Neutral Citation Number: [2022] EWHC 1162 (Ch)

Case Nos: **E00YE350 and F00YE085**

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: 18 May 2022

Before :

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

- -

Between :

In the Possession Proceedings

AXNOLLER EVENTS LIMITED

Claimant

and

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE

Defendants

In the Eviction Proceedings

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

- -

- -

William Day and Niraj Modha (instructed by **Stewarts Law LLP**) for the **Claimant (Possession) and the Defendant (Eviction)**
Mrs Nihal Brake for herself, Mr Andrew Brake and Mr Tom D'Arcy

Hearing date: 27 April 2022

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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 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 10:15 am on Wednesday 18 May 2022.

HHJ Paul Matthews :

Introduction

1. On 25 February 2022 I handed down judgment in these two related claims, under neutral citation numbers [2022] EWHC 365 (Ch) and [2022] EWHC 366 (Ch). The first (the "Possession Claim") was a claim against Mr and Mrs Brake by Axnoller Events Ltd ("AEL") for, amongst other things, possession of West Axnoller Farm ("the Farm"), near Beaminster in Dorset (this includes the main house, "the House", and associated equestrian facilities). I held that AEL was entitled to possession.

2. The second ("the Eviction Claim") was a claim against AEL's parent company ("Chedington") by Mr and Mrs Brake and Mrs Brake's son Tom D'Arcy (together, "the Brakes") for, amongst other things, possession of a cottage near the House, known as West Axnoller Cottage ("the Cottage"), based on what was alleged to be an unlawful eviction of them by Chedington. I held that the Eviction Claim failed. Chedington is a company in which Dr Geoffrey Guy and his wife Kate Guy are shareholders and directors, and I therefore refer to them and their companies collectively as "the Guy Parties".

3. There was disagreement about the appropriate form of the order, at least in the first case. After considering written submissions, I made orders on 3 March 2022, in the first case that the defendants give up possession of the Farm forthwith (as to which see [2022] EWHC 459 (Ch)), and in the second case that the claim be dismissed. Each order provided for a hearing of consequential matters on a date which was then agreed between the parties, namely 31 March 2022. As I say below, however, the date has been adjourned more than once, so that the hearing in fact took place only on 27 April 2022.

Writ of possession

4. On 14 March 2022 AEL applied for, and on 15 March obtained, a writ of possession based on my order of 3 March in the Possession Claim. Fourteen days' notice of eviction was given at the property on 15 March, to take place on 29 March 2022. On 16 March 2022, the Brakes issued an application for a stay of the possession order. They also informed the court that they intended to apply direct to the Court of Appeal for permission to appeal. On 18 March 2022 I dismissed the application for a stay for written reasons given ([2022] EWHC 622 (Ch)). On 21 March 2022 Arnold LJ, sitting in the Court of Appeal, granted a stay of my possession order to the Brakes over until 4 PM on 21 April 2022. The reasons given included that I would be considering the question of permission to appeal on 31 March, although, as I have said, the Brakes had said that they intended to apply direct to the Court of Appeal.

5. AEL applied to the Court of Appeal to set aside the stay granted by Arnold LJ, and the hearing of that application took place on 7 April 2022, together with the Brakes' applications for permission to appeal. On that day Arnold LJ varied the stay to provide that it ceased to have effect immediately, and that notice of eviction could be given straight away. In addition, he refused permission to appeal in the Possession Claim, but granted permission to appeal

in the Eviction Claim. Further notice of eviction was in fact given. 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. The Guy Parties say that the Brakes did not inform them that they had left, but I do not need to decide whether that was so.

Application for stay

6. On 21 April 2022, the Brakes lodged with the court an application in Form N244 for a stay of "the order of 3 March 2022" made in the Eviction Claim. There was some correspondence about whether the application should be made to the High Court or the Court of Appeal, and as a result the fee for the application was paid only on 26 April 2022. This application had not been listed for hearing by the time of the consequentials hearing on 27 April 2022.

Application for interim injunction

7. Also on 21 April 2022, Chedington and AEL together issued an application in Form N244 in both the Possession Claim and the Eviction Claim, for an interim injunction to restrain the Brakes from trespassing on the land at the Farm and at the Cottage. This was supported by a witness statement from Dr Guy dated 20 April 2022. I was told that this application had been served by email on the Brakes on that day, though Mrs Brake told me at the hearing that she was not aware of this, and that she knew about it only on Monday 25 April 2022, when the skeleton argument of the other side had been sent to her. I do not need to resolve that question.

Third party debt order

8. Before I turn to the consequentials hearing itself, there are two further matters I need to mention. The first is that, in *Brake v Guy* [2021] EWHC 671 (Ch), the trial of a case concerning email accounts and electronic files held within those accounts, and known as the "Documents Claim", I had given judgment in favour of the Guy Parties on 25 March 2021. The Brakes sought and obtained permission to appeal, and the appeal was heard in February 2022. The Court of Appeal handed down its judgment on 2 March 2022 (see [2022] EWCA Civ 235), dismissing the appeal. The Brakes were ordered to pay the Guy Parties' costs, assessed in the sum of £70,000.

9. On 17 March 2022, the Guy Parties applied to the Court of Appeal in the Documents Claim for an interim third party debt order in relation to a debt (a pension policy sum) due from a third party to Mr Brake. The draft order submitted to the court on 17 March suggested a hearing for further consideration in Bristol not before 28 April 2022. However, it was not until 4 April 2022 that Lewison LJ considered and made that interim third party debt order. The Court of Appeal office sent the order to me in Bristol. However, the hearing for further consideration was not then listed. I come back to this below.

The Brakes' address for service

10. The second matter I should mention now is the question of the Brakes' address for service. The House was previously their address for service in these proceedings. As I have said, however, the Brakes vacated the House on 24 April 2022. They do not act by solicitors, but in person, and yet have not so far supplied the Guy Parties (or the court) with their new address for service. Mrs Brake told me that they had moved from the House to what they called "holiday accommodation" which, she said, by its very nature was not long-term, and the address of which she has declined to disclose.

