No loss, no gain, no mesne profits?

***Wigan BC v Scullindale Global Ltd* [2021] EWHC 779 (Ch)**

Date of decision: 1 April 2021

Court: High Court

Link: Wigan Borough Council v Scullindale Global Ltd & Ors [2021] EWHC 779 (Ch) (01 April 2021)

Summary

Haigh Hall, Wigan in 2010.[1]

1. This decision is a real treat to read. The case, which is principally concerned with the validity of a break clause notice served by a landlord to determine a lease, is delivered in a communicative style, and enlivened by a number of sporting references.

2. Condensed within its 35 pages are discussions on a variety of subjects which should engage most landlord & tenant practitioners including helpful summaries of the present state of the law on construing a lease, implication, and waiver, as well as tips on bundle preparation

[1] Photograph: "Haigh Hall", by Anthony Parkes, licensed under CC by 2.0. https://www.geograph.org.uk/photo/2000746

and a rebuke of the critical obituary in "The Times" newspaper on 13 March 2021 of the late Sir Jeremiah Harman.

3. Perhaps the most eye-catching feature is the refusal to award any sum for mesne profits despite the tenant holding over since November 2019 on the basis that the landlord had suffered no loss and the tenant secured no gain. Underpinning this approach was the observation by the court that there was no inherent right for a person to be vindicated for infringement of proprietary rights.[2]

Facts

4. The focus of the dispute concerned Haigh Hall, being a Grade II listed stately home (the "**Premises**"). By a lease, Wigan Borough Council (the "**Council**") demised the Premises to Scullindale Global Limited (the "**Tenant**") in 2016 for a term of 199 years at a premium of £400,000 plus VAT (the "**Lease**"). The Tenant's aim was to restore and refurbish the dilapidated premises to deliver a first class hotel and wedding venue. The Lease contained an option (*in the form of a break clause*) to determine the Lease and to re - acquire the Premises at any time should the Tenant fail to complete the development works in accordance with planning permission by 23 May 2018.

5. Despite it being acknowledged that the Tenant had, through its agents, invested millions of pounds to restore the Premises to a splendid condition, the Council purported to exercise its option to terminate the Lease by serving a notice pursuant to cl. 9.1 on grounds that the Tenant had failed to complete the works by 23 May 2018. The Council accepted that pursuant to cl. 9.3, it would have to pay to re-acquire the Premises. No doubt with one eye on the collapse in the hospitality trade, the Council argued at trial that the valuation date was not the expiry of the termination notice (*i.e. November 2019*), but when vacant possession was obtained (*i.e. 2021*). The Council also

[2] "*Mesne profits are awarded on either a compensatory or a restitutionary basis and not as a matter of legal right simply by virtue of legal ownership*" [**¶126**].

claimed damages for trespass or mesne profits in respect of the period from 22 November 2019 onwards.

6. The Tenant vigorously resisted the claim. Firstly, the right to exercise the option had not arisen. Secondly, the Council was required to serve a break notice within a "*reasonable time*" and not at "*any time*". Thirdly, the Council had prevented the Tenant from completing the works. Fourthly, the Council had waived any right to rely, or alternatively, was estopped from serving the break notice. Fifthly, the Council had suffered no loss as a result of the Tenant's continued occupation, meaning there was no entitlement to mesne profits.

Discussion

Validity of the break notice

7. Although the court determined that the break notice was validly served, the Council did not have everything go its own way. The Tenant successfully persuaded the court to imply a term to avoid an uncommercial situation which would otherwise permit the Council to serve a break notice "*at any time*". In other words, the break notice could only be served at any time whilst the development was still incomplete.

8. There are at least two interesting points to note here. Firstly, the court was prepared to imply a form of wording which had not been specifically pleaded by the Tenant as it fell *"within the compass of the term actually implied by the court and the opposing party [was] not taken by surprise or otherwise prejudiced by the form in which the implied term [was] pleaded."* In so doing, the Judge was careful to distinguish the extant circumstances to those found in ***Satyam Enterprises Ltd v Burton*** **[2021] EWCA Civ 287**. Secondly, the court emphasised that whilst the Lease worked perfectly well without a temporal limitation on the Council's right to serve a break notice, such a result did not reflect the reasonable expectations of the parties. The court considered it to be one of those

rare cases where a term could be implied despite it not being necessary for business efficacy to do so.

