Case No: B5/2013/3760

Neutral Citation Number: [2015] EWCA Civ 806
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM**
**CENTRAL LONDON COUNTY COURT**
**HHJ Gerald**
**2CL10209**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 30th July 2015

**Before:**

**LADY JUSTICE ARDEN**
**LORD JUSTICE RYDER**
and
**LORD JUSTICE BRIGGS**

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**Between:**

| | |
|---|---|
| **Freifeld & Anr** | **Appellants** |
| **- and -** | |
| **West Kensington Court Limited** | **Respondent** |

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(Transcript of the Handed Down Judgment of
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**Mark Warwick QC and Caroline Shea** (instructed by **Bude Nathan Iwanier**) for the **Appellants**
**Caroline Hutton and Jennifer Meech** (instructed by **Beavis Partnership Limited LLP**) for the **Respondent**

Hearing dates: 1 – 2 July 2015

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Judgment

**LADY JUSTICE ARDEN :**

**SHOULD A LESSOR GAIN A WINDFALL FROM FORFEITING A LEASE?**

1. This is an appeal from the order dated 5 December 2013 of HHJ Gerald, sitting in the Central London County Court, refusing relief from forfeiture to the appellants who are the head lessees under a Head Lease ("the Head Lease") of seven commercial retail units ("the Units") forming part of a block of residential flats at West Kensington Court, London W14.

2. The Head Lease was granted in 1982 for a term of 99 years. It was acquired at a premium, and no monetary passing rent was payable under it (though an annual insurance rent was payable). The rack rent achievable in respect of the subletting of the Units is the region of £133,000. This means that the Head Lease has significant value.

3. The issue on this appeal is whether, despite the appellants' highly unsatisfactory conduct as Head Lessees, there should be relief from forfeiture because there has been some mending of their ways and because the head lessor would receive a uncovenanted windfall if forfeiture took place.

4. The covenants in the Head Lease contained a covenant ("the alienation provision") whereby the head lessees covenant as follows:

> "(a) (i) Not to assign part only of the demised premises
>
> (ii) Not to underlet the whole or any part of the demised premises without the consent of the Landlord (such consent not to be unreasonably withheld)"

5. The respondent is the lessor under the Head Lease. It is also the lessor under about 150 residential long leases, located both above the Units and along the third side of the triangle forming the block of properties of which the Units form part. Most of the long lessees are also shareholders in the respondent.

6. The respondent had to serve notice under section 146(2) of the Law of Property Act 1925 ("the 1925 Act") to forfeit the Head Lease. It served two valid notices.

7. The statutory right to claim relief from forfeiture is contained in section 146 (2). This provides:

> (2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs,

> expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

8. Relief from forfeiture is discretionary and thus the conduct of the lessee is relevant. The discretion to grant relief is very wide and is not to be subjected to rigid rules. As Lord Loreburn, with whom the other members of the House agreed, held in *Hyman v Rose* [1912] AC 623 with respect to the predecessor (namely s 14 of the Conveyancing Act 1881) of section 146(2) of the 1925 Act:

> . . . the discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. (at 631)

9. In this case, the judge made serious findings about the conduct by the appellants.

**JUDGE'S FINDINGS AS TO THE CONDUCT OF THE APPELLANTS**

10. The background to this case is that one of the Units had been sublet to a controversially-run Chinese restaurant ("the Chinese restaurant"). The respondent made numerous complaints at trial about the practices of the Chinese restaurant involving poor waste management, smoking breaks and preparation of food in a courtyard area behind the Chinese restaurant (which was not in possession of the respondent) and noisy air conditioning units. These matters caused nuisance and annoyance to the residential lessees in breach of clause 3(11) of the Head Lease not to permit a nuisance or annoyance. The respondent alleged that much management time and money and many board meetings of the respondent were devoted to trying to remedy these problems.

11. The judge found that the appellants had in December 2011 in breach of the alienation provision deliberately granted a future sublease ("the Future Lease") to the existing sub-lessees of the Chinese restaurant. The judge held that the breach on which the forfeiture was incurred was deliberate because Mr Freifeld (the first appellant) accepted under cross-examination that he was aware when the Future Lease was granted that the consent of the respondent should have been sought. In the light of this, and what the judge found to be the attitude of the appellants towards their responsibilities under the Head Lease, he declined to grant relief from forfeiture.

