Neutral Citation Number: [2024] EWHC 2041 (Ch)

Case No: CR-2023-BHM-000722

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN BIRMINGHAM

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF S.A.L. HOLDINGS LIMITED (IN MEMBERS' VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Date: 16 July 2024

Before :

Deputy District Judge Bradshaw

- -

Between :

ROBERT BROWN **Applicant**

- and -

(1) FRAZER ULRICK
(as the Liquidator of S.A.L. Holdings Limited)

(2) S.A.L. Holdings Limited
(In Members' Voluntary Liquidation)

Respondents

- -
- -

Ms Rebecca Farrell (instructed by HCR Legal LLP) for the Applicant
Mr Ian Tucker (instructed by Freeths LLP) for the Respondents

Hearing date: 29 May 2024

- -

This judgment was handed down by circulation to the parties or their representatives by e-mail and by release to the National Archives.

JUDGMENT

Deputy District Judge Bradshaw:

1. The First Respondent, Mr Frazer Ulrick, is the liquidator of the Second Respondent company, S.A.L. Holdings Ltd, which I shall refer to in this judgment as S.A.L. The only creditor in its liquidation is the Applicant, Mr Robert Brown.

2. This application is an appeal by Mr Brown pursuant to Rule 14.8 of the Insolvency (England and Wales) Rules 2016 ("the Insolvency Rules") to set aside the decision by Mr Ulrick to reject a Proof of Debt dated 7 February 2024 for the sum of £277,397 ("the appeal").

3. Mr Brown has also applied pursuant to Section 171(2) of the Insolvency Act 1986 to remove Mr Ulrick as liquidator of S.A.L. That application was listed alongside the appeal before me on 29 May 2024. However, it quickly became apparent that there would not be time to deal with both applications in the same hearing, and furthermore counsel (Ms Farrell for Mr Brown, and Mr Tucker for Mr Ulrick and S.A.L.) agreed that it would not be appropriate to deal with the application to remove Mr Ulrick until I had determined the appeal regarding Mr Brown's Proof of Debt. I have therefore reserved judgment on this appeal, which raises a number of issues regarding contractual remedies, and will hear counsel as to the other application at the adjourned hearing fixed for 31 July 2024. I am grateful to both Ms Farrell and Mr Tucker for their helpful submissions.

Background

4. On 3 March 2018 Mr Brown entered into a tenancy agreement (which I shall refer to herein as "the Lease") for the letting of his property at 9 Lifford Gardens, Broadway ("the Property"). The tenant was, perhaps somewhat unusually for a residential property, not a natural person but instead a company, S.A.L. The term of the Lease was 5 years; again, that is rather longer than usual for a residential tenancy but nothing turns on that.

5. The reason for S.A.L. entering into a residential lease was to provide accommodation for its director and sole shareholder, Mr William Wells. Indeed, Mr Brown's evidence

is that all his dealings with S.A.L. were via Mr Wells, and he signed the tenancy agreement for the Property in his capacity as a director. The Lease specifically stated that it was for the purpose of Mr Wells occupying the Property as S.A.L.'s licensee.

6. In short, Mr Wells was using S.A.L., of which he was at all material times a majority or sole shareholder, as a corporate vehicle by which he rented the Property to occupy. There was and is nothing untoward about such an arrangement and indeed it is Mr Brown's evidence that the Lease followed a previous tenancy agreement on substantially the same terms entered into in March 2017 for a period of a year. That first tenancy having seemingly been to the satisfaction of both Mr Brown and Mr Wells, Mr Brown was content to enter into a second, and to do so for a rather longer term. The significance of the tenancy being between Mr Brown and S.A.L. rather than with Mr Wells was that S.A.L. was privy to the covenants in the Lease and thus liable under them.

7. Despite its 5-year period the Lease was, in all material terms, a typical shorthold tenancy. It placed upon Mr Brown the repairing covenants of ss.11-16 Landlord and Tenant Act 1985 and the obligation to insure the property. Of particular relevance to this matter the Lease included the following covenants on behalf of S.A.L., which I shall refer to in this judgment as "the Condition Covenants":

> *9.1 To take reasonable steps to keep the interior of the Property and the Fixtures and Fittings in the same decorative order and condition throughout the Term as at the start of the Tenancy, as noted in the Inventory and Schedule of Condition. The Tenant is not responsible for the following:*
>
> *9.1.1. fair wear and tear;*
>
> *9.1.2. any damage caused by fire unless that damage was caused by something done or not done by the Tenant or any other person permitted by the Tenant to reside, sleep in, or visit the Property;*
>
> *9.1.3. repairs for which the Landlord has responsibility;*
>
> *9.1.4. damage covered by the Landlord's insurance policy.*

9.16 Not to decorate or make any alterations or additions to or in the Property without the prior consent of the Landlord or the Agent which will not be unreasonably withheld.

14.1. To keep the garden in the same condition and style as at the commencement of the Tenancy.

8. Mr Wells duly occupied (or rather continued to occupy) the Property and S.A.L. paid rent. That rent was rather lower than the usual market rent for such a property but it seems that this was in reflection of the length of the Lease as compared with that of a typical assured shorthold tenancy. Mr Brown's evidence is that he got on well with Mr Wells during the currency of the Lease and that, given that rent was being paid on time and no issues were raised with the Property, he did not seek access to it or to interfere in any way with S.A.L.'s and Mr Wells' quiet enjoyment of it.

9. In July 2021 Mr Wells informed Mr Brown that he wished to extend the term of the Lease from 2023 to 2028. Mr Brown's evidence is that he was not inclined to do this and he evidently communicated this to Mr Wells. Mr Wells made further similar approaches, either asking for an extension of the Lease, or asking what price Mr Brown might seek for a sale of the Property to Mr Wells. Mr Brown reports that these approaches continued but by the second half of 2022 had become, as he puts it, *"rather disjointed"*. He says that by the end of 2022 he was pressing Mr Wells as to the details for handing back the Property as he was not sure what Mr Wells planned to do and wished to have a clear way ahead for taking it back over.

10. Although Mr Brown had been dealing with Mr Wells, his tenant was S.A.L. In fact, S.A.L. had entered members' voluntary liquidation, having been voluntarily wound up on 2 June 2021 by special resolution. A resolution of the same date appointed Mr Ulrick as S.A.L.'s liquidator.

11. It is Mr Brown's evidence that he did not know of this at the time. Neither Mr Wells nor S.A.L. itself informed him of the ongoing liquidation. Although details were available by notice on the Register of Companies, it seems there was nothing to put Mr Brown on notice of the liquidation such as to prompt him to inspect them.

12. Mr Wells returned the keys of the Property to Mr Brown on behalf of S.A.L. on 18 March 2023. This was some two weeks after the Lease had expired but no separate point is taken on this. On visiting the Property Mr Brown found that contrary to the express covenants of the Lease S.A.L. had made considerable alterations to it. Such alterations were presumably made upon the direction of Mr Wells, but as noted any liability attaches to S.A.L.

