Neutral Citation Number: [2019] EWHC 1352 (Ch)

Case No: HC-2014-000349

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, London EC4A 1NL

Date: 04/06/2019

Before :

DEPUTY MASTER BOWLES

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Between :

Brocket Hall (Jersey) Limited	**Claimant**
- and -	
(1) Howard Robert Kruger and David Barry Zackheim (as Trustees of the Will of the First Lord Brocket)	
(2) Charles Ronald George Nall-Cain (the Third Lord Brocket	**Defendants**

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Thomas Braithwaite (instructed by **Rosenblatt LLP**) for the **Claimant**
Emily Betts (instructed by **Fladgate LLP**) for the **Defendants**

Hearing dates: 7th, 8th and 9th January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DEPUTY MASTER BOWLES

Deputy Master Bowles :

1. By a Counterclaim, first issued in 2014 and amended, primarily, as to quantum, in September 2018, the Defendants seek arrears of licence fees and damages, in respect of a considerable quantity of valuable chattels and fixtures which were licensed to the Claimant under a number of licence agreements. The Defendants also seek orders for delivery up in respect of a relatively small number of chattels which had not, as at the date of trial, been delivered up.

2. The Claimant, Brocket Hall (Jersey) Limited, is the lessee of Brocket Hall, a Grade 1 listed building, standing in grounds of some 543 acres, in Welywn in Hertfordshire. The lease was granted in December 1996 for a term of 60 years and these proceedings commenced, in 2014, by way of a Claim by the Claimant for relief from forfeiture in respect of the possible, or prospective, forfeiture of that lease. No forfeiture has ever been effected and, hence, this litigation proceeds only on the Counterclaim.

3. Brocket Hall was previously the home of, inter alios, Lord Melbourne, Queen Victoria's first prime minister, and Lord Palmerston. It is a 'stately home', open to the public and hired out by the Claimant, commercially, for events, including weddings and conferences.

4. The chattels and fixtures, the subject of this litigation, relate to the historic contents of the Hall, such items as chandeliers, paintings and, as fixtures, certain fitted furniture. The bulk of the items are owned by the first Defendant, the trustees of a will trust created by the first Lord Brocket. A number of items, however, are separately owned by the second Defendant, the current and third Lord Brocket.

5. It is now common ground that the licences, so far as they related to chattels, or what were, in the relevant licence agreement, thought to be chattels, were terminated by the Defendants, by written notice, expiring on 20th November 2013. A further licence, relating to fixtures (the fixtures licence), and dated 24th October 2003, remains in force. That licence continues until the expiration, or sooner determination of the Claimant's lease, unless, which is not and has not been the case, the Claimant assigns the lease, or parts with possession.

6. The fixtures licence was one of two licences entered into with the Claimant, by the trustees, on 24th October 2003. The other related to chattels, or to items then thought to be chattels.

7. Prior to entering into the 2003 licences, there had been some history of prior licences, as between the trustees and the Claimant. An initial licence, comprehending, at that date, both chattels and fixtures had been entered into contemporaneously with the lease. In 1999 that initial licence was modified, by a supplemental licence, dated 12th May 1999. Relevantly to this judgment, one of the modifications introduced by the supplemental licence was to explicitly provide, in respect of the chattels element of the 1996 licence, that payments made under that licence would be made 'together with Value Added Tax thereon'.

8. The 1996 licence, as modified, was replaced, in 2003, by new licences, which sought to discriminate, separately, between chattels and fixtures. These new licences were entered into, after the sale off to the Claimant of a quantity of previously licenced

items and were designed to regulate the position in respect of those items which had not been the subject of purchase. Subject to some adjustment in respect of the payment provisions in respect of chattels, the fundamentals of the new licences; the termination provisions, the provisions as to delivery up, the provisions as to insurance and repair and the provisions as to RPI uplift in respect of both fixtures and chattels; replicated those in the 1996 licence.

9. Additionally to the licences granted by the trustees, on 13th July 2007 and 15th December 2011, Lord Brocket granted separate licences to the Claimant, in respect, firstly, of a portrait of Philip de Laszio and, secondly, in respect of a number of other personally owned chattels. These licences were terminated at the same time as the trustee's chattels' licence.

10. Each of the terminated licences contained the same basic formula for the payment of licence fees, namely a mechanism whereby the original annual licence fee was to be uplifted on the anniversary date of the relevant licence to an amount equivalent to 1% of the then current insured value of the items the subject of the licence, or, in the event that no insurance revaluation took place prior to the relevant anniversary, by a formula which was intended and which has been construed as uplifting the relevant fees in accordance with RPI. None of the terminated licences made any mention of any obligation to pay VAT in addition to the licence fees as defined in each licence.

11. In regard to termination, the licences, other than the fixtures licence, required the Claimant, at the expiry of the relevant licence, to deliver up to the trustees, or, as the case might be, Lord Brocket, the items the subject of the licence in the state of repair and condition (damage by insured risks excepted) as they had been at the date of the grant of the licence.

