Neutral Citation Number: [2025] EWCA Civ 619

Case No: CA-2024-001307

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
His Honour Judge Klein (sitting as a High Court Judge)
Judgment given on 16 May 2024
Claim No. CR-2023-LDS-001028

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 13 May 2025

Before :

LADY JUSTICE KING
LORD JUSTICE NUGEE
and
LORD JUSTICE SNOWDEN

- -

Between :

SIMON CARVILL-BIGGS **MILES ANDREW NEEDHAM** **(As Joint Administrators of Rose Cottage Farm Limited)**	**Applicants/ Respondents**
- and –	
ASHLEY VALENTINE READING	**Respondent/ Appellant**

- -

Clive Wolman (instructed by **William Sturges LLP**) for the **Appellant**
Eleanor Temple KC and Jonathan Fletcher-Wright (instructed by **Ashtons Legal LLP**) for the **Respondents**

Hearing date: 21st January 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30 a.m. on 13 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Snowden:

1. This appeal concerns the ability of administrators to obtain an order pursuant to section 234 of the Insolvency Act 1986 ("section 234" and "the Insolvency Act") for delivery of possession of a residential property which a director of the company is occupying as a trespasser. Prior to the company going into administration, the property in question was charged by way of legal mortgage to a lender which enforced its security over the property by appointing receivers under the Law of Property Act 1925 and taking possession proceedings in the County Court as a mortgagee pursuant to CPR 55.

2. The judge made an order under section 234 requiring the director to deliver possession of the property to the administrators. The main question raised by the appeal is whether section 234 permitted such an order to be made.

3. For the reasons set out below, I consider that section 234 did not permit the administrators to obtain an order for delivery of possession of the property in question. I would therefore allow the appeal.

Background

4. The background to the matter is not entirely straightforward, but for present purposes it can be summarised as follows.

5. The case concerns freehold land known as Furzefield, Holwood Park Avenue, Orpington BR6 8NQ which is registered at the Land Registry with title number SGL47420 (the "Land"). The Land comprises a large six-bedroomed house set in about one acre in a gated estate.

6. The freehold title to the Land is held by Rose Cottage Farm Limited (the "Company") which was a special purpose vehicle set up by the appellant ("Mr. Reading") to acquire the Land in 2022. Mr. Reading was the sole director of the Company. The purchase price was about £2.5 million.

7. TFG Capital No.2 Limited ("TFG2") is a company based in Doncaster, which lent a total of £2.85 million to the Company in August 2022. The loans were secured by a legal charge which was expressed to be by way of mortgage over the Land (the "Mortgage"); and by a floating charge over any other assets and undertaking of the Company (the "Floating Charge"). At the time, the Land was valued for the purposes of TFG2's security at between £3.5 million and £4 million.

8. TFG2's loan documents contained a covenant by the Company not to permit occupation of the Land as a dwelling by any person related to the Company. However, Mr. Reading and various members of his family and other dependents took up residence at the house on the Land in early 2023. They have not contended that they have any formal lease or other agreement with the Company entitling them to remain there.

9. The Company defaulted on the loans from TFG2 in April 2023. Thereafter, under the terms of the loans, interest became due to TFG2 on all amounts outstanding at a rate of 3% per month, compounded monthly.

10. On 3 August 2023, TFG2 exercised its power under the Mortgage to appoint two directors of Wilson Field Limited to be joint receivers of the Land (the "LPA Receivers"). As is conventional, the Mortgage incorporated and conferred upon the LPA Receivers all the powers conferred on receivers by the Law of Property Act 1925 (the "LPA"), which included the power to demand and receive monies payable in respect of the Land and to take possession and sell it.

11. Although the details are disputed, it would seem that the LPA Receivers took the view that Mr. Reading was not co-operating with them in seeking to arrange a sale of the Land. Accordingly, on 16 August 2023, TFG2, as mortgagee, issued proceedings in the County Court at Bromley against Mr. Reading and the Company pursuant to CPR 55 seeking an order for possession of the Land (the "Bromley Proceedings"). TFG2's claim form asserted that TFG2 had a right to possession of the Land pursuant to the Mortgage and sought an order for possession against the Company and Mr. Reading in order that it could invoke the power of sale in the Mortgage and sell the Land free from occupation. As at 31 August 2023, the amount required to redeem the Mortgage was said to be just over £3.1 million.

12. Mr. Reading indicated an intention to contest the Bromley Proceedings on a wide variety of grounds that included a number of challenges to TFG2's security. He also took a number of steps designed to frustrate TFG2's claim, including filing statements on behalf of the Company at Companies House to the effect that the Mortgage and Floating Charge had been satisfied, and causing the Company to purport to grant a further debenture to a third party.

13. The first hearing of the Bromley Proceedings took place on 10 November 2023. Each of the parties was given permission to file an amended or CPR-compliant statement of case and the case was adjourned for a further 1 hour directions hearing to take place on 10 May 2024.

