis

Introduction

1. This case concerns the second of two forfeiture claims which have been brought by the Claimant against the Defendant relating to commercial premises known as Two Southbank Place, London SE1 ("the Premises") let by the Claimant to the Defendant under a lease dated 25 January 2019 ("the Lease"). The second forfeiture claim was served on the Defendant on 28 December 2023 without prejudice to the Claimant's contention that the Lease was already validly forfeit by service of a first forfeiture claim earlier in the same month. Both claims arise out of the same corporate reconstruction in the United States affecting the guarantor of the Defendant's obligations under the Lease.

2. By an application notice dated 18 June 2024 the Defendant seeks the summary dismissal or strike out of the second forfeiture claim under CPR r. 24.2 and r.3.4 (2) (a) on the grounds that the claim has no real prospects of succeeding, both (i) because there has been no relevant breach of condition as a matter of the proper construction of the re-entry clause within the Lease and (ii) because the purported forfeiture of the Lease by service of the claim was premature, before a reasonable time had elapsed for the Defendant to act in response to the section 146 notice which had been served just a few days before on 20 December 2023.

3. In the alternative, if the claim as a whole is not dismissed or struck out, the Defendant seeks at the very least the strike-out of paragraph 33 of the Claimant's Reply and Defence to Counterclaim which, it contends, fails adequately to plead the basis upon which the Claimant contends that a reasonable time had elapsed between service of the notice and the purported forfeiture.

4. The application has been argued before me over two days with skill and tenacity. I pay tribute to leading, junior and co-counsel on both sides for their clear and persuasive submissions, both oral and in writing.

Background

5. The Claimant, the landlord under the Lease, is a company registered in the Grand Duchy of Luxembourg, and is part of the Almacantar group. The Defendant tenant is an SPV company incorporated in 2015 in England and Wales, and part of the WeWork global group of companies, the central administration and operations of which are based in the United States.

6. The Premises demised by the Lease are a serviced office building comprising 300,000 square feet over 17 floors, situate in a prime location opposite Waterloo Station on York Road, fronting onto the Southbank. They are described as WeWork's flagship location in the UK and have been fitted out by the Defendant to very high specification, at a cost of over £50 million, to which the Claimant made a capital contribution of over £36 million under the terms of an agreement for lease entered into by the parties dated 3 May 2017. Office and ancillary accommodation within the premises is made available for use by WeWork clients under a variety of membership models offering exclusive or shared use of space and facilities in the Premises together with other sites operated by WeWork companies.

7. The Lease was granted for a term of 20 years at a passing rent of just under £20 million per annum, and benefits from the security of tenure conferred by Part II of the Landlord and Tenant Act 1954. WeWork Companies Inc ("WWC Inc"), a Delaware registered company, was joined to the Lease as guarantor of the Defendant's obligations.

8. As might be expected, the Lease itself was a detailed and lengthy document, as was the preceding Agreement for Lease to which it was annexed in draft. Amongst other things, it reserved the usual right of re-entry to the Claimant for non-payment of rent, breach of tenant covenants or breach of condition in clause 6.1 in terms which I shall have to consider at some length in the course of this judgment. I set out in an appendix to this judgment the entirety of that clause, but for present purposes it is sufficient to refer to the following extracts:-

> *6.1.1 If any event specified in Clause 6.1.2 occurs the Landlord may at any time afterwards re-enter the Demised Premises or any part of them in the name of the whole and this Lease will then immediately determine.*
>
> *6.1.2 The events referred to in Clause 6.1.1 are as follows:*
>
> > *...*
> >
> > *(d) in respect of the Tenant or the Guarantor the appointment of a liquidator or administrator or it or its shareholders passing a resolution for winding-up or the Tenant or the Guarantor being unable to or deemed unable to pay its debts within the meaning of sections 122 or 123 of the 1986 Act, or the Tenant or Guarantor summoning a meeting of its creditors or any of them under Part 1 of the 1986 Act or allowing an application for an administration order in respect of it to be filed in court or a receiver or administrative receiver for it being appointed;*
> >
> > *...*
> >
> > *(f) any corporate action, legal proceedings or other formal procedure in the nature of insolvency action is taken in relation to:*
> >
> > *...*
> >
> > > *(iv) the institution, by a regulator, supervisor or any similar official with primary insolvency or rehabilitative jurisdiction over the Tenant or Guarantor in the jurisdiction of its incorporation or organisation or the jurisdiction of its head or home office, a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation by the Tenant or Guarantor or such regulator, supervisor or similar official; or*
> >
> > *(g) is the subject of any order or event occurring in any jurisdiction that is analogous to or has a similar effect or result to any of the events described in Clauses 6.1.2 (c) to 6.1.2 (f) including, without limitation, if any corporate action or legal proceedings or other statutory procedure is taken in relation to US bankruptcy proceedings in respect of the Tenant and/ or Guarantor*

9. Following the grant of the Lease, on 16 July 2019 WWC Inc entered into a form of corporate restructuring known as a plan of division under Delaware law. It is the Defendant's case that the effect or result of such restructuring was that WWC Inc's

guarantee obligations under the Lease were allocated to WeWork Companies LLC, a company incorporated in Delaware in consequence of the division, and WWC Inc ceased to exist. For its part, the Claimant accepts that the latter company replaced the former as guarantor under the Lease, but contends that this was only the result of a deed of guarantee entered into by the latter company under English law on 17 October 2019. This controversy is not one I need to resolve but foreshadows a similar controversy concerning the effect of a further restructuring which took place in November 2023 which has given rise to the current dispute between the parties.

10. The November 2023 restructuring requires more careful elaboration. For those purposes, I shall refer to WeWork Companies LLC, in its corporate existence prior to the restructuring as "the Dividing Company", and shall refer to the two corporate entities which emerged from the restructuring as the "Surviving Company" and "the Resulting Company":-

    a) on 6 November 2023 the Dividing Company adopted a plan of division under section 18-217 of the Delaware Limited Liability Company Act, pursuant to which it was divided into two division companies, the Surviving Company and the Resulting Company, the latter being a limited liability company incorporated in consequence of the division;

    b) prior to the plan of division, the Dividing Company had been subject to guarantee obligations under many hundreds of leases held by WeWork group companies in the United States and worldwide; the Defendant says that as a result of the plan of division, under Delaware law those guarantee obligations were allocated between the division companies so that the Resulting Company became guarantor under 81 leases of properties situate in Australia, the Republic of Ireland and the United Kingdom including the Lease, with the Surviving Company allocated the remaining guarantees relating to leases of properties in the United States together also with other liabilities of the Dividing Company; at the same time, all the assets of the Dividing Company were allocated to the Surviving Company, and the Surviving Company indemnified the Resulting Company for the liabilities to which it was subject under the guarantees allocated to it;

    c) the Surviving Company on the same day then filed a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey.

11. The parties are in dispute as to the effect of the plan of division as it concerns the guarantee obligations under the Lease. The Claimant contends, as its primary position, that (i) the plan of division was ineffective or should not be recognised under English law as affecting the Dividing Company's guarantee obligations, and (ii) the Dividing Company and the Surviving Company are one and the same entity as a matter of Delaware law, with the result that the Dividing / Surviving Company's entry in Chapter 11 bankruptcy constitutes a relevant breach of condition under clause 6.1.2 (f) (iv) or 6.1.2 (g) of the lease. The Defendant contends that (i) the plan of division should be recognised as a matter of English law and was effective to allocate the guarantee obligations under the lease to the Resulting Company, and (ii) the Surviving Company is in any event a distinct entity from the Dividing Company.