13. In a letter to Mr Ulrick dated 25 May 2023 Mr Brown made abundantly clear his dismay at the alterations to the Property:

> *"To my utter amazement, large-scale unauthorised alterations in breach of lease clauses had been carried out to a massive degree."*

14. The nature and extent of the alleged alterations was the subject of lengthy schedules in the hearing bundle. A brief summary of the changes complained of is as follows:

    i) Natural stone flooring in the kitchen and breakfast room and other areas had been replaced with laminate.

    ii) Feature oak beams had been painted white.

    iii) Artisan wall tiling in the kitchen had been removed.

    iv) Several dozen brass lighting and electrical fittings had been replaced with stainless steel or chrome fittings.

    v) The master bedroom and en-suite had been completely remodelled including replacement of the shower and bath.

    vi) Curtains, curtain rails, pelmets and roller blinds had been replaced with "office-style" venetian blinds.

    vii) Internal stone walls had been painted, contrary to accepted practice regarding such types of wall.

    viii) Gas fires were replaced with electrical heaters.

ix) A natural stone effect pathway in the garden had been removed, a patio of similar style had been replaced with paving slabs, and extensive landscaping including established flower beds and shrubs had been stripped out.

x) External features such as black ironmongery fittings had been removed and replaced with modern-style items.

15. As will considered later in this judgment, there has been some dispute as to evidence of the condition and appearance of the Property before and after the Lease. However, for reasons I will address later, I am satisfied that the photographs relied upon by Mr Brown, in the form of a sales brochure prepared by Hayman-Joyce estate agents, and a rental brochure prepared by C.J. Hole letting agents, both show the Property as it was in the period 2015 to 2016. I also have the benefit of a very extensive internal and external photographic survey carried out by Evans Jones surveyors in January 2024.

16. The development in which the Property stands, and the Property itself, were described in the Hayman-Joyce sales brochure is as follows:

> *"Lifford Gardens is a small cul-de-sac of houses and bungalows mainly built of reconstituted stone in the late 1960's. Number 9 was significantly extended in 2003/4 to create a very spacious drawing room, kitchen/breakfast room and master bedroom with large en-suite bathroom."*

17. The Property is very typical of those built in Cotswold villages so as to fit in with the prevailing architectural style, in that it is built of yellow stone. Although in no way a pastiche of an 18th or 19th century rural cottage, it is of a character that fits well with its Cotswold setting. The internal photographs show an effort to achieve a traditional rural style, with a warm-coloured stone floor, predominantly magnolia or cream fittings and walls, exposed wooden beams and decorative wall tiling. The overall impression is of a cosy, rural style.

18. It is relevant for the context of the Property's style that it is located in Broadway, a large village often referred to as 'the Jewel of the Cotswolds' and noted for its concentration of houses and properties in the Cotswolds style I have alluded to. Although not in the old centre of Broadway focused on its main street, I take note of the point that the Property is located within comfortable walking distance. I accept

that a person wishing to live in Broadway might well wish to have a property decorated in a style fitting with that so strongly associated with the neighbourhood.

19. The 2024 photographs show a very substantial change of style. The stone floor has been replaced with wood-effect laminate, and the interior colour scheme is now predominantly white and grey, accentuated with chrome or steel fittings. Curtains have been replaced with plain blinds. External white painted wood such as the front door and garage door are now grey. The overall impression is now starkly modernistic. Whatever the arguments about quality or value, the internal style of the Property has been profoundly altered.

20. The photographs of the garden are equally striking. A mature garden with sweeping, well-established borders has been turned into a plain rectangular area of grass bordered by plain fences. Were it not for the evidence of dates, I would have assumed that the more recent pictures showed the original state of a garden, with the ones from 2015 and 2016 showing the subsequent result of years of gardening and landscaping.

21. Mr Brown has obtained quotations for remedying the changes made to the Property and restoring the property to its previous style and condition. The sums involved are very substantial. His initial schedule of claim forming the basis of his first proof of debt (filed on 31 July 2023) amounted to some £235,000. The largest sums related to reinstatement of the garden, patio and path, reinstatement of the stone floors, and returning the bedrooms and bathrooms to their original design. An updated schedule of work was produced in February 2024 claiming £188,214 for rectification work. That schedule, alongside other claimed losses, forms the basis of a second proof of debt filed on 7 February 2024 in the amount of £277,397. It is the second proof of debt that was considered and rejected by Mr Ulrick and all references to "the proof of debt" in this judgment are to that second one.

22. Ordinarily Mr Brown would have pursued a claim against S.A.L. However, having become aware that S.A.L. was in liquidation, he sent details of his claim to Mr Ulrick. It appears that Mr Ulrick sought to engage with Mr Wells but that this proved difficult. Mr Ulrick's evidence is that Mr Wells disputed Mr Brown's claim, and that he then said he would discuss matters directly with Mr Brown. That evidently did not happen and indeed it now appears that neither Mr Ulrick nor his legal representatives

have heard from Mr Wells since the latter part of 2023. Perhaps rather ruefully, Mr Ulrick notes in his most recent statement that with hindsight he *"...might have handled things differently ... in particular having a more pessimistic view as to the level of engagement from Mr Wells."*

23. Considerable correspondence passed between the solicitors acting for Mr Brown and Mr Ulrick (and, in due course, the solicitors Mr Ulrick instructed). Mr Brown became increasingly frustrated with Mr Ulrick's reluctance to agree the quantum of his claim or even to accept that he had a valid claim against S.A.L. Furthermore, as Mr Brown obtained reports on the liquidation of S.A.L, he became concerned at the manner in which the business had been wound up. In particular, it came to light that S.A.L had had net assets of £9.134 million in May 2021, and that there had been distributions to the shareholder (Mr Wells) totalling £8.989 million by way of cash and distribution of book debts – the latter largely comprising a director's loan to Mr Wells – within a day of the resolution of winding up. It became apparent to Mr Brown that there might well be no money left in S.A.L. to meet any claim, and that Mr Ulrick might have to call in an indemnity against Mr Wells.

24. By December 2023 Mr Brown's concerns had become so serious that he issued his application to remove Mr Ulrick as liquidator of S.A.L. As I have noted, the hearing of that application has been reserved until the determination of this appeal. Nonetheless I refer to it as part of the background to this dispute, and in particular as a potential explanation as to why Mr Ulrick is taking a less strictly neutral approach to the appeal than might normally be the case for a liquidator who had rejected a proof of debt.

25. Having issued that application, Mr Brown then filed his (second) proof of debt in the amount of £277,397. This sum was comprised of the following elements:

    i) £156,845 plus VAT (£31,369) for rectification works.

    ii) £23,200 for legal costs.

    iii) £51,181 for loss of rental income and loss of use and enjoyment.

    iv) £13,802 in interest.

