Neutral Citation Number: [2015] EWHC 2590 (Ch)

Case No: 6861 of 2014

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
IN THE MATTER OF SSRL REALISATIONS LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 September 2015

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Chancery Division)

- -

Between:

LAZARI INVESTMENTS LIMITED

Applicant

- and -

(1) (1) PETER MARK SAVILLE (administrator) **Respondents**

(2) (2) ALASTAIR PAUL BEVERIDGE (administrator)

(3) (3) CATHERINE WILLIAMSON (administrator)

(4) (4) SSRL REALISATIONS LIMITED (in administration)

Blair Leahy (instructed by Charles Russell Speechlys LLP) for the Applicant

Katharine Holland QC (instructed by Taylor Wessing LLP) for the Respondents

Hearing dates: 17 and 24 June 2015

Judgment

RICHARD SPEARMAN Q.C.:

Introduction

1. This is an application by Lazari Investments Limited ("the Landlord") for permission to forfeit a lease dated 30 January 2007 ("the Lease") made between (1) Allied London (Brunswick) Limited and (2) Signature and Strada Restaurants Limited ("the Tenant") and other relief. Under the terms of the Lease, the premises comprising Units 15/17 The Brunswick Centre, Bloomsbury, London WC1 ("the Property") were demised for a term of 25 years from 25 December 2006.

2. The Landlord purchased The Brunswick Centre, including the Property, on 21 November 2014, and thereby became the Tenant's landlord under the Lease. The Tenant changed its name to SSRL Realisations Limited on 9 October 2013 and is the Fourth Respondent.

3. The First to Third Respondents ("the Administrators") are partners in Zolfo Cooper LLP and, on 29 September 2014, were appointed administrators of (a) SRL Realisations Limited (formerly Signature Restaurants Limited) ("SRL") and (b) the Tenant.

4. Permission to forfeit the Lease is required pursuant to the provisions of paragraph 43 of Schedule B1 to the Insolvency Act 1986 ("the IA"). There is a dispute between the parties as to which part of that paragraph is material for present purposes, which is tied up with the question of whether the wording of the application notice is appropriate to seek to exercise a right of forfeiture by peaceable re-entry. However, that does not affect the proper approach to the present application. If, as the Landlord contends, paragraph 43(4) applies, it has the effect that the Landlord may not exercise a right of forfeiture by peaceable re-entry to the Property except with the consent of the Administrators or the permission of the court. If, as the Administrators contend, paragraph 43(6) applies, it has the effect that the current legal process against the Tenant may not be instituted or progressed except with the consent of the Administrators or the permission of the court.

5. The application involves applying the principles and guidance concerning applications for leave to commence or continue legal proceedings against companies in administration which are to be found in *Re Atlantic Computer Systems plc* [1992] Ch 505 (*"Atlantic Computers"*). *Atlantic Computers* itself concerned section 11(3)(d) of the IA, but it is common ground that the guidance which it contains is equally applicable to paragraph 43: see *Sunberry Properties Ltd v Innovate Logistics Ltd* [2009] BCC 164 at [18]-[22].

6. In accordance with paragraph 111(1) of Schedule B1 to the IA "the purpose of the administration" means an objective specified in paragraph 3 of that Schedule. Paragraph 3(1) of that Schedule provides that "The administrator of a company must perform his functions with the objective of (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors".

7. In the present case, the Administrators say that it has not been possible to achieve objective (a), and the purpose which they claim would be impeded by the grant of permission is the attainment of objective (b). However, there is a secured creditor in this case, and the Administrators estimate that there will be a shortfall of approximately £11m to that creditor. Further, the Administrators have neither identified unsecured creditors nor ascertained the value of any claims that such creditors may have. In these circumstances, it may be that the case really engages objective (c) rather than objective (b). However, that, also, does not affect the proper approach to the present application. Whether the objective involves acting in the interests of the company's creditors as a whole or realising property for the benefit of one or more secured or preferential creditors affects neither (i) whether the objective will be impeded by the grant of permission nor (ii) if the grant of permission will impede the objective, whether the balance should be stuck in favour of refusing permission (to the detriment of the Landlord and the benefit of the purpose of the administration) or granting it (with the reverse consequences).

8. The Applicant was represented by Ms Blair Leahy and the Respondents by Ms Katharine Holland QC. I am grateful to both of them for their clear and helpful submissions.

Background and outline of the dispute

9. The administration is a complex pre-pack administration, where a purchaser for certain of the assets of the Tenant, namely Strada Trading Limited ("STL"), was already in place. On 22 September 2014, an Asset Purchase Agreement had been entered into between (1) the Tenant (2) SRL (3) Tragus Group Limited and (4) STL ("the APA"). SRL and the Tenant together operated the Strada chain of restaurants. They formed part of the Tragus group of companies, which also operates the Café Rouge and Bella Italia chains. STL was a subsidiary of SRL and the Tenant, which had been incorporated on 21 August 2014, and which, accordingly, had no trading history and no independent financial strength.

10. Also on 22 September 2014, a Licence to Occupy dated 22 September 2014 was entered into between the Tenant and STL, by which STL was permitted to occupy the Property, and which (according to the Administrators) was intended to apply while consent to a formal assignment of the Lease to STL was obtained. It is common ground that this was

in breach of Clause 4.16(b) of the Lease, which contains the following covenant on the part of the Tenant: "(b) Not to assign underlet or otherwise part with possession of or hold on trust for another the whole of the Premises or agree to do so except that the Tenant may at any time after the third anniversary of the commencement of the Contractual Term assign or underlet the whole of the Premises if it obtains the Landlord's consent before completion of the assignment or underletting which consent shall not be unreasonably withheld or delayed but which may be granted in the case of assignment subject to any one or more of the conditions referred to un sub-clause 4.16(c) and which may be withheld if any one or more of the circumstances referred to in sub-clause 4.16(d) exist and in the case of underletting subject to the provisions of clause 4.16(e)."

11. On 29 September 2014, the same day as they were appointed, the Administrators completed a sale of the shares in STL to SCP Sugar Limited, a company within the Sun Capital Partners Group. The sale included the sale of 43 leasehold premises (among which was the Property) from which Strada restaurants were operated. It appears from the Administrators' Disclosure Report made pursuant to Statement of Insolvency Practice 16 dated 30 September 2014 that the sale of the Strada business was part of a much broader agreement between the Tragus Group and its secured lenders in respect of a proposed restructuring of the capital structure of the Tragus Group.

12. Also on 29 September 2014, SRL, the Tenant, the Administrators and STL entered into a Vendor Loan Note ("VLN"), which, in essence, enables STL to defer payment of up to £18.5m due under the APA. Pursuant to section 176A of the IA, the Administrators are required to make a prescribed part of the Tenant's net property available for the satisfaction of unsecured debts. As part of this series of transactions, US Bank, as Security Agent, agreed that the full amount that could be payable pursuant to section 176A, namely £600,000, should be set aside and made available to unsecured creditors.

13. Clause 4.17 of the Lease contains a pre-emption provision which, in sum, provides that, before assigning the Lease, the Tenant must offer to surrender it to the Landlord, and that in the event that the Landlord decides to exercise the right of pre-emption it must pay a premium equal to the value of any consideration to be paid by the proposed assignee. The maximum consideration payable pursuant to the APA is £37m. This has been apportioned by the parties to the APA in such a way that the total premium that STL has agreed to pay in respect of an assignment of the Lease is £1,376,953. In the result, according to the Administrators and the Tenant, in the event that consent to an assignment to STL could not reasonably be refused by the Landlord, this is the amount that the Landlord would be required to pay in order to exercise its rights of pre-emption contained in clause 4.17.

14. By letter from the solicitors for the Administrators, Taylor Wessing LLP ("TW"), dated 24 October 2014, a request was made to the previous landlord of the Property, BIS

(Postal Services Act 2011) Company Limited, for consent to assign the Lease to STL, or, in the alternative, to accept a surrender of the Lease in return for payment of a premium of £1,376,953 (exclusive of VAT). The letter stated that, due to their position, the Administrators were unable to comply with the strict terms of the pre-emption provisions contained in clause 4.17 of the Lease. This request was refused in a letter dated 20 November 2014 sent on behalf of the previous landlord.

15. On 17 December 2014 a Notice under section 146 of the Law of Property Act 1925 was served by Charles Russell Speechlys LLP ("CRS") on behalf of the Landlord, which relied on two grounds (which reflected conventional provisions in the Lease): (a) "the Tenant has appointed joint administrators of its company on 29 September 2014 and so has obtained, or taken steps to obtain, a moratorium or other form of protection against creditors or a general suspension of the payments of debts due and payable" and (b) "the Tenant has parted with or shared possession and/or occupation with a third party".

16. By letter from TW dated 9 January 2015, the Administrators made a second application for consent to assign the Lease to STL "on the terms and in accordance with our letter dated 24 October 2014". The letter also stated that the Administrators did not consent to the Lease being forfeited, and that no prejudice would be caused to the Landlord because the Administrators would be paying the passing rent for the period during which the Tenant retained the Property for the benefit of the administration.

17. The Landlord's response was contained in a letter from CRS dated 12 January 2015, which took the following points. First, the application for consent to assign was not valid because it did not comply with clause 4.17 of the Lease. Second, consent to assign was refused for the reasons set out in the letter sent on behalf of the previous landlord dated 20 November 2014, and further reasons. These reasons included failure to comply with clause 4.17, the grounds relied on in the section 146 notice, that STL was not of sufficient financial standing, and that the Tenant had not offered an authorised guarantee agreement ("AGA"). Third, the passing rent had not been paid and "nor do we have confirmation that rent will be paid as an expense of the administration". Fourth, there was prejudice to the Landlord, not only due to the failure to pay rent and allowing STL into occupation but also "by having an illegal occupier with no trading history in [the Property], when [the Landlord] has third parties with good covenant strength interested in taking a lease of [the Property]". Fifth, the test under *Atlantic Computers* is not whether there is prejudice to the Landlord but, as a starting point, whether forfeiture would result in any prejudice to the creditors of the Tenant, and then, if the purpose of the administration would be impeded by forfeiture, how to strike the balance between the legitimate interests of, on the one hand, the Landlord and, on the other hand, other creditors of the Tenant.