12. Based upon that primary position, on 9 November 2023 the Claimant served a section 146 notice on the Defendant alleging that the Defendant was in breach of the aforesaid conditions of the Lease, by reason of the filing of the Chapter 11 petition by the Dividing / Surviving Company who was and remained the guarantor under the Lease. Subsequently, on 18 December 2023 it issued a possession claim based on forfeiture in the Business and Property Courts under claim number PT-2023-001118 which was served on the Defendant on 19 December 2023 ("the First Proceedings"). The Defendant has disputed that the Claimant was entitled to forfeit the lease by the First Proceedings because it contends that the Resulting Company is the guarantor under the Lease in consequence of the plan of division, and that company, in contrast to the Surviving Company, has not filed any Chapter 11 petition.

13. As a secondary position, on 20 December 2023 shortly after 4pm the Claimant served a further section 146 notice on the Defendant, without prejudice to its position that the Lease was already forfeit by reason of service of the claim in the First Proceedings. In that second notice, the Claimant alleged that if the Resulting Company was now the guarantor under the Lease the Defendant (i) was in breach of the condition contained in clause 6.1.2 (d) of the Lease because the Resulting Company was or was deemed unable to pay its debts within the meaning of sections 123 (1) (e) or (2) of the Insolvency Act 1986, or (ii) was in breach of certain other provisions of the Lease relating to the conditions which had to be satisfied for the Defendant to be entitled to appoint any replacement guarantor under the Lease.

14. On 27 December 2023, the Claimant issued a second set of proceedings, the present forfeiture claim ("the Second Proceedings"), in the Business and Property Courts, based upon the second section 146 notice. Those proceedings were served on the Defendant in the morning of 28 December 2023, at shortly before 12pm. I will need to set out and consider in more detail below the correspondence passing between the parties' solicitors during this period in the context of the Defendant's second summary judgment ground.

15. By order of Chief Master Shuman on 11 January 2024, the First and Second Proceedings have been directed to be case managed and tried together. Both sets of proceedings have since been fully pleaded out, but no further case management directions have been given pending the determination of the present application in the Second Proceedings.

The summary judgment / strike out application

16. The Defendant's first and principal ground of the application is that the Resulting Company was not at the time of service of the notice unable or deemed unable pay its debts within the meaning of section 123 (1) (e) or (2) of the Insolvency Act 1986 as alleged in the notice. That is because the expression "being unable to or deemed unable to pay its debts within the meaning of sections 122 or 123 of the 1986 Act" as it is used in clause 6.1.2 (d) of the Lease requires the inability to pay the relevant company's debts to have been established before any section 146 notice is served, either by one of the deeming events set out in sections 123 (a) to (d) (none of which are relied on in this case), or, in the case of sections 123 (1) (e) and 123 (2), by a prior judicial determination. The Defendant says that this is the natural and proper meaning of the words "it is proved to the satisfaction of the court" as they are used in each of those sub-sections. The Claimant says that is wrong, and that no such prior judicial determination of inability to pay was required.

17. That question turns solely on the proper construction of clause 6.1.2 (d), considered within the language of the Lease as a whole and in its relevant factual matrix.

18. The Defendant's second ground of the application is that a reasonable time had not elapsed between service of the section 146 notice on 20 December 2023 and the subsequent purported forfeiture of the Lease by service of the claim form on 28 December 2023. It points out that less than four working days had elapsed in the intervening period taking into account both the weekend of 23 / 24 December and the Christmas bank holidays on 25 and 26 December 2023; that was not a reasonable time for the Defendant to consider its position even if the breach was irremediable, and still less if, as the Defendant contends, the breach was remediable. The Claimant disputes that the breach was remediable, or that a reasonable time had not elapsed before service of the claim form whether the breach was remediable or not; in any event it contends that these are all questions of fact unsuitable for summary determination.

19. Under what was is now CPR r.24.3 (previously r.24.2) the court may grant summary judgment against a claimant on the whole of a claim, or a particular issue, if it considers that (a) the claimant has no real prospect of succeeding on the claim, and (b) there is no other compelling reason why the case or issue should be disposed of at trial. Under the closely analogous provisions of CPR r.3.4(2)(a), the court may strike out a claim form / particulars of claim if it appears to the court that it discloses no reasonable grounds for bringing the claim.

20. The proper approach of the court in considering the "no real prospect" test under CPR r.24.3(a), or the "no reasonable grounds" test under the CPR r.3.4(2)(a), is not in dispute between the parties. It was summarised by Lewison J in *Easy Air Limited v. Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] in the following numbered propositions:-

    (i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

    (ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

    (iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

    (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

    (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

    (vi) Although a case may turn out at trial not to be really complicated, it does not follow

that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

21. In *Commerz Real Investmentgesellschaft mbh v TFS Stores Limited* [2021] EWHC 863, Chief Master Marsh commented further on the question when it was appropriate to grasp the nettle and determine a point of construction, and the overlap with this question and r.24.3(b) as follows:-

As it appears to me, the notion of shortness does not relate to the length of the document to be construed or the length of the material passage in that document; but it may relate to the length of the hearing that will be required and the complexity of the matrix of fact the court will have to consider. In my experience the court regularly deals with points of law and of construction of real difficulty on the hearing of an application for summary judgment. I would only add that there may be some overlap between the idea of a point of construction not being 'short' and the second limb of CPR rule 24.2 . There may be some points that the court is capable of grappling with (or grasping the nettle as it is sometimes put) that, nevertheless due to the context in which they arise or other factors are best left to be dealt with at a trial.

22. On the present application, I raised with counsel whether it was appropriate to grasp the nettle and determine the question of construction which underlies the principal ground of the application in circumstances where (i) the First and Second Proceedings arose from the same restructuring affecting the guarantor under the Lease, (ii) there would in any event need to be a trial of the First Proceedings, and (iii) the question of construction was by no means straightforward and may more satisfactorily be dealt with in the context of the wider trial. Some of those factors might alternatively be argued to provide a compelling reason why the claim in the Second Proceedings should be left to be determined at trial with the First Proceedings.

23. On behalf of the Defendant, Mr Ballance submitted that I should determine the question of construction because, if disposed of in the Defendant's favour, it would significantly reduce the length of the trial by avoiding the need for both expert evidence and evidence of fact on the question of the Resulting Company's alleged insolvency, both at the date of the section 146 notice, for the purposes of establishing the relevant breach of condition, and at the date of trial, for the purposes of considering any question of relief from forfeiture under the Defendant's counterclaim.

24. For the Claimant, Ms Bhaloo KC disagreed that it would result in any substantial saving at trial. She pointed out that the Defendant had not averred any positive case in paragraph 33 of its defence that the Resulting Company was solvent at the relevant time, and so it was at the least unclear what substantive challenge there was to the claim that it was unable to pay its debts on a going-concern or balance sheet basis. However, she did not maintain in argument that there was otherwise any reason why I should not determine the question of construction, for instance because there was any dispute as to the underlying factual matrix or because further material relevant to that matrix might be expected to be adduced at trial.