26. Mr Ulrick rejected the proof of debt on 1 March 2024. The reasons given for that rejection were:

    i) That Mr Brown had not provided sufficient evidence of the condition of the Property at the start and end of the Lease.

    ii) That Mr Brown had not provided sufficient proof that the alternations to the Property had been carried out by S.A.L. or Mr Wells.

    iii) That the proof of debt included losses that Mr Brown would not incur.

    iv) That the sum sought was unreasonably high in proportion to the value of the Property.

    v) That there was no evidence that Mr Brown could not have re-let the Property immediately.

    vi) That the claims for interest and costs were not recoverable.

27. Mr Brown applied on 19 March 2024 pursuant to Insolvency Rule 14.8 for the rejection of the proof of debt to be set aside and the proof of debt be reconsidered.

Appeals against rejection of Proof of Debt

28. Both counsel referred me to a number of authorities regarding the manner in which a liquidator should evaluate a proof of debt. In an appeal under Insolvency Rule 14.8 the Court re-considers the proof of debt *de novo*, and so adopts the same approach, albeit often on a more detailed and fulsome evidential basis than was available to the liquidator. Many of those authorities were summarised in the very helpful exposition of the relevant law by Mr Registrar Briggs (as he then was) in *McCarthy v (1) Tann (2) Stevens (as Joint Liquidators of Emerald Meats (London) Ltd* [2015] EWHC 2049 and rather than attempt a further precis I will simply quote the learned Registrar:

> *7. The joint liquidators are under a statutory duty to ascertain and discharge the liabilities of the Company. Part of the process by which a liquidator discharges the duty is to ask claimants if they have any claims against the company in liquidation. Typically a creditor will submit a proof of debt which will include (among other things) the total amount of his claim as at the date liquidation, and*

particulars of how the debt was incurred. The particulars may be supported by documents to substantiate the claim.

8. Following submission of the proof a liquidator may seek clarification or call for the documents, if they were not annexed to the proof. Upon receipt of the material and proof a liquidator must make a decision as to whether to admit or reject the proofs but he may also admit part of the proof: rule 4.82 of the Rules provides that a proof may be admitted for dividend either for the whole amount claimed by the creditor, or for part of that amount.

9. When he makes the decision a liquidator acts in a quasi-judicial capacity. In Menastar Finance Limited [2003] BCC 404 Etherton J (as he was) explained:

"The power of a liquidator is, in this respect no different from that of the court itself, since the liquidator, in deciding whether to accept or reject a creditor's proof in whole or in part, is acting in a quasi judicial capacity.....His statutory duty is to ensure that the company's property is collected in and applied in satisfaction of its liabilities pari passu among its proper creditors."

10. In discharging the duty to adjudicate on claims an office-holder may question and investigate but where evidence has been submitted he must examine it. In Re Van Laun [1907] 2 KB 23 Bigham J gave the following account of the duty:

"The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills. When he sees them it may be that he thinks them fair and reasonable and, if so, he will probably admit the truth. But until Mr Chatteron furnishes him with the means of forming an opinion I think the trustee cannot do otherwise than reject the proof."

11. Rule 4.83 of the Rules sets out the procedure that should be followed if a contributory or creditor is dissatisfied with the liquidator's decision permitting an application to court for the decision to be reversed or varied. Buckley J said in Re Kentwood Construction Limited [1960] 1 WLR 646 that when such an application comes before the court it should approach the question afresh:

"When an application is made to the court to reverse a decision of a liquidator in rejecting a proof, evidence is filed which is very commonly much fuller than the evidence available to the liquidator at the time when he decides to reject the proof; the court is bound to decide the rights of the claimant in light of the evidence which is before the court, and not merely to express a view as to whether the liquidator was right or wrong in rejecting the proof when he rejected it.....the court must approach the question de novo and determine to what extent the claimants ought to be allowed to rank as a proving creditor."

12. More recently Blackburne J explained the task for the court on an appeal in Re a Company no 004539 of 1993 [1995] BCC 116 at 120:

"In my view, the task of the court on an appeal under 4.70(4) is simply to examine the evidence placed before it on the matter and come to a conclusion whether, on balance, the claim against the company is established, and if so in what amount."

13. It is common ground between the parties that the burden of proof lies with the appellant/applicant in discharging the test. The reference to 'whether on balance' in the passage cited in Re a Company no 004539 of 1993 is to the standard of proof, namely the balance of probabilities.

29. Save that the relevant provisions have been re-numbered following the introduction of the Insolvency Rules 2016 I am satisfied that this summary accurately encapsulates the legal principles I must follow in considering the Applicant's proof of debt. That proof of debt relating as it does to an unliquidated claim for breach of contract it falls to me to determine, on the basis of the evidence before me, whether the Applicant has, on the balance of probabilities, made out his claim against the Second Respondent.

Measure of Damages for Breach of Covenant

30. Before turning to that evaluation it is necessary to consider the law regarding the measure of damages for breach of covenant. The most substantial part of the Applicant's claim in respect of the Property relates to the asserted cost (£156,845.67 excluding VAT) of making good the alterations carried out by the Second Respondent. There are other aspects of the claim, and there are to an extent disputes of fact in relation to it, but the fundamental legal point dividing the parties is the question of how such loss should be assessed.

31. Mr Brown and Mr Ulrick adopt the following positions on this question.

    i) Mr Brown submits that he is entitled to the cost of restoring the Property to the condition that it was when first let out to S.A.L.

    ii) Mr Ulrick submits that Mr Brown is entitled to only the diminution in value of the Property consequent on the alterations made by S.A.L.

32. Any law student even moderately familiar with the law of contract will recognise two of the three standard approaches to measuring loss for breach of contract: expectation loss and diminution loss (the third being reliance loss). Such a student will typically have been taught first that the usual measures of loss for breach of a contract are expectation and reliance loss, which might be defined briefly as follows:

    i) Expectation loss is the measure of damages that will put the innocent party in the same position as it would have been in had the defaulting party performed its obligations under the contract.

    ii) Reliance loss is the measure of damages that will compensate the innocent party for losses that it would not have sustained but for the defaulting party's breach; or in other words, such as to put the innocent party in the position it would have been in had the contract never been entered into.