The consequentials hearing

11. The consequentials hearing was originally fixed by agreement for 31 March. However, shortly before that date, Mrs Brake developed a problem with one eye, and was unable to read. I therefore proposed to move the hearing to the following week, though in fact it then turned out that there would be a hearing in the Court of Appeal on 7 April, and so the parties agreed to a further adjournment to 27 April 2022. On 21 April, Mrs Brake sought a further adjournment, which however I refused, for reasons given, and the hearing duly went ahead on 27 April 2022. Mrs Brake represented the Brakes. The Guy Parties were represented by William Day (in relation to the Eviction Claim) and Niraj Modha (in relation to the Possession Claim). They were the junior counsel in the trials of those respective claims.

12. The agenda suggested by the Guy Parties for the consequentials hearing accordingly included the following:

    1. The Brakes' address for service;

    2. The costs of the Eviction Claim;

    3. The costs of the Possession Claim;

    4. Directions as to the trial of quantum issues in the Possession Claim;

    5. The application for an interim payment on account of mesne profits in the Possession Claim;

    6. The Brakes' stay application;

    7. The question of the chattels in the House and the state of the House;

    8. The Guy Parties' injunction application;

    9. The Guy Parties' third party debt order application.

13. As to these matters, I decided that nos 6 and 9, the Brakes' stay application and the Guy Parties' third-party debt order application, should be heard on Tuesday 10 May 2022, and I gave directions for evidence to be served (in fact, it was subsequently adjourned further, but I do not deal with that now). I heard argument and decided no 2, the costs of the Eviction Claim, giving oral reasons. I heard the parties on no 4, directions as to the trial of quantum issues in the Possession Claim, and gave appropriate directions there and then. There

was some discussion of no 7, the question of the chattels in the House and the state of the House, but I was not required to make any decision on that and did not do so. Item 8 was not proceeded with on that day. I stayed it with liberty to restore. That left nos 1, 3 and 5, namely the Brakes' address for service, the costs of the Possession Claim, and the application for an interim payment on account of mesne profits in the Possession Claim. I heard argument on these matters, but reserved my judgment, as I wished to review the underlying materials further before deciding. This judgment gives my decisions on these three issues, and the reasons for those decisions.

Address for service

14. I begin with the question of the Brakes' address for service. The relevant procedural rules in the CPR are these:

> "6.23. (1) A party to proceedings must give an address at which that party may be served with documents relating to those proceedings. The address must include a full postcode unless the court orders otherwise. …
>
> (2) Except where any other rule or practice direction makes different provision, a party's address for service must be –
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> […]
>
> (c) where there is no solicitor acting for the party –
>
> (i) an address within the United Kingdom at which the party resides or carries on business; …
>
> […]
>
> 6.24. Where the address for service of a party changes, that party must give notice in writing of the change as soon as it has taken place to the court and every other party."

15. Mrs Brake told me that she did not want Dr Guy or those associated with him to know her new physical address. She was prepared to disclose it to the Guy Parties' solicitors, and to the court, but only on the basis that it was not passed to Dr Guy. The Guy Parties said that that was unworkable and would increase costs (for example, because of the need for redaction of communications to and from the Brakes which were passed to Dr Guy). Mrs Brake confirmed that the Brakes were content to be served by email. The Guy Parties pointed out that under the rules sometimes personal service was needed.

16. The first question is whether the rules actually require a physical address, or whether the supply of an email address is sufficient to comply with them. In *Smith v Marston Holdings Ltd* [2020] EW Misc 23 (CC), a county court case, the applicant for pre-action disclosure gave as his address a physical address which was demonstrated to be a shop where postal mail could be received and held until called for; in other words, an accommodation address. It was submitted that this did not comply with the rules.

17. I considered the wording of CPR r 6.23, and the comment in the 2020 White Book at paragraph 6.23.1 as follows:

> "It should be noted that where a solicitor's or European lawyer's address is not given under (2)(a) or (b) the address must be an address within the UK or EEA state at which the party resides or carries on business. The precise wording of this rule is important because on occasions defendants attempt to give a PO box address as an address for service. However, a person cannot 'reside' at or 'carry on business' at a PO box although such a business might be carried on by using such a PO box address. In the circumstances a PO box would not be a valid address for service under that rule."

18. I then said this:

> "27. I respectfully agree with the reasoning in this comment. The use of a post office box number or accommodation address, where the person concerned neither resides not [sic] carries on business, does not comply with the rule. This is yet further unacceptable behaviour by the applicant. Mr Edwards said that the consequence was that the court might strike out the proceedings. There is of course a power in CPR rule 3.4 to strike out a statement of case where there has been a failure to comply with a rule: see rule 3.4(2)(c). But an application notice is not a statement of case: see the definition in CPR rule 2.3(1). On the other hand, the court clearly has general management powers under rule 3.1, including the power to stay the whole or part of any proceedings: see rule 3.1(2)(f). In an appropriate case, that might be a suitable sanction, until a compliant address were provided. But in circumstances where I have decided on other grounds to refuse the applications as totally without merit, it is not necessary to take the matter further, apart from recording this further example of bad litigation practice."

19. I adhere to that view. But, if you cannot 'reside' at or 'carry on business' *at* a PO box, then by parity of reasoning an email address will not satisfy the rules either, because you cannot reside or carry on business *at* such an address. Whether the rules should continue to require a physical address, or whether an email address should be considered sufficient for service, are not matters for me, but (if for anyone) for the Rules Committee. I must apply the procedural rules as I find them. As the Guy Parties say, there are cases where personal service is needed, and a person's place of residence or business is a good starting point to locate that person.

20. The next question is whether the court can dispense with or qualify the requirement to provide a physical address, for example by directing that it be not disclosed to someone else. In *E Group Ltd v Baker* [2008] EWHC 2349 (TCC), the defendant was acting in person, and frequently complained that she had not received documents relating to the litigation. Coulson J (as he then was) said this:

> "4. Following a number of delays in the early life of the case, on 12th February 2008 Ramsey J made an order that:

> 'The address provided to the court today by the defendant is the proper address for service on the defendant, such address not to be disclosed to a third party without an order of the court.'
>
> This was a highly unusual order, but it was designed to ensure that the claimants knew when and where they could serve documents on the defendant, so as to avoid the difficulties that were being created by the defendant and her persistent claims that she had not received documentation."

21. Whilst that decision recognises the power of the court to withhold a party's address from a *non-party*, it does not say anything about a power to withhold the address from a *party*, who (as the judge makes clear) will wish to know where to serve the other party or parties. The court's powers to disclose or withhold information it holds to others are governed by CPR rules 5.4A to 5.4D.

