IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MR A TYRELL QC)
(Sitting as a Deputy High Court Judge)

QBENF 97/0117 CMS1

Royal Courts of Justice
Strand
London WC2

Friday, 24 April 1998

B e f o r e:

LORD JUSTICE BELDAM
LORD JUSTICE MAY
SIR JOHN VINELOTT

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IVORY GATE LIMITED

PLAINTIFF/APPELLANT

- v -

SPETALE & ORS

DEFENDANTS/RESPONDENTS

- - - - - -

(Transcript of the handed down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 421 4040
Official Shorthand Writers to the Court)

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MR S JOURDAN (Instructed by Messrs Olswang, London WC2E 9TT) appeared on behalf of the Appellant

MR M ROBERTS [MR D WARNER - judgment only] (Instructed by Messrs Stephen Mitchell, London SE1 2BE) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Judge)

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Friday, 24 April 1998

J U D G M E N T

SIR JOHN VINELOTT: This is an appeal from a decision of Mr Alan Tyrell QC, sitting as a Deputy High Court Judge. The main issue in this appeal is whether if proceedings are commenced by a lessor for the forfeiture of a lease on the ground of breach of covenant and if the proceedings are afterwards compromised on terms that the action is discontinued and the Lease transferred to the lessor, sureties for the due performance of the covenants in the Lease for the payment of rent and otherwise are liable for the rent which accrued after the date of the issue of the proceedings and before the Lease was assigned to the lessor and merged with the reversion.

The relevant facts can be shortly stated:

(1) By a Lease dated 30th October 1981 and made between Hambro Life Assurance Limited as landlord, Independent Leisure Limited as tenant and four named individuals, Carlo Christopher Spetale, Emmanuel Montague Freedman, Colin Fisher and John Julian Marks as sureties premises in Princes House and Princes Arcade, Piccadilly, were demised to Independent Leisure Limited for a term of twenty six years from 29th September 1981 at a rent of a peppercorn up to 25th September 1982 and thereafter £66,000 per annum subject to review on 29th September 1986, 29th September 1991, 29th September 1996 and 29th September 2001. The Lease contained the following provisions:

(a) A covenant by the tenant not to assign

(b) A proviso for re-entry by the landlord in the event (amongst other things) that the tenant should "suffer a Receiver to be appointed"

(c) Covenants by each of the sureties that in the event of default by the tenant in payment of any of the rents reserved by the lease the surety would pay the rent in respect of which the tenant should have defaulted "notwithstanding any time

or indulgence granted by the Landlord to the tenant".

(d) Provision for the review of the rent on the dates I have stated under which in default of agreement as to the amount of the new rent the new rent would be assessed by a Surveyor agreed between the landlord and the tenant or in default of agreement appointed by the President for the time being of the Royal Institution of Chartered Surveyors.

(2) On 14th February, Hambro Life Assurance Limited gave Independent Leisure Limited licence to assign the Lease to Capital City Leisure Limited ("Capital City"). The Third Defendant, Geoffrey Neville Wright, was joined as an additional surety. Capital City was duly registered as the proprietor of the Lease and on 26th July 1985 Capital City executed a debenture in favour of Lloyds Bank Plc charging all its property and assets and a Legal Charge charging its interest in the leasehold premises to secure its liabilities to Lloyds Bank. On 25th April 1991 the Plaintiff, Ivory Gate Limited, was registered as the freehold proprietor of the premises.

(3) On 6th January 1992 an arbitrator, Mr Newberry FRICS, was appointed by the President of the Royal Institute of Chartered Surveyors to determine the new rent following the review on 29th September 1991. There was considerable delay before Mr Newberry made his award on 13th September 1993; the delay was occasioned by a dispute which had to be determined in High Court proceedings.

(4) In the meantime, on 16th June 1993, Lloyds Bank exercised its powers under the debenture and Legal Charge by appointing two Chartered Accountants to be Administrative Receivers of Capital City. That was followed on 25th June by the service of a notice under Section 146 of the Law of Property Act 1925. The notice after

referring to the appointment of receivers over Capital City required Capital City "to remedy the aforesaid breach, insofar as it may be capable of remedy and to make compensation in respect thereof to the Landlord", it gave notice that in the event of failure to comply with the notice within a reasonable time from the service of the notice it was the intention of the landlord to forfeit the Lease, and stated that the landlord considered fourteen days to be a reasonable time.