33. Our hypothetical student will then no doubt have been introduced to the concept of diminution loss through the leading authority of *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344. The facts of *Ruxley* are well-known, to the extent that even lawyers who have specialised in areas far removed from contract law can

probably recall something about *'the case with the too-shallow swimming pool'*, but for convenience I set them out as summarised in the headnote of the ICLR report:

> *"The two plaintiffs in the consolidated actions contracted to build, respectively, a swimming pool and its enclosure for the defendant in his garden. The contract specified that the pool should have a diving area 7 feet 6 inches deep. On completion the pool was suitable for diving but the diving area was only 6 feet deep. However, there was no adverse effect on the value of the property. The estimated cost of rebuilding the pool to the specified depth was £21,560. The judge gave judgment for the plaintiffs on their claims for the outstanding balance of the contractual price, but, except for awarding the defendant £2,500 for loss of amenity, dismissed his counterclaim for breach of contract, holding that the cost of reinstatement was an unreasonable claim in the circumstances."*

34. The Court of Appeal reversed the decision at first instance, but on further appeal the House of Lords restored the trial judge's assessment of damages, holding that where the costs of reinstatement was out of all proportion to the loss occasioned by the breach, it was the diminution loss rather than the expectation loss (the cost of reinstatement) that formed the basis of the quantum of damages. Lord Lloyd (at 367H) expressly approved the following two propositions:

> *"…first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the benefit to be obtained, and, secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award."*

35. Returning to the matter at hand, the submissions of the parties – pared down to their essentials – are as follows:

    i) Mr Brown says that he is entitled to expectation loss. His expectation was that the Property would be returned to him at the end of the Lease in the same condition of decoration and arrangement as it was at the outset, as specifically contemplated by the parties when they agreed the Condition Covenants. Accordingly, Mr Brown should be entitled to such damages as would put him in the same position as if the S.A.L. had performed the contract embodied in the Lease (and the Condition Covenants in particular) by not making the

alterations to the Property and the garden. The measure of loss for such damages is the cost of reversing those alterations such as to restore the Property and garden to their pre-Lease conditions.

ii) Mr Ulrick says (setting aside for the moment questions of causation and the actual quantum of damages) that Mr Brown's loss, if any, is to be measured as the diminution in value of the Property as a result of the alterations. He submits that there is a line of authority to the effect that this is the appropriate measure of loss for breach of a covenant relating to decoration of leased property, and that in any event the principle in *Ruxley* applies in that the asserted cost of reversing all the alterations is out of all proportion to any loss of amenity that Mr Brown can be said to have suffered.

36. For Mr Brown, Ms Farrell relies on *Hadley v Baxendale* (1854) 9 Exch. 341 as authority for the propositions that loss should be pragmatically assessed as following by way of a causal relationship with the conduct of the party in breach, and that damages of a more special or extensive nature may flow where both parties contemplated that such damages might arise from a breach of the contract. On Ms Farrell's submission Mr Brown and S.A.L. entered into a very clear contractual agreement as set out in the Condition Covenants and so S.A.L. was on notice of the foreseeable consequences of carrying out substantive changes to the condition of the Property and its garden, such consequences being that S.A.L. would be liable for the full cost of reversing those changes.

37. For Mr Ulrick, Mr Tucker referred me to statements in *McGregor on Damages* (21st ed.) and *Dilapidations: Modern Law and Practice* (7th ed.) in relation to damages in 'reinstatement' cases concerning breach of covenants by a tenant to return a leased property in a specified condition of decoration and repair. To quote from the former text (at §28-092):

> *"So far no case has appeared where cost of reinstatement well in excess of diminution in value has been awarded. For this it is necessary to turn to another type of situation where at the end of the term the premises are in a different structural condition from that in which they should have been, either because the lessee has altered their condition in breach of contract or because, though*

alteration was permissible, the lessee has failed to restore them to their original condition. Here one leaves the replanting of the vegetation of Ocean Island and comes nearer home to the less exotic changing the use of urban premises from residential to commercial or from a single dwelling-house to a number of flats. In this type of situation the difference between diminution in the value of the reversion and the cost of reinstatement can be far more marked than in the case of a repair covenant broken, because the lessee may have increased rather than diminished the market value of the reversion by their breach. Yet the lessor has expressly stipulated that the premises should revert to them in a particular condition and questions of market value may not count with them: for instance, the lessor may wish to occupy the premises personally as a private dwelling-house and not be interested in the increased value that would be given to the property by conversion to commercial use or conversion into flats. Here therefore it would seem that, while the prima facie measure of damages remains the diminution in the value of the reversion, the claimant ought to be awarded as damages the cost of reinstatement if they intend to alter the condition of the premises to comply with the contract and if this can be regarded as a reasonable course for the claimant to take in the circumstances."

38. In the specific context of breaches of covenant by a tenant, both Ms Farrell and Mr Tucker referred me to *Westminster v Swinton* [1948] 1 K.B. 524, a case regarding the lease of a house subject to covenants not to use it other than as a private dwelling and not to make any alteration to it without the express prior consent of the landlord or his solicitor. The tenant, contrary to both these provisions, undertook work to convert it into six separate flats which were then let out. Denning J (as he then was) held (at 533 – 534) that there was no *"rigid rule"* that every breach of a lease covenant gave rise to a claim for the cost of reinstating the premises, but rather that damages would depend on the circumstances of each particular case, and that the real question was *"What damage has the plaintiff really suffered from the breach?"*. Denning J awarded damages under this head of £200, although unfortunately the reported judgment sets out neither the costs of remediation originally claimed nor Denning J's rationale for this sum.

39. As might be inferred from the fact that both counsel sought to rely upon it, *Westminster v Swinton* is a case where the *ratio* is expressed in such broad terms that it is apt to be relied on by either party to a dispute, simply by reframing the question of loss as being one of what damage the claimant has *"really suffered"*. With the greatest of respect to Denning J, his statement is based on relatively limited analysis or line of authority. It is also very evident from reading the judgment that Denning J came to his conclusion in the context of the acute shortage of housing during and immediately following the Second World War, and one can detect a manifest reluctance to sanction the defendants for actions that sought to relieve such shortages. Accordingly, it is not an authority that provides much firm assistance to either party beyond the broad statement of principle set out by the editors of *McGregor on Damages* as quoted above.

40. I have found more assistance in the Australian case of *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, [2009] CLR 272, a decision of the High Court of Australia ("the HCA"). Although an Australian case, and so a persuasive rather than binding authority upon me, *Tabcorp* was a case very close on the facts to the matter at hand and one in which the HCA specifically considered *Ruxley* in great detail.

41. Furthermore, in *Tabcorp* the HCA made substantial reference to its earlier decision in the case of *Bellgrove v Eldridge* (1954) 90 C.L.R. *Bellgrove* is cited by the House of Lords in *Ruxley* as the leading Australian case on the issue of reasonableness of damages in cases for breach of building contracts, and its reasoning and conclusions were specifically endorsed by Lord Lloyd in his speech (at 368B). I am therefore satisfied that the HCA's analysis of *Ruxley* in *Tabcorp* is consistent with, and based upon the same legal principles as, the reasoning in *Ruxley* itself.

42. In *Tabcorp* the landlord (Bowen) had entered into a lease with the tenant (Tabcorp) for an office building in Melbourne. The lease included a covenant in the following terms:

> *Not without the written approval of the Landlord first obtained (which consent shall not be unreasonably withheld or delayed) to make or permit to be made any substantial alteration or addition to the Demised Premises.*

43. The building had been leased with a recently-constructed granite foyer. Within a few months of the commencement of the lease the tenant began demolition work on the foyer, in what the trial judge described as *"contumelious disregard"* of the covenant not to alter. The tenant then installed a foyer of its own design.