12. In April 2012, when the respondent found out about this subletting, the appellants applied for consent. The appellants now admit that the grant of the Future Lease was a breach of the alienation provision in the Head Lease.

13. On 31 May 2012, the respondent served a notice pursuant to section 146 of the 1925 Act based on (1) breach of the alienation provision of the Head Lease by reason of the

grant of the Future Lease and (2) a further alleged breach of the alienation provision in respect of Unit 159/161 which it has since been conceded did not occur.

14. The respondent took a serious view of this breach because it contends that if its consent had been sought it would have been able to seek undertakings as to the way the restaurant was carried on.

15. These proceedings were begun by the appellants because the respondent had unreasonably withheld consent to the sub-letting of another unit. That claim succeeded. In September 2012, the respondent forfeited the Head Lease by counterclaim in these proceedings. In March 2013 the appellants applied to the court for relief from forfeiture on such terms and conditions as the court thought fit.

16. The respondent served a further section 146 notice in August 2012, without prejudice to its right to forfeit the Head Lease, citing other breaches of the Head Lease. At trial the respondent asked the court to take into account the matters in the second section 146 notice and other general complaints about the appellants' alleged attitude, acts and omissions.

17. As to the test he had to apply, the judge held that he should take into account that it might be disproportionate to refuse relief where the landlord might receive a windfall as in this case due to the value of the leasehold interest but he saw that as a factor which should make the tenant more punctilious about performing his obligations. Failure to perform his side of the lease might in those circumstance lead to the conclusion that the tenant would not perform his obligations in the future, which would be a factor weighing against the grant of relief:

> 87. Whether the landlord or those in proximity to him have suffered damage. The conduct of any non-parties material to the occupation of the demised premises may also be relevant. Whether any damage suffered by the landlord is proportionate to the advantage the landlord will obtain if no relief is granted is highly material. That said, it might be said that the greater the length and value of a lease, the more punctilious the tenant might be expected to be in observing the covenants and managing the demise so as to jealously guard it and its value. If he fails to do so that is a cause for concern as to the future relationship between landlord and tenant. Particularly where the breach is deliberate, the tenant will bear a heavy burden of demonstrating to the court that he has since the breach and particularly in the period leading up to the hearing of the application for relief and after service of the section 146 notice observed and taken all reasonable steps to ensure due compliance with the covenants so as to justify the court in permitting the contractual relationship to continue with the landlord.
>
> 88. Thus, depending on the circumstances of the case, the intrinsic value of the unexpired forfeited term is of itself not necessarily persuasive. If it were, then, of course, breaches could be committed by tenants with valuable leases with

> impunity, and a mere granting of relief would neuter or very seriously undermine the landlord's ability to enforce the covenants in the lease, which, it is well known, is in practical terms very difficult in a long lease, not only because of the Leasehold Reform (Repairs) Act 1938 but also because of the reluctance of the courts to interfere with the operation of long leases or, as Miss Shea put it albeit perhaps a little high, to lean against forfeiture and in favour of relief from forfeiture.

18. The judge made scathing findings about the appellants' grant of the Future Lease, finding that he deliberately decided not to seek the respondent's consent:

> 109. In short, I find that Mr Freifeld, acting for himself and his wife, took a conscious and deliberate decision to grant the future lease to Mr Ding and Ms Yang on 8th December 2011, since when he has wilfully failed to take any steps to remedy that breach by procuring or taking steps to procure surrender of the future lease, at any rate until mid-way through trial on the evening of the 12th November 2013. He also failed to inform, and concealed from [the respondent], the fact of that grant leaving it up to [the respondent] to find it out for itself which it ultimately did on 17th April 2012 when inspecting the Land Register, causing the section 146 notice to be issued on 15th August 2012, by which time these proceedings had been issued without any reference to the unlawful grant of the future lease. . . .
>
> 113. In acting in the way they have, it seems to me and I find that the Freifelds demonstrated a cynical disregard for their own obligations under their lease and also for the very real and longstanding problems which had been encountered by [the respondent] for many years in respect of the Chinese restaurant. I was not at all satisfied that Mr Freifeld gave a true and full account of precisely why he had agreed to grant the future lease at the time when he did. . . .