18. The letter ended by saying that imminent instructions were anticipated to make an application to the court for permission under paragraph 43 of Schedule B1 to the IA to exercise the Landlord's right "to forfeiture under the Lease by peaceable re-entry and/or an injunction forcing your client to comply with clause 4.17(b) and offer a surrender".

19. On 13 January 2015, TW replied, stating that rent had been paid until 31 January 2015, and would continue to be paid as an expense of the administration for as long as the Property was required for the purpose of the administration. The letter also stated that there would be clear prejudice to the creditors of the Tenant if the Lease was forfeited given the value of the Property, and that consent to forfeiture would not be provided and proceedings for forfeiture would be defended on that basis.

20. The letter further asserted that "The Administrators are currently considering all their options in relation to [the Property] which would maximise the return to creditors". This prompted a response from CRS dated 14 January 2015, stating (among other things): "With respect, your clients have had since September last year to do that. Please therefore confirm precisely what those options are, when all your clients appear to have done is to let a third party in to [the Property] in patent breach of the Lease".

21. On 15 January 2015, the Landlord issued the present application, supported by the first witness statement of Len Lazari. The First Respondent, Peter Mark Saville, made two witness statements in response, dated 29 and 30 January 2015, in the first of which he stated "In the event that [the Landlord] reasonably refuses consent to the proposed assignment to STL, the Administrators intend to exercise their rights to seek an assignment of [the Lease] to a suitable alternative operator" and "I understand that the prospects of successfully marketing [the Lease] for a substantial premium are good".

22. The matter came before Nugee J on 5 February 2015, when an Order was made by consent whereby the Landlord's application was relisted to be heard on the first available date after 6 March 2015 upon the Respondents "confirming that they will use reasonable endeavours to submit an application for consent to assign by 5 February 2015".

23. By letter from TW dated 5 February 2015 a third application was made for consent to assign the Lease to STL. This letter suggested that the Landlord's concerns regarding STL's covenant strength had been dealt with by the provision of "details concerning the background to STL's incorporation and the experience of its management", but added confirmation that STL was willing (a) to comply with the existing rental terms contained in the Lease, (b) to provide security in the form of a deposit equal to six months' rent due under the Lease, and (c) to arrange for its parent company, SCP Sugar Limited, to guarantee STL's obligations under the Lease. By the letter and an enclosed pre-emption

notice ("PEN") the Administrators on behalf of the Tenant offered to surrender the Lease to the Landlord in consideration for a payment of £1,376,953.

24. By the response from CRS dated 6 February 2015 the Landlord indicated that it would be likely to refuse consent to assign on the basis that the third application seemed to be on largely similar terms to the two previous applications "save that a company has now been offered as a guarantor, that company being a newly-incorporated company with apparently no accounts or trading history". Nevertheless, the letter went on to state that the Landlord was willing to give the Administrators "every opportunity" to address its concerns, and to ask for clarification of a number of matters. These included details of the financial position of STL and SCP Sugar Limited, and confirmation that the Tenant would be prepared to enter into an AGA. The letter also asked for details of how the premium of £1,376,953 had been calculated, and for an unredacted copy of the APA, in respect of which a written confidentiality agreement was offered.

25. On 16 February 2015, CRS sent a letter expressing disappointment that no reply had been received to their letter dated 6 February 2015, and asking a number of further questions relating to the PEN and the premium of £1,376,953. The letter asked for a copy of the VLN and stated that "we cannot possibly even begin to consider [the PEN] without an unredacted copy [of the APA]". It concluded: "We understand that the adjourned application has been re-listed for a two hour hearing in a three day window from 17 June 2015. We remind you that our client was only prepared to agree an adjournment to the first available date after 28 days on the basis that they expected the matter to be resolved one way or the other within that time".

26. On 19 February 2015, the third application for consent to assign was refused in a letter of that date from CRS. The letter expressed surprise at the lack of response to the letters dated 6 and 16 February 2015. It then listed a number of reasons why CRS did not consider the PEN to be valid. It gave a number of reasons for refusal of the application for consent to assign. These included the grounds set out in the section 146 notice, failure to pay fees requested in the letter from CRS dated 6 February 2015, and reasons why neither STL nor SCP Sugar Limited were considered to be of sufficient or appropriate financial standing. So far as concerns SCP Sugar Limited, the letter pointed out that the company had only been incorporated in August 2014, had no trading history, had no filed accounts available for review, and had an outstanding charge registered at Companies House. The letter also stated that no AGA had been offered, and that the Tenant was at the date of the application, and remained, in arrears of rent.

27. By letter dated 20 February 2015, TW provided a detailed response to all these points. Further details concerning the financial position of STL and SCP Sugar Limited were

said to have been provided directly to the Landlord by STL. The letter reiterated STL's offer (a) to comply with the existing payment provisions in the Lease, (b) to pay a six months' rent deposit and (c) to arrange for a guarantee to be provided by SCP Sugar Limited. It addressed CRS's fees and costs requests. It stated that administrators did not generally enter into AGAs, but this issue could be revisited once the PEN position had been resolved. It rejected the suggestion that there had been a deliberate breach of the Lease, or that STL was not a potential assignee "of appropriate character", pointing out that STL's occupation had been arranged by the Administrators to best achieve the objects of the Tenant's administration. It disputed that the PEN was not valid, but nevertheless provided further information concerning the calculation of the sum of £1,376,953 and of the way in which monies became payable under the APA.

28. On 24 February 2015, TW wrote saying that they had received the funds that they had been expecting in respect of the fees and costs that had been requested by CRS, and that the costs of the section 146 notice had been transferred to the account named by CRS.

29. On 26 February 2015, CRS replied to TW's letter dated 20 February 2105 saying that the letter raised nothing new and that its contents did not cause the Landlord to change its position. CRS also stated, in respect of the PEN, that to understand the position with regard to the premium they needed an unredacted copy of the APA or much more detail.

30. On 3 March 2015, CRS wrote to TW saying that the three applications for consent to assign to STL had been reasonably refused by the Landlord and asking TW to confirm "that your client is indeed marketing the property and that this purported assignment to a "suitable alternative operator" is not just a further attempt to delay matters". The letter concluded: "In any event, please now rectify the breach of lease by removing STL".

31. On 12 March 2015, CRS asked for a response to their letters of 26 February and 3 March.

32. On 13 March 2015, TW replied stating: (a) that it remained the Administrators' position that an assignment to STL would be in the best interests of the parties, and that the provision of the six month rent deposit and parent company guarantee "would give a reasonable landlord sufficient comfort concerning STL's performance of covenants in the Lease"; (b) that "Deferred consideration is due from STL on the completion of the assignment of the Lease and consequently it remains in the best interests of the creditors as a whole to keep the licence to occupy in place"; (c) that the Landlord was not suffering financial prejudice because rent was being paid as an expense of the administration; (d) that the PEN which had been served on 5 February 2015 was valid, and the Landlord had not accepted it within the timeframe provided in clause 4.17(b) of the Lease; (e) that "the Lease remains an important asset for our clients and our clients are now considering their options generally"; (f) that the Landlord was now on notice of the Administrators' right to

apply to the court for a declaration that the Landlord had acted unreasonably in refusing to consent to the proposed assignment to STL; and (g) that "Separately, our clients are also reviewing the possibility of marketing the Lease to entities other than STL. Your client will be informed of any significant progress in this regard".

33. On 25 March 2015 (it appears that a letter in identical terms dated 16 March 2015 was not sent at that earlier date), CRS replied noting TW's refusal to provide a full copy of the APA, when confidentiality protection had been offered and when the redacted version did not provide the information which the Landlord claimed that it needed. The letter also stated that the Landlord's refusal to consent to an assignment to STL had not been unreasonably withheld, but that if the Administrators genuinely believed the contrary then they should make an application to the court. The main point made in the letter, however, was that the statement in TW's letter of 13 March 2014 that the Administrators were "reviewing the possibility of marketing the Lease to entities other than STL" was "markedly different" from the evidence in Mr Saville's first witness statement that "In the event that [the Landlord] reasonably refuses consent to the proposed assignment to STL, the Administrators intend to exercise their rights to seek an assignment of [the Lease] to a suitable alternative operator". Accordingly, the letter sought confirmation that STL would be removed and that the Administrators would "let us know urgently what steps they are taking to market the lease to a suitable third party".

34. CRS received no response, and chased for a reply by letter dated 10 April 2015.

35. TW replied on 16 April 2015, taking issue with each of the points made in CRS's letter. TW's response included statements that (a) "The parties are also liaising on a direct basis, as you will no doubt be aware" and (b) the Administrators were continuing to pursue the objective of the administration, namely "to achieve a better result for creditors as a whole than would be likely upon a winding up without an administration".

36. By letter dated 21 April 2015, CRS replied complaining that the Administrators appeared to have taken no steps to market the Lease to any entity other than STL and that "It appears to us that the fears we expressed prior to the last adjournment are correct, that your client has no intention of assigning this lease to a third party other than STL and simply wants to keep an illegal occupier in the Premises as long as they (sic) can". The letter suggested that if there was any genuine intention of assigning the Lease to a third party other than STL then the appropriate steps should be taken immediately "bearing in mind there is a hearing in June at which we will be seeking permission to forfeit the lease immediately". The letter also stated: "You claim that the parties are liaising on a direct basis. This is not correct. No contact is being made between your client and our client".

37. Having received no answer to that letter, CRS wrote to TW again on 12 May 2015 asking for confirmation of the steps that had been taken to market the Lease to entities other than STL. It appears that CRS received no answer to that letter either.

38. On 1 June 2015, CRS wrote to TW concerning a different topic, namely a licence to use a seating area outside the Property, which was personal to the Tenant ("the Seating Licence"). The letter stated that unless written confirmation was received by 9am on 5 June 2015 that STL was no longer using the seating area, the Seating Licence would be terminated with immediate effect. No such confirmation was provided. By letter to TW dated 5 June 2015, CRS wrote stating that the Seating Licence was terminated. By letter to CRS dated 5 June 2015, TW contended (among other things) that the Tenant was not in breach of the Seating Licence "on the basis that our client continues to have use for the licence for the purposes of the administration and the benefit of creditors".