9. However, despite all the Tenant's efforts to imply favourable terms, its case was beyond redemption on the facts. The evidence overwhelmingly indicated that the works were not completed either by either 23 May 2018 or the date of service of the break notice in September 2019.

10. As regards waiver and estoppel, the Tenant's case once again fell down on the facts. It was unable to point to any clear and unequivocal communication made by the Council which would give rise to any type of waiver or estoppel. Nevertheless, the decision serves as a useful reminder to distinguish between a person's right to exercise an option and a right to terminate a lease. Whilst the Tenant placed significant reliance upon the Council's delay as being inconsistent with the continuing right to exercise an option, the court did not agree. After summarising the decision of ***BDW Trading Ltd v JM Rowe (Investments) Ltd*** **[2011] EWCA Civ 548**, the Judge stated that the Council's delay was an irrelevant consideration:

> *"The principle which is in operation in present circumstances is not like the situation where a party repudiates a contract and the innocent party has to elect timeously whether to affirm it or to terminate the contract by accepting the repudiation. This is made clear in the BDW Trading case itself. The question whether a party with a contractual right to rescind has waived that right by electing to affirm the contract must depend on an analysis of the terms of the particular contract and the circumstances in which the right has arisen. As in the BDW Trading case, it is difficult to see how, where the right to terminate can be exercised at any time, the Council's delay in exercising that right could ever have amounted to acting in a way inconsistent with the right."* **[¶92]**

<u>Re-acquisition of the Premises</u>

11. Even though the court agreed that the Council was entitled to exercise the break clause to terminate the Lease, it was required to re-acquire the Premises at an open market value *"on termination of this Lease"*. The court accepted the Tenant's

submissions that the only sensible way to construe cl. 9.3 was to value the Premises on the expiry of the break clause in November 2019, being £1 million more than its value in 2021. This determination no doubt contributed to the court imploring the parties within the Judgment to find a commercial resolution.[3]

Mesne profits

12. Perhaps surprisingly, the court refused to award damages to the Council despite the Tenant holding over and trespassing on the Premises for more than a year.

13. The decision makes no reference to any rent payable under the Lease, with it assumed by the reader that the Tenant was only required to pay a £400,000 premium in 2016.[4]

14. In comparison to other parts of the Judgment, the sections analysing the Council's legal entitlement to mesne profit is light on case law references. It is not immediately clear which authority is being relied upon by the court when general propositions of law are being set out within the Judgment. The relevant sections of the decision dealing with mesne profit are cited below:

> *124. In closing Mr Hutchings referred me to paras 19.012 (Liability for mesne profits and other losses) and 19.013 (Amount of mesne profits) of Woodfall: Landlord and Tenant. I accept that the amount of the mesne profits for which a tenant who holds over after the termination of his tenancy is liable is an amount equivalent to the ordinary letting value of the property in question; and that this is so even if the landlord would not have let the property during the period of trespass. However, in a case where the landlord would not have let the property, he has suffered no actual loss so the liability of the former tenant to pay mesne profits is in the nature of restitution for unjust*

[3] *"I would invite the parties to consider whether the terms of this judgment may assist them in coming to some form of sensible accommodation over the future of Haigh Hall. The world has changed considerably since the Cabinet first resolved to determine the Lease on 29 August 2019. The Covid pandemic means that the Council will have to pay Scullindale over a million pounds more than Haigh Hall is presently worth when it comes to vacate the property. Scullindale has delivered a firstclass hotel and wedding and events venue in an appropriately, and splendidly, restored and refurbished Grade II* listed building. It has become clear during the course of this trial, that there are tensions between the ability to operate the Hall successfully and profitably and maintaining unrestricted public access to its grounds which IHL and the Council will need to address but which they are likely to find difficult to resolve. Even at this late hour, the Council may feel that permitting Haigh Hall Hotel Limited to operate the hotel business and act as a buffer between itself and the public, but with more clearly defined, but restricted, rights of public access, may prove to be a sensible, and more cost-effective, way forward. If the parties so wish, I am prepared to allow them time for negotiations in advance of the next hearing."* **[¶139]**

[4] In the absence of any rent, it is not immediately clear from the decision what figure was sought by the Council for mesne profit. At **[¶122]**, the decision records that the Council accepted the methodology proposed by the Defendant's expert (presumably being the methodology to calculate the open market valuation as opposed to a periodic rent) as the basis for calculating mesne profit. The starting figure being the stabilised Year 3 net operating income, from which the cost of the Tenant's works would be deducted.