44. At first instance the trial judge ordered damages of A$34,820, this sum representing the assessed diminution in the value of the building, holding that to award the full cost of reinstating the original foyer would only be awarded where the alterations had caused a radical change in the use to which the building could be put.

45. The Full Court of the Federal Court of Australia subsequently increased the award of damages on appeal to A$1,380,000, comprising A$580,000 for the cost of reinstating the original foyer and A$800,000 for loss of rent during such work. That decision was appealed to the HCA.

46. Before the HCA Tabcorp sought to rely on *Ruxley* in support of its argument that the Full Court had erred in allowing that the measure of damages was the cost of reinstatement rather then the diminution in value of the building, arguing that the reinstatement cost (even leaving aside the loss of rental income) was out of all proportion to the loss suffered by Bowen.

47. The HCA in its single judgment referred (at 288) to Lord Mustill's speech in *Ruxley* and in particular His Lordship's exposition of the relevant principles at 360B-D:

> *"Yet the householder must surely be entitled to say that he chose to obtain from the builder a promise to produce a particular result because he wanted to make his house more comfortable, more convenient and more conformable to his own particular tastes; not because he had in mind that the work might increase the amount which he would receive if, contrary to expectation, he thought it expedient in the future to exchange his home for cash. To say that in order to escape unscathed the builder has only to show that to the mind of the average onlooker, or the average potential buyer, the results which he has produced seem just as good as those which he had promised would make a part of the promise illusory, and unbalance the bargain. In the valuable analysis contained in Radford v. De Froberville [1977] 1 W.L.R. 1262, Oliver J. emphasised, at p. 1270, that it was for the plaintiff to judge what performance he required in*

> *exchange for the price. The court should honour that choice. Pacta sunt servanda.*[1] *If the appellant's argument leads to the conclusion that in all cases like the present the employer is entitled to no more than nominal damages, the average householder would say that there must be something wrong with the law."*

48. Lord Mustill went on to hold that *"the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance would secure"*.

49. Reviewing the breaches in *Ruxley*, the HCA in *Tabcorp* held that the facts of that case had evidently been considered to be exceptional and were plainly distinguishable from those in the case before it. Noting a further element of Oliver J's judgment in *Radford*, that diminution would apply where the innocent party was *"merely using a technical breach to secure an uncovenanted profit"* the HCA made a clear distinction between such cases (principally *Ruxley*) and those cases where there had been a deliberate breach of a terms requiring that a thing be done or not done. To quote again from the HCA's judgment (at 290):

> *"The Tenant's submissions rested on a loose principle of "reasonableness" which would radically undercut the bargain which the innocent party had contracted for and make it very difficult to determine in any particular case on what basis damages would be assessed. That principle should not be accepted."*

50. Before I leave *Tabcorp* two further points arise. The first concerns an argument raised in *Ruxley* and also before me in this matter, which is the concern that the innocent party might not actually use the sum that would be awarded for the full cost of reinstatement on actually carrying out the work. That point was addressed in *Ruxley* by Lord Lloyd (at 373B-D), who accepted the submission that that evidence of a lack of such intent might undermine the reasonableness of the higher cost measure. In *Ruxley* there was a finding of fact that the plaintiff would not in fact reconstruct his swimming pool. For me, the question therefore is whether I would find that Mr Brown would restore the Property to its original condition. That is a matter I will address when I consider questions of fact in due course.

[1] 'Agreements must be kept.'

51. The second point concerns a footnote to the reported judgment in *Tabcorp* in which the HCA noted, but dismissed, an English authority relied upon by Tabcorp, *Espir v Basil Street Hotel Ltd* (1936) 3 All ER 91. The footnote simply stated that *Espir* was an *ex tempore* decision that did not take into account the issues considered in detail by the HCA. I, however, am in a different position to the HCA and must distinguish any authority that would otherwise bind me. I therefore turn to *Espir*.

52. It is a case that is unusual on its facts. The premises were owned by a railway company, which sublet part of it to the plaintiffs, who then sublet it (for the term of their lease less 15 days) to the defendants. Subsequently the rest of the building became surplus to the railway company's needs, and it then let the whole building directly to the defendants on a 999-year lease, subject to the plaintiff's interest. The defendants thus occupied the whole building, either as tenants or as subtenants of the plaintiffs, and undertook substantial work to adapt the premises to the purposes of a hotel. This was done, in respect of the part still held on reversion by the plaintiffs, without the plaintiff's permission, contrary to an express covenant in that lease.

53. The plaintiffs sued for breach of the covenant and claimed £450 (some £26,000 today) as cost of reinstatement. The judge at first instance awarded £60 (£3,500 today) but on appeal the Court of Appeal held that diminution of value was the correct measure and reduced the damages to 40 shillings (£2, or £120 today).

54. Having read the judgment I am in agreement with the HCA. The central issue is that the plaintiff's interest was a reversion of 15 days that would fall due some 72 years in the then future. Slesser LJ, giving judgment, noted that the defendants in reality held the entire premises for 999 years less that future 15 days, and there could not realistically be said to be any damage to the plaintiff's very limited and transient reversionary interest. The case is very special on its facts, and predates the much more substantial consideration of the relevant legal principles in *Ruxley* (or even the rather briefer analysis in *Westminster*). It has been cited in few subsequent cases, and never on the issue of the measure of damages; rather, to the extent that it has ever been an authority, it is so as regards the implications of brief reversionary interests. I am satisfied that it does not bind me in respect of the facts of this case.

55. Accordingly, I consider that the principles to be applied in determining the measure of damages for a breach of contract in cases such as this are as follows:

i) The normal measure of damages for breach of contract is the cost of putting the innocent party in the position they would have been in had the contract been performed properly, and this will typically be the expectation loss.

ii) There are circumstances where this may not be the appropriate measure of damages. These include where one or more of the following factors apply:

a) The cost of compliance with the terms of the contract would be out of all proportion to the value of the contract or its subject matter.

b) The performance actually rendered to the innocent party is only marginally different or inferior to that specified in the contract.

c) The innocent party is more concerned with the effect of the breach on the value of the subject matter of the contract than the fact of non-compliance with the specification; conversely there is more weight on awarding the full loss where the specification was for the personal benefit of the innocent party and the consequent benefit is not measured solely in pecuniary terms.

d) There is evidence that the innocent party would not use the full sum awarded on attaining compliance with the contract and would profit themselves from a 'technical breach'.

iii) These factors are particularly apt to arise in claims arising from construction contracts but are equally applicable in claims arising for breach of covenant in a lease.

iv) Where such factors predominate, the loss will usually be assessed as the diminution in value of the asset that forms the subject matter of the contract.

v) The central issue for the court is that articulated by Denning J in *Westminster*, i.e. *"What damage has the plaintiff really suffered from the breach?"*, but this question is the starting point of the evaluation and the factors set out above fall to be taken into account.