(5) A Writ claiming forfeiture was issued on 13th July 1993 and served eighteen days after the service of the Section 146 notice. The Statement of Claim, endorsed on the Writ claimed possession and mesne profits. A Defence and Counterclaim was served by Capital City. In its Defence Capital City claimed that the "alleged breach of covenant" was a breach capable of remedy either by assignment to a suitable assignee in respect of whom no receiver had been appointed or by the removal of the joint Administrative Receivers and also that the Section 146 notice did not give Capital City a reasonable time for compliance with it. The Counterclaim contained a usual claim for relief from forfeiture.

(6) On 13th September 1993, Mr Newberry gave an interim award determining the rent as from 29th September 1991 in the sum of £175,000 pa.

(7) Shortly thereafter on 16th September, an order was made by consent adding Lloyds Bank as a Defendant to the forfeiture action. On 28th September, a Defence and Counterclaim by Lloyds Bank was delivered in terms which in all material respects reflect the Defence and Counterclaim by Capital City. Finally, in November 1993, Ivory Gate delivered their Reply to the Defence and their Defence to the Counterclaim by Lloyds Bank. In the Defence to the Counterclaim Ivory Gate stated that it would not

oppose the grant of relief from forfeiture to Lloyds Bank by the vesting of the demised premises in Lloyds Bank on appropriate terms including the payment of all arrears of rent.

(8) On 18th January 1994, a further forfeiture action was commenced by Ivory Gate. In the Statement of Claim Ivory Gate, after reciting the pleadings in the earlier action and the allegation by Capital City that the period allowed for remedying the breach alleged in the Section 146 notice was not a reasonable time for compliance set out the contention that the breach was not capable of remedy and that if it was so capable and if no reasonable time had been allowed between the service of the Section 146 notice and the service of the Writ in the first action the Lease was forfeited by service of the Writ in the second action. No further step was taken in that action.

(9) On 18th January 1994 negotiations were on foot for the settlement of the issues raised in both actions. Those negotiations resulted in the execution of a Deed dated 18th February 1994 between Ivory Gate (1) Capital City (2) the Administrative Receivers (3) and Lloyds Bank (4). The Deed recites the Lease and the amount of the current rent "payable", the covenants by the sureties, the licence to assign, the covenant by Mr Wright as additional surety, the Debenture and Legal Charge and the appointment of the Administrative Receivers. Finally, it recites that by a transfer of even date Lloyds Bank "has transferred the premises to Ivory Gate for a consideration of £100,000."

Clause 1.1 of the operative part contains a covenant by Ivory Gate with Capital City and the Administrative Receivers and Lloyds Bank that it will not take any steps to enforce any rights against them in respect of their liabilities under the Lease and Clause 1.2 contains a covenant by Capital City and Lloyds Bank that they will not enforce any rights which they may

have against the sureties or the additional surety whether in respect of the premises, the Debenture or the Legal Charge unless they are given notice in writing by Ivory Gate that it has no objections to them so doing. It is further provided that in the case of the additional surety if Ivory Gate decides not to take any steps to enforce its rights against the additional surety it will within fourteen days of such decision give notice to Lloyds Bank in the foregoing terms and that in any event such notice is to be deemed to be issued if by the date of twelve months from the date of the Deed Ivory Gate has not obtained a Bankruptcy Order against the additional surety.

Clause 2 is of central importance and I should cite it in full:

> "It is hereby expressly agreed and declared that nothing in this Deed is intended to or shall operate as a release by Ivory Gate of any of its rights or remedies against the Sureties or the Additional Surety in respect of their respective liabilities pursuant to the Lease (and in respect of the Additional Surety the said Licence to Assign) and Ivory Gate shall remain entitled (and fully reserves its rights) to enforce any such rights or remedies in any manner which it shall see fit."

(10) On the same day Ivory Gate gave notice to the Mayor's and the City of London Court (to which the forfeiture action had been transferred) discontinuing the action and certifying that they had that day given like notice to Capital City and Lloyds Bank. Notice was also given on the same day to the Mayor and City of London Court by Capital City and Lloyds Bank discontinuing their counterclaims, notice having been given on the same day of the withdrawal of the counterclaims to Ivory Gate.

(11) The transfer, also dated 18th February, was a transfer by Lloyds Bank as mortgagee in exercise of a power of sale conferred by the Legal Charge.

The Writ in the action which is now before this Court was issued on 25th July 1994.