25. I have concluded that I should proceed on this application to determine the disputed question of construction rather than leave it to the trial judge. I have not been told, and do not consider it likely, that there is any further oral or documentary evidence which has not presently been adduced but is likely to be available at trial which will be relevant to the question, and it is not suggested that any of the matters presently relied upon in support of the parties' rival constructions are ones which would require forensic examination at trial. Moreover, I am persuaded that, if the question is resolved in the Defendant's favour, that will likely result in a substantial saving in costs and time of any trial. In particular:-

    a) whilst it is correct that the Defendant has not advanced any positive case in its defence as to the solvency of the Resulting Company, that is not surprising where the Defendant contends that as a matter of construction the question did not arise in the absence of any prior judicial determination of inability to pay its debts; in the event that the Defendant is wrong on that question of construction, I do not consider that it would be precluded from challenging the Claimant's assertion that it was unable to pay its debts at the time of service of the section 146 notice, and it appears that it intends to do so;

    b) it is in any event apparent from paragraph 46 of its counterclaim that the questions as to the current solvency of the Resulting Company would need to be considered as part of the Defendant's application for relief from forfeiture in the Second Proceedings, having regard both to the extent of its exposure under the guarantees allocated and to the strength of the Surviving Company's indemnity covenant following its exit from Chapter 11 protection;

    c) I accept Mr Ballance's analysis that this is likely to require both expert evidence and evidence of fact which may take up a number of days of court time; there is therefore a real potential benefit of determining the question now rather than leaving it for trial.

26. I shall now therefore deal with the question of construction as the first ground of the application before considering the issues of fact and law which arise under the second ground.

The first ground: the construction question

(i) Principles of construction

27. It is unnecessary for me to set out at length the many dicta from successive decisions of the Supreme Court concerning the process of construction, or refer to the other authorities to which I was taken in argument and which I have considered. The principles are not in dispute, although understandably the parties may place different emphasis on textual and contextual considerations. It is sufficient to cite the following passages from the judgment of Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24;[2017] AC 1173 at [10] – [13]:-

> 10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning …
>
> 11. … Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved

by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

28. In the context of a provision which purports to adopt a statutory test as to the meaning of a company being unable to pay its debt, I have also been referred to the judgments of the Court of Appeal in *Enviroco Ltd v Farstad Supply A/S* [2009] EWCA Civ 1399; [2010] Bus LR 1008 per Longmore LJ at [53] – [54], and of the Supreme Court [2011] UKSC 16; [2011] 1 WLR 921. In the latter, Lord Collins said this at [51]:-

> The starting point is that if the terms of a statute are incorporated into a contract by reference, the contract has to be read as if the words of the statute are written out in the contract and construed, as a matter of contract, in their contractual context: see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, 152, 184.

It is only if the words of the contract are themselves inconsistent with the meaning of the incorporated statutory language that an ambiguity may arise which requires the court to choose between alternative meanings.

(ii) Sections 122 and 123 of the Insolvency Act 1986

29. Section 122 (1) of the Insolvency Act 1986 provides that a company may be wound up if one or more of the conditions set out in the section are satisfied. One of those conditions, in sub-paragraph (f), is that "the company is unable to pay its debts". Section 123 of the Act, under the heading "Definition of inability to pay debts" then provides as follows:-

> (1) A company is deemed unable to pay its debts—
>
> > (a) if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company's registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, or
> >
> > (b) if, in England and Wales, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or

(c) if, in Scotland, the inducíae of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made, or

(d) if, in Northern Ireland, a certificate of unenforceability has been granted in respect of a judgment against the company, or

(e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.

(2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

30. It can be seen the each of sub-paragraphs (a) – (d) of sub-section (1) sets out events the occurrence of which will result in the company being deemed unable its debts, whether or not that the company is actually able to do so. Sub-paragraph (e) of sub-section (1) and sub-section (2) are different in requiring the company's insolvency to be proved to the satisfaction of the court either on the cash-flow basis: *the company is unable to pay its debts as they fall due*; or on the balance sheet basis: *the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities*. As set out by Lord Walker in *BNY Ltd v Eurosail Ltd* [2013] UKSC 28; [2013] 1 WLR 1408, at [25] and [37], the process of proving insolvency on either of these tests may require an inquiry into a much wider range of factual matters and involve a complex assessment of a company's financial position. But where insolvency is proved to the satisfaction of the court on either basis, then the company likewise is then deemed unable to pay its debts giving the court jurisdiction to wind it up.

31. The process of proving the company's insolvency to the satisfaction of the court under these two sub-sections of course generally takes place at the hearing of the winding-up petition itself. It is not a pre-condition of the presentation of the petition unlike the other events from which a company is deemed unable to pay its debts. But it is still nevertheless a pre-condition to the court's jurisdiction to make an order.

(iii) Some preliminary points

32. The Lease is plainly a complex, formal contract which has been drafted by highly experienced solicitors on both sides. It is plain that the court should give close regard to the language chosen to express the parties' agreement, but it must also be aware that the text may in places lack logic or coherence due to the type of factors referred to in paragraph 13 of *Wood.* In reading clause 6.1.2 of the Lease, I am struck by the comprehensiveness of the list of forfeiting events, in particular those arising in the context of the insolvency of the tenant or guarantor. The provisions bear the hallmark of a precedent which may have been developed and extended over years, with relics left in of a bygone age of receiving orders (see sub-paragraph (e)), but also with what may be specific adaptations under sub-paragraph (g) so as to catch analogous US insolvency procedures as they may affect a tenant or guarantor incorporated in a US state, as WWC Inc. was and any replacement guarantor might likewise be. The clause, in short, appears to me to a bespoke adaptation of a long-developed precedent.

33. I have to interpret the provisions of clause 6.1.2. in their relevant factual matrix; this requires me to consider how the words used would have been understood by a reasonable person in the position of the actual parties. But I must also bear in mind that much of the language employed in the clause is formulaic and may be found in many other commercial leases. That applies not least to the specific words which are in issue in this case "... *being unable to or deemed unable to pay its debts within the meaning of sections 122 or 123 of the 1986 Act*" which may be found in very many re-entry clauses in commercial leases. In her submissions, Ms Bhaloo suggested that the meaning of these words as they apply in this Lease may differ from their meaning when used in other commercial leases because of the different characteristics of the parties and of the subject premises. In my judgment, that cannot be correct; it is to overplay the contextualist card. In the absence of any other specific provisions within the Lease which might operate to qualify the language of the clause, in my judgment it should mean the same in this Lease as it does in other commercial leases where it is employed as part of the panoply of a re-entry clause.

34. Further, it is in my judgment also important to remember that the particular forfeiting event with which we are concerned is but one of a large number of insolvency events which constitute a breach of condition triggering the right of forfeiture. The parties have focused on what they contend are the absurd or uncommercial results which follow from interpreting the words in one way or the other; Ms Bhaloo, for instance, contends that if the interpretation for which the Defendant contends is correct, that would render the event unworkable and of no utility to the Claimant landlord. Even if that is correct, it does not compel the conclusion that the interpretation must be wrong: the landlord could still resort to the other insolvency events within the panoply and so the re-entry clause as a whole would not be denuded of practical efficacy. Such arguments should, therefore, be kept within their proper confines, and not exaggerated in their significance within the wider scope of the re-entry clause.