39. Following that, further witness statements were served.

40. The second witness statement of Mr Lazari dated 8 June 2015 summarised the above history, and emphasised his concern that the Respondents' real motive in asking for an adjournment in February 2015 and thereafter was "just trying to buy more time to allow the illegal occupier to remain". With regard to the PEN, he stated "To suggest that a third party would be prepared to pay a premium of £1.3 million for an assignment of a lease that is to undergo a rent review next year is just nonsense".

41. With regard to prejudice to the Landlord, Mr Lazari re-iterated the position set out in paragraph 27 of his first witness statement, in which he identified the following factors: (a) the uncertainty of a tenant in administration; (b) one of the most important units in the Brunswick Centre being occupied by an illegal occupier; (c) the lack of covenant strength of STL, which adversely affects the value of the Landlord's reversionary interest and its ability to raise finance; and (d) the existence of a firm offer from a third party with good covenant strength which is willing to pay more than the current rent under the Lease.

42. By the time of Mr Lazari's second witness statement, this offer had been replaced by another, but no less acceptable, offer from a different company, in respect of which he exhibited redacted Heads of Terms. This offer was for a 15 year lease at a rent above the current rent, but with a 3 month rent-free period and no premium. However, this offer was subject to verbal consent being given by 24 June 2015 and to an Agreement for Lease being executed by no later than 10 July 2015, and the offeror's solicitors had made clear that those deadlines had to be complied with strictly for the transaction to go ahead.

43. One point made by Mr Lazari in this context is that no one to whom the Landlord and its agents had offered the Property had been prepared to offer a premium for the Lease.

44. This witness statement was answered by the third witness statement of Mr Saville.

45. First, Mr Saville denied that the Administrators' motives or actions were in any way improper: on the contrary, they had acted throughout in accordance with their duties to the court, and, in particular, with a view to realising the value of the Lease, which they believed to be considerable, for the benefit of the creditors of the Tenant.

46. Second, Mr Saville explained that the reason why the Administrators had pursued the prospect of assigning the Lease to STL with such vigour was that this would produce a return of £1,376,953 for the creditors of the Tenant. He also made the further points that: (a) the applications for consent to assign the Lease to STL were not all in the same terms, and (b) while, according to the Administrators, they had served a valid PEN, in light of the fact that the Landlord disputed that the PEN was valid, STL had not paid the sum of £511,070 that it was due to pay in accordance with the terms of the APA upon service on the Landlord of a valid PEN.

47. Third, Mr Saville set out the Administrators' case that the Landlord had not acted reasonably in refusing consent to an assignment to STL. In sum, while the Administrators accepted that there might be some reasonable grounds for refusal based on the financial standing of STL and in relation to the AGA, they contended that in reality the Landlord was acting for the collateral purpose of seeking to take back the Lease for the Landlord's financial advantage, and that this was evident from the raft of additional, unreasonable, grounds given by the Landlord for refusing consent (e.g. non-payment of fees and costs which were modest in any event and which had subsequently been paid; and "arrears of rent" when rent had been tendered but the Landlord had refused to accept payment).

48. Fourth, with regard to STL, Mr Saville stated that "Discussions with STL continued up until 8 June 2015, when it became clear that its position on its offer to [the Landlord] would not change, and that any further negotiations with [the Landlord] were unlikely to succeed", and that a notice had been served on STL on 9 June 2015 (i.e. on the Administrators' case, as soon as that position became clear to STL) to rescind the APA in respect of the Property and to terminate STL's occupation of the Property.

49. Fifth, Mr Saville accepted that the remaining ground relied upon in the section 146 notice – namely that the Tenant was in administration – continued to apply, but he disputed that this constituted a good reason to allow the Lease to be forfeited. He contrasted, on the one hand, that allowing forfeiture would prevent the Administrators from fulfilling their

objective by realising the value of the Lease for the benefit of the creditors of the Tenant, and, on the other hand, that forfeiture would enable the Landlord to benefit from that value and thereby obtain a windfall at the expense of those creditors.

50. Sixth, Mr Saville dealt with the continuing value of the Lease, exhibiting and relying on a note of advice dated 9 June 2015 obtained by the Administrators from Mr Negus of AG & G Limited. Mr Negus reached the conclusion that an appropriate guide price premium for the Lease would be £650,000. This was on the basis that, although the security of tenure provisions of the Landlord and Tenant Act 1954 (Part II) were excluded from the Lease, and although the unexpired term of the Lease was only 16 years, "The favourable rent provisions in [the Lease] (discounted rent to market rent and fixed rent until December 2016) will undoubtedly be of value to prospective purchasers".

51. Mr Lazari made a third witness statement in response to this witness statement of Mr Saville. In large part, this rehearsed the history of the correspondence that I have set out above, and argued that this supported the Landlord's contention that the Administrators had not acted either quickly or reasonably. However, it also made further points.

52. First, with regard to contact between STL and the Landlord, Mr Lazari stated: "To be clear, neither the Administrators nor STL have made any contact in relation to any assignment since the last formal consent to assign was made in February. They have also not made any contact either to myself or my solicitors on a without prejudice basis or on any other basis other than via the letters set out in the bundle. The only other contact we have had is that a Mr Gripton of STL called my solicitor for the first time on the afternoon of Friday 5 June but his stance did not get around the fundamental issue that he was still suggesting that STL be the assignee".

53. Second, he disputed that a premium of £650,000 would be obtainable for the Lease, and stated that it was wrong to suggest that anything other than a nominal premium could be obtained. The reason for this was that the permitted use was basically restaurant use and "restaurant operators are not prepared to take a lease of anything less than 20 years because they cannot write-down the fit-out cost for any period shorter than 20 years".

54. In support of this case, Mr Lazari exhibited a letter dated 11 June 2015 from Mr Bruce of Bruce Gillingham Pollard, who describe themselves as "a niche, landlord only leasing agency who specialise in the restaurant and retail market across the UK" and say they "operate one of the largest restaurant leasing teams in the UK". In that letter, Mr Bruce explained that, in the course of his firm's extensive marketing of the Property on behalf of the Landlord "There was no suggestion at any stage that we would be able to receive a

premium offer from any occupier on a new lease or assignment basis" and that, in the view of his firm, it was unlikely that any incoming premium offer would be received.

The hearing on 17 June 2015

55. On 16 June 2015, the day before the date that had been fixed for the adjourned hearing of the Landlord's application for some time, Mr Saville made a fourth witness statement. One purpose of this statement was to explain that STL was close to vacating the Property and "will be out by 5pm today". However, its main purpose was to put in evidence that, contrary to Mr Lazari's scepticism, the Administrators had received two offers to pay a substantial premium for the Lease. First, by letter dated 16 June 2015, Casual Dining Group Limited ("CDG"), described by Mr Saville as "the owner of the Belgo, Café Rouge and Bella Italia restaurant brands", had offered £600,000 for the leasehold interest in the Property, albeit (a) "subject to [CDG's] final board approval" and (b) "conditional on receipt of the lease and related documents". Second, the Wagamama restaurant chain had made an initial offer to acquire that leasehold interest for a premium of £250,000. Mr Saville contended that these offers demonstrated that the Lease had significant value.

56. This statement was referred to in Ms Holland's Skeleton Argument, although it seems that it was not served on the Landlord until after Skeleton Arguments were exchanged.

57. CRS's response was contained in a letter dated 16 June 2015. That letter contended that (a) the breach of covenant in parting with possession to STL was only being rectified because of the impending hearing of the Landlord's application, (b) not all breaches of covenant were being rectified, (c) "the allegation that negotiations were ongoing between [the Landlord] and the Administrators up until 8 June is patently incorrect", and (d) if the Administrators had got on with marketing the Property timeously, the hearing would have been avoided. The letter also complained that Mr Saville had not made clear in his witness statement that CDG "is in fact the new name for Tragus Group, the ex-parent company of Strada". Finally, the letter suggested that the hearing should be vacated on terms of a draft Order which was attached to the letter, the contents of which were said to reflect a willingness to allow the Administrators further time to assign the Lease, within a timetable that was said to be reasonable in light of the existence of the offer from CDG.

58. The Administrators regarded this proposal as unacceptable, for the reasons that were set out in detail in TW's third letter dated 16 June 2015. That letter counter-proposed that (a) the Landlord's application should be adjourned for 8 weeks with costs reserved and (b) in the meantime, rent would be paid monthly as an expense of the administration.

59. That counter-proposal was unacceptable to the Landlord, and the hearing therefore went ahead.

60. On the day of the hearing, Mr Saville made a fifth witness statement. One purpose of this statement was to affirm that the Administrators were "duty bound" to refuse the offer made by the Landlord for the reasons set out in TW's letter dated 16 June 2015. Another purpose was to re-iterate that STL had not paid £511,070, but that even if such a sum was to be paid it would not provide any gain for the Administrators in the event that the assignment of the Lease to STL did not go ahead, because it would be deductible from monies paid on future assignments in that event. More importantly, in the context of answering the allegation that the Administrators had been guilty of inaction, Mr Saville stated that: "Throughout this period [i.e. from February to June 2015] the Administrators had regular conference calls with STL. The Brunswick Premises were discussed at these calls, and the Administrators were informed by STL that progress with the negotiations was continuing and that a deal was still possible. In these circumstances, it always seemed likely that a deal would be struck on an amicable basis. As stated at paragraph 3.7 of my third statement, as soon as STL made it clear that a deal was not possible, the Administrators served formal notice to force STL to vacate the Premises. STL subsequently vacated yesterday afternoon and we now have the keys".

61. One of the points taken by Ms Leahy at the hearing was that Mr Negus had based his advice that the assignment of the leasehold interest was worth a premium of £650,000 on a misunderstanding of the terms of the Lease. She also submitted that CDG's offer of £600,000 might similarly turn out to be unsustainable once CDG learned of those terms.

62. In any event, the 2 hour time estimate for the hearing turned out to be wholly unrealistic: even with the benefit of full pre-reading by the court, Ms Leahy's oral submissions took from 2pm until shortly before 4pm, and this left insufficient time for Ms Holland to complete her oral submissions within that time, let alone for judgment to be delivered.

