[2022 Gib LR 233]

SAXA LIMITED v. LOAMSA LIMITED, EL KRIRI'S LE MARRAKECH LIMITED, A. AVELLANO, F. AVELLANO and COITINO

SUPREME COURT (Yeats, J.): August 26th, 2022

2022/GSC/23

Landlord and Tenant—possession—order for possession—order for possession in owner's favour appropriate in circumstances where lease expired and owner sought possession and changed locks but sub-tenant remained in occupation

Landlord and Tenant—renewal of tenancy—business premises—no declaration that management agreement between tenant and third party precludes tenant relying on Part IV of Landlord and Tenant Act where declaration of no practical use because claimant had been granted possession of premises

Landlord and Tenant—possession—mesne profits—owner awarded mesne profits (i.e. market rental) for period after lease expired when owner sought possession until owner re-entered property and changed locks

The claimant sought possession of certain premises.

The claimant was the freehold owner of a property which included premises which were used as a restaurant. In 2018, the claimant's predecessor in title had granted a lease over the premises to the first defendant ("Loamsa") for a term of three years. The third, fourth and fifth defendants were sureties under the lease. Loamsa and the third, fourth and fifth defendants established the restaurant. The rent payable by Loamsa was £850 per month for the first three months of the term and £950 per month thereafter. In 2019, the property was conveyed to the claimant. The conveyance was subject to the tenancies then existing, including the Loamsa lease.

In 2020, Loamsa entered into a management agreement with the second defendant ("El Kriri") for El Kriri to manage the restaurant and pay Loamsa a monthly fee.

In anticipation of the lease expiring on June 30th, 2021, the claimant's solicitors wrote to Loamsa informing it that it would need to give up possession of the premises. The claimant asserted that Loamsa was not

protected by Part IV of the Landlord and Tenant Act because the management agreement with El Kriri was an unauthorized sub-letting of the premises.

Loamsa failed to give up possession of the premises and requested a new tenancy, which was opposed by the claimant. The claimant issued a claim form in December 2021, setting out the following claims:

(i) As against Loamsa: A declaration that the tenancy of Loamsa over the premises was not one to which s.38(1) of the Act applied by reason of the fact that Loamsa was not in occupation of the premises for the purposes of a business carried on by it or for those and other purposes.

(ii) As against Loamsa and El Kriri: An order for possession of the premises.

(iii) As against the first, third, fourth and fifth defendants: An order for mesne profits or in the alternative an order compensating the claimant in respect of his loss of enjoyment of the premises at the daily rate of £59.14 until possession of the premises was given up, together with interest.

(iv) The claimant also sought its costs.

The Loamsa defendants (the first, third and fourth defendants) claimed that sometime between January 1st and 3rd, 2022, the claimant changed the locks to the premises and thereby unlawfully took possession. The Loamsa defendants filed a defence and counterclaim, and the claimant filed a reply and defence to the counterclaim. The Loamsa defendants subsequently stated that they no longer wished to defend the claim for possession or play any part in the proceedings save on the question of costs. They paid £5,275 representing the rent payable by Loamsa up to December 31st, 2021. At the hearing, on May 5th, 2022, the court granted possession of the premises to the claimant and reserved its decision on the other claims.

Although the claimant had been granted possession of the premises, it submitted that a declaration was nevertheless necessary to remind landlords, tenants and legal practitioners of the limitation on tenancy renewals under the Act where premises had been sub-let on a pretext that a tenant had entered into a management agreement with a third party. The claimant sought payment of mesne profits by the Loamsa defendants for the period from July 1st, 2021 to May 5th, 2022. It claimed the profits accruing to Loamsa from the granting of the licence to El Kriri. The Loamsa defendants claimed that all that the claimant should be entitled to was an amount equivalent to the rent which had been payable under the lease up until the claimant re-entered the premises on or about January 1st, 2022.