14. TFG2's concern over the steps that had been taken by Mr. Reading and the limited progress of the Bromley Proceedings led it to consult the respondents to this appeal, who are insolvency practitioners with FRP Advisory, which had taken over Wilson Field Limited in September 2023.

15. On 20 November 2023, acting as the holder of the Floating Charge pursuant to paragraph 14 of Schedule B1 to the Insolvency Act ("Schedule B1"), TFG2 appointed the respondents as joint administrators of the Company (the "Administrators").

16. The Administrators' proposals to creditors of the Company pursuant to paragraph 49 of Schedule B1 were dated 8 January 2024. The purpose of the administration was said to be that set out in paragraph 3(1) of Schedule B1, namely of "realising property in order to make a distribution to one or more secured or preferential creditors". The proposals included a statement of the financial position of the Company that indicated that the only known asset of the Company was the Land, which was listed as having an uncertain value, and which was stated to be subject to the Mortgage in favour of TFG2 to secure a debt then said to be about £3.54 million The statement of the financial position of the Company did not take account of the costs of the administration and indicated that on the basis of the information available to date there would be no assets available in the administration for TFG2 as holder of the Floating Charge or for any

unsecured creditors. The proposals also indicated that the LPA Receivers intended to remain in office.

17. The automatic stay of proceedings against the Company under paragraph 43 of Schedule B1 which followed the appointment of the Administrators had no effect upon the continuation of the Bromley Proceedings against Mr. Reading as an individual defendant. Since it was clear that the Company had no right to possession of the Land that it could assert against TFG2, it would have been open to the Administrators either to consent to judgment being entered against the Company, or to consent under paragraph 43(6) of Schedule B1 to the continuation of the Bromley Proceedings against the Company. However, they did neither.

18. Instead, on 8 March 2024 the solicitors acting for the Administrators wrote to the solicitors acting for TFG2 in the Bromley Proceedings, stating that the Administrators considered,

> "that it would be more appropriate for the matter of possession of the [Land] belonging to the Company to be dealt with by an insolvency application to be issued by the Administrators."

On 18 March 2024 TFG2's solicitors responded by email stating that,

> "following the moratorium in relation to the Bromley Proceedings against the Company due to its administration, [TFG2 is] content for possession and sale of the [Land] to be dealt with by the Administrators within the administration."

19. On 20 March 2024 the Administrators issued an application under the Insolvency Act in the name of the Company and in their own names in the Business and Property Courts in Leeds (the "Application"). The named respondents were Mr. Reading and "occupiers unknown". TFG2 was not a party to the Application.

20. The Application and draft order sought declarations that the Land was "solely owned legally and beneficially by the Company" [sic] and that the Mortgage and Floating Charge in favour of TFG2 "remain unsatisfied". In addition, the Application sought orders (i) that the Land be sold with vacant possession by the Administrators, (ii) that the net proceeds of sale of the Land be paid wholly to the Administrators, and (iii) that Mr. Reading and all current occupiers of the Property deliver up vacant possession of the Land "to the Applicant" [sic].

21. The draft order attached to the Application indicated that the Application was made "pursuant to paragraphs 1, 2 and 5 of Schedule 1 of the Insolvency Act" and "paragraphs 59 and 63 of Schedule B1 of the Insolvency Act". The reference to paragraphs of Schedule 1 of the Insolvency Act was entirely misconceived: those paragraphs do not apply to the administration in this case. Paragraphs 59 and 63 of Schedule B1 do apply to the administration in this case, but they are only in the most general of terms as regards the power of administrators to manage the affairs, business and property of the company and to apply to the court for directions. It is far from obvious that they could have been relied upon to obtain the specific declarations and orders sought in the Application.

22. The witness statement from one of the Administrators in support of the Application set out the history of the charges over the Land and asserted that on the basis of the information available, the Land "appears to represent the Company's only substantial asset" and "is likely to be the only realisable asset within the administration". It also indicated that the Land had been on the market with an asking price of £3.95 million since September 2023 and that it was subject to the unsatisfied Mortgage to secure the total amount owing to TFG2. That debt was said to have risen to about £3.83 million by 1 March 2024.

23. Mr. Reading indicated that he intended to contest the Application on a plethora of grounds which focussed on the alleged invalidity of TFG2's Floating Charge and the appointment of the Administrators. After a hearing on 12 April 2024, HHJ Klein (the "Judge") made an order joining three identified members of Mr. Reading's family as respondents to the Application (together with Mr. Reading, the "Respondents") and adjourning the matter for a hearing in Leeds on 16 May 2024 with an order that any cross-application by Mr. Reading under paragraph 88 of Schedule B1 to remove the Administrators from office should be issued by 26 April 2024. Mr. Reading duly made such cross-application.

24. The matters all came back before the Judge on 16 May 2024. By that stage, including accrued interest to 1 May 2024, the amount owing to TFG2 which was secured by the Mortgage had risen to in excess of £4.06 million.