19. The judge concluded that these facts meant that the appellants faced a journey which was very steep, though not necessarily impossible, to obtain relief from forfeiture:

> 114. I am bound to say that, in those circumstances, the Freifelds face a vertiginous, but not necessarily impossible, climb up to the peak of relief from forfeiture. I say this because it is difficult to see why [the respondent] should be compelled to remain in a contractual relationship with a tenant who has so acted. That said, it would be wrong for me to reach that conclusion without consideration of the other evidence relating to relief from forfeiture and also the factors which the authorities indicate should be considered, one of which uppermost in my mind is the length of the unexpired but forfeited term and its apparent value. .

20. In the event, he found that the appellants' case fell a long way short of what was needed to obtain relief from forfeiture:

> 203. When viewed in the cold light of day, it is fair to say and will be apparent from what I have said and found in relation to past and present breaches that, in my judgment, the Freifelds had not even begun to make preparations to leave base-camp in order to embark upon their vertiginous journey up to the peak of relief from forfeiture. . . .
>
> 224. As I have said, the Freifelds, in those circumstances, faced a vertiginous but not necessarily impossible climb to the summit of relief made, it has to be said, more difficult by their historic failure to properly manage the demise and discharge their contractual obligations. In my judgment, the Freifelds have failed to adduce any or any sufficient evidence upon which the court could properly grant relief from forfeiture.

21. So the judge dismissed the application for relief from forfeiture.

**POST-JUDGMENT APPLICATIONS FOR RELIEF ETC**

22. The appellants eventually realised the seriousness of what they had done and they procured the surrender of the Future Lease on 6 December 2013 but by that time the judge had given judgment. The surrender was registered at the HM Land Registry on 16 December 2013.

23. There was a flurry of activity just before and during the days the judge was delivering his judgment, leading to applications by the appellants to the judge to file further evidence. The respondent had already made the initial application to the judge on 3 December 2013 to allow a new witness statement exhibiting photographs to be adduced showing what were alleged to be further problems with overflowing bins in the courtyard.

24. The appellants emailed to the judge with further evidence which they wished to adduce about their attempts to rectify the problems complained of by the respondent, including the plumbing in the Chinese restaurant and the use of the courtyard by its employees. However, it was too large to be printed out. Accordingly, a hard copy was delivered to the judge the following day.

25. By emails dated 3 December 2014, the parties indicated to the judge that a joint application was to be made for the new evidence to be admitted. Counsel for the respondent said that short submissions would be made. Counsel for the appellants said that the evidence spoke for itself.

26. Prior to judgment, the appellants made a further application by email to adduce yet further evidence (of an agreement to surrender the Future Lease). The judge replied by email that no further evidence was to be adduced without a formal application. This led to a misunderstanding because counsel for the appellants understood the judge to mean further evidence about the surrender, not the evidence which had

already been sent to him. However, that misunderstanding was not appreciated until after judgment had been given."

**POST-JUDGMENT APPLICATIONS FAIL**

27. On 5 December 2013, Ms Caroline Shea, for the appellants, applied to the judge for relief from forfeiture on a new basis, namely that relief be given on condition that they be given six months within which to complete the sale and assignment of the commercial lease, failing which it would be surrendered. The appellants proposed an undertaking to court not to apply to extend that time period, or make any further application in respect of that condition which would undermine it. Ms Shea submitted that the result of the judge's decision was that there had been an injustice in the sense that the respondent gained a windfall of £1million to £2million as a result of the order for forfeiture. The application was opposed by Ms Caroline Hutton, for the respondent.

28. The judge refused the application. He was concerned about the respondent obtaining a benefit from forfeiture but he held that it was very difficult to say that there was any injustice where a party acted as the appellants had done. "They are simply reaping what they have sowed". There was no evidence of the value of the lease, but Ms Hutton conceded in a very broad approach that the value was £1-2 million. The judge held that by the time the lease was forfeit on 15 September 2012, "virtually all of the sand had gone through the hourglass so that all that was left thereafter was a hope value, a hope that relief from forfeiture would be granted if applied for, application for relief finally being made on 13 March 2013."

29. The judge said that the hope value diminished every month closer to trial during which time Freifelds did nothing or virtually nothing and in fact had made matters worse in respect of block insurance. All that had happened was that the Freifelds had failed to produce sufficient evidence to justify the grant of relief. In any event, there was no evidence as to whether they could find a new assignee and who that assignee might be and who would manage the property.

