Neutral Citation Number: [2017] EWHC 2175 (Ch)

Case No: HC-2017-002290

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 23 August 2017

Before :

MR JUSTICE SNOWDEN

- -

Between :

WEST END COMMERCIAL LIMITED	**Claimant**
- and -	
LONDON TROCADERO (2015) LLP	**Defendant**

- -
- -

Andrew McGuinness (instructed by **Consilium Legal Limited**) for the **Claimant**
Nicholas Trompeter (instructed by **Jury O'Shea LLP**) for the **Defendant**

Hearing dates: 17-18 August 2017

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Judgment Approved

MR JUSTICE SNOWDEN:

1. On 17-18 August 2017 I heard an application by the Claimant ("WECL") for the continuation of an interim injunction granted without notice by Henry Carr J on 11 August 2017. The injunction restrained the Defendant ("LT") from seeking to terminate a contractual licence dated 6 July 2017 relating to the occupation by WECL of a retail unit within The Trocadero, Piccadilly Circus, London W1 ("the WECL Licence" and "Unit 6"). At the conclusion of the hearing I indicated that I would not continue the injunction, and that I would give my detailed reasons in writing later. I now do so.

The Facts

2. The facts can be stated relatively shortly. By an earlier licence dated 11 July 2016 ("the G7 Licence") LT granted a company known as G7 Group Limited ("G7") a licence to occupy Unit 6 for a period from 6 July 2016 to 5 July 2017 or such earlier date upon which the licence might be determined in accordance with the terms of the agreement. The licence fee payable under the G7 Licence was £1,456,000 plus VAT per annum. G7 operated from Unit 6 together with two other retail outlets in Oxford Street, selling memorabilia and tourist items.

3. By Clause 2, the G7 Licence conferred on G7 the right to use Unit 6 for the licence period during certain specified hours, and Clause 3 contained a series of undertakings as to use of the Unit and payment of the licence fee by G7. Clause 4.1 then contained a provision for termination of the licence as follows,

> "The rights granted in Clause 2 shall determine … 30 days after written notice given by the Licensor to terminate at any time after 13 December 2016 or immediately after written notice by the Licensor determining this Licence following any breach by the Licensee of its undertakings contained in Clause 3."

4. The evidence is that the initial period until 13 December 2016 in which it was not possible for LT to terminate the G7 Licence on 30 days' notice was to reflect the fact that G7 had paid substantial sums to fit out Unit 6.

5. The sole director of G7 was and is Mr. Asif Abrar. Mr. Abrar is also the sole director of WECL which was incorporated on 31 January 2017. According to his own evidence, by April 2017 Mr. Abrar had "decided to change my trading vehicle from G7 to WECL", and shortly thereafter he commenced negotiations with LT for the grant of a new licence of Unit 6 to take effect upon the expiry of the G7 Licence.

6. As part of those negotiations, on 25 May 2017 there was a meeting between Mr. Abrar and Miss Cosmina Stan ("Ms. Stan") of LT's managing agent, Criterion Capital. Mr. Abrar's evidence in relation to that meeting is as follows,

> "Following discussions with Cosmina Stan in early May 2017, I attended on 25 May 2017 to Criterion Capital's offices … in order to discuss and finalise terms governing the future licence. By this stage Cosmina Stan had agreed that the licensee would be WECL… At the meeting I reviewed carefully the draft licence agreement. I noted that in clause 4.1 there was a similar provision allowing the landlord 28 days to terminate the license. I was not agreeable to accept this provision, and I informed Cosmina Stan of this. I advised her that Unit 6 was a totally different unit whereby a sizeable investment had already been carried out by G7, the benefit of which WECL sought to enjoy, and further in light of the substantial weekly licence fees, and the continuation and investment of a large volume of stock, it was not commercially viable to proceed whereby the landlord could simply terminate the licence by giving 28 days' notice.
>
> My conversation with Cosmina Stan can be summarised as follows:
>
> > (a) In light of my express concerns of my requirement for the clause to be amended to reflect the 6 month minimum period as contained in the Licence dated 11 July 2016 in favour of G7, Cosmina Stan informed me that I had nothing to worry about, and that whilst she could not agree to amend the clause due to the "lender's requirements", provided WECL paid the licence fee regularly each week in full, and that there were no other breaches of the licence, she assured me that the landlord would not exercise the right to terminate by giving 28