The judgment

25. The Judge gave an *ex tempore* judgment. It is apparent from paragraph 1(a) of the transcript of that judgment that, notwithstanding the jurisdictional basis originally advanced for the orders sought, the Application had in fact been presented to him as an application by the Administrators pursuant to section 234.

26. Section 234 is headed "Getting in the company's property". Section 234(1) provides that the section applies, inter alia, whenever a company enters administration or goes into liquidation. Section 234(2) then provides,

> "(2) Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the [administrator or liquidator]."

27. The Judge recorded, at [20] - [24], that the initial point raised by counsel who then appeared for Mr. Reading was that the Company had no entitlement to possession of the Land which could justify an application under section 234. Counsel argued that the effect of section 87 of the LPA was that the Company had divested itself of all proprietary interest in the Land when it granted the Mortgage to TFG2.

28. The Judge rejected that argument in reliance on two passages from *Fisher & Lightwood's Law of Mortgage* (15th ed) ("*Fisher & Lightwood*"). He concluded, at [25], that,

> "section 87 of the [LPA] does not have the effect of bringing about a conveyance, or other transfer, of any proprietary interests by a charger to a chargee".

29. The Judge then addressed the second argument made on behalf of Mr. Reading which was that the Application, "now framed as one for possession under section 234", did not follow the procedure under CPR 55. The Judge rejected that argument at [28], stating,

> "The short answer to [Mr. Reading's] objection is that the Administrators' application is not a possession claim within the meaning of CPR 55. It is an insolvency application under section 234 of the Insolvency Act 1986 so that the Insolvency Rules procedures may be followed to the extent that they depart from the CPR. More importantly, I am satisfied that all the protections afforded to defendants to a CPR 55 possession claim have substantively been afforded to the respondents in this case. The case against them has been clearly set out in the Administrators' witness evidence and the respondents have had an adequate opportunity to respond and to defend themselves. On that basis, I have concluded that any failure to follow CPR 55 should not be an obstacle to determining the Administrators' application."

30. The Judge then set out what he viewed as the requirements for the Administrators to succeed in an application under section 234. These were (i) that the Respondents are in possession or control of the Land, (ii) that the Company is entitled to possession of the Land, (iii) that the Land is property covered by section 234, (iv) that an order under section 234 furthers the purpose of the administration, and (v) that there are no other discretionary factors why an order should not be made.

31. In these respects, the Judge held, first, that the Respondents were in possession or control of the Land. Secondly, the Judge held that the Company's registered title to the Land was sufficient to establish that it was entitled to possession of it, because none of the Respondents had any better title than the Company. The reasoning of the Judge, at [32]-[33], was as follows,

> "32. Secondly, the administrators rely on the Company's title to the property as establishing their entitlement to possession of the [Land]. The office copy entries, which are up-to-date to 12 April 2024, show that the Company is the registered proprietor of the [Land]. Unless the respondents have an interest in the [Land] which may be said to have priority to the Company's interest, it is sufficient for the administrators to point to the Company's registered title as a basis for establishing that the Company appears to be entitled, or is entitled, in this case, to possession of the [Land]. *Clerk & Lindsell on Torts*, at paragraph 18-74, an authority to which I was not referred, provides a helpful analogy where it explains that:

> "[Where a claim is for possession of a property], the claimant may show a better title…by his title, independently of prior possession, to own the land. In any such case, where the claimant produces a documentary or paper title the defendant may challenge it by pleading *jus tertii*, that is, that the claimant has no such title as alleged and that the title belongs to another person."

> 33. In other words, where one is claiming to be entitled to possession of a property, one can rely on one's paper title, but the defendant can point to somebody having a better title. In this case, it has not been suggested that any of the respondents have a better title than the Company. At best, on the evidence, the respondents have been occupying the [Land] as licensees of the Company. However, by the [Administrator's] Application and, by the service on the respondents of the documents which have been served on them, it is clear to me that any such licence has been terminated."

32. Thirdly, the Judge held that the Land was "covered by section 234", because section 436 of the Insolvency Act defines "property" to include land.

33. Fourthly, the Judge held that the purpose of the administration would be served by the Administrators taking possession and realising the Land. He stated, at [35],

> "… Indeed, on the material before me, I think the only way the objective of the administration is likely to be realised is by the Administrators taking possession of the [Land], because it appears that the [Land] is the Company's only asset of any substance. I think I can also bear in mind that TFG2 in effect supports, or does not object to, the Administrators' application and has itself sought possession of the [Land]."

34. Finally, the Judge dismissed the suggestion that there were any specific factors (e.g. arising from the personal circumstances of the Respondents) that would make it inappropriate to make an order for possession.

35. The Judge therefore ordered that "the Respondents must deliver possession of [the Land]" to the Administrators before the end of 11 July 2024.

36. The second matter before the Judge on 16 May 2024 was the application by Mr. Reading for an order removing the Administrators from office. Since the underlying basis upon which the removal of the Administrators was sought was that they had no entitlement to seek possession of the Land, the Judge essentially decided that application on the same basis that he had decided the Application in the Administrators' favour.