63. In these circumstances, the matter was adjourned part-heard until 24 June 2015. Among other things, this afforded an opportunity for the Administrators to clarify whether they could continue to rely upon Mr Negus's advice and CDG's offer of £600,000 in light of Ms Leahy's submissions that both were based on ignorance of the terms of the Lease.

The hearing on 24 June 2015

64. On 22 June 2015, Mr Saville made a sixth witness statement. With regard to CDG's offer to pay a premium of £600,000, he confirmed that CDG had, in fact, been sent the Lease and related documents before CDG made its offer dated 16 June 2015. He also exhibited

correspondence with CDG which demonstrated (a) that the Administrators had specifically drawn to the attention of CDG that the current 20% discount on rent would be removed on assignment, that the rent at December 2016 would be at full market value, and that the Landlord would be unlikely to grant a seating licence in the short term, and (b) that CDG's offer still stood, subject to contract.

65. With regard to Mr Negus's valuation, Mr Saville exhibited an email from Mr Negus which recorded Mr Negus's view that these factors (to which he had not had regard when producing his initial advice) would have a detrimental impact on his guide price, but that he considered "that there would still be a strong market for this lease and that we can get offers in excess of £500k, and hopefully in the region of £650k and above".

66. With regard to negotiations between STL and the Landlord, Mr Saville gave details of discussions and meetings between the Administrators and STL. These included that on 9 April 2015 the Administrators' Mr Paice "was informed that STL continued to be in dialogue with [the Landlord]", that STL had confirmed to Mr Paice on 29 April 2015 that "there had been little progress with [the Landlord]", and that "Discussions with STL continued until mid-May to try to find a commercial solution to the impasse", that Mr Saville had understood that STL was negotiating with the Landlord "on an open or without prejudice basis", and that the Administrators had "ultimately" (i.e. on 9 June 2015) rescinded the APA in respect of the Property, which was a step that they had only taken once it was clear that negotiations with the Landlord had failed. Mr Saville seems nevertheless to have accepted that further negotiations between STL and the Landlord were not in fact undertaken between February and June 2015, as he expressed regret about this while explaining that "negotiations were in the control of STL".

67. Mr Lazari made a fourth witness statement in response to Mr Saville's fourth, fifth and sixth witness statements. In that statement, Mr Lazari confirmed his previous evidence about the lack of discussions between STL and the Landlord between 5 February 2015 and 9 June 2015.

68. Second, Mr Lazari made the following points with regard to the offer from CDG: (a) there is a connection between CDG and STL, and, like STL, CDG is offering to pay much more than the Lease is worth; (b) CDG was only incorporated in August 2014, has filed no accounts, and has no trading history; (c) on the face of it, the Landlord would be reasonably entitled to refuse consent to an assignment to CDG on the same basis as it had refused consent to an assignment to STL; (d) in any event, no details had been provided of the type of restaurant which CDG would intend to run, and this might also provide grounds for refusing consent to assign because of the importance of having an appropriate mix of tenants at the Brunswick Centre.

69. Third, Mr Lazari emphasised that in accordance with clause 4.16(c)(i) of the Lease one of the conditions to which the Landlord's consent to assign may be subject is that the Tenant should enter into an AGA with the Landlord in the form that the Landlord reasonably requires; that failure to provide an AGA was one of the reasons which had been given by the Landlord for refusing consent to assign to STL; and that the Administrators had not suggested, and could not suggest, that this was unreasonable. He states: "In summary, therefore, unless the Respondents confirm that [the Tenant] is prepared to offer an AGA, [the Landlord] can refuse to consent to any proposed assignee. This fundamental point has not been addressed by the Respondents".

70. Fourth, with regard to the Wagamama restaurant chain, Mr Lazari made clear that the Landlord would accept Wagamama Limited as an assignee. However, he also stated that, having spoken to them, Wagamama had confirmed that they were not aware of the lack of seating licence, and he exhibited an email from their global brand director, Simon Cope, which stated "The external seating area is critical for us and if it were no longer available our interest in this particular unit would fall away even without a premium".

71. Finally, and by reference to a further letter from Mr Bruce dated 23 June 2015, Mr Lazari set out the reasons for saying that it is unlikely that the Lease could be assigned at anything more than a nominal premium. Those reasons were, in summary: (a) on assignment the rent would increase by 25% to £138,750 per annum, (b) an incoming restaurant operator would require a rent free period of between 3 and 6 months, equivalent to £34,687.50 and £69,375, and in the event of an assignment a like sum would fall to be deducted from any premium that would otherwise be payable, (c) in light of the fact that the Landlord's prospective tenant has offered to pay £230,000 per annum, that could be taken as the market rent, such that an assignee's saving on rent for the 16 months between August 2015 and December 2016 could be calculated as £230,000 less £138,750, less a rent free period of between 3 and 6 months, which produces a maximum rental saving of between £52,291.50 and £86,979.16, (d) however, a potential assignee would need to consider not only this saving of rent but also (i) the absence of a seating licence and (ii) that the Lease has only 16 years to run when restaurant operators typically require an unexpired term of 20 years over which to write down capital expenditure.

The law

72. In *Sunberry Properties Ltd v Innovate Logistics Ltd* [2009] BCC 164 *("Sunberry")*, the Court of Appeal allowed an appeal by a company in administration against a decision of HH Simon Brown QC, whereby a landlord had been granted permission to commence proceedings against the company and the purchaser of the company's business ("YHL") to which the administrators had purported to grant a licence to occupy premises which the company had leased from the landlord, in breach of a covenant in that lease.

73. The leading judgment was given by Mummery LJ, who summarised the relevant law, including the guidance which is contained in *Atlantic Computers*, as follows at [18]-[24]:

> "18. The 1986 Act, as amended, provides for a statutory moratorium on the making of an administration order by postponing the enforcement of substantive rights. It derives from, and is in similar terms to, section 11(3) (d) of the 1986 Act, which was construed by this court in *Atlantic Computer Systems*. Paragraph 43 of Schedule B1 provides that
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> "(6) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except (a) with the consent of the administrator, or (b) with the permission of the court"
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> 19. The relevant purpose of the administration is to achieve "a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)" and to do so "in the interests of the company's creditors as a whole": paragraph 3 Schedule B1.
>
> 20. The administrators are officers of the court. They have power to do anything necessary or expedient for the management of the affairs, business and property of the Company. In exercising their functions they act as agents of the Company. The wide powers include sale of the property of the Company: see paragraphs 59 and 60 of Schedule B1.
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> 21. According to *Atlantic Computer Systems* the burden is on Sunberry to make out its case and to satisfy the court that it is inequitable for it to be prevented from commencing the intended proceedings. The administrators accept that the Company acted in breach of clause 3.18.1 of the Lease in granting YHL a licence to occupy the Property and that Sunberry has a seriously arguable case for the relief claimed in the intended proceedings, though they would dispute whether a mandatory injunction should be granted.
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> 22. The guidance in *Atlantic Computer Systems* also states that the court, in seeking to give effect to the statutory purpose of the administration, has to conduct a balancing exercise of the legitimate interests of the lessor and the legitimate interests of other creditors of the Company. The court has to compare the financial loss suffered by the landlord, if permission to commence proceedings is refused and he is temporarily denied the relief sought, with the loss suffered by the other creditors, if permission to issue proceedings is granted. The court must take into account money paid by the administrators to compensate the landlord. The court attaches great importance to the proprietary interests of a landlord, who should not be prejudiced by the way in which the administration is conducted "save to the extent that this may be unavoidable and even then this will usually be acceptable only to a strictly limited extent": see page 542G-H.

23. In considering the loss suffered by the other creditors of the Company the guidance states that

"If substantially greater loss would be caused to others by the grant of leave, or loss which is out of all proportion to the benefit which leave would confer on the lessor, that may outweigh the loss to the lessor caused by a refusal": see page 543A-B."

74. At [24], Mummery LJ observed that:

"this is not a case like *Atlantic Computer Systems*, where the lessor is seeking to re-possess his property because of non-payment of rent. Sunberry wants YHL to remain in possession as its tenant under an assigned or new lease, rather than being in occupation under a licence from the Company."

75. At [51]-[52], Mummery LJ stated:

"51. … one of the main purposes of the administration was a continuation of the collection of the book debts for the benefit of the creditors of the Company in administration. In order to achieve that it was essential for YHL to occupy the Property and so take over and perform the Company's contracts by storage and distribution of the goods of the customers, many of whom owed money to the company …

52. The Company enjoyed a continuing benefit from YHL's occupation of the Property. Sunberry would also benefit. The Company did not have the funds to pay the rent under the Lease. For its occupation of the Property YHL would pay Sunberry a monthly payment equal to the passing rent."

76. At [53], Mummery LJ concluded:

"the judge ought to have carried out the balancing exercise in accordance with the *Atlantic Computers* guidance. The balancing of the legitimate interests of Sunberry, on the one hand, and the legitimate interests of the Company's creditors, on the other hand, is necessary. Occupation of the Property is required for the purposes of the administration. The judge ought to have asked himself whether Sunberry had shown that it was inequitable to prevent it from commencing the proceedings for a mandatory injunction. Instead, he relied on a range of inadequate reasons for not carrying out the balancing exercise: the achievement of the purpose of the administration; the breach of clause 3.18.1; the need for the administrators to find someone willing to take an assignment of the Lease; and the reprehensible manner in which the administrators had dealt with Sunberry."

77. Ward LJ agreed with the judgment of Mummery LJ and with that of Stanley Burton LJ, who said at [65]-[67]:

"65. Turning to the substance of the appeal, the purpose of the administration had not been achieved. The company had outstanding book debts, and one of the objects of the administration was to collect them for the benefit of the creditors. The administrators reasonably feared that if it failed to perform its existing contracts with its customers they would seek to set off their resulting losses from those debts. Indeed, it seems to me to be obvious that if the company's customers lost the food stored at the Property, they would be bound to deduct their losses from the sums they owed the company. The retention of the Property to enable those contracts to be completed was, therefore, in the interests of the creditors and promoted the achievement of the purpose of the administration.