12. It was not in dispute, at trial, that there had existed substantial arrears of licence fees due and owing as at the expiration, by notice, of the terminated licences. Nor was it in any dispute, for purposes of this trial, but that substantial arrears existed, as at the trial date, in respect of the continuing fees falling due under the fixtures' licence. The Claimant advanced no positive defence, as such, to its liability for such fees. It did, however, put the trustees and, in so far as relevant, Lord Brocket to proof of the amount of those arrears.

13. In the event, once Ms Betts, counsel for the trustees and Lord Brocket, had taken me through the evidence as to the arrears, it emerged that, subject to some modest and agreed recalculation, reflecting that, for the licence year 2011/2012 and following an insurance revaluation by Christie's, in 2011, an RPI uplift had been applied when it should not have been, there was, before me, only one area of subsisting dispute; namely the entitlement of the trustees to claim and recover VAT upon the outstanding arrears.

14. An additional matter had been sought to be raised by the Claimant prior to trial; namely as to whether, because, as it was contended, the items which formed the subject matter of the fixtures licence had already been demised to the Claimant as part of the land demised by the 1996 lease, that licence was void for mistake, such that no monies were payable under it and such that monies previously paid, under and in respect of that licence, were recoverable as monies paid under a mistake. An application to amend the current proceedings to raise this issue had been made late in

the day and rejected by order dated 5th September 2018. Whether and to what extent that argument can still be advanced in new proceedings remains open. It formed, however, no part of the argument before me.

15. The essence of the Claimant's argument, in respect of VAT was, quite simply, that neither the chattels' licence, nor the fixtures' licence make any reference to the payment of VAT, as a payment additional to the licence fee, as defined. VAT has not been claimed in respect of the payments due to Lord Brocket under his two licences.

16. In elaboration of that argument, Mr Braithwaite, for the Claimant, took me to two authorities, which, he submitted, demonstrated that VAT can only be recovered, in addition to another contracted payment, if the contract in question expressly provides for the payment of VAT, in addition to that other contracted payment. Mr Braithwaite, further submitted, that he was entitled to raise the argument as to VAT, because, by putting the trustees to proof of the claimed arrears, which included claimed arrears of unpaid VAT, his client was requiring the trustees to establish not just the figures claimed but, also, the legal entitlement to those figures.

17. I agree with Mr Braithwaite that, by putting the trustees to proof of the arrears claim, it became incumbent upon the trustees to establish their legal entitlement to all monies said to form part of the arrears, including, therefore, in this case, VAT.

18. Further, in proving that entitlement, it did not seem to me that it was open to the trustees to advance arguments as to the Claimant's liability which had not been pleaded. The suggestion was raised, by Ms Betts, that, even if, as a matter of construction of the two 2003 licences, her client was not entitled to recover VAT, then an entitlement to that recovery might arise by way of estoppel, specifically estoppel by convention, or upon the basis of rectification. Whatever the possible merits of such an estoppel, or of a claim for rectification the trustees' claim had never been pleaded in that way. The claim for arrears had been pleaded in contract. The trustees were, in effect, put to proof of the extent, or width, of the liabilities arising under that contract and it was, accordingly, for the trustees to make good their claim in contract and to establish, as a matter of the construction of each of the two licences that the trustees' entitlements under those licences included an entitlement to VAT upon the licence fees.

19. The starting point is, of course, the plain fact that neither the chattels' licence, nor the fixtures' licence makes any reference to the Claimant's entitlement to recover VAT upon its licence fees; this to be contrasted, as Mr Braithwaite submitted, with the provisions of the 1999 supplemental licence, which, in respect of the chattels element of the 1996 licence, as amended by the supplemental licence, made specific provision for the recovery of VAT.

20. The effect of silence as to VAT has, unsurprisingly, been considered in other cases. The clearest exposition of the position, where VAT is payable upon a transaction, or supply, but where express provision has not been made, is to be found in a dictum of Hazel Williamson QC, sitting as a judge of this Division, in **Hostgilt Ltd v Megahart Ltd (unreported 4th December 1998)**, cited with approval by Lord Walker, in the Privy Council, in **National Transport Authority v Mauritius Secondary Industry Limited [2010] UKPC 31**. 'If there were no mention at all of VAT then the sums

quoted would simply be the consideration for the purchase and it would be a matter for the (in that case) vendor to sort out the VAT liability on his own.

21. Mr Braithwaite submits that this case is on all fours with the position postulated by Hazel Williamson QC and that the result should be the same.

22. Ms Betts disputes this. Her contention is that, having regard to the relevant factual matrix, the proper construction of the 2003 licences is that the provisions as to licence fees are to be construed as being exclusive of VAT.

23. In regard to the factual matrix and to any other aids to the construction of the 2003 licences, outside the language of the licences themselves, Ms Betts relied, primarily upon the fact, not, I think, in any dispute, that under the 1996 licence, which had preceded the 2003 licences and which had been substituted by the 2003 licences, consequent upon the purchase by the Claimant of a number of items previously held under the 1996 licence, VAT had always been demanded and paid, both in respect of chattels and fixtures, despite the language of the 1996 licence being silent as to VAT.