The appeal

37. By an appellant's notice sealed on 18 June 2024, Mr. Reading sought permission to appeal the Judge's order for possession. He also sought a stay of execution of the

possession order pending appeal on the basis that the appeal would be rendered academic if the order for possession was enforced.

38. On 9 July 2024, I granted permission to appeal on three grounds which in essence were:-

    i) that in circumstances in which the LPA Receivers had been appointed, the Land should not be regarded as "property to which the company appears to be entitled" for the purposes of section 234(2);

    ii) that the Judge was wrong to hold that CPR 55 did not apply to the Application, so that any order for possession should have been made in the Bromley Proceedings rather than pursuant to the Application; and/or

    iii) that it was an abuse of process for the Administrators to seek to bypass the existing Bromley Proceedings by commencing a second set of proceedings also seeking possession of the Land but in a High Court centre some distance from the Land.

39. I also granted a stay of the Judge's order pending determination of the appeal, which I subsequently upheld on review (on terms) following a challenge by the Administrators: see [2024] EWCA Civ 1005. The consequence is that the Respondents have remained in occupation of the Land, paying a monthly amount in respect of occupation into court to await the outcome of this appeal.

Analysis

Ground 1: the scope of section 234(2)

40. I have set out the terms of section 234 above.

41. At the outset, it is important to appreciate that section 234 does not create new rights but is designed as a summary procedure to assist an insolvency office-holder to carry out his functions in the relevant insolvency process. The office-holder can obtain an order in his own name for transfer etc. of company property to himself, but the section does not give the office-holder any better rights to any property than the company had: see Leyland DAF Limited [1994] 2 BCLC 106, Smith v Bridgend CBC [2001] UKHL 58 at [28] and Ezair v Conn [2020] EWCA Civ 687 at [26].

42. I agree with the Judge that, in accordance with section 436 of the Insolvency Act, "property" for the purposes of section 234 is wide enough to include land and any interest in land. However, it is apparent that the Judge's decision was not based upon a suggestion that the Respondents had in their possession or control any legal or equitable interest in the Land that they were required to convey or transfer to the Administrators. This was not, for example, a case where a person held the registered legal title to land on trust for the company as beneficial owner, and the administrators sought to have that legal title transferred or conveyed to them. The Respondents had no legal or equitable interest in the Land to deliver up. They were only in possession of the Land in the sense that they were occupying it.

43. In this regard, I have very real doubt that section 234 is intended to apply where the only basis for saying that a person "has in his possession or control property to which

the company is entitled" is that he is occupying land as a trespasser. I find it difficult to see what property a trespasser could be ordered to "pay, deliver, convey, surrender or transfer" to an office-holder. What a trespasser would in fact be required to do would be to cease to occupy the land. The point can be tested by contemplating what would happen if an order that a person "deliver possession" of land was not complied with. In such a case the court would simply order that the person be physically removed (evicted) from the land in question.

44. That point was, however, not argued before us on this appeal, and it is not necessary for us to decide it, because, as I shall explain, on the particular facts of this case I think that there are other, equally fundamental reasons, why section 234 was not applicable. In order to understand those reasons, it is necessary to consider, from first principles, the rights of a mortgagee and mortgagor of land.

45. In general terms, a mortgage of land is a form of fixed security created by contract which confers an interest in land in favour of the mortgagee which is defeasible upon the payment of a given sum of money. Since 2003, a mortgage of registered land must take the form of a charge by deed expressed to be by way of legal mortgage.

46. By virtue of section 87(1) of the LPA, a legal mortgage, in the case of an estate in fee simple, confers on the mortgagee the same protection, powers and remedies, (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rent and profits, or any of them) as if a mortgage term for three thousand years without impeachment of waste had been created in favour of the mortgagee. This statutory fiction means that a mortgagee of registered land does not get any actual legal estate in the land, but can act in all respects *as if* it did have a three thousand year lease of the land. It also follows that after the grant of a mortgage over land, the mortgagor retains its legal estate in the land. That legal title is, however, subject to the incumbrance of the mortgage – i.e. subject to the rights conferred upon the mortgagee by the mortgage. See generally *Fisher & Lightwood* at paragraph 1.3 and *Megarry & Wade, The Law of Real Property* (10th ed.) ("*Megarry & Wade*") at paragraphs 23-025 and 23-026.

47. The term "equity of redemption" can have a number of meanings, but in its broadest sense it is used to describe the interest in land which is the sum total of the mortgagor's rights in the mortgaged property. It will thus include the legal estate in the mortgaged land, subject to the incumbrance of the mortgage. It will also include the equitable right of the mortgagor to redeem the mortgage and thereby to remove the incumbrance by paying the secured debt. That right to redeem is sometimes also referred to as the "equity of redemption" in the narrow sense. In essence it represents the economic value of the land to the mortgagor, and will depend upon the value of the property in question and the amount of the secured debt. See *Megarry & Wade* at paragraphs 23-017, 23-018 and 23-022.