66. As to the exercise by the Court of its discretion under paragraph 43 of Schedule B1 to the Insolvency Act 1986, it is inherent in the provisions of subparagraphs (4) and (6) that administration may preclude a landlord from enforcing the terms of his lease. He can enforce them only with the consent of the administrator or the permission of the court. When considering whether to grant or to refuse leave, the court has regard to the consequences of the administration and of the order sought for the persons affected by them: in other words, it follows the guidance given in *Atlantic Computers.*

67. In this case, it was obvious from the fact that Sunberry was not seeking to forfeit the lease of the Property that the rent payable under the lease was higher than the current market rent. If the rent that would be obtained by Sunberry by re-letting the Property were higher than the lease rent, there would be no reason for Sunberry not to seek forfeiture. It follows that Sunberry had benefited from the making of the administration order, together with the agreement entered by the administrators with YHL and the administrators' agreement to pay to Sunberry the sums paid by YHL for the occupation of the Property at the same rate as the rent payable under the lease, as against what it would have received if the company had gone into liquidation. Apart from its so-called bargaining position, all that Sunberry would lose if the court refused permission to it to enforce the terms of the lease by the grant of the mandatory injunction it sought would be the difference between interest on the lease rent if it were paid quarterly in advance, as required by the lease, and interest on the lease rent paid monthly in arrears. As against that, if Sunberry were permitted to bring proceedings for a mandatory injunction that would, if granted, prevent the Company and YHL from continuing to perform the Company's outstanding contracts. The likelihood was that the collection of the Company's debts would be substantially prejudiced, with consequential loss to the creditors. When weighing the loss relied upon by Sunberry as against the potential loss to the creditors of the Company the result was obviously in favour of refusing permission."

78. Over and above the summary provided in *Sunberry* of the guidance which is contained in *Atlantic Computers*, Ms Leahy drew my attention to the recognition in *Atlantic Computers* that "an administration is intended to be only an interim and temporary regime" (at p528) and to the following particular features of that guidance:

(1) If granting leave to a lessor of land to exercise his proprietary rights and re-possess his land or goods is unlikely to impede the achievement of the purpose of the administration, leave should normally be given (at p542, guideline (2)).

(2) In other cases when a lessor seeks possession the court has to carry out a balancing exercise, balancing the legitimate interests of the lessor and the legitimate interests of the other creditors of the company. The exercise is not a mechanical one; each case calls for an exercise in judicial judgment, in which the court seeks to give effect to the purpose of the statutory provisions, having regard to the parties' interests and all the circumstances of the case. The purpose of the prohibition is to enable or assist the achievement of the object of the administration. The purpose of the power to give leave is to enable the court to relax the prohibition where it would be inequitable for the prohibition to apply (at p542, guideline (3)).

(3) It will normally be a sufficient ground for the grant of leave if significant loss would be caused to the lessor by a refusal. For this purpose loss comprises any kind of financial loss, direct or indirect, including loss by reason of delay, and may extend to loss which is not financial (at pp542-543, guideline (5)).

(4) In assessing these respective losses the court will have regard to matters such as: the financial position of the company, its ability to pay the rental arrears and the continuing rentals, the administrator's proposals, the period for which the administration order has already been in force and is expected to remain in force, the effect on the administration if leave were given, the effect on the applicant if leave were refused, the end result sought to be achieved by the administration, the prospects of that result being achieved, and the history of the administration so far (at p543, guideline (6)).

(5) In considering these matters it will often be necessary to assess how probable the suggested consequences are. Thus if loss to the applicant is virtually certain if leave is refused, and loss to others a remote possibility if leave is granted, that will be a powerful factor in favour of granting leave (at p543, guideline (7)).

(6) This is not an exhaustive list. For example, the conduct of the parties may also be a material consideration in a particular case (at p543, guideline (8)).

79. In addition, Nicholls LJ, giving the judgment of the Court of Appeal, stated at pp543-544 that the above considerations may be relevant not only to the decision whether leave

should be granted or refused, but also to a decision on whether to impose terms if leave is granted or as a condition for refusing leave, and that:

> "Cases where leave is refused but terms are imposed can be expected to arise frequently. For example, the permanent loss to a lessor flowing from his inability to recover his property will normally be small if the administrator is required to pay the current rent. In most cases this should be possible, since if the administration order has been rightly made the business should generally be sufficiently viable to hold down current outgoings. Such a term may therefore be a normal term to impose".

80. In *Lazari GP Ltd v Jervis* [2013] BCC 294 *("Jervis")*, the landlords applied for permission to commence or exercise their rights to forfeit a lease to a company in administration. The lease had approximately a year to run. When the administrators were appointed, they wrote to the landlords saying that they intended, without adopting the lease, to make use of the property, but they had not paid the rent falling due under the lease, which was in arrears. The lease contained covenants not to part with or share occupation of the premises and a qualified covenant against assignment. Further, on an application for permission to assign, the landlords were permitted to ask for an AGA. The forfeiture provisions in the lease were in standard form and might be triggered by arrears of rent, breach of the obligation not to part with occupation or possession and insolvency.

81. Around the time when the administrators were appointed, a business sale agreement which was in substance a "pre-pack" had been signed between the tenant and another company ("Baker"), which appeared to have been specifically formed for the purposes of this acquisition. That agreement provided for the buyer, Baker, to go into immediate occupation of a number of the tenant's trading premises, including the property with which the application was concerned, under a licence from the tenant, and Baker went into some form of occupation of the property on or about the date that the agreement was signed. Shortly afterwards, the landlords served a section 146 notice based upon insolvency and the unlawful occupation of Baker and also referring to the arrears of rent.

82. The landlords sought consent to forfeit, which was refused by the administrators. The letter of refusal did not identify any prejudice which would be caused to the achievement of the purposes of the administration if forfeiture rights were exercised by the landlords. In response, the landlords sent a letter before action and made an application to the court.

83. Briggs J accepted the landlords' contentions that, on these facts, (a) there was no basis for believing that the purpose for which the administration order had been made would be in any way impeded by the immediate grant of permission to the landlords to exercise their forfeiture rights, which were proprietary rights such that in accordance with the guideline 2 contained in *Atlantic Computers* leave should normally be given, and that (b) the

balancing act which the court has to perform, if there would be some impeding of the purposes for which the administration order was made, therefore simply did not arise.

84. Briggs J said at [14] and [16]:

> "14. … There has been a business sale by the administrators very shortly after the commencement of the administration. It was one under which the buyer was given occupation under a licence with full risk of the consequences of that occupation being without the landlords' consent. The buyer has … made what seems to me to be a half-hearted application for consent to an assignment which was refused … and has not since been pursued. The buyer has not sought to avail itself of its right to use the company's name for the purpose of bringing any claim that consent has been unreasonably delayed or withheld. Indeed, it seems to me obvious that no such claim could properly be brought. The consequence, as I understand it, from the limited parts of the business sale agreement which I have been shown, is that it matters not for the beneficial realisation of [the company's] property in the administration whether the landlord is or is not able to exercise its proprietary rights by seeking recovery of possession of the property because, the buyer having taken full risk of the exercise of those rights, there will be no adverse consequences for the administration. [Counsel] for the administrators, has very frankly acknowledged (large parts of the agreement being redacted) that there was no provision for deferred consideration, for example, such that the amount payable under the business sale agreement could be adversely affected if possession were taken of the property as against Baker. It seems to me, therefore, that the purpose of this administration has been substantially achieved by the business sale agreement and would in no way be interfered with by the immediate permission given by this court to the landlords to pursue their proprietary rights …
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> 16. I should add that, even if, contrary to the clear impression which I have formed and have described, there was some possible impediment to the full achievement of the purposes of the administration by the court giving immediate permission, the conduct of a balancing exercise in the manner set out by Nicholls LJ., which I acknowledge incidentally is not a mechanical exercise but the exercise of judgment by the court, could only come down in favour of giving the landlords the permission which they seek. The evidence demonstrates a real prospect that the landlords would suffer loss, indeed financial loss, by reason of, for example, the delay caused by being unable to enforce their rights, in particular because of the probable adverse effect of any such delay upon their conduct of negotiations for the grant of a new lease of the premises at a higher rent to an apparently satisfactory retail chain with a good covenant. Against that, there seem to me to be no countervailing considerations such as might to alleviate any prejudice to the administration if permission were either refused or delayed."

85. At [17], Briggs J dealt with an additional argument:

> "I must deal, finally, with the submission by [Counsel for the administrators] that in giving permission I should nonetheless limit it to permission to forfeit by legal proceedings rather than peaceful re-entry. He submitted that it was generally

unsatisfactory to have locks changed during the night, but it does not seem to me that the court, exercising its administration jurisdiction, is particularly concerned with that, nor has the court any reason to suppose that a peaceable re-entry would be anything otherwise than lawful. As far as I can see, although the court has power to impose any relevant conditions, conditions which the court should impose are not those which they think might be generally useful but conditions which would serve the purposes of the administration. I have been unable to identify any purpose of the administration which would be served by imposing the suggested condition. As [Counsel for the landlords] pointed out, if relief from forfeiture is to be sought pursuant to the buyer's right to do so in the name of [the company] under the business sale agreement, an application for relief could be made by a separate proceedings rather than, as [Counsel for the administrators] suggested would be more convenient, by way of counterclaim to forfeiture proceedings. There is, as it seems to me, no real indication that an application for relief will be made, not least because, thus far, the administrators have declined to pay the March rents which would be, in any event, a condition of any relief from forfeiture and because there has been no indication from Baker, the buyer, or its solicitors that any application is contemplated or threatened."

86. A similar argument also arises in the present case.

The Landlord's submissions

87. Ms Leahy submitted that:

(1) In the present case, just as *Jervis*, the grant of permission would not impede the purposes of the administration, and, accordingly, there is no reason to refuse the Landlord's application. In particular (a) there is reason to doubt that any substantial premium could be achieved by assignment of the Lease, (b) even if it could be achieved, it could fairly be described as providing a benefit for the secured creditor which is (i) a windfall for that creditor and (ii) *de minimis*, and accordingly not in any meaningful sense capable of promoting a statutory objective, in circumstances where the secured claim is £45 million and there is an expected deficit of about £11 million to the secured creditor.

(2) If, contrary to the above, a balancing exercise falls to be performed, the balance comes down firmly in favour of granting the relief sought by the application. On the one hand, if permission is refused, the Landlord will suffer financial loss by being denied the opportunity to grant a new lease of the Property at a higher rent to a new tenant which it regards as suitable and which can offer a good covenant, as well as in other ways identified by Mr Lazari. On the other hand, if permission is granted the Administrators have not identified any sufficient financial or other loss or prejudice that would result.