Held, ruling as follows:

(1) The declaration sought by the claimant was now of no practical use in this case as the claimant had been granted possession of the premises. However, the claimant sought a declaration that the management agreement entered into between Loamsa and El Kriri would have precluded Loamsa from relying on Part IV of the Act. The court had power to make a declaration but it declined to do so for the following reasons. First, the declaration would serve no purpose in this case. There was no real or

present dispute as the claimant had been granted possession of the premises. Secondly, the claimant had made no substantive submissions on the law other than to refer to two historic authorities. In effect therefore, all that the court was being asked to do was to restate the principles set out by the learned judges in their respective judgments and apply them to the facts of this case. Thirdly, whether or not the principles applied to the facts of this case was a matter in issue between the parties. In the end, the defendants had not pursued their defence and consequently the court would not have both sides to the argument. Any declaration would therefore be of very limited benefit (paras. 11–15).

(2) The Loamsa defendants had claimed that no order for possession was necessary because the claimant had re-entered the premises when it changed the locks on or about January 1st, 2022. The claimant considered that an order was necessary because Loamsa remained in occupation through El Kriri's presence on the premises. It was clear that as at the date of the hearing (May 5th, 2022), El Kriri continued to run a restaurant from the premises. El Kriri had no entitlement to be in occupation of the premises. The lease of the premises to Loamsa expired on June 30th, 2021 and Loamsa did not seek to have it renewed. In the circumstances, an order for possession of the premises in the claimant's favour was appropriate (paras. 16–17).

(3) The claimant had not made good its claim that in awarding mesne profits the court should depart from the normal measure, namely the market rental value of the property in question. There was no evidence of the market rental value of the premises other than the amount of rent paid by Loamsa up until the lease expired on June 30th, 2021. No evidence was filed appraising the rental value as from July 1st, 2021. Therefore, the mesne profits payable by Loamsa should be calculated by reference to the rent payable under the Loamsa lease. The claimant changed the locks at the premises on or about January 1st, 2022. In the circumstances, the court found that Loamsa's occupation of the premises ended on December 31st, 2021. The claim for mesne profits exceeding the amount of the rent payable by Loamsa to the claimant up to December 31st, 2021 would be dismissed (paras. 31–35).

Cases cited:

(1) *Anglo Hispano Bodega Co. Ltd.* v. *Marrache (No. 2)*, 1979 Gib LR 10, considered.
(2) *Anglo Wines Ltd.* v. *Lau Anaya Ltd.*, 1988–90 Gib LR 17, considered.
(3) *Dean and Chapter of the Cathedral and Metropolitan Church of Christ Canterbury* v. *Whitbread plc*, [1995] 1 E.G.L.R. 82, considered.

S. ffrench Davis (instructed by Governor's Street Chambers) for the claimant;
G. Stagnetto, *Q.C.* with *F. Facio-Beanland* (instructed by TSN) for the first, third and fourth defendants.

1 **YEATS, J.:** The claimant is the freehold owner of the property situate at 7–9 Governor's Parade, Gibraltar ("the property"). The property includes premises on the ground floor of 9 Governor's Parade ("the premises") which, as at the date of the hearing on May 5th, 2022, were in use as a restaurant trading by the name of "Taste of Marrakesh." On that date, I granted possession of the premises to the claimant and reserved my decision on its claim for a declaration and mesne profits.

Background

2 On July 1st, 2018, the claimant's predecessor in title, Easington Properties Ltd., granted a lease over the premises to the first defendant Loamsa Ltd. ("Loamsa") for a term of three years. The third, fourth and fifth defendants were sureties under the lease. Loamsa and the third, fourth and fifth defendants established the restaurant. The rent payable by Loamsa to Easington Properties Ltd. was the sum of £850 per month for the first three months of the term and the sum of £950 per month thereafter.

3 On June 5th, 2019, Easington Properties Ltd. conveyed the property to the claimant. The conveyance was subject to the tenancies then existing, including the Loamsa lease over the premises.