The substantial claim is for arrears of rent, insurance premiums and service charges due from Capital City up to 18th February 1994 with interest (payable under the terms of the Lease) on those arrears. Two of the original sureties, Carlo Christopher Spetale and Emmanuel Montague Freedman are joined as Defendants together with the additional surety, Mr Wright. Defences were served by Mr Spetale and Mr Wright and a separate defence was served by Mr Freedman. Mr Spetale took no part in the proceedings and did not appear at the trial which commenced on 12th November 1995. Mr Wright, who was not represented by Counsel, wrote to the Court to say that he would be unable to attend through illness. He did not appear on the first day of the trial and Counsel for Ivory Gate elected to proceed against Mr Freedman who was represented by Counsel, Mr Michael Roberts, while further enquiries were made as to Mr Wright's state of health. Later a letter was received from his General Practitioner confirming that he was ill. The trial therefore continued against Mr Spetale and Mr Freedman, the latter acting through Mr Roberts. The case against Mr Wright stands adjourned. The trial lasted for four days. On 17th November, Mr Tyrell handed down a written judgment giving his reasons for his conclusion that Ivory Gate's claims against Mr Spetale and Mr Freedman failed, though he recorded his finding that the amount due if the claim had succeeded would have been £240,313.15 plus interest to 7th October 1996 of £81,812.41. On 20th December 1996 he gave formal judgment for Mr Spetale and Mr Freedman and ordered that Ivory Gate pay Mr Freedman's costs of his defence.

In my judgment there was no arguable defence to the claim by Ivory Gate and Ivory Gate would have been entitled, if it had applied, to summary judgment under Order 14. It was held as long ago as 1909 in Dendy v Evans [1909] K.B. 894, that where a writ claiming forfeiture of a lease and possession is served the writ does not put an end to the lease; the issue and service of the writ do not without more put an end to an underlease granted by the tenant. The Court of Appeal rejected the claim that where relief was given in an action for forfeiture

pursuant to Section 14 of the Conveyancing Act 1881 (the predecessor of Section 146) the effect was to resuscitate the lease as from the date of the order giving relief or to create a new lease as from that date. The effect of the order giving relief was that "the right of entry for forfeiture is got rid of". (See Lord Cozens Hardy MR at p.269). That was the position before 1881 both under the inherent jurisdiction of the Chancery Court to grant relief against forfeiture and under the Landlord and Tenant Act 1730 and the Common Law Procedure Act 1852. The Conveyancing and Law of Property Act 1881 did not alter the principle on which relief was given though it extended relief which the law granted for non-payment of rent to forfeiture for breach of covenant.

That principle has been applied in a many cases. I need only refer to two of them.

In Driscoll v Church Commissioners for England [1957] QBD 330 the appellant acquired the leases of a number of dwelling houses. He applied to the landlords for permission to use them as clubs and hostels. The landlords refused consent save on terms which the appellant found unacceptable. The appellant then applied to the Lands Tribunal under Section 84 of the Law of Property Act 1925 for an order discharging or modifying the covenants restricting the use to which the properties (all of which were held on long leases) could be put. Thereafter, before the Lands Tribunal hearing the landlord issued writs claiming forfeiture. In May 1956, the Lands Tribunal upheld the landlords' contentions that the restrictions they required were reasonably necessary to maintain the character of the neighbourhood and refused to grant the application. Shortly thereafter, in July 1956, Pearce J, granted the appellant relief from forfeiture. An appeal against the refusal of the Lands Tribunal to vary the covenant then came before the Court of Appeal and at the hearing of the appeal the landlord raised the preliminary point that service of the writ determined the leases so that there were no subsisting covenants which could have been discharged or modified by the Lands Tribunal. That

contention was rejected by the Court of Appeal. Denning LJ (as he then was) said at p.340:

> "I do not agree with that argument, for this reason: that, although a writ is an unequivocal election, nevertheless, until the action is finally determined in favour of the landlord, the covenant does not cease to be potentially good. For instance, the forfeiture may not be established; or relief may be granted, in which case the lease is re-established as from the beginning. .. .. .. It seems to me that so long as the covenant is potentially good, Mr Discroll, or anyone in like position, has a locus standi to apply to the tribunal for a modification of the covenant. So I think that Mr Driscoll is not to be defeated on any technical point".