24. While acknowledging that, as regards chattels, the 1996 licence had been modified, in 1999, such as to include an explicit reference to the payment of VAT upon the chattel licence fees, she pointed out that VAT had, also and always, been paid on the fixtures element of the 1996 licence fees, even in the absence of such an explicit reference, and she submitted that the likely explanation for this apparent discrepancy was, simply, that the 1999 supplemental licence had been no more than a clarification, albeit limited to chattels, of what was already implicit in the understanding between the parties.

25. Ms Betts, also placed some reliance upon correspondence, following upon the execution of the 2003 licences, which stated, in terms and in explicit contrast to Lord Brocket's licences, that the licence fees under the 2003 licences carried VAT and upon the fact that that further liability had not been queried, then, or later, and that VAT had, in fact been recovered upon the licence fees over some eight years.

26. Mr Braithwaite, rightly, I think, questioned the admissibility of these matters as legitimate aids to construction. The fact that VAT was, in fact, paid on the licence fees over many years cannot provide any retrospective insight into the intentions of the parties at the time that the licences were entered into. Likewise, letters written by the trustees, setting out their understanding of the effect of the licences, even where that understanding is implicitly accepted by the Claimant, cannot constitute any more than evidence of the parties' subjective intentions as to the meaning and effect of the licence agreements.

27. Where, however, that correspondence does carry weight is in excluding the possibility, postulated in argument by Mr Braithwaite, that, in drawing up the 2003 licences, the parties had expressly agreed that the Claimant would not pay VAT on licence fees. It is profoundly unlikely, had any such discussion, or agreement, of that type taken place, that the Claimant would, following execution of the licences, have, then, acquiesced in an interpretation by the trustees of the licences in complete contradiction of any such discussion.

28. I consider that Ms Betts is right and that this case is properly distinguishable, having regard to the factual matrix, from the authorities relied upon by Mr Braithwaite.

29. In the context of the fact that VAT had always been paid on licence fees, even where the licences had been silent as to that liability; in the context that, as I find, there had been no express agreement, or discussion, prior to the execution of the 2003 licences, to the effect that VAT would not be recoverable upon the new licence fees; and in the context of new licence agreements substantially replicating the provisions of the predecessor licences, it seems to me that the intention of the parties was that the new licences would operate in the same way and with the same effect, including as to the payment of VAT by the Claimant, as had previously been, or understood to have been, the case. I agree with Ms Betts that, again, in context, the reference to VAT in the 1999 supplemental licence was not intended to reflect a change in liability, but, simply, to clarify the Claimant's existing liabilities.

30. In the result, it seems to me that the true construction of the 2003 licences, in the circumstances in which they came into being, was that the licence fees under the new, as with the old, licences were to be paid exclusive of the VAT payable upon those fees and, hence, that the trustees were and are entitled to recover VAT upon those fees.

31. The other issue raised by the Counterclaim is the issue of contractual damages arising from the Claimant's failure to deliver up the items the subject of the three chattel licences, in accordance with the provisions for delivery up contained in each of those licences. That issue is raised, as already set out, alongside a claim for delivery up, which is now limited to some thirteen chattels still retained by the Claimant.

32. The position as to delivery up is as follows.

33. No items were delivered up by the Claimant, in November 2013, upon the expiration of the three relevant licences. The first tranche of delivery up only took place on 28 January 2015, when 237 chattels were made available for collection and duly collected. That left in issue eighteen items; two of which had been held under the licences granted by Lord Brocket and the balance under the trustees' chattels' licence. Of the eighteen, seven were agreed, as between experts instructed by the parties as being chattels, six were 'disputed', in the sense that experts disagreed as to whether the items, although forming part of the subject matter of the chattels' licences, were chattels, as opposed to fixtures, and five were agreed, notwithstanding that they were included within the chattels licences, to be fixtures.

34. Late in the day, it has now been conceded by the Claimant that the 'disputed' items are chattels and, along with the seven agreed chattels, fall to be delivered up. Although, by way of an open offer, dated 4th December 2018 and clarified on 7th December 2018, it was stated that all items, excluding, I think, what I will call the chattel fixtures, could be removed by the trustees and/or Lord Brocket, that offer of delivery up was expressed to be conditional upon the acceptance of the terms of the open offer and, in consequence, did not amount to an unconditional offer to deliver up.

35. In the event and notwithstanding the Claimant's concession, the position, as at the date of trial, was that no delivery up of the residual thirteen chattels had taken place

and no proposals were in place in order to effect delivery up. Accordingly and unless following trial the parties have made arrangements for delivery up, I will direct delivery up of those items.

36. In regard to what I will call the chattel fixtures, it is accepted by the trustees that those items, form, as fixtures, part of the demised land and remain in lease to the Claimant. In that circumstance, the trustees are not pursuing a claim for delivery up by way of specific performance. They are, however, seeking damages for the Claimant's failure to deliver up.