(iv) Textual and contextual analysis

35. I turn to the text of the clause itself, the language the parties adopted in expressing their agreement.

36. The Defendant emphasises the following matters:-

a) the right of entry under clause 6.1.1 is said to arise <u>after</u> the occurrence of any of the <u>events</u> specified in clause 6.1.2;

b) each of the sub-clauses of 6.1.2 specifies such an event, or one of a series of events;

c) sub-clause (d) lists a series of insolvency events relating to corporate bodies, such as the appointment of an office-holder, the passing of a resolution, the summoning of a meeting or the filing of an application, and including "*the Tenant or the Guarantor being unable to or deemed unable to pay its debts within the meaning of sections 122 or 123 of the 1986 Act*";

d) as set out above, section 123 itself lists a series of events, in sub-section (1) (a) – (d); and likewise in sub-section (1) (e) and subsection (2) where the relevant event is that <u>it is proved to the satisfaction of the court</u> that the company is unable to pay its debts as they fall due, or the value of its assets are less than the amount of its liabilities.

37. The Defendant accordingly submits that the relevant event, the breach of condition which triggers the right of forfeiture, is the judicial act of making a determination that the tenant or guarantor is unable to pay its debts on a going concern or balance sheet basis. This provides a workable scheme under which both landlord and tenant know with certainty both that a forfeiting event has occurred, and when it has occurred, and may then act on the strength of that.

38. The Claimant disputes that the language of the clause provides such a clear and logical scheme. Ms Bhaloo points out that not all of the matters which give rise to a right of forfeiture under clause 6.1.2 are principally one-off events, as opposed to continuing states; in particular a tenant's breach of its repairing covenant is a continuing state of affairs rather than principally an event, even if there may be an identifiable point in time when the relevant breach first occurs. And, likewise, a tenant or guarantor being unable to pay its debts within the meaning of subsections (1) (e) and (2) is a state of affairs, albeit one which first occurs at an identifiable point in time. For those provisions to make sense within the scheme of the clause as a whole, there is no need for there to be a prior judicial determination. Indeed, she submits, there are a number of reasons why it would be commercially absurd for the parties to have imported such a requirement.

39. Those reasons are as follows:-

a) the requirement for a landlord to obtain a prior judicial determination of a tenant's or guarantor's inability to pay its debts on a going concern or balance sheet basis could tie the parties up in months, if not years of litigation, during which period the landlord could not demand or accept rent or seek to enforce any of the tenant covenants under the Lease for fear of waiving its right of forfeiture; that cannot have been intended, in particular in multi-occupied and highly-managed premises such as we have here;

b) such litigation would be potentially complex, and expensive, involving, as Lord Walker described in *BNY Ltd v Eurosail*, what may be a wide-ranging factual inquiry into a company's immediate debts, which may be disputed, or a complicated comparison of its assets and liabilities;

c) such litigation would, moreover, be potentially pointless, since the tenant's financial position may have altered between the date such proceedings are commenced, and the later date, months or years thereafter, when the landlord is finally in a position to serve a section 146 notice, having obtained its judicial determination;

d) there is little, if any, precedent for the type of litigation of a declaratory nature, which, on the Defendant's construction, would be required; I was referred to *Gas & Electricity Markets Authority v Spark Energy Supply Ltd* [2018] EWHC 2522 (Ch), a case brought by the energy regulator for a declaration that an energy supply company was unable to pay its debts within the meaning of section 123 (1) (e) of the 1986 Act, entitling the regulator to terminate the company's energy supply licence on 24 hours' notice, but there are no similar cases in the context of forfeiture of commercial leases of which the parties are aware;

e) taking into account all these matters it is vanishingly unlikely that the parties intended that they should be subjected to such litigation before the landlord could take any steps

to forfeit; in contrast there is nothing unusual or unorthodox in a commercial landlord exercising a right of forfeiture, whether by physical re-entry or service of possession proceedings, based on a tenant's breach of covenant which may be disputed and which the landlord may then have to prove to the satisfaction of the court after the event, whether at the trial of the landlord's possession claim or on the hearing of a tenant's application to be reinstated to the premises, and there is no reason to treat a re-entry based on a tenant's or guarantor's insolvency on the cash-flow or balance sheet basis any differently.

40. Attractive though these submissions are, there are a number of points made by the Defendant to meet them:-

   a) the spectre of a long period of delay between the right of forfeiture based on either of the two sub-sections first arising, and the right being established by judicial determination, during which the landlord can take no steps which recognise the continuing existence of the lease for fear of waiver, is in fact illusory; the right of forfeiture only arises once there has been a judicial determination, and until that time the landlord cannot be at any risk of waiving the right;

   b) similarly, there is no danger that proceedings to obtain judicial determination of insolvency could be rendered pointless by a subsequent change in the tenant's or guarantor's financial position; that is because, on the Defendant's construction, the event giving rise to the right of forfeiture is the judicial determination itself;

   c) for a landlord to exercise its right of forfeiture based on the tenant's or guarantor's insolvency on a cash-flow or balance sheet basis, it is wrong to suppose that the landlord would first have had to have brought its own proceedings for a declaration of insolvency; a landlord could instead rely upon a determination made in other proceedings, not least on the hearing of a winding-up petition brought against the tenant or guarantor by a creditor under either of the sub-sections; a landlord may prefer to await such determination on a creditor's petition rather than relying merely upon the presentation of the petition itself as a forfeiting event, where (for example) the tenant or guarantor may be contesting the petition in good faith;

   d) if, as the Claimant contends, a right of forfeiture arises by reason simply of a tenant or guarantor being unable to pay its debts as they fall due, or by reason of the value of its assets being less than the amount of its liabilities, it may be uncertain at any time whether such state of insolvency exists; it cannot have been intended that the tenant should be at risk of losing its property and facing disruption to its business based on such an uncertainty, without there having been any prior determination of insolvency, at least in the absence of clear words providing for such result.

41. What is more, the Defendant submits, the construction of the clause for which the Claimant contends gives no effect to the words of the statute as it is incorporated into the clause: *it is proved to the satisfaction of the court*. On the Claimant's construction, a landlord could exercise its purported right of forfeiture based on the alleged insolvency of the tenant or guarantor by physical re-entry without there having been any prior judicial determination of insolvency and without there being any subsequent judicial determination of insolvency. In contrast to the position where forfeiture is effected by service of landlord's proceedings for possession of the demised premises, there may never be any court process in which the

question of the tenant's or guarantor's insolvency falls to be determined unless the tenant has the will, means and wherewithal to challenge the landlord's physical re-entry by its own claim to be reinstated to the premises. So the insolvency may never fall to be proved to the satisfaction of the court, leaving the words otiose or mere surplusage.

42. On this point, I asked Ms Bhaloo how the Claimant's construction catered for the type of tenant who, finding the locks changed to its premises by the landlord, might disappear without challenging the landlord's actions. In response, she emphasised that such a scenario would be inconceivable in the context of this particular lease and these particular parties. It would be unlikely, if not impossible, for the landlord to effect physical re-entry given the presence of occupiers within the premises at all hours of day and night; and even if it did, it is wholly unrealistic to suppose there could be any circumstances in which the tenant would not itself challenge the landlord's actions leading to a judicial determination.

43. In my judgment, the logic of that submission means that the relevant words of clause 6.1.2 (d) may carry a different meaning under the present lease than it would where used in leases of other different and less valuable premises where a landlord may be more likely to forfeit by physical re-entry, and a tenant more likely to disappear without challenging such re-entry. That cannot be right for the reasons I have set out in paragraph 33 above. In my judgment, such commonly used provisions of a re-entry clause cannot fall to be interpreted in so radically a different way in different leases based on the characteristics of the premises or the parties to the lease.