In the well known case Meadows v Clerical Medical and General Life Assurance Society [1981] CH 70, an underlease of business premises contained repairing covenants by the tenant. The underlessor served on the tenant a Section 146 notice requiring him to remedy breaches of covenant. Shortly thereafter the defendants, the head landlords, served notice under Section 25 of the Landlord and Tenant Act 1954 to determine the tenancy. The tenant gave a counter notice. The underlessor then issued a Writ claiming forfeiture of the tenant's underlease on the ground of breach of the repairing covenant; the tenant claimed relief against forfeiture. The Master, by consent, gave judgment for the underlessor and adjourned the tenant's application for relief. The head landlord applied to have the tenant's application under the 1954 Act dismissed on the ground that the underlease had been forfeited and that there was no tenancy to which the Act of 1954 applied, the underlessor not being in possession. Sir Robert Megarry, the Vice Chancellor, dismissing the claim by the head lessor said at p.74:

> "A number of authorities were discussed in argument, but none of them had any direct bearing on this problem. It seems clear that the mere issue of a writ claiming forfeiture of a lease does not bring about a forfeiture. On the other hand, there is authority for saying that as soon as such a writ is served, there is a forfeiture, though not until judgment will it be determined whether the forfeiture was justified".

A little later on p.75 he observed

> "There are, of course, curiosities in the status of a forfeited lease which is the subject of

> an application for relief against forfeiture. Until the application has been decided, it will not be known whether the lease will remain forfeited, or whether it will be restored as if it had never been forfeited. But there are many other instances of such uncertainties. When the validity of a notice to quit is in dispute, until that issue is resolved it will not be known whether the tenancy has ended or whether it still exists. The tenancy has a trance-like existence pendente lite; none can assert with assurance whether it is alive or dead. The status of a forfeited underlease which is the subject of an application for relief seems to me to be not dissimilar; at least it cannot be said to be dead beyond hope of resurrection".

It is unnecessary to refer to the many other cases in which the court has approved the principle that service of a writ claiming forfeiture and possession of demised premises does not by itself bring the lease to an end. It operates as an unequivocal election by the landlord to rely on a breach of covenant or condition as a forfeiture. However, in the words of Sir Robert Megarry V.C., the lease "has a trance like existence pendente lite: no one can assert with assurance whether it is alive or dead". If it is subsequently held that there was no breach of the covenant or condition or that a notice given under Section 146 was defective it will be seen that the lease was never forfeited; similarly if an application for forfeiture succeeds the lease will be restored to life as from the date of forfeiture. If the defence and any counterclaim for relief both fail the forfeiture will take effect retrospectively from the date of service of the writ. The position is the same if there is a re-entry which is at first contested and is later held to have been lawful.

Applying these principles to the instant case there can, in my judgment, be no doubt that the lease was not forfeited and came to an end only by merger when it was acquired by Ivory Gate. On 18th February 1994, the forfeiture action was discontinued and the lease, free from the claim for forfeiture, was transferred to Ivory Gate. The transaction was so structured as to ensure that the liabilities of the sureties and the additional surety to Ivory Gate up to 18th February 1994 should remain unaffected and, in my judgment, it was effective to achieve that end.

In his judgment in the Court below the learned judge started with the proposition that: "Service of a writ claiming forfeiture is an exercise of the right of re-entry which determines the lease: Billson v Residential Limited [1992] 1 AC 495."

I shall have to come back to say something about that decision of the House of Lords, which is the a sheet-anchor of the argument presented to this Court by Mr Roberts. I should, however, observe at this point that the statement I have cited is not, in my judgment, an wholly accurate statement of the law. Service of a writ claiming forfeiture is an unequivocal election by the landlord to forfeit the lease: it does not by itself determine the lease. Turning to the deed of 18th February 1994, the learned judge said:

> "The structure of the deed raises two questions. First and most important, whether the Lease emerged from "twilight" to resume the place it held on 14th July 1993. Unless it did, the liability of the sureties never emerged from "twilight" either. There was much discussion during argument as to the order of events. There is no document which shows the relative timing of the Notices of Discontinuance and the execution of the deed. Mr Barclay [who gave evidence on behalf of Ivory Gate] believes that the deed may have been executed in advance subject to completion on 18th February 1994 by him, and that the Notices of Discontinuance preceded completion. The deed states that by the time of its execution the premises had already been transferred to the Bank. Attempting to place these events in order is altogether too artificial to govern the liabilities of the parties. The entire arrangement was a single transaction. The various steps taken to implement it must be regarded as simultaneous. On that basis, the Plaintiff took the assignment which instantaneously merged the underlease with the Plaintiff's superior interest, and at the same time both sides in the forfeiture proceedings discontinued them, leaving no time for the underlease to be restored to its pre-forfeiture state."

The fallacy in that reasoning lies, I think, in the assumption that it is necessary to dissect the various steps which were taken on 18th February 1994 and to place them in a temporal order in order to ascertain whether there was a moment of time when the lease emerged from "twilight". The lease remained in existence albeit that if the defences had failed and if the claims for relief had also failed the forfeiture would have been treated as having taken effect on the service of the Writ. However, in the event the action for forfeiture was discontinued thereby removing the only defect in the title to the Lease which Lloyds Bank as

mortgagee was free to dispose of. And that is what happened.

