Claim No.: PT-2021-000426

Neutral Citation Number: [2021] EWHC 2881 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 19/07/2021

Before:

THE HONOURABLE MR JUSTICE FANCOURT

IN THE MATTER OF:

CORPORATE SPEC LIMITED

Claimant

-v-

(1) RACHEL MILTON
(2) 3 THAMES ROAD LIMITED

Defendants

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- -

MR C DARTON QC (instructed by **Vanderpump and Sykes LLP**) appeared on behalf of **the Claimant**
MR M BOOTH QC (instructed by **Pini Franco LLP**) appeared on behalf of **the First Defendant**
MR A BUTLER QC (instructed by **Huggins Lewis Foskett Solicitors**) appeared on behalf of **the Second Defendant**

Hearing date: 19 July 2021

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Approved Judgment

MR JUSTICE FANCOURT:

1. This is an application made on 11 May 2021 by the claimant, Corporate Spec Limited, for an injunction to restrain the defendants, Rachel Milton and 3 Thames Road Limited, from taking possession of Unit 3, Thames Road, Silvertown, which are warehouse premises already occupied by the claimant and various other licensees who have been allowed into occupation by a company called Trans-Global Holdings Limited ("TGH"). The first defendant is a director of TGH. The second defendant, 3 Thames Road Limited, bought the freehold of the premises from TGH on 4 September 2018 and the second defendant then granted the first defendant a short-term tenancy for a duration of 12 months, subject to earlier termination on notice.

2. A notice to vacate the premises was given by the first defendant to the claimant on 10 November 2020, to give up possession no later than 31 March 2021. The notice to vacate was not complied with. It appears that the first defendant's tenancy of the premises came to an end or was terminated with effect from 30 April 202,1 whereupon the second defendant became entitled to possession subject only to such rights as the claimant has.

3. The claimant was physically thrown out of the premises by persons currently unknown, but it has to be inferred acting on behalf of one or other of the defendants, on 4 May 2021. There was, regrettably, some violence that was used on the officers or employees of the claimant in the process. As a result, after a brief period of negotiation between the parties, the claimant made an application without notice to Falk J on 12 May 2021. Notice of that without notice application was in fact given to both defendants, who were represented at that hearing.

4. Falk J ordered the reinstatement of the claimant in the premises and restrained the defendants from further interfering with the claimant's quiet enjoyment of the premises up to this return date. She made that order on the basis that the claimant itself must not interfere with either the use of the premises by the licensees who had previously been

in there, or interfere with the second defendant's exercise of such rights that it was properly able to exercise as the freehold owner of the premises (subject to a qualification which I do not need to go into because it had no significant effect). Falk J also ordered that while the restorative injunction had effect, the claimant had to continue to pay a monthly sum of £10,000 to the second defendant for occupation of the premises.

5. The applicant, having been reinstated by that order, now seeks to continue the injunction until a trial can take place, which all before me recognised in practice means a trial of some preliminary issues which will determine the question of who is now entitled to possession of the warehouse premises. The preliminary issues are whether the claimant has a tenancy of the premises or any part of them, or only a licence, and if a tenancy, whether pursuant to a notice given under section 25 of the Landlord and Tenant Act 1954 on 6 May 2021 the second defendant can oppose the grant of a new tenancy to the claimant under section 30(1)(f) of that Act, that is to say that the landlord intends to carry out substantial works, or demolition, or reconstruction of the premises or a substantial part thereof.

6. On the evidence before me, there is about to be granted planning permission by the London Borough of Newham for the demolition of the warehouse and the construction of a new mixed-use development including 161 flats. The evidence establishes that a s. 106 agreement has been negotiated but not yet signed off and that a resolution to grant planning permission subject only to a satisfactory s. 106 agreement is in existence. What there is not is any evidence of a timeline for the proposed re-development of the premises by or on behalf of the second defendant. And, indeed, the second defendant's evidence is that it may not re-develop the premises itself but may sell them for re-development by someone else.

7. It is unclear as things stand to what extent the proposed re-development or any re-sale of the premises is being delayed by the continuing presence of the claimant in the premises, but it is an obvious inference that if that possession continues without limit, at some time it will seriously interfere with the re-development proposal, assuming that the s. 106 agreement is indeed signed in due course.

8. The first issue that arises before me today is that both defendants argue, though principally the second defendant, that the injunction granted should be discharged or at least any continuation of the injunction refused on the basis of failure by the claimant's director, Mr John Murphy, to make full and frank disclosure on the without notice application before Falk J. Mr Darton QC, on behalf of the claimant, rightly points out that that hearing having been attended on behalf of representatives of both defendants, the obligation to make full and frank disclosure is not as full as it would have been had there been no such attendance, but nevertheless there clearly is a responsibility on an applicant in those circumstances to draw matters to the attention of the court that may be material on the grant or withholding of an injunction and of which the defendants may themselves not be wholly aware.

9. The defendants refer to the, by now, well-known judgment of Carr J as she then was, in the case of *Tugushev v Orlov* which at paragraph 7 summarises the principles that apply on the question of whether an injunction should be discharged on the basis of a failure to make full and accurate disclosure of all material facts and draw the court's attention to important matters on a without notice application. In particular, paragraph 7 (6) is relevant and it reads as follows:

i. "Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved or one to be approached with the benefit of hindsight. The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect."

10. The three grounds of non-disclosure relied upon were the following; first, a failure to inform the court that the claimant's most recent statutory accounts ending 31 July 2020 were unreliable; second, inaccuracy about the number of employees of the claimant company who work in the premises, as relied upon by the claimant as a factor in favour of the grant of injunctive relief; and third, a failure by the claimant to draw to the court's attention a letter written on behalf of the first defendant asking the claimant to clear various walkways in the premises to facilitate removal by various licensees.

11. Dealing with the first of those matters first, Mr Murphy in his evidence drew attention to the financial position of the claimant company and he exhibited its most recent

accounts. The most recent accounts of the company appear to show that it has a balance of assets over liabilities of something in the region of only £70,000. However, the evidence relied upon by Mr Murphy was to the effect that the company's business was booming; it had five to six million pounds worth of stock, and a sum of over £2 million in cash in its bank account. The contrast between those statements of the assets of the company and its most recent accounts was in a sense self-evident and it was picked up at the without notice hearing by counsel then acting on behalf of the first defendant, who alleged that there was a clear inconsistency and a failure by the claimant to come clean about its true financial position.

12. The explanation put forward by Mr Murphy in paragraphs 28 and 29 of his second witness statement, made more recently than the without notice hearing, is that the claimant has experienced a period of extremely rapid growth during the pandemic and lockdown and has at times had difficulty in keeping up with bookkeeping; and that when the company's accountant approved the accounts that in turn have been approved by the company director, Mr Murphy, in April 2021, the accountant did not have all of the figures available in order to file full accounts for the year in question. And therefore, in order to avoid a fine, the accountant filed preliminary accounts which will need to be amended once the bookkeeping has been finalised.

13. That on the face of it gives rise to serious concern about the compliance of the claimant company with the requirements of the Companies Act 2006, however, that is not the issue in these proceedings. The relevance of the statement of assets and the accounts was to the value of the undertaking in damages that the claimant was willing to give in return for the grant of injunctive relief. The accounts, unreliable though they may have been, were identified, and evidence as to the current financial standing of the company was placed before the court.

14. Mr Murphy was probably aware at that time that the accounts were not reliable and in an ideal world he would have caveated reliance on the accounts by drawing attention to the matters in his first witness statement that he later did in his second witness statement. However, the misstatement in the accounts for once was in a direction which could only be favourable to the defendants, so it appears, in that the true asset position of the company on 31 July 2020 is, if anything, likely to have been

significantly better than the accounts show, on account of the large cash balance that is now shown to have existed in the company's bank account from shortly after that time.

15. Accordingly, in considering whether or not to grant injunctive relief on the basis of the undertaking in damages, the court was not *materially* misled even though there was in a sense a failure to disclose something that was of significance in relation to the accounts. In my judgment therefore, there was no material misleading of the court in this respect that could justify refusing to continue the injunction that was granted.

16. Second, the inaccuracy about the number of employees. In his evidence Mr Murphy said that there were 10, however, the accounts to which I have just referred said that there was only one employee as at 31 July 2020. A document that Mr Booth QC, on behalf of the first defendant, drew to my attention suggests that there may have been two or three employees in 2018. This discrepancy was not explained by Mr Murphy in his evidence. It may well, however, be correct that, as a result of the considerable growth in the claimant's business, Mr Murphy was accurate in the evidence that he gave. There is no evidence going in the other direction suggesting that that is incorrect. All that has done is to draw attention to the change in the number over a relatively short period of time. Once again, therefore, I am not satisfied that there was any misleading or intention to mislead in this case and I cannot conclude that there was a non-disclosure of any material matter that influenced the court in the decision that it made.

17. The third issue is the letter from the first defendant's solicitors dated 30 November 2020 written to the claimant. The letter referred to an earlier email covering the same issue in briefer terms, and said as follows, "In her email to you, our client asked that you remove your property from common areas within the premises as they were causing an obstruction and preventing other tenants from using their space within the premises as well as the common paths. Photographs attached indicate that as of Friday morning you have not complied with our client's request.". There was no reply to this letter on behalf of the claimant and there is no evidence that the claimant complied with the request that the letter made. All that the letter therefore does is to evidence the belief of the first defendant that the legal relations between her and the claimant were such that she had a right to request the claimant to re-organise the nature of its

occupation in the premises on a temporary basis. The letter is certainly consistent with that understanding.

18. It might be said that the absence of any reply - given the claimant's case that what had been created was a tenancy - tends to suggest that the claimant did not find fault with the way in which the matter was put in the solicitor's letter. However, that seems to me to be a rather subtle point on which to rely at this interim stage and may well be a matter for cross-examination at trial. I do not consider that the failure to disclose this letter was a material non-disclosure and was likely to have misled the court. I therefore decline to set aside the injunction that was granted or to continue it on grounds of material non-disclosure.

19. The next and more substantial argument that the defendants rely upon is that the claimant has no arguable case that it has a lease or tenancy agreement and therefore it fails at the first hurdle on an *American Cyanamid* approach, and for that reason, before even considering the balance of convenience, I should refuse to grant an injunction and indeed dismiss the claim insofar as it is based on an allegation of a tenancy.

20. Some of the context relied upon is that at the date when the tenancy agreement was allegedly made in about April or May 2018, the first defendant as director of TGH was in the course of negotiating the sale of the property, and it is therefore inherently unlikely that she would at that time have intended to grant a lease or tenancy of the premises to the claimant with security of tenure.

21. Further, four months or so after the oral agreement was made, the first defendant sent to the claimant a document to record the agreement that had been made and the document was a licence agreement and not a tenancy agreement. The evidence is that Mr Murphy refused to enter into it but there is no evidence that Mr Murphy refused because he understood that what had been agreed was the grant of a tenancy. That is really only a bit of context in which the question of whether there is an arguable case that a tenancy was created has to be decided.

22. The negotiations and agreement were previously reached between the first defendant, Ms Milton, and Mr Murphy on behalf of the claimant company. They were wholly oral

agreements. The evidence of Mr Murphy goes no further than confirming the accuracy of the way the agreement is pleaded in the particulars of claim. Mr Murphy says at paragraph 14 of his witness statement, "In April/May of 2018, I approached Ms Milton with a proposal that CSL should take a lease of the whole site. After a series of oral negotiations, Ms Milton agreed to the terms that are now set out at paragraph 11 of the particulars of claim.".

23. Paragraph 11 and paragraph 12 read as follows: "11. In April/May of 2018, and in the light of TGS's liquidation, the first defendant granted the claimant a tenancy of the premises, ('the lease') following a series of oral negotiations with the claimant's director, Mr John Murphy. It is averred that in making the said grant, the first defendant acted for and on behalf of the freeholder, THL, she being unable to grant a tenancy in any other capacity.".

24. "12. The following were express terms of the lease: (1) that the claimant would take exclusive occupation of the whole of the warehouse but subject to the existing licences; (2) that the first defendant, TGH, would as soon as reasonably practicable, take steps to remove these licensees so as to give the claimant the sole use of the premises; (3) that the claimant would pay a monthly rent that would increase as each of the remaining licensees were removed; (4) that the lease would continue until the grant of planning consent and the re-development of the premises, which would not occur for at least another two and a half years."

25. The "premises" as defined in the particulars of claim are the registered title of the second defendant. The "warehouse" as defined in the particulars of claim is the warehouse building itself, so potentially something less than the "premises". The particulars of claim then proceed to plead certain implied terms and in paragraph 15 state: "Further, and in reliance on the fact that it enjoyed a secure tenancy of the premises for at least some two and a half years and the aforesaid assurances, after April/May of 2018 the claimant carried out the following works and incurred the following expenditure …".

26. The accuracy of that account is disputed by Ms Milton in her first witness statement. She says she agrees that an agreement was reached as to the terms of occupation of the

warehouse and says that those terms were, "(a) occupation on a monthly basis, terminable on one month's notice, (b) rent payable monthly in advance, (c) access to the warehouse only during normal operating hours as set out in paragraph 5 above, (d) during opening hours members of my staff who were located in their own secure office within the warehouse would have free access to all areas within the warehouse, (e) no keyholding. The keys and security codes to the warehouse were never made available to any customer.". And she also says she would like to make it clear that at no point was Mr Murphy or the claimant given an agreement relating to the whole warehouse.

27. The argument that the claimants were granted a tenancy is challenged on the basis that there was no certainty at all in the terms agreed about the identity of the premises that were allegedly demised; there was no certainty of length of term; and there is no indication even of the rent that was agreed to be paid. So far as the premises are concerned, what is alleged is that there was express agreement that the claimant would take occupation of the whole of the warehouse, but subject to existing licenses, and that the first defendant, or TGH, would take steps to remove these licensees so as to give the claimant the sole use of the premises.

28. It is to be borne in mind that what is pleaded in paragraph 12 of the particulars of claim is not the legal effect of the agreement that was reached between Ms Milton and Mr Murphy, but the terms that were agreed expressly between them. It is a possible interpretation of the terms pleaded in sub-paragraphs 1 and 2 of paragraph 12 that there would be a lease of the whole of the warehouse but, nevertheless, those licensees who were in situ at the time would be entitled for a while to stay there until the first defendant or TGH removed them from the premises, thereby leaving the claimant with sole use of the premises.

29. That issue may well depend on the detailed context in which the agreement was reached, the facts relating to occupation of those licensees and the prior negotiations that have taken place between Ms Milton and Mr Murphy. I therefore cannot at this stage say that it is impossible or unrealistic in legal terms that the conclusion to be reached is that there was agreement on a lease of the whole of the warehouse.

30. So far as the term is concerned, the position of a term of years that will last until the happening of a particular event which may not happen at all and may happen at any time is that such a lease is void for uncertainty: see the decision of the House of Lords in *Prudential Assurance Co v London Residuary Body* [1992] 2 AC 386. However, the conclusion reached in that case was that although the intended lease was void for that reason, nevertheless as a result of possession and payment of a periodic sum for the right to possession, a periodic tenancy was created by implication of law.

31. Mr Booth submits that that is not an argument that is available to the claimant on its pleaded case. He points to the fact that paragraph 12 (4) refers to the lease continuing until a point in time in the future which would not occur for at least another two and a half years, and also in paragraph 15, to enjoyment of a secure tenancy for at least two and a half years.

32. I do not consider that the claimant is precluded from arguing, in the alternative, that the legal effect of what was expressly agreed between Mr Murphy and Ms Milton was a monthly periodic tenancy. What is set out in paragraph 12 is what was expressly agreed, not the legal consequence of that agreement. What is pleaded in paragraph 15 is very clearly Mr Murphy's own understanding that he enjoyed a secure tenancy of the premises for that period of time, it being the reason why he spent money on the premises.

33. In my judgment, it is a possible legal conclusion of the agreement as alleged to have been made that a monthly periodic tenancy came into existence. That is not an issue that I can determine or should determine at this stage. It is a matter for trial in due course when the full picture of the negotiations is known. I do however agree with Mr Butler QC on behalf of the second defendant that this cannot be a periodic tenancy that is subject to a restriction that it cannot be terminated until planning permission is granted or until re-development takes place. That as a limitation matter is uncertain.

34. The remaining issue is the rent. It is a little surprising that, if there was agreement on a monthly rent that would be payable, it is not pleaded and Mr Murphy does not say what it was. Mr Darton accepted that it was something of an oversight not to spell it out in the pleaded case. However, there appears to be no dispute that in fact an increased

monthly payment was made as a consequence of the oral agreement that was reached, and that in due course the amount of this payment increased, such that the current payment is £10,000 per month. It seems to me that the arguments in favour of a tenancy here, while not strong, are not ones that I can dismiss at this stage as having no realistic prospect of success.

35. I turn then to the balance of convenience. It appears very likely that in due course the claimant will have to vacate the premises as a result of the grant of planning permission and the intended re-development of the premises, either by the second defendant or by a purchaser from the second defendant. Given the nature of the planning permission, it seems inherently likely that a very valuable development of the premises will take place at some stage and in those circumstances the relevant landlord at the time will almost certainly succeed in opposing the grant of a new tenancy under section 30(1)(f) of the 1954 Act, if indeed the claimant does have a tenancy.

36. I have considered whether in those circumstances it would be appropriate to limit the period of any injunction that I might otherwise be minded to continue on the basis that the claimant would have to vacate in due course anyway, and that therefore allowing them time for an orderly vacation over a period of months from today's date would be sufficient to protect their proper interests. However, it is not absolutely certain that the development will proceed, or that the second defendant or a purchaser will be in a position to prove any ground of opposition when the proceedings based on the section 25 notice that have already been issued come to be tried. In those circumstances, I should not pre-judge the question of whether or not the claimant will have to give up possession in any event in the near future.

37. As to loss that would be caused if the injunction were not continued, I am satisfied that substantial loss would be caused if, with effect from today, the defendants were entitled to remove the claimant from the premises. The business is clearly now a substantial business. There was evidence of the extent of the growth over the last year in particular. Having to remove from the premises in a disorderly way would be liable to do significant harm to the goodwill of the business, in a way which is notoriously difficult to quantify at a later stage, particularly with a business of that kind that has undergone enormous growth in a short period. That is because there is no stability in its

financial receipts and affairs that enable one to assess the likely losses. I am for that reason persuaded that damages would not be an adequate remedy were an injunction now to be refused but the claimant proved later at trial that they had a tenancy agreement.

38. The inadequacy of damages in those circumstances could well be the more marked in view of the fact that the second defendant is considering selling the property. The second defendant appears to be a special purpose vehicle that was incorporated solely to buy the freehold of this property and therefore may have no other assets. If the claimant will definitely have to leave the premises in any event, then an injunction limited to a time sufficient for an orderly removal would arguably suffice to make damages an adequate remedy, but for the reasons I have given, it cannot be assumed at this stage that the second defendant will certainly obtain possession as a result of the trial of the issues that I have identified.

39. The question then is the nature of any loss that may be caused to the second defendant by the grant of an injunction. As I have said, there is no evidence that the development of these premises was otherwise about to start, within a short period of time. It is obvious that the grant of planning permission is needed first, and Mr O'Donovan's evidence is that the next stage will be entry onto the premises in order to carry out various tests and surveys in the usual way in order to prepare a specification and plans for the re-development. That and the following steps may well take a substantial period of time in any event. If there is going to be a substantial delay of months while the preparatory steps are put in place, then it is not evident that a delay of a number of months in recovering possession from the claimant will cause any loss to the second defendant or a purchaser, though it may be so if, for example, the second defendant were minded to conclude a sale of the property. The presence of the claimant and the injunction and the court proceedings would inevitably make that more difficult. There is therefore the potential for loss being caused but it seems to me that that loss is likely to be monetary loss rather than any other kind of loss that cannot be adequately compensated by damages.

40. The claimant's undertaking in damages was no doubt considered satisfactory by Falk J over a short period before the return date of the hearing, but if I am going to continue

the injunction until a trial, I am not satisfied, given the unreliability of the accounts in this case and the risk that a very large amount of cash in a bank account may not otherwise stay there for the duration of the proceedings. I consider that a fortification of the undertaking is required and I will come back to that question shortly.

41. I have also taken into account evidence of concern about the fire risk currently caused by the way that the premises are occupied. Mr Butler referred me to The Regulatory Reform (Fire Safety) Order of 2005 and said that it was in view of the obligations imposed by that order that his clients commissioned a fire safety report on the premises. The fire safety report gives rise to considerable concern. There is clearly a significant fire risk and the second defendant relies upon that as a factor for an early recovery of possession of the premises.

42. However, it seems to me that, on the proper interpretation of Article 3 of that Order, it is the claimant who is the person in occupation for business purposes and therefore is the responsible person for the purpose of Article 5, although it was no doubt prudent of the second defendant, as a responsible owner, to assess the position under Article 3 (b) (i) of the Order. It is a person who has control of the premises in connection with the carrying on by them of a trade business or other undertaking who is the responsible person, and the owner of the premises only where there is no such person in control carrying on a business. Although that does not mean that there is no fire risk at the premises, it does mean that it is a matter that does not directly threaten the second defendant, or indeed the first defendant. The claimant is responsible for mitigating such fire risks as exist and Mr Darton has told me that two fire marshals have recently been engaged to assist with that. I do not therefore consider that this on its own is a factor that should cause me to refuse to continue the injunction.

43. It is however clearly important that the second defendant, or any purchaser from the second defendant, acting by their agents or contractors or officers, are able to enter the premises on reasonable notice in order to carry out surveys and tests in advance of the proposed re-development, provided that those do not unreasonably impact - or impact for an unreasonable time - on the claimant's use of the premises. The continuation of the injunction must therefore be subject to that right for the second defendant. It must

also clearly be subject to continued payment of the £10,000 per month, which is a condition of the existing order, the next payment being due on 12 August 2021.

44. I have considered whether the first defendant is in any different position so far as losses are concerned. It does not appear to me that the first defendant is directly impacted, she being the director of the company that sold the freehold to the second defendant. What is suggested is that the daughter of the first defendant, Debbie Milton, should be brought within the scope of the undertaking in damages by reason of her interest under an overage agreement made on 4 September 2018, the same day as the sale of the property to the second defendant.

45. As things stand, under the terms of that agreement there may be overage of £75,000 payable based on the planning permission that is about to be granted, if the planning permission is implemented by 3 September 2023. That is more than two years away. There does not seem to me to be any immediate threat to Debbie Milton's rights under that agreement by virtue of continued occupation by the claimant company. If matters change for any particular reason, then Debbie Milton is always at liberty to apply herself to be brought within the scope of the undertaking in damages, and clearly that application has to be made on notice to the claimant. It seems to me, given the unlikelihood that as things stand she is going to be affected by any relatively short term delay in recovering possession, that matters should be left that way rather than bringing her within the scope of the undertaking at this stage.

46. For all the reasons that I have given, I therefore conclude that the injunction should be continued until what will be an expedited trial of two preliminary issues, namely whether or not the claimant has a tenancy of the premises or any part of the premises, and if so, whether the second defendant is able to prove its ground of opposition to the grant of a new tenancy. In my judgment, having heard the views of all three counsel, those two issues can clearly be determined within a trial of three days without undue difficulty. I will give directions for an expedited trial of those issues and will discuss them with counsel shortly.

47. The remaining question is therefore the fortification of the undertaking in damages although, as I have said, there does not appear to be any immediate loss that is likely to

be caused to either of the defendants by a delay in their recovering possession of the premises. That may change depending on events that cannot entirely be foreseen at this stage. It seems to me that there does need to be a substantial sum paid into court. A figure of £1.5 million was suggested. That seems to me to be far too much given the evidence as it stands and the amount of loss that can reasonably be foreseen. It is not simply a case of multiplying the monthly interest figure of £74,000 by the number of months between now and the final determination of the issues and recovery of possession because there is no evidence that as of today, the second defendant is otherwise ready to begin the redevelopment of this property.

48. However, it seems to me that a significant sum should be paid into court to fortify the undertaking. The claimant has substantial cash assets at the moment and Mr Darton has confirmed that the claimant is able and willing to make such a payment into court. I consider that the appropriate figure is £250,000. Provided that that figure is paid therefore within a number of days which I will hear counsel on, the injunction will continue. If it is not paid within that time then the injunction will cease to have effect.