4 On September 1st, 2020, Loamsa entered into a management agreement with the second defendant, El Kriri's Le Marrakesh Ltd. ("El Kriri"). On the face of the agreement, El Kriri was to manage the restaurant and pay to Loamsa a monthly fee at the rates set out in the agreement. (As from June 1st, 2021, the monthly fee was the sum of £1,600 per month.)

5 In anticipation of the lease expiring on June 30th, 2021, the claimant's solicitors wrote to Loamsa on June 10th, 2021 informing Loamsa that it would need to give up possession of the premises. The claimant asserted that Loamsa was not protected by Part IV of the Landlord and Tenant Act ("the Act") because the management agreement with El Kriri was an unauthorized sub-letting of the premises. Notwithstanding, Loamsa failed to give up possession of the premises on June 30th, 2021 and, on August 12th, 2021, it issued a notice pursuant to s.45 of the Act requesting a new tenancy. This was responded to on September 30th, 2021, with the claimant giving notice pursuant to s.45(7) of the Act that it was opposing the grant of a new tenancy on two grounds. First, that Loamsa was no longer in occupation of the premises; and secondly, that Loamsa was in breach of two covenants in the lease. It had persistently failed to pay its rent on time and it had underlet the premises without the landlord's consent.

6 The claimant then issued the claim form on December 10th, 2021. It was served on the first to fourth defendants on January 3rd, 2021. An appearance was entered by Loamsa and the third and fourth defendants. (Together I shall refer to these three defendants as the "Loamsa defendants.") No appearance has been entered by El Kriri. The fifth defendant has not been

served. (The fifth defendant resigned as a director of Loamsa in 2019 and Mr. ffrench Davis confirmed that the claimant would not be pursuing any claim against him.)

7 The Loamsa defendants say that at a time unknown to them between January 1st and 3rd, 2022 the claimant changed the locks to the premises and thereby unlawfully took possession.

8 The claim first came for hearing on January 12th, 2022. I adjourned the case and gave directions which included directions for the filing of defences. The Loamsa defendants filed a defence and counterclaim on January 31st, 2022. The claimant then filed a reply and defence to the counterclaim on February 14th, 2022.

9 On March 18th, 2022, the Loamsa defendants' solicitors communicated to the claimant's solicitors that the Loamsa defendants no longer wished to defend the claim for possession or play any part in the proceedings save on the question of costs. They then paid the sum of £5,275 representing the rent payable by Loamsa up to December 31st, 2021 that the claimant had previously refused to accept following the expiry of the lease. Despite the position taken by the Loamsa defendants, and the payment of the rent, the claimant continued to pursue its claims.

The claims

10 The particulars of claim sets out the following claims:

(i) *As against Loamsa alone*: A declaration that the tenancy of Loamsa over the premises [was] not one to which s.38(1) of the Act applies by reason of the fact that Loamsa [was] not in occupation of the premises for the purposes of a business carried on by it or for those and other purposes.

(ii) *As against Loamsa and El Kriri*: An order for possession of the premises.

(iii) *As against the Loamsa defendants [and the fifth defendant]*: An order for mesne profits or in the alternative an order compensating the claimant in respect of his loss of enjoyment of the premises at the daily rate of £59.14 until possession of the premises is given up, together with interest.

(iv) The claimant also seeks its costs.

The claim for a declaration

11 The declaration sought by the claimant is now of no practical use in this case. The claimant has been granted possession of the premises. Mr. ffrench Davis nevertheless urged the court to make the declaration, submitting that it was in the interests of justice that this be made. The court

does indeed have the power to make a declaration, but it is a discretionary remedy.