48. One of the rights conferred by the legal mortgage and to which the mortgagor's legal estate is subject, is the right of the mortgagee to go into possession of the land by virtue of its rights under the fictional three thousand year term created in its favour by section 87(1) of the LPA. The mortgagee is entitled to go into possession immediately upon execution of the mortgage - "before the ink is dry": see Four-Maids Ltd v Dudley Marshall (Properties) [1957] Ch 317 at 320. A mortgagee will, however, not ordinarily go into possession, but will agree that the mortgagor can

remain in possession for so long as the payments secured by the mortgage are being made: see *Fisher & Lightwood* at paragraphs 29.2 - 29.4 and *Megarry & Wade* at 24-025.

49. A second right given to a mortgagee by a legal mortgage is the right to appoint a receiver pursuant to section 101 of the LPA once money is due under the mortgage and is unpaid. Conventionally, and as was the position in the instant case, the receiver will be given wide powers of management which will include those set out in the LPA and specifically the power to take possession of, and to sell, the mortgaged property for the benefit of the mortgagee.

50. If appointed, the receiver will invariably be appointed to exercise these powers as agent of the mortgagor. The receiver is, however, no ordinary agent. The receiver is not obliged to exercise his powers for the benefit of the mortgagor, but is appointed to exercise his powers for the primary benefit of the mortgagee in order to repay the secured debt: see re B Johnson & Co (Builders) Ltd [1955] Ch 634 at 646 and 661, Downsview Nominees v First City Corp [1993] AC 295 at 313, Medforth v Blake [2000] Ch 86 at 95-96, and Silven v Royal Bank of Scotland [2004] 1 WLR 997 at [21]-[29].

51. Further, once a receiver has been appointed by the mortgagee, it is not open to the mortgagor to revoke the appointment or interfere with the receiver's management of the mortgaged property: see Gosling v Gaskell [1896] 1 QB 669 at 692 (per Rigby LJ), affirmed on appeal, [1897] AC 575.

52. The making of a winding up order in respect of the mortgagor does not change this position. Specifically, and most relevantly for present purposes, the effect of the appointment of a receiver under a mortgage is that any liquidator of the company who is subsequently appointed is not entitled to get in or realise the charged property. The only "property" that is available to be dealt with by the liquidator in the winding up is the mortgagor's equity of redemption, which is subject to the prior rights of the mortgagee. The position in this respect was very clearly explained by Rigby LJ in Gosling v Gaskell at 699,

> "What, then, was the effect of the winding-up order? It could not give the company rights which it did not before possess; for instance, the right of revoking the appointment of the receiver, or withdrawing from his control and management any of the property committed to him, that being the property, first of all, of the debenture-holders, and only belonging to the company as to the equity of redemption expectant on the mortgages to them."

53. The only effect of the appointment of a liquidator is to terminate the agency of the receiver so that he can no longer commit the mortgagor to new liabilities that will be provable in the liquidation. The position was neatly explained by Goulding J in Sowman v David Samuel Trust [1978] 1 WLR 22 at 30,

> "Winding up deprives the receiver, under such a debenture as that now in suit, of power to bind the company personally by acting as its agent. It does not in the least affect his powers to

> hold and dispose of the company's property comprised in the debenture, including his power to use the company's name for that purpose, for such powers are given by the disposition of the company's property which it made (in equity) by the debenture itself. That disposition is binding on the company and those claiming through it, as well in liquidation as before liquidation, except of course where the debenture is vulnerable under [the avoidance provisions of the Insolvency Act] or is otherwise invalidated by some provision of law applicable to the winding up."

54. That analysis is entirely consistent with Lord Hoffmann's explanation in Buchler v Talbot [2004] 2 AC 298 at [28]-[29] of how liquidation operates to create separate funds of assets for the benefit of the holders of security and the unsecured creditors of a company. Lord Hoffmann was considering the position of the holders of a floating charge which crystallises and becomes a fixed charge, but the same analysis applies a fortiori to a mortgage that from the outset was a fixed security,

> "28. The winding up of a company is a form of collective execution by all its creditors against all its available assets. The resolution or order for winding up divests the company of the beneficial interest in its assets. They become a fund which the company thereafter holds in trust to discharge its liabilities: Ayerst v C&K (Construction) Ltd [1976] AC 167. It is a special kind of trust because neither the creditors nor anyone else have a proprietary beneficial interest in the fund. The creditors have only a right to have the assets administered by the liquidator in accordance with the provisions of the Insolvency Act 1986: see In re Calgary and Edmonton Land Co Ltd [1975] 1 WLR 355, 359. But the trust applies only to the company's property. It does not affect the proprietary interests of others.
>
> 29. When a floating charge crystallises, it becomes a fixed charge attaching to all the assets of the company which fall within its terms. Thereafter the assets subject to the floating charge form a separate fund in which the debenture holder has a proprietary interest. For the purposes of paying off the secured debt, it is his fund. The company has only an equity of redemption; the right to retransfer of the assets when the debt secured by the floating charge has been paid off. It is this equity of redemption which forms part of the fund held on trust for the company's creditors which arises upon a winding up."