> *enrichment; and the value of the occupation to the former tenant may therefore be taken into account. On the unusual facts of the present case, I am satisfied that whether mesne profits fall to be assessed by reference to the loss which has been caused to the Council, or restitution of the value of the benefit which Scullindale has received from its continuing possession of the premises, the end result is that the Council should be entitled to recover nothing by way of mesne profits*
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> …….
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> *126. Mr Hutchings emphasised that a trespasser should not be able to use another person's land without paying compensation, and that mesne profits are payable even if the landowner would not have relet the premises. However, I do not accept that mesne profits are payable if the premises are effectively unlettable and the trespasser makes no profit from them because they are incapable of beneficial occupation. In my judgment, mesne profits are awarded on either a compensatory or a restitutionary basis and not as a matter of legal right simply by virtue of legal ownership*
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> …….
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> *128. The reality is that the Council has suffered no financial loss, and Scullindale has derived no financial benefit, from its continued possession of Haigh Hall since 22 November 2019. That is entirely the effect of matters consequent upon the global pandemic which were entirely outside the parties' own control and were extraneous to their continuing, enforced relationship. In these unusual, indeed unprecedented, circumstances, I would award the Council nothing by way of mesne profits.*

15. In the present case, the court reasoned that where a claimant is unable to prove losses (*compensatory damages*), a wrongdoer may be stripped of his subjective gains (*restitutionary damages*). Although the decision of ***Ministry of Defence v Ashman*** **[1993] 2 EGLR 102** is not listed as a case cited, the court's reasoning is similar. In ***Ministry of Defence v Ashman***, Lord Hoffman also referred to the two bases of damages for mesne profit as being mutually exclusive:

> *"A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. The first is for the loss which he has suffered in consequence of the defendant's trespass. This is the normal measure of damages in the law of tort. The second is the value of the benefit which the occupier has received. This is a claim for restitution. The two bases of claim are mutually exclusive and the plaintiff must elect before judgment which of them he wishes to pursue…..*

> *…..It is true that in the earlier cases it has not been expressly stated that a claim for mesne profit for trespass can be a claim for restitution. Nowadays I do not see why we should not call a spade a spade. In this case the Ministry of Defence elected for the restitutionary remedy. It adduced no evidence of what it would have done with the house if the Ashmans had vacated. In my judgment, such matters are irrelevant to a restitution claim. All that matters is the value of benefit which the defendant has received."*

16. The case of ***Ministry of Defence v Ashman*** built on previous authorities which had sought to refine the common law to ensure that justice was done to cater for a situation where a claimant's right had been infringed but could not demonstrate any losses. In such a case, the court will look to the use of the land by the wrongdoing. In ***Ministry of Defence v Ashman***, Lord Hoffman said it was time '*to call a spade a spade*' by indicating that these so called 'user damages' were, in fact, restitutionary in nature.

17. As regards the Premises in the present case, the court refused to award any damages for mesne profits as there was no prospect of the Council re-letting the Premises prior to the national lockdown in March 2020. Moreover, the Tenant had not been able to trade from the Premises as a boutique hotel since the termination of the Lease and so secured no gains or benefits from its continued occupation.

18. However, it is worth noting a decision which followed on from ***Ministry of Defence v Ashman***. In ***Inverugie Investments Ltd v. Hackett*** **[1995] 1 W.L.R. 713**, the defendant wrongfully occupied thirty apartments in a Bahamian hotel for over fifteen years, taking two appeals to the Privy Council before surrendering to the plaintiff's claims. It is important to mention that the wrongdoer had not made any profit from the apartments, but instead had been running them at a loss. The Privy Council held that the claimant could recover a reasonable rent for the period for which he was deprived of possession. Lloyd LJ (*who gave the dissenting judgment in Ashman*), applied the 'user principle' and concluded that the claimant was entitled to recover a reasonable rent whether or not he had '*suffered any actual loss*'. Likewise, the defendant was liable to

pay a reasonable rent even though he '*may not have derived any actual benefit*'.[5] At [845], Lloyd LJ referred to the user principle underlying damages for trespass as being neither exclusively compensatory or exclusively restitutionary, but combining elements of both. In that case, damages were assessed on the basis of the market value of the property.