12 It was said on behalf of the claimant that a declaration was necessary to remind landlords, tenants and legal practitioners of the limitation on tenancy renewals under the Act where premises have been sub-let on a pretext that a tenant has entered into a management agreement with a third party. In short, under Part IV of the Act, on expiry of a business tenancy, a tenant can apply for the renewal of the tenancy and the court must grant it unless the landlord establishes a ground of opposition as provided for in s.49. However, in order for Part IV to apply to the tenancy, the premises must be *occupied* by the tenant for the purpose of a business carried on by him. The claimant seeks a declaration that the management agreement entered into between Loamsa and El Kriri would have precluded Loamsa from relying on Part IV of the Act.

13 Mr. ffrench Davis referred to two judgments of this court. The first was *Anglo Hispano Bodega Co. Ltd.* v. *Marrache (No. 2)* (1). There, Spry, C.J. held that, in the context of the equivalent section in the then Landlord and Tenant (Miscellaneous Provisions) Ordinance, the term "occupied" was to be given a restricted meaning. The learned Chief Justice said (1979 Gib LR at 13) that in the case of a company it should be taken as meaning: "occupied by the company itself or by an employee of the company, employed for the purposes of the business which brings the premises under [the relevant Part]." The second authority was *Anglo Wines Ltd.* v. *Lau Anaya Ltd.* (2) where Alcantara, J. found that whilst it was possible to occupy premises through a manager or agent, the tenant in that case had entered into a management agreement by which he licensed the premises to a third party. The result was that the tenant was not protected by Part IV of the Act.

14 As the more recent of these authorities is more than 30 years old, Mr. ffrench Davis submitted that it was desirable for the court to apply the legal principles found in those authorities and make a declaration which would serve to update the law. I decline to do so for the following reasons.

15 First, as I have already observed, the declaration serves no purpose in this particular case. There is no real or present dispute as the claimant has been granted possession of the premises. Secondly, the claimant has made no substantive submissions on the law other than to refer to the two historic authorities. In effect, all that the court is therefore being asked to do is to restate the principles set out by the learned judges in their respective judgments and apply them to the facts of this particular case. Thirdly, whether or not the principles applied to the facts of this particular case was a matter in issue between the parties. In the end, the defendants have not pursued their defence and consequently the court will not have both sides to the argument. Any declaration would therefore be of very limited benefit.

The claim for possession of the premises

16 I granted the claimant possession of the premises on May 5th, 2022. This was not opposed by the Loamsa defendants and, as I have already recorded, no appearance was entered by El Kriri in these proceedings. In fact, the Loamsa defendants' position was that no order for possession was necessary because the claimant had re-entered the premises when it changed the locks on or about January 1st, 2022. The claimant was of the contrary view. Its position was that Loamsa remained in occupation through El Kriri's presence in the premises.

17 Whether or not Loamsa continued in occupation of the premises after the changing of the locks by the claimant is a matter which I will consider in relation to the claim for mesne profits. In any event, it was clear that, as at the date of the hearing on May 5th, 2022, El Kriri continued to run a restaurant from the premises. El Kriri had no entitlement to be in occupation of the premises. The lease of the premises to Loamsa expired on June 30th, 2021 and Loamsa did not seek to have it renewed. In the circumstances, an order for possession of the premises in the claimant's favour was appropriate.

The claim for mesne profits

18 The claimant seeks payment of mesne profits by the Loamsa defendants for the period from July 1st, 2021 to May 5th, 2022. The claimant claims the profits accruing to Loamsa from the granting of the licence to El Kriri. The Loamsa defendants say that all that the claimant should be entitled to is an amount equivalent to the rent which had been payable under the lease up until the claimant re-entered the premises on or about January 1st, 2022. Loamsa has in fact paid the sum of £5,275 towards this sum. (There was some confusion at the hearing as to whether payment of that sum did actually represent the entirety of the rent that would have been outstanding for that period because of some previous overpayment. Whether it did or not, Mr. Stagnetto agreed on behalf of Loamsa that if there was a shortfall, this would be paid.) In relation to this claim, there are therefore two distinct issues to determine. The first is how mesne profits should be calculated. The second is the period for which mesne profits should be paid.