22. In relation to non-parties, the relevant rule is CPR rule 5.4C, which materially provides:

> "(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
>
> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing).
>
> […]
>
> (2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.
>
> […]
>
> (4) The court may, on the application of a party or of any person identified in a statement of case –
>
> (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
> (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
> (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
> (d) make such other order as it thinks fit.
>
> […]."

23. The court's power in relation to withholding information from other *parties* is however contained in CPR rule 5.4B, which relevantly provides:

> "(1) A party to proceedings may, unless the court orders otherwise, obtain from the records of the court a copy of any document listed in paragraph 4.2A of Practice Direction 5A.
> (2) A party to proceedings may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party or communication between the court and a party or another person."

24. The rule distinguishes between (1) obtaining a copy of another document of a certain kind, listed in PD 5A para 4.2A, including statements of case, application notices, acknowledgments of service, statements of costs, and various other kinds of notice, and (2) obtaining copies of other documents and communications. In relation to (1), the default rule is in favour of disclosure, whereas in relation to (2) it is in favour of withholding. But in either case it is the court that must decide in case of any dispute.

25. I add two comments for the sake of completeness. First, it is clear that the provisions of rule 5.4C (at least) are not exhaustive of the inherent power of the court to make information it controls available in order to advance open justice (*Cape Intermediate Holdings Ltd v Dring* [2020] AC 629). Nevertheless, it is still *the court* that makes the decision. Secondly, although in family proceedings the basic rules about parties providing an address for service (FPR rules 6.26 and 6.27) are in substance identical to those in CPR rules 6.23 and 6.24, the rules about disclosure of information held by the court to other *parties* are quite different (see FPR rule 29.1 and Form C8). I therefore need not and do not consider the position in family cases, where it is common for parties to apply (and to be permitted) to withhold their addresses from other parties.

26. Accordingly, in my judgment it is clear that the court in civil proceedings has power to withhold the address of one party from another party if it considers it right to do so. It is possible to imagine circumstances where this might be appropriate. For example, suppose one party has made threats to hurt or even kill another party, and the latter has gone into hiding and then seeks an injunction against the former. That is an extreme case, but it illustrates the point. There has to be some sufficiently strong countervailing factor to justify withholding a party's address for service from another party. The question for me is whether the Brakes can show a sufficient justification for the court taking such a step here.

27. In my judgment they cannot. There is no evidence of any threat by Dr Guy or his associates to cause any unlawful harm to the Brakes at all. There is no suggestion (and certainly no evidence to support such a suggestion) that Dr Guy has any intention of attending at or picketing her place of residence. Mrs Brake did not suggest any reason why Dr Guy would be at all concerned to do so. The fact is that Mrs Brake simply does not want Dr Guy to know where she lives. But, in my judgment, that is not good enough. Accordingly, the Brakes must file their (physical) address for service, complying with rule 6.23, within seven days of the date of the handing-down of this judgment, and must

update it as required by rule 6.24, until these proceedings (including any appeals) are concluded.

Costs of Possession Claim

28. The next matter is that of the costs of the Possession Claim. The Brakes accept both that they lost the action and that AEL was the successful party. They do not in principle oppose an order that they pay AEL's costs. However, they do resist AEL's application for an order that costs should be assessed on the indemnity basis instead of the standard basis. The main differences between the two bases are that (1) assessment of costs on the indemnity basis does not need to take account of proportionality (as it does on the standard basis), and (2), in case of any doubt as to the reasonableness of incurring costs or their amount, that doubt is resolved in favour of the receiving party (instead of the paying party, as it is on the standard basis).

29. There are many authorities dealing with the choice of basis of assessment. Two recent decisions in the Court of Appeal are *Excalibur Ventures v Texas Keystone & Others (No.2)* [2017] 1 WLR 2221 and *Whaleys (Bradford) Ltd v Bennett* [2017] EWCA Civ 2143, both of which make clear that the standard basis of assessment is "the norm" and that costs on the indemnity basis are to be awarded only when there is some conduct which takes the case "out of the norm". AEL referred me to passages in the even more recent judgment of Hildyard J in *Hosking v Apax Partners Ltd* [2019] 1 WLR 3347. In that case the judge discussed the kinds of factors that might take a case "out of the norm".

30. He said this:

> "42. The emphasis is thus on whether the behaviour of the paying party or the circumstances of the case take it out of the norm. The merits of the case are relevant in determining the incidence of costs: but, outside the context of an entirely hopeless case, they are of much less, if any, relevance in determining the basis of assessment.
>
> 43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are (1) the making of serious allegations which are unwarranted and calculated to tarnish the commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims."

31. In seeking costs on the indemnity basis, AEL says that the Brakes invented allegations during the litigation which made it unnecessarily complex and increased both the length and cost of the proceedings. It says the first references to the 2015 Assurances appeared nearly 5 years after they were supposed to have been given. It says that the case on the 2017 Promise was also contrived. It says that Mrs Brake made up evidence as she went along in

order to support their misconceived case. It says that this is not a case of faulty recollection, misunderstandings, or a difference of interpretation or emphasis. Instead, it says it was a case based on a web of lies. Finally, it says that all these inventions meant that AEL lost four trial dates or windows, and that without the fabricated defence by the Brakes, the claim would have been determined at the first trial date in January 2019, at a fraction of the cost.

32. In addition to these points, AEL also relies on three further features of the case. First, it says that the Brakes deliberately misled DJ Walsh at hearings in Yeovil on 20 March 2019 and 18 December 2019, by permitting counsel to tell him that they did not have "millions of pounds" as part of a submission that they had nowhere else to live, whereas in fact at that time they had more than £2 million in their bank accounts. The relevant part of the transcript of the first hearing (at which Mrs Brake was present in court) shows that DJ Walsh asked the Brakes' counsel, Daisy Brown, whether there was anything else that she wanted to say to him, and that counsel then said this (at page 76 lines 23-27):

> "I do not know if you want me to address you on some fairly wild allegations about whether or not we have millions of pounds and we have another property hidden away because we do not and there is no evidence that there is another property. I do not think they are alleging that we do actually have another property."