19. Later, in the well-known case of ***A-G v Blake*** **[2001] 1 AC 268**, Lord Nicholls also emphasised that damages were to be assessed on the basis of an open market value. He said at [278]:

> *"A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user.*[6]

20. Since then, the Supreme Court has accepted in ***Star Energy Weald Basin Limited and another v Bocardo SA*** **[2010] UKSC 35** that damages for trespass to land are to be assessed by determining what the claimant would have received if he had been paid to use his land.

21. More recently in ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20**, Lord Reed gave a short historical account of user damages in tort and cited with approval the summary given by Nicholls LJ of the 'user principle' in ***Stoke-on-Trent City Council v W & J Wass Ltd*** **[1988] 1 WLR 1406** at [1416]:

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[5] He deployed the following analogy to explain his position: - "*If a man hires a concrete mixer, he must pay the daily hire, even though he may not in the event have been able to use the mixer because of rain. So also must a trespasser who takes the mixer without the owner's consent. He must pay the going rate, even though in the event he has derived no benefit from the use of the mixer. It makes no difference whether the trespasser is a professional builder or a do-it-yourself enthusiast. The same applies to residential property.*" [846]

[6] As well as emphasising the basis of damages as being the hypothetical market value, Lord Nicholls went on to refer to the case of ***Ministry of Defence v Ashman*** without any bold endorsement of Lord Hoffman's approach, preferring instead to refer to these types of damages as being an exception to the general rule. He said at [279]: "*Recently there has been a move towards applying the label of restitution to awards of this character: see, for instance, Ministry of Defence v Ashman and Ministry of Defence v Thompson. However, that may be, these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule.*"

> *"The law has reached this conclusion by giving to the concept of loss or damage in such a case a wider meaning than merely financial loss calculated by comparing the property owner's financial position after the wrongdoing with what it would have been had the wrongdoing never occurred. Furthermore, in such a case it is no answer for the wrongdoer to show that the property owner would probably not have used the property himself had the wrongdoer not done so."*[7]

22. In light of the development of the common law since ***Ministry of Defence v Ashman***, the learned authors of **McGregor on Damages 21st Ed** set out the present position in respect of the law on 'user damages' at (39-054):

> *"Then in no time [after Ministry of Defence v Ashman] a differently constituted Court of Appeal, but still one containing Hoffmann LJ, followed Ashman; the fact pattern in Ministry of Defence v Thompson was identical and the conclusion reached the same. Hoffmann LJ said that the law now was that an owner might today choose to found his mesne profits claim in restitution; this was no doubt a correct statement in view of the majority ruling in Ashman. Although the damages claim for mesne profits still exists, the effect of the decision of the Supreme Court in One Step (Support) Ltd v Morris-Garner is that these damages are compensatory, not restitutionary. As the Supreme Court said in Prudential Assurance Co Ltd v Revenue and Customs, "user damages" awards are "designed to compensate for loss". However, this concentration on loss does not require that a claimant could be held strictly to what they lost in conventional terms. To so require would be inconsistent with the result in Inverugie Investments v Hackett which is a result to be commended. Ministry of Defence v Ashman and Ministry of Defence v Thompson must now be regarded as suspect authorities for two reasons. The first is their reliance on the approach, which was then an alternative, of treating licence fee damages as restitutionary. The second was because they are illustrations of an unusual situation where the market rental value did not provide the measure of the claimant's damages."*

23. In the present case, the passages within the Judgment indicate that the court was intent upon drawing a sharp distinction between compensatory and restitutionary damages. The law, as it stands at present, appears to be that damages for mesne profits are to be considered under the holistic umbrella of compensatory damages, with the

[7] Later in the judgment at [30], Lord Reed stressed the compensatory nature of user damages, albeit it was recognised that such an assessment was not undertaken in the conventional sense. *"In these cases, the courts have treated user damages as providing compensation for loss, albeit not loss of a conventional kind. Where property is damaged, the loss suffered can be measured in terms of the cost of repair or the diminution in value, and damages can be assessed accordingly. Where on the other hand an unlawful use is made of property, and the right to control such use is a valuable asset, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In such circumstances, the person who makes wrongful use of the property prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss. Put shortly, he takes something for nothing, for which the owner was entitled to require payment."*

correct approach favouring an assessment of the market value based upon a hypothetical negotiation.