19 Before turning to these specific issues, I shall deal with an application made by the claimant on the day of the hearing that its claim for mesne profits be adjourned. I refused the request and indicated that I would be providing my reasons for doing so in this judgment. The application for the adjournment arose after I questioned whether the claimant had presented evidence in support of its claim for mesne profits. Mr. ffrench Davis submitted that there was evidence that could be relied on and that in any event the claim was unopposed. However, sensing that I was not satisfied

by that submission, he sought an adjournment in order to obtain and file further evidence. In doing so, he raised two matters. The first was that the claimant was in a difficult position because Loamsa had not provided disclosure of its dealings with El Kriri. The evidence the claimant could provide to the court was therefore limited unless an order for disclosure was made. The second was that the claimant had proceeded to the hearing on the basis that the claim for mesne profits was not being contested by the Loamsa defendants.

20 In relation to disclosure, it was submitted that the proceedings could be converted into a Part 7 claim and an order for disclosure made. It seemed to me that the opportunity for considering this had passed. The matter first came to court on January 12th, 2022. Despite opposition by the claimant who wanted the matter dealt with summarily, I gave the defendants the opportunity to file defences and also gave directions as to the filing of evidence for the hearing. At that stage, no application for disclosure was made. The hearing was then set for a two-day hearing on May 5th and 6th, 2022.

21 As to whether or not the Loamsa defendants were opposing the claim for mesne profits, this was based on an email sent by the Loamsa defendants' solicitors to the claimant's solicitors on March 18th, 2022 which, *inter alia*, provided as follows:

> "Despite having a very arguable case they simply are not prepared to plow more money into this litigation and venture.
>
> They will therefore not be playing any further part in the proceeding (save in relation to costs) and will not be proceeding with their counterclaim.
>
> Your clients have refused to accept rent when tendered in the past. It will be tendered again a cheque will be delivered to you by hand.
>
> On the basis that it had previously been tendered and has been again your client has no basis for claiming anything more.
>
> Your claim for possession was unnecessary from before the day you served your claim on my clients. It continues to be unnecessary. You already have possession.
>
> Your claim for a declaration is a matter for you. We do not propose to play any part in it but if you insist on pursuing it you will need to convince the court. My clients take no position on it . . ."

22 Mr. ffrench Davis pointed to the fact that this communication made clear that the Loamsa defendants were not going to contest the claimant's claims and that must necessarily include its claim for mesne profits. It was therefore unfair to now question its entitlement to the claim. I disagree. First, whilst the email does not expressly refer to the claim for mesne

profits, a necessary implication of what is said is that the Loamsa defendants are not agreeing to paying anything other than the rent which they were tendering. Whilst it may have been prudent to address the claim for mesne profits specifically, it should also have been made clear in any reply to this email that the claim for further mesne profits would continue to be pursued. Undoubtedly, the Loamsa defendants would then have confirmed their intention to defend that as well as any claim for costs. Secondly, the court is not considering the entering of judgment by default. Any claim made has to be evidenced and the court has to consider whether or not there is a basis for it, regardless of what representations may be made in opposition by a defendant. Thirdly, as pointed out by Mr. Stagnetto, the email of March 18th, 2022 was sent after the deadline for the filing of evidence had passed. No evidence was filed by the claimant dealing with any claim for mesne profits.

23 The court originally set aside two days for the hearing. Then, on April 26th, 2022, the claimant's solicitors informed the Registrar that, as the Loamsa defendants were not intending to take any further part in the proceedings, only half a day would be required for the hearing. Be that as it may, significant court time had already been allocated to the case. The adjournment was only required in respect of the financial remedy. If the claimant is right that he is entitled to mesne profits at a rate equivalent to the management fee ostensibly being paid by El Kriri to Loamsa, then it would be entitled to the further sum of £3,900[1] if the period is 6 months; or to approximately £10,300[2] if the period extends to May 5th, 2022. In my judgment, the request for an adjournment was neither reasonable nor proportionate.