(v) Conclusions

44. Although the question is a difficult one, and powerful arguments have been presented on both sides, I have come to the clear conclusion that the Defendant's construction is the correct one. To express at length my reasons for that conclusion, I would simply be repeating much of the argument which I have summarised above. However the key factors which have persuaded me are as follows:-

    a) the language of clause 6.1.2 does clearly envisage the right of re-entry being exercised after the occurrence of one or more forfeiting events; in the case of the disputed provisions of clause 6.1.2 (d), the event in question may naturally be read as the tenant's or guarantor's insolvency having been proved to the satisfaction of the court by some form of judicial determination;

    b) that construction provides a certain, clear and workable scheme, under which the right of forfeiture only arises upon and by reason of such judicial determination, so that no difficulty arises of there being a risk of the right being waived prior to that determination, or of the right being lost by reason of a change in the tenant's or guarantor's financial position subsequent to that determination;

    c) it also gives proper effect to the language of the two subsections that the tenant's or guarantor's insolvency on the cash-flow or balance sheet basis is proved to the satisfaction of the court, where, in contrast, the Claimant's construction leaves those words otiose;

    d) whilst it may be cumbersome and expensive for a landlord to bring its own claim to obtain a prior judicial determination of insolvency, the landlord may rely on such a

determination in proceedings brought by a third party, in particular a creditor's petition; and in any event, since this is only one of a large number of separate events upon which a right of forfeiture arises, I do not consider that this objection carries any real weight.

45. In reaching my conclusions, I have had regard to the doubts expressed by Snowden J in the *Gas & Electricity Markets Authority* case as to the correct interpretation of a similarly worded clause in the supply licence. However, that case is ultimately of little assistance to me in determining the proper construction in this case, not least because the judge did not need to and did not in fact reach any conclusion on the correct interpretation of the clause. Moreover, the use of such a clause in an electricity supply licence granted by a regulator, a public or quasi-public body who may be entrusted to carry out an objective assessment of a licensee's financial position in determining whether it was insolvent on a cash-flow or balance sheet basis, is very different from its use in a commercial lease, under which a landlord could not reasonably be assumed to have been entrusted to carry out any similarly objective assessment.

46. Finally, if the matter goes further, I should refer to two matters relied upon by the Defendant which have not influenced my decision:-

    a) first, the Defendant has relied, as part of the factual matrix, on the fact that its most recent filed accounts prior to the date of grant of the Lease indicate that it was itself balance sheet insolvent; it contends that it cannot have been intended that the landlord's right of forfeiture on grounds of insolvency could arise without a prior judicial determination because it would then have been exposed to such forfeiture at the moment the Lease was granted; I consider that this point carries no weight because the Defendant was a SPV company formed for the very purpose of taking the Lease; the accounts in question are for the financial year ended 31 December 2017 and so do not reflect its financial position as it stood or might reasonably be anticipated to stand upon the grant of the Lease in January 2019;

    b) second, in his reply Mr Ballance belatedly put forward an argument that the provisions of clause 6.1.2 (d) which incorporated sections 122 and 123 of the 1986 Act applied only to UK registered companies who fell within the ambit of those sections, and not to unregistered companies, including companies incorporated in other jurisdictions, which fell outside their ambit; he prayed in aid the definition of "company" in the Lease, which, as it applied to clause 6.1, excluded unregistered companies; this point was not one which had previously been pleaded in the Defendant's statements of case, or identified in the Defendant's evidence in support of the application, and was only tangentially mentioned in Mr Ballance's skeleton argument; in short further written submissions which I allowed the Claimant to file in response to this point, objection was taken to it on the basis that it had not been pleaded or previously advanced, as well as to the substance of the point; in the circumstances, and without having heard fuller argument on the point, I have not taken it into account.

The second ground: had a reasonable time elapsed between service of the section 146 notice and service of the claim?

47. My conclusions on the first ground make it unnecessary for me to determine the second ground. However, I have heard full argument on the issues which arise under it, and it is

right that I should set out my conclusions and reasons on that ground in case this matter goes further.

(i) Factual context in which section 146 notice was served

48. It is necessary first to set out in more detail the factual context surrounding the service of the second section 146 notice as it appears from the evidence and correspondence before me.

49. As already set out above, prior to 6 November 2023, the Defendant's obligations under the Lease were guaranteed by the Dividing Company, then known as WeWork Companies LLC. That company also acted as guarantor of hundreds of other leases held by WeWork group companies in the US and internationally.

50. Although the parties are in dispute as to legal effect of the restructuring which took place on 6 November 2023, it is apparent on either party's case that the events had a material adverse impact on the covenant strength of the guarantor:-

   a) on the Defendant's case, as a result of the plan of division entered into by the Dividing Company on 6 November 2023, its guarantee obligations in respect of the Lease, together with 80 other leases in Australia, the Republic of Ireland and the UK, were allocated to the Resulting Company, a company whose only asset was an indemnity provided by the Surviving Company; the value of that indemnity was immediately undermined by the Surviving Company on the same day filing a petition for Chapter 11 relief;

   b) on the Claimant's case, the Dividing Company remained the guarantor notwithstanding the plan of division, but that company then sought Chapter 11 relief.

51. In her witness statement dated 23 August 2024 in opposition to the application, Alison Hardy, a partner of Ashurst LLP, the Claimant's solicitors, sets out what she says was the knock-on effect of these events to the Claimant. She explains that the Claimant's existing loan facilities were due to mature in April 2024, and it was already in negotiations to extend those facilities because it feared, in view of the precarious financial position of the WeWork group companies, that it would face difficulty in obtaining appropriate refinancing from alternative lenders. It was only able to negotiate an extension of the existing facilities on onerous financial terms which involved both the prepayment of £100 million of its debt, and the retention of £10.5 million in funds in a locked box account to stand as collateral against future obligations under the facility. In consequence of the events of 6 November 2023, which triggered the default provisions of its amended facility agreement entered into on 20 November 2023, it was also required to retain an additional £5.4 million within the locked box account, and all of its surplus rent receipts in a separate cash trap account. The overall effect of such requirements, at their peak in August 2024, was that aggregate sums of over £21 million, which would otherwise have been available to the Claimant as cash-flow for use in its business, were frozen within these accounts, to its obvious detriment.

52. Following service of its first section 146 notice on 9 November 2024, correspondence had ensued between solicitors acting for the Defendant, Stephenson Harwood LLP ("SH"), and Ashurst, for the Claimant. SH had set out in robust terms by its letter of 15 November 2023 why on the Defendant's case no right of forfeiture had arisen on the grounds alleged in the

first notice, and why, even if that were wrong, the Defendant could expect to obtain relief from forfeiture. It sought, on short notice, the Claimant's undertaking it would not attempt peaceably to re-enter the Premises, to which the Claimant agreed, initially only for a limited period, but subsequently, following service of the first claim, up to the trial of that claim.

53. The second section 146 notice was served on the Defendant shortly after 4pm on 20 December 2024, after the claim form in the First Proceedings had been served and a limited undertaking was already in place, which was extended the following day in the manner described.