(3) The Administrators' conduct has involved an illegitimate use of the statutory moratorium, and this is a further factor in favour of granting permission. Although the Administrators may have been motivated by a desire to improve the position of the creditors of the Tenant (and SRL), the Landlord was plainly entitled to refuse consent to an assignment to STL, and they must have known since at latest February 2015 that there was no prospect of an assignment to STL. However, between February 2015 and 9 June 2015 they took no steps to terminate STL's unlawful occupation or to market the Property in order to find an acceptable assignee. Instead, right up to the initial hearing of the application, they were doing no more than embarking on a leisurely review of their options, which the Landlord believed they had been actively pursuing for months before that. Indeed, the Administrators have used the mechanism of the licence that they granted to STL (in deliberate breach of the terms of the Lease) as a means of extending the protection of the statutory moratorium to STL, in that if they had simply caused the Tenant to assign the Lease to STL, the statutory moratorium would not have protected STL and the Landlord would have been entitled to proceed immediately to forfeiture of the Lease.

(4) If and in so far as the Administrators might seek to argue that, if the court is minded to give permission, it should nevertheless limit this to permission to forfeit by legal proceedings rather than peaceable re-entry, so that the Tenant can cross-apply for relief from forfeiture, that argument should be rejected. Conditions should only be imposed if they would serve the purpose of the administration, and requiring the Landlord to commence forfeiture proceedings would not serve that purpose: (a) first, it would not disadvantage the Tenant to require it to commence separate proceedings seeking relief from forfeiture, as opposed to counterclaiming for relief in forfeiture proceedings; (b) second, the Administrators had not manifested any intention to apply for relief from forfeiture to date, and given the value of the Lease it would be surprising if they were now to take such steps – but to require them to take positive steps if they wished to seek relief would be appropriate in any event in light of their dilatoriness to date and the prejudice thereby occasioned to the Landlord; (c) third, an application for relief from forfeiture would be doomed to failure in any event. In this regard, while the court has a wide discretion whether to grant relief from forfeiture, when exercising that discretion the court will take into account the conduct and financial position of the tenant, the nature and gravity of any breach, and its relationship to the value of the property, and only in exceptional circumstances will the court grant relief against wilful or deliberate breaches of covenant. Reference was made to *Hyman v Rose* [1912] AC 623, *Shiloh Spinners Ltd v Harding* [1973] AC 691; *Mascherpa v Direct Ltd* [1960] 1 WLR 447, and *Magnic Ltd v Ul-Hassain*

[2015] EWCA Civ 224, Patten LJ at [50]. It was submitted that (i) the Tenant was in serious and deliberate breach of covenant in allowing STL to occupy the Property for some 9 months, (ii) there is no prospect that the Tenant would be able to regularise the position by obtaining a declaration that the Landlord had unreasonably withheld consent to assign (see *Scala House & District Property Co v Forbes* [1974] QB 575), (iii) the Tenant remained insolvent and in administration, and (iv) the Landlord had been caused significant prejudice.

The Administrators' submissions

88. Ms Holland submitted that:

(1) It is clear that the purpose of the administration would be impeded by forfeiture. The applicable statutory objective of the Administrators is to achieve a better result for the Tenant's creditors as a whole than would be likely if the Tenant was wound up (without first being in administration). As appears from the Statement of Proposals, the Administrator's proposals in relation to the achievement of this statutory objective were all based upon their ability to realise various assets of the Tenant, including the leasehold asset represented by the Lease. Accordingly, the continued existence of the Lease has throughout been essential for the achievement of this statutory objective in that the leasehold interest represents a very valuable asset which the Administrators are able to realise for the benefit of the creditors. In particular, now that it has become apparent that the sale to STL cannot be achieved, the continued existence of the Lease is of critical importance to enable the Administrators to market the leasehold interest.

(2) Therefore, and in contrast to the position which obtained in *Jervis,* it is appropriate for the Court to proceed to consider the balancing exercise referred to in *Atlantic Computers.* Further, the applicable factors point overwhelmingly to the conclusion that permission ought to be refused: (a) first, forfeiture of the Lease would result in a loss to the Tenant's creditors of a sum in the region of £650,000 – the fact that an offer of £600,000 has already been received demonstrates that the existing leasehold interest will command a very substantial premium on assignment, and the evidence regarding the proposed letting at a market rent by the Landlord only serves to confirm why the Lease, which is at a lower rent, should attract a substantial premium on assignment; (b) second, there has been no loss to the Landlord as a result of the administration or the temporary occupation of STL, because the Landlord has accepted full payment of the rent due pursuant to the Lease (it having been agreed that the Administrators will take no point on this issue in respect of waiver of a right to forfeit the Lease); (c) third, it is not correct that an unlawful occupier was imposed upon the Landlord, in that as soon

as it became clear that negotiations between STL and the Landlord would not succeed, the Administrators and STL took steps to vacate the Property, and there has been no continuing breach after 16 June 2015; (d) fourth, the Landlord is seeking a complete windfall benefit as a result of the administration of the Tenant. Merely by virtue of the fact of the administration and the standard procedure of administrators arranging a pre-pack administration with a licence to occupy, the Landlord is seeking the massive commercial advantage of taking the Lease back early, some 16 years before it is due to expire. The Landlord has been motivated by this collateral purpose for its own financial advantage throughout, as evidenced most clearly by the fact that in refusing the applications for consent to assign it relied on a number of grounds which were manifestly unreasonable.

(3) As the negotiations between STL and the Landlord have only very recently come to an unsuccessful conclusion, it would only be fair at this stage to allow the Administrators the opportunity to market the leasehold interest in order to realise the benefit of the asset for the creditors in pursuance of their statutory objective.

(4) Even if the Landlord has a prospective new tenant for the Property which it stands to lose, that is not correctly characterised as "prejudice". Instead, any new lease represents a massive financial windfall which the Landlord is seeking to realise to the very substantial financial detriment of the creditors of the Tenant.

(5) In any event, the claim of "prejudice" lacks credibility. First, the Landlord has adduced no evidence regarding its marketing of the Property or regarding other interest shown in it. Second, the Landlord would not be able to proceed with the proposed third party tenant on the terms claimed to be insisted upon by the third party (including that the new lease is to be subject to an agreement for lease by 10 July 2015). This timescale completely overlooks the fact that even if the Landlord was to be granted permission to forfeit, the proceedings for possession would need to comply with the procedure and timescales set out in CPR 55.

(6) With regard to CPR 55, it is apparent from the fact that paragraphs 2 and 3 of the Application Notice include a claim for possession and an order for the payment of monetary sums that the Landlord is proposing to seek permission to forfeit by way of court proceedings. However, even if the Landlord succeeds on the hearing of the application for permission to forfeit, it cannot then proceed to seek any substantive order for possession and any orders for monetary payments. On the contrary, it has to seek permission and, if successful, it may then proceed to commence proceedings for forfeiture by virtue of the issue and service of a Particulars of Claim which set out the grounds of forfeiture relied upon and which can then be the subject of a proper Defence and an application for relief from

forfeiture. This is the established procedure at common law to effect a forfeiture by proceedings. In any event, CPR 55.2 makes it clear that the procedure set out in Section 1 of Part 55 *must* be used where a landlord claims possession of land. Accordingly, the claims for relief sought in paragraphs 2 and 3 of the Application Notice are fundamentally misconceived and are liable to be dismissed. Even if the Landlord now sought to change its mind and to proceed instead by way of peaceable re-entry, this would not overcome the problem. The Tenant will immediately seek relief from forfeiture in the event that the Landlord is granted permission to forfeit (and injunctive relief if appropriate or necessary). The Tenant's application for relief from forfeiture is also subject to the same procedure and timescales under CPR 55.2(1)(c), and it would not be open to Landlord to seek to override the Tenant's rights in this regard.

(7) It is unlikely that the proposed letting could ever take place, given that relief from forfeiture would be likely to be granted and would result in the Lease being retrospectively reinstated: see *Woodfall, Landlord and Tenant,* paragraph 17.175. Relief would be very likely to be granted given that the consequences for the Tenant if relief from forfeiture was refused would be wholly disproportionate. The Tenant would lose the benefit of a valuable asset, which is of significant importance to the general body of creditors. By contrast, the Landlord would gain a considerable windfall. Further, the circumstances in which the alleged breach came about in this case were very different from those applicable on an ordinary breach of an alienation provision and would be viewed far less seriously by the court. The events of September 2014 of which the Landlord complains are now very much an accepted consequence of the type of "pre-pack" administration which is encouraged and endorsed as part of the new procedures for the administration of companies (pursuant to the amendments introduced to the IA by the Enterprise Act 2002). Thus, the Administrators had little choice in dealing with the matter in any other way.

(8) It is also to be noted that the Landlord acquired the Property *after* STL had entered into occupation and *after* the Administrators had already been appointed, about two months after the licence to occupy had been granted to STL and one month after the first application for consent to assign to STL had been submitted. There has been no change after acquisition to what the Landlord acquired.

(9) It is not right to say that the Administrators have delayed and that permission to forfeit should be granted for that reason. In pursuance of the statutory objective, they have properly and legitimately endeavoured to seek to complete an assignment to STL, given the particularly advantageous financial terms that would have resulted for the creditors from this disposal. At the same time as seeking to

achieve this goal, the Administrators prepared for the marketing of the Property. It was not until 8 June 2015 that it became clear that further negotiations between STL and the Landlord would not succeed. They then immediately took steps to require STL to vacate the Property and they have since set about marketing it.

(10) The prohibition on legal process in this case would enable the Administrators to realise the substantial value represented by the leasehold interest in the Property, and would therefore clearly enable and assist in the achievement of the object of the administration. Further, it would not be inequitable for the prohibition to apply in this case. Quite the contrary: forfeiture would result in the loss of a valuable asset, which is of significant importance to the general body of creditors, while at the same time it would confer a very considerable windfall benefit on the Landlord. Accordingly, applying the guidance contained in *Atlantic Computers*, the Landlord's application for permission to forfeit should be refused.