24 Turning then to the measure of mesne profits that should be paid in this case. The evidence is limited to the following, the terms of the Loamsa lease which provides that Loamsa is to pay the claimant the sum of £950 per month in rent. There is then the management agreement between Loamsa and El Kriri which provides that El Kriri is to pay a monthly fee of £1,600 to Loamsa. In his written submissions for the hearing, Mr. ffrench Davis said the following at para. 5(c):

> "Notwithstanding the fact that [Loamsa] has since 1 July 2021 no estate or interest in the Premises, it has continued until at least the month of March 2022 to demand and receive the monthly payments from [El Kriri] which are stipulated in the Management Agreement."

There is however no evidence of what El Kriri has actually been paying and whether or not it continued paying the management fee beyond January

[1] The difference between the sum of £1,600 and £950 for a period of 6 months.
[2] The sum of £3,900 plus an additional £1,600 per month for a period of 4 months.

1st, 2022. Indeed, the claimant is not certain that anything was paid after March 2022.

25 Even assuming that the payments have been made for the entire period to May 5th, 2022, what is the correct measure in any event?

26 Mr. Stagnetto referred to a number of passages in *Woodfall's Landlord and Tenant*. In a section entitled "Tenant's liability by holding over," the following is said at para. 19.011, at 19/5:

> "The tenant is liable for failure to give complete possession of the premises at the end of the tenancy even where a sub-tenant wrongfully holds over and refuses to quit. The tenant is liable for the period of such holding over . . ."

At para. 19.013, at 19/6–19/7, the learned authors then say:

> "The amount of the mesne profits for which the trespasser is liable is an amount equivalent to the ordinary letting value of the property in question . . . Where the rent payable under the former lease is the fair letting value of the property, mesne profits are awarded at the rate of the rent; but if the rent is less than the true letting value of the premises, then mesne profits may be awarded at a rate exceeding the rent."

It was therefore submitted that mesne profits should be calculated simply be reference to the rent payable under the Loamsa lease.

27 Mr. ffrench Davis however pointed to the following statement contained in the same para. 19.013, at 19/7:

> "The calculation of mesne profits may take into account the actual benefit derived by the trespasser from his trespass, and is not confined to the assessment of what rent would have been paid under a hypothetical letting . . ."

This appears to suggest that, in principle, mesne profits could be calculated by reference to the profits made by Loamsa.

28 Mr. Stagnetto submitted that the amount paid by El Kriri to Loamsa under the management agreement should not be used to measure mesne profits. This is because Loamsa set up the restaurant and the costs of doing so were factored into the payments made by El Kriri. As a matter of common sense this must be right, but should it not also be assumed that Loamsa entered into the management agreement for profit? There is however no evidence of any of this.

29 Although it was not referred to by the parties, the only case cited in *Woodfall* in support of the statement that mesne profits may take into account the actual benefit derived by a trespasser is *Dean and Chapter of*

the Cathedral and Metropolitan Church of Christ Canterbury v. *Whitbread plc* (3). There the tenant, with the landlord's consent, was holding over following the expiry of the lease and the parties were negotiating new terms. In the event, the tenant quit the premises and the question of the appropriate sum to pay by the tenant for the period of the holding over was referred to the court. Judge Cooke (sitting as a judge of the High Court) found that the tenancy was a tenancy at will. In assessing the mesne profits he then said the following 72 P. & C.R. at 16):