30. Ms Hutton submitted to the judge that the respondent should have the right to object to the proposed assignee. The judge recognised that conditions could be imposed which might resolve those very real practical problems. The judge considered that the undertakings were unsatisfactory and that there had to be end to litigation particularly where the Freifelds had had ample opportunity to put forward evidence to put their house in order.

31. The judge refused the application to grant relief on terms that the lease be assigned within 6 months. He further directed that his order of 5 December should not be sealed pending any application by the following day by the appellants to adduce fresh additional evidence from the Land Registry about surrender. However, on 18 December 2013 the judge refused all applications to adduce further evidence. His order was drawn on 20 December 2013. The judge gave his reasons in a supplementary judgment emailed to the parties on 24 December 2013. The judge refused permission to appeal.

**APPEAL AND APPLICATIONS TO THIS COURT TO ADMIT FRESH EVIDENCE**

32. On 8 January 2014, Lewison LJ granted a stay of the order of the judge pending an application by the appellants for permission to appeal. Patten LJ granted permission to appeal and a continuation of a stay pending appeal. The grounds included an appeal against the judge's refusal to admit further evidence. The appellants applied for this court to receive further evidence, namely the second witness statement of the first appellant, Jacob Freifeld dated 5 December 2013. This was the evidence put before the judge but some further material was added. At paragraph 17 some additional paragraphs have been inserted to state that Mr Din and Ms Yang had on 2 December 2013 signed the agreement and executed the transfer. The agreement was for the surrender of the Future Lease. The surrender was to be registered at HM Land Registry.

33. The appellants have made an application for admission on this appeal of further witness statements: (1) the fourth witness statement of Jacob Freifeld dated 22 June 2015, and (2) the witness statements of Mr Maunder Taylor. The fourth witness statement of Jacob Freifeld deals with the appointment of Maunder Taylor as managing agent on 27 June 2014. In paragraph 4 he states that Maunder Taylor have had authority to deal with all communications relating to the commercial units as well as decision making powers, save where these would involve an expense, which would then be referred to him for authorisation. He adds

> "I have to date authorised all recommendations made by Maunder Taylor in a timely manner to ensure the proper management of the units. Maunder Taylor have direct dealings with the commercial tenants including the collection of rent and service charges and have the authority to serve the appropriate notices on tenants for breach of lease and take enforcement action as well as approving new incoming tenants."

The witness statements of Mr Maunder Taylor (a) deal with the agreement dated 2 July 2014 between the firm of Maunder Taylor, chartered surveyors and the appellants whereby Maunder Taylor agreed to provide management services for the property. Maunder Taylor could terminate the arrangement on giving notice in accordance with the conditions of engagement; and (b) particularise the various steps of management that he has taken. For instance he states that properties are inspected annually and where vacant fortnightly.

34. The respondent seeks to adduce in evidence that witness statement of Ann Geary dated 15 June 2015. Ms Geary, managing agent for the respondent, describes how the appellants had failed to deal with the insurance or assessment of risks or the unlawful residential occupation and noise. On management issues she states that Maunder Taylor were not involved in close monitoring of the Units. She states that she had not observed any significant improvement in the management of the Units since July 2014 and that she had serious concerns over the level of discretion that Mr Freifeld allowed Maunder Taylor to deal with the Units as in all correspondence where she had raised issues the response had been that they would need to refer back to their client. She states that she does not have confidence that the management of the commercial units will significantly be improved on under Maunder Taylor as Mr Freifeld appears still not to be prepared to take a proactive attitude in his management of the Units and although she acknowledged that Mr Pryke and Mr Maunder Taylor were more pleasant and professional for her to deal with they did not have

appropriate authority to manage and there had in her opinion been no improvement since their appointment although all concerned must have been aware of its importance pending this appeal.

35. We decided to read the new evidence *de bene esse* and to give a decision on the application for further evidence when giving judgment on the appeal. I will deal with them after the three main issues.