Discussion

89. As the submissions of both Counsel rightly recognise, the first issue is whether the grant of permission would impede the purposes of the administration.

90. The first question which arises in this regard concerns the value of the Lease in the hands of the Administrators. The higher that value, the more likely it is that the purpose of the administration would be impeded by the grant of permission, and *vice versa*.

91. It appears that the Administrators would have realised £1,376,953 if the assignment of the Lease to STL could have been achieved. However, that outcome is a product of the structure of the APA and is not a true reflection of the open market value of the Lease.

92. Further, and regardless of whether there may be any validity in other criticisms of the Landlord's stance towards the Administrators' applications for consent to STL, it seems to me that it is beyond dispute that the Landlord's withholding of consent to that assignment was entirely reasonable on one of more of the following grounds: (a) that STL was not of sufficient financial standing; (b) that this lack of financial standing was not made good either by STL offering to provide a deposit of six months' rent as security or by offering that STL's obligations would be guaranteed by SCP Sugar Limited (another company of little or no financial standing); and (c) that no AGA had been offered, or appeared likely to be capable of being offered. It is therefore unsurprising that, whether tardily or timeously, in June 2015 the Administrators gave up all prospect of obtaining consent to assign the Lease to STL, and terminated STL's occupancy of the Property.

93. In these circumstances, it is necessary to look elsewhere to ascertain the value of what the Administrators would lose if the Landlord was granted permission to forfeit the Lease.

94. In light of the fact that CDG has re-iterated its offer to pay a premium of £600,000 with clear knowledge of the true terms of the Lease, it appears that, on the evidence before me, the Administrators would realise that sum if an assignment to CDG could be achieved. In my judgment, however, there is no real prospect of obtaining the Landlord's consent to such an assignment, or of establishing that such consent has been unreasonably withheld, because CDG is not of sufficient financial standing and because of the lack of an AGA.

95. Accordingly, I am unable to accept that the grant of permission would deprive the Administrators of the opportunity of realising £600,000 (or any sum) for the Lease by accepting CDG's offer and seeking the Landlord's consent to assign the Lease to CDG.

96. In addition, I am very doubtful that the offer from CDG represents a true reflection of the open market value of the leasehold interest in the Property. In substance, the APA involved the sale of the Strada business, which had been operated by two companies in the Tragus group. The part of that sale which would have involved the transfer of the leasehold interest to the acquirer of the Strada business having fallen through, the group is now proposing to retain that interest as an asset, not in the name of the subsidiary which originally owned that asset (i.e. the Tenant), but in the name of another company in the group, which has now changed its name to CDG, by offering to buy that interest from the Administrators. The reasoning and motivation underlying this proposal has not been explained. These features suggest to me that this was not an offer made at arm's length.

97. Be that as it may, I see no reason to doubt that the offer by Wagamama to pay a premium of £250,000 was one made at arm's length. It appears that this offer was made with full knowledge of the terms of the Lease, including that (a) it has only 16 years left to run, (b) the current discount on rent will cease on assignment, and (c) following a review due in December 2016 the rent payable under the Lease will be a market rent. Moreover, on the Landlord's own evidence, Wagamama Limited would be an acceptable assignee.

98. These considerations support the Administrators' case that the leasehold interest has substantial value. In particular, they show that (a) whatever may be true of such operators in general, a restaurant operator may be interested in acquiring a lease that has less than 20 years to run, and (b) the premium which an assignee would be prepared to pay may be substantially greater than that suggested by the evidence of Mr Bruce and Mr Lazari.

99. However, on the evidence before me, it also clear that no value can be attributed to the prospect of that the Administrators will achieve an assignment to Wagamama Limited,

because (a) Wagamama has stated unequivocally that without the benefit of the Seating Licence it has no interest in taking an assignment of the Lease, (b) there is no Seating Licence, because the Landlord has terminated it, and (c) it forms no part of the Administrators' case that the Landlord was not entitled to do this, or that the Landlord could be compelled to grant a seating licence to Wagamama (or any other assignee).

100. The argument that the Administrators would lose something of value if permission was granted therefore depends on the prospect that they will be able to find some other, as yet unidentified, assignee which is prepared to pay a premium for the Lease and to which the Landlord cannot reasonably withhold consent to assign. It is here that the conflict between the evidence of Mr Negus on the one hand and that of the Mr Bruce and Mr Lazari on the other comes into play. This kind of conflict does not readily lend itself to resolution on the basis of witness statements and correspondence alone, and without the assistance of disclosure and cross-examination. Further, I am not convinced that the question of whether it is appropriate to resolve such issues on the basis of such evidence alone has been addressed in any of the cases to which I was referred (in which the point does not seem to have arisen for determination). However, both Counsel submitted that this is what I should do, in accordance with what they suggested is the usual practice.

101. Mr Negus based his original view that an appropriate guide price premium for the Lease would be £650,000 on the basis that (among other things) the Lease contained favourable rent provisions, namely (a) discounted rent to market rent and (b) fixed rent until December 2016. In truth, however, the 20% discount on rent enjoyed by the Tenant would fall away on assignment, and the rent at December 2016 would be at full market value. Moreover, the Seating Licence had been terminated, and it appears from their correspondence with CDG that the Administrators accept that a valuation should be based on the premise the Landlord would be unlikely to grant a new seating licence at least in the short term. When informed of these matters, Mr Negus's revised view was that these factors would have a detrimental impact on his initial guide price, but there would still be a strong market for the Lease and that the Administrators might expect to obtain "offers in excess of £500k, and hopefully in the region of £650k and above".

102. The evidence of Mr Bruce and Mr Lazari is that the premium which could reasonably be expected on assignment is non-existent or modest at best. In substance, their stance rests on the contentions that (a) the rent that the Landlord's prospective tenant has offered to pay represents the market rent, (b) the total rental saving which an incoming tenant would make in light of the fact that from December 2016 the rent payable under the Lease is a full market rent is of the order of £52,000-£87,000, taking into account what is suggested to be a likely stipulation for a rent free period of between 3 and 6 months, and (c) a premium at even this modest level is unlikely to be achieved in light of the considerations that there is no seating licence and that the Lease has only 16 years to run.

They seek to bolster that stance by stating that none of the prospective tenants they have found have offered to pay a premium, and instead they have asked for a rent free period.

103. I find the evidence of Mr Negus unconvincing. His initial advice was based on a flawed understanding of the terms of the Lease, which undermines his reliability. In any event, in my view, it did not provide a satisfactory explanation as to why and on what basis he had arrived at the figure that he was putting forward. I consider that the latter criticism applies to his revised view as well. In addition, in his revised advice, while on the one hand he suggests that the price-depressing factors to which he initially failed to have regard would reduce the offers of premium which might be expected below the sum of £650,000 which he originally put forward to "in excess of £500k", on the other hand he suggests that there are grounds to hope that offers "in the region of £650k and above" may be achieved. This wide range of values does not inspire confidence. In addition, this conclusion is unsatisfactory because it refuses to give up Mr Negus's original figure of £650,000 (or, indeed, "above"), contrary to the logic of those price-depressing factors.

104. In my judgment, Mr Bruce and Mr Lazari have provided a basis for their views which is logical and reasonable. In particular, it seems to me that, as a matter of commercial reality, it is highly likely that a new restaurant operator would either negotiate a rent free period or would negotiate a reduction of any premium that would otherwise be payable to compensate for the absence of a rent free period. I consider that negotiation of a rent free period would not arise in the same way on the assignments to STL and CDG which the Administrators were seeking to promote, because those assignees would either be carrying on the same restaurant business as the Tenant or at least (as I infer) taking over the Tenant's restaurant operation subject to re-branding it as no longer a Strada venue.

105. The range of premium figures suggested by the evidence of Mr Bruce and Mr Lazari is contradicted by the much higher premium of £250,000 that was in fact offered to the Administrators by Wagamama. The offer from Wagamama also demonstrates that a lease with only 16 years left to run may be of interest and value to a restaurant operator. Nevertheless, the withdrawal of that offer once Wagamama discovered that the Property did not have the benefit of the Seating Licence supports the Landlord's case that, regardless of any premium value the leasehold interest would otherwise have, the absence of a seating licence is likely to prove a fatal obstacle to finding a suitable assignee.

106. It is a product of the bundle of rights and obligations that were agreed between the Landlord and the Tenant long before the Administrators became involved that the Landlord is lawfully entitled to elect to resolve the impasse over the seating licence in the event that it forfeits the Lease and wants to grant a new lease to a new tenant, but to decline to resolve it vis-à-vis any potential assignee which the Administrators may find.

107. In the result, I conclude that the purpose of the administration will not be impeded by granting the Landlord permission to pursue its proprietary rights. For the reasons and in the circumstances set out above, there are no grounds to believe that the Administrators will be able to achieve a premium by assigning the Lease. I accept that the leasehold interest has some potential premium value, not least because the current rent under the Lease is lower than the market rent and because the offer initially made by Wagamama supports that conclusion. However, the Administrators are unable to unlock that value due to the Landlord's lawful exercise of its rights. Those rights include the right to terminate the Seating Licence and to decline to grant a new seating licence to a prospective assignee, and to require the provision of an AGA. The purpose of the material provisions of the IA is to provide a moratorium to enable the administrators to retain or realise assets for the benefit of creditors. That involves postponing the enforcement of substantive rights. However, the legislation, the case law, and as far as I am aware the arguments before me, do not go so far as to suggest that a lessor is not entitled to rely on rights which it can invoke without legal process, even if it would further the purpose of the administration for the lessor to agree or to be prevailed upon not to rely on them.

108. In reaching that conclusion, I have not found it necessary to consider whether the size of any premium that may be achievable is such that, in comparison to the overall likely deficit in the administration, it can be said that depriving the Administrators of the opportunity to realise that premium would not impede the purpose of the administration.