33. At the hearing on 18 December 2019, Mrs Brake was not in court, and the Brakes were represented by Stephen Davies QC, as Daisy Brown was unwell. The relevant part of the transcript of that hearing (at pages 31-33) shows that DJ Walsh specifically raised with Mr Davies QC the question whether he had been misled at the earlier hearing because as he now understood it the Brakes had in fact had the benefit of a "gift" from Saffron Foster of £2.6 million. Mr Davies QC confirmed that this money had been paid over in the six months ending autumn 2017, but he said that he could not take the matter any further. The judge referred specifically to the passage cited above from the transcript of the earlier hearing, and Mr Davies QC thanked him "for flagging it because that means I can take it back … and we can do a bit of archaeology there." So far as I am aware, the matter was not however referred back to the judge thereafter.

34. Secondly, it says that Brakes conducted an aggressive and hostile press campaign against the Guy Parties. Thirdly, it says that the conduct of the Brakes since judgment was handed down has involved multiple attempts to adjourn or obstruct the consequentials hearing, and also continued occupation of the House despite the possession order, ending only a few days ago, on Sunday 24 April 2022, just before the expected visit of High Court enforcement officers.

35. In addressing me at the hearing, Mrs Brake gave explanations in relation to most of these points. First, she said that in my judgment I had held that the allegations of the 2015 Assurances were new (in the pleadings) in 2020, but she said that they had been aired during the early hearing before DDJ Hebblethwaite on 17 January 2019. Secondly, she said that she, like other

parties in litigation, had put forward the case she believed in, adducing the evidence they thought supported it. Thirdly, she said that the Possession Claim could never have been tried in January 2019, when only one day was set aside. So, it had to be adjourned in any event. She said the second adjournment, in February 2020, arose because the Guy Parties repleaded their case at the end of January 2020. Then there was Covid in 2020. Lastly, the final adjournment, in April 2021, arose because the Brakes' counsel gave up the case not long before trial. Fourthly, she said that, with the exception of the episode of the parking ticket appeal, she had believed that the evidence she was giving was the truth. Sixthly, she said that up until the trial the Brakes had won every round of the Possession Proceedings. So, this did not look like an indemnity costs case. It was not a hopeless case. Seventhly, she pointed out that the Brakes did not have access to their emails when they originally pleaded their case, so that, once they had sight of them, they remembered relevant matters which needed to be pleaded. Eighthly, she told me that junior counsel changed in early 2019, and that also might explain why their case needed to be repleaded.

36. Then she turned to the further allegations of misleading the court, conducting a press campaign against the Guy Parties, and failing to leave the House after the possession order was made. As to the first, Mrs Brake told me that their junior counsel at the hearing in March, Daisy Brown, had seen the witness statement made by Saffron Foster dated 20 February 2019 in which she said that she had given the Brakes £2.6 million out of the proceeds of sale of Sarafina, and indeed had had a hand in drafting it. It was inconceivable that she, as a truthful and straightforward person, would misrepresent the position to the court. Mrs Brake said that this was a "fudged paragraph", essentially about "wild allegations about North Dibberford [Susan Maslin's property]", rather than about the money. In relation to the later hearing, in December 2019, she said that Mr Davies QC, representing the Brakes in the absence of Ms Brown, did not know what to say because he had not known what had gone on at the hearing in March.

37. As to the second allegation, concerning the alleged press campaign, Mrs Brake told me she used to pay Lacings, a reputation management company, because she did not know how to handle the press. She said Dr Guy used a similar company called Slate Communications. However, she said that she did not get involved in any campaign. She accepted that both sides had reputation management firms working for them and the press took an interest one way or another at various points. As to the third allegation, based on the conduct of the Brakes since judgment was handed down and the failure to comply with the possession order, Mrs Brake did not make any specific submissions that I have noted or found in the transcript.

38. In reply, Mr Modha made a number of short points. The first one was that the trial fixed for February 2020 was lost because disclosure had to be redone, and the claimant took the opportunity to re-amend its particulars of claim. The trial in April 2021 was not lost because Mr Davies QC withdrew, because he was never instructed in the possession trial. He said that the decision not to instruct counsel for that trial was a conscious decision taken by the Brakes themselves.

Secondly, Mr Modha said that there were clear references in the possession judgment to Mrs Brake knowingly telling falsehoods. Thirdly, the interim successes of the Brakes were based on what he called a fundamentally dishonest case, and rested on an incomplete picture of the facts, whereas the court obtained a complete picture only at the trial, *ie* after disclosure and cross-examination. Fourthly, Mr Modha said that the witness statement of Saffron Foster in the insolvency proceedings, which referred to the "gift" to the Brakes, had not been referred to in open court and so could not be deployed at the hearing in March. But the real issue was whether the Brakes had the funds in 2019 to be able to obtain alternative accommodation, and the judge was misled into thinking that they had not. Fifthly, the misrepresentation to the judge was never corrected. Sixthly, on instructions, counsel said that Dr Guy was not behind and had no knowledge of any press involvement at the recent Court of Appeal hearing on 7 April 2022. Seventhly, he said that it was accepted that the 2017 Promise appeared in earlier versions of the statement of case, but the 2015 Assurances did not. The claim that was referred to before DJ Hebblethwaite was in respect of the 2017 Promise.

39. As I observed during the hearing, an award of costs on the indemnity basis against the party is not made simply because that party lost the case, even badly. Sometimes litigants acting in perfect good faith make poor decisions about pursuing litigation, or make those decisions on the basis of poor advice. Sometimes a case turns on which witnesses' evidence will be preferred at trial, and parties sometimes believe that their own witnesses are more credible than in fact they turn out to be. None of these things is a sound basis for indemnity costs to be awarded. Instead, as the authorities make clear, the test is whether there are circumstances and conduct which take the case out of the norm.

40. Here the Brakes certainly made the allegations of the 2015 Assurances for the first time only in 2020, on re-amending their claim. Despite what Mrs Brake says, I agree with Mr Modha that what were aired before DJ Hebblethwaite were allegations in respect of the 2017 Promise, which is quite different. So this was a substantial new cause of action introduced well after the proceedings have been begun, about something potentially very important which was said to have happened five years earlier. I found that it did not happen and that the Brakes had made it up. I also agree with the Guy Parties that in my judgment in the Possession Claim I found that, although Mrs Brake had persuaded herself in some respects that things had happened which in fact had not, I nevertheless found that she told me some deliberate falsehoods. I found that she was making up evidence as she went along, that she changed her story as she gave evidence, and told lies which were frankly childish. I did not believe her written and oral evidence that the assurances and promises which (unsupported by any clear documentary evidence amongst the multitude of files produced) she claimed had happened had actually taken place. This really was the case of a defence which could properly be described as "a web of lies".