**PRINCIPAL ISSUES ON THIS APPEAL**

36. This appeal raises the following issues, which I will address and rule on in turn:

**Issue (1): Did the judge direct himself correctly about what had to be shown to obtain relief from forfeiture where the breach was deliberate?**

**Issue (2): If there was a misdirection, what order should this court make?**

**Issue (3): If there was no misdirection, how should the court exercise its residual discretion to grant or refuse relief on the findings of the judge and the fresh evidence and new circumstances?**

**ISSUE (1): DID THE JUDGE DIRECT HIMSELF CORRECTLY ABOUT WHAT HAD TO BE SHOWN TO OBTAIN RELIEF FROM FORFEITURE WHERE THE BREACH WAS DELIBERATE?**

37. Mr Mark Warwick QC, for the appellants, does not challenge any of the judge's findings of fact but submits that the judge wrongly declined to exercise his discretion in favour of the appellants. He submits that the judge's refusal to grant relief on any conditions, whilst handing to the respondent a multi-million pound asset belonging to the appellants was wholly disproportionate to any damage suffered by the respondent as a result of the original breach (the grant of the Future Lease). He further submits that the judge's approach to the wilfulness of the breach was wrong in principle on the appellants' case. The first appellant frankly admitted that when the Future Lease was granted the first claimant knew of the requirement under the Head Lease for the respondent's consent to be obtained. The judge found that the breach was wilful and that the appellants therefore faced a "vertiginous" climb to persuade the court to exercise the discretion in its favour. This approach is wrong in principle. The court is concerned to ensure that any damage occasioned to the landlord by the breach is made good. Given the deferred nature of the Future Lease, there was any number of mechanisms to ensure that the breach was practically remedied to prevent any prejudice being caused to the defendant. After the judge indicated that nothing short of actual surrender would suffice, the appellants indicated their willingness to submit to this as a condition of relief and indeed invited the judge to make an order injuncting the tenant to surrender the future sub-lease.

38. Ms Hutton submits that, in assessing the judge's approach, this court must look at all the circumstances. The burden is on the tenant to put a positive case and put his whole house in order. The complaints in the second s 146 notice were about nuisance

and they were amply justified by the evidence. There is no basis for upsetting his finding or his exercise of discretion.

39. One of the serious breaches which the judge found was a failure to comply with the requirements of the insurers of the Units with the result that the insurers refused to renew the insurance (judgment of HHJ Gerald, paras 188 to 200). The respondent had had to find insurers at considerable expense to replace the insurance which the respondent was obliged under the Head Lease to maintain.

40. I start with the law. Mr Warwick submits, and Ms Hutton did not dispute, that relief can still be granted even though a breach is deliberate. Special circumstances do not have to be shown.

41. I agree. Mr Warwick relies on *Southern Depot Co Ltd v British Railways Board* [1990] 2 EGLR 39. In that case, there was a deliberate breach of two provisions in a lease: an alienation provision, which required the landlord's consent which was deliberately not sought, and a user provision. The landlord would receive a benefit of at least £1m if the lease was forfeit. Morritt J held that, even where the breach was wilful, the relevant question was whether the damage sustained by the landlord as a result of the breach was proportionate to the advantage that he would obtain if relief were not granted. Morritt J also held that the mere fact that the breach was wilful did not mean that relief could only be granted in exceptional circumstances. He summarised the law thus:

> There can be no doubt that the wilfulness of the breach is a relevant consideration and that the court should not in exercising its discretion encourage a belief that parties to a lease can ignore their obligations and buy their way out of any consequential forfeiture.
>
> But to impose a requirement that relief under section 146(2) should be granted only in an exceptional case seems to me to be seeking to lay down a rule for the exercise of the court's discretion which the decision of the House of Lords in *Hyman v Rose* [1912] AC 623 said should not be done. Certainly Lord Wilberforce in *Shiloh Spinners Ltd v Harding* did not purport to do so in cases under the statute.
>
> Accordingly, in my judgment, although I should give considerable weight to the fact that two out of the three breaches were wilful, I am not required to find an exceptional case before granting relief from forfeiture. (page 43)

42. Mr Warwick also cited *Cremin v Barjack Properties Ltd* [1985] 1 EGLR 30, a decision of this court. Given, however, that the propositions are not in dispute, it is not necessary for me to cite that case as well.