Evaluation of Evidence

56. I now turn to the evidential basis of the claim. In making such an evaluation I have had regard to the evidence before me, which comprises several witness statements from both Mr Brown and Mr Ulrick that exhibit substantial evidence regarding the Property. Even with careful removal of duplicate exhibits (and I express my gratitude to those who prepared the bundle for taking the time to do this oft-omitted task) the hearing bundle was nearly 650 pages long.

57. I first address an issue on which submissions were made to me in court, which was the approach to be taken in a hearing under the Insolvency Rules to evidence which was not accepted but had not been challenged by cross-examination. This matter was listed before me (along with the application for Mr Ulrick's removal as executor) for a three-hour hearing. Noting the length of the bundle I asked the advocates at the outset if any cross-examination was proposed, and I was told it was not.

58. In light of the Supreme Court's recent firm restatement in *Griffiths v TUI (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204 of the long-standing principle in *Browne v Dunn* (1893) 6 R 67 that the evidence of a witness who is to be impugned should be tested in cross-examination, I invited submissions as to how to resolve differences in the evidence of Mr Brown and Mr Ulrick.

59. Ms Farrell, in her skeleton argument, referred me to *Re Burden Group Ltd: Fielding v Hunt* [2017] EWHC 245 (Ch) and the detailed consideration of the point by HHJ Stephen Davis (sitting as a Judge of the High Court) at paragraphs 2.1 to 2.12. HHJ Davis cited at length the judgment of Rimer J in *Long v Farrer* [2004] EWCH 1774 (Ch), a bankruptcy case where there had been a challenge to the decision of the registrar to conclude a factual dispute without cross-examination. Having considered the like of authority beginning with *Browne* and focussing on Company cases, Rimer J held (at paragraphs 60 and 61) as follows:

> *"I accept that any court, and particularly the Companies Court, should not seek to resolve issues of fact without cross-examination where there is credible evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a proper understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible.*
>
> *[…]*
>
> *The basic principle is, therefore, not an unqualified one. In particular, paper evidence which is manifestly incredible can be disregarded or disbelieved. But it will require a fairly extreme case for untested paper evidence to be rejected on that basis."*

60. HHJ Davis, noting the undesirability in insolvency hearings of requiring cross-examination in every case where there was a dispute of fact, adopted Rimer J's *"basic principle"* and concluded (at paragraph 2.14) that:

> *"It follows, it seems to me, that although the matter is always highly fact-sensitive and no hard and fast rule can be laid down, in general the benefit of the doubt must be given to the witness in such cases, and his or her evidence should only be disbelieved if it can properly be regarded as incredible."*

61. Accordingly, where it is suggested that I should not accept the written evidence of a witness I will disbelieve it only if I can properly find that it is incredible.

62. I also deal with the question of quasi-expert evidence. I say 'quasi-expert' because on reading the bundle I noted two reports on the Property. One, as I have noted, was produced for Mr Brown by Evans Jones surveyors. The other is a report for Mr Ulrick produced by Hollis surveyors on 2 February 2024. No order has been given for use of expert evidence and neither report was, or purported to be, compliant with CPR Part 35. Counsel accepted that neither report was formally speaking expert evidence.

63. The Evans Jones report is entitled 'Schedule of Condition' and is principally a survey, and to that extent I treat it as documentary evidence exhibited by Mr Brown as to the internal and external condition of the Property in early 2024. Although not compliant

with CPR Pt 35 it does bear a statement of truth. It also contains a schedule of costs for reinstating the Property to its original condition. That Schedule I treat with two caveats: it is necessarily based on Mr Brown's evidence as to the prior condition of the Property, and not being expert evidence it is opinion. That said, I consider it to be 'informed' opinion setting out price quotations, although I accept that some of the quoted prices may be more uncertain than others.

64. The Hollis report is entitled 'Claim Response to: 9 Lifford Gardens'. It does not bear any statement of truth. It does include a summary of instructions in the following terms:

> *"Instructions were received from Frazer Ulrick of Westgates Restructuring Ltd on 14 December 2023 to review the landlords [sic] claim, inspect the property and advise upon the validity of the claim."*

65. The report consists mainly of extensive expressions of opinion as regards the necessity, appropriateness and costs of remedial work. It also, albeit briefly, expresses opinion on the law regarding recoverability of damages. It contains a number of comments from which it is apparent that the basis of the report is to challenge and undermine Mr Brown's claim, including the suggestion at paragraph 2.3.3, regarding the cost of removing internal painting, that *"We believe this cost is grossly inflated and would suggest the landlord is looking to profiteer without substantiating or demonstrating their loss as there is no evidence to suggest the landlord will undertake these works."*

66. In an expert report such expression of opinion would be a usurpation of the role of the Court, contrary to the clear statement of an expert's duties set out by HHJ Toulmin CMG QC in *Anglo Group v Winther Brown* [2000] EWHC Tech 127. Here, it exemplifies why I treat the Hollis report as a mix of advocacy and opinion that I give little if any weight to as evidence per se.

67. I also note the lack of any evidence from Mr Wells. To the extent there is any evidence from him, it is by the hearsay report given in Mr Ulrick's statement. I have already noted Mr Wells' disengagement from the liquidation process in respect of S.A.L. and Mr Ulrick's own tacit acceptance that Mr Wells has been less than fully

cooperative in the process. I do not attach any negative weight to Mr Ulrick's case by reason of his not having produced evidence from Mr Wells.

68. However, I do give some weight to the fact that Mr Wells has not sought to offer any support of his own by way of evidence. I am satisfied from Mr Ulrick's evidence that Mr Wells is fully aware of the dispute over the Property. Mr Ulrick exhibits documentary evidence that he informed Mr Wells of the nature and extent of the claim and that he reminded Mr Wells that he had given Mr Ulrick an indemnity in respect of unexpected creditor claims. Mr Wells was and is therefore aware that Mr Brown had made a substantial claim against S.A.L. and that potentially Mr Wells might himself to meet that claim.

69. In such circumstances one might expect Mr Wells to offer any assistance he could to Mr Ulrick by way of evidence that challenged or undermined Mr Brown's claim. Instead, as Mr Ulrick sets out, Mr Wells has been silent since he was written to by Mr Ulrick's solicitors in October 2023.

70. I do not draw any adverse inference against Mr Ulrick from this. In circumstances though where, on Mr Ulrick's evidence, Mr Wells told him that Mr Brown was a *"con artist"* and that he (Mr Wells) had done nothing to damage the Property, I do draw an adverse inference against that hearsay evidence by reason of Mr Wells' failure to reinforce it by admissible evidence of his own. I therefore give no weight to Mr Wells' reported comments regarding the state of the Property.

71. The first evidential point I must be satisfied on to admit any part of Mr Brown's claim is that S.A.L. was indeed responsible for the changes to the interior and garden of the Property. There is no real dispute about the condition of the Property as of January 2024, and no suggestion that the condition documented in the Evans Jones report is materially different from that when S.A.L. ended the Lease in March 2023. Rather, Mr Ulrick has raised doubts as to whether I can be satisfied that the Property was in the condition before the Lease began that Mr Brown asserts.