41. There is then the question of what happened at the hearing before DJ Walsh in March 2019. On the material before me, I am entirely satisfied that the district judge was led to believe that the Brakes did not have either another property or

the resources to find another property. It does not matter whether counsel was aware that what she was saying was incorrect (but I emphasise that she is a respected member of the Bar, and I have heard nothing from her; I therefore proceed on the basis that she was not). This is because Mrs Brake, a highly intelligent woman, was in court, heard what was said, and was well aware both of its significance and of course also that it was untrue. But she did not alert her counsel or solicitors, either then or subsequently, and so the point was not corrected. The district judge himself then raised the point with Mr Davies QC in December, referring to the actual passage in the transcript of the earlier hearing, because Mr Davies QC had not been there. Mr Davies QC said he would refer the matter back to his solicitors so that, as he put it, some "archaeology" could be carried out. I assume that Mr Davies QC did what he said he would, but the fact is that the point was never followed up by the solicitors or the Brakes. Allowing the judge to be misled, and failing to correct a judge who has been misled, on an important matter of fact, are serious matters, and certainly out of the norm.

42. So far as concerns the question of "press campaigns", I accept that the parties to litigation are perfectly entitled to take advice on reputation management and similar matters, especially when they have personal or commercial interests to protect which may be damaged by inaccurate adverse publicity. But it is quite another thing to pay someone to encourage the media to run stories which are favourable to your own side or unfavourable to the other as a means of putting pressure on the other side. Mrs Brake said she paid her reputation management advisers only because she did not know how to handle the press, and was not involved in any "campaign". I do not accept this explanation. Mrs Brake is a highly sophisticated and forceful woman, well used to getting her own way and imposing her own point of view upon others. I cannot help but notice that all the media stories that were published in 2019 about this litigation showed the Guy Parties in an unflattering light, and the Brakes in a flattering one. Dr Guy was invariably depicted as an unsympathetic millionaire, usually called "Dr Pot" because of his research into and development of the medicinal properties of cannabis. The Brakes were depicted as the underdogs being unjustly evicted from their home. I dare say that Mrs Brake did not deal directly with the media. But her reputation management adviser did so on her behalf, and this was the result. This was a campaign, and it too is conduct out of the norm.

43. Mrs Brake complains at the media photographing of herself and her husband outside Lincoln's Inn when they attended the Court of Appeal on 7 April 2022, and accused the Guy Parties of organising it. Counsel for the Guy Parties said on instructions that they were not involved. On the material before me, I cannot find that they were. But in any event there is no comparison between the two sets of events.

44. Lastly, there is the question of the Brakes' conduct after judgment was given against them in the Possession Claim. I have already set out much of this at the outset of this judgment, but I repeat some of it here for the purposes of my decision on the basis of the assessment of costs. My draft judgment was circulated to the parties on 18 February 2022. It was formally handed down on

25 February 2022. There was a dispute about the date when possession should be given up. The Brakes asked that they be not required to give up possession of the house until 1 August 2022. I gave a written ruling on 3 March 2022, that the law required that possession should be given "forthwith": [2022] EWHC 459 (Ch). My order, sealed next day, directed a hearing of consequential matters, for which the parties agreed on 31 March 2022. On 15 March 2022 the claimant obtained a writ of possession, to be executed on 29 March 2022. On 16 March 2022, the Brakes sought a stay of my order until a date after 31 March. On 18 March 2022 I handed down a written ruling dismissing the application for a stay: [2022] EWHC 622 (Ch).

45. On 17 March 2022, the Brakes applied to the Court of Appeal for permission to appeal against my order, and for a stay of the order in the meantime. On 21 March 2022, Arnold LJ granted the stay pending disposal of the application for permission to appeal. On 23 March 2022, the Guy Parties applied to set aside the stay, on the grounds that the Brakes had not informed the Court of Appeal when they applied that they had already applied to me for a stay, and neither had they informed that court of my dismissal of that application to me before the court made its order of 21 March 2022. In addition, they had not informed the Court of Appeal that they had decided (and had told me) that they would not apply to me for permission to appeal but instead would apply directly to the Court of Appeal, and accordingly Arnold LJ had made his order on a false basis, expecting an application to be made to the lower court for permission to appeal.

46. In the event, Arnold LJ directed an oral hearing of both the Brakes' application for permission to appeal and the Guy Parties' application to set aside the stay on 7 April 2022. An application by the Brakes to adjourn this hearing was refused by Arnold LJ. At that hearing, permission to appeal my possession order was refused, and the stay was determined immediately, so that an eviction could take place forthwith. In the event, although the eviction was fixed to take place on 25 April 2022, the Brakes left the house the day before. In my judgment, this too, is conduct out of the norm. The Brakes have strung out the enforcement proceedings as long as they possibly could, even resorting to misleading the Court of Appeal.

47. I should add that I do not place any weight on the point made by the Guy Parties about the loss of trial dates for the Possession Claim. Nor, in the other direction, do I place any weight on the fact that the Brakes had won the earlier rounds of the litigation. They won them because they were all interlocutory, before disclosure had been given, witness statements had been served and cross-examination had taken place. It was only at the trial that the full picture emerged. Nor do I place any real weight on the point made by Mrs Brake that, when they pleaded their case originally, they did not have access to their emails. That is true, but it does not explain the absence from their statements of case of such a fundamentally important part of their case as the 2015 Assurances. Even if they could not remember the details, they could not have failed in principle to remember the 2015 Assurances, if they really were given.

48. Overall, I am in no doubt that the conduct of this litigation by the Brakes amply justifies the award of costs against them to be assessed on the indemnity basis, and I will so order.

Variation of budgets and payment on account of costs

49. At the hearing on 27 April, the Guy Parties wished also to raise questions about (i) the variation of the costs budgets in the light of the various developments in the litigation, and (ii) a payment on account of costs. As to (i), the Guy Parties wished for directions in relation to submitting a revised budget for approval. However, they considered that this would probably only be necessary if I ordered costs on the standard basis, but not if I ordered them on the indemnity basis. So, it was agreed to wait and see what my decision was, before revisiting the question of budget variations (see internal page 123 of the transcript). It similarly meant that I could not deal with (ii) either (see the same page of the transcript). Both of these matters were thereafter left over.