54. That notice alleged that the Defendant was in breach both of clause 6.1.2 (d), by reason of the Resulting Company's inability to pay its debts within the meaning of section 123 (1) (e) and / or (2) of the 1986 Act, and by reason of its failure to obtain the landlord's consent to a replacement guarantor. It required the Defendant to remedy the breaches within a reasonable time so far as they were capable of remedy, and to pay compensation in money for the breach, as well as the Defendant's costs reasonably and properly incurred in connection with the preparation and service of the notice, to which the Claimant was contractually entitled under clause 4.22 (a). It stated that it was the Defendant's intention to forfeit the Lease if the Claimant failed to comply with it within a reasonable period.

55. No further communications took place between solicitors relating to the second section 146 notice before the Claimant issued its claim form in the Second Proceedings on 27 December 2024, and before the same was served on the Defendant, by e-mail to SH, shortly before midday on 28 December 2024.

56. Under clause 6.4.3 of the Lease, it was provided that whilst the Lease was vested in a WeWork tenant all notices had to be served on such tenant at its registered offices, with copies served on (amongst others) WWW Inc at 114 West 18th Street, New York (FAO Real Estate Legal Department), or such alternative address pf which the tenant notified the landlord from time to time. A point was initially taken by the Defendant that a copy of the notice had not been so served on WWW Inc at the New York address before the purported forfeiture of the Lease on 28 December 2024. However, there was nothing in this: WWC Inc had ceased to exist in consequence of the 2019 plan of division, and it follows that there can have been no continuing obligation to serve copy notices on that company; moreover, it is apparent that delivery of a copy notice on WWC Inc at that address was attempted on 28 December 2024 but failed because WWC Inc was no longer at the address and had provided no forwarding address. In any event, if the purpose of the notice provisions was to ensure that the WeWork group companies in the US were informed of any intended forfeiture of a WeWork tenant's lease, that was achieved by reason of the fact that a copy of the notice had been sent on 20 December 2024 to the e-mail address legalnotices@wework.com which had previously been provided.

(ii) The issues arising under the second ground

57. The Defendant seeks the summary dismissal or strike out of the claim on the basis that the Claimant has no real prospect of establishing at trial that a reasonable time had elapsed between service of the second notice and service of the claim form in the Second Proceedings.

58. It is common ground between the parties that:-

a) the Claimant was required to allow a reasonable time following service of the notice before exercising its right of forfeiture by the service of the claim form; if it did not, the purported forfeiture was invalid and so the claim must fail;

b) what is a reasonable time is a question of fact, which will vary in each case;

c) where the breaches were remediable, the reasonable time must be sufficient for remedying all the breaches alleged in the notice, subject to the exception recognised in the case of *Billson v Residential Apartments Ltd* [1993] AC 494;

d) if the breaches were irremediable, the reasonable time need be sufficient only to allow the Defendant to consider its position before a claim was brought against him, as that is explained in *Horsey Estates Ltd v Steiger* [1899] 2 QB 79.

59. It is also common ground between the parties that the second of the alleged breaches set out in the section 146 notice relating to the replacement guarantor was never properly characterised as a breach of covenant at all, and in consequence is no longer relied upon as a ground for forfeiture. It is senseless therefore to attempt to analyse whether it was a remediable breach or not, but the Claimant accepts that the Defendant was entitled to a reasonable time at least to consider whether the matters complained of amounted to a breach of covenant to which it should respond.

60. The following points are in issue between the parties:-

a) whether the breach of condition under clause 6.1.2 (d) was remediable or not; the Claimant contends it was not, the Defendant that it was;

b) if the breach was remediable, whether the time that elapsed between service of the notice and service of the claim form was reasonable for remedying it; the Claimant contends that it was, having regard to the *Billson* exception and on the specific facts of this case; the Defendant says not;

c) if it was irremediable, whether in any event the time that elapsed was reasonable to enable the Defendant to consider its position in relation to it, as well as the other alleged breach; the Claimant says it was, the Defendant not.

(iii) Was the breach remediable or not?

61. For the purposes of the present application I have to decide only whether the Claimant has real prospects of establishing that the breach was irremediable. This is a mixed question of fact and law, and if the Claimant has at least real prospects of success on the point, it is not suggested that I could or should determine the question on its merits.

62. The modern test for remediability is set out in Woodfall at paragraph 17.132 as follows:-

> "The test for remediability is whether the harm that has been done to the landlord by the relevant breach is, for practical purposes, capable of being retrieved within a reasonable time. Thus on the remediability issue the ultimate question for the court is: if the s. 146 notice had required the tenant to remedy the breach and the landlord had

then allowed a reasonable time to elapse to enable the tenant fully to comply with the relevant covenant, would such compliance, coupled with the payment of any appropriate monetary compensation, have effectively remedied the harm which the landlord had suffered or was likely to suffer from the breach?

"Ordinarily the breach of a positive covenant (whether a continuing breach or a once for all breach) will be capable of remedy. In the ordinary case, the breach of a promise to do something by a certain time can for practical purposes be remedied by the thing being done, even out of time.

"On the other hand, a once for all breach of a negative covenant may not be capable of remedy. It is, however, going too far to say that a breach of a negative covenant can never be capable of remedy."

This is derived from decisions of the Court of Appeal in *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] 1 Ch 340, per Slade LJ at 355B-C and 358C-E, *Savva v Hussein* (1997) 73 P&CR 150 per Staughton LJ at p. 154, and *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296; [2006] 1 WLR 201 per Neuberger LJ at [64] – [65].

63. The question whether the harm which has been caused by the breach is capable of being retrieved within a reasonable time may in the majority of cases, whether they involve the breach of a positive or negative covenant, be answered in the affirmative because the damage can either be reversed by restoring the situation to what it would have been had the covenant not been broken, and / or compensated for. However, it still remains the law that there are certain types of breaches which are by their nature incapable of remedy – the so-called stigma cases involving the use of premises for illegal or immoral purposes, and those involving unlawful assignment or subletting – where it is considered as a matter of law that the breach cannot be undone and the harm cannot be removed. In other cases, it is a question of fact whether the harm can be retrieved.

64. I was taken by Ms Bhaloo in her submissions to a passage in the judgment of Slade LJ in *Expert Clothing* where he noted a concession which had been made in that case by counsel for the landlord, David Neuberger, that a breach of a tenant's insurance covenant, ordinarily remediable, might be incapable of remedy at a time when the premises had already burnt down. In his judgment in *Akici* some twenty years later Neuberger LJ at [68] refers to the same example of a breach which although ordinarily remediable may on its facts be irremediable. I find the logic of this difficult to follow: although the premises may have burnt down nevertheless one might ask why the harm might not be remedied by the tenant either rebuilding the premises or paying compensation equal to the insurance monies which would have been paid out. The question whether such a breach is remediable cannot sensibly depend on whether the particular tenant has the resources to rebuild or pay compensation, for if that were so then the question whether an ordinary breach of a tenant's repairing covenant was remediable or not could open a factual inquiry in every case into the means and resources of the tenant.

65. In my judgment, the question whether the harm caused by a breach is retrievable in any case must be considered at a relatively high level of abstraction without reference to the means, ability or willingness of the tenant to remedy. It assumes a tenant is willing and able to remedy, and asks even if that is so, whether the harm can in fact be remedied within a reasonable time. The means, ability or willingness of the tenant to remedy instead may

fall to be considered further down the line, either (i) in assessing what is a reasonable time for the breach to be remedied, or in any event (ii) in considering whether and on what terms relief from forfeiture should be granted.