109. In my view, however, on the arithmetic of the present case, there is a powerful argument to that effect. It is open to question whether the Administrators' contention that the purpose of the administration is to achieve a better result for the Tenant's creditors as a whole is sustainable on the basis that, at least in the first instance, any premium that they may obtain on assignment of the Lease will go into a general pot of recoveries. Even if that is so, in reality any sum that is obtained on assignment will not result in any benefit for unsecured creditors, because the full amount that could be payable to them is ensured in any event, and the estimated shortfall for the secured creditor is £11m. If, contrary to my initial finding, there are grounds to believe that the Administrators will be able to obtain a premium, I consider that the likely level of that premium is modest indeed: significantly less than the sum of £250,000 that was offered by Wagamama without appreciating that there is currently no seating licence, and quite possibly of the order of £52,000-£87,000 suggested by the Landlord's arithmetic, or even less. That sum is so small in comparison to the estimated shortfall of £11m that, in my view, its lack of recoverability would not in any real sense impede the purpose of the administration.

110. Even if these conclusions are wrong, the probability that the Administrators would be able to obtain a premium, and the effect on the administration if permission to forfeit is

given, are considerations which come into play at the second stage, when balancing the legitimate interests of the Landlord and the legitimate interests of the creditors of the Tenant. At that stage, the grounds for doubting that the Administrators would be able to unlock whatever value the leasehold interest may have, and the modest effect on the administration if they are denied the opportunity to realise that value, are factors in favour of granting permission in accordance with the guidance contained in *Atlantic Computers.*

111. It is also unnecessary at the first stage to consider whether the Administrators' conduct weighs against them and in favour of the Landlord. However, I do not consider that the Administrators have behaved either illegitimately or improperly. It is entirely understandable that they should have given priority to achieving an assignment to STL.

112. Nevertheless, the Landlord made clear at all times, and as I have found on grounds which included objections which it could not be said were unreasonable, that it was unlikely to accept STL as an assignee. Instead of actively pursuing other avenues, the Administrators initially attempted to persuade the Landlord to accept STL as an assignee by improving the support for STL's covenant that was offered to the Landlord, and then subsequently relied upon STL to carry out further negotiations with the Landlord. The Administrators do not appear to have taken any steps to market the Lease to entities other than STL until shortly before the hearing on 17 June 2015, and they do not appear to have heeded the Landlord's repeated statements that no negotiations between it and STL were, in fact, taking place. In particular, nothing much seems to have happened between 21 April 2015 and 9 June 2015, although by letter of the former date CRS made clear that there had been no material contact between STL and the Landlord, complained that no steps appeared to have been taken to market the Lease to any entity other than STL, and spelled out the Landlord's case that if the Administrators had any genuine intention of assigning the Lease to an entity other than STL then they should get on with marketing it immediately in light of the relief that would be sought at the hearing on 17 June 2015.

113. In these circumstances, the Administrators took the risk that the attempt to obtain the Landlord's consent to an assignment to STL would fail, and that by the time of the adjourned hearing of the application in June 2015 they would not be able to provide much concrete demonstration to the court that other avenues were available whereby the purpose of the administration would be furthered by obtaining a substantial premium for the leasehold interest. In the events which are rehearsed in detail above, that risk materialised. I accept the Administrators' evidence that, on the basis of what they were told by STL, they genuinely believed that there were ongoing negotiations with the Landlord that might bear fruit. However, I also accept the Landlord's evidence that, in fact, the Landlord never provided any objective basis for anyone reasonably to believe that it had changed or might change its stance towards STL, and that no effective negotiations actually took place concerning STL between February and June 2015.

114. Whether or not it would be harsh to criticise the Administrators for trusting STL in the teeth of the Landlord's repeated denials that any negotiations were taking place, it does not follow that fairness requires that the Administrators should be allowed a further opportunity to market the leasehold interest in order to realise the benefit of the Lease for creditors in pursuance of their statutory objective. It is unfortunate that the Administrators only discovered in June 2015 the truth about what had been happening as between the Landlord and STL. In the meantime, however, the Landlord had not only been denied the ability to exercise its proprietary rights. It had also lost the opportunity to lease the Property to a new tenant on terms which would be financially advantageous to the Landlord and which would involve the Property being occupied and used in a manner which the Landlord considered to be beneficial to its interests as owner of the Brunswick Centre. In my judgment, these matters comprise "significant loss" to the Landlord within the meaning of the guidance contained in *Atlantic Computers*, which would be continued or repeated in the event that permission is refused. Far from it appearing unfair to grant permission, I consider that the Landlord has therefore made out what would normally be a sufficient ground for the grant of permission in accordance with that guidance.

115. In particular, I reject the arguments that the Landlord's claim that it will suffer financial loss if permission is refused lacks credibility, and that the subject matter of that claim is correctly characterised as a windfall benefit (which, implicitly, ought to be given no or little weight when conducting the balancing exercise). On the evidence, the Landlord has obtained offers from two prospective tenants on terms which would be more financially advantageous to it than continuing with a new tenant under the Lease. Even if it assumed that both offers have not only lapsed but also cannot be revived, there is no reason to doubt that the Landlord is likely to obtain other, similarly advantageous, offers if permission is granted. Nor do I consider that it is right to regard this prospective profit as a windfall benefit to the Landlord, any more than it would be right to regard any premium which the Administrators might have been able to obtain as a windfall benefit to the Tenant. Where the market rent is greater than the rent payable under the Lease, or where the leasehold interest has a capital value for any other reason, the Landlord stands to gain if it becomes entitled to forfeit the Lease, just as the Tenant stands to gain if it can achieve the assignment of the leasehold interest. The potential gains of both the Landlord and the Administrators seem to me to be no more and no less than the product of the rights and obligations agreed between the Landlord and the Tenant. This aspect of the balancing exercise involves comparing actual or prospective financial outcomes, and it does not assist to gloss consideration of this aspect with the terminology of "prejudice".

116. The fact that the Administrators have been paying, and have agreed to continue paying, the passing rent as an expense of the administration – and, since the hearing in June 2015 have agreed to pay it in accordance with the terms of the Lease, rather than

monthly – has removed the most obvious source of potential loss to the Landlord flowing from the refusal of permission. Nevertheless, for the reasons give above, this does not mean that there has been no loss to the Landlord as a result of the administration and the temporary occupation of STL. However, I reject the argument that the Landlord has additionally suffered harm just by having an illegal occupier in the Property, or because of uncertainty arising from the Tenant's administration or the lack of covenant strength of STL. I doubt that the financial difficulties of the Tenant or the transfer of occupancy to STL would have been apparent to any outside observer visiting the Brunswick Centre, and the Landlord has not, in my judgment, produced any satisfactory evidence that, or explanation why, these matters affected its ability to raise finance and so forth.

117. I accept that, although this was in clear breach of the terms of the Lease, there were good reasons to grant a licence to occupy to STL for the purpose of the administration. Further, the Administrators have been paying the passing rent and, on my understanding, to all intents and purposes STL carried on operating at the Property the same Strada business as the Tenant had operated. The breach of covenant by parting with possession to STL has been brought to an end and replaced by another breach, of not running a business at the Property. On one view, the latter breach is a product of the Landlord's insistence on the termination of STL's occupancy, but looked at another way it is merely a reflection of the quandary in which the Tenant and the Administrators find themselves: the Tenant has ceased trading, but no suitable assignee of its leasehold interest has been found. At all events, I do not consider that, in all the circumstances, these breaches of covenant of themselves weigh critically in the scales against the Administrators.

118. However, I do consider that the chronology counts against them. The guidance in *Atlantic Computers* recognises that administration is intended to be only an interim and temporary regime, and includes the statement that the proprietary interests of a landlord should not be prejudiced by the way in which the administration is conducted save to the extent that this may be unavoidable and even then this will usually be acceptable only to a strictly limited extent. From the standpoint of the Administrators, the focus on STL was understandable, and it may be fair to take a charitable view of their reliance on STL's word as to what was happening as between STL and the Landlord. However, by the time the matter came before me they had been appointed for 9 months (during which time they had concentrated on STL and had done little more towards marketing the Lease), and had rejected an offer from the Landlord which would have allowed them more time to find a suitable assignee, and had instead suggested that the hearing of the application should be adjourned for a further 8 weeks. In my judgment, that does not accord with that guidance.

119. So far as concerns the form of relief, CRS's letter of 12 January 2015 stated that the Landlord envisaged applying to the court for permission to forfeit the Lease by peaceable re-entry, and I am not persuaded that the wording of the application notice restricts it to

seeking permission to forfeit by way of court proceedings. It appears to be common ground between Counsel that, whether the Landlord seeks permission to forfeit by peaceable re-entry or by legal proceedings, it will be open to the Tenant to apply for relief from forfeiture, and, at least on the Tenant's case, that the procedure and timescales will be the same. The only difference, as I understand it, is that if the Landlord has to forfeit by legal proceedings the Tenant will be able to counterclaim for relief from forfeiture, whereas if the Landlord is permitted to forfeit by way of peaceable re-entry the Tenant will need to commence separate proceedings. There is a major difference between the parties as to the Tenant's prospects of success on any application for relief from forfeiture that may be made, but it is not suggested that those prospects will be affected either way. In these circumstances, and because I am unable to identify any purpose of the administration which would be served by limiting the Landlord to seeking forfeiture by legal proceedings, I do not consider it appropriate to impose such a limitation.

120. For completeness, I should say that there was some discussion before me, particularly at the adjourned hearing on 24 June 2015 as to whether I should grant or refuse permission on terms. Ms Holland QC submitted, and Ms Leahy disputed, that Ms Leahy's case had been run on an all or nothing basis, and that it was not open to Ms Leahy to seek at a late stage to suggest some middle route. Ms Holland QC did not, if my understanding is correct, advance her own case on an alternative basis. I made clear that, if I was attracted to Ms Leahy's fall-back position, I would not rule on the conditions on which permission should be granted or refused without allowing the parties a further opportunity to address me on what those conditions should be, but in the event this does not arise.

121. In sum, although for different (and more elaborate) reasons on the very different facts of this case, I have reached the same result as Briggs J in *Jervis*. I do not consider that the purpose of the administration would be impeded by granting the Landlord permission to exercise its rights of forfeiture; even if that is wrong, I consider that the balancing exercise which the court has to perform if the grant of permission would impede that purpose comes down in favour of granting the Landlord the permission that it seeks; and I do not consider it appropriate to limit the Landlord to forfeiting by legal proceedings.

Conclusion

122. For all these reasons, I propose to grant this application. I invite Counsel to agree a form of Order, and any ancillary issues, but if and to the extent that they are unable to do so I will rule on any matters that remain in dispute when judgment is handed down.