50. In fact, in emails to the court and to the Guy Parties on the following day, 28 April 2022, Mrs Brake appeared to be saying that, although she did not concede the indemnity costs basis, she did not want to spend time writing submissions about variations in the costs budgets, and was accordingly willing to agree to the variations sought by the Guy Parties. At the hearing on 29 April 2022, which was principally concerned with the freezing injunction, Mrs Brake expressly confirmed this to me (see internal pages 7 and 8 of the transcript for that day). It is therefore not necessary for me to receive and consider submissions on the proposed variation by the Guy Parties. It will be sufficient for the order to say that, the Brakes not opposing the variation, the revised costs budget attached is approved by the court. However, I will of course look through the revised budget before approving it for sealing, and if I have any queries I will take them up with the Guy Parties, copying in Mrs Brake.

51. That leaves the question of a payment on account of costs. I direct that the Guy Parties file and serve a written submission on this, if so advised, by 4 pm on Wednesday 18 May 2022, with any written submission in answer by the Brakes by 4 pm on 20 May 2022, and any further submission in reply by the Guy Parties by 4 pm on 23 May 2022. I will then deal with the matter on paper as soon as possible thereafter.

Interim payment on account of mesne profits

52. I turn now to the application by the AEL for a payment of £300,000 on account of mesne profits. In my judgment in the possession claim I held that AEL was entitled to possession of the House and the arena, and that therefore there was no defence to the claim for mesne profits. However, the quantum of such profits would have to be dealt with at a further trial. Section 32 of the Senior Courts Act 1981 provides that rules of court may be made to enable the court to make an order requiring a party to proceedings to make an interim payment on account of any damages, debt or other sum (excluding costs)

which that party may be held liable to pay to or for the benefit of another party if a final judgment or order is made in favour of that other party.

53. CPR rule 25.1(1)(k) accordingly provides:

> "The court may grant the following interim remedies –
>
> […]
>
> (k) an order (referred to as an order for interim payment) under rule 25.6 for payment by the defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay;
>
> […]."

CPR rule 25.6 lays down certain procedural requirements for an application for such an order. I do not need to set it out or consider it for present purposes. The application notice was issued on 16 March 2022, supported by a witness statement from Russell Bowyer, a director of AEL. I am told that it was served shortly thereafter. Mrs Brake filed and served a witness statement in response to the application dated 19 April 2022. No point is taken on the lateness of that witness statement.

54. The sum of £300,000 sought by AEL in this application is said to represent the "irreducible minimum" amount of damages which would be awarded by way of mesne profits for trespass after the trial of the quantum issue. Although that trial will cover the question of compensation for business losses and the value or alternatively delivery up of certain chattels, the interim payment is sought only in relation to the mesne profits claim. It covers the exclusion of AEL from use of the House and the arena from 1 December 2018 to 16 March 2022 in the case of the House (being the date of Mr Bowyer's witness statement), and from 1 December 2018 to 10 March 2022 in the case of the arena (being the date on which the Brakes gave up possession of it to AEL).

AEL made no profits

55. Mrs Brake made a number of submissions. The first is that, in her witness statement, Mrs Brake submitted that the accounts of AEL from 2016 to 2019 showed that AEL did not make any profit from its rental or wedding operations at the Farm. She said that therefore it was irrelevant at what rate the House was advertised for rent. It did not provide AEL with a profit. Therefore, no interim payment should be ordered.

56. I do not accept this argument. Mesne profits are not rent in the legal sense, because the defendant is a trespasser. Instead, they are damages. Damages are usually compensatory in assessment, that is, looking at what the claimant has lost. Even if it were the right approach to look at what AEL had lost, Mrs Brake's point would still be wrong, This is because the point is not whether letting the House would have made a difference for the company between profit and loss, but simply whether it would have brought in any income (which might simply have reduced the company's overall loss). But, in any

event, the law is clear that the amount of mesne profits to be awarded is calculated by reference to the ordinary letting value of the premises, *without* adducing evidence that the landowner could or would have let the property to someone else in the absence of the trespassing defendant: see *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285, CA, per Megaw LJ (with whom Browne and Waller LJJ agreed) at page 288E.

57. This formulation led Hoffman LJ, in *Ministry of Defence v Ashman* (1993) 25 HLR 513, CA, to say (at page 519) that he regarded the remedy as restitutionary rather than compensatory. He said it was true that in the earlier cases it had not been expressly stated that a claim for mesne profits could be a claim for restitution, but "nowadays I do not see why we should not call a spade a spade". (In fact, since then we have decided to call a spade a shovel, because academic lawyers, at least, now speak of 'unjust enrichment' rather than 'restitution'.) However, the other two members of the court on that occasion did not adopt that approach. Kennedy LJ (at page 518) described the approach in *Swordheath Properties* as one "which may be *somewhat analogous to* quasi contractual restitution" (emphasis supplied). Lloyd LJ also referred to that case, but he went further, and said that he could find nothing in the judgment of Megaw LJ to show that that judge "thought he was enforcing a restitutionary remedy. He was clearly awarding damages for trespass".

58. I am bound by the decision of the Court of Appeal in *Swordheath Properties*, but not bound by the *dicta* of a single Lord Justice of Appeal not supported by his brethren. 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* 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.

Threshold condition

59. A further argument made by the Brakes is that they have been given permission to appeal my decision in the Cottage Claim, dismissing their claim to have been unlawfully evicted from the Cottage. Mrs Brake in her witness statement says that this means "there is good prospect of success". (This is actually not right, as what has to be shown in order to obtain permission to appeal is a "*real prospect*" of success. This does not mean probable, but simply means "not unreal" or "not illusory": *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA. It is therefore a low threshold to get over.)

60. She builds on this by saying that, if this appeal succeeds, it will have a significant bearing on any damages claim that AEL can make. This is because, had the Brakes had the Cottage to move into in January 2019, then they would have done so. Accordingly, the damages in respect of the House would only be referable to a very short period of time. The application for an interim

payment on account of damages therefore does not satisfy the requirements of CPR rule 25.7(1)(c), which provides that:

> "(1) The court may only make an order for an interim payment where any of the following conditions are satisfied –
>
> […]
>
> (c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial sum of money (other than costs) against the defendant from whom he is seeking an order for an interim payment …"

61. As a matter of fact, it must be very doubtful whether, if the Cottage *had* been available in January 2019, the Brakes would have moved there. The Cottage was available to them all the time from the moment the Brakes were dismissed in November 2018 until 19 January 2019. Yet the Brakes made no attempt before that date to move there, despite being invited to do so by the Guy Parties in the dismissal letters of 8 November 2018. Mrs Brake's witness statement evidence in the Possession Claim (supported by statements of truth) was to the effect that the Brakes could not move to the Cottage, because it was "in a state of disrepair and not fit for habitation" (statement of 8 January 2019, [150]), and "not fit for long term occupation in winter", at least until significant works had been done to it first (statement of 17 March 2021, [175]-[176]). The only evidence that they would in fact have done so is the present unsupported assertion by Mrs Brake in her submissions, quite at odds with her own earlier evidence.