43. The value of the leasehold interest is also a relevant consideration. The well-known passage from the speech of Lord Loreburn in *Hyman v Rose* makes it clear as a matter

of principle that the exercise of the court's wide discretion should not enable the landlord to take advantage of a breach by which he is not irreparably damaged. More recently this court considered the weight which the court should give to the fact that a leasehold interest has substantial capital value. Thus in *Magnic Ltd v Mahmood Ul-Hassan* [2015] EWCA Civ 224, where there had been disregard of a prior order of the court due to a mistake as to the effect of a stay, this court held that it would be disproportionate and unjust for the tenant's lease to be forfeited in these circumstances. Patten LJ, with whom Dyson MR and Tomlinson LJ agreed, set out the principled approach at para 50 of his judgment:

> [50] The starting point for the exercise of our discretion has to be to remind ourselves that the purpose of the reservation of a right of re-entry in the event of unpaid rent or a breach of covenant is to provide the landlord with some security for the performance of the tenant's covenants. The risk of forfeiture is not intended to operate as an additional penalty for breach. It is an ultimate sanction designed to protect the landlord's reversion from continuing breaches of covenant which remain unremedied and to secure performance of the covenants: see *Shiloh Spinners Ltd v Harding* [1973] AC 691 at p 723, [1973] 1 All ER 90, [1973] 2 WLR 28. There may, of course, be breaches which are so serious and irremediable as to justify the refusal of relief: for example, an unlawful sub-letting. But in most cases relief will be granted on the breach being remedied and on terms as to costs.

44. As Ms Hutton demonstrates, however, it is not enough to find that the effect of the forfeiture will be to cause a windfall to be respondent. As Patten LJ said at paragraph 41 of his judgment in *Magnic*,:

> If . . . [t]he defendants' conduct in this case amounted to a conscious disregard of the terms for relief which the court had imposed then it would be much more difficult to argue that the refusal of further relief was wrong in principle even though it would produce a windfall for the landlord. The balance to be struck will obviously depend on the relevant circumstances. (para 41)

45. Therefore the judge was clearly right to make findings about the wilfulness of the breach and to take his findings into account in deciding whether to grant relief from forfeiture. The judge was amply justified in his conclusion. When the lessees have concealed important breaches from the lessor and acted in continuous disregard of their obligations, it would not without some security that the future would be different be fair to grant relief and restore the parties to their previous contractual relationship. There can be no such guarantee here since the appellants may lapse back into their old ways. I reject Mr Warwick's submission that the judge was wrong not to have regard to the fact that this was the first time that steps had been taken to forfeit the Head Lease. I regard that as an appeal to pity rather than logic and experience. The course

of conduct, which the judge found, was sustained, and amply entitled him to refuse to grant relief with a view to the parties continuing as lessor and lessees as before.

46. When describing the appellants' neglectful management of their obligations under the Head Lease, Ms Hutton made much use of the old proverb - "for want of a nail the shoe was lost. For want of a shoe the horse was lost, for want of a horse the battle was lost, for failure of battle, the kingdom was lost". The appellants had been careless in their mismanagement of this property. He allowed acts to occur which added up to such serious disregard of his obligations under the lease that it was now forfeit. I think that is right so far as it goes for the reasons I have given, but no-one would say that it was proportionate to lose a kingdom for want of a horseshoe nail. That brings me to the question of the value of the leasehold interest which the appellants would lose and the respondent gain on forfeiture: the "windfall" point.

47. The windfall point is about proportionality. The appellants' egregious conduct is not relevant to the question of the windfall, which was a self-standing consideration to be considered on its own merits and *then* weighed against the appellants' egregious conduct. Once it has been appreciated that the value of the leasehold interest is an advantage which the respondent will obtain from forfeiture, it has to be thrown into the balance with all the other circumstances.

48. In my judgment, the judge failed to do this. He took the view that there was no injustice in refusing the application to have time to sell the Head Lease within six months since the "appellants are simply reaping what they have sown." (Ruling of HHJ Gerald, 5 December 2013, para 3). That assessment left out of account the advantage which the respondent would obtain from the forfeiture. The order had not been drawn. There was a new application. He did not consider the possibility that there should be no forfeiture if the leasehold interest could be sold on suitable conditions. If he had done this, he would have seen that there was a way of squaring the circle between the lessor's right to enforce its right of re-entry and the lessees' right not to be required to give the lessor some uncovenanted benefit.