72. Mr Brown has produced the evidence I have referred to above in the form of the marketing documents from 2015 and 2016, and has further provided evidence as to when the photographs in them were produced. Although it is true, and perhaps with hindsight unfortunate, that there was no comprehensive photographic inventory of the

Property at the start of the Lease, I am entirely satisfied that the photographic evidence supports Mr Brown's written evidence as to the original state of interior decoration and of the garden. Applying the test in *Long v Farrer* as adopted in *Fielding*, there is nothing to suggest that Mr Brown's evidence in this respect is incredible. I accept it.

73. A related point is whether it is proven to my satisfaction that S.A.L. committed the breaches complained of. There is no evidence that anyone other than Mr Wells, who was both occupier as S.A.L.'s approved licensee and also a director and the principal or sole shareholder of S.A.L., had carried out or caused to be carried out the works. Indeed, Mr Brown went to the effort of contacting local tradespeople who had worked on the Property and was able to obtain receipts showing payment from Mr Wells. I am therefore satisfied that the works were carried out on the instruction of Mr Wells while he was acting as S.A.L.'s employee, servant or agent.

74. The second evidential point for me to consider is whether the quantum of the claim is credible. As noted, I do not have expert evidence on this point. Again, though, the test is whether Mr Brown's evidence, not tested in cross-examination, should be found so incredible as to be believed. I say 'evidential' because there is a separate legal point in respect of some of the elements of the proof of debt as to whether they are recoverable in law. I will address that separately in due course. The issue of evidential credibility applies to the largest element of the claim, those for remediation/rectification costs and for loss of rental income and amenity.

75. The Schedule of Costs relied upon by Mr Brown is, as noted, verified by a statement of truth and states that prices are derived from Spon's Architects and Builders' Price Book. The Schedule provides a detailed breakdown but in summary the costs are as follows (excluding VAT):

i)	External works, principally the garden:	£68,048.00
ii)	Internal works:	£71.992.78
iii)	12% uplift for overheads and profit	£16,804.89

76. Separated out in this manner, the sum claimed is less exceptional. The evidence is that the Property was being marketed for £650,000 in 2015 and it is likely to be worth somewhat more now. The expenditure of just over £80,000 (including uplift) plus VAT on a very substantial interior redecoration, including the reinstallation of stone floors, is neither implausible nor, in my opinion, disproportionate to the value of the Property.

77. The comparable sum in respect of the exterior and garden must be considered in terms of the work necessary to reinstate from little more than bare grass to what was a well-established landscaped mature garden. I bear in mind that what Mr Brown is seeking to achieve is the re-establishment in a relatively short period of a garden that in all likelihood took many years to come to maturity. It is the common experience of anyone engaged in gardening that it costs more to buy grown shrubs and trees than it does to buy them as small cuttings or saplings. There are also the costs of removing the new patio and reinstating the original patio and path. Again, in my view the quoted costs are neither implausible nor disproportionate to the overall value of the Property.

78. Insofar as I have considered the individual costed elements of work they are consistent with the changes that Mr Brown sets out, in his evidence, as having been made and which need to be reversed. I further note that one of the most contentious items in the original proof of debt, a claim for £20,000 for 'damages' in respect of painting of internal stone walls, has been greatly reduced and now forms a claim for £5,200 for removal of paint by a specialist stone conserver.

79. I am therefore satisfied that the element of the proof of debt for remedial works in the amount of £156,845 plus VAT is not incredible and represents a reasonable sum to claim for such works.

80. Turning to the claim for loss of rental income and amenity, Mr Brown breaks this down as follows:

    i) 10 months' lost rental income at £3,500 per calendar month.

    ii) 3 months' loss of use (apparently at the same rate) during redecoration.

iii) 6 months of council tax.

iv) Interest.

81. Mr Brown's evidence is that he could not re-let the Property immediately because it would have been difficult to demonstrate the condition at the date of vacation and he would have had to find alternative accommodation for himself. In respect of the first point it is hard to see why Mr Brown could not have had a thorough survey done (which might also have served as a pre-lease report for a subsequent tenant) along the lines of that carried out in January 2024. As for his need for accommodation, this is a cost that would have fallen upon Mr Brown in any event if he had re-let the Property. It is not an additional loss. I do not find either of these elements of the Proof of Debt to have been wrongly rejected and do not allow them. Irrespective of whether interest would be recoverable, it does not therefore arise.

82. I do however accept in principle the claim for loss of use of the Property during remedial work, which equates to £10,500. The sum sought is, on evidence, the current market rent (rather than the very discounted rate offered to S.A.L. for a relatively long lease) and 3 months is a realistic timescale for the extensive works quoted for. As this is a future loss no question of interest arises.

83. Before I turn to the other heads of claim I have one further evidential point to consider: whether I am satisfied that Mr Brown does intend to carry out the remedial work he has costed. Returning to Oliver J's point in *Radford* I have to consider whether this is a merely 'technical' breach that Mr Brown in fact has no real intention of rectifying.

84. Firstly, his evidence is that he does intend to do the work. This evidence has not been challenged in cross-examination and is not incredible. The position is very different from that of Mr Forsyth and his swimming pool, where it was found that he was in fact going to be quite content to use his pool even though it was a little shallower than he had contracted for and would not in fact replace it even if paid damages sufficient to do so. Here, Mr Brown entered into a specific covenant with S.A.L. that his home would be returned to him in the same state of interior decoration and the same well-established garden as he had let it. That is a covenant whose breach cannot be measured purely in hypothetical diminution of value, especially where it is said by Mr

Ulrick that there is no proof that the Property is worth any less than it was before. In my judgment this is a paradigm example of a case where there is a real rather than 'technical' breach and it is entirely credible that Mr Brown, as innocent party, genuinely intends to rectify it rather than live in a house so changed in style from that which it was in when he let it to S.A.L.

85. I am thus satisfied of the following (by reference to the tests I set out at paragraph 55(ii)):

i) The costs of complying with the Condition Covenants by reinstating the Property (including the garden) to its pre-lease condition would not be disproportionate to the value of the Property.

ii) The performance rendered by S.A.L. was in fact drastically different to that contemplated by the parties to the Lease, in that the Property (both internally and in respect of the garden) was returned to Mr Brown in a very different condition from that at the start of the Lease.

iii) The Condition Covenants were for the personal benefit of Mr Brown and his loss occasioned by their breach is not measured solely (or indeed substantially) in purely monetary terms.

iv) Mr Brown is likely to carry out the proposed remedial work and will not simply take any damages as a windfall arising from a 'technical breach' (which I find this was not).

86. In such circumstances I do find that the cost of such remediation is reasonable, and so I admit the proof of debt for the remediation cost. I find that the element of loss claimed for loss of use is also reasonable, but I do not admit the other claimed losses to the proof of debt.