37. The basis, upon which any damages, recoverable, in respect of the Claimant's failure to deliver up in accordance with the three chattel licences, fall to be determined, has not been the subject of any dispute, or debate. It is agreed, or, at least, accepted, by the Claimant that, where there has been an actionable failure to deliver up, the application of the principles relevant to the award of 'user' damages and 'negotiating' damages, as recently explained by the Supreme Court, in **Morris-Garner v One Step (Support) Ltd [2018] 2 WLR 1353**, entitles the Defendants to an award of damages reflecting the economic value of the items in question and that, in this case, that value is demonstrated by the licence fees which would have been payable for the items in question had the licences pertaining to those items remained in place. Those licence fees, as damages, would, of course, be paid exclusive of VAT and, as damages, would not carry VAT.

38. On that footing, the award of damages is, in essence, to be determined by an identification of the period, or periods, in respect of which there had been an actionable failure to deliver up and a calculation of the licence fees which would have been payable during that period if the relevant licences had remained in place.

39. The trustees and Lord Brocket's case, in this regard, is very simple. They submit that the language of the licences is completely clear, that the Claimant's obligation, under each relevant licence, was to deliver up the items the subject of that licence upon the day upon which that licence was terminated by notice and that, in consequence, damages fall to be assessed by the application of the contractual fee which would have been payable in respect of the items the subject of each licence from the date of termination until their eventual delivery up.

40. Accordingly, their submission is that damages equivalent to the full licence fees exclusive of VAT are payable for the period from 20th November 2013 until 29th January 2015 in respect of all items the subject of the licences and that in respect of the residual items, including the chattel fixtures, damages are payable at the same rate as licence fees would have been paid for those items, had the licences continued, and continue to be payable at that rate until their eventual delivery up.

41. I did not understand the Claimant to query the figures calculated by the Defendants in application of that approach. Rather, Mr Braithwaite's argument was that the listed status of Brocket Hall, the planning considerations arising from that status, as they impacted upon the various chattels the subject of the chattel licences, and the interest, or intervention, of the planning authorities, arising from the status of the Hall and from those planning considerations, had the effect of limiting, or excluding, the periods in respect of which it could otherwise be said that there had been an actionable failure to deliver up.

42. In regard to the chattel fixtures, Mr Braithwaite took the additional point that those items, as fixtures, formed part of the demised land, that on the termination of the licences relating to those items any obligation to pay for their retention, or use, fell away, such that, thereafter, the Claimant was entitled to retain those items without any payment, other than the rental payments falling due under the lease.

43. Mr Braithwaite's initial position, as set out in his skeleton argument, was that, in principle and subject to the separate position in respect of the chattel fixtures, his client was liable to pay damages in respect of the retention of chattels following the termination of the licence agreements, that for the bulk of items that period was, as already explained the period from 21st November 2013 to 28th January 2015, but, for the thirteen items not made available for delivery up in January 2015, that period continued, or would continue, until the date of eventual delivery.

44. In final submissions, however, and as set out above, Mr Braithwaite resiled from this and submitted, in essence, that no damages, or very limited damages, should be payable in respect of his client's retention of chattels.

45. In support of that submission, Mr Braithwaite took me to correspondence between the parties and the relevant planning authorities commencing at or about the date when the licences were terminated. The essence of his submission, as I have understood it, was that much of the delay in delivering up, or in making available for delivery up, the relevant chattels arose out of the intervention of the planning authorities and that the responsibility for that delay should, largely, be placed at the door of the trustees, and Lord Brocket, because it was their failure, to reach appropriate agreement with the local planning authorities as to the status of the chattels, having regard to the listed status of Brocket Hall, or to make any necessary applications for consent as to the removal of chattels, that brought about that delay and that, in that circumstance, it would be wrong to award damages for that delay against the Claimant.

46. In further support of that submission and in support, also, I think, of his submission in respect of the chattel fixtures, Mr Braithwaite argued that, as pleaded in the Claimant's Defence to Counterclaim, the provisions in each of the licences as to delivery were qualified by a term which was said to be implied into each of the licences.

47. That term, as set out in paragraph 13 of the Claimant's Reply and adopted in its Defence to Counterclaim, was to the effect that the Claimant's obligation to deliver up, in respect of any given item, did not arise in circumstances where '(a) consent from a local authority was required for its removal … and (b) such consent had not been obtained by the person requiring removal'.

48. I am not persuaded by Mr Braithwaite's submissions.

49. It seems to me to be clear from the express language of the chattel licences (setting aside for the moment any implication of additional terms) that the contractual obligation to deliver up is an obligation of the Claimant and, in consequence, that it was the obligation of the Claimant and not of the trustees, or of Lord Brocket, to make any necessary arrangements with the local authority, or any other planning authority, such as to procure performance of the obligation to deliver up.

50. In this case, so far as I can see, nothing was done, as, on the face of the licence agreements, it should have been, in the period after notice was given, but before that notice expired, in order to ensure that the chattels the subject of the licences were available for delivery up as at the date when the licences expired. Likewise, following the expiry of the licences and although it remained, on the face of the licence agreements, the Claimant's obligation, by reason of its contractual promise to deliver up the chattels, albeit while already in breach of that promise, as regards the date of delivery up, to take all the necessary steps and to make all the necessary arrangements, or applications, in order to effect delivery up, no steps were taken by the Claimant to facilitate removal, or delivery up.