24. When considering the restitutionary element in isolation, the court's focus was on stripping the Tenant of its subjective gains as if the defendant had actually received something physically tangible. For example, at [**¶125**] it was said that: "*Likewise, it cannot be said that Scullindale has enjoyed any windfall benefit. It has endured several months of lockdown restrictions of varying severity and its wedding business had ended when the break notice was publicised.*" However, it is averred that the species of compensation in respect of mesne profits, whether it is described as a type of restitutionary claim or not, is typically the market value of the property, not the subjective loss of the claimant or the subjective gain of the defendant. To focus on what was lost by the Council in conventional terms or gained by the Tenant may be inconsistent with the result in ***Inverugie Investments v Hackett***.

25. If it is accepted that the correct starting point is to assess the market value of the Premises in order to calculate any entitlement to mesne profits, the effect of the court's approach is to value the Premises, and not just the parties' losses and/or gains, as nil. There are at least three possible points to consider here:

26. Firstly, the measure of damages is often analysed as a loss of a bargaining opportunity which falls to be determined <u>when the benefit is obtained</u> (*underlined for emphasis*).[8] On that basis and the fact that a new cause of action in trespass arises each day, it is arguably the case that the charge would be daily from the date of termination of the Lease on 22 November 2019. In the present case, the court placed reliance on the expert evidence which confirmed that had possession been given on 22 November 2019, no tenant would have been located prior to the lockdown in March 2020. However, whilst this approach may be relevant for an assessment of any subjective losses, it seems to be a less useful approach for any assessment of the objective value of the Premises as at 22 November 2020.

[8] That is the position at least in the context of an unjust enrichment claim. See ***Benedetti v Sawiris*** **[2013] UKSC 50** [**14**]: *"Whichever approach is adopted, it is clear that the enrichment is to be valued at the time when it was received…."*

27. Secondly, the use of the Premises as a boutique hotel is just one type of use. It seems doubtful that the Premises were devoid of any benefit at all. This seems to be consistent with the view taken by the Court of Appeal in ***LB Lewisham v Masterson*** **(2000) 80 P. & C.R. 117.**[9]

28. Thirdly, it is averred that the correct approach, as regards the identification of the market value, is not what a willing supplier and buyer would have agreed upon but the "*the price which a reasonable person in the defendant's position*" would have had to pay.[10] In those circumstances, it is at least arguable that the continued occupation of the Premises by the Tenant, as opposed to an arms-length third party, did have some continued value for the defendant for which it should be obliged to pay.

29. This is an interesting case for denying a remedy where there is no market for a previously tenanted property in light of the covid-19 pandemic. It remains to be seen whether this case might have a broader application in the current climate for negotiating down any mesne profits given that most properties will have some commercial value, albeit lower than prior to the onset of the pandemic.

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5 April 2021

[9] "*In view of that, and looking at the case more generally, it is in my judgment simply not right, even taking Mr Masterson's case at its highest, to say that his interest in this land was m any proper sense valueless to him. When the cases speak of value to the tenant, they do not mean commercial value but, in a world of free bargaining, the value of the occupation that the tenant has chosen to enjoy. That is why, as Hoffmann L.J. said shortly after the passage that I have just quoted from him in Ministry of Defence v. Ashman, open market value would ordinarily be the appropriate test of valuation. The Court of Appeal in that case did not say, and it is not the law, that (as Mr Roberts put it in closing) the question of the value of the occupation to this tenant (meaning, as I understood it, the commercial value) was the use that in fact he put the property to. In the event that Mr Masterson's occupation was not fruitful commercially, that was nothing to the point-as, indeed, the judge said and emphasised. Nor was the value diminished by the fact that he had to do the works. As I have already said, apart from the erection of the boundary fence, it was after all under the proposed lease (and still more under his tenancy at will) a matter for him whether he did the works or not. Lewisham were no doubt glad, as a local authority, that he was creating a business on part of their land, but that that should occur was not a condition of the lease or a condition of occupation.*"
[10] See ***Benedetti v Sawiris*** **[2013] UKSC 50 [17]**