49. He further went on to misdirect himself as to the value of the leasehold interest was nil because he had just denied relief from forfeiture. At paragraph 4 of his Ruling of 5 December 2013, the judge held:

> ".. from..8 December 2011 onwards, [the Head Lease] was an asset whose value was at risk the minute [the respondent] discovered that [the appellants] had deliberately acted in breach of covenant. That risk became a threat of forfeiture when [the respondent] served the section 146 notice on 31 May 2012. By the time [the Head Lease] was forfeit, on 15 September 2012, virtually all of the sand had gone through the hour glass so that all that was left thereafter was a hope value, a hope that relief from forfeiture would be granted if applied for, application for relief finally being made on 13 March 2013."

50. The Head Lease was not, however, a flawed asset if the court gave relief from forfeiture for the purposes of sale, which was what the court was being asked to do.

51. As Mr Warwick submits, this court had made such an order in *Khar v Delbounty Ltd* (1998) 75 PC & R 232, where Woolf MR, giving the judgment of the court, held:

> "In our judgment, there should be added to the Master's order additional terms for the protection of the legitimate interests of Delbounty against the likely continuance of the problems experienced by Delbounty with Mr and Mrs Khar over the years. On the past record of Mr and Mrs Khar, the prospects for future improvement are not good. Mr and Mrs Khar have been bad payers from the start. Delbounty have had to start legal proceedings against them on a number of occasions. No satisfactory explanation has been provided by Mr and Mrs Khar for failure to pay the maintenance charges. They live out of the country. They left the flat empty and were unable to agree on joint instructions because of continuing matrimonial disputes. In contrast, the conduct of Delbounty and their managing agents is not subject to any criticism.
>
> The fair and just solution in this situation is for the lease to be sold, so that Delbounty can recoup themselves out of the proceeds of sale for any arrears of rent and maintenance charge due to them. They can then account to Mr and Mrs Khar for the balance. Delbounty will be entitled to let to a new tenant. Mr and Mrs Khar will have the benefit of the value of the lease, subject to the discharge of their liabilities to Delbounty. (at page 239)

52. Having found these misdirections, I proceed to the second and third issues.

**ISSUE (2): IF THERE WAS A MISDIRECTION, WHAT ORDER SHOULD THIS COURT MAKE?**

53. At this point of course the court is re-exercising the discretion vested in the judge. It is clearly right that the court should take into account the current position, and so I would admit the fresh evidence that has been filed and which I have summarised above.

54. Ms Hutton submits that the evidence shows that Mr Maunder-Taylor is a residential not commercial managing agent whose offices are in London N20, some considerable distance from West Kensington Court. The proposed terms of his appointment are that he will be appointed for a two year term which he can terminate on three months' notice at any time without cause. So his appointment is of no comfort to the respondent.

55. I have no doubt that the Units the subject of the Head Lease are now being properly managed. Mr Maunder Taylor takes the appointment very seriously. He has extensive experience in residential property. However, I would accept the appellants'

offer to give Maunder Taylor (the firm) authority to spend up to £500 on anyone item of expenditure so as to reduce delays due to Maunder Taylor having to ask for authority under the current arrangements for every single item of expenditure. I would conclude that the respondent is well- protected by his appointment for the limited period that will be necessary for a sale. Ms Hutton's objections to Mr Maunder Taylor are not determinative where the court is only considering the position for the immediate future and not on an indefinite basis. I would, however, require Maunder Taylor not to be permitted to give notice of termination of his appointment during the period for which the appellants would be able to sell the leasehold interest.

56. I would fix that period at 6 months, starting on 1 September (after completion of the traditional holiday month when there may be few purchasers around), which ought to be enough for the appellants to take any preparatory step they wish to take before sale. The appellants only sought six months in their application to the judge and the period of one year for which they ask is too great a period to fairly ask the respondent before certainty is achieved in relation to the Head Lease. Moreover, unless contracts for the sale of the leasehold interest are executed within six months, the order dismissing the application for relief should come into effect. That contract may of course be subject to a condition as to the obtaining of the respondent's consent but that condition would have to be fulfilled for the relief to take effect. Meanwhile the judge's order dismissing it should (if my Lords agree) be set aside, and this court's order refusing relief will be come into effect on a date to be specified or described in the order, unless the condition for sale has by then been achieved. I would grant liberty to either party to apply to a judge of the High Court with regard to the enforcement of this order.