51. Rather the very clear tenor of the correspondence was that the Claimant would not allow, or enable, let alone facilitate, delivery up, but would, in fact, refuse to deliver up unless and until the trustees and Lord Brocket had reached agreement, or made any necessary arrangements, or procured any necessary consents, from the planning authorities.

52. It is and was, subject to the existence and operation of any implied term reversing, or varying, the effect of the express terms of the licence agreements, no answer to the claim for damages for delivery up to say that the trustees had failed to make arrangements, or applications. The burden of making such arrangements, or applications, under the parties' contracts and subject to any implication, having the opposite effect, is cast squarely upon the Claimant and the Claimant has, on that footing, wholly failed to meet that obligation.

53. The next question, therefore, given the impact and effect, as I see it, of the express terms of the licence agreements, is whether there exist proper grounds for concluding that the express terms of the three chattel licences are modified, or, even, as regards specific items, where a local authority consent is required, reversed, by the implication of the term for which Mr Braithwaite contends.

54. I am satisfied that no grounds for such an implication exist.

55. Somewhat tellingly, Mr Braithwaite did not seek to support the implication of the term by the application of the well understood usual principles which operate in order to determine whether a term should be implied. Instead, he drew my attention to case law, relating to detinue and conversion, in particular, **Kahler v Midland Bank [1950] AC 24**, where it was held that a claimant had no immediate right to possession, such as to found a claim in detinue or conversion, in circumstances where it would be illegal for the defendant to give possession.

56. It does not seem to me that that authority, or line of authority, assists Mr Braithwaite in this case. The issue, here, is whether it is the Claimant, or the trustees and Lord Brocket who have the obligation under the licence agreements to take the necessary steps to effect a lawful delivery up and whether a term should be implied imposing that obligation upon the trustees, or Lord Brocket, rather than upon the Claimant. The case law and the decision relied upon by Mr Braithwaite does not assist me at all in the resolution of that question.

57. I have no doubt at all that there are no proper grounds, in this case, for the implication of the term for which Mr Braithwaite and the Claimant contend.

58. The starting point is that the chattel licences are just that; that is to say licences relating to chattels, as opposed to fixtures, and where, therefore, the prospect that any consent might be required for their removal from Brocket Hall is unlikely to have been something that the parties to the licence agreements would have had in mind when entering into the agreements in question.

59. Additionally to that, I can see no basis at all either upon which I could properly hold that the term was required for business efficacy, or that it is one of those terms which can be regarded as going without saying, or, if proffered by the metaphorical officious bystander, would have been treated by the parties as applying as a matter of course.

60. As regards business efficacy, there is no reason at all why the burden of securing any consents, if consents were required, should rest upon the trustees and lord brocket rather than the Claimant. Likewise, it is impossible to see that the parties would have accepted, if the term had been put to them, when contracting, that it went without saying that the obligation to make arrangements, or procure, consents, was, of course, one that should be borne by the trustees, or Lord Brocket.

61. Rather, as it seems to me and as already set out, it is abundantly clear that the express terms of the agreement and the imposition upon the Claimant of the obligation to deliver up carries with it the obligation upon the Claimant to take the necessary steps to enable delivery up. In that context and given that it is a fundamental principle, in the implication of contractual terms, that an implied term should not negative an express term, the suggestion that there should be implied a term, effectively reversing the agreed obligations as to delivery up, is patently ill founded.

62. In the result, I am satisfied that the term contended for by Mr Braithwaite should not be implied and, consequently, that, even if, in respect of any chattel, local authority consent for its removal from Brocket Hall and delivery up was required, the burden of procuring that consent and enabling delivery up was the Claimant's and any delay, or difficulty, in securing that consent, or coming to necessary arrangements with the local authority, would not, accordingly, preclude, or diminish the Claimant's liability in damages.

63. The consequence of the foregoing is that the Claimant is liable for damages for failure to deliver up, in respect of the items which have been, or are to be, delivered up from the date 20th November 2013 until, delivery up of the items in question.

64. What that means is that damages, assessed upon the basis of the licence fees that would have been payable, had the chattel licences continued, are payable upon all the chattels which have been delivered up, or which are to be delivered up, from 20th November 2013 until 28th January 2015 and that, for the residual thirteen items, still to be delivered up, damages at those rates, as applied to the individual chattels, will continue to be paid until eventual delivery up. The position, in short, is precisely that which was originally conceded by Mr Braithwaite in his skeleton argument.

65. In this regard, in argument, Mr Braithwaite sought, in respect of a number of the residual thirteen items, where the trustees and Lord Brocket (not the Claimant) had taken steps to facilitate the removal/delivery up of the items in question, by way of applications for listed building consent to their removal and by way of successful

planning appeals in that regard, to submit that, until the successful outcome of those appeals, in May 2017, there had been no actionable failure to deliver up.