62. But I do not have to decide this point. This is because of the opening words of sub-rule (1), and in particular the words "where *any* of the following conditions … " (emphasis supplied), coupled with paragraph (b), which reads:

> "(b) The claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed…"

That condition *is* satisfied in the present case, and therefore the court is in a position to make an order for an interim payment if it thinks fit, whether or not condition (c) is satisfied. But I bear in mind also that sub- rules (4) and (5) of that rule provide:

> "(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.
>
> (5) The court must take into account –
>
> (a) contributory negligence; and
>
> (b) any relevant set of or counterclaim."

63. Whilst mentioning rule 25.7(4), I add, though it was not cited to me, that, in *Cobham Hire Services Ltd v Eeles* [2010] 1 WLR 1 WLR 409, CA, the court

said this in relation to the power to order an interim payment on account of damages:

> "30. We are quite satisfied that, although the power to order an interim payment is a discretionary power, there is not an unfettered discretion. The discretion is limited at the upper end by CPR 25.7(4). The court has no power to make an order for more than a reasonable proportion of the likely amount of the final judgment. It is true that the expression 'reasonable proportion' leaves the precise limits of the jurisdiction somewhat uncertain. But, for present purposes, it is sufficient to say that there is clearly no jurisdiction to order an interim payment of more than the likely amount of the final judgment."

Causation of loss

64. Mrs Brake also submitted that the application should fail on the facts. At the first possession hearing on 17 January 2019, the Brakes gave undertakings to the court that they would vacate the House and move to the Cottage on the occasion of every wedding, so that the House could be used, and AEL's business would not be harmed pending the determination of the possession claim. However, on the next day Chedington took possession of the Cottage. In the light of this, the undertakings were varied by order of 20 March 2019, so that those undertakings were expressly subject to AEL making the Cottage unconditionally available for the exclusive occupation of the Brakes whenever the House was to be occupied for the purposes of a wedding. However, AEL never made the Cottage available for the exclusive occupation of the Brakes for any wedding, and therefore the Brakes' undertakings to vacate the House never took effect. Accordingly, if AEL had suffered any losses, they would be a direct consequence of its own actions.

65. AEL makes a number of points in reply to this submission. One is that it did not have a duty to mitigate loss caused to it by a trespasser on its land. Another is that the undertakings given to the court in January and March 2019 were given because there was an interim injunction in place from 5 December 2018 restraining AEL, until final hearing or further order of the court, from interfering with the Brakes' horses in the arena, and with their occupation of the House. Moreover, it is unclear what the judge would have done had he not been misled into thinking that the Brakes did not have the resources to find alternative accommodation. A third is that AEL could not have used the House for its business after February 2019, because the Brakes had practically emptied the House of its antique furniture and thereby made it unusable.

66. I will deal with the second point first. I agree with Mr Modha that the undertakings were an attempt to reduce the effect on AEL's business of the original injunction. As it turns out, the injunction should never have been granted, because the Brakes have been found to be trespassers on the land. They were never entitled to remain in the House and arena once the bare licences ended. I also agree that we cannot know that the judge would have varied the undertakings as he did in March had he not been misled. But I do not think that it lies in the mouths of the Brakes to say that the real cause of AEL's loss of the use of their property was their failure to make the Cottage

available for the Brakes to occupy during weddings. They were not obliged by the terms of the order to do so. The real cause was the Brakes' conduct in remaining as trespassers after their rights to be there had come to an end.

67. In essence, the Brakes' point is that there is a duty on the landowner to mitigate its own loss. AEL was being deprived of the use of its land, but failed to take the steps open to it (by virtue of the Brakes' undertakings to the court) to reduce that loss by allowing the Brakes to use the Cottage. In substance this is the first of Mr Modha's three points above. But it seems to me to be a strange argument. If a trespasser excludes me from my house, and I have another house which happens to be empty, I have never heard it said that, because I did not offer to allow the trespasser into my empty house, I should obtain only reduced or even no mesne profits in respect of the one in which the trespass took place. In any event, it is clear from *Swordheath v Tabet* that the landlord does not need to show that he could and would have let the property in order to obtain damages. This is because the assessment of his damages is not done by reference to what he has *actually lost*. Instead, as I have shown above, it is normally done by reference to the *benefit obtained* by the trespasser. Hence there is usually no mitigation which the landowner can in practice make.

68. As to the third point, I also agree with Mr Modha that, after the Brakes removed most of the furniture from the House, it was in practice unusable for weddings. But, in light of my conclusions above, I do not think it would be useful for me for present purposes to examine how far this might otherwise affect a claim to mesne profits or an application for an interim payment. It may or may not be necessary to do so at the quantum trial.

Expert evidence

69. AEL has adduced evidence of the market value of the House and the arena, by reference to a short report by a qualified surveyor and valuer, Justin Lowe of Greenslade Taylor Hunt, Yeovil office, dated 15 March 2022. This is supported by almost 50 pages of material including information already available and market comparables. At this stage, of course, no permission to adduce expert evidence under CPR Part 35 has been sought or obtained. AEL submits that it should not be necessary to do so for the purposes of an application for an interim payment. Mr Lowe says that he has inspected the interior of the arena, but only the exterior of the House, and therefore his report is purely informal one, and not a so-called "Red Book" valuation. Nevertheless, he says that the letting value of the House (furnished) is about £6000 to £8000 per month from December 2018, depending on the nature of the occupation, and for the arena about £30,000 per annum (£2500 a month). AEL also refers to an earlier report by Savills dating from 2014, to the effect that the letting value of the whole Farm (which is more than just the House and the arena) would have been £12,000 per month.