66. So, in the present case, in deciding whether the Claimant has real prospects of establishing that the breach of clause 6.1.2 (d) is irremediable, it is not correct in my judgment to take into account whether the Defendant was in fact able to remedy the breach within a reasonable time. Instead the focus of any factual enquiry is whether the harm caused by the breach could be retrieved assuming that steps could be taken, at the Defendant's behest, to return the Resulting Company to solvency by, for instance, a cash injection or debt for equity swap.

67. In that context, the Claimant's real complaint, as it seems to me, is that the damage caused by the Resulting Company's insolvency, in the context of the wider restructuring of the WeWork group companies, is incapable of remedy because it has resulted in an enduring stigma in the economic value of the reversion which is reflected in the more onerous terms of lending to which the landlord is now subject.

68. I have not been taken to any authorities in which any similar submission has been considered by the courts, so it may be that the point is a novel one. However it is not one which I consider is suitable for summary determination against the Claimant, as it depends in part upon questions of fact and of valuation evidence which are properly the domain of the trial judge.

69. Accordingly, for the purposes of this application, I proceed on the basis that the Claimant has at least a real prospect of establishing that the breach was irremediable

(iv) If the breach was irremediable, had a reasonable period elapsed for the Defendant to consider its position?

70. On this basis, I turn next to the question whether the four working days which elapsed between service of the notice and the claim were a reasonable period for the Defendant to consider its position as regards both alleged breaches as they were set out in the notice, assuming the insolvency breach to be irremediable.

71. It was common ground that *Horsey v Steiger* remains the leading authority. In that case, a landlord had served notice under the predecessor to section 146 alleging that the tenant was in breach both of a condition against entering into liquidation, and in breach of its repairing covenants under the lease. The landlord had then purported to forfeit the lease by service of possession proceedings some two days later. The Court of Appeal held the time which had been allowed following service of the notice was insufficient and the action not maintainable. In his judgment, Lord Russell CJ set out the reasons for which a reasonable time was allowed in the following well-known passage at pp. 91–2:-

> "The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what, compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him."

72. There is no hard and fast rule as to what is the reasonable time to be afforded to the tenant for considering its position; it is a question of fact in every case. In *Civil Service Co-Operative Society Ltd v McGrigor's Trustee* [1923] 2 Ch 347, Russell J rejected a tenant's submission that 14 days was an unreasonably short period for these purposes. In *Fuller v Judy Properties Ltd* (1992) 64 P&CR 176, the Court of Appeal considered on the facts of that case that a tenant's claim for relief from forfeiture brought five days (of which three were working days) after service of a section 146 notice when the landlord was already in possession of the premises was not too late under the law as it was then (wrongly) understood.

73. The Defendant's case, in essence, is that the Claimant has no real prospects of establishing at trial that the period of under four working days, over the Christmas period, was a reasonable period for the Claimant to consider its position in the manner contemplated in *Horsey*. In circumstances where the breach was one which concerned the financial position of the Resulting Company, as guarantor, that necessarily involved liaising with the Resulting Company and other WeWork group companies in the US, communicating across different time zones. The Defendant's solicitors were, to the knowledge of the Claimant, over that period already busily engaged in dealing with not only the First Proceedings but also two other forfeiture claims relating to other WeWork premises in the UK let by different landlords to associated WeWork companies where similar breaches arising out of the restructuring were alleged. Having regard to those matters, it was wholly unrealistic to contend that the period allowed was a reasonable one (and not simply a sufficient one) for the Defendant and its US associates to give proper consideration of the relevant matters:-

   a) whether the insolvency breach was made out, a complex matter which could require input from expert accountants; and whether the alleged breach relating to the replacement guarantor provisions of the Lease had any proper legal foundation;

   b) whether the breach was capable of remedy, and if so what steps were required to remedy it, again a matter potentially requiring the assistance of expert accountants;

   c) what other defences were available to the Defendant, including one of waiver;

   d) what if any compensation may be payable to the Claimant for breach of condition;

   e) whether the Defendant should bring its own pre-emptive applications either for injunctive relief to restrain any physical re-entry, or for relief from forfeiture, and if so on what terms.

74. The Claimant contends that on the facts of this case the period in question was reasonable, but in any event that is a matter on which I cannot reach any firm conclusion without the facts being properly interrogated at trial. Contrary to what the Defendant says, the crucial staff of the WeWork group companies in the US and their advisers, together with the Defendant's own staff and advisers in the UK, could be expected to be working outside business hours and on non-working days on this matter of the utmost importance. Moreover, the Defendant and the US group companies could be expected already to have considered their position, in the context of the restructuring itself which was a pre-orchestrated scheme to reallocate guarantee obligations to a company with no assets, and in the context of the first notice and First Proceedings which had followed. That was

evident, for instance, in the fact that the Defendant had already sought and secured undertakings from the Claimant not to effect physical re-entry.

75. In assessing whether a reasonable time had elapsed, I am doubtful whether it is correct on either side to rely upon particular matters which subjectively affected the Defendant's ability to consider its position within any particular timescale, rather than to consider the matter objectively by reference to the time which a tenant in the position of the Defendant ought reasonably to have been afforded to consider its position. Thus, I do not think that it is a relevant consideration that SH were pressed during the relevant period dealing with the other forfeiture claims, but nor do I think it relevant to ask whether the Defendant's advisers in the UK and the US were in fact in the office and able to deal with the matter during weekend or bank holidays over the Christmas period. Instead, I consider that the question should properly be assessed by reference to the period of working days which elapsed when the relevant staff and advisers of the Defendant could reasonably be expected to be available.

76. I am not persuaded that I can conclude summarily that the period allowed was unreasonably short. The Defendant had to be afforded a reasonable period to consider its position, but it was not having to do so out of the blue, or in the abstract, but in the context of the restructuring which had taken place on 6 November 2023 involving the allocation of the guarantee obligations to the Resulting Company with the benefit only of an indemnity from the Surviving Company which then filed immediately for Chapter 11 relief, and in the context of the first section 146 notice and forfeiture claim the subject of the First Proceedings, in respect of which the Defendant had already taken advice and secured undertakings. Whether in that context the time allowed was reasonable is a matter which would require further interrogation at trial.

(v) If remediable, had a reasonable period elapsed for the breach to be remedied

77. Finally, I consider the position if the breach was remediable. On the basis of my foregoing conclusions, this question does not arise. However, I shall deal shortly with it.

78. In my judgment, it is not realistic to argue that the four working days which elapsed between service of the notice and service of the claim form was a reasonable period within which to remedy the breach, given the steps which would have been necessary to procure the requisite cash injection or debt for equity swap.

79. Ms Bhaloo however urged upon me that this was a case, by way of exception to the usual rule, where the Defendant had made clear by its words or conduct that it had no intention of remedying the breach within a reasonable time, so entitling the Claimant to proceed to forfeit without allowing it any further time to remedy.