66. For the reasons already given, there is nothing in that submission. There was no implied term such as to render it the trustees', or Lord Brocket's duty to secure the relevant consents. Rather, it was the Claimant's duty to deliver up and, so, to make any necessary arrangements. It is their failure, timeously, to do so, which gives rise to their continuing liability.

67. Turning to the chattel fixtures, there is, as I see it, no essential difference between those items and the other items the subject of the chattels licences. In both cases there was a contractual obligation to deliver up. That obligation is not, in my view, vitiated by the fact that the items in question are fixtures and, by annexation, form part of the demised land. The position is no different to that which might arise where a party contracted to sell and deliver up some item, obviously, part of the land, say, timber on the land, or some artefact forming part of a building upon land, where the building is to be demolished. The fact that the sale of the object in question involves and requires the severance of the object from the land does not negate the contractual obligations, including those of delivery, arising out of the transaction. Similarly, in this case, the fact that the items that the Claimant has contracted to deliver up would in order to effect delivery up, require that those items be severed from the demised land, has not negated the obligation to deliver up, or, therefore, precluded the Claimant's liability for failure to deliver up.

68. Nor, as was suggested by Mr Braithwaite, in his skeleton argument, but not in oral submission, do the circumstances of this case render the Claimant the involuntary bailee of the chattel fixtures and, for that reason, exempt from any liability for damages to deliver up.

69. It is hard to see, for a start, that one can be the involuntary bailee of items forming part of one's demised land. Putting that to one side, there is no evidence before me, in respect of any of the chattel fixtures, that any necessary permission could not have been obtained by the Claimant, upon whom the contractual obligation lies, in respect of the items in question. Even were that the case, it seems to me that, under the parties' contracts, it was the Claimant who contracted to deliver up and who must, therefore, bear the risk of non-performance.

70. It follows that, in my view, the Claimant is, in respect of the chattel fixtures, as with other chattels, liable in damages, at the rates which would have been payable under the licences, pending any delivery up.

71. It remains to consider a number of other areas, or heads of claim, where the trustees and Lord Brocket, principally the trustees, assert that the Claimant is liable in damages consequential upon its failures to deliver up, or where, otherwise, the Claimant has been in breach of the terms of the licences.

72. The first such matter relates to three Waterford crystal candelabra held, until the termination of the licence, under the 2003 chattels licence. Under that licence, the Claimant covenanted to keep the chattels the subject of the licence in the state of repair and condition as had existed at the date of the licence and to deliver up the chattels, including, therefore, the chandelier in that state of repair or condition. The

candelabra are described in the schedule to the 2003 chattels licence, where it is indicated that some drops are damaged and that there has been damage to a central arm. The candelabra appear to have suffered further damage prior to 2010, when they were not made available for a Christie's valuation at that date. Subsequently, in March 2013, Mr Gray, of Strutt and Parker, who gave evidence for the trustees, visited Brocket Hall and was shown the damaged pieces of the candelabra. Photos in the bundles before me show that very serious damage had occurred. The broken pieces of the candelabra were, however, not then, or at any time since, returned. The candelabra, or perhaps, more accurately, the remnants of the candelabra, constitute one of the items retained in 2015 and which must now be delivered up.

73. In these circumstances, the trustees have taken Christies' advice and, on that advice, have secured a quotation from Brotheridge Chandeliers (Brotheridge), based upon the photographs in Strutt and Parker's hands, for the repair, or reconstruction of the candelabra. That quotation, which assumes that the Claimant delivers up the relevant pieces of the damaged candelabra, is in the sum of £47,250 plus VAT. A further specialist company, Wilkinson, was asked to quote but felt that there were insufficient parts available to allow a restoration to take place. Christies, themselves, have estimated a replacement price, or value, for the candelabra, at some £60,000.

74. The Claimant has met the foregoing by way of an email from a Mr Stewart Nardi, of Chandelier Cleaning and Restoring Services Ltd, who, on the basis of a number of candelabra parts, including some not, apparently, shown to Mr Gray, collected by him from Brocket Hall, and a description of the candelabra, which appears to differ significantly from that described in the 2003 chattels licence (he appears to be referring to the restoration of two candelabra of one type and a further and different chandelier, rather than three identical candelabra, as indicated in the schedule to the 2003 licence), has estimated a restoration cost of some £21000, inclusive of VAT.

75. I do not feel able to give much weight to Mr Nandi's quotation. I have no provenance in respect of him, such as to enable me to know the worth of his quotation, whereas, in regard to Brotheridge, its quotation comes with the recommendation of Christies. As importantly and as set out above, I am not at all satisfied that Mr Nandi's quotation necessarily addresses the issue of the restoration of the three Waterford candelabra shown in the chattels licence and with which I am, here, concerned.

76. On the other side of the coin, Mr Gray, whose evidence, I felt, was conscientiously given and, other than one matter mentioned later in this judgment, reliable, acknowledged that there might have been other parts shown to Mr Nandi, which had not been shown to Brotheridge and which, if they related to the relevant candelabra, might have had the effect of reducing the cost of restoration. I also bear in mind that the schedule to the chattels licence, itself reflects that the candelabra were already the subject of some damage and that the Claimant is under no obligation to improve the condition of the candelabra beyond that existing at the date of the licence.