70. The Brakes do not suggest that permission to rely on expert evidence at this stage is necessary, or, if necessary, should be refused. Indeed, they also rely on an equally short report from another surveyor and valuer, Philip Beattie of Savills, at their Wimborne office. This is dated 28 March 2022, and is

supported by four pages of comparables. Mr Beattie says that he is familiar with the property but has not inspected it recently. It appears that the last report he produced on it was in 2015. However that may be, Mrs Brake says that Mr Beattie is more familiar with the property than any other agent. His report gives a letting value of £5000 per month, unfurnished, on an un-discounted basis, but states that a discount of 40% should be applied because the House is very close to the holiday cottages and the party barn used for the wedding business. So, he reasons, it would be very noisy, and at unsocial hours, when there were weddings. Thus, it could not be valued in the same way as a house in a more tranquil setting. As for the arena, on the basis that it has no land associated with it, he applied a value as covered storage space at £8 per square foot, or approximately £25,000 per annum.

71. The evidence of value provided by Messrs Lowe and Beattie is not evidence of fact. It is clearly opinion evidence given by experts, in the sense of persons who have a recognised expertise in the subject matter of that opinion evidence. CPR rule 35.4(1) provides that "No party may call an expert or put in evidence and expert report without the court's permission". CPR rule 35.1 provides that "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings". CPR rule 35.5(1) provides that "expert evidence is to be given in a written report unless the court directs otherwise". CPR rule 35.10 requires that an expert's report comply with the requirements set out in the Practice Direction to Part 35, as well as contain certain statements and comply with other requirements.

72. It is clear from these few references from CPR Part 35 that the admission of expert evidence is very much under the control of the court, which has power to relax some of the prescribed requirements. The court frequently admits expert evidence for interlocutory purposes in a form which does not comply with Part 35, for example, medical evidence on an application for the adjournment of a hearing or for an extension of time. It would complicate matters, slow down proceedings, and make them less cost-effective, if applications for interim payments had to be preceded by formal application for permission to adduce expert evidence and for that expert evidence to be given in the same form as it would be given at trial. Nevertheless, the court retains control of the admission of all expert evidence, even informal evidence of this kind. However, I am entirely satisfied that it is appropriate to admit these informal reports as evidence, for the purposes of this application only.

73. There is a significant difference between the base values for letting the House given by the two surveyors, £5,000 per month on one side, and £6,000 to £8,000 per month on the other. Part of this can be explained by the fact that the lower value is for an unfurnished letting, and the higher for a furnished one. If the Brakes had vacated the House but left the antique furniture in accordance with their agreement, I am in no doubt that the letting value would have been higher than for an unfurnished house. At this stage I will take a cautious view, and adopt a base letting value of £6,000 per month.

74. The next question is whether there should be a discount for the fact that the Farm is actually a wedding venue, and the lessees would have the problem of noisy wedding parties a few yards away. There is an interesting question here

as to whether the noise caused by the wedding parties would constitute an actionable nuisance, such that they would be entitled to stop parties going on beyond, say, 11 pm. There may be questions of derogation from grant and so on. In fact, the parties say nothing about this either way. But Mr Beattie gives his opinion that, on the basis that late night parties could take place, this would mean a discount of 40% on the base letting value. Mr Lowe for the Guy Parties on the other hand does not mention the point. Taking a common sense view, if a prospective long term lessee were offered two otherwise identical houses in the countryside, one exposed to loud party noise and one not, it is obvious that if the rents were the same such a prospective lessee would prefer the quieter one, and the owner of the noisier would have to offer a discount in order to tempt the lessee into taking a lease of any significant length. On the other hand, a person renting the House for a few days to celebrate a wedding or other event would probably be making noise as much as any wedding party, and it would be less important that such a party was taking place next door.

75. The more difficult question is how much the discount should be. There would not be parties every night. The evidence of the wedding business was that there were fewer than 20 weddings a year, though there were other events as well. That leaves the tenant in peace for the overwhelming majority of days in the year, and in particular in the wedding "off-season" from (say) October to March. Moreover, a person renting a high-end property such as this for a significant time would probably be absent for periods, perhaps in another residence or on holiday, perhaps abroad (especially in the summer). A person renting for a short period would be less concerned, for the reasons already given. Mr Beattie does not really deal with this, and I do not think that a flat discount of 40% really does justice to the complexity of the calculation. Doing the best I can, I consider that in the present, unusual circumstances, where there would be noisy parties on perhaps twenty occasions a year, the discount would be somewhere between 10% and 20%. I will therefore proceed on the basis of a discount of 15%, on a base letting value of £6,000 per month. This gives a discounted figure of £5,100 per month. Between the beginning of December 2018 and the end of April 2022 there are 41 months, which at £5,100 per month makes £209,100.

76. As for the arena, the difference between the parties' experts is not so great, £25,000 as against £30,000 per annum. I will split the difference, at £27,500 per annum. Possession of the arena was given in March 2022, rather than April, so I will multiply that by 3.25 years. This makes £89,375. Adding £89,375 to £209,100 makes £298,475. That is therefore the raw figure for the letting value of the House and the arena for the period of exclusion.

77. The next question is what discount, if any, should be applied to that raw figure for the purposes of calculating an interim payment. As made clear in *Cobham Hire Services Ltd v Eeles*, what I have to find is "a reasonable proportion of the likely amount of the final judgment". As the court said in that case, that means that the proportion cannot exceed 100%. I must make allowance for the possibility that the evidence accepted at the quantum trial establishes *less* than the raw figure produced by consideration of the informal expert evidence. Erring on the cautious side, I consider that I should discount the raw figure by

approximately 25%, so that the interim payment on account of damages will be £225,000. I will order this to be paid in 14 days after this judgment is handed down.

Conclusion

78. Accordingly, I will order that the Brakes

(1) within 7 days of hand-down of this judgment provide a physical address for service complying with CPR rule 6.23(1);

(2) pay AEL's costs of the Possession Claim to be assessed on the indemnity basis if not agreed;

(3) pay £225,000 to AEL on account of mesne profits in the Possession Claim.

In addition, I have already given directions for written submissions on an interim payment on account of costs. They will be incorporated in the order which I make.

79. Lastly, at the hearing on 27 April I had said that I hoped to produce this decision by 6 May. In the event this was not possible, because of pressure of other work, in particular on my judgment in the freezing injunction in this litigation, and then in another case which required an urgent answer. I am sorry for this delay. I should be grateful to receive a draft minute of order for approval, drafted by counsel and agreed between the parties if possible, but otherwise a draft by one side with comments/objections by the other.