80. As authority for that proposition Ms Bhaloo relied on the Court of Appeal decision in *Billson v Residential Apartments Ltd* [1992] AC 494, a case where a tenant in breach of covenant had carried out major works of alteration to convert the premises from furnished accommodation into self-contained residential flats without its landlord's consent. Prior to taking an assignment of the lease, the tenant had been warned by the landlord that it should not undertake any alterations without a formal licence in place, but following the completion of the assignment in early May 1989 it had nevertheless proceeded at great speed with the conversion works without any licence and in the face of the landlord's

objections. Following service of a section 146 notice on 4 July 1989 requiring the breach to be remedied within a reasonable time so far as capable of remedy, the tenant continued to press on with the works, leading the landlord to conclude that it had no intention of complying with the notice, and on 18 July 1989 it peaceably re-entered the premises. The court granted the landlord's claim for a declaration that the lease had been validly determined, notwithstanding the short time which had elapsed between service of the notice and the re-entry. Sir Nicholas Browne-Wilkinson V-C said this, at p. 308A-C:-

> In my judgment, even if the breach was capable of remedy the defendants' actions in continuing to press on with the work in defiance of the warnings and in defiance of the section 146 notice demonstrated that the defendants had no intention to remedy the breach at all. It is to be noted that the section 146 notice itself does not have to limit a time within which the breach is to be remedied. All that the statute requires is that a reasonable time to remedy the breach must elapse between service of the notice and the exercise of the right of re-entry or forfeiture. If the actions of the lessee make it clear that he is not proposing to remedy the breaches within a reasonable time, or indeed any time, in my judgment a reasonable time must have elapsed for remedying the breaches once it is clear that they are not proposing to take the necessary steps to remedy the breach but are committing further breaches. If this were not the case, what would the landlord's rights be if the defendant continued to commit the very breaches complained of by the section 146 notice after the date of its service? If he were to take proceedings to restrain further breaches of covenant, he would subsequently be faced with the contention, (such as that advanced by the defendants based on the threat of proceedings in the letter dated 30 June 1989) that the landlord had waived his right to forfeit by seeking to enforce the covenants. The only effective remedy of a landlord, faced with intransigent behaviour such as that of the defendants in the present case, must be to forfeit the lease on the ground that whatever time was allowed the defendant was showing no intention of remedying the breach at all.

81. It was clear in the present case, Ms Bhaloo argued, that the Defendant had no intention or means of remedying the breach within any reasonable period. The breach arose in consequence of a deliberate design to re-allocate the guarantee obligations of the WeWork group in respect of its 81 international leases to a company with no real assets and no income stream, as part of a major corporate restructuring in the United States. In their letter of 15 November 2023 SH had given no ground that any of this might be reversed and had instead maintained that if, contrary to the Defendant's case the Claimant could establish its right to forfeiture in the First Proceedings the Defendant would be entitled to relief from forfeiture without any proposal for any remedial steps. Moreover, the Defendant had adduced no evidence to demonstrate how it could possibly have remedied the breach within a reasonable time.

82. For the Defendant, Mr Ballance submitted that the Defendant was seeking to extend the *Billson* exception far outside its limited ambit. As was clear from the Vice Chancellor's judgment cited above, the court had concluded that the landlord was discharged from the requirement to allow the tenant any further time to remedy the breach not merely because of the tenant's past actions and failure to heed the landlord's warnings but also because it was pressing ahead and committing further breaches. There was nothing comparable on the facts of the present case.

83. In my judgment, it would not be appropriate for me to determine the proper scope of the *Billson* exception on an application for summary judgment, and where the point is academic in light of my other findings. It is sufficient to say that I consider that the Claimant's arguments are not fanciful and are more than merely arguable. Whether the exception properly applies is matter which, other things being equal, I consider would properly fall to be determined in the light of the facts as they are found at trial.

The alternative application for strike out of paragraph 33 of the Reply and Defence to Counterclaim

84. It is unnecessary for me to determine this alternative application in light of my conclusions on the first ground above. In view of the fact that it is really a question of case management which no longer arises, I see no purpose in doing so.

Disposal

85. I have concluded that, as a matter of its proper construction, the breach of condition relied upon by the Claimant in its second section 146 notice required the Resulting Company's inability to pay its debts on a cash-flow or balance sheet basis to have been proved to the satisfaction of the court prior to service of the notice. That constituted the event which would have triggered the right of forfeiture. As there has been no prior determination by the court of such inability, the right had not been triggered. On that basis alone, I accede to the Defendant's application and shall grant summary judgment dismissing the claim.

APPENDIX: CLAUSE 6.1 OF THE LEASE

Re-Entry

6.1.1 If any event specified in Clause 6.1.2 occurs the Landlord may at any time afterwards re-enter the Demised Premises or any part of them in the name of the whole and this Lease will then immediately determine.

6.1.2 The events referred to in Clause 6.1.1 are as follows:

(a) any rent reserved remaining unpaid for 21 days after becoming due and payable whether formally demanded or not;

(b) the Tenant failing to comply with any obligation which it has undertaken or any condition to which it is bound under this Lease;

(c) in respect of the Tenant or Guarantor, the appointment of a Law of Property Act 1925 receiver, administrator or court appointed receiver or other receiver or similar officer over or in relation to the whole or any part of his/ its undertaking, property, revenue or assets or entering into an arrangement, scheme, moratorium, composition or similar arrangement of any nature with its creditors;

(d) in respect of the Tenant or the Guarantor the appointment of a liquidator or administrator or it or its shareholders passing a resolution for winding-up or the Tenant or the Guarantor being unable to or deemed unable to pay its debts within the meaning of sections 122 or 123 of the 1986 Act, or the Tenant or Guarantor summoning a meeting of its creditors or any of them under Part 1 of the 1986 Act or allowing an application for an administration order in respect of it to be filed in court or a receiver or administrative receiver for it being appointed;

(e) the Tenant or the Guarantor (if an individual) having a receiving order made against him or becoming bankrupt or entering into a composition with his creditors or being unable to pay his debts within the meaning of sections 267 and 268 of the 1986 Act or an interim order being made against him under Part VIII of the 1986 Act; and

(f) any corporate action, legal proceedings or other formal procedure in the nature of insolvency action is taken in relation to:

(i) a suspension of payments, a moratorium of any indebtedness, winding-up, dissolution, or administration in respect of the Tenant or Guarantor;

(ii) a compromise arrangement with the creditors of the Tenant or Guarantor as a whole or a substantial group of them (which is not connected to a commercial negotiation arising from a dispute);

(iii) the appointment of a liquidator, receiver, administrative receiver, administrator, compulsory manager or other similar officer in respect of the Tenant or Guarantor or any of its assets (whether out of court or otherwise);

(iv) the institution, by a regulator, supervisor or any similar official with primary insolvency or rehabilitative jurisdiction over the Tenant or Guarantor in the jurisdiction of its incorporation or organisation or the jurisdiction of its head or home office, a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation by the Tenant or Guarantor or such regulator, supervisor or similar official; or

(g) is the subject of any order or event occurring in any jurisdiction that is analogous to or has a similar effect or result to any of the events described in Clauses 6.1.2 (c) to 6.1.2 (f) including, without limitation, if any corporate action or legal proceedings or other statutory procedure is taken in relation to US bankruptcy proceedings in respect of the Tenant and/ or Guarantor,

provided that sub-clauses 6.1.2 (c) to 6.1.2 (g) shall not apply to any action or winding up petition which is frivolous or vexatious (including, without limitation, a claim and/ or petition for a de minimis debt or a collection action contested in good faith on its merits) or an administrative oversight, and is discharged, stayed or dismissed within 14 days of the Tenant becoming aware that it has been commenced

and reference to the Tenant and/ or the Guarantor where he/ it is more than one person or company shall be to any one of them."