77. Taking all these matters together, I think that the breach of contract, reflected in the failure to deliver up the three candelabra in their 2003 state of repair and condition, should be met, in addition to an order for the delivery up of all parts of the candelabra retained by the Claimant, by an order for the payment of £45,000, but that that payment should be treated as including any VAT which might be payable upon the restoration of the candelabra.

78. The second matter relates to expert fees incurred by the trustees and Lord Brocket. As already foreshadowed, experts were instructed both by the Claimant and by the trustees and Lord Brocket. The purpose of that instruction, from the perspective of the trustees and Lord Brocket, was to establish, so far as it could be done, that the items required to be delivered up were chattels and were not, therefore, subject to any regime that required listed building consent in respect of their removal from Brocket Hall.

79. The need for that instruction arose from the stance taken by the Claimant, as set out earlier in this judgment, namely that it would not deliver up any of the items the subject of the chattel licences unless and until the trustees and Lord Brocket had come to appropriate arrangements, or secured appropriate consents from the planning authorities as to delivery up. As explained earlier in this judgment, this was a wholly incorrect stance.

80. The consequence, however, of that stance was that, instead of the Claimant, as it should have done, taking all the necessary steps to secure delivery up, the trustees and Lord Brocket came to be involved in the process and to incur expert costs, which the trustees and Lord Brocket submit would not have had to be incurred had the Claimant performed its contractual obligations.

81. Those costs are put at £32,556.36 and reflect the costs, firstly, of a very lengthy expert report, prepared by a Mr Stephen Levrant, in May 2014, and, thereafter, advice and guidance given by Mr Levrant, throughout 2014, culminating, in November 2014, with a meeting with the Claimant's expert at which, as it transpired, it was agreed, on all sides, that the very large bulk of the chattels in issue were, indeed, chattels, where the chattel fixtures, already discussed, were agreed to be fixtures and where the 'dispute' between the experts, as to the status of the items the subject of the licences turned out to be confined to five items, all of which are now conceded to be chattels and are to be delivered up.

82. Mr Braithwaite submitted that, because the planning authority had, as he put it, its own position with which the trustees and Lord Brocket would, in any event, have had to engage, it could not be said that the Claimant's failure to deliver up was causative of the costs incurred. Mr Braithwaite also questioned whether the costs should properly be recoverable as damages, or whether they should be regarded as costs of this litigation.

83. I am satisfied that the expert costs in question are appropriately claimed as damages. While it is true that, in due course and by my order of 18th May 2018, permission was given for the parties to call expert evidence in the field of heritage architecture and in relation to the, by then, limited dispute between the parties as to whether certain items were chattels or fixtures, it is plain that the work carried out by Mr Levrant and which the trustees and Lord Brocket seek to charge to the Claimant was not work related to the litigation, but was work carried out as part of the process, in which the trustees and Lord Brocket had become involved, in seeking the delivery up of their chattels.

84. I am equally satisfied that, had the Claimant complied with its obligation to deliver up, by taking timeous steps to make such arrangements as might have been necessary to ensure delivery up, Mr Levrant would not have been involved in the way that he has been. It would have been the Claimant which would have engaged with the

planning authority and which would have been involved in any discussions, or negotiations, as to the items which could be delivered up.

85. Instead and as I have already set out, in paragraph 80 of this judgment, the Claimant chose not to take the necessary steps to enable delivery up, but rather sought to deflect its responsibility for its non-compliance on to the trustees and Lord Brocket. It was that election and that conduct by the Claimant, in breach of contract, which gave rise to the involvement of Mr Levrant and to the costs incurred by the trustees and Lord Brocket, in respect of his involvement. In those circumstances, I agree with the trustees and Lord Brocket that Mr Levrant's fees flow from the Claimant's breach and are recoverable as damages for that breach.

86. The final potential head of claim, which the trustees, in this instance, seek to raise against the Claimant, relate to costs said to have been incurred by the trustees in respect of an abortive attempt, in December 2014, to collect from Brocket Hall the 237 items which were, in fact, subsequently delivered up to the trustees in January 2015.

87. Without descending into unnecessary detail, the position here is that, by early December 2014 and following the meeting of experts which had taken place in November 2014, it had become common ground that the bulk of the items in the chattels licences were chattels and could be removed from Brocket Hall without any objection from the planning authority. Mr Allingham, the relevant planning officer, had, by 4th December, accepted, albeit informally, that this was the position.

88. Consequent upon that, the trustees' solicitors, Fladgate LLP (Fladgate), sought to agree that the trustees could collect the undisputed chattels from Brocket Hall. Initially, steps were taken to procure collection on 19th December 2014. When the Claimant's then solicitors, Thrings, rejected that date, Fladgate indicated that collection would be sought upon 22nd December and that vehicles would attend at Brocket Hall on 22nd December to effect a collection. On the morning of 22nd December, Thrings informed Fladgate that access would not be granted to the Hall and when vehicles and personnel arrived at the Hall, a Mr Perkins, of the Claimant, confirmed that access would not be given.