> "How one approaches the assessment of the figure and what principles one applies are, however, somewhat more complex to explain.
>
> (a) There is no need for the landlords to show that he could or would have let the premises to somebody else at the material time . . . There are alternative and mutually exclusive bases of claim. (1) Loss actually suffered and (2) value of benefit which the occupier has received. The latter is a restitutionary claim . . .
>
> (b) The ordinary measure is a proper letting value of the property for the relevant period, there being in the ordinary case in a free market the value to the trespassers of its use . . .
>
> In the instant case there is certainly evidence that the plaintiffs would have let the premises and probably, so far as anybody can tell, could have done. Certainly there were people around in the market at the relevant period and the landlords in principle wanted to let this property; probably one need go no further than that.
>
> Thus far it does not seem to me to make any real difference whether one looks at it as gain for the tenant or loss to the landlord, the principle would be the same, ordinary market value."

30 The learned judge did not go into what circumstances, if any, would give rise to there being a distinction between loss to a landlord or gain to a tenant. I do not therefore find that this case assists me.

31 Other than for the reference to the passage in *Woodfall*, no submissions were made as to how the court is to exercise any discretion it may have to depart from the normal measure of mesne profits—the market rental value of the property in question. The claimant has not therefore made good its claim. Its reliance on the bare assertion in *Woodfall* does not assist the court. I will award mesne profits in the normal way.

32 There is no evidence of the market rental value of the premises other than the amount of rent being paid by Loamsa up until the lease expired on June 30th, 2021. No evidence was filed appraising the rental value as from July 1st, 2021. It therefore seems to me that the mesne profits payable by

Loamsa should be calculated by reference to the rent payable under the Loamsa lease.

33 The second issue is whether Loamsa was in possession of the premises up to May 5th, 2022 or whether the claimant took possession on or about January 1st, 2022 when it changed the locks to the premises. At the hearing, Mr. ffrench Davis rejected the suggestion that the changing of the locks had any such effect saying that the locks had been changed for practical reasons. He asserted that the claimant's director was having difficulty accessing other parts of the property and he therefore had to change the locks to the premises. Those may have been counsel's instructions but there was no evidence to support this rather surprising contention, seen in the light of the steps then being actively taken by the claimant to regain possession of the premises. Indeed, the explanation is not contained in the claimant's reply and defence to counterclaim even though the question of the change of the locks and the effect it had was asserted by the Loamsa defendants in their defence and counterclaim. In its reply, the claimant simply admits that it changed the locks to the premises and that a copy of the new key was given to El Kriri's director to allow him to carry on running the restaurant. Furthermore, in a chronology prepared for the hearing by Mr. ffrench Davis, the following is stated at para. 15: "03 01 22 By agreement with the second defendant, the claimant changes the locks to the premises so as to exclude access on the part of the first defendant . . ." In submissions, Mr. ffrench Davis distanced himself from this last statement saying that it had been made in error.

34 Clearly, the reasons for changing the locks, and the effect of the same, was a matter in issue between the parties. The claimant should have addressed this and should have filed evidence as to what it did and why. I would then have been able to hear evidence on the point. All that I have before me is the agreed fact of the changing of the locks and an admission that the new keys were given to El Kriri's director. Mr. ffrench Davis submitted that El Kriri was Loamsa's agent under the terms of the management agreement and therefore Loamsa remained in possession. This ignores two things. First, that the claimant's case is that El Kriri was not a manager running a restaurant for Loamsa but rather that El Kriri is a sub-tenant or licensee. The claimant cannot have it both ways. Secondly, and more importantly, in the absence of any evidence as to why the locks were changed, the only conclusion that can sensibly be drawn is that the locks were changed so as to exclude Loamsa from the premises. (In this regard, I have noted that in an affidavit by the claimant's director Terry Lefcovitch, dated December 7th, 2021 and filed in support of the claim form, it is said that the claimant had been negotiating directly with El Kriri.) In the circumstances, I find that Loamsa's occupation of the premises came to an end on December 31st, 2021.

35 The claim for mesne profits exceeding the amount of the rent payable by Loamsa to the claimant up to December 31st, 2021 is dismissed.

Ruling accordingly.