57. Mr Warwick is prepared to accept that the assignment to the proposed purchaser should be subject to the lessor's consent (not to be unreasonably withheld). I agree. However, Ms Hutton does not want to leave it to chance whether the purchaser will be a nominee for the appellants. Ms Hutton also submits that the lessor is entitled to some very detailed protection. First she submits that the respondent should have the right to give prior approval to the purchaser. I do not see why the respondent needs more protection that that the appellants should be bound to obtain its prior consent, such consent not to be unreasonably withheld. Ms Hutton then asks that the respondent should have control of the marketing and sale. Ms Hutton suggests that this is absolutely critical. I do not consider that is so because I would, as mentioned, make the respondent's consent a condition of the grant of relief from forfeiture. If the respondent had reasonable grounds to take the view that the assignee intended to make an inappropriate sub-sale that might be a matter which would entitle the respondent to refuse its consent.

58. As to the mode of sale, I would direct that the appellants should instruct professional agents for the purposes of sale, to be agreed on, if possible, by both parties and if not to be appointed by appellants and in either case to be named in the order of this Court on the handing down of this judgment. I note that Ms Hutton helpfully accepts that a sale by auction, which the appellants prefer, might well be the best course. In my judgment, the manner and terms of sale should be fixed by those agents having consulted both the lessor and the lessees. Ms Hutton asks the court to approve a long list of conditions which it is inappropriate for us to lay down. I would certainly not accept her submission that the lessor should have the conduct of the sale. The

appellants would have every incentive to obtain the best possible price. If they do not agree to a sale within six months the forfeiture will take effect and they will only have themselves to blame. I see no objection to the lessor having liberty to bid.

59. The proceeds of sale would have to be held for payment first of any expenses or other sums payable by the appellants to the respondents. I would leave the parties to propose an appropriate means of achieving this in the order.

**ISSUE (3): IF THERE WAS NO MISDIRECTION, HOW SHOULD THE COURT EXERCISE ITS DISCRETION TO GRANT OR REFUSE RELIEF ON THE BASIS OF A CHANGE IN CIRCUMSTANCES?**

60. The question of exercising a discretion on the basis that the new evidence shows a relevant change of circumstances does not in my judgment arise.

**CONCLUSION**

61. I would allow this appeal on terms that there should be relief from forfeiture for the purposes of and conditional upon sale of the Head Lease within 6 months from 1 September 2015. I would also admit the fresh evidence.

62. If my Lords agree, I would direct the parties to agree and file a minute of order.

**Lord Justice Ryder**

63. I have had the opportunity to read in draft both judgments with which I agree.

**Lord Justice Briggs**

64. I agree that this appeal should be allowed, for the reasons given by my Lady, and with the terms of the order which she proposes that we should make by way of relief from forfeiture.

65. I can well understand why the judge should have come to the view that the dysfunctional relationship between this landlord and these tenants needed to be brought to an end, and he was right to conclude that the appellants were wholly responsible for that breakdown, by their manifest and partly deliberate breach of their obligations under the Head Lease, for all the reasons which he vividly described in his long and careful judgment. I can also understand why he may have felt that the appellants' last minute attempt to seek relief on the basis of an assignment of the lease came too late to save the day for them, after they had steadfastly refused to face up to the serious matters alleged against them during the trial.

66. But I consider that this led him into error in two critical respects. First, he wrongly assumed that, after a deliberate breach by subletting, it would take exceptional circumstances, or a vertiginous climb to the summit, for the court to grant relief, even where, as here, the unlawful subletting was belatedly undone by an agreement for surrender. Secondly, he wrongly discounted the value of the windfall which would accrue to the landlord if forfeiture was not relieved, by reference to the growing risk of forfeiture caused by the tenant's continuing failure to comply with his obligations.

67. The result is that the discretion whether to grant relief needs to be exercised afresh by this court. Relief on the terms proposed by my Lady fully serves the dual purposes of ensuring that the respondent will no longer be prejudiced by the Appellants' misconduct as tenants, and that the value of the leasehold interest will not unnecessarily be transferred to the respondent. The right of re-entry will therefore provide effective security without excessively penal consequences.

68. This conclusion should not be misinterpreted as conferring *carte blanche* on tenants to disregard their covenants, wherever there is value in their leasehold interest which would be lost by an unrelieved forfeiture. In every case a balance will have to be struck, and there may well be cases where even substantial value has to be passed to the landlord, if no other way of securing the performance of the tenants' covenants can be found.