89. In those circumstance the trustees contend that the abortive costs of the ineffective collection exercise should be paid by the Claimant, as damages arising from the Claimant's failure to deliver up the relevant chattels.

90. I am not prepared to make any award in respect of those costs. I am not persuaded that at least one element of the costs which are sought to be charged pertain, at all, to the abortive collection. More significantly, I am not persuaded that the trustees had any legal right, other than by consent, to enter Brocket Hall to effect a collection.

91. The particular element that has caused me concern is a supposed charge of some £7,800 said to have been incurred to an entity called Simple Manage in respect of the abortive collection. My problem with this charge is that the invoice pertaining to the charge is dated in June 2014, some six months prior to the abortive collection.

92. That concern is exacerbated by the rubric to be found upon the invoice, namely that the charge relates to something called Operation Monkey Puzzle. Operation Monkey

Puzzle was what I will call a frolic, or foray, effected by Lord Brocket, although, I think, with the acquiescence of the trustees, whereby Lord Brocket had gained entry to Brocket Hall, in June 2014, by accessing a staff door and had, then, without any consent from the Claimant, loaded a number of the relevant chattels into removal vehicles and taken them away. This venture had resulted in his and his vehicles being stopped by police upon the motorway, following an allegation of burglary, and, in due course, the chattels in question being returned to Brocket Hall.

93. Although Mr Gray sought to maintain that it was his belief that the Monkey Puzzle invoice in some way related to the December attempt, rather than the June foray, and, although, otherwise than this, I found Mr Gray a reliable witness, I cannot accept this aspect of his evidence, or that there is any basis upon which Operation Monkey Puzzles costs can be ascribed to the events of December 2014.

94. More significantly, however, and although I gave the parties the opportunity following trial to make further submissions on the point, I was not shown anything to suggest that where, at inception items, or chattels, were lawfully upon land, any common law, or self-help, right existed, such as to enable the owner of the items, or chattels, any licence, or bailment having been determined, to go onto the land of the erstwhile licencee, or bailee, to collect those items.

95. Nor were the trustees able to point to any reservation, or right, either in the lease of Brocket Hall, or arising out of the chattels licences, such as to entitle the trustees to go on to the demised land to collect any of their chattels retained upon that land, following the termination of any licence, or bailment.

96. The significance of the foregoing is that, as it seems to me, the costs of the abortive collection were caused not by the Claimant's failure to deliver up but by the trustees' election to seek to secure the collection of the chattels in question by a process which was not legally available.

97. Although it can be said that, but for the Claimant's failure to deliver up, the occasion of the abortive collection would not have arisen, the true and effective cause of the costs wasted upon the abortive collection was the trustees election to seek to collect the chattels in question, in the knowledge that consent had not been given to that collection, or to the entry onto land required to effect that collection, and, consequently, in circumstances where they had no right to act in the way they did. The costs of that process cannot be put at the Claimant's door.

98. The remaining matter for consideration is the rate of interest to which the trustees and Lord Brocket are entitled, both upon the arrears and upon the damages that I propose to award.

99. Ms Betts, somewhat optimistically, in the low interest environment that has existed for the last ten, or so, years, seeks interest at the Judgment Act rate of 8%. She supports that submission upon the footing that that would have been the rate of interest payable had judgment been entered at the date of the relevant arrears, or damages.

100. The short answer, however, to that is that judgment was not so entered and that, given that interest is awarded to compensate a claimant for being kept out of his money, a

rate of interest which comfortably exceeds the rate which could have been achieved by a claimant if he had had the use of his money, or which he would have had to pay to make good the money he has been held out of, cannot be correct.

101. In this case, as in most cases, the court cannot make a minute enquiry as to what would have been done by the trustees, or Lord Brocket, had they not been deprived by the Claimant of monies to which they were entitled. The likelihood, however, in a case of this nature, particularly as regards the trustees, is that the monies, had they been received, would not have been used to make good borrowed monies, but rather would have been invested for a return. There is then the question of what return. Being realistic, I cannot envisage, other than in respect of a very long term investment, or deposit, any return exceeding the 3% suggested by Mr Braithwaite and, in that circumstance I think that that rate is appropriate.

102. In regard to period, there may have to be, following handing down and in a case where the monies now owed by the Claimant have accrued over time, some discussion as to the appropriate date, or dates, for commencement. Mr Braithwaite suggested that, whatever the appropriate period, I should exclude from the period over which interest is recovered the period between, he says, January 2015 and June 2017, during which, by reason of the insolvency of the Claimant's then sub-tenant and various negotiations, arising out of that insolvency and the administration to which it gave rise, the proceedings were effectively 'parked'.

103. I am not minded to disregard that period. The simple fact is that the trustees and Lord Brocket were held out of their money during that period and, correspondingly, the Claimant had the use of the monies which it should have been, but was not, paying. In those circumstances, there is no good reason to limit, or reduce, the period over which interest falls to be paid.