87. Finally, I turn to the sums claimed for costs and interest. The interest is based upon the cost of remedial work (as stated in the letter from Mr Brown's solicitors dated 11 March 2024). Interest is awarded on money due, and no expenditure has been incurred yet, so this does not form an admissible part of the Proof of Debt. The position regarding costs is less straightforward.

88. The costs claimed are £23,200. In the same letter these are said to be Mr Brown's incurred costs to mid-February 2024 in respect of seeking to enforce the breaches of the Lease. Mr Tucker, for Mr Ulrick, refers me to Insolvency Rule 14.5(a):

> *14.5. Unless the court orders otherwise—*
>
> *a) each creditor bears the cost of proving for that creditor's own debt, including costs incurred in providing documents or evidence under rule 14.4 (3);*

89. Ms Farrell, for Mr Brown, refers me to Clause 21.1 and in particular 21.1.2 of the Lease:

> *21.1. To pay to the Landlord, or Agent, all reasonable costs and expenses, as agreed by the Tenant or awarded by the Court, incurred by the Landlord in:*
>
> *21.1.1. recovering or attempting to recover any Rent or other monies in arrears;*
>
> *21.1.2. the enforcement of any reasonable obligation of the Tenant under this Agreement;*
>
> [further provisions omitted]

90. So, Mr Tucker says that Mr Brown is barred by the Insolvency Rules from including in his Proof of Debt any legal costs associated with proving that debt. Ms Farrell says that such costs, arising from a breach of the Lease, are expressly recoverable under the Lease.

91. Neither party relied on any authority for their submissions. I have not found any case dealing specifically with the point. I turn therefore to the definitions within the Insolvency Rules at Rule 1.2, which defines the concept of proving a debt as follows:

> *"prove" and "proof" have the following meaning—*
>
> > *(a) a creditor who claims for a debt in writing is referred to as proving that debt;*

and Rule 14.1(3) which defines a debt for the relevant purposes:

> *"Debt" […] means (subject to the next paragraph) any of the following—*
>
> > *(a) any debt or liability to which the company is subject at the relevant date;*
> >
> > *(b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date;*

92. By Rule 1.2, 'proving a debt' means the steps taken to prove that debt by claiming for it in writing. Interpolating that into Rule 14.5(a), a creditor such as Mr Brown bears his own costs of taking the steps necessary to prove that debt by claiming for it in writing. Mr Brown's evidence being that the costs he seeks in his Proof of Debt are such costs, then this would indicate that he must bear them himself rather than include them in the Proof of Debt.

93. However, Rule 14.1(3)(b) defines a debt as any debt or liability to which the company (here S.A.L.) may become subject to after the relevant date (the date of entering into liquidation) by reason of any obligation incurred before that date. Clause 21.1.2 of the Lease was entered into by S.A.L. before it entered liquidation, and created a liability upon S.A.L. to pay Mr Brown's costs of enforcing any reasonable obligation under the Lease. Such obligations include the Condition Clauses, and the costs that Mr Brown has incurred in seeking to recover the expense of remedying those breaches are themselves thus debts arising under the Lease.

94. By Rule 14.2(1) all claims by creditors, save for specified exceptions, are provable as debts against the company *"whether they are present or future, certain or contingent,*

ascertained or sounding only in damages". The debt arising under Clause 21.1.2 of the Lease falls within none of the exceptions set out at Rule 14.2 and so would appear to be a provable debt.

95. I am thus faced with two contradictory conclusions both based on straightforward interpretation of the Insolvency Rules and the Lease. Which do I consider takes precedence?

96. The tension between a contractual entitlement to costs and a rule of court preventing the recovery of costs was considered by the Court of Appeal in *Chaplair Ltd v Kumari* [2015[EWCA Civ 798; [2015] H.L.R. 39. Arden LJ (as she then was) considered previous jurisprudence regarding the interplay of contractual entitlement to costs with rules for costs recovery as set out in *Gomba Holdings (UK) Ltd v Minories Finance (No 2)* [1993] Ch 181 and *Church Commissioners v Ibrahim* [1997] E.G.L.R. 13, and held that a contractual entitlement to costs took precedence over the limits to costs recovery on the small claims track set down in the CPR. In a concurring judgment, at paragraph 45, Patten LJ pithily summarised the point as follows (my emphasis added):

> *"What the decision in Gomba Holdings seems to establish is that a contractual claim for a costs indemnity should ordinarily be given effect to through the machinery of what is now CPR r.44.5 according to the principles set out by Scott LJ in the passage from his judgment quoted by my Lady. But that does not alter the fact that* ***it remains a contractual entitlement which the court will enforce subject to its equitable power to disallow unreasonable expenses. There is nothing in the rule making powers in respect of the CPR which enable the rules to exclude or override that contractual entitlement*** *and I therefore agree with Arden LJ that the judge had jurisdiction to assess the costs free from any restraints imposed by CPR r.27.14."*

97. Patten LJ's point regarding the rule making powers in respect of the CPR must apply with equal force to the rule making powers in respect of the Insolvency Rules. Accordingly, the Insolvency Rules do not exclude or override a contractual entitlement to recover costs.

98. I therefore consider that Mr Brown's costs of proving his debt are recoverable as a debt within his Proof of Debt. However, this is subject to the court's equitable power to disallow unreasonable expenses also noted by Patten LJ. Clause 21.1 of the Lease, as the governing clause of Clause 21.1.2, expressly refers to 'reasonable' costs and so there is no question of an indemnity as was the case in *Church Commissioners v Ibrahim*.

99. Mr Brown's evidence does not set out any detailed breakdown of the costs claimed. Had he been entitled to an indemnity then, applying the evidential principle referred to earlier I would not have rejected his evidence on that figure unless I found it incredible (which, in light of the duration and extent of correspondence exhibited, and the detailed report obtained, I would not have). Where, however, the contract provides that Mr Brown is entitled to his reasonable costs, Mr Ulrick is it seems to me entitled to address the reasonableness of those costs.

100. Fortunately, this is an area where expert evidence is not required as it is fully within the Court's competence to assess the reasonableness of costs. Applying my case management powers and considering the Overriding Objective (which both apply to this application pursuant to Insolvency Rule 12.1(1)) I consider that the most expeditious way to do this is for Mr Brown to file and serve a Form N260 Schedule of Costs in respect of his claimed costs of proving his debt, but excluding costs incurred after the filing of the Proof of Debt. That Schedule is to be filed and served by 4pm on 24 July 2024, 7 days before the adjourned hearing at which I will make orders consequential upon this judgment and deal with the removal application. I will hear representations on the costs schedule at that hearing and summarily assess it.

Conclusion

101. Mr Ulrick's rejection of the Proof of Debt is set aside and the Proof of Debt is approved to the following extent:

i) Cost of remedial works to the Property: £156,845.00

ii) VAT on remedial works: £31,369.00

iii) Loss of amenity during remedial works: £10,500.00

iv) Costs recoverable under the Lease: **to be assessed**