55. The meaning of "assets" and property" in the relevant sections of the Insolvency Act concerning a liquidation must be construed in accordance with these principles. So, under section 143(1) of the Insolvency Act,

> "(1) The functions of the liquidator of a company which is being wound up by the court are to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it."

Section 144 then provides,

> "(1) When a winding-up order has been made … the liquidator … shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled."

56. It follows from this analysis that in relation to a liquidation, the "property … to which the company is or appears to be entitled" in section 144 does not include property to which a receiver has been appointed under the fixed charge in a mortgage. It also follows that when section 234 is applied in a liquidation, the "property …to which the company appears to be entitled" does not include any mortgaged property to which a receiver has been appointed.

57. The basic position, and the meaning of section 234 in this respect, is no different in an administration. An administrator is defined by paragraph 1(1) of Schedule B1 as a person "appointed under this Schedule to manage the company's affairs, business and property". In the same way as Rigby LJ held in Gosling v Gaskell that the appointment of a liquidator did not give the company rights that it did not previously have, there is no basis for any argument that the appointment of an administrator to manage the company's affairs, business and property could give the company in administration any rights to property that it did not have prior to the administration.

58. So, when paragraph 67 of Schedule B1 provides, in similar terms to section 144, that,

> "The administrator shall on his appointment take custody or control of all the property to which he thinks the company is entitled"

this does not extend to property which is subject to a mortgage under which receivers have been appointed prior to the administration. For the same reason, the "property" to which section 234(2) applies in an administration cannot extend to property subject to the fixed charge in a mortgage to which receivers have been appointed.

59. The only material inroad in relation to the rights of mortgagees in this respect is that contained in paragraph 71 of Schedule B1 which permits the court to make an order enabling an administrator to sell property subject to a fixed charge as if it were not subject to the fixed charge. The court can, however, only exercise such power where the sale would be likely to promote the purposes of the administration, and then only on condition that the proceeds of sale of the charged property be applied to discharge the secured debt: see e.g. O'Connell v Rollings [2014] EWCA Civ 639.

60. In addition to the specific meaning that must be given to the expression "property … to which the company appears to be entitled" in section 234(2) as regards mortgaged property to which fixed charge receivers have been appointed, there is a further reason to conclude that, purely as a matter of land law, the Company is not in any event entitled to possession of the Land, and hence that section 234(2) cannot be used to give such a right to the Administrators.

61. As a general proposition, a mortgagor which is permitted to remain in possession has a right to take proceedings in its own name against third parties, such as trespassers,

to recover possession of the mortgaged land or to protect its own right to possession. However, for obvious reasons, the mortgagor cannot assert a right to possession against the mortgagee. Importantly for the analysis in the instant case, a mortgagor's right to take proceedings for possession of the land in its own name against third parties also ceases when the mortgagee gives notice of its intention to take possession. That is confirmed by section 98(1) of the LPA which is headed "Actions for possession by mortgagors" and provides,

> "A mortgagor for the time being entitled to the possession or receipt of the rents and profits of any land, *as to which the mortgagee has not given notice of his intention to take possession or to enter into the receipt of the rents and profits thereof*, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."
>
> (my emphasis)

See also *Megarry & Wade* at 24.117 – 24.118 and Kitchen's Trustee v Madders [1950] 1 Ch 134 at 146 per Cohen LJ.

62. Applying these principles to the instant case, although the Company remained in possession of the Land after the grant of the Mortgage, the effect of the commencement of the Bromley Proceedings by TFG2 was to terminate any right that the Company had as mortgagor to take proceedings for possession of the Land. In this regard, as in other respects, I do not see how the Administrators could stand in any better position than the Company was in prior to their appointment.

63. In my judgment, these matters were, separately and collectively, fatal to the Administrators' ability to invoke section 234 to seek an order for possession of the Land. The Company had no entitlement to the Land other than its equity of redemption which was subject to the Mortgage. After the appointment of the Receivers and the commencement of the Bromley Proceedings by TFG2 as mortgagee, the Land subject to the Mortgage was not "property to which the Company [is] entitled" within the meaning of section 234(2), and the equity of redemption gave the Company no entitlement to take proceedings for possession.

64. In fairness to the Judge, it is not apparent that this argument was advanced to him in the same way as it was put to us. Instead, the Judge relied by analogy upon an extract from *Clerk & Lindsell on Torts* (24th ed) at paragraph 18-74 dealing with actions for recovery of land. But that extract does not address the particular position of a mortgagor after the mortgagee has intervened to appoint receivers and to claim possession of the land in its own right. If anything, the extract relied upon by the Judge indicates that it would have been open to the Respondents to have resisted an action for possession brought by the Company by raising the defence of *jus tertii*, pointing out that the Company's legal estate was subject to the Mortgage and that, after TFG2 had appointed the LPA Receivers and asserted its own right to possession, the Company was no longer entitled to seek possession of the Land.