Mr Roberts relied in this Court as in the Court below on observations made by Lord Templeman in Billson v Residential Apartments Limited (Supra). In that case tenants undertook works of reconstruction of demised premises without the written consent of the landlords which was required under the terms of the lease. The landlords served notice under Section 146(1) requiring the tenants to remedy the breach of covenant. The tenants failed to do so and, while the building works were still in progress, the landlords peaceably re-entered, changed the locks and fixed notices to the effect that the lease had been forfeited. The question was whether the Court had jurisdiction to grant relief against forfeiture pursuant to Section 146(2) notwithstanding the re-entry of the landlord. It was held that where a landlord has physically re-entered premises without obtaining an order of the Court a tenant can claim relief against forfeiture on the footing that the landlord was still "proceeding" to assert his right of forfeiture within the meaning of Section 146(2), the words "is proceeding" in Section 146(2) being read as "is taking the necessary steps" or "proceeds" (See per Lord Oliver at p.544).

Mr Roberts relied upon an observation in the speech of Lord Templeman at p.535 that "The effect of issuing and serving a writ is precisely the same as the effect of re-entry; in each case the lease is determined". In my judgment, it is quite clear from the paragraph in which that observation occurs that Lord Templeman did not intend to say that the service of a writ or peaceful re-entry has the effect that the lease is determined for all purposes. Lord Templeman was answering a submission that on the true construction of Section 146(2) a tenant cannot apply for relief against forfeiture after the landlord has re-entered without obtaining a Court Order since "Thereafter the landlord is no longer proceeding to enforce his rights; he has succeeded in enforcing them". Lord Templeman equated the position of a landlord who has served a writ claiming possession with the position of a landlord who has re-entered and

concluded that "In each case the tenant seeks relief because the lease has been forfeited". It is quite clear from subsequent passages in the speech of Lord Templeman that he had well in mind the principle that "Re-entry can only avail the landlord if the entry is lawful". (See page 536 at G). If the tenant challenges the claim by the landlord that the right of re-entry has arisen by reason of breach of covenant or otherwise the question whether the lease has been forfeited must await the outcome of the action; similarly, if the landlord serves a writ claiming possession and the tenant claims that the landlord has no right to re-enter. Again, in both cases if the tenant claims relief against forfeiture the question whether the lease will be restored to full life remains in abeyance pending the determination of that claim. The position is even more clearly stated by Lord Oliver at P.542, where he said:

> "It is clear, for instance, that where a judgment for possession has been wrongfully obtained because, for instance, no notice was served under section 146(1), it may, by appropriate procedure, be set aside so as to enable one deriving title under the lessee to defend: see Jacques v Harrison (1884) 12 QBD 165. What defeats the claim to relief is not the fact of possession simpliciter but possession under a final and unassailable judgment"

Mr Roberts' submission if well founded would have the result that the observation of Lord Templeman he relies upon has overruled a long series of cases none of which are referred to in his speech and many of which were not even referred to in argument. As Mr Jourdan, who appeared for Ivory Gate, pointed out, it would have the absurd consequence that if a landlord peaceably re-entered while, for instance, a tenant was on holiday and granted a lease to a third party before the tenant could issue a writ claiming either that the re-entry was unlawful or while admitting that the right of re-entry had arisen, claiming that no notice had been served in accordance with Section 146(1) or claiming relief against forfeiture, the tenant would thereafter be debarred from obtaining relief because it would affect rights accrued to a third party.

In my judgment, the appeal succeeds on this short ground. There were other issues before the learned judge: whether if the Lease was forfeited by service of the Writ, Ivory Gate could claim the rent as determined by the Arbitrator from the rent review date until the service of the Writ and whether the failure of Capital City to deliver up possession was a further breach of covenant for which damages could be recovered from the sureties. We have not heard argument on these further questions and I express no opinion on them.

There was no dispute before the learned judge as to the amount of rent and interest thereon up to 7th October 1996. The action will have to be restored before a Master to calculate interest accrued due since 7th October 1996 unless that calculation can be agreed.

LORD JUSTICE MAY: I agree.

LORD JUSTICE BELDAM: I also agree.

ORDER: Appeal allowed with costs; orders to be in accordance with paragraphs 1, 2, 3 and 5 of the Notice of Appeal; leave to appeal to the House of Lords refused.