> days' notice. I informed Cosmina Stan that I would rely on her assurance, and that I would proceed to complete the licence, and transfer the deposit from G7 to WECL…"

7. The meeting was also attended by a business acquaintance of Mr. Abrar, a Mr. Imran Rashid, whose evidence was,

> "During the course of the meeting, discussions took place with regards to the entering of a new licence concerning Unit 6 with WECL. Cosmina furnished a copy of the licence which both Asif and I reviewed. Asif made general comments, the particular one which I recall was that he was not happy with a clause which entitled the landlord to terminate the licence by giving 28 days' notice. Asif requested that the 28 day notice be removed and, as I recall, requested a minimum of 6 months' notice, making reference to an existing licence agreement. Cosmina Stan responded stating that whilst she was unable to amend the clause, she made reference to the "lenders" not being agreeable to any amendments, she assured Asif that provided WECL complied with the terms of the licence, and in particular made payment of the weekly fee, the landlord would not seek to terminate the licence before the end of the term. There was a general discussion about this, but ultimately Asif informed Cosmina that he would trust her and rely on what she said, and would make arrangements to send a letter confirming the transfer of the existing deposit from what I understand is now G7, to be transferred by the landlord to WECL."

8. On behalf of LT, Ms. Stan signed a witness statement denying that she ever gave any assurances to Mr. Abrar. In addition, Mr. Asif Aziz, the CEO of Criterion Capital (who was not at the meeting) produced a witness statement asserting that it is inherently implausible that Ms. Stan would have said anything of the sort alleged, and claiming that in any event she had no authority to do so.

9. Following the meeting on 25 May 2017, on or about 6 July 2017, LT and WECL entered into the WECL Licence in respect of Unit 6. The WECL Licence is on very similar terms to the G7 Licence. However, the licence fee was increased to £1,500,000 plus VAT per annum, equating to £28,846.15 plus VAT per week, or a total of £34,615 per week.

10. Importantly, Clause 4.1 of the WECL Licence enables LT to determine the licence on notice as follows:

> "The rights granted in Clause 2 shall determine … 90 days after written notice given by the Licensee or 30 days after written notice given by the Licensor or immediately after written notice by the Licensor determining this Licence following any breach by the Licensee of its undertakings contained in Clause 3."

11. The WECL Licence also contains a notice provision at Clause 4.9:

> "All notices given by either party pursuant to the provisions of this Licence shall be in writing and shall be sufficiently served if delivered by hand or sent by recorded delivery to the other party at its registered office or last known address."

12. On 14 July 2017, i.e. only about one week after the WECL Licence was entered into, LT served a notice of termination under Clause 4.1, purporting to terminate the WECL Licence on 13 August 2017 ("the Notice"). The Notice was served by three methods, namely email, hand delivery to Unit 6, and recorded delivery to Unit 6.

13. At or about the time of giving notice to WECL, LT entered into a new arrangement in relation to Unit 6 with a company known as H&K Group Limited ("H&K"). The evidence of Mr. Aziz of Criterion Capital, for LT, is as follows,

> "Contemplating that [WECL's] licence would come to an end upon the expiration of the notice given on 14 July 2017, a few days later, on 20 July 2017, [LT] entered into a new licence agreement in respect of Unit 6 with H&K Group Limited. This licence agreement is accompanied by a side letter. H&K Group has agreed to pay £50,000 per week for Unit 6. This is approximately £15,000 more per week than [WECL] agreed to pay."

14. The new licence granted by LT to H&K ("the H&K Licence") was in similar format to the G7 and WECL Licences. However, the licence period is short, running only from 14 August 2017 to 13 November 2017; and Clause 4.1 provides for the licence to be terminated by LT on only 7 day's notice, or immediately upon breach of any of the Clause 3 undertakings. Surprisingly, however, the licence fee is stated to be "one peppercorn per annum".

15. The "side letter" referred to by Mr. Aziz is a letter dated 14 July 2017 from Criterion Capital on behalf of LT and countersigned by H&K ("the Side letter"). In it, H&K is referred to as "the Occupier", LT is referred to as "the Owner" and Unit 6 is referred to as "the Property". The Side Letter reads as follows,

> "By the signing of this letter, the Occupier and the Owner agree that the occupation of the Property by the Occupiers shall cease and determine with effect from midnight on 13 November 2017 ("the Termination Date").
>
> The Occupier and the Owner agree that dilapidation has accrued at the property during the course of the occupation in the sum of £657,123.29 ("the Dilapidation").

> Given the Occupier's inability to pay the Dilapidation immediately, the Owner agrees to accept equal weekly instalments of £50,000 until the Dilapidation has been cleared, the first instalment of which shall be made on 14 August 2017.
>
> The Occupier shall pay the Owner all sums due and outstanding in relation to their occupation of the Property up until and including the Termination Date."

16. Mr. Aziz's evidence in relation to this matter continued,

> "H&K has already been invoiced for, and paid, £50,000 pursuant to the licence agreement."

In fact, the invoice that Mr. Aziz exhibited to his witness statement to support this assertion is not an invoice pursuant to the H&K Licence, but is an invoice dated 2 August 2017 for £49,990 which is expressed to be for dilapidations covering the period from 14 August 2017 to 20 August 2017. The invoice did not include VAT. This is a matter to which I shall return at the end of this judgment.

17. After receipt of the Notice in July, WECL appears to have taken no steps to contest the Notice until 10 August 2017 when solicitors instructed by it wrote to LT's managing agent saying it had received instructions to apply on the following day for an injunction. The only substantive ground articulated in the correspondence for seeking an injunction was invalid service of the Notice.

18. On 11 August 2017, WECL applied for an injunction. It also produced a Claim Form and Particulars of Claim. The Particulars of Claim assert that the Notice was not validly served upon two grounds.

19. The first refers to the statement allegedly made by Ms. Stan which is described as "a clear an unequivocal representation with the effect that [LT] can give notice only where [WECL] is in breach of its undertakings contained in Clause 3 of the [WECL] Licence", and alleges that "[WECL] relied upon this representation to its detriment by entering into the [WECL] Licence." This is said to have the result that LT is "estopped from exercising its legal right contained in Clause 4.1 of the [WECL] Licence, to terminate the [WECL] Licence upon giving written notice of 30 days."

20. The second pleaded ground is that in breach of Clause 4.9 of the WECL Licence, the Notice was not properly served and is of no effect because it was not served on or delivered to WECL at its registered office.

21. WECL's application for an interim injunction came before Henry Carr J on 11 August 2017. After a relatively brief hearing, Henry Carr J granted an injunction in wide form prohibiting the service of any notice to terminate the WECL Licence. In a short judgment, he rejected the argument on service, but accepted that the estoppel argument raised a serious issue to be tried and that the balance of convenience favoured the grant of an interim injunction until the return date. In doing so, Henry Carr J rejected arguments made by counsel for LT (who had appeared on short notice) that a pre-

contractual representation could not found an estoppel and that WECL was attempting to use estoppel as a sword rather than a shield. Henry Carr J indicated that he considered that estoppel was a flexible remedy.

The arguments before me

22. Before me, it was common ground that any injunction should be in more restricted form than granted by Henry Carr J, and in particular that LT should not be restrained from seeking to terminate the WECL Licence on the basis of any alleged breaches of the undertakings given by WECL in Clause 3. The injunction sought related solely to the service of a 30-day notice without cause.

23. WECL also no longer sought an injunction on the basis of the argument that the Notice had not been validly served. WECL was clearly right to drop that argument. The provisions of Clause 4.9 are permissive and do not purport to describe exhaustively the methods of service of a notice under the licence. Moreover, Clause 4.9 in any event permits service at WECL's last known address, and service at Unit 6 from which WECL traded would suffice for that purpose.

24. Accordingly, the only basis upon which WECL sought an injunction was the estoppel argument based upon the pre-contractual assurances allegedly given by Ms. Stam to Mr. Abrar at the meeting on 25 May 2017.

Analysis

25. It was common ground between the parties that in order to obtain the continuation of the interim injunction in accordance with the principles set out in American Cyanamid v Ethicon [1975] AC 396, WECL needs to establish,

    i) that there is a serious issue to be tried;

    ii) that damages would not be an adequate remedy or (alternatively) it would be unjust to confine WECL to a remedy of damages; and

    iii) that the balance of convenience lies in favour of continuing the injunction.

Serious Issue to be Tried

26. Mr. Trompeter suggested in his written argument that I should find that the evidence of the assurances allegedly given by Ms. Stan was incredible and reject it. He pointed out, for example, that the alleged assurances had not been recorded in any written record of the meeting, and that they did not feature in any of the pre-action correspondence. Mr. Trompeter also made the point that Mr. Abrar's evidence that it would not have been commercially viable for WECL to proceed to take a licence if LT could give 28 days' notice made no sense given evidence that the WECL Licence was said to have been a continuation of the earlier G7 Licence albeit through a different trading vehicle. He observed LT had in fact been entitled to give 30 days' notice to terminate the G7 Licence at any time after 13 December 2016, and that no assurances were alleged to have been given to the contrary in respect of that licence.

27. These were powerful points well made, but as Lord Diplock indicated in American Cyanamid, it would not be appropriate for the court at this stage of the proceedings to resolve the factual dispute between the parties as to what was said or not said at the meeting on 25 May 2017 without hearing oral evidence and cross-examination. I therefore proceed, for the purposes of assessing whether there is a serious issue to be tried, on an assumption that the assurances set out in Mr. Abrar and Mr. Rashid's evidence were given by Ms. Stan on behalf of LT.

28. The question is therefore whether such assurances could possibly give rise to an estoppel as a matter of law such that there is a serious issue to be tried. The Particulars of Claim do not specify the type of estoppel which WECL contends arose, but English law has conventionally divided estoppel into a number of identifiable sub-species, each with their own particular requirements, and has not embraced a unified theory of equitable estoppel based simply upon notions of unconscionability: see e.g. *Snell's Equity*, 33rd ed, paras 12-008 to 12-009, referring among other things to the dictum of Lord Scott in Cobbe v Yeoman's Row Management Limited [2008] 1 WLR 1752 at para 16. Accordingly, it is necessary to ask what type of estoppel WECL might be able to establish on the assumed facts.

29. In that regard, Mr. McGuinness did not suggest that Ms. Stan's alleged statements could be the foundation for a promissory estoppel. A promissory estoppel can arise where one party to a transaction (A) makes to the other (B) a clear and unequivocal promise or assurance that he (A) will not enforce his legal strict legal rights, that the promise or assurance is intended to affect the legal relations between the parties, and that before it is withdrawn, B acts upon to alter his position in such a way that it would be inequitable to permit A to withdraw the promise or act inconsistently with it: see e.g. *Snell's Equity* at para 12-018.

30. But in Thorner v Major [2009] 1 WLR 776 at para. 61, Lord Walker (with whom all the other members of the House of Lords agreed) observed that a promissory estoppel must be based upon an existing legal relationship. So, in this case, although Mr. McGuinness emphasised the continuity of the two Licences between the two companies of which Mr. Abrar was a director, that cannot assist WECL, which had no existing legal or other relationship with LT prior to the execution of the WECL Licence.

31. Mr. McGuinness therefore put his argument squarely on the basis that the facts gave rise to a proprietary estoppel. At first glance that would seem to be a surprising contention, given that WECL claims no proprietary interest in Unit 6. As Clause 4.5 of the WECL Licence makes explicit, WECL is not a tenant under a lease of Unit 6 and has no legal interest in the premises: it is merely a licensee having contractual rights to use the premises on certain conditions and at certain times.

32. For LT, Mr. Trompeter contended that this point was sufficient to make a proprietary estoppel unarguable. As Lord Hoffmann indicated in Thorner v Major at para 2,

> "… a claim, under the principle known as proprietary estoppel, requires the claimant to prove a promise or assurance that he will acquire a proprietary interest in specified property."

33. Lord Walker put the point slightly differently in para 61, saying,

> "In my opinion it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant. That is one of the main distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel… The former must be based on an existing legal *relationship* (usually a contract, but not necessarily a contract relating to land). The latter need not be based on an existing legal relationship, but it must relate to *identified property* (usually land) owned (or, perhaps, about to be owned) by the defendant. It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in Crabb v Arun DC [1976] Ch 179, 187."

34. Although Mr. McGuinness argued that Lord Walker's requirement that the assurances "should relate to identified property" was satisfied where the assurance related to a contractual licence concerning identified property, I think that Lord Walker's reference to Crabb v Arun and to proprietary estoppel developing as a sword and not merely as a shield makes it clear that he was contemplating that the estoppel would be one that gave a claimant an interest in property owned by the defendant, and not just a right in relation to a contract with the defendant.

35. There have been suggestions in academic literature that proprietary estoppel should not be limited to claims to property in this way: see e.g. *Snell's Equity*, para. 12-036 (contributed by Ben McFarlane), and McFarlane and Sales, *Promises, Detriment and Liability: Lessons from Proprietary Estoppel* (2015) 131 LQR 610 at 621-628. Moreover, in Motivate Publishing v Hello Limited [2015] EWHC 1554 (Ch) at paras 55-61, Birss J appears to have held that proprietary estoppel was in principle available to prevent a defendant from denying the existence of a licence giving the claimant permission to publish the Middle East edition of "Hello" magazine.

36. However, as *Snell's Equity* observes, given the authority of the decision in Thorner v Major, it is clear that only the Supreme Court or the legislature could remove the current proprietary limit to the operation of proprietary estoppel. Accordingly, I consider that I am bound to accept Mr. Trompeter's submission that on the current state of the law at set out in Thorner v Major, WECL cannot hope to establish the proprietary estoppel for which Mr. McGuinness contended.

37. Mr. Trompeter also submitted that even if this limit on the scope of proprietary estoppel was open to argument, WECL would necessarily fail because it could not hope to establish detriment, which is an essential element of a proprietary estoppel.

38. In Thorner v Major at para 21, Lord Walker described the essential elements of a proprietary estoppel,

> "..most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms:

> a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance:"

39. For WECL, Mr. McGuinness accepted that he needed to show that WECL had suffered detriment in consequence of relying on the alleged assurances of Ms. Stan. He contended that WECL had suffered detriment in two ways: (i) that it had entered into the WECL Licence, and (ii) that it had provided a deposit for the licence fee.

40. I do not consider that WECL suffered relevant detriment by entering into the WECL Licence itself. Before the execution of the WECL Licence, WECL had no rights to occupy or use Unit 6 at all. After execution of the WECL Licence, WECL had the right to trade from Unit 6, and the whole point of its case was that this was a valuable commercial right. Its only objection was that it should not be able to be deprived of that valuable right without cause on 30 days' notice.

41. In this respect, Mr. McGuinness also sought to rely upon Mr. Abrar's evidence that it,

> "was not commercially viable to proceed whereby the landlord could simply terminate the licence by giving 28 days' notice."

However, that evidence does not suggest that WECL actually suffered a detriment in entering into a licence on those terms. Moreover, this submission also ignores the point that until the G7 Licence expired by effluxion of time in July, G7 had been making healthy profits from its occupation of Unit 6 on precisely those terms, because under clause 4.1 of the G7 Licence, LT was entitled to give 30 days' notice to terminate the G7 Licence without cause at any time after 13 December 2016 and there was no suggestion that it had received any assurances of the type now alleged by WECL.

42. As to the second head of alleged detriment, although Mr. McGuinness contended that WECL suffered a detriment in providing a deposit to LT for the licence fees under the WECL Licence, on closer analysis the evidence clearly demonstrated that it did not in fact do so. As indicated in the extract from Mr. Abrar's evidence set out above, what in fact occurred was that after the meeting on 25 May 2017, on 26 May 2017 Mr. Abrar sent an email to Ms. Stan directing her to "transfer" the deposit of £33,600 that had been provided by G7 under the G7 Licence to WECL. As such, it is clear that WECL itself provided no deposit monies to LT.

43. Although I suggested in argument that the "transfer" of the deposit provided by G7 might implicitly have given rise to a liability owed by WECL to indemnify G7, which could have been a detriment to WECL, Mr. Trompeter took me to the accounts for WECL for the relevant period ending 31 July 2017 that had been exhibited by Mr. Abrar, and pointed out that they did not in fact show any indebtedness between the two companies. As such, I think I must accept that there is no evidence that WECL suffered any detriment in this respect.

44. I therefore conclude that even on the assumed facts in its favour, the essential requirements of a proprietary estoppel as alleged by WECL cannot be made out and that there is not a serious issue to be tried.

45. I am very conscious both that I am reaching a conclusion different from the view that Henry Carr J expressed on 11 August 2017, and that the hearing of an application for an interim injunction is not the time or place to decide difficult points of fact or law (see e.g. Sukhoruchkin v Van Bekestein [2014] EWCA Civ 399 at para 32). I would observe, however, that the hearing before Henry Carr J took less than an hour and his view was reached on the basis of a very abbreviated argument in the context of a 'without notice' application for a very short term injunction. I have had the benefit of much fuller argument over the best part of a day, and I am entirely satisfied that for the reasons that I have explained, WECL's case cannot be made out.

46. That conclusion makes it strictly unnecessary for me to consider the remaining requirements for the grant of an interim injunction, but since they were argued I shall state my views briefly on them.

Adequacy of damages

47. In Alstom Transport UK Ltd v London Underground Ltd [2017] EWHC 1521 (TCC), at para. 22, Stuart-Smith J summarised the "modern approach" to the question of adequacy of damages:

> "(a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so…
>
> (b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages…"

48. Mr. Trompeter contended that if it should be found that LT had unlawfully terminated the WECL Licence, then WECL could (in principle) maintain a straightforward claim for the loss of profits it could have generated over the remainder of the licence period (i.e. until 5 July 2018). He submitted that primary evidence for such a claim would come from a number of sources, including G7's historic rates of profit from trading at Unit 6 and expert evidence about the probable profit that WECL would have generated had the WECL Licence continued to its natural conclusion.

49. For WECL, Mr. McGuinness accepted that such a claim could be formulated and made, and he did not suggest that there were any features of the case that gave rise to any particular difficulty, other than the normal uncertainties that attend any quantification of damages in litigation. That contrasts, for example, with the type of difficulties in assessment of particular heads of damages that were relied upon (unsuccessfully) in argument in Alstom at paras 24-26. A general uncertainty arising in litigation cannot, of course, lead to a conclusion that damages would not be an adequate remedy, since it would be present in virtually every case.

50. Mr. McGuinness' main point in this respect was that LT had adduced no evidence of its own financial position to demonstrate that it would be good for an award of damages

in favour of WECL. It is true that LT has produced no evidence as to its financial status, but I consider that should be put into context.

51. The only evidence of the loss and damage that WECL might suffer was a bare assertion by Mr. Abrar in his evidence as follows,

> "The attempt by the landlord to prematurely terminate the licence will have dire financial consequences for [WECL] resulting in the loss of 15 employees, the distress sale of current stock valued at £200,000 culminating with losses of approximately £250,000 to the company."

52. For LT, Mr. Trompeter pointed out that WECL's management accounts showed that it did not make any payments of salary to any employees and it therefore appeared that it did not have any. He also suggested that the stock to which Mr. Abrar referred appeared to be stock consisting of memorabilia and tourist items that might well have been acquired from G7 when it vacated Unit 6. He suggested that these were the type of items that would not need to be subject to a distress sale as suggested by Mr. Abrar, but could very easily be sold through G7's outlets on Oxford Street. Mr. McGuinness provided no answer to those submissions, which I accept.

53. Mr. Trompeter also pointed out that as a guide to the level of profits that WECL might claim, it was apparent that G7's trading at Unit 6 for about three months from 1 April 2017 to 6 July 2017, together with its trading at its other outlets from 1 April to the until the end of July 2017 produced profits before tax of £52,552, and WECL's profits before tax from its incorporation on 1 February 2017 to the end of July 2017 amounted to £25,086. Mr. Trompeter therefore submitted that the level of lost profits capable of being claimed by WECL for the eleven months remaining on the WECL Licence would be likely to be far less than the £250,000 suggested by Mr. Abrar. Whilst I do think that the figures show that trading at Unit 6 was profitable, I think that there is some force in the point made by Mr. Trompeter.

54. Against this background of likely loss and damage, although I think it is unsatisfactory that LT did not produce evidence as to its financial means, I do not consider that I have any basis for reaching a conclusion that it would not be good for the level of damages that WECL would be likely to obtain at any trial. Although I do not have any information about LT's borrowings or outgoings, it is the owner of The Trocadero which is a substantial property in the heart of London, and on the strength of what is known about the income from Unit 6, LT appears to be likely to be in receipt of very significant income from the licences of units at the premises which ought to enable it to be in a position to pay the level of damages likely to be awarded to WECL.

55. I would therefore have refused the injunction in any event on the basis that it would not be unjust in the circumstances to confine WECL to its remedy in damages.

Balance of convenience

56. If, contrary to the view that I have expressed, I thought that there was a serious issue to be tried and that damages would not be an adequate remedy for WECL, I would have

considered that the balance of convenience favoured the continuation of the interim injunction for a short period until trial, which I would have been prepared to order take place on an expedited basis in September or early October.

57. Continuing the injunction for that relatively short period would have preserved the status quo and I do not consider that LT would have suffered material loss over that relatively short period that WECL (or G7 which was willing to be joined to the proceedings for the purposes of fortifying a cross-undertaking in damages) would have been unable to pay. I say that because assuming that H&K was willing to pay £50,000 per week to LT in relation to occupation of Unit 6 under the arrangements to which I have referred, and given that WECL was prepared to continue to pay the weekly licence fee under the WECL Licence, the marginal loss to LT of not being able to accommodate H&K at Unit 6 for the short period until trial would be relatively small. Moreover, such limited evidence as I had as to the attitude of H&K did not suggest to me that H&K would not still be willing to take a licence of Unit 6 in early October if LT was successful at trial.

VAT and the arrangements between LT and H&K

58. I have set out above the arrangements between LT and H&K which were entered into in July. Although described in places in the evidence and submissions on behalf of LT as the payment of a licence fee for Unit 6 of £50,000 per week, it is readily apparent that the H&K Licence in fact only provides for a licence fee of a peppercorn per annum. Instead it is the Side Letter that provides for the payment of £657,123.29 at the rate of £50,000 per week by H&K to LT, ostensibly on the basis that this sum represents payment by instalments of an agreed amount of "dilapidation" which is said in the Side Letter "has accrued at the property during the course of the occupation".

59. The reference in the Side Letter to dilapidations having accrued at Unit 6 during the course of the occupation makes no sense in so far as it relates to the future occupation of Unit 6 by H&K; and there is no reason whatever why H&K should be responsible for any dilapidations which occurred during the previous occupation of Unit 6 by G7 or WECL. As such, I agree with Mr. McGuinness, who submitted that there is a prima facie case that these are sham documents which do not appear accurately to reflect the true arrangement between LT and H&K in relation to Unit 6, which is that H&K has agreed to pay a licence fee of £50,000 per week.

60. Mr. McGuinness submitted that the likely explanation for the creation of these documents is that whereas the payment of a licence fee would carry VAT, the payment of dilapidations does not carry VAT. He referred me in that respect to paragraph 10.12 of VAT Notice 742 issued by HMRC which provides,

> "The terms of a lease may provide for the landlord to recover from tenants, at or near the termination of the lease, an amount to cover the cost of restoring the property to its original condition. The amount is often agreed between the parties and may be based on a surveyor or contractor's estimate.

> A dilapidation payment represents a claim for damages by the landlord against the tenant's 'want of repair'. The payment involved is not the consideration for a supply for VAT purposes and is outside the scope of VAT."

61. Mr. McGuinness pointed out that unlike the invoices issued by LT to G7 and WECL for the licence fees under the G7 Licence and the WECL Licence, which did carry VAT, the invoices issued by Criterion Capital on behalf of LT to H&K were ostensibly for dilapidations and did not carry VAT.

62. Mr. McGuinness submitted that this was, prima facie, evidence of an attempt to evade the payment of VAT by or on behalf of H&K and LT. I agree, and whilst I cannot and do not intend to express any conclusion on the matter (not having heard evidence from the parties involved) given the very significant sums of VAT which may be involved, which would exceed £100,000 in relation to the arrangements with H&K alone, I indicated to Mr. Trompeter during the hearing that I was considering referring the papers in this case to Her Majesty's Commissioners for Revenue and Customs in order that they may, if they consider it appropriate to do so, investigate these matters further. Mr. Trompeter did not suggest that there was any reason why I should not follow that course and I shall do so.

63. The issues that I have identified in relation to VAT do not, however, have any direct bearing upon my decision in relation to the injunction, but are matters between the parties concerned in those arrangements and HMRC.

Conclusion

64. For the reasons that I have set out, I declined to continue the injunction preventing LT from terminating the WECL Licence.

65. I will hear argument as to all consequential matters at an adjourned hearing on a date to be fixed after I have handed down this judgment in final form.