65. For completeness, I should add that I do not think that the letter and email exchange between the solicitors for the Administrators and TFG2, to which I have referred above, changes that analysis. Although TFG2 indicated that it was content that the Administrators should make the Application and deal with the Land within the administration, TFG2 did not indicate any intention to waive any of its rights as fixed charge holder under the Mortgage. Nor did TFG2 discontinue the Bromley Proceedings, instead merely seeking an order that they be temporarily stayed pending the outcome of the Application. Neither did the LPA Receivers vacate office or otherwise take any steps to terminate their powers to deal with the Land.

66. I would therefore allow the appeal on Ground 1.

67. That makes it unnecessary to reach any concluded views on Grounds 2 or 3. However, since they were argued, I would briefly express my provisional views on them.

Ground 2: the relationship between section 234 and CPR 55

68. Ground 2 for which permission to appeal was granted raises the question of whether the Judge was wrong to hold that CPR 55 did not apply to the Application, so that any order for possession should have been made in the Bromley Proceedings rather than pursuant to the Application.

69. CPR 55.1(a) defines a "possession claim" as meaning, "a claim for the recovery of possession of land" and so far as relevant to the instant case, CPR 55.1(b) defines "a possession claim against trespassers" as meaning "a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land."

70. CPR 55.2(1) then provides that the procedure set out in Section I of CPR 55 must be used where the claim includes a possession claim brought by a mortgagee or a possession claim against trespassers. The remainder of CPR 55 contains an extensive code for the conduct of such possession claims, including particular procedures to be followed for possession claims against trespassers and by mortgagees seeking possession of land that includes residential property. Among other things, CPR 55 and its associated Practice Direction require possession claims to be brought in the County Court unless there are exceptional circumstances justifying the claim being started in the High Court, and provide that the possession claim will be transferred to be heard in the County Court hearing centre serving the address where the land is situated. There are also prescribed claim forms and particulars of claim that are to be used.

71. As I have indicated, the Judge held that the Application was not a possession claim within the meaning of CPR 55 because it was an application made under section 234 of the Insolvency Act. He also held that the procedures under the Insolvency (England and Wales) Rules 2016 (the "Insolvency Rules") should be followed to the extent that they departed from the CPR.

72. The starting point in the analysis must be CPR 2.1(2). This provides that the CPR do not apply to various types of proceedings, save to the extent that they are applied to

those proceedings by another enactment. The proceedings to which the CPR do not apply include insolvency proceedings that are governed by rules made under section 411 of the Insolvency Act.

73. The Insolvency Rules are the relevant rules made under section 411 of the Insolvency Act, and they provide, at Insolvency Rule 12.1(1) that,

> "The provisions of the CPR (including any related Practice Directions) apply for the purposes of proceedings under Parts A1 to 11 of the [Insolvency] Act with any necessary modifications, except so far as disapplied by or inconsistent with these Rules."

Section 234 is to be found in Part VI of the Insolvency Act.

74. The assumption for Ground 2 of the appeal is that (contrary to the view that I have reached above) section 234 was available to be used by the Administrators to seek an order for possession against the Respondents. If that is the case, then as I read it, the effect of Insolvency Rule 12.1(1) is that the provisions of the CPR would apply for the purposes of those proceedings under section 234, with any necessary modifications, except so far as the relevant provisions of the CPR are disapplied or are inconsistent with the Insolvency Rules.

75. On this basis there can therefore be no question of the Application being invalidated by reason of a failure to comply with CPR 55. Rather, as the Judge essentially indicated, it was for the court hearing the Application to apply the provisions of CPR 55 to the proceedings, with any necessary modifications, except to the extent that the provisions of CPR 55 are inconsistent with the Insolvency Rules.

76. Mr. Reading's main objections to the procedure adopted by the Judge were twofold: first, that there were no pleadings by way of statements of case as would be required under CPR 55; and second that the case should have been heard in the County Court hearing centre serving Orpington where the Land is situated.

77. As to the first of those objections, it is true that the case for the Administrators was set out in witness statements and exhibits and there were no statements of case. I fully accept that if section 234 was able to be used to make what is in essence a claim for possession, the court should, so far as possible, apply the procedure set out in CPR 55. This should include, for example, giving directions under Insolvency Rule 12.11 for the service of statements of case containing the same information required in the prescribed forms under the Practice Direction to CPR 55.

78. But even in relation to CPR 55, a failure to comply with a procedural requirement does not automatically invalidate the proceedings and the court has a discretion to make an order remedying the error: see CPR 3.10. In the instant case, the Judge held that the case had been clearly set out in the Administrators' evidence and that the Respondents had had an adequate opportunity to respond and to defend themselves and were not prejudiced by the lack of pleadings. I have no doubt that the Judge was entirely correct in that assessment.

79. The Judge did not expressly deal with the issue of venue. CPR 55 envisages that a possession claim will be heard in the County Court at a hearing centre close to the property in question, unless it is (exceptionally) issued in the High Court. It can be surmised that this is for the convenience of the parties (in particular the defendant), in the interest of saving costs, in case local knowledge of the property is required and so that any order for possession can more easily be enforced if required. The venue chosen by the Administrators in the instant case offered none of those benefits.

80. However, I do not think that the failure by the Judge to transfer the Application to be heard in a more geographically suitable venue (either in the High Court or in a hearing centre of the County Court with jurisdiction to hear insolvency cases) should be regarded as an irremediable defect in the proceedings. Mr. Reading did not suggest that he had suffered any particular prejudice by the Application being brought in Leeds. Although he made the point that the other Respondents might have been discouraged or unable to attend a hearing so far away from the Land, he did not identify any particular arguments that they could have made that he did not.

81. Had the matter required decision, I would thus have been minded to dismiss the appeal on Ground 2.

Ground 3: abuse of process

82. As with Ground 2, the assumption for the purposes of the argument on Ground 3 is that (contrary to my decision under Ground 1) the Application was jurisdictionally capable of being brought under section 234. The question is whether, assuming that section 234 was available to them, the commencement of new proceedings in Leeds by the Administrators was nonetheless an abuse of process given that there was an existing claim for possession being brought by TFG2 in the Bromley Proceedings.

83. There is no single definition of an abuse of process. In Hunter v Chief Constable of the West Midlands Police [1982] AC 529, 536, Lord Diplock described an abuse of process in general terms as involving,

> "… misuse of [the court's] procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

I think that it is self-evident that the commencement of duplicative proceedings so as to subject a defendant to more than one set of proceedings on the same subject matter at the same time is capable of amounting to an abuse of process.

84. In the instant case, Mr. Reading and the Company were defendants to the Bromley Proceedings which had been brought by TFG2 seeking possession of the Land. As I have indicated above, although the effect of the appointment of the Administrators was to stay the possession claim against the Company by reason of paragraph 43(6) of Schedule B1, there was no stay of the proceedings against Mr. Reading. Since the Company had no rights to possession of the Land that it could assert against TFG2, it was open to the Administrators either to agree to a possession order being made

against the Company, or to consent to the moratorium being lifted, to permit the proceedings to continue against the Company in any event.

85. It is also important to appreciate that even if, contrary to the view that I have explained above, section 234 was available to the Administrators, on the facts the only party with any economic interest in the Land was TFG2. I say that because it was tolerably clear after the Administrators were appointed, and was crystal clear by time of the hearing before the Judge, that the entirety of proceeds of sale of the Land would be payable to TFG2 under the Mortgage, and there would be no return to any other creditor of the Company.

86. That was the view expressed by the Administrators in their proposals to creditors in January 2024, which doubtless took into account the likely price that would be achieved on a sale of the Land, together with the fact that the interest due to TFG2 under the Mortgage was increasing rapidly on a compound basis, month by month. Indeed, by the time of the hearing before the Judge, even ignoring the costs of sale, the amount owing to TFG2 secured by the Mortgage (£4.06 million) exceeded both the most optimistic valuation of the Land in August 2022 (£4 million), and perhaps more relevantly, the asking price at which the Land had been put onto the market by the LPA Receivers after their appointment in the Autumn of 2023 (£3.95 million).

87. In these circumstances, the reality of the situation was that the Bromley Proceedings and the Application both sought possession of the Land, and both were conducted for the sole benefit of TFG2 as mortgagee. As I have indicated, CPR 55 is the prescribed method by which mortgagees should in general seek possession of land, and by which possession orders should in general be obtained against trespassers. I do not doubt that TFG2 felt frustrated by Mr. Reading's actions, his resistance to the Bromley Proceedings and the likely timescale for determination of those proceedings in the County Court. I also do not doubt that, as evidenced by the correspondence between their solicitors shortly before the Application was issued, the Administrators thought that the Application would better serve TFG2's interests given the obstacles that Mr. Reading had sought to place in way of TFG2 obtaining possession in the Bromley Proceedings.

88. In these circumstances, although, as I have said, we do not need to decide the point, I incline to the view that it was a misuse of section 234 for the Administrators to offer to issue the Application in effect for the private advantage of TFG2 as mortgagee, thereby subjecting the Respondents to duplicate proceedings which were designed to achieve for TFG2 the same result that it was already trying to obtain in the existing Bromley Proceedings.

Disposal

89. For the reasons that I have set out above, subject to My Lady's and my Lord's views, I would allow the appeal on Ground 1 and set aside the Judge's order for possession.

90. For the avoidance of doubt, nothing in this decision in relation to the Application is intended to have any effect upon the Bromley Proceedings or upon the merits of that claim.

Lord Justice Nugee:

91. I agree.

Lady Justice